

**WD 62876**

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**IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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**VANCE BROTHERS, INC.,  
*RESPONDENT,***

**vs.**

**OBERMILLER CONSTRUCTION SERVICES, INC.,  
*APPELLANT.***

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**APPEAL FROM THE  
CIRCUIT COURT OF CASS COUNTY, MISSOURI  
AT HARRISONVILLE**

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**BRIEF OF APPELLANT**

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## **JURISDICTIONAL STATEMENT**

This is an appeal from a final order and judgment, after jury verdict, from the Circuit Court of Cass County, Missouri, in favor of Plaintiff/Respondent, Vance Brothers, Inc., and against Defendant/Appellant Obermiller Construction Services, Inc.

Pursuant to *Section 512.020 RSMo 2000*, Appellant appeals the judgment against it and the Missouri Court of Appeals, Western District, has jurisdiction.

The appeal does not involve issues as enumerated in *Article V, Section 3 of the Missouri Constitution* amended effective November 2, 1982.

## STATEMENT OF FACTS

The parties to this Appeal are referred to as follows: “Obermiller” for Appellant/ Defendant/Counterclaimant, Obermiller Construction Services, Inc., and “Vance” for Respondent/Plaintiff/Counterclaim-defendant, Vance Brothers, Inc. All references to the Legal File are abbreviated “LF.” Three transcripts have been prepared for this Appeal. References to the transcript of the trial, with pages from 1 to 826, are referred to as “T.” References to the supplemental transcript from hearings on April 1, 2003, with pages from 1 to 16, are referred to as “ST-4/01/03.” References to the supplemental transcript from hearings on April 25, 2003, with pages from 1 to 52, are referred to as “ST-4/25/03.”

This Appeal arises out of an underlying action based upon a dispute between Obermiller (a general contractor) and Vance (a paving sub-contractor) regarding resurfacing work performed upon the parking lot of the Wal-Mart in Ft. Scott, Kansas, in the summer of 2001. Vance brought suit against Obermiller on September 1, 2001, by way of a petition stating one count denominated “Petition on Account.” (LF011-012). On November 26, 2001, Obermiller filed its Answer and Counterclaim. (LF014-028). Vance’s petition properly set forth each of the elements for the quasi-contractual claim of “account.” Vance did not allege any of the necessary averments to state a claim for breach of contract.

Prior to closing arguments, the trial court held a conference on the record regarding instructions to be given to the jury in which the court indicated that it was granting Vance’s request that the jury be instructed on MAI 26.03 (Verdict Directing – Action on Account): “Instruction number eight, submitted by Plaintiff, is 26.03 – I’m sorry. And that is the correct directing instruction for petition on account.” (Statement by the court, T, p.843, ll.13-16). A true and correct copy of the instruction for recovery under a theory of “Action on Account,” MAI 26.03,

submitted by Vance, is attached hereto as Appendix “A-1.” A true and correct copy of the “Instruction No. 8” (Verdict Directing – Action on Account) actually submitted to the jury for decision is attached hereto as Appendix “A-2.” Plaintiff prayed for, submitted on, and sought and received instruction to the jury upon, a claim for its petition on account.

On April 4, 2003, the jury returned a verdict on Verdict Form A “...for unpaid account” (T, p. 915, ll.13-24) in favor of Vance, in the amount of \$39,468.00. A true and correct copy of the jury’s verdict on Verdict Form A is attached hereto as Appendix “A-3.” Obermiller dismissed two of its counts in its counterclaim and submitted on a theory of breach of contract under Count I. On April 4, 2003, the jury returned a verdict on Verdict Form B against Obermiller on its counterclaim and in favor of Vance (T, p. 915, l. 25–p. 916, l. 5). After trial and upon motion of Obermiller for remittitur (LF096-103), Vance stipulated to a remittitur of the amount of the verdict from \$39,468.00 to \$36,492.75.

After taking the jury’s verdict, the trial court set hearing upon the issue of attorneys fees for April 21, 2003 (LF008, handwritten notes on 11<sup>th</sup> line of Court’s Docket). The matter was then set over and heard on April 25, 2003 (LF009, handwritten notes beginning on the 3<sup>rd</sup> line of Court’s Docket). Obermiller filed its “Motion Opposing Discretionary Award of Attorneys Fees.” (LF091-095). At the hearing on April 25, 2003, testimony and argument were heard by the trial court. Because Vance had not, up until that time, submitted any written documentation to either the court or Obermiller supporting its claim for attorneys fees, and because the court indicated to counsel for Vance that he had an obligation to present such documentary support to the court (ST-4/25/03 at p.32, ll.11-18), the court granted Vance an extension to file such supporting documentation on or before April 29<sup>th</sup> of 2003 (ST-4/25/03 at p.50, ll.11-18). The itemized billing was filed with the court on April 30<sup>th</sup>, 2003 (LF09, 21<sup>st</sup> line of Court’s Docket, and LF116-119).

On May 5, 2003, the court held a hearing and took up Obermiller's Motion for New Trial and Motion for Judgment Notwithstanding the Verdict (LF104-115), denying each. On that same day, the court held in abeyance any ruling on the issue of attorneys fees (LF009, handwritten notes beginning on 21<sup>st</sup> line of Court's Docket).

On May 10, 2003, the court granted Vance's request for attorneys fees in the amount of \$61,400.00 (the amount stated in the billing summary filed by Vance on April 30, 2003)(LF116-119). Judgment was entered on May 13, 2003 in the amount of \$36,492.75 upon the verdict; pre-judgment interest in the amount of \$6,021.18 "...for 22 months at \$273.69 per month since 06/10/01;" (which is the legal rate of interest under *RSMO Section 408.020*), "...plus reasonable attorney fees of \$61,400.00 under RSMO 431.180." (LF120-121). A true and correct copy of the judgment is attached hereto as Appendix "A-4." From this judgment for attorneys fees, Obermiller now appeals.

## POINTS RELIED ON

- I. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES TO VANCE UNDER SECTION 431.180 RSMO BECAUSE THE TRIAL COURT LACKED ANY STATUTORY AUTHORITY FOR ENTERING SUCH AN AWARD IN THAT THIS “PRIVATE PROMPT PAYMENT STATUTE” PROVIDES FOR THE DISCRETIONARY AWARD OF ATTORNEYS FEES TO A PREVAILING PARTY ONLY AFTER THE LOSING PARTY HAS FAILED TO “...MAKE ALL SCHEDULED PAYMENTS PURSUANT TO THE TERMS OF [A] CONTRACT,” AND VANCE’S SUIT AND RECOVERY OF DAMAGES WAS NOT UNDER A CONTRACT BUT RATHER UPON A PETITION ON ACCOUNT**

*Missouri Revised Statutes, Section 431.180*

*Raysik v. Standiford, 944 S.W.2d 288 (Mo. App. W.D., 1997)*

*Missouri Revised Statutes, Section 408.020*

*Missouri Approved Jury Instructions, Eighth Edition, MAI 26.03*

- II. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES TO VANCE UNDER SECTION 431.180 RSMO BECAUSE THE TRIAL COURT LACKED ANY STATUTORY AUTHORITY FOR ENTERING SUCH AN AWARD IN THAT VANCE FAILED TO ESTABLISH ENTITLEMENT TO AND THEN BE GRANTED AN AWARD OF THE INTEREST PENALTY PROVIDED FOR UNDER THE “PRIVATE PROMPT PAYMENT STATUTE” AS IS REQUIRED AS A PREREQUISITE TO ENTITLEMENT TO ANY AWARD OF DISCRETIONARY ATTORNEY FEES**

*Missouri Revised Statutes, Section 431.180(2)*

*Missouri Revised Statutes, Section 34.057 et. seq.*

*Strain-Japan R-16 School Dist. v. Landmark*

*Systems, Inc. 51 S.W.3d 916 (App. E.D. 2001)*

*Midwest Asbestos Abatement Corp. v. Brooks 90*

*S.W.3d 480 (Mo. App. E.D., 2002)*

## ARGUMENT

I. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES TO VANCE UNDER SECTION 431.180 RSMO BECAUSE THE TRIAL COURT LACKED ANY STATUTORY AUTHORITY FOR ENTERING SUCH AN AWARD IN THAT THIS “PRIVATE PROMPT PAYMENT STATUTE” PROVIDES FOR THE DISCRETIONARY AWARD OF ATTORNEYS FEES TO A PREVAILING PARTY ONLY AFTER THE LOSING PARTY HAS FAILED TO “...MAKE ALL SCHEDULED PAYMENTS PURSUANT TO THE TERMS OF [A] CONTRACT,” AND VANCE’S SUIT AND RECOVERY OF DAMAGES WAS NOT UNDER A CONTRACT BUT RATHER UPON A PETITION ON ACCOUNT

Appellate review of a trial court's award of attorney's fees is “...limited to determining whether the trial court's determination was arbitrary and capricious, unreasonable, unsupported by competent and substantial evidence, made contrary to law or in excess of the court's jurisdiction.” *Hinton v. Director of Revenue 21 S.W.3d 109, 112 (Mo.App. W.D. 2000)* (Citation omitted) (Emphasis added). “The trial court is afforded no deference in its determinations of law. This court will review those de novo.” *Id.*

In reference to the standard for appellate review of a trial court’s statutory authority to enter an award of attorneys fees, the *Kreuter* Court noted: “Although awards of attorney's fees are left to the broad discretion of the trial court and will not be overturned except for abuse of discretion, this standard is based on the assumption that the court had the authority to award the fees. Because our inquiry involves the question of the trial court's authority to award attorney's fees, this court need not defer to its decision. *Consolidated Public Water Supply Dist. No. C-1 of Jefferson County v. Kreuter 929 S.W.2d 314, 316 (Mo. App. E.D. 1996)*(Citation omitted). See, also, *Environmental Protection, Inspection, and Consulting, Inc., v. City of Kansas City* for the proposition that, as to the issue of attorneys fees under Missouri’s Prompt Payment Act, “Because submissibility presents a question of law, our determination is de novo.” *Environmental*

*Protection, Inspection, and Consulting, Inc., v. City of Kansas City 37 S.W.3d 360, 369 (Mo.App. W.D., 2000).*

Vance's petition, filed September 29, 2001, was for one count only, denominated and plead as a "Petition On Account," stating nine paragraphs and a prayer, setting forth the necessary elements of the quasi-contractual claim for an account, but lacking any averments as to the creation of a contractual relationship. (LF011-012). Vance submitted to the jury on this one count, requested and was granted instruction to the jury on MAI 26.03 (Verdict Directing – Action on Account). Vance received a verdict under Verdict A "On the claim of plaintiff Vance Brothers, Inc. for unpaid account." See, Verdict "A" attached hereto as Appendix "C."

The court rendered a judgment for attorneys fees "...of \$61,400.00 under RSMO 431.180" (LF120-121).

"Missouri courts generally do not permit recovery of attorney's fees, unless provided for by statute or contract, or "when needed to balance benefits in a court of equity." We follow the "American Rule" which provides that litigants should bear the expense of their own attorney's fees." *Moore v. Weeks, 85 S.W.3d 709, 723 (Mo. App. W.D., 2002)* (Citations omitted). There was no contractual agreement alleged by Vance and no allegation of attorneys fees recoverable by agreement between the parties. Vance sought recovery of its attorneys fees under statute and it is Obermiller's contention that the statute in question does not apply to Vance's "Petition on Account."

*Missouri Revised Statutes, Section 431.180 (Scheduled payments pursuant to private construction contracts-- enforcement—exemption-Appendix "A-5")* states, in pertinent part:

"1. All persons who enter into a contract for private design or construction work after August 28, 1995, shall make all scheduled payments pursuant to the

terms of the contract.

2. Any person who has not been paid in accordance with subsection 1 of this section may bring an action in a court of competent jurisdiction against a person who has failed to pay. The court may in addition to any other award for damages, award interest at the rate of up to one and one-half percent per month from the date payment was due pursuant to the terms of the contract, and reasonable attorney fees, to the prevailing party.”

By the plain language of the statute, its terms are self-limiting to situations in which private design or construction work has proceeded pursuant to the terms of a “contract,” and to situations in which the party responsible for making payment has then failed to “...make all scheduled payments pursuant to the terms of the contract.”

Suits for “petition on account” and for “breach of contract” are founded upon mutually exclusive legal theories. They are proven by distinct elements and utilize different measures of damages. Although a party could plead the counts of “breach of contract” and “account” in the alternative, a party could not properly submit both counts to a trier of fact after the close of evidence. A petition on account assumes that a contract failed to form between the parties and merely seeks to prevent unjust enrichment.

An action upon account seeks to prove 1) that, at defendant’s request, plaintiff furnished goods and/or services to defendant, 2) that plaintiff charged a specific amount to the account, and 3) that the charges were reasonable (See, *Missouri Approved Jury Instructions, Eighth Edition, MAI 26.03*, and, Plaintiff’s Petition On Account, paragraphs 3, 4, and 7 (LF011-012)). Distinct from these elements of a petition on account, “[t]he elements that must be proven in order to recover for breach of contract are “(1) existence of an enforceable contract between [the parties to the action], (2) that mutual obligations had arisen under its

terms, (3) that [the party or parties being sued] had not performed obligations imposed by the contract and (4) that [the party seeking recovery] was thereby damaged." *Superior Ins. Co. v. Universal Underwriters Ins. Co.* 62 S.W.3d 110, 118 (Mo. App. S.D. 2001), citing *Trimble v. Pracna*, 51 S.W.3d 481, 506 (Mo. App. 2001). See, also, the approved instruction for an action based upon a breach of contract, *Missouri Approved Jury Instructions, Eighth Edition, MAI 26.01, 26.02 and 26.06.*

Authorities have repeatedly held that a petition on account is only a quasi-contractual remedy, akin to a request for relief under a theory of quantum meruit: "The principal purpose for enforcement of a quasi-contractual obligation under quantum meruit is to prevent unjust enrichment. An action on account and an action for quantum meruit are "almost mirror images"." *Raysik v. Standiford* 944 S.W.2d 288, 291-292 (Mo. App. W.D., 1997). (Citations omitted).

If the legislature had intended Section 431.180 to apply to a suit on an account in addition to those actions founded solely upon contractual relationships, it would have included such broadening language in the statute, as is evidenced by the legislature's enactment of Section 408.020 RSMO (which controls the rate of interest recoverable from creditors upon money due and payable upon both written contracts and upon accounts). Section 408.020 states:

"Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made." *Missouri Revised Statutes, Section 408.020* (emphasis added).

Section 408.020, last amended in 1979, fifteen years before the enactment of Section 430.180, shows that the Missouri legislature understands and appreciates the difference between actions upon a contract and those upon an account. The legislature can and does explicitly include petitions on account, along with actions upon contracts, in statutes dealing with the redress of broken agreements when the legislature finds that to do so is appropriate.

Section 431.180(2) only allows for an interest penalty in excess of the legal rate of nine per cent (under Section 408.020), and then, in addition to the interest penalty, for attorney's fees, if the party responsible to make payment under a private design or construction contract has failed to make "...all scheduled payments pursuant to the terms of the contract." By definition, a petition on account does not even seek recovery of any such "scheduled payments" but seeks as a remedy instead only the reasonable value of goods and/or services as a quasi-contractual method of preventing unjust enrichment when the parties have failed to enter into a contract. On its face then, it is at odds with the explicit language of Section 431.180 to seek attorney's fees pursuant to a petition on account which has as its redress not the award of the "scheduled payments" contemplated by the statute, but rather the "reasonable value of goods and services." To make a petition on account applicable to Section 431.180 would go beyond a straining of the plain meaning of the language of the statute and impose a stretch even upon the title of the law itself: "Scheduled payments pursuant to private construction contracts."

It is conceivable to posit that, in rendering its award for attorneys fees, the trial court applied rules regarding the liberal allowance of amendments to pleadings to conform them to the evidence and found Vance's "Petition on Account" to be in the nature of a breach of contract claim and then amended it as such, *sua sponte*, such that recovery of attorneys fees under Section 431.180 was justified.

In the alternative, it might be argued that Obermiller had impliedly consented to such an amendment by stating, itself, a count for breach of contract in its counterclaim (even though the jury found against Obermiller on this count). Such arguments, however, would go beyond even the rules allowing for liberality in granting amendments to the pleadings and would be contrary to the holdings of several authorities.

The Court, in *Jefferson v. Bick*, 872 S.W.2d 115 (Mo. App. E.D. 1994), stated:

“Bick Corporation argues that we may uphold the money judgment under the theory that the evidence amended the pleadings and supported a money judgment against Maurice Jefferson on the theory that he benefited from the loan and thus had a duty to repay it. We disagree that the evidence amended the pleadings. The evidence to which Bick Corporation points as supporting a money judgment was all evidence relevant to other issues in the case. In order for evidence admitted without objection to amend the pleadings by implied consent under Rule 55.33(b), that evidence must bear only on the new issue and not be relevant to an issue already in the case. “When evidence is relevant to an issue already in the case and there is no indication that the party who introduced it was seeking to raise a new issue, pleadings are not amended by implication or consent under Rule 55.33(b).” Further Bick Corporation never sought a money judgment at trial against Maurice Jefferson. In its proposed findings relating to Count II, Bick Corporation only asked the court to order an equitable lien. The trial court plainly erred in awarding Bick Corporation a money judgment against Maurice Jefferson.” *Id.* at 120. (Citations omitted).

*See, also, Springfield Land And Development Co. v. Bass, 48 S.W.3d 620, 623 (Mo. App. S.D., 2001): "Here, breach of contract by Byrd was not pled. "Courts have power to decide only those questions which are presented by the parties in their pleadings;" State v. Hall, 867 S.W.2d 251, 254 (Mo.App.1993): "[a]lthough a certain degree of flexibility is allowed in pleading a cause of action, a party cannot completely stray from a specifically pleaded statutory theory of recovery and claim that the theory intended was an altogether different statutory theory."*

**II. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES TO VANCE UNDER SECTION 431.180 RSMO BECAUSE THE TRIAL COURT LACKED ANY STATUTORY AUTHORITY FOR ENTERING SUCH AN AWARD IN THAT VANCE FAILED TO ESTABLISH ENTITLEMENT TO AND THEN BE GRANTED AN AWARD OF THE INTEREST PENALTY PROVIDED FOR UNDER THE "PRIVATE PROMPT PAYMENT STATUTE" AS IS REQUIRED AS A PREREQUISITE TO ENTITLEMENT TO ANY AWARD OF DISCRETIONARY ATTORNEY FEES**

In the judgment rendered in the case at bar, the trial court entered judgment for the amount of the remitted verdict (\$36,492.75) and provided for pre-judgment interest at the legal rate (9% per annum) only, declining, without comment, to impose the interest penalty of up to 1.5% (or 18% per annum). The trial court's award of pre-judgment interest was stated in the judgment as: "...plus pre judgment interest of \$6,021.18 for 22 months at \$273.69 per month." (LF120-121). Interest on \$6,021.18 totals \$279.69 per month if figured at the legal rate of 9 per cent multiplied by the 22 months (pursuant to *Missouri Revised Statutes, Section 408.020*) as opposed to figuring the interest at 18 per cent per annum which would yield a total interest of \$456.18 per month.

*Missouri Revised Statutes, Section 431.180 (Scheduled payments pursuant to private construction contracts-- enforcement—exemption)* states, in pertinent

part:

“...2. Any person who has not been paid in accordance with subsection 1 of this section may bring an action in a court of competent jurisdiction against a person who has failed to pay. The court may in addition to any other award for damages, award interest at the rate of up to one and one-half percent per month from the date payment was due pursuant to the terms of the contract, and reasonable attorney fees, to the prevailing party.” *Missouri Revised Statutes, Section 431.180(2)* (emphasis added).

The explicit language of Section 431.180 sets forth a scheme whereby a court must first determine whether the circumstances of any given dispute warrant an additional award of an interest penalty, and then, if so, additionally whether or not an award of discretionary, reasonable attorney’s fees shall be awarded. If the legislature intended that a court would have the discretion to award *either* the interest penalty *or* attorney’s fees, and thus the authority to award only attorneys fees, in the absence of awarding the interest penalty, then the language of the statute would have indicated, instead, that a court may award interest “and/or” reasonable attorney’s fees.

Although this reading of Section 431.180 may seem somewhat picayune, when read in context with the statutory scheme of the Missouri (Public) Prompt-Payment Act (or “MPPA”), enacted in 1990 (*Missouri Revised Statutes, Section 34.057 et. seq.*), a predecessor statute to the “private prompt payment act” under Section 431.180, it seems clear that the Missouri Legislature most likely intended that an award of reasonable attorneys fees only be attendant to an award of the interest penalty after a determination that the interest penalty is justified due to a party’s bad faith failure to make scheduled payments.

Under the MPPA, a statutory framework was set up for the procedures to be followed, and for redress of the violation of those procedures, in regards to

public works (instead of private) contracts. The concern of contractors prior to passage of the MPPA was a seemingly prevalent trend with state and municipal entities (and general contractors hiring subs) to routinely pay slowly upon invoices for work done pursuant to public works contracts. (*See, City of Independence for Use of Briggs v. Kerr, 957 S.W.2d 315(Mo. App. W.D., 1997)*: “Section 34.057 is a remedial statute, adopted for the purpose, inter alia, of addressing widespread abuses of subcontractors by contractors. Efforts to legislatively address the problem of abusive practices led to the adoption in 1990 of § 34.057.” *Id.* at 321, citing *R. Stockenberg, Prompt Pay for Government Construction Work in Missouri, 48 J. Mo. Bar 11 (1992)*) The MPPA set about to address these concerns by legislating the proper framework for payment, and by allowing for the imposition of an interest penalty of up to 1.5% per month and reasonable attorneys fees, in the event that a contractor brought suit under the MPPA and was successful at trial. The statutory framework of the MPPA, however, was a two-tiered approach in regards to the award of the interest penalty and attorney’s fees. With the understanding that payment on government contracts is often justifiably withheld, the Act first set forth a list of ten, non exclusive, justifications under which a governmental agency would have adequate cause to withhold or delay the payments as scheduled by the underlying contract (*Missouri Revised Statutes, Section 34. 057(5)*). The Act then required that, prior to any award of the interest penalty, the trier of fact (either judge or jury) make a specific determination that the withholding of any scheduled payments had been unjustified (or “not withheld in good faith for reasonable cause” as stated in Section 34.057(5)). Regarding the interest penalty and an award of attorneys fees, the MPPA was worded as follows:

“If it is determined by a court of competent jurisdiction that a payment which was withheld pursuant to subsections 2 and 5 of this section was not

withheld in good faith for reasonable cause, the court may impose interest at the rate of one and one-half percent per month calculated from the date of the invoice and may, in its discretion, award reasonable attorney fees to the prevailing party.” *Missouri Revised Statutes, Section 34. 057(6)*

This language is, of course, remarkably similar to the language of the private prompt payment act quoted above: “The court may in addition to any other award for damages, award interest at the rate of up to one and one- half percent per month from the date payment was due pursuant to the terms of the contract, and reasonable attorney fees, to the prevailing party.” *Missouri Revised Statutes, Section 431.180(2)*

After exhaustive research, Appellant has been able to locate no cases interpreting the “private prompt payment act” of Section 431.180. Cases interpreting the MPPA (Section 34. 057, *et. seq.*) do exist, however, and are instructive as to interpretation of the provisions of Section 431.180, as that section applies to private (instead of public) contracts for design and construction work. For example, the title “Private Prompt Payment Act” is not in fact the title of Section 431.180 but instead has been the moniker ascribed to that section by various Courts interpreting the MPPA as a reference to its growth out of the MPPA and its similarity thereto. *See, for example, Environmental Protection, Inspection, and Consulting, Inc., v. City of Kansas City 37 S.W.3d 360, 369 (Mo. App. W.D., 2000)* where, at footnote 18, Section 431.180 is called by that Court “Missouri's prompt payment statute for private construction contracts § 431.180.” *See, also, Midwest Asbestos Abatement Corp. v. Brooks 90 S.W.3d 480, 483 (Mo. App. E.D., 2002)* which labeled Section 431.180 the “Private Prompt Pay Act, Section 431.180.” It is also instructive to note that, in *Midwest Asbestos Abatement Corp. v. Brooks*, the Court there chose to review the trial court’s granting of judgment notwithstanding the verdict based upon the MPPA, even

though the trial court granted JNOV pursuant to the private prompt pay statute under Section 431.180, due to the fact that the contracting agency was a public instead of private entity. Finding the statutes sufficiently similar, the *Midwest Asbestos* Court found no problem reviewing the trial court's decision under either statute ("If a plaintiff is entitled to recovery upon any theory pleaded we will affirm the judgment for the plaintiff regardless of the reasoning articulated by the trial court." *Id.* at 484-85) and chose to review it under the MPPA because of the contracting party's public entity status.

When interpreting the language of the MPPA and its framework for imposing the interest penalty and attorneys fees, the authorities have consistently held in accord with the argument that the legislature's use of the connector "and" by itself (instead of "and/or") compels a penalty scheme whereby the interest penalty must be imposed prior to any award of attorneys fees. Those same authorities hold that, in the absence of an award of the interest penalty, no award of attorneys fees may be granted.

The Court in *Strain-Japan R-16 School Dist. v. Landmark Systems, Inc.* 51 S.W.3d 916 (App. E.D. 2001), stated:

"Even if we were to find that the arbitrator did not exceed his powers by awarding attorney's fees on the prior litigation, Landmark would still fail in its argument. The arbitrator in awarding attorney's fees did not impose the penalty interest under Section 34.057.6. The issue of attorney's fees is to be decided after the issue of good faith has been decided and if penalty interest is to be awarded. City of Independence, 957 S.W.2d at 323. The judge, here the arbitrator, may award attorney's fees only if the party prevails on the penalty interest issue. *Id.* In the present case, the arbitrator's award does not mention anything as to the good faith or bad faith of either of the

parties. The arbitrator did not award penalty interest on the amount withheld by District. Since penalty interest was not imposed on District, we conclude the trial court was correct in vacating the arbitrator's award as to attorney's fees.” *Id.* at 921.

Also, in *Environmental Protection, Inspection, and Consulting, Inc. v. City of Kansas City* (App. W.D. 2000) 37 S.W.3d 360, the Court there reviewed the trial court’s granting of a motion for judgment notwithstanding the verdict as to the interest penalty imposed under the MPPA claim, upheld the trial court’s granting of the JNOV striking the interest penalty, and then found that the striking of the interest penalty was dispositive of the attendant award of attorneys fees as well: “Our determination that EPIC made no submissible case disposes of its entire claim under the Prompt Payment Statute. We will, therefore, not consider its remaining points concerning the conditional new trial and the denial of attorney fees.” *Environmental Protection, Inspection, and Consulting, Inc. v. City of Kansas City* (App. W.D. 2000) 37 S.W.3d 360, 372.

See, also, *Midwest Asbestos Abatement Corp. v. Brooks* 90 S.W.3d 480 (Mo. App. E.D., 2002), where the Court there confirmed: “The issue of attorney's fees under the Prompt Pay Act is to be decided after the issue of good faith has been decided and if penalty interest is to be awarded. (Citation omitted). The trial court may award attorney's fees only if the party prevails on the penalty interest issue.” *Id.* at 483.

## CONCLUSION

Wherefore, pursuant to the arguments and authorities set forth, Appellant Obermiller asks that this Court reverse the judgment entered by the trial court against it for attorneys fees in the amount of \$61,400.00.

Respectfully submitted,

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By: \_\_\_\_\_  
Charles E. Weedman, Jr., #29319

CERTIFICATE OF SERVICE

I hereby certify that I delivered the original plus nine copies of the within Brief of Appellant together with a diskette to the MISSOURI COURT OF APPEALS, Western District, 1300 Oak Street, Kansas City, Missouri, 64106, and mailed two copies with a diskette thereof to Jerry Rellihan, 319 West Foxwood Drive, P.O. Box 1485, Raymore, MO 64083, Attorney for Plaintiff/Appellee, on the 4th day of March, 2004.

\_\_\_\_\_  
C. E. Weedman, Jr.

CERTIFICATE OF COMPLIANCE

I, hereby certify that Microsoft Word 2000 was used to prepare this Brief and that I have provided the Clerk of the Court and Plaintiff/Appellee's counsel with a 3-1/2 inch computer diskette containing the full text of this brief, labeled with the case name and number. I further certify that the diskette was scanned and is virus-free.

\_\_\_\_\_  
Charles E. Weedman, Jr., #29319

**RULE 84.06 CERTIFICATE**

**I hereby certify that the foregoing brief:**

- (1) includes the applicable information required by Rule 55.03;**
- (2) complies with the limitations contained in Rule 84.06(b);**
- (3) the number of words in the brief is 5,582.**

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