

**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)	ORAL ARGUMENT
FIRE & MARINE INSURANCE)	REQUESTED
COMPANY)	
)	
Respondents.)	

**RESPONDENTS CAMDEN BUILDERS, INC. AND ST. PAUL FIRE & MARINE
INSURANCE COMPANY'S 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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COMPANY, INC., CAMDEN)	
BUILDERS, INC. AND ST. PAUL)	
FIRE & MARINE INSURANCE)	
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STATEMENT OF FACTS

Respondent Brown Builders Electrical Company, Inc. (“Brown Builders”) maintained an apprentice program approved by the Bureau of Apprenticeship and Training, Department of Labor. (Appellants’ Ex. 5; Tr. 92:10-16). In 2001, Brown Builders subcontracted to perform labor on a public works project for Camden Builders, Inc. (“Camden”), on which it utilized Appellants, who were apprentices in that program. (Appellants’ Ex. 4). The apprentice program was registered with and approved by the U.S. Department of Labor. (Appellants’ Ex. 5; Tr. 92:10-16). The apprentice program sets forth a schedule of wages for apprentices employed and working under the program. (Appellants’ Ex. 5 at p. 7). The apprentice program provided that the starting rate of pay

“shall not be less than 46.2% of the sponsor’s skilled rate for the occupation” and further provided that the rates of pay “are given in percentages of the sponsor’s prevailing rate for skilled professionals in the occupation.” (Appellants’ Ex. 5 at p. 7). The program set the base pay rate as follows: “sponsor’s current rate for the occupation is \$13.00 per hour as of January 1, 2001.” (Appellants’ Ex. 5 at p. 7). Brown Builders was instructed by the Prevailing Wage Division of Missouri and the Department of Labor that the prevailing wage law was inapplicable to its apprentices and that apprentices in the approved program were not subject to payment based on the prevailing wage rate for journeymen. (Tr. 123:20-124:10; 145:1-7). At the time of the project, Brown Builders was paying journeymen electricians \$13.00 per hour. (Appellants’ Ex. 5, at p. 7; Tr. 104:4-7). As set forth in the program, each of the Appellants, who were working as apprentices on the project, was paid a percentage of said journeymen rate. (Appellants’ Ex. 5, 28, 29, 30, 33; Tr. 104:14-23).

Respondent St. Paul Fire & Marine Insurance Company (“St. Paul”) issued a Performance and Payment bond on the project. (Appellants’ Ex. 3). The bond provisions require that any claimant for unpaid wages has 90 days after the last day worked to notify in writing the Owner of the project and the General Contractor (Camden) of their claim. (Appellants’ Ex. 3 at 4.2.1). None of the Appellants satisfied this notice requirement. (Tr. 58:10-21, 66:23-67:9, 149:12-16; Appellants’ Ex. 27, at 14:4-6). As recognized in the separate trial court’s judgments, “plaintiff conceded that he had not given a 90-day notice” as required by the payment bond. (Robinson Judgment, p. 1-2; Crowder Judgment, p. 1-2; Evans Judgment, p. 2).

ARGUMENT

I. STANDARD OF REVIEW

As this appeal is taken from a trial by the court, appellate review is conducted pursuant to Missouri Rule of Civil Procedure 84.13(d). MO. R. CIV. P. 84.13(d); *Mortenson v. Leatherwood Constr., Inc.*, 137 S.W.3d 529, 531 (Mo. App. S.D. 2004). Appellants bear the burden of showing that the trial court erred in its decision. *In re Marriage of Patrick*, 201 S.W.3d 591, 594 (Mo. App. S.D. 2006); *Coit v. Coit*, 778 S.W.2d 344, 346 (Mo. App. E.D. 1989). In fact, this Court has stated, “The appellant bears the burden of demonstrating error, and this court defers to the trial court’s decision, even if the evidence could support a contrary conclusion.” *In re Marriage of Patrick*, 201 S.W.3d at 594. Thus, the trial court’s decision must be affirmed “unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law.” *Mortenson*, 137 S.W.3d at 531. When an appellant’s claim of error is based on lack of evidence, Missouri courts refer to the appellant’s burden as “heavy.” *Welshans v. Boatmen’s Bancshares, Inc.*, 872 S.W.2d 489, 495 (Mo. App. E.D. 1994).

In evaluating the trial court’s decision, this Court has held that, “All evidence favorable to the judgment and all inferences to be drawn from the evidence are accepted as true, and all contradictory evidence is disregarded.” *Mortenson*, 137 S.W.3d at 531. While conclusions of law are reviewed *de novo*, Missouri courts routinely hold that “[j]udging credibility and assigning weight to evidence and testimony are matters for the trial court, which is free to believe none, part, or all of the testimony of any witnesses.”

Id.; see also *Lashmet v. McQueary*, 954 S.W.2d 546, 552 (Mo. App. S.D. 1997).

Missouri appellate courts generally defer to the trial court’s “superior opportunity to assess the witnesses’ credibility.” *Mortenson*, 137 S.W.3d at 531.

II. RESPONSE TO APPELLANTS’ POINT I

A. POINT I SHOULD BE DENIED, AND THE JUDGMENTS AFFIRMED, BECAUSE THE TRIAL COURT CORRECTLY INTERPRETED THE LAW AS APPLICABLE TO APPRENTICES IN THE STATE OF MISSOURI.

The Missouri Code of State Regulations sets forth the requirements for the payment of apprentice wages for workers employed on public works projects subject to prevailing wage law. 8 C.S.R. 30-3.030 (2007). The regulation reads, in pertinent part:

Apprentices shall be permitted to work at **less than the predetermined rate** for the class or type of work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the United States Department of Labor. . . . 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 journeyman hourly rate for the class or type of worker specified in the applicable wage determination.

Id. at 30-3.030(2) (emphasis added).

The courts have acknowledged the general intent or distinction of the regulation, which is to necessitate that apprentices’ wages are specifically to be set lower than prevailing wage rate of journeymen workers. *HTH Companies, Inc. v. Mo. Dep’t of Labor & Indus. Relations*, 157 S.W.3d 224, 228 (Mo. App. E.D. 2004). However, no courts in this State have yet addressed or interpreted this apprentice regulation with respect to the applicable “base rate” from which to calculate apprentice pay.

Appellants' only allegation of error on this point relates to the trial court's calculation of the apprentice wages as a percent of the base hourly rate of \$13.00, instead of as a percent of the base hourly rate of \$27.85. (Appellants' Brief, p. 13). A plain reading of the regulation compels the conclusion that the trial court, in rendering its judgments, considered and applied the apprentice percentage to the appropriate rate of pay, which was the rate specified in the registered apprentice program.

First, Appellants do not challenge the trial court's finding that a bona fide apprentice program existed in this case, or that each of the Appellants were, in fact, the lowest level "apprentices" in that program. (Appellants' Brief, pp. 11, 15). Thus, each of the Appellants was clearly entitled to be paid at less than prevailing wage for this project. *Id.* Brown Builders' apprentice program set forth a schedule of wages for apprentices employed and working under the program. (Appellants' Ex. 5, p.7). As mandated by the regulation, the "rates of pay" for apprentices expressed in the registered program was shown as a percentage of the journeyman rate of pay for electricians. (Appellants' Ex. 5, p.7). At the time of the project, Brown Builders was paying journeymen electricians \$13.00 per hour, and that amount was set forth in the apprentice program and approved by the Department of Labor as the "sponsor's prevailing rate for skilled professionals" in the electrician occupation." (Appellants' Ex. 5, p. 7). As provided in the program, "[t]he sponsor's current rate for the occupation is \$13.00 per hour as of January 1, 2001." *Id.*

Each of the Appellants was, in accordance with the apprentice program and regulation, paid a percentage of that journeyman hourly rate.¹

Appellants would have this Court believe the Regulation is ambiguous or “not written plainly,” but such is not the case. (Appellants’ Brief, p. 14). The Regulation clearly allows the contractor to specify in its registered, approved program the applicable rate of pay for apprentices. *See* 8 C.S.R. 30-3.030(2) (“Every apprentice shall be paid at not less than the rate specified in the registered program.”). Had the Division, in promulgating the Regulation, intended that apprentice pay rates be based on wage rates outside of that which were expressed in the registered program, it could have done so expressly. *See e.g.*, CAL. LAB. CODE § 1777.5 (2007) (“Every apprentice employed upon public works shall be paid the prevailing rate of per diem wages for apprentices in the trade to which he or she is registered . . .”). It did not.

It is clear that Brown Builders was in compliance with the express provisions of the regulation. This conclusion is further supported by the position of the Missouri Prevailing Wage Division and the Department of Labor, both of which opined to Brown Builders that the prevailing wage rate for journeymen was not applicable to apprentices in the program. (Tr. 123:20-124:18, 145:1-7). There is no error of law and the judgments should be affirmed.

¹ Appellants do not on appeal contest the application of the apprentice percentage rate (46.2%), but argue only that said percentage was applied to the wrong base rate of pay. (Appellants’ Brief, p. 12) (“In short, the trial court is correct if the subcontractor could pay 46.2% of \$13.00...”).

B. POINT I SHOULD ALSO BE DENIED BECAUSE AT TRIAL, APPELLANTS TREATED THE ISSUE (i.e. APPRENTICE WAGE BASE RATE) AS ONE OF FACT AND ARE NOW PRECLUDED FROM RE-CASTING THE ISSUE AS ONE OF LAW.

In the trial court, Appellants took the position that that applicable base rate from which to calculate apprentice pay was a question of fact. Appellants presented testimony from multiple witnesses specifically focusing on whether the applicable apprentice base rate for calculation of pay was \$13.00 (as set forth in the apprentice program documents) or \$27.85 (as set forth in the Butler County Wage Order).

For example, Mr. Hanley testified as follows:

Q: Would you read that – read the last sentence of that paragraph?

A: The sponsor's current rate for the occupation is \$13 per hour as of January 1, 2001.

(Tr. 28:6-9).

Q: So, in summary, it's your understanding, even if there's an apprenticeship program, you'd be paid a percentage of the 27.85 per hour plus the 15.02 fringe benefits?

A: Yes.

Q: And a percentage would come from page 7 of the apprenticeship program?

A: Right.

(Tr. 32:14-21).

Q: And would you pick up Exhibit 2, which would be the pay chart? What's the basic hourly rate?

A: \$27.85.

(Tr. 31:15-17).

Mr. Crowder testified in the following manner:

Q: And what is the base hourly rate for electricians on Plaintiffs' Exhibit 2?

A: 27.85

(Tr. 59:14-16).

Mr. Brown, owner of Brown Builders, when questioned by Appellants' counsel, also testified as follows:

Q: But you continued to base the apprenticeship's wages on the \$13 an hour?

A: That's correct. That was my interpretation of the program.

(Tr. 123:13-16).

Now Appellants claim this is a question of law, and not fact, advancing the theory that Missouri's regulation pertaining to apprentice programs governs the applicable base rate as a matter of law. It is clear that a party cannot at the appellate level take a factual issue and "recast the issue as one of law in order to convict the trial court of error on a theory never advanced at trial." *Mortenson*, 137 S.W.3d at 536 (finding party who treated issue as one of fact at trial precluded from recasting issue as one of law on appeal).

This Court's decision in *Mortenson* is quite analogous and instructive on this point. In *Mortenson*, a prevailing wage case, the dispute involved whether prevailing wages were owed to ironworkers for work on a school addition. *Id.* at 531-32. The contractor argued on appeal that, as a matter of law, the addition was not a "packaged building" under the ironworker regulation, and thus, the workers were not owed

prevailing wages for work on that addition. *Id.* at 536. The contractor claimed the governing regulation was plain and unambiguous, and that the trial court erred as a matter of law in its application of the regulation. *Id.* This Court rejected the argument, concluding that the contractor had presented the issue to the trial court as a question of fact, not law. *Id.* In so finding, this Court acknowledged that the workers had presented testimony as to why the witnesses believed the addition was a packaged building. *Id.* The contractor had presented testimony from witnesses who held the opposite view and explained the factual basis for their position. *Id.* This Court recognized that even “[a]ssuming the trial court erred in treating the issue as one of fact, [the contractor] invited the error by its conduct.” *Id.*

Similar to *Mortenson*, Appellants contend on appeal that the trial court misapplied or misinterpreted the apprentice regulation, which Appellants now assert legally mandated paying apprentices a percentage of the prevailing wage base rate. The evidence and arguments presented at trial concerning applicable apprentice base rate was offered to the judge as a factual dispute. Appellants took the position at trial that the base rate of \$27.85 should apply. Appellants individually testified as to their belief that the correct base rate was \$27.85. (Tr. 32:14-18, 59:14-16, 64:19-21; Appellants’ Ex. 27, at 10:14-19). Respondents expressed the opposite view and explained the factual basis for their position that the proper base rate was \$13.00, the rate approved by the U.S. Department of Labor, and confirmed to Mr. Brown by the Department of Labor, and the Missouri Prevailing Wage Division. (Tr. 104:2-20, 118:20-119:4, 123:20-124:1). For the same reasons advanced in *Mortenson*, Appellants’ argument should be rejected.

III. RESPONSE TO APPELLANTS' POINT II

A. POINT II SHOULD BE DENIED, AND THE JUDGMENTS AFFIRMED, BECAUSE APPELLANTS FAIL TO SATISFY THEIR "HEAVY" BURDEN OF ESTABLISHING LACK OF SUBSTANTIAL EVIDENTIARY SUPPORT.

The trial court's decision to deny Appellants any additional wage payments was supported substantially by the evidence submitted at trial. There was ample factual testimony at trial as to the applicable wage rate for apprentices on this project.

Mr. Brown specifically testified on this point:

Q: Okay. How do you determine how much to pay each apprentice?

A: When the Department of Labor and I sat down and were drafting this apprenticeship program, they asked me what was my regular salary for a journeyman electrician, and I stated \$13 an hour.

Q: So let me stop you right there. The \$13 an hour that was being testified to before is – was, at the time this was going on in 2002, the going rate for a journeyman electrician on a non-prevailing wage job?

A: Correct.

Q: Okay. Go ahead. I'm sorry.

A: They had asked me to put together a percentage rate of what I felt like apprentices should make, compared to that \$13 an hour, as it states in the apprenticeship program. And so we came up with a percentage rate of first year, second year, third year, fourth year apprentice that they should be paid, a minimum they should be paid, based on that \$13 an hour rate.

(Tr. 104:2-20).

THE COURT: Where did you get the idea, which may or may not be correct, that you should base this .42, or whatever it is, on \$13 instead of the \$39?

THE WITNESS: In my conversations with the Department of Labor and the Prevailing Wage Division, that if the apprentices were in an apprenticeship program that the prevailing wage law did not apply to them.

(Tr. 123:20-124:1).

Appellants request this Court to ignore such evidence and instead accept their evidence which they claim supports a contrary conclusion. Such is beyond this Court's review. *In re Marriage of Patrick*, 201 S.W.3d at 594 (recognizing appellate court defers to trial court's decision "even if the evidence could support a contrary conclusion).

Further, the trial court is granted the discretion to assess the credibility of witnesses and evidence. *Mortenson*, 137 S.W.3d at 531. Not only was the wage rate determination supported by ample evidence at trial, the only "opposing" evidence was not credible. The only "evidence" offered in opposition to the applicable apprentice wage rate as set forth in the apprentice program was Exhibit 2, the Wage Order.

Appellant Hanley was the only witness to speak specifically to the Wage Order, and his testimony lacked credibility as to his actual knowledge of its application. (Tr. 9:16-10:16). Appellant Crowder expressly admitted he had no knowledge of the applicable rate. (Tr. 60:23-61:1, 9-12). The remaining trial witnesses, Appellant Evans, failed to speak to the applicable pay rate at all. (Tr. 62:4-66:18). Here, the trial court was free to

assess the credibility of the witnesses and to weigh the evidence, and it did so. Its decision should be afforded deference.

IV. RESPONSE TO APPELLANTS' POINT III

A. POINT III SHOULD BE DENIED BECAUSE AN AWARD OF PREJUDGMENT INTEREST FROM THE DATE OF SERVICE OF SUIT IS PROPER WHERE THERE IS NO EVIDENCE THAT APPELLANTS DEMANDED PAYMENT PRIOR TO FILING SUIT.

Appellants' Point III relating to recovery of prejudgment interest should be denied because there is no evidence that Appellants made any demand for payment of these unpaid wages prior to filing suit. As properly recognized by the trial court in the underlying judgments, Appellants are only entitled to recover prejudgment interest on their respective damage awards calculated from the time suit was served. MO. REV. STAT. § 408.020 (2007); *Rois v. H.C. Sharp Co.*, 203 S.W.3d 761, 767 (Mo. App. E.D. 2006). Appellants assume, without support, that their recovery is based on Brown Builders' subcontract with Camden, and now claim prejudgment interest from some uncertain time prior to filing suit. However, since Appellants are neither parties, nor third-party beneficiaries, to the Brown-Camden subcontract, they have no right to enforce that contract. *Verni v. Cleveland Chiropractic College*, ___ S.W.3d ___, 2007 WL 274837 (Mo. banc 2007). If Appellants' recovery is pursuant to any contract, it is pursuant to their *oral* contracts of employment with Brown Builders. Furthermore, Missouri courts generally treat actions to recover wages or salary as actions on account. *See, e.g., Coleman v. Kansas City*, 351 Mo. 254, 173 S.W.2d 572, 576 (Mo. 1943).

Because Point III involves a question of law, this Court's review is *de novo*. *Mortenson*, 137 S.W.3d at 531.

1. **Because Appellants' Recovery is Not Based on a Written Contract, R.S.Mo. § 408.020 Allows Prejudgment Interest Only After a Demand is Made.**

Appellants are not entitled to recover prejudgment interest prior to filing suit, because their recovery is not based on a written contract. R.S.Mo. § 408.020 provides, in pertinent part, "Creditors shall be allowed to receive interest ... for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand is made." MO. REV. STAT. § 408.020. However, some Missouri cases hold that, even in cases involving written contracts, demand is necessary for prejudgment interest to run. *Watters v. Travel Guard Int'l*, 136 S.W.3d 100, 111 (Mo. App. E.D. 2004) (holding in case on written contract, that prejudgment interest allowed only after demand for payment made).

Regardless of whether demand is necessary on a written contract, in this case, Appellants' recovery is based on an oral contract or account, not a written contract. Thus, under clear Missouri law, prejudgment interest does run only from demand. *Id.*

a. **Appellants are not entitled to recover prejudgment interest under Brown's subcontract with Camden because they were not parties or third-party beneficiaries to the contract.**

Appellants are not entitled to recover any award, including prejudgment interest under Brown Builders' subcontract with Camden because they have no right to enforce the contract. As clearly evidenced at trial, none of the Appellants were parties to the subcontract between Brown Builders and Camden. (Appellants' Ex. 4). Missouri law is

clear that only parties to a contract and third-party beneficiaries may sue to enforce a contract. *Verni*, 2007 WL 274837 at *2, citing *Andes v. Albano*, 853 S.W.2d 936, 942 (Mo. banc 1993). An individual is a third-party beneficiary to a contract only where, “the terms of the contract [] *clearly express* intent to benefit that party or an identifiable class of which the party is a member. *Verni*, 2007 WL 274837 at *2 (emphasis added); *see also JTL Consulting LLC v. Shanahan*, 190 S.W.3d 389, 399-400 (Mo. App. E.D. 2006). Furthermore, “there is a strong presumption that the third party is not a beneficiary and that the parties contracted to benefit only themselves.” *Verni*, 2007 WL 274837 at *2. A mere incidental benefit to a third party does not give them the right to enforce the contract. *Id.*

In *JTL Consulting*, an Operating Agreement specifically referred to a third party who sought to enforce a provision of the agreement. *JTL Consulting*, 190 S.W.3d at 400. The agreement specifically conferred some benefits on the third party, stating, for example, that the company would strive to maintain and improve the business of the third party. *Id.* However, the *JTL Consulting* court held that the relevant inquiry was not whether the parties to the contract intended the third party to receive some benefit from the contract. *Id.* Rather, the relevant inquiry was whether the parties intended the third party to have the right to maintain an action on the contract. *Id.* Because nothing in the contract indicated that the parties intended to give any third parties a right to maintain an action on the contract, it was held that the third party was not a third-party beneficiary under the contract. *Id.*

Similarly, in *Verni*, the Missouri Supreme Court recognized that the plaintiff received some incidental benefit from the contract at issue. *Verni*, 2007 WL 274837 at *2. However, because the parties did not contract for the express purpose of benefiting the plaintiff, he was not a third-party beneficiary under the contract, and could not sue to enforce its terms. *Id.*

Verni and *JTL Consulting* are instructive here. Although Appellants may have received some incidental benefit from the subcontract between Brown Builders and Camden (i.e. wages), the subcontract does not clearly express an intent to benefit Appellants, or any class to which they belong. (Appellants' Ex. 4). In fact, the four corners of the subcontract clearly show that Camden and Brown Builders contracted only to benefit themselves. *Id.* The incidental benefit Appellants may have received does not make them third-party beneficiaries of the contract.

Because Appellants are not parties to, or third-party beneficiaries of, the Brown Builders/Camden subcontract, they cannot sue to enforce its terms. Thus, Appellants' recovery cannot be based on the written subcontract, and Appellants have pointed to no other written contract.

b. Appellants' Reliance on *Rich*, *Neosho City Water Company*, and *Killian* is Misplaced.

Appellants rely heavily on certain Missouri cases involving written contracts, all of which are distinguishable from this case. *Neosho City Water Co. v. City of Neosho*, 136 Mo. 498, 38 S.W. 89 (1896); *Rich v. Peters*, 50 S.W.3d 814 (Mo. App. W.D. 2001); *Killian Constr. Co. v. Tri-City Constr. Co.*, 693 S.W.2d 819 (Mo. App. W.D. 1985).

Neosho City Water Company, a Missouri case from 1896, is inapplicable because the plaintiff in *Neosho* was a party to a written contract, on which it sought to recover damages. *Neosho City Water Co.*, 38 S.W. at 89. Furthermore, *Neosho* did not involve a contract to recover unpaid wages, but merely sought payment of contract damages. *Id.* Such is not the situation here. Thus, Appellants' reliance on *Neosho City Water Company* is misplaced.

Rich v. Peters is similarly inapplicable to this case. In *Rich*, a county collector brought suit to recover unpaid wages, the amount of which were set by statute. *Rich*, 50 S.W.3d at 816. However, the plaintiff in *Rich* was only entitled to recover damages because of a separate, and express written contract that he had entered with the defendant. *Id.* It was only the amount of the plaintiff's compensation that was set by statute. *Id.* Thus, unlike the Appellants in this case, the plaintiff in *Rich* was a party to a written contract, pursuant to which he recovered damages.

Appellants entirely misconstrue the holding of *Killian Construction Company v. Tri-City Construction Company*. In *Killian*, the Missouri court awarded *no prejudgment interest at all*. *Killian*, 693 S.W.3d at 829. *Killian* involved an action by a subcontractor against a general contractor to recover damages for delayed payment under the subcontract. *Id.* at 822-23. Because of the delayed payment, the subcontractor was forced to take out a loan at over 14% interest to cover its costs, and to perform remedial work on the project. *Id.* at 828. The subcontractor brought a separate count to recover the interest it paid on that loan. *Id.* The general contractor objected to those damages, claiming the trial court improperly awarded prejudgment interest. *Id.* The *Killian* court,

however, clarified that the interest awarded was not prejudgment interest pursuant to R.S.Mo. § 408.020, but was contract damages resulting from the loan the subcontractor was forced to incur. *Id.* In fact, the *Killian* court specifically did not award prejudgment interest because the subcontractor “for whatever reason, made no claim for prejudgment interest, and the awards invest none.” *Id.* at 829.

Neosho City Water Company, Rich, and Killian do not support Appellants’ claim for prejudgment interest. Each of these cases differs factually and legally, and are misapplied by Appellants.

2. R.S.Mo. § 408.020 Requires Demand Before Interest Begins to Run on an Action to Recover an Account.

Appellants’ recovery under the Missouri Prevailing Wage Act is properly defined as an “account” under R.S.Mo. § 408.020. Demand for payment is required before interest begins to accrue on an account. MO. REV. STAT. § 408.020. Since there exists no evidence that Appellants made a demand for payment prior to filing suit, the trial judge properly found that prejudgment interest did not begin to accrue until service of process, when Camden and Brown Builders first had notice of the demand.

a. Missouri law generally treats actions to recover unpaid wages as actions on accounts.

Missouri cases generally treat actions to recover unpaid wages or salaries as action on accounts. *See Coleman*, 173 S.W.2d at 576; *Coleman v. Kansas City*, 348 Mo. 916, 156 S.W.2d 644, 649 (Mo. 1941); *Baris v. Layton*, 43 S.W.3d 390, 397 (Mo. App. E.D. 2001); *Nangle v. Brockman*, 972 S.W.2d 545, 550 (Mo. App. E.D. 1998); *Specialty Rest. Corp. v. Gaebler*, 956 S.W.2d 391, 397 (Mo. App. W.D. 1997). Thus, Appellant’s action

under the Prevailing Wage Act for unpaid wages is properly treated as an “account” for purposes of prejudgment interest under R.S.Mo. § 408.020.

In *Coleman*, the salaries of certain city employees were set by city ordinance. *Coleman*, 173 S.W.2d at 573. For a period of approximately nine years, salary cuts were imposed on the plaintiff employees through enforced “leaves of absence.” *Id.* During these “leaves of absence,” the plaintiff employees were still required to perform their job duties, or face termination. *Id.* The plaintiff employees in *Coleman*, brought suit to recover unpaid wages they were due by city ordinance. *Id.* The trial court in *Coleman* allowed prejudgment interest from the date of filing the petition. The plaintiffs argued that interest should have been awarded from the dates the unpaid wages were due. *Id.* at 576. The Missouri Supreme Court, on two occasions, held that the trial court was correct in awarding prejudgment interest because the plaintiffs’ unpaid wages were an “account.” *Id.* at 576; *Coleman*, 156 S.W.2d at 649. The Court stated, “As used in a general sense, the term ‘account’ is equivalent to ‘claim’ or ‘demand.’” *Coleman*, 173 S.W.2d at 576. The *Coleman* Court further explained that, “The primary idea of account, computation, whether we look to the proceeds of courts of law or equity, is some matter of debt and credit, or demands in the nature of debt and credit, between parties. It implies, that one is responsible to another for moneys or other things ...” *Id.*

Appellants’ claim is analogous to that in *Coleman*. Appellants claim that they were underpaid for their work on a construction contract. They seek to recover unpaid wages pursuant to the Missouri Prevailing Wage Act, which sets the compensation for workers on public construction projects. MO. REV. STAT. § 290.210 *et seq.* Thus, as in

Coleman, Appellants seek additional amounts set by statute or ordinance. *Coleman* is therefore controlling, and Appellants' claim is an action on "account."

Missouri courts have consistently followed the Supreme Court's guidance in *Coleman*. *Baris*, 43 S.W.3d at 397 (attorney's claim for unpaid attorney's fees was an "account" and interest began to accrue on demand); *Nangle*, 972 S.W.2d at 550 (attorney's action for unpaid fees pursuant to written contingency contract was an "account"); *Gaebler*, 956 S.W.2d at 396-97 (action to recover advance on attorney fees pursuant to written contingency contract was action on "account"). Appellants' claims for unpaid wages are also actions on "account," which require demand before interest begins to accrue.

b. In the absence of a demand, interest runs from the time suit was filed.

The trial court properly awarded interest from the date of service of process because Appellants presented no evidence that they demanded payment prior to filing suit. Under R.S.Mo. § 408.020, interest begins to accrue on an "account" only after demand for payment is made. MO. REV. STAT. § 408.020. Where no demand is made prior to filing suit, the filing of suit itself constitutes demand for purposes of prejudgment interest. *Rois v. H.C. Sharp Co.*, 203 S.W.3d 761, 767 (Mo. App. E.D. 2006); *McCormack v. Stewart Enter.*, 956 S.W.2d 310, 314 (Mo. App. W.D. 1997).

In this case, Appellants presented no evidence that they demanded payment prior to filing suit. Thus, the trial court correctly awarded interest from the date of service of

process, which was the first date on which Camden and Brown had notice of Appellants' demands. Thus, Point III should be denied, and the trial court's decision upheld.

V. REPONSE TO APPELLANTS' POINT IV

A. POINT IV SHOULD BE DENIED BECAUSE APPELLANTS FAILED TO PROPERLY PRESERVE THIS ISSUE FOR APPEAL.

Appellants' Point IV should be denied because Appellants conceded that the trial court should find against them on the surety bond's 90-day notice provision, and thus may not argue on appeal that the trial court erred in its decision. Missouri law is clear that, "[o]n appeal, a party is bound by the position he took in the circuit court and will not be heard on a different theory." *In re Marriage of Medlock*, 749 S.W.2d 437, 440 (Mo. App. S.D. 1988). Furthermore, Missouri courts hold that a "party will not be heard to complain on appeal of an alleged error in which, by his own conduct at the trial, he joined or acquiesced." *Id.*; *see also Mortenson*, 137 S.W.3d at 536; *Tate v. Dept. of Soc. Serv.*, 18 S.W.3d 3, 7 (Mo. App. E.D. 2000).

The *Tate* decision is instructive on this issue. In *Tate*, the hearing officer informed the plaintiff's counsel that he would have to seek enforcement of a subpoena in the Circuit Court. *Tate*, 18 S.W.3d at 7. Rather than challenging the hearing officer's decision, the plaintiff's counsel agreed that the record should be kept open while he sought to enforce the subpoena in Circuit Court. *Id.* On appeal, however, the plaintiff challenged the hearing officer's decision on various constitutional grounds. *Id.* The court of appeals refused to consider the plaintiff's arguments because she failed to object to the hearing officer's decision or raise any of the arguments she sought to raise on

appeal. *Id.* The court held that plaintiff’s counsel “did not bring any error to the attention of the tribunal, thus he did not afford the tribunal the opportunity to correct any application of the statute in question.” *Id.*

This case is analogous to *Tate*. Appellants now seek to challenge the surety bond’s 90-day notice provision based on various policy and statutory arguments. However, none of Appellants arguments on appeal were raised to the trial court. In fact, Appellants’ counsel conceded this issue in the following exchange with the trial judge during trial:

MR. ALBRIGHT: There is case law saying my clients are required to comply with the terms of this bond and give notice.

THE COURT: Okay.

MR. ALBRIGHT: And we will – I’ll get into this in the memorandum, because I don’t want to start sitting here citing cases. But there is a decision, a concurrence, actually in the Southern District, that says the law may say that, but it’s not very good law.

THE COURT: Oh. Well –

MR. ALBRIGHT: So Mr. Johnson is correct. These people haven’t complied with the bond; and as such, I don’t think you have any choice but to rule against them as to a claim on the bond. (Tr. 149:2-15).

This concession is specifically referenced by the trial court in the respective judgments. (Robinson Judgment, p. 1-2; Crowder Judgment, p. 1-2; Evans Judgment, p. 2). At no point did Appellants argue to the trial court that the 90-day notice provision

should not be applied. Appellants never raised their arguments against the notice provision to the trial judge, and thus gave the judge no opportunity to correct any errors in the law as applied to 90-day notice provisions.

Thus, as in *Tate*, Appellants joined and acquiesced in the alleged error they now challenge in Point IV. Missouri law is clear that Appellants may not acquiesce in alleged error at the trial court level, thus depriving the trial court of an opportunity to correct the alleged error, and then argue the alleged error on appeal. Appellants failed to preserve the 90-day notice issue for appeal, and thus Point IV must be denied.

B. POINT IV SHOULD ALSO BE DENIED BECAUSE THE TRIAL COURT CORRECTLY ENTERED JUDGMENT IN FAVOR OF ST. PAUL BECAUSE THE APPELLANTS FAILED TO SATISFY THE 90-DAY NOTICE REQUIREMENT OF THE PERFORMANCE AND PAYMENT BOND, AND MISSOURI COURTS RECOGNIZE SUCH NOTICE PROVISIONS AS VALID AND ENFORCEABLE.

Appellants Point IV concerns a surety bond, which requires claimants, like Appellants to “[h]ave furnished written notice to the Contractor and sent a copy, or notice thereof, to the Owner, within 90 days after having last performed labor . . .” (Appellants’ Ex. 3, at 4.2.1).

In Missouri, the “[l]iability of a surety is limited to the terms and conditions stated in the bond.” *Frank Powell Lumber Co. v. Fed. Ins. Co.*, 817 S.W.2d 648, 651 (Mo. App. S.D. 1991). A court cannot impose upon parties the obligations of a bond that they have not assumed, nor can it make a contract for the parties they did not make for themselves. *Id.* Appellants are asking this Court to change the terms of the surety bond

and impose upon St. Paul obligations beyond what it agreed to impose on itself. To do so would be to ignore judicial precedent.

Appellants contend that the St. Paul notice provision violates Missouri public policy against limiting or tending to limit the time in which a suit may be commenced. *See* MO. REV. STAT. § 431.030 (2007). This Court has already decided that similar 90-day notice provisions do not bar suit on the bond so as to violate the public policy against limiting the time in which a suit may be commenced. *See State ex rel. E.A. Martin Mach. Co. v. Line Ore, Inc.*, 11 S.W.3d 924, 928 (Mo. App. S.D. 2003); *Frank Powell Lumber Co.*, 817 S.W.2d at 653, *Reorganized Sch. Dist. R-3 v. L.D. Compton Constr. Co.*, 483 S.W.2d 674, 676 (Mo. App. 1972). The St. Paul notice provision is valid and enforceable under Missouri law, because it does not limit the time in which a suit may be commenced. *Frank Powell Lumber Company* is dispositive on this issue. In *Frank Powell Lumber Company*, a lumber supplier brought an action on a surety bond for payment for the value of goods and merchandise sold to a subcontractor and used in a construction project in Rolla, Missouri. *Frank Powell Lumber Co.*, 817 S.W.2d at 649. The trial court found in favor of the surety because the lumber supplier failed to provide written notice to both the contractor and owner of the property within 90 days as required by the surety bond.² *Id.* On appeal, the lumber supplier claimed that the trial court erred

² The surety bond in *Frank Powell Lumber Company* required the claimant to furnish written notice to the contractor and send a copy or notice thereof to the owner within 90 days after having last performed labor or furnished materials or equipment. The lumber supplier gave notice to the owner within 90 days, but its notice to the contractor was more than 90 days after the last sale of goods and merchandise. *Frank Powell Lumber Co.*, 817 S.W.2d at 649.

in not finding that the 90-day notice requirement was void as violating public policy. *Id.* at 650. Specifically, it claimed that the notice provision “attempts to create a private statute of limitations,” and therefore, that judgment should have been entered for Appellant. *Id.*

This Court expressly rejected the lumber supplier’s argument that the 90-day notice provision violated R.S.Mo. § 431.030 because the 90-day notice provision in the surety bond did not limit or tend to limit the time in which a suit or action could be instituted. *Id.* at 653. In so holding, this Court explained:

In this case, the 90-day notice provision did not affect when suit could be brought on the surety bond. Rather, it determined what notice was required in order for the claimants who had no direct contract with the Contractor to have coverage under the terms of the surety bond.

Id.

Here, as in *Frank Powell Lumber*, the St. Paul notice provision does not attempt to limit the time in which suit can be brought; rather, it determines what notice is required in order for the Appellants to have coverage under the surety bond. The facts are undisputed that the Appellants failed to provide notice as required by the surety bond. For the same reason this Court upheld the 90-day notice provision in *Frank Powell Lumber Company*, the St. Paul notice provision is valid and does not conflict with the public policy against limiting the time in which suit may be commenced. The trial court correctly applied this precedent to the facts of this case.

Appellants do not dispute any relevant facts in the present case and acknowledge this Court’s holding in *Frank Powell Lumber Company*; but they suggest that that the

holding in that case is inapplicable because the present case involves a public works project. Appellants' suggestion seems to be based on the idea that the concurring opinion by the Honorable James K. Prewitt in *Frank Powell Lumber Company* somehow renders this Court's holding in said case inapplicable to a public works project. In *Frank Powell Lumber Company*, Judge Prewitt concurred with the majority opinion, but criticized the result of *Reorganized School District R-3 v. L.D. Compton Construction Company*, 483 S.W.2d 674, another case on which the majority relied to reach its decision in *Frank Powell Lumber Company*. Examination of the *Compton* holding and Judge Prewitt's concurring opinion, however, does not yield any support for Appellants' suggestion that *Frank Powell Lumber Company* does not apply to this case. *Compton* involved a public construction project to which R.S.Mo. § 107.170³ applied. *Compton*, 483 S.W.2d at 676. Its terms included a requirement that unless a subcontractor claimant gave written notice to the owner or surety within 90 days of performing the last work on the project, "[n]o suit or action shall be commenced." *Id.* The Missouri Court of Appeals, St. Louis District, upheld the validity of the notice requirement and its enforceability, finding that "[t]he contracting parties had the authority to incorporate such a provision in the instrument as long as it was reasonable and did not thwart the purpose and intent of the statute." *Id.*

In concurring with the majority opinion in *Frank Powell Lumber Company*, Judge Prewitt opined that the notice provision in *Compton* was inconsistent with the statute that

³ R.S.Mo. § 107.170 requires payment bonds to be provided for public projects. MO. REV. STAT. § 107.170 (2007).

required the bond, but he did not provide an explanation for his opinion. *Frank Powell Lumber Co.*, 817 S.W.2d at 653. The concurring opinion in *Frank Powell Lumber* is not binding, nor does it affect the validity or applicability of the majority opinion to the present case. See *Sherman v. Sherman*, 160 S.W.3d 381, 403 (Mo. App. W.D. 2004); see also *Kehr v. Knapp*, 136 S.W.3d 118, 124 (Mo. App. E.D. 2004).⁴ Furthermore, absent an explanation by Judge Prewitt as to why he believed that the notice provision in *Compton* conflicted with the statute, there is no basis to conclude that Judge Prewitt's opinion is even relevant to the present case. Nonetheless, the majority of the Court in *Compton* did not find that the notice provision was inconsistent with the statute requiring the bond; this Court in *Frank Powell Lumber Company* followed *Compton*, which did involve a public construction project; and the trial court in the present case appropriately followed this precedent. Appellants offer no authority for their contention that the trial court should have ignored the majority opinion in *Frank Powell Lumber Company* and followed Judge Prewitt's concurring opinion instead.

Appellants' contention that the "legal framework" upon which *Frank Powell Lumber Company* relied no longer exists because workmen now have three years in which to file a claim for unpaid wages under R.S.Mo. § 516.130.3, is unsupported and contrary to precedent. Appellants' representation of the "legal framework", is inaccurate,

⁴ In affirming the trial court's judgment on a jury verdict in favor of a physician in a medical malpractice case, the Court of Appeals, Eastern District, explained that "[a]lthough doubts about the wisdom of allowing the defense the kind of access to treating physicians that obviously occurred here were expressed in Judge Holstein's concurrence in *Brandt*, it is the majority opinion which controls and drains the Kehrs' argument of its persuasiveness. *Kehr*, 136 S.W.3d at 124 (citation omitted).

and the existence of § 516.130.3 has no effect on the validity of notice provisions in surety bonds.

Appellants' characterization of the charter provision at issue in *City of Kansas City v. St. Paul Fire & Marine Insurance Company*, 639 S.W.2d 903 (Mo. App. W.D. 1982), as "similar" to the St. Paul notice provision is inaccurate as this Court has already distinguished the two different provisions. *City of Kansas City* involved a requirement in the Kansas City Charter that suits on a bond must be commenced within three months of the completion of the contract and acceptance by the City. *Id.* The Court held that the charter provision was inconsistent with the applicable statute of limitations. *Id.* at 905. In *Frank Powell Lumber Company*, this Court determined that *City of Kansas City* was inapplicable because it was limited to a determination that the a particular city ordinance was contrary to state constitutional provisions; and unlike the charter at issue in *City of Kansas City*, the notice requirement in *Frank Powell Lumber Company* did not attempt to limit when suit could be brought, only when notice must be given in order to be covered under the surety bond. *Frank Powell Lumber Co.*, 817 S.W.2d at 653.

City of Kansas City is inapplicable to the present case in the same way that this Court held it to be inapplicable to *Frank Powell Lumber Company*. As explained in *Frank Powell Lumber Company*, a 90-day notice provision in a surety bond, like the one at issue in this case, is markedly different than a provision that purports to require suits on a bond to be commenced within a certain amount of time. The St. Paul notice provision applies to when the notice must be given in order for a claim to be covered under the surety bond, but it does not attempt to limit when a suit may be brought.

(Appellants' Ex. 3, at 4.2.1). This distinction is apparently lost on the Appellants as they claim that the type of notice provision struck down in *City of Kansas City* was extended to surety bonds like the one in *Compton*. *Compton* involved the same type of notice provision as *Frank Powell Lumber Company*; and neither attempted to limit the time in which one could file suit. The Appellants' failure to accurately characterize the "legal framework" that they claim no longer exists is fatal to their argument that the extinction of said legal framework renders the precedent set forth in *Compton* and *Frank Powell Lumber Company* inapplicable to the present case. The St. Paul notice requirement applies to when the notice must be given in order for a claim to be covered under the surety bond. (Appellants' Ex. 3, at 4.2.1). It does not attempt to limit when a suit may be brought. It is the very kind of notice requirement recognized to be valid by this Court in *Compton* and *Frank Powell Lumber Company*.

Appellants further attempt to cloud clear precedent with *Farm Bureau Town and Country Insurance Company of Missouri v. Rogers*, 959 S.W.2d 880 (Mo. App. S.D. 1997), a case that has no applicability to this issue on appeal. *Rogers* involved a liability insurance policy provision that required written notice to the insurer of any accident or potential claim "as soon as practicable." *Rogers*, 959 S.W.2d at 882. *Rogers* did not address the validity or enforceability of a notice requirement in a surety bond. Rather, the sole issue on appeal was whether the trial court erred by finding that the insurer was not prejudiced by the claimant's five year time delay in providing notice. *Id.* *Rogers* is not applicable to the present case as it involves an entirely different issue in a different context.

Finally, Appellants' contention that it is "absurd" to suggest that a workman must demand the wages owed for a job, knowing full well such a demand will cost the workman his job is a legally unsupported appeal to policy, which demonstrates their confusion over the purpose of surety bonds. In *Frank Powell Lumber Company*, this Court explained the purpose of a similar surety bond as follows:

Its purpose was to protect the owner of the property where the construction was performed. Any benefits that materialmen or other third-party beneficiaries received as a result of the surety bond were incidental and were available only in accordance with its terms.

Frank Powell Lumber Co., 817 S.W.2d at 650. While individual workmen do not have a lien right under Chapter 429, they do have a statutory right under the Prevailing Wage Act, R.S.Mo. § 290.010, *et seq.*, to an action for double whatever difference there may be between the amount paid for his or her services and the rates provided by the contract, together with attorney's fees. MO. REV. STAT. § 290.300 (2007). The 90-day notice provision in this case has no more of an effect on a workman's statute of limitations under the Prevailing Wage Act than the notice provision in *Frank Powell Lumber Company* had on the lumber company's rights under the mechanics' and materialmen's statutes. Nothing in the surety bond prevents or otherwise serves as an obstacle to the Appellants filing suit under the Prevailing Wage Act. The failure to comply with the notice provision only affects coverage under the bond.

St. Paul's liability is limited to the terms and conditions in the surety bond. Appellants have unsuccessfully attempted to call into question the St. Paul notice provision, which is similar to other such provisions already recognized by this Court to

be valid and enforceable, by claiming that said provision limited the time in which to maintain a suit. The St. Paul notice provision does not limit or attempt to limit the time in which Appellants could have maintained an action. Thus, the trial court correctly applied the well-established law of this State to the facts of the case. Accordingly, judgment in favor of St. Paul should stand.

CONCLUSION

For the foregoing reasons, the judgments of the trial court should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS
CAMDEN BUILDERS, INC. AND ST. PAUL
FIRE & MARINE INSURANCE COMPANY

**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,
)	SD27894, SD27896,
vs.)	SD27897
)	
BROWN BUILDERS ELECTRICAL)	
COMPANY, INC., CAMDEN)	
BUILDERS, INC. AND ST. PAUL)	
FIRE & MARINE INSURANCE)	
COMPANY.)	
)	
Respondents.)	

CERTIFICATE OF SERVICE

COMES NOW the Respondents, by and through the undersigned counsel, and certifies that the Brief complies with the limits in Rule 84.06(b) insofar as it is Respondents' Brief with less than 31,000 words or a Respondents' Brief with less than 27,900 words or as a Reply Brief with less than 7,750 words in that it is Respondents' Brief and contains 8,978 words and that a copy of the Respondents' Brief, together with a copy on disk in Word format scanned for viruses, was served upon the attorneys of record by Federal Express delivery, prepaid, addressed to: John M. Albright, Moore & Walsh, L.L.P., 433 N. Main, Poplar Bluff, MO 63901 and Lawrence Brown, Brown Builders

Electrical Co., Inc., 1718 Sylvan Drive, Poplar Bluff, MO 63901 on this 3rd day of
March, 2007.

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