

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI EX REL.)	
JAMES GRIFFIN,)	
)	
Appellant,)	Appeal No.: SC87324
)	
vs.)	ORAL ARGUMENT
)	REQUESTED
R.L. PERSONS CONSTRUCTION,)	
INC., AND UNITED FIDELITY)	
ANDGUARANTEE COMPANY,)	
)	
Respondents.)	

RESPONDENTS' SUBSTITUTE BRIEF

On Appeal to the Missouri Supreme Court
From the Circuit Court, Division II, of Ripley County, Missouri

Honorable Mark L. Richardson, Judge

John M. Albright—44943
Moore, Walsh & Albright LLP
P.O. Box 610
Poplar Bluff, Missouri 63902
(573) 785-6200

Attorney for Appellant

Ralph L. Innes—54115
Edmundson, Edmundson &
Innes
P.O. Box 1049
Poplar Bluff, Missouri 63902
(573) 785-6416

Attorney for Respondents

TABLE OF CONTENTS

SECTION	PAGE
Table of Contents	pg. 1
Table of Authorities	pp. 2-4
Jurisdictional Statement	pg. 5
Points Relied On	pp. 6-7
Point I, Statute of Limitations	pp. 8-17
Point II, §516.130	pp. 19-20
Conclusion	pg. 21
Certificate of Service	pp. 22-23
Appendix	A1
§290.300 RSMo.—A1	

TABLE OF AUTHORITIES

Case	Page
<u>City of Kansas City v. Integron Indemnity Corp.,</u> 857 S.W.2d 233 (Mo.App. W.D. 1993).....	11-12
<u>Division of Labor Standards Dept. of Labor and Inds. Relations</u> <u>State of Mo. V. Walton Const. Management Co., Inc.,</u> 984 S.W.2d 152 (Mo.App. W.D. 1998).....	9-10
<u>Fitzmaurice v. Turney,</u> 165 S.W. 307 (Mo. 1914).....	14
<u>Flowers v. Roberts,</u> 979 S.W.2d 465 (Mo.App. E.D. 1998).....	16
<u>Julian v. Burrus,</u> 600 S.W.2d 133 (Mo.App. W.D. 1980).....	12
<u>McCormick v. Kaye,</u> 41 Mo.App. 263 (Mo.App. 1890).....	14
<u>Powell v. St. Louis Dairy Co.,</u> 276 F.2d 464 (8 th Cir. 1960).....	15
<u>Ratican v. Terminal R. Ass'n of St. Louis,</u> 114 Fed. 666 (C.C.Mo. 1902).....	14

Case	Page
<u>Revelle v. St. Louis, I.M. & S. Ry. Co.,</u>	
74 Mo. 438 (Mo. 1881).....	14
<u>Ridgeway v. TTnT Dev. Corp.,</u>	
26 S.W.3d 428 (Mo.App. S.D. 2000).....	16
<u>State ex rel. City of Springfield v. Crouch,</u>	
687 S.W.2d 639 (Mo.App. S.D. 1985).....	16-17
<u>State ex rel. Laszewski v. R.L. Persons Const.,</u>	
136 S.W.2d 863 (Mo.App. S.D. 2004).....	8, 9, 13
<u>Tabor v. Ford,</u>	
240 S.W.2d 737 (Mo.App. W.D. 1951).....	11
<u>Vroom v. Thompson,</u>	
55 S.W.2d 1024 (Mo.App. 1932).....	12, 14
<u>Young v. Kansas City, St. J. & C.B. Ry. Co.,</u>	
33 Mo.App. 509 (Mo.App. 1889).....	14
 Statutes	 Page
R.S.Mo. §290.250.....	10, 15
R.S.Mo. §290.300.....	<i>passim</i>
R.S.Mo. §290.527.....	13
R.S.Mo. §516.130.....	19-20

Statutes	Page
R.S.Mo. §516.140.....	12
R.S.Mo. §516.390.....	10
R.S.Mo. §516.400.....	<i>passim</i>
R.S.Mo. §537.340.....	15

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI EX REL,)	
JAMES GRIFFIN,)	
)	
Appellant,)	Appeal No.: SC87324
)	
vs.)	
)	
R.L. PERSONS CONSTRUCTION,)	
INC., AND UNITED STATES)	
FIDELITY AND GUARANTEE)	
COMPANY,)	
)	
Respondents.)	

JURISDICTIONAL STATEMENT

Respondents hereby adopt the Jurisdictional Statement of Appellant.

POINTS RELIED ON

POINT I

The Trial Court did not err in ruling that a cause of action based upon the Prevailing Wage Act that is brought by a workmen was subjected to a three-year statute of limitations pursuant to §516.400 RSMo because the RSMo §290.300 remedy allowing a workmen to recover double their unpaid wages plus attorneys fees is a “penalty or forfeiture.”

State ex rel. Laszewski v. R.L. Persons Const, 136 S.W.3d 863

(Mo.App. S.D. 2004)

Division of Labor Standards Dept. of Labor and Inds. Relations State

of Mo. v. Walton Const. Management Co., Inc., 984 S.W.2d 152

(Mo.App. W.D. 1998)

POINT II

The trial court did not err in ruling that a cause of action based upon the Prevailing Wage Act that is brought by a workmen was subjected to a three-year statute of limitations because the recently amended §516.130 illustrates the legislature's intent that an action brought pursuant to §290.300 is a separate cause of action that is subject to a three year statute of limitations.

RSMo §290.300

RSMo §516.130

ARGUMENT

POINT I

The Trial Court did not err in ruling that a cause of action based upon the Prevailing Wage Act that is brought by a workmen was subjected to a three-year statute of limitations pursuant to §516.400 RSMo, because the remedy §290.300 RSMo allowing a workmen to recover double their unpaid wages plus attorneys fees is a “penalty or forfeiture.”

The Prevailing Wage statute is a penal statute. Any substantive action filed under this statute is therefore subject to RSMo’s §516.400 three-year statute of limitations. Appellant last worked on the Project in December of 1999, and he filed his Petition on March 2, 2003. LF 28. Therefore, Appellant’s cause was appropriately dismissed by the Trial Court.

The Trial Court specifically held that Appellant’s action was barred by the statute of limitations based upon the Southern District’s decision in State ex rel. Laszewski v. R.L. Persons Const, 136 S.W.3d 863 (Mo.App. S.D. 2004). In Laszewski, the Trial Court held that the three-year statute of limitations pursuant to §516.400 RSMo was the applicable statute of limitations in prevailing wage actions in which the workmen filed the action,

because the Prevailing Wage statute operates to penalize the contractor who fails to comply with the wage requirements. Id.

The Respondent in Laszewski appealed the trial court's decision regarding the statute of limitations. The Southern District affirmed the lower court, finding appropriate the Trial Court's reasoning concerning the legal analysis, including applicability of the three-year statute. As such, Laszewski's cause of action was timely under the three-year statute of limitations set forth in Section 516.400. Id.

Laszewski is the controlling precedent in the Southern District. Appellant's action is thus, as a matter of law, time-barred on the face of his pleadings. In fact it is curious given the Appellant's attorney's success in Laszewski that he is not relying on it in his brief.

Appellant is attempting to circumvent Laszewski by maintaining that §290.300 RSMo of the Prevailing Wage Act is not a penal statute. However, in Division of Labor Standards Dept. of Labor and Inds. Relations State of Mo. v. Walton Const. Management Co., Inc., 984 S.W.2d 152 (Mo.App. W.D. 1998) the Court affirmed the Trial Court's dismissal of an action by the State for penalties against the construction contractor and subcontractor for violation of the Prevailing Wage Act, finding that the State's action was time barred by the two-year statute of limitations for

penal statutes. Claims for penalties by or in behalf of the State are barred under §516.390 RSMo which provides:

“If the penalty is given in whole or in part to the State,a suit therefore may be commenced, by or in behalf of the State at any time within two years after the commission of the offense, and not after.”

RSMo §516.390.

The Prevailing Wage Act is no less penal in nature when the action is brought by a workman rather than by the State. Indeed, the statutory remedy actually treats the contractor who is sued by a worker harsher than the contractor who is sued by the State. When the State brings the action, the penalty is \$10.00 per day per underpaid workmen, with no provision allowing the recovery of attorney’s fees. §290.250 RSMo. In contrast, if a workman brings the action, the statute automatically doubles the difference in wages, and requires the contractor to pay the workman’s attorney’s fees. §290.300 RSMo. The allowance for double the difference in wages, plus the presumptive award of attorney’s fees, is on its face harsher and more penalizing than \$10.00 per day per worker. Walton Construction properly deemed the Prevailing Wage statute penal in nature. Laszewski and the trial

court herein did so as well. This Court should affirm the trial court's dismissal of Appellant's claims.

Appellant and both Amici Curiae argue in great detail that the Prevailing Wage statute is remedial rather than penal. The Respondent and both Amici Curiae cite Tabor v. Ford, 240 S.W.2d 737 (Mo.App. W.D. 1951) in support of their position. In Tabor, the Kansas City Court of Appeals was of the position that for a statute to be penal, penalties had to be paid to the government. Id. This cannot be the law. To hold so, one would have to completely disregard §516.400 RSMo. If the only way a statute could be penal is if a penalty went to the government, there could never be a case subjected to the three-year statute of limitations pursuant to §516.400 RSMo.

In its Brief of Amici Curiae, the Missouri State Labor Council, AFL-CIO and the Missouri State Building and Construction Trades Council discusses the Western District's holding in City of Kansas City v. Integron Indemnity Corp., 857 S.W.2d 233 (Mo.App. W.D. 1993). In its discussion, the Amici Curiae implies that the Court held that the statute of limitations is greater than three years. The Court did not go that far. The Respondent in Integron was arguing that a prevailing wage action was an action for a minimum wage. The Court expressly did not determine the appropriate

statute of limitations, concluding only that “the two year limitation statute, §516.140 does not apply to actions for prevailing wages.” Id. At 235-36. The Integron court thus did not construe the penalty provisions of the Prevailing Wage statute.

§516.400 RSMo requires that a penalty or forfeiture to be given to the party aggrieved. Courts have held that a penalty is defined as a sum of money of which the law exacts payment by way of punishment for doing some act that is prohibited. Julian v. Burrus, 600 S.W.2d 133 (Mo.App. W.D. 1980). Forfeiture was defined a comprehensive term which, as used in this title, means a divestiture of specific property without compensation, in consequence of some default or act forbidden by law. Id. “The term ‘penalties’ and ‘forfeitures,’ as used in the various statutes of limitations, have been construed to have reference to those created by statute alone, and inflicted for dereliction of duty, or failure to perform specific acts, or for the commission of acts prohibited by statute. The effect and not the form of the statute determines whether it is penal or not.” Vroom v. Thompson, 55 S.W.2d 1024, 1026 (Mo.App. 1932).

The Legislature’s enactment of the Prevailing Wage Act operates to punish a contractor that fails to pay the prevailing wage. If the Legislature had intended only to compensate the aggrieved workmen, it would have

provided traditional compensatory damages measured by the difference between the prevailing wage and the wage actually paid to the workman. It did not; instead, it mandated double damages, plus attorney's fees. Additionally the liability imposed upon the contractors was created by statute alone. It has no analogous common law roots. Therefore, the statute is penal in nature.

The Appellant attempts to argue that the double damages provision are not true penalties and therefore should be considered either punitive damages or as liquidated damages. This argument also misses the mark. Had the Legislature intended on making the damages punitive or liquidated it could have expressly done so, as it did, for example, when it wrote §290.527 RSMo. Under §290.527 RSMo, an employer who pays an employee less than the minimum wage shall be liable for the full amount of the wage and an additional rate amount as liquidated damages. The fact that the Legislature failed to indicate that the doubling damages provision was to be considered as punitive damages or liquidated damages further buttresses the Trial Court's decision and Laszewski's sound analytical foundation.

Like the Prevailing Wage Act, there are many statutes that the Courts have held to be penal statutes and thus subject to the three-year statute of limitations.

The treble damage provision in favor of a person charged a rate for rail service in excess of permissible rates was held penal and subject to the three-year statute of limitations. Young v. Kansas City, St. J. & C.B. Ry. Co., 33 Mo.App. 509 (Mo.App. 1889). Actions for treble or double damages under the trespass statute have been held penal and therefore subject to the three-year statute of limitations. McCormick v. Kaye, 41 Mo.App. 263 (Mo.App. 1890). Civil liability imposed upon a corporation officer was held penal and subject to the three-year statute of limitations. Vroom v. Thompson, 55 S.W.2d 1024 (Mo.App. 1932). The double damage provision for failure of a railroad to maintain proper right of way was held penal. Revelle v. St. Louis, I.M. & S. Ry. Co., 74 Mo. 438 (Mo. 1881). A daily penalty for failure to open a private road after being ordered open was held penal. Fitzmaurice v. Turney, 165 S.W. 307 (Mo. 1914). In an action seeking recovery of a penalty for discrimination in rates pursuant to Section 8 of the Interstate Commerce Act, the 8th Circuit held that the statute of limitations was governed by the Missouri penal statute. Ratican v. Terminal R. Ass'n of St. Louis, 114 Fed. 666 (C.C.Mo. 1902). Before the United States Congress specifically imposed a four-year limitation upon suits brought pursuant to the Clayton Act, the Courts held that the provisions allowing for treble damages was penal in nature and therefore subject to the

three-year statute of limitations. Powell v. St. Louis Dairy Co., 276 F.2d 464 (8th Cir. 1960).

A conspicuous common thread links each of these cases: the adverse party in each of the above referenced cases was punished by either daily penalties or double or treble damages, all of which are above and beyond compensation designed to make the aggrieved worker whole. Under the Prevailing Wage Act, a construction contractor is subjected to either a daily penalty or double damages, depending on who brings the action. §290.250 & §290.300 RSMo. It is clear that the Legislature intended on punishing a contractor that fails to pay the prevailing wage regardless who brings the action. The fact that the damage award goes to the State rather than to the workman does not detract from the fact that it plainly operates to punish and deter the non-complying contractor.

Appellant also argues that the double damages provision is not a punishment but rather an incentive to bring the action forward due to certain intangibles that attach to such a cause of action. This reasoning is analogous to actions for trespass on realty. §537.340 RSMo.

Under §537.340 RSMo, a claimant is entitled to treble damages for numerous acts upon a person's realty, including cutting down of trees. The person filing the claim for damages pursuant to §537.340 RSMo does not

have to even prove negligence or intent to recover the treble damages. This Court held that §537.340 RSMo was a penal statute. Ridgeway v. TTnt Dev. Corp., 26 S.W.3d 428 (Mo.App. S.D. 2000). In Ridgeway, this Court also held that “Statutory trespass attempts to redress plaintiff for injuries that often have intangible qualities, such as aesthetic value...” Id. Even though statutory trespass attempts to redress injuries that have intangible qualities, the statute of limitations on the penal statute is three years. Flowers v. Roberts, 979 S.W.2d 465 (Mo.App. E.D. 1998).

The presence of intangible qualities is irrelevant. If the claimant is bringing the action based upon a penal statute, the statute of limitations is three years.

Counsel for Appellant is under the impression that the undersigned is attempting to change the statute of limitations for an action on a bond. To the contrary, Respondent acknowledges and agrees that an action brought on a bond has a ten-year statute of limitations. Griffin’s claim, however, is not action on a bond.

Appellant claims his action is an action on a bond, while in the same breath he attempts to recover under §290.300 RSMo of the Prevailing Wage Act. It is well established that the provisions of a specific statute prevail over a general one. State ex rel City of Springfield v. Crouch, 687 S.W.2d

639 (Mo.App. S.D. 1985). Griffin's attempts to fashion this an action on a bond is a general one, which as a matter of law must give way to the provisions of the more specific statute that gives rise to Griffin's claims in the first place, the Prevailing Wage statute. The specifically-tailored provisions of the Prevailing Wage Statute trump the broad umbrella of a garden-variety suit on a bond.

Appellant is seeking benefits under the Prevailing Wage Act. However, he wants this Court to believe that he is bringing an action on a bond, plainly to evade the fatal consequences of the statute of limitations. One can call a duck a dog, but it is still a duck. The Trial Court saw through this smoke screen and based its decision on the specific statute. This Court should do so as well.

Respondent admitted to the Trial Court that Appellant could bring an action based only on the bond. In doing so, Appellant would be allowed to recover the difference in what he was paid and what he should have been paid. Appellant, instead chose to leave the path created by the general bond statute, following the lure of the specific Prevailing Wage path, a decision that he believed would lead to the proverbial bigger pot of gold, double the difference in the wages along with his attorney's fees. With the statute's potentially greater recovery, in the hands of the contractor, comes a more

stringent limitation period for bringing the cause of action. Regrettably for Appellant, his decision to do so was fatal to his claim.

POINT II

The trial court did not err in ruling that a cause of action based upon the Prevailing Wage Act that is brought by a workmen was subjected to a three-year statute of limitations because the recently amended §516.130 illustrates the legislature's intent that an action brought pursuant to §290.300 is a separate cause of action that is subject to a three year statute of limitations.

Recently the legislature amended RSMo §516.130 by adding subsection 3. This addition adds, "[a]n action under Section 290.300, RSMo" to the list of causes of actions that must be brought within three years. At the time this amendment was enacted, the case at bar had already been decided by the trial court and was on appeal.

While the implications of the newly amended §516.130 were not raised at trial or on appeal, the Respondent is pleased that the Appellant has now broached this issue, as it illustrates the legislature's intention regarding causes of action pursuant to §290.300.

The amendment to §516.130 clarified the legislature's intention concerning what statute of limitations applies to actions brought pursuant to §290.300. Clearly the legislature's enactment of this section shows that its intent that a three year statute of limitations apply to suits under §290.300.

It would be illogical and absurd to reason that the legislature would clarify this issue by passing a three year statute of limitations if it intends for these types of actions to be subject to a ten year statute of limitations.

Furthermore the enactment of subsection 3 to §516.130 illustrates that the legislature views suits for double the unpaid prevailing wage as an action that is both different and independent of other types of suits, including actions on a bond. If §290.300 simply specifies damages, as the Appellant contends, it would not require its own specific statute of limitations and §516.130.3 would be meaningless.

It is only rational that by passing a specific statute of limitations that applies to a specific statute, that the legislature considers and intends for that statute to be a separate and distinct cause of action.

CONCLUSION

The statute of limitations for a prevailing wage action under §290.300 RSMo is three years. The double damages provision under §290.300 is a penalty that a contractor is forced to pay for failing to pay the prevailing wage. Therefore, §290.300 is a penal statute which is subjected to the statute of limitations pursuant to §516.400 RSMo.

The amendment adding subsection 3 to §516.130 illustrates the legislature's intention that §290.300 creates a separate cause of action subject to a three year statute of limitations.

Appellant's action was time barred by the three-year statute of limitations. The Judgment of the Trial Court in favor of the Respondent should be affirmed.

Respectfully Submitted,

By: _____
Ralph L. Innes, #54114

EDMUNDSON, EDMUNDSON & INNES
Attorneys and Counselors at Law
Post Office Box 1049
Poplar Bluff, Missouri 63902-1049
Telephone: 573-785-6416
Fax: 573-785-2130

ATTORNEYS FOR RESPONDENTS

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI EX REL.)	
JAMES GRIFFIN,)	
)	
Appellant,)	Appeal No.: SC97324
)	
vs.)	
)	
R.L. PERSONS CONSTRUCTION, INC.,)	
AND UNITED FIDELITY AND)	
GUARANTEE COMPANY,)	
)	
Respondents.)	

CERTIFICATE OF SERVICE

COMES NOW Respondents, R.L. Persons Construction, Inc. and United Fidelity and Guarantee Company, by and through their attorney, Ralph L. Innes, of the law firm of Edmundson, Edmundson & Innes, and certifies the Brief complies with the limits in Rule 84.06(b) insofar as it is Appellant’s Brief with less than 31,000 words or a Respondents’ Brief with less than 27,000 words or as a Reply Brief with less than 7,750 words in that it is Respondent’s Brief and contains 3,156 words and that a copy of the same, together with a copy on disk in Word format scanned for viruses, was served upon the attorneys of record by United States mail, postage prepaid,

addressed to: John Albright, Esq., P.O. Box 610, Poplar Bluff, Missouri
63902 on this ____ day of April, 2006.

Respectfully Submitted,

By: _____
Ralph L. Innes, #54114

EDMUNDSON, EDMUNDSON & INNES
Attorneys at Law
Post Office Box 1049
Poplar Bluff, Missouri 63902
Telephone: 573-785-6416
Fax: 573-785-2130

ATTORNEY FOR RESPONDENTS