

No. SC95255

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In the  
Missouri Supreme Court

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MISSOURI REAL ESTATE APPRAISERS COMMISSION,

Respondent,

v.

MARK A FUNK,

Appellant.

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Transfer from the Missouri Court of Appeals, Western District

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RESPONDENT'S SUBSTITUTE REPLY BRIEF PURSUANT TO 84.05(e)

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CHRIS KOSTER  
Attorney General

CRAIG H. JACOBS  
Assistant Attorney General  
Missouri Bar No. 48358  
P.O. Box 899  
Jefferson City, MO 65102  
Phone: (573) 751-1143  
Fax: (573) 751-5660  
Email: craig.jacobs@ago.mo.gov

Attorneys for Missouri Real Estate  
Appraisers Commission

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## 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.**

**A. Funk’s Application Was Not Timely Filed in the Proper Tribunal.**

Funk did not file a substitute brief, so this reply will address any issues raised in Funk’s Respondent’s Brief by Appellant filed in the Court of Appeals, Western District that have not already been addressed in Respondent’s Substitute Brief Pursuant to 84.05(e).

Funk asserts in his analysis of *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 353 (Mo. banc 2001), that “Funk did not have a “final disposition” until the mandate [of the Court of Appeals, Western District] was issued.” This incorrectly states the law as set forth in *Greenbriar*, which states “the judgment does not become final until all time has passed for potential motions of rehearing and the rulings thereon.” *Id.* In *Greenbriar*, the Court notes that the mandate issued only a few days after the Supreme Court’s decision became final, thus allowing only a short window in which the application for attorney fees could be filed within the

requirements of § 536.087, RSMo, because the Court lost jurisdiction after the issuance of the mandate. This is what created the “anomaly” discussed in *Greenbriar*. Without the Court being willing to withdraw its mandate, it would have been impossible for Greenbriar to file its application for attorney fees unless it had done it within the first few days after the Supreme Court’s decision, not allowing the full 30 days allowed for its filing by the statute. Because the Supreme Court was where Greenbriar first prevailed, the Supreme Court withdrew its mandate and allowed the case to proceed.

Unlike Greenbriar, Funk did prevail at the administrative level. Also, unlike Greenbriar, this case does not present an impossibility. As explained in Respondent’s Substitute Brief, section 536.087.4, RSMo, allowed Funk to file at the end of the AHC case on costs other than attorney fees and then have the case on costs and fees held in abeyance while the case on the merits was reviewed and Funk incurred attorney fees.

## **B. Law of the Case and Collateral Estoppel.**

In Funk’s Court of Appeals brief, he argues the jurisdictional issue is barred by law of the case or collateral estoppel, because the AHC’s initial decision dismissing the case based on the late filing issue was reversed and remanded by the Henry County Circuit Court, and not appealed by the MREAC. Nevertheless, law of the case does not apply, because the MREAC was not entitled to appeal the Henry County Circuit Court decision.

When the Henry County Circuit Court remanded the case to the AHC, the AHC matter was not finally resolved and, therefore, not appealable to the Court of Appeals. The case styled *Labor and Industrial Relations Commission v. Hoffman*, 825 S.W.2d 874 (Mo. App. W.D. 1991), explains this principle, as follows:

Section 512.020, RSMo 1986, provides statutory authorization for appeals. Only final awards, disposing of all parties and all issues are appealable. [Citation omitted.] Appeals from final judgments and certain other orders are authorized, but a remand for consideration of additional evidence is not. [Citation omitted.] Moreover, an appeal from an order remanding to an administrative tribunal for additional proceedings is not authorized by § 512.020, and thus, there is no appeal from such an order. [Citation omitted.] The logic behind such a rule is obvious, that being to avoid hearing appeals on a piecemeal basis. [Citation omitted.] One appeal should suffice to determine all the controverted issues. [Citation omitted.]

The Henry County Circuit Court remanded the case to the AHC for “a hearing on [Funk’s] application for attorney fees and expenses.” LF 506.

Because further proceedings were required to finalize the matter, an appeal was not authorized. Therefore, it is not reasonable or fair to allow the Henry County determination to be treated as the law of the case.

Furthermore, *Walton v. City of Berkeley*, 223 S.W.3d 126 (Mo. banc 2007) is not analogous to this case. First, *Walton* had been appealed to the Court of Appeals twice, and then to the Missouri Supreme Court. The issue that was determined to have been barred from further review had not been raised by the party in the earlier appeal, when it could have been. In *Walton*, the Court stated:

Walton also asserted at oral argument that he had no reason in *Walton I* to cross-appeal the Count II dismissal, since he won the trial. However, the law of the case bars relitigation of issues not only expressly raised and decided on appeal, but also those that could have been raised but were not. [*Williams v. Kimes*, 25 S.W.3d 150, 154 (Mo. 2000).] Thus, failure to raise points in an appeal means a later court need not consider them. *Id.*

*Walton*, 223 S.W.3d at 129.

The other case cited by Funk, *Davis v. General Electric Company*, 991 S.W.2d 699, 702-704 (Mo. App. S.D. 1999) is also distinguishable from this case, because 1) the party against whom the law of the case was asserted had attempted an appeal to the Court of Appeals, but then voluntarily dismissed it, and 2) no further evidence was taken on remand before a new decision was issued. The MREAC has not appealed this issue previously and an entire hearing was held between the Henry County judgment and this appeal. Therefore, law of the case does not apply here.

Collateral estoppel is not an appropriate theory for this case, because there is no prior case. There is only one case – the AHC’s Decision on Funk’s application for reasonable fees and expenses. This Court does not review the Judgments of either circuit court (Cole County or Henry County). The earlier Henry County judgment does not stand as an independent case worthy of collateral estoppel.

Therefore, this Court may adjudicate the issue of the timeliness of Funk’s filing without consideration or deference to the Henry County Circuit Court order.



**II. The AHC erred, under § 536.087.3, RSMo, in not basing its determination of substantial justification on the record made in the agency proceeding and, instead, basing it on the MREAC's position before a higher court reviewing the AHC's action for error.**

In Funk's response to the MREAC's second point, he sets forth the standard of review accurately by reference to § 536.087.7, RSMo, but does not apply it correctly. Furthermore, he argues, in essence, that the MREAC's position before the AHC in the underlying case is not relevant, because Funk did not incur any attorney fees at that stage of the case. Funk's response does not otherwise address the MREAC's argument that the AHC Decision inappropriately evaluates the MREAC's position on appeal. Due to no significant response from Funk on this issue, the MREAC will primarily refer this Court back to MREAC's discussion in Respondent's Substitute Brief Pursuant to 84.05(e) of § 536.087.3, RSMo, and *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 357-358 (Mo. banc 2001).

Nevertheless, the MREAC still maintains that its position on appeal was substantially justified, because it was reasonable for it to believe that the dearth of evidence regarding the 2007 Appraisal Reports submitted by Funk 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). The Court of Appeals did not agree and ruled against the MREAC. Appendix to Respondent's Substitute Brief Pursuant to 84.05(e), pp. 7-8. The opinion seemed to be based, in large part, on the fact that the MREAC did not object to Funk's testimony or the admission of the 2007 Appraisal Reports. Nevertheless, errors in litigation strategy or execution of a case do not affect the determination of whether the MREAC was substantially justified to deny Funk's application for upgraded certification.

The AHC made no findings in either the underlying AHC case or the AHC's attorney fee decision that were contrary to the MREAC's position that Funk prepared the 2006 appraisals in violation of the Uniform Standards of Professional Appraisal Practice. As part of his discovery response, Funk volunteered the 2007 Appraisal Reports as a better indication of his work, but refused to and failed to provide workfiles for the reports as requested in subsequent discovery.<sup>1</sup> On their face, the 2007 Appraisal Reports contain the same basic errors as were found in the 2006 appraisal reports (as described in Respondent's Substitute Brief Pursuant to 84.05(e)), most significantly mathematical errors, identical out-of-date data supporting his capitalization rate, and a failure to use proper units of comparison. Funk's only unequivocal

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<sup>1</sup> Exhibits N and O of Case No. 07-1550 RE of the Missouri Administrative Hearing Commission.

testimony regarding these reports was that they were not prepared with negligence or gross negligence. He equivocates on whether they were in compliance with the Uniform Standards of Professional Appraisal Practice (USPAP). Although negligence and gross negligence would be a basis for denying Funk's license, such were not required for a denial. Under 339.532.1 and .2, RSMo, the MREAC can deny a certification for many reasons independent of negligence and gross negligence, such as violations of USPAP.

At the end of the AHC hearing, it was not apparent that Funk had presented adequate evidence for the AHC to make any determination regarding the quality of the 2007 Appraisal Reports. The reports were submitted without any meaningful explanation or discussion of their content. The findings made by the AHC were based on its own review of the reports and the minimal expert testimony of whether they had been prepared with negligence or gross negligence.

Based on these facts the MREAC was also substantially justified in appealing the AHC's Decision, but again, such is not the proper standard. Therefore, the AHC's Attorney Fee Decision should be reversed as arbitrary and capricious, unreasonable, unsupported by competent and substantial evidence, and as contrary to law.

## Conclusion

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

Respectfully submitted,

CHRIS KOSTER  
Attorney General

/s/ Craig H. Jacobs  
Assistant Attorney General  
Missouri Bar No. 48358  
Craig.Jacobs@ago.mo.gov  
207 East High Street  
P.O. Box 899  
Jefferson City, MO 65102  
Telephone: (573) 751-1143  
Telefax: (573) 751-5660

Attorneys for the Missouri Real  
Estate Appraisers Commission

### **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 Special Rule 18 through Missouri Case Net, on this 10<sup>th</sup> day of February, 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 reply brief contains 1,724 words.

/s/ Craig H. Jacobs  
Assistant Attorney General