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MO. DEPT OF INSURANCE,
FINANCIAL INSTITUTIONS &
PROFESSIONAL REGISTRATION

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

VERSATILE MANAGEMENT GROUP,)
INC., AND DEMITRIUS GLASS,)

Respondent,)

v.)

ED88144

DOUGLAS M. OMMEN,)
DIRECTOR, MISSOURI DEPARTMENT)
OF INSURANCE, FINANCIAL)
INSTITUTIONS, AND PROFESSIONAL)
REGISTRATION,¹)

Appellant.)

**MOTION FOR REHEARING
OR, IN THE ALTERNATIVE,
APPLICATION FOR TRANSFER TO THE SUPREME COURT OF MISSOURI**

On May 15, 2007, in an opinion by Judge Romines, joined by Judge Norton but with Judge Mooney dissenting, this court holds that a party not aggrieved by the administrative order on review by this court nonetheless bears the burdens of briefing and persuasion to defend that order. Because that holding is contrary to practice and precedent – and, frankly, cannot be practically applied without

¹ Pursuant to Rule 52.13(d), Director Ommen is automatically substituted for his predecessor – and the Department is referred to by its new name.

modifying Supreme Court Rule 84.04 or 84.05 – the court should rehear it. In the alternative, the court should transfer the case to the Missouri Supreme Court, recognizing its impact not just on the Department of Insurance, but on every state and local government entity whose decisions are subject to two-step (circuit court, then court of appeals) review.

Reasons for Rehearing

This court decides, without the benefit of briefing or argument, the question of which side bears what burden on appeal of an administrative order. That question is important because the party that bears the burden *must* brief the appeal; the other side may remain mute and still prevail. And briefing means, of course, briefing in accordance with the rules, because filing a brief that fails to conform to the rules is tantamount to filing no brief at all.

The general rule allocating burdens in appellate practice and procedure is so obvious that it is seldom mentioned. It can be described in two ways: First, that the party seeking relief as to the decision being reviewed by to the appellate court bears the burdens of briefing and persuasion. Second, that the party who filed the notice of appeal bears those burdens. Normally, of course, the party who is aggrieved by the order on review is the same party who files the notice of

appeal, so both routes normally lead to the same result. But here, the two routes lead to different places. The destination depends on whether the focus is on what decision is before the court, or on the step that led to the appellate court's jurisdiction.

The decision before the court here is the decision of an administrative tribunal, *i.e.*, the decision of the Administrative Hearing Commission (AHC). Rule 84.05(e). *See, e.g., State ex rel. Riverside Pipeline Co. v. Public Serv. Comm'n*, 165 S.W.3d 152, 155 (Mo. banc 2005) ("...in an appeal following judicial review of an administrative agency's decision ..., the appellate court reviews the agency's decision, rather than the circuit court's judgment."); *Missouri Coalition for the Environment v. Herrmann*, 142 S.W.3d 700, 701 (Mo. banc 2004) (same). *See also* Neely, MISSOURI PRACTICE VOL. 20A: ADMINISTRATIVE PRACTICE AND PROCEDURE (West 2001) § 12.43 n. 4. "In other words, a reviewing court owes no deference to the judgment of the lower court." *Id.* at p. 95. Though the decision of the circuit court may be persuasive, to the extent it addresses the questions decided by the agency, it is of no legal significance once the case arrives here.² To "affirm" in a

² Sometimes – most notably when there is a question of constitutionality that falls outside the AHC's jurisdiction, the circuit court's decision goes beyond the

review of an administrative order is to confirm the validity of that order. The appellate court may agree with and even itself adopt the rationale of the circuit court. But it cannot merely affirm a circuit court's decision regarding an administrative order, for the circuit court's order is not the subject of review.

Focusing on the decision actually being reviewed leads to the conclusion that the party aggrieved by an administrative order bears the burden of briefing and persuasion, regardless of the intervening action of the circuit court.

In its decision in this case, this court focuses not on what it is charged to review, but on the steps leading to its jurisdiction. This court's jurisdiction was triggered not by a petition for review of the administrative decision, but by a notice of appeal from the decision of the circuit court. Again, normally, the party filing the notice of appeal is the party aggrieved by the decision before the court, so that party is seeking a reversal and obviously bears the burdens. But here, that party is seeking affirmance.

The normal rule, then, leads to confusion in an appeal of an administrative order; it does not clearly establish where the burdens of briefing and persuasion lie. Thus this court logically turns to the Supreme Court Rules for guidance. But

administrative order.

in doing so, it ignores the results of those rules and the manner in which they have been applied in this court and others.

The first pertinent rule is 84.05(e), the source of the rule that the appellate court reviews the administrative decision, not the circuit court decision. That rule also, significantly, lays out the order of briefing:

If the circuit court reverses a decision of an administrative agency and the appellate court reviews the decision of the agency rather than of the circuit court, the party aggrieved by the agency decision shall file the appellant's brief and reply brief, if any, and serve them within the time otherwise required for the appellant to serve briefs.

The party aggrieved by the circuit court decision shall prepare the respondent's brief and serve it in a time otherwise required for the respondent to serve briefs.

If the court is reviewing the administrative agency decision, then it is logical, at the very least, to have the party attacking that decision open the briefing. After all, were the party defending the decision to brief first, what would they say? Would they have to hypothesize and then defend against every possible attack? That is impractical, if not impossible; only

the party attacking the decision under review can really define the scope of briefing.

That is demonstrated by applying the rule setting out the content of "points relied on." There is a specific rule, of course, for appeals from administrative agency decisions:

Where the appellate court reviews the decision of an administrative agency, rather than a trial court, each point shall:

(A) identify the administrative ruling or action the appellant challenges;

(B) state concisely the legal reasons for the appellant's claim of reversible error; and

(C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.

The point shall be in substantially the following form: "The [name of agency] erred in [identify the challenged ruling or action], because [state the legal reasons for the claim of reversible error, including the reference to the applicable statute authorizing review], in that [explain why, in the context of the case, the legal reasons support the claim of reversible error]."

Rule 84.04(d)(2). In every respect, that rule contemplates that the party drafting the “point” will do what only a party attacking the decision can do: identify the “ruling or action” they challenge, “state the reasons” that “ruling or action” was “reversible error,” and explain why that is so.

This court does not deal with that problem. Instead it insists, suddenly and retroactively, that the burden Rule 84.04(d) imposes on an appellant’s brief must be borne by a party who *prevailed* at the agency level and is entitled by Rule 84.05(e) to file a respondent’s brief to which Rule 84.04(d) does not apply. Compare Rule 84.04 (a) and (f).

But the problem raised by the court’s conclusion may be even more basic than the complications it imposes in the briefing rules. The court recognizes that the party defending the decision being reviewed is not required to brief his case on appeal and may rely upon the presumption of a right judgment in the trial court. Slip op. at 3. *See also Mochar Sales Co. v. Meyer*, 373 S.W.2d 911, 913 (Mo. 1964); *Childs v. Director of Revenue*, 3 S.W. 3d 399, 402 (Mo.App. E.D. 1999). By putting the party who attacks the agency decision into the shoes of the respondent, the court opens the door to a rather bizarre result. The only fixed deadline in Rule 84.05(a) is for the appellant’s brief – the brief filed by the party

aggrieved by the administrative order. Under the court's rationale, that brief never needs to be filed (absent a case-specific order, perhaps a bit like the one this court entered on Sept. 7, 2006), for that party bears no burden of briefing or persuasion. If that brief is never filed, the brief of the party defending the administrative decision never becomes due!

The decision here is inconsistent with this court's own precedent. In *Moto, Inc. v. Board of Adjustment of the City of St. Louis*, 88 S.W.3d 96 (Mo.App. E.D. 2002), this court complained that appellant's brief filed by that party contained an "argumentative" statement of facts "in violation of Rule 84.04(d)," and that "its points relied on do not comply with Rule 84.04(c)." *Id.* at 99 n. 2. If the burden of briefing fell to the party who filed the notice of appeal, the Board of Adjustment, those complaints would be meaningless.

Of course in *Moto*, the briefing errors were not dispositive; the court went on to use its discretion to consider the merits of the administrative order on review. But that has not been true in similar Southern District cases. At least three times, that court has refused to consider appeals or portions of appeals because of briefing deficiencies by the party aggrieved by the administrative order, despite an intervening, contrary circuit court decision. In *Newcomb v.*

Humansville R-IV School District, 908 S.W.2d 821, 832 (Mo.App. S.D. 1995), the court found that “Newcomb’s fourth point [relied on did] not state ‘wherein’ she was deprived of her right to fair and impartial hearing,” and thus that point “preserves nothing for review.” And in *Garrett v. Missouri Department of Social Services*, 57 S.W.3d 916, 918 (Mo.App. S.D. 2001), the court found numerous “fatal defects” in the brief and points relied on, observed that “[b]riefs that fail to substantially comply with Rule 84.04 preserve nothing for appellate review,” and affirmed the administrative order.

More recently, in *Stacy v. Department of Social Services*, 147 S.W.3d 846 (Mo.App. S.D. 2004), the Southern District again held the party aggrieved by the administrative order to the burden of briefing under rule 84.04, rejecting one of that party’s “points” for failure to develop the matter in the argument and holding that it was “deemed abandoned” without worrying about how the circuit court ruled. But perhaps even more important is the Southern District’s unequivocal statement regarding the burden imposed in an administrative order appeal:

A party aggrieved by an administrative decision has the burden of persuasion upon appeal to this court. We presume that the

[Administrative Hearing] Commission's decision is valid, and the burden is the attacking party's to overcome. ... That burden has been described as "heavy."

Id. at 850 (citations omitted). Here, by contrast, this court has held that the burden on the party aggrieved by the administrative order – Versatile Management – is, rather than "heavy," in essence nonexistent.

This court is not bound, of course, by the decision of the Southern District. But because its decision cannot be reconciled with this court's own practice and precedent and with the practical application of the Supreme Court's rule reflected in the Southern District's rulings, it should rehear the matter – and take up the merits of the administrative order before it.³

Additional Reasons for Transfer

The conflict between the court's decision and the usual and reasonable application of the Supreme Court's rules, along with the conflict between the

³ We do not suggest that the court is required to consider briefs that do not conform to Rule 84.04. Indeed, the court here could presumably find errors in the briefs of both sides, and strike or disregard them both. The results of such a step are dependant, of course, on the burden question addressed here.

decision and those of the Southern District, counsel strongly in favor of transfer, if the court chooses not to grant rehearing. But there is more reason for transfer.

The court's decision was entirely without precedent, in this or any other Missouri appellate court. It was made without the benefit of briefing or argument. And it affects not just the Department of Insurance, Financial Institutions, and Professional Registration, but every state agency that renders decisions that are initially reviewed in the circuit courts. It affects the hundreds of local governments and other political subdivisions (like the Board of Adjustment in *Moto*) that also make decisions reviewed first in the circuit courts.

Perhaps the only effective solution for the problem the court discerns is a change in the Supreme Court Rules. But if so, that is simply another reason to transfer, sending the question to the only court that created and can amend those rules.

CONCLUSION

For the reasons stated above, the court should rehear this appeal or, in the

alternative, transfer it to the Missouri Supreme Court.

Respectfully submitted,

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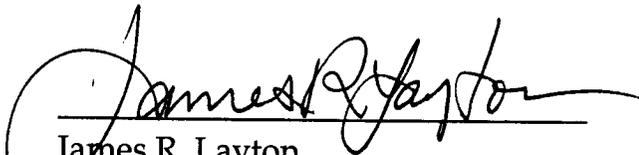
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed,
postage prepaid, via United States mail, on this 25th day of May, 2007, to:

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James R. Layton

State Solicitor