

IN THE SUPREME COURT OF MISSOURI

Case No. SC88232

THOMAS O. POLEN, APPELLANT

v.

JERRY L. CROCKETT, RESPONDENT

**Substitute Appellant's Brief in Response to
Trial Court's Denial of Motion to Quash Wrongful
Garnishment**

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TABLE OF CONTENTS

Table of Contents.....1-3

Table of Cases.....4-8

Table of Other Authorities.....9-10

Jurisdictional Statement.....11

Statement of Facts.....12

Points Relied On.....13, 14

Argument-First Point Relied On15-29

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.

Under Missouri law, the presumption that a judgment has been paid more than ten years after entry and rendition is conclusive.....15-18

In order to toll or revive the applicable statute of limitations the payment of a debt founded on a contract, whether in whole or in part, must be voluntarily made by the party chargeable.....18-25

A garnishment is not a voluntary act of payment on the part of a judgment defendant.....25-27

Recent modifications to RSMo.§516.350 have clearly been intended by the Missouri General Assembly to only affect judgments related to child-support and spousal maintenance and are not intended to alter the Statute of Limitations as it relates to judgments based on a contract.27-30

Argument-Second Point Relied On30-33

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 failed to consider the applicability

of Mo. Rev. Stat. § 516.320 in the instant action, in that, the underlying action was founded on a contract; to wit, a Promissory Note executed between the parties, and that no written acknowledgement or promise made by the party chargeable thereby was ever entered into evidence that could have sought to revive the expired judgment past the ten-year Statute of Limitation and that, therefore, any involuntary collection of funds by Plaintiff/Respondent Jerry Crockett from Defendant/Appellant Thomas Polen more than ten years after the entry of the Judgment was void, improper, and injurious.

Conclusion and Prayer for Relief	33-35
Certificate of Service.....	36
Certificate of Compliance.....	37
Appendix.....	A1-A26

TABLE OF CASES

<u>Abele v. Dietz</u> , 312 Mass. 685, 45 N.E.2d 970, 144 A.L.R. 1015 (1942).....	25
<u>Alliance First Nat. Bank v. Spies</u> , 158 Ohio St. 499, 110 N.E.2d 483, (Ohio 1953).....	25
<u>Anderson v. Stanley</u> , 753 S.W.2d 98 (Mo. Ct. App. E.D. 1988).....	25
<u>Battle v. Battle</u> , 116 N.C. 161, 21 S.E. 177 (1895).....	20
<u>Beck v. Fleming</u> , 165 S.W. 3d 156 (Mo. 2005).....	16
<u>Bender v. Markle</u> , 37 Mo. App. 234 (1889).....	18
<u>Blanton v. United States Fidelity and Guaranty Co.</u> , 680 S.W. 2d 206 (Mo. App. W.D. 1984).....	26, 27
<u>Brooklyn Bank v. Barnaby</u> , 197 N.Y. 210, 90 N.E. 834 (1910), reargument denied, 198 N.Y. 522, 92 N.E. 1079 (1910).....	25
<u>Budding v. SSM Healthcare Systems</u> , 19 S.W. 3d 678 (Mo. Banc 2000).....	15, 31
<u>Butler v Mitchell-Hugeback, Inc.</u> , 895 S.W.2d 15 (Mo. Banc 1995).....	17
<u>Caneer v. Kent</u> , 119 S.W. 2d 214 (Mo. 1938).....	23
<u>Castellano v. Bitkower</u> , 216 Neb. 806, 346 N.W.2d 249 (1984).....	25

<u>Citicorp North America, Inc. v. Thornton</u> , 707 A.2d 536 (Pa. Super. Ct. 1998).....	25
<u>Clark (Whitney) v. Chambers</u> , 17 Neb. 90 (1885).....	20
<u>Clay v. Lakenan</u> , 74 S.W. 391 (Mo. App. 1903).....	23
<u>Cochrane v. Cott</u> , 138 S.W. 46 (Mo. App. 1911)	31-32
<u>Countryman v. Seymour R-II Sch. Dist.</u> , 823 S.W. 2d 515 (Mo. App. S.D. 1992).....	24
<u>Davis v. Burke</u> , 188 S.W. 2d 765 (Mo. App. 1945).....	23
<u>Drake v. Tyner</u> , 914 P.2d 519 (Colo. Ct. App. 1996).....	25
<u>Estate of Markley</u> , 922 S.W. 2d 87 (Mo. App. W.D. 1996).....	14, 31
<u>Eubank v. Eubank</u> , 29 S.W. 2d 212 (Mo. App. 1930).....	20, 21
<u>Ferguson v. Ferguson</u> , 636 S.W. 2d 323 (Mo. banc 1982).....	28, 29
<u>Fisher v. Pendleton</u> , 184 Kan. 322, 336 P.2d 472, 74 A.L.R.2d 1274 (1959).....	25
<u>Forry v. Department of Natural Resources, et. al.</u> , 889 S.W. 2d 838 (Mo. App. W.D. 1994).....	14, 32
<u>Gardner v. Early</u> , 78 Mo. App. 346 (1899).....	19
<u>Green v. Boothe</u> , 188 S.W. 2d 84 (Mo. App.1945)	23
<u>Greenbriar Hills Country Club v. Dir. of Revenue</u> , 47 S.W.3d 346 (Mo. 2001).....	30

<u>Greer Limestone Co. v. Nestor</u> , 175 W. Va. 289, 332 S.E.2d 589 (1985).....	25
<u>Hamilton v. Pearce</u> , 15 Wash. App. 133, 547 P.2d 866 (Div. 1 1976).....	25
<u>Hodgson v. Pixlee</u> , 272 S.W.2d 222 (Mo. 1954)	17
<u>Howard v. Pritchett</u> , 207 Ala. 415, 92 So. 782, 25 A.L.R. 55 (1922).....	25
<u>Hunter v. Hunter</u> , 237 S.W. 2d 100 (Mo. 1951)	17
<u>In Re Jackman’s Estate</u> , 124 S.W. 2d 1189 (Mo. 1939)	16
<u>In re the Marriage of Holt</u> , 635 S.W. 2d 335 (Mo. 1982).....	13, 27, 28
<u>Jones v. Hempel</u> , 316 Ark. 647, 873 S.W.2d 540 (1994).....	25
<u>Keppinger v. Hanson Crushing, Inc.</u> , 161 Or. App. 424, 983 P.2d 1084 (1999).....	25
<u>Kinser v. Elkadi</u> , 654 S.W. 2d 901 (Mo. Banc 1983).....	24
<u>Kokoszka v. Belford</u> , 417 U.S. 642, 650 (1974).....	29
<u>Locke v. Warden</u> , 179 S.W.2d 624 (Mo. App. 1944).....	17
<u>Martin v. Martin</u> , 979 S.W. 2d 948 (Mo. App. S.D. 1998)	29
<u>Mayes v. Mayes</u> , 116 S.W. 2d 1 (Mo. 1938).....	13, 21-24

<u>Meyer v. Buford</u> , 18 S.W.2d 526 (Mo. App. 1929).....	21
<u>Milliken v. Amour & Co.</u> , 104 S.W. 2d 1027 (Mo. 1937).....	26
<u>Millington v. Masters</u> , 96 S.W. 3d 822 (Mo. App. S.D. 2002).....	31
<u>Missouri Interstate Paper Co. v. Gresham</u> , 116 S.W. 2d 228 (Mo. App. 1938).....	23
<u>Murphy v. Cannon</u> , 536 S.W. 2d 30 (Mo. Banc 1976)	15, 30
<u>Nacy v. Le Page</u> , 111 S.W. 2d 25 (Mo. 1937).....	26
<u>Ochoa v. Ochoa</u> , 71 S.W. 3d 593 (Mo. Banc 2002)	15, 30-31
<u>Pear v. Grand Forks Motel Associates</u> , 553 N.W.2d 774 (N.D. 1996).....	25
<u>Perkins v. Schicker</u> , 641 S.W. 2d 432 (Mo. App. E.D. 1982).....	32
<u>Person Earth Movers, Inc. v. Buckland</u> , 525 S.E.2d 239 (N.C. Ct. App. 2000).....	25
<u>Peterson v. Peterson</u> , 273 S.W. 2d 239 (Mo. 1954).....	17
<u>Phillips v. Mahan</u> , 52 Mo. 197 (1873).....	19
<u>Pirtle v. Cook</u> , 956 S.W. 2d 235 (Mo. Banc 1997).....	16, 18
<u>Premier Capital, Inc. v. Gallagher</u> , 740 A.2d 1047 (N.H. 1999).....	25
<u>Pourney v. Seabaugh</u> , 604 S.W. 2d 646 (Mo. App. 1980).....	17

<u>Regan v. Williams</u> , 185 Mo. 620, 84 S.W. 959 (Mo. 1905).....	13, 18-20, 23
<u>Roscoe v. Hale</u> , 7 Gray 274 (Mass. 1856).....	20
<u>Ryan v. Engelke</u> , 285 S.W. 2d 6 (Mo. App. E.D. 1955).....	24
<u>Simpson v. Davis</u> , 130 S.W. 2d 666 (Mo. App. 1939)	23
<u>Smith v. Smith</u> , 156 N.E. 2d 113 (Ohio 1959).....	27-28
<u>State v. Finn</u> , 14 S.W. 984 (Mo. 1890).....	20
<u>State ex. rel. Eagle Bank & Trust Co. v. Corcoran</u> , 659 S.W. 2d 775 (Mo. Banc 1983).....	26
<u>State ex. Rel. Harper Indus. v. Sweeny</u> , 190 S.W.3d 541 (Mo. App. S.D. 2006).....	33
<u>Stoddard v. Doane</u> , 7 Gray 387 (Mass. 1856).....	20
<u>State ex rel. Baumruk v. Belt</u> , 964 S.W. 2d 443 (Mo. Banc 1998).....	15, 31
<u>Two Pershing Square, L.P. v. Boley</u> , 981 S.W. 2d 635 (Mo. App. W.D. 1998).....	24
<u>Wallace Cotton Co. v. Estate of Wallace</u> , 722 S.W. 2d 103 (Mo. App. 1986)	14, 16, 32
<u>Warlick v. Peterson</u> , 58 Mo. 408 (1874).....	31
<u>Wells v. Hargrave</u> , 23 S.W. 885 (Mo. 1893)	32
<u>White v. Black</u> , 115 Mo. App. 28, 90 S.W. 1153 (Mo. App. 1903)	23
<u>Williams v. Markt</u> , 742 S. W. 2d 577 (Mo. App. W.D. 1987).....	14, 31
<u>Windschitl v. Windschitl</u> , 579 N.W.2d 499 (Minn. Ct. App. 1998).....	25

Wormington (Woolsey) v. City of Monett, 218 S.W. 2d 586 (Mo. Banc 1949).....13, 16

TABLE OF OTHER AUTHORITIES

MISSOURI COURT RULES

Supreme Court Rule 74.09 (a).....16, 33

LAW REVIEWS

John M. Specca, *A Survey of Missouri Debtor-Creditor Law,*

54 U.M.K.C. Law Review 19 (1985).....13, 21-22, 25-27

LEGISLATION

Senate Bill 468, (1982).....28

Senate Bill 291, (1999)..... 29

RECORD ON APPEAL

Certified Legal File of This Appeal.....12

Transcript of Hearing Held on March 10, 200512, 16

SECONDARY SOURCES

25 A.L.R. 55 (1942)..... 25

144 A.L.R. 1015 (1942)..... 25

<u>35 A.L.R.2d 1446</u> (1953) (updated 2006).....	25
<u>45 A.L.R.2d 967</u> (1956) (updated 2006).....	20-22
<u>74 A.L.R.2d 1274</u> (1959).....	25
<u>10 A.L.R. 4th 932</u> (1981) (updated 2006).....	25
<u>4 Am. Jur. 2d, Appeal and Error § 260</u> (1962).	25
<u>51 Am. Jur. 2d Limitation of Actions § 339</u> (2006).....	24-25
<u>51 Am. Jur. 2d, Limitations of Actions § 366</u> (2006).....	24
<u>70 C.J.S. Payment Section 2</u> (2005).....	23
<u>Webster’s Third New International Dictionary, Unabridged</u> , (1993).....	16, 19, 26
<u>31 Willison on Contracts § 79:90</u> (4 th ed.) (database updated July 2006).....	27

MISSOURI STATUTES

<u>Mo. Rev. Stat. § 511.370</u> (2006) ...	16
<u>Mo. Rev. Stat. §§ 516.010 – 516.370</u> (2006) ...	31
<u>Mo. Rev. Stat. § 516.320</u> (2006) ...	14, 30-33
<u>Mo. Rev. Stat. § 516.350</u> (2006)	12, 13, 15, 17, 18, 20, 26-29, 32-34
<u>Mo. Rev. Stat. § 525.010</u> (2006)	26

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)

Wormington (Woolsey) v. City of Monett, 218 S.W. 2d 586 (Mo. Banc 1949)

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)

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

John M Speca, *A Survey of Missouri Debtor-Creditor Law*, 54 U.M.K.C. Law
Review 19, 32 (1985)

2) 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 failed to consider the applicability of Mo. Rev. Stat. § 516.320 to the instant action, in that, the underlying action was founded on a contract; to wit, a Promissory Note executed between the parties, and that no written acknowledgement or promise made by the party chargeable thereby was ever entered into evidence that could have sought to revive the expired judgment past the ten-year Statute of Limitation and that, therefore, any involuntary collection of funds by Plaintiff/Respondent Jerry Crockett from Defendant/Appellant Thomas Polen more than ten years after the entry of the Judgment was void, improper, and injurious.

Mo. Rev. Stat. §516.320

Williams v. Markt, 742 S. W. 2d 577 (Mo. App. W.D. 1987)

Estate of Markley, 922 S.W. 2d 87 (Mo. App. W.D. 1996)

Wallace Cotton Co. v. Estate of Wallace, 722 S.W. 2d 103 (Mo. App. 1986)

Forry v. Department of Natural Resources, et. al., 889 S.W. 2d 838

(Mo. App. W.D. 1994)

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).

Under Missouri law, the presumption that a judgment has been paid more than ten years after entry and rendition is conclusive.

Missouri case law affirmatively states that the presumption that a judgment has been paid after ten years is conclusive. Wormington (Woolsey) v. City of Monett, 218 S.W. 2d 586 (Mo. Banc 1949); Pirtle v. Cook, 956 S.W. 2d 235, 245 (Mo. Banc 1997); Beck v. Fleming, 165 S.W. 3d 156, 159 (Mo. 2005). “The life of the judgment ends with the lapse of the period. It may be extended only by revival.” Wormington, at 590.

In the instant case, Plaintiff/Respondent is attempting to mischaracterize involuntary, state-mandated garnishments as payments, sufficient to toll the judgment, in an attempt to avoid the applicable Statute of Limitations. 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).

Because Plaintiff/Respondent chose not to take such action, his only claim is that the judgment was “revived” by “payments” (Transcript of Hearing Held March 10, 2005 Hearing, p.2). *Payment* is defined as, “the act or paying or giving compensation... something given to discharge a debtor’s obligation or to fulfill a promise.” Webster’s Third New International Dictionary, Unabridged, (1993). 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.

The burden of proof is on the party seeking to continue to enforce a judgment (herein the Plaintiff/Respondent) when a judgment is more than ten-years old. Peterson v. Peterson, 273 S.W. 2d 239, 241 (Mo. 1954). The burden of proof is on the holder of a judgment to show that the statute has been tolled by the making of a payment within the statutory period prior to the bringing of the action, Hodgson v. Pixlee, 272 S.W.2d 222, 225 (Mo. 1954); Locke v. Warden, 179 S.W.2d 624, 627 (Mo. App. 1944), or that the statute has been tolled for another cause. Wallace Cotton, at 106.

Statutes of limitations are favored by the courts and are strictly construed so that exceptions to their operation are most often left to the state legislature. Butler v Mitchell-Hugeback, Inc., 895 S.W.2d 15 (Mo. Banc 1995); Hunter v. Hunter, 237 S.W. 2d 100, 104 (Mo. 1951). In various pleadings and argumentation presented, Plaintiff/Respondent has not cited even one case holding that garnishment or other coercive measures used to enforce a judgment work to toll a statute of limitations as it applies to sum certain judgments. Every case cited by Plaintiff/Respondent deals only with child support or spousal maintenance which are, by definition, decretial installment payments that are governed, during the times at issue, by the current subsections (2), (3) and (4) of Mo. Rev. Stat. § 516.350.

The presumption [of what is now RSMo. § 516.350(1)] is conclusive, and no execution or process shall issue on a non-revived judgment. Pourney v. Seabaugh, 604 S.W. 2d 646, 649 (Mo. App. 1980). While garnishments and other involuntary, state-

obtained takings may, or may not, meet the burden of allowing collection more than ten years after judgment in child support cases and other future-looking decretial orders, they do not in any way meet the burden in cases founded on a contract theory, such as this action.

“Once the conclusive presumption arises, the judgment cannot be revived and no suit can be maintained upon it.” Pirtle, 956 S.W. 2d at 238. On September 13, 2004, Appellant Thomas Polen acquired a substantive right to be free from suit or execution with regard to the instant sum certain judgment.

In order to toll or revive the applicable statute of limitations the payment of a debt founded on a contract, whether in whole or in part, must be voluntarily made by the party chargeable.

The general rule that to toll a limitation statute, part payment on a debt must be voluntary draws upon an exceedingly long line of nineteenth-Century opinions that were all discussed at length by this Court in Regan v. Williams, 185 Mo. 620, 84 S.W. 959 (1905). The Regan Court received the case by certification of the St. Louis Court of Appeals in that it (the Court of Appeals) believed that its ruling had created a conflict with the Kansas City Court of Appeals and its ruling in Bender v. Markle, 37 Mo. App. 234 (1889). Id. at 960. However the split in authority to be resolved in Regan did not revolve around the question of voluntariness being necessary for a payment to toll or reinstate a judgment’s statute of limitation. Id. Instead, this Court in Regan gave a superb

lineage of cases showing the unquestionably well-founded assertion by Appellant that payment, as intended by the predecessors to Mo. Rev. Stat. § 516.350(1), has voluntariness as an essential element in its interpretation and application.

The word *voluntary* is defined as, “proceeding from the will...produced in and by an act of choice...performed, made, or given of one’s own free will...done by design or intention...acting of oneself: not constrained, impelled, or influenced by another...acting or done without any present legal obligation to do the thing done or any such obligation that can accrue from the existing state of affairs.” Webster’s Third New International Dictionary, Unabridged, (1993). On the contrary, *involuntary* is defined as, “dictated by authority or circumstance...independent of volition.” Id.

The holding in Regan, which dealt with enforcement of a promissory note, as does the case now at bar, starts by stating that, “The party relying on a payment to stop the statute must not only establish that it was made, but that it was made by the authority of the defendant.” Id. at 961, (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. (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).

The Regan Court continues on to quote the Supreme Court of Massachusetts who clearly and decisively stated that, “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 962; (citations omitted). This Court summed up the issue by maintaining that, “involuntary payments are, we believe, usually held not to take the case out of the statute.” Id.; *citing*, Clark (Whitney) v. Chambers, 17 Neb. 90 (1885); Roscoe v. Hale, 7 Gray 274 (Mass. 1856); Stoddard v. Doane, 7 Gray 387 (Mass. 1856); Battle v. Battle, 116 N.C. 161, 21 S.E. 177 (1895). Not one case, in the one-hundred plus years since Regan has contracted its holding, in regard to sum certain judgments.

Regan was followed, twenty-five years later, by the Kansas City Court of Appeals in Eubank v. Eubank, 29 S.W. 2d 212, 214 (Mo. App. 1930), which also cited to a ruling of this Court in State v. Finn, 14 S.W. 984 (Mo. 1890) (A part payment, to be effectual to interrupt the statute, must be voluntary on account of the debt at suit.)

Regan did not cite to Finn, but Eubank showed that through both Finn and Regan, the Missouri Supreme Court explicitly recognized that payments sufficient to toll an otherwise applicable statute of limitation on a judgment founded on a contract theory must be voluntarily made, whether or not such payments are proffered before or after the running of the statute. Eubank at 214. The Court of Appeals goes on to hold that, “...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...”. Id. Payments made during the running of the statute, if made voluntarily or with the consent of the part chargeable, and if credited on the record, would toll the running of the statute. Id.; *as cited*

in, 45 A.L.R. 2d 967 (updated 2006); *distinguishing*, Meyer v. Buford, 18 S.W.2d 526 (Mo. App. 1929).

This Court next addressed this issue in Mayes v. Mayes, 116 S.W. 2d 1 (1938). In Mayes the Supreme Court explicitly dealt with the question of whether payments made prior to the expiration of a judgment must be voluntary in order to toll the ten-year statute of limitations. The Court noted that the Appellant Helen Mayes received her Missouri civil judgment, against Mr. Mayes, for alimony, child support, and attorney fees on May 7, 1920. Id. at 2. The record shows that in 1926 she discovered his whereabouts in Los Angeles, California. Id. at 5. Sometime after gaining that knowledge, “she brought some sort of suit or action in what she referred to as the ‘Failure to Provide Court’ in Los Angeles”. Id.

An apparently penal sentence was issued against Mr. Mayes by a California court and he performed up to two years in servitude in California. Id. The Appellant later testified that, “with the assistance of the Probation Court...in Los Angeles” she received \$595.00. Id. at 5. The Mayes Court noted that under section 886, the precursor to today’s section 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 or under and pursuant to the judgment or decree in the divorce case.” Id. at 6. “In the case before us the payments were not so made.” Id. Payments made pursuant to a criminal conviction

are held not to be voluntary and do not toll the statute. John M Speca, *A Survey of Missouri Debtor-Creditor Law*, 54 U.M.K.C. Law Review 19 (1985) citing, Mayes.

Mrs. Mayes obtained the only payments she received within the first ten years after judgment through the coercive efforts of a separate court in California. Mr. Mayes only began making payments after being sentenced to two years on a road gang and with the assistance of the “Probation Court”. Mayes at 5. The Missouri Supreme Court is on point as to the instant case in its holding that in Mayes voluntariness is a vital requisite for such a payment to toll the statute, and, eventhough there was some sort of a payment made less than ten years after rendition of judgment, it was not voluntarily made and, therefore, did not stop the judgment from finally and conclusively lapsing ten years after entry of judgment. Id. at 6.

The Mayes court noted that, in the facts before it, the payment had not been entered on the Missouri record when the California execution was issued, but that whether or not that fact would prevent the tolling of the statute was not required to be decided. 45 A.L.R. 2d 967 (updated 2006). Those 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, nor made upon the judgment, where it appeared from the record that the payment had been the direct result of the California penal prosecution, following which a condition of the parole of the Defendant was that he make certain contributions toward the support of his child. Id.

As applied to the facts in the instant case, 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, without tolling or revival, were void on their face.

Missouri courts immediately after Mayes continuously interpreted *payment* in this context to mean *voluntary* payment. E.g.; Caneer v. Kent, 119 S.W. 2d 214, 218 (Mo. 1938) (citing Regan); Missouri Interstate Paper Co. v. Gresham, 116 S.W. 2d 228, 229 (Mo. App. 1938) (quoting Regan); Simpson v. Davis, 130 S.W. 2d 666, 667 (Mo. App. 1939) (citing Regan); Davis v. Burke, 188 S.W. 2d 765, 768 (Mo. App. 1945) (citing Missouri Interstate Paper); Green v. Boothe, 183 S.W. 2d 84, 88 (Mo. App. 1945) (citing Regan and Caneer).

This definition of payment, as a voluntary exchange, is widely accepted throughout the legal system. *See, e.g., 70 C.J.S. Payment Section 2* (2005). *Payment* is performance by the delivery of money, or other valuable consideration, by a debtor to a creditor, where the money, or other valuable consideration, is tendered and accepted. *See Generally, Clay v. Lakenan*, 74 S.W. 391 (Mo. App. 1903). Furthermore, in order to toll a statute of limitations, it is recognized in similar contexts that the payment of a debt must be *voluntary* (emphasis added). Caneer; Green; Simpson; *see also, White v. Black*, 115 Mo. App. 28, 90 S.W. 1153 (1903) (“...a discharge of the obligation in money or its equivalent by the assent of the *parties* [emphasis added] would be admissible.)

To this day, following the holding in Mayes, Missouri courts 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); *citing*, Ryan v. Engelke, 285 S.W. 2d 6, 10-11 (Mo. App. E.D. 1955); 4 Am. Jur. 2d, Appeal and Error § 260 (1962); *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).

The theory upon which part payment of a debt starts the statute of limitations running anew is that the part payment amounts to a voluntary acknowledgement of the existence of the debt from which the law implies a new promise to pay the balance. 10 A.L.R. 4th 932 (1981)(updated 2006); *citing generally*, 51 Am. Jur. 2d, Limitations of Actions § 366 (2006). A judgment creditor seeking turnover of assets through garnishment or attachment, by acting upon property not in the dominion and control of the judgment debtor, can in no way be said to be receiving such assets as part of a volitional act on the part of the judgment debtor.

This legal theory retains its vitality. A part payment tolls the statute of limitations if and when it is a voluntary acknowledgment of the existence of the debt, from which the law implies a new promise to pay the balance. 51 Am. Jur. 2d Limitation of Actions §

339 (Database updated May 2006), *citing*; Howard v. Pritchett, 207 Ala. 415, 92 So. 782, 25 A.L.R. 55 (1922); Jones v. Hempel, 316 Ark. 647, 873 S.W.2d 540 (1994); Drake v. Tyner, 914 P.2d 519 (Colo. Ct. App. 1996); Fisher v. Pendleton, 184 Kan. 322, 336 P.2d 472, 74 A.L.R.2d 1274 (1959); Abele v. Dietz, 312 Mass. 685, 45 N.E.2d 970, 144 A.L.R. 1015 (1942); Windschitl v. Windschitl, 579 N.W.2d 499 (Minn. Ct. App. 1998); Anderson v. Stanley, 753 S.W.2d 98 (Mo. Ct. App. E.D. 1988); Castellano v. Bitkower, 216 Neb. 806, 346 N.W.2d 249(1984); Premier Capital, Inc. v. Gallagher, 740 A.2d 1047 (N.H. 1999); Brooklyn Bank v. Barnaby, 197 N.Y. 210, 90 N.E. 834 (1910), reargument denied, 198 N.Y. 522, 92 N.E. 1079 (1910); Person Earth Movers, Inc. v. Buckland, 525 S.E.2d 239 (N.C. Ct. App. 2000); Pear v. Grand Forks Motel Associates, 553 N.W.2d 774 (N.D. 1996), reh'g denied, (Oct. 22, 1996); Alliance First Nat. Bank v. Spies, 158 Ohio St. 499, 49 Ohio Op. 446, 110 N.E.2d 483, 35 A.L.R.2d 1446 (Ohio 1953); Keppinger v. Hanson Crushing, Inc., 161 Or. App. 424, 983 P.2d 1084 (1999); Citicorp North America, Inc. v. Thornton, 707 A.2d 536 (Pa. Super. Ct. 1998); Hamilton v. Pearce, 15 Wash. App. 133, 547 P.2d 866, (Div. 1 1976); Greer Limestone Co. v. Nestor, 175 W. Va. 289, 332 S.E.2d 589 (1985).

A garnishment is not a voluntary act of payment on the part of a judgment defendant.

A judgment creditor may use garnishment as a means of satisfying his judgment.

John M Speca, *A Survey of Missouri Debtor-Creditor Law*, 54 U.M.K.C. Law Review 19,

32 (1985). Garnishment is a process by which a creditor may levy upon property of the debtor which is in the possession of a third party. Id. citing, State ex. rel. Eagle Bank & Trust Co. v. Corcoran, 659 S.W. 2d 775, 777 (Mo. Banc 1983); Nacy v. Le Page, 111 S.W. 2d 25, 26 (Mo. 1937).

Garnishment is defined as, “a legal notice concerning the attachment of property to satisfy a debt....a summons to a third party to appear in court and answer to the suit of the Plaintiff to the extent of his liability to the Defendant.” Webster’s Third New International Dictionary, Unabridged, (1993). *Attachment* is defined as, “a seizure or taking into custody (of persons or property) by virtue of legal process.” Id.

Garnishment involves three parties: (1) the judgment debtor; (2) the creditor or garnishor, and, (3) the garnishee or the person in possession of the property belonging to the debtor. Specia, 54 U.M.K.C. Law Review 19, 32. In Missouri, garnishment is either in aid of attachment or of execution (of a judgment). Id. at 33; *citing, Milliken v. Amour & Co.*, 104 S.W. 2d 1027, 1028 (Mo. 1937); Mo. Rev. Stat. § 525.010. In Missouri, property may be garnished if it belongs to the debtor and if it is in the garnishee’s possession either at the time of service of the writ or is acquired by garnishee before filing answers to interrogatories. Id.

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 action is a proceeding *in rem.*” Blanton v. United States

Fidelity and Guaranty Co., 680 S.W. 2d 206, 208 (Mo. App. W.D. 1984). “Its 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.” Id.

For all of the above-stated reasons, it would be incorrect to read the “payment” reference contained in Mo. Rev. Stat. § 516.350(1), and as interpreted by a majority of courts, as encompassing the dissimilar and coercive state action of garnishment. An Appropriation by the law without the debtor’s volition cannot revive a debt. 31 Willison on Contracts § 79:90 (4th ed.) (database updated July 2006).

Recent modifications to §516.350 have clearly been intended by the Missouri General Assembly to only affect judgments related to child-support and spousal maintenance and are not intended to alter the Statute of Limitations as it relates to judgments based on a contract.

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 § 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). Id.

All subsequent holdings in Missouri courts that contend with decretial installment payments interpret subsections (2), (3), and (4), [subsections (3) and (4) being enacted in 1999 and 2002, respectively] of Section 516.350 only and do not interpret or examine the historical case law of what was, after 1982, subsection (1). *See generally*, Martin v. Martin, 979 S.W. 2d 948 (Mo. App. S.D. 1998). None of the child-support related cases, after 1982, can reasonably be employed to extend this public policy based rationale to a sum certain judgment founded on a contract; the term “payment” as it is employed in, what is now, Mo. Rev Stat. § 516.350 (1) has always been interpreted by Missouri courts to mean a voluntary or volitional act and, on pain of textual incoherence, it must be given the same meaning throughout § 516.350. *See, e.g.*, Kokoszka v. Belford, 417 U.S. 642, 650 (1974) (describing the application of the Whole Act Rule of statutory interpretation).

In 1999 the General Assembly passed Senate Bill 291, thereby, after signing into law, creating subsection (3) to § 516.350, arguably, in response to the Southern District’s holding and dicta in Martin. Subsection (3) codified this Court’s prescient rulings in Ferguson by establishing a different rule for reviving judgments in child support and spousal maintenance cases. However, the explicit limitation of subsection (3) of 516.350 to child support and spousal maintenance cases removes all doubt concerning the issue of whether the legislature intended to work an unprecedented modification to the rules governing sum certain judgments. No such change was intended, and one cannot be

implied. *See, e.g., Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346, 352 (Mo. 2001) (employing the standard maxim of statutory construction *expressio unius est exclusio alterius*).

Argument-Second 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 failed to consider the applicability of Mo. Rev. Stat. § 516.320 in the instant action, in that, the underlying action, and subsequent judgment entered on September 13, 1994, was founded on a contract; to wit, a Promissory Note executed between the parties, and that no written acknowledgement or promise made by the party chargeable thereby was ever entered into evidence that could have sought to revive the expired judgment past the ten-year Statute of Limitation and that, therefore, any involuntary collection of funds by Plaintiff/Respondent Jerry Crockett from Defendant/Appellant Thomas Polen more than ten years after the entry of the Judgment was void, improper, and injurious.

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).

Under Mo. Rev. Stat. § 516.320, a written admission of debt is required in order to bar the applicable Statute of Limitations from running in a case founded upon a breach of contract such as the instant case, which is based on a Promissory Note. In actions founded on any contract, no acknowledgement or promise is evidence of a new or continuing contract, whereby any case is taken out of the operation of the provisions of Mo. Rev. Stat. §§ 516.100 to 516.370, or any party is deprived of the benefit thereof, unless such acknowledgement or promise is some writing subscribed to by the party chargeable thereby. Mo. Rev. Stat. § 516.320.

The determination as to the sufficiency of the acknowledgement of a debt so as to take it out of the statute of limitations in satisfaction of § 516.320 is one of law, not of fact. Williams v. Markt, 742 S. W. 2d 577, 579 (Mo. App. W.D. 1987), *citing* Warlick v. Peterson, 58 Mo. 408, 411 (1874), *as cited by*, Forry, *infra*. Case law also establishes the need for a written admission of debt (as opposed to an involuntary garnishment) in order to find a statute of limitations inapplicable. *See, e.g.*, Estate of Markley, 922 S.W. 2d 87 (Mo. App. W.D. 1996), *discussed favorably by* Millington v. Masters, 96 S.W. 3d 822, 831 (Mo. App. S.D. 2002). An acknowledgement in writing of a debt to remove the bar

of the statute of limitations must contain an unqualified and direct admission of a present subsisting debt. Cochrane v. Cott, 138 S.W. 46 (Mo. App. 1911), *as cited by* Perkins v. Schicker, 641 S.W. 2d 432, 436 (Mo. App. E.D. 1982); Forry v. Department of Natural Resources, et. al., 889 S.W. 2d 838, 843 (Mo. App. W.D. 1994), *citing* Perkins, *supra*.

In Wallace Cotton Co. v. Estate of Wallace, the Southern District Court of Appeals commented on the type of writing necessary to comply with Mo. Rev. Stat. § 516.320:

The acknowledgement, in order to satisfy the statute, should contain an unqualified and direct admission of a present, subsisting debt. If the acknowledgement is accompanied with conditions or circumstances which repel or rebut the intention to pay, or if the expressions used be vague, equivocal, or ambiguous, leading to no certain or determining conclusion, they will not satisfy the requirements of the statute...in all cases the acknowledgement must be in terms so distinct and unqualified that a promise to pay upon request, or at some fixed time, may reasonably be inferred from it. It must be clear and explicit, and not incumbered with any condition... A clear, distinct, and unequivocal acknowledgement of a debt is sufficient.

Id. at 107; *citing*, Wells v. Hargrave, 23 S.W. 885, 886 (Mo. 1893) (authorities omitted).

Because § 516.320 is more specific than the general statute of limitations for all types of judgment found in § 516.350, its additional requirement that the statute of limitations period for judgments based on contract may be tolled only by a written admission of debt must be given full legal effect. *See, e.g., State ex. Rel. Harper Indus. v. Sweeny*, 190 S.W.3d 541, 543-44 (Mo. App. S.D. 2006) (employing the standard canon of construction that specific statutes trump general statutes when there is no logical conflict between the provisions).

Therefore, Plaintiff/Respondent's failure to meet the requirements of § 516.320 is clearly another reason why Defendant/Appellant should prevail in his appeal and be made whole, with damages and fees, for all garnishments after September 13, 2004.

V. Conclusion & Prayer for Relief

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. (Cite entire history portion of the brief) 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.

Fortunately, two uncontested facts make this an easy case. No Missouri court has ever held that a sum certain judgment may be extended or revived solely by a state-mandated taking, such as a garnishment, and, the Missouri legislature has now clearly indicated that all amendments to § 516.350 since 1982 have only involved changes to the treatment and interpretation of decretial installment payments for child support and spousal maintenance.

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.

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CERTIFICATE OF SERVICE

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

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 7,945 words, 875 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 Court of Appeals for the Western District 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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APPENDIX TABLE OF CONTENTS

Table of Contents.....	A1
Mo. Rev. Stat. §511.370.....	A2
Mo. Rev. Stat. §516.320.....	A3
Mo. Rev. Stat. §516.350.....	A4
Mo. Rev. Stat. §525.010.....	A5
CaseNet Docket for 0694AC01066, as of December 27, 2005.....	A6-A16
Judgment of September 13, 1994 in 0694AC01066.....	A17-18
Motion to Quash Wrongful Garnishment filed on January 24, 2005.....	A19-20
Execution/Garnishment Application and Order of November 9, 2004.....	A21
Execution/Garnishment Application and Order of February 7, 2005.....	A22
Execution/Garnishment Application and Order of May 19, 2005.....	A23
Missouri Supreme Court Rule 74.09.....	A24
CaseNet docket entry of Denial of Defendant’s Motion to Quash	A25
Full, Written Order of Denial of Defendant’s Motion to Quash (8-16-06)	A26