

IN THE
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

FILED
APR 10 2007

SANDRA L. SKINNER, Clerk
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)

FILED

JUL 2 2007

Thomas F. Simon

CLERK, SUPREME COURT

Appellants,

vs.

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

) Appeal No. SD27892
) SD27894, SD27896,
) SD27897

88574

) ORAL ARGUMENT
) REQUESTED
)

APPELLANTS' REPLY 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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MICROFILMED

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REPLY

POINT I

The first point concerns the calculation of the apprentice's pay. The issue is whether the language of the regulation allows the employer to base the apprentice's pay on a percentage of the rate he usually pays a journeyman or requires using the prevailing wage rate for journeymen. The regulation states:

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.*

8 C.S.R. 30-3.030(2) (2007).

The Respondent stresses the words "in the registered program". The Appellant notes those words are a prepositional phrase modifying the term just before them "the rate specified". The specific rate is further modified by the words "for the apprentice's level of progress,". Those words are further modified by the only means or manner in which it is acceptable to specify the rate, i.e. as a percentage. No one disputes the percentage for the apprentices is in the registered apprenticeship program.

What is at issue is the question "Percentage of what?". The Appellant believes the regulation is plain in its statement that the percentage is a percentage "of the journeyman hourly rate for the class or type of work

specified in the applicable wage determination”. In the context of a regulation concerning apprenticeship programs allowable under Missouri’s Prevailing Wage Act, the only meaning that can be given to the words “specified in the applicable wage determination” is the prevailing wage order. The terms of the regulation draw this distinction. The percentage is from the registered apprenticeship program. It is a percentage of the rate “...in the applicable wage determination.” If the DOL had meant to say an apprentice could be paid the rate in the registered program it could have done that. It would have been much easier to say a workman could be paid the rate in the program. There would be no point in demanding the pay rate be expressed as a percentage, if rate of pay were that set out in the program. Under the Respondent’s view the last two-thirds or three-quarters of the regulation is needless surplusage. The regulation requires that it be expressed as percentage because the hourly wage rate varies from county to county, which is why there are different wage orders for each county.

The Respondent’s claim that the issue, even though it involved the application of law to undisputed facts, was turned into a fact question is a non-issue. Unlike *Mortenson*, in the case at bar, the Appellants’ introduced the regulation at issue as an exhibit. *Mortenson v. Leatherwood Construction, Inc.*, 137 S.W.3d 529 (Mo.App. S.D. 2004). Shawn Hanley testified first. He read into the record the relevant portion of the regulation. TR 21-28; Ex. 7; App. 1. As the cases had been consolidated for trial, he was the only who did this.

The propose in consolidating the cases for trial was to avoid the need of having four witnesses introduce the same documents. The is of what the law or contract documents required Brown Builders to pay was never turned into a fact question. By introducing the regulation and reading the relevant parts into the record, at most, an issue involving the application of law to undisputed facts became an issue of applying the terms of the contract to undisputed facts. Unlike *Mortenson*, where the parties treated the question of whether the building was a packaged building was a fact question, in the case at bar the Appellants never suggested they might be owed just the fringe benefit rate.

POINT II

The Respondent claims there was substantial evidence on which the court could find the prevailing wage law had no application to the workmen. The Appellants did not raise Point II out of a concern that an issue involving the application of law to undisputed facts was turned into a fact question. The Appellant raised Point II because the final judgment includes no express conclusion of law that the workmen could be paid a percentage of the \$13.00 per hour rate from the apprenticeship program. The judgment simply declares the Appellant "... is entitled to recover only the fringe benefits at the rate of \$15.02 per hour for the 126 hours he worked ..." LF 67 (judgment in Evans). There could be no dispute that was owed as the statute requires the fringe benefit be paid to the workman unless they work through a union hall.

RSMo § 290.210(5) (2000). The requirement to pay the full fringe benefit rate is carried through in the regulation. 8 C.S.R. 30-3.030(2). What the Appellants found inexplicable was how the part of the regulation requiring the fringe benefit pay applied but the remainder of the regulation requiring that the hourly rate be based on a percentage of the prevailing wage did not apply.

From the Respondent's reply, it seems clear there is no factual basis upon which one could believe the subcontractor actually paid the workmen the appropriate prevailing hourly wage rate. The Respondent can only cite the part of the record where Brown Builders claimed none of the prevailing wage law applied to the apprentices. Not only did the court reject that notion in awarding the fringe benefits the claim could not be enforced. One cannot escape obligations imposed by law by simply testifying one does not have to comply with the law. It is also contrary to Brown's entire defense, which was that it complied with the law by setting up the apprenticeship program.

No one disputed the Appellants were paid between \$6.00 and \$12.00, until they got a journeyman's card and were paid \$39.29 per hour. As the lowest level apprentice they should have been paid \$27.89. The hours of work found in the judgment match the hours of work in the Appellant's judgments. Ricky Robinson was owed \$17,017.45 not the \$12,091.10 awarded. Ex. 27. David Crowder was owed \$10,027.20 not the \$7,209.60 he was awarded. Ex. 29. Hanley is owed a fair sum although it is not calculated out because he earned his journeyman's license during the project and claimed he should

have been paid as the highest level apprentice. Ex. 28. Robert Evans was owed \$4,144.60 not the \$3,785.04 awarded. Ex. 30 (for the hours of work in week ending June 23, 2002 and there after, LF 67.)

POINT III

An employee does not have to make a demand for his or her pay check. Workmen on prevailing wage jobs are not like contractors who must produce work and make draws based on the percentage of the job completed. Workmen, as with others are paid an hourly rate for the thier labor. If the employer does not like the quantity or quality of work, in Missouri the employer can fire the workman. Indeed, a Missouri Employer does need any cause at all and can fire anyone at anytime. The law is not so imbalanced that an employee or laborer can be fired at any time and he or she must demand his pay in the meantime.

The Respondent claims the Appellant's are not third party beneficiaries of any written contract. The Appellant's almost wish this could be an admission because, if it were, the Appellant's would not be bound by the 90 day notice provision (assuming it can be included in a public work's bond). Unfortunately, it is well settled law, the Appellant's are intended third-party beneficiaries of the primary contract between Camdenton and the government owner of the public works project. *Board v. Eurostyle*, 998 S.W.2d 810 (Mo.App. S.D. 1999). The workman don't even have to sue the subcontractor. *Ibid*. Indeed, the workman have a direct cause of action

against the bond. RSMo § 522.300 (2000). The case at bar has nothing to do with the Appellants' oral employment contract.

Likewise, the Respondent's claim the workmen's claim for wages is an action on account is an area of well settled law. If the Appellants' wages were an action on account, they would have ten years to enforce their claim. *See Miner v. Howard*, 67 S.W. 692 (Mo.App. W.D. 1902). That notion was soundly rejected in *State ex rel. Griffin v. R. L. Persons Construction, Inc.*, 193 S.W.3d 424 (Mo.App. S.D. 2006).

Whatever the limitations period may be, this is a suit for wages owed pursuant to a written contract. The entire structure of the Prevailing Wage Act, which places the burden on all the contractors to make sure all the workmen are paid the prevailing wage and requires regular reporting to the government what wages are paid, suggests interest ought to run from the date the wages were due.

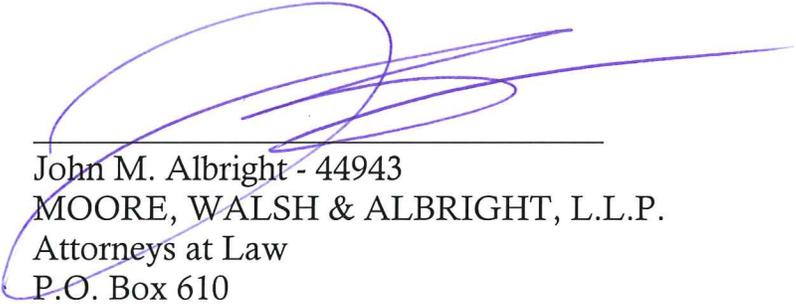
POINT IV

In response to the claim that the surety is not entitled to enforce its 90-day notice provision, the Respondent begins by suggesting the Appellants did not preserve the issue for appeal. The Respondent overlooks that counsel for the Appellants is bound by the rules of ethics and obligated to be forthright with the trial court. At the time of trial, indeed at the time of writing this brief, there is binding authority saying that a 90-day notice provision in the surety

bond issued on a public works project is enforceable. *Reorganized School Dist. R-3 v. L.D. Compton Const. Co.*, 483 S.W.2d 624 (Mo.App. E.D. 1972). The Appellants were not waiving the issue for appeal. The Appellants were advising the trial court that, to counsel's knowledge, there was but one appellate opinion on the issue and, as such, that opinion was binding and required the trial court to enforce 90-day notice provision. The trial court was well aware that counsel for the Appellants was and would be relying on the concurring opinion from the decision in *Frank Powell Lumber Co. v. Federated Ins. Co.*, 817 S.W.2d 640 (Mo.App. S.D. 1991). As it is beyond the power of a state government to create and enforce a 180 notice provision, i.e. claims must be filed within 180 days of death, it seems unlikely a contract could impose a similar 90 day notice provision, given that private contracts cannot shorten a period of limitation. See *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988) and RSMo § 431.030.

In response to the merits of the point relied on, the Respondent begins by claiming this Honorable Court cannot change, amend or alter the terms of the suretyship. The Respondent ends its answer to the point relied on by asserting the Appellant is improperly relying on a policy argument. The Respondent misunderstands the obligation it undertook when it issued a suretyship allegedly in compliance with RSMo § 107.170. A bond tendered pursuant to a statute cannot vary from the terms of the statute, hence Judge Pruitt's concurrence *Frank Powell, supra*.

The only legal underpinning for the prior decisions was the absence of a limitation period hence, the court's obligation to fill in the gap or affirm the parties' efforts to fill in the gap. This is no longer the case. There is now expressly a three year statute of limitations, RSMo § 516.130, thus, no matter how well reasoned the prior opinions were, they have been superseded by subsequent legislation. The Respondent was entitled by law to notice within 3 years. RSMo § 516.130. The Respondent can't interpose a condition subsequent in the contract that shortens the time in which suit can be filed. The parties to the contract could, in theory have conditions subsequent before liability arose but there cannot be a condition for which the only effect, as to a covered claim, its sole effect is to shorten the time in which suit can be filed or preserved. RSMo § 431.030. The Appellant's suggest it is only theoretically possible to create conditions because RSMo § 107.170 requires a surety to promise to complete the project and a surety to promise all the material men and laborers are paid.



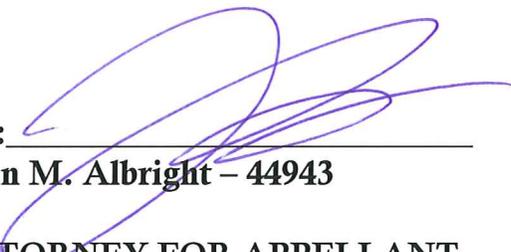
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CERTIFICATE OF SERVICE

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 Reply 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 Reply Brief and contains 1,989 words and that a copy of the Appellant's Reply 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: Amber Van Hauen, Esq., 1200 Main St., Suite 1700, Kansas City MO 64105 on this 9th day of April, 2007.

BY: 

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