IN THE SUPREME COURT OF MISSOURI

SC94230

MEAGAN GARLAND,
Appellant,

v.

JEFFREY RUHL,
Respondent,

STATE OF MISSOURI, DEPARTMENT OF SOCIAL SERVICES, FAMILY SUPPORT DIVISION,
Respondent.

On Appeal from the Circuit Court of St. Charles County
11th Judicial Circuit, Division 3, The Honorable John P. Banas

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SUBSTITUTE BRIEF OF RESPONDENT, STATE OF MISSOURI

CHRIS KOSTER
Attorney General of Missouri

JAMES R. LAYTON
Solicitor General
Missouri Bar No. 45631
DEBORAH J. WEIDER-HATFIELD
Assistant Attorney General
Missouri Bar No. 56429
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
james.layton@ago.mo.gov
deborah.weider-hatfield@ago.mo.gov
Attorneys for Respondent, State of Missouri

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JURISDICTIONAL STATEMENT

Mother appeals from the Judgment and Order entered on March 1, 2013 by the Circuit Court of St. Charles County denying her Application for Attorney Fees and Costs (L.F. 174). The circuit court entered Findings of Fact and Conclusions of Law on March 18, 2013 (L.F.175-180).

This Court sustained Respondent Family Support Division's application for transfer from the Missouri Court of Appeals, Eastern District, on June 24, 2014, because the case presents an issue of general interest or importance and the case allows for reexamining existing law. Jurisdiction is vested in the Supreme Court under Article V, § 10, of the Missouri Constitution.

STATEMENT OF FACTS

Appellant Meagan Garland (Mother) requested child support establishment services from the Family Support Division (the Division) (L.F. 54-57). The Division issued a Notice and Finding of Financial Responsibility alleging that Jeffrey Ruhl (Father) should provide health insurance and pay $558.00 per month for child support (L.F. 73-78). At Father's request (L.F. 82), an administrative hearing was scheduled (L.F. 87). The Director issued an administrative order, docketed and filed under Cause Number 1111-MC05845 (the Administrative Order). Under that order, Father was to provide health insurance and to pay $357.00 per month in child support effective November 15, 2010 (L.F. 7-10, 15-18).

Mother filed her Petition for Review (L.F. 1-2). The Division filed a Motion to Dismiss or Strike Request for Attorney Fees and Costs (L.F. 97-99).

During a Case Management Conference, the circuit court entered the parents' stipulated and agreed to Judgment and Decree, whereby they "abandoned" the administrative order (L.F. 100-102). The Division did not sign the stipulation because at that point Mother was no longer litigating the issues in the Petition for Review; instead, she was settling her child support dispute with Father. The circuit court's Judgment (L.F. 100-101) superseded the Administrative Order (L.F. 7-10; see also L.F. 100-102). § 454.501, RSMo.

STANDARD OF REVIEW

This Court will affirm the trial court's judgment on Mother's application for attorney fees under § 536.087, RSMo, unless it finds that it was arbitrary and capricious, unreasonable, unsupported by competent and substantial evidence, made contrary to law, or was made in excess of the court's jurisdiction. § 536.087.7, RSMo. The determination of whether Mother is a prevailing party within the meaning of § 536.087, RSMo, is a matter of statutory interpretation, thus a question of law the Court will review *de novo*. *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 152 (Mo. 2003).

Mother incorrectly cites *In re T.Q.L.*, 386 S.W.3d 135, 139 (Mo. 2012) and *State ex rel. Henley v.* Bickel, 285 S.W.3d 327, 329 (Mo. 2009) for the applicable standard of review. These cases involved a motion to dismiss for failure to state a claim, not a Judgment and Order entered by the circuit court on stipulated facts agreed to by some, but not all, parties.

ARGUMENT

Point I: As a waiver of sovereign immunity, § 536.087, RSMo allows the award of fees only to parties who "prevail" in certain "contested cases."

This appeal addresses a waiver of the State's sovereign immunity: in very limited circumstances, § 536.087, RSMo allows litigants in some agency proceedings—or subsequent judicial review—to obtain an award of attorney fees from the State treasury. The waiver applies only to those who "prevail" in a "proceeding or civil action" "brought by or against the state":

> A party who prevails in an agency proceeding or civil action arising therefrom, brought by or against the state, shall be awarded those reasonable fees and expenses incurred by that party in the civil action or agency proceeding, unless the court or agency finds that the position of the state was substantially justified or that special circumstances make an award unjust. § 536.087.1, RSMo.

The definition of "agency proceeding" limits the scope of the waiver. "Agency proceeding" means only "an adversary proceeding in a contested case pursuant to this chapter in which the state is represented by counsel, but does not include proceedings for determining the eligibility or entitlement of an individual to a monetary benefit or its equivalent, child custody proceedings, [nor] proceedings to establish or fix a rate." § 536.085(1), RSMo.

"Contested Case," in turn, "means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." § 536.010(4), RSMo.

Such a waiver "must be strictly construed." *McNeill Trucking Co., Inc. v. Missouri State Highway & Transp. Comm'n*, 35 S.W.3d 846, 848 (Mo. 2001). That includes construction of terms such as "for determining entitlement to a monetary benefit," "to establish or fix a rate," and "prevails," at issue here. In other words, the door to the State Treasury is open only as the General Assembly specifically allowed. And the General Assembly has not opened the door far enough to allow two private parties to resolve a child support dispute between themselves after one of them takes the question to an administrative agency, and then compel the agency to pay their attorney fees.

Point II: Appellant Mother is not entitled to fees because the "agency proceeding" in which she claims that she prevailed is "for determining [her] entitlement to a monetary benefit" and "to establish or fix a rate." § 536.085(1), RSMo.

Before reaching the question of whether a particular disposition of a matter first brought to the agency qualifies for a fee award, we must address whether the matter can qualify under the fees statute at all. The proceeding here began with the appellant Mother's request filed with the Division to

establish the support required of Father (L.F. 54-57). And the first question before the Court is whether she could be entitled to a fee award under § 536.087, RSMo, even if she had prevailed. The answer is "no."

As noted above, such fee awards are available only on an "agency proceeding and civil actions arising therefrom," and the definition of "agency proceeding" expressly excludes "proceedings for determining the eligibility or entitlement of an individual to a monetary benefit or its equivalent, [and] proceedings to establish or fix a rate." § 536.087(1), RSMo. Determining the appropriate amount of child support under the income-shares model adopted by Missouri is both a proceeding determining eligibility for "a monetary benefit" and a proceeding "establishing or fixing a rate" at which that benefit is paid.

What Mother eventually received, by virtue of her agreement with Father, which at their request the Court entered as a Judgment and Decree, was a monetary benefit, defined as a fixed rate of child support, $500.00 per month (L.F. 100). The only other provision in the award was the agreement that the child would be under Mother's health insurance—or under Father's, if Mother's became unavailable (L.F. 101). Buying health insurance for someone's dependent is the "equivalent" of determining eligibility for "a monetary benefit"—as shown by the history of this case, in which the

allocation of responsibility to obtain (and pay for) such insurance was traded off against the amount of support ordered. *See* L.F. at 38-40, 45-46.

What Mother obtained from her judicially-endorsed agreement with Father was a "fixed rate" of monetary child support from Father. Because this was and is an proceeding "to establish or fix a rate" of a "monetary benefit," it falls outside the scope of § 536.087. RSMo.

That is a question that should have arisen in many cases, but has often been ignored. In *Braddock v. Missouri Dept. of Mental Health*, 200 S.W.3d78 (Mo.App. E.D. 2006), the Court defined "benefit" as payment" or "gift," which is exactly what Mother sought here, the payment of a fixed rate of monthly child support or monetary benefit. The Court in *Braddock* pointed out that although some cases cited by the parties seeking attorney fees held that individuals who prevailed on administrative claims that had a monetary value, none dealt with the limiting provision of § 536.085(1), RSMo, i.e., "the question of whether the administrative claim fit the definition of an 'agency proceeding'," *id.* at 82. This Court should answer that question—and do so by reading the waiver of immunity to exclude fee awards in child support establishment and modification cases.

Point III: Appellant Mother is not entitled to fees because she did not "prevail" against the agency, instead choosing to resolve her dispute privately—albeit with judicial confirmation.

If the Court were to hold Mother's child support proceeding is not one in which she was asking for a "monetary benefit" or "to establish or fix a rate," it would have to next look at the disposition of the proceeding to decide whether Mother "prevailed" for purposes of a fee award under § 536.087, RSMo. In Mother's view, it is always enough that the party seeking fees obtained relief against any other party. But the statute should be read more narrowly—to allow the award of fees against a government agency only when the party seeking fees actually prevailed against that agency.

That conclusion is consistent with the General Assembly's objective in enacting § 536.087, RSMo. The purpose of § 536.087, RSMo is "to require agencies to carefully scrutinize agency and court proceedings and to increase accountability of the administrative agencies." *White v. Mo. Vet. Med. Bd.*, 906 S.W.2d 753, 755 (Mo.App. W.D. 1995), quoted with approval, *Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346, 358 (Mo. 2001). When private parties to an agency proceeding reach an agreement that makes the proceeding unnecessary, and then ask the circuit court to endorse that agreement, they do not serve the public interest in careful scrutiny of agency

proceedings. Nor does their agreement enhance the accountability of government. They serve their own interests—important ones, to be sure, in the child support context, but quite different from the public interests the fee statute was enacted to address.

Admittedly, the question of whether private parties' agreement, with judicial endorsement, can qualify for fee awards from government agencies will not arise in many administrative review cases. After all, the more typical model is for the only parties to be a private person and a government agency—such as a license applicant and the agency that issues licenses. Any relief obtained by the private party in such a proceeding necessary comes at the expense of the government. But sometimes there are more than just those two parties involved—such as when an agency addresses unemployment compensation due from an employer to an employee, or grants a permit to one person over the objection of another who could be harmed by the permitted activity. In such cases, it may be possible for the private parties to do what the Mother and the Father did here: to resolve their dispute privately, then have the court endorse that resolution, without involvement by or any adverse consequence to the agency. In Mother's view, that is enough to qualify for a fee award.

There is no precedent on point construing § 536.087, RSMo. But the Missouri statute is patterned after the Federal Equal Access to Justice Act

(EAJA), 28 U.S.C. § 2412. *Greenbriar Hills Country Club*, 47 S.W.3d at 358. And where "Missouri courts have not addressed the specific issue [at hand,] . . . [courts can] turn to federal jurisprudence interpreting the EAJA for guidance." *White v. Mo. Vet. Medicine Bd.*, 906 S.W.2d 753, 755 (Mo.App. W.D. 1995); *Sprenger v. Dep't of Public Safety*, 340 S.W.3d 109, 113 n. 3 (Mo.App. W.D. 2010). So although no Missouri court has addressed the issue of whether a party can "prevail" under § 536.087, RSMo, if the parties settle their dispute with each other instead of adjudicating the matter against the agency, this Court can look to the U.S. Court of Appeals for the Sixth Circuit, which took up essentially the same question in *Heeren v. City of Jamestown, Kentucky,* 39 F.3d 628, 631 (6th Cir. 1994).

Heeren sued the City of Jamestown and the U.S. Department of Housing and Urban Development (HUD) regarding a proposed wastewater treatment system. *Heeren v. City of Jamestown, Kentucky*, 817 F.Supp. 1374 (W.D. Ky. 1992). "Throughout the litigation, HUD maintained the posture of a disinterested observer, ready to comply with this Court's rulings but taking no position on the merits of Plaintiff's and Jamestown's arguments." *Id.* At 1375. Despite HUD's posture throughout the litigation, Heeren sought attorney fees from the agency. Because Heeren obtained a settlement against Jamestown, but not HUD, the Court determined that he was not a prevailing

party and should not receive attorney fees from HUD. *Id.* at 1377. *Heeren,* 39 F.3d at 630-631 (6th Cir. 1994).

Here, the parties' posture is remarkably similar to that of the parties in *Heeren*. The Division was not a party to the parents' agreement, but it was prepared to comply with the circuit court's order. This Court should apply the *Heeren* rule.

That is true, in part, because of the limited role that the Division plays in child support modification cases. Unless the State has its own TANF claim,[1] the Division's role is "purely nominal and derivative of the interests" of the requesting parent, *Werths v. Div. of Child Support Enforcement*, 95 S.W.3d 136 (Mo.App. W.D. 2003), more akin to HUD's "disinterested observer" role in *Heeren* than to the role of a litigant against whom another litigant may "prevail." The Division's job is to arrive at a reasonable amount of support as allowed by law and the parents' financial condition—an amount that either parent can then challenge in court. The Division does not advocate for a particular amount or for either party.

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[1] Mother did not apply for Temporary Assistance to Needy Families (TANF) to support the minor child. Where a parent receives such payments, the Division may have its own financial stake in the child support modification, as it seeks to recover "state debt." §§ 208.040 and 454.465, RSMo.

The U.S. Court of Appeals for the First Circuit addressed the availability of fee awards against agencies taking such a role in *In re Stephen C. Perry, et al.*, 882 F.2d 534 (1989). There, the court held that under the EAJA, the actions of a purely adjudicatory entity taken in the course of adjudication are not subject to an award of attorney fees. As an adjudicator, the Occupational Safety and Health Review Commission was not subject to an award of attorney fees. *Id.* at 540. The same analysis should apply to the role of the Division in child support establishment cases when it provides agency proceedings in which the Division acts as an adjudicator rather than an adversary.

The impact of making the Division, despite its limited role, responsible for attorney's fees in non-TANF cases would be dramatic. The Division filed more than 15,000 non-TANF child support establishment decisions in circuit courts throughout Missouri in fiscal years 2013 and 2014. If parties are entitled to fees where the Division had no role in the settlement and gave up nothing because of it, the parents in these cases would have a new incentive to agree to terms that differ from those dictated by the Division's adjudication, choosing which parent will, on paper, appear to "prevail," then have that parent's attorney fees paid out of public coffers. Or maybe, as here, they can craft a result that both can claim is better than the one the Division, as adjudicator, originally set out—thus leading to the question posed by the

dissent in the Eastern District: "can both [Mother and Father] seek attorney fees?" *Garland v. Director, Family Support Division*, 2014 WL 1499517 *6 (Mo.App. E.D. 2014).

Perhaps just as troubling as the perverse incentive given to parents is the incentive that the holding sought by appellant Mother would give to the Division: to step outside of its dispassionate, adjudicatory role and become an advocate, in circuit court and beyond, for a particular resolution between two parents—even where the parents have agreed to settle their differences. The impact of such a policy change on the circuit courts' handling child support establishment proceedings could be considerable.

And the impact may not be limited to child support proceedings. Many state agencies conduct administrative hearings under Chapter 536, RSMo, to determine rights between litigants. If this Court were to follow the path trod by the Eastern District, private litigants could seek fee awards against those agencies even when the agency's role is purely adjudicatory. Some of the other many state agencies that hold such adjudicatory hearings are the Highway and Transportation Commission, the Administrative Hearing Commission, the Personnel Advisory Board, the State Board of Registration for the Healing Arts, the Missouri Ethics Commission, and the Board of Police Commissioners, to name a few. Local governments have adjudicatory tribunals, too.

And if the door is open to fee awards in cases such as this where the circuit court acts at the behest of two private parties, the next step will be for private parties to seek fees even where they work out their differences without judicial consideration. Such a case is now pending before the Circuit Court of Cole County, where the Land Reclamation Commission has been ordered to pay attorney fees, under § 536.087, RSMo, to private litigants for work of their attorneys in settling a dispute they had with another private litigant, waiving a hearing that would have been before the Commission as an administrative adjudicator. The settlement agreement did not include the participation of the Commission, and it was neither presented to nor entered by the circuit court as a resolution of the case. *Saxony Lutheran High School, et al. v. Missouri Land Reclamation Commission*, No. 11AC-CC00133, Cole Co. Circuit Court. The fee order at issue there exceeds $155,800.00, and includes costs of over $8,400.00—further demonstrating the importance of the question before this Court.

Thus, assuming that the Court determines that § 536.087, RSMo is available to parents disputing child support administrative establishment orders at and in circuit court proceedings arising from Division adjudication, the Court should follow federal precedent and limit such awards to instances where the person seeking fees actually prevails against the agency and then asks the State to pay those fees. To fulfill the purpose of the fee statute—

agency accountability—it is not enough that the party have prevailed against another private party.

CONCLUSION

For the reasons state above, the Court should affirm the judgment of the Circuit Court.

Respectfully submitted,

CHRIS KOSTER
Attorney General of Missouri

/s/James R. Layton
JAMES R. LAYTON
Solicitor General
Missouri Bar No. 45631
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65203
james.layton@ago.mo.gov

/s/Deborah J. Weider-Hatfield
DEBORAH J. WEIDER-HATFIELD
Assistant Attorney General
Missouri Bar No. 56429
P.O. Box 861
St. Louis, MO 63188
Phone: 314.340.4748
Fax: 314.340.7121
deborah.weider-hatfield@ago.mo.gov

CERTIFICATE OF SERVICE

I certify that I sent a true and correct copy of the foregoing via the Court's electronic filing system to the following on August 29, 2014:

Thomas J. Henderson
7750 Clayton Road, Suite 102
St. Louis, MO 63117
tom@tjhlegal.com
Counsel for Appellant

/s/ Deborah J. Weider-Hatfield
Assistant Attorney General

CERTIFICATION OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 3,059 words, excluding the cover, certificate of service, signature block, appendix, table of contents, table of authorities, one footnote, and this certification as determined by Word 2007 software; and

2. That the attached brief includes all information required by Supreme Court Rule 55.03.

/s/*Deborah J. Weider-Hatfield*
Deborah J. Weider-Hatfield #56429
Assistant Attorney General

APPENDIX