IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

TODD JANSON, GERALD T. ARDREY, CHAD M. FERRELL, and C & J REMODELING LLC, on behalf of themselves and on behalf of all others similarly situated, Plaintiffs, v. LEGALZOOM.COM, INC., Defendant.	Case No. 2:10-cv-04018-NKL

SUGGESTIONS IN OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE (DOC. NO. 154) TO EXCLUDE EVIDENCE OR ARGUMENT CONCERNING THE IN RE THOMPSON DECISION

Defendant LegalZoom.com, Inc. ("LegalZoom"), for its Suggestions in Opposition to Plaintiffs' Motion in Limine to Exclude Evidence or Argument Concerning the *In re Thompson* decision ("Motion 154," Doc. 154), states as follows:

This Court's Order granting in part and denying in part LegalZoom's Motion for Summary Judgment ("Order") correctly calls *In re Thompson* one of "[t]wo foundational cases . . . cited throughout the Missouri Supreme Court's jurisprudence on the unauthorized practice of law." Order, Doc. 145, at 10. Yet, Plaintiffs seek to exclude all argument or evidence concerning this bedrock case. In support of this broad demand, Plaintiffs cite a criminal case from Iowa involving the distribution of methamphetamines, *United States v. Ceballos*, 593 F. Supp. 2d 1054, 1059 (S.D. Iowa 2009) — a case that has absolutely no bearing on the case at bar. Indeed, even the case that Plaintiffs cite notes that "'[t]he threshold for relevance is quite minimal.'" *Ceballos*, 593 F. Supp. 2d at 1059 (*quoting United States v. Holmes*, 413 F.3d 770, 773 (8th Cir. 2005) and *citing* Fed. R. Evid. 401). "Relevance is

established by *any showing, however slight . . .*" that the evidence is probative. *Id.* (*citing United States v. Casares-Cardenas,* 14 F.3d 1283, 1287 (8th Cir.1994)) (emphasis added). The *Thompson* case is a central touchstone in Missouri UPL jurisprudence and is therefore highly relevant and probative for several reasons.

First, the jury needs to compare the product LegalZoom offers to the divorce kit in *Thompson* in order to fully apply Missouri law. In *Eisel v. Midwest BankCentre*, the Missouri Supreme Court held that a defendant accused of violating the state's UPL statute "may defend a claim under the statute *by showing a conflict between the text and activities that this Court has determined to be the authorized practice of law*." *Eisel v. Midwest BankCentre,* 230 S.W.3d 335, 339 (Mo. banc 2007) (emphasis added). The court therefore *invited* a defendant accused of UPL to compare its actions to what the court has previously determined either is or is *not* the unauthorized practice of law in Missouri. The court went on to hold that the literal text of Missouri's UPL statute, while advisory and informative, is not ultimately determinative of what constitutes the unauthorized practice of law. *Id.* at 338-39 ("Such statutes are merely in aid of, and do not supersede or detract from, the power of the judiciary to define and control the practice of law."). Here, whether the comparison of LegalZoom's business model to the divorce kit is a pure fact question or a mixed question of law and fact, it is for the jury. *See In re K-tel Intern., Inc. Sec. Litig.*, 300 F.3d 881, 897 (8th Cir. 2002), citing *Silver v. H & R Block, Inc.*, 105 F.3d 394, 396 (8th Cir. 1997) (mixed question of law and fact is for jury).

In *Thompson*, the Missouri Supreme Court examined a do-it-yourself kit that allowed customers to prepare their own legal documents. As this Court's Order noted, the Missouri Supreme Court held that "'the advertisement and sale by the respondents of the divorce kits does not constitute the unauthorized practice of law so long as the respondents and other[s] similarly

situated refrain from giving personal advice as to legal remedies or the consequences flowing therefrom.'" Order at 13, *quoting Thompson*, 574 S.W.2d at 369.

In the Court's Order, the Court engaged in precisely that exercise. The Court compared LegalZoom's business model to *Thompson* as well as the other "foundational case[]" in Missouri UPL jurisprudence, *Hulse v. Criger*, 247 S.W.2d 855 (Mo. banc 1952) — and a line of cases flowing from it — in which the Missouri Supreme Court considered businesses where non-lawyers completed forms for customers one-on-one. Order at 17-22. While the Court concluded that "LegalZoom's internet portal is not like the 'do-it-yourself' divorce kit in *Thompson*," Order at 18, a reasonable juror could conclude otherwise.

A reasonable juror could compare the typical experience of a LegalZoom customer to the scenarios in *Hulse* and *Thompson* and conclude that LegalZoom customers, who type in their own information, are more like the customers who used the *Thompson* do-it-yourself forms than the customers in *Hulse*, who had a person prepare their forms for them. Because the comparison of LegalZoom's business model to the business model at issue in *Thompson* cuts to the core of this case, *Thompson* — as well as the contents of the divorce kit at the heart of *Thompson* — go well beyond mere relevance. LegalZoom should therefore be permitted to present evidence about *Thompson*.

Second, Plaintiffs here seek both treble and punitive damages. Amended Class-Action Petition at 35-36 of Doc. 1 ("Defendant's conduct in this case shows reckless disregard for its acts and is outrageous in that it knowingly violates Missouri law by practic[ing] law without a license.") Under Missouri law, "[e]ssential to an award of punitive damages is evidence of the defendant's culpable mental state." *Haynam v. Laclede Elec. Co-op., Inc.*, 889 S.W.2d 148, 150-51 (Mo. App. 1994); *see also Williams v. Miller Pontiac Co.*, 409 S.W.2d 275, 279 (Mo. App.

1966) ("'[T]he courts of this state seem now to be committed to the proposition that in cases of fraud and deceit punitive damages may be awarded where legal malice is present.'") (*quoting Luikart v. Miller*, 48 S.W.2d 867 (Mo. 1932)); *Bostic by Bostic v. Bill Dillard Shows, Inc.*, 828 S.W.2d 922, 925-26 (Mo. App. 1992) ("Missouri law on punitive damages requires knowledge or scienter . . . .") (internal citations omitted)). Because an award of punitive damages under Missouri law requires culpable mental state, LegalZoom is entitled to present evidence for the basis of its belief that an internet portal where customers fill out their own legal documents by means of software was the functional equivalent of providing blank forms and instructions for filling them out and was not the unauthorized practice of law in Missouri.

Similarly, in *Carpenter*, the Missouri Supreme Court held that treble damages were not unconstitutional because the defendants had "clear and fair notice, both by statute *and case law*, that its activities constituted the unauthorized practice of law business and that this conduct would subject it to treble the amount of fees paid in exchange for those services." *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 701-02 (Mo. 2008) (emphasis added). Here, LegalZoom arguably had notice that its specific conduct was *not* the unauthorized practice of law based on a careful comparison of LegalZoom's questionnaire process and the fill-in-the-blank forms in the divorce kit in *Thompson*. Again, to accurately make the comparison and to reach a factual determination, jurors should be permitted to see the kit and learn about the case.

Third, LegalZoom's expert witness, Dean Burnele V. Powell, thoroughly analyzed the *Thompson* divorce kit. If permitted, Dean Powell will testify about his examination of the kit. Part of his role as LegalZoom's expert in this case was to examine the history of the enforcement of unauthorized practice of law statutes, including Missouri's. Therefore, one of the key elements of his investigation was considering what this court aptly called one of the state's

"foundational cases." Order at 10. As such, providing the jury with the opportunity to examine the kit is important to understanding Powell's report and conclusions.

Finally, regarding the divorce kit itself, it is not uncommon for courts and fact-finders to look to the underlying record when questions are raised about the meaning or substance of a court's opinion — as is the case here regarding the divorce kit in *Thompson*. *See, e.g.*, *Rutherford v. Parker*, 195 S.W.2d 328, 330 (Tenn. Ct. App. 1946) ("The original record may be examined to ascertain the issues made by the pleadings and the decision of the court thereon."); *see also State to Use of City of Memphis v. Bank of Commerce*, 95 Tenn. 221, 31 S.W. 993, 996 (Tenn. 1895) ("That we may look to the original records to ascertain accurately what was before the court, and what was intended to be decided, we think, upon authority, is clear.") (citations omitted), *aff'd, Bank of Commerce v. State of Tenn.*, 163 U.S. 416, 421 (1896) ("Being a part of the record . . . gives the court a right to look into these opinions for the purpose of discovering the ground upon which the judgment of the court actually proceeded."); *Piqua Branch v. Knoop*, 57 U.S. 369, 401 (1853) ("What questions were there presented on the part of the State of Maryland, does not appear in the report of the case, but I have turned to them in the record, to see how they were made in the State courts.").[1]

Other such examples include malicious prosecution cases, where it is customary to include the record from the previous trial during the subsequent litigation surrounding the malicious prosecution litigation. Indeed, the Eighth Circuit held that a district court in Missouri

[1] In addition, UPL actions such as *In re Thompson* are brought by the Advisory Committee of the Missouri Bar and are original to the Missouri Supreme Court. *See* 574 S.W.2d at 366. If the record in *In re Thompson* had been developed in the Circuit Court and litigated in the Court of Appeal before arriving in the Supreme Court, there is every possibility that the resulting opinion in the Supreme Court would have described the features of the divorce kit in more detail — or even that the kit would have been attached to the opinion as an exhibit. LegalZoom should not be penalized because the opinion in *In re Thompson* did not more fully describe or attach the kit.

committed reversible error by *failing* to permit the record from the previous trial to be admitted in a subsequent malicious prosecution case. *Ulmer v. Associated Dry Goods Corp.*, 823 F.2d 1278, 1281 (8th Cir. 1987) ("Case authority holds that it is customary, and indeed necessary, to present evidence of the want or existence of probable cause to the jury. 'It is customary . . . in malicious prosecution cases to consider all the circumstances preliminary to and surrounding the institution of the prosecution.'") (*quoting Boquist v. Montgomery Ward & Co.*, 516 S.W.2d 769, 773 (Mo. App. 1974)); *see also Hoene v. Associated Dry Goods Corp.*, 487 S.W.2d 479, 483-84 (Mo. 1972); *Huffstutler v. Coates*, 335 S.W.2d 70, 76 (Mo. 1960); *Randol v. Kline's, Inc.*, 49 S.W.2d 112, 114-15 (Mo. 1932).

By way of analogy, it is common in the criminal context to look to the underlying record of a prior action in perjury cases, in double jeopardy cases, and when there is a question about an acquittal by general verdict. Here, the Missouri Supreme Court "acquitted" the producer of the divorce kit in *Thompson* of violating the unauthorized practice of law statute, which does carry criminal penalties. To understand how and why, jurors must study the complete contents of the actual kit that was before the court. This entails looking to the record, just as is common when considering an acquittal by general verdict. *See, e.g., United States v. Sousley*, 453 F. Supp. 754, 760 (W.D. Mo. 1978) ("[W]here a previous judgment of acquittal was based upon a general verdict, the trial judge in a subsequent trial must 'examine the record of the prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matters.'") (*quoting Ashe v. Swenson*, 397 U.S. 436, 444 (1970)).

CONCLUSION

For the reasons set forth above, LegalZoom respectfully requests that the Court deny Plaintiffs' Motion in Limine to Exclude Evidence or Argument Concerning the *In re Thompson* Decision.

Respectfully submitted,

BRYAN CAVE LLP

By: s/ James T. Wicks

Robert M. Thompson MO #38156
James T. Wicks MO #60409
Christopher C. Grenz MO #62914
One Kansas City Place
1200 Main Street, Suite 3500
Kansas City, MO 64105
Tel.: (816) 374-3200
Fax: (816) 374-3300

John Michael Clear MO #25834
Michael G. Biggers MO #24694
One Metropolitan Square – Suite 3600
211 North Broadway
St. Louis, MO 63102
Tel.: (314) 259-2000
Fax: (314) 259-2020

Attorneys for LegalZoom.com, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2011, I electronically filed the above and foregoing with the clerk of court using the CM/ECF system, which will send notice of electronic filing to all counsel of record.

s/ James T. Wicks