IN THE
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

STATE OF MISSOURI, ex rel. ROBERT EVANS) STATE OF MISSOURI, ex rel. DAVID CROWDER STATE OF MISSOURI, ex rel. SHAWN HANLEY STATE OF MISSOURI, ex rel. RICKY ROBINSON	)	
Appellants,	)	
vs.	)	Appeal No. SD27892 SD27894, SD27896, SD27897
BROWN BUILDERS ELECTRICAL COMPANY, INC., CAMDEN BUILDERS, INC. AND ST. PAUL FIRE & MARINE INSURANCE COMPANY.	)	**ORAL ARGUMENT REQUESTED**

APPELLANTS' BRIEF

On Appeal to the Missouri Court of Appeals
SOUTHERN DISTRICT
From the Circuit Court, Division I, of Butler County, Missouri

Honorable Paul McGhee, Judge

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	)	SD27897
BROWN BUILDERS ELECTRICAL	)	
COMPANY, INC., CAMDEN	)	
BUILDERS, INC. AND ST. PAUL)		
FIRE & MARINE INSURANCE	)	
COMPANY.	)	

JURISDICTIONAL STATEMENT

Workmen who provided labor on a public works project in Butler County brought suits against the prime contractor, surety and subcontractor alleging underpayment of wages. LF 28-40. On May 12, 2006, the trial court having consolidated the cases for trial, heard evidence. Tr 2. The court rendered judgment on July 7, 2006. LF 58, 60, 62 & 65. The workmen filed notices of appeal on July 26, 2006 and, as none of the issues are within the exclusive jurisdiction of the Missouri Supreme Court, venue and jurisdiction lie with this court. LF 68-75. Pursuant to the Order of this Honorable Court dated September 13, 2006, the cases have been consolidated for appellate purposes.

STATEMENT OF FACTS

The Appellants provided labor on a public works project. LF 58, 60, 62 & 65. They appeal two issues of law regarding the calculation of wages, to-wit: when interest should begin to accrue and whether they were underpaid part of the base wage. They appeal the judgment rendered in favor of the Surety on the strength of the requirement in the payment bond that demand be made within 90 days of any alleged underpayments.

The Appellants are electricians. Tr 8-9, 50-51, 62-63, Ex. 27. They provided labor on a project building student housing on the Three Rivers Community College campus in Poplar Bluff, Missouri. *Id.*, Ex. 1. They worked for the Respondent, Brown Builders. Ex. 4. The prime contractor, Respondent Camden Builders, Inc., subcontracted with Brown who was to perform the electrical work on the project. Ex. 1 & 4. Brown Builders provided certified payroll records to Camden. Ex. 6.

The subcontractor alleged and the trial court found the Appellants were employed as apprentices. LF 59, 61, 63 & 67. The apprenticeship program had eight pay tiers. Ex. 5. The program was essentially a four year program with evaluations every six months. *Ibid.* The wage rate began at 46.2% of a journeyman electrician's wage and increased in 6% increments every six months, assuming satisfactory advancement until the apprentice was earning 90% of the electrician's wage. *Ibid.* The trial court found each of the appellants was an entry level apprentice. LF 59, 61, 63 & 67.

The apprenticeship program set a journeyman's wage at $13.00 per hour. Ex. 5. The prevailing wage for an electrical journeyman was $42.87 per hour. Tr 9-11; Ex. 2. The subcontractor paid the apprentices between $6.00 and $12.00 an hour. Ex. 28, 29 30, 32 and 27. Forty-six and two-tenths percent of $13.00 is $6.00 per hour.

The prevailing wage rate has two parts. The base-rate for a journeyman is $27.05 per hour. Tr 9-10, Ex. 2. Forty-six and two-tenths percent of $27.85 per hour is $12.87 per hour. The prevailing wage rates also include a fringe benefit rate. The fringe benefit rate for electrical journeymen was $15.02 per hour. Tr 10-11; Ex. 2.

The trial court found the subcontractor owed the Appellants $15.02 per hour. LF 59, 61, 63 & 67. The judgment found and declared this was owed as the fringe benefit portion of the prevailing wage. *Ibid*.

The Appellants seek review, as they believe the same law requiring the payment of the fringe benefit directly to the workmen also required applying the percentage in the apprenticeship program, 46.2%, to the base prevailing wage rate, $27.85 not the $13.00 in the apprenticeship program.

The trial court awarded the Appellants interest on the money awarded. LF 59, 61, 63 & 67. The trial court awarded interest from the date summonses were served in each suit. *Ibid.* The Appellants assert interest ran from when the wages were due.

The trial court rendered judgment in favor of the surety. LF 59, 61, 63 & 67. The prime contractor posted a surety bond issued by the Respondent, St. Paul Fire & Marine Insurance. Ex. 3. The bond required those claiming to be unpaid to make demand on the surety and either the prime contractor or the project owner within 90 days of the last day of work. *Ibid.* The Appellants allege the 90 day provision is unenforceable.

POINTS RELIED ON

POINT I

The trial court erred in failing to include in its judgment an award for underpaid base-wages in that the law requires paying the full fringe benefit rate plus the apprentice's percentage of the base prevailing wage rate because, having found the number of hours worked for which the fringe benefit rate was not paid, the same pay records show the Appellants were paid between $6.00 and $12.00 per hour, but the law mandated paying the apprentice's percent, 46.2%, of the prevailing wage $27.85, or $12.87 per hour, and for every hour they were not paid the fringe benefit, the Appellants were also paid less than $12.87.

RSMo § 290.210.5

8 C.S.R. 30-3.030

Burney v. McLaughlin, 63 S.W.3d 223 (Mo.App. S.D. 2001)

POINT II

The trial court erred in finding the workmen were not underpaid any of their base wage rate in that a judgment must be supported by evidence and the law sets an apprentice's wages as a percent of the prevailing wage in the work order because the trial court found the number of hours worked and the records showing the hours worked show a pay rate less than the rate required by law, $12.87, and a determination the Appellants were paid more than the rate and the certified payroll was not supported by any evidence.

Legacy Homes Partnership v. General Electric Capital Corp., 10 S.W.3d 161 (Mo.App. E.D. 1999)

POINT III

The trial court erred in awarding pre-judgment interest from the date of service of the summons because interest runs from the date a written contract is breached including contracts for wages or salaries set by statute and in this case the Appellants worked as electricians on the construction of a public works project but were not paid the prevailing wage as specified pursuant to the Prevailing Wage Act, entitling them to prejudgment interest from the date of the breech, which was two or three year prior to the dates of service.

Killian Const. Co. v. Tri-City Const. Co.,

693 S.W.2d 819 (Mo.App. W.D. 1985)

Rich v. Peters,

50 S.W.3d 814 (Mo.App. W.D. 2001)

Werremeyer v. K.C. Auto Salvage Co. Inc.,

134 S.W.3d 633 (Mo. 2004)

POINT IV

The trial court erred in entering judgment in favor of the surety based on the workmen's failure to provide notice of the underpayment within 90 days because, while there is an Eastern District opinion affirming such a

condition on a public works surety bond and a subsequent Southern District opinion in dicta recognizing that authority, there is likewise a Southern District concurring opinion questioning that authority and a statutory amendment expressly providing the workmen with three years in which to bring their cause of action thus, in this case, as the workmen brought their cause of action within three years, it would be a violation of Missouri's expressed public policy, as set forth in RSMo § 431.030 to allow a surety to impose a condition in its contract effectively limiting the time to perfect a cause of action to 90 days.

Farm Bureau Town & Country Ins. Co. of Missouri v. Rogers,

959 S.W.2d 880 (Mo.App. S.D. 1997)

RSMo § 413.030

RSMo § 516.130

RSMo § 107.170

POINT I

The trial court erred in failing to include in its judgment an award for underpaid base-wages in that the law requires paying the full fringe benefit rate plus the apprentice's percentage of the base prevailing wage rate because, having found the number of hours worked for which the fringe benefit rate was not paid, the same pay records show the Appellants were paid between $6.00 and $12.00 per hour, but the law mandated paying the apprentice's percent, 46.2%, of the prevailing wage $27.85, or $12.87 per hour, and for every hour they were not paid the fringe benefit, the Appellants were also paid less than $12.87.

The trial court erred in failing to make an award for underpayment of the hourly rate. The prevailing wage includes two parts, the base-rate and the fringe benefit. The entire fringe benefit rate, $15.02 in this case, must be paid regardless of whether the workmen are journeymen or apprentices. RSMo § 290.210(5) and 8 C.S.R. 30-3.030(2). The trial court correctly awarded the workmen double the unpaid fringe benefit rates. *Id.* and RSMo § 290.300. However, the contractor was also required to pay the base hourly rate of $27.87 to journeymen or some percentage of $27.87 to the apprentices. 8 C.S.R. 30-3.060(2). The Appellants have not challenged the factual finding they were the lowest level apprentices. Nevertheless, even at the lowest apprenticeship level, the hourly rate would be 46.2% of $27.87 or $12.87 and the apprentices were paid between $6.00 and $12.00 per hour. The trial court's award was based on the number of hours the

certified payroll and pay stubs show the Appellants worked at a pay rate between $6.00 and $12.00.[1] Assuming the trial court did not find facts for which there was no evidence, the source of error rests on a mistaken conclusion of law, to-wit: the subcontractor only had to pay the apprenticeship percent, 46.2%, of the wage rate in the apprenticeship program, $13.00. In short, the trial court is correct if the subcontractor could pay 46.2% of the $13.00, $6.00, but, as 8 C.S.R. 30-3.030(2) required paying 46.2% of $27.85, $12.87, the court erred in the application of law to undisputed facts.

The Appellants are unaware of any factual dispute as to the hours worked or the rate actually paid. When the facts are not disputed, the issues involve questions of law reviewed *de novo*. *Burney v. McLaughlin*, 63 S.W.3d 223 (Mo.App. S.D. 2001).

The prevailing wage has two parts. A portion of the prevailing wage is designated as the "fringe benefit" rate. RSMo § 290.210.5. The fringe benefit portion is ordinarily paid to either a union or other third-party providing benefits for a labor group. *Ibid.* However, when the workmen are hired through a subcontractor rather than through a union or other employee group, the law requires that the fringe benefit rate be paid directly to the workmen. *Ibid.* The

[1] Shawn Hanley worked 191 hours at a pay rate of $10.00 an hour and 103 hours at $39.29. Ex. 6 & 28. The court found he had been underpaid $15.02 for 191 hours of work and $3.58 for 103 hours. LF 63.

principal that the full fringe benefit rate must be paid carries over to the state regulations governing apprenticeships. 8 C.S.R. 30-3.030(2). While the code of regulations allows hiring apprentices and paying them a reduced wage, the entire fringe benefit must still be paid. *Ibid.* In this case, as the Appellants were not union members and there was no other evidence of third-parties providing them benefits and no provision in the apprenticeship program regarding the fringe benefits, the entire fringe benefit rate, the $15.02 portion of the prevailing wage rate, had to be paid to the workmen. The trial court correctly awarded this sum. LF 59, 61, 63 & 66.

While the fringe benefit portion of the prevailing wage is usually paid to a union, the prevailing wage rate also includes a base-rate for the workman's pay. The apprenticeship program established by the Respondent, Brown, set an electrician's wage at $13.00 per hour. Ex. 5. The apprentice's wages were calculated as a percent of the $13.00 an hour. Tr 104-05. The trial court's error was in sanctioning the use of the $13.00 an hour. The apprentice's base hourly rate should have been a percentage of $27.85 an hour. This is the requirement set forth in the code of state regulations defining apprenticeships, to-wit:

> (2) Apprentices shall be permitted to work at less than the predetermined rate for the class or type of work they performed…
>
> Every apprentice shall be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a

percentage of the journeymen hourly rate for the class or type of worker specified in the applicable wage determination.

8 C.S.R. 30-3.030(2).

Admittedly, the regulation is not written as plainly as one might like. Nonetheless, the intent is obvious. The apprentices are to be paid "…a percentage of the journeyman hourly rate for the class or type of work in the applicable wage determination." While the percentage would come from the apprenticeship program, the classes or type of work in a wage determination do not vary. *See* 8 C.S.R. 30-3.060 (specifying the occupation titles of work). What does vary and why the relevant percentage from the apprenticeship program must be applied to the applicable wage determination is that the hourly rate changes. To put this another way, had the Code of State Regulations intended for the apprenticeship's percentage to be multiplied by the hourly rate in the apprenticeship program, there would have been no need for the regulation to even mention the applicable wage determination. The wage schedules in the apprenticeship program were already broken down into different percentages based on whether they applied to either an electrician or a carpenter. There would have been no need to reference the wage determination unless the percentages from the apprenticeship program were to be multiplied against the hourly rate in the wage determination.

Paying an apprentice 46.2% of $13.00 an hour results in an apprentice electrician's wage being $6.00 an hour. Even in the final stage of the apprenticeship program, the apprentice would be earning 90% of $13.00 an hour

or $12.00 an hour. It is inexplicable how, during the last six months of a four year apprenticeship program, the apprentice would learn such skills as would catapult his or her wage rate by two-and-a-quarter times, i.e. $12.00 * 25=$28.00. It is not difficult to imagine that an apprentice would be worth about half what a journeyman is but that would be 46.2% of the journeyman's wage, i.e. 0.462 x $27.85 or $12.87. This notion that the percentages from the apprenticeship program will be multiplied against the prevailing wage base rate carries forward, as an apprentice nearing the end of the program would be worth about 90% of the journeyman, which is not $12.00 an hour but $25.07 an hour, i.e. 0.90 x $12.85. If the trial court's reading of regulation were to stand, an apprentice electrician in the final stage of the program would ear $12.00 an hour while even a lowly general laborer would have a base rate of $14.15. Ex. 2.

The trial court found an apprenticeship program existed. The trial court found all of the Appellants were the lowest tier of apprentices. Even so, the Appellants were shorted more than just the failure to pay the fringe benefit rate. As the Appellants read the regulation, the contractor also shunted them their hourly wages for work done as apprentices. The judgment should be reversed and remanded with directions for the trial court to determine the amount of underpaid base wages by comparing the rate paid verses the rate that should have been paid, $12.87, and multiplying the pay rate difference by the number of hours worked at that pay rate.

POINT II

The trial court erred in finding the workmen were not underpaid any of their base wage rate in that a judgment must be supported by evidence and the law sets an apprentice's wages as a percent of the prevailing wage in the work order because the trial court found the number of hours worked and the records showing the hours worked show a pay rate less than the rate required by law, $12.87, and a determination the Appellants were paid more than the rate in the certified payroll was not supported by any evidence.

This point is simply a counterpart to Point I and asserts there was no factual support for a finding that might explain away the error of law alleged in Point I. The trial court found the number of hours the Appellants worked. The hourly rate they should have been paid is, as argued in Point I, mandated by law to have been 46.2% of $27.85 or $12.87 per hour. The records show the Appellants were paid between $6.00 and $12.00 an hour. Ex. 28-33. As the hours of work are fixed, the only means to reach the conclusion in the judgment that the Appellants were not underpaid the base-rate, would have been to find they were paid at least $12.87 an hour. If the trial court reached the conclusion and judgment the Appellants were paid at least $12.87 an hour as apprentices, that finding was not support by any evidence.

The trial court concluded the Appellant were not underpaid the base wage rate and awarded only the underpaid fringe benefit rate. This conclusion can only follow if the workmen were paid at least the required prevailing hourly wage. The

number of hours worked were found by the court. The rate the Appellants should have been paid was set by law at $12.87. The certified payroll records and pay stubs, as summarized in Exhibit 28-33, show the workmen were only paid between $6.00 and $12.00 an hour. The court's judgment that no additional sums were owed for the hourly base-rate could not have been based on a factual finding that the Appellants were paid at least $12.87 because there was no evidence of pay in excess of the payroll records.

The Appellants assume the trial court err occurred in concluding the Appellants could be paid between $6.00 and $12.00 an hour, as the base hourly rate. That would have been the error of law addressed in Point I. As the trial court made no express findings of fact on the issue of underpaid base wages, it is at least conceivable to suggest the error of law is not evidence, as it might have been a factual dispute. However, assuming the law required paying a base rate of $12.87, there is no factual basis to show the workmen were paid the rate required by law. A judgment lacking any evidentiary support must be reversed. *Legacy Homes Partnership v. General Electric Capital Corp.*, 10 S.W.3d 161 (Mo.App. E.D. 1999). As with *Legacy Homes*, the Appellants requested findings of fact, however, the trial court made no mention of how it arrived at the base hourly rate. SLF 1-2 and LF 58-67.

POINT III

The trial court erred in awarding pre-judgment interest from the date of service of the summons because interest runs from the date a written contract is breached including contracts for wages or salaries set by statute and in this case the Appellants worked as electricians on the construction of a public works project but were not paid the prevailing wage as specified pursuant to the Prevailing Wage Act, entitling them to prejudgment interest from the date of the breech, which was two or three year prior to the dates of service.

Wages and salaries set by law bear statutory interest from the date they become due and owing. Rich v. Peters, 50 S.W.3d 814 (Mo.App. W.D. 2001). This is true of all contracts regardless of whether the contract specifies a fixed sum, as in Rich, or simply provides a basis from which the amount owed pursuant to the terms of the contract can be readily ascertained. Neosho City Water Company v. City of Neosho, 38 S.W. 89 (Mo. En Banc 1896)(awarding interest for fees due under a contract for extra water hydrants even though the contract did not specify a fixed number of extra hydrants but only provided the fee due on each of the extras). The legal principal that interest runs from the date the monies are due under the terms of the contract or from the point in time the liability can be readily ascertained by the terms of the contract even extends to instances where parties rely on calculations made after the completion of the project. Killian Const. Co. v. Tri-City Const. Co., 693 S.W.2d 819 (Mo.App. W.D. 1985)(interest

ran on the money owed by the contractor to the subcontractor from the date the Army Corps of Engineers supplied the final assessment pursuant to a survey of the dirt-work done by the subcontractor).

The Appellant raises an issue that involves the application of law to undisputed facts. The application of law to undisputed facts in resolving when interest begins to run pursuant to R.S.Mo. § 408.020 is reviewed de novo. Barris v. Layton, 43 S.W.3d 390 (Mo.App. E.D. 2001).

The laws of Missouri have long provided for the running of prejudgment interest between creditors and debtors or escrow agents. R.S.Mo. § 408.020 (2000)[2]. Although the statute casts the issue in terms of whether the suit is an action on account or for breech of contract, the reported opinion tends to apply the statutory terms after a factual determination of when the debt became readily ascertainable. When the action is on an oral contract or a running account, the courts tend to impose prejudgment interest from the date of demand, which often turns out to be the date the creditor files a petition. Coleman v. Kansas City Mo., 173 S.W.2d 572 (Mo.App. W.D. 1943)(the trial court awarded interest from the date of filing and the plaintiff did not appeal); compare Rich, *supra* where the trial court awarded no interest. When the court finds that simple calculations based on

[2] Section 408.020 certainly dates back to R.S.Mo. § 5972 (1889), as cited in Neosho, *supra* and if V.A.M.S. historical and statutory notes are to be believed, it dates back to an Act of November 5, 1808, in 1 Terr. L., p. 220, § 1.

prices fixed by the contract are sufficient to determine the debt, the courts define the debt as a breech of contract regardless of the no-nothing protestations of the debtor. Killian, *supra*.

The Prevailing Wage Act requires that all contracts involving public work projects include the applicable prevailing wage order. R.S.Mo. § 290.250. The contract defining the scope of work required to construct the student housing included the Prevailing Wage Report. Ex. 1 & 2. The fact that the exact amount owed a workman varied by the number of hours worked did not render the contractual debt an action on account limiting interest to the date of service or marking a demand. In Neosho, the contract provided a fixed price for five miles of water mains and 50 hydrants and an additional sum for each extra hydrant and extra length of water main. Neosho City Water Co. v. City of Neosho, 38 S.W. 89 (Mo. En Banc 1896). The issue giving rise to the Neosho lawsuit was the installation of 35 extra hydrants at an annual rent of $30 per hydrant raising the City's annual obligation from $2,000 to $3,000. Id. at 91. The court observed the City used the extra hydrants and having received the benefit of a fair contract, it was lawfully obligated to pay the debt incurred. Id. The court held that interest ran on the obligation as a matter of course and that a written contract specified the amount of rent due on each hydrant, regardless of the number of hydrants. Id. at 91-92. In the case at bar, the School received the benefit of the Appellant's labor and there was an obligation to pay for the benefit received at the rate specified in the contract. The only distinction between this case and Neosho is that on the

construction of public works projects the State has decided to shift the obligation from itself, as the landowner who retains the benefit of electrical work, to a third-party insurer by requiring the posting of payment and performance bonds. R.S.Mo. § 107.170.

To determine the amount of obligations for a workman's wages it would be necessary to look beyond the contract to payroll records. As noted, the Respondent relied on certified payroll records from subcontractors. Ex. 28-33; Tr 39-40, 55-56, 65-66, 74-75. The courts have had no hesitation in finding a contractual obligation is a readily ascertainable debt and interest runs from the date of the breech, even if liquidating the damages depends on a third-party records. In Killian, it became necessary to rely on Army Corps of Engineer determinations to allocate the final payments between the contractor and subcontractor. Killian Const. Co. v. Tri-City Const. Co., 693 S.W.2d 819 (Mo.App. W.D. 1985). The court held that the debt bore interest, as an obligation readily ascertainable on simple calculations, following the final report from the Army Corp of Engineers. In the case at bar, the obligation was readily ascertainable based on the number of hours worked using simple multiplication to determine the obligation owed then subtracting the amount actually paid with the remainder representing the amount owed.[3]

[3] The Appellants are not raising nor do they intend to fret about whether interest ran from the end of each week of labor or, as in *Killian*, from the end of the

Defendants often dispute whether they are liable for a debt and then allege the amount of the debt could not be known until a verdict is rendered. The courts have not been receptive to this argument either.[4] In Barris, an attorney brought suit to collect attorney fees. Barris v. Layton, 43 S.W.3d 390 (Mo. App. E.D. 2001). The trial court refused to grant prejudgment interest. Id. at 397. The appellate court reversed noting that once the claim became liquidated, the court had no choice but to follow § 408.020 and award prejudgment interest. Id. at 398.

None of these cases or their holdings should come as a surprise. When a person becomes obligated to a pay a debt on a contract, interest begins to run. This is true whether the amount of the obligation is known at the moment of contracting or following a breech or only after the non-breeching party finds a

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contract. Their primary concern is the 9% interest for the two or three years between when they last worked and when suit was filed.

[4] One exception to this is when an action for breech of contract includes consequential damages. In Wulfing, the contract was breeched by not expeditiously getting the corporation's stock publicly listed after the Plaintiff requested a buyout by the defendant and, pursuant to the contract, the defendant elected to list the stock publicly rather than buy out the shares. Wulfing v. Kansas City Southern Industries, Inc., 842 S.W.2d 133 (Mo.App. W.D. 1992). As a consequence of not immediately buying out the Plaintiff and not expeditiously listing the stock publicly, it could not be sold and became worthless. Id. at 38-41.

substitute or replacement and learns the true cost of the breech. Killian Const. Co., 693 S.W.2d 819 at 829. The Killian court expressly relied on a prior contract case where the initial fire retardant installed was of insufficient thickness and the actual extent of correcting the deficiency could not be known until the subcontractor reapplied the fire retardant. Id. at 823-29, *citing* Groppel Co. Inc. v. U.S. Gypsom Co., 616 S.W.2d 49 (Mo.App. E.D. 1981). In Killian, interest ran not from the time of the breech but from the time the Army Corps of Engineers determined the final quantities of work done. The defendant attempted to claim it could deduct the Corps's estimate of work completed at the time the subcontractor took over rather than the final report based on a convoluted reading of the subcontract. Id. at 824-26. The court rejected this proposition and found that interest ran from the date of the final report, which allowed the parties to the subcontract to readily determine the contractor's obligation to the subcontract. Id. at 846 & 849.

As a practical matter, the issue of interest is resolved on whether the action appears to be a tort with no interest, as occurs with consequential contract damages, or a contract or an account. The extent to which it is considered a contract verses an account rests on when the debtor learned the amount owed or when the amount of the debt became readily knowable based on simply computations.

The debt in the case at bar is money owed on a contract and the extent of the obligation was readily knowable from the last date the Appellant worked on

the project. The required rate of pay was set forth in the Wage Order and was known from the time the Respondent entered the contract. Consider further that in an action account, interest begins from the date of service. This is true even though there may be issues of what was ordered, what was delivered and the agreed upon price. In a suit for the prevailing wage, none of those issues should exist, as the price is fixed by the wage order and the subcontractor must provide certified payroll of the amount of the goods delivered.

The Western District has recently experienced some problems in resolving the issue of when and why prejudgment interest is awarded. In Werremeyer and Hoskins, the Western District concluded prejudgment interest did not apply to punitive damages. The Missouri Supreme Court reversed both decisions. Werremeyer v. K.C. Auto Salvage Co. Inc., 134 S.W.3d 633 (Mo. 2004); Hoskins v. Business Men's Assurance, 116 S.W.3d 557 (Mo.App. W.D. 2003). The Western District's vacated opinion reasoned that prejudgment interest served as compensatory damages for the plaintiff's loss of use of the money during the time of litigation and imposing interest on punitive damages, which served to punish the defendant, would over compensate the plaintiff. Werremeyer v. K.C. Auto Salvage Co. Inc., slip op. WD61179, 2003 W.L. 21487311 (Mo.App. W.D. 2003). The Werremeyer court relied heavily on and essentially summarized the extended discussion on this issue as it is found in the Hoskins opinion. Hoskins, 116 S.W.2d 557, 579-82. The Supreme Court reversed both cases holding that the court would enforce the plain language of § 408.040 and prejudgment interest ran

on the amount of the judgment. Werremeyer, 134 S.W.3d 633 (Mo. 2004). The court reasoned that allowing prejudgment interest on punitive damages furthered the ends of the statutes by promoting settlement and disabusing any perception that a defendant could obtain an unfair benefit based on the natural delay in the litigation process.

The law vests underpaid workmen with the right to recover double their unpaid wages. R.S.Mo. § 290.300. Even if viewed as punitive in nature, there is no sound reason to treat the damages available to unpaid workmen different than punitive damages. Just as § 408.040 imposes interest on the entire judgment, § 408.020 allows prejudgment interest "for all monies after they become due and payable" in contract actions or "after they become due and demand of payment is made" in actions on account.

The contractor was required by law to gather payroll information. RSMo § 290.290. The amount that should have been paid was readily ascertainable from the plain language of the Missouri's Prevailing Wage Act and the Code of State Regulations. Interest should run from the date workmen were underpaid the wage set forth in the contract.

POINT IV

The trial court erred in entering judgment in favor of the surety based on the workmen's failure to provide notice of the underpayment within 90 days because, while there is an Eastern District opinion affirming such a condition on a public works surety bond and a subsequent Southern District opinion in dicta recognizing that authority, there is likewise a Southern District concurring opinion questioning that authority and a statutory amendment expressly providing the workmen with three years in which to bring their cause of action thus, in this case, as the workmen brought their cause of action within three years, it would be a violation of Missouri's expressed public policy, as set forth in RSMo § 431.030 to allow a surety to impose a condition in its contract effectively limiting the time to perfect a cause of action to 90 days.

It is Missouri's public policy that portions of a contract directly or indirectly limiting or tending to limit the time in which suit can be commenced are void. RSMo § 431.030. While it has been suggested a 90-day notice provision in a surety bond was consistent with the purpose of the prevailing wage act, i.e. to provide protection coextensive with the mechanic's lien statute, such reasoning will no longer stand. In 2005, the legislature amended RSMo § 516.130 to expressly provide that a suit brought by a workman under the prevailing wage act, i.e. under § 290.300, could be commenced anytime within three years. Even if one were to entertain the notion that a notice provision does not limit when suit

can be filed, that is only half of the prohibition in Missouri stated public policy set forth in § 431.030. The public policy also prohibits anything tending to limit the time in which suit can be brought and a condition in a surety bond subsequent to the breach that requires notice within 90 days of the breech, is a contract condition tending to indirectly limit the time in which the suit can be brought. Further, if the matter is considered generally one of a contract, insurance policies have universally been interpreted to only require reasonable notice and, as the workmen had at least three years in which to bring suit and the basis of their claim for damages were written documents in the possession of the principal, certified payroll records, the notice within the three year limitations period was reasonable.

There is no dispute as to any relevant fact. The bond required notice within 90 days of the last day of work for any claim of nonpayment. Ex. 3. The Appellants gave no such notice. The Appellants' claim that the bond condition is no longer valid pursuant to § 431.030 after the amendment to § 516.130, is a question of law required *de novo*. *Burney v. McLaughlin*, 63 S.W.3d 223 (Mo.App. S.D. 2001).

This Court affirmed a similar 90-day notice provision in a private contract. *Frank Powell Lumber Co. v. Federated Ins. Co.*, 817 S.W.2d 648 (Mo.App. S.D. 1991). In reaching that conclusion, the court relied on an earlier decision approving a city ordinance that required bringing suit within 90 days. *Id.* at 651 *citing Reorganized School Dist. R-3 v. L.D. Compton Const. Co.*, 483 S.W.2d 624 (Mo.App. E.D. 1972). While concurring in the result, the Honorable James K.

Prewitt suggested that, as applied to a public works project, the holding in *Compton* was in conflict with the statute requiring the bond, i.e. RSMo § 107.170. *Frank Powell Lumber Company*, 817 S.W.2d at 863-64. Indeed, when a similar charter provision in Kansas City was challenged as being in excess of the municipality's authority, it was struck down. *City of Kansas City v. St. Paul Fire & Marine Ins. Co.*, 639 S.W.2d 903 (Mo.App. W.D. 1982).

This history is confounded with the recent decision that, as regards to a materialman's claim on a public works project, the 90 day notice provision was enforceable. *State of Missouri ex rel. E.A. Martin Machinery Company v. Line One Inc.*, 111 S.W.3d 924 (Mo.App. S.D. 2003). In *E.A. Martin Machinery*, the court, on its own initiative, reaffirmed the validity of *L.D. Compton* holding. *Id.* at 928, ftnt. 4. What is of more than passing importance is that the parties had not raised the issue of the validity of the 90-day notice provision, *L.D. Compton* is not good law and beyond standing for the fact a party must properly preserve and argue an issue. *See City of Kansas City v. St. Paul Fire & Marine Ins. Co.* case, as recorded in 639 S.W.2d 903 (Mo.App. W.D. 1982)(striking down the exact same ordinance the *L.D. Compton* court had approved). Further, it does not appear that any of the parties presented to the court in either of those cases the applicability of RSMo § 431.030 and what could not have been presented in any case the subsequent amendment to RSMo § 516.130 expressly vesting workmen with the right to bring suit within three years.

To this tale, the Appellants will add a case that was transferred from the Southern District and retransferred by the Supreme Court wherein it was held the failure to give notice within 5 years would not defeat coverage. *See Farm Bureau Town & Country Ins. Co. of Missouri v. Rogers,* 959 S.W.2d 880 (Mo.App. S.D. 1997). The *Rogers* case involved liability insurance where under the insured was required to give prompt notice of any accident or potential claim. *Id.* at 882. In *Rogers,* Hugh Rogers's alleged negligence caused injury to his granddaughter, Sara Rogers, in a riding lawnmower accident. *Id.* at 881-82. Hugh's insurer did not receive notice of the claim until 5 years after the accident. *Ibid.* Nevertheless, the court found the 5 year time delay in providing notice of the claim was not unreasonable so as to preclude insurance coverage because there was no evidence the insurance company inspected the mower or the site of the accident or engaged in anything to suggest the passage of the 5 years prejudiced the insurer. *Id.* at 885.

Working backwards, unlike the liability insurance policy in *Rogers* where the insurer had policy exclusions, the case at bar involved a surety. A surety, in theory, has no defense upon a showing a condition of the bond has not been met. The surety cannot possibly change its position, even if it has notice the principal is in breech of the terms of the bond. The surety undertook its obligation to pay if the principal failed to do so upon issuing the payment bond. The legal facts determining the nature and extent of the surety's obligation were fixed at the time it issued its bond. In the case at bar, the underpaid workmen established their cause of action on the basis of certified payroll records submitted to the principal

and the application of law setting the wage rate. There was simply nothing for the surety to have investigated nor anything the surety could have changed. Further, even if there might be circumstances where the surety wanted to investigate, there is no evidence of such a need in this case or prejudice to the surety arising from the late notice. As in *Rogers*, the notice provision in the suretyship should not be strictly enforced and judgment should have been entered in favor of the Appellants. *Farm Bureau Town & Country Ins. Co. of Missouri v. Rogers*, 959 S.W.2d 880 (Mo.App. S.D. 1997).

As interesting as the running dispute in the *Frank Powell Lumber* and *State ex rel. E.A. Martin* cases might be, the legal foundation on which those decisions rested no longer exist, as workmen have three years in which to file a claim for unpaid wages. *Frank Powell Lumber Co. v. Federal Insurance Co.*, 817 S.W.2d 648 (Mo.App. S.D. 1991); *State ex rel. E.A. Martin Machinery Co. v. Line One, Inc.*, 111 S.W.3d 924 (Mo.App. S.D. 2003); RSMo § 516.130.3. As originally passed in the 1890s, the bond statute, RSMo § 107.170, and the action on the bond, RSMo § 522.300, had no period of limitation. When the prevailing wage act was added to those statutes, it too lacked a limitation period. RSMo § 290.210 *et seq.* The courts were forced into the breech. The issue of a 90 day notice provision initially arose in the form of a municipal ordinance requiring suit within 90-days. Although the propriety of such an ordinance was originally upheld in *City of St. Louis ex rel. Atlas Plumbing*, when the issue was properly raised the ordinance was struck down as being in excess of the municipality's authority. *City*

of St. Louis ex rel. Atlas Plumbing Supply Co. v. Aetna Casualty and Surety Co., 444 S.W.2d 513 (Mo.App. E.D. 1969); *City of Kansas City v. St. Paul Fire & Marine Ins. Co.*, 639 S.W.2d 903 (Mo.App. W.D. 1982). Even though the ordinances were struck down, in the meantime, the theory was extended to bonds in general, even if there was no ordinance. *Reorganized School Dist. R-3 v. L.D. Compton Const. Co.*, 483 S.W.2d 674 (Mo.App. E.D. 1972). The theory ran that, since there was no express limitation period on bringing an action on the payment bond and the purpose of the prevailing wage act was to provide protection coextensive with the mechanics lien statute therefore, in the absence of express guidance as to the limitation period, the court would borrow the limitation from the mechanics lien statute or accept as appropriate a condition in the party's contract consistent with such a limitation period, i.e. notice within 90 days.

In the first instance, extending that legal theory from contractors and subcontractors to individual workmen is difficult to understand. The individual workmen do not have a lien right under Chapter 429 or, as might be better said, there does not appear to be any reported case instituted by individual workman claiming a mechanics lien and, as a law was passed to give a specific subset of workmen a specific lien right when the contract involves demolition, the amendment implies individual workmen who are not involved in such demolition have no lien right. *See* RSMo § 429.015.3. The second problem is that, while contractors and their subcontractors will likely have several, if not many, different contracts they could be working on, the workmen had but one job. The contractor

or subcontractor can readily demand payment upon a threat to abandon the project and move to the next contract if they are not paid. Individual workmen do not have multiple employers lined-up. Statutes are not interpreted to produce absurd results but requiring an individual workman to demand pay, presumably under a threat to quit work or knowing such a demand will result in firing, is absurd. *Baxley v. Jarred*, 91 S.W.3d 192 (Mo.App. W.D. 2002).

As in *Baxley*, where the court noted it be absurd to think a party could relocate with a child but the relocation resulted in a change of circumstance to modify custody and keep the child in the State, it is equally absurd to suggest a workman must demand the wages owed for a job knowing full well such a demand will cost the workman his job. While a 90-day notice provision is perfectly consistent with Missouri's prompt payment statute, RSMo § 34.057, *i.e.* the unpaid subcontractor must raise the issue with the owners and contractor who can determine which party is not promptly paying the other, the notion is completely contrary to the Prevailing Wage Act (PWA). The PWA requires contractors to demand certified payroll records from subcontractors and gives the public body the right to review them and, if necessary, withhold funds. RSMo § 290.290 and § 290.250. In short, while the contractor and the subcontractor must show the work was done and make demand for the payment, less they be precluded from making claims under the prompt payment statute, the PWA turns the obligations on their head so that the owner of the property, the contractor and the subcontractor must

check and double check to make sure the workmen are being paid the prevailing wage.

Beyond the practical difference between claims brought by contractors, subcontractors or materialmen, the courts' law that developed to fill a statutory gap has been abrogated with the amendment to § 516.130. The only legal underpinning for approving the 90-day notice provision in the surety bonds was the lack of a specific limitation period, as applicable to claims by underpaid workmen. While as to materialmen and the contractors and subcontractors, the 90-day notice provision was reinforced with the enactment of the prompt payment statute's 90-day demand period, *see* RSMo § 34.057, its application workmen were abrogated when the legislature expressly vested workmen with a three year period in which to bring a prevailing wage act claim. RSMo § 516.130.3. Section 413.030 rendered void any contract provision indirectly tending to limit the time in which suit could be brought once the General Assembly expressly granted workmen three years to bring suit. The surety's attempt to create a condition subsequent in the suretyship limiting the time to perfect a right to bring suit to 90 days is prohibited.

It does not matter if the contract term is labeled a condition precedent or subsequent or if it is aimed at a substantive right or remedy. *See Asel v. Order of United Commercial Travelers of America*, 193 S.W.2d 74 (Mo.App. W.D. 1946). The purpose of § 431.030 is to protect the uniformity of the statutes of limitation and insure the courts are open so long as suit is brought within a reasonable time,

as that time is defined by the statute of limitations. *Id.* at 79, *quoting Karnes v. American Fire Insurance Co.*, 46 S.W. 166 (Mo. 1898). The statute is not limited to express contract language requiring a suit to be filed within a set time, as it is not a prohibition on making people run to the courthouse. The statutory prohibition is on using terms of contract to close the courthouse doors. Thus, to say the Appellants could file suit, even though they were absolutely assured of loosing because they had failed to meet a condition subsequent the breach, i.e. providing notice to the surety within 90-days, is precisely the type of contract term that is void pursuant to § 431.030.

The trial court erred entering judgment in favor of the surety on its claim the workmen failed to meet the conditions subsequent in the suretyship by not providing notice within 90 days. While the court was bound by the existing opinion of appellate courts, those opinions are no longer good law. The judgment should have been entered in favor of the Appellants and against the surety.

CONCLUSION AND REMEDY

The judgment of the trial court should be reversed. The cause should be remanded for the trial court to make such findings of fact and conclusions of law as may be necessary to determine any additional sums the Appellants are entitled to as the result of the underpayment of their base wages or the accrual of interest from dates earlier than the service of their summons. In addition, the judgment should be reversed and remanded with directions to enter judgment in favor of the Appellants and against the Surety.

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IN THE
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

STATE OF MISSOURI, ex rel. ROBERT EVANS)		
STATE OF MISSOURI, ex rel. DAVID CROWDER	)	
STATE OF MISSOURI, ex rel. SHAWN HANLEY	)	
STATE OF MISSOURI, ex rel. RICKY ROBINSON	)	
	)	
Appellants,	)	
	)	Appeal No. SD27892
vs.	)	SD27894, SD27896,
	)	SD27897
BROWN BUILDERS ELECTRICAL	)	
COMPANY, INC., CAMDEN	)	
BUILDERS, INC. AND ST. PAUL	)	
FIRE & MARINE INSURANCE	)	
COMPANY.	)	

CERTIFICATE OF SERVICE

COMES NOW the Appellant, by and through the undersigned counsel, 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 Brief and contains 8,381 words and that a copy of the Appellant's Brief, 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: Robert Johnson,

Esq., 1200 Main St., Suite 1700, Kansas City MO 64105 on this 1st day of February, 2007.

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