

2011 WL 1035561 (Mo.App. W.D.) (Appellate Brief)  
Missouri Court of Appeals, Western District.

Crystal Gayle ARAGON, Respondent,  
v.  
MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES, Appellant.

No. WD72751.  
January 13, 2011.

Appeal from the Circuit Court of Lafayette County Honorable Dennis A. Rolf

**Appellants Brief<sup>1</sup>**

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**\*4 JURISDICTIONAL STATEMENT**

This is an appeal of an agency decision by the Missouri Department of Health and Senior Services which originally placed Respondent on the Employee Disqualification List (EDL) pursuant to [Section 198.090.15 RSMo.](#), thereby disqualifying her permanently from employment in the field of care giving, her chosen profession. That decision was reversed after judicial review by the Circuit Court pursuant to relevant provisions of the Administrative Procedure Act, [Sections 536.100-140 RSMo.](#) This appeal was men instituted by Appellant Missouri Department of Health and Senior Services. [Section 536.140.6, RSMo.](#) provides that appeals from Circuit Court review of agency decisions under the Administrative Procedure Act “may be taken from the Judgment of the Court as in other civil cases.” Inasmuch as none of the issues to be raised in this appeal are within the exclusive jurisdiction of the Missouri Supreme Court, this Court has jurisdiction of the appeal, pursuant to its general appellate jurisdiction, as more particularly set forth in [Article V, Section 3 of the Missouri Constitution.](#)

#### **\*5 STATEMENT OF FACTS**

Crystal G. Aragon was born in Kansas City, Missouri. At the time of the hearing in this matter in July of 2008 she was 26 years old. (Page 231, lines 5418-20)<sup>2</sup>

Her upbringing was not a good one. She has never met her father. (Page 231, line 5431)

Her mother was only cared for her during brief intervals of her childhood. (Page 231, line 5433)

Most of her growing up years were spent either with her grandmother or in foster care. (Page 231, lines 5435-38)

Because of her dismal life, Crystal dropped out of high school when she was seventeen, and took a job. (Page 232, line 5448)

Thereafter, however, her grandmother became ill, so Crystal had to quit work to take care of her. (Page 232, line 5450, 5458) This was when Crystal was seventeen years of age. (Page 233, line 5465)

**\*6** Ultimately, Crystal's grandmother went into the Meyer Care Center, a nursing home in Higginsville, and Crystal went to work there, commencing her career as a caregiver. (Page 233, lines 5470-73)

Crystal found that being a caregiver suited her. (Page 233, line 5475)

She went on to get her CNA license and her GED. (Page 233, line 5481)

After her grandmother passed away, Crystal went to work for Shirkey Care Center, a nursing home in Lexington in August, 2003. (Page 233, line 5488) She was then 20 years of age. (Page 234, line 5490)

At Shirkey, among the residents was Donald Witt.

Donald Witt was in Shirkey because he was paralyzed, and wheelchair bound. (Page 235, line 5513)

Unlike the typical nursing home resident, Donald Witt was able to come and go from the nursing home as he pleased by driving his handicap adapted van. (Page 236, lines 5554-5560)

He had no [mental disabilities](#) or shortcomings, was very strong minded, very smart, and a very caring man. (Page 234-235)

According to Chris Brown, the Executive Director at Shirkey, Donald Witt was intelligent, a good communicator, well read, and sharp as a tack. (Page 144, lines 3387-3403)<sup>3</sup>

\*7 According to his daughter, Donald Witt, was a man of not insignificant means, and could also be very generous. (Page 201, line 4725)

Donald Witt took a liking to Crystal when she started working there in 2003, and she liked him too. (Page 234, line 5511)

Over the three years Crystal worked there, Donald Witt came to be Crystal's "best friend". (Page 236, line 5538)

On days when Crystal didn't work, Donald Witt would call her on the phone, he would drive over to visit her at her home, and he would take Crystal and her daughter out to eat. (Page 236, lines 5539-5543)

Donald Witt also continually encouraged Crystal to better herself, and go to nursing school to become a R.N. "Have hope, you know you can do it," he would tell her. "You're smart enough." (Page 237-238)

One day in 2005, some two years after they had first met, Crystal told Donald Witt that she was going to take his advice and try to go to nursing school. The first step was to find dependable transportation so she could make it back and forth to school. (Page 242-43)

\*8 Donald Witt suggested that they should go to lunch together and look at cars. (Page 243, line 5705)

A few days later, on a day she didn't work, Donald Witt came to pick her up at her house in his van. They had lunch and went car shopping. (Page 243, lines 5704-19)

The first place they stopped in Lexington, there were no acceptable cars in Crystal's price range. (Page 244, lines 5721-26)

After Lexington, Donald Witt drove with Crystal to Excelsior Springs to shop for cars. He told her that a car salesman would probably take advantage of a girl, so he took the lead in negotiating for her at the Excelsior Springs dealership. (Page 244, lines 5728-39) Fortunately, Crystal found a car in Excelsior Springs that was in her price range. (Page 244, lines 5732-39)

Unfortunately, however, she was unable to secure **financing** of the sales tax and insurance which would keep her monthly payment within her price range. (Page 246, lines 5785-5788)

Donald Witt agreed to help Crystal with the sales tax and insurance, true to his generous nature, and on July 20, 2005, Donald Witt wrote Crystal a check for \$1,296.00 to cover the sales tax and insurance on the car he'd accompanied her to purchase so she could transport herself to and from nursing school. (Pages 246-247, lines 5789-5808)

Donald Witt then accompanied her to the License Bureau to pay the sales tax and apply for the title. (Page 247, lines 5809-11)

\*9 The next year, in March of 2006, Crystal decided to move to Higginsville, and end her relationship with the father of her daughter, with whom she had been residing, as that had become a bad relationship for her. (Pages 238-39, lines 5603-14)

Unfortunately, Crystal had no furniture to set up housekeeping in Higginsville, and Donald Witt offered to help by taking her shopping for some basic housekeeping essentials. (Page 239, lines 5607-14)

In March of 2006, Crystal gave her two weeks notice to Shirkey's Unit Coordinator, Stacy Williams, and her last day was April 9, 2006. (Page 148, lines 3469-81; Page 172, lines 4042-44; and Page 239, line 5625-6)

According to her supervisor, Ms. Williams, Crystal had been a likeable girl, did good work, and left Shirkey on good terms. (Pages 172-73) (Page 239, line 5626)<sup>4</sup>

Thereafter, Crystal, having left the employment of Shirkey Nursing Home, moved in with her aunt in Higginsville. (Page 240, lines 5631-32) However, she still maintained her friendship with Donald Witt after leaving that employment. (Page 240, lines 5637-39)

**\*10** At the time she was moving, Donald Witt again promised her that he would give her his credit card to help her buy furniture to help set up housekeeping in Higginsville, and that she could pay him back. Crystal indicated she could not go shopping with his credit card. He responded that he would “take care of that”, and there was never any further discussion about it until one day a credit card bearing Crystal's name arrived in the mail at her aunt's house. (Page 241, lines 5662-70)

Upon receiving the credit card, she immediately called Donald Witt, who told her that he had the credit card issued on his account and sent to her, and that she could use it to get her feet on the ground and start paying him back when she did so. (Page 241-42)

Subsequently, Crystal made a series of purchases to set up housekeeping at Nebraska Furniture Mart. (Page 53, lines 1246-49)

The first time she used the credit card which Donald Witt had had sent to her was April 23, 2006, some two weeks after her last day of work at Shirkey. (Page 53, lines 1246-49)

As of October 5, 2006, Donald Witt's health was on the decline. He was admitted on that date to the VA Hospital in Kansas City with COPD, and he passed away on November 23, 2007. (Page 19, lines 446-47) (Page 21, lines 473-74)

While in his last hospitalization, Donald Witt's daughter, Ms. Donna Woodland, had her father's mail forwarded to her house. (Page 179, lines 4214-15)

Thereafter, Ms. Woodland learned about Crystal using Donald Witt's credit card account, and also about the check Donald Witt had written to her for the sales tax on the motor vehicle in July of 2005. (Page 179, line 4197) (Pages 195-96)

**\*11** Upon learning of Crystal's receipt of the credit card and check, Ms. Woodland called her father's attorney for advice, and thereafter called the Richmond Police Department. (Page 179, line 4200)

In her call to the police, Ms. Woodland believes she accused Crystal of “**exploiting**” Donald Witt and further believes she got that verbiage from the attorney she called for advice before calling police. (Page 211, lines 4959-63)

Thereafter, Crystal was charged with felony **financial exploitation** of an **elderly** or disabled person. (Page 114, line 2684) Those charges were subsequently dismissed by the Ray County Prosecuting Attorney. (Page 124, lines 2907-09)

The lead investigator with respect to this matter on behalf of the Department of Health and Senior Services was Nancy Gamble (Pages 75-76)

Ms. Gamble had occasion to interview Donald Witt personally on August 10, 2006, some four months after Crystal had last worked at Shirkey. Ms. Gamble found Donald Witt to be alert and oriented, and capable of making his own decisions. (Page 91, lines 2128-36)

Donald Witt told Ms. Gamble that he handled his own **finances**, and didn't think they were any of her business, nor anybody else's. (Page 93, lines 2181-91)

Donald Witt also told Ms. Gamble that no one had taken advantage of him. (Page 93, lines 2194-96)

He also did not want his daughters to know anything about his **finances**. (Page 96, line 2259)

**\*12** Furthermore, in regard to the benefits conferred upon her by Donald Witt, Crystal testified that she never asked Donald Witt for anything; she never asked or begged in any fashion for him to give her any money or **financial** benefit; nor did she in any manner or sense of the word misappropriate anything from him. The benefits Donald Witt conferred upon her were wholly a matter of his initiation. (Page 251, lines 5889-98)

Nonetheless, on or about March 14, 2008, Crystal received a “Notice of Violation” from the Missouri Department of Health and Senior Services, notifying her that she was being permanently placed on the Employee Disqualification List for “misappropriation of funds”, as determined by the Department pursuant to [Section 198.090](#) and [660.315, RSMo.](#), thereby disqualifying her from working as a caregiver as a profession. (Hearing Officer’s exhibit 1, LF 22, as amended by Motion, see Appendix, Pages A-3 - A-6)

In that notice, as subsequently amended, Crystal was accused of misappropriation of funds from Mr. Witt based upon the check he wrote to her in the sum of \$1,296.00 to pay for the sales tax on the motor vehicle in August of 2005 and for the use of his credit card, which he had had issued in her name and sent to her, after her last date of work as a Shirkey employee. (Hearing Officer’s Exhibit 1, as amended by Motion, see Appendix, Pages A-3 - A-6) (Page 53, line 1246) (LF 625)

Crystal timely appealed that determination for administrative review. (Hearing Officer’s exhibit 2, LF 26)

On July 18, 2008, an administrative hearing was held in regard to that appeal. Evidence was adduced, and a record was made (Page 1). Subsequently, the agency decision was affirmed by the agency’s hearing officer.

**\*13** At the time of hearing, Crystal was employed by the Lafayette County Board of Sheltered Services as a Site Manager for a group home in Higginsville. (Page 221, lines 5193-97)

Her duties involved the daily operations of a group home supporting three adult men who are mentally handicapped in Higginsville. (Page 233, line 5237-52)

Crystal started with the Lafayette County Board of Sheltered Services as a direct care employee. (Page 224, line 5261) According to her supervisor, Marcus Whitlock, Crystal quickly established herself as a highly valued employee, and when the Site Manager position came open she was recommended and hired for that position. (Page 225, lines 5278-85)

Unfortunately, if Crystal is permanently placed on the Employee Disqualification List, such would effectively permanently terminate her employment within the field. (Page 227-28)

Upon judicial review by the Circuit Court of Lafayette County, Missouri, the determination of the agency was reversed in the Circuit Court’s “Amended Judgment and Order Overruling the Decision and Order of the Department of Health and Senior Services and Overruling said Respondent Agency’s Decision to Place Petitioner’s Name on the Employee Disqualification List”. (Appendix to Brief, Pages A-16 - A-23).

Specifically, in finding that Mr. Witt’s check written to Crystal in July of 2005 did not constitute “misappropriation” within the meaning of [Section 198.090.15 RSMo.](#), the Circuit Court determined that “the record is wholly lacking in any evidence whatsoever **\*14** that Ms. Aragon coerced, defrauded, or overbore Mr. Witt’s will in connection with same.” (Appendix to Brief, Pages A-16 - A-23)

Furthermore, in finding that the use of a credit card by Crystal Aragon issued in her name on Mr. Witt's account did not constitute "misappropriation...while employed in (the) facility" within the meaning of [Section 198.090.15 RSMo.](#), the Circuit Court determined that "the uncontroverted evidence is that Donald Witt had requested and ordered the issuance of said credit card and had it forwarded to Ms. Aragon by mail, without her knowledge or involvement", and "the use of this credit card by Ms. Aragon occurred after the last day of employment of Petitioner Crystal Aragon at the facility in which Mr. Witt was a resident." (Appendix to Brief, Pages A-16 - A-23)

This appeal to this Court by the agency followed.

**\*15 POINT RELIED ON**

**THE DEPARTMENT OF HEALTH AND SENIOR SERVICES ERRED IN PLACING RESPONDENT CRYSTAL ARAGON'S NAME ON THE EMPLOYEE DISQUALIFICATION LIST (EDL) BECAUSE THE DETERMINATION THAT SHE MISAPPROPRIATED FUNDS FROM NURSING HOME RESIDENT DONALD WITT IS UNSUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE WHOLE RECORD; IS UNAUTHORIZED BY LAW; IS ARBITRARY, CAPRICIOUS OR UNREASONABLE; AND/OR INVOLVES AN ABUSE OF DISCRETION, IN THAT THE UNCONTROVERTED EVIDENCE IS THAT THE TWO MATTERS OF FINANCIAL BENEFIT CONFERRED UPON RESPONDENT CRYSTAL ARAGON BY DONALD WITT WERE VOLUNTARY ACTS BY HIM WHICH HE WAS WHOLLY COMPETENT AND ENTITLED TO MAKE, ONE OF WHICH DID NOT EVEN OCCUR WHILE RESPONDENT WAS EMPLOYED AT THE SUBJECT FACILITY, AND NEITHER OF WHICH CONSTITUTED MISAPPROPRIATION ON THE PART OF REPONDENT CRYSTAL ARAGON.**

[Wells v. Dunn](#), 104 S.W.3d 792 (Mo. App. W.D. 2003)

[Section 536.140 RSMo.](#)

[Section 198.090 RSMo.](#)

**\*16 LEGAL ARGUMENT**

Under [Section 536.140.2 RSMo.](#) of the Missouri Administrative Procedure Act, this Court's inquiry extends to a determination of whether the action of the agency (1) Is in violation of constitutional provisions; (2) Is in excess of the statutory authority or jurisdiction of the agency; (3) Is unsupported by competent and substantial evidence upon the whole record; (4) Is, for any other reason, unauthorized by law; (5) Is made upon unlawful procedure or without a fair trial; (6) Is arbitrary, capricious or unreasonable; or (7) Involves an abuse of discretion.

The merits of this case hinge upon the application of the facts contained in the record to [Section 198.090.15 RSMo.](#), which states that the Department of Health and Senior Services shall place on the Employee Disqualification List the names of any persons who are determined to "have *misappropriated* any property or funds of a resident *while employed in any facility*". (Emphasis added.)

"Misappropriated" is not a defined term within that statute.

In statutory construction, undefined words are given their plain and ordinary meaning as found in the dictionary in order to ascertain the intent of lawmakers. [BHA Holding Group, Inc. v. Pendergrass](#) 173 S.W.3d 373 (Mo. App. W.D., 2005). [Asbury v. Lombardi](#), 846 S.W.2d 196, 201 (Mo. banc 1993).

The construction of the term “misappropriate” within the meaning of [Section 198.090.15 RSMo.](#) was directly addressed by this Court of Appeals for the Western \*17 District of Missouri in the case of *Wells v. Dunn*, 104 S.W.3d 792 (Mo. App. W.D. 2003), an EDL case wherein the issues are substantially like those in this case.

In *Wells*, our Court of Appeals examined a series of dictionary definitions of the term “misappropriate”, and concluded that: “Common to all these definitions is the idea that misappropriation involves the dishonest diversion of the money or property of another to one's own use.” *Wells* at 797. [See also, for example, the Merriam Webster online dictionary, which defines “misappropriate” thusly: “to appropriate wrongly (as by theft or embezzlement)” (sic)]

In this case, the un rebutted factual evidence that is the basis for the agency action is as follows:

1. In July of 2005, Donald Witt, at all relevant times an intelligent man of keen mind and in control of his own intellectual faculties and **financial** resources, took Crystal Aragon car shopping in his van, decided to help her acquire same by covering the sales tax and insurance, and in so doing wrote her a check in his own hand in the sum of \$1,296.00 for that purpose. (Pages 91, 93, 144, 234, 235, 236, 246,247,251)

2. In April of 2006, she received in the mail at her new residence in Higginsville, Missouri, a credit card bearing her name from Donald Witt's account. She immediately called Donald Witt, who told her that he had had the extra credit card issued and sent to her so that she could use it to set up housekeeping in her new location, and pay him back later. Of great significance is that this credit card was received and first used by Crystal *after* she had worked \*18 her last day at Shirkey Care Center, and some four months *before* Donald Witt was interviewed by the agency investigator, Ms. Gamble, by whom he was observed to be alert, oriented, and capable of making his old decisions, and whom Mr. Witt advised in no uncertain terms that his **finances** were his own business and nobody else's, and that no one had taken advantage of him. (Pages 83, 91, 93, 96, 148,172,239,241,251)

The record is accordingly devoid of any evidence of “misappropriation” on the part of Crystal Aragon, as that term has been defined by our Court of Appeals in the operative statute, nor of any of the conduct associated with its common definition, “dishonesty, theft, or embezzlement”, in regard to the allegations in this matter.

Furthermore, circumstances regarding the credit card set forth in paragraph 2, above, occurred after Crystal had worked her last day at Shirkey, and thus, we would submit, not “while employed” there as required by [Section 198.090.15 RSMo.](#)<sup>5</sup>

\*19 The issues in this care are nearly identical to *Wells*, where, as here, the agency administrative hearing resulted in the placement of the Petitioner on the EDL for alleged misappropriation of funds, after the employee there had received a **financial** benefit in the form of a check from a resident of a facility. In *Wells*, the Circuit Court reversed the decision of the agency, and this Court affirmed the Circuit Court decision, finding that the agency's determination of misappropriation was in error.

In *Wells*, this Court noted that the agency had apparently relied upon the fact that the employee had violated the terms of her employment and of [Section 198.090.2 RSMo.](#), which provides that any person working at a facility is required to create a written record of anything received from a resident having a value of more than ten dollars.<sup>6</sup> In so doing this Court stated that there were “serious problems” with the agency's apparent determination that a violation of terms of employment or the statutory reporting requirement of [Section 198.090.2 RSMo.](#) constituted ipso facto “misappropriation” for purposes of placement on the EDL pursuant to [Section 198.090.15 RSMo.](#) *Wells* at 796.

\*20 This Court in *Wells* went on to hold that the Circuit Court had correctly determined that the evidence was not sufficient to support the agency's decision to place the employee in that case on the EDL.

The agency in this case attaches great importance to the fact that Crystal violated the terms of her employment by accepting a gift from a resident in violation of her employee handbook, and also by not reporting the receipt of this gift, as required by [Section 198.090.2 RSMo.](#) However, in finding that this accordingly would constitute “misappropriation” within the meaning

of [Section 198.090.15 RSMo](#), and corresponding permanent placement on the EDL, the agency is engaging in the same flawed logic that was condemned as representing an approach to the issue with “serious problems” by this Court in *Wells*. Id at 796.

**\*21 CONCLUSION**

The decision of the agency herein is unsupported by competent and substantial evidence upon the whole record; is unauthorized by law; is arbitrary, capricious or unreasonable; and/or involves an abuse of discretion. A finding of any one of these circumstances requires reversal of the agency decision under [Section 536.140.2 RSMo](#). of the Missouri Administrative Procedure Act. Therefore, the decision should be reversed, and this Court should order that the Respondent not be placed on the EDL. Respondent would further request that this case be remanded for determination of her Motion for Attorney Fees and Expenses filed in the Circuit Court on May 19, 2010, pursuant to [Section 536.087 RSMo](#).

Footnotes

- 1 This is an appeal by Appellant Missouri Department of Health and Senior Services from a Circuit Court Judgment reversing said Agency's Decision. Accordingly, this Court's review is of the Agency's Decision pursuant to Rule 84.05(e), and therefore Respondent files this Brief first pursuant to said Rule.
- 2 Parenthetical references to “page” and “line” in the “Statement of Facts” relate to the transcript of the administrative hearing in this matter held by the agency on July 18, 2008. That transcript was certified by the agency and filed with the Circuit Court in accordance with [Section 536.130 RSMo.](#), and was filed in this Court in that same form as part of the record on appeal.
- 3 Donald Witt suffered from chronic obstructive pulmonary disease (COPD) that causes diminished lung capacity (Page 156, lines 3654-7) This condition can give rise to diminished oxygen saturation and can give rise to confusion in some who suffer from it, depending on the patient. (Page 157, lines 3687-99) According to nurse Stacy Williams, the unit coordinator in charge of nursing staff and residents at Shirkey, the first time she ever noted any confusion on the part Donald Witt was sometime in March of 2006. (Page 170, lines 3991-5)
- 4 Although Crystal had given her two weeks notice in March of 2006, and her last day of work at Shirkey was April 9, 2006, she did go on “PRN” status for a period of 60 days thereafter, whereby she remained subject to being called and asked to work on a possible as needed basis, which never occurred, and after 60 days she was removed from PRN status, in accordance with Shirkey's policy. (Pages 146-8)
- 5 The agency would urge that because Crystal was still under PRN status for 60 days after her last day of work, inasmuch as she left her employment at the facility on good terms, she should still be considered “employed” there for purposes of [Section 198.090.15 RSMo](#). While Petitioner's counsel feel compelled to note this circumstance, we would further note that this Court need not reach this issue in that the clarity of the lack of evidence of any misappropriation is dispositive of this case. The significance of the fact that this second circumstance occurred after Crystal had worked her last day at the facility would seem, more importantly, to further negate any notion that Crystal was somehow using her job at the facility to engage in any course of dishonesty, embezzlement, or other type of alleged misappropriation against Donald Witt.
- 6 Section 198.090.2 also provides that failure to report a gift from a resident as required thereby is a class C misdemeanor, but nowhere within that provision does it make reference to or mention placement on the EDL.