

No. SC91307

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In the Missouri Supreme Court

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**DEWAYNE SPRENGER,**

**Appellant,**

**v.**

**MISSOURI DEPARTMENT  
OF PUBLIC SAFETY,**

**Respondent.**

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**Appeal from Cole County Circuit Court  
The Honorable Richard G. Callahan , Judge**

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**RESPONDENT'S SUBSTITUTE BRIEF**

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**ATTORNEYS FOR RESPONDENT**

## Table of Contents

Table of Authorities .....	2
Jurisdictional Statement .....	4
Statement of Facts .....	5
Point Relied On .....	6
Standard of Review .....	7
Argument .....	8
Conclusion .....	14
Certificate of Compliance .....	15

## Table of Authorities

### Cases

<i>Agnello v. Walker</i> , 306 S.W.3d 666 (Mo. App. W.D. 2010) .....	6, 11
<i>Anderson v. Ken Kauffman &amp; Sons Excavating, L.L.C.</i> , 248 S.W.3d 101(Mo. App. W.D. 2008) .....	11
<i>Board of Educ. of City of St. Louis v. Daly</i> , 272 S.W.3d 228 (Mo. App. E.D. 2008).....	11
<i>Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources</i> , 532 U.S. 598 (2001) .....	12
<i>Collins v. Dep’t of Soc. Servs., Family Support Div.</i> , 141 S.W.3d 501(Mo. App. S.D. 2004).....	7
<i>Cook v. Newman</i> , 142 S.W.3d 880 (Mo. App. W.D. 2004) .....	12
<i>Dale v. Gubin</i> , 879 S.W.2d 699 (Mo. App. S.D. 1994) .....	6, 13
<i>Dubinsky v. St. Louis Blues Hockey Club</i> , 229 S.W.3d 126 (Mo. App. E.D. 2007) .....	11
<i>Hutchings v. Roling</i> , 193 S.W.3d 334 (Mo. App. E.D. 2006).....	7
<i>Livingston v. Omaha Property and Cas. Ins. Co.</i> , 927 S.W.2d 444(Mo. App. W.D. 1996) .....	13
<i>Lorenzini v. Short</i> , 2010 W.L. 2284173 (Mo. App. E.D. 2010).....	11
<i>Missouri Dep’t of Pub. Safety v. Dameron</i> , 161 S.W.3d 411(Mo. App. W.D. 2005).....	7
<i>Norris v. Dir. of Revenue</i> , 304 S.W.3d 724(Mo. banc 2010).....	13
<i>Painter v. Missouri Comm’n on Human Rights</i> , 251 S.W.3d 408 (Mo. App. W.D. 2008) .....	6, 13
<i>Pierce v. Underwood</i> , 487 U.S. 552 (1988) .....	9, 11

*Plumb v. Missouri Dept. of Soc. Servs., Family Support Div.*,  
246 S.W.3d 475(Mo. App. E.D. 2007)..... 7

*Sprenger v. Missouri Dep’t of Pub. Safety*,  
248 S.W.3d 626 (Mo. App. W.D. 2008) ..... 5, 7, 9

*Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854(Mo. App. E.D. 2009)..... 8

**Statutes and Additional Authority**

§213.211.2, RSMo..... 12

§536.085, RSMo..... 6, 7, 8, 11

§536.087, RSMo..... 4, 5, 9, 11, 13

28 U.S.C. §2412 (1982)..... 9

### **Jurisdictional Statement**

The Appellant appeals from a decision of the Circuit Court of Cole County, Missouri, awarding him attorneys' fees pursuant to §536.087, RSMo, but denying him fees in excess of \$75.00 per hour. After a decision affirming the judgment of the Circuit Court by the Missouri Court of Appeals, Western District, this cause was ordered transferred to this Court on January 25, 2011, pursuant to its authority under Rule 83.04.

## Statement of Facts

The Appellant, Dewayne Sprenger, was an employee of the Missouri Division of Alcohol and Tobacco Control, who appealed his proposed termination by the Division Supervisor, Dale Roberts. *Sprenger v. Missouri Dep't of Pub. Safety*, 248 S.W.3d 626, 627 (Mo. App. W.D. 2008). The Director of the Department of Public Safety convened an administrative board to hear Mr. Sprenger's appeal and issued findings and recommendations. *Id.* As a result of that hearing, Mr. Sprenger was reinstated, but removed from his supervisory position in the Division. *Id.* The decision was eventually appealed to the Court of Appeals, resulting in an opinion that Mr. Sprenger was entitled to attorneys' fees pursuant to §536.087, RSMo. The Court of Appeals remanded the matter to the administrative board to determine the amount of those fees. *See Id.* at 629.

On remand, a hearing was held in which Mr. Sprenger presented the testimony of a local attorney, Roger Brown, and his own counsel, who testified that no attorney in private practice is paid \$75.00 per hour. (Tr. pp. 19, 38). The Board issued its findings of fact and conclusions of law, awarding Mr. Sprenger attorneys' fees of \$15,325.07, at a rate of \$75.00 per hour. (L.F. 111-15). Mr. Sprenger then appealed that decision to the Circuit Court of Cole County. (L.F. 107-09). The Circuit Court issued a judgment affirming the award of attorneys' fees at \$75.00 per hour. (L.F. 136-38). This appeal followed. (L.F. 139-41).

After an adverse decision from the Missouri Court of Appeals, Western District, Mr. Sprenger obtained transfer to this Court.

### **Point Relied On**

**The Circuit Court did not err in refusing to invalidate and nullify the statutory rate of \$75.00 per hour for attorneys' fees established by the legislature under § 536.085, RSMo, because it is within the legislature's authority to set the rate of recovery for attorneys' fees, even if deemed "inadequate" by a court, in that raising the rate of attorneys' fees is a matter of legislative prerogative and not to be made by judicial fiat.**

*Dale v. Gubin*, 879 S.W.2d 699 (Mo. App. S.D. 1994)

*Painter v. Missouri Comm'n on Human Rights*, 251 S.W.3d 408 (Mo. App. W.D. 2008)

*Agnello v. Walker*, 306 S.W.3d 666 (Mo. App. W.D. 2010)

## Argument

**The Circuit Court did not err in refusing to invalidate and nullify the statutory rate of \$75.00 per hour for attorneys' fees established by the legislature under § 536.085, RSMo, because it is within the legislature's authority to set the rate of recovery for attorneys' fees, even if deemed "inadequate" by a court, in that raising the rate of attorneys' fees is a matter of legislative prerogative and not to be made by judicial fiat. – Responding to Appellant's Point Relied On.**

### *Standard of Review*

In reviewing the decision to award attorneys' fees, this Court makes its decision based on the record before the agency. *Hutchings v. Roling*, 193 S.W.3d 334, 346 (Mo. App. E.D. 2006). In earlier litigation, the Western District determined that it was for the Personnel Hearing Board to determine the amount of attorneys' fees. *Sprenger v. Missouri Dep't of Pub. Safety*, 248 S.W.3d 626, 229 (Mo. App. W.D. 2008). The evidence is reviewed in the light most favorable to the judgment of the Board. *Id.* at 628.

Furthermore, in contested administrative proceedings, it is the decision of the Board, and not that of the Circuit Court, that is reviewed. *Missouri Dep't of Pub. Safety v. Dameron*, 161 S.W.3d 411, 413 (Mo. App. W.D. 2005). The presumption is that the agency's decision was correct. *Plumb v. Missouri Dep't of Soc. Servs., Family Support Div.*, 246 S.W.3d 475, 479 (Mo. App. E.D. 2007); *Collins v. Department. of Soc. Servs., Family Support Div.*, 141 S.W.3d 501, 503 (Mo. App. S.D. 2004).

### *Argument*

The Appellant believes that the statutory rate of recovery for attorneys' fees of \$75.00 per hour is inadequate and below the "market rate" for attorneys practicing law in Missouri. He asks, therefore, that the statutory rate be altered by judicial fiat to \$175.00 per hour to better reflect the prevailing rate. Recognizing that such action is an improper exercise of authority that belongs exclusively to the legislature, the Circuit Court properly refused to ignore the clear and unambiguous language of § 536.085(4), RSMo, and affirmed the decision of the Board. Likewise, the Court of Appeals expressed empathy for the Appellant's position, but was unwilling to wholly undermine the statutory intent of Missouri's legislature. The exercise of such restraint was appropriate and proper.

Mr. Sprenger asks this Court to re-write the attorneys' fees statute of the Administrative Procedures Act to nullify and modify the statutory rate of \$75.00 because he believes it to be outdated and inadequate.<sup>1</sup> Yet, the law is quite clear that "a trial court is limited to awarding only those costs granted by virtue of express statutory authority." *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 880 (Mo. App. E.D. 2009).

Upon transfer, Mr. Sprenger now asks this Court to disregard the long standing rules of statutory interpretation, usurp the authority of the Legislative branch, and re-write the statute through a strained interpretation:

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<sup>1</sup> Mr. Sprenger notes that the statutory rate was enacted in "1989 [when] it was probably not unusual and extraordinary for a claimant to find an attorney for \$75.00 per hour in out-state Missouri." (App.'s Brief, p. 8).

“Reading the statute as a whole, the legislature intended for state agencies to pay the reasonable market rate for attorneys fees in the area.”

(Appellant’s Substitute Brief, p. 10).

This argument is not, however, based on the plain words used in the statute itself, which expressly “excepts” attorneys fees from being “based on prevailing market rates.” Section 536.087(4), RSMo. Instead, Mr. Sprenger’s argument is based on the conclusory claim that \$75.00 is “40% of the market rate.”<sup>2</sup>

As the Western District noted, section 536.087, was patterned after a comparable federal statute, 28 U.S.C. §2412 (1982). Congress has since raised the rate of compensation, in 1997, to \$125.00 per hour. *Sprenger, supra*. At 6. In *Pierce v. Underwood*, 487 U.S. 552 (1988), a case that preceded the federal increase in compensation, the United States Supreme Court rejected the very argument now made by Mr. Sprenger:

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<sup>2</sup>In his reply, Mr. Sprenger will be unable to cite any portion of the record demonstrating that the “market rate” for attorneys in Jefferson City is \$175.00 per hour. Indeed, one of the dangers the legislature avoids by setting a statutory maximum is the ability of attorneys to arbitrarily set their fees. In this case, there is no evidence that the \$175.00 per hour sought is (1) the market rate for Jefferson City, (2) the market rate for administrative hearings, (3) what Mr. Sprenger’s attorney normally charges on every case, or (4) what Mr. Sprenger was actually charged by his attorney. At most, the testimony was that \$175.00 was reasonable, as declared by Mr. Sprenger’s attorney himself.

If “the limited availability of qualified attorneys for the proceedings involved” meant merely that lawyers skilled and experienced enough to try the case are in short supply, it would effectively eliminate the \$75 cap – since the “prevailing market rates for the kind and quality of the services furnished” are obviously *determined* by the relative supply of that kind and quality of services. “Limited availability” so interpreted would not be a “special factor,” but a factor virtually always present when services with a market rate of more than \$75 have been provided. We do not think Congress meant that if the rates for all lawyers in the relevant city – or even in the entire country – come to exceed \$75 per hour ..., then that market-minimum rate will govern instead of the statutory cap. To the contrary, the “special factor” formulation suggests Congress thought that \$75 an hour was generally quite enough public reimbursement for lawyers’ fees, whatever the local or national market might be. If that is to be so, the exception for “limited availability of qualified attorneys for the proceedings involved” must refer to attorneys ... having some distinctive knowledge or specialized skill needful for the litigation in question – as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. Examples of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language. Where such qualifications are necessary and can be obtained only at

rates in excess of the \$75 cap, reimbursement above that limit is allowed.

*Pierce v. Underwood*, 487 U.S. 552, 571-72 (1988)(footnote omitted).

In the absence of the award of attorneys' fees permitted by §536.087, RSMo, Mr. Sprenger would have no right to any award of attorneys' fees whatsoever. This is because Missouri follows the "American Rule," which is the common law rule that each party is required to bear his or her own attorneys' fees regardless of who prevails. *Lorenzini v. Short*, 2010 W.L. 2284173, p. 4 (Mo. App. E.D. 2010); *Agnello v. Walker*, 306 S.W.3d 666, 679 (Mo. App. W.D. 2010).

The express language of subsection 4 of § 536.085, prohibits the award of attorneys' fees based on the "prevailing rate." The statute provides that fees awarded "shall be based on prevailing market rates for the kind and quality of services furnished" except "attorney fees shall not be awarded in excess of seventy-five dollars per hour unless the court determines that a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."

It is, of course, a fundamental rule of statutory construction that when "the language of a statute is unambiguous and clear, the court will give effect to the language as written, and not engage in statutory construction." *Dubinsky v. St. Louis Blues Hockey Club*, 229 S.W.3d 126, 130 (Mo. App. E.D. 2007). It is assumed that when the legislature "excepted" attorneys' fees from the provision that otherwise considered the "prevailing market rates," this was intentional "and should be given meaning." *Board of Educ. of City of St. Louis v. Daly*, 272 S.W.3d 228, 234 (Mo. App. E.D. 2008); *Anderson v. Ken Kauffman & Sons*

*Excavating, L.L.C.*, 248 S.W.3d 101, 109 (Mo. App. W.D. 2008) (“It is presumed that the legislature did not intend a meaningless act.”).

The prevailing market rate for attorneys’ fees does exist in other “fee shifting”<sup>3</sup> provisions of Missouri law. For example, under Missouri’s Human Rights Act, the legislature allows a prevailing plaintiff to receive “reasonable attorneys fees,” with no maximum limit set. §213.211.2, RSMo. Thus, it cannot be argued that the legislature was unaware or overlooked its authority to increase the rate of compensation – should the legislature so desire.

“Presumably, the legislature does not insert superfluous language in a statute.” *Cook v. Newman*, 142 S.W.3d 880, 889 (Mo. App. W.D. 2004). Of course, Mr. Sprenger does not ask this Court to misread the attorneys’ fees provisions under Chapter 536 but, instead, asks this Court to engage in the quintessential act of “judicial activism” and re-write the statute because \$75.00 per hour is no longer the prevailing rate.

Mr. Sprenger’s evidence at the attorneys’ fees hearing was that “I can’t imagine anyone in the present economy working for \$75.00 an hour,” (Tr. p. 38), and that “I think it’s virtually impossible to find anybody to do anything for \$75.00 an hour right now.” (Tr. p. 19) (emphasis added). This may be entirely true. But the legislature clearly and

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<sup>3</sup> Recognizing the “American Rule” as the norm, the United States Supreme Court applies the term “fee shifting” statutes to laws authorizing the award of attorneys’ fees. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep’t of Health and Human Resources*, 532 U.S. 598, 604 (2001).

unambiguously indicated that attorneys' fees under §536.087, RSMo, are not based on the prevailing market rate. And to suggest that the prevailing market rate is, in itself, a "special factor" authorizing a higher fee rate is to presume the legislature intended an absurd or unreasonable result. *Livingston v. Omaha Property and Cas. Ins. Co.*, 927 S.W.2d 444, 446 (Mo. App. W.D. 1996); *Norris v. Dir. of Revenue*, 304 S.W.3d 724, 726 (Mo. banc 2010).

Mr. Sprenger laments that no attorney will work for \$75.00 per hour. The statute does not mandate such a result. An individual and his or her attorney are free to enter into any fee arrangement they desire, at any rate of compensation they agree upon. The statute simply limits the amount the State will reimburse private counsel. It seems reasonable, therefore, that it would be prudent for counsel to advise a client that, should they prevail, the State may reimburse private counsel – and thus reduce the amount of compensation the client must pay the attorney – by \$75.00 per hour. Again, in the absence of the statute, Mr. Sprenger's obligation is to pay the entirety of his attorneys' bill. The statute provides for limited reimbursement for those fees.

If the statutory fee is to be corrected, "this result must be achieved, if at all, by the legislature." *Dale v. Gubin*, 879 S.W.2d 699, 701 (Mo. App. S.D. 1994). Courts "have no power to expand the legislature's specification of the circumstances in which attorneys fees and expenses are recoverable from the state." *Painter v. Missouri Comm'n on Human Rights*, 251 S.W.3d 408, 413 (Mo. App. W.D. 2008). Mr. Sprenger's argument that the statutory maximum of \$75.00 per hour is inadequate fails to acknowledge that in the absence of the statute, he would be entitled to no award of attorneys' fees whatsoever. The

appropriate remedy for Appellant's complaint that \$75.00 per hour is an inadequate fee lies with the Missouri legislature and not this Court.

**Conclusion**

For these reasons, the decision of the Board awarding attorneys' fees at a rate of \$75.00 per hour should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 2676 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 1<sup>st</sup> day of March, 2011, to:

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