WD85561

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

KYLE ODERMANN and AUDREY ODERMANN,

Petitioners - Respondents,

vs.

DESARAE G. HARRAH, and HARRAH LAW, LLC,

Respondents - Appellants.

On Appeal from the Circuit Court of Jackson County
Honorable Justine E. Del Muro, Circuit Judge
Case No. 2216-CV08060

REPLY BRIEF OF THE APPELLANTS

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Reply Argument

A. Summary of opening brief

Desarae Harrah, an attorney, filed a petition for her client, Gerald Mancuso, in the Underlying Case, alleging Mr. Mancuso had a contract to purchase real property ("the Property") from two sellers, the Odermanns, stating claims against the Odermanns for breach or specific performance of that contract (D30). Ms. Harrah also recorded for Mr. Mancuso a notice of *lis pendens* on the Property, stating the Underlying Case had been filed concerning the Property (D9).

The Odermanns then filed a petition against Mr. Mancuso, Ms. Harrah, and her firm, Harrah Law, LLC, under § 570.095.7, R.S.Mo., alleging the notice of *lis pendens* was a "false document" or "fraudulent document" because they disputed Mr. Mancuso's allegations in the Underlying Case, and requesting the notice of *lis pendens* be stricken (D2; D3). The court agreed, held the notice of *lis pendens* was false or fraudulent, declared it invalid, and ordered the defendants to pay the Odermanns' costs (D6).

Ms. Harrah and Harrah Law now appeal[1] from the trial court's judgment under § 570.095.7 holding the notice of *lis pendens* invalid because it was fraudulent or false.

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[1] Mr. Mancuso previously was a party to this appeal but elected to voluntarily dismiss his appeal. The Odermanns' suggestion in their response to the appellants' third point "that Mancuso did not authorize his appeal, and in fact, instructed Appellant's counsel not to file it on his behalf" (Brief of the Respondents ["Resp.Br."] 14) is absolutely untrue. The appellants do acknowledge, though, that because of Mr. Mancuso's decision to dismiss his appeal, the third point in their opening brief, which only pertained to Mr. Mancuso, no longer is active.

In their opening brief, the appellants explained holding the notice of *lis pendens* was false or fraudulent under § 570.095.7 was error for two reasons.

First, the law of Missouri is that a notice of *lis pendens* that complies with § 527.260, R.S.Mo. is subject to absolute privilege, which attached here and barred the Odermanns' action against the appellants (Brief of the Appellants ["Aplt.Br."] 23-28). This is because § 527.260 requires filing a notice of lis pendens in any action affecting real estate (Aplt.Br. 24-26). Therefore, "[w]here *lis pendens* have a reasonable relation to the action filed, absolute privilege attaches to their recordation," and "Missouri law places no limitations or qualifications on the absolute privilege it accords *lis pendens* notices" (Aplt.Br. 25) (citations omitted). Even the "motive for filing the notices is not relevant; likewise, the evidence on that issue is not relevant" (Aplt.Br. 25) (citation omitted). Accordingly, as the only evidence was the notice of *lis pendens* Ms. Harrah recorded was as § 527.260 required for the Underlying Case, Ms. Harrah and her firm had an absolute privilege from the Odermanns' action under § 570.095 (Aplt.Br. 26-28).

Second, there was no substantial evidence that anything in the notice of *lis pendens* was false or fraudulent (Aplt.Br. 29-35). As other states' courts uniformly have held for statutes like § 570.095, a notice of *lis pendens* that truthfully states there is litigation pending affecting a property is not false or fraudulent under § 570.095 (Aplt.Br. 30-33). Therefore, as the only evidence was the notice of *lis pendens* Ms. Harrah recorded truthfully stated the Underlying Case had been filed affecting the Property, there were no grounds to hold it false or fraudulent under § 570.095 (Aplt.Br. 33-35).

B. This appeal is not moot, as the appellants' issues remain live controversies upon which the Court's decision will have practical effects.

In response, the Odermanns barely address the appellants' arguments at all, relegating them to three pages toward the end of their brief (Resp.Br. 12-14). The appellants briefly address that response below at pp. 20-23.

Instead, as they argued in a motion to dismiss this appeal that the Court ordered taken with the case, the Odermanns principally argue this appeal is moot (Resp.Br. 8-12). They argue this is because: (1) the Underlying Case since has been dismissed and all claims in it now are final (Resp.Br. 9); and (2) the Odermanns filed a unilateral satisfaction of judgment of their award of costs below, so the appellants "will be neither be harmed by nor benefit from the outcome of this Appeal [*sic*]" (Resp.Br. 10-11).

The Odermanns' argument is in error. The law of Missouri is that this appeal is not moot. To the contrary, the issues in the appellants' opening brief remain live controversies affecting the appellants for which the Court's decision will provide important resolution.

The judgment below invalidly holds Ms. Harrah, an attorney, and her firm recorded a false or fraudulent public document, subjecting them to substantial serious collateral consequences. They therefore must have a remedy against that judgment. And an involuntary satisfaction of judgment such as the Odermanns filed never moots an appeal.

Moreover, the Odermanns used the judgment below as a predicate to obtain damages against Mr. Mancuso, which would give him cause to set aside if this Court reverses it. *See* Rule 74.06(b)(5). And this is true even

though he no longer is a party to the appeal. Moreover, the Odermanns are continuing to use the judgment below as a predicate now to seek damages against Ms. Harrah in a malicious prosecution and abuse of process action that they just filed against her and her firm.

Therefore, regardless of the appellants unilaterally filing a satisfaction of judgment and judgment being entered on the Underlying Case, this appeal is not moot. The Court's determination of the appellants' first two points will have direct practical effects upon existing controversies.

1. An involuntary satisfaction of a judgment does not moot an appeal, and the Odermanns' unilateral filing of a satisfaction of judgment is not a voluntary satisfaction by the appellants that could render the appeal moot.

"'The mootness of a controversy is a threshold question in any appellate review of that controversy.'" *Two Pershing Square, L.P. v. Boley*, 981 S.W.2d 635, 638 (Mo. App. 1998) (citation omitted). "A cause of action is moot when the question presented for determination would not have any practical effect upon an existing controversy." *Laas v. Wright*, 191 S.W.3d 93, 96 (Mo. App. 2006). At the same time, the "right to appeal should be liberally construed as appeals are favored in the law," and "[i]f doubt exists as to the right of appeal, it should be resolved in favor of that right." *In re Competency of Parkus*, 219 S.W.3d 250, 254 (Mo. banc 2007).

The Odermanns argue the trial court only ordered Ms. Harrah and her firm to pay their costs, which is now moot because they unilaterally filed a satisfaction of that judgment below (Resp.Br. 10-11). But neither Ms. Harrah nor her firm paid the Odermanns anything. Instead, as the Odermanns concede, they filed a satisfaction of judgment as a tactic in the hope this

would avoid review of the trial court's judgment and, therefore, their scheme in filing the action under § 570.095.7 below.

It is well-established that only a *voluntary* satisfaction of judgment by an appellant renders an appeal moot. A respondent unilaterally filing a satisfaction of judgment does not. While the "voluntary satisfaction of a judgment renders any appeal from that judgment moot." *State ex rel. Mo. Highway & Transp. Comm'n v. Christie*, 890 S.W.2d 1, 2-3 (Mo. App. 1994), "[a]n involuntary satisfaction of judgment does not, however, render an appeal moot." *McFadden v. McFadden*, 200 S.W.3d 594, 596-97 (Mo. App. 2006).

The Odermanns argue these authorities mean that only involuntary satisfactions in which respondents collected judgments from appellants by execution avoid mootness, and they simply elected to file a satisfaction, so that makes the appellant's appeal moot (Resp.Br. 10-11). This is a distinction without a difference. Notably, they do not cite any authority in which, as here, a creditor unilaterally filed a satisfaction of judgment without collection, and the appellate court held this rendered the appeal moot. This is because this is not the law of Missouri or anywhere else.

The Odermanns cite *Coburn v. Kramer & Frank, P.S.*, 627 S.W.3d 18 (Mo. App. 2021), for the proposition that "involuntary satisfaction" must mean "actual payments of a judgment" (Resp.Br. 10-11). *Coburn* does not hold this. Instead, just as here, *Coburn* supports that a creditor filing a satisfaction of judgment without collecting the whole judgment does not render an appeal moot.

In *Coburn*, the creditor obtained a default judgment against the debtor in a collection case for $747.34. 627 S.W.3d at 25. At some point thereafter, the debtor paid "over $500.00" to satisfy the default judgment, though without any collection activity by the creditor. *Id.* Many months later, the creditor filed a satisfaction of judgment. *Id.* In a separate class action under the Missouri Merchandising Practices Act, the debtor then sought to collaterally attack the default judgment. *Id.* The creditor responded that the debtor had satisfied the judgment, recognizing its validity, making the class action moot. *Id.* at 25-26.

This Court disagreed the action was moot. *Id.* at 28-29. It noted the creditor had filed the satisfaction of judgment without engaging in any collection activity, and with only $500 of the $747.34 collected. *Id.* at 28. Therefore, "While [the debtor] satisfied the Default Judgment shortly after it was entered five years ago, it would be difficult to conclude that her satisfaction was voluntary under these facts." *Id.* at 29. Instead, the debtor's "satisfaction of the Default Judgment was involuntary within the meaning of the mootness doctrine, and thus, this case is not moot." *Id.* at 29.

The same is true here. Just as in *Coburn*, the Odermanns unilaterally filed a satisfaction of judgment without engaging in collections or collecting the full amount under the judgment due at all, just in an attempt to forestall a review. Under those facts, that is not a *voluntary* satisfaction by Ms. Harrah or anyone else. Instead, it is involuntary as in *Coburn*.

While this has not happened often, other decisions from throughout the United States have recognized that where a judgment creditor seeks to avoid

an appeal by filing a satisfaction of judgment without actually having collected the amounts due, the appeal is not moot. *See, e.g.*, *Liberty Mut. Ins. Co. v. Fales*, 505 P.2d 213, 215 (Cal. 1973) (defendant insurer's unilateral filing of satisfaction of judgment did not moot plaintiff's appeal raising important public questions and allow insurer to avoid resolution of those questions); *Lee v. Lee*, 528 S.W.3d 201, 209-10 (Tex. App. 2017) (where receiver appointed for trust entered into settlement agreement with beneficiaries, receiver's filing of satisfaction of judgment did not moot trustee's appeal of receiver's appointment).

This makes sense because as "a 'satisfaction of judgment' can be set aside," parties "continue to have a live controversy for which appellate relief potentially is available." *Id.* at 209. In Missouri, too, a satisfaction of judgment can be set aside. *United States v. Brooks*, 40 S.W.3d 411, 416 (Mo. App. 2001) ("a satisfaction of judgment, although absolute and unqualified on its face, may nevertheless be cancelled and set aside *upon motion and proof* the satisfaction was entered by mistake, or procured by misrepresentation, fraud, duress, or undue influence, or was irregularly or improperly entered," collecting authorities (emphasis in the original)).

Here, if this appeal were dismissed, the Odermanns easily could seek to set aside their unilateral satisfaction of judgment filing. Ms. Harrah and her firm then truly would have no recourse.

Instead, the law of Missouri is that as the satisfaction of the judgment below was not voluntary by Ms. Harrah or her firm, but rather was involuntary and by the Odermanns' unilateral hand, this appeal is not moot.

2. The trial court's judgment finding Ms. Harrah had recorded a false or fraudulent notice of *lis pendens* is a live controversy because it raises significant potential collateral consequences for Ms. Harrah as an attorney, which cannot be allowed to evade review.

In arguing their filing a satisfaction of judgment rendered Ms. Harrah's and her firm's appeal moot, the Odermanns also argue this means Ms. Harrah and her firm "will be neither be harmed by nor benefit from the outcome of this Appeal [*sic*]" (Resp.Br. 10-11). Even outside the award of costs, this is untrue.

The trial court's judgment holds the notice of *lis pendens* Ms. Harrah, an attorney, recorded for Mr. Mancuso is invalid under § 570.095 because it was false or fraudulent (D6 pp. 2-3). So, it holds Ms. Harrah, an attorney with an unblemished professional record, recorded a false or fraudulent document.

As her appeal shows, this is all meritless, as she *did not* record anything false or fraudulent. Instead, she truthfully recorded a proper notice of *lis pendens* as the law required.

Nonetheless, the trial court's judgment effectively finds Ms. Harrah engaged in professional misconduct. *See, e.g.*, Rule 4-4.1(a) ("a lawyer shall not knowingly … make a false statement of material fact or law to a third person"); Rule 4-8.4(c) ("[i]t is professional misconduct for a lawyer to … engage in conduct involving dishonesty, fraud, deceit, or misrepresentation").

This has the real potential to harm Ms. Harrah in the future. She could be subjected to discipline. It could hobble her ability to seek appointment to the bench or other office. If she seeks licensure in a new

jurisdiction, she likely would have to report that the trial court here found she had recorded a false or fraudulent document. It could damage her reputation in the legal community and hamper her ability to attract clients.

Like most jurisdictions, Missouri recognizes that a judgment is not moot when it subjects a party to significant collateral consequences, which themselves constitute an existing controversy. So far, this Court only has applied this to juvenile delinquency cases challenging an adjudication of delinquency that otherwise has become moot because the juvenile reached the age of majority before submission of his or her appeal, *In re A.B.W.*, No. WD85049, 2023 WL 2278602 at *3 (Mo. App. Feb. 28, 2023) (collecting cases), and criminal cases in which the appellant was pardoned during the appeal. *D.C.M. v. Pemiscot Cnty. Juvenile Office*, 578 S.W.3d 776, 781 (Mo. banc 2019) (citing *State v. Jacobson*, 152 S.W.2d 1061, 1064 (Mo. 1941)).

The reason is the adjudication itself brings "discredit and stigma," which will continue into the future and bring other potential consequences for the appellant, so the appeal "is not moot, as addressing [it] would have a practical effect on an existing controversy." *Id.*

No Missouri decision has analyzed this doctrine in the context of an adjudication that an attorney has committed something that could be professional misconduct. But decisions from throughout the United States uniformly hold the same concerns apply and an attorney must have the ability to appeal such an adjudication for the same reasons. *See, e.g.*:

- *In re Hatfield*, 658 S.E.2d 871, 873-74 (Ga. App. 2008) (attorney's appeal from contempt judgment was not mooted by his paying fine, due

to "possible continuing adverse collateral consequences he may suffer as a result of his contempt of court conviction;" collecting cases);

- *United States v. Schrimsher*, 493 F.2d 842, 843-44 (5th Cir. 1974) (same where attorney had served contempt sentence);
- *Paladino v. Bd. of Educ. for City of Buffalo Pub. Sch. Dist.*, 124 N.Y.S.3d 409, 414-15 (App. Div. 2020) (attorney's challenge to his removal from school board after administrative finding he disclosed confidential information was not mooted by expiration of his term, where his reputation and credibility were subject to damage for being removed from public office for violating law, potentially subjecting him to professional discipline);
- *Obert v. Republic W. Ins. Co.*, 398 F.3d 138, 142-43 (1st Cir. 2005) (settlement of case including payment of attorneys' fees mooted sanctions imposed for Fed. R. Civ. P. 11 violation but not the finding of the violation itself, as "the reputations of counsel are affected by the findings that individual counsel and their firms violated state ethics rules or Rule 11," with "serious practical consequences of such findings");
- *Ibarra v. Baker*, 338 F. App'x 457, 460 (5th Cir. 2009) (appeal of findings of attorney misconduct and sanctions not moot even though attorneys paid sanctions; collecting cases); and
- *Rios v. Vill. of Hatch*, 86 F. App'x 366, 370-71 (10th Cir. 2003) (dismissal of case did not moot attorney's appeal of order removing him as counsel as sanction, as findings of misconduct could potentially harm

his professional reputation, so he had to be able to independently challenge them).

The same as in all these cases is true here. Even without any monetary interest, Ms. Harrah must be able to protect her reputation and obtain review of the trial court's erroneous finding that she recorded a false or fraudulent document. The trial court's holding brings "discredit and stigma" on Ms. Harrah, which will continue into the future and bring other potential consequences for her, so her appeal "is not moot, as addressing [it] would have a practical effect on an existing controversy." *D.C.M.*, 578 S.W.3d at 781.

3. The trial court's judgment continues to be a live controversy because the Odermanns have used and are using it for seeking and obtaining damages in other cases, including presently against Ms. Harrah.

Besides Ms. Harrah's professional reputation, the resolution of this appeal will impact two cases in which the Odermanns have used or are using the trial court's judgment here as a predicate: first for obtaining an award of damages against Mr. Mancuso in the Underlying Case, and second for a new action they only recently filed against Ms. Harrah and her firm for malicious prosecution and abuse of process.

It is well-established that where a judgment "is being used as the predicate for a civil action" separately, an appeal from that judgment "is not moot" even if it otherwise might be by itself. *State ex rel. McCulloch v. Hoskins*, 978 S.W.2d 779, 782 (Mo. App. 1998). In *Hoskins*, a mayor appealed a judgment for writ of *quo warranto* ousting him for allegedly holding other elective public office during his term. *Id.* at 780. When he then also lost a

recall election, the relator moved to dismiss the appeal as moot. *Id.* But a petition also had been filed against the mayor in federal court seeking to impose liability on him for the same findings in the *quo warranto* judgment – "because he illegally served as Mayor while also holding office as a political party committeeman." *Id.* at 782. This Court held that despite the recall, the appeal therefore was not moot, as the mayor "has demonstrated that he is aggrieved by the judgment even if he cannot now be restored to office inasmuch as the judgment is being used as the predicate for a civil action against him." *Id.*

Here, the Odermanns are using or have used the judgment below as a predicate for two other civil actions. The first is the Underlying Case itself. While Mr. Mancuso is no longer a party to this appeal, where "the interests of the non-appealing party are so commingled with those of the appealing parties as to be inseparable, an appellate court may reverse the lower court's decision as to the non-appealing party." *Shelter Mut. Ins. Co. v. Briggs*, 793 S.W.2d 862, 864 (Mo. banc 1990). As to the trial court's judgment here, that plainly is true: all three defendants were held to have recorded a false or fraudulent notice of *lis pendens*, so whether this was error affects all of them.

The Odermanns used the finding in the judgment in this case that Mr. Mancuso had recorded a false or fraudulent notice of *lis pendens* as a predicate in the Underlying Case for seeking an award of their attorney fees (D32). They also stated a claim in the Underlying Case for violation of § 570.095 in filing the *lis pendens* and requested restitution for their actual losses, including attorney fees (D32 pp. 13-14).

When ultimately filing their request for an award of damages in the form of their attorney fees against Mr. Mancuso, the Odermanns sought attorney fees and expenses of $62,065.80 (D96 p. 2; D97 p. 14; D98 p. 6; D98 p. 78). Of this, $24,248.75 was for obtaining the judgment in this case (D98 p. 78). The court in the Underlying Case awarded the Odermanns everything they requested (D101).

While the Odermanns are correct that the judgment in the Underlying Case now cannot be appealed, Rule 74.06(b)(5) provides a motion for relief from judgment when "a prior judgment upon which it is based has been reversed or otherwise vacated." This "authorizes a circuit court to vacate a portion of a judgment as relief from the final judgment." *Olofson v. Olofson*, 625 S.W.3d 419, 436 (Mo. banc 2021).

Therefore, if the Court agrees with the appellants that the trial court erred in holding the notice of *lis pendens* invalid below and reverses that judgment, Mr. Mancuso will have grounds to seek relief from the portion of the judgment in the Underlying Case predicated on the judgment below.

The second civil action in which the Odermanns are using the judgment in this case as a predicate is an action against Ms. Harrah and her firm for malicious prosecution and abuse of process, which they only recently filed. The case is *Odermann v. Harrah*, No. 2316-CV04113 before the Circuit Court of Jackson County, filed February 5, 2023. (The appellants request the Court take judicial notice of that case.) In it, the Odermanns seek damages against Ms. Harrah and her firm, in part based on the judgment in this case. Paragraphs 21 and 22 of their petition state:

> 21. On April 4, 2022, Plaintiffs, in order to expedite resolution and fulfill their obligations under the Kissel Contract filed a Petition for Review and Statement of Probable Cause under the Missouri false filing statute, R.S.Mo. § 570.095 (the "False Filing Review"), which was assigned to Division 4 of this Court (Judge Justine Del Muro) under case no. 2216- CV08060, Odermann et al. v. Mancuso et al. A true and correct copy of the petition and statement of probable cause from the False Filing Review is attached hereto as Exhibit D.
>
> 22. Judge Del Muro rendered judgment in favor of defendants (i.e., Plaintiffs in this case), invalidating their Notice of Lis Pendens on April 25, 2022, although Plaintiff filed a late appeal of the False Filing Review that is still pending as case no. WD85561, alleging that the application of the false filing statute was in error, but not challenging any factual findings of the judgment.[2] A true and correct copy of the judgment is attached hereto as Exhibit E.

The Odermanns mention this new action in their brief (Resp.Br. 11-12), but omit that it is in part predicated on the judgment below.

Therefore, just as in *Hoskins*, the judgment below being used as a predicate for other civil actions cannot be moot. This Court's decision will have a direct effect on this continuing controversy between the parties.

C. If the Court somehow finds this appeal is moot, the public interest exception to mootness applies.

In their opposition to the Odermanns' motion to dismiss, the appellants explained that if the Court somehow finds this case moot, it nonetheless should exercise its discretion to decide their appeal anyway under the "public

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[2] This statement clearly is in error. In their second point, Ms. Harrah and her firm challenge the trial court's finding that the notice of *lis pendens* was false or fraudulent because this lacks substantial evidence in its support (Aplt.Br. 29-35).

interest" exception to the mootness doctrine. "[T]his exception permits substantive review if the case presents an issue that: (1) is of general public interest; (2) will recur; and (3) will evade appellate review in future live controversies." *Coburn*, 627 S.W.3d at 29 n.11. As they explained, both their points fit this exception.

The Odermanns argue the Court should decline this discretion and instead "address [§ 570.095] in the context of a live controversy with a less-convoluted factual and procedural background" because "bad cases make bad law" (Resp.Br. 12).

The Odermanns' argument is in error. The actual saying to which they allude is "hard cases make bad law." *See* Sepehr Shahshahani, *Hard Cases Make Bad Law? A Theoretical Investigation*, 51 U. CHI. J. LEGAL STUD. 133, 138 (Jan. 2022) (citing *Hodgens v. Hodgens*, 6 Eng. Rep. 257 (H.L. 1837)). It means that "when a case presents a special hardship, the court is tempted to bend a generally sound law to avoid the hardship, which results in a law that, though perhaps fine for the case at hand, is unsound as a general rule." *Id.*

This is not a hard case. The appellants recorded a true and accurate notice of *lis pendens* for their client as § 527.260 required. Therefore, the well-established, uniform law of Missouri is they had absolute privilege from any action for doing so (Aplt.Br. 23-28). And the notice of *lis pendens* could not be a false or fraudulent document within the meaning of § 570.095, because it merely truthfully stated the Underlying Case had been filed concerning the Property (Aplt.Br. 29-35). There is no special hardship. And

the Odermanns' inability to offer any real response to these issues (Resp.Br. 12-14), *see also* below at pp. 20-23, is telling.

Instead, absent this Court answering these straightforward questions now, this issue will recur, impugning attorneys for following what § 527.260 requires. But if their opponents can evade review of this, regardless of the other direct consequences to the attorney, simply by filing a unilateral satisfaction of judgment, then the public interest exception is satisfied.

This is a straightforward case. The trial court erred in holding a notice of *lis pendens* that truthfully stated litigation had been filed concerning property on which it was recorded was false or fraudulent and therefore invalid under § 570.095. The appellants' appeal from that judgment is not moot. But if the Court disagrees and finds it is moot, the issues remain easily recurring ones of public interest and the Court should decide them now anyway.

D. The trial court erred in holding the notice of *lis pendens* recorded against the Property invalid as a false or fraudulent document under § 570.095, R.S.Mo.

When the Odermanns do briefly respond to the appellants' first two points, they offer nothing of substance, hardly citing any authority, and certainly none remotely on point.

In response to the appellants' first point, that they were entitled to absolute privilege for filing the notice of *lis pendens*, the Odermanns call the appellants' argument "an oddly-mixed cocktail of a non-conflicting Missouri statute, outdated Missouri case law, and very different fraudulent lien statutes from other states" (Resp.Br. 12). The Odermanns do not explain how

the Supreme Court's and this Court's binding decisions holding that filing a notice of *lis pendens* as § 527.260 requires are "outdated." Instead, they seem to suggest that because those decisions "predate[e] § 570.095," somehow § 570.095 implicitly repealed § 527.260 as to some category of notices of *lis pendens*.

But "[r]epeal by implication is disfavored, and if two statutes can be reconciled then both should be given effect." *Crawford v. Div. of Empl. Sec.*, 376 S.W.3d 658, 666 (Mo. banc 2012) (citation omitted). Here, as in the decisions the appellants cited from other states with similar laws to § 570.095 and similar absolute privilege from filing a notice of *lis pendens* related to a property suit, that reconciliation is straightforward. A notice of *lis pendens* recorded per § 527.260 is entitled to the absolute privilege the Supreme Court has held it is for 50 years, and therefore cannot be attacked as "false" or "fraudulent" under § 570.095.

Beyond that, the Odermanns cite a single decision from Rhode Island, *Montecalvo v. Mandarelli*, 682 A.2d 918 (R.I. 1996), a state that, unlike Missouri, does not accord notices of *lis pendens* absolute privilege. In *Montecalvo*, the Supreme Court of Rhode Island allowed a slander of title claim against a notice of *lis pendens* where the filing of it was done maliciously. *Id.* at 923-24. That is not the law of Missouri. To the contrary, in Missouri, no slander of title claim can lie on a notice of *lis pendens* filed as § 527.260 requires, as it is barred by the absolute privilege. *See Lippman v. Bridgecrest Ests. I Unit Owners Ass'n, Inc.*, 991 S.W.2d 145, 152-53 (Mo. App. 1998) (action for notice of *lis pendens* clouding title barred by absolute

privilege under § 527.260); *Sharpton v. Lofton*, 721 S.W.2d 770, 777 (Mo. App. 1986) (same re: action for slander of title). And unlike in Rhode Island, under Missouri's absolute privilege, the "motive for filing the notices is not relevant; likewise, the evidence on that issue is not relevant." *Birdsong v. Bydalek*, 953 S.W.2d 103, 114 (Mo. App. 1997). The appellants discussed all these decisions in their opening brief (Aplt.Br. 25), but the Odermanns do not address them at all.

Section 570.095 did not implicitly repeal any part of § 527.260. Instead, the same absolute privilege that § 527.260 always has created remains. As in all similar decisions from other states under similar laws, that privilege bars an action under § 570.095.

The Odermanns' response to the appellants' second point, that there was no evidence that anything in the notice of *lis pendens* was false or fraudulent, is even more lacking, and is a single page that cites no authority at all (Resp.Br. 14). They argue the appellants should have cited legislative history (Resp.Br. 14). But unlike Congress and some other states, "we have no legislative history in Missouri to aid us in determining the reason for" enactment of a statute. *In re B.R.F.*, 669 S.W.2d 240, 245 n.12 (Mo. App. 1984). Nor do the Odermanns offer such a history.

The point remains that to be actionable under § 570.095, an instrument must be false or fraudulent (Aplt.Br. 30-31). The Odermanns point to nothing in the notice of *lis pendens* that was false or fraudulent, only to "the Underlying Case itself" (Resp.Br. 14). But they cite no authority allowing supposed facts external to a recorded instrument to be grounds for holding

that instrument false or fraudulent when the actual language of that instrument itself is not in any way false or fraudulent. This is because none exists. Rather, the only authority from other states with similar laws is what the appellants discussed in their opening brief.

The notice of *lis pendens* Ms. Harrah recorded for Mr. Mancuso truthfully stated the Underlying Case was filed against the Property and nothing more. The law of Missouri is and must be that it was not false or fraudulent. The trial court erred in holding otherwise, and nothing in the Odermanns' brief refutes this.

Conclusion

The Court should reverse the trial court's summary judgment outright, without remand.

Respectfully submitted,

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by /s/Jonathan Sternberg

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule 41, as this brief contains 5,108 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this reply brief of the appellants, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on March 27, 2023, I filed a true and accurate Adobe PDF copy of this reply brief of the appellants via the Court's electronic filing system, which notified the following of that filing:

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