

NO. SC91307

MISSOURI SUPREME COURT

DEWAYNE SPRENGER,

Appellant,

vs.

**MISSOURI DEPARTMENT OF PUBLIC SAFETY,
DIVISION OF ALCOHOL AND TOBACCO CONTROL,**

Respondent.

APPELLANT'S SUBSTITUTE REPLY BRIEF

**DAVID J. MOEN, # 39239
621 E. McCarty Street, Ste. A
Jefferson City, Missouri, 65101
Phone: (573) 636-5997
Fax: (866) 757-8665**

**ATTORNEY FOR APPELLANT
DEWAYNE SPRENGER**

**THEODORE A. BRUCE, #29687
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-0782
Fax: (573) 751-0924**

**ATTORNEY FOR RESPONDENT
MISSOURI DEPARTMENT OF
PUBLIC SAFETY**

TABLE OF CONTENTS

| | |
|--------------------------------|----|
| Table of Contents..... | i |
| Table of Authorities..... | ii |
| Argument..... | 1 |
| Conclusion..... | 6 |
| Certificate of Compliance..... | 8 |
| Certificate of Service..... | 9 |

TABLE OF AUTHORITIES

Cases

| | |
|---|---|
| <i>McMahan v. Missouri Dept. of Social Services, Div. of Child Support Enforcement</i> , 980 S.W.2d 120, 124 (Mo. App. E.D. 1998)..... | 3 |
| <i>Hutchings ex rel. Hutchings v. Roling</i> , 193 S.W.3d 334, 350 (Mo. App. E.D. 2006)..... | 3 |

Statutes

| | |
|---|---------|
| Missouri Revised Statute § 213.111..... | 4 |
| Missouri Revised Statute § 536.085..... | 1, 4, 6 |
| Missouri Revised Statute § 536.087..... | 4, 5 |

ARGUMENT

In its brief, Respondent argues that the express language of § 536.085.4 RSMo prohibits the award of attorney fees based upon prevailing market rates for the kind and quality of services furnished. **Respondent's Substitute Brief, p. 11.** However, a thoughtful reading of the statute suggests otherwise.

“Reasonable fees and expenses includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, tests, or project which is found by the Court or agency to be necessary for the preparation of the party’s case, and a reasonable attorney or agent fees. The amount of fees awarded as reasonable fees and expenses shall be based upon prevailing market rates for the kind and quality of the services furnished, except that no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the state in the type of civil action or agency proceeding, and attorneys fees shall not be awarded in excess of \$75 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;”

§536.085.4 RSMo

Our legislature placed no limitation on payment by the state of reasonable costs of any study, analysis, engineering report, test, or project which was necessary for the preparation of the party’s case. The Court is directed to award these fees and expenses based upon prevailing market rates. Set apart by our legislature were two categories of

fees: expert witness fees and attorney fees. Expert witness fees are capped at a rate no higher than the highest rate of compensation for expert witnesses hired by the state in similar proceedings. That is a black line, mechanical rule that is easy to apply. If the state employs a medical expert in a Medicaid case at the rate of \$250 per hour, the prevailing party in the agency proceeding against the state can only receive an award for an expert at the rate of \$250 per hour.

The legislature made the attorney fee award more flexible. The legislature could have said that reasonable attorney fees will be capped based upon the highest rate of compensation for attorneys paid by the state in similar proceedings where counsel working outside of state employment are used by the state. This the legislature did not do. Sprenger believes that \$75 per hour was the rate generally paid by the state for outside counsel in similar proceedings as late as 1993. However, courts were directed by our legislature not to follow a mechanical or black line rule to identify the appropriate hourly rate for a reasonable attorney fee. The Court was to determine whether a “special factor” exists, justifying a higher fee. The legislature apparently realized that there would be situations where attorneys experienced in handling contested cases would not be available for \$75 per hour, even though the state had law firms under contract willing to work for \$75 per hour.

Even when the statute was enacted in 1989, our legislature expressly allowed attorney fee award in excess of \$75 per hour where the Court determines that the minimum rate normally awarded was not adequate in light of the limited number of qualified attorneys. Our Courts have interpreted limited availability of qualified attorneys

in an area who are willing to take a case at \$75 per hour as a “special factor” justifying an enhancement above the statutory cap. *McMahan v. Missouri Dept. of Social Services, Div. of Child Support Enforcement*, 980 S.W.2d 120, 124 (Mo. App. E.D. 1998), *Hutchings ex rel. Hutchings v. Roling*, 193 S.W.3d 334, 350 (Mo. App. E.D. 2006).

Respondent appears not to dispute the fact that no attorney would have been available to Sprenger at the rate of \$75 per hour. **Respondent’s Substitute Brief, p. 12.** Except for the fee charged Sprenger by Attorney Moen for driving to Kansas City to file the brief in the Western District Court of Appeals in a timely fashion, Respondent did not dispute that Sprenger’s attorney fees are fair, reasonable, and based upon an amount at or below the market rate. Likewise, the Cole County Circuit Court reviewed the evidence in Sprenger’s attorney fee request and declared that there were no attorneys available in mid-Missouri to litigate this type of case for \$75 per hour, and that the attorney fee charged by Attorney Moen was fair and reasonable. **Appendix, p. 9.**

With respect to the relevant factors used to determine a reasonable amount of attorney fees, the courts have considered: rates customarily charged by the attorney and other attorneys in the community for similar cases, the hours expended in litigation, the nature and character of the services rendered, the degree of professional ability required, the nature and importance of the subject matter, the amount involved of the result obtained, and the vigor of the opposition. *Hutchings* at 351. In our case, Attorney Roger Brown testified before the Board that he charged \$225 per hour for this type of work. Brown testified that he was familiar with other attorneys in mid-Missouri who charged for similar services, and \$175 per hour was at the bottom of the scale. Charges at times

were as high as \$300 per hour. The middle range was \$225-\$250 per hour. **Transcript p. 15.** Brown further testified with respect to the hours expended by Sprenger's attorney, that the hours expended were fewer than would have been expected. According to Attorney Brown, the case was unusually complex and required a higher degree of professional skill than could be found in most attorneys. **Transcript p. 16-17.** The only real issue for this Court to resolve is whether a "special factor" exists, justifying a rate above \$75.00 per hour in Sprenger's case.

Respondent argues that legislative intent to limit the rate of compensation in attorney fee awards under Chapter 536 is clarified when one compares it with the language in §213.111.2 RSMo, which provides for the award "reasonable attorney fees" under the Missouri Human Rights Act. However, under the Human Rights Act, our legislature stated: "The Court *may* grant as relief, as it deems appropriate... reasonable attorney fees to the prevailing party..." Section 536.087 states that reasonable fees and expenses "shall be awarded" unless the position of the state was substantially justified. It seems logical that the legislature would have given more attention to the payment of attorney fees and expenses in a statute where payment is mandatory. Under § 536.085.4, the legislature requires a determination of whether there is a "special factor" to consider when deciding the hourly rate of compensation for attorneys. Under the Human Rights Act, the legislature has given courts discretion to determine what amount is a reasonable attorney fee, and whether attorney fees should even be awarded to a prevailing party. Under Chapter 213, an award need not be based solely on the hourly rate the attorney

charges. For example, representation could be based on a contingency fee, making an award of fees under Chapter 213 more complex.

Respondent argues that the legislature intended under Chapter 536 to provide limited reimbursement for attorney fees to prevailing parties who successfully challenge unjustified state action. It argues that Sprenger was free to enter into a fee agreement with his attorney requiring him to pay his attorney's bill from his own pocket for amounts charged above \$75 per hour. This argument has two problems. First of all, it suggests that the legislature intended an unreasonably low fee to be paid by the state, thus undermining the legislative intent of § 536.087. Also, Respondent's argument suggests that a special factor exists. If there is no attorney available for \$75 per hour, there is a special factor, and a higher fee is justified.

Respondent states that Sprenger fails to acknowledge that in the absence of §536.085, he would be entitled to no award of attorney fees whatsoever. Such acknowledgement is pointless. Sprenger is entitled to an award of reasonable attorney fees because our legislature ordered it to be so. Respondent's argument is like arguing that in the absence of Chapter 287 RSMo, injured employees would not be entitled to any workers' compensation benefits in the state of Missouri; therefore, injured employees should be happy with what they get from the employer and pay from their own pockets if there is a shortfall. Sprenger acknowledges that absent Chapter 536, the Administrative Procedures Act, Sprenger would be proceeding in Circuit Court instead of a tribunal formed or hired by Respondent to determine whether Respondent violated its own rules and regulations in terminating his employment. No doubt, our legislature realized that, by

requiring Sprenger to submit to contested case review, under the Administrative Procedures Act, additional accountability for state actions was needed to protect our citizens from unreasonable and unjustified actions by the State. But, if no attorney is available to represent private parties in contested cases, the intent of our legislature is thwarted.

CONCLUSION

Appellant Sprenger is cognizant that our legislature was dealing with competing goals when it enacted § 536.085.4 RSMo. The legislature was trying to strike a balance between the need to hold state agencies accountable when their actions are not substantially justified, and the need to control attorney fee awards against the state because the awards are ultimately paid by taxpayers. The balance cannot be properly struck where the rate of compensation for attorney fees is based on an hourly rate so low that no qualified attorney will take the case. The balance between these competing interests can be met where courts are given the discretion to decide the rate required to obtain competent legal counsel for the particular contested case at issue. Was there any attorney in the area qualified to handle Sprenger's case that was charging \$75 per hour for this kind of work? There were none. Therefore, there was a special factor justifying a higher rate. Sprenger was charged the minimum rate necessary to obtain competent legal counsel. Respondent should be ordered to pay Sprenger's attorney fees based on the hourly rate charged by his attorney.

Respectfully submitted,

DAVID J. MOEN, P.C.

David J. Moen, #39239
621 East McCarty, Suite A
Jefferson City, MO 65101
(573) 636-5997
(866) 757-8665 (Facsimile)
ATTORNEY FOR APPELLANT SPRENGER

IN THE SUPREME COURT OF MISSOURI

DEWAYNE SPRENGER

Appellant,

v.

**MISSOURI DEPARTMENT OF
PUBLIC SAFETY,**

Respondent.

)
) **Cir. Ct. Case No.: 06AC-CC00411**
) **Western Dist. Case No.: WD71745**
)
) **SUP. CT. CASE NO.: SC91307**
)
)
)
)
)
)

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Appellant's Substitute Brief complies with the limitations set forth in Rule 84.06(b), contains _____ words and ____ lines, as counted by the word-processing software used, Word 2007, and that the compact disk filed together with this Brief in accordance with Rule 84.06(g) has been scanned for viruses and is virus-free.

David J. Moen, #39239
621 East McCarty, Suite A
Jefferson City, MO 65101
(573) 636-5997
(866) 757-8665 (Facsimile)

ATTORNEY FOR APPELLANT
DEWAYNE SPRENGER

IN THE SUPREME COURT OF MISSOURI

DEWAYNE SPRENGER

Appellant,

v.

**MISSOURI DEPARTMENT OF
PUBLIC SAFETY,**

Respondent.

)
) **Cir. Ct. Case No.: 06AC-CC00411**
) **Western Dist. Case No.: WD71745**
)
) **SUP. CT. CASE NO.: SC91307**
)
)
)
)
)

CERTIFICATE OF SERVICE

I hereby certify that one copy of Appellant's Brief and one copy of the disk required by Rule 84.06(g) were served by First-Class U.S. mail this 16th day of March 2011, on:

Theodore A. Bruce, Assistant Attorney General
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, MO 65102

ATTORNEY FOR RESPONDENT

David J. Moen