NO. SC91307

MISSOURI SUPREME COURT

DEWAYNE SPRENGER,

Appellant,

vs.

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

Respondent.

APPELLANT'S SUBSTITUTE BRIEF

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PUBLIC SAFETY

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JURISDICTIONAL STATEMENT

This action concerns an award of attorney fees, as provided for under **Mo. Rev. St. § 536.087 (2000),** and whether the unavailability of qualified attorneys willing to take such a case for $75.00 per hour qualifies as a special factor justifying an award of attorney fees higher than the statutory amount of $75.00 per hour as provided under that statute, and involves the construction and application of administrative procedure law of this state.

STATEMENT OF FACTS

Appellant DeWayne Sprenger (hereinafter "Sprenger") was employed by the Missouri Department of Public Safety (also referred to as "the Department") for more than 11 years. **R. 73**. After receiving a termination letter from his supervisor, Sprenger appealed the termination. **R. 74.** The Department director appointed a Personnel Hearing Board (hereinafter "the Board") and the Board, pursuant to **Mo. Rev. St. § 36.390.8**, conducted an evidentiary hearing. **R. 74.** The Board determined that Sprenger was to be reinstated to his employment. **R. 74.** Sprenger timely submitted his request for attorney fees to the Missouri Department of Public Safety and to the Board that decided his case. **R. 74.**

On April 28, 2006, General Counsel for the Department notified Sprenger that his request for attorney fees was denied. **R. 74.** The denial of Sprenger's attorney fee request was based upon the Department's belief that the termination hearing was not a contested case and that the position of the state agency was substantially justified. **R. 74.**

Sprenger timely filed his Petition for Attorney's Fees with the Circuit Court of Cole County, Missouri. **R. 74.** On January 18, 2007, the Honorable Circuit Judge Richard Callahan entered his judgment and order finding that the Sprenger hearing was a contested case. **R. 75**. The Circuit Court determined that Sprenger was the prevailing party and the position of the state agency was not substantially justified. **R. 75.** The Circuit Court further stated that Sprenger's attorney fees were reasonable and necessary for the prosecution of Sprenger's case, but awarded him $75.00 per hour as opposed to the higher rate requested by Sprenger. **R. 75.** The Department appealed the Circuit Court's findings that were adverse to it, and Sprenger appealed the Circuit Court's decision with respect to the rate of attorney fees awarded.

The Western District Court of Appeals entered its decision in the case, ***Sprenger v. Missouri Dept. of Public Safety,*** **248 S.W.3d 626 (Mo. App. W.D. 2008),** remanding the case and ordering the Department to convene a hearing to determine the amount of attorney fees due Sprenger and whether special factors exist justifying a higher rate than the $75.00 per hour statutory rate. **R. 78**. The Board convened a hearing May 20, 2008. **R. 110**.

The Board heard evidence from attorney Roger Brown, who testified on behalf of Mr. Sprenger on the issue of whether attorney fees should be paid at a rate higher than the statutory rate of $75.00 per hour. The Board also heard testimony from Sprenger's attorney, David Moen. Mr. Brown testified that these types of cases are difficult because when dealing with state government in a disciplinary proceeding, the government has great discretion. As a practical matter, the burden of proof is difficult because the party

has to convince a hearing officer or a board to reverse the decision of one of its administrators. Also, the issue of whether the case was a contested case or not would be a demanding issue for the average attorney. **Tr. Transcr. 16.**

Mr. Moen testified that approximately 85 percent of his practice involved employment law. **Tr. Transcr. 85.** He further testified that half of his time in his practice is spent working on cases like Sprenger's before state agencies. **Tr. Trancr. 36.** Mr. Moen testified that the only two attorneys in mid-Missouri that he knew of, who were doing this type of litigation, were Mr. Brown and himself. **Tr. Transcr. 40.** Mr. Moen further testified that by the time a case reaches agency adjudication, the cards are pretty well stacked against the employee. **Tr. Transcr. 42.** On a scale of one to ten, with ten being the most difficult, Sprenger's case was a seven or eight automatically because of the nature of the types of administrative disciplinary proceedings. Within that category, Sprenger's case was even more complex because of the procedural issue raised by the State that this case was not a contested case. Sprenger was not afforded the right to issue subpoenas or rely on any of the other rights provided to employees in contested cases under Chapter 536. Only a very experienced and aggressive attorney familiar with administrative law would be able to proceed successfully in such a case. Moen testified that he knew of no other attorney other than himself or Mr. Brown who would have been able to work their way through the complex procedural maze which this case presented. **Tr. Transcr. 43, 44.** Over the last 15 years, Moen testified, that there have been fewer and fewer attorneys willing to take these kinds of cases. **Tr. Transcr. 45.**

Both attorney Brown and attorney Moen testified that Mr. Sprenger would not have been able to obtain competent counsel for $75.00 per hour to do this case. **Tr. Transcr. 19, 28, 38.** The Board did not hear any evidence from the state agency with respect to the availability of attorneys or prevailing market rates for attorneys. Nonetheless, the Board found that there was no special factor justifying an award of fees above the statutory rate of $75.00 per hour. The board held that there was not a limited availability of qualified attorneys for this type of case. **R. 112 A.** The Board also awarded Sprenger fees for law clerk time billed at the rate of $75.00 per hour. **R. 114**.

Sprenger appealed to the Circuit Court which affirmed the Board's award of attorney fees. **R. 143.** Sprenger appealed the judgment of the Circuit Court to the Western District Court of Appeals, which affirmed the decision of the Board. The Court of Appeals held that the unavailability of qualified attorneys to take the case for $75.00 per hour was not a "special factor" justifying the award of attorney fees above the statutory rate of $75.00 per hour. ***Sprenger v. Missouri Dept. of Public Safety*, 2010 WL 3629549 (Mo. App. W.D. Aug. 21, 2010).**

POINT RELIED ON

I. The Missouri Department of Public Safety erred in awarding an hourly rate of $75.00 per hour for attorney fees instead of the higher rate requested by Sprenger because the Department acted unreasonably, abused its discretion, made its decision based upon conclusions not supported by competent evidence upon the whole record and contrary to law, thereby subjecting that decision to reversal under Mo. Rev. St. § 536.087.7 (2000), in that there were a limited number of attorneys available who

were qualified to take the case, and Sprenger established that there were no competent attorneys who would take the case for $75.00 per hour where the prevailing market rate was $175.00 per hour.

Mo. Rev. St. § 536.085 (2000)

Mo. Rev. St. § 536.087 (2000)

***Hutchings ex rel. Hutchings v. Roling*, 193 S.W.3d 334 (Mo. App. E.D. 2006)**

***Dishman v. Joseph*, 14 S.W.3d 709 (Mo. App. W.D. 2000)**

Equal Access to Justice Act, 28 U.S.C. § 2412 (1982)

ARGUMENT

The scope of judicial review with respect to the Board's failure to award a reasonable fee to Sprenger is whether the award was arbitrary and capricious, was unreasonable, was unsupported by competent and substantial evidence, was made contrary to law, or was made in excess of the court's jurisdiction. ***Hutchings ex rel. Hutchings v. Roling*, 193 S.W.3d 334, 346 (Mo. App. E.D. 2006)**.

Mo. Rev. St. § 536.087 (2000) provides that the prevailing party shall be awarded reasonable fees and expenses incurred in the civil action or agency proceeding. **Mo. Rev. St. § 536.085(4)** provides that reasonable attorney fees or agent fees shall be based on:

> . . . prevailing market rates for the kind and quality of the services furnished . . . and attorney fees shall not be awarded in excess of $75.00 per hour unless the court determines that a *special* factor, such as a *limited availability* of qualified attorneys for the proceedings involved, justifies a higher rate.

(Alterations added.)

Testimony established that the litigation skills required in this case were uncommon even among experienced attorneys. Sprenger further established that an attorney with the qualifications and experience necessary to litigate this case would usually have charged a higher rate than Sprenger was charged, and that no qualified attorney would litigate this case for $75.00 per hour. **Tr. Transcr. 19:8-20:5**. The Department did not dispute the reasonableness of the hourly rate requested by Sprenger, nor was there any evidence that the hourly rate charged by Sprenger's counsel was not at or below the prevailing market rate for similar legal services. There is no dispute that there were a limited number of qualified attorneys to litigate this proceeding. Therefore, a higher rate than $75.00 per hour was justified.

Mo. Rev. St. § 536.085(4) expressly provides for attorney fee awards in excess of $75.00 per hour when the court determines that a "special factor" justifies the higher fee. The amount of fees awarded must be reasonable and based upon prevailing market rates for the kind and quality of services furnished. ***Hutchings*, 193 S.W.3d at 351.** In ***Hutchings,*** there was evidence that attorney Kennedy had expertise and experience in handling Medicaid law issues. There was evidence that the plaintiff had difficulty obtaining competent counsel experienced in Medicaid law. The evidence was that Mr. Kennedy's hourly rate of $200.00 was reasonable based upon the prevailing rates for attorneys in the area, and based upon his experience in Medicaid law. The court in ***Hutchings*** declared that the trial court properly found that there was a "special factor," because of the limited availability of qualified attorneys at the rate of $75.00 per hour. There was evidence that no attorney in the St. Louis area would handle any case for

$75.00 per hour. ***Hutchings,* 193 S.W.3d** at **350.** Sprenger presented substantial evidence that a reasonable rate for an attorney qualified to practice and provide effective counsel in cases of this type is over $175.00 per hour.

The Western District Court in ***Sprenger,* WL 3629549,** stated that it does not believe it has the right to encroach upon the General Assembly. However, under our rules of statutory construction, no "encroachment" is required to achieve the intent of the Missouri legislature. All canons of statutory construction are subordinate to the requirement that the court ascertain and apply a statute in a manner consistent with the legislative intent, and construction of statutes should always avoid unreasonable and absurd results. ***Anderson v. Ken Kauffman & Sons Excavating,* 248 S.W.3d 101, 107-108 (Mo. App. W.D. 2008)**.

The primary rule of statutory construction is to determine the intent of the legislature from the language used by considering the plain and ordinary meaning of the words used in the statute. For the purpose of statutory interpretation, appellate courts presume that the legislature intended that each word, clause, sentence and provision of a statute have effect and should be given meaning. ***Dubinsky v. St. Louis Blues Hockey Club,* 229 S.W.3d 126, 131 (Mo. App. E.D. 2007)**.

It is presumed that the legislature did not insert idle verbiage or superfluous language in a statute. Ordinarily, the meanings of words in statutes are derived from the dictionary when not defined in the statute or regulations. ***Collins v. Department of Social Service,* 141 S.W.3d 501, 505 (Mo. App. S.D. 2004)**. The term "special factor" is not defined in § 536.085, but an example is given. Our legislature declared that special

factors include factors "such as" the unavailability of qualified attorneys. "Special" has to do with unusual or extraordinary. A "factor" in this context presumably has to do with any condition that brings about a result. In 1989 it was probably not unusual and extraordinary for a claimant to find an attorney for $75.00 per hour in out-state Missouri.

The Western District Court in ***Sprenger*** recognized that the intent of the legislature is to require the state to pay reasonable attorney fees so that persons are represented in contested cases. ***Sprenger,* WL 3629549 at *5, n. 2** (citing ***Dishman v. Joseph,* 14 S.W.3d 709, 715 (Mo. App. W.D. 2000)**). The legislature stated that exceptions, *such as* the availability of qualified attorneys for the proceedings, justified a higher rate than the rate in the statute. The legislature did not state that a special factor was found "only when there is no attorney in the venue that is qualified." The legislature stated, "such as," and in so doing selected language that described the kind of special factors that courts were to consider when setting a reasonable fee. "Such as" the limited availability of qualified attorneys logically empowers the court to consider other factors that are necessary for a client to obtain representation. Obviously, if there are no qualified attorneys who will work for $75.00 per hour, then there are no attorneys *available*. There is no reason, based upon the language of § 536.085, for a court or agency to conclude that a "special factor" is limited to one thing: that there are no qualified attorneys available.

The Board apparently concluded that "limited availability" means there are *no* attorneys available. The evidence was that there were two attorneys available in mid-Missouri. How limited must the availability be?

The Board reads § 536.085 in conflict with subsection 4 of § 536.087. The legislature states that the intent of this section is to require payment based on market rates for fees and expenses. In 1989, the legislature adopted what it thought, at that time, was a reasonable fee. However, according to the Board that decided in Sprenger's case, after 1989, the fee rate of $75.00 per hour could not be increased in order to accomplish the payment of a reasonable fee. Instead, according to the Board's decision in ***Sprenger***, the legislature mandated that an unreasonably low fee would be paid except in one circumstance: where there is no attorney qualified to take the case. If that really is what the language at issue means, then there is a conflict between § 536.085 and § 536.087 and this Court must utilize the rules of statutory construction to give meaning to § 536.085 in light of the intent of the legislature.

Sprenger argues that the legislature intended that courts consider factors such as the actual difficulties faced by the claimant in obtaining representation. The intent of the legislature was for state agencies to pay the necessary amount to persons harmed by state action, so that they could obtain competent counsel. Likewise, the legislature did not intend for state agencies to pay an unreasonably high attorney fee. For example, attorney fee awards are not to be based upon the reputation of the attorney or the excellent results reached. The "loadstar" and other such considerations relevant to award of attorney fees under other statutory schemes are not considered in contested cases under Chapter 536 RSMo. Sprenger believes that "such as" means courts are to look at the actual circumstances in the legal community that existed at the time the claimant sought counsel so as to provide an incentive for qualified attorneys to take such cases.

This Court need not take an all-or-nothing approach to controlling attorney fee costs in contested cases like Sprenger's. Under our statutory scheme, not every factor should be considered by trial courts in awarding fees. Only factors *such as* the rate required to obtain qualified counsel willing to take a case are to be considered. Reading the statute as a whole, the legislature intended for state agencies to pay the reasonable market rate for attorney fees in the area. The statute contemplates that there may be circumstances where an amount higher or lower than the market rate state wide would be charged and appropriately paid by a state agency. The statute suggests no situation where a state agency would pay law clerks and qualified attorneys on the same scale. The only way to reach that conclusion is to read in isolation the clause in § 536.085, stating attorney fees shall not be awarded in excess of $75.00 per hour and ignore the "such as" limitation on the "statutory cap" of $75.00 per hour.

The financial reality in the legal profession is that experienced practitioners cannot afford to work for 40% of the market rate. That makes them "unavailable" at $75.00 per hour. As in ***Hutchings***, legal practitioners on the plaintiff's side daily refuse to take these kinds of cases because of this financial reality. If a case costs $30,000 to litigate and the client cannot pay the fees, every qualified attorney the claimant talks to will probably be "unavailable" in the Western District. The only time an attorney fee request is made, after all, is after an attorney has been found who is "available." Under the Board's and the Western District Court's analysis, attorney fee rates will always be unreasonably low, and will be paid by the state only after the client pays up front or finds a marginally

qualified attorney who agrees to work for next to nothing. In either event, the intent of our legislature is not accomplished.

In our case, there was uncontroverted evidence that Sprenger's attorney was specialized and that his particular knowledge and skills with respect to administrative law were necessary for this particular case. Nonetheless, the fee charged by Sprenger's attorney was below the market rate charged by attorneys with equivalent skills. The holding in ***Sprenger,* WL 3629549** presents somewhat of an anomaly on the facts of this case. At $75.00 per hour, no attorney will be available in mid-Missouri. If Sprenger found an attorney, and that attorney traveled from St. Louis and charged $375.00 per hour, the court may very well have awarded attorney fees at a rate of $375.00 per hour. Also, the opinion in this case actually encourages bad behavior: that is, attorneys will be encouraged to charge above average rates for these types of cases in order to avoid being "branded" as an attorney with no specialized skills, and who only charges the market rate for legal services generally. Isn't it the intent of our legislature that local attorneys with specialized skills be awarded attorney fees based on a rate necessary to obtain competent counsel? Sprenger respectfully suggests that common sense dictates that courts should consider factors such as the unavailability of qualified attorneys willing to work for $75.00 per hour.

This Court does not need to rewrite § 536.085(4) RSMo in order to find that the unavailability of an attorney to work for $75.00 per hour is a "special factor" justifying a higher attorney fee than the statutory rate. The Courts of Appeals in this state have held that the express language of § 536.085 provides for just this result. ***Hutchings,* 193**

S.W.3d at 350; ***McMahan v. Missouri Dept. of Social Services, Div. of Child Support Enforcement,*** **980 S.W.2d 120, 124 (Mo. App. E.D. 1998).**

Statutory construction is a matter of law, and the primary rule is to determine the intent of the legislature from the plain and ordinary meaning of the language used. ***Dubinsky,*** **229 S.W.3d at 130.** The Department believes the legislature intended to prohibit courts from basing an award of attorney fees on the prevailing market rate. According to Respondent, for any court to consider the limited availability of qualified attorneys in the area who are willing to take the case for $75.00 an hour is to engage in judicial activism. ***Sprenger,*** **WL 3629549 at *3.**

It has been the law in the State of Missouri, at least since 1998, that § 536.085(4) expressly allows fee awards in excess of $75.00 per hour considering the limited availability of qualified attorneys in the area who are willing to take the case at a rate of $75.00 per hour. ***McMahan,*** **980 S.W. 2d at 127** (citing ***Douglas v. Baker,*** **809 F. Supp. 131, 135 (D.D.C. 1992)**). In ***Douglas***, a case interpreting the federal Equal Access to Judgment Act (EAJA), 28 U.S.C. § 2412(d), the court gave a fairly extensive discussion of factors that can be considered for the enhancement of the attorney fee award. The EAJA provides, in pertinent part, that:

> the amount of fees awarded under this subsection shall be based upon the prevailing market rates for the kind and quality of the services furnished, except that … (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such

as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

Douglas*, 809 F. Supp. at 134** (alteration added). The ***Douglas court found that even with the cost of living increase, a higher rate was justified because a higher rate was needed to obtain competent counsel. ***Id.* at 135.**

CONCLUSION

Sprenger's attorney fee award should be reversed and the case remanded to the Department of Public Safety, with instructions that it calculate Sprenger's attorney fee award in accordance with the amount actually charged Sprenger for attorney Moen's time. The Department should consider Sprenger's additional attorney fee and expense request for services rendered in litigating his attorney fee request.

Respectfully submitted,

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	)
v.	**) SUP. CT. CASE NO.: SC91307**
	)
MISSOURI DEPARTMENT OF PUBLIC SAFETY,	**)**
	)
Respondent.	**)**

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 3,770 words and 304 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.

_____

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	)
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PUBLIC SAFETY,	**)**
	)
Respondent.	**)**

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 14th day of February 2011, on:

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