IN THE MISSOURI SUPREME COURT

Jerry Crockett

Plaintiff/Respondent

v.

Thomas Polen

Defendant/Appellant

Supreme Court No. 88232

RESPONDENT'S SUBSTITUE BRIEF

Appeal From the Circuit Court of Platte County
The Honorable Gary D. Witt, Circuit Judge

On Transfer From
The Missouri Court of Appeals
Western District.

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JURISDICTIONAL STATEMENT

This appeal concerns the decision issued by the Honorable Judge Gary Witt denying Thomas Polen's Motion to Quash Wrongful Garnishment entered on or about April 4, 2005. This decision occurred in the Sixth Judicial Circuit, Division V in the city of Platte, state of Missouri. Therefore this case was appealable to the Missouri Court of Appeals, Western District pursuant to Article V, Section 3 of the Missouri Constitution. The Defenant appealed on May 5, 2005.

The Missouri Court of Appeals for the Western District reversed the trial courts decision in favor of the Plaintiff-Respondent on October 31, 2006. On November 15, 2006 the Plaintiff Respondent filed its motion for rehearing and or transfer, with suggestions in support thereof to the Supreme Court. On December 19, 2006 the Court of appeals overruled and denied said motions. On January 2, 2007, Plaintiff-Respondent filed his motion for transfer to this court. This court granted transfer on January 30 2007.

This Court has jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

In June of 1994 the Respondent Jerry Crockett, also referred to as the Plaintiff, by and through his attorney of record filed a cause of action against Appellant Thomas Polen, also referred to as the Defendant and Judgment Debtor, for failure to pay on a Promissory Note. (S.L.F. 1-2)

On September 13, 1994 the Defendant, Thomas Polen, appeared in person and confessed to a judgment in the amount of Three Thousand Six Hundred Dollars ($3,600) together with interest and costs. (S.L.F. 3-4)

Between October 7, 1994 and February 27, 1995 two garnishments were issued to the Defendant's place of employment both of which were returned unsatisfied due to prior wage attachments pursuant to a child support order. (S.L.F. 5-7)

In February of 2004 it was discovered that the prior wage attachment pursuant to a child support order had expired and on February 26, 2004 a garnishment was issued to the Defendant's employer and served on March 1, 2004. (S.L.F. 8, 9, 10)

On March 29, 2004 the clerk of the Platte County Court received and duly entered upon the record a garnishment check received from the Garnishee, AMR Corp, in the amount of $497.06. (S.L.F 11, 12) followed by another garnishment check received from the Garnishee which was recorded on April 12, 2004. (S.L.F 13, 14)

The Defendant, by and through his attorney of record, filed a Motion to Quash Wrongful Garnishment on April 20, 2004 asserting that the judgment had been previously satisfied. (S.L.F 15)

On April 26, 2004 the clerk of the Platte County Court once again received and duly entered upon the record another garnishment check received from AMR Corp in the amount of $497.06. (S.L.F 16, 17) with other payments recorded on May 10, 2004 (S.L.F 20) and on May 24, 2004. (S.L.F 21, 22, 23)

A motion hearing was held on August 26, 2004, several days prior to the ten year anniversary of the judgment date, wherein the Defendant, Plaintiff, and their respective attorneys met in person before the Honorable Judge Gary Witt. Both sides presented evidence, both sides presented witnesses for direct and cross examination, and each side through council argued their case to determine whether the judgment had been previously paid and the vitality of the remaining judgment. The court took the matter under advisement on both the Defendant and the Plaintiff's testimonies and the evidence presented. (Tr.1. 4-21)

Judge Witt denied the Defendant's motion on August 30, 2004 and allowed the continuing garnishment of the Judgment Debtor's wages. (S.L.F. 37)

On September 13, 2004 the clerk of the Platte County Court received and duly entered upon the record another garnishment check received from the Garnishee, AMR Corp, in the amount of $523.94. (S.L.F 38, 39) with other payments recorded on December 20, 2004. (S.L.F 48, 49)

On January 24, 2004 the Defendant, by and through counsel, filed a Motion to Quash Wrongful Garnishment and to quash "the performance of any proceedings to enforce the judgment" asserting the Judgment expired on September 13, 2004. (S.L.F. 54-55) Shortly thereafter on February 7, 2004 the court filed the Plaintiff's Response to

Defendant's Motion to Quash Wrongful Garnishment. (S.L.F. 61-62) Both sides appeared, by and through their respective attorneys, in front of Judge Witt on March 10, 2005 for the motion hearing. The Defendant's motion claimed that the underlying judgment had expired and the continuing garnishments of his wages should cease. The Plaintiff's answer to the motion was that there had been multiple payments duly recorded upon the record prior to the expiration of the 10-year statute of limitations which had revived the judgment for an additional ten (10) years from the last recorded payment on the record. At a motion hearing on the 10th day of March, 2005, both sides presented evidence and oral arguments and the Honorable Judge Witt of the Platte County Circuit Court found for the Plaintiff that payments received and paid into the court were duly entered upon the court record before the judgment had expired and allowed the continuing execution to issue pursuant to Missouri Revised Statute Section 516.350.1. From the finding thereon the defendant took the appeal in question. (Tr.2. 2-4)

On April 4, 2005 the court having weighed the evidence, which included both the proper recordation of payments on the record and the previous motion hearing, took the matter under advisement denied the Defendant's motion (S.L.F. 74). A Notice of Appeal was filed with the court on May 11, 2005. (S.L.F. 83-84)

The Judgment Debtor's wages continued to be garnished until all monies due and owing on the judgment were collected and the Plaintiff's attorney filed a Satisfaction of Judgment on or about June 29, 2005. (S.L.F. 93)

On October 31, 2006, the Western District Court of Appeals issued its written opinion finding in favor of the Appellant and against the Respondent, your petitioner,

reversing and remanding this case to the Platte County Circuit Court. The written opinion of the court concedes the court chose not to follow the previous decision of another Missouri appellate court, specifically Martin v. Martin, *979 S.W.2d 948 (Mo. App. S.D. 1998)* which states that payments received and paid into the court via garnishment, and duly entered upon the record before the expiration of the judgment, revive the judgment for an additional 10 (ten) years. Further the court's opinion raised questions about the validity of a Missouri statute and the intent of the legislature by rendering the language contained in Missouri Revised Statute Section 516.350 to be mere surplusage. The court's ruling therefore raises an important question of general interest and importance.

References to the Appellant's Legal File are designated "L.F." References to the Supplemental Legal File supplied by the Respondent are designated "S.L.F." References to the transcript of the August 26, 2004 proceeding are designated "Tr.1." References to the transcript of the March 10, 2005 proceeding are designated "Tr.2." References to Respondent's Appendix are designated "Resp. App."

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT ERR BY DENYING THE JUDGMENT DEBTOR'S MOTION TO QUASH THE GARNISHMENT BECAUSE MO.REV.STAT. § 516.350 PERMITS A JUDGMENT CREDITOR TO CONTINUE TO EXECUTE AN UNSATISFIED JUDGMENT SO LONG AS THE CREDITOR REVIVES IT WITHIN TEN YEARS OF ITS RENDITION OR LAST REVIVAL, OR IN CASE A PAYMENT HAS BEEN MADE ON SUCH JUDGMENT, ORDER OR DECREE, AND DULY ENTERED UPON THE RECORD THEREOF, AFTER THE EXPIRATION OF TEN YEARS FROM THE LAST PAYMENT SO MADE, IN THAT THE CLERK OF THE COURT ENTERED NUMEROUS PAYMENTS ON THE RECORD WITHIN TEN YEARS OF THE TRIAL COURT RENDERING JUDGMENT, THE LAST OF WHICH WAS DECEMBER 20, 2004, FAR LESS THAN TEN YEARS BEFORE THE JUDGMENT DEBTOR FILED HIS MOTION.

Martin v. Martin, 979 S.W.2d 948 (Mo. App. S.D., 1998)

Burton v. Everett, 845 S.W.2d 710, 714 (Mo. Ct. App. 1993)

Ferguson v. Ferguson, 636 S.W.2d 323 (Mo. 1982)

Pirtle v. Cook, 956 S.W.2d 235, 238 (Mo. 1997).

Section 511.350 R.S.Mo.

Section 516.350 R.S.Mo.

Missouri Supreme Court Rule 74.09

II.

THE TRIAL COURT DID NOT ERR BY DENYING THE JUDGMENT CREDITOR'S MOTION TO QUASH THE GARNISHMENT BECAUSE MO.REV.STAT. § 516.320 DOES NOT APPLY TO THE QUESTION OF THE CONTINUED VITALITY OF CROCKETT'S JUDGMENT IN THAT CROCKETT HAD PREVIOUSLY OBTAINED A JUDGMENT AGAINST THE JUDGMENT DEBTOR, WITH WHICH HIS CAUSE OF ACTION MERGED.

Hanff v. Hanff, 987 S.W.2d 352 (Mo. App. E.D., 1998)

Prenger v. Barmhoer, 939 S.W.2d 23, 28 (Mo. App. 1997)

Wormington v. City of Monett, 358 Mo. 1044, 218 S.W.2d 586, 588 (1949)

Section 516.100 R.S.Mo.

Section 516.320 R.S.Mo.

Section 516.350 R.S.Mo.

Missouri Supreme Court Rule 74.09

Missouri Supreme Court Rule 84.04(d)(C)

ARGUMENT

THE STANDARD OF REVIEW

The standard of review of the trial court's denial of Appellant's Motion to Quash Garnishment is governed by the principles of Murphy v. Carron, 536 S.W.2d 30 (Mo. Banc. 1976). The trial court's decision should be affirmed "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." Id. at 32. In this case, there is substantial evidence to support the trial court's decision, and the trial court neither erroneously declared the law, nor erroneously applied the law and therefore the trial court's decision should be affirmed, and the dictates of Breman Bank and Trust v. Muskopf, 817 S.W.2d 602 (Mo. App. E.D. 1991) do not apply herein.

The phrase "weight of the evidence" as it is used in Murphy v. Carron, means its weight in probative value, not the quantity or the amount of evidence. The "weight of the evidence" is not determined by mathematics; instead the weight of the evidence depends on its effect in inducing belief. Johnson v. Gregg, 807 S.W.2d 680, 685 (Mo. App. S.D. 1991). Appellate courts should exercise the power to set aside a decree or judgment on the ground that it is "against the weight of the evidence" with caution and with a firm belief that the decree or judgment is wrong. Murphy v. Carron, 536 S.W.2d 32. (Mo., 1976) "Since the determination of whether a payment is made on the record does not involve the exercise of discretion but only involves the application of law to the facts, the court may weigh the evidence and determine the facts accordingly. This court finds that a

payment on the judgment was duly entered on the record… Any payment made will revive the judgment...” Martin v. Martin, 979 S.W.2d 948 (Mo. App. S.D., 1998)

I.

THE TRIAL COURT DID NOT ERR BY DENYING THE JUDGMENT DEBTOR'S MOTION TO QUASH THE GARNISHMENT BECAUSE MO.REV.STAT. § 516.350 PERMITS A JUDGMENT CREDITOR TO CONTINUE TO EXECUTE AN UNSATISFIED JUDGMENT SO LONG AS THE CREDITOR REVIVES IT WITHIN TEN YEARS OF ITS RENDITION OR LAST REVIVAL, OR IN CASE A PAYMENT HAS BEEN MADE ON SUCH JUDGMENT, ORDER OR DECREE, AND DULY ENTERED UPON THE RECORD THEREOF, AFTER THE EXPIRATION OF TEN YEARS FROM THE LAST PAYMENT SO MADE, IN THAT THE CLERK OF THE COURT ENTERED NUMEROUS PAYMENTS ON THE RECORD WITHIN TEN YEARS OF THE TRIAL COURT RENDERING JUDGMENT, THE LAST OF WHICH WAS DECEMBER 20, 2004, FAR LESS THAN TEN YEARS BEFORE THE JUDGMENT DEBTOR FILED HIS MOTION.

As evidenced by the court docket (S.L.F. I – IV) and by several court stamped and filed payment receipts (S.L.F. 13, 14, 16, 17, 19, 20, 21, 22, 23, 35, 36, 38, 39) there were numerous payments "duly entered upon the record" pursuant to RMSo 516.350.1 (Resp. App. A1) before the September 13, 2004 anniversary date of the underlying judgment. The Appellant argues that a statute of limitations may not be tolled even if payments are duly recorded upon the record and then alleges further and inconsistently that even if they are on the record they must be voluntary and then goes so far as to insist that if they were voluntary, it is up to the Plaintiff to prove there was no coercion.

The Appellant begins an argument by citing Wormington, Peterson, and Hodgson.(App. Br. 16). Peterson is somewhat on point in that it deals with the Plaintiff relying on payments on a judgment to toll the statute of limitations. However, unlike this appeal, there were no payments duly entered on the record in Peterson pursuant to RMSo 516.350 so the judgment was deemed to have not tolled. Wormington is also misapplied in that the Appellant attempts to shade the findings of the court. "Section 516.350 presumes payment of a judgment after ten years have expired from its rendition or revival. This is a conclusive presumption and the statute cancels the judgment debt and extinguishes the right of action." Wormington v. City of Monett, 358 Mo. 1044, 218 S.W.2d 586, 588 (1949)

Under Section 516.350.1, judgments are conclusively presumed to be paid within ten years of the original judgment unless there has been a revival of the judgment within the ten-year time period or a payment has been entered on the record. Pirtle v. Cook, 956 S.W.2d 235, 238 (Mo. 1997) see also Burton v. Everett, 845 S.W.2d 710, 714 (Mo. Ct. App. 1993) (citing Spangler v. Spangler, 831 S.W.2d 256, 259 (Mo. Ct. App. 1992)).

There is no argument by the Appellant that any of the payments received by the clerk of the Platte County Court were not duly entered upon the record before the expiration of the ten year anniversary of the judgment. The simple fact that payments have been duly entered upon the record by the clerk in accordance with § 516.350.1 RMSo simply can not be disputed.

Section 516.350.1 provides an extension to the life of a judgment so long as a payment is "duly entered upon the record." "Duly entered upon the record" would seem

to require some recordation by a person in authority or charged with the duty of making the record. In reference to court proceedings, the term "record" is "a written memorial of all the acts and proceedings in an action or suit, in a court of record." The term "record" would include "any recordation by the clerk of the court for payments made on the judgment." State ex rel. Clatt v. Erickson, 859 S.W.2d 239 (Mo. Ct. App. 1993). Missouri Courts have continuously and without waiver overwhelmingly affirmed or implied that payments alone within ten years toll the judgment and extend the limitation period. See, e.g., Martin v. Martin, 979 S.W.2d 948 (Mo. App. S.D., 1998); Spangler v. Spangler, 831 S.W.2d 256, 259 (Mo. Ct. App. 1992); Peterson v. Peterson, 273 S.W.2d 239 (Mo.1954); Wardlow v. Denny, 579 S.W.2d 842 (Mo.App.1979); Vogel v. Vogel, 333 S.W.2d 306 (Mo.App.1960); Burton v. Everett, 845 S.W.2d 710, 714 (Mo. Ct. App. 1993); State ex rel. Meyer v. Buford, 18 S.W.2d 526 (Mo.App.1929) ; Walls v. Walls, 620 S.W.2d 11 (Mo.App.1981); Tudor v. Tudor, 617 S.W.2d 610 (Mo.App.1981); Schmidt v. Schmidt, 617 S.W.2d 601 (Mo.App.1981); Pourney v. Seabaugh, 604 S.W.2d 646 (Mo.App.1980); Rincon v. Rincon, 571 S.W.2d 475 (Mo.App.1978); Swan v. Shelton, 469 S.W.2d 943 (Mo.App.1971).

Appellant throughout his argument continually misstates that a payment must be voluntary to revive a judgment. In his argument he even raises Martin v. Martin, 979 S.W.2d 948 (Mo. App. S.D., 1998) which clearly contradicts him as it says payments need not be voluntary to revive a judgment but he attempts to wrongfully distinguish the Martin decision to apply only towards periodic child support. However, Martin distinctly and unequivocally states that garnishments are payments pursuant to the meaning of §

516.350.1 RMSo. 1992 which precludes child support. “This Court consistently held that payments collected by garnishment and duly entered upon the record were within the meaning of § 516.350.1” Id. and this court has previously found the difference between "voluntarily" and “involuntary” payments inconsequential.

The Appellant also briefly touches on the Legislative amendment to § 516.350.1 in which they added subsection § 516.350.2, a subsection that separates child support orders from other forms of civil judgments. As he points out the in the discussion in Ferguson v. Ferguson, 636 S.W.2d 323 (Mo. 1982) the court agreed that the legislative intent was to “attempt to ameliorate the harshness of and hardships created by former § 516.350, RSMo. 1978” Id.324 however the Appellant misconstrues the courts discussion as they were obviously referring to the undue burden placed upon the holder of the support order to prove the existence of payments not recorded by the court clerk in the execution and revivals of maintenance orders against the Obligors. The Appellant also excluded the preemptive paragraph which also contradicts his stance, “Section 516.350, RSMo 1978, declared that judgments were conclusively presumed paid ten years after original rendition absent some exception found in the statute that would extend the time period. In 1982 the legislature amended § 516.350, RSMo 1978 by reenacting the former statute as section 1 and adding one additional section-section 2. (S.B. 468-81st General Assembly Second Regular Session). In view of the legislative reenactment, the clear intent of the general assembly expressed in the reenacted subsection 1 was to require either a revival "upon personal service duly had upon the defendant or defendants therein," or a payment made on the judgment "and duly entered upon the record thereof" in order to revive the

judgment and extend the time period past "the expiration of ten years from the date of the original rendition" of the judgment under that subsection." Id. 324 The court agreed en banc then, as it continues to do so today, that a payment either voluntary or involuntary, which is duly entered upon the record, revives a judgment. It would seem that the legislative intent was to give the judgment debtor mere notice that the debt remained unsatisfied. Notice could be given formally through service and a hearing or through a garnishment where the judgment debtor is served each time with a statement that the judgment and underlying obligation remains unsatisfied.

The precursor to section 516.350 was passed in 1909. The statute was also amended or revised in 1919, 1929, 1982, 1999, and 2001. In 1999, the legislature added subsection 3 to the statute, leaving sub sections 1 and 2 intact from the 1982 revisions. It is important to note that in the almost 100 year history of 516.350 the Missouri Legislature has never changed the term "payment" to prohibit and exclude garnishments nor have they amended the term to read "voluntary payment". There is no uncertainty or ambiguity contained in the language of § 516.350.1 and the Legislative intent is clear.

Clearly Martin v. Martin, 979 S.W.2d 948 (Mo. App. S.D. 1998) controls the outcome of this appeal. Appellant attempts to base a conclusion that "payments must be voluntary" based on Mayes and Eubank, and in doing so chose to disregard Martin. It must first be noted that in reading both Mayes and Eubank, neither case stipulates that a payment must to be voluntary to revive a judgment before the judgment expires under Section 516.350.1 RSMo. The Appellant accordingly misstated the law.

Neither Mayes nor Eubank decided any questions raised in this appeal. Both cases dealt solely with the execution on judgments which had already expired before the attempted executions took place. In both cases the courts found that, absent evidence of a voluntary payment made after the statute of limitations had passed, the statute bars further execution on the previously expired judgments as there had been no revival by payments on the record before the expiration of the statutes.

Unlike either Mayes or Eubank, this appeal is based upon the tolling of the statute of limitations as contemplated by RSMO 516.350.1 and based solely on facts that the payments were made and duly entered upon the record before the expiration of the judgment. There is no argument that payments were made and duly entered upon the record before the 10-year anniversary of the judgment. However, the Appellant relies on Eubank to hold that the payments made upon the record did not toll the statute of limitations pursuant to Section 516.350.1. The Appellant noted that the payments were made involuntarily since they were collected via garnishment. Even though, as the Appellant concedes, the statute does not specify that only voluntary payments toll the period, the Appellant concluded that the legislature did not intend to allow involuntary payments to toll the statute. A thorough reading of Eubank shows that the *Eubank* court never held that a payment must be voluntary to toll the statute before the judgment expires, but does hold that only a voluntary payment can revive a judgment after it has expired - in the same way as reaffirming a cause of action on a promissory note after the statute of limitations has expired.

Specifically, in Eubank the appellate court had before it a case where several years after the ten-year period to collect the judgment had lapsed the creditor asked the clerk of the court to enter a partial credit in favor of the judgment creditor on the judgment. Eubank v. Eubank, 29 S.W.2d 212, 213 (Mo. App. 1930). The judgment debtor denied having made any payment. Id**.** The court, analogizing to a statute of limitations on a promissory note, ruled that the creditor cannot manufacture an extension of the statute of limitations by entering a gratuitous credit on the record. Id. at 214. The court said that, for such a credit to toll the period, it must be backed by proof that the debtor actually made a payment. Id. at 214-15. It would make no sense either in the Eubank context of a payment after the judgment expired or in the context of a promissory note to talk about involuntary payments, because there couldn't be any. Nowhere in the opinion did the court rule that only a voluntary payment can toll the period before it had so expired.

Essentially, Eubank is about the efficacy of letting a judgment creditor simply enter credits on the court's record and having that entry, by itself, serve as proof of payment sufficient to toll the statute or revive and re-toll an expired judgment. It is not about the form that such payment must take. It certainly doesn't say that, if the clerk of the court had entered record payments, by virtue of garnishments passing through the court before the judgment had expired, those payments would not toll the statute.

In the context of Eubanks, after the judgment has expired any payments must be made voluntarily either by stipulation of the debtor or through a showing that the creditor received payments and that the credits were not merely gratuitous entries upon an account register. Absent the showing of such additional evidence the court should

rightfully rule for the debtor. In referring to Section 1341, the forerunner of RSMO 516.350, the *Eubank* court stated:

> "The clause in section 1341 referring to the effect of payments on account of judgments must be deemed to have been inserted for a purpose. If that does not mean that such payments shall have the effect of extending the life of the judgment, it is meaningless."

Id. (quoting Buford, S.W.2d 526, 528)

Here, unlike *Eubank*, Plaintiff, the judgment creditor, does not rely upon mere recitals of payments hand-written into margin entries made upon on the judgment record after the judgment had already expired. Rather the Plaintiff/Respondent met the requirements of Eubank by including proof "aliunde" for the receipt of payments received before the tolling of the 10 years contemplated by RSMo. 516.350.1.

In Mayes, the Supreme Court was presented a case where six years after the ten-year period to collect the judgment had lapsed, the creditor asked the clerk of the court to enter a partial credit in favor of the judgment creditor on the judgment and allow execution to issue. Mayes v Mayes, 116 S.W2d 1, 6 (Mo 1938). The debtor presented a motion to quash the execution because the underlying judgment had already expired. The trial court agreed and quashed the execution. An appeal to the Kansas City Court of Appeals and subsequent transfer to the Supreme Court followed. In the appeal, the Supreme Court found there was no evidence of any payments ever being made on the judgment aside from the "vague oral testimony" of the creditor. Id. The court also found there had been no revival, by either payment on the record or scire facias, and so affirmed the judgment

quashing the execution that had been issued 16 years after the original decree. The Court also noted that even if one were to believe the creditor's testimony, she had caused the debtor to be arrested and placed into penal servitude, so those payments could not be placed on the record six years after the expiration of the judgment in an attempt to re-toll the statute because they were not the voluntary payments required to revive a previously expired judgment. Id. (citing *Eubank).*

The opinion of the *Mayes* court, just like the *Eubank* court, found that any payments made by the debtor after a judgment has expired must be made voluntarily if those payments are to revive the expired judgment. A thorough reading of Mayes also shows that the Supreme Court does not claim a payment must be voluntary to toll the statute before a judgment expires, but would be required only after it has so expired – much like a voluntary payment can revive a lapsed cause of action on a promissory note. Nowhere in the opinion does the court rule or even hint that only voluntary payments can toll the period before the judgment has expired.

In an interesting interpretation of "voluntary payment" Spangler v Spangler, 831 S.W.2d 256 (Mo App. W.D. 1992), states that a voluntary payment made by Mr. Spangler was sufficient to toll the statute. A thorough reading of Spangler shows that Mr. Spangler's payment re-tolled the statute - even though it was only made after the significant coercion and threats of imprisonment inherent in the Clay County Prosecuting Attorney filing an action for contempt. Id. The *Spangler* court found this payment, which one cannot reasonably characterize as voluntary, made before the expiration of the judgment, tolled the statute for an additional 10 years. Id. If Spangler's judicially forced

payment tolled the judgment, it would take a serious amount of mental gymnastics to find a garnishment order would not also toll the statute.

Further, the Appellant's arguments err by failing to apply the additional evidence of payments, submitted in compliance with Eubank, that conclusively show payments made and duly entered upon the records as prescribed by RSMo 516.350.1. Those payments should have tolled the judgment for an additional 10 years from each payment entered as the Southern District Court of Appeals previously decided in Martin, which also relied on Spangler.

One must ask if it is even possible to have a voluntary payment pursuant to 516.350.

After a judgment is rendered against a defendant and in favor of a plaintiff, can a defendant make anything but an "involuntary" payment? As seen in the cases cited previously, isn't the defendant subject to the courts enforcement powers and post judgment remedies if he refuses to pay as ordered?

The appellant finally evolves his argument to state that an involuntary payment can revive a decretal order but a judgment which is "sum certain" can only be revived by a voluntary payment and cites Mayes which is left unsupported. Again the law of Section 516.350 is clear; the decretal language of the statute pertaining to child support was added to alleviate the harshness of those not paying child support payments for ten years and then claiming they did not have to pay anymore, even though their children were still minors and in need of support. The law clarified the principle that an order of child support was a series of orders, each with a ten year statute of limitations starting on the day that each payment is due, not on the date the original judgment was entered. The

Appellant wants to turn that logic on its ear and argue that this is still one order dating back to the original date rather than separate orders beginning on the date each installment is due. That being said, one must ask why then a decretal installment order which becomes a series of sum certain orders is treated any differently than a single sum certain order.

The trial court's decision should be affirmed "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." Prenger v. Barmhoer, 939 S.W.2d 23, 28 (Mo. App. 1997). The trial court did not err in denying the Defendant's motion, which is the underlying point on appeal, because substantial and credible evidence supported the finding that multiple payments were duly entered upon the record prior to September 13, 2004 as prescribed by Section 516.350.1 and Rule 74.09(a) thereby reviving the judgment and extending the ten year statute of limitations from the date the payments were entered.

II.

THE TRIAL COURT DID NOT ERR BY DENYING THE JUDGMENT CREDITOR'S MOTION TO QUASH THE GARNISHMENT BECAUSE MO.REV.STAT. § 516.320 DOES NOT APPLY TO THE QUESTION OF THE CONTINUED VITALITY OF CROCKETT'S JUDGMENT IN THAT CROCKETT HAD PREVIOUSLY OBTAINED A JUDGMENT AGAINST THE JUDGMENT DEBTOR, WITH WHICH HIS CAUSE OF ACTION MERGED.

The Appellant arguments fail to comply with Missouri Supreme Court Rule 84.04(d)(C) in that he fails to state the legal reasons for his claims of reversible error and he fails to explain why the legal reasons, in the context of the case, support the claim of reversible error.

Furthermore the Appellant misconstrues and wrongly argues that Mo. Rev. Stat. § 516.320 applies to the statue of limitations of court rendered judgments. The sole purpose of Section 516.320 is to lay out the circumstances which may extend the time frame for a creditor to bring an original action in civil court to enforce a contract if he is in possession of a written promise to pay. (Resp. App. A5) Pursuant to Section 516.320 the statute of limitations to initiate a new action would begin to accrue from the date of that written promise. Appellant argues that Section 516.320 is conclusive. However, that section cannot be read in isolation from the other relevant sections.

The underlying Section 516.100 which states "Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections …" (Resp. App. A6) places the statute of limitations for the

commencement of civil actions at ten years under Section 516.110.1 “An action upon any writing, whether sealed or unsealed, for the payment of money or property” (Resp. App. A7) unless Section 516.320 allows for an extension of time.

The Appellant’s argument simply has no merit and has already been firmly decided by previous courts against the Appellant’s position. In Hanff v. Hanff, 987 S.W.2d 352 (Mo. App. E.D., 1998) the court ruled upon a nearly identical argument wherein the Appellant attempted to use the underlying Sections of 516.100 to argue the tolling of the ten year statute of a judgment to which the court responded, “By their very terms, neither of these statutes purports to toll section 516.350. Instead, they toll the running of the statutes of limitation on causes of action, not on the enforceability of judgments. Section 516.350 alone determines the time in which a judgment may be enforced, and the exceptions contained therein operate exclusively to toll its application.” Id. 356

While misguided the Appellant is correct that the Respondent would be bared from currently initiating an original action in civil court had it not already been rendered to judgment by the trial court in September of 1994. A written admission of debt, such as a written agreement to extend the repayment terms of the original promissory note, would also have been required to file an original action had the Respondent not already pursued legal remedies and had the court not already rendered a judgment in this instant case ten years prior.

The statute of limitations for civil judgments and their timely revivals are clearly defined and controlled by Section 516.350 and Rule 74.09(a) regardless of the underlying reasons for the initiation of the original action.

Even the Appellant's cases relied upon contradict his assertions that Section 516.320 has any relevance to the statute of limitations on judgments. "The conclusive presumption of payment created by Section 1038…" which was the precursor to Section 516.350 "…though imposing a limitation on actions on judgments, is to be distinguished from the bar of the remedy created by the usual statute of limitation." Wormington v. City of Monett, 358 Mo. 1044, 1049, 218 S.W.2d 586, 588 (1949). In the same manner all of the cases cited by the Appellant to back his contention that a "payment must be voluntary" and "a written admission of debt is required" are misplaced as they only apply to Section 516.320 which deals solely with defaulted promissory notes and not judgments or orders rendered in a civil action by a trial court.

The application of Mo. Rev. Stat. § 516.320 to contracts which have already been rendered to judgment in view of the clear legislative intent, and the well settled case law which distinguishes between bringing an original cause of action on a note and the separate statute of limitations of judgments, is a misguided attempt to cloud the issue of payments which were duly recorded upon the record in accordance with § 516.350.1. Each of those "duly recorded" payments tolled and renewed the vitality of the judgment pursuant to the previous findings of the trial court.

If the Appellant's argument were to be taken seriously one would have to imagine that all orders, judgments, and decrees would have to specify the theory of law on which they were granted to then determine if they were still enforceable.

The trial court's decision should be affirmed "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." Prenger v. Barmhoer, 939 S.W.2d 23, 28 (Mo. App. 1997). The trial court did not err in denying the Defendant's motion, which is the underlying point on appeal, because substantial and credible evidence supported the finding that multiple payments were duly entered upon the record prior to September 13, 2004 as prescribed by Section 516.350.1 and Rule 74.09(a) thereby reviving the judgment and extending the ten year statute of limitations from the date the payments were entered, and Section 516.320 is inapplicable to this case.

CONCLUSION

For the foregoing reasons, Respondent requests this Court affirm the trial court's denial of Appellant Motion to Quash Wrongful Garnishment. The trial court was well within it jurisdiction to rule on the motion. In so doing, after extensive trial and motion practice, the trial court determined that the Appellant's motion should be denied in that the underlying judgment had been revived. The trial court's judgment with respect to its jurisdiction and the revival of the judgment pursuant to Section 516.350 are supported by substantial and credible evidence. Therefore the Judgment of the trial court must be upheld.

Respondent further requests this court uphold the decision of Martin v. Martin, 979 S.W.2d 948 (Mo. App. S.D., 1998) and find that garnishment payments duly recorded upon the record, before the expiration of the judgment, revive the judgment for an additional 10 years as defined in Section 516.350 and that garnishment payments are payments as contemplated in Section 516.350 and further that the nature of payments duly recorded by the court are inconsequential. The Respondent also asks the court to recognize the frivolous and meritless nature of this appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Respondent's Substitute Brief includes the information required by Rule 55.03, and complies with the requirements contained in Rule No. 84.06. Relying on the word count of the Microsoft Word 2002 for Windows, the undersigned certifies that the number of words contained in the Respondent's Substitute Brief, excluding the cover page, certificate of service, signature block, appendix and certificate required by Rule 84.06(b) is 6,154. This brief complies with the limitations contained in Missouri Supreme Court Rule 84.06

The IBM-PC compatible CD-ROM filed with this brief contains one file entitled PolenSubstitutebrief.doc. The file consists of Respondent's Substitute Brief in Microsoft Word 2002 for Windows format. The CD-ROM has been scanned using AVG Antivirus ver. 7.5.446 using the virus definition table released on 03/08/2007 and found to be free of any detectable viruses.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Respondent's Substitute Brief and one copy of the Respondent's Substitute Brief on CD-ROM Brief in Microsoft Word 2002 for Windows format was deposited in the U.S. Mail, clearly addressed and with proper postage affixed thereto to the law offices of Appellant's counsel, Michael W. McCrary, 1204 Rogers Street, Ste E, Columbia, Missouri 65201, this _____ day of _____, 2007.

_____

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APPENDIX