

IN THE
SUPREME COURT OF MISSOURI

MARY JEANETTE HAGGARD d/b/a)
JENNY'S HOUSCLEANING, and)
JENNY'S HOUSECLEANING, INC.,)
)
Appellant,)
)
v.) No. SC88577
)
DIVISION OF EMPLOYMENT)
SECURITY,)
)
Respondent.)

AMICUS BRIEF OF THE ATTORNEY GENERAL

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INTEREST OF AMICUS

Rather than reach the merits, the court of appeals decided that the decision below was “void” because of what a non-lawyer of the Division of Employment Security did at an administrative hearing. The court of appeals relied on *Reed v. Labor & Industrial Relations Commission*, 789 S.W.2d 19 (Mo. banc 1990). There, this court held that a decision of an administrative tribunal rendered on appeal to that tribunal was “void” when the notice of appeal was filed by a non-lawyer on behalf of the corporation.

As discussed in the motion for transfer and the Attorney General’s amicus in support of transfer, the court of appeals holding would have broad ramifications. Government agencies have been represented to varying degrees by non-lawyers in administrative tribunals in a wide variety of contexts. There are literally hundreds of such matters each year – perhaps thousands in some years. The court of appeals holding could have rendered the final decisions in many, perhaps all of those proceedings void. To do so would extend the *Reed* holding far beyond what any reasonable argument could support.

The Attorney General appears here as amicus to ask that the Court modify or clarify its holding in *Reed*, making clear that the mere appearance in an administrative proceeding of a person other than an attorney on behalf of the government does not necessarily mean that the decision reached there is “void.”

ARGUMENT

Consideration of the non-lawyer representation in a tribunal – whether a lower court or an administrative tribunal – logically involves answering four questions:

1. Did a non-lawyer appear before the court or tribunal on behalf of someone else (here, a government agency, but in other cases a corporation or another person)?
2. In the course of that representation, did the non-lawyer perform any functions that fall within the definition of the practice of law?
3. If the non-lawyer did perform functions that constituted the practice of law, were those actions authorized by law, such that those actions do not constitute the unauthorized practice of law?

4. And if those actions did constitute the unauthorized practice of law, what impact does that have on the result?

The Division of Employment Security concentrates on the third question, pointing out that this Court's Rule 5.29(c) expressly authorizes the performance of some legal functions by non-lawyers.

The Attorney General here addresses only the fourth question – *i.e.*, we recognize (1) that the Division's non-lawyer officer appeared on the Division's behalf, and (2) that the acts he performed (briefly questioning witnesses and making argument) constituted the practice of law, and we assume, solely for the purpose of argument, (3) that those acts were not authorized by Rule 5.29(c) or otherwise.

The rules and statutes regarding the unauthorized practice of law in Missouri do not answer the fourth question; like those in Maryland, they do “not mandate any particular sanction” in cases in which a non-lawyer improperly participates. *First Wholesale Cleaners, Inc. v. Donegal Mut. Ins. Co.*, 792 A.2d 325, 331 (Md. App. 2002). Instead, they merely provide for collateral relief – for sanctions against the person who engages in unauthorized practice. *E.g.*, § 484.020, RSMo. 2000; *Hoffmeister v. Tod*, 349 S.W.2d 5 (Mo. banc 1961) (citing for

contempt and fining non-lawyer for appearing before the Division of Workers' Compensation); *Clark v. Austin*, 101 S.W.2d 977 (Mo. 1937) (citing for contempt a non-lawyer appearing before the Public Service Commission); *Curry v. Dahlberg*, 110 S.W.2d 742 (Mo. banc 1937) (refusing to enforce a contract for payment for work done by non-lawyer when that work constituted unauthorized practice of law).

The court of appeals concluded that this Court answered the fourth question in *Reed* – and that it provided a single answer, to be used in each and every case where a non-lawyer engaged in the unauthorized practice of law. That court implicitly concluded that it doesn't matter which party was improperly represented – thus allowing even a party that was properly represented to have a decision declared “void” because of the unauthorized practice of law on behalf of another.

As discussed below, in our view that is not a holding that *Reed* compels. Nor is it one that can be logically supported. Should this Court, however, read *Reed* to compel holding that any and every decision reached in a case that included the unauthorized practice of law is void, the Court should overrule that precedent.

A. The purpose of the prohibition on unauthorized practice is to protect those who might be harmed by that practice.

We begin by addressing purposes and policies – the considerations that form the basis for a decision concerning the appropriate remedy when a non-lawyer oversteps his bounds in a proceeding. Those include not just the purpose of the prohibition on unauthorized practice of law, but also other policies.

Though the majority in *Reed* did not speak of the reason for the prohibition, Judge Holstein did: “The reason for prohibiting non-lawyers from appearing in legal proceedings as advocates for other persons is to protect the public, including corporations and corporate shareholders, from incompetence of untrained, unlicensed practitioners.” 789 S.W. 2d at 29 (Holstein, J. concurring). A few years earlier, the Court had explained

that the regulation by this court of the unauthorized practice of law “. . . is not to protect the Bar from competition but to protect the public from being advised or represented in legal matters by incompetent or unreliable persons. Our purpose must be to make

sure ‘that legal services required by the public, and essential to the administration of justice, will be rendered by those who have been found by investigation to be properly prepared to do so by conforming to strict educational standards, and who demonstrate that they have the character to conform to higher standards of ethical conduct than are ordinarily considered necessary in business relations which do not involve the same fiduciary and confidential relationships.’”

In re Thompson, 574 S.W.2d 365, 367 (Mo. banc 1978), quoting *Hulse v. Criger*, 247 S.W. 2d 855, 857-58 (Mo. banc 1952), in turn quoting *Curry v. Dahlberg*, 110 S.W. 2d 742 (Mo. 1937).

Courts in other states have similarly stated the purpose of the prohibition on unauthorized practice of law. *E.g.*, *Attorney Grievance Commission of Md. v. Hallman*, 681 A.2d 510, 514 (Md. 1996) (“to protect the public from being preyed upon by those not competent to practice law-from incompetent, unethical, or irresponsible representation”); *Bennie v. Triangle Ranch Co.*, 216 P. 718, 719 (Colo.

1923) (“for the protection of citizens and litigants in the administration of justice, against the mistakes of the ignorant on the one hand, and the machinations of unscrupulous persons on the other”); *Niklaus v. Abel Const. Co.*, 83 N.W.2d 904, 911 (Neb. 1957) (quoting *Bennie*); *Franklin v. Chavis*, 640 S.E.2d 873, 876 (S.C. 2007) (“to protect the public from incompetence in the preparation of legal documents and prevent harm resulting from inaccurate legal advice”).

The fourth question must be answered, then, in a fashion that vindicates that policy. But the search for an answer must not be myopic, for other policies, too, must be given effect.

Among them is the courts’ strong preference for deciding cases on the merits. This Court has most often referred to that preference in connection with the court’s rules, often citing this language from the seminal decision of *Thummel v. King*, 570 S.W.2d 679, 690 (Mo. banc 1978):

On numerous occasions we have expressed our reluctance to punish innocent parties for the shortcomings of counsel on appeal. As we have often

declared, it is the policy of this court to decide cases on the merits whenever possible.

See also, e.g., State v. Sloan, 756 S.W.2d 503, 505 n.2 (Mo. banc 1988).

Although this court has not discussed the interaction between that policy and the prohibition on unauthorized practice, the Florida Court of Appeals has. In rejecting a demand by a defendant that the trial court be required to dismiss a complaint filed by a non-lawyer, that court noted the “welcome policy” requiring decisions on the merits “whenever possible,” and then held that dismissal (rather than permitting the corporation to belatedly appear by counsel) could be justified only if it “will somehow substantially advance some other more compelling public policy.” *Szteinbaum v. Kaes Inversiones y Valores, C.A.*, 476 So. 2d 247, 250 (Fla. App. 1985). *See also First Wholesale Cleaners*, 792 A.2d at 332.

In reaching that decision, the Florida court made an observation that demonstrates the difficulty the court faced when the defendant attempted to invoke the unauthorized practice rule: “Indeed, prohibiting amendment and dismissing as a nullity the complaint would yield the ironic result of prejudicing the constituents of the corporation,

the very people sought to be protected by the rule against the unauthorized practice of law.” *Szteinbaum*, 476 So. 2d at 250. The “people sought to be protected,” though often described as “the public” without explication, must necessarily begin (and perhaps end) with those who the non-lawyer represents. In *Szteinbaum*, then, the Florida court treated the prohibition as protection for the party not properly represented, and rejected use of the prohibition as a shield that represented parties could use against unrepresented ones.

The Florida Supreme Court used the same approach in *Torrey v. Leesburg Regional Medical Center*, 769 So. 2d 1040 (Fla. 2001). The court quoted the language from *Szteinbaum* that to declare “a nullity” everything done by a non-lawyer and refuse to allow amendment or correction “disserves the policy that cases should be decided on their merits.” *Id.* at 1044, quoting *Szteinbaum*, 476 So. 2d at 250. The Florida Supreme Court itself criticized such an approach as “ill-suited to promote the policy served by the rule against the unauthorized practice of law.” 769 So.2d at 1044.

Where the Florida courts spoke of just one purpose for the prohibition on unauthorized practice of law, an appellate court in California cited two:

Two public policies underlie the strictures against the unlicensed practice of law. First, attorneys must be licensed so that the public is protected from being advised and represented by persons who are not qualified to practice law. ... Second, the litigation of cases by unlicensed attorneys threatens the integrity of the judicial process itself.

Russell v. Dopp, 36 Cal. App. 4th 765 (Cal. App. 4th Dist. 1995). That court then posed a more limited version of our fourth question:

“whether the unlicensed representation also taints the judgment obtained against the clients of the unrepresented person.” *Id.*

Consistent with its phrasing of the purposes of the prohibition, the court then observed that the answer to its question “depends, in part, on whether the clients of the unlicensed person ... were victims of the unlicensed person or coparticipants in the fraud.” *Id.* In other words, to the extent the purposes of the prohibition on the unauthorized

practice of law are to be vindicated in the context of the case in which it occurs, the court's actions must remedy the injury to the victims, not provide a windfall to other parties. The court apparently leaves any additional need to address the "integrity of the judicial process" to collateral means directed at the non-lawyer representative, not at the improperly represented party.

The Indiana Supreme Court shared that focus on the interests of those who the non-lawyer improperly represents, observing: "The practice of law without a license is not a 'victimless crime' because the legal interests of people assisted by those who are not qualified to act as attorneys can be irreparably harmed." *State ex rel. Indiana State Bar Association*, 838 N.E. 2d 433, 443 (Ind. 2005). But nothing in that court's holdings, nor those of the Florida courts, nor those in Missouri suggests that the prohibition can be used as a shield by properly represented parties.

B. The purpose of prohibiting the unauthorized practice of law is best served by declaring void at most some specific acts.

The reference in the Florida decisions to “nullity” places that state in one of two lines of cases described by the Arkansas Supreme Court in *Davenport v. Lee*, 72 S.W.3d 85 (Ark. 2002). That court observed that “there is a split of authority as to whether the unauthorized practice of law renders a proceeding a nullity or merely amounts to an amendable defect.” *Id.* at 93. The “nullity” courts have “conclude[ed] that the proscription on the unauthorized practice of law is of paramount importance in that it protects the public from those not trained or licensed in the law.” *Id.* “On the other hand, those jurisdictions holding that the unauthorized practice of law results in an amendable defect have done so in an attempt to avoid what they deem to be the unduly harsh result of dismissal in technical grounds.” *Id.*

But a key to the *Davenport* holding is implicit in both the language of the Arkansas court and of its selection of authorities. Look at the language the court uses to describe the second group: the defect must be “amendable.” Consistent with that, each of the precedents the

Arkansas court cites turns on the filing of a pleading made defective by the absence of an authorized attorney's signature. The court in *Davenport* implicitly recognized that both lines of cases consist of ones in which the non-lawyer not only did something only a lawyer can do, but something was indispensable to the proceeding.

That is true, of course, of *Reed*. There a non-lawyer filed an application for review, which is necessary to initiate the review of an unemployment benefits decision made by the Appeals Tribunal of the Division of Employment Security. Such filings are required in order to avoid having the Division's decision become final and unreviewable.¹

In that respect, *Reed* was like its predecessors in the Missouri Court of Appeals. In *Credit Card Corp. v. Jackson County Water Co.*, 688 S.W.2d 809 (Mo. App. W.D. 1985), a non-lawyer filed the appellant corporation's brief. Because a non-lawyer could not file a brief for a

¹ Even in *Reed* the court showed more flexibility than the court of appeals' reading would suggest: this court retransferred and ordered the court of appeals to consider the merits of the appeal, given that "the application for review was filed in accordance with then prevailing practices." 789 S.W.2d at 24.

corporation, “in effect no brief was filed,” requiring that the appeal be dismissed. And in *Property Exchange & Sales, Inc. v. Bozarth*, 778 S.W.2d 1 (Mo. App. E.D. 1989), there were three petitions, two filed by the corporation’s president on behalf of the corporation and a third filed in the president’s name, based on an assignment by the corporation of the claims to the president. The court cited the longstanding rule that a corporation as “an artificial entity ... cannot appear and act in person. It must act in ... legal matters ... through licensed attorneys.” *Id.* at 3. The court rejected the premise that a corporation could use assignment to avoid the ban on non-lawyer representation. There, as in *Reed*, declaring void the petition that opened the proceeding meant that the proceeding itself would be void *ab initio* and thus correctly dismissed.

Post-*Reed* decisions by the Missouri Court of Appeals follow that same pattern. For example, in *Risbeck v. Bond*, 855 S.W.2d 749 (Mo. App. S.D. 1994), the corporation’s “attorney-in-fact” – not an attorney-at-law – filed the petition to quiet title. In *Sellars v. Booth*, 945 S.W.2d 63 (Mo. App. S.D. 1997), a grandmother filed the petition, a notice of appeal, and an appellant’s brief on behalf of her grandchild. In *Schenberg v. Bitzmart, Inc.*, 178 S.W.3d 543 (Mo. App. E.D. 2005), a

non-lawyer shareholder filed a motion for new trial, leading the court to hold that the subsequent notice of appeal was untimely, since the motion that would have delayed finality of the judgment was a nullity. In each case, the non-lawyer performed an act that was essential to initiating or continuing the litigation.

The same was true in *Wright v. Patchin*, 994 S.W.2d 100 (Mo. App. S.D. 1999), where a nonresident attorney, who failed to comply with the rules that would permit him to appear in Missouri, filed the petition for judicial review of an agency order. And it was true in *Strong v. Gilster Mary Lee Corp.*, 23 S.W.3d 234 (Mo. App. E.D. 2000), where a non-resident attorney filed an application for review of a workers' compensation order.

Significantly, this Court reached a somewhat different conclusion in *Hensel v. American Air Network, Inc.*, 189 S.W.3d 582 (Mo. banc 2006). There a non-resident attorney signed the petition – but this Court refused to penalize the plaintiffs themselves, instead requiring the circuit court to correct the omission. In doing so, the court observed – much as did the Florida court in *Torrey* – that to deprive a party of its claim because of the improper work of an unlicensed attorney would be

contrary to the purpose of the prohibition on unauthorized practice of law: “The purpose of declaring certain acts by those not authorized to practice law a nullity is to protect the public. That purpose is not served under the facts of this case.” *Id.* at 584.

This Court has not considered, post-*Reed*, situations such as those in *Risbeck*, *Sellars*, and *Schenberg*. But in *Hensel* it rejected the kind of rigid approach those decisions take. Here, to serve the purpose of the prohibition on unauthorized practice, this Court (should its analysis reach the fourth question) should maintain the concern it manifest for the improperly represented party in *Hensel* and do two things.

The first is the result of the fact that the most *Reed* and the other Missouri precedents really could stand for would be a rule that particular acts of non-lawyers are a nullity. The Court should clarify that despite the broad language of *Reed*, the ultimate result in a particular proceeding would be void only if the null acts – such as the filing of the petition itself, or of a notice of appeal – were essential to jurisdiction or to some other aspect of the case. Here, the agency’s non-lawyer official merely appeared at the hearing and that he asked a few (very few) questions of witnesses on the express invitation of the

hearing officer. If the questions and the answers are deleted from the record, the result does not change.

The second comes from the fact that nothing in *Reed* or other Missouri cases suggests that a properly represented party can use the prohibition on unauthorized practice of law as a shield against liability. The Court should leave the protection of the broader “public” from the unauthorized practice of law to the collateral methods (criminal sanctions and contempt). Thus the Court should refuse to make the unauthorized practice a shield to be wielded by represented parties against their adversaries. That is particularly important when that adversary is the government, fulfilling the public policy in a realm such as unemployment compensation.

CONCLUSION

For the reasons stated above, should the Court reach the question of the impact of unauthorized practice of law, it should modify or clarify its decision in *Reed* so as to prevent courts in the future from citing that case for the broad proposition that if anyone in a proceeding performs an act that constitutes the unauthorized practice of law, the decision in the matter is void.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage pre-paid this 29th day of August, 2007, to:

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**Certification of Service and of Compliance
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The undersigned hereby certifies that on this 29th day of August, 2007, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 3,563 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copy of the brief has been scanned for viruses and is virus-free.

State Solicitor