IN THE MISSOURI SUPREME COURT

SC95482

KAREN CARPENTER,

Appellant,

vs.

STATE BOARD OF NURSING,

Respondent.

Appeal from the Circuit Court of the City of St. Louis

State of Missouri

Honorable Judge David Dowd

SUBSTITUTE BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This case stems from the Final Judgment of the Circuit Court of St. Louis City denying Carpenter's Motion for Attorneys' Fees after Carpenter obtained a reversal and substantial modification of the Board's Disciplinary Order upon judicial review thereof under §§ 536.140 and 536.087 RSMo. This action raises the legal question of the proper legal standard to apply in determining an individual's eligibility for an award of attorneys' fees (i.e., "prevailing party" status) under § 536.087 RSMo.

On November 24, 2015, the Eastern District Court of Appeals affirmed the Final Judgment. On January 4, 2016, the Eastern District denied Carpenters' Motion for Rehearing and Motion for Transfer to the Missouri Supreme Court. On January 19, 2016, Carpenter filed a Transfer Application with this Court. On March 1, 2016, this Court sustained Appellant's Transfer Application.

STATEMENT OF FACTS

Appellant Karen Carpenter ("Appellant" or "Carpenter") worked at Fulton State Hospital ("Fulton") until April 25, 2008, when Fulton submitted her to a drug screen she did not pass. (L.F. 260). Fulton reported the incident to Respondent State Board of Nursing ("Respondent" or "Board") the same day. (L.F. 260).

Over three (3) years later, on May 5, 2011, Respondent filed a Complaint with the Administrative Hearing Commission ("AHC") seeking to discipline Carpenter's license under the Nurse Practice Act ("NPA"). (L.F. 23). On February 15, 2012, the AHC held a hearing on Respondent's Complaint. (L.F. 23). The Board was represented by counsel. (L.F. 23). Carpenter had not filed an answer before the hearing and did not have legal representation. (L.F. 23). On September 13, 2012, the AHC concluded cause existed to discipline Carpenter's license. (L.F. 28).

After the AHC determined cause existed, the Board convened a hearing before itself to determine what discipline, if any, should be imposed on Carpenter's nursing license. (L.F. 29). On December 5, 2012, Respondent held its disciplinary hearing, at which it was again represented by counsel and had another staff attorney rule on evidentiary objections. (L.F. 29). Carpenter appeared without counsel. (L.F. 29).

On December 17, 2012, over four (4) years after the initial incident at issue, Respondent entered its disciplinary order, including a three-year probation period with numerous conditions and restrictions ("Disciplinary Order"). (L.F. 39). These conditions and restrictions included, but were not limited to, the following:

GENERAL REQUIREMENTS:

(A) Licensee shall meet with the Board or its professional staff at such times and places as required by the Board. The Board shall provide Licensee with notice of the dates, times and locations of regularly scheduled meetings at the time this executed Board Order is provided to Licensee. If Licensee does not receive notice of the dates, times and locations of her regularly scheduled meeting with the Board within one (1) month after the effective date of this Board Order, Licensee shall contact the Board office at: Missouri State Board of Nursing, P.O. Box 656, Jefferson City, Missouri 65102, or by telephone at: (573) 751-0681. In addition to these regularly scheduled meetings, Licensee shall meet with the Board or its professional staff at any other time, as required by the Board.

(B) Licensee shall meet in person with the Board's Discipline Administrator to review the terms and conditions of the probation at such date, time and place as designated by the Board's Discipline Administrator.

(C) Licensee shall submit documents showing compliance with the requirements of this Board Order to the Board when requested and within the time limit the Board requests.

(D) Licensee shall inform the Board within ten (10) working days of any change of home address or home telephone number.

(E) Licensee shall not violate the Nursing Practice Act, Chapter 356 RSMo, as amended, shall renew her license within five (5) working days and shall not allow her license to lapse. Licensee may place her license on inactive or retired status. The conditions of discipline will continue to apply if the license is inactive or retired.

(F) Licensee shall bear all costs of complying with this Board Order.

(G) Licensee shall obey all federal, state and local laws, and all rules and regulations governing the practice of nursing in this state.

EMPLOYMENT REQUIREMENTS

(A) Licensee shall keep the State Board of Nursing informed of her current place of employment and of any changes in her place of employment by notifying the Board within ten (10) working days of such a change. This form is located at [website omitted].

(B) Licensee shall provide a copy of this Board Order to any current employer and to any potential employer. Licensee shall provide a copy of this Board Order to her current employer as soon as she receives it and no later than during her next work shift or her employer's next working day, whichever is sooner. In addition, Licensee shall provide a copy of this Board Order to any potential employer prior to acceptance of any offer of employment.

(C) Licensee shall cause an evaluation, using the form supplied by the Board, from each and every employer to be completed for the Board at least quarterly, with due dates to be determined by the Board. The evaluation form shall be completed by Licensee's supervisor within a four-week period prior to the date it is due. If Licensee ends employment with an employer, the Licensee shall, in addition, request that a final evaluation form from that supervisor to be submitted to the Board within a six-week period following the last day of employment. This evaluation shall be an evaluation of Licensee's job performance and shall be sent to [address omitted]. The preferred method of submitting the evaluation is that the evaluation is sent directly by the employer. The Licensee may submit the form to the Board; however, Board staff may verify with the employer the authenticity of the evaluation submitted by Licensee. This form may be found at [website omitted].

(D) If Licensee is not employed at any time during the period of discipline, Licensee shall instead submit a form "Statement of Unemployment" stating the period(s) of unemployment. This form is located on the Board of Nursing Website at the address provided in paragraph E above.

(E) Licensee shall execute any release or provide any other information necessary for the Board to obtain records of Licensee's employment during the period covered by this Board Order.

EMPLOYMENT RESTRICTIONS

(A) Licensee may not serve on the administrative staff, as a member of the faculty or as a preceptor at any school of professional or practical nursing.

(B) Licensee shall only work as a nurse where there is on-site supervision. Licensee shall not work in home health care, hospice or durable medical equipment.

(C) Licensee shall not work in a healthcare-related position for a temporary employment agency or as a healthcare related independent contractor.

(D) Licensee shall not carry narcotic keys or have access to controlled substances contained within automated dispensing devices for the first twelve months of probation.

(E) Licensee shall not administer, possess, dispense or otherwise have access to controlled substances for the first twelve months of probation.

REQUIREMENTS REGARDING CHEMICAL DEPENDENCY TREATMENT AND REHABILITATION

(A) Licensee shall, within six (6) weeks from the effective date of this agreement, undergo a thorough evaluation for chemical dependency performed by a licensed chemical dependency professional. The chemical dependency professional shall submit to the Board evidence that he or she is licensed or certified in the treatment of chemical dependency. Licensee shall show this agreement to the chemical dependency professional before the evaluation is performed.

(B) Licensee shall have the chemical dependency professional send the results of the evaluation directly to the State Board of Nursing, [address omitted] or by fax to (573) 522-2143 within ten (10) working days after the evaluation is complete.

(C) Each written evaluation shall include:

(1) A description of the tests performed and test results;

(2) Discussion of relevant clinical interview findings/interpretations;

(3) Specification of DSM IV diagnosis/es, and discussion of appropriate treatment recommendations/plan.

(4) Discussion of appropriate treatment recommendations/plan. If there is no diagnosis

requiring treatment, this should be specified in the evaluation.

IF TREATMENT IS RECOMMENDED

(A) Licensee shall follow any recommendations for treatment made by the chemical dependency professional.

(B) Licensee shall execute a medical release or other appropriate release which shall remain in effect for the entire period covered by this agreement authorizing the State Board of Nursing to obtain records of Licensee's treatment for chemical dependency. Licensee shall not take any action to cancel this release. Licensee shall take any and all steps necessary to continue the release in effect and shall provide a new release when requested.

(C) Licensee shall cause an update of treatment evaluation from the chemical dependency professional to be submitted to the Board at least quarterly, with due dates to be determined.

(1) The update shall be submitted using a form prescribed by the Board and shall be sent by the chemical dependency professional addressed to: [address omitted].

(2) The update shall include an evaluation of Licensee's current progress and status related to the treatment

recommendations/plan and Licensee's current prognosis and treatment recommendations/plan.

(D) If a twelve-step program or other support group attendance is recommended, Licensee shall submit evidence of weekly (or recommended) attendance at Alcoholics Anonymous, Narcotics Anonymous or other support group meetings to the Board at such times as required by the Board, but not less than quarterly. The documentation shall be on forms provided by the Board and shall include the date and name of the meeting and shall bear a signature or abbreviated signature of another person verifying attendance.

(E) If the treatment of Licensee is successfully completed at any time during the period covered by this agreement, Licensee shall cause the chemical dependency professional to submit a letter of final evaluation/summary which includes a statement that Licensee has successfully completed treatment and indicates whether Licensee should continue in a 12-step program. If continuance in a 12-step program is recommended, Licensee shall comply with terms of documentation as outlined in Paragraph D.

DRUG SCREENS – REQUIRED

REGARDLESS OF WHETHER FURTHER TREATMENT IS

RECOMMENDED

(A) Licensee shall contract with the Board-approved third party administrator (TPA) to schedule random witnessed screening for alcohol and other drugs of abuse. The frequency and method of such screenings shall be at the Board's discretion. The screenings may be conducted on urine, breath, blood or hair. The random screens shall be at the expense of Licensee.

(B) Within twenty (20) working days of the effective date of this agreement, Licensee shall complete the TPA's contract and submit the completed contract to the TPA.

(C) The Licensee's failure to comply with Licensee's contract with the TPA shall constitute a violation of the terms of discipline.

(D) Licensee shall call the TPA each day of the week including weekends, holidays, and each day that the Licensee is on vacation, between the hours of 5:00 a.m. and 4:00 p.m. C.S.T.

(E) Failure to call the TPA every day as described in Paragraph D above between the hours of 5:00 a.m. and 4:00 p.m. C.S.T., shall constitute a violation of the terms of discipline.

(F) If selected by the TPA, Licensee shall submit to drug and alcohol screening prior to a collection site closing for business on the day that Licensee is selected to be tested. Licensee shall report to the collection site in sufficient time as to allow a collection site adequate time to retrieve the sample prior to the close of its business hours.

(G) Failure to timely submit to drug and alcohol screening by the end of the business day of the collection site when selected by the TPA shall constitute a violation of the terms of discipline.

(H) It is the Licensee's responsibility to assure that lab personnel observe all urine specimen collections. If the urine specimen collection is not observed, the Board, in its discretion, may consider the results to be invalid.

(I) During the disciplinary period, Licensee shall abstain completely from the use or consumption of alcohol in any form, including over the counter products. The presence of any alcohol whatsoever in any biological sample obtained from the Licensee, regardless of the source, shall constitute a violation of Licensee's discipline.

(J) During the disciplinary period, Licensee shall abstain completely from the personal use or possession of any controlled substance or other drug for which a prescription is required, unless use of the drug has

been prescribed by a person licensed to prescribe such drug and with whom Licensee has a bona-fide relationship as a patient.

(K) Licensee shall show this agreement to any healthcare professional prescribing a prescription for Licensee.

(L) Upon request, Licensee shall execute a medical release authorizing the Board to access all records pertaining to Licensee's condition, treatment and prescription(s) maintained by the healthcare professional that prescribed the controlled substance.

(M) The presence of any controlled substance or other drug requiring a prescription whatsoever in any biological sample obtained from the Licensee for which Licensee does not hold a valid prescription shall constitute a violation of Licensee's discipline.

(N) If Licensee receives a prescription for a controlled substance or any other drug, Licensee shall have the prescribing healthcare professional fill out and send to the Board Office a prescription identification form the same day the controlled substance or other drug is prescribed. Licensee shall inform each healthcare professional who prescribes a controlled substance or other drug of each and every prescription Licensee received sixty (60) days prior to obtaining the new prescription. All such prescriptions shall be listed on the prescription identification form.

CONTINUING EDUCATION

(A) Licensee shall complete the following classes offered at [website omitted]:

Righting a Wrong-Ethics and Professionalism in Nursing (3.0 hours)

Professional Accountability and Legal Liability for Nurses (5.4 hours)

Missouri Nursing Practice Act (2.0 hours)

Disciplinary Actions: What Every Nurse Should Know (4.8 hours)

(B) Specific information regarding these classes will be provided by the Discipline Administrator at Licensee's initial meeting with the Board.

(C) Licensee shall submit proof of completion of these classes to the Board during the first year of the disciplinary period. A specific due date will be determined by the Board after the discipline goes into effect.

(D) Failure to obtain the required contact hours by the due date shall constitute a violation of the terms of discipline.

(L.F. 33-39).

On January 3, 2013, Carpenter secured legal representation for the first time, retaining undersigned counsel ("Appellant's Counsel") to appeal two (2) issues: (1) the

unreasonableness of the Disciplinary Order; and (2) whether the Board timely filed its Complaint (i.e., whether the AHC had jurisdiction). (L.F. 8-45, 129-41, 178-209, 260). Appellant's Counsel did not represent Carpenter during the underlying administrative proceedings before the AHC or the Board. (L.F. 23, 29).

On January 15, 2013, Appellant's Counsel filed a Stay Request and Verified Petition for Judicial Review in the Circuit Court of the City of St. Louis (the "Circuit Court"). (L.F. 8-16). On February 4, 2013, Respondent filed its Answer to Carpenter's Stay Request and Petition. (L.F. 46-57). On February 8, 2013, Appellant's Counsel filed a reply brief to Respondent's answer, clarifying its position on the issues raised in the Stay Request and Petition. (L.F. 58-74).

On February 20, 2013, the Circuit Court heard oral argument on Carpenter's Stay Request. (L.F. 75). On March 4, 2013, Appellant's Counsel met with Respondent's counsel in the Circuit Court for a settlement conference to discuss Judge Dowd's recommendations on how to resolve the case. (L.F. 261). Despite efforts by Appellant's Counsel to resolve the case, the parties did not reach a settlement. (L.F. 261).

On April 5, 2013, the Circuit Court granted Carpenter's Stay Request. (L.F. 88). In this order, the Circuit Court specifically found Respondent failed to show any harm to the public interest and emphasized Carpenter displayed a flawless disciplinary record since the singular incident in 2008. (L.F. 88).

On July 15, 2013, Appellant's Counsel filed a brief on the issue of whether the Board timely filed its Complaint ("First Brief"). (L.F. 129-41). On August 30, 2013,

Respondent filed its response. (L.F. 142-51). On September 16, 2013, Appellant's Counsel filed a reply brief. (L.F. 152-61).

On February 20, 2014, the Circuit Court issued a partial judgment ("Partial Judgment"), finding the Board's Complaint to have technically been filed within the statute of limitations. (L.F. 162-68). In the Partial Judgment, the Circuit Court ordered final briefing of the remaining substantive issue: whether the Board abused its discretion in rendering the Disciplinary Order. (L.F. 168).

On April 11, 2014, Appellant's Counsel filed a brief on the issue of whether the Board abused its discretion in entering the Disciplinary Order ("Second Brief"). (L.F. 178-209). Respondent filed a response brief the same day. (L.F. 169-77). On July 14, 2014, Appellant's Counsel presented oral argument before the Circuit Court. (L.F. 210). On September 26, 2014, the Circuit Court issued an order ("Order and Remand") reversing the Disciplinary Order and remanding the case to the Board to reconsider discipline in light of the Circuit Court's determination. (L.F. 211-23). The Circuit Court explained, *inter alia*, "[t]he role of the Board is not to punish misconduct but, rather, to protect the public" and cases in Missouri "uniformly reflect this focus with respect to the disciplining of various occupational licenses." (L.F. 218) (citations omitted).

In the September 26, 2014 Order and Remand, the Circuit Court specifically found "the Board's Discipline [sic] Order to be arbitrary and capricious" and "the discipline imposed against [Carpenter's] license [was] unreasonable under all the circumstances, and an abuse of discretion." (L.F. 220). "The Nursing Board's Disciplinary Order

evidence[d] a lack of careful consideration of the particular factual circumstances of this case" and "[t]here [was] nothing in the Disciplinary Order or in the submissions to the [Circuit Court] from which it can be said that the discipline imposed is in any way proportional or tailored to the offense[] charged." (L.F. 221). In light of these findings, the Circuit Court reversed the Disciplinary Order and remanded the case to the Board pursuant to Section 536.140(5) for reconsideration in light of the Order and Remand. (L.F. 221-22).

On October 24, 2014, Carpenter moved for an award of attorneys' fees pursuant to § 536.087 RSMo. (L.F. 259-333, 354-56). On November 4, 2014, Respondent filed its response to Carpenter's Motion for Attorneys' Fees. (L.F. 334-39). The Circuit Court set a status conference for January 12, 2015 to address the remaining issue of the award of attorneys' fees. (L.F. 340).

On January 12, 2015, the Circuit Court ordered the parties to each submit a proposed final order and judgment. (L.F. 357). On January 26, 2015, Carpenter submitted her proposed final order and judgment. (L.F. 358-71). On January 27, 2015, Respondent filed its proposed order and judgment. (L.F. 372-76).

On February 10, 2015, the Circuit Court issued a final judgment, incorporating its Partial Judgment and Order and Remand ("Final Judgment"). (L.F. 377-94). In its Final

Judgment, the Circuit Court reversed and modified[1] the Disciplinary Order pursuant to § 536.140(5). (L.F. 390). The Circuit Court completely revamped the discipline to be imposed against Carpenter's nursing license: the Circuit Court reduced the term of probation from three (3) years to one (1) year, discarded almost all of the conditions and restrictions of Carpenter's probation, and replaced them with the following:

GENERAL REQUIREMENTS

(A) [Carpenter] shall meet with the Board or its professional staff at such times and places as required by the Board.

(B) [Carpenter] shall meet in person with the Board's Discipline Administrator to review the terms and conditions of the probation at such date, time and place as designated by the Board's Discipline Administrator.

(C) [Carpenter] shall inform the Board within ten (1) [sic] working days of any change of home address or home telephone number.

(D) [Carpenter] shall not violate the Nursing Practice Act, Chapter 335 RSMo, as amended, shall renew her license within five (5) working days and shall not allow her license to lapse. [Carpenter] may

[1] The Board requested the Circuit Court fashion the appropriate discipline pursuant to § 536.140(5), instead of having the matter remanded for reconsideration of discipline in light of the Order and Remand, as originally ordered.

place her license on inactive or retired status. The conditions of discipline will continue to apply if the license is inactive or retired.

(E) [Carpenter] shall bear all costs of complying with the terms of this Disciplinary Order.

(F) [Carpenter] shall obey all federal, state and local laws, and all rules and regulations governing the practice of nursing in this state.

(G) [Carpenter] shall complete the continuing education classes specified in the Board's Findings of Fact, Conclusions of Law, and Disciplinary Order of December 17, 2012, at pages 10-11.

(H) As noted by the Board, the State of Missouri is a member of the Nurse Licensure Compact. Pursuant to the Compact, while on probation with their home state, a licensee losses [sic] her multi-state privileges. Therefore, [Carpenter] may not work outside the State of Missouri pursuant to a multistate licensure privilege without written permission of the Missouri State Board of Nursing and the Board of Nursing in the party state where the Petitioner wishes to work.

(I) The Board is to maintain this Final Judgment and Disciplinary Order as an open and pubic record of the Board as provided in Chapters 335, 610 and 620, RSMo. The Board will report this Order to data banks, and other appropriate entities. A copy of this Final Judgment

and Disciplinary Order shall be kept in the Board's file and its contents shall be disclosed to the public upon proper request.

(L.F. 390-92).

In its Final Judgment, the Circuit Court held Carpenter was not entitled to an award of attorneys' fees because she was not the "prevailing party" for purposes of §§ 536.085(3) and 536.087(1). (L.F. 394). The Circuit Court relied exclusively upon one case in denying Carpenter's Motion for Attorneys' Fees: White v. Missouri Veterinary Bd., 906 S.W.2d 753 (Mo. Ct. App. 1995). (L.F. 392-94).

On March 3, 2015, Carpenter filed her Notice of Appeal to the Eastern District Court of Appeals for review of the Circuit Court's final judgment denying her Motion for Attorneys' Fees. (L.F. 395-421). Neither Carpenter nor the Board appealed the Circuit Court's finding the Board abused its discretion or the Circuit Court's determination of the discipline to be imposed against her nursing license. (L.F. 395-422). On November 24, 2015, after submission of briefs and oral argument, the Eastern District affirmed the Circuit Court's holding in an unpublished memorandum opinion.

On December 7, 2015, Carpenter filed her Motion for Rehearing and her Motion for Transfer to the Missouri Supreme Court. On January 4, 2016, the Eastern District denied both of Carpenter's motions. On January 19, 2016, Carpenter filed her Transfer Application with this Court. On March 1, 2016, this Court sustained Carpenter's Transfer Application.

POINTS RELIED ON

I. STANDARD OF REVIEW

Garland v. Ruhl, 455 S.W.3d 442, 446 (Mo. banc 2015)

Sanders v. Hatcher, 341 S.W.3d 762 (Mo. Ct. App. 2011)

Section 536.087(7) RSMo (1989)

II. THE CIRCUIT COURT ERRED IN DENYING CARPENTER'S MOTION FOR ATTORNEYS' FEES AND HOLDING CARPENTER WAS NOT A "PREVAILING PARTY" UNDER SECTION 536.087 RSMO BECAUSE CARPENTER OBTAINED A FAVORABLE JUDGMENT ON THE SIGNIFICANT ISSUE OF DISCIPLINE TO BE IMPOSED AGAINST HER NURSING LICENSE, WHICH MATERIALLY ALTERED THE LEGAL RELATIONSHIP BETWEEN THE BOARD AND CARPENTER IN A MANNER CARPENTER SOUGHT IN THAT THE FINAL JUDGMENT REVERSED AND SUBSTANTIALLY MODIFIED THE BOARD'S DISCIPLINARY ORDER, WHICH THE CIRCUIT COURT FOUND TO BE UNREASONABLE UNDER ALL OF THE CIRCUMSTANCES, ARBITRARY AND CAPRICIOUS, AND AN ABUSE OF DISCRETION UNDER SECTION 536.140 RSMO.

Melahn v. Otto, 836 S.W.2d 525 (Mo. Ct. App. 1992)

Sanders v. Hatcher, 341 S.W.3d 762 (Mo. Ct. App. 2011)

State Div. of Child Support Enforcement v. Grimes, 998 S.W.2d 807 (Mo. Ct. App. 1999)

White v. Missouri Veterinary Med. Bd., 906 S.W.2d 753 (Mo. Ct. App. 1995)

Section 536.085 R.S.Mo. (1989)

Section 536.087 R.S.Mo. (1989)

Section 536.140 R.S.Mo. (2005)

ARGUMENT

I. STANDARD OF REVIEW

Section 536.087(7) RSMo provides the standard of review for an appeal of a determination of fees in a civil action arising from an agency proceeding:

> The reviewing or appellate court's determination on any judicial review or appeal heard under this subsection shall be based solely on the record made before the agency or court below. The court may modify, reverse or reverse and remand the determination of fees and other expenses if the court finds that the award or failure to make an award of fees and other expenses, or the calculation of the amount of the award, was arbitrary and capricious, was unreasonable, was unsupported by competent and substantial evidence, or was made contrary to law or in excess of the court's or agency's jurisdiction.

The reviewing court's determination is "made solely upon the record made before the agency or the circuit court." Sanders v. Hatcher, 341 S.W.3d 762, 766 (Mo. Ct. App. 2011). However, "the Court will review *de novo* any questions of law raised by the application, including questions as to statutory interpretations." Garland v. Ruhl, 455 S.W.3d 442, 446 (Mo. banc 2015). An appeal may be taken from the judgment of the reviewing court as in other civil cases. See 536.140(6) RSMo.

II. THE CIRCUIT COURT ERRED IN DENYING CARPENTER'S MOTION FOR ATTORNEYS' FEES AND HOLDING CARPENTER WAS NOT A "PREVAILING PARTY" UNDER SECTION 536.087 RSMO BECAUSE CARPENTER OBTAINED A FAVORABLE JUDGMENT ON THE SIGNIFICANT ISSUE OF DISCIPLINE TO BE IMPOSED AGAINST HER NURSING LICENSE, WHICH MATERIALLY ALTERED THE LEGAL RELATIONSHIP BETWEEN THE BOARD AND CARPENTER IN A MANNER CARPENTER SOUGHT IN THAT THE FINAL JUDGMENT REVERSED AND SUBSTANTIALLY MODIFIED THE BOARD'S DISCIPLINARY ORDER, WHICH THE CIRCUIT COURT FOUND TO BE UNREASONABLE UNDER ALL OF THE CIRCUMSTANCES, ARBITRARY AND CAPRICIOUS, AND AN ABUSE OF DISCRETION UNDER SECTION 536.140 RSMO.

Section 536.087(1) provides for an award of reasonable attorneys' fees and expenses to a "party who prevails in an agency proceeding or civil action arising therefrom, brought by or against the state." § 536.087 RSMo. This award is mandatory "unless the court or agency finds that the position of the state was substantially justified or that special circumstances make an award unjust." Id.

A. Background Of Section 536.087 And The Equal Access To Justice Act.

Missouri courts broadly construe Section 536.087 as an access-to-courts statute, encouraging parties to challenge abusive state agency conduct. See Greenbriar Hills Country Club v. Director of Revenue, 47 S.W.3d 346, 358 (Mo. banc 2001). Section

536.087 is modeled after a specific provision—5 U.S.C. § 504—of the Equal Access to Justice Act ("EAJA"). State Bd. of Registration for Healing Arts v. Warren, 820 S.W.2d 564, 565 (Mo. Ct. App. 1991). The intent of both statutes is to "require agencies to carefully scrutinize agency and court proceedings and to increase accountability of the administrative agencies." Dishman v. Joseph, 14 S.W.3d 709, 716 (Mo. Ct. App. 2000); White v. Missouri Veterinary Med. Bd., 906 S.W.2d 753, 755 (Mo. Ct. App. 1995). "The law is designed to encourage relatively impecunious private parties to challenge abusive or unreasonable government behavior by relieving such parties of the fear of incurring large litigation expenses." Id. (citing U.S. v. 1,378.65 Acres of Land, 794 F.2d 1313, 1314-15 (8th Cir. 1986)); see also Hernandez v. State Bd. of Registration for Healing Arts, 936 S.W.2d 894, 902 (Mo. Ct. App. 1997) ("[the EAJA and Section 536.087] were enacted to eliminate for the average person the financial disincentive to challenge unreasonable government actions") (citing Commissioner, Immigration and Naturalization Service v. Jean, 496 U.S. 154, 163 (1990)); Wadley v. State, Dep't of Social Services, 895 S.W.2d 176, 179 (Mo. Ct. App. 1995) ("[Section 536.087] has a broad public policy purpose to ensure the legitimacy and fairness of government and the law so that contests between private citizens and the government are decided on the merits of the matter and not on the costs").

In Hensley v. Eckerhart, the United States Supreme Court held a party need not prevail on all issues to be eligible for an award of attorneys' fees and expenses under the EAJA. 461 U.S. 424, 433 (1983) (describing the "prevailing party" standard as

"generous"). In Texas State Teachers Ass'n v. Garland Independent School Dist., the Supreme Court expressly rejected the argument a party must prevail on the "central issue" of litigation to be eligible for an award of attorneys' fees. 489 U.S. 782, 790 (1989). Determination of which issues are "central" or "secondary" would "distract[] the district court from the primary purposes behind [the statute]" and would be "essentially unhelpful in defining the term 'prevailing party.'" Id. at 791. Instead, a party must obtain *at least some relief* on his claims to qualify as a "prevailing party." Id. at 792. "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner" sought by the party seeking fees. Id. at 792-93; Melahn v. Otto, 836 S.W.2d 525, 528 (Mo. Ct. App. 1992) (focusing on the connection between litigation and the practical outcome realized).

Garland addressed a circuit split concerning whether, for purposes of determining a party's eligibility to an award of fees (i.e., "prevailing party" status), a party need prevail on "*the central issue*" in a case, or whether a party need only "succeed on *any* significant issue in the litigation which achieves some of the benefit [the party] sought in bringing the suit." 489 U.S. at 782 (emphasis added). The Court in Garland expressly rejected "the central issue" test because it was inconsistent with the congressional intent of the EAJA and distracted courts from the purpose of fee awards: to provide impecunious parties a meaningful chance to challenge abusive government action and to obtain relief when successful. See id. at 790-91. The Court persuasively reasoned: "the *degree* of the plaintiff's success in relation to the lawsuit's overall goals is a factor

critical to the determination of the size of a reasonable fee, not to eligibility for a fee award at all." Id. at 783.

The Eighth Circuit Court of Appeals affirmed the flexible nature of this standard: "[t]he EAJA standard is not stringent: 'a plaintiff [must] receive at least *some relief* on the merits of his claim…' to be a prevailing party." S.E.C. v. Comserv Corp., 908 F.2d 1407, 1412 (8th Cir. 1990) (quoting Hewitt v. Helms, 482 U.S. 755, 760 (1987)); see also United States for Heydt v. Citizens State Bank, 668 F.2d 444, 447 (8th Cir. 1982) (holding "[a] party may be deemed prevailing if he or she obtains a favorable settlement of the case" or "even if he or she does not ultimately prevail on all issues").

B. Carpenter Is Entitled To An Award Of Attorneys' Fees Under § 536.087 RSMo Because She Obtained A Favorable Judgment Which Materially Altered Her Legal Relationship With The Board In A Manner She Sought.

Missouri law is clear: a prevailing party under § 536.087 RSMo is not required to prevail on all issues to be eligible for an award of attorneys' fees. Sanders, 341 S.W.3d at 766. A party need only obtain a favorable result which materially altered its legal relationship with the opposing party in a manner consistent with Congress's intent in enacting the EAJA. White, 906 S.W.2d at 755-56; see also Melahn, 836 S.W.2d at 527-28 (holding the "sought for result" by the party is the controlling factor for determining eligibility for an attorneys' fees award).

In her Verified Petition for Judicial Review, Carpenter raised two (2) separate issues relating to the Board's conduct: (1) the timeliness of the Board's filing of its Complaint (i.e., the jurisdiction of the AHC)[2]; and (2) whether the Board abused its discretion in rendering the Disciplinary Order. (L.F. 8-45). The Circuit Court addressed each issue separately: first, ordering the parties to brief and argue Carpenter's challenge to the timeliness of the Board's filing of its Complaint, and then ordering the parties to brief and argue Carpenter's challenge to the Disciplinary Order. (L.F. 129-161, 169-210). While the Circuit Court technically found the Complaint timely, it reversed and modified the Disciplinary Order pursuant to § 536.140(5) RSMo, finding the disciplinary terms and restrictions therein unreasonable under all of the circumstances, arbitrary and capricious, and an abuse of discretion. (L.F. 162-67, 377-94).

Here, the Circuit Court's reversal and substantial modification of the Disciplinary Order materially altered the legal relationship between Carpenter and the Board in a manner sought by Carpenter. A direct and unmistakable connection exists between the litigation and the practical outcome realized for Carpenter. See generally Melahn, 836 S.W.2d at 528. The Circuit Court removed nearly all of the conditions and restrictions on Carpenter from the Disciplinary Order, as sought by Carpenter. Had Carpenter not obtained the Final Judgment in her appeal of the Disciplinary Order, Carpenter would

[2] The Circuit Court notably reversed the Disciplinary Order in part due to the Board's dilatory pursuit of disciplinary action.

have been required, *inter alia*, to: call a TPA every day of the week for three (3) years[3] (subject to random drug testing—the frequency of which is determined solely and exclusively by the Board—on any day at Carpenter's expense); submit employer evaluations and chemical dependency evaluations at least four (4) times each year; execute any release of healthcare or employment records requested by the Board; notify all current and prospective employers of her discipline and the underlying facts; and follow any instructions given by a chemical dependency professional (such as attending weekly support group meetings at Carpenter's expense and submitting proof thereof to the Board). However, because she obtained the Final Judgment, Carpenter removed, *inter alia*, two years of probation and all of the above stated requirements and restrictions.

The Court of Appeals, like the Circuit Court, found Carpenter did not prevail under White, creating a conflict between the lower courts' decisions and established appellate precedent in Missouri. See Melahn, 836 S.W.2d at 528; Sanders, 341 S.W.3d at 766; State Div. of Child Support Enforcement v. Grimes, 998 S.W.2d 807 (Mo. Ct. App. 1999).

In Sanders, the Western District Court of Appeals affirmed an award of attorneys' fees to respondent under § 536.087 RSMo. Id. at 769. The Missouri Department of

[3] For purposes of context, this translates into one thousand ninety five (1,095) phone calls. The terms of her probation explicitly provide that failing to call on any single day constitutes a violation of her probation. (L.F. 37).

Social Services ("DSS") issued an order for respondent—Delmar Hatcher, Jr. ("Hatcher")—to pay monthly child support and provide health insurance coverage for his minor child. Id. at 764. Hatcher requested an administrative hearing and challenged both obligations. Id. Hatcher argued, in part, that he did not have health insurance available for the child but that the child's mother did. Id. The hearing officer issued a decision ordering Hatcher to pay child support and provide health insurance. Id. Hatcher thereafter filed for judicial review with the circuit court. Id.

The circuit court affirmed the administrative order relating to child support payments, but modified the order to require the mother—not Hatcher—to provide health insurance to the child. Id. at 765. Hatcher thereafter filed a petition for attorneys' fees under § 536.087 RSMo, asserting he prevailed "on at least one issue of significance." Id. The circuit court granted the request for attorneys' fees because it "found that Hatcher was a prevailing party in his petition for judicial review in regard to the issue of health insurance." Id.

DSS appealed the circuit court's award of attorneys' fees. Id. at 766. DSS claimed Hatcher was not a "prevailing party" because he did not prevail on the child support issue. See id. The Court of Appeals emphasized the purpose and intent of § 536.087: "to carefully scrutinize agency and court proceedings and to increase accountability of the administrative agencies." Id. The Court of Appeals concluded Hatcher was a prevailing party under § 536.087 RSMo because he obtained a partial modification of the original administrative order relating to health insurance. Id. at 767.

In Grimes, the Eastern District Court of Appeals affirmed an award of attorneys' fees under § 536.087 RSMo to respondent in a child support matter wherein respondent obtained a settlement with the state, reducing—but not eliminating—monthly child support payments. 998 S.W.2d at 811. The petitioners—State Division of Child Support Enforcement ("DCSE") and Rosalie Pruitt ("Pruitt"), the mother of Grimes—obtained an administrative order against respondent—Shelly Grimes ("Grimes")—to pay monthly child support. Id. at 808. The order was certified to the circuit court of St. Francois County. Id.

Grimes thereafter filed a four-count motion to modify the child support order, alleging in part Pruitt failed to inform DCSE of the existence of Grimes' two other children in her custody. Id. Consideration of these additional children in calculating child support payments would have reduced the payments owed by Grimes to Pruitt. See id. at 808-09. After a hearing on the motion, the parties stipulated to a retroactive reduction of child support payments from $583 to $195 per month. Id. at 809. The court entered an order outlining the terms of the stipulation, but denied further relief. Id. Grimes moved for attorneys' fees under § 536.087 RSMo. Id.

The court thereafter entered findings of fact and conclusions of law wherein the court approved the stipulation, found DCSE erred in failing to recognize and consider the two other children, and awarded Grimes attorneys' fees. Id. at 809-10. The court concluded Grimes was a "prevailing party" under § 536.087 RSMo because she "prevailed in the civil proceeding on some substantive issues" and "[t]he DCSE, by

counsel, in open court, participated in the civil action that arose from the agency proceeding and resulted in a correction or modification of the agency decision." Id.

Here, like the respondents in Sanders and Grimes, Carpenter prevailed on significant issues in her appeal which materially altered her legal relationship with the opposing party. The Circuit Court not only reduced Carpenter's probationary period from three (3) years to one (1) year, but also significantly reduced the number and scope of the terms and conditions of her probation. (L.F. 377-94). The Circuit Court removed the following provisions from the Disciplinary Order:

> General Requirement (C);
>
> Employment Requirements (A), (B), (C), (D), (E);
>
> Employment Restrictions (A), (B), (C), (D), (E);
>
> Requirements Regarding Chemical Dependency Treatment and Rehabilitation (A), (B), (C);
>
> If Treatment Is Recommended (A), (B), (C), (D), (E);
>
> Drug Screens – Required Regardless of Whether Further Treatment Is Recommended (A), (B), (C), (D), (E), (F), (G), (H), (I), (J), (K), (L), (M), (N).

(Cf. L.F. 33-39 with L.F. 390-92). Removing this litany of restrictions and conditions from the Disciplinary Order materially altered the legal relationship between Carpenter and the Board in a manner sought by Carpenter. In Sanders, the respondent did not prevail on the child support issue, but obtained a favorable reversal of the health

insurance coverage issue. In Grimes, the respondent did not eliminate her child support obligations, but obtained a favorable modification thereof. Under Missouri law, the fact a party does not prevail on all relief sought in litigation does not, and should not, categorically render that party ineligible for a fee award under § 536.087.

The Circuit Court unambiguously concluded the terms and conditions of the Disciplinary Order were unreasonable, arbitrary and capricious, and constituted an abuse of discretion. (L.F. 388). The Circuit Court's finding that Carpenter was not a "prevailing party" is not only inconsistent with the Circuit Court's finding that the Disciplinary Order was unreasonable, arbitrary, capricious, and an abuse of discretion, but also with the legislative intent and purpose of Section 536.087—to hold governmental agencies accountable and support average citizens in challenging their unreasonable conduct. The Disciplinary Order infringed upon a host of Carpenter's interests—fiscal, privacy, liberty, and employment—in a manner that bore no rational relation to the alleged conduct warranting discipline. Carpenter successfully obtained a favorable judgment from the Circuit Court reversing and significantly modifying not only the length but also the terms and restrictions of her probation; as such, under Sanders and Grimes, Carpenter qualifies as a prevailing party for purposes of § 536.087 RSMo.

C. The Lower Courts Erred In Relying On White Because It Is Factually And Procedurally Inapposite.

White is neither controlling nor apposite because the respondent therein only challenged the AHC's cause-for-discipline determination—not a board disciplinary order—and did not obtain a favorable order or judgment (or any practical relief) in that singular challenge. White must be limited to the unique facts of that case, which are wholly distinct from those in Carpenter's case and most other professional licensure cases.

In White, the Western District Court of Appeals held respondent was not a "prevailing party" pursuant to § 536.087 RSMo because he did not prevail on "the significant issue" in his case—whether his license was subject to discipline. 906 S.W.2d 753, 755-57 (Mo. Ct. App. 1995). Respondent was a veterinarian whose license was revoked by the Missouri Veterinary Medical Board ("Veterinary Board") after the AHC concluded cause for discipline existed based on evidence that he falsified disease test records of animals, failed to accurately report test results, and thereby failed to properly guard against the spread of disease. Id. at 754. Before the AHC, the Veterinary Board did not prove each and every factual allegation against respondent. Id. at 756. Nonetheless, the AHC concluded cause for discipline existed because the Veterinary Board had proven some of respondent's actions constituted "misconduct, gross negligence, fraud, misrepresentation, dishonesty, and incompetency." Id. at 754.

Respondent thereafter filed a complaint with the AHC seeking a determination that the Veterinary Board was responsible for the attorneys' fees and expenses he incurred in defending against charges which the Board did not prove at the cause-for-discipline hearing before the AHC. Id. Respondent contended he prevailed on certain "issues" and was entitled to fees pursuant to § 536.087 RSMo. Id. The Veterinary Board argued in response that, even if it did not prove every charge, respondent did not obtain any favorable order or judgment. Id. The AHC denied respondent's claim for attorneys' fees and costs. Id. Respondent thereafter unsuccessfully appealed the AHC's decision in the Circuit Court of Cole County. Id. Respondent then appealed the circuit court's decision to the Western District Court of Appeals. Id.

The Western District in White concluded respondent was not a "prevailing party" because he "did not prevail on *the significant issue* of the underlying litigation" and "the legal relationship of the parties was altered in the manner sought by the Board and opposed by appellant." Id. at 756 (emphasis added). Additionally, the court in White cited (without authority) to "[g]eneral public policy" in support of its decision to deny a fee award. Id. at 756-57. The White court noted the Veterinary Board was not "abusive" in the matter because it conducted an extensive investigation that supported its disciplinary actions and decision against respondent. Id. at 757. The White court expressed its belief that the state need not prevail on every allegation to avoid being subject to an award of fees. Id.

As a threshold matter, Carpenter's Verified Petition for Judicial Review primarily—if not exclusively—concerned the *actions of the Board* in dilatorily filing its Complaint and imposing excessive discipline against Carpenter.[4] Unlike state boards, the AHC solely and exclusively determines whether cause exists under an applicable professional licensing statute to subject a licensee's license to discipline; it does not decide appropriate discipline. See generally § 621.045 RSMo; § 621.110(1) RSMo (stating "[i]n any case where the commission fails to find any cause charged by the complaint… the commission shall dismiss the complaint, and so notify all parties"). The level or severity of discipline to be imposed (if the AHC finds cause exists) is a question before, and decided by, state boards—not the AHC. See id.

Once a state board—such as the Board here—establishes cause exists through an adversarial proceeding before the AHC, the state board holds a disciplinary hearing to determine what, if any, discipline is appropriate. § 621.110(1) RSMo. Missouri law affords state boards significant discretion in fashioning disciplinary orders to carry out their legislative mandate: to protect the public, not punish licensees. See Coffer v. Wasson-Hunt, 281 S.W.3d 308, 310 (Mo. banc 2009) ("[i]f the evidence [upon judicial review] permits either of two opposing findings, deference is afforded to the

[4] As the Circuit Court correctly observed: "[Carpenter's] *principal argument* is that the discipline that the Board imposed on her nursing license…was an abuse of discretion, and was arbitrary, capricious, or unreasonable." (L.F. 381) (emphasis added). Carpenter did not directly challenge the AHC's finding of cause for discipline. (L.F. 11-13).

administrative decision"); KV Pharmaceutical Co. v. Missouri State Bd. of Pharmacy, 43 S.W.3d 306, 310 (Mo. banc 2001) (deferring to "specialized knowledge" of state board); Kerwin v. Missouri Dental Bd., 375 S.W.3d 219, 232 (Mo. Ct. App. 2012) (noting discretion of state board to choose from wide variety of sanctions); § 536.140(2) RSMo; Moore v. Missouri Dental Bd., 311 S.W.3d 298, 312 (Mo. Ct. App. 2010) (role of state board is to protect public, not to punish licensees); Johnson v. Missouri Bd. of Nursing Adm'rs, 130 S.W.3d 619, 645 (Mo. Ct. App. 2004) (focus of licensing laws is on protection of public). Significantly, state boards (including the members of the board and/or its staff attorneys)—such as the Board here—act not only as an adversary at such disciplinary proceedings, but also as the judge (i.e., decision-maker on evidentiary objections) and jury (i.e., decision-maker on discipline). (L.F. 29). The state board's level of control and discretion over the lives of licensed professionals is truly remarkable at this second stage of the administrative proceedings.

Here, unlike the respondent in White, Carpenter succeeded in challenging, reversing, and modifying a state board's disciplinary order in a manner she sought. The Circuit Court issued the Final Judgment, specifically finding the Disciplinary Order to be unreasonable under all the circumstances, arbitrary and capricious, and an abuse of discretion. (L.F. 388). Based on these findings, the Circuit Court reversed the Board's Disciplinary Order and significantly modified it in a manner sought by Carpenter. Unlike Carpenter, the veterinarian in White failed to obtain a favorable order or judgment providing him any practical relief.

Moreover, unlike Carpenter, the respondent in White did not challenge the Veterinary Board's disciplinary order (i.e., license revocation) and he lost on the sole issue in his appeal—that is, whether he "prevailed" before the AHC on the cause-for-discipline issue. White turned on this dispositive fact. The cause-for-discipline determination was not "the significant issue" in the litigation; it was the *only* issue. Furthermore, the veterinarian only sought judicial review of the AHC's denial of fees, whereas here Carpenter sought judicial review of the Board's actions in dilatorily filing its complaint and rendering a draconian disciplinary order. Because the AHC in White found cause for discipline existed and because the reviewing courts affirmed the AHC's denial of fees, the respondent in White did not obtain any practical outcome or relief—much less a favorable order or judgment—that materially altered his legal relationship with the Veterinary Board.

D. The Lower Courts' Rulings Undermine The Legislative Intent Of Section 536.087, Missouri Appellate Court Precedent, And United States Supreme Court Precedent.

Missouri has over forty (40) professional licensing boards regulating the activities of approximately 430,000 licensed professionals in the State of Missouri.[5] In expressing its opinion *in dicta* that "the only significant" issue before it was the *cause-for-discipline* determination, the White court appears to have given the lower courts here the false

[5] See Missouri Division of Professional Registration, About this Site: Regulating Professionals and Serving the Public, http://pr.mo.gov/about.asp.

impression of having established a legal standard in Missouri precariously reliant on judicial perception of "*the* significant issue" in a case. White, 906 S.W.2d at 755-56 (emphasis added); see also Garland, 489 U.S. at 791 (explaining the ill-advised and "unstable nature of a "prevailing party" standard predicated upon judicial perception of the "significance" of issues).

Based on an apparent misreading of White, the lower courts applied, in effect, a "central issue test" and erroneously presumed Carpenter did not prevail on "the" significant issue in her case without: (1) acknowledging Carpenter's appeal (unlike the appeal in White) challenged a state board disciplinary order, or (2) analyzing whether (or seriously considering the notion that) administrative disciplinary proceedings involve more than one "significant issue" upon which a licensee could prevail. As discussed above, the "central issue test" applied by the lower courts directly conflicts with the legislative intent of § 536.087, Missouri appellate court precedent and Supreme Court precedent. See Garland, 489 U.S. at 782; Sanders, 341 S.W.3d at 765 (party prevailed "on at least one issue of significance"); Grimes, 998 S.W.2d at 809-10 (party prevailed "on some substantive issues").

The Eastern District also appears to have misread the "final *decision* rule" in § 621.145 RSMo to suggest only one *issue* exists on appeal. Section 621.145 merely clarifies a licensee facing discipline must appear before the AHC *and* state board prior to seeking judicial review. Cf. §§ 621.050 (director of revenue appeals to be filed before AHC within thirty days) and 621.052 (tax-related appeals to be filed before AHC within

thirty days) with §§ 621.110 (AHC finds cause and transfers record to board to determine appropriate discipline) and 621.145 (defining when AHC decision is deemed "final" for purposes of seeking judicial review). The mere fact that courts "treat" the AHC and state board decisions as one *decision* for procedural purposes neither means only one *issue* exists on appeal upon which relief may be granted nor that the disciplinary order is categorically a "subsidiary" issue. How state boards discipline professionals is undoubtedly significant to all licensed professionals across this state; whether a license is revoked or publically censured (or whether a professional is subjected to one year of probation or five) is undoubtedly a significant issue to hundreds of thousands of licensed professionals in the State of Missouri who may face a complaint by a state board.

The lower courts' analyses and holdings in the instant matter have the practical effect of precluding average citizens from challenging a state board's disciplinary order – no matter how abusive or unreasonable – by categorically deeming it a "subsidiary" and insignificant issue upon which fees may not be awarded. The lower courts' logic (i.e., "[Carpenter] did not prevail, in that cause was found to discipline her license") is based on a fundamental misunderstanding of administrative procedure and judicial review, and necessarily precludes a state board disciplinary order – despite its potentially devastating effects on an individual's career and livelihood – from ever being "significant." Missouri appellate courts and the United States Supreme Court reject the lower courts' logic as inconsistent with legislative intent, recognizing a party need only obtain a material alteration of its legal relationship with its adversary in a manner the party sought in order

to be eligible for a fee award – not success on one specific issue a judge perceives to be, and deems, "significant."

Missouri law ultimately affords state boards significant discretion in ordering appropriate discipline against licensees in the second part of the administrative disciplinary process. See KV Pharmaceutical, 43 S.W.3d at 310; Kerwin, 375 S.W.3d at 232. Reviewing courts afford state boards significant deference in their disciplinary decisions. See Coffer, 281 S.W.3d at 310; § 536.140(2) RSMo. However, the lower courts' rulings go a substantial, unnecessary step further contrary to the undisputed legislative intent of § 536.087 RSMo and established federal and state appellate precedent: they remove any real economic possibility for an average citizen to challenge a state board disciplinary order, regardless of its abusiveness or unreasonableness.

CONCLUSION

For the aforementioned reasons, the Circuit Court and Eastern District Court of Appeals erred in denying Carpenter's Motion for Attorneys' Fees. As a result of the foregoing, Appellant Karen Carpenter respectfully requests this Court reverse the Circuit Court's holding Carpenter was not a "prevailing party" under § 536.087, enter judgment in favor of Carpenter as a "prevailing party," and remand this case to the Circuit Court for determination of a fee award, and such other and necessary relief this Court deems just and proper under the circumstances of this case.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Appellant's Substitute Brief was sent to counsel of record via electronic filing on March 17, 2016.

CERTIFICATE OF COMPLIANCE

I certify that this brief is typed in Times New Roman, 13 point type, Microsoft Word. This brief contains 9,094 words, which is in compliance with the 31,000 word count allowed. This brief is otherwise in compliance with Rule 84.06(b).