No. SC95255

IN THE
MISSOURI SUPREME COURT

MISSOURI REAL ESTATE APPRAISERS COMMISSION,

Respondent,
v.

MARK A. FUNK,

Appellant.

Transfer from the Missouri Court of Appeals, Western District

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RESPONDENT'S SUBSTITUTE BRIEF PURSUANT TO 84.05(e)

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Jurisdictional Statement

This appeal is from a decision of the Missouri Administrative Hearing Commission (AHC) issued on September 10, 2013, directing the Missouri Real Estate Appraisers Commission (MREAC) to pay attorney fees and costs to Mark A. Funk (Funk) arising from a prior case in which the AHC overturned the MREAC's decision to deny Funk certification as a state-certified general real estate appraiser.[1] The MREAC sought review of this decision in the Circuit Court of Cole County.[2] The Circuit Court reversed the AHC's Decision by Order and Judgment dated July 8, 2014.[3] Funk appealed to the Western District of the Missouri Court of Appeals. On August 4, 2015, the Western District Court of Appeal affirmed the circuit court's reversal of the AHC's award, because it found that Funk's fee application was untimely, so that the AHC did not have jurisdiction to award the fees and expenses.

Jurisdiction lies in the Missouri Supreme Court pursuant to Article V, Section 10 of the Missouri Constitution and § 536.140.6, RSMo Cum. Supp. 2013.

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[1] Legal File (LF) 416-430.

[2] LF 655-659.

[3] LF 660-662.

The MREAC files the first brief pursuant to Supreme Court Rule 84.05(e).

Statement of Facts

A. The MREAC Decision.

On January 8, 2007, Funk finalized his application to the MREAC for certification as a state-certified general real estate appraiser.[4] As part of the application process, Funk submitted for review two commercial appraisal reports requested by the MREAC, known for purposes of this brief and in the underlying action as the South Maguire Appraisal Report and the South Main Appraisal Report (the 2006 Appraisal Reports).[5]

The MREAC (comprised of five certified real estate appraisers and a public member) reviewed the 2006 Appraisal Reports.[6] On May 16, 2007, the MREAC met with Funk to discuss the South Maguire Appraisal Report.[7] During the interview, the MREAC questioned Funk about the following concerns from the South Maguire Appraisal Report: analysis of leases; the determination of the capitalization rate from out-of-date data; the lack of

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[4] Denial Hearing.Exhibit (D.H.Exh.) A, p. 9 and LF 83 (Denial Hearing Transcript (D.H.Tr.), p. 79:5-7).

[5] D.H.Exh. C and F, respectively.

[6] LF 653-654 (Attorney Fees Hearing Exhibit (A.F.H.Exh.) AF-4) and D.H.Exh. B.

[7] D.H.Exh. C.

explanation of the reasoning for the capitalization rate in the report; the MREAC's discovery that the basis for the capitalization rate was an undisclosed neighboring property and not the data included in the report; use of proper units of comparison; lack of information supporting adjustments; inconsistent rental amounts; and lack of supporting data generally.[8]

Through its prior review and the interview, the MREAC found that Funk did not understand how to properly calculate a capitalization rate, that he used out-of-date data, that he had many mathematical errors in his reports, and that he did not disclose his true reasoning in the South Maguire Appraisal Report.[9] During the interview, Funk admitted that he did not base the capitalization rate on the data set forth in the South Maguire Appraisal Report, but instead on an undisclosed lease of an adjoining property.[10]

On August 14, 2007, the MREAC issued a letter denying Funk's application for certification as a state-certified general real estate appraiser stating that Funk 1) failed to correctly apply appraisal techniques that are necessary to produce a credible appraisal, 2) failed adequately analyze, support, or develop an opinion of value, and 3) did not include sufficient

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[8] D.H.Exh. B, pp. 9:22, 11:17; 15:1; 19:24; 22:22-25; 25:19; and 26:19.

[9] LF 312-315.

[10] D.H.Exh. B, p. 15:1-17:1.

information, explanation or analysis to support the adjustments or subsequent value conclusions. More specifically, the letter noted inadequate support and analysis for the sales comparison and income approaches, inadequate analysis of sales comparison data, inadequate analysis of the current lease, and an incorrect capitalization rate.[11]

B. The AHC's Review of the MREAC's Denial

On September 12, 2007, Funk appealed the MREAC's denial of his application by filing a Complaint with the AHC (Case No. 07-1550 RA).[12] The MREAC's case in support of its decision to deny Funk's application was centered on an expert, James Summers, explaining the deficiencies in the two 2006 Appraisal Reports. Funk's defense, in addition to attempting to explain his conduct regarding the 2006 Appraisal Reports, was to submit three appraisals handpicked by him that he prepared in 2007, claiming that they were a better indication of his work.[13] Funk was not represented by counsel during these AHC proceedings.[14]

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[11] LF 312-315.

[12] LF 309-311.

[13] LF 7-10.

[14] LF 6.

Prior to the hearing, the MREAC propounded discovery on Funk. In addition to his response to the discovery, Funk provided three unsigned and uncertified appraisal reports that he selected and indicated were a better sample of his work. The reports were admitted into evidence at the hearing as Exhibits 9, 10, and 11 (the 2007 Appraisals).[15] The MREAC propounded further discovery requesting the workfiles for the 2007 appraisals.[16] Funk never produced the requested workfiles.[17] Since Funk did not provide the requested workfiles, the MREAC did not request its expert to review the 2007 Appraisal Reports, or present any evidence regarding them.

At the hearing, the MREAC's expert provided testimony that the South Maguire Appraisal Report was not credible based on multiple errors and omissions, as follows:

a. The South Maguire property was a modest multi-tenant commercial retail property abutting a similar, but more updated structure to the north, and included a separate structure in the parking lot that had been used as a Laundromat at the time of the appraisal.[18]

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[15] LF 40-41 (D.H.Tr., pp. 36:17-37:13).

[16] D.H.Exh. N & O.

[17] D.H.Exh. K, pp. 56:10-58:15.

[18] LF 147 (D.H.Tr., p. 143:12-25).

b. Funk estimates the value of the property as of June 28, 2006 at $495,000.[19]

c. Funk's estimated valuation under the Income Approach was not credible based on the following errors and omissions:

i. Inadequate support is provided for the capitalization rates in that 1) the data on the bottom of page 24 and 25 ranged from six to eleven years old,[20] 2) the analysis of how a capitalization rate of 11 percent was derived from the range of 7.9 to 13.5 percent is not discussed,[21] and 3) information regarding the property abutting to the north was purposely withheld from the report that supposedly would have provided support for the 11 percent rate.[22]

ii. The calculations under the "Reconstructed Income Statement" on page 24 and the "Projected Income Statement Based on Market Rents" on page 25 of the South Maguire

[19] D.H.Exh. C, pp. 1-36 to 1-37.

[20] LF 94-96 and 162 (D.H.Tr., pp. 90:17-92:23, and 158:4-18).

[21] LF 167-168 (D.H.Tr., p. 163:2-164:1).

[22] D.H.Exh. B, pp. 14:23-15:9; D.H.Exh. C, pp. 1-26 and 1-27; and LF 56 and 165-166 (D.H.Tr., pp. 52:1-23 and 161:2-162:15).

Appraisal Report contain numerous multiplication, division and summation errors. The most significant of these errors was the final calculation of "$37,823 capitalized @ 11% = $416,053" under the Reconstructed Income Statement section. The answer and, therefore, the estimated value under this analysis for as-is value should have been $343,845, not $416,053.[23]

d. Funk's estimated valuation under the Sales Comparison Approach was not credible based on the following errors and omissions:

i. Fails to use the proper unit of comparison (dollars per square foot) and makes adjustments at inconsistent rates without any discussion regarding how these amounts were determined.[24]

ii. Contains mathematical or typographical errors in that the final value before discounting is inconsistently cited as $580,000 and $582,000.[25]

[23] D.H.Exh. C, pp. 1-26 to 1-27; and LF 156-158 (D.H.Tr., pp. 152:20 to 154:13).

[24] LF 169-172 (D.H.Tr., pp. 165:5-168:2).

[25] D.H.Exh. C, pp. 1-33; and D.H.Tr., pp. 168:24 to 169:14.

e. The South Maguire Appraisal Report violated USPAP Standards 1 and 2, and Standard Rules 1-1(a), (b) and (c), 1-4(a), (b) and (c), 1-5(a) and (b), 2-1(a) and (b), and 2-2(b)(ix), 2005 Edition.[26]

f. Funk's conduct constituted carelessness, negligence and was a violation of the USPAP Ethics Rule.[27]

Summers also testified as follows regarding the South Main Appraisal Report: 1) deficiencies in the South Main Appraisal Report, the most relevant of which for these proceedings was that Funk did not use appropriate units of comparison such as price per sq. foot,[28] 2) violated USPAP Standards 1 and 2, and Standard Rules 1-1(a), (b) and (c), 1-4(a), 1-5(a), 2-1(a) and (b), and 2-2(b)(iii), 2006 Edition,[29] and 3) Funk's conduct constituted carelessness and negligence.[30]

At the hearing, Funk moved to have the 2007 Appraisal Reports admitted into evidence as Exhibits 9, 10, and 11 as a better indication of his

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[26] LF 178-208 (D.H.Tr., pp. 174:22-204:3).

[27] LF 208-210 (D.H.Tr., pp. 204:4-206:9).

[28] D.H.Exh. F, p. 2-18; and LF 247-248 (D.H.Tr., pp. 243:12 to 244:7).

[29] LF 254-263 (D.H.Tr., pp. 250:22-259:15).

[30] LF 254-263 (D.H.Tr., pp. 250:22-259:20).

work.[31] The MREAC did not object, so the documents were admitted.[32] Funk did not provide testimony explaining how the 2007 Appraisal Reports differed from the 2006 Appraisal Reports or about the methods and techniques used in preparing the 2007 Appraisal Reports. Funk's entire testimony regarding whether the 2007 Appraisal Reports were USPAP compliant was in response to Commissioner Nimrod Chapel's questions during Funk's re-cross of the MREAC's expert witness. The exchange between Commissioner Chapel and Funk was:

> [Commissioner Chapel:] "Mr. Funk, did you prepare those appraisals in conjunction or in compliance with USPAP?
>
> Mr. Funk: Yes. They're – I won't say total compliance, but they're a much better sample of my work, competency at the time of my application submission.
>
> Commissioner Chapel: Okay. You didn't commit negligence or gross negligence in any of those, did you?

[31] LF 44-45 (D.H.Tr., pp. 40:1-41:21).

[32] LF 43 (D.H.Tr., p. 39:21-23).

Mr. Funk: No."[33]

A review of the 2007 Appraisal Reports against templates[34] prepared by the MREAC's expert for the 2006 Appraisal Reports shows that the 2007 Appraisal Reports contain the same significant errors, and were prepared in virtually the same manner and with the same level of care as the 2006 Appraisal Reports, as follows:

a. Each of the 2007 Appraisal Reports contained mathematical errors and two of the three contained substantial mathematical errors.

i. Petitioner's Exhibit 9 is a commercial appraisal of real estate comprised of two light industrial/warehouse type buildings. In the Cost Approach on pages 24 and 25 of the appraisal report, Petitioner makes multiple mathematical and carry through errors that affect the estimate of value by approximately $2,300. First, on page 24, Petitioner calculates the opinion of current market value of the subject land at $29,250 based on the following formula: "2.09 acres @ $12,000/acre." Properly calculated this should be $25,080 causing an

[33] LF 280 (D.H.Tr., p. 276:1-11).

[34] D.H.Exh. D and G.

overvaluation of $4,170. On page 25, the value of fencing is calculated at $800 based on "600' @ $8.00". Properly calculated this should have been $4,800, thus understating the Total Cost New of Improvements by $4,000. Due to the carry through error the depreciation was understated by $2,120 ($5,883 less $3,763), and the Depreciated value of Site Improvements was understated by $1,880 ($5,217 less $3,337). The end result was that the value indicated by the cost approach was overstated by approximately $2,300 (the sum of $25,080, $405,800 and $5,217, instead of the sum of $29,250, $405,800 and $3,337).[35]

ii. Petitioner's Exhibit 10 is a commercial appraisal of an RV Park located in Warsaw, Missouri. Petitioner makes mathematical errors in each approach to value. In the Income Approach, the following formula is miscalculated as $521,102: "$52,102 capitalized @ 10%." The correct calculation would have been $521,020. In the Sales Comparison Approach, the Total Adjustments for Comparable Sale #2 were miscalculated at $262,400, instead of the correct amount of $257,400; causing an overstatement of the Adjusted Value by $5,000. The adjustment

[35] D.H.Exh. 9, p. 25.

for the Site to Comparable Sale #3 was miscalculated at $18,300 based on an acreage difference of 6.2 acres at $3,000 per acre. The correct calculation should have been $18,600. In the Cost Approach, Petitioner miscalculated the Land value at $108,300 based on 36.2 acres at $3,000 per acre. The correct calculation would have been $108,600. In addition, the per acre value of Sale #1 on the "Addendum – Comparable Sales/Vacant Land Sales" was calculated at $3,245 based on a sale of 94.19 acres for $305,000. The correct calculation would be $3,238. None of these errors can be excused as the result of rounding, because proper rounding techniques would not have resulted in any of the amounts listed.[36]

iii. Petitioner's Exhibit 11 is a commercial appraisal of a self-serve car wash facility in Clinton, Missouri. In this appraisal report, Petitioner has fewer mathematical and/or transposition errors, but one can still be found on page 24. Funk calculates the "Total Variable Expenses" as $59,414 by summing $16,490, $33,438, $3,100, and $6,486. The correct sum is $59,514.[37]

[36] D.H.Exh. 10, pp. 34, 39, 40, and 45.

[37] D.H.Exh. 11, p. 24.

b. Each of the 2007 Appraisal Reports fail to use proper units of comparison. The MREAC's expert explained "an appraiser should recognize the important role played by relevant units of comparison. In this instance, the operative unit of comparison should be dollars per square foot of building area."[38] In his testimony, Summers provided additional explanation regarding the importance of proper units of comparison.[39] A simple review of the sales comparison approaches in the 2007 appraisal reports shows that Mr. Funk used aggregate adjustments instead of proper units of comparison contrary to the recognized methods and techniques of the appraisal profession for commercial appraisals.[40]

c. Funk commits the same significant capitalization rate errors in Exhibit 9 of the 2007 Appraisal Reports as he did in the South Maguire Appraisal Report by using the exact same out-of-date data and by failing to provide any explanation or analysis as to why he determined a capitalization rate of 11% from the broad range of

[38] D.H.Exh. D, p. 6, and Exhibit G, p. 9.

[39] LF 169-170 and 247-248 (D.H.Tr., pp. 165: 5-166:19 and 243:12-244:7).

[40] D.H.Exh. 9, p. 32; Exhibit 10, p. 39; and Exhibit 11, p. 35.

capitalization rates shown in the data.[41] The importance of this explanation is emphasized by the fact that in Petitioner's Exhibit 9, he reaches a capitalization of 10%, and in the South Maguire Appraisal Report, he reaches a capitalization rate of 11% on the same data. The reader of these reports has no way of knowing why he comes to 10% in one report and 11% in the other report.

On November 5, 2008, the AHC issued its Decision granting Funk certification as a state-certified general real estate appraiser.[42] In the Decision, the AHC made no finding contrary to the MREAC's expert testimony regarding the 2006 Appraisal Reports. Instead, the AHC "concluded that the 2007 appraisal reports that Funk placed into evidence were done competently and in substantial conformity with USPAP" and "gave more weight to Funk's testimony about the 2007 appraisal reports than to the

[41] LF 162-163 and 167-168 (D.H.Tr., pp. 158:7-18, 159:13-160: 3, and 163:2 - 164:1); compare D.H.Exh. C, p. 1-26 to 1-27 and the Addendum, entitled Sales Analyzed to Arrive at Overall Capitalization Rate, found on page 37 of D.H.Exh. 9; and D.H.Exh. 9, p. 28.

[42] LF 401-407.

MREAC's testimony about the two 2006 appraisal reports because the 2007 appraisal reports are more recent."[43]

Funk did not file a petition for attorney fees and costs within 30 days of the issuance of the November 5, 2008 AHC Decision.

C. Circuit Court Review of the AHC's Decision on Funk's Certification Application.

On December 4, 2008, the MREAC filed a Petition for Judicial Review with the Cole County Circuit Court appealing the AHC Decision.[44] Funk hired Michael Edgett (Edgett) as his attorney.[45] After briefing and oral argument, the Cole County Circuit Court overturned the AHC's Decision granting Funk a license as a state-certified general real estate appraiser.[46] Since Funk was not the prevailing party at this phase of the litigation, he did not file a petition for attorney fees and costs.

D. Western District Court of Appeal Review of the AHC's Decision.

On May 19, 2009, Funk filed a Notice of Appeal with the Cole County Circuit Court appealing its Judgment to the Court of Appeals, Western

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[43] LF 406.

[44] LF 286-289.

[45] LF 291.

[46] LF 292-295.

District.[47] Edgett continued to represent Funk during these proceedings. On January 12, 2010, the Court of Appeals, Western District reversed the Cole County Circuit Court Judgment and reinstated the AHC's award of Funk's general real estate appraiser certification. In its Opinion, the Court of Appeals found that the "AHC was free to consider any evidence admitted without objection if that evidence has probative value," that "[i]t was up to the AHC to assess Funk's credibility," and that the Court was "not permitted to substitute [its] judgment for the judgment of the AHC on the credibility of witnesses." The MREAC's arguments regarding the inadmissibility of Funk's expert opinion testimony were disregarded because the MREAC did not object to Funk's testimony or exhibits at hearing.[48]

On February 3, 2010, the Court of Appeals issued its Mandate.[49]

On May 10, 2010, Funk filed a Motion to Recall Mandate and for Determination of Attorney Fees and Expenses under Section 536.087 R.S.M.o with the Court of Appeals, Western District, which was denied on June 1, 2010.[50]

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[47] LF 296-297.

[48] LF 436-440.

[49] LF 441.

[50] Appendix, pp. A028-A038

E. Commencement of the Attorney Fees Cases Before the AHC

On February 16, 2010, Funk filed Petitioner's Motion for Reasonable Fees and Expenses Under Section 536.087, R.S.Mo. with the AHC.[51] On March 22, 2010, the MREAC filed a Motion to Dismiss asserting that Petitioner's motion for attorney fees had either been filed beyond the due date or in the wrong court, and alleging a certain pleading deficiency.[52] On April 2, 2010, Funk filed a Motion for Leave to Amend Complaint to correct the pleading deficiency. Nevertheless, the AHC granted the MREAC's motion to dismiss on April 19, 2010, based on finding of lack of jurisdiction.[53]

F. Howard County Circuit Court Review of the AHC's Order Dismissing Funk's Motion for Attorney Fees.

On May 17, 2010, Funk filed a Petition for Judicial Review of the AHC's Dismissal with the Henry County Circuit Court.[54] On December 13, 2010, the Henry County Circuit Court reversed the AHC's dismissal of Funk's petition for attorney fees and remanded for further proceedings.[55]

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[51] LF 434-435.

[52] LF 460-463.

[53] LF 469-472.

[54] LF 473-478.

[55] LF 506.

G. AHC Hearing and Decision on Attorney Fees – Special Factors.

On May 10, 2011, after remand from the Howard County Circuit Court, Funk filed Petitioner's Amended Motion for Reasonable Fees and Expenses Under Section 536.087 R.S.Mo. On November 30, 2011, the AHC held a hearing on Petitioner's Amended Motion. The parties stipulated to admit into evidence the Transcript of the hearing in the denial case (2 volumes) as Petitioner's Exhibits 4A and 4B (referred to herein as the Denial Hearing Transcript or the D.H.Tr.), and all of the exhibits from that hearing (referred to herein as the Denial Hearing Exhibits or D.H.Exh.).[56] In addition, Funk submitted exhibits to establish his contract with Funk, his bills to Funk, the Opinion of the Court of Appeals, Western District, and the cost of Funk's expert witness. The following witnesses testified for Funk: himself, his attorney Edgett, and Judge Steve Angle as an expert witness on attorney fees.

On behalf of Funk's case, Edgett testified that he has 34 years of experience as an attorney, charged $200 per hour for his representation of Funk, authenticated his contract with and bills to Funk, and discussed the services provided and charged by his paralegal.[57] Judge Angle[58] testified

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[56] LF 511-513 (Attorney Fees Hearing Transcript (A.F.Tr., pp. 4:17-6:2).

[57] LF 561-563 (A.F.Tr., p. 55:4-7).

regarding his own background as a judge and attorney in Johnson and Henry counties, and the reasonableness of Edgett's bills. He also testified that "Mr. Edgett is at the top of the pool in Henry County. He is probably the number one attorney in Henry County. I don't think there is any question about that."[59] But there is no evidence in the record, either through testimony or

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[58] Judge Angle was to testify regarding attorney fees based on his experience as a judge, but his testimony was:

> "When I first got out of the judiciary and went to Henry County, I did not have a clue what the Henry County attorneys were charging and who was charging. I mean I had some idea from court experience, but you know, I'd been out of it for twenty years." (LF 566-567 (A.F.Tr., pp. 60:22-61:1).)

He further testified that he had never had to handle the attorney fees portion of a case involving a petition for judicial review from the AHC. He then testified that he had researched the attorney fees in the area after he retired as a judge in order to know what to charge for his services. Based on this limited familiarity with attorney fees, the MREAC objected to Judge Angle's testimony as an expert witness based on a lack of foundation. (LF 571-572 (A.F.Tr., pp. 65:21-66:5).

[59] LF 563-579 (A.F.Tr., p. 57:9-73:10).

exhibits, supporting the finding that "Edgett is the only attorney in Henry County qualified by expertise and experience to address the complex legal and factual issues in this case."[60] There is no evidence in the record, either through testimony or exhibits, supporting the implied findings that Edgett had special expertise, or any experience at all, in USPAP or administrative law prior to this case.[61]

The MREAC did not present any witnesses, relying on the record and exhibits from the denial hearing, but did submit the Affidavit of Vanessa Beauchamp as Exhibit AF4 to establish the certification levels of the MREAC Commissioners that reviewed Funk's application. In addition, the MREAC moved to have admitted Exhibits AF1 and AF2 showing discovery requests propounded on Funk.

On September 10, 2013, the AHC issued its Decision granting Funk attorney fees and costs at a rate of $200 based on special factors totaling $17,055.00 in attorney fees and $2,379.92 in costs.[62] The AHC found, among other things, that Edgett's $200 per hour fee was reasonable, that no attorney in Johnson or Henry County charge $75 per hour, that Edgett was "the only

[60] LF 507 (A.F.Tr., generally).

[61] LF 507 (A.F.Tr., generally).

[62] LF 416-430.

attorney in Henry County qualified by expertise and experience to address the complex legal and factual issues in [the] case," that Funk's case was factually complex," that "specialized knowledge of appellate procedure and civil procedure in the review of administrative law" under "the specialized rules and regulations" of the AHC was required, and that "Edgett's knowledge of administrative law . . . was particularly relevant and necessary in this case."[63] The items noted as comprising the "complex legal and factual issues were 1) the case filed in 2007 involved facts from 2006, 2) a "large number of exhibits . . . dealing with [a] highly technical field" (25 exhibits), 3) the "highly complex, convoluted, and often contradictory" nature of USPAP, 4) "highly technical" issues on appeal, and 5) "the case required experience in administrative law, appellate law and civil procedure."[64] The AHC ruled that the "MREAC was not substantially justified in filing an appeal," because "the law is very well established that the [Courts of Appeal] are bound by credibility findings" made by the AHC, and that "such an appeal had no realistic chance of succeeding."[65]

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[63] LF 420-422.

[64] LF 421.

[65] LF 425-426.

H. Circuit Court and Court of Appeals Review.

On October 10, 2013, the MREAC filed a Petition for Judicial Review in the Cole County Circuit Court.[66] On July 8, 2014, the Cole County Circuit Court entered a Judgment reversing the AHC and finding that the MREAC was substantially justified in denying Funk's certification application and that Funk failed to meet his burden to demonstrate that he is entitled to an award of fees in excess of $75 per hour.[67] On July 28, 2014, Funk filed a Notice of Appeal with the Circuit Court, which was filed with the Western District Court of Appeals on July 29, 2014.[68] On August 4, 2015, the Western District Court of Appeal affirmed the Cole County Circuit Court's reversal of the AHC's award, because it found that Funk's fee application was untimely, so that the AHC did not have jurisdiction to award the fees and expenses. On December 22, 2015, this Court ordered the transfer of this case from the Western District Court of Appeals.

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[66] LF 655-659.

[67] LF 660-662.

[68] LF 665-670.

Points Relied On

I. The AHC erred in entertaining Funk's application for attorney fees, because the petition was not filed as required by § 536.087, RSMo, in that Funk filed his petition in the AHC after prevailing before the Court of Appeals, and not within 30 days after first prevailing before the AHC.

Missouri Comm'n on Human Rights v. Red Dragon Restaurant, Inc., 991 S.W.2d 161 (Mo.App. W.D., 1999).

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

State ex rel. Utility Consumers, Council of Missouri, Inc. v. Public Service, 33 P.U.R.4th 273, 585 S.W.2d 41 (Mo., 1979).

§ 536.087.3, RSMo.

§ 536.087.4, RSMo.

II. The AHC erred in finding the MREAC had no substantial justification to appeal the AHC's Decision awarding Funk attorney fees, because, under § 536.087.3, RSMo, such determination is to be based on the record made in the agency proceeding and the MREAC had a reasonable basis in both fact and law for its position to deny Funk's certification and to appeal the AHC's Decision, in that the MREAC has an obligation to guard the interest of the public, the MREAC presented ample evidence regarding the deficiencies in Funk's 2006 Appraisal Reports, and the AHC based its Decision on minimal evidence regarding his 2007 Appraisal Reports, thus showing substantial justification for both the initial decision and the appeal.

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

Joseph v. Dishman, 81 S.W.3d 147 (Mo.App. W.D. 2002).

Pulliam v. State, 96 S.W.3d 904 (Mo.App. W.D. 2003).

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

§ 339.532.1, RSMo.

§ 339.532.2(5), (6), (7), and (10), RSMo.

§ 536.087.1 and .2, RSMo.

§ 536.087.3, RSMo.

20 CSR 2245-3.010.

III. The Administrative Hearing Commission erred in finding Funk was entitled to attorney and paralegal fees at $200 per hour because Funk failed to establish special factors under § 536.085(4), RSMo, that would allow the AHC to exceed the $75 per hour limit, in that 1) the inability to find an attorney at $75 per hour does not constitute a special factor, 2) specialized knowledge of administrative law, judicial review of AHC decisions, appellate law, and civil procedure do not constitute a special factor, and 3) there was no evidence before the AHC that Funk's attorney, prior to taking the case, had any specialized or exclusive knowledge in the area of real estate appraisals.

In re Application of Mgndichian, 312 F.Supp.2d 1250 (C.D. Cal. 2003).

National Assoc. of Manuf. v. United States Dep't of Labor, 962 F.Supp. 191 (D.D.C. 1997).

Baker v. Department of Mental Health, 408 S.W.3d 228 (Ct.App. W.D. 2013).

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

§ 536.085(4), RSMo.

Argument

I. The AHC erred in entertaining Funk's application for attorney fees, because the petition was not filed as required by § 536.087, RSMo, in that Funk filed his petition in the AHC after prevailing before the Court of Appeals, and not within 30 days after first prevailing before the AHC.

This action poses the situation in which Funk represented himself without an attorney at the initial proceeding before the AHC, and prevailed, but then was represented for the appeals to the Circuit Court (where he lost) and the Court of Appeals (where he again prevailed). Pursuant to the § 536.087, RSMo, and the decisions to date interpreting it, Funk was required to file his application for attorney fees with the AHC within 30 days of the AHC Decision, and then have the application held in abeyance until the appellate process was finalized. Alternatively, if this Court should determine that, since Funk had not yet incurred any attorney fees at the conclusion of the AHC action, final disposition was when Funk prevailed before the Court of Appeals, then, under the statute, the action should have been filed with the Court of Appeals within 30 days of final disposition.

Under § 536.087.3, RSMo, Funk, as the prevailing party in a contested case, was required to submit an application for attorney fees and costs

"within 30 days of a final disposition" to "the court, agency, or commission which rendered the final disposition," as follows:

> 3. A party seeking an award of fees and other expenses **shall, within thirty days of a final disposition in an agency proceeding** or final judgment in a civil action, **submit to the court, agency or commission which rendered the final disposition** or judgment **an application** . . ..

(Emphasis added.) The words "final disposition" are used twice in this section and must carry the same meaning each time. The first reference sets the starting date for the 30 day deadline, and the second reference identifies the tribunal for filing the application. Any appropriate interpretation must apply the same meaning to "final disposition" each time it is used, and not change the meaning halfway through the statute. "Final disposition" has occurred if a decision "disposes of all issues as to all parties and leaves nothing for future determination."[69]

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[69] *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 353 (Mo. banc 2001), citing *Davis v. Angoff*, 957 S.W.2d 340, 343 (Mo. App. W.D. 1997).

Under § 536.087.4, RSMo, the application is to be submitted to the "administrative body before which the party prevailed," as follows:

> 4. **A prevailing party in an agency proceeding shall submit an application for fees and expenses to the administrative body before which the party prevailed.** A prevailing party in a civil action on appeal from an agency proceeding shall submit an application for fees and expenses to the court. The filing of an application shall not stay the time for appealing the merits of a case. When the state appeals the underlying merits of an adversary proceeding, no decision on the application for fees and other expenses in connection with that adversary proceeding shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(Emphasis added.) "This section requires the party claiming fees and expenses to submit its application to the administrative body before which it first prevailed, within thirty days of the ruling, even if the State appeals." *Missouri*

Comm'n on Human Rights v. Red Dragon Restaurant, Inc., 991 S.W.2d 161 (Mo.App. W.D.,1999), citing *State ex rel. Div. of Transp. v. Sure–Way Transp., Inc.*, 948 S.W.2d 651, 657–58 (Mo.App.1997) and *Hernandez v. State Bd. of Registration for the Healing Arts*, 936 S.W.2d 894, 901–02 (Mo.App.1997). "Even if the underlying case is appealed, the tribunal before which the fee application was properly brought will retain jurisdiction over that fee application, and the action will be held in abeyance until the adversary proceeding becomes final." *Red Dragon Restaurant* quoting *Davis v. Angoff*, 957 S.W.2d 340, 344 (Mo.App.1997).

The fact Funk had not incurred attorney fees did not preclude the filing of an application under § 536.087, RSMo, because it is not limited to attorney fees. It also allows for "reasonable . . . expenses," which is defined in section 536.085, RSMo, as:

> (4) "Reasonable fees and expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court or agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees. The amount of fees awarded as reasonable fees and expenses shall be based

> upon prevailing market rates for the kind and quality of the services furnished, except that no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the state in the type of civil action or agency proceeding, and attorney fees shall not be awarded in excess of seventy-five dollars per hour unless the court determines that a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee[.]

Missouri courts have already established that expenses are not limited to those itemized in section 536.085(4), RSMo, in ruling that court costs can be recouped under this statute. *Rose City Oil Company v. Missouri Commission on Human Rights*, 832 S.W.2d 314, 317-318 (Mo. App. E.D. 1992). To the degree Funk personally incurred reasonable expenses, other than attorney fees, he would still have been able to file an application for such expenses, which would have then been held in abeyance until an appeal, if any, concluded.

"Failure to request attorney's fees within thirty days of a final disposition in an agency proceeding or a final judgment in a civil action

deprives the court or agency of jurisdiction to consider the request." *Greenbriar Hills Country Club v. Director of Revenue,* 47 S.W.3d 346, 353 (Mo. 2001), *citing Davis and Community Title Co. v. Angoff and the Administrative Hearing Commission*, 957 S.W.2d 340, 343 (Mo.App.1997). "A 'final' disposition in an agency proceeding or a civil action occurs whenever the decision disposes of all issues as to all parties and leaves nothing for future determination." *Id.* This should not be confused with meaning after all possible appeals have been exhausted, because § 536.087.4, RSMo, already uses the language "final and unreviewable decision" to refer to that stage of the proceedings. As was discussed in *Davis v. Angoff*, 957 S.W.2d 340, 344 (Mo. App. W.D. 1997), which compared federal statutes with § 536.087, RSMo, the requirement for the application to be filed within 30 days after the agency decision means that a final disposition has occurred even if the case is subsequently appealed.

Section 536.087, RSMo, is to be strictly construed because it constitutes a waiver of sovereign immunity. In *Stigger v. Mann*, 263 S.W.3d 721 (Mo. App. W.D. 2008), the Court of Appeals stated:

> Our attempt to confirm the propriety of the award is also undermined by the fact that section 536.087 is a waiver of sovereign immunity, [citations omitted] and

> therefore must be "strictly construed." [Citations omitted.] In construing a statutory waiver, we are not to construe it beyond the meaning of the words expressed but are, rather, to construe it narrowly. [Citations omitted.]

The Missouri Supreme Court has identified § 536.087, RSMo, as an example of a statutory waiver of sovereign immunity that is strictly construed. *Richardson v. State Highway & Transp. Comm'n.,* 863 S.W.2d 876, 882 (Mo. banc 1993). The intent to waive sovereign immunity must be express rather than implied. *Bachtel v. Miller County Nursing Home Dist.*, 110 S.W.3d 799, 803–04 (Mo. banc 2003).

The AHC issued its Decision on November 5, 2008.[70] Therefore, Funk's application for attorney fees was to have been filed in the AHC on or before December 5, 2008. It was not. Instead, Petitioner's Motion for Reasonable Fees and Expenses under Section 536.087, RSMo, was filed on February 16, 2010, after the Court of Appeals issued its mandate, and more than a year

[70] LF 401-407.

after the 30 day deadline for filing with the AHC, requiring dismissal of the action for lack of jurisdiction.[71] *Greenbriar Hills,* 47 S.W.3d at 353 (Mo. 2001).

Granted, the statute does not seem to contemplate situations in which a pro se litigant prevails initially without an attorney, but incurs attorney fees later during the appeal, and, therefore, does not address it. Nevertheless, since the right to file an application for attorney fees and expenses is created by statute, it is also limited by statute. See *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service*, 33 P.U.R.4th 273, 585 S.W.2d 41, 49 (Mo., 1979). "[N]either convenience, expediency or necessity are proper matters for consideration." *Id.* No distinction is made in the statutes between those who represent themselves in the initial stages of a case, but hire an attorney to handle the appeal, and those who are represented throughout the proceeding.

Nevertheless, if this Court were to entertain the argument that the statute allows for an application for attorney fees to be filed in the tribunal where the party first prevails with an attorney, then the case was finally disposed of on January 27, 2010 – 15 days after issuance of the Opinion of the

[71] LF 434-435.

Court of Appeals, Western District.[72] If the 30 days runs from the date of the Court of Appeals's opinion, then the tribunal for filing would also need to be the Court of Appeals, because, as state previously, the meaning of final disposition cannot change halfway through the statute. Funk did not attempt to file an application with the Court of Appeals, Western District at that time, but instead filed with the AHC, which would have been wrong.

Also, if this Court agrees that the MREAC's position in choosing to appeal was a relevant issue, then the Court of Appeals would be a better forum to evaluate substantial justification to appeal. The AHC would have an inherent bias regarding such issue, because it is bound up with an evaluation of the strength of the AHC decision, not the MREAC's position.

Funk did not attempt to file with the Court of Appeals, Western District, until May 10, 2010, more than three months after what would have

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[72] LF 436. "For purposes of any decision of [an appellate court], the judgment does not become final until all time has passed for potential motions of rehearing and the rulings thereon." *Greenbriar Hills Country Club v. Director of Revenue,* 47 S.W.3d 346, 353 (Mo. 2001). Under Supreme Court Rule 84.17, a party must file a motion for rehearing within 15 days after the court files its opinion. Thus, the Opinion of the Court of Appeals, Western District became final 15 days after it was issued (i.e. January 27, 2010).

been the due date, by filing his Motion to Recall Mandate and for Determination of Attorney Fees and Expenses Under Section 536.087 RSMo, which was summarily denied.[73]

Therefore, regardless of the interpretation, Funk failed to properly and timely file his application for attorney fees and costs, and it should be denied.

[73] Appendix, pp. A028-A038.

II. The AHC erred in finding the MREAC had no substantial justification to appeal the AHC's Decision awarding Funk attorney fees, because, under § 536.087.3, RSMo, such determination is to be based on the record made in the agency proceeding and the MREAC had a reasonable basis in both fact and law for its position to deny Funk's certification and to appeal the AHC's Decision, in that the MREAC has an obligation to guard the interest of the public, the MREAC presented ample evidence regarding the deficiencies in Funk's 2006 Appraisal Reports, and the AHC based its Decision on minimal evidence regarding his 2007 Appraisal Reports, thus showing substantial justification for both the initial decision and the appeal.

The AHC erred in finding the MREAC was not substantially justified, because the AHC used the wrong standard for evaluating substantial justification and because, even under the wrong standard, the MREAC was substantially justify. A prevailing party is entitled to an award of attorney fees and expenses unless it is determined that the agency's position was substantially justified. Section 536.087.1. Funk was the prevailing party, but the AHC erred in determining the "position" at issue. The AHC used an

improper standard by evaluating the MREAC's decision to appeal, not its position to deny Funk's certification, as follows:

> MREAC must bear its burden based on the facts previously found in the underlying case and the additional information shown at the attorney fee hearing as to matters that led to its decision to file a petition for judicial review in the Cole County Circuit Court.

LF 425. (Underline added.) The AHC Decision fixates on why the MREAC's appeal had "no realistic chance of succeeding." LF 426. This standard was incorrect.

Section 536.087.3, RSMo, regarding the standard of review, provides in part:

> The fact that the state has lost the agency proceeding or civil action creates no legal presumption that its position was not substantially justified. Whether or not the position of the state was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by an agency upon which a civil action is based) which is

> made in the agency proceeding or civil action for which fees and other expenses are sought, and on the basis of the record of any hearing the court or agency deems appropriate to determine whether an award of reasonable fees and expenses should be made, provided that **any such hearing shall be limited to consideration of matters which affected the agency's decision leading to the position at issue in the fee application.**

The MREAC is required only to present a prima facie case that it had a reasonable basis in both fact and law for its position, and that this basis was not merely marginally reasonable, but clearly reasonable, although not necessarily correct. *Dishman v. Joseph*, 14 S.W.3d 709, 716-19 (Mo. App. W.D. 2000); *Joseph v. Dishman*, 81 S.W.3d 147, 153 (Mo. App. W.D. 2002). The MREAC must bear its burden based on the facts previously found in the underlying case and the additional information shown at the attorney fee hearing as to matters that led to its decision to deny Funk's application. The Court is to take into consideration not just the facts as determined in the underlying case, but also how these facts reasonably may have appeared to the MREAC. *Dishman*, 14 S.W.3d at 716, 718-19.

The MREAC reviewed two appraisals submitted as part of Funk's application. One was completed approximately six months prior to the application date, the other one month prior to the application date. These were recent appraisals at the time of the application, not old appraisals from early in his training. Upon reviewing the appraisals and noting multiple deficiencies, none of which were false or trivial, the MREAC invited Funk in to explain the appraisals. During the interview, the MREAC confirmed the deficiencies and learned that Funk had purposefully withheld relevant information from one of the reports regarding the basis for his capitalization rate, thus failing to summarize the data relied upon or to explain his reasoning, all of which violated USPAP in a substantial way. Based on the deficiencies and this purposeful misrepresentation in the report, the MREAC determined to deny his application to upgrade his certification to state-certified general real estate appraiser.

Under 20 CSR 2245-3.010, the MREAC reviews applications with the paramount interest of the public as to the honesty, integrity, fair dealing, and competency of applicants. To that end, the MREAC seeks to assure itself that the applicant can competently prepare appraisals at the level allowed by the license or certification. Rule 20 CSR 2245-3.010 states in relevant part: "The commission may require each applicant for a certificate or license to furnish,

at his/her expense, any information deemed necessary by the commission to determine the applicant's qualifications for a certificate or license." The MREAC required Funk, an applicant for general certification, to submit two commercial appraisals for review.[74] The appraisals were reviewed by the full MREAC, which included five certified real estate appraisers.[75] Upon finding problems in the appraisal reports, the MREAC requested Funk to appear before it to explain certain perceived errors, including 1) his calculation of the capitalization rate, which on the face of the appraisal has outdated data and no explanation of the reasoning leading to the capitalization rate, 2) a failure to use proper units of comparison, and 3) numerous mathematical errors.[76] At the interview, the MREAC learned that Funk purposefully omitted the factual basis for his capitalization rate (the sales information for the adjoining property), including instead a set of out-of-date sales and capitalization rate data that had nothing to do with his analysis.[77] Besides misleading the user of the report to believe the out-of-date data was the basis of his capitalization rate, which it was not, he specifically violated USPAP

[74] D.H.Exh. C and F.

[75] LF 653-654 (A.F.H.Exh. AF-4) and D.H.Exh. B.

[76] D.H.Exh. B, pp. 9:22, 11:17; 15:1; 19:24; 22:22-25; 25:19; and 26:19.

[77] Id.

Standard Rule 2-2(b)(ix), which required Funk to summarize in the report the information analyzed and the reasoning that supported his analysis, opinions, and conclusions. Similarly, his use of aggregate adjustments in the sales comparison approach, instead of appropriate units of comparison, such as dollars per square foot, was not the recognized method and technique for commercial appraisals in violation of USPAP 1-1(a). In addition, the numerous and substantial mathematical errors noted in the appraisal reports implied a carelessness to its preparation that violated USPAP Standard Rule 1-1(c).[78]

The AHC Decision does not contradict any of these positions asserted by the MREAC, instead choosing to ignore the 2006 Appraisal Reports entirely in deference to the 2007 Appraisal Reports, which were not available to the MREAC when it made its decision. In addition, a cursory review of the 2007 Appraisal Reports show that, a year later, he was still using the same out-of-date data, performing his appraisals without proper units of comparison, and making significant mathematical errors.[79] Therefore, a review of the 2007 Appraisal Reports would not have provided any different information than the MREAC already had.

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[78] LF 136-279.

[79] See Statement of Facts starting on p. 11.

Under § 339.532.1, RSMo, the MREAC may "refuse to issue . . . any certificate . . . issued pursuant to sections 339.500 to 339.549 for one or any combination of causes stated in subsection 2 of [§ 339.532]." Section 339.535, RSMo, requires appraisals to be prepared in compliance with the Uniform Standards of Professional Appraisal Practice, and denial of an application is authorized for such violations under § 339.532.2(5), (6), (7), and (10), RSMo, which state:

> (5) Incompetency, misconduct, gross negligence, dishonesty, fraud, or misrepresentation in the performance of the functions or duties of any profession licensed or regulated by sections 339.500 to 339.549;
>
> (6) Violation of any of the standards for the development or communication of real estate appraisals as provided in or pursuant to sections 339.500 to 339.549;
>
> (7) Failure to comply with the Uniform Standards of Professional Appraisal Practice promulgated by the appraisal standards board of the appraisal foundation;
>
> . . . . .

> (10) Violating, assisting or enabling any person to willfully disregard any of the provisions of sections 339.500 to 339.549 or the regulations of the commission for the administration and enforcement of the provisions of sections 339.500 to 339.549[.]

The MREAC's expert testified regarding the deficiencies in the 2006 appraisals and the USPAP violations in those reports that supported findings by the MREAC that cause existed to deny Funk's application for certification as a general real estate appraiser under § 339.532.2(6), (7), and (10).[80]

In matters of certification denials, the AHC exercises the discretion of the MREAC in making the determination to issue a certification. The fact that, in evaluating Funk's certification application, the MREAC did not exercise its discretion in the same fashion as the AHC does not make the MREAC subject to an award of attorney's fees and expenses because it appealed the AHC's decision.

The AHC heightened the standard of substantial justification, by saying regardless of whether the MREAC was substantially justified to make its initial decision to deny Funk's application, the MREAC was not substantially justified to appeal the AHC Decision after it had lost. The AHC

[80] LF 136-279 (D.H. Transcript, pp. 132:20-275:25).

standard is not supported by the case law, which states that, "in reaching a fee decision, the agency may consider the facts as determined in the underlying action, how those facts reasonably may have appeared at the time the action was initiated, and the thoroughness of the investigation preceding the action." *Pulliam v. State*, 96 S.W.3d 904, 907 (Mo.App. W.D. 2003), *citing Dishman v. Joseph*, 14 S.W.3d 709, 719 (Mo. App. W.D. 2000)

"Section 536.087.3 specifically provides that the determination on the issue of substantial justification shall be based on the record made in the agency proceeding for which fees are requested, not on the determination of a higher court when reviewing the agency action for error." *Greenbriar*, 47 S.W.3d at 357-358. The MREAC's burden is to establish that its position in denying Funk's certification application had a reasonable basis in fact and law, not its appeal. Id. at 358.

Nevertheless, the MREAC was reasonable in appealing the AHC Decision, because the AHC did not rule against the MREAC's position regarding the USPAP violations in the 2006 Appraisal Reports, and because it was reasonable for the MREAC to believe that the extremely limited testimony provided by Funk regarding the 2007 Appraisal Reports did not constitute substantial evidence, but instead constituted that "rare case when

the award is contrary to the overwhelming weight of the evidence." *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003).

Funk testified only that he did not commit negligence or gross negligence. He was not even able to give an unequivocal "yes" to the question of whether he completed the 2007 Appraisal Reports in compliance with USPAP. He provided no specific explanation of how the 2007 Appraisal Reports were different from or better than the 2006 Appraisal Reports.

The reasonableness of the MREAC's position is supported by a review of the 2007 Appraisal Reports which, on their face, are prepared in the same fashion, with the same out-of-date data, and with the same significant errors in the capitalization rate, the units of measure, and the arithmetic. Without any specific testimony by Funk regarding the 2007 Appraisal Reports, there is no substantial justification for the MREAC to have altered its position. The content of the 2007 Appraisals, which were never discussed by Funk in his case other than to offer them into evidence, contradicted Funk's testimony that they were a better indication of his work, and were a confirmation of the problems found by the MREAC.

The MREAC's position at all stages of these proceedings was substantially justified.

III. The Administrative Hearing Commission erred in finding Funk was entitled to attorney and paralegal fees at $200 per hour because Funk failed to establish special factors under § 536.085(4), RSMo, that would allow the AHC to exceed the $75 per hour limit, in that 1) the inability to find an attorney at $75 per hour does not constitute a special factor, 2) specialized knowledge of administrative law, judicial review of AHC decisions, appellate law, and civil procedure do not constitute a special factor, and 3) there was no evidence before the AHC that Funk's attorney, prior to taking the case, had any specialized or exclusive knowledge in the area of real estate appraisals.

Funk's basic case is that the market rate for attorney fees in the State of Missouri is significantly higher than $75 per hour, that attorney Edgett is a highly capable attorney, and that Edgett's fee of $200 per hour is reasonable based on his abilities and the market. The MREAC does not necessarily dispute any of these facts, but these are not adequate special factors under § 536.085(4), RSMo (Supp. 2012), to support the higher fees. The AHC exceeds its authority and the scope of the evidence when it buoyed up the record with meaningless and unsupported additional factors.

Section 536.085(4), RSMo (Supp. 2012), which allows fees at the

"prevailing market rates," while capping attorney fees at $75 per hour, states:

> (4) "Reasonable fees and expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court or agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees. The amount of fees awarded as reasonable fees and expenses **shall be based upon prevailing market rates** for the kind and quality of the services furnished, **except that** no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the state in the type of civil action or agency proceeding, and **attorney fees shall not be awarded in excess of seventy-five dollars per hour** unless the court determines that a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee[.]

"The party requesting an award of attorney's fees bears the burden of introducing competent and substantial evidence to support the claim that a special factor exists." *Hutchings ex rel. Hutchings v. Roling*, 193 S.W.3d 334, 350 (Mo. App., E.D. 2006). Section 536.085(4) allows no more than $75 per hour for a reasonable fee unless we determine "that a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee[.]"

Federal courts have developed a three-part test to determine whether a higher rate may be allowed due to the attorney's "distinctive knowledge or specialized skill." *In re Application of Mgndichian*, 312 F.Supp.2d 1250, 1264 (C.D. Cal. 2003). In *Mgndichian*, the Court states: "The Ninth Circuit has stated that three requirements must be met before higher fees can be awarded on this basis: 'First, the attorney must possess distinctive knowledge and skills developed through a practice specialty. Secondly, those distinctive skills must be needed in the litigation. Lastly, those skills must not be available elsewhere at the statutory rate.'" *Id.*

The AHC lists a series of unsupported, insignificant, and irrelevant factors in support of its position, as follows:[81]

[81] LF 420-421.

a. Edgett is the only attorney in Henry County qualified by expertise and experience to address the factually complex legal and factual issues raised in the case;

b. The case is uniquely complex because it dealt with facts from the year before the case was filed;

c. The case had a lot of exhibits that dealt with real estate;

d. USPAP is a complex, convoluted, and often contradictory set of regulations that require expertise, experience, and knowledge of industry standards;

e. The issues on appeal were highly technical in nature;

f. The case required experience at all levels of administrative, civil and appellate litigation; and

g. Edgett knew the specialized rules of the Commission and the case law related to those rules.

Although evidence was admitted that Edgett is a capable, even very good attorney, there was no evidence that he was the only attorney qualified in Henry County to handle the case, or that he had any particular expertise in real estate or real estate appraising, or that prior to the case he had any unique familiarity with the laws and rules regulating real estate appraisals.[82]

[82] LF 507-654, generally.

In addition, Edgett did not handle the original hearing that dealt with all of the complex real estate and real estate appraising issues. That part of the process was handled by Funk, pro se.[83] The claim that the case was unusually complex because it dealt with facts from the prior year or because it had a lot of exhibits is meaningless. Nearly all cases deal with facts from a prior year, and although there were a decent number of exhibits (26), the number was by no means high enough to consider it a complexing factor. Although some fairly complex issues were raised on appeal by the MREAC regarding expert testimony, Funk ultimately prevailed on the basic principle that because no objection was made to his testimony or to his exhibits, the Court of Appeals would not interfere with the discretion of the trier of fact.[84]

Funk has not presented evidence to support that Edgett had distinctive knowledge and skills that were needed in the litigation. The AHC has previously stated citing a federal case: "defending a licensee in a professional licensing proceeding does not require distinctive knowledge or specialized skill. Unlike patent law, no technical education is necessary to excel in representing a licensee." *Foshee v. State Board of Nursing*, 2008 WL 5638332 (AHC Case No. 06-1194 AF), p. 14, referencing *National Assoc. of Manuf. v.*

[83] LF 6.

[84] LF 436-440.

United States Dep't of Labor, 962 F.Supp. 191, 198-99 (D.D.C. 1997). "'Mastery of administrative … issues, while challenging,' is not a special factor." *Id.* "The action itself was not so complex that an attorney of ordinary knowledge with a solid work ethic could not have successfully litigated the issues." *Id.,* quoting *National*, 962 F.Supp. at 199.

In *Baker v. Department of Mental Health*, 408 S.W.3d 228 (Ct. App. W.D. 2013), the Court explained that the mere fact a case required an attorney with the ability to represent a client at the administrative, circuit and appellate level is not a special factor, as follows:

> The circuit court found that Baker's case required an attorney with the ability to represent Baker at the administrative, circuit and appellate level. This factual finding states the obvious, as every case initiated under the Administrative Procedure Act can be expected to require representation of a client's interests at the administrative, circuit and appellate level. Read literally, if this factual finding represents a "special factor" as a matter of law, the statutory cap would be eviscerated "as all proceedings would present the 'special factor[.]' " *Quoting Sprenger v. Missouri*

Department of Public Safety, 340 S.W.3d 109, 112 (Ct.App. W.D 2010).

In addition, the fact the market rate exceeds $75 an hour is not a special factor. *Sanders v. Hatcher*, 341 S.W.3d 762 (Mo.App.W.D. 2011); and *Sprenger v. Mo. Dept. of Public Safety*, 6340 S.W.3d 109 (Mo.App.W.D. 2010) (opinion adopted and reinstated after retransfer). Section 536.085(4), RSMo (Supp. 2013) already mandates that attorney fees be based on the prevailing market rate, but still caps the fees at $75 per hour.

The Court of Appeals, Eastern District, has taken a different, more lenient approach, because it has held that "the limited availability of qualified attorneys can constitute a "special factor." (*Hutchings v. Roling*, 193 S.W.3d 334, 350 (Mo. App. E.D. 2006), and *McMahan v. Missouri Dept. of Social Services*, 980 S.W.2d 120, 127 (Mo. App. E.D. 1998)).

First, it should be noted that the "special factor" described by the Eastern District does not differ from the approaches of the Western District. The "limited availability of qualified attorneys" is not a court created special factor. It is identified in the definition of "reasonable fees and expenses" set forth in § 536.085(4), which identifies "the limited availability of qualified attorneys for the proceedings involved" as the only special factor expressed in the statute.

Second, in *Hutchings*, the Court of Appeals Eastern District, does make a finding that there are no attorneys available for $75 per hour, but states as its primary finding that "[t]here was uncontroverted evidence that Mr. Kennedy was the only available attorney in the metropolitan St. Louis area who could and would handle plaintiff's [Medicaid] case." This finding was made without reference to the rate charged. Similar evidence did not exist in this case. Although there was evidence that Michael Edgett was a qualified, and even very good attorney, and that the market rate was higher than $75 per hour, there was no evidence that he was the only attorney in the area that could or would handle the case. Therefore, even if this Court was to follow *Hutchings*, Funk would not qualify for the special factor.

In *McMahan*, the Court of Appeals, Eastern District, is bolder in simply finding that the "limited availability of qualified attorneys in the area willing to take a case at the $75–per–hour rate has been interpreted to be a 'special factor' that can justify an enhancement above $75 per hour." *McMahan* at 980 S.W.2d at 127. This ruling is in direct contradiction with the Court of Appeals, Western District's more recent decisions in *Sanders v. Hatcher*, 341 S.W.3d 762 (Mo. App. W.D. 2011) and *Sprenger v. Mo. Dept. of Public Safety*, 340 S.W.3d 109 (Mo. App. W.D. 2010). To adopt *McMahan* would eviscerate the statutory cap set by the legislature. The evidence is pretty clear that

market rates have significantly exceeded $75, so that parties will have difficulty finding attorneys at that rate. It can also be presumed that the legislature is aware of the general market. Nevertheless, year after year since this statute was adopted in 1989, the legislature has not amended it. The courts should not take it upon themselves to amend a statute judicially that is not unconstitutional and which the legislature has not amended.

Therefore, Funk establishes no special factors to warrant the fee of $200 awarded by the AHC.

Conclusion

WHEREFORE, the Missouri Real Estate Appraisers Commission respectfully requests that this Court sustain the Cole County Circuit Court Judgment and Order of Dismissal and the Opinion of the Court of Appeals, Western District, and reverse the AHC's September 10, 2013 Decision awarding Funk attorney's fees and costs.

Respectfully Submitted,

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Certificate Pursuant to Rule 55.03

The undersigned hereby certifies that: (1) the foregoing was filed electronically; (2) the attorney or party shown thereon as the signer signed the original of the foregoing; and, (3) the original signed filing will be maintained by the filer for a period of not less than the maximum allowable time to complete the appellate process.

/s/ Craig H. Jacobs
Assistant Attorney General

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing was filed electronically pursuant to Rule 103 and Local Rule XII through Missouri Case Net, on this 11th day of January, 2016, to:

Michael X. Edgett

/s/ Craig H. Jacobs
Assistant Attorney General

Certification of Compliance

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 9,443 words.

/s/ Craig H. Jacobs
Assistant Attorney General