

MISSOURI SUPREME COURT

Appeal No. SC 88763

Lisa L. Rokusek
Jennifer Human,
Appellants,

v.

Commonwealth Land Title
Insurance Company
Respondent.

**Appellants'
Substitute Reply Brief**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

POINTS RELIED ON 4

ARGUMENT 7

**I. The trial court erred in granting Commonwealth’s
summary judgment motion on the violation of the Missouri
Notary Public Statute claim because Commonwealth’s
notaries committed official misconduct in charging \$12 for
notarizing six signatures that they failed to record in their
journal in that the Missouri Notary Public Statute
prohibits notaries from charging, maximum, more than \$1
per notarized signature that was not recorded in their
journal 7**

1. Commonwealth Caused Appellants’ Damages 7

2. The Secretary of State’s Interpretation Is Entitled to Great
Weight 11

3. Commonwealth Committed Official Misconduct 12

4. Appellants are under no obligation to show Commonwealth’s
consent to its notaries actions 14

II. The trial court erred in granting Commonwealth’s summary judgment motion on plaintiffs’ common law unjust enrichment claim because that common law claim is not preempted by the Missouri Notary Public Statute in that there is no requirement that common law liability preexist statutory liability to escape preemption, and even if that proposition were true, notaries public had common law liability that predated the Missouri Notary Public Statute 16

III. The trial court erred in granting Commonwealth’s motion to dismiss the Missouri Merchandising Practices Act (“MMPA”) claim because Commonwealth provided no evidence that it was exempt from the MMPA in that it did not prove that it was under the direction and supervision of the Department of Insurance 17

IV. The Secretary of State’s handbook as well as the argument about whether a notary is entitled to \$1 per signature not recorded in a journal is properly before this Court 19

CONCLUSION 26

TABLE OF AUTHORITIES

Cases	Pages
<i>Denny’s Inc. v. Avesta Enterprises</i> , 884 S.W.2d 281, 289 (Mo.App. 1994)	22
<i>ITT Commercial Fin. Corp. v. Mid-America Marine Supply Co.</i> , 854 S.W.2d 371, 381 (Mo. banc 1993)	14
<i>Kegel v. Runnels</i> , 793 F.2d 924 (8 th Cir. 1986)	15
<i>Kirk Corp. v. First American Title Co.</i> , 220 Cal. App. 3d 785 (1990)	9, 10
<i>Miller v. United Security Ins.</i> , 496 S.W.2d 871, 876 (Mo.App. 1973) .	15
<i>State ex rel. Sprint Missouri v. Public Serv. Comm’n of Missouri</i> , 165 S.W.3d 160, 164 (Mo. banc 2005)	11, 21
<i>State v. Biddle</i> , 599 S.W.2d 182,193(Mo. banc 1980)	23
Statutes	
§381.003, RSMo	19
§486.200, <i>et seq.</i> , RSMo.	16
§486.350, <i>et seq.</i> , RSMo.	12, 13

POINTS RELIED ON

I. The trial court erred in granting Commonwealth's summary judgment motion on the violation of the Missouri Notary Public Statute claim because Commonwealth's notaries committed official misconduct in charging \$12 for notarizing six signatures that they failed to record in their journal in that the Missouri Notary Public Statute prohibits notaries from charging, maximum, more than \$1 per notarized signature that was not recorded in their journal.

Kegel v. Runnels, 793 F.2d 924 (8th Cir. 1986)

Miller v. United Security Ins., 496 S.W.2d 871, 876 (Mo.App. 1973)

State ex rel. Sprint Missouri v. Public Serv. Comm'n of Missouri, 165 S.W.3d 160, 164 (Mo. banc 2005)

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preexist statutory liability to escape preemption, and even if that proposition were true, notaries public had common law liability that predated the Missouri Notary Public Statute.

III. The trial court erred in granting Commonwealth’s motion to dismiss the Missouri Merchandising Practices Act (“MMPA”) claim because Commonwealth provided no evidence that it was exempt from the MMPA in that it did not prove that it was under the direction and supervision of the Department of Insurance.

IV. The Secretary of State’s Handbook as well as the argument about whether a notary is entitled to \$1 per signature not recorded in a journal is properly before this Court.

State ex rel. Sprint Missouri v. Public Service Commission of Missouri, 165 S.W.3d 160, 164 (Mo. banc 2005)

Denny’s Inc. v. Avesta Enterprises, 884 S.W.2d 281, 289 n. 5 (Mo.App. 1994)

State v. Biddle, 599 S.W.2d 182,193 n.12 (Mo. banc 1980)

ARGUMENT

I. The trial court erred in granting Commonwealth's summary judgment motion on the violation of the Missouri Notary Public Statute claim because Commonwealth's notaries committed official misconduct in charging \$12 for notarizing six signatures that they failed to record in their journal in that the Missouri Notary Public Statute prohibits notaries from charging, maximum, more than \$1 per notarized signature that was not recorded in their journal. (Responds to Commonwealth's Point I).

1. Commonwealth Caused Appellants' Damages.

Commonwealth's primary argument concerning damages is a straw man that it sets up so it can easily knock it down. It, however, ignores appellants' true damage claim: Commonwealth overcharged for its notarial services and appellants, as Commonwealth's customers, are entitled to a refund for the overcharge. The case is no more complex than that.

After analyzing a series of Missouri cases, Commonwealth concludes that because appellants admitted their signatures on the

notarized documents were genuine, “no civil liability can be imposed against the notary or its employer because the signatures were genuine and no damages were sustained by Appellants or caused by Respondent.” (Commonwealth substitute brief at 18). That statement pretends that appellants, like the plaintiffs in the cited cases, are seeking damages related to fraudulent signatures in the underlying real estate closing. But appellants are not seeking to undo any part of their real estate closing. They simply seek a refund of the amount that they were overcharged. None of the “causation” cases cited by Commonwealth are relevant because here the damages sought are not damages for mis-notarizing, but damages for overcharging.

Likewise, the sole out-of-state case that Commonwealth cites is irrelevant. In *Kirk Corp. v. First American Title*, 220 Cal. App. 3d 785 (Cal. Ct. App. 1990)¹ plaintiffs challenged the validity of the underlying transaction. Plaintiffs contend that they did not sign a lease-

¹ Commonwealth again makes the same mistake in this Court that it did in the Court of Appeals. It refers to this case as a California Supreme Court case. It is not. It is a California Court of Appeals case.

cancellation document and that the notary’s “failure to keep her journal precluded them from proving that they did not sign the cancellation of the lease.” *Id.* at 811. The notary admitted that she did not keep her journal. The court found, however, that plaintiffs damages could not have been caused by the notary’s failure to keep a journal because “there was substantial evidence that [plaintiffs] signed the cancellation in her presence.” *Id.* “The evidence of surrounding circumstances substantially supports the conclusion that plaintiffs signed the cancellation” *Id.* at 812. Thus, the notary’s failure to keep a journal did not cause plaintiffs’ damages because substantial, surrounding evidence proved that, in fact, plaintiffs had signed the cancellation document that formed the basis for their damages.

If appellants were arguing that Commonwealth’s failure to keep a journal undermined their ability to undo or recover damages from the underlying transaction, then *Kirk* would be relevant. Appellants are not making that claim. They accept the underlying transaction and all legal ramifications from it. They are simply claiming that they were overcharged for notarial services in violation of Missouri statutes.

Those damages were caused by Commonwealth. After all, who else could have caused the overcharge?

2. The Secretary of State's Interpretation Is Entitled to Great Weight.

Commonwealth claims that “the Supreme Court shall never defer to a Secretary of State's statutory interpretation.” (Commonwealth substitute brief at 20). This is simply plain wrong. As this Court explained two years ago, “[T]he interpretation and construction of a statute by an agency charged with its administration is entitled to great weight.” *State ex rel. Sprint Missouri v. Public Serv. Comm'n of Missouri*, 165 S.W.3d 160, 164 (Mo. banc 2005). While the deference is not absolute, it is given great weight.

With that aside, Commonwealth makes the startling observation that appellants “offered no proof that whatsoever that the handbook is the Secretary of State's interpretation.” (Commonwealth substitute brief at 20). Well, if the interpretation found in the Missouri Secretary of State's handbook is not that of the Missouri Secretary of State, then whose is it? Has someone hijacked the office? Of course not. The

handbook is the Missouri Secretary of State's directives to the notaries that it supervises.

3. Commonwealth Committed Official Misconduct.

Commonwealth argues that “while §486.350 RSMo can be construed to read that charging more than \$2.00 per notarization can constitute ‘official misconduct’ on the part of the notary, nothing in that provision implies that charging \$2.00 can ever be held to be ‘official misconduct.’” (Commonwealth substitute brief at 22)(emphasis in original). In fact, a simple review of the statute indicates that charging \$2.00 can be official misconduct. The statute states: “a notary who charges more than the maximum fee specified ... is guilty of official misconduct.” §486.350(5), RSMo. As explained in its opening brief, Commonwealth could have properly charged at most \$1 per signature, for a total of no more than \$6 to appellants. It, however, charged them \$12. As such, Commonwealth's conduct is squarely “official misconduct” because it charged “more than the maximum fee.” Nowhere, as Commonwealth implies, does the statute say that charging \$2.00 can never be official misconduct.

Commonwealth also misconstrues another of appellants' argument. Commonwealth claims that "[u]nder Appellants' 'half act' argument, no notarization on a document would be effective until the notary, subsequently and independently, records the notarial act in a journal." (Commonwealth substitute brief at 25). At the risk of sounding like a broken record, appellants do not challenge the underlying transaction. The signatures on appellants' real estate closing documents are effective. Period. The notarization even without proper recording in a journal is legally effective. The issue in this case is how much can notaries charge for their services. Commonwealth performed a "half-act" in the sense that it only did half of what the Notary Statute requires of it to charge \$2 per signature. The statute is clear: "The maximum fee in this state for notarization of each signature *and the proper recording thereof in the journal of notarial acts* is two dollars for each signature notarized." §486.350(1), RSMo. (emphasis added).

Finally, Commonwealth claims appellants' argument is "inconsistent with the exceptions to the requirement that journal entries of official acts be kept in journals." (Commonwealth substitute

brief at 23). This exception has no relevance to Commonwealth's case because the exemptions to which Commonwealth refers came into existence *two years after* appellants closed on their real estate. If the Court is interested in appellants' interpretation of the exemptions in a case where the exemptions may apply, a full analysis is found in Finnegan's substitute reply brief at 18-20 of the companion case *Finnegan v. Old Republic*, No. SC 88761.

4. Appellants are under no obligation to show Commonwealth's consent to its notaries actions.

Finally, Commonwealth's argument that appellants have not proved that Commonwealth consented to its notaries actions need not detain us long. This issue was not raised in Commonwealth's summary judgment motion and as such it is waived.

As the movant for summary judgment, it is Commonwealth's burden to establish all facts necessary to entitle it to a verdict. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Co.*, 854 S.W.2d 371, 381 (Mo. banc 1993). Commonwealth had the opportunity to place any factual issue before the court. It raised five factual issues but none involved its consent to its employee's actions. (L.F. 115). Had

Commonwealth presented evidence concerning consent, it would have been appellant's duty to rebut it but Commonwealth did no such thing.

Furthermore, even though the sufficiency of the pleading is not at issue on appeal, appellants raised the issue of consent in their petition. It acknowledged that employers must consent to the acts of the employees. (L.F. 6 at ¶ 10). It then alleged that Commonwealth knew of the overcharges, set the fee schedule, and collected the fee. (L.F. at 7 ¶ 13). Appellant's could rely on those allegations in the summary judgment motion. After all, "[o]n a motion for summary judgment made by defendants the facts in the petition must be taken as true, unless by admissions, depositions, and other evidence introduced, it appears beyond genuine controversy otherwise." *Miller v. United Security Ins.*, 496 S.W.2d 871, 876 (Mo.App. 1973); *Kegel v. Runnels*, 793 F.2d 924 (8th Cir. 1986)(interpreting similar federal civil procedure rules)("Allegations in a pleading which are not contested by a moving party by evidentiary materials [in a summary judgment motion] are assumed to be true.) Here, Commonwealth presented *no* evidence on this issue therefore appellants had no obligations in this regard.

II. The trial court erred in granting Commonwealth’s summary judgment motion on plaintiffs’ common law unjust enrichment claim because that common law claim is not preempted by the Missouri Notary Public Statute in that there is no requirement that common law liability preexist statutory liability to escape preemption, and even if that proposition were true, notaries public had common law liability that predated the Missouri Notary Public Statute. (Responds to Commonwealth’s Point II).

Appellants rest on their substitute opening brief concerning preemption with two exceptions. Upon further analysis, a careful reading of the judgment indicates that the trial court did not find preemption of the unjust enrichment claim. The Court found that Commonwealth “did not charge a notary fee higher than the statutory maximum allowed under § 486.200, RSMo and that Defendants could not be unjustly enriched.” (L.F. 153). The judgment does not mention preemption and Commonwealth did not cross-appeal on this issue therefore the preemption issue, as applied to Commonwealth, is not before the Court.

Commonwealth also claims that appellants did not discuss the “inequitable” element of an unjust enrichment claim. (Commonwealth substitute brief at 28). The bulk of appellants’ argument concerning unjust enrichment was devoted to preemption. Appellants explained that they were devoting most of the unjust enrichment analysis to preemption because they had already exhaustively discussed why Commonwealth overcharged for its services in Point I. (Appellants’ substitute opening brief at 19). It is obvious that it would be “inequitable” to allow someone to overcharge for a service in violation of a statute. No more discussion is necessary on that point because it is obvious that someone who overcharges for services under these circumstances is unjustly enriched.

III. The trial court erred in granting Commonwealth’s motion to dismiss the Missouri Merchandising Practices Act (“MMPA”) claim because Commonwealth provided no evidence that it was exempt from the MMPA in that it did not prove that it was under the direction and supervision of the Department of Insurance. (Responds to Commonwealth’s Point III).

The sole issue here is whether Commonwealth proved that it is under the direction and supervision of the Department of Insurance. Commonwealth concedes that it did not provide any proof but that “the trial judge took judicial notice of the court file and of the fact that Commonwealth Land Title Insurance Company is under the direction of the Department of Insurance. As such, no further proof was required.” (Commonwealth substitute brief at 29). The record, however, is devoid of any reference to judicial notice. There is no reference because no one mentioned “judicial notice” until Commonwealth’s appellate brief.

Appellants are not trying to be hyper-technical and catch Commonwealth on an unforeseen misstep. They pointed out the deficiency of proof long ago. In its opposition to the Motion to Dismiss, appellants wrote: “Commonwealth’s argument is, at best, premature. There is no evidence, nor can there be in a motion to dismiss, that Commonwealth is under the direction and supervision of the Department of Insurance. If Commonwealth develops evidence to support its position, it can renew its argument in a motion for summary

judgment.” (L.F. 101). Commonwealth chose to ignore the deficiency and now must bear the price.

Commonwealth also selectively and misleadingly cites §381.003, RSMo. At first blush, Commonwealth’s citation that “all provisions of the insurance code applying to insurance and insurance companies generally shall apply to title insurance, title insurers and title agents” appears controlling. (Commonwealth substitute brief at 30).

Commonwealth, however, failed to cite the first part of the very same sentence “Except as otherwise expressly provided in this chapter and except where the context otherwise requires” There are, therefore, exceptions to the general rule that title companies are subject to the insurance code.

It is Commonwealth’s burden to prove that it is obligated to register with the Missouri Department of Insurance and to prove that it, in fact, did so. Commonwealth has not provided any proof.

IV. The Secretary of State’s Handbook as well as the argument about whether a notary is entitled to \$1 per signature not recorded in a journal is properly before this Court. (Responds to Commonwealth’s Point I E and V .)

Commonwealth's point is confusing. It refers to its pending motion to strike. It also claims that the "Missouri Court of Appeals shall not consider a document that was not a part of the record on appeal." (Commonwealth substitute reply brief at 32). Commonwealth has not filed a motion to strike in this Court and apparently its argument did not take into consideration that this case is now pending in the Missouri Supreme Court rather than the Missouri Court of Appeals. For these reasons alone, this Court should ignore these undeveloped arguments.

Commonwealth claims that the Secretaries of State handbook was improperly included in the appendix because it was not introduced at trial or made part of the appellate record by stipulation. (Commonwealth's substitute brief at 29). There is, however, no requirement that the items in the appendix be admitted at trial or be part of the record on appeal. Rule 84.04(h) governs what may be included in an appendix. It allows for the inclusion of "agency rules" and "matters pertinent to the issues discussed in the brief such as ... copies of new cases or other pertinent authority." Documents in the appendix do not need to be part of the legal file or be introduced at

trial. The handbook provides the “agency rule” and is “pertinent authority” so it was properly included in the appendix.

Commonwealth also asks this Court to ignore the interpretation of the relevant statutes by the Missouri Secretaries of State and to ignore appellants’ analysis about why Commonwealth should be precluded from charging anything rather than \$1.00 for its services in this case. Commonwealth seeks to suppress the Secretaries of State’s interpretation of how much a notary can charge. Appellants understand why Commonwealth does not want this Court to find out that the Secretary of State agrees with their interpretation. After all, the Secretary of State is charged with regulating notaries. Its interpretation of the Notary Public Statute should be and is entitled to great deference. “[T]he interpretation and construction of a statute by an agency charged with its administration is entitled to great weight.” *State ex rel. Sprint Missouri v. Public Service Commission of Missouri*, 165 S.W.3d 160, 164 (Mo. banc 2005).

Commonwealth seeks to ignore the Secretaries of State’s Document Certification Services Handbook which instructs notaries that they can only charge “a fee of \$2 for each signature notarized and

RECORDED IN THEIR NOTARY JOURNAL.” (Emphasis in original.)

In other words, the Missouri Secretary of State instructed that notaries may only charge \$2 if they: 1) notarize a signature, and 2) record it in their journal. This interpretation from Secretary Blunt is the same as the interpretation from Secretary Carnahan. (Compare Appendix 25 to Appendix 30)

Commonwealth does not think that the Secretary of State’s interpretation is properly before this Court. As an abstract statement of law, Commonwealth is correct that an appellate court should not generally consider *evidence* that was not presented to the trial court and included in the record on appeal. For example, in the only case that it cited, the appellate court refused to consider a contract between the parties that was not part of the record on appeal. *Denny’s Inc. v. Avesta Enterprises*, 884 S.W.2d 281, 289 n. 5 (Mo.App. 1994).

That situation, however, is much different from a Missouri appellate court considering an *interpretation* of a Missouri statute by the administrative body charged with its enforcement. Appellate courts routinely consider new cases and legal authority. Parties rarely rely exclusively on authorities cited to the trial court. In fact, there is no

requirement that parties cite any authority to the trial court in a motion to dismiss or a motion for summary judgment. The only requirement that authority be cited exists at the appellate level.

Compare Rules 55.27 and 74.04 to Rule 84.04. Appellants' inclusion of the Secretaries of State's interpretation as it appears in its Handbook is no different than citing legal authority. Appellants are simply informing the Court of an important legal interpretation, not introducing new evidence.

But even if this Court thought that appellants did not properly bring the interpretation before the Court, it should take judicial notice of it. For example, in *State v. Biddle*, 599 S.W.2d 182,193 n.12 (Mo. banc 1980) the Missouri Supreme Court took judicial notice of federal statutes and then went further and took "notice of the Department of Treasury, Bureau of the Mint 'Annual Report: Calendar Year Coinage Statement 1975-1976'" *Id.* at 193 n. 14. If this Court may take judicial notice of a federal agency's report, it can also certainly take notice of a Missouri agency's handbook.

Commonwealth also asks this Court to ignore appellants' argument that a \$1 per signature interpretation is better than a \$2 per

signature interpretation. As mentioned earlier, Commonwealth thinks that the best interpretation is \$2 per signature while appellants think that the best interpretation is zero dollars per signature. Those are the primary positions raised at the trial court. What happens if this Court disagrees with both parties and thinks that the best interpretation is \$1 per signature? Is the Court then relegated to writing an opinion accepting the “least wrong interpretation” as espoused by the parties or does it not render an opinion at all? Of course not. It writes an opinion explaining why the \$1 per signature interpretation is superior to the other two interpretations.

Commonwealth’s motion assumes that the issue before this Court is whether it forfeited all of its compensation because it failed to record signatures in a journal. It thinks that if this Court disagrees that it forfeits all of its compensation, it is automatically allowed to charge \$2 per signature because appellants did not argue that \$1 per signature is the proper fee. Appellants can easily turn this same argument against Commonwealth by framing the issue as whether Commonwealth may collect \$2 per signature that it failed to record in a journal. If the Court disagrees that Commonwealth is entitled to collect \$2 per signature

then this Court should automatically rule that it is not entitled to collect anything because Commonwealth did not argue the \$1 per signature is the proper fee. Of course, framing the issue in these terms is too narrow. The real issue before this Court is how much can a notary charge. Appellants and Commonwealth have argued their position. These arguments are properly before this Court.

Commonwealth's motion also encourages bad jurisprudence. Unlike many purely private cases, this case affects more people than just the parties. It affects every notary in Missouri. There are about a half dozen cases currently pending in the St. Louis County Circuit Court that are waiting for the resolution of this appeal.

Commonwealth is asking this Court to turn a blind eye to the Secretary of State's position and to certain of appellants' arguments. This Court's interest is reaching the correct decision. This requires taking into account the Missouri Secretary of State's position and the parties' best arguments. There is no question that this case properly raises the issue of how much a notary can charge for notarizing signatures without recording them in a journal. It defies common sense to ask that this Court not use the best tools at its disposal to make the best

decision possible. Especially when that decision affects many more people than the parties.

CONCLUSION

For all of these reasons, this Court should reverse the trial court's ruling on Commonwealth's motion to dismiss the MMPA claim and should also reverse the trial court granting of Commonwealth's summary judgment motion. It should remand the case to the trial court for prosecution on its merits.

Respectfully submitted,

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SUPREME COURT OF MISSOURI

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v.) Appeal No.: SC88763
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COMMONWEALTH LAND)
TITLE INSURANCE COMPANY,)
)
Respondent.)

ATTORNEY'S CERTIFICATE AND CERTIFICATE OF SERVICE

Pursuant to Rule 84.06(c), the undersigned certifies:

1. The substitute reply brief of appellants Lisa L. Rokusek and Jennifer Human complies with the requirements of Rule 55.03.
2. The brief complies with the limitations contained in Rule 84.06(b).
3. The brief contains 4202 words, *including* the cover, table of contents, table of authorities, points relied on, and signature block, all of which are permitted to be excluded from the count.
4. Electronic copies of the brief, in both WordPerfect and Adobe PDF format, are on the enclosed floppy disk, and both the disk and the files have been scanned for viruses and are virus-free.
5. Two copies of the brief, a copy of this certificate, and a duplicate of the floppy disk filed with the Court, have been served on each of the

following named counsel of record for respondent at the following addresses of record this 20th day of November, 2007, by mailing the same by U.S. Mail, first-class postage prepaid:

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