IN THE SUPREME COURT OF MISSOURI

JOHN BECK,	)	
	)	
Petitioner/Respondent,	)	
	)	**Supreme Court No. SC86568**
v.	)	
	)	
ANN FLEMING,	)	
	)	
Respondent/Appellant.	)	

SUBSTITUTE REPLY BRIEF OF APPELLANT

Appeal from the Circuit Court of the County of St. Louis
State of Missouri
Honorable Joseph A. Goeke, III, Judge
(Judgment approving and adopting the Findings and Recommendations of the Family Court Commissioner, Honorable Victoria McKee)
Cause No. 563906

And

Missouri Court of Appeals Eastern District
Division Three
No. ED84457

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II. THE COURT ERRED IN FAILING TO APPLY THE EXCEPTION FOUND IN SEC. 516.350 R.S.MO (2001), REGARDING JUDGMENTS DIVIDING EMPLOYEE BENEFITS IN CONNECTION WITH A DISSOLUTION OF MARRIAGE, BECAUSE THE COURT FAILED TO FOLLOW THIS COURT'S RULING AND ANALYSIS IN *HOLT V. HOLT* REGARDING THE DISTINCTIVE NATURE OF PERIODIC AND FUTURE PAYMENTS.

Holt v. Holt, 635 S.W.2d 335 (Mo. 1982)

Pirtle v. Cook, 956 S.W.2d 235, 245 (Mo. 1997)

III. THE COURT ERRED IN FAILING TO APPLY THE EXCEPTION FOUND IN SEC. 516.350 R.S.MO. (2001) REGARDING JUDGMENTS DIVIDING EMPLOYEE BENEFITS IN CONNECTION WITH A DISSOLUTION OF MARRIAGE, BECAUSE THAT VERSION OF THE STATUTE WAS IN EXISTENCE AT THE TIME THE ACTION WAS FILED, AND FAILURE TO APPLY A REMEDIAL STATUTE TO AN ACTION IN EXISTENCE AT THE TIME DENIES APPELLANT HER CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

Loard v. Tri-State Motor Transit, 813 S.W.2d 71, 73 (Mo. App. 1991)

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

ARGUMENT

I. THE TRIAL COURT MISINTERPRETED THE LAW BY FINDING THAT THE JUDGMENT WAS PRESUMED PAID ON JUNE 24, 1998, AND FAILING TO APPLY THE EXCEPTION CONTAINED IN SEC. 516.350 R.S.MO. (2001) BASED UPON SUBSECTION (3) OF SAID STATUTE, BECAUSE THE JUDGMENT WAS NOT ADJUDICATED TO HAVE LAPSED AND THEREFORE IT WAS *NOT* PRESUMED PAID PURSUANT TO SUBSECTION (1) OF THE STATUTE.

Husband's assertion that the 2001 amendment to Sec. 516.350 R.S.Mo. does not resurrect the 1988 judgment in this case is erroneous. According to this Court, and all three districts of the Court of Appeals of the State of Missouri, if a judgment was not "adjudicated to have lapsed," then the judgment is not presumed paid within the meaning of Subsection 3 of the statute. The Court in *Holt v. Holt,* 635 S.W.2d 335 (Mo. 1982), indicated that the litigant should be afforded the benefit of the new statute, and specifically stated that this was appropriate because the judgment had not been "adjudicated to have lapsed." *Id.* at 338. Husband seems to assert that the "straightforward and common-sense meaning of the final sentence

of the new subsection 3" (Husband's Brief, Page 21) is that as of August 28, 2001, *any* judgment is presumed paid under subsection 1 if the judgment if it is ten years old, unless it falls under the exceptions outlined in the pre-2001 version of the statute. However, in Subsection 3 the legislature did not say "pursuant to *the pre-2001 version of this* section," it said "pursuant to *this* section," which can only mean the amended statute. In addition, the legislature reincorporated the exact language into the 2001 amendment found in subsection 2 of the statute, and the legislature was well aware that this language had received settled judicial construction by a court of last resort. Accordingly, it must be presumed that the legislature knew of and adopted this construction. *Smith v. Atterbury*, 270 S.W.2d 399 (Mo. en banc 1954).

The fact that *Holt* was in litigation at the time of the 1982 amendment and that Wife's case was brought six months after the 2001 amendment is of no consequence. In order to achieve a uniform and consistent guide in adjudicating similar cases, as suggested in *Holt*, the amendment should benefit a litigant that brings an action after its enactment in the same way it would benefit a litigant who had an action pending at the time of its enactment. Husband's suggestion to the contrary would result in an inconsistent application of the statute, and unequal protection under the law. Therefore, *Holt* does hold that an amendment to Section 516.350 may apply to a judgment more than ten years old if the judgment has not

been adjudicated to have lapsed. This holding was acknowledge by this Court in 1997 by it decision in *Pirtle v. Cook*, 956 S.W.2d 235, 245 (Mo. 1997), when it was stated, "*Holt* concluded that the statutory exception for child support and alimony…applied retroactively." Consistent with its holdings in *Holt* and *Pirtle* regarding the retroactive application of an amendment to Sec. 516.350, this Court should conclude that the new statutory exception for pension, retirement, life insurance, or other employment benefits, applies retroactively.

Husband next asserts that this Court applied the new statute in *Holt* because it enabled the Court to reach the same result "via a different route." Even without the statute, Husband argues, this Court was fully prepared to modify the application of the pre-1982 version of Sec. 516.350 to judgments for child support and maintenance due to the unique nature of these payments. While it is clear that the Court in *Holt* came to its conclusion in part due to the analysis of the unique nature of support payments, it is also clear that the Court came to its conclusion in part because it applied the amended statute retroactively to that judgment. This Court felt that the amendment should apply to a judgment not adjudicated to have lapsed, even though the judgment was more than ten years old. Similarly, this Court should be prepared to modify the application of the pre-2001 version of Sec. 516.350 to pensions, life insurance, or other employment benefits (stock options in the instant case), due to their unique nature and the same reasoning found in *Holt*.

In fact, the reasoning found in *Holt* and the unfairness of the applicability of the pre-2001 version of the statute is the very reason the legislature took action to amend it. In addition, the same retroactive application of an amendment that was utilized by this Court in *Holt*, should be available to Wife when dealing with an identical amendment, even though the judgment at issue is more than ten years old.

In support of his argument Husband cites *Hanf*, *Ronollo*, and *Starrett*, however each case was decided prior to the 2001 amendment. Consequently, they are inapplicable. In addition, these cases rely on *Pirtle*, which is also relied on by Husband. This Court's decision in *Pirtle* is distinguishable because it was based on the fact that the nature of the judgment was a one-time payment of $40,000.00 as and for marital real estate. The amount of the judgment debt was ascertainable, and enforcement could have been pursued well within ten years of the judgment. On the contrary, all of the payments in the instant case did not become due until well after the tenth anniversary of the judgment, and therefore enforcement was not possible. This Court's decision in *Pirtle*, which was also handed down prior to the 2001 amendment, acknowledged the holding in *Holt*, and simply said that the judgment at issue was more consistent with the statute's plain language than the holding in *Holt.* In the instant case, the judgment at issue is more consistent with the holding in *Holt*, and is now also consistent with the plain meaning of the

amended statute, and therefore the holding in *Pirtle* is distinguishable from the instant case.

In discussing policy arguments for his position that the amended statute should not be applied retroactively, Husband argues that a judgment can never really be presumed paid unless and until there has been an adjudication. (Husband's Brief, Page 30). This assertion is a mischaracterization. First, those judgments that may be affected by the amended statute are only those relating to pensions, life insurance, or other employment benefits, not all judgments. Second, under the statute even these judgments can be presumed paid ten years after the payment is due. The ability of a judgment debtor to rely on the statute for the presumption that a debt has been paid must be balanced with the right of a judgment creditor to receive the debt owed. This is especially true when a judgment calls for payments that are periodic, due in the future, or have contingencies, because these judgments provide more opportunity for a debtor to defraud the judgment creditor in the ten years after the judgment is issued, and then claim the judgment is presumed paid once the fraud is discovered.

Husband next claims that the retroactive application of the amendment would cause an increase in litigation because judgment creditors would rush to court for a declaratory order that the judgment has lapsed. (Husband's Brief, Page 30). This argument contains two significant fallacies. First, if the judgment debtor

has met all obligations under the judgment, there would be no need for the judgment creditor to bring an action to enforce the judgment, and therefore the debtor should not need to rush to court for a declaratory order. On the other hand, if the judgment debtor feels a need to seek a declaratory judgment, then it is likely that he or she has not met all obligations under the judgment. In that case, if the debtor chooses to bring the judgment before the court (which is highly unlikely), this litigation provides an opportunity for the creditor to enforce the judgment as necessary, and this is a just result. Second, this interpretation would cause no more litigation than prudent judgment creditors filing numerous actions each year to revive judgments so that they may be enforced. Therefore, the concern of increased litigation is not practical and should have no effect on the Court's decision.

II. THE COURT ERRED IN FAILING TO APPLY THE EXCEPTION FOUND IN SEC. 516.350 R.S.MO (2001), REGARDING JUDGMENTS DIVIDING EMPLOYEE BENEFITS IN CONNECTION WITH A DISSOLUTION OF MARRIAGE, BECAUSE THE COURT FAILED TO FOLLOW THIS COURT'S RULING AND ANALYSIS IN *HOLT V. HOLT* REGARDING THE DISTINCTIVE NATURE OF PERIODIC AND FUTURE PAYMENTS.

The ruling in *Holt,* and the reasoning therefore, is clearly analogous to the judgment in the instant case. Unlike other judgments, support payments look toward the future and it is not known at the time the decree is entered the amount of the future installment payments. These payments are subject to contingencies and even termination. As a result, the former spouse cannot execute on the judgment and presently collect future periodic payments. *Holt.* at 337.

The judgment at issue is for the periodic payments on stock options that will be paid to Wife in the future upon Husband's sale of the stock. The options expired at different times in the future, the value of the stock changes daily, and Husband has complete control over when to sell the stock. These numerous contingencies, and the fact that some of the payments were not due until thirteen years after the judgment (Wife was paid a portion of the proceeds in 2001; see Appellant's Brief

at A-8), make these payments unique, and therefore they should receive the same treatment as support payments. The argument made by Husband that payment on the options could have been made by a one time sale does not diminish the uniqueness of these payments. The original Incentive Stock Option Agreement (see Appellant's Brief at A-18) itself is designed for periodic, future exercise because of the change in value of the stock and the benefit of waiting until a future date to exercise the options because the stock will presumably increase and become more profitable.

Husband argues that the holding in *Pirtle* limits the holing in *Holt* to recurring periodic support payments. As already discussed, *Pirtle* does not limit the holding in *Holt*, it simply found that the judgment in that case was not consistent with the reasoning in *Holt* and its application of the statute to unique payments. This Court should find that the reasoning in *Holt* does apply to the unique payments at issue in the stock option portion of the present judgment. Like the support orders mentioned in *Holt*, the detailed division of stock options and pensions in divorce judgments are often done by a subsequent "Stock Option Order" or "Qualified Domestic Relations Order." These are characterized as orders because they call for a particular action in the future based on certain contingencies. In fact, these orders can be modifiable to conform with future changes in company plans, even though they affect property division, so that the

intent of the order may be fulfilled. Unlike the $40,000.00 judgment in *Pirtle*, where the creditor could have forced the sale of the house and executed on the judgment, Wife had no ability to execute on the judgment or accurately ascertain all of the payments due to her until thirteen years after the date of the judgment when Husband sold the stock. The price of the stock, the date of the sale, and the amount of the proceeds received from the sale were all subject to numerous contingencies. Therefore, the application of Sec. 516.350 to these payments, and the reasoning therefore, should be identical to the support payments addressed in *Holt.*

III. THE COURT ERRED IN FAILING TO APPLY THE EXCEPTION FOUND IN SEC. 516.350 R.S.MO. (2001), REGARDING JUDGMENTS DIVIDING EMPLOYEE BENEFITS IN CONNECTION WITH A DISSOLUTION OF MARRIAGE, BECAUSE THAT VERSION OF THE STATUTE WAS IN EXISTENCE AT THE TIME THE ACTION WAS FILED, AND FAILURE TO APPLY A REMEDIAL STATUTE TO AN ACTION IN EXISTENCE AT THE TIME DENIES APPELLANT HER CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

In addition to the well settled state of the law outlined above regarding the applicability of Sec. 516.350 R.S.Mo and the intent of the legislature to make the statute retroactive, the law is also well settled that a statute dealing only with procedure or remedy may constitutionally apply to causes of action existing at the time it was enacted. *Loard v. Tri-State Motor Transit*, 813 S.W.2d 71, 73 (Mo. App. 1991). Husband cites *Wormington v. City of Monett*, 218 S.W.2d 586 (Mo. an banc 1949) for the proposition that Sec. 516.350 should be characterized as substantive rather than procedural. However, the language in *Wormington* stating that a presumption of payment statute is not concerned with remedy was based in part because there were no exceptions contained in that statute and the presumption

was not rebuttable. That case was decided in 1949, well before the 1982 and 2001 amendments. The rigidity of the statutes has been decreased by the legislature, and the exceptions found in the two amendments in and of themselves are remedial even if the statute is characterized as substantive.

The exceptions found in the statute are part of the machinery used to bring a suit to enforce a judgment. The timing of the presumption has been changed, which allows a suit for enforcement to be maintained more than ten years after the judgment is rendered. As such, the amendments affect the mechanics that must be followed in order to bring the suit, not any substantive duty allegedly created by Sec. 516.350. The amendment does not create a new duty, but provides a mechanism to enforce an existing duty, and thus it is remedial. Therefore, the remedial amendments to the statute should be applied retroactively.

CONCLUSION

This Court should sustain the ruling of the Appellate Court and reverse the dismissal of Wife's Motion to Enforce. The 1988 Judgment at issue is not presumed paid because it has not been adjudicated to have lapsed. This Court's ruling in *Holt* regarding the application of the statute to unique payments, and the retroactivity of an amended to the statute providing for exceptions, should be applied to the judgment at hand regarding payments on stock options. Finally, the amendment to the statute is remedial, and therefore it should be applied retroactively.