A corporation can only appear by an attorney in Missouri!

181 S.W.3d 129
CBD ENTERPRISES, INC., Plaintiff-Respondent,
v.
BRACO MANUFACTURING, INC., Defendant-Appellant.
No. 26843.
Missouri Court of Appeals, Southern District, Division Two.
October 28, 2005.
Application for Transfer Denied November 21, 2005.
Application for Transfer Denied January 31, 2006.

Page 130

John W. Rourke, Charles R. Vantine, St. Louis, for appellant.

John W. Grimm, Limbaugh, Russell, Payne & Howard, Cape Girardeau, for respondent.

KENNETH W. SHRUM, Presiding Judge.

CBD Enterprises, Inc. ("Plaintiff") obtained a default judgment against Braco Manufacturing, Inc. ("Defendant") on a breach of contract claim. Defendant moved to set aside the judgment (per Rule 74.05(d)), alleging it had a meritorious defense to Plaintiff's claim and there was good cause to set aside the judgment. The motion was overruled and Defendant appeals, charging the trial court abused its discretion by not setting aside the judgment. This court agrees. We reverse and remand with directions.

On October 15, 2003, Plaintiff sued Defendant, claiming that Defendant breached its contract with Plaintiff by (a) refusing to manufacture diapers for Plaintiff according to original specifications, and (b) "refus[ing] to refund the purchase price to [Plaintiff]."

Defendant's president, Jack Braha ("Braha") was served with the suit documents and summons on December 9, 2003. However, Braha did not hire a lawyer to answer Plaintiff's suit at that point. Instead, he placed a call to Karen Turley ("Turley"), circuit court clerk of Mississippi County, Missouri, on January 5, 2004, and then faxed a letter to the circuit clerk on January 6, 2004. The letter, written on Defendant's letterhead, was denominated "Reply to Summons and Petition."

The two versions of what was said in the Braha to Turley telephone call on January 5, 2004, are as follows. In a post-judgment affidavit, Braha swore he asked Turley for "instructions on answering Plaintiff's Petition." Continuing, Braha testified Turley "instructed me to respond, i.e., answer the allegations set forth by Plaintiff, but

made no mention of the requirement that corporations must appear by attorney." Braha concluded this part of his affidavit as follows: "I told Clerk Turley that I would be answering Plaintiff's Petition via letter on behalf of [Defendant]," but "[h]ad I known that the corporation was required to appear through counsel, [Defendant] would have retained Missouri counsel."

Turley's affidavit (also part of the post-judgment filings) acknowledged talking with Braha on January 5. She testified:

"During our conversation, I told Mr. Braha that he needed to file an Answer to the Petition. Further, I told him that he would need to get an attorney. Mr. Braha insisted that he did not want to go to the expense of hiring an attorney at that time. He stated that he wanted to file an Answer himself. I advised Mr. Braha that I would file-stamp and place in the Court file anything that he sent. I also told him that I did not know if that would be a legal response on behalf of his company." (Paragraph numbers omitted.)

Braha's January 6 letter was a two-page, single-spaced document directed to

"Judge David Andrew Dolan, c/o Karen Turley." It made reference to the style of the case, the case number, and recited that a copy had been sent to John Grimm ("Grimm"), Plaintiff's attorney. In the body thereof, Braha alleged he had talked with Grimm after he (Braha) had received the summons; that Grimm had then faxed documents to Braha which Grimm claimed supported Plaintiff's claims. Continuing, Braha's letter recited that after looking at the documents received from Grimm, he decided "we are all looking at the same evidence [and] I will resubmit these same documents to support my answers below." The balance of the letter alleged facts supportive of Defendant's claim that it had not breached the contract.

A docket sheet entry on January 7, 2004, recited: "Answer Filed (copy mailed by Defendant to Plaintiff's attorney) Filed by BRACO MANUFACTURING INC."

On February 10, 2004, Grimm filed a "Motion For Default Judgment" against Defendant, alleging that only a lawyer could have answered on Defendant's behalf; that since Braha was not a lawyer, the letter filed by him did not qualify as a responsive pleading or answer; consequently, Defendant was in default. Accompanying the motion was an affidavit by Lucille R. Casell, which stated Plaintiff had damages totaling $68,897.76 because of Defendant's breach of the contract. Neither Defendant nor Braha were notified of these filings nor were they notified in advance of Grimm's court appearance on February 10, 2004. Judgment for $68,897.76 was entered against Defendant on that date.

On March 5, 2005, Defendant moved to set aside the judgment, relying upon Rule 74.05(d) as its basis. Both in its motion and Braha's affidavit, Defendant set out facts that it claimed raised a meritorious defense and supported a "good cause shown" finding. Defendant's motion was denied and this appeal followed.

Rule 74.05(d) applies specifically to default judgments and requires that a motion to set aside shall be for "good cause shown" which includes a mistake or conduct not intentionally designed to impede the judicial process. *Billingsley v. Ford Motor Co.*, 939 S.W.2d 493, 497 (Mo.App.1997). Relief via this rule must be sought "within a reasonable time not to exceed one year after the entry of default judgment." "Good cause includes a mistake or conduct that is not intentionally or recklessly designed to impede the judicial process." *Id.*

Defendant's first point relied on maintains, *inter alia,* that the trial court committed reversible error by not setting aside the default judgment because Defendant's motion stated facts that established the good cause element of a Rule 74.05(d) case.[1]

The applicable scope of appellate review is stated *Keltner v. Lawson,* 931 S.W.2d 477 (Mo.App.1996):

"`The trial court has discretion to set aside a default judgment, and its decision will not be interfered with unless an abuse of discretion is found. *Bell v. Bell,* 849 S.W.2d 194, 197 (Mo.App.1993); *Moore v. Dahlberg,* 810 S.W.2d 730, 732 (Mo.App.1991). The discretion not to set aside a default judgment, however, is a good deal narrower than the discretion to set one aside. *LaRose v. Letterman,* 890 S.W.2d [347] at 350 [Mo.App.1994].

Thus, appellate courts are more likely to reverse a judgment which fails to set aside a default judgment than one which grants that relief. *Moore v. Dahlberg,* 810 S.W.2d at 732. This is because of the law's distaste for default judgments and its preference for trials on the merits. *See LaRose v. Letterman,* 890 S.W.2d at 350; *Gibson v. Elley,* 778 S.W.2d [851] at 854 [Mo.App.1989].'"

Id. at 479 (quoting *Myers v. Pitney Bowes, Inc.,* 914 S.W.2d 835, 838 (Mo.App.1996)).

In adopting Rule 74.05(d), the Missouri Supreme Court "considerably broadened" the discretion of the trial court to forgive the mishandling of legal documents. *Myers,* 914 S.W.2d at 839[5]. Under the current version of this rule, "[w]here a reasonable doubt exists as to whether the conduct was intentionally designed or irresponsibly calculated to impede the work of courts, it should be resolved in favor of good faith." *Id.* at 839.

This court has noted that although the good cause element of Rule 74.05(d) evades "`precise definition,'" it "`obviously intends a remedial purpose and is applied with discretion to prevent a manifest injustice or to avoid a threatened one.'" *In re Marriage of Williams,* 847 S.W.2d 896, 900 (Mo.App.1993) (quoting *B L C(K) v. W W C,* 568 S.W.2d 602, 605 (Mo.App.1978)).

"Good cause" under Rule 74.05 for failure to timely file an answer was addressed in *Myers:*

"`The good cause requirement of Rule 74.05(d) is satisfied by proving that the party in default did not recklessly or intentionally impede the judicial process. *Great S. Sav. & Loan* Ass'n v. Wilburn, 887 S.W.2d 581, 584 (Mo.banc 1994); LaRose v. Letterman, 890 S.W.2d at 351; Plybon v. Benton, 806 S.W.2d 520, 524 (Mo.App. W.D.1991). While the prior version of Rule 74.05 was interpreted to mean that a defendant who negligently failed to file a timely answer should be denied relief, the amended rule clarified that `"good faith mistakes do constitute good cause, and a default judgment can be vacated *even if the movant has negligently failed to file a timely answer.*"' Newton v. Manley, 824 S.W.2d 522, 524 (Mo.App. S.D.1992) (quoting Laughrey, *Judgments — The New Missouri Rule,* J.Mo.Bar 11, 15 (Jan.-Feb.1988))."

914 S.W.2d at 839[6].

When analyzing the term "reckless" in the Rule 74.05(d) context, this court has looked to the dictionary definition: "`[R]eckless' is `lacking in caution: deliberately courting danger.' WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 1896 (1971)." *Williams,* 847 S.W.2d at 900. In *Williams,* we also impliedly recognized the applicability of the RESTATEMENT[2] definition of "reckless" in a Rule 74.05 case:

"`Recklessness differs from negligence also in kind. A person is negligent, if his inadvertence, incompetence, unskillfulness or failure to take precautions precludes him from adequately coping with a possible or probable future emergency.' RESTATEMENT § 500, Comment g. To be reckless, a person makes a conscious choice of his course of action, `either with knowledge of the serious danger to others involved in it or with knowledge of the facts which would disclose the danger to any reasonable man.'"

Id. (quoting Gibson by Woodall v. Elley, 778 S.W.2d 851, 854 (Mo.App.1989) and Farm Bureau Town & Country Ins. Co. v. Turnbo, 740 S.W.2d 232, 235 (Mo.App.1987)).

Page 133

Based on the facts of this case, the trial court's implicit conclusion that Defendant failed to show good cause is erroneous. In so deciding, we examine Braha's behavior and conduct.

After Braha received the summons and petition, he did not ignore the directive in the summons, i.e., that Defendant "file [its] pleading to the petition . . . within 30 days after receiving the summons." The uncontroverted evidence is that he contacted Turley four days before a responsive pleading was due. His purpose was to get "instructions on answering Plaintiff's Petition." Understandably, Turley was guarded in her response. However, the answers she gave Braha were, in part, couched in terms of what Braha should do, not what Braha should do for the corporation. For example, she told Braha that "*he* needed to file an [a]nswer to the [p]etition[ ]" and that "*he* would need to get an attorney." (Emphasis supplied.) When Braha voiced his intent to file an answer himself, Turley's response was that she

would "file-stamp and place in the file anything that [Braha] sent[,]" but cautioned that she "did not know if that would be a legal response on behalf of the company."

Evidence of Turley's comments to Braha may well have supported a finding of negligence, namely, that Braha did not adequately cope with the possibility of the case going into default when, in the face of Turley's remarks, he did not check with a lawyer or otherwise determine if he could file an answer on behalf of Defendant. *See* RESTATEMENT, n. 2 above; *see also Billingsley,* 939 S.W.2d at 499; *Williams,* 847 S.W.2d at 900; *Gibson,* 778 S.W.2d at 854. This court does not agree, however, that such evidence, even when considered in light of Turley's cautionary remark that she "did not know if [Braha's letter] would be a legal response on behalf of the company[,]" supports a finding that Braha deliberately courted danger or consciously chose a course of action "either with knowledge of the serious danger to [Defendant] . . . or with knowledge of . . . facts which should disclose the danger to any reasonable man." Nothing in Turley's testimony can reasonably be interpreted as importing knowledge to Braha that a corporation can only appear in legal proceedings though an attorney and that filings by him on behalf of Plaintiff might be considered "untimely filed and null and void." *See Reed v. Labor and Indus. Relations Comm'n.,* 789 S.W.2d 19, 23 (Mo.banc 1990); *Stamatiou v. El Greco Studios, Inc.,* 935 S.W.2d 701, 702 (Mo.App.1996). We are led to this view, in part, by what we earlier noted, i.e., Turley first talked with Braha in terms of what Braha should do, not what Braha should do for the corporation. Equally significant is Braha's testimony — not directly controverted by Turley's affidavit or any other evidence — that he did not know nor was he told by Turley that "corporations must appear by attorney." The record is silent on whether Defendant had been in other litigation, and if so, whether Braha had ever been rebuffed or precluded from filing pleadings on behalf of Defendant.

In sum, there are no facts, either generally or peculiar to this case, that should have disclosed to Braha, when measured by the "reasonable man" standard, that a default judgment might occur if he, rather than a lawyer, answered Plaintiff's petition. Under the circumstances, reasonable doubt exists as to whether Braha's filing an answer on behalf of Defendant was intentionally designed or irresponsibly calculated to impede the work of the courts. Consequently, the trial court should have resolved all doubts on this issue in favor of a finding of good faith. *Billingsley,* 939 S.W.2d at 498. We are persuaded Defendant did not impede the judicial process by reason of Braha's behavior and that the

trial court abused its discretion when it did not prevent a manifest injustice by setting aside the default judgment. *See Wilburn,* 887 S.W.2d at 584; *Billingsley,* 939 S.W.2d at 499; *Williams,* 847 S.W.2d at 900.

In so holding, we do not ignore cases cited by Plaintiff to support its argument for affirmance, i.e., *Krugh v. Hannah,* 126 S.W.3d 391 (Mo.banc 2004), and *Snelling v. Roy's Transmission, Inc.,* 144 S.W.3d 919 (Mo.App.2004). However, factual dissimilarities in the cases make them inapposite as support for Plaintiff's position. In *Krugh,* the court reversed a judgment that set aside a default because (a) there was

uncontradicted evidence that four default judgments had been taken against the defaulting party or its registered agent in the three-year period before the subject case; (b) the plaintiff's lawyer gratuitously notified the defaulting party's registered agent "on August 10 that [the defendant corporation] was already several weeks in default, [yet] she still waited another 13 days to contact the insurer[;]" and (c) defendant took absolutely no action to defend itself in the thirty-day period before default. 126 S.W.3d at 393. Those are not the facts here. This record has no evidence of previous disregard of the court system by Braha or Defendant; there was no warning of Defendant or Braha by Plaintiff's lawyer; and Defendant did take some action to defend itself, chiefly via the letter/answer filed on its behalf by Braha.

The *Snelling* court also reversed a judgment that set aside a default judgment, but did so because (a) the defaulting party did not verify its Rule 74.05(d) motion nor otherwise support it by affidavit or sworn testimony, and (b) the defaulting party "`failed to notice' that a responsive pleading was required, thereby admitting that [the party served] failed to read at least part of the summonses." 144 S.W.3d at 921. The latter conduct was held to be conduct "recklessly designed to impede the judicial process." *Id.* at 921[2]. Again, those are not the facts of this case.

For the reasons explained, we hold that Defendant presented facts sufficient to constitute good cause for its failure to appear and defend as required by Rule 74.05(d).

For the reasons given above, we conclude Defendant's first point has merit.[3] The trial court abused its discretion and erred in not setting aside this default judgment. The trial court's judgment refusing to set aside the default judgment is reversed. The case is remanded and the trial court directed to set aside the default judgment and to fix a reasonable time in which Defendant shall be permitted to file an answer.

GARRISON and BARNEY, JJ., concur.

Notes:

1. During oral argument on appeal, Plaintiff conceded Defendant had a meritorious defense and that Defendant's Rule 74.05(d) motion was timely filed. Consequently, the only issue on appeal is whether the trial court erred when it implicitly ruled Defendant had not proven the good cause element.

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935 S.W.2d 701
Dian STAMATIOU, Respondent,
v.
EL GRECO STUDIOS, INC., Appellant.
No. WD 52341.

Missouri Court of Appeals,
Western District.
Oct. 22, 1996.
Motion for Rehearing and/or Transfer to
Supreme Court Denied Nov. 26, 1996.
Application to Transfer Denied
Jan. 21, 1996.

Allen Russell, Kansas City, for appellant.

Keith Drill, Kansas City, for respondent.

SPINDEN, Judge.

El Greco Studios, Inc., appeals the circuit court's denial of its motion to vacate and set aside a judgment entered in an unlawful detainer action. We remand with instructions.

Dian and Dimitri Stamatiou [1] divorced in August 1989. Among the marital assets distributed by the circuit court were a parcel of commercial real estate and the corporation which had previously been doing business there. The circuit court awarded Dian the real estate and Dimitri sole ownership of El Greco Studios, Inc. Several appeals followed. While the first appeal was pending, Dian brought an unlawful detainer action against El Greco Studios. In July 1991, the circuit court issued an order directing El Greco Studios to make rental payments into the court registry and placed the unlawful detainer case on the court's inactive docket pending resolution of the appeals from the dissolution decree. Following resolution of the divorce appeals, the unlawful detainer action was tried in 1993, and the circuit court found for Dian and against El Greco Studios. El Greco Studios appealed, and this court affirmed the circuit court's judgment. Stamatiou v. El Greco Studios, Inc., 898 S.W.2d 571 (Mo.App.1995).

In August 1994, Dimitri asked the circuit court to vacate and to set aside the judgment. Dimitri purported to be acting on El Greco Studios' behalf as its "Attorney Pro Se." In January 1996, the circuit court denied El Greco's motion. El Greco Studios appealed.

El Greco Studios complains that it was not properly notified that a senior judge had been assigned to its case and that it was denied its right to seek a change of judge. It

also complains that the trial court did not have jurisdiction to enter its January 1996 order because the judge who entered the order was retired and was not properly assigned to the case.

We do not reach any of El Greco Studios' points on appeal. The record shows that El Greco Studios' motion to vacate was not filed by a licensed attorney acting on

behalf of the corporation; therefore, the motion was not properly before the circuit court.

A corporation cannot appear in a legal proceeding except through an attorney. Reed v. Labor and Industrial Relations Commission, 789 S.W.2d 19, 21 (Mo. banc 1990); Property Exchange & Sales, Inc. v. Bozarth, 778 S.W.2d 1, 2 (Mo.App.1989); Credit Card Corporation v. Jackson County Water Company, 688 S.W.2d 809, 811 (Mo.App.1985); Dobbs Houses, Inc., v. Brooks, 641 S.W.2d 441, 443 (Mo.App.1982).

In Reed, the Missouri Supreme Court noted:

A corporation is not a natural person. It is an artificial entity created by law. Being an artificial entity it cannot appear or act in person. It must act in all its affairs through agents or representatives. In legal matters, it must act, if at all, through licensed attorneys .... (Emphasis added).

* * * * * *

Since a corporation cannot practice law, and can only act through the agency of natural persons, it follows that it can appear in court on its own behalf only through a licensed attorney. It cannot appear by an officer of the corporation who is not an attorney, and may not even file a complaint except by an attorney, whose authority to appear is presumed; in other words, a corporation cannot appear in propria persona. A judgment rendered in such a proceeding is void. (Emphasis added).

789 S.W.2d at 21 (quoting Clark v. Austin, 340 Mo. 467, 101 S.W.2d 977, 982-83 (1937))

An attorney did not file El Greco Studios' motion. Dimitri, purporting to act on behalf of the corporation as an "Attorney Pro Se" filed it. Dimitri was not a party to the action or an attorney. He had no authority to act on El Greco Studios' behalf in any legal proceedings.

"[A] corporation cannot act in legal matters or maintain litigation without the benefit of an attorney." Property Exchange, 778 S.W.2d at 3. Filings by a lay person on behalf of a corporation will be considered untimely filed, null and void. Reed, 789 S.W.2d at 23.

The motion to vacate, therefore, was a nullity and was not properly before the circuit court. El Greco Studios' motion was not entitled to consideration, and the circuit court should have dismissed it without considering its allegations. We, therefore, remand with instructions that the circuit court vacate its order of January 1996 and that it dismiss El Greco Studios' motion for lack of jurisdiction to consider it.

ULRICH, C.J., P.J., and EDWIN H. SMITH, J., concur.

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1 For the reader's ease, we refer to the parties by their first names

789 S.W.2d 19
Marjorie REED, Plaintiff-Appellant,
v.
LABOR AND INDUSTRIAL RELATIONS COMMISSION and K-Mart Corporation, Defendants-Respondents.
No. 71882.
Supreme Court of Missouri,
En Banc.
March 13, 1990.
As Modified on Denial of Rehearing May 15, 1990.

Dennis J. Capriglione, Nina Balsam, Legal Services of Eastern Missouri, Inc., St. Louis, for plaintiff-appellant.

Maurice B. Graham, Fredericktown, amicus curiae (Mo. Bar).

Ronald F. Harris, Labor and Industrial Relations Com'n, Sandy Bowers, Chief Counsel, Division of Employment Sec., Jefferson City, for defendants-respondents.

John J. Moellering, Jeffrey B. Hunt, Ronald A. Norwood, St. Louis, for K-Mart Corp.

James M. Talent, St. Louis, amicus curiae (Associated Industries of Missouri).

BILLINGS, Judge.

The issue in this case is whether the Labor and Industrial Relations Commission has jurisdiction of an appeal filed on behalf of a corporate employer by a non-attorney employee of the corporation. The court of appeals concluded the appeal was tainted by the corporation's unauthorized practice of the law, the appeal was null and void, and the Commission's denial of unemployment benefits could not stand; further, that the appeal be dismissed. The cause is retransferred to the court of appeals for decision on the merits.

K-Mart Corporation is a Michigan corporation doing business in Missouri. Marjorie Reed was employed in one of K-Mart's stores in the St. Louis area. She was discharged by K-Mart Corporation and filed a claim for unemployment benefits with the Missouri Division of Employment Security ("Division"). At an informal hearing, a Division deputy found Reed was discharged because of tardiness, which the deputy determined was not misconduct connected with work, and granted her benefits.

R.L. Kalajian, "unemployment compensation manager" for K-Mart Corporation, International Headquarters, Troy, Michigan, sent a letter to the Division requesting

an appeal to the Division's Appeals Tribunal. The request was granted following a formal hearing before a referee. No attorney appeared at the hearing on behalf of K-Mart. The deputy's determination was affirmed by the referee. Again by way of letter from R.L. Kalajian, the decision was appealed to the Labor and Industrial Relations Commission ("Commission"). A majority of the Commission found in favor of K-Mart Corporation and denied Reed benefits. One Commission member dissented, asserting as one of his grounds that K-Mart Corporation must act through an attorney when appealing to the Commission. He argued that because Kalajian was not an attorney, the Commission had no jurisdiction to hear the merits.

Reed appealed the Commission's denial of benefits, which was affirmed by the circuit court. She appealed that decision and after the court of appeals' dismissal, this Court accepted transfer of the case.

This Court is the final arbiter in determining what constitutes the practice of law, Hulse v. Criger, 363 Mo. 26, 247 S.W.2d 855, 857 (banc 1952), and the General Assembly may not interfere with this inherent power. In re Thompson, 574 S.W.2d 365, 367 (Mo. banc 1978). However, the General Assembly has provided penalties for acts determined to be the unauthorized practice of law. Section 484.010, et seq. RSMo, 1986. [1]

K-Mart Corporation asserts its actions do not fall within the practice of law. For support, they refer to § 288.200.1 RSMo, 1986, which allows any "party" to file an application requesting review by the Commission of an Appeals Tribunal decision. They contend that the informal nature of the Commission's review reinforces their interpretation of § 288.200.1. In addition, K-Mart Corporation asserts that the

mere act of filing a petition for review does not rise to the level of active representation or the holding out of the corporate employee to the public as capable of performing legal acts. Liberty Mutual Insurance Co. v. Jones, 344 Mo. 932, 130 S.W.2d 945 (banc 1939); Hulse v. Criger, 247 S.W.2d at 862.

The law does not treat individuals and corporations equally. The law allows an individual to bear the risk that representation without an attorney may entail. Natural persons may represent themselves in situations which, if done for someone else, would constitute the practice of law. Clark v. Austin, 340 Mo. 467, 101 S.W.2d 977, 982 (1937). Unlike individuals, corporations are not natural persons, Clark v. Austin, 340 Mo. 467, 101 S.W.2d at 982, but are creatures of statute. Businesses operating in corporate form are entitled to certain benefits that are denied to others. In addition to benefits, however, corporations also have certain restrictions placed upon them. One such restriction in Missouri is that a corporation may not represent itself in legal matters, but must act solely through licensed attorneys. Liberty Mut. Ins. Co. v. Jones, 130 S.W.2d at 955. Clark v. Austin, 101 S.W.2d at 982, the Court held:

[O]ne is engaged in the practice of law when he, for a valuable consideration ... appears in a representative capacity as an advocate in proceedings pending or prospective, before any court, commissioner, referee, board, body, committee, or

commission constituted by law or authorized to settle controversies, and there, in such representative capacity, performs any act or acts for the purpose of obtaining or defending the rights of their clients under the law.

This definition encompasses a broad range of activities in which a non-attorney corporate employee may not engage on behalf of the corporation. It is the character of the acts done, and not the place where they are committed, that constitutes the decisive factor in determining whether the acts fall within the practice of law. Hoffmeister v. Tod, 349 S.W.2d 5, 13 (Mo. banc 1961).

Clark v. Austin, 101 S.W.2d at 982, this Court held that lay railroad employees could not represent persons before the Public Service Commission. The employees were appearing at hearings, prepared and filed pleadings, gave advice as to certain facts to establish, and cross-examined witnesses. The Court held this was the unauthorized practice of law, saying:

The law recognizes the right of natural persons to act for themselves in their own affairs, although the acts performed by them, if performed for others, would constitute the practice of law. A natural person may present his own case in court or elsewhere, although he is not a licensed lawyer. A corporation is not a natural person. It is an artificial entity created by law. Being an artificial entity it cannot appear or act in person. It must act in all its affairs through agents or representatives. In legal matters, it must act, if at all, through licensed attorneys.... (Emphasis added).

* * * * * *

Since a corporation cannot practice law, and can only act through the agency of natural persons, it follows that it can appear in court on its own behalf only through a licensed attorney. It cannot appear by an officer of the corporation who is not an attorney, and may not even file a complaint except by an attorney, whose authority to appear is presumed; in other words, a corporation cannot appear in propria persona. A judgment rendered in such a proceeding is void. (Emphasis added).

Clark v. Austin, 101 S.W.2d at 982-83.

Hoffmeister v. Tod, 349 S.W.2d at 17, attending and participating in hearings before the Division of Employment Security and the Division of Workers' Compensation and advising other employees as to their rights under certain laws were held to be the unauthorized practice of law when performed by non-attorney corporate employees.

The Court also held a contract void because the contract allowed a non-attorney, self-appointed "rate expert" to transact legal business for clients in state and federal

courts. Curry v. Dahlberg, 341 Mo. 897, 110 S.W.2d 742, 746-47, 112 S.W.2d 345 (banc 1937). See also Property Exchange & Sales, Inc., (PESI) by Jacobs v. Bozarth, 778 S.W.2d 1 (Mo.App.1989) (dismissal upheld on grounds that a non-attorney corporate officer assigned a corporation's claims cannot file and maintain an action without the representation of a duly licensed attorney); Credit Card Corporation v. Jackson County Water Co., 688 S.W.2d 809 (Mo.App.1985) (a brief filed by a non-attorney on behalf of a corporation was held void and required dismissal of the corporation's appeal); Dobbs Houses, Inc. v. Brooks, 641 S.W.2d 441 (Mo.App.1982) (upholding a regulation prohibiting a non-attorney employee from representing a corporation before the Missouri Commission on Human Rights while allowing an individual to represent him/herself).

The initial claim, objected to by K-Mart Corporation's local personnel employee Kathy Meinhardt, was decided by the Division deputy in employee Reed's favor. K-Mart Corporation's non-attorney employee Kalajian appealed the decision to the Appeals Tribunal by letter. On November 17, 1986, a second letter was sent by Kalajian from the Michigan headquarters, requesting the Commission review the decision of the Appeals Tribunal.

On the Court's own motion, pursuant to Rule 81.12(e), the Court ordered the record supplemented. The supplemental record disclosed a letter dated January 8, 1987, from Kalajian to the Commission informing them K-Mart Corporation had received the brief filed by Reed's attorney. Kalajian explicitly stated that the letter was the employer's (K-Mart Corporation's) written response to the employee's brief. The letter then set forth the reasons K-Mart Corporation believed the Appeals Tribunal was in error and requested a reversal. Although presented in letter form, in substance this letter represented a brief filed by a non-attorney employee for K-Mart Corporation. A copy of the application for review and the letters concerning the same sent by Kalajian are attached to this opinion as an appendix.

The facts thus presented demonstrate the level of activity which Kalajian, the non-attorney employee, represented the corporation before a body constituted by law to settle controversies. Sections 288.190, 288.200, 288.210 RSMo, 1986. Respondents assert the letters were merely ministerial acts, which do not constitute the practice of law or law business. This Court disagrees. Employee Kalajian's actions fall squarely within the definition set out above. Kalajian, representing K-Mart Corporation, advocated the corporation's position that Reed was discharged because of work misconduct, and asserted Reed had no right to receive unemployment benefits.

The Court finds that submitting the application for review to the Commission by a non-attorney employee on the corporation's behalf constitutes the unauthorized practice of law. "Misconduct connected with work" was characterized as having a specific legal meaning in the decision of the Commission, also a respondent in this case, and the Appeals Tribunal referee. Ritch v. Industrial Com'n., 271 S.W.2d 791, 793 (Mo.App.1954); Laswell v. Industrial Com'n. of Missouri, etc., 534 S.W.2d 613, 616 (Mo.App.1976). Non-attorney Kalajian, in his representative capacity for K-Mart Corporation, filed an application for review with the Commission and appeared by letter before the Commission advocating K-Mart Corporation's legal position as to

the meaning of "misconduct connected with work." Through his letters, Kalajian sought to defend the corporation's rights under the law.

The Court finds the statutes require the applicant to assert facts and legal theories supporting reversal, which requires some degree of legal skill and knowledge. The statutes also recognize the different degree of legal skill and knowledge required in hearings of the Appeals Tribunal and beyond. When a deputy receives a claim for unemployment benefits that involves a complex question of law or fact, the deputy, without making a decision and with the director's approval, may refer the claim directly to the Appeals Tribunal for a hearing. Section 228.070.2 RSMo, 1986.

Page 23

The Court finds the statutes require the applicant to assert facts and legal theories supporting reversal, which requires some degree of legal skill and knowledge. The statutes also recognize the different degree of legal skill and knowledge required in hearings of the Appeals Tribunal and beyond. When a deputy receives a claim for unemployment benefits that involves a complex question of law or fact, the deputy, without making a decision and with the director's approval, may refer the claim directly to the Appeals Tribunal for a hearing. Section 288.070.2 RSMo, 1986. The Court finds that filing the application for review to the Commission constitutes assertions of legal rights. It is axiomatic that a corporation must act through an attorney in all legal matters. Clark v. Austin, 101 S.W.2d at 982; Property Exch. & Sales v. Bozarth, 778 S.W.2d at 3; Dobbs Houses, Inc. v. Brooks, 641 S.W.2d at 443.

Respondents argue that the plain meaning of the word "party" in § 288.200.1 means "any party" and should be enforced as such. They cite language in the agency's regulation, 8 C.S.R. 20-4 (1988), as support. The regulation allows any "interested party" to file an application for review to the Commission. An interested party is defined as a claimant, any other person or employing unit filing a timely protest under § 288.070.1, any person, employer or employing unit having a legal interest in any determination made under § 288.130 and any assessment under § 288.160, or the Division of Employment Security. 8 C.S.R. 20-4(3). The regulation also states:

Any individual may appear for him/herself in any hearing. Any partnership may appear by any of its members. An officer of a corporation or association or any other duly authorized person may attend a hearing on an application to which the corporation or association is an interested party and may be a witness in the hearing. Any party may be represented by an attorney-at-law and no one who is not an attorney may appear in a representative capacity. (Emphasis added).

8 C.S.R. 20-4(8). Respondents argue this section of the regulation only applies at the hearing phase. Only at that point are corporations distinguished from other business entities in terms of who may represent them. By allowing other applications to be filed by corporate non-attorneys in other cases, respondents argue the

Commission has interpreted the statute and regulation the same as K-Mart Corporation.

The Court reads the regulation as consistent with recognized law that a corporation may not appear except through an attorney in legal proceedings. The regulation recognizes that individuals and partnerships may appear for themselves but, because they are an artificial entity, corporations or associations must be represented by an attorney. Clark v. Austin, 101 S.W.2d at 982. However the Commission may have interpreted the statutes or regulation in the past, the Court now holds that allowing a non-attorney corporate employee to file an application for review with the Commission is the unauthorized practice of law. The right to conduct business in corporate form also includes the obligations to do so in a lawful manner.

Corporations may have become complacent in their duty to act through an attorney in matters before the Commission, due in part to the Commission's laxness in enforcing this duty. Compromising those applications now pending with the Commission, where corporations have relied on the Commission for guidance, would be inequitable and unjust. Therefore, the Court will not disturb any filings by corporate non-attorneys which are currently pending before the Commission. This is consistent with prior practice when a decision effects unanticipated procedural or substantive changes. Gustafson v. Benda, 661 S.W.2d 11 (Mo. banc 1983). As to new filings of applications for review, corporate employers must act by and through licensed Missouri attorneys in all proceedings before the Commission. Any such filings by a lay person on behalf of a corporate employer will be considered untimely filed and null and void. The Commission, as a part of its duty to insure the

law is not further violated, should reject attempted filings of applications for review on behalf of corporations by non-lawyers.

Inasmuch as the application for review was filed in accordance with then prevailing practices, and not rejected by the Commission, it is appropriate to retransfer this case to the court of appeals for consideration of the merits of the appeal.

BLACKMAR, C.J., and ROBERTSON, HIGGINS and COVINGTON, JJ., concur.

HOLSTEIN, J., concurs and concurs in separate opinion filed.

RENDLEN, J., concurs and concurs in separate concurring opinion of HOLSTEIN, J.

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778 S.W.2d 1
PROPERTY EXCHANGE & SALES, INC., (PESI), by Richard JACOBS, Assignee, Plaintiff-Appellant,

v.
William BOZARTH, et al., Defendants-Respondents.
No. 56106.
Missouri Court of Appeals,
Eastern District,
Division One.
Sept. 12, 1989.
Motion for Rehearing and/or Transfer
to Supreme Court
Denied Oct. 10, 1989.

Richard Jacobs, St. Louis, for plaintiff-appellant.

Richard C. Bresnahan, Clayton, for defendants-respondents.

SIMEONE, Senior Judge.

Cutting through the numerous issues raised by the parties as to whether certain claims are assignable, the precise issue to be determined in this proceeding is whether an assignee, not a licensed attorney, who is an officer of the corporation which assigned the claims to the officer-assignee to recover a rent-security deposit, may maintain litigation in the courts of this state when the assignor-corporation could not itself maintain suit. We hold that the assignee-officer of the corporation, under such an assignment, cannot file and maintain an action under circumstances where the corporation itself is precluded from so doing without representation by a licensed attorney.

On November 18, 1988, Property Exchange & Sales, Inc. (PESI), in its corporate name, filed a petition for damages in five counts. The petition alleged that PESI is a Missouri corporation in good standing, that the defendants, William T. Bozarth, et al. are non-resident trustees/owners of property located in St. Louis County known as Town & Four Villages. The first count alleged that the defendants made certain fraudulent representations to it that they would return $520 as a security deposit at the termination of a lease. The allegations were that certain premises were leased to a third party prior to December 24, 1984, that the third party wished to sublet the premises and that the plaintiff--PESI--was willing to "take over" said lease. The petition alleged that defendants agreed and represented that PESI could "take over" the premises with a new lease and that if PESI would return the premises in the same condition it was, the entire security deposit of $520 would be given to PESI, that these representations were false and relied upon by PESI, and that the plaintiff was damaged in the amount of $520 plus interest of $421.27.

Count II alleged similar facts but based upon a theory of violations of the Merchandising Practices Act, ch. 407, RSMo., 1986. Count III was based upon a theory of wrongful failure to return a security deposit pursuant to § 535.300, R.S.Mo., 1986. Count IV alleged a breach of contract theory for failing to return the deposit, and Count V alleged a theory of prima facie

tort. [1]

Plaintiff prayed for a return of the security deposit, or at least the undisputed amount of the deposit, $384.00, without condition and prayed for punitive damages in the amount of $10,000,000.

On November 21, 1988, PESI filed a "corrected" petition, and on December 23, 1988 filed an amended petition styled "PESI v. William T. Bozarth," et al. In this amended petition, it was additionally alleged that on November 1, 1988, "said Plaintiff assigned to R. Jacobs all of its right title and interest to any causes of action it has against the defendants jointly and severally."

An assignment, dated November 1, 1988, although not attached as part of the petition, but located in the legal file, indicates that PESI assigns to R. Jacobs, an officer of the corporation all of its right, title and interest to any and all causes of action and claims that PESI has as a result of the failure to return the security deposit. The assignment was signed by PESI by R. Jacobs, President as assignor, and by R. Jacobs as assignee.

On December 30, 1988, the defendants moved to dismiss the "Plaintiff's Petition" contending that the petition is filed by the corporation, signed by R. Jacobs, not a licensed attorney, as an officer of the corporation and that in Missouri a corporation is prohibited from maintaining litigation in the courts without the representation of a licensed attorney. On January 10, 1989, defendants filed a supplemental motion to dismiss the petition alleging further that the attempt at assignment to Jacobs is an attempt to circumvent the law that corporations cannot represent themselves in the Missouri courts without retaining an attorney.

The motion to dismiss was heard and argued and on January 18, 1989, the trial court entered its order finding that "the corporation cannot assign to an assignee causes of action for breach of contract, fraud, unlawful practices, [and] failure to refund security deposit. Cause dismissed with prejudice. [2] Costs against Plaintiff."

It is not essential in this case to determine in detail whether a corporation may make an assignment of causes of action for fraud, breach of contract, unlawful merchandising practices, failure to refund a security deposit under the law, or prima facie tort, for the reason that it is clearly the law in this state that a corporation, and as we construe it, an assignee who is an officer of that corporation, not a licensed attorney, cannot maintain litigation in this state without the representation of a duly licensed attorney.

Ever since the case of Clark v. Austin, 340 Mo. 467, 101 S.W.2d 977, 983 (1937), Missouri courts have consistently held that a corporation cannot appear in a legal proceeding except through an attorney. Liberty Mutual Ins. Co. v. Jones, 344 Mo. 932, 130 S.W.2d 945, 955 (1939); Dobbs

Houses, Inc. v. Brooks, 641 S.W.2d 441, 443 (Mo.App.1982); Credit Card Corp. v. Jackson County Water Co., 688 S.W.2d 809, 811 (Mo.App.1985); § 484.020, R.S.Mo.1986.

The law recognizes the right of natural persons to act for themselves in their own affairs, although the acts performed by them, if performed by others, would constitute the practice of law. A natural person may present his own case in court or elsewhere, although he is not a licensed lawyer. A corporation is not a natural person. It is an artificial entity created by law. Being an artificial entity it cannot appear or act in person. It must act in all its affairs through agents or representatives. In legal matters, it must act, if at all, through licensed attorneys. Clark v. Austin, supra, at 982; quoted in Dobbs Houses, Inc. v. Brooks, supra, 641 S.W.2d at 443.

In this case, the first two petitions were filed by PESI, by R. Jacobs, president and the amended petition was styled PESI v. Bozarth, and signed by "Property Exchange & Sales, Inc., 'PESI' by R. Jacobs, assignee, c/o P.E.S.I., St. Louis, Missouri 63105." Even the brief filed in this court is styled "P.E.S.I. by Assignee, R. Jacobs."

In effect therefore, the amended petition is filed and the action sought to be maintained by the PESI corporation, through its president, R. Jacobs, not a licensed Missouri attorney. To permit the corporation or the officer, as assignee of the corporation, to maintain litigation in the Missouri courts, through the device of an assignment would destroy the salutary principal that a corporation cannot act in legal matters or maintain litigation without the benefit of an attorney. Biggs v. Schwalge, 341 Ill.App. 268, 93 N.E.2d 87 (1950); Mercu-Ray Industries, Inc. v. Bristol-Myers Company, 392 F.Supp. 16 (1974); Cf., Kamp v. In Sportswear, Inc., 70 Misc.2d 898, 335 N.Y.S.2d 306 (1972), rev'd, 39 A.D.2d 869, 332 N.Y.S.2d 983 (1972).

The trial court's judgment or order of dismissal, although based upon the theory that a corporation cannot assign the alleged causes of action, its judgment and order must be affirmed if the dismissal of an action can be sustained on any ground which is supported by the motion to dismiss regardless of whether the trial court relied on that ground. Delmain v. Meramec Valley R-III School Dist., 671 S.W.2d 415, 416 (Mo.App.1984).

The judgment is affirmed.

GARY M. GAERTNER, P.J., and CRIST, J., concur.

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1 The appellant, in his brief, contends that all of these rights of fraud, violation of the Merchandising Practices Act, wrongful failure to return a security deposit, breach of contract and prima facie tort are freely assignable. Respondent disagrees. It is not necessary to determine whether these claims are assignable to dispose of this case. However, rights are generally assignable if the cause of action survives, Beall v. Farmers' Exchange Bank of Gallatin, 76 S.W.2d 1098 (Mo.1934), but not where a tort is for a wrong done to the person, reputation, feelings of the injured party, or a contract of a purely personal nature. Id. An action for fraud is

assignable where the wrong is not regarded as one to the person but is assignable where the injury is regarded as affecting the estate or arising out of contract. Houston v. Wilhite, 224 Mo.App. 695, 27 S.W.2d 772 (Mo.App.1930); Beall, supra, at 1099; Kansas City v. Rathford, 353 Mo. 1130, 186 S.W.2d 570 (1945). A contract is assignable unless it involves personal services which involve special skill, knowledge or a relation of personal confidence. Sympson v. Rogers, 406 S.W.2d 26, 30 (Mo.1966). Personal injuries are not assignable. Travelers Indemnity Company v. Chumbley, 394 S.W.2d 418, 423 (Mo.App.1965). It may be that a claim for unlawful practices based upon a statutory right is not. Cf., Houston v. Wilhite, 27 S.W.2d at 775.

2 Although the trial court made no mention of Count V, prima facie tort, the court did dismiss the cause. The order is appealable when the court finds that no cause of action is stated. Coyne v. Southwestern Bell Tel. Co., 360 Mo. 991, 232 S.W.2d 377, 378 (Mo.1950); White v. Sievers, 359 Mo. 145, 221 S.W.2d 118, 123 (Mo.1949).

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641 S.W.2d 441

DOBBS HOUSES, INC., A Delaware Corporation, Plaintiff-Respondent,
v.
Alvin L. BROOKS, Bill Beemont, Marie Burrow, Frank J. Cason, Jean Collins, Samuel Houston, Joan Krauskopf, Joy Lieberman, Jerry Puchta, Donald E. Rau, and John Al Rodriguez, Members of Missouri Commission on Human Rights;
and
Missouri Commission on Human Rights, a State Agency;
and
Phillip J. Hoskins, Hearing Examiner, Missouri Commission on Human Rights;
and
John Ashcroft, Attorney General, State of Missouri, Defendants-Appellants.
No. 44646.
Missouri Court of Appeals,
Eastern District,
Division Three.
Sept. 7, 1982.
Motion for Rehearing and/or Transfer Denied Oct. 15, 1982.

John Ashcroft, Atty. Gen., Scott A. Woodruff, Asst. Atty. Gen., Jefferson City, for defendants-appellants.

Thomas C. Walsh, David S. Slavkin, St. Louis, Mo., for plaintiff-respondent.

SNYDER, Judge.

This is an appeal from an action in which the plaintiff, Dobbs Houses, Inc., sought a declaratory judgment on whether its Equal Employment Opportunity Affairs manager, who is not an attorney, could represent it before the Missouri Commission

on Human Rights (Commission). The circuit court of St. Louis County ruled in favor of Dobbs Houses, Inc. The Commission and other parties-defendant appealed. The judgment is reversed.

On November 13, 1979, Phillip H. Hayman filed a complaint with the Missouri Commission on Human Rights alleging that his discharge by Dobbs Houses, Inc. was racially motivated. Following an investigation and attempts to conciliate the parties, the complaint was set for public hearing on March 18, 1981.

Dobbs Houses, Inc. sought permission to appear before the Commission and conduct its defense through Raymond C. Castro. Mr. Castro is the equal employment opportunity affairs manager for Dobbs Houses, Inc., and is not a licensed attorney. The hearing examiner denied the request.

On March 13, 1981, Dobbs Houses, Inc. sought a declaratory judgment in the circuit court of St. Louis County to determine whether Castro could represent Dobbs Houses before the Commission. The trial court ruled that Castro could represent the corporation before the Commission, in effect overruling a commission rule to the contrary. Members of the Commission and other parties-defendant appeal.

The primary issue here is whether a lay employee may represent a corporate respondent before the Commission. The key to the resolution of this issue is a determination of whether the Commission has the authority to promulgate a rule allowing only attorneys and individuals who are parties to appear before it.

The Commission is charged with the enforcement of the Discriminatory Employment Practices Act, Chapter 296 RSMo. 1978. The Commission is empowered by statute to conduct investigations, hold adversarial hearings and issue orders regarding the rights of parties upon the filing of employment discrimination complaints. § 296.030 RSMo. 1978. The Commission also has the authority to "adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of [chapter 296] and the policies and practices of the Commission in connection therewith." § 296.030.6 RSMo. 1978.

In accordance with that authority, the Commission had adopted the following rule:

"Only persons who are licensed attorneys admitted to practice in this state or permitted to practice in Missouri by the Missouri Supreme Court rules will be permitted to practice before the Commission. An individual who is a party may act as his own attorney." 4 CSR 180-2.060.1 (Emphasis added).

This rule, without more, would support the Commission hearing examiner in his ruling that Mr. Castro, a lay person, could not represent Dobbs Houses, Inc., a corporation, before the Commission.

Respondent, however, maintains that this rule conflicts with § 296.040.5 RSMo. 1978:

"The respondent may file a written verified answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony. At the discretion of the hearing examiner or the panel, the complainant may be allowed to intervene and present testimony in person or by counsel. The commission or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent shall have like power to amend his answer.

Page 443

The testimony taken at the hearing shall be under oath and be transcribed." (Emphasis added).

In particular, the respondent claims that the words "in person or otherwise" authorizes the representation of a corporate respondent by a lay employee.

The statute is ambiguous as it applies to corporations. A corporation cannot appear in person. The word "otherwise" is not defined any further. Appearance does not necessarily mean appearance in a representative capacity. The ambiguity has been resolved by the Commission in its rules.

The Commission has interpreted § 296.040.5 to allow it, by rule, to prohibit a lay employee from representing a corporate respondent before it. See 4 CSR 180-2.060.1. This interpretation has strong support.

"Rules and regulations are to be sustained unless unreasonable and plainly inconsistent with the act, and they are not to be overruled except for weighty reasons ... The burden is on those challenging the rules to show that they bear no reasonable relationship to the legislative objective ... The interpretation and construction of a statute by an agency charged with its administration is entitled to great weight." Foremost-McKesson, Inc. v. Davis, 488 S.W.2d 193, 197[1-4] (Mo. banc 1972). The rule in question must be so at odds with fundamental principles as to be mere whim or caprice if it is to be overruled by the courts. Foremost-McKesson, Inc. v. Davis, supra at 200. Rule 4 CSR 180-2.060.1 is neither at odds with fundamental principles nor unreasonable.

The Missouri Courts have consistently held that a corporation cannot appear in a legal proceeding except by an attorney. Clark v. Austin, 340 Mo. 467, 101 S.W.2d 977, 983 (banc 1937); Liberty Mutual Ins. Co. v. Jones, 344 Mo. 1127, 130 S.W.2d 945, 955 (banc 1939). The court rulings support the Commission rule.

"The law recognizes the right of natural persons to act for themselves in their own affairs, although the acts performed by them, if performed by others, would constitute the practice of law. A natural person may present his own case in court or elsewhere, although he is not a licensed lawyer. A corporation is not a natural person. It is an artificial entity created by law. Being an artificial entity it cannot appear or act in person. It must act in all its affairs through agents or representatives. In legal matters, it must act, if at all, through licensed attorneys." Clark v. Austin, supra at 982. (Emphasis added).

In addition, the Commission regulation is supported by statute. Section 484.020 RSMo. 1978 prohibits a corporation from engaging in the practice of law or doing law business. [1] The practice of law includes the "appearance as an advocate in a representative capacity ... in connection with proceedings pending or prospective before any court of record, commission, referee or any body, board, committee or commission constituted by law or having authority to

settle controversies." § 484.010.1 RSMo. 1978. (Emphasis added).

Section 296.040.5 RSMo. 1978 does not expressly authorize a lay employee to represent a corporate respondent before the Commission. Therefore, 4 CSR 180-2.060.1 which interprets that provision, cannot be held to be plainly inconsistent. Nor can the regulation be said to be unreasonable. It is consistent with Missouri case law and statutory authority. [2]

The Commission had the authority to adopt the regulation at issue here. Absent any plain inconsistency or unreasonableness, the lower court was required to uphold and enforce that regulation. This it failed to do. As long as 4 CSR 180-2.060.1 remains in effect, a lay employee may not represent a corporate respondent before the Missouri Commission on Human Rights.

The judgment is reversed.

REINHARD, P.J., and CRIST, J., concur.

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1 Section 484.020 provides: "1. No person shall engage in the practice of law or do law business, as defined in section 484.010, or both, unless he shall have been duly licensed therefore and while his license therefore is in full force and effect, nor shall any association or corporation engage in the practice of the law or do law business as defined in section 484.010, or both.

2. Any person, association or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor and upon conviction therefore shall be punished by a fine not exceeding one hundred dollars and costs of prosecution and shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person, firm, association or corporation paying the same within two years from the date the same shall have been paid and if within said time such person, firm, association or corporation shall neglect and fail to sue for or recover such treble amount, then the state of Missouri shall have the right to and shall sue for such treble amount and recover the same and upon the recovery thereof such treble amount shall be paid into the treasury of the state of Missouri.

3. It is hereby made the duty of the attorney general of the state of Missouri or the prosecuting attorney of any county or city in which service or process may be had upon the person, firm, association or corporation liable hereunder, to institute all suits necessary for the recovery by the state of Missouri of such amounts in the name and on behalf of the state."

2 It is also important to note that 4 CSR 180-2.060 was adopted in 1975. Section 296.040.5 was amended in 1978. At that time, the legislature had the opportunity to change the rule and chose not to.