IN THE SUPREME COURT OF MISSOURI

MEAGAN GARLAND,	)	
	)	
Appellant,	)	
	)	
v.	)	No. SC 94230
	)	
STATE OF MISSOURI, DEPARTMENT OF SOCIAL SERVICES, FAMILY SUPPORT DIVISION, and JEFFREY RUHL,	)	
	)	
Respondents.	)	

Transferred from the Missouri Court of Appeals, Eastern District, Division Four
Hon. Lisa S. Van Amberg, Hon. Patria L. Cohen, concurring
Hon. Gary M. Gaertner, dissenting
Case No. ED99773

On Appeal from the Circuit Court of St. Charles, County Missouri, Division Three
Honorable John P. Banas
Case No. 1111-CV08982

APPELLANT'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

A. The parties agree that the question presented to this Court is a question of law and that the proper standard of review on appeal is *de novo*

The trial court made it very clear that it was ruling on FSD's **motion to dismiss** Appellant's application for attorney fees when it entered its order of March 1, 2013. The Court's Order specifically states "FSD's Amended Motion To Dismiss + Motion To Dismiss +/or Strike Request for Attorney Fees called, heard, and sustained this day." (App. A1; LF 174). The trial court stated at the beginning of the hearing that it had already ruled on the motion and proceeded to a hearing only to allow counsel to make a record. (Tr. 2:7). Thus, the trial court did not base its decision on any evidence adduced at the hearing. The standard of review for a motion to dismiss is as cited in Mother's Brief. Regardless, FSD does not appear to take any exception to the factual allegations in Mother's application for attorney fees, so this may be a distinction without a difference in this instance. Both parties agree in their briefs that the question of whether Appellant was a prevailing party is a question of law that should be reviewed by this Court *de novo*.

B. The Federal case law relied upon by FSD is inapplicable

FSD's argument that this Court should look to *Heeren v. City of Jamestown, Ky.*, 39 F.3d 628 (6th Cir. 1994) for guidance relies upon the premise that "Missouri courts have not addressed the issue at hand." (Res. Sub. Br. 14). To the contrary, the cases cited by

Appellant, *Washington v. Jones*, 154 S.W.3d 346 (Mo.App. E.D. 2004) and *Greenbriar Hills Country Club v. Dir. of Revenue,* 47 S.W.3d 346 (Mo. banc 2001) are squarely on point. As previously argued, this Court already decided in *Washington* that the question of whether one is a "prevailing party" is answered by determining whether said party obtained a favorable result in the litigation. *Washington*, 154 S.W.3d 346-51. Even a dismissal of a petition for review for mootness can qualify as a favorable result. *Id*. At 350-1.

Further, *Heeren* is not in disagreement with the Missouri cases cited by Appellant, rather, it is distinguishable. The *Heeren* court held the plaintiff in that case had not prevailed vis-à-vis the government agency because it determined that the lawsuit against that particular agency "was not a necessary and important factor in achieving the relief desired." *Heeren*, 39 F.3d 628 at 631.

Here, the agency decision entered by the Family Support Division no longer stands as a direct result of the Petition For Review filed by Appellant. Clearly, the lawsuit filed against FSD was "a necessary and important factor in achieving the relief desired."

FSD admits in its brief that it docketed its administrative order with the Circuit Court of St. Charles County. (Res. Sub. Brief, p. 6). If Mother had not filed her petition for review, the administrative order entered by FSD would stand and have the same "force, effect, and attributes of a docketed order or decree of the circuit court, including, but not limited to, lien effect and enforceability by supplementary proceedings, contempt of court, execution and garnishment." § 454.490, RSMo. Assuming *arguendo* that FSD's decision is

not substantially justified, entry of the agency order would have prejudiced the child's right to adequate support from her father.

In stark contrast to *Hereen*, there is nothing in this case to suggest that the relief Mother obtained would have occurred had she not filed her Petition For Review of the agency decision. Unlike *Hereen*, this case was a direct challenge to the action taken by the agency from which attorney fees are sought.

FSD also cites a 1st Circuit Federal case, *In re Perry*, 882 F.2d 534 (1st Cir. 1989). However, the holding there rests upon the fact that the agency in that case was a purely adjudicatory entity. *Id*. at 540-541. "OSHRC thus differs from the conventional agency model in that it is purely an adjudicator; there is no intermixing of regulatory, prosecutorial, and adjudicative functions." *Id*. at 537. "The commission was envisioned by its creators to be similar to a district court." *Id*.

Here, FSD is not at all similar to the agency in *In re Perry*. FSD does have regulatory functions. § 454.200.2(5), RSMo. FSD is charged with issuing and prosecuting its orders. § 454.200.2(14) and (15), RSMo. Parties only have an opportunity to be heard on FSD's finding of financial responsibility if they are either an obligor or an "aggrieved" party and raise an issue of fact. § 454.470.4 and § 454.470.7, RSMo. Essentially, FSD conducts its own investigation and issues a notice and finding of financial responsibility. FSD then automatically executes its findings unless someone properly requests a hearing, which it conducts *itself*. *Id*., § 454.475.5 RSMo. Further, "[i]n contested cases, the findings

and order of the hearing officer shall be the decision of the director." *Id*. There is no question that FSD's function is adversarial in nature. FSD obviously has no similarity with a court as does the agency at issue in *In re Perry*—FSD, if anything, is more similar to a prosecutor. FSD's argument that its role is "purely adjudicatory" is without merit.

C. The public policy reflected by § 536.087 supports a determination that Mother is a prevailing party

FSD argues that because it chose to engage in only limited participation at the circuit court level, it would be unfair and even invite collusive behavior to award attorney fee awards against the state in this instance.

First, FSD's argument ignores the fact the statute also requires a trial court to find that the agency decision was not "substantially justified" before entering an award of fees. § 536.087.1, RSMo. (A-10). Because the trial court granted FSD's motion to dismiss, this element of the statute was never reached by the trial court. (A1-A7; LF 174-180). If the agency decision is substantially justified, then the agency has no liability under the statute; thus, FSD's argument that finding mother to be a prevailing party will lead to collusion to obtain attorney fees from the State is simply a red herring. The agency must have taken some action that is not justifiable, as a prerequisite to an award of fees.

Second, this Court has clearly stated that the intent of § 536.087 is "to require agencies to carefully scrutinize agency and court proceedings and to increase the

accountability of the administrative agencies." *Greenbriar Hills Country Club v. Dir. of Revenue,* 47 S.W.3d 346, 358 (Mo. banc 2001). FSD argues that trial court's new support order was a judgment against Father and not FSD because FSD did not sign the order entered by the Court. The fact of the matter is that Mother's Petition For Review of FSD's agency decision is what was before the Court. The circuit court saw fit to enter its judgment and FSD made no objection. The judgment entered by the trial court is not special simply because the trial court did not perceive any dispute and entered judgment without a hearing. If FSD had an issue with entry of judgment, it should have objected or taken some other action at that time. Allowing a government agency to completely avoid its responsibility for attorney fees under the statute by simply declining to defend its actions in any proceedings that result from its administrative orders would fail to achieve the statute's intent that agencies be required to scrutinize their decisions.

Further, it is undisputed that noncustodial parents have a duty of support under Missouri Law. The Family Support Division is charged with the important responsibility of carefully determining child support under the law and Supreme Court Rule 88.01. § 454.400, RSMo. In its Substitute Brief, FSD expresses the sentiment that its role is "purely nominal" and FSD is merely a "disinterested observer." Clearly, FSD does not understand that it must carefully scrutinize its own proceedings and decisions. *Greenbriar Hills Country Club v. Dir. of Revenue,* 47 S.W.3d at 358. If the underlying order would have been substantially justified under the facts before the agency, FSD would not be in the

position of paying an attorney fee award. § 536.087.1, RSMo. Appellant submits that FSD declined to resist entry of a new order because it is obvious that the agency's decision is full of errors. Once the case reached the circuit court level, FSD's mistake had already been made. The fact that FSD may have simply been a "disinterested observer" at the circuit court level does not correct the actions it took at the agency proceeding level. As soon as FSD entered its administrative order, Mother was aggrieved in that she was compelled to incur attorney fees to obtain that which FSD failed to award her under the law.

Appellant respectfully requests this Court to affirm the Eastern District's opinion reversing the trial court's determination that Appellant is not a prevailing party and remand this case for a determination of whether the agency decision was substantially justified.

Respectfully submitted,

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CERTIFICATION OF SERVICE

AND OF

COMPLIANCE WITH RULE 84.06

The undersigned certifies that on this 8th day of September, 2014, one true and correct copy of the foregoing brief was served via the Court's electronic filing system, upon:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that this brief contains approximately 1,982 words.

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