No. WD77769

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT OF MISSOURI

MISSOURI REAL ESTATE APPRAISERS COMMISSION,

Respondent,
v.

MARK A. FUNK,

Appellant

Appeal from the Circuit Court of Cole County
Honorable Jon Beetem

RESPONDENT'S BRIEF BY APPELLANT

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I. Jurisdictional Statement

Appellant agrees with Respondent that jurisdiction lies in this Court.

II. STATEMENT OF FACTS

Mark Funk is a resident of Clinton, Henry County, Missouri. He is a graduate of University of California at Long Beach with a Bachelor of Science Degree in Business Administration with a minor in Financial Management. L.F.21 He graduated from Western State University of Law at Fullerton, California with his J.D. degree in 1983. L.F.22 He is a member of the California Bar Association. He has not practiced law since 1985. He successfully owned and managed his own business in Clinton, Missouri for 16 years before selling it in 2001.

In addition to owning and managing his own business Mr. Funk has been involved in real estate development for over 20 years. He has personally been involved in construction, property development, sales, renovation, foreclosures and financing and property management. L.F.24

After selling his business in 2001 he joined Whitlow Appraisals in Clinton, Missouri in February 2003. His educational qualifications are found in D.H. Exhibit 3.

Mr. Funk teaches continuing education in appraising for Lowman and Company. L.F.26 He has testified as an expert appraiser in numerous courts. He was licensed as a Residential Real Estate Appraiser in 2004 and passed the General Real Estate Appraiser examination in 2006. D. H. Exhibit 3&L.F.25.

Mr. Funk submitted his Application for Real Estate Appraiser Certificate License for his General Real Estate Appraiser license on January 3, 2007. L.F.28-L2 Before then he had all required training and additional classes and training over and above that which is required to obtain his general appraisers license. LF46L19

On January 9, 2007 Mr. Funk was thereupon required by the Missouri Real Estate Appraiser Commission to submit two particular appraisal reports. D.H. Exhibit 4 These were chosen by the Commission from a log of appraisals which had been submitted by him to the Commission. D. H. Exhibit 12. The request was for two residential appraisals and he was to submit them no later than March 9, 2007. He thought this was a mistake because his application was for licensure as a commercial appraiser so he called the Commission on February 12, 2007 to ask if this was correct and if they wanted commercial appraisals. An employee of the Missouri Real Estate Appraisers Commission told him to submit the residential appraisals as directed and he did so. LF28L25 to 29L10

On Thursday, March 8, 2007 Mr. Funk was called by an employee of the Commission and told that they had requested the wrong appraisals and that he must submit two particular commercial appraisals, along with his work files, and have them delivered to the office of the Commission before the meeting which was scheduled for the next day, Friday, March 9, 2007. With great difficulty he complied with the request as best he could. L.F.29 L24 to 30 L20. L.F.29 L11-23.

On April 11, 2007 a letter was sent to Mr. Funk which stated that the Commission had reviewed the appraisal reports which he submitted and he was requested to appear before the Commission on May 16, 2007 "to discuss the appraisals you submitted for review before a final decision is made." D.H. Exhibit 5. L.F.30L20

Mr. Funk was notified that even though he had passed the test for certification as a General Appraiser he was required to come before the Missouri Real Estate Appraisers

Commission on May 16, 2007 for questions regarding his appraisals. L.F.31 L1-13. The meeting was held on May 16, 2007 and some questions were asked about the appraisals but many questions were asked about commercial appraisal techniques in general. The meeting was in the nature of an oral examination as to Mr. Funk's commercial appraisal knowledge. L.F.31 L14 to 32 L5. This was in spite of the fact that he had already passed the general commercial appraisal examination and had been told the purpose of the meeting was to discuss the appraisal reports. Mr. Funk raised the point that he had been asked to appear for purposes of answering questions about the two specific appraisals he submitted and that the questions being asked were more in the way of an oral examination of his knowledge of relatively rare valuation techniques which had no direct connection to the appraisals he had submitted. D. H. Exhibit B. P17 L2 + P31 L8 L.F.31 L14 to 32 L5.

It was not until three months after the hearing of May 17, 2007 that Mr. Funk received a letter indicating that his application had been denied. This was done by letter dated August 14, 2007. D. H. Ex 14. When asked at the administrative hearing when the decision was made to deny the license Vanessa Beauchamp, Executive Director of the Missouri Real Estate Appraisers Commission, said the decision was made on May 17, 2007 immediately after its meeting with Appellant. She stated the delay until August 14, 2007 was because it took that long to get the letter of denial typed up. L.F.106 L22 to 107 L4.

During the MREAC nearly 14 week delay in notifying Mr. Funk that his application was denied new regulations went into effect which meant that after the denial

Mr. Funk would have to start over completely. He would have to meet new, stricter, educational requirements which went into effect on July 31, 2007, just two weeks before he received the letter of denial. L.F.79L1-7 The new requirements drastically changed the licensing requirements which would require Appellant to take the test again and resubmit his application. D.H. Exhibit 8

Mr. Funk filed his appeal. While the matter was pending before the Administrative Hearing Commission his deposition was taken on April 18, 2008. D.H. Exhibit K

Before licensure Mr. Funk was required to train by doing commercial appraisals under the supervision of a licensed General Appraiser. The two samples which the Commission requested were part of his training under the supervision of a General Appraiser. These are Exhibits C and F and were done on June 29, 2006 and December 13, 2006 respectively. Exhibit C was actually done before Appellant took his formal, required income Capitalization class. L.F.42 L8-16.

On December 26, 2007, some six months before the first administrative hearing regarding his license, Mr. Funk notified the MREAC that he intended to rely on these more current, more recently prepared appraisals as indicative of his present level of competency. These were subsequently admitted into evidence without objection at the Administrative Hearing related to the denial of Mr. Funk's license as Petitioner's Exhibits 9, 10 and 11. L.F.71 L14-18 & 40.1.

In his deposition on April 18, 2008, before the first administrative hearing, Mr. Funk testified that after he prepared the two appraisals which were requested and

reviewed by the Commission, (D.H. Exhibits C and F), he took additional training including a course in principals of capitalization. L.F.42L8-16. He testified this plus additional experience made him a better appraiser and his level of competency had improved due to further training and experience. L.F.44 L3 to 45 L21.D. H. Exhibit K, 14:17 to 15:21. He stated the reports which were considered by the MREAC were not a true representation of his competence at the time of the hearing before MREAC on May 17, 2007 or at the time of the deposition in April, 2008. He further stated he intended to introduce into evidence at the administrative hearing these three appraisals which were more recent and more indicative of his present level of expertise. D.H. Ex. K, 58:6-12. L.F.40 L19-41 L2 & LF 41 L14-42 L16.

These three later appraisal reports were subsequently admitted into evidence without objection at the first administrative hearing on May 19, 2008. They are Petitioner's Exhibits 9, 10, and 11. L.F.40L1. In addition to the reports, Appellant testified at the administrative hearing, with no objection from Respondent, that his appraisals were in substantial compliance with USPAP. He said he did not commit negligence in the preparation of the reports. L.F.280:1-11 He further stated his competency had improved and that he was very competent at the time of the hearing. L.F.44:3-20 He testified his later reports were better; that his analysis had never been flawed but his reporting was improved. L.F.45:7-13 He is now "more than competent" in his commercial appraisal work. L.F.45:14-21

The Administrative Hearing Commissioner entered his Decision regarding Mr. Funk's license on November 5, 2008. (L.F. 401) The Decision was favorable to Mr. Funk

and ordered the Missouri Real Estate Appraisers Commission to issue the license to Mr. Funk. The Respondent filed a Motion to Reconsider which was denied by the Administrative Hearing Commissioner. Respondent filed its Petition for Judicial Review. The Circuit Court of Cole County, Missouri reversed the decision of the Administrative Hearing Commission. L.F.292.

The Administrative Hearing Commissioner in the hearing regarding Mr. Funk's license denial focused on the later three appraisals, (D.H. Ex. 9, 10, 11) which were admitted into evidence without objection. Respondent adduced evidence about alleged faults in the earlier two appraisals, Respondent's Exhibits C and F but did not put on any evidence as to the quality of the later three appraisals, Petitioner's Exhibits 9, 10 and 11. L.F.405

The Respondent did not challenge Exhibits 9, 10 and 11 at the first administrative hearing. L.F.71L14-18. They were admitted without objection. L.F.43 L11-25 and 44 L1 & 40L1. The Respondent submitted no evidence at the May 19, 2008 administrative hearing as to the Appellant's competency at that time. The Respondent only admitted evidence as to alleged flaws in the reports identified as Exhibit C, dated June 29, 2006 and F, dated December 13, 2006. Mr. Funk's Exhibits 9, 10 and 11 were dated March 8, 2007, December 21, 2007 and May 14, 2007 respectively. The MREAC did not submit any evidence at all about these later reports. L.F.405 The MREAC had the reports for approximately 6 months prior to the hearing. Mr. Funk had informed the MREAC he intended to rely on them at the administrative hearing. Mr. Funk was questioned about them when the MREAC took his deposition on April 18, 2008. The MREAC never

submitted the later reports to its expert, Mr. Summers, and Mr. Summers knew nothing about them at the time of the administrative hearing held on May 19, 2008. Mr. Summers testified he had no knowledge of and no information about Mr. Funk's competency at the time of the administrative hearing of May 19, 2008. L.F. 226 L20-28 & 227 L14-17. The attorney for the MREAC stated in argument at the attorney fee hearing before the AHC, "I mean I am kicking myself I didn't have my expert review them." L.F.590 L12-17.

The Administrative Hearing Commissioner gave more weight to Mr. Funk's testimony about the 2007 appraisal reports than MREAC's testimony about the earlier two reports. L.F.406 The MREAC offered no testimony contrary to Funk's contention that the later three reports were done substantially in compliance with USPAP. L.F.406

The Administrative Hearing Commissioner noted that the issue to be tried at the hearing was the Appellant's competency at the time of the hearing. L.F. 403 The Commissioner found he had the same authority that has been granted to the MREAC. "Therefore, we simply decide the application anew." L.F 403, 404

The Hearing Commissioner's decision was based upon the evidence of Mr. Funk's competency at the time of the hearing. He held the 2007 appraisal reports (D. H. Exhibits 9, 10, 11) were done competently and in substantial conformity with USPAP. L.F.406 The Hearing Commissioner stated his decision was based upon Appellant's testimony and the later reports. He considered the later reports because they were more recent and did not rely upon the two older reports (D.H. Ex. C, F) which had been prepared early on in Mr. Funk's training as a commercial appraiser. Even so, the Respondent still chooses

to focus on alleged flaws in the old reports. (D.H. Ex. C, F) This is true even though Respondent's expert witness, James Summers, testified that had absolutely no bearing on Mr. Funk's competency at the time of the hearing. L.F.264 L11-19 Witness Summers said he did not have a clue as to Appellant's competency at the time of the hearing. Summers further admitted that the first report he did was not as good as what he prepares now and there is the element of experience involved in preparation of these reports. L.F.227 L7-17 The MREAC had never submitted the later reports, Exhibits 9, 10 and 11 to Mr. Summers for consideration and he had never seen them. L.F.227

The Respondent's expert, Mr. James Summers, testified that his review of two older reports prepared two years (D.H. Ex. C) and one and one-half years (D.H. Ex. F) before gave him no insight into Mr. Funk's competency as of the date of the hearing.

> Q. One question I might ask you while I'm doing this is, what was the date of this report?
>
> A. June 29, 2006.
>
> Q. And today is May 19, 2008, almost two years later. Does that, reviewing that report, give you any indication of my competency as of today?
>
> A. Not a clue.
>
> Q. So almost two years later, it could be completely different, I might be much more versed in that?
>
> A. Absolutely.

Q. And the three copies of the reports that I submitted to the Attorney General's office, you did not review?

A. No. I've not seen them.

L.F.226 L17 to 227 L6.

Q. Again, the same questions. The date on this report is?

A. December 13, 2006.

Q. So a year-and-a-half ago or in that range? …

A. Yes.

Q. Really doesn't make you, help you for an opinion as to my competency today?

A. I agree. L.F. 264 L11-19

The MREAC put on absolutely no evidence as to Mr. Funk's competence at the time of the first administrative hearing and its expert witness admitted such.

The MREAC has made multiple complaints about the way the 2006 appraisal reports (Exhibits C and F) were written and even though its expert had never analyzed the later, 2007 appraisal reports submitted by Mr. Funk, (Exhibits 9, 10 and 11) the MREAC now complains about them too. This issue will be addressed by Appellant in the argument portion of this brief.

Mr. Funk acknowledged the 2006 appraisal reports (Exhibits C and F) were not a true representation of his competence at the time of the hearing before MREAC on May 17, 2007 or at the time of the deposition in April, 2008. He stated that his appraisal

analysis and conclusions had always been competent but his reporting had much improved with experience and training. He testified he had completed additional training between the time of the first 2006 appraisal and the second 2006 appraisal which helped his reporting. (L.F. 44 L2 to & 45 L1) While the earlier reports were not perfect, we deny the flaws justified the initial denial of Mr. Funk's general appraiser's license by the MREAC.

We will argue that the MREAC should have analyzed Mr. Funk's later reports when they received them. It should have submitted them to its expert, Mr. James Summers. If it had done so, it would have seen that Mr. Funk's competency in reporting had much improved and that his reports clearly complied with the requirement of the USPAP which provides, "Perfection is impossible to attain, and competence does not require perfection." (USPAP. 2006. Standard 1-1 (c) comment.)

The MREAC appealed the first decision of the Administrative Hearing Commission to the Circuit Court of Cole County which reversed the decision of the Administrative Hearing Commission on May 4, 2009. L.F. 292

Appellant appealed the Judgment of the Circuit Court of Cole County to the Missouri Court of Appeals. The Western District rendered its opinion on the 12th day of January, 2010, subject to post hand down motions. *Missouri Real Estate Appraisers Commission* v. *Funk,* 306 S. W. 3d 101 (Mo. App. 2010).

It its opinion, the Western District Court of Appeals held that:

(1) AHC stood in the shoes of the MREAC to review Mr. Funk's application anew and was free to look at any properly admitted evidence. The AHC was

free to consider the later, 2007 appraisals (Exhibits 9, 10 and 11) and grant them more weight than the older, 2006 appraisals (Exhibits C and F).

(2) The evidence was sufficient to support the MREAC award because Funk qualified as a witness to his own competency. His testimony constituted substantial evidence and the AHC was entitled to give such testimony whatever weight it determined appropriate; Funk met all the requirements for certification except for the production of a representative sample of commercial appraisal reports which demonstrated his competence and knowledge necessary to be a certified general appraiser; the 2007 appraisal reports were admitted into evidence without objection and the AHC was free to consider them and put whatever weight upon them it deemed appropriate; in light of the entire record, the decision of the AHC was supported by substantial and competent evidence.

(3) By failing to object to Mr. Funk's 2007 reports, Exhibits 9, 10 and 11, or raise this issue at the AHC hearing, its complaints about those exhibits were not preserved for review. *Id.*, 108, n5.

The front page of the opinion rendered on January 12, 2010 included the following warning which had been stamped on the page in red ink:

> NOTICE
> THIS OPINION IS NOT FINAL UNTIL
> ALL POST HANDDOWN MOTIONS HAVE
> BEEN DISPOSED OF AND THE MANDATE
> IISSUED AND RECEIVED
>
> Appellant's Appendix Page 4

The Mandate of the Western District Court of Appeals was entered on the 3rd day of February, 2010, 22 days after the opinion was rendered. The Court reversed the decision of the Circuit Court and reinstated the decision of the Administrative Hearing Commission which was favorable to Appellant Funk.

Appellant filed his Motion for Reasonable Attorney Fees and Expenses L.F.410 under Section 536.087 RSMo. before the Administrative Hearing Commission on

February 16, 2010, within 30 days after the final disposition of the case by the Western District Court of Appeals.

The MREAC filed its motion to dismiss on March 22, 2010 L.F.469 The AHC dismissed the Motion for Fees on April 19, 2012 for lack of jurisdiction on the grounds that the application should not have been filed in the AHC.

On May 17, 2010 the Appellant filed his Petition for Judicial Review of the dismissal by the AHC in the Circuit Court of Henry County. L.F.473 On December 13, 2010 the Henry County Circuit Court reversed the dismissal by the AHC and remanded the matter to the AHC for a hearing on the Plaintiff's application for attorney fees and expenses. L.F.506

After a hearing held on the 30th day of November, 2011, the AHC awarded attorney fees and expenses to Appellant. L.F.416 The AHC held in part:

> (1). The MREAC was not substantially justified in appealing the initial award of a general real estate appraiser's license to Mr. Funk because the appeal was based on the argument that the decision was not supported by substantial evidence upon the record on the whole. The law is well established that the appellate courts are bound by the credibility findings of the AHC.
>
> (2). Any objections related to the later, 2007 appraisals were not preserved for judicial review, citing *Funk, id.*, 106 n.5. This law is also well established and the MREAC was not substantially justified in pursuing the appeal on this basis.
>
> (3) Appellant's attorney fees were reasonable because: (a) Special factors required an award of more than the $75 per hour limit of section 536.085 (4). (b) No attorney would represent Funk for $75 per hour. (c) Funk's fees were reasonable because expert testimony established no attorney in Henry or Johnson Counties (Funk resides in Henry County) would accept an appeal for less than $7,500 but Funk's attorney charged only $4,365. (c) The case was complex with an appeal to Cole County Circuit Court, then to the Missouri Court of Appeals, instituting an attorney fee action, appealing dismissal of the attorney fee action to Henry County, then trying the attorney fee case. (d) These areas together require a discrete set of skills that were essential to Funk and his attorney

possessed all of these skills, experience and knowledge and used them to advocate Funk's case and eventually to prevail. (e) Expert testimony established Funk's attorney to be the only attorney in Henry County who possessed those skills, knowledge and experience. (f) Real estate appraisal is a specialized field and the USPAP standards are subjective, malleable and nearly impossible to employ in a consistent manner. Expertise such as Edgett brought to the case was essential.

The MREAC appealed to Cole County Circuit Court which reversed the AHC. Appellant's Appendix, Page 1.

This brings us to this appeal of the decision of the AHC to award fees. Mr. Funk, the citizen of this State, is the only person in the proceeding who is not being paid. He is the only person digging into his own pocket to contest the State's action against him.

Table of Authorities

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Uniform Standards of Professional Appraisal Practice (USPAP)

Points Relied On

I. The AHC did not err in entertaining Funk's application for attorney fees under section 536.087 because the application was timely filed; filed in the only possible place; the MREAC's position would deny fees to every person who represented themselves before the AHC; the MREAC is barred from asserting this because it failed to appeal the ruling on the jurisdictional question made by the Circuit Court of Henry County. Respondent's re-litigation of this point is barred by the doctrines of "law of the case" and "collateral estoppel

Davis v. Angoff, 957 S.W.2d 340 (Mo. App. 1997)

Davis v. General Electric Company, 991 S.W.2d 699 (Mo. App. 1999)

Greenbriar Hills Country Club v. Director of Revenue, 47 S.W.3d 346 (Mo. Banc 2001)

Walton v. City of Berkley, 223 S.W.3d 126 (Mo. Banc 2007)

§536.087

II. The AHC did not err in finding the MREAC did not have substantial justification under Section 536.087 to appeal the AHC's Decision to grant Appellant Funk his general appraisers license because the MREAC had no substantial justification for appealing because its appeal challenged the credibility of the evidence and the weight which was assigned to the evidence which are solely within the purview of the AHC and not reviewed by the court of appeals; the evidence of which it complained was admitted without objection; the MREAC did not preserve the issue on which it appealed for appeal and the law clearly supported the Decision of the AHC and the MREAC did not argue for the law to be changed on appeal.

Greenbriar v. Director of Revenue, 475 S.W.3d 346 (Mo. Banc 2001)

Missouri Real Estate Appraisers Commission v. Funk, 306 S.W.3d 101(Mo. App. 2010)

Redel v. Capital Regional Med. Ctr., 165 S.W.3d 168, 173-73 (Mo. App.2005)

St ex rel. Nixon v. American Tobacco Co., Inc., 34 S.W.3d 122, 129 (Mo. 2000)

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§536.087

III. The Administrative Hearing Commission did not err in finding Funk was entitled to attorney fees at $200 per hour because the AHC made the required findings of special factors to support an award in excess of $75 per hour under section 536.085. (4) in that the Commission found the fees charged to be reasonable and that the case required and Funk's counsel delivered special skills, knowledge, was complex and there were no capable attorneys who would represent Mr. Funk for $75 per hour.

Hernandez v. State Board of Registration for the Healing Arts, 936 S.W.2d 894 (Mo. App. W.D. 1997)

Hutchings v. Roling, 193 S.W.3d 334 (Mo. App. 2006)

McMahan v. Missouri Dept. of Social Services, 980 S.W.2d 120 (Mo. App. 1998)

Western Blue Print Co. v. Roberts, 367 S.W.3d 7 (Mo. Banc 2012)

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ARGUMENT

I. The AHC did not err in entertaining Funk's application for attorney fees under section 536.087 because the application was timely filed; filed in the only possible place; the MREAC's position would deny fees to every person who represented themselves before the AHC; the MREAC is barred from asserting this because it failed to appeal the ruling on the jurisdictional question made by the Circuit Court of Henry County. Respondent's re-litigation of this point is barred by the doctrines of "law of the case" and "collateral estoppel."

Appellant acknowledges this issue may be dispositive. This is a legal issue so this court does not defer to the findings of the AHC.

Appellant represented himself before the Administrative Hearing Commission in the hearing regarding the denial of his license. He had no attorney fees or taxable costs when the AHC decision became final. The AHC decision was rendered on November 5, 2008. (L.F. 407) Respondent filed its Petition for Judicial Review in the Circuit Court of Cole County on December 4, 2006. (L.F. 286) By the time Mr. Funk received the notice of appeal, more than 30 days had passed after the entry of the AHC Decision.

Mr. Funk subsequently decided he needed an attorney to assist him with the appeal. He employed the undersigned.

A. Was the Application Timely Filed?

Section 536.087.3 R.S.Mo. requires a party who is seeking an award of fees and other expenses to file his application for fees within 30 days after a final disposition. It requires, among other things, that the filing party state that he (1) is a prevailing party and is eligible to receive an award; (2) the amount sought including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party

stating the actual time expended and the rate and other expenses. Mr. Funk could not file an application within 30 days after the AHC decision which would comply with these terms. He could not truthfully allege that he was eligible to receive an award or provide an amount.

The MREAC argues Mr. Funk should not have been able to file an application at all and in the alternative, if he was entitled to file an application for fees, he was required to do so in the Western District Court of Appeals.

The Western District opinion was issued on January 12, 2010, subject to post hand down motions. The opinion was not final at the time it was issued. The Court reminded everyone of this by placing a big, red stamp on the front of the opinion which reads:

> NOTICE. THIS OPINION IS NOT FINAL UNTIL ALL POST HAND-DOWN MOTIONS HAVE BEEN DISPOSED OF AND THE MANDATE IS ISSUED AND RECEIVED.

The general rule is that once the mandate of an appellate court is transmitted the court is divested of jurisdiction of the cause. *Greenbriar Hills Country Club v. Director of Revenue,* 47 S. W.3d 346, 353 (Mo. banc 2001) Funk did not have a "final disposition" until the mandate was issued. Upon issuance of the mandate the appellate court lost jurisdiction. Funk had read *Greenbriar,* id., wherein the court recognized the inherent confusion caused by Section 536.087 so it recalled its Mandate so it could consider Greenbriar's application for attorney fees and expenses.

The Western District Court of Appeals filed its mandate on February 3, 2010. Funk filed his petition for attorney fees and expenses with the Administrative Hearing

Commission on February 16, 2010, within 30 days after "final disposition" in the Court of Appeals. Funk's application for attorney fees was timely filed.

B. Was the Application for Fees Filed in the Right Place?

Section 536.087 (4) requires the application for fees be filed in "the administrative body before which the party prevailed." Appellant filed his application in the Administrative Hearing Commission where he first prevailed. It was filed in the right place.

Appellant recognizes the provisions in Section 536.087 (4) where it provides that if the state appeals an administrative decision the application for fees, no decision shall be granted until the appeal is finalized. However, this provision is inapplicable here because the Appellant could not file an application for fees after the administrative hearing.

Greenbriar Hills Country Club v. Director of Revenue, id., turns on different facts. In *Greenbriar* the Appellant did not prevail at the administrative hearing level. *Greenbriar Hills Country Club* first prevailed when the Missouri Supreme Court overruled the administrative decision. It cited *Davis v. Angoff,* 957 S. W. 2d 340 (Mo. App. 1997) which held that the failure to request attorney fees within thirty days of a final disposition in an agency proceeding or a final judgment in a civil action deprives the court or agency of jurisdiction to consider the request. However, in *Davis, id.,* the applicant had actually incurred fees at the administrative hearing level. Mr. Funk had not.

Greenbriar Hills Country Club, id. held that the court (or agency) where the applicant first prevailed is the court or agency that has jurisdiction over the application for attorney fees. *Id.*, 353. Mr. Funk first prevailed in the AHC. Under *Greenbriar* his application must be filed before the AHC.

Greenbriar Hills Country Club, id. acknowledged that the court had lost jurisdiction of the case after the issuance of its Mandate, leaving the applicant guessing as to where to file its application for fees. "To appropriately acknowledge that the Court no longer had jurisdiction over the cause to entertain the application creates an anomaly not anticipated by the legislature when enacting Section 536.087." *id., 354.*

This case is also subject to an "anomaly not anticipated by the legislature", that is, where to file a case when the applicant prevails at the administrative level, but at that time has no fees.

> The purpose of Section 536.087 is to 'require agencies to carefully scrutinize agency and court proceedings and to increase accountability of the administrative agencies.' Section 536.087 was modeled after the federal Equal Access to Justice Act (EAJA)…and the legislative history of the EAJA is described in *Spencer v. NLRB.* The *Spencer* court stated that 'awarding attorney's fees to private parties who successfully challenge governmental departures from established policy would both foster the 'refinement' of the administration of the law and provide a valuable deterrent to officials contemplating making gratuitous exceptions to the general rules'. Missouri courts have adopted the same rational for justifying the fee-shifting provisions of Section 536.087 by awarding litigation fees to encourage private parties to challenge unreasonable government behavior. *Greenbriar,* 358. Internal citations omitted.

This court should affirm and enforce the purpose of the law and do as the *Greenbriar* court did and acknowledge this case presents an "anomaly not anticipated by the legislature" and interpret the statues so as to comport with the purpose of the law.

Section 536.087 is a remedial statute. A remedial statute is one that gives a party a remedy for a wrong where none existed before.

A remedial statute is one 'enacted for the protection of life and property, or which introduces some new regulation conducive to the public good.' *City of St. Louis v. Carpenter,* 341 S. W. 3d 786, 788.....Remedial statutes should be construed liberally to include those cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case. (internal citations omitted) *State ex rel. Ford v. Wenskay,* 824 S.W. 2d 99, 100 (Mo. App. 1992)

If the statutory interpretation proposed by the MREAC was adopted, a person in Mr. Funk's situation would never be able to file a petition for fees and expenses in a situation where he/she initially represented him/herself in an administrative action and won. With no fees at the administrative level he could not file an application and with the Court of Appeals losing jurisdiction when the case became final, at the transmittal of the Mandate, he could not file his application there.

If Mr. Funk cannot file an application for fees, the purpose of the statute which permits an award of fees would be thwarted. Further, while the statute is confusing, as held in *Greenbriar,* id., a reading which permits the applicant to file in the administrative agency before which he prevailed within 30 days of "final disposition" in the appellate court is just as logical as the interpretation set forth by the Petitioner.

C. Law of the Case & Collateral Estoppel

On April 19, 2010 Mr. Funk's petition for attorney fees and expenses was dismissed by the Administrative Hearing Commission on the grounds that it was not timely filed and was filed in the wrong place. (L.F. 469) This Decision was appealed to the Circuit Court of Henry County, Missouri (L.F. 473) where, on December 13, 2010 the

Decision of the Administrative Hearing Commission was reversed and the case was remanded to the Administrative Hearing Commission for a hearing on Funk's application for attorney fees and expenses. (L.F. 506) This reversal was not appealed. The decision has become the "law of the case".

> The doctrine of law of the case provides that a previous holding in a case constitutes the law of the case and precludes re-litigation of the issue on remand and subsequent appeal. The doctrine governs successive adjudications involving the same issues and facts. Generally, the decision of a court is the law of the case for all points presented and decided, as well as for matters that arose prior to the first adjudication and might have been raised but were not. *Walton v. City of Berkley,* 223 S.W.3d 126, 128 (Mo. banc 2007)

In *Davis v. General Electric Company,* 991 S.W.2d 699, (Mo. App. 1999) (Overruled on other grounds by *Hampton v. Big Boy Steel Erections)*121 S.W.3d 220 (Mo banc 2003) The Division of Worker's Compensation denied Ms. Davis's claim on the grounds it was barred by the statute of limitations. The employee appealed and the Circuit Court reversed and remanded to the Division of Workers Compensation for entry of an award favorable to the employee. The employer appealed. The Court of Appeals requested briefs on whether the Circuit Court Judgment was final for purposes of appeal. The Employer dismissed its appeal, the case was remanded to the Division of Workers' Compensation and a favorable award was entered for the Employee. The Employer appealed on the grounds that the claim was barred by the statute of limitations. The Southern District held that in not proceeding with its appeal of the Circuit Court judgment which was in favor of the Employee, the unchallenged decision of the Circuit Court became the "law of the case" and the Employer appeal on the statute of limitations

issue was barred by the doctrine of the law of the case. The Court of Appeals therefore refused to reach the merits on that point.

This case is similar in that the question of the jurisdiction of the AHC to hear the attorney fee application was determined by the Henry County Circuit Court and an order was entered overruling the dismissal by the AHC. The MREAC did not challenge that decision which therefore became the "law of the case".

The issue has been determined once and the MREAC is collaterally estopped from litigating it again. The doctrine of collateral estoppel (issue preclusion) precludes the same parties from re-litigating issues which have already been decided.

The court in reviewing whether the application of collateral estoppel is appropriate should consider: (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; and (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication. (Internal citations omitted) Most courts have added a fourth factor to the three enunciated by Chief Justice Traynor in the *Bernhard* case: whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. *Oates v. Safeco Ins. Co. of America*, 583 S.W.2d 713, 719 (Mo. banc. 1979)

The issue presented here is the identical issue which was decided in the Circuit Court of Henry County. The prior adjudication resulted in a judgment on the merits. The case went back to the AHC where it was litigated to conclusion. The parties are identical and both parties had a full and fair opportunity to litigate the issue in the Henry County appeal. The issue has been decided and further consideration is barred by the doctrine of collateral estoppel.