IN THE SUPREME COURT OF MISSOURI

Case No. SC88232

THOMAS O. POLEN, APPELLANT

v.

JERRY L. CROCKETT, RESPONDENT

Substitute Appellant's Reply Brief

Submitted by:

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I. Jurisdictional Statement

This is an appeal of the denial of Defendant/Appellant Thomas O. Polen's Motion to Quash Wrongful Garnishment entered by the trial court on or about April 4, 2005 and filed in the case of Jerry Crockett v. Thomas Polen, No. 0694-AC01066, in the Sixth Judicial Circuit, Circuit Court of Platte County, Missouri. The presiding Judge was the Honorable Gary D. Witt. The April 4, 2005 Order was the result from a bench hearing held on March 10, 2005.

The April 4, 2005 Order of the Court was later supplemented and particularized by a full, written Order entered by Judge Witt on August 14, 2006. This written Order is an appealable, final judgment that disposed of all parties and issues before the trial Court.

In addition, on or about June 29, 2005, the Plaintiff/Respondent filed a release from liability and satisfaction of judgment with the trial court. Consequently, there remain no outstanding issues regarding any ongoing aspect of the underlying judgment and action. Therefore, Defendant/Appellant's Motion to Quash is in regard to a case that has had its final disposition, and is therefore ripe for appeal.

II. Statement of Facts

On September 13, 1994 a judgment was entered in the Circuit Court of Platte County, Missouri, Case No. 0694-AC01066 against Defendant/Appellant. Said action concerned a Petition on a Promissory Note, in the amount of $3,600.00, plus interest. (L.F. pp. 24-25). Pursuant to Mo. Rev. Stat. §516.350.1, this judgment expired ten years after entry, on September 13, 2004, unless revived prior to that time or in some way tolled.

The record shows that the judgment was never tolled nor revived by a proper writ, as proscribed by Missouri Law and Practice, and Plaintiff/Respondent's attorney stated same, in open court, to the trial judge, on March 10, 2005, on the record. (T.R. March 10, 2005 Hearing p.2).

Nevertheless, contrary to controlling statutes and case law, for a period of almost ten months, from September 13, 2004 to on or about June 29, 2005, when Plaintiff/ Respondent filed with the Circuit Court a Release from Liability and Satisfaction of Judgment, Plaintiff/Respondent obtained an additional amount in involuntarily-taken garnished wages earned by Appellant, Thomas Polen. (L.F. pp. 19, 27, 28, 32, 35, 41-44).

These involuntarily obtained wages have not been returned to Defendant/ Appellant despite repeated requests and demands made on Plaintiff/Respondent. At this time the Plaintiff/Respondent continues to retain Defendant/Appellant's earned wages that were only obtained through involuntary garnishment. This continued retention has damaged and harmed Defendant/Appellant.

III. Points Relied On

1) The trial court erred in denying Defendant/Appellant's Motion to Quash Wrongful Garnishment based on a hearing held on March 10, 2005 and not ordering the restitution of all monies involuntarily taken by the Plaintiff/Respondent plus interest, fees, and costs, because the Court did not properly invoke the applicable statute of limitations period mandated in Mo. Rev. Stat. §516.350.1, in that monies were improperly taken from the Defendant/Appellant by the Plaintiff/Respondent through a series of wrongfully obtained wage garnishments beyond the expiration of the underlying judgment without benefit of revival of the underlying civil judgment.

Mo. Rev. Stat. §516.350.1

In re the Marriage of Holt, 635 S.W. 2d 335, 337 (Mo. 1982)

Regan v. Williams, 185 Mo. 620, 84 S.W. 959 (Mo. 1905)

Eubank v. Eubank, 29 S.W. 2d 212 (Mo. App. 1930)

Mayes v. Mayes, 116 S.W. 2d 1 (Mo. 1938)

Missouri Supreme Court Rule 74.09(a)

IV. Argument-First Point Relied On

The trial court erred in denying Defendant/Appellant's Motion to Quash Wrongful Garnishment based on a hearing held on March 10, 2005 and not ordering the restitution of all monies taken by the Plaintiff/Respondent plus interest, fees, and costs, because the Court did not properly invoke the applicable statute of limitations period mandated in Mo. Rev. Stat. §516.350.1, in that monies were improperly taken from the Defendant/Appellant by the Plaintiff/Respondent through a series of wrongfully obtained wage garnishments beyond the expiration of the underlying judgment without benefit of revival of the underlying civil judgment.

Statutory interpretation is a question of law, which an appellate court reviews *de novo*. Murphy v. Cannon, 536 S.W. 2d 30, 32 (Mo. Banc 1976); Ochoa v. Ochoa, 71 S.W. 3d 593, 595 (Mo. Banc 2002). When interpreting a statute, an appellate court must ascertain legislative intent from the language; give effect to that intent, if possible; and consider the words in their plain and ordinary meaning. Budding v. SSM Healthcare Systems, 19 S.W. 3d 678, 680 (Mo. Banc 2000). A court can not look to rules of construction unless a statute contains an ambiguity. State ex rel. Baumruk v. Belt, 964 S.W. 2d 443, 446 (Mo. Banc 1998).

Missouri case law and precedent clearly shows that voluntariness is, and has always been, an essential element of a payment which would be necessary to toll or revive a sum certain judgment and that payments incident to a garnishment or attachment are not voluntary.

Contrary to assertions repeatedly made in Respondent's brief, Missouri courts have routinely held that voluntariness is an essential element of a payment necessary to toll or revive a sum certain judgment.

Respondent states on page fifteen of his brief that, "Appellant throughout his argument continually misstates that a payment must be voluntary to revive a judgment." Respondent's Substitute Brief. And yet, Appellant is able to find readily available phrases such as; "made by the authority of the defendant", "signified his willingness to pay", "with the consent of the payor", "must be voluntary", and "by the authority of the defendant" in Missouri case law.

In chronological order this clear line of cases can plainly start with Regan v. Williams, 185 Mo. 620, 84 S.W. 959 (Mo. 1905) which states that, "The party relying on a payment to stop the statute must not only establish that it was made, but made by the authority of the defendant". Id. at 961 (internal citations omitted). "Part payment does not take a debt out of the statute unless made under such circumstances as to warrant the inference that the debtor thereby recognized the debt and signified his willingness to pay it." Id. (internal citation omitted). "The payments must be made by or with the consent of the payor." Id.; *citing*, Gardner v. Early, 78 Mo. App. 346 (1899); Phillips v. Mahan, 52

Mo. 197 (1873). "Involuntary payments are, we believe, usually held not to take the case out of the statute." Id. at 962.

The next major case in this imposing, yet apparently hidden from the Respondent, line is Eubank v. Eubank, 29 S.W. 2d 212 (Mo. App. 1930). Eubank specifically held that in order for a payment to be effective in tolling the statute of limitations for purposes of reviving a judgment, the payment must be voluntary, or made with the consent of the payor. Id. at 214. "The burden is upon the one seeking to uphold the right of action to show that …payment was made by, or with the consent of, the payor, or under such circumstances as to warrant the inference that he thereby recognizes the debt, and signifies his willingness to pay it…" Id. "[O]therwise, the holder of a note would have no difficulty in avoiding the bar of the statute." Id. (internal citation omitted). "…the party relying on a payment to stop the running of the statute must not only establish that it was made, but that it was made by authority of the defendant, is the rule." Id. "The general rule applicable to this situation is stated in 37 C.J. p. 1146: 'A part payment to be effectual to interrupt the statute must be voluntary…'" Id. *citing*, State v. Finn, 102 Mo. 222, 14 S.W. 984 (Mo. 1890).

This Court subsequently cited Eubank approvingly for the rule that in order for a payment to extend the ten-year period within which execution may issue, the payment "must have been made voluntarily…" Mayes v. Mayes, 116 S.W. 2d 1, 6 (Mo. 1938). The Mayes Court noted that under Section 886, one of the statutory forerunners to today's Mo. Rev. Stat. § 516.350.1, a payment, in order to toll the applicable Missouri ten-year statute of limitation must be made within that period and entered upon the

record. Id. In its analysis, the court followed Eubank in stating that, "…we think this means that such payment, in order to extend the time, must have been made voluntarily…" Id. at 6. The payment(s) received by Mrs. Mayes within the first ten years after rendition of the Missouri order were held by the Court not to have been voluntarily made. Id.

Missouri courts followed Mayes in continuously interpreting "payment" to mean *voluntary* payment. In Caneer v. Kent, 119 S.W. 2d 214, 218 (Mo. 1938) this Court affirmed Regan by citing verbatim from its holding: "Part payment does not take a debt out of the statute unless made under such circumstances as to warrant the inference that the debtor thereby recognized the debt and signified his willingness to pay it." Caneer at 218. "…[p]ayments made after the note is barred do not revive the note unless such …are made at the direction of, or with knowledge and consent of the debtor." Id. at 217 (internal citations omitted).

In Missouri Interstate Paper Co. v. Gresham, 116 S.W. 2d 228 (Mo. App. 1938), the Kansas City Court of Appeals unequivocally upheld the requirement of voluntariness by holding that, "We conclude that the law as quoted from Regan v. Williams…is the recognized law in this state. Id. at 230. The Missouri rule applicable to the issue…is well expressed…as follows:

> 'The ground upon which a part payment is held to take a case out of the statute is that such payment is a voluntary admission by the debtor that the debt is then due, which raises a new promise by implication to pay it or the balance. To have this effect it must be

such an acknowledgment as reasonably leads to the inference that the debtor intended to renew his promise of payment.'"

Id. at 229 (internal citations omitted).

In Simpson v. Davis, 130 S.W. 2d 666 (Mo. App. 1939) the Court of Appeals held that:

"…the burden of showing that payments were made or directed by the defendants was on plaintiff. On this record this case we think falls within the rule, or, rather, the exception to the general rule, announced in the case of Missouri Interstate Paper Company v. Gresham (citation omitted) where we held… the rule to be that when money, not the property of defendant, is applied to payment of a debt after the statute has run it does not effect a revival of the debt as to him for the reason that he has no interest therein and the money so paid has only the effect of extinguishing the debt *pro tanto*.

Id. at 667.

In Davis v. Burke, 188 S.W. 2d 765, 768 (Mo. App. 1945), the Court discussed an improper jury instruction on this issue by stating:

"It would have been much better for the instruction to have been kept in the limits of the rule laid down by our courts, i.e., 'The ground upon which a part payment is held to take a case out of the

> statute is that such a payment is a voluntary admission of the debtor that the debt is then due, which raises a new promise by implication to pay it or the balance. To have this effect it must be such an acknowledgment as reasonably leads to the inference that the debtor intended to renew his promise of payment.'".

Id.

More modern cases have continued to clearly regard voluntariness as an essential element for payments to toll or revive sum certain judgments. "When a defendant pays a judgment after execution or writ of garnishment in aid of execution has issued, courts have generally held that the payment was involuntary." Kinser v. Elkadi, 654 S.W. 2d 901, 903 (Mo. Banc 1983) (citations omitted); *See also*, Two Pershing Square, L.P. v. Boley, 981 S.W. 2d 635, 638 (Mo. App. W.D. 1998) (payment involuntary when made after execution or writ of garnishment because presumed to be made as a result of legal coercion); Countryman v. Seymour R-II Sch. Dist., 823 S.W. 2d 515, 519 (Mo. App. S.D. 1992) (payment following execution of garnishment is involuntary).

Respondent states on page eighteen of his brief that, "Neither Mayes nor Eubank decided any questions raised in this appeal." Appellant finds that assertion risible.

Respondent attempts to distinguish those cases as only dealing with "judgments which had already expired before attempted executions took place." Respondent's Substitute Brief p. 18 (emphasis in original). Appellant is heartened to learn that Respondent agrees that, based on the holdings of Mayes and Eubank, the ten-year statute

bars further execution on expired judgments, absent evidence of a *voluntary* payment. It is also momentous that Respondent has recognized that there is such a thing as a *voluntary* payment, and, therefore, that there is such a thing as an *involuntary* payment, and that, at least according to the Respondent, a voluntary payment is requisite for revival of an *expired* judgment.

However, the *within ten years after rendition vs. after expiration* distinction is nowhere to be found in court holdings. "Part payment does not take a debt out of the statute unless made under such circumstances as to warrant the inference that the debtor thereby recognized the debt and signified his willingness to pay it." Regan, *supra*. "A part payment to be effectual to interrupt the statute must be voluntary…". Eubank, *supra*. "…[W]e think this means that such payment, in order to extend the time, must have been made voluntarily…". Mayes, *supra*.

In fact, the use of the verb "interrupt" in Eubank (*citing* Finn), can only be interpreted to apply to the first ten years of life of a judgment. A judgment that has died can not then be interrupted. When interpreting the term "payment" in statutes of limitations, this court has given it the same meaning whether or not the payment is made before or after the running of a statute of limitations. *See, e.g.*, Welborn v. Southern Equip. Co., 395 S.W.2d 119, 124 (Mo. Banc 1965) (holding that a voluntary payment of medical expenses will toll the running of various statutes of limitations).

In any event, Mayes clearly holds that payments *made prior to the expiration of the judgment* that are sufficient to toll the statute of limitations found in section 886 (the exact precursor of § 516.350.1) must be voluntary. Id. at 5 and 6. Because Ms. Mayes

brought her action in 1936, the tolling of the statue of limitations could only be achieved by a payment made both: (1) within ten years of the original judgment entered on May 7, 1920; and (2) no longer than ten years prior to June 25, 1936. Mrs. Mayes claims that the credits entered on January 1, 1929 met both of these requirements, and she was correct, at least in regard to the temporal nature of the payment in relation to the rendition of judgment and filing date of Mrs. Mayes' action. Id. at 6. The January 1, 1929 credit was recorded prior to the end of the ten year statute of limitations found in section 886 and it is this credit that Mrs. Mayes argued extended the statute of limitations past May 7, 1930 so that she could properly bring her suit in 1936 for recovery of the initial judgment which was entered on May 7, 1920. Id. at 2, 6.

Of course, in Mayes this court unequivocally held that the payment made on January 1, 1929 was not voluntary and endorsed the general rule found in Eubank that for a payment to be effective in tolling the statute of limitations for purposes of reviving a judgment, the payment must be voluntary. 29 S.W.2d at 214.

In the present case there is no dispute that no voluntary payment was ever entered on the record, only garnishments, both less than and more than ten year after rendition of judgment. Therefore no payments were ever of a nature to stop, interrupt, toll, or avoid operation of Mo. Rev. Stat. § 516.350.1. Garnishments, attachments, and other involuntary, state-obtained takings do not in any way meet the burden to take cases founded on a contract theory, such as this action, outside of the applicable ten-year statute of limitations.

There are several statutorily-mandated steps that occur in the garnishment process, all of which are either court ordered and supervised or initiated and monitored by a sheriff, none of which can be instituted, maintained, or arrested by any action of the defendant. "[A garnishment's] function is *to bring within the jurisdiction and power of the court* (emphasis added) the debt or chose in action and impress it with the lien of the judgment in aid of the execution." Blanton v. United States Fidelity and Guaranty Co., 680 S.W. 2d 206, 208 (Mo. App. W.D. 1984).

In response to an, apparently hypothetical question on page 22 of Respondent's brief, Appellant's argument is only that payments incident to a garnishment or attachment are, on their face, involuntary. Payments incident to the judgment itself are not automatically involuntary, but must be judged based on the circumstances involving each payment. Payments placed on the record due to garnishment or attachment are, by their nature, coercive, non-volitional, and involuntary. They do not operate to toll or revive the ten-year statute of limitation.

However, obviously, garnishment or attachment is not the only way a payment can be made. It is very easy for Appellant to envision a scenario whereby a recent judgment debtor comes out of a short-term financial reversal, perhaps the cash flow nadir that led to taking out a loan or signing a promissory note. He then may acquire additional funds made available to him via a raise, a bonus, a large tax refund, or an inheritance. He then communicates with the judgment creditor seeking to commence a payment plan or even a full payoff of the balance. The parties could then meet, or make arrangements from afar,

and either commence payments or complete payment in full, perhaps at a negotiated, reduced amount.

These are voluntary payments. They can work to toll or revive the vitality of a sum certain judgment. They do not require effort by a sheriff or a court order of garnishment or attachment and they involve funds or assets under the dominion and control of the judgment debtor himself; not putative wages held by an employer or a demand account held by a financial institution. Here, there never was a voluntary payment made on the record. Therefore, the judgment died exactly ten years after rendition and all payments taken after that date were improper.

Because Martin v. Martin involved decretial child support, it could not interpret or address Mo. Rev. Stat. § 516.350.1, but instead interpreted and addressed Mo. Rev. Stat. § 516.350.2 only.

Decretial installment payments and sum certain judgments, when originally entered, are categorically different. In re the Marriage of Holt, 635 S.W. 2d 335, 337 (Mo. 1982). Because of these differences they are incapable of being treated as the same and are not analogous. Id.

> "An order or judgment for installment support payments is a judgment unlike any other because of its uncertainty of amount, although it is similar to an award of installment alimony payments where the total alimony awarded by the court is not designated as

> a sum certain at the time judgment is rendered. The usual order for installment support payments is not rendered in the form of a judgment for a sum certain, payable in installments, but…it is usually an order to pay a certain amount periodically until the minor…reaches a certain age."

Id., citing, Smith v. Smith, 156 N.E. 2d 113 (Ohio 1959).

"The word 'order' is used because at the time a decree awarding maintenance or child support is issued, it looks to the future and it is not at that time (when entered) a judgment of a sum then due and owing as are most other awards of money." Id. "Other money judgments, by their nature, constitute a fixed sum." Id.

In 1982 the Missouri General Assembly passed Senate Bill 468, which was signed by Governor Bond in June of that year. Senate Bill 468 added a new subsection to Mo. Rev. Stat. 516.350, thereby creating newly numerated subsections (1) and (2), subsection (1) being the original wording, verbatim, of the previous § 516.350. Id. In addition to Holt, in response to the 1982 amendment to Mo. Rev. Stat. § 516.350, this Court issued a ruling in three conjoined cases headlined by Ferguson v. Ferguson. 636 S.W. 2d 323 (Mo. Banc 1982). In its short ruling, this Court described the new subsection (2) as representing, "the legislative attempt to ameliorate the harshness of and hardships created by former § 516.350, RSMo 1978, reference child-support or maintenance orders." Id. at 324.

Ferguson followed and affirmed Holt in instructing lower courts to further the General Assembly's intent to take orders awarding decretial installment payments away from the historical treatment of all other judgments and henceforth deem such future support payments as only "presumed paid and satisfied after the expiration of ten years *from the date that periodic payment is due* (emphasis added). Ferguson at 324. Neither case addresses any changes in intent or effect regarding the consequence of whether a payment on the record was voluntary or involuntary. In fact, Holt stated that, "it is unnecessary to determine the manner in which a judgment may be revived or tolled under § 516.350." Holt at 336.

Martin is of little consequence to this action for a couple of reasons. First, since Martin involved an attempt to revive a judgment for child support, Id. at 948, it could only interpret subsection 2 of Mo. Rev. Stat. § 516.350 since the legislature took awards of child support or maintenance away from subsection 1 in its 1982 amendment to the statute. Mo. Rev. Stat. § 516.350. Second, Martin itself states that the crux of the case hinges on whether a payment was "duly entered upon the record". Id. at 951. Third, the Martin court's statements regarding voluntariness are without any citation or support and make no effort to harmonize or distinguish previous holdings of the Missouri Supreme Court.

Clearly, the preferred statutory method to revive and extend the vitality of a sum certain judgment is through the process of revival and a filing with the Court of a Writ of *Scire Facias*.

A judgment creditor may revive a sum certain judgment at any time within ten years of rendition of same by filing of a writ of *Scire Facias*. Elliott v. Cockrell, 943 S.W. 2d 328, 329 (Mo. App. E.D. 1997) (citing Mo. Rev. Stat. § 511.370 and Missouri Court Rule 74.09(a)). The only pertinent issues in a writ of *Scire Facias* proceeding to revive a sum certain judgment are whether the judgment creditor initiated the proceeding within the prescribed time of ten years; whether service, either personal or by publication, was obtained on the judgment debtor; whether the judgment existed; and whether the judgment was satisfied. Id. at 330.

Plaintiff/Respondent simply and clearly did not ever take the necessary and required steps to revive the underlying civil judgment, entered on September 13, 1994, as required by statute, by requesting a writ of *Scire Facias*, and, therefore, Appellant was never afforded the opportunity to challenge and confront such a writ of revival. In re Jackman's Estate, 124 S.W. 2d 1189 (Mo. 1939); Wallace Cotton Co. v. Estate of Wallace, 722 S.W. 2d 103 (Mo. App. 1986).

Under the plain language of Supreme Court Rule 74.09(a) and Mo. Rev. Stat. § 511.370, a motion to revive a judgment must be "filed by a judgment creditor within ten years after entry of the judgment." Mr. Crockett did not file a motion to revive either before or after the running of the ten-year statutory life of the judgment. Therefore, this judgment died, unless tolled prior to its running, exactly ten years after its rendition. As stated above, involuntary, court-ordered wage garnishments are not enough to toll, or extend, the life and vitality of a sum certain judgment.

Mr. Crockett slept on his rights by not moving to timely revive this judgment. The only payments entered on the record in the first ten years of life of the underlying judgment, prior to September 13, 2004 were garnishments of Mr. Polen's wages. These were acceptable takings in partial satisfaction of the judgment, however, they in no way operated as a toll on or extension of the vitality and life of the judgment. Therefore, all garnishments taken after September 13, 2004, more than ten years after rendition of judgment were void on their face.

V. Conclusion & Prayer for Relief

"To toll a limitation statute, part payment on a debt must be voluntary…". 12 Missouri Practice § 7:355 (2006). For, at least, more than 115 years, Missouri courts have followed the standard position that voluntary payments are necessary in order to toll the applicable statutes of limitations as to sum certain judgments. If this were not the rule, then the function of garnishment would be radically altered so that it ceases to become a means of *enforcing* judgments and, instead, becomes a means for *reviving* judgments without affording the Judgment Debtor a fair hearing. Under such a regime the writ of *scire facias* and the procedures of Supreme Court Rule 74.09 (a) would become superfluous.

Therefore, this Court should make the simple and clearly correct choice in this case by reiterating the view that Missouri follows the historical and well-established standard model for tolling statutes of limitations in sum certain judgment cases.

For all of the aforementioned reasons, Appellant prays that the Court grant restitution to Appellant for all amounts improperly garnished after September 13, 2004, plus applicable interest, award Appellant's reasonable attorney costs and fees, and Appellant's own reasonable costs to Appellant, and for such other and further relief as the Court deems just and proper under the circumstances.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above Brief was sent via U.S. mail, first class, postage prepaid, this Twenty-first day of March, 2007 to: Kim G. Schwarzkopf, 2600 Forum Blvd., #A, Columbia, MO 65203, Attorney for Respondent.

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Michael W. McCrary

CERTIFICATE OF COMPLIANCE

I, the undersigned counsel for Appellant, hereby certify pursuant to Missouri Supreme Court Rule 84.06(c) that the foregoing Appellant's brief (1) includes the information required by Missouri Supreme Court Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 5,267 words, 626 lines, excluding the sections excepted by Rule 84.06(b)(2) of the Missouri Supreme Court Rules, based on the word count that is part of Microsoft Word 2003.

I do hereby further certify that the compact disks provided to the Missouri Supreme Court and the Attorney for Respondent have been scanned for viruses and that they are virus-free as to all viruses known to the undersigned's various computer security programs and measures.

_____

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