



A13-0757

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Melony Michales et al.,

Respondents,

vs.

First USA Title, LLC,

Appellants,

Centennial Mortgage and Funding, Inc., et al.,

Defendants.

APPELLANTS BRIEF AND ADDENDUM

HOLSTAD & KNAAK, PLC
Wayne B. Holstad, Esq. (ID#124461)
4501 Allendale Drive
St. Paul, MN 55127
Phone (651) 490-9078

Attorney for Appellants

THE LOWDEN LAW FIRM
Shari L. Lowden (ID#028256X)
Michael W. Lowden (ID#0282558)
5101 Thimsen Avenue, Suite 204
Minnetonka, MN 55345
Phone (952) 896-8500

Attorney for Respondents

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
STATEMENT OF ISSUES.....	4
STATEMENT OF THE CASE.....	5
STATEMENT OF THE FACTS.....	6
STANDARD OF REVIEW.....	7
ARGUMENT	
I. The Law of Agency does not support a finding of an agency relationship between the notary and a title insurance agent engaged by a lender for the preparation of title commitments and settlement statements.....	7
II. Actions for notary negligence or misconduct should be a claim against the notary's bond, not the person or entity that retained the notary's services.....	16
CONCLUSION.....	17
CERTIFICATION.....	18
ADDENDUM.....	19

TABLE OF AUTHORITIES

CASES

<i>Semrad vs. Edina Realty, Inc.</i> , 493 N.W. 2d 528 (Minn. 1992).....	4, 9, 10, 11, 16
<i>Kasner vs. Gage</i> , 281. 149, 161 N.W. 2d 40 (1968).....	4, 10
<i>Larson Fidelity Mutual Life Ass'n</i> , 71 Minn. 101, 73 NW 711 (1898).....	9
<i>Lamb vs. South Unit Jehovah's Witnesses</i> , 232 Minn. 259, 45 N.W. 2d 403 (1950).....	9, 10
<i>Cardinal vs. Merrill Lynch Realty/Burnet</i> , 433 N.W. 2d 864 (1988).....	12, 13, 14, 17
<i>Semrad vs. Edina Realty, Inc.</i> , 470 N.W.2d 135 (Minn. App. 1991).....	7
<i>White vs. Iltis</i> , 24 Minn. 43 (1877).....	7
<i>Yunker vs. Honeywell, Inc.</i> , 496 NW2d 419, 422 (Minn. App. 1992).....	10

MINNESOTA STATUTES

Minn. Stat. §359.08 & .12

Real Estate Brokers Act, Minn. Stat. 82.17-34 (1984)

Minn. Stat. §28

OTHER AUTHORITIES

66 CJS Notaries § 1, 32

66 CJS Notaries § 28

Restatement (Second) Agency, §1, §2(1), §2(3), §14D.....

4, 8, 9

OTHER CASES

Real Estate Bar Association vs. National Real Estate Information Services,
946 N.E. 2d 665, 684 (Mass. 2011).....

15

STATEMENT OF ISSUES

I. IS THERE A CAUSE OF ACTION FOR NEGLIGENT SUPERVISION OR VICARIOUS LIABILITY AGAINST A TITLE INSURANCE AGENT FOR THE WRONGFUL ACTS OF A NOTARY HIRED AS AN INDEPENDENT CONTRACTOR?

How raised: Appellants moved for Summary Judgment on the agency issue

Ruling: The District Court held that Janie Coates was an agent of Appellant First USA Title, LLC.

Authority: *Semrad vs. Edina Realty, Inc.*, 493 N.W. 2d 528 (Minn. 1992), *Kasner vs. Gage*, 281. 149, 161 N.W. 2d 40 (1968), Restatement (Second) of Agency, 66 CJS Notaries, sec. 1, 32.

II. IS THERE A PRIVATE RIGHT OF ACTION UNDER THE MINNESOTA NOTARY STATUTE?

How raised: Appellant raised the issue as an affirmative defense in its Answer. Appellants also moved for a Summary Judgment on the agency issue.

Ruling: The District Court found Appellants liable to Respondents for damages arising from the fraud of the notary.

Authority: *Semrad vs. Edina Realty, Inc.*, 493 N.W. 2d 528 (Minn. 1992), Minn. Stat. §359.08 & .12.

STATEMENT OF THE CASE

This case was commenced in February 2010. The case was not filed until August 24, 2010 by the filing of a Notice of Motion and Affidavit and Memorandum. The Summons and Complaint were filed on September 22, 2010. The first filing was a Motion to Dismiss by Defendants Jerry Moore and J.L. Moore Consulting, LLC. The Court granted the Motion to Dismiss and denied the Plaintiffs Motion to Amend. (A-5)

On November 9, 2010, Defendant Robert Anderson filed a Motion to Dismiss and Motion for Sanctions under Rule 11. Plaintiff filed a Second Motion to Amend. The Motion to Dismiss was granted without prejudice. The Second Motion to Amend was also granted but no Amended Complaint was ever filed. (A-5)

A mediation was scheduled for July of 2011 and a date was reserved to hear any dispositive motions not resolved by mediation. On June 29, 2011, Plaintiffs requested a stay of the proceedings because its counsel had withdrawn. (A-5)

On April 27, 2012, the Plaintiffs filed their Third Amended Complaint. (A-7) Motions for Summary Judgment and Motions to Dismiss were heard on July 12, 2012. (A-8) On August 20, 2012, the Court granted the Motions for Summary Judgment brought by Defendants Halisi Edwards Staten and Robert Anderson and denied the Plaintiffs Motion for Summary Judgment against Defendant Jerry Moore, d/b/a/ J. L. Moore Consulting for lack of service by publication. (A-8) The Court granted Plaintiff's Motion for Summary Judgment against Coates on the issue of liability and granted Summary Judgment on the invasion of privacy claims against Maxwell, Cox and

KingRussell. The judgment against Coates was based on her “failure to exercise due care in carrying out her statutory obligation as a notary.” (A-14).

The remaining issues were decided following trial on February 1, 2013 the Court issued Findings of Fact, Conclusions of Law and Order for Judgment granting judgment against Defendants Larry Maxwell, Jerome KingRussell, Vicky Cox-Maxwell, Jamie Coates and First USA Title, LLC in the amount of \$849,131.54.

STATEMENT OF FACTS

John Foster had his identity stolen by Jerome KingRussell and Larry Maxwell. (A-11) His identity was stolen after applying for a second mortgage on a home owned by Foster and Melony Michaels. (A-11) KingRussell and Maxwell used Foster’s identity to conduct two real estate transactions in which KingRussell impersonated Foster and Maxwell acted as the buyer representing both the buyer and the seller in which Foster was the purported buyer. In connection with the two real property purchases, Maxwell arranged for loans in the approximate amount of \$500,000.00. (A-11)

The mortgages were obtained through Trent Bowman, a loan officer working for Centennial Mortgage and Funding, Inc. (hereinafter Centennial Mortgage). (A-11) Title insurance and settlement services were ordered from First USA Title, LLC, (hereinafter First USA), a title insurance agency operating in Shoreview, Minnesota.(A-11) The closing was handled by Janie Coates, a licensed notary public. (A-12)

The trial was a default hearing. (T-3) An issue to be considered and proven at trial was whether there was an agency relationship between Janie Coates and First USA. (T-4). There was clear and unrefuted testimony at the trial that Coates was a closer for

Centennial Mortgage, (T-25), Centennial Mortgage, though found negligent, was not held responsible for the fraud of Coates. (A-15)

Later, in what was essentially testimony not under oath provided through the Plaintiffs' attorney, the only argument made to connect First USA with Coates was a hearsay statement allegedly made by Denise Randall, a non-attorney employee of First USA, that Coates was an agent of First USA. (T-120).

STANDARD OF REVIEW

This actual determination by the court based on the record can be appealed and is reviewable. *White vs. Ittis*, 24 Minn. 43 (1877). The findings of a trial court sitting without a jury are entitled to the same weight as a jury verdict, and will not be set aside unless they are manifestly contrary to the evidence or based on erroneous view of law. The appellate court need not defer to the trial court's trial court's determination of questions of law. *Semrad vs. Edina Realty, Inc.*, 470 N.W.2d 135 (Minn. App. 1991).

ARGUMENT I

THE LAW OF AGENCY DOES NOT SUPPORT A FINDING OF AN AGENCY RELATIONSHIP BETWEEN THE NOTARY AND A TITLE INSURANCE AGENT ENGAGED BY A LENDER FOR THE PREPARATION OF TITLE COMMITMENTS AND SETTLEMENT STATEMENTS

Janie Coates was not an employee of First USA Title. (T-17, 32, 47, 254, 430). Janie Coates was a notary public who, at most, was an independent contractor of somebody. The evidence as to who "hired" Janie Coates to notarize documents points clearly to Maxwell. (T-72). There was also testimony indicating that Coates may have been an agent of Centennial Mortgage. (T-25). The only connection made between Coates and First USA was a hearsay comment by a non-lawyer employee of First USA that appears in the record as an argument made by the Plaintiffs' attorney. (T-120)

Accordingly, there was no evidence in the record to support a finding of an agency relationship between Coates and First USA.

The list of licensed notary publics is available on the State of Minnesota Department of Commerce website. The referral to use a particular notary public is no different than a referral to a particular real estate broker, title company, or even attorneys at law. There is no legal precedent to support a theory that a referral to a licensed real estate broker, title company, or attorney, in and of itself, establishes an agency relationship. To establish a case based on the law of agency, more is required.

Under the general rules of agency law, it is difficult to support a finding of an agency relationship between First USA Title and Janie Coates. Much of the difficulty is because the facts never established any communication at all between Coates and the title company. Coates was recognized as being aligned with Maxwell and also worked with Centennial Mortgage. For there to be an agency relationship, there has to be a relationship resulting from the manifestation of consent by one another where one of the parties agrees to act for the other under the other party's control. See, Restatement (Second) Agency, §1. There is no evidence of any conversation or communication or written agreement between Coates and First USA.

Allegations were made using the terminology of master and servant. (T-120). The definitions clearly do not support that either. A "master" is a principal who employs an agent to perform services pertaining to the master's business with the right to control the "servant" in regards to physical location and the means of performing the tasks. See, Restatement (Second) Agency, §2(1). That clearly is not the case here. Rather, Janie

Coates, in her capacity as the notary, was an independent contractor. See, Restatement (Second) Agency, §2(3).

The notarial tasks were not done for the benefit of First USA. First USA was hired by the lender to prepare documents. The mortgage documents were prepared and executed for the benefit of the lenders business. If the facts supported an agency relationship with either of the entities involved in the transaction, which they do not, it would be with the lender, not the title company.

In its capacity as the settlement or escrow agent, First USA was neither the principal nor an agent of anyone. See, Restatement (Second) Agency, §14D. By definition, the escrow holder is not an agent of either party to the transaction. The escrow agent is, technically, responsible only to follow the written instruction of the parties to the transaction. There was no evidence presented as to what those instructions were in this transaction. The allegations against First USA were that First USA failed to recognize a fraud. As First USA was neither a principal nor an agent of anyone in the transaction, there is no recognizable duty that can be imposed on them for the fraud that was committed. Their liability is limited to whether it followed the instructions, prepared documents accurately and disbursed to the parties entitled to funds, and any liability that may arise under the title policy. First USA was found negligent in the preparation of documents, like Centennial Mortgage's negligence, First USA's negligence was not found to cause the damages to the Respondents.

Under Minnesota law, a principal is liable for the acts of an agent committed in the course and within the scope of the agency and not for a purpose personal to the agent. *Semrad vs. Edina Realty, Inc.*, 493 N.W. 2d 528 (Minn. 1992), *Larson Fidelity Mutual*

Life Ass'n, 71 Minn. 101, 73 NW 711 (1898). A principal is also liable for the negligent performance of a non-delegable duty by an independent contractor. *Semrad* at 535, *Lamb vs. South Unit Jehovah's Witnesses*, 232 Minn. 259, 45 N.W. 2d 403 (1950), (employer liable if it knew or ought to have known of the defect in the work). The Court has also held that a principal is not liable for the unauthorized intentional tort of its agent when not within the scope of employment. *Kasner vs. Gage*, 281 Minn. 149, 161 N.W. 2d 40 (1968)

The Appellant does not concede that an agency relationship ever existed between Janie Coates and First USA Title. In *Semrad*, no agency relationship was found even though Edina Realty, as the real estate broker, provided office space, business cards and marketing brochures to its sales associates, First USA, in contrast provided none of those benefits to Janie Coates. She worked independently and went to the location of the customers choosing, seldom at the office of the title agent, to notarize the documents. See, *Yunker vs. Honeywell, Inc.*, 496 NW2d 419, 422 (Minn. App. 1992), (cites *Semrad* for authority, that respondeat superior requires use of premises or chattels). As an independent notary, she could have been hired by the lender, the title agent/settlement agent, or even the real estate broker that participated in the fraud. It is not uncommon, in Minnesota, for notaries to maintain relationships with lender and real estate agents, and that the settlement agents are the ancillary participants in the transaction, not the principal. In this case, it was made clear that the real estate broker hired the notary, that the lender was aware after conducting thirty to forty closings with Maxwell and Coates that an imposter was used, but that First USA didn't recognize the fraud until after it was revealed to them. (T-101)

A. In Minnesota practice, the function of the notary is delegable.

The settlement agent and the notary public have two separate, well defined functions. The duty of the settlement agent is to follow the written instructions of the parties. In this case, the instructions came from the lender. The instructions are limited to document preparation, collection and disbursement of funds and the recording of documents. Although the trial court questioned whether those functions were performed adequately, and were, in his opinion, negligent, there was no liability for those negligent activities engaged in by the Appellant in its capacity as the settlement agent.

The notary public has a separate function. This function is limited to the execution of documents. As a matter of law, it is not well-settled that a notary public is liable for damages when an imposter executes documents. Regardless, it is a separate function from those undertaken by the settlement agent. It can be argued that the role of the notary public, as a public officer, is more analogous to the responsibilities in a real estate transaction of the county recorder than it is to the settlement agent. In that situation, where there may be found negligence by the County Recorder, there would be no suggestion that there could ever be a cause of action against a title company as the settlement agent arising from the negligence of the County Recorder. Any liability would be limited to whatever claim could be made against the title insurance policy.

Semrad rejected arguments based on actual and implied authority under principles of agency law and respondeat superior which is the argument made by the Plaintiffs counsel. (T-120). To find actual or implied authority under agency law, there has to be some evidence that Coates was representing herself as an agent of First USA and First USA was directly responsible for putting her there. Further, there must be a

majority opinion in *Cardinal* carved out a limited exception to the unauthorized practice of law statute that permitted a limited number of specific activities to be performed by non lawyers. The dissent warned that too many tasks in a closing required the knowledge and experience of someone trained in the law. Whether or not the dissent was correct in *Cardinal* is not an issue in this case. But history and experience supports the view that the dissent was correct and that many of the problems now occurring in the real estate industry in Minnesota would not occur if lawyers handled the transaction. It is not likely that the damages suffered by the Plaintiffs would have occurred if lawyers were involved.

Increasing the scope of the duty of the non lawyers would be an unwise expansion of *Cardinal*. If the goal is to simply find a “deep pocket” to satisfy title claims, the “deep pocket” should be the underwriter that, by law, is responsible for the closing activities of title agents. The Plaintiffs did not pursue the title underwriter of First USA. Under agency law, their claim should have been directed at that entity.

The importance of this issue is linked to the Court’s holding as to whether the notary function is a non-delegable duty. If the notary’s responsibility in a real estate transaction is so intertwined with the preparation of the documents and the title process, then it should not be done by independent contractors or non-attorneys at all. To impose all of the supervisory and/or fiduciary duty in a real estate transaction to non lawyers is an extension of the acts allowed in *Cardinal* should be rejected. An expansion of responsibilities is to move directly into the areas of tasks and duties which the dissent in *Cardinal* warned would constitute the practice of law.

A recent case from Massachusetts carefully considered the issue and held that the notary function not only had to be handled by an attorney but that it had to be the same attorney involved in the preparation of the documents. *Real Estate Bar Association vs. National Real Estate Information Services*, 946 N.E. 2d 665, 684 (Mass. 2011). This holding is consistent with the dissent in *Cardinal* and is an argument against making non attorneys ultimately responsible as the fiduciaries with the superior skill and knowledge.

What happened in this case is unfortunate. The solution, as a matter of public policy, is not to make lawyers out of title companies. In the proper case, the court should reevaluate *Cardinal*. Lawyers have become strangers in real estate transactions. They are no longer considered necessary. There is good authority that a law license, rather than a notary license, is very necessary to protect parties to real estate transactions. This court should not establish more precedents that could hamper a retreat from the *Cardinal* precedent rather than its expansion.

Admittedly, First USA did not perform all of the tasks assigned to it with the skill and care expected of a title agent. But those deviations by First USA did not make them liable to the Plaintiffs. First USA was the most innocent, and perhaps the only participant in these transactions, that was unaware of the scheme perpetrated by Maxwell and KingRussell, with the knowing assistance of Coates and Bowman.

It would not be a fair result, nor a result warranted by existing law, to hold First USA more responsible simply because they are title agents. Any action against First USA should be based on the title policy. The title policy provides a potential remedy for Plaintiffs, and established principles of insurance law govern its resolution.

ARGUMENT II

ACTIONS FOR NOTARY NEGLIGENCE OR MISCONDUCT SHOULD BE A CLAIM AGAINST THE NOTARY'S BOND, NOT THE PERSON OR ENTITY THAT RETAINED THE NOTARY'S SERVICES

Under Minnesota law, every notary public is required to obtain a bond. The bond requirement is intended to provide a remedy for misconduct of the notary. The Plaintiffs in this case did not pursue the bond company as their remedy. That statutory remedy is not only the proper course of action to pursue in this situation, it is the only cause of action that can be maintained on the issue of notary misconduct other than a direct claim against the notary herself.

There is authority that permits a direct action against a notary. See, 66 CJS Notaries, §28. The title agency, First USA, cannot be made liable as an insurer for acts of a notary when the notary herself is not liable. The liability of the notary is limited as are the remedies available to the Plaintiffs. The Plaintiffs claims for wrongful notarial acts have been directed at the bonding company and its claims based on insurance law should have been directed at the Appellants title agent's insurer.

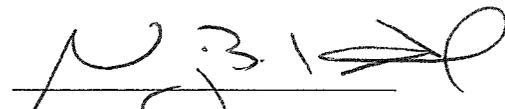
The Court addressed a similar issue, whether a statute grants a private right of action, in *Semrad*, the Minnesota Supreme Court upheld the dismissal by both the District Court and the Court of Appeals of the Plaintiffs claim of a private right of action based on the Real Estate Brokers Act, Minn. Stat. 82.17-34 (1984). In *Semrad*, the Supreme Court made two points that also apply to this case. One, although the legislature was

penalty provision makes a statutory violation a gross misdemeanor. But makes no reference to civil liability. The notary statute is also similar on that point; Minn. Stat. 359.08 except the penalty for misconduct is a misdemeanor.

CONCLUSION

The judgment against the Appellants First USA should be reversed. There is no statutory authority permitting a private right of action against a settlement agent for violations of the notary statute by a notary employed as an independent contractor. Liability cannot be imposed against a title agency, merely on the basis of agency law, without evidence that the title agency actually employed the notary and assumed responsibility for the notary's actions. Imposing liability against a title agency on a theory that the title agent is the entity most appropriate to impose a legal duty as a fiduciary for the accuracy and propriety of the entire transaction, rather than limiting its duty to its responsibility as an escrow agent to follow the instructions of the parties and as a title agent to prepare a title search and issue a title commitment for the benefit of its underwriter, would be an unwise expansion of the limitations imposed by *Cardinal* needs to be reevaluated and the analysis and holding in the recent Massachusetts case of MBREI should be considered as precedent that non-attorney notaries be excluded from the participation in Minnesota real estate transactions as a violation of Minnesota's unauthorized practice of law statute.

Dated: 7/29/13



Wayne B. Holstad, Esq. (#124461)
Attorney for the Appellants
4501 Allendale Drive
St. Paul, MN 55127

STATE OF MINNESOTA
IN COURT OF APPEALS

Court File No.: A13-0757

Melony Michaels et al.,

Respondents,

vs.

CERTIFICATION OF BRIEF LENGTH:
APPELLANTS BRIEF

First USA Title, LLC,

Appellant,

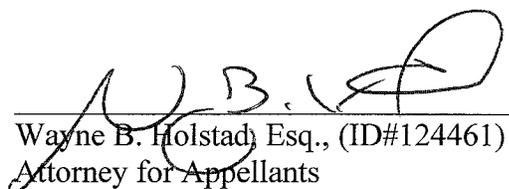
Centennial Mortgage and Funding, Inc., et al.,

Defendants.

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. P. for a brief produced with proportional font. The length of this brief is 3,999 words. This Brief was prepared using Microsoft Word 2000.

HOLSTAD & KNAAK, PLC

Dated: 7/29/13



Wayne B. Holstad, Esq., (ID#124461)
Attorney for Appellants
4501 Allendale Drive
St. Paul, MN 55127
Phone (651) 490-9078