

**IN THE  
MISSOURI SUPREME COURT**

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STATE OF MISSOURI EX REL,	)	
JAMES GRIFFIN,	)	
	)	
Appellant,	)	
	)	Appeal No. SC87324
vs.	)	
	)	
R.L. PERSONS CONSTRUCTION,	)	
INC., AND UNITED STATES	)	<b>ORAL ARGUMENT</b>
FIDELITY AND GUARANTEE	)	<b>REQUESTED</b>
COMPANY,	)	
	)	
Respondent.	)	

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**APPELLANT'S SUBSTITUTE BRIEF**

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

Honorable Mark L. Richardson, Judge

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R.L. PERSONS CONSTRUCTION,	)	
INC., AND UNITED STATES FIDELITY	)	
AND GUARANTEE COMPANY,	)	
	)	
Respondent.	)	

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**JURISDICTIONAL STATEMENT**

On April 1, 2004 this case involving a claim for the underpayment of prevailing wages, 290.210 *et seq.* was tried to the bench in the 36<sup>th</sup> Judicial Circuit, which court entered judgment for the Respondents on their statute of limitations defense on September 24, 2004. LF 3-5, 28. The Appellant filed his *Notice of Appeal* on September 29, 2004. LF 5, 30-33. Upon the timely filing of the *Notice of Appeal* and in the absence of any issues within the exclusive jurisdiction of the Missouri Supreme Court, venue and jurisdiction lay with the Southern District Court of Appeals. That court rendered its decision affirming the trial court's judgment on November 21, 2005 and on December 13, 2005 denied the Appellant's motion for transfer

that had been timely filed on December 6, 2005. On December 15, 2005 the Appellant filed his Motion to Transfer with this Honorable Court, which was granted on February 28, 2006.

## STATEMENT OF FACTS

The only issue in this appeal is the proper statute of limitations. LF 28. The Respondent has not filed a cross-appeal. Thus, the facts can be briefly stated and, as they generally derive from a judgment, are undisputed.

The Appellant worked for Gaylon Griffin -- of no relationship to the Appellant -- as an electrician. LF 27-28; Tr 13. In June of 1998, R.L. Persons Construction subcontracted with Gaylon Griffin to provide electrical work on the Blanchard Elementary School. LF 27. The project involved new construction and was covered by Missouri's Prevailing Wage Act. *Ibid.* United States Fidelity and Guarantee Company is the surety. *Ibid.*

When R.L. Persons Construction asked Gaylon Griffin for its certified payroll records, it received a letter in which Gaylon Griffin claimed he had subcontracted all the labor. Tr 53; Resp. Ex. B. It is now settled that the electricians who "subcontracted" to provide the labor of electricians were workmen within the definition of the Prevailing Wage Act. *See State ex rel. Laszewski v. R.L. Persons Const.*, 136 S.W.3d 863 (Mo.App. S.D. 2004); App. 4-14. The Appellant first worked on the project in September of 1999. LF 28. The Appellant last worked on the project in December of 1999. *Ibid.*

The Appellant filed suit in March of 2003. *Ibid.* Relying on *Laszewski*, which case involved the same prime contractor, subcontractor and lawyers, the trial court ruled the case was governed by a three-year statute of limitations and judgment must enter on behalf of the Respondent. LF 28.

## **POINTS RELIED ON**

### **POINT I**

**The Trial Court erred in ruling that this case was covered by a three-year statute of limitations in that § 516.400 only applies to penalties or forfeitures and, while § 290.300 does allow underpaid workmen to recover double their unpaid wages, this is not a “penalty or forfeiture” in that the increased damages are linked to the extent of the harm, the increase further serves the purpose of compensating workmen for certain intangibles that attach to bringing such a cause of action, i.e. difficulty finding employment in the future, and, as the Respondent has no vested interest or right deriving from the statute of limitations, the Appellant is entitled to the longer statute of limitations, which applies to the cause of action as he has pled it, an action on a bond, which has a ten-year limitation period and the legislature intended this result as the statute creating the cause of action declares they shall be treated as a suit for wages.**

*Miner v. Howard*, 67 S.W. 657 (Mo.App. W.D. 1902).

R.S.Mo. § 522.300

R.S.Mo. § 516.110

## POINT II

The trial court erred in entering judgment in favor of the Respondent on its statute of limitations defense because the legislature amended the law in 2005 by adding subparagraph 3 to § 516.130, which statute sets forth those causes of action which shall have a three-year period of limitation and the subsection added states “An action under Section 290.300, R.S.Mo.” but amendments to statutes of limitations must provide a reasonable time for people with claims accruing prior to the amendment to bring suit and in this case, the amendment makes no allowance of time to bring suit and the claim had not only accrued but suit had been filed and the case prosecuted through judgment and was on appeal when the law was amended; further, in that legislative intent derives not only from the plain language of the words used but related statutes when the statutory amendment is ambiguous and the amendment is ambiguous because there is no such thing as a § 290.300, which section only specifies the damages recoverable regardless of which among the multitude of available theories the suit is filed under and, as one of the ones is a suit against public officials who fail to obtain a payment bond and § 516.130.1 relates to suits against public officials, the better

**reading is that suits for damages allowed by § 290.300 brought against public officials who fail to obtain a payment or performance bond have a three-year statute of limitations while suits brought against the bond as allowed by § 522.300 seeking the damages recoverable under § 290.300 remain covered by the ten-year statute of limitations for actions on bonds.**

*Goodman v. St. Louis Children's Hospital*, 687 S.W.2d 889 (Mo. 1985)

R.S.Mo. § 290.300

R.S.Mo. § 522.300

## POINT I

**The Trial Court erred in ruling that this case was covered by a three-year statute of limitations in that § 516.400 only applies to penalties or forfeitures and, while § 290.300 does allow underpaid workmen to recover double their unpaid wages, this is not a “penalty or forfeiture” in that the increased damages are linked to the extent of the harm, the increase further serves the purpose of compensating workmen for certain intangibles that attach to bringing such a cause of action, i.e. difficulty finding employment in the future, and, as the Respondent has no vested interest or right deriving from the statute of limitations, the Appellant is entitled to the longer statute of limitations, which applies to the cause of action as he has pled it, an action on a bond, which has a ten-year limitation period and the legislature intended this result as the statute creating the cause of action declares they shall be treated as a suit for wages.**

The Appellant believes the statute of limitations should be determined based on the suit as it has been pled, an action on a bond, which has a ten-year limitation period. *Miner v. Howard*, 67 S.W. 692 (Mo.App. W.D. 1902). The types of penalties or forfeitures, as those terms are used in § 516.380 *et seq.*, refer to those matters that are

strictly penal in nature, *i.e.* matters that could be commenced by complaint, information or indictment. R.S.Mo. § 516.410. The increased damages allowed by § 290.300 are neither penalties nor forfeitures within the strict sense of those terms, thus an action to recover double a workman's unpaid wages is covered by a five-year statute of limitations for parol employment contracts, § 516.120, or a ten-year statute of limitations, § 516.110, when the cause of action is brought against the bond pursuant to § 522.300 or for the breach of a written employment contract. If there remains any doubt, the legislature clearly expressed its intent for this to be the result by stating the course of action it was creating in § 290.300 was to be treated as a suit for wages.

The issue before this court is the determination of the appropriate statute of limitations. There is no factual dispute in that the Respondent drafted the *Judgment* and the court found the Appellant completed work on the prevailing wage project in December of 1999 and did not file this cause of action until March of 2003. LF 2, 5 & 28. When the facts are not disputed, the determination of the appropriate statute of limitations and whether it has run is a question of law reviewed on appeal *de novo*. *Millington v. Masters*, 96 S.W.3d 822 (Mo.App. S.D. 2002).

The Appellant would first suggest that the analysis begin with the larger view. For nearly a century, public entities have been required to obtain bonds on public works projects. R.S.Mo. §107.170 (2000); see § 1247 (1909). The failure to obtain a bond exposes the board or commission members to personal liability despite their position as elected officials. *National Oil and Supply, Inc. v. Vaughn, Inc.*, 856 S.W.2d 912 (Mo.App. S.D. 1993). The *National Oil* case is just the most recent in a long line of cases wherein the courts reached similar conclusions and the point was conceded by the parties in *National Oil*. *Id.* at 914; see *C. A. Burton Machinery Co. v. Ruth*, 186 S.W. 737 (Mo.App. S.D. 1916). For as long as the law has required bonds, the law has allowed workmen and material men to maintain actions on those bonds. R.S.Mo. § 522.300; see § 1248 (1909).

Actions on bonds are to be commenced within 10 years. R.S.Mo. § 516.110. As the law states:

Within 10 years:

- (1) An action upon any writing, whether sealed or unsealed, for the payment of money or property;

*Ibid.* It appears parties rarely even question the proposition that a suit on a bond is covered by the ten-year statute of limitations insofar as the most recent Supreme Court decision the Appellant could find is

from 1921. *Missouri C. & T. Ry. Co. v. American Surety Co. of New York*, 236 S.W. 657 (Mo. en banc 1921). It has likewise been held that a surety bond offered by a contractor to a government entity is likewise covered by the ten-year statute of limitations. *Miner v. Howard*, 67 S.W. 692 (Mo.App. W.D. 1902).

The *Miner* case has more than a passing connection to the issue in the case at bar. In *Miner*, the defendant contracted with the City of Bethany to dig a well and provided a surety bond for the payment of materials and labor. *Miner*, 67 S.W. 692 at 693. Unpaid materialmen brought suit and the sole issue, by stipulation of the parties, was the applicable statute of limitations. *Ibid.* The Appellant argued that the action by the materialmen was an action on an account, which account was for materials and secured by the bond, and the bond provided no more coverage and did not work an extension of the five-year limitation period for actions on accounts. *Ibid.* The *Miner* court ruled that the laborers and materialmen were third party beneficiaries and, as such, the bond was an obligation entered into with the laborers and materialmen as well as the City. *Ibid.* The court concluded the promise to pay did not rest alone on the materialmen's accounts. *Ibid.* The court likewise refused to give any weight to the proposition that, as an indirect promise to pay, the bond was

secondary to the materialmen's accounts. *Ibid.* The court held that, "Though indirect, the bond itself contained the promise and was a writing 'for the payment of money,' which would sustain an action within 10 years." *Ibid.*

The Respondents in this case are advancing the same proposition as the Appellants in *Miner*. In *Miner*, the Appellant argued that the applicable limitation period was governed by the underlying cause of action, the action on account, and not the action on the bond. In the case at bar, the Respondent's are arguing the applicable limitation period is found based on the underlying cause of action, *i.e.* for double the unpaid wages, and the limitation period should be found based on that statute's alleged penal nature. Although it has been more than a century since a lawyer has been insightful enough to cast the issue in this way,<sup>1</sup> the law remains unchanged. The applicable statute of limitations is determined based on the cause of action as pled. *Schwartz v. Mills*, 685 S.W.2d 956 (Mo.App. E.D. 1985).

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<sup>1</sup> The attorneys representing the Appellant in *Miner*, Mr. Howard, kept the material men tied in knots, including two trips to the Missouri Supreme Court, for almost eight years. *See Miner supra* (which case contains cites to the two cases decided by the Supreme Court and a prior decision by the Western District Court of Appeals).

The courts usually apply the longer limitation period when it is unclear which of two statutes of limitation apply. *Ibid* (construing an action on a nuisance as alleging temporary nuisances with separable injuries and separable periods of repose rather than as a time barred action on a permanent nuisance); *Campbell v. Anderson*, 866 S.W.2d 139, 142 (Mo.App. W.D. 1993)(relying on the same distinction between temporary nuisances and permanent nuisances in finding that temporary nuisances had been pled); *Sierk v. Reynolds*, 484 S.W.2d 675 (Mo.App. S.D. 1972)(action on a tax bill governed by the ordinance creating the tax lien, which provided for a six-year limitation period). A statute of limitations does not confer a right and merely bars the remedy. *Walls v. Walls*, 673 S.W.2d 450 (Mo.App. E.D. 1984)(although previously held to be barred, *Walls*, 620 S.W.2d 111, changes in the statute of limitations altering how the ten-year bar applied to judgments requiring future periodic payments, *i.e.* maintenance and child support judgments, revived the judgment and the wife's right to recovery). Given that finding the longer period applies takes nothing from the party pleading the bar, the issue before the court is really one of determining the clarity with which the General Assembly has spoken.

The Prevailing Wage Act does not contain a time bar, although when writing a law about wages the General Assembly is certainly aware of how to include one. See R.S.Mo. § 290.527 (2000)(two-year limitation period on minimum wage actions). This court, as the judicial branch, should presume the legislative branch was aware workmen could sue on the bonds and the ten-year limitation would apply. R.S.Mo. § 522.300 (2000). As originally enacted, the statute requiring a bond, § 107.170, and the statute allowing actions on the bond, § 522.300, were part of the same legislation: 1895 Law p. 240; R.S.Mo. §§ 6761 & 6762 (1899). Other than the Respondent's zealous and insightful lawyering in framing the issue in a once-in-a-century context, one would think an action on a bond is covered by a ten-year statute of limitations. Wholly undeterred by the fact that the requirement for a bond and the statute authorizing actions on the bond were enacted simultaneously, the Respondent now claims the attorneys in *Miner* just saddled the wrong horse.

The *Amici Curiae* briefs thoroughly argue the issue assumed by the Southern District to have been properly decided by the Laszewski trial court, *eg.* whether the doubling of the unpaid wages as allowed in § 290.300 is a penalty falling within the three-year limitation period in § 516.400. The State of Missouri correctly notes that in *Laszewski*

the issue was not subject to the full adversarial process. What the State did not know but this Court probably should know is that Laszewski, in trying to avoid the one or two year statute of limitations, briefed and argued the issue trying to get a longer than necessary period of limitation, i.e. the 5 or 10 year general statutes.<sup>2</sup>

The problem in the case at bar arises from several unfortunate choices of phrasing in prior opinions. The problem is not unlike the one before the court in *Laszewski*, in which case the repeated use in reported opinions of the term “employee” to describe individuals providing labor on a prevailing wage project gave rise to the argument that only employees were covered by the act, despite the statute’s express language providing for the protection of all workmen who provide labor on a prevailing wage project. R.S.Mo. § 290.210(8). This case involves the meaning and varied uses of the terms penal, penalty

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<sup>2</sup> This case involves the unusual circumstances where one appellate panel may need to take judicial notice of the case file in another appeal. *Wilson v. Berning*, 293 S.W.2d 151 (Mo.App. E.D. 1956)(an appellate court may not take notice of matters outside of the record on appeal or its own files). While being mindful of the rules regarding records on appeal, the Appellant fears it would be much worse for there to be an appearance that something was being hidden.

and forfeitures. As the court will see, the opinions in this area of the law have a quality reminiscent of *Alice in Wonderland*.

Missouri has two statutes allowing an assured to recover additional damages when an insurer vexatiously refuses to pay. R.S.Mo. §§ 375.296 & 375.420. The statutes in question allow not only the recovery of an additional 10% in excess of the damages or insurance coverage but attorney's fees as well. The sections have been described as being "highly penal" and sections that "must be strictly construed." *State ex rel. U.S. Fidelity & Guarantee Co. v. Walsh*, 540 S.W.2d 137 (Mo.App. E.D. *en banc* 1976). The courts have repeatedly referred to the enhanced recovery as "statutory penalties". Nevertheless, the statutes in question do not impose a true "penalty" but are in fact in the nature of punitive damages. *Jones v. Prudential Ins. Co.*, 155 S.W. 1106, 1110 (Mo.App. E.D. 1913).

The issues with the terms penal and penalty arise as often as not from the imprecise nature of the English language. *See Missouri Gaming Comm. v. Missouri Veteran's Comm.*, 951 S.W.2d 611 (Mo. 1997)(J. Holstein, *concurring*, noting the two divergent definitions for the term "penal"). The issue before the court in the *Missouri Gaming Commission* case was not a new one but an age old question involving

what sums of money are penalties or forfeitures collected under a penal statutes that must be surrendered to the State Treasurer for distribution to the schools pursuant to Article IX, Section 7 of the Missouri Constitution. The issue in the *Missouri Gaming Commission* case was the same one that had been put before the court in *Rodes* following the enactment of certain laws designed to protect game and wildlife. *State ex rel. Rodes v. Warner*, 94 S.W. 962 (Mo. 1906). The *Rhodes* decision went beyond considering just Missouri law to include decisions from Michigan and North Carolina and included the following extended passage from an opinion of the United States Supreme Court drafted by Justice Gray:

In order to determine this question, it will be necessary, in the first place, to consider the true scope and meaning of the fundamental maxim of international law stated by Chief Justice Marshall in the fewest possible words: 'The courts of no country execute the penal laws of another.' *The Antelope*, 10 Wheat. 66, 123. In interpreting this maxim, there is danger of being misled by the different shades of meaning allowed to the word 'penal' in our language.

In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and

primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws. *U. S. v. Reisinger*, 128 U. S. 398, 402, 9 Sup. Ct. Rep. 99; *U. S. v. Chouteau*, 102 U. S. 603, 611. But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts, wholly independent of statutes, as when we speak of the 'penal sum' or 'penalty' of a bond. In the words of Chief Justice Marshall: 'In general, a sum of money in gross, to be paid for the nonperformance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party.' *Tayloe v. Sandford*, 7 Wheat. 13, 17.

Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal

in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.

*Rodes*, 94 S.W. 962, 964, *citing Huntington v. Attrill*, 146 U.S. 657, 666-67 13 S.Ct. 224 (1892)(quoted language lifted from the original).

All of which is to point out that the difficulty of understanding the term penalty has apparently been around since John Marshall sat as the Chief Justice of the Supreme Court of the United States of America.

The Appellant would first posit the proposition that the terms “penalty or forfeiture” as used in § 516.380 *et seq.* are properly understood to have the same meaning as those are defined by the Supreme Court in *Huntington supra* and as used in Article IX, Section 7 of the Missouri Constitution.<sup>3</sup> The first statutory section in question is § 516.380 allowing only one year in which to bring a suit for a penalty when that penalty is recoverable by anyone who should choose to file the suit. This type of action is properly known as a *qui tam* suit. The last Missouri statute that the Appellant is aware of creating a *qui tam* action was struck down as unconstitutional. *City*

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<sup>3</sup> To the extent it carries any weight at all, the Revisor of Statutes titles § 516.380 *et seq.* “Actions on Penal Statutes”. A19.

of *Charleston ex rel. Brady v. McCutcheon*, 227 S.W.2d 736 (Mo. 1950). The statute in *McCutcheon* authorized suits against theater operators for failing to provide adequate aisles to the seats with the penalty being paid in part to the person bringing the suit and in part to the schools. *Ibid.* The statute was found to be unconstitutional insofar as the penalty could be collected and the seating requirements enforced only if the violation occurred within a town, village or city. *Ibid.*

The second section in question, § 516.390 includes “penalties or forfeitures” payable in whole or in part to the State. None of the recoveries sought by the Appellant are payable to the State. However, it is clear that the \$10.00 per day per workmen penalty provided in § 290.250 and payable to the appropriate public entity is covered by the two-year limitation period. *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 Respondent will be contending as the trial court found and the Southern District assumed the trial court in *Laszewski* had properly decided, to-wit: the third section on penal statutes, § 516.400, applies because the “penalty or forfeiture” is payable in whole or in part to the Appellant. What is difficult to see is why the words “penalty or forfeiture” would suddenly take on a new meaning

in § 516.400 from that which they obviously have under the immediately preceding sections, i.e. §§ 516.380 & 516.390. There can be little doubt that any matter covered by § 516.390 also falls within Article IX, Section 7 of the Missouri Constitution. The General Assembly has the authority to create *qui tam* causes of action, which could fall under one of the first two sections depending on how it was drafted. It follows that the word “penalty or forfeiture” in § 516.400 has the same very narrow definition for those terms, *eg* the penalty must arise under a strictly penal law.

The proposition that §§ 516.380-.400 were intended to apply to a very narrow class of cases is born out by the remainder of the sections. In § 516.410, it provides that actions commenced by “bill, *complaint, information, indictment* or action,” under a statute with a shorter or longer period of limitation is governed by the enabling legislation rather than § 516.380 *et seq.* There are actions within the Prevailing Wage Act that can be commenced by complaint, information or indictment but the remedies in § 290.300 are not among them. The terms “penalty or forfeiture” as used in § 516.380 *et seq.* refer to penal statutes within the strict definition of that term. Section 290.300 is not a true penal statute, insofar as the money is not recoverable by the State and neither the Governor nor the President

has the power to pardon the failure to pay a workman the wages he is contractually owed.

The elastic nature of the term penalty has led to an alternative test. The United States Supreme Court has long relied on the legislative history of the statutory enactment to determine whether a double or treble damages provisions was intended to be a punishment or intended as compensatory in nature. The Missouri Supreme Court has adopted at least half this view, declaring that “penalties” are imposed as punishments. *Missouri Gaming Comm. v. Missouri Veteran’s Comm.*, 951 S.W.2d 611 (Mo. 1997). The *Gaming Commission* case goes on to note that penalties are recovered for harms to or violations of public rights. *Ibid.* Missouri’s Prevailing Wage Act includes several penalty and forfeiture provisions to address harms to the public rights, §§ 290.250, 290.330 & 290.340, but § 290.300 is not among those. The recovery allowed by § 290.300 address the harm to the workman not the public harm.

The terms of Missouri’s Prevailing Wage Act are incorporated into all contracts involving public works projects. R.S.Mo. § 290.250. Amongst the provisions incorporated, several of them are admittedly penalties that would be unenforceable in a contract between private parties. One statute provides for a penalty of \$10.00 per day for every

underpaid workmen. R.S.Mo. § 290.250. The courts have previously held that this is a penalty and is covered by § 516.390. *Division of Labor Standards, supra*, 984 S.W.2d 152 (Mo.App. W.D. 1998). Not unlike the flat \$10.00 per day penalty, the Act includes other forfeiture provisions, to-wit: a company convicted of violating the Act is stripped of its right to contract with public entities for public works projects. R.S.Mo. § 290.330; in § 290.340, the Act provides for criminal penalties. However, the provisions in § 290.300 allowing a workman to recover double his unpaid wages together with reasonable attorney's fees bears little, if any, resemblance to those penalty provisions.

The recovery allowed by § 290.300 is not payable to the State nor may the State attempt to recover it. *State Dept. of Labor and Ind. Rel. v. SKC Electric, Inc.*, 936 S.W.2d 802 (Mo. 1997). When considering whether a provision in a contract provides for liquidated damages or is a penalty provision in disguise, the courts consider several factors. The first factor is whether the amount of the increased recovery is related to the damages incurred. *Muhlhauser v. Muhlhauser*, 754 S.W.2d 2 (Mo.App. E.D. 1988). The increased recovery allowed by § 290.300 is directly linked to the amount of the harm and likewise reflects the level of culpability, i.e. intentionally

paying a skilled craftsman as a laborer is an expensive misstep while a minor miscalculation in the amount of wages owed results in a modest additional obligation. The courts also consider whether or not the amount of the liquidated damages is reasonable in light of the harm and whether the harm is of such a nature that it is difficult to accurately estimate or is not readily susceptible of proof. *Ibid.* While it might be tempting to conclude that the amount of unpaid wages is readily susceptible of calculation, the harm being remedied by § 290.300 is the contractor's or subcontractor's retention of the workman's wages. As the United States Supreme Court has concluded, "The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages.". *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583, 62 S.Ct. 1216 (1942)(overruled on other grounds by statutory amendments), *citing Atchison, T. & S.F. Ry. Co. v. Nichols*, 264 U.S. 348, 44 S.Ct. 353 (1924)(holding that New Mexico's wrongful death statute declaring the amount of the liability for a train conductor causing another person's death to be \$5,000.00 was not penal but remedial and was a reasonable estimate of the value of the person's life), and *James-Dickinson Farm Mortg. Co. v. Harry*, 273 U.S. 119, 47 S.Ct. 308 (holding that a Texas statute allowing for the

recovery of up to double the amount of actual damages suffered from fraudulent promises is not a penal statute). In the case at bar, if the court would like direct evidence of the obscure nature of damages that would not be readily susceptible of proof, one need only consider that the Appellant was blacklisted in his trade or craft and had difficulty finding or maintaining employment in his chosen avocation. Tr 24-25. This court is invited to ponder the question of what the appropriate measure of damages would be if the State of Missouri decided judges would be paid only half their wages and any judge daring to file suit would have his or her license to practice law revoked.<sup>4</sup> As the damages recoverable in this case are directly linked to the amount of the harm and the increased recovery provides compensation for elements of harm not readily susceptible of proof or accurate measure, they are in the nature of liquidated damages and not an unenforceable penalty provision nor a penalty provision within the meaning of that term as used in § 516.400.

The legislative intent is usually derived by considering the plain language of the statute. *State v. Blocker*, 133 S.W.3d 502, 504 (Mo.

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<sup>4</sup>The Appellant should have been paid \$36.55 per hour but only received \$12.70 an hour. Tr 24 & 40-42. Suggesting the General Assembly would enact a two-thirds wage reduction sounded Kafkaesque but those are the facts in this case.

2004). Each word or phrase in the statute is to be given meaning when possible. *Ibid.* In this case, the legislature spoke clearly when it decreed that the cause of action created by § 290.300 “shall be deemed to be a suit for wages, and any and all judgments entered therein shall have the same force and effect as other judgments for wages.” No one would construe a suit for wages as a penalty. While the last phrase bothered Appellant’s counsel for years because he was unaware of any special rules attaching to judgments for wages, the meaning and intent is now clear. The proposition stated by Justice Marshall that no country could enforce the penal law of another country extends to the full faith and credit clause in the United States Constitution. If the statute is penal it could not be enforced interstate as discussed *infra*. Before turning to that argument, the statute has been amended creating some additional legislative history.

The compensatory nature of § 290.300 is further borne out by the amendments to § 290.300. As the provision was first enacted, the statute only provided for a workman to recover double his or her unpaid wages. The original enactment mentioned nothing of attorney’s fees. The inclusion in a contract of a provision allowing a party to recover its attorney’s fees, should it become necessary to seek the assistance of a court in enforcing the agreement, could hardly be

viewed as a penalty in this day and age. Older cases, such as *State ex rel U.S.F&G, supra*, 540 S.W.2d 137, declare such provisions to be highly penal. The Appellant believes it is subject to judicial notice that in today's world nearly every contract includes an attorney's fee provision. What is or is not cruel or unusual and presumably what is a penalty, not just liquidated damages, may evolve overtime. *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005) (agreeing with the Missouri Supreme Court and holding it was no longer acceptable to execute people for crimes committed while a minor). The United States Supreme Court has posited the proposition that a statute allowing the recovery of a reasonable attorney's fee is an incentive for private individuals to step forward and act as private attorney generals, when the statute otherwise provides for civil remedies. See *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 151, 107 S.Ct. 2759 (1987). Indeed, as an incentive for workmen to step forward and report violations in light of the likelihood they would be blacklisted, allowing them to recover only double their unpaid wages was hardly an incentive given that most or all of the increased recovery would be used up by attorney's fees. Filing suit to collect your wages and nothing more but insuring you will lose your job is rather like cutting off your nose to spite your face.

Section 290.250 requires the incorporation of the prevailing wage act into construction contracts. When viewed as a contract, the provisions in § 290.300 are not penalties or forfeitures. The doubling of the underpaid wages is a reasonable estimate of the harm a workman is likely to suffer when a contractor or subcontractor retains part of his wages and is an enforceable liquidated damages provision not an unenforceable penalty nor a penalty provision in a penal law subject to the shortened statute of limitations. The inclusion of an attorney's fee provision in a contract is not a penalty bringing the Appellant's cause of action within the shortened limitation period but is, in fact, now common place in contracts.

While a court has never addressed the true nature of the remedy provided in § 290.300, the issue has been addressed in regards to many similar statutes. The Emergency Price Control Act allowed the recovery of double the overpayment for payments made in excess of the prices set by the Price Control Act, yet it was not a penal law nor was the recovery considered a penalty. *Tabor v. Ford*, 240 S.W.2d 737 (Mo.App. W.D. 1951). The Fair Labor Standards Act allows the recovery of double the unpaid wages, yet it has not been found to be a penal law nor is the additional recovery viewed as a penalty.

*Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 62 S.Ct. 216

(1942). Indeed, in the *Missel* decision, the Supreme Court noted that “retention of a workman’s pay may well result in damages to obscure and difficult of proof for estimate other than by liquidated damages” and the court concluded the statute was not penal and the additional recovery was not imposed as a punishment. *Ibid.*

Beyond employment law, Congress has often included a damage multiplier in statutes regulating commerce. The Sherman Anti-Trust Act allowed the recovery of treble damages, nevertheless, those were determined to be compensatory and not penal. *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 27 S.Ct. 65 (1906). The treble damages provisions in the RICO statute is remedial and not punitive. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 107 S.Ct. 2759 (1987). Recovery of treble damages under the Clayton Act are not penalties but included to give meaningful recovery given the hardships of litigation. *Brunswick Corp. v. Pueblo Bowl-O-Matic*, 429 U.S. 477, 97 S.Ct. 690 (1977). The *Brunswick* case is interesting in that, although the anti-trust legislation and its inclusion of treble damages had often been described as penalizing wrongdoers and intended to deter boorish, anti-competitive behavior, it was nonetheless still primarily a remedial law. *Id.* at 485-86; See also *Chattanooga Foundry*, *supra* 203 U.S. 390 (deciding that

Tennessee's ten-year statute of limitation applied rather than Tennessee's one-year limitation on penalty statutes).

A similar proposition holds true for some statutes regulating the interactions between businesses and consumers. The Truth In Lending Act allows the recovery of twice the amount of any improperly imposed finance charges or \$100.00 if there are no finance charges, yet the Act is primarily remedial in nature. *Mourning v. Family Publication Services, Inc.*, 411 U.S. 356, 93 S.Ct. 1652 (1973). While recognizing that the \$100.00 was undisputedly a "penalty", the court held that the Truth In Lending Act remained primary remedial and was not a statute that had to be construed narrowly as a penal or criminal statute. *Ibid.*

Wholly aside from the legal or judicial aspects of the issues before this court, there is a policy concern. A judgment on a penal statute is a matter of local concern. The judgments on a penal statute are not subject to full faith and credit. Indeed, most of the decisions by the United States Supreme Court cited *supra* involved attempts to avoid the operation of one State's laws based on a claim the law was penal in nature. *See Huntington v. Attril*, 146 U.S. 657, 13 S.Ct. 224 (1892)(Maryland trying to avoid New York law) *Chattanooga*, 203 U.S. 390 (trying to avoid liability by pleading a bar based on Tennessee's

one-year statute of limitations for penalties); *Atchison*, 264 U.S. 348 (Californian trying to avoid New Mexico’s \$5,000 wrongful death cap); and, *James-Dickinson*, 273 U.S. 119 (Missouri Corporation sued in Illinois trying to dodge Texas law). Missouri Courts recognize the “local concern doctrine”. *Burg v. Knox*, 67 S.W.2d 96 (Mo. Div. 2 1933). In *Burg*, the court first noted that one having a cause of action under the law where the cause arose may bring that suit in Missouri with the exception of statutes that are strictly penal in nature. *Ibid.* Given that most of Missouri’s major metropolitan areas border on other States, declaring Missouri’s Prevailing Wage Act to be a penalty would not only create a dangerous loophole rendering Missouri Judgments under the Prevailing Wage Act unenforceable against foreign contractors in their home states, such a result would be in direct conflict with the policy of the Act, which is to insure that workmen are paid the prevailing *local* wage regardless of where the contractor hails from R.S.Mo. § § 290.220 & 290.230 (purpose of act to pay “the prevailing hourly rate of wages for work of a similar character in the *locality* in which the work is performed ...”).<sup>5</sup>

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<sup>5</sup> While not a concern under the facts of this case, which involve a Missouri Contractor and hence only a matter to be addressed as a policy concern herein, this

The issue before this court is whether double the underpaid wages is a reasonable estimate of the injury suffered by the workman. Just because one side is required to pay more than it would have cost had the job been done right the first time, does not mean the increased expense is a penalty. The proposition is within the experience of everyone who has tried to use a stop-gap measure rather than having a problem fixed right the first time. One is always told that not only will the corrective action cost what it would have cost in the first place but there will be an additional premium to undo the harm caused by the stop-gap measure. The increased recovery allowed by § 290.300 to workmen who are not paid the prevailing wage is not a penalty.

The issue before this court was probably best summed up by the Honorable Harvey Johnsen of the Eighth Circuit Court of Appeals. When confronted with an attempt to claim the Fifth Amendment privilege against self-incrimination in response to an action brought under the Emergency Price Control Act, Judge Johnsen wrote:

In addition, mere increased or multiple damages, whether they be for exemplary or other public-interest purposes, whose

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Honorable Court is reminded that opposing counsel has already resurrected one argument last used in 1902 and should not be underestimated.

allowance is dependent upon the recovery of actual damages, have never been regarded as constituting a criminal penalty. See 15 Am.Jur., Damages, § 267, p. 703. A penalty in a sense they may well be, in their practical significance perhaps and to the defendant's mind no doubt, but in legal concept their allowance is simply an incident or part of the remedial sanction of damages. *Stockwell v. United States*, 13 Wall. 531, 547, 80 U.S. 531, 547, 20 L.Ed. 491, put it thus: 'There are many cases in which a part injured is allowed to recover in a civil action double or treble damages. \* \* \* It will hardly be claimed that these are penal actions requiring the application of different rules \* \* \* from those that prevail in other actions for indemnity.' 'to whatever extent, therefore, that it may be argued that double or treble damages in a civil action amount to a penalty, they are, unless the statute otherwise indicates, a mere remedial sanction and do not in any way take the action subject to the rules or privileges of a criminal prosecution. Cf. *Helvering v. Mitchell*, supra, 303 U.S.at page 400, 58 S.Ct.at page 633, 82 L.Ed. 917, and cases there cited.

*Crary v. Porter*, 157 F.2d 410, 414 (8<sup>th</sup> Cir. 1946)(omissions in original). In the case at bar, it seems clear that §§ 516.380-516.420

are limited to actions susceptible to being filed as a complaint, information or indictment. The Appellant trusts that this court is not prepared to extend the Fifth Amendment privilege to remain silent to contractors and subcontractors when workmen have to sue them to recover their wages.

Missouri's Prevailing Wage Act, while containing some penalty provisions, is, by and large, remedial in nature. *Long v. Interstate Ready-Mix L.L.C.*, 83 S.W.3d 571 (Mo.App. W.D. 2002); *Morterson v. Leatherwood Constr., Inc.*, 137 S.W.3d 529 (Mo.App. S.D. 2004). An action under § 290.300 is covered by a five-year statute of limitations, § 516.120. A18. An action brought pursuant to § 522.300 against the bond posted on a public works project seeking the remedies created by § 290.300 is covered by a 10-year statute of limitations as set forth in § 516.110. *Ibid.*

## POINT II

The trial court erred in entering judgment in favor of the Respondent on its statute of limitations defense because the legislature amended the law in 2005 by adding subparagraph 3 to § 516.130, which statute sets forth those causes of action which shall have a three-year period of limitation and the subsection added states “An action under Section 290.300, R.S.Mo.” but amendments to statutes of limitations must provide a reasonable time for people with claims accruing prior to the amendment to bring suit and in this case, the amendment makes no allowance of time to bring suit and the claim had not only accrued but suit had been filed and the case prosecuted through judgment and was on appeal when the law was amended; further, in that legislative intent derives not only from the plain language of the words used but related statutes when the statutory amendment is ambiguous and the amendment is ambiguous because there is no such thing as a § 290.300, which section only specifies the damages recoverable regardless of which among the multitude of available theories the suit is filed under and, as one of the ones is a suit against public officials who fail to obtain a payment bond and § 516.130.1 relates to suits against public officials, the better

**reading is that suits for damages allowed by § 290.300 brought against public officials who fail to obtain a payment or performance bond have a three-year statute of limitations while suits brought against the bond as allowed by § 522.300 seeking the damages recoverable under § 290.300 remain covered by the ten-year statute of limitations for actions on bonds.**

While this case was on appeal, the legislature amended § 516.130. The statute defines what causes of action must be commenced within three years. The legislature added subparagraph 3 to the statute, which subparagraph states “An action under Section 290.300 R.S.Mo.”. The law is clear that the courts will retroactively enforce shortened limitation periods as to accrued claims only when the legislation allowed people with accrued claims some reasonable time to bring suit. *Goodman v. St. Louis Children’s Hospital*, 687 S.W.2d 889 (Mo. 1985). The amendment to § 516.130 contains no saving period and cannot be retroactively applied. *Ibid.* Moreover, far from an accrued claim involving a suit that has yet to be filed, the case at bar had been filed, prosecuted to judgment and was on appeal when the statute was amended. Thus, the amendment cannot be retroactively applied and as discussed *supra* the suit was timely brought.

One supposes that, while it would appear illogical it is not impossible to conclude, as to persons with accrued but unfiled suits, the claimants must be given time to file suit, but, as a procedural change, a statute shortening the limitation period would be applied to pending suits. Setting aside the absurdity of allowing those who have yet to file suit and put the defendant on notice extra time while shortening the time for those diligent enough to have already filed suit, there are statutory and constitutional problems with retroactively applying the amendments. Section 1.170 prohibits giving force or effect to the legislature's repeal of a law as to pending litigation and that statute formed the basis for one of the arguments advanced in the *Goodman* case. Further, the courts have generally eschewed invitations to apply § 1.170 selectively depending on whether the change in the law is labeled procedural or substantive. *State ex rel. St. Louis-San Francisco RR Co. v. Buder*, 515 S.W.2d 409, 411 (Mo. 1974). Absent a cogent reason for a contrary conclusion, the parties remain in the same position they were in at the time the cause of action accrued, regardless of how the law might change between that time and the time suit is filed or, as in this case, during the pendency of the appeal. *Ibid.*

The *Buder* case brings to the fore the constitutional hurdle that cannot be cleared. Article I Section 13 bars the retroactive impairment of an obligation in a contract. Contracts with counties, municipalities and similar public entities must be in writing. R.S.Mo. § 432.070. Every contract involving public works must include the prevailing hourly wage rate, § 290.250. Workmen supplying labor on public works projects are third-party beneficiaries of the contract between the public entity and the prime contractor. *Board v. Eurostyle*, 998 S.W.2d 810 (Mo.App. S.D. 1999). A change to a statute of limitations shortening the time in which a contractual obligation to pay the prevailing wage could be enforced would be a change impairing an obligation on a contract and is prohibited by Art. I, § 13. The Respondent may well find the *Rosenblatt* case, which holds the statute of limitations may be extended at any time before it runs and attempt to reason that the reverse is true, which is not the case. *State to the use of Rosenblatt v. Heman*, 7 Mo.App. 420 (Mo.App. E.D. 1879).

An argument reasoning that, since the period of limitation can be extended it can be shortened, is faulty for the same reason that, while all roses are bushes, not all bushes are roses. When the Appellant performed labor on the public works project, he became vested with the right to be paid the prevailing wage for the type of

work he performed. While the Appellant did not have a vested right in the statute of limitations, he did the right to a reasonable opportunity to prosecute his claim and had already done so by the time the statute was amended. *Goodman supra*. The Respondent was under a contractual obligation to pay that wage. The Respondent has no vested right in escaping its written promises. *Rosenblatt supra*. Thus, the Respondent is off in the bushes while the Appellant has gotten the rose.

The contractual nature of § 290.300 results in a final argument that might not be readily apparent. The amendment made to § 516.130 is all but nonsensical. To the Appellant's understanding, there is no such thing as "An action under Section 290.300", as the phrase is used in § 516.130.3. Section 290.300 does not create a cause of action. It only specifies what damages may be recovered. This is the only sensible intent that can be given to § 516.130.3 as § 290.300 does not state "an action brought [under this section][...] shall be deemed to be a suit for wage...". What § 290.300 does state is "an action brought to recover the same", the damages allowed, "shall be deemed to be a suit for wages...". There are a great many actions that may be pled seeking the recovery of damages as allowed by § 290.300 be they parole employment contracts, written employment

contracts, suits by workmen employed by subcontractors against the prime or general contractor on a third-party beneficiary theory or suits on the bond, See § 522.300, but the Appellant does not believe § 290.300 creates an independent cause of action as implied by § 516.130.3. In short, while the words used in § 516.130 appear unambiguous, if the court looks at the statute § 516.130.3 purports to effect, it is clear § 290.300 does not create a cause of action and § 516.130.3 is ambiguous for alleging that it does.

There is a cause of action to which § 516.130.3 would apply such that the limitation statute can be given meaning without doing violence to the equally weighty language in § 290.300. The first provision in § 516.130 applies to suits against officials for *inter alia* the omission of an official duty. When the board members of a public body, officials, let a public works contract but fail to require the contractor to post a payment or performance bond, an omission of the obligation imposed by § 107.170, making it an official duty to require a bond, then suit may be brought against the individual board members. *National Oil and Supply, Inc. v. Vaughns, Inc.*, 857 S.W.2d 912 (Mo.App. S.D. 1993). The amendment to § 516.130 makes perfect sense in the very particular and narrow category of causes of action that seek to recover the damages allowed by § 290.300 in suits

brought against elected or appointed public officials sitting on boards that for some reason let a public works contract but failed to require a payment or performance bond. To read the amendment to § 516.130 more broadly does grievous violence to the prevailing wage act in general and to § 290.300 in particular, which section was enacted with the specific legislative intent of creating a specific remedy available to workmen who are not paid the prevailing wage regardless of the reason. To give the amendment to § 516.130 its literal meaning would extend to every cause of action that might be brought by underpaid workmen on prevailing wage projects, including those who had been threatened or intimidated into surrendering part of their wages. See § 290.315. This is likewise true given the natural reluctance to bring a suit that may make finding or keeping employment difficult. Tr 24-25.

The Appellant's proposed reading of subsection 3 in § 516.130 to limit its scope as co-extensive with subsection 1 in that statute does add a gloss to the statute but the gloss is necessary to give it meaning. If read literally, subsection 3 assumes that which is not true, there is only one cause of action by which the damages allowed in § 290.300 may be brought. As § 290.300 contemplates that the damages recoverable thereunder may be pled in any number of causes of

actions, to interpret § 516.130.3 as applying to any causes of action seeking those damages would be to impugn the General Assembly of resorting to trickery to work a *sub silentio* repeal or limitation on § 290.300 and the related provisions of the prevailing wage act. See *State ex rel. Aquamsi Land Co. v. Hostetter*, 79 S.W.2d 463, 469 (Mo. 1935)(refusing to accept the proposition that the passage of one constitutional amendment worked a *sub silentio* repeal of another part of the constitution).

The statutory amendment does not apply retroactively. To the extent it applies retroactively, it cannot be given its literal meaning without assuming members of the General Assembly had resorted to trickery to work a *sub silentio* repeal or limitation on the recovery of those damages specified in § 290.300. As the judicial branch will not assume members of the legislative branch have resorted to trickery as a means to limit the application of a law enacted by a prior general assembly, if § 516.130 does apply retroactively to a suit on appeal, then its application is limited to those cases being brought against public officials who omit their official duty to obtain a bond and, as the case at bar has not pled the damages allowed by § 290.300 as being recoverable against such public officials, it cannot be retroactively applied to this case.

## CONCLUSION

The statute of limitations should be found by looking at the cause of action as plead and this case has been plead as an action on a bond with a ten-year statute of limitations. When, as a matter of law, there appears to be a choice between applicable statutes, the courts choose the longest applicable statute because statutes of limitation do not create or vest wrongdoers with a right and are only legislative declarations of when persons harmed can no longer seek a remedy. The term “penalty”, as used in § 516.380 *et seq.*, is used within the strict legal sense as in a cash payment demanded of entities that violate a criminal or quasi-criminal law, which violation could be pardoned by the President or a Governor. The enhanced recovery allowed to underpaid workmen by § 290.300 is not a penalty within the meaning of that term as used in § 516.400, thus the statute is not applicable to the case at bar.

The amendment adding subsection 3 to § 516.130 cannot apply retroactively to a case on appeal. To the extent it does apply, the language is ambiguous in that § 290.300 does not create a separate cause of action and only specifies the damages recoverable. The courts cannot assume through trickery the General Assembly worked a *sub silentio* repeal of a century old principal of law. The statute of

limitations depends on the suit as pled and suits against a surety on a public works project are covered by the ten-year statute of limitations.

The action was timely filed. The judgment of the trial court in favor of the Respondent based on its statute of limitation defense should be reversed. The case should be remanded for further proceedings.

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ATTORNEY FOR APPELLANT

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

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STATE OF MISSOURI EX REL,	)	
JAMES GRIFFIN,	)	
	)	
Appellant,	)	
	)	Appeal No. SD26562
vs.	)	
R.L. PERSONS CONSTRUCTION, INC.,	)	
AND UNITED FIDELITY AND	)	
GUARANTEE COMPANY,	)	
	)	
Respondent,	)	

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**CERTIFICATE OF SERVICE**

COMES NOW Appellant, by and through counsel, John M. Albright of MOORE AND WALSH, L.L.P., and certifies that 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 Respondent's Brief with less than 27,000 words or as a Reply Brief with less than 7,750 words in that it is Appellant's Substitute Brief and contains 9,750 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: Ralph Innes, Esq., P.O. Box 1049, Poplar Bluff, MO 63902 on this 23<sup>rd</sup> day of March, 2006.

**BY: \_\_\_\_\_**  
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