

**IN THE SUPREME COURT OF MISSOURI**

---

**Appeal Number SC97321**

---

**UNIFUND CCR PARTNERS,  
*Plaintiff/Appellant,***

**v.**

**WILLIAM O. ABRIGHT,  
*Defendant/Respondent.***

---

**SUBSTITUTE BRIEF OF APPELLANT**

---

**Appeal from the Circuit Court of Ralls County, Missouri  
Honorable David C. Mobley, Circuit Judge  
Cause Number CV905-80AC (10V090500080)**

---

**MILLER AND STEENO, PC**

***/s/ Ronald C. Miller***

**Ronald C. Miller, 41992**

**11970 Borman Dr., Suite 250**

**St. Louis, MO 63146**

**(314) 726-1400 Telephone**

**(314) 726-1406 Facsimile**

**[rmiller@millersteeno.com](mailto:rmiller@millersteeno.com)**

***Attorneys for Plaintiff/Appellant***

**TABLE OF CONTENTS**

Table of Contents ..... 2

Table of Authorities ..... 3

Jurisdictional Statement ..... 5

Statement of Facts ..... 6

Point Relied On ..... 9

Argument ..... 10

**1. The trial court erred in denying Unifund’s motion to revive judgment as untimely, because Unifund had filed its motion to revive within ten years of the date of the last payment duly entered on the trial court’s record as required under RSMo § 516.350.1 and Missouri Rule 74.09, and nothing in the record indicates that Defendant had otherwise shown cause for not reviving the judgment. .... 10**

**A. Standard of review. .... 10**

**B. Procedure and burden of proof on motions to revive judgments. ....11**

**C. There is no conflict between Rule 74.09 and RSMo § 516.350.1. .12**

**D. Unifund timely filed its motion to revive the underlying judgment. ....14**

**E. Nothing in the record supports a showing of cause for not reviving the underlying judgment. .... 17**

Conclusion ..... 19

Certificate of Compliance .....20

Certificate of Service ..... 21

## TABLE OF AUTHORITIES

<u>Authority</u>	<u>Pages</u>
<b>Cases:</b>	
<i>Abbott v. Abbott</i> , 415 S.W.3d 770 (Mo.App.W.D. 2013) . . . . .	3, 11, 12, 13
<i>Crockett v. Polen</i> , 225 S.W.3d 419 (Mo.banc 2007) . . . . .	3, 9, 14, 15, 16, 17
<i>Disalvo Properties, LLC v. Bluff View Commercial, LLC</i> , 464 S.W.3d 243 (Mo.App.E.D. 2015) . . . . .	3, 13
<i>Dummett v. Koster</i> , 446 S.W.3d 732 (Mo.App.E.D. 2014) . . . . .	3, 10, 12, 18
<i>Elliott v. Cockrell</i> , 943 S.W.2d 328 (Mo.App.E.D. 1997) . . . . .	3, 17
<i>Eubank v. Eubank</i> , 29 S.W.2d 212 (Mo.App.K.C. 1930) . . . . .	3, 16, 17
<i>Ford Motor Credit Co. v. Updegraff</i> , 218 S.W.3d 617 (Mo.App.W.D. 2007) . . . . .	3, 13
<i>Gabriel v. Saint Joseph License, LLC</i> , 425 S.W.3d 133 (Mo.App.W.D. 2013) . . . . .	3, 13
<i>Martin v. Martin</i> , 979 S.W.2d 948 (Mo.App.S.D. 1998) . . . . .	3, 9, 13, 14, 16, 17
<b>Statutes and Rules:</b>	
RSMo § 516.350.1 . . . . .	2, 3, 9, 10, 11, 12, 13, 14, 15, 16
Missouri Supreme Court Rule 55.03 . . . . .	3, 20
Missouri Supreme Court Rule 74.09 . . . . .	2, 3, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

Missouri Supreme Court Rule 83.04 ..... 4, 5  
Missouri Supreme Court Rule 84.06 ..... 4, 20  
Missouri Constitution, Article V, § 10 ..... 4, 5

## **JURISDICTIONAL STATEMENT**

The appeal was transferred to this Court by this Court's order entered on October 30, 2018 upon Appellant's application for transfer pursuant to Rule 83.04 of the Missouri Rules of Civil Procedure, following the decision of the Eastern District of the Missouri Court of Appeals entered in Appeal Number ED106082 on June 12, 2018.

This Court has jurisdiction over this appeal pursuant to Article V, § 10 of the Missouri Constitution which provides, *inter alia*, that

[c]ases pending in the court of appeals may be transferred to the supreme court . . . by order of the supreme court before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule. The supreme court may finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as on original appeal.

As this appeal involves a pending case transferred to this Court by this Court's own order entered upon an application for transfer filed pursuant to Rule 83.04 after issuance of an opinion by the Eastern District, and concerns a question of state law that is of general interest or importance, this Court has jurisdiction over the appeal.

## **STATEMENT OF FACTS**

On May 23, 2005, Plaintiff/Appellant Unifund CCR Partners, Assignee of Citibank (South Dakota), N.A. (hereinafter “Unifund”), filed suit in the Ralls County Associate Circuit Court against Defendant/Respondent William O. Abright (hereinafter “Defendant”), seeking monies owed on a credit card account. Legal File 4, 5.<sup>1</sup> Defendant was served on June 17, 2005 and a judgment in default was entered in favor of Unifund and against Defendant on June 28, 2005. LF 4, 12, 13.

Unifund subsequently served garnishments on Defendant’s employer, the State of Missouri, who withheld money from Defendant’s paychecks and paid the garnished funds into the registry of the trial court. LF 17-38; SLF 2.

The trial court last received funds paid by Defendant’s employer pursuant to garnishment on July 26, 2007. LF 36, 68; SLF 2. On that date, the sheriff for Cole County, the county in which Defendant’s employer, the State of Missouri, was located, filed with the trial court its return indicating that it was paying over to the trial court the net amount of \$76.00 received from the State of Missouri pursuant to

---

<sup>1</sup> All references to the Legal File contained in the record on appeal shall be abbreviated “LF.” Unifund has also moved for leave to file a Second Supplement to Legal File, with said motion still pending as of the date of this substitute brief. All references to said Second Supplement to Legal File shall be abbreviated “SLF.”

the garnishment. LF 2, 36; see also item 19 on the circuit clerk's certification of the initial legal file.

Also on July 26, 2007, the trial court printed out receipts stating that a total of \$76.00 had been paid into the trial court's registry on that date, and that this same amount had been paid out to Unifund's counsel. SLF 2, 3. The trial court subsequently sent a check dated July 31, 2007, payable to Unifund's counsel, in the amount of the above garnishment. LF 50.

On July 17, 2017, Unifund filed a motion to revive the foregoing judgment pursuant to Rule 74.09 of the Missouri Rules of Civil Procedure. LF 2, 41, 42. The trial court issued an order to show cause directed to Defendant. LF 2, 43, 44. Defendant was served with the motion to revive and order to show cause on July 25, 2017, and appeared in person at the hearing for the same held on August 22, 2017. LF 2, 43-46.

On August 24, 2017, the trial court entered an order and judgment denying Unifund's motion to revive the judgment, holding that the motion "was not filed in a timely manner." LF 2, 45-47. Unifund subsequently moved to set aside the trial court's order denying the motion to revive judgment, arguing that the garnishments paid on the judgment served to extend the expiration date of the judgment to the end of July 2017 and that Unifund's motion to revive therefore had been timely filed. LF 2, 48-53. After a hearing on Unifund's motion to set aside, which Defendant

also attended in person, the trial entered an order denying Unifund's motion to set aside. LF 3, 54-55. Unifund appealed the trial court's order and judgment. LF 56-66.



**POINT RELIED ON**

**1. The trial court erred in denying Unifund’s motion to revive judgment as untimely, because Unifund had filed its motion to revive within ten years of the date of the last payment duly entered on the trial court’s record as required under RSMo § 516.350.1 and Missouri Rule 74.09, and nothing in the record indicates that Defendant had otherwise shown cause for not reviving the judgment.**

Missouri Rule 74.09

RSMo § 516.350.1

*Crockett v. Polen*, 225 S.W.3d 419 (Mo.banc 2007)

*Martin v. Martin*, 979 S.W.2d 948 (Mo.App.S.D. 1998)

## ARGUMENT

**1. The trial court erred in denying Unifund’s motion to revive judgment as untimely, because Unifund had filed its motion to revive within ten years of the date of the last payment duly entered on the trial court’s record as required under RSMo § 516.350.1 and Missouri Rule 74.09, and nothing in the record indicates that Defendant had otherwise shown cause for not reviving the judgment.**

The underlying judgment that Unifund sought to revive was originally entered on June 28, 2005, but payments were entered upon the record by means of garnishments directed to Defendant’s employer up until July 26, 2007, the last date on which the trial court received, and recorded, garnishment payments on the judgment. Under Rule 74.09 and RSMo § 516.350.1, Unifund had ten years from the last date on which payments on the judgment were entered upon record, or until July 26, 2017, in which to file its motion to revive the underlying judgment. As Unifund had filed its motion to revive on July 17, 2017, said motion was timely and the trial court erred in denying Unifund’s motion to revive.

**A. Standard of review.**

In reviewing a trial court’s order granting or denying a motion to revive judgment, the only issue presented is whether the trial court properly applied the law governing such motions to revive. *Dummett v. Koster*, 446 S.W.3d 732, 734

(Mo.App.E.D. 2014) (*citing Abbott v. Abbott*, 415 S.W.3d 770, 771 (Mo.App.W.D. 2013)).

**B. Procedure and burden of proof on motions to revive judgments.**

Under RSMo § 516.350.1, judgments are presumed paid and satisfied after the expiration of ten years from the date of entry of the original judgment, or if the judgment has been revived upon personal service on the defendant, then after ten years from and after such revival, or if payment has been made on the judgment “and duly entered upon the record thereof, then after the expiration of ten years from the last payment so made[.]”

Rule 74.09 provides the procedure for reviving a judgment and states, in its entirety, as follows:

(a) **When and by Whom.** A judgment may be revived by order of the court that entered it pursuant to a motion for revival filed by a judgment creditor within ten years after entry of the judgment *or the last prior revival of the judgment.*

(b) **Order to Show Cause.** Upon the filing of a motion of revival of a judgment, an order shall issue to the judgment debtor to show cause on a day certain why such judgment should not be revived. The order to show cause shall be served pursuant to Rule 54 on the judgment debtor, his successors in interest, or his legal representatives.

(c) **Judgment of Revival.** If the judgment debtor, his successors in interest, or legal representatives fail to appear and show cause why the judgment should not be revived, the court shall enter an order reviving the judgment.

[Emphasis added.]

The only obligation placed upon a party seeking revival of a judgment is to file a motion to revive within ten years of the date of either the date on which the judgment was entered or the date of the last revival of the judgment. *Dummett*, 446 S.W.3d at 734-5; *Abbott*, 415 S.W.3d at 772. Upon the filing of a motion to revive judgment, the judgment debtor bears the burden of showing cause for why the judgment should not be revived. *Dummett*, 446 S.W.3d at 734. If nothing in the record indicates that the judgment debtor showed cause as to why the judgment should not be revived, then the trial court is mandated by Rule 74.09(c) to enter an order reviving the judgment. *Id.*

**C. There is no conflict between Rule 74.09 and RSMo § 516.350.1.**

While Rule 74.09 does not expressly provide that a payment on the underlying judgment shall be considered in calculating the ten-year limitation for filing a motion to revive judgment, RSMo § 516.350.1 does utilize the date of the last payment on a judgment as a benchmark in determining when the ten-year limitation begins to run. Specifically, the statute provides that judgments remain in effect upon the expiration of ten years from the date that payment has been made on the judgment “and duly entered upon the record thereof[.]” Unifund submits that the rule and the statute are not in conflict and can be harmonized. In fact, in previous decisions of this Court and other Missouri courts, these provisions of the rule and statute have been harmonized.

In interpreting rules and statutes, courts are to give the language used its plain and ordinary meaning. *Ford Motor Credit Co. v. Updegraff*, 218 S.W.3d 617, 623 (Mo.App.W.D. 2007). Courts must enforce statutes as they are written, and may not engraft upon a statute any provisions which do not appear in explicit words or by implication from other words in the statute. *Disalvo Properties, LLC v. Bluff View Commercial, LLC*, 464 S.W.3d 243, 249 (Mo.App.E.D. 2015).

As a general matter of statutory construction, if there is a conflict between a Supreme Court Rule and a Missouri statute, the rule prevails if it addresses practice, procedure or pleadings. *Gabriel v. Saint Joseph License, LLC*, 425 S.W.3d 133, 139 (Mo.App.W.D. 2013). More specifically and applicable to this case, “To the extent that any conflict arises regarding the obligations of the party seeking revival as a result of the presumption supplied in section 516.350.1, the language of [Rule 74.09] prevails.” *Abbott*, 415 S.W.3d at 774.

However, where there are apparent differences between rules and statutes, courts will attempt to harmonize their provisions. *Updegraff*, 218 S.W.3d at 623. Unifund submits that the Southern District harmonized the pertinent provisions of Rule 74.09(a) and § 516.350.1 in an opinion it issued approximately twenty years ago. In *Martin v. Martin*, 979 S.W.2d 948 (Mo.App.S.D. 1998), the Southern District held that payments on a judgment, duly entered upon the record, revive the judgment pursuant to § 516.350.1, and that motions to revive filed within ten years

of the date of such payments will, under Rule 74.09(a), be deemed filed within ten years after “the last prior revival of the judgment.” *See* 979 S.W.2d at 952.

This Court agreed with *Martin*’s reasoning in its own decision in *Crockett v. Polen*, 225 S.W.3d 419 (Mo.banc 2007). Citing *Martin*, this Court held in *Crockett* that a garnishment payment posted prior to the expiration of the ten-year limitation in § 516.350.1 “effectively revives the judgment.” 225 S.W.3d at 421.

Rule 74.09(a) requires that a motion to revive judgment be filed within ten years “after entry of the judgment or the last prior revival of the judgment.” Under RSMo § 516.350.1, a judgment is presumed paid and satisfied after the expiration of ten years from the date of payment on the judgment “duly entered upon the record.” If a payment on a judgment is also deemed a revival of the judgment, as held by this Court in *Crockett*, then Rule 74.09(a) and § 516.350.1 can be read harmoniously to permit motions to revive filed within ten years after the date of the last payment on the judgment.

**D. Unifund timely filed its motion to revive the underlying judgment.**

Unifund filed its motion to revive the underlying judgment on July 17, 2017, which was within ten years of July 26, 2007, the date on which the trial court last received funds paid by Defendant’s employer pursuant to a garnishment on the underlying judgment. Under Rule 74.09 and RSMo § 516.350.1, the payment of these garnished funds into the trial court constituted payments “duly entered upon

the record thereof,” and therefore the ten-year period for filing the motion to revive ran from that date. Unifund’s motion to revive was filed over one week prior to the expiration of that ten-year period and was thereby timely under Rule 74.09 and RSMo § 516.350.1.

This Court’s prior decision in *Crockett v. Polen*, 225 S.W.3d 419 (Mo.banc 2007), is directly on point with the facts of this case. In *Crockett*, the judgment debtor attempted to quash garnishments on a judgment after September 13, 2004, the date on which the ten-year statute of limitations set forth in RSMo § 516.350.1 had lapsed. 225 S.W.3d at 419. In affirming the trial court’s denial of the debtor’s motion, this Court held that garnishment payments posted within the ten-year period contained in § 516.350.1 effectively revived the judgment; therefore, “[t]he payments effected through the garnishment of [the debtor]’s wages and recorded by the court clerk prior to September 13, 2004, tolled the statute of limitations.” *Id.* at 421.

In the immediate case, the trial court received, and recorded, garnishment payments on the judgment through July 26, 2007. Per *Crockett*, these payments “tolled” the ten-year statute of limitations contained in RSMo § 516.350.1 or, more accurately, *revived* the judgment. Therefore, Unifund had ten years from the date that the last garnishment payment was posted to the trial court, or until July 26, 2017, in which to file its motion to revive the judgment. *See* Rule 74.09(a)’s requirement

that a motion for revival be filed within ten years after “after entry of the judgment or the last prior revival of the judgment.”

The Southern District’s decision in *Martin v. Martin*, 979 S.W.2d 948 (Mo.App.S.D. 1998), relied on by this Court in *Crockett*, provides further support for Unifund’s position that the ten-year limitation for reviving the judgment started running from the date of the last payment made on the judgment. In *Martin*, the Southern District reversed the trial court’s order denying, as untimely, the judgment creditor’s motion to revive, which had been filed within ten years of the date that garnishment payments were posted with the trial court. 979 S.W.2d at 949. The Southern District held that (1) Rule 74.09(a) required, *inter alia*, that a motion for revival be filed within ten years after “the last prior revival of the judgment[,]” and (2) under RSMo § 516.350.1, a judgment is revived if a payment thereon is made and duly entered upon the record thereof. *Id.* at 952.

Finally, the Kansas City Court of Appeals, predecessor to the Western District, held in *Eubank v. Eubank*, 29 S.W.2d 212 (Mo.App.K.C. 1930), that payments made on a judgment within the ten-year limitations period contained in RSMo § 516.350.1 would “toll” the statute, “and in such case the statute runs from the date of last payment.” 29 S.W.2d at 214. As noted in *Eubank*, the clause in the statute referring to the effect of payments on judgments was inserted for a purpose; if it did not mean that such payments effectively extended the life of the judgment,



the clause was meaningless. *Id.* at 214-5. The statutory clause referring to expiration of ten years from “the date of the last payment” could only mean that prior to the expiration of ten years from the date of the last payment, execution may issue on the judgment. *Id.* at 215.

Unifund submits that, in light of the foregoing decisions in *Crockett*, *Martin*, and *Eubank*, the garnishment payment posted to the trial court on July 26, 2007 in the immediate case revived the judgment for purposes of the ten-year limitations period set forth in Rule 74.09(a). Therefore, Unifund’s motion to revive, filed on July 17, 2017, was timely, and the trial court erred in denying Unifund’s motion to revive on the ground it “was not filed in a timely manner.”

**E. Nothing in the record supports a showing of cause for not reviving the underlying judgment.**

In a proceeding to revive a judgment pursuant to Rule 74.09, the judgment debtor may show cause for why the original judgment should not be revived. *Elliott v. Cockrell*, 943 S.W.2d 328, 329 (Mo.App.E.D. 1997). However, the only pertinent issues in such a proceeding are whether (1) the judgment creditor initiated the proceeding within the prescribed time of ten years, (2) service was obtained on the judgment debtor, (3) the underlying judgment existed, or (4) the judgment was satisfied. *Id.* at 330. If these issues are resolved in favor of the judgment creditor, the trial court must enter an order to revive the judgment. *Id.*; Rule 74.09(c).

As the judgment debtor, Defendant bore the burden of showing cause for why the underlying judgment should not have been revived. *Dummett*, 446 S.W.3d at 734. Here, however, the record does not indicate that Defendant challenged Unifund's motion to revive judgment in any manner. The record is devoid of any evidence or argument showing cause for not reviving the judgment.

As argued above, Unifund's motion to revive was filed within ten years of the date of the last payment duly entered upon the court's record, and was therefore timely filed. Moreover, the record clearly shows that Defendant was personally served with the motion to revive and order to show cause, and in fact Defendant personally appeared at the hearing on the same. LF 2, 43-46.

Further, nothing in the record indicates that Defendant offered evidence or even argued that the underlying judgment did not exist or was void, or that the underlying judgment had been satisfied. See LF 2-3, 41-55.

As nothing in the record indicates that Defendant showed cause as to why the underlying judgment should not have been revived, the trial court was mandated by Rule 74.09(c) to enter an order reviving the judgment. See *Dummett*, 446 S.W.3d at 734. Unifund respectfully submits that this Court must reverse the trial court's order denying Unifund's motion to revive judgment and remand the cause with instructions that the trial court enter an order reviving the underlying judgment.

### **CONCLUSION**

For the foregoing reasons, Unifund respectfully requests this Court to reverse the trial court's order and judgment denying Unifund's motion to revive the underlying judgment, and to remand the case with instructions that the trial court enter an order reviving the underlying judgment.

MILLER AND STEENO, PC

*/s/ Ronald C. Miller*

---

Ronald C. Miller, 41992  
11970 Borman Dr., Suite 250  
St. Louis, MO 63146  
(314) 726-1400 Telephone  
(314) 726-1406 Facsimile  
[rmiller@millersteeno.com](mailto:rmiller@millersteeno.com)  
*Attorneys for Plaintiff/Appellant*

**CERTIFICATE OF COMPLIANCE**

In accordance with Missouri Supreme Court Rule 84.06, the undersigned certifies that the foregoing Appellant’s Brief includes the information required by Rule 55.03; complies with the limitations contained in Rule 84.06(b); and was prepared using Microsoft Word in 14-point font, is proportionately spaced, and contains 4,747 words.

*/s/ Ronald C. Miller*

\_\_\_\_\_  
Ronald C. Miller, 41992

**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing was served by means of United States mail this November 19, 2018 on William O. Abright, *pro se* Respondent herein, 11507 Orchard Rd., Hannibal, MO 63401.

*/s/ Ronald C. Miller*

Ronald C. Miller, 41992