

CAUSE NO. SC95796

IN THE MISSOURI SUPREME COURT

ROBIN WRIGHT- JONES

APPELLANT

vs.

MISSOURI ETHICS COMMISSION

RESPONDENT

**Appeal From The Twenty-Second Judicial Court
City of St. Louis, Missouri
Cause No. 1422-CC09284 Division 2
Honorable David Dowd, Presiding**

AMENDED APPELLANT'S BRIEF

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Jurisdictional Statement

This is an appeal to the Missouri Supreme Court after an adverse decision of the circuit court on a petition for review pursuant to § 536.100 RSMo, of the Administrative Hearing Commission (AHC) decision in favor of a decision of the Missouri Ethics Commission against Appellant. Appellant maintains that the Missouri Ethics Commission order imposing fines under § 105.961.4(2), RSMo, against the Appellant for alleged violations of the Campaign Finance Disclosure laws, as upheld by the decision of the AHC decision, violates Article I Section 31 and Article I Section 21 of the Missouri Constitution as well as the 8th Amendment and First Amendment of the U.S. Constitution as applied to the states through the Fourteenth Amendment of the U.S. Constitution. The Court, pursuant to Article V, Section 3 of the Missouri Constitution has exclusive appellate jurisdiction over this case.

Statement of Facts

The Appellant adopts and incorporates the findings of facts by the Administrative Hearing Commission as set forth in pages 9-26 of the Appendix.

However, a brief summary of the facts, for the convenience of the court, follows. Appellant was a candidate for and elected to the Missouri Senate in 2008. As a candidate for public office, Appellant formed a candidate's campaign committee as provided under Chapter 130, RSMo. The Missouri Ethics

Commission regulates candidate's campaign committees under the provisions of Chapter 130, RSMo and Chapter 105, RSMo. Under both the law and the regulations of the Missouri Ethics Commission, a candidate must file periodic reports of contributions received and expenditures made related to their campaign for public office both during their campaigns as well as post campaign so long as the candidate maintains a continuing committee and continues to receive contributions and make expenditures. The Ethics Commission reviews and investigates those reports for accuracy. The Ethics Commission also enforces or seeks to enforce the law and their regulations, including taking action for alleged violations of the law and regulations of the Commission. The Ethics Commission investigated and charged Appellant with eight counts of violations of the campaign finance disclosure laws. After a hearing on the charges, the Ethics Commission found that the Appellant and her campaign committee violated specific sections of Chapter 130, RSMo, and fined her for said violations in the aggregate sum of \$229,996.00. The Ethics Commission cited as authority for said fines, § 105.961.4(6), RSMo. As provided by law, the Appellant appealed the Ethics Commission's decision, inter alia, the assessment of fines by the Ethics Commission, to the Administrative Hearing Commission (AHC) which, after a de novo review, upheld the decision of the Ethics Commission. The Appellant then sought judicial review in the circuit court under § 536.100, RSMo of the decision

of the AHC asserting, inter alia, that the Ethics Commission was not authorized to issue fines or the fines issued under § 105.961.4(6), RSMo as well as under both the Missouri and the US constitutions. The circuit court affirmed the decision of the AHC. Asserting violations of the Missouri and US Constitutions, Appellant sought review by direct appeal to the Supreme Court of Missouri.

Points Relied On

Point I

The Missouri Ethics Commission erred in issuing a fine under § 105.961.4(6), RSMo, against the Appellant for alleged violations of Chapter 130, RSMo, the Campaign Finance Disclosure Laws, because as an Administrative Agency, the Missouri Ethics Commission may not assess fines for violation of state statutes or rules and regulations of the agency, which actions of the Missouri Ethics Commission in assessing or issuing such fines is subject to judicial review under § 536.100, RSMo, in that the Missouri Ethics Commission's assessment and issuing of fines against Appellant as a penalty for alleged violations of state statutes, rules or regulations of the agency violate Article 1, Section 31 of the Missouri Constitution.

State v. Lovelace, 585 SW 2d 507 (Mo App, ED., 1979) Mo. Const., Art. I,

§ 31

City of Pleasant Valley v. Baker, 991 SW 2d 725 (Mo App, WD. 1999)

§ 105.961.4(6), RSMo

Mo. Const., Art. I, § 31

Point II

The Missouri Ethics Commission erred in issuing a fine under § 105.961.4(6), RSMo, against the Appellant for alleged violations of Chapter 130, RSMo, the

Campaign Finance Disclosure Laws, because fines may only be assessed by the Missouri Ethics Commission through reconciliation agreements with a candidate or campaign committee or by a court under § 105.961.4(6), RSMo, which actions of the Missouri Ethics Commission in assessing or issuing such fines, without reconciliation of the Appellant, is subject to judicial review under 536.100, RSMo, in that assessing and issuing fines as a penalty for alleged violations of state statutes, rules or regulations of the agency is in excess of the statutory authority or jurisdiction of the agency set forth in § 105.961.4(6), RSMo.

Tap Pharmac. Prod. v. State Bd. of Pharmacy, 238 SW 3d 140 (Mo banc, 2007)

§ 105.961.4(6), RSMo

Point III

The Missouri Ethics Commission erred in issuing a fine \$229,996.00 against Appellant under § 105.961.4(6), RSMo, against the Appellant for alleged violations of Chapter 130, RSMo, the Campaign Finance Disclosure Laws, because § 105.961.4(6), RSMo, limits the fine to one thousand dollars for each violation or double the amount involved in the violation, which actions of the Missouri Ethics Commission in assessing or issuing such fines, without reconciliation of the Appellant, is subject to judicial review under § 536.100,

RSMo, in that the amount of said fine issued by the Missouri Ethics Commission against the Appellant is in excess of the statutory authority or jurisdiction of the agency set forth in § 105.961.4(6), RSMo and the amount of said fines assessed are unsupported by the record.

Tap Pharmac. Prod. v. State Bd. of Pharmacy, 238 SW 3d 140 (Mo banc, 2007)

§ 105.961.4(6), RSMo

Point IV

The Missouri Ethics Commission erred in issuing fines under § 105.961.4(6), RSMo, against the Appellant for alleged violations of Chapter 130, RSMo, the Campaign Finance Disclosure Laws, because said fines were excessive, which actions of the Missouri Ethics Commission in assessing or issuing such fines is subject to judicial review under § 536.100, RSMo, in that the Missouri Ethics Commission's assessment and issuing of excessive fines against Appellant as a penalty for alleged violations of state statutes, rules or regulations of the agency violate Amendment 8 of the U.S. Constitution

Citizens United v. Federal Election Commission, 558 U. S. 310,339 366 S.

Ct. 876, 175 l. Ed. 2d 753 (2010)

U.S. v. Alef et al 772 F 3d 508, 512, 513 (2014 8th Circuit)

U.S. v. Harper, 490 U. S. 435,440(1989)

U. S. V. Mayer, 313 F. 3d 1 082.1086 (8th Circuit 2002).

§ 105.961.4(6), RSMo

U.S. Const., Amend 8

U.S. Const., Amend. 14

Standard of Review

As held in *Albanna v. State Bd. Regis. Healing Arts*, 293 SW 3d 423 (Mo banc, 2009):

Article V, section 18 of the Missouri Constitution articulates the standard of judicial review of administrative actions. On appeal, this Court is charged with determining whether the agency actions "are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record."

On appeal from the circuit court's review of an agency decision, this Court reviews the action of the agency, not the action of the circuit court. *Lagud v. Kansas City Bd. of Police Comm'rs*, 136 S.W.3d 786, 791 (Mo. banc 2004).

*** In *West v. Posten Const. Co.*, 804 S.W.2d 743 (Mo. banc 1991), this Court held that a reviewing court should consider the evidence

underlying an agency decision in the light most favorable to the agency's findings. ***

The correct standard of review for administrative decisions governed by article V, section 18 of the Missouri Constitution — which includes (Missouri Ethics Commission) cases — is "whether, considering the whole record, there is sufficient competent and substantial evidence to support the [agency's decision]. This standard would not be met in the *** case when the [agency's decision] is contrary to the overwhelming weight of the evidence." *Lagud*, 136 S.W.3d at 791 (citing *Hampton*, 121 S.W.3d at 223).^[3] When the agency's decision involves a question of law, the court reviews the question *de novo*. *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 152 (Mo. banc 2003).

The scope of judicial review of an administrative agency's decision is provided for under § 536.100, RSMo, *State ex rel. Chicago, RI & PR Co. v. Public Service Commission*, 312 SW 2d 791 - Mo: Supreme Court 1958. Said section reads as follows:

536.140. 1. The court shall hear the case without a jury and, except as otherwise provided in subsection 4 of this section, shall hear it upon the petition and record filed as aforesaid.

2. The inquiry may extend to a determination of whether the action of the agency

(1) Is in violation of constitutional provisions;

(2) Is in excess of the statutory authority or jurisdiction of the agency;

(3) Is unsupported by competent and substantial evidence upon the whole record;

(4) Is, for any other reason, unauthorized by law;

(5) Is made upon unlawful procedure or without a fair trial;

(6) Is arbitrary, capricious or unreasonable;

(7) Involves an abuse of discretion.

Argument

Point I

The Missouri Ethics Commission erred in issuing a fine under § 105.961.4(6), RSMo, against the Appellant for alleged violations of Chapter 130, RSMo, the Campaign Finance Disclosure Laws, because as an Administrative Agency, the Missouri Ethics Commission may not assess fines for violation of state statutes or rules and regulations of the agency, which actions of the Missouri Ethics Commission in assessing or issuing such fines is subject to judicial review under § 536.100, RSMo, in that the Missouri Ethics Commission's

assessment and issuing of fines against Appellant as a penalty for alleged violations of state statutes, rules or regulations of the agency violate Article 1, Section 31 of the Missouri Constitution.

In this point the Appellant argues that the assessment of fines against her, by the Missouri Ethics Commission, for alleged violations of Chapter 130, RSMo, Campaign Finance Disclosure Laws, as allegedly allowed under § 105.961.4(6), RSMo, is in violation of the Missouri Constitution, and specifically, Mo. Const., Art. I, § 31.

Mo. Const., Art. I, § 31, provides:

Section 31. That no law shall delegate to any commission, bureau, board or other administrative agency authority to make any rule fixing a fine or imprisonment as punishment for its violation.

Under the separation of powers doctrine no administrative agency may issue a fine which is solely a judicial function. *State v. Lovelace*, 585 SW 2d 507 (Mo App, ED., 1979) Mo. Const., Art. I, § 31 of the Constitution of Missouri prohibits the legislature from delegating to any administrative agency the power to make rules which establish fines for their violation. *City of Pleasant Valley v. Baker*, 991 SW 2d 725 (Mo App, WD. 1999) The Missouri Ethics Commission violated Mo. Const., Art. I, § 31

Clearly then the Missouri Ethics Commission's assessment of fines against the Appellant for alleged violation of state statutes or its rules and regulations is unconstitutional.

Point II

The Missouri Ethics Commission erred in issuing a fine under Chapter 105, RSMo, against the Appellant for alleged violations of Chapter 130, RSMo, the Campaign Finance Disclosure Laws, because fines may only be assessed by the Missouri Ethics Commission through reconciliation agreements with a candidate or campaign committee or by a court under § 105.961.4(6), RSMo, which actions of the Missouri Ethics Commission in assessing or issuing such fines, without reconciliation of the Appellant, is subject to judicial review under 536.100, RSMo, in that assessing and issuing fines as a penalty for alleged violations of state statutes, rules or regulations of the agency is in excess of the statutory authority or jurisdiction of the agency set forth in § 105.961.4(6), RSMo.

The Missouri Ethics Commission and the Missouri Administrative Hearing Commission found that the Missouri Ethics Commission had assessed fines against the Appellant under the authority of § 105.961.4(6), RSMo. The relevant part of said section to this point on appeal reads as follows:

4. If the appropriate disciplinary authority receiving a report from the commission pursuant to subsection 3 of this section fails to follow, within sixty days of the receipt of the report, the recommendations contained in the report, or if the commission determines, by a vote of at least four members of the commission that some action other than referral for criminal prosecution or for action by the appropriate disciplinary authority would be appropriate, the commission shall take any one or more of the following actions:

(6) Through reconciliation agreements or action of the commission, the power to seek fees for violations in an amount not greater than one thousand dollars or double the amount involved in the violation. (Emphasis mine)

Clearly, under said statute, a fine may be assessed or issued against the Appellant, only through a reconciliation agreement entered into between Appellant and the Ethics Commission or through juridical action. The Appellant did not agree to any fines and no fines were assessed or imposed against the Appellant by a court. Instead, the Ethics Commission directly assessed and imposed fines against the Appellant without any authority under the law. The assessment of fines against the Appellant by the Missouri Ethics Commission was unauthorized by law

and thus the judgment and order of the Missouri Ethics Commission should be vacated and reversed. *Tap Pharmac. Prod. v. State Bd. of Pharmacy*, 238 SW 3d 140 (Mo banc, 2007)

Point III

The Missouri Ethics Commission erred in issuing a fine \$229,996.00 against Appellant under Chapter 105, RSMo, against the Appellant for alleged violations of Chapter 130, RSMo, the Campaign Finance Disclosure Laws, because § 105.961.4(6), RSMo, limits the fine to one thousand dollars for each violation or double the amount involved in the violation, which actions of the Missouri Ethics Commission in assessing or issuing such fines, without reconciliation of the Appellant, is subject to judicial review under § 536.100, RSMo, in that the amount of said fine issued by the Missouri Ethics Commission against the Appellant is in excess of the statutory authority or jurisdiction of the agency set forth in § 105.961.4(6), RSMo and the amount of said fines assessed are unsupported by the record.

The Missouri Ethics Commission imposed fines against the Appellant that aggregated \$229,996.00. The Missouri Ethics Commission and the Missouri Administrative Hearing Commission found that the Missouri Ethics Commission had assessed said fines against the Appellant under the authority of §

105.961.4(6), RSMo. The relevant part of said section to this point on appeal reads as follows:

4. If the appropriate disciplinary authority receiving a report from the commission pursuant to subsection 3 of this section fails to follow, within sixty days of the receipt of the report, the recommendations contained in the report, or if the commission determines, by a vote of at least four members of the commission that some action other than referral for criminal prosecution or for action by the appropriate disciplinary authority would be appropriate, the commission shall take any one or more of the following actions:

****r*

*(6) Through reconciliation agreements or action of the commission, the power to seek fees for violations **in an amount not greater than one thousand dollars or double the amount involved in the violation.***

(Emphasis mine)

Clearly, under said statute, any fine assessed or issued against the Appellant is limited to only \$1,000 per violation or double the amount involved in the violation. The record does not support the \$229,996.00 fine assessed by the Missouri Ethics Commission against the Appellant., only through a reconciliation agreement entered into between Appellant and the Ethics Commission or through

juridical action. The Appellant did not agree to any fines and no fines were assessed or imposed against the Appellant by a court. Instead, the Ethics Commission directly assessed and imposed fines against the Appellant without any authority under the law. The assessment of fines against the Appellant by the Missouri Ethics Commission was unauthorized by law and thus the judgment and order of the Missouri Ethics Commission should be vacated and reversed. *Tap Pharmac. Prod. v. State Bd. of Pharmacy*, 238 SW 3d 140 (Mo banc, 2007)

Point IV

The Missouri Ethics Commission erred in issuing fines under Chapter 105, RSMo, against the Appellant for alleged violations of Chapter 130, RSMo, the Campaign Finance Disclosure Laws, because said fines were excessive, which actions of the Missouri Ethics Commission in assessing or issuing such fines is subject to judicial review under § 536.100, RSMo, in that the Missouri Ethics Commission's assessment and issuing of excessive fines against Appellant as a penalty for alleged violations of state statutes, rules or regulations of the agency violate Amendment 8 of the U.S. Constitution

The Missouri Ethics Commission imposed fines against the Appellant that aggregated \$229,996.00. Not only are these fines prohibited and in excess of the amount that may be assessed under § 105.391.4(6), and were issued in violation of Article I Section 31 of the Missouri Constitution, but they are excessive fines in

violation of the U.S. Const., Amend 8 as applied to the states through U.S. Const., Amend. 14. There is no standard for double the sum provision in said statute. Moreover, this provision violates the 8th Amendment's Excessive Fine clause since it is punishment designed to chill the speech of appellant with no measure for reimbursing the state in proportion to the violation. This fine was assessed for alleged inaccurate reporting of campaign activities on MEC forms. In this case, the fine, if permitted by law, should have been no more than \$8,000, not more than \$229,964 which violates the 8th amendment.

There should not have been any fine imposed where the Appellant was punished for incorrectly placing information on an MEC form such as the special form used for "consulting services". The standard expressed in *Citizens United v. Federal Election Commission*, 558 U. S. 310, 339 366 S. Ct. 876, 175 l. Ed. 2d 753 (2010) prohibits the MEC from punishing appellant for using the words "consulting services." Such punishment has a chilling effect on using such services and punishment follows for not using the correct form. Any fine for this reporting error violates Article I, Section 31 of the Missouri Constitution, and the US Constitution's 8th Amendment's Excessive Fine clause. Clearly the intent of said fine was meant to punish appellant. Furthermore, appellant has been punished for necessary and ordinary costs which the Missouri Senate reimbursed when there

is no prohibition to spend campaign funds on services that are office-holder related and ad-campaign related pursuant to the Separation of Powers doctrine.

Article I, Section 31 of the Missouri Constitution and the U.S. Constitution's 8th Amendment's Excessive Fine clause voids the excessive penalties imposed by § 105.961.4(6), RSMo since that statute places a ceiling of \$1,000 as a maximum for violations and there is no proportionality between the fine and the offense. Therefore, these are unconstitutional punishments that are not remedial in nature, but punitive. See *U.S. v. Alef et al* 772 F 3d 508, 512, 513 (2014 8th Circuit). This case requires that Article I Section 31 be interpreted together with the 8th Amendment or the Excessive Fine clause would mean nothing to the MEC.

The \$229,000 fine in this case is over 200 times greater than the maximum fine for violations in §105.961.4(6), similar to the fine imposed in *U.S. v. Harper*, 490 U. S. 435,440(1989) where Harper was fined \$130,000 under the False Claims Act 31 U. S. C. sections 3729-3731, when Harper had overcharged the government \$585. The Supreme Court held that the disparity in punishment was unconstitutional.

The court reviews de novo the constitutionality of an order under the Excessive Fine clause. *U. S. V. Mayer*, 313 F. 3d 1 082.1086 (8th Circuit 2002).

The Excessive Fines clause applies to civil penalties that are punitive in nature. A punitive sanction violates the Excessive Fines clause if it is “grossly

disproportional to the gravity of the defendant's offense". Proportionality is determined by a defendant's conduct, the relationship between the penalties and the harm to the victims and the sanctions in other cases for comparable misconduct. Legislative intent is also relevant as is the defendant's ability to pay. *U.S. v. Alef et al* 772 F 3d 508, 512, 513 (2014 8th Circuit). In the instant case, Article I Section 31 and the 8th Amendment to the U.S. Constitution would bar the excessive fines imposed in this case.

Conclusion

For the reasons argued above, the assessment of fines against the Appellant by the Missouri Ethics Commission was unauthorized by law and are unconstitutional; and thus the judgment and order of the Missouri Ethics Commission should be vacated and reversed.

Certification Under Rule 84.06(c)

This is to certify that the foregoing brief complies with the limitations contained in Rule 84.06(b); and that the number of words in the brief total 4,025 that the PDF file has been scanned and has been found to be free of any viruses and spy ware, and that the brief was prepared using Microsoft Word, word processing software.

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CERTIFICATE OF SERVICE: By signature below, I hereby certify that I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, and that a copy will be served by the CM/ECF system upon those parties indicated by the CM/ECF system.

BY: /s/Bernard F. Edwards, Jr.