

**IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI**

FLOWER VALLEY, LLC,)
12667 NEW VALLEY, LLC,)
)
J.C.)
NOLOB, LLC)
KEEVEN DEVELOPMENT, LLC)
DUNWOOD DEVELOPMENT CO.)
FRENCH QUARTER, LLC)
GLIDEPATH, LLC)
)
Plaintiff,)
)
VS.)
)
ASSESSOR, ST. LOUIS)
COUNTY, MISSOURI)
Defendant.)

October 20, 2017

Case No. ■

FILED
OCT 20 2017
CIRCUIT COURT OF ST. LOUIS COUNTY

■■■■■■■■■■ **DECISION**

This case came before the Court on June 27, 2017 on Petitioners' Petition for Review.

Cause called and heard. All parties appear by counsel of record. The parties briefed all issues, and the matter was taken under submission.

FACTS

The facts in this matter are not in dispute. Each of the Petitioners appealed a decision of St. Louis County Board of Equalization (hereinafter "BOE") regarding the value of their real property to the State Tax Commission ("STC"). The Petitioners each retained the same property tax agent, Property Assessment Review ("PAR"), to investigate and prosecute the appeals. Pursuant to their contract, PAR provided legal and appraisal services and paid all of the associated attorney fees and appraisal costs in return for Petitioners' payment of a contingency fee in the event of a successful appeal.

Petitioners were directly represented by legal counsel in their tax appeals, and a certified appraiser provided an appraisal report and expert testimony in each appeal. PAR directly paid all attorney fees and appraisal costs pursuant to the aforementioned contract.

The STC found in favor of Petitioners' on their appeals, triggering the reimbursement of their attorney fees and appraisal costs pursuant to §138.434 RSMo and St. Louis Co. Rev. Ord. §503.300. Subsequently, upon application by Petitioners, the STC ordered reimbursement of their attorney fees and appraisal costs.

Respondent filed a petition for review appealing the STC Order of Reimbursement, and, on May 2, 2016, the Hon. Patrick Clifford of this Court remanded the case for review, rehearing and reconsideration. Specifically, Judge Clifford's Order of Remand requested clarification from the STC regarding the authority relied on in (1) determining the meaning of in awarding attorney fees and appraisal costs, and (2) the basis for the STC's interpretation of the word "reimbursement" of such fees and costs under §138.434 RSMo.

On August 16, 2016, the STC reversed its initial decision and entered its Order Upon Remand reversing its prior order and denying Petitioners' an award of attorney fees and costs. The STC concluded that due to fact the Petitioner's had not directly paid their attorney fees and appraisal costs, they could not be reimbursed under §138.434 RSMo.

Petitioners filed their petition for review the STC's Order Upon Remand which is before this Court.

ANALYSIS

The August 16, 2016 Order Upon Remand before this Court involves only the STC's application of the law to the facts, therefore this Court conducts a *de novo* review. §536.140.3 RSMo.

The pertinent portion of §138.434 RSMo provides as follows:

Any first class charter county or a city not within a county **may require by ordinance or charter the reimbursement to a taxpayer for the amount of just and reasonable appraisal costs, attorney fees and court costs resulting from an evidentiary hearing** before the state tax commission or a court of competent jurisdiction if such appeal results in a final decision reducing the appraised value of residential property by at least fifteen percent or the appraised value of utility, industrial railroad and other subclass three property by at least twenty-five percent from the appraised value determined by the board of equalization for that tax year.

§138.434 RSMo (emphasis added). The Petitioners are taxpayers within St. Louis

County, and St. Louis County is a first class charter county. St. Louis County enacted an ordinance, §503.300, which provides:

If an appeal by a taxpayer of an assessment of real property before the state tax commission or court of competent jurisdiction results in a final decision which reduces the appraised value as determined by the Board of Equalization for that tax year: i.) of residential property by at least fifteen (15) percent, or ii.) of utility, industrial, commercial, railroad and other subclass three property by at least twenty-five (25) percent, **then such taxpayer shall be reimbursed the amount of such taxpayer's just and reasonable appraisal costs, attorney's fees and court costs which result from an evidentiary hearing** before the state tax commission or court of competent jurisdiction.

St. Louis County Ordinance No. 22343 (2005) (amending and re-enacting code section 503.300) (emphasis added).

There is no dispute that the result of the Petitioners' appeals from the BOE qualified for reimbursement of attorney fees, appraisal costs and court cost. The only issue is whether Petitioners' can be "reimbursed" given their contract with PAR.

Definition and Use of “Reimbursed”

“The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning.” *Belcher v. State*, 299 S.W.3d 294, 295-296 (Mo. banc 2009). Absent a statutory definition, the Court may use the dictionary to derive the plain and ordinary meaning of a term. *Balloons Over the Rainbow, Inc. v. Director of Revenue*, 427 S.W.3d 815, 825 (Mo. banc 2014), citing *Am. Healthcare Mgmt., Inc., v. Dir. Of Revenue*, 984 S.W.2d 496, 498 (Mo. banc 1999).

Neither §138.434 RSMo nor St. Louis County Ordinance No. 22343 define the word “reimbursement” or “reimbursed”. Nor has a higher court of this state addressed this specific issue. The parties, in their respective briefs, provide various dictionary definitions of “reimbursement”, including Black’s Law Dictionary (10th ed. 2014) (“1. Repayment. 2. Indemnification.”), Merriam-Webster’s Collegiate Dictionary (10th ed. 1998) (“payment of an amount of money to someone equal to the amount that person has already spent.”), www.dictionary.com, based on Random House Dictionary 2016 (“to make repayment for expense or loss incurred”).

In reading both §138.434 RSMo and St. Louis County Ordinance No. 22343, clearly, the legislative intended to remove or reduce the impediment of attorney fees, appraisal costs and court costs to allow taxpayers the ability to challenge excessive real property valuation by the BOE.

Further, the various dictionary definitions of “reimbursement” involve the element of liability or obligation, either in the form of “payment”, “expense” or “loss”. Particularly persuasive is Black’s Law definition as “2. Indemnification”. That dictionary further defines “indemnification” as “[t]he action of compensating for loss or damage sustained.” Black’s Law Dictionary (10th ed. 2014). The contingency fee owed to PAR is a loss sustained by each Petitioner resulting from a successful appeal. Therefore, the Petitioners’ are entitled to be reimbursed.

Collateral Source Rule

Respondent argues that because Petitioners did not directly pay their attorneys, appraisers or the court costs, they cannot be reimbursed. However, Respondent cannot rely on the fact that Petitioners’ expenses were paid by PAR, a collateral source. The fact that Petitioners entered into an agreement with PAR, a third party, who in turn paid the necessary attorney fees, appraisal costs and court costs for the appeal, in exchange for a fee, does not preclude reimbursement for the expenses. “The collateral source rule provides that ‘a wrongdoer is not entitled to have the damages to which he is liable reduced by proving that plaintiff has received or will receive compensation or indemnity for the loss from a collateral source.’” *Jim Toyne, Inc. v. Adams*, 916 S.W.2d 381, 382-83 (Mo.App. W.D. 1996) (party entitled to attorney fees despite fees having been paid by party’s insurer) citing, *Collier v. Roth*, 434 S.W.2d 502, 506–07 (Mo.1968). See also *Employer’s Mutual Casualty Co. v. Northwest Missouri Masonry*, and *Protection Sprinkler Co. v. Lou Charno Studio*, 888 S.W.2d 422, 424 (Mo. App. W.D. 1994). In both the *Toyne* and *Protection Sprinkler* cases, the collateral source rule is applied substantively, and not limited only to evidentiary rulings.

The contingency nature of the contract between PAR and Petitioners also does not preclude an award of fees and costs. Both §138.434 RSMo and St. Louis County Ordinance No. 22343 use the word “reasonable” and the phrase “resulting from” in describing the attorney fees, appraisal costs and court costs to be reimbursed. The use of “reasonable” contemplates an amount of compensation, given all of the circumstances, for the time and effort spent on behalf of the prevailing party, and does not bind the prevailing party to his or her contract for attorney fees. *Blanchard v. Bergeron*, 109 S.Ct. 939, 944-945 (1988); *O’Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64, 71 (Mo. banc 1989); *Dominion Home Owner Association, Inc. v. Martin*, 953 S.W.2d 178, 182 (Mo. App. W.D. 1997). Accordingly, Petitioners are entitled to an award of attorney fees, appraisal costs and court costs regardless of the nature of their contract.

The legislatures’ use of “reasonable” also displays their intent with regard to the statute and ordinance at issue. Using Respondent’s interpretation of “reimbursement”, a taxpayer would only be awarded the incurred attorney fees he or she had the means to pay, at an hourly rate, in full, prior to resolution. The added requirement that attorney fees, appraisal costs and court costs be “reasonable” allows the STC to either decrease or *increase* a prevailing taxpayer’s claimed expenses from his or her appeal. Surely, if the STC ordered an increased reimbursement of attorney fees, so that the amount would be “reasonable”, the taxpayer would receive more than what was paid, and therefore would not be “reimbursed”, as narrowly defined by Respondent.

Waiver of Sovereign Immunity

Respondent argues that as both §138.434 RSMo and St. Louis County Ordinance No. 22343 constitute waivers of sovereign immunity, each must be strictly construed, and therefore “reimbursed” must be narrowly defined. *Richardson v. State Highway & Transp. Comm’n*, 862 S.W.2d 876, 882 (Mo. Banc 1993). (Error to award court costs against the State Highway Commission when not an express waiver of sovereign immunity set out in §537.600 RSMo).

A statutory waiver of sovereign immunity is to be constructed narrowly, and not beyond the literal meaning of the words expressed. *Stigger v. Mann*, 263 S.W.3d 721,728-29 (Mo.App.W.D. 2010). Strict construction requires that the statute not be unreasonably interpreted. *Snyder v. Consolidated Library Dist. No. 3*, 306 S.W.3d 133, 136, 137 (Mo. App. W.D. 2010). For the reasons cited above, the Court finds that the literal meaning of the words expressed in the legislation, particularly the use of “reimbursement”, support an award of attorney fees, appraisal costs and court costs under the present circumstances. Although this may not be the narrowest possible *definition* of “reimbursement”, it is a narrow *construction* of the statute and ordinance, not beyond the literal meaning of the words, and not unreasonable, especially given the Court’s primary obligation to follow the legislatures’ intent.

Petitioner’s “Fees on Fees” Claim

Finally, Petitioners assert that they are entitled to an award of all attorney fees incurred from their Application for Reimbursement through all related proceedings. Neither §138.434 RSMo and St. Louis County Ordinance No. 22343 expressly provides

for reimbursement of attorney fees incurred seeking an award of attorney fees, appraisal costs and court costs. However, both the statute and the ordinance provide for an award of attorney fees “resulting” or “which result from” an evidentiary hearing. Arguably, the attorney fees incurred by Petitioners in seeking an award of fees is a result of the evidentiary hearing.

The Court can, and does consider a similar statute for clarification. *BASF Corp. v. Dir. of Revenue*, 392 S.W.3d 438, 444 (Mo. banc 2012). Like the legislation at issue in this case, §536.087 RSMo of the Missouri Administrative Procedure Act provides for an award of attorney fees to a prevailing party who successfully challenges an unreasonable position taken by a government agency. Similarly, the statute does not expressly provide for an award of attorney fees incurred in seeking fees. Also, §536.087, like the statute and ordinance at issue, is a waiver of sovereign immunity. *State Bd. of Registration for Healing Arts v. Warren*, 820 S.W.2d 564, 565 (Mo. App. W.D. 1991).

Nevertheless, Missouri courts have consistently held that an award of attorney fees for seeking fees is appropriate under §536.087. *State ex rel. Div. of Transp. v. Sure-Way Transportation, Inc.*, 948 S.W.2d 651, 657 (Mo. App. W.D. 1997); *Hernandez v. State Bd. of Registration for Healing Arts*, 936 S.W.2d 894, 902 (Mo. App. W.D. 1997); *Missouri Real Estate Appraisers Commission v. Funk*, 492 S.W.3d 586, 593 (Mo. banc 2016); and *Greenbriar Country Club v. Director of Revenue*, 47, S.W.3d 346, 359, n. 42 (Mo. banc 2001).

In *Hernandez*, the Court found that “[r]efusing to award attorney’s fees for the time spent in obtaining the attorney’s fees for the underlying agency proceeding... would thwart the purpose of ... §536.087...” *Hernandez*, 936 S.W.2d at 902. The Court determined that if prevailing parties are required to incur yet additional attorney fees litigating the fee disputes, which may equal or exceed the fees awarded in the underlying agency proceeding, they may choose not to challenge offensive government action in the first place. *Id.*

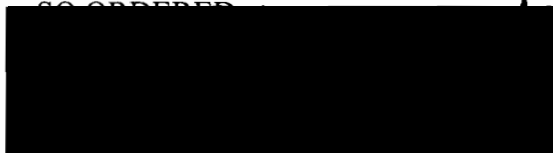
As indicated above, the clear intent set forth in both §138.434 RSMo and St. Louis County Ordinance No. 22343 is to allow property owners, regardless of financial status, to challenge what amounts to a tax overreach by the BOE. Prevailing property owners should be relieved of attorney fees incurred in seeking their fees and costs, otherwise, any such tax savings may be nullified by the large legal expense of significant ongoing litigation and appeals. To hold otherwise would thwart the shared purpose of §138.434 RSMo and St. Louis County Ordinance No. 22343. As a result, the Court finds that Petitioners are entitled to an award of attorney fees for the time spent in obtaining reimbursement of appraisal costs and attorney fees, including fees incurred for this petition for review.

JUDGMENT AND ORDER

Based upon the foregoing, the Court hereby reverses the STC’s Order Upon Remand entered August 16, 2016, and reinstates the awards to Petitioners contained in the original Order of Reimbursement, entered December 22, 2015.

Further, the Court orders that this matter is set for a case management conference on November 9, 2017, at 9:00 a.m. for purposes of scheduling proceedings to determine Petitioner's additional attorney fees incurred in the legal proceedings beginning with their original application for reimbursement and continuing through the present action for judicial review.

SO ORDERED



Associate Circuit Judge
Circuit Court of St. Louis County
State of Missouri

Date: 10/20/17