SD36906

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

FOUR STAR ENTERPRISES EQUIPMENT, INC., and RGH, LLC,

Plaintiffs / Appellant-Respondents,

vs.

EMPLOYERS MUTUAL CASUALTY COMPANY,

Defendant / Respondent-Appellant.

On Appeal from the Circuit Court of Greene County
Honorable Jason R. Brown, Circuit Judge
Case Nos. 31106CC3828 and 31106CC3828-01

BRIEF OF THE RESPONDENT-APPELLANT

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Statement of Facts

A. Overview

In 1995, Employers Mutual Casualty Company ("EMC") issued D&E Plumbing, Inc. ("D&E") a statutory payment bond on a project (D46).

Four Star Enterprises Equipment, Inc. ("Four Star") alleged T&T Construction, Inc. ("T&T") was a subcontractor on that project and owed it a debt for equipment it had furnished for the project (D47). After suing on that alleged debt in 1997, in 1999 Four Star assigned it to RGH, LLC ("RGH") (D41) and then merged into a Delaware corporation and ceased to exist (D51). In 2005, Four Star obtained a default judgment against T&T for $52,598.44, consisting of $18,873.18 principal, $29,725.26 prejudgment interest, and $4,000 attorney fees, plus 18% per year post-judgment interest (D53).

In 2006, Four Star and RGH sued EMC, alleging EMC was liable on its bond for the debt from T&T (D48). After a trial in 2011 (D45), the court entered judgment for EMC (D2), but this Court reversed it on a procedural error and remanded for further proceedings. *See Four Star Enters. Equip., Inc. v. Empl. Mut. Cas. Co.*, 451 S.W.3d 776 (Mo. App. 2014). Both parties then filed dueling motions for summary judgment (D11; D12; D13; D44; D55).

The trial court entered summary judgment for EMC against RGH, holding RGH's action time-barred under § 516.120, R.S.Mo. (D87 pp. 1-2). But it entered summary judgment for Four Star against EMC for $18,873.18 in principal plus 18% interest per year from February 21, 1997 until paid (D87 pp. 2-4). It then denied both sides' post-judgment motions (D96).

Four Star, RGH, and EMC all now appeal (D97; D99).

B. Glossary of Entities

As this case involves a number of entities' names and abbreviations, this is a clarification of who is who:

- **D&E**: D&E Plumbing, Inc., the general contractor on the public works project at issue.
- **EMC**: Employers Mutual Casualty Company, a surety who furnished D&E a statutory payment bond on the project, who is the defendant below and the respondent and cross-appellant in this Court.
- **Four Star**: Four Star Enterprises Equipment, Inc., a now-defunct corporation alleging T&T owed it a debt for equipment it rented to T&T for use on the project, who was a plaintiff below and is an appellant and cross-respondent in this Court.
- **RGH**: RGH, LLC, the 1999 assignee of Four Star's alleged debt from T&T, who was a plaintiff below and is an appellant and cross-respondent in this Court.
- **T&T**: T&T Construction, Inc., a corporation who Four Star alleged was a subcontractor on the project and owed it a debt for equipment Four Star rented it for the project.
- **U.S. Rentals**: U.S. Rentals, Inc., a Delaware corporation into which Four Star merged in 1999.

C. The Project

From 1995 to 1997, D&E was Greene County's general contractor on a project involving the improvement of Plainview Road ("the Project") (D36 p. 4; D37 pp. 75-76; D58 p. 1). EMC furnished D&E's statutory payment bond for the Project (D36 pp. 2, 4; D38). The bond provides in relevant part:

> The condition of this obligation is such that
>
> WHEREAS, the said bounden principal has entered into a certain contract with Greene County, said contract being marked "Greene County Highway Roadway Improvement Program, West Farm Road 182 (Plainview Road) Improvements, U.S. 160 to Farm Road 141", a copy of said contract being hereto attached and made a part hereof and bearing date of NOVEMBER 1, 1995
>
> NOW, THEREFORE, if the said principal shall comply with and fulfill all the conditions of said contract, including those under which principal agrees to pay the prevailing hourly rate of wages for each craft or type of workman required to execute the contract in the locality as determined by State and Federal authority, as applicable, or by final judicial determination, and properly and promptly complete the work in accordance with the provisions of said contract, plans, and specifications without any hidden defects, and furnish all the labor and materials required by said contract, and any and all changes in, or additions to said contract, which may hereafter be made, and shall perform all the undertakings stipulated by said bounden principal to be performed and within the time mentioned in said contract, or within any additional time granted by the County or its Engineer, which may be granted without notice to or consent from the surety, and shall pay for all materials, lubricants, fuel, coal and coke, repairs on machinery, groceries and foodstuff, equipment and tools consumed or used in connection with the construction of such work, and all insurance premiums, both compensation, and all other kinds of insurance, on said work, and for all labor performed in such work, whether by subcontractor or claimant in person or by his employee, agent, servant, bailee, or

> bailor, then this to be void; otherwise it shall be and remain in full force and effect.

(D38 pp. 1-2). Despite the bond referring to the contract between D&E and Greene County and stating it was attached, no copy of the bond furnished below contained that contract, which was never put in the record (D18; D38; D46; D71).

Steve Eoff was D&E's president during September 17, 1996 through January 17, 1997 and oversaw D&E's work on the Project, including the schedule of work and material, hiring subcontractors, and processing paperwork (D36 p. 4; D37 p. 139; D58 pp. 1-2). At some point before August 1996, Mr. Eoff hired T&T as a subcontractor on the Project to install some block walls (D36 p. 4; D37 pp. 139-40; D58 p. 2). T&T did not have a formal contract with D&E, only a bid form that Mr. Eoff signed, and did not have any agreement with D&E that D&E would pay attorney fees or interest if D&E did not pay T&T or that D&E would pay T&T for equipment rental (D36 p. 4; D37 p. 141; D58 p. 2).

Mr. Eoff said D&E terminated T&T from working on the Project in August 1996, and between September 17, 1996 and January 17, 1997 T&T did not perform any work on the Project (D36 p. 4; D37 pp. 140-41). This was because T&T stopped showing up to work, so D&E itself, along with a different subcontractor, had to finish the job for which T&T was hired (D36 p. 4; D37 pp. 140-41, 148). D&E did not pay T&T for any work performed on the Project between September 1996 and January 1997, and T&T never sued D&E for any wages or other claims (D36 p. 4; D37 p. 141).

D. Four Star's 1997 lawsuit and 1999 merger and assignment

Four Star was incorporated in Missouri in 1986 or 1987 (D36 p. 4; D37 p. 28; D58 p. 3). At some point, Four Star filed a proof of claim with EMC for some $18,000, alleging D&E owed it that amount and it was covered by EMC's bond, but when Mr. Eoff was shown it, he instructed his counsel to tell EMC not to pay it because D&E did not owe it (D36 p. 5; D37 pp. 142-43).

In May 1997, Four Star sued T&T in the Circuit Court of Greene County, alleging that on or before September 12, 1996, T&T entered into a contract with Four Star to provide equipment for the Project, which Four Star alleged it had done but for which T&T had not paid it (D36 pp. 1, 5; D39 pp. 2-3). In the suit, Four Star also named EMC and D&E as defendants, alleging D&E was liable to pay T&T's debt to Four Star and so EMC was bound on its bond to D&E to pay that debt, too (D36 p. 5; D39 pp. 5-7).

Four Star later alleged below that the specific debt was that between September 17, 1996 and January 17, 1997, it furnished and rented a lift and bucket to T&T for work on the Project between those dates, for an agreed amount of $18,873.18 (D36 p. 5; D40). None of the alleged rental contracts between Four Star and T&T on which Four Star relied for the debt at issue contained signatures (D36 p. 6; D37 p. 173; D48 pp. 31-45; D49 pp. 1-17). Below, in reply to EMC's opposition to the plaintiffs' motion for summary judgment, and in response to EMC's own motion for summary judgment, the plaintiffs presented copies of alleged contracts with scribbled signatures, but which had no affidavit, verification, or other foundation (D58 pp. 280-82; D66; D67; D68; D69). EMC objected that they were inadmissible (D83 pp. 13-22).

On June 15, 1999, Four Star was bought out by a Delaware company, U.S. Rentals, as part of which Four Star's owners, Mr. and Mrs. Ron Hinds, had to assume all Four Star's bad debts, and effective August 1999 Four Star ceased to exist (D36 p. 5; D37 pp. 7-10, 13, 39, 49, 52, 131; D51; D92 pp. 10-53). Before the buyout, Mr. and Mrs. Hinds formed an LLC named "RGH" to take over the money paid to them for Four Star and Four Star's bad debts left over when it was bought out (D36 pp. 2, 5; D37 pp. 49, 133). On June 1, 1999, Four Star assigned all right, title, and interest in its claim against T&T in the 1997 lawsuit to RGH, divesting itself of any right, title, or interest in that claim at that point (D36 p. 5; D37 pp. 49-50, 52; D41; D58 p. 5).

On November 16, 2005, after T&T never responded to Four Star's suit, the court entered a default judgment against T&T for $52,598.44, consisting of $18,873.18 in principal, $29,725.26 of interest at 18% per year from February 21, 1997 until judgment, and attorney fees of $4,000, plus 18% per year post-judgment interest (D36 pp. 2, 6; D42). To support the amounts, Four Star provided an affidavit from Fred Townlian, T&T's principal, in support of Four Star obtaining a judgment against T&T (D103 pp. 10-12).

Though Four Star's claims against EMC and D&E remained pending and set for trial, it dismissed them two days later on November 18, 2005, and the court entered a final judgment in the 1997 lawsuit holding all claims had been disposed of by default or dismissal (D36 p. 6; D37 p. 174; D43 p. 11; D58 p. 6). By that point, Four Star had not existed for more than six years and no longer was a Missouri corporation (D36 p. 6; D37 pp. 7-10, 13, 39, 49, 52, 131). RGH never was a party to the 1997 lawsuit (D36 p. 6; D41 p. 1; D43).

E. Proceedings below

1. Initial proceedings

In August 2006, EMC received a proof of claim showing RGH as an assignee and alleging EMC owed it money (D36 p. 6; D37 pp. 159, 161, 165-66, 170-710). EMC's bond claims manager at that time, Linda Hoffman, had requested a proof of claim back in 1997 from Four Star's attorney, but it was not sent for ten years, making the proof of claim in 2006 the first time RGH ever made a claim against EMC (D36 p. 6; D37 pp. 159, 161, 165-66, 170-71).

In September 2006, Four Star and RGH filed the action below alleging two counts: (1) a declaratory action that EMC was liable on the Bond to D&E to cover the default judgment Four Star obtained against T&T and (2) a vexatious refusal claim against EMC for failing to pay it (D101 pp. 1-11).

EMC answered and denied the plaintiffs' allegations (D119). It denied T&T ever performed any work on the Project, and alleged instead that the alleged debt, Mr. Townlian's affidavit, and the alleged invoices were false and fraudulent (D119 pp. 3-7). Before trial, EMC also moved to dismiss the plaintiffs' claims or for judgment on the pleadings, arguing: (1) Four Star lacked standing because it had assigned its whole claim to RGH (D90 p. 4; D92 pp. 3-4), (2) Four Star also lacked standing because it ceased to exist in 1999 when it merged into U.S. Rentals (D92 p. 4), attaching the Secretary of State's certified records of this (D92 pp. 10-53), and (3) RGH's claim violated the applicable five-year statute of limitations (D91 pp. 3-4).

2. Trial, judgment, and first appeal

The case proceeded to a bench trial in November 2011 (D37). At the trial, EMC objected to the admission of ten pieces of evidence, each of which the court overruled and admitted. *Four Star Enters. Equip., Inc. v. Empl. Mut. Cas. Co.*, 451 S.W.3d 776, 780-81 (Mo. App. 2014).

In December 2012, the Court entered judgment for EMC, accepting all EMC's proposed findings and conclusions (D2; D3; D114 pp. 5-16; D115; D116). It held Four Star lacked standing to sue EMC in 2006 because in 1999 it had merged into U.S. Rentals and also had conveyed RGH all its interest in its cause of action against T&T (D114 pp. 5-6; D115 p. 16). It held the plaintiffs' copies of invoices, affidavits, and account statements constituting its proof of claim were not credible and were not evidence T&T owed them a debt for work on the Project (D114 pp. 7-16; D115 pp. 1-5, 9-14). But it held even if these documents were relevant or probative, the unsigned alleged contracts on which the plaintiffs sued to collect meant their claim was subject to a five-year statute of limitations, so RGH had to bring its claim against EMC by 2002, making its 2006 claims time-barred (D115 pp. 15-16).

The court also held that in any case, the plaintiffs' claim underlying the default judgment and the documents on which they based that claim "were fraudulent" (D116 p. 13). It found Mr. Eoff was credible, T&T had not performed any work on the Project during the period the plaintiffs' claim concerned, the plaintiffs' evidence was not credible, "the Plaintiffs willfully and intentionally submitted claims for purchases of equipment, repairs for damage caused by negligence or accident and claims for work which predated

the claims presented in this case and for work on jobs other than the Plainview Road project," and "Plaintiffs intended the Defendant to rely on representations made in the proof of claims in order to get Defendant to pay for items that Plaintiffs' alleged subcontractor, [T&T] could never have recovered from the general contractor, D&E" (D116 pp. 12-13). In the judgment, the court also reversed the prior ruling admitting the ten pieces of evidence and held they would be excluded. *Four Star*, 451 S.W.3d at 780-81.

The plaintiffs appealed, and this Court reversed the judgment and remanded the case for further proceedings. *Id.* at 782-83. It that "the procedure employed by the trial court in admitting" the ten pieces of evidence described above "at trial and then excluding it by its judgment was an abuse of discretion." *Id.* It held the remedy was to remand the case "for further proceedings consistent with this opinion. If, on remand, the trial court determines that the proffered evidence was properly excluded, [the plaintiff] should be given a chance to offer additional evidence." *Id.* In the course of the decision, the Court observed in a long footnote that a surety's liability can be co-extensive with a principal's liability on a default judgment, and even a subcontractor's liability where it makes the principal liable, absent fraud or collusion. *Id.* at 781 n.7.

3. Remand and initial summary judgment proceedings

On remand in June 2015, the court engaged in the procedure this Court ordered and issued an order stating, "Court determines that evidence received at bench trial should not have been admitted and therefore was

properly excluded from the Court's judgment," and it "therefore, will permit [the plaintiff] to offer additional evidence in support of their claim" (D9).

In November 2018, the plaintiffs moved for summary judgment on their Count I (D11). Relying on the footnote in this Court's opinion, they argued the default judgment against T&T was "conclusively binding" on EMC, requiring judgment against EMC for the principal, prejudgment interest, and attorney fees on that judgment, plus 18% interest since 2005 (D12 pp. 1-3).

Despite seeking several extensions of time, EMC's counsel did not respond to the plaintiffs' summary judgment motion and ultimately did not even appear at the summary judgment hearing (D1 pp. 25-27; D22; D27). So, in June 2019, the court entered judgment for the plaintiffs on Count I for the amount of the judgment in the 1997 case, $52,598.44, plus 18% interest since November 16, 2005 for a total judgment of $181,622.46 (D1 p. 27; D28). The court stated this would be a final judgment, "the Court making the express determination pursuant to Rule 74.01(b) that there is no just reason for delay" (D28). EMC's counsel filed post-judgment motions, which the court did not rule on after 90 days (D1 pp. 27-29; D29; D30).

Undersigned counsel then entered the case and appealed the June 2019 judgment to this Court (D32). But this Court dismissed the appeal, holding the judgment was not final and appealable (D33).

Through its new counsel, EMC moved to set aside the June 2019 judgment and allow it to respond now to the plaintiffs' motion for summary judgment (D1 p. 30; D35 p. 1). The plaintiffs then dismissed their Count II for vexatious refusal, so as to make the June 2019 judgment final (D34), and

EMC refiled its motion to set aside as a post-judgment motion under Rules 75.01 and 74.06(b)(1) (D1 p. 35). After an evidentiary hearing, the court granted EMC's motion to set aside the June 2019 judgment and allowed EMC to respond to the plaintiffs' motion for summary judgment (D35 pp. 2-3).

4. Summary judgment proceedings

EMC opposed the plaintiffs' motion for summary judgment (D36). It argued the judgment against T&T was only *prima facie* evidence of a debt for which it was liable, and it still could rebut that with proper defenses, including that the default judgment was the product of fraud (D36 pp. 10-15). It argued Four Star stopped existing in 1999 and had assigned its claim to RGH at that time, both of which meant it lacked standing to sue EMC in 2006 (D36 pp. 15-16). It argued RGH's claim against EMC on the unsigned contracts between Four Star and T&T was subject to the five-year statute of limitations in § 516.120, R.S.Mo. and had to be filed by May 2002, making its 2006 action against EMC time-barred (D36 pp. 17-19). It argued that if either plaintiff could sue it now, then viewing the record in the light most favorable to it, and as the trial court previously had held in the 2012 judgment, the plaintiffs' claim that led to the default judgment was fraudulent, so it could not be liable for that judgment (D36 pp. 19-22). Finally, EMC argued that in any case, it could not be held liable for any attorney fees or interest T&T may owe the plaintiffs, because its bond did not agree to cover any such attorney fees or interest and it was not statutorily required to cover these items (D36 pp. 22-25). The plaintiffs did not file any reply argument to EMC's opposition (D1 pp. 36-38).

EMC then moved for summary judgment in its own favor (D44). It argued there was no genuine dispute of material fact that Four Star lacked standing or capacity to sue, due to both the 1999 merger and the assignment to RGH (D55 pp. 5-6). It argued there was no genuine dispute of material fact that RGH's claim was time-barred under § 516.120, R.S.Mo. (D55 pp. 7-9). It argued that at the very least, it was entitled to a partial summary judgment that it was not liable for any interest or attorney fees T&T owed the plaintiffs (D55 pp. 9-11).

The plaintiffs opposed EMC's motion for summary judgment (D82). They admitted Four Star merged into U.S. Rentals in 1999 and assigned its claim to RGH at that time, but argued this nonetheless allowed Four Star's claims against EMC to survive (D82 pp. 1-2, n.1). They argued the ten-year statute of limitations in § 516.110, R.S.Mo. applied, and in any case the one-year saving statute in § 516.230, R.S.Mo. saved RGH's claim (D82 pp. 2-4). They argued EMC was statutorily bound under § 107.170, R.S.Mo. to cover interest T&T owed them at a rate of 18% per year (D82 pp. 4-16). Finally, they argued the language of EMC's bond was broad enough to cover attorney fees T&T owed them (D82 pp. 16-17).

Replying in support of its motion for summary judgment, EMC argued a party who lost interest during a case does not have standing to prosecute a new case, particularly a merged corporation whose surviving corporation had that interest, and the saving statute in § 516.230 does not apply to an assignee who was not a party to an earlier suit (D84 pp. 5-6, 8). It argued that the statute of limitations for a claimant's underlying claim applies to a

claim against a surety, which here was five years. It argued § 107.170 does not obligate a surety to pay interest its principal or a subcontractor may owe, and that the plaintiffs' authorities otherwise all were either vexatious refusal cases, which do not apply here, or cases in which the sureties agreed to pay interest, and EMC only could be liable for 9% post-judgment interest on the amount it, itself owed, not the 18% in the default judgment against T&T (D84 pp. 9-13). Finally, EMC argued § 107.170 did not obligate it to pay attorney fees its principal or a subcontractor may owe unless its bond expressly agreed to, and its bond did not (D84 pp. 15-16).

5. Judgment, post-judgment, and appeal

In August 2020, the trial court entered a judgment in favor of EMC against RGH, but in favor of Four Star against EMC, granting and denying both parties' summary judgment motions accordingly (D87).

First, the court held that as to the 1997 case, T&T as subcontractor was in privity with D&E as contractor, the judgment against T&T applied to D&E, and EMC's liability as D&E's surety is coextensive with D&E's liability (D87 pp. 1-2). It held EMC therefore "cannot now collaterally attack or impeach the T&T judgment," including as to "the substance or merit of the claim asserted" there (D87 at p. 2).

Second, the court held that as Four Star had standing to sue EMC in the 1997 case and had brought but then dismissed a claim against EMC in that case, the saving statute in § 516.230 allowed Four Star to reassert its previously dismissed claim against EMC, which it had done in this case within one year of dismissing EMC from the 1997 case (D87 p. 2). But it held

the saving statute did not benefit RGH, which was not a party to the 1997 suit, the statute of limitations for RGH's claim against EMC was five years from when it accrued for Four Star in 1997, and RGH's claim against EMC therefore was time-barred (D87 p. 2).

Next, the court held the language in EMC's bond to fulfill "all the conditions of said contract" and to "pay for all … repairs on machinery … equipment or tools consumed or used" was broad enough to include interest for undertakings not paid or fulfilled on time, and therefore included interest T&T had to pay Four Star because it was "contractually agreed upon" (D87 p. 3) (emphasis removed). But it agreed the bond language was not broad enough to include attorney fees (D87 p. 3).

The court stated, "Judgment is thus awarded in favor of Plaintiff Four Star and against EMC in the principal amount of $18,873.18, plus interest thereon at the contractual rate of 18% from and after 2/21/1997, until paid in full," and "[t]he Court awards Judgment to EMC upon the claims of RGH" (D87 p. 4).

Both parties then filed post-judgment motions. The plaintiffs moved to amend the judgment or for a new trial (D88). They argued the court should have ordered EMC not to pay just interest T&T was contractually bound to pay Four Star, but rather to pay the prejudgment interest the 1997 judgment ordered T&T to pay Four Star, plus post-judgment interest that judgment ordered T&T to pay on that pre-judgment interest, plus post-judgment interest on that aggregate amount for which EMC now would be liable in this judgment, all at 18% each (D88 pp. 1-2). They argued RGH's statute of

limitations was ten years, not five (D88 pp. 2-3). They also argued EMC's bond bound it to cover attorney fees (D88 p. 3). They did not present any other challenge to the form or language of the court's judgment (D88 pp. 1-3). EMC responded, opposing each of these propositions (D93).

EMC also moved to amend the judgment or for a new trial (D89). First, it argued it was entitled to judgment against Four Star as well as RGH, because Four Star could not take advantage of the saving statute in § 516.230, as once it merged into U.S. Rentals in 1999 and then dismissed EMC from the prior suit in 2005, under § 351.450(5) only U.S. Rentals, and not Four Star, had standing or capacity in 2006 to file the new suit against EMC (D89 pp. 2-6). It also argued Four Star could not do so because of the assignment of its claim to RGH in 1999, either (D89 pp. 7-8). Second, it argued the language in its bond agreeing to fulfill "all the conditions of said contract" referred to D&E's contract with Greene County, of which there was no evidence it required EMC to cover interested a subcontractor may have agreed to pay a supplier (D89 pp. 8-10). Finally, it argued that in any case, there was a genuine dispute of material fact whether Four Star obtained the judgment against T&T to which it seeks to hold EMC by fraud, which is an allowed defense by EMC (D89 pp. 11-17). The plaintiffs did not file a response to EMC's motion (D1 pp. 43-44).

The trial court denied both parties' post-judgment motions (D96). Both parties then timely appealed to this Court (D97; D99).

Respondent's Argument

Standard of Review as to All the Appellants' Points

In their arguments over the first two of their points, the plaintiffs state the standard of review is the one for bench trials from *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976) (Brief of the Appellants ["Plt.Br."] 12, 17).[1] But this case was decided on summary judgment (D87), not a bench trial. So, the summary judgment standard of review applies.

"Appellate review of the grant of summary judgment is *de novo*." *Kinnaman-Carson v. Westport Ins. Corp.*, 283 S.W.3d 761, 764 (Mo. banc 2009). "The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." *Id.*

> Summary judgment is only proper if the moving party establishes that there is no genuine issue as to the material facts and that the movant is entitled to judgment as a matter of law. … The record below is reviewed in the light most favorable to the party against whom summary judgment was entered, and that party is entitled to the benefit of all reasonable inferences from the record.

Goerlitz v. City of Maryville, 333 S.W.3d 450, 452-53 (Mo. banc 2011) (citations and internal quotation marks omitted).

But while this Court "view[s] factual assertions in the light most favorable to the non-movant, and draw[s] all reasonable factual inferences in the non-movant's favor," it "accept[s] as true the facts containing in the

[1] The page numbering of the plaintiffs' brief violates Rule 84.06(a)(2), which requires "all pages, including the cover page," to be "consecutively paginated using Arabic numbers." Arabic numbers do not begin until their second page. In referring to their brief, this brief uses their misnumbering.

moving party's affidavits or otherwise propounded in support of the moving party's motion, unless the non-moving party's response properly contradicts the proffered facts." *Rail Switching Servs., Inc. v. Marquis-Mo. Terminal, LLC*, 533 S.W.3d 245, 253-54 (Mo. App. 2017).

"This Court will affirm the trial court's grant of summary judgment on any reasonable theory supported by the record." *Id.* at 253.

* * *

Roadmap for Deciding the Parties' Points on Appeal

The plaintiffs bring three points on appeal and EMC brings four on cross-appeal. EMC respectfully suggests the following would be the most straightforwardly dispositive order to decide those points:

1. EMC's first and, alternatively, second points, arguing Four Star lacked standing or capacity to sue EMC in this case in 2006.
2. The plaintiffs' third point, arguing RGH's claim against EMC was timely. If either of EMC's first two points are granted and the plaintiffs' third is also denied, judgment would have to be for EMC.
3. EMC's third point, arguing EMC could not be liable for interest T&T owed Four Star. If either plaintiff was able to sue EMC in this case in 2006, but EMC was only liable for the principal amount at issue, the Court does not have to reach any of the plaintiffs' other points, both of which concern the calculation of interest, or EMC's fourth point.
4. EMC's fourth point, arguing that a genuine dispute of material fact precluded summary judgment for either plaintiff. If either plaintiff was able to sue EMC in this case in 2006 and EMC could be liable for interest T&T owed Four Star, but the Court grants EMC's fourth point, the trial court's judgment would be reversed and remanded for trial, and the Court would not need to reach the plaintiffs' other points.
5. The plaintiffs' first and second points, arguing errors in calculating interest and in the form of the trial court's judgment. Only if a summary judgment against EMC for either plaintiff stood would the calculation of interest or the form of the judgment remain at issue.

I. If EMC's bond somehow binds it to cover 18% interest that Four Star was owed under a contract with T&T, that would not bind EMC to cover separate interest on that interest in Four Star's *judgment* against T&T, and the trial court correctly stated the interest EMC would owe.

(Response to plaintiffs' Point I)

In its judgment, the trial court held the language in EMC's bond is broad enough to cover any interest T&T agreed to pay Four Star, because the bond states, "EMC also undertook obligations in the event D&E (or T&T) did not fulfill 'all the conditions of said contract' and 'all the undertakings stipulated….' 'and within the time mentioned……' '… and shall *pay* for all' … 'repairs on machinery ….equipment or tools consumed or used'" (D87 p. 3) (emphasis and alterations the court's). It therefore ordered EMC to pay Four Star interest per Four Star's contract with T&T of 18% per year from February 21, 1997 until paid (D87 p. 4).[2]

In their first point in their appeal, the plaintiffs argue EMC's bond obligated it to pay not just the 18% interest running from February 1997 that T&T owed Four Star under their alleged agreement. Instead, they argue the trial court should have ordered EMC to pay Four Star the prejudgment interest *a court* ordered T&T to pay Four Star in the prior judgment, *plus*

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[2] In its own appeal, EMC explains that the "said contract" to which its bond referred is the one between D&E and Greene County, which is not in evidence and of which there is no evidence it required the general contractor to pay interest a subcontractor may owe a supplier, and instead it was not so obligated. *See* below at pp. 59-63. But if the trial court was correct that EMC *was* bound to pay interest T&T owed Four Star and *was* bound to the 18% amount, then it correctly held EMC was not bound to pay additional interest amounts assessed against T&T in the 2005 judgment, such as interest on interest.

post-judgment interest *on* that pre-judgment interest, plus (presumably) post-judgment interest on that aggregate amount for which EMC now would be liable in this judgment, and all at 18% for each (Plt.Br. 12-17).

This is without merit. If the trial court was correct that EMC agreed to pay interest T&T owed Four Star, then it is limited to the interest it agreed to pay, which is only that by contract, not later imposed by a court against another party. The trial court correctly stated that amount.

The plaintiffs argue EMC must pay T&T's prior judgment, including pre-judgment interest, post-judgment interest on that pre-judgment interest, and presumably post-judgment interest on all that, because "EMC's obligation was coextensive to that of T&T under the T&T judgment" (Plt.Br. 12). But the doctrine of "co-extensive liability" means that the surety is bound only as to the *liability for contract damages* in the judgment – i.e., the principal amount the debtor owes.

For example, the doctrine of co-extensive liability does not extend to an award of attorney fees unless the surety agrees in its bond to be liable for them. *See Marcomb v. Hartford Fire Ins. Co.*, 934 S.W.2d 17, 19-20 (Mo. App. 1996); *Midwest Asbestos Abatement Corp. v. Brooks*, 90 S.W.3d 480, 486 (Mo. App. 2002); *Prudential Ins. Co. of Am. v. Goldsmith*, 192 S.W.2d 1, 3-4 (Mo. App. 1945). The trial court concurred here and held EMC was not liable for attorney fees in Four Star's judgment against T&T (D87 p. 3). The plaintiffs concede this was correct, do not challenge that decision, and instead expressly cut attorney fees out of all their arguments on appeal (Plt.Br. 13-14, 16).

Similarly, the doctrine of co-extensive liability does not include interest for which the surety did not agree in its bond to be liable. EMC explains this in more detail below in its own appeal at pp. 59-63. And again, the trial court agreed, holding it was *the language of EMC's bond* that obligated it to pay interest per "said contract," which it (incorrectly, *see* below at pp. 59-63 interpreted to mean Four Star's contract with T&T, not the *statutory* doctrine of co-extensive liability (D87 p. 3). The plaintiffs do not present any argument that this was error, either, such as arguing that EMC somehow was statutorily liable for interest, rather than liable solely by function of its bond and the alleged contract between Four Star and T&T (Plt.Br. 12-17).

So, if the trial court was correct that EMC agreed to pay interest in is bond per the contract between Four Star and T&T, which was 18% per year from the time due until paid (D87 p. 3), it correctly required EMC to pay "interest at the contractual rate of 18% from and after 2/21/1997," the date due under that contract, "until paid in full" (D87 p. 4). Case law supports that view. In *J.R. Watkins v. Lankford*, a surety who agreed to be liable to pay interest under a principal's contract with a creditor was ordered to do so from the date it was due under that contract. 250 S.W.2d 798, 803 (Mo. App. 1952). This makes sense. In that scenario, the surety is agreeing to be liable for the amount due in the contract, not a separate judgment later.

The plaintiffs argue that excluding attorney fees and interest on them, "the obligation of T&T (*and therefore, EMC*) amounted to $176,801.18 on August 12, 2020, when the trial court entered judgment" (Plt.Br. 13) (emphasis the plaintiffs'). But the only authorities the plaintiffs cite do not

bear that out. They are either vexatious refusal cases, where the liability for interest was due to the language of § 375.420, R.S.Mo. requiring interest *as* damages, or cases where the surety did not dispute that it had to pay interest. *See Howard Constr. Co. v. Teddy Woods Constr. Co.*, 817 S.W.2d 556, 564 (Mo. App. 1991) (vexatious refusal); *City of Indep. for Use of Briggs v. Kerr Constr. Paving Co., Inc.*, 957 S.W.2d 315 (Mo. App. 1997) (surety did not dispute that it had to pay non-penal interest).

Moreover, in none of those cases, including *Howard* which the plaintiffs block-quote (Plt.Br. 15-16), was the surety required to pay post-judgment interest on prior post-judgment interest on pre-judgment interest from a prior judgment. This is because no surety in its right mind would agree to be liable for that. In *Howard*, for example, where the right to interest arose because the surety was found liable for vexatious refusal, *not* by the language of the bond or a contract, the contract damages were $52,034.65, the prior pre-judgment interest was $19,681.93, and standard post-judgment interest of 9% was ordered on that aggregate amount. 817 S.W.2d at 564. But the plaintiffs here want more than that, and without a vexatious refusal or other statutory requirement that EMC pay interest: they want the principal amount in the 2005 judgment, plus 18% prejudgment interest from 1997 to 2005, plus 18% on that total amount from 2005 to 2020, plus 18% on all of that since then.

The plaintiffs argue that if EMC is not required to pay the interest-on-interest-on-interest it requests, EMC would receive a "windfall" (Plt.Br. 14). This is untrue. If anyone would receive a windfall, it would be the plaintiffs.

It would mean that by suing a subcontractor, obtaining a default judgment against it that awarded pre- and post-judgment interest (notably, here, with the subcontractor's approval), and then waiting to sue the surety and dragging on the case for 15 years, the plaintiff would be able to obtain far more from the deep pocket than it ever would have.

The law of Missouri does not support that. If EMC somehow is liable for interest, it is liable for *contractual* interest, which is 18% per year from the date payment was due under that contract, not 18% until 2005, then another 18% on that first 18% until 2020, then another 18% on that prior 18% on 18% until paid. If EMC's bond does indeed bind it to cover 18% interest that Four Star was owed under a contract with T&T until paid, then the trial court properly awarded the plaintiffs exactly that.

If judgment for Four Star was not error as EMC explains in its cross-appeal below, the Court should affirm the trial court's existing judgment.

II. The trial court's judgment is sufficiently definite to meet the terms of § 408.040.2, R.S.Mo.

(Response to plaintiffs' Point I)

In their second point, the plaintiffs argue the trial court's "judgment does not establish a fixed amount as the judgment balance" and therefore fails to make a finding § 408.040.2, R.S.Mo. requires, because it awarded the plaintiffs "the principal amount of $18,873.18; plus interest thereupon at the contractual rate of 18% from and after 2/21/1997, until paid in full" (Plt.Br. 18-19) (quoting D87 p. 4).

The plaintiffs' argument is without merit.

First, this point is not preserved for review.[3] Rule 78.07(c) requires that, "In all cases, allegations of error relating to the form or language of the judgment, **including the failure to make statutorily required findings**, must be raised in a motion to amend the judgment in order to be preserved for appellate review." (Emphasis added). Failing to do so waives that claim. *Roberts Holdings, Inc. v. Becca's Bakery, Inc.*, 423 S.W.3d 920, 930 (Mo. App. 2014).

This requirement applies to a summary judgment, just as any other. *State ex rel. Mo. Parks Ass'n v. Mo. Dep't of Nat. Res.*, 316 S.W.3d 375, 383 (Mo. App. 2010) (observing Rule 78.07(c) required appellant to raise challenge to a summary judgment's form or language in a post-judgment motion). And it applies to any challenge "related to the form of the judgment." *Sneil, LLC v. Tybe Learning Ctr., Inc.*, 370 S.W.3d 562, 574 (Mo. banc 2012).

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[3] Rule 84.04(e) requires each of an appellant's arguments to "include a concise statement describing whether the error was preserved for appellate review" and "if so, how it was preserved …." The plaintiffs fail this for any argument.

Nowhere in the plaintiffs' post-judgment motion did they argue the judgment failed to make a statutorily required finding of a "fixed amount" under § 408.040.2, R.S.Mo. (D88 pp. 1-3). Therefore, they waived this argument.

Second, if the plaintiffs' second point somehow was not waived, the trial court's judgment *does* include a fixed amount and provide for interest on that amount – just not the amount or terms the plaintiffs would prefer. It provides a fixed amount of $18,873.18, the principal of what Four Star claimed T&T owed it (D87 p. 4). It then provides that interest of 18% per year runs from the date that principal was due until paid (D87 p. 4), per what the trial court held was language in EMC's bond agreeing to pay what was owed under T&T's alleged contract with Four Star (D87 p. 3).

Parties may agree to interest rates and schemes different than that in the statutes. *See Manfield v. Auditorium Bar & Grill, Inc.*, 965 S.W.2d 262, 269 (Mo. App. 1998); *Doe Run Res. Corp. v. Certain Underwriters and Lloyd's London*, 400 S.W.3d 463, 477 (Mo. App. 2013). They can even agree to cut out pre- or post-judgment interest entirely. *See, e.g.*, *Manfield*, 965 S.W.2d at 269 (parties' agreement to 0% interest foreclosed any statutory interest at all).

If the trial court was correct here that EMC's bond agreed to pay the interest under the terms of T&T's alleged contract with Four Star, then that is exactly what the trial court gave it in the judgment: the principal of $18,873.18 plus interest on that amount at the contractual rate of 18% from and after the date it was due, February 21, 1997.

III. The trial court correctly held RGH's claim against EMC accrued in 1997 and was subject to the five-year statute of limitations in § 516.120, R.S.Mo., making RGH's suit against EMC in 2006 was time-barred.

(Response to the plaintiffs' Point III)

In its judgment, the trial court held the statute of limitations for RGH's claim against EMC was five years from when Four Star's claim against T&T accrued in 1997 because the underlying contracts on which RGH relies are unsigned, and as RGH was not a party to Four Star's 1997 case, RGH's claim against EMC first brought in 2006 was time-barred (D87 p. 2). It held that "as an assignee, RGH did not sue 'in the same right' as Four Star, nor in the same capacity," and so could not take advantage of a saving statute as it held Four Star could (D87 p. 2).[4] Citing this Court's decision in *State ex rel. Griffin v. R.L. Persons Constr., Inc.*, 193 S.W.3d 424 (Mo. App. 2006), it held that "[b]ased upon the unsigned agreements between D&E and T&T, … the

[4] RGH does not challenge the trial court's holding that it could not take advantage of the one-year saving statute in § 516.230, R.S.Mo. Because RGH was not a party to the prior suit against T&T, it was not "the plaintiff therein," as § 516.230 requires to activate its savings provisions. *See Smith v. Tang*, 926 S.W.2d 716, 719 (Mo. App. 1996). To qualify, "[t]he right to commence a new action within one year of suffering a nonsuit is given only to the plaintiff in the original action," and does not apply to "legally different plaintiffs." *Id.* (saving statute did not apply to personal representative's medical malpractice action to recover for patient's lost chance of survival where earlier survivorship action was filed by plaintiff in her individual capacity, as patient's daughter, before she became personal representative); *cf. Cook v. ProBuild Holdings, Inc.*, 17 N.E.2d 1210, 1219-20 (Ohio App. 2014) (same re: assignee of original plaintiff's claims under materially identical saving statute); *Smith v. Copiah Cnty.*, 100 So.2d 614, 616 (Miss. 1958) (same).

statute of limitations for RGH's bond claim was five (5) years," so "RGH's claims are thus time barred" (D87 p. 2).

In their third point, without addressing *Griffin*, the plaintiffs argue this was error, and instead because *EMC's bond* was a signed writing, regardless of the underlying claim RGH's limitation period was ten years from 1997, making its 2006 claim timely (Plt.Br. 19-22). This is without merit. As the Court made plain in *Griffin*, the limitation period for an action against a surety to collect on its bond for an underlying claim is that for the underlying claim. Here, Four Star's alleged agreements with T&T on which its claim is predicated are unsigned, making its limitation period five years, and its action filed in 2006 time-barred, just as the trial court held.

A. The limitation period for a claim against a surety on its bond to cover an underlying obligation is the period applicable to the underlying obligation.

Some older decisions had held the ten-year statute of limitations in § 516.110, R.S.Mo., applied to all actions against a surety under § 107.170 to collect on its bond. *See, e.g.*, *Miner v. Howard*, 67 S.W. 692, 693 (Mo. App. 1902). In *Griffin* in 2005, this Court overruled this older law, specifically *Miner*, clarifying that it predated modern surety statutes including § 107.170 and no longer should be followed. 193 S.W.3d at 429. (Despite this, in their brief, the plaintiffs rely on *Miner* without disclosing that this Court expressly overruled it in *Griffin* (Plt.Br. 21).)

Instead, in *Griffin*, the Court held the statute of limitations for the underlying claim for which a claimant seeks to hold a surety liable applies to the claimant's action against the surety, too. *Id.* There, the three-year

statute of limitations in § 516.400, R.S.Mo. applied to a § 107.170 surety for a claim for unpaid wages, rather than ten-year statute of limitations in § 516.110.

The plaintiff/appellant in *Griffin* made the same argument the plaintiffs do in their brief here, that their claim "was not an action against" the principal "based on *their*" actions, but "was a claim against EMC's surety bond" (Plt.Br. 22) (emphasis the plaintiffs'), making the applicable statute ten years, not three. 193 S.W.3d at 427 ("Appellant maintains the ten-year statute of limitations set out in section 516.110 is the applicable statute of limitations relating to his claim, because it "'applies to the cause of action as [Appellant] has pled it, an action on a bond'"). The Court rejected this argument, holding that as § 107.170 itself did not "impose any limitation upon the claimant in the giving of notice or filing of suit," the limitation period for the underlying claim against the principal – there one for unpaid wages – applied. *Id.* at 429. Moreover, the Supreme Court then approved of *Griffin*, initially transferring it after opinion by this Court, but after briefing and argument retransferred it to this Court. *See State ex rel. Griffin v. R.L. Persons Constr., Inc.*, No. SC97324 (May 30, 2006).

The few authorities besides the now-overruled *Miner* that the plaintiffs cite in their argument over their third point are not to the contrary. None holds an action against a surety to collect on an underlying unsigned obligation is subject to a ten-year statute of limitation. *See City of Kan. City v. St. Paul Fire & Marine Ins. Co.*, 639 S.W.2d 903, 905 (Mo. App. 1982) (city charter could not create separate statute of limitations outside state law; no

holding unsigned contract was subject to ten-year limitation period in § 516.110); *Hughes Dev. Co. v. Omega Realty Co.*, 951 S.W.2d 615, 617 (Mo. banc 1997) (ten-year limitation period in § 516.110 applied to action on signed, written contract); *Frank Powell Lumber Co. v. Fed. Ins. Co.*, 817 S.W.2d 648, 653 (Mo. App. 1991) (private 90-day limitation in surety bond did not apply over applicable statute of limitations; no holding unsigned contract was subject to ten-year limitation period in § 516.110).[5]

B. The limitation period for a claim on an unsigned written contract is five years under § 516.120, R.S.Mo.

Section 516.120(1), R.S.Mo., provides that "[a]ll actions upon contracts, obligations or liabilities, express or implied," must be brought within five years. While § 516.110 provides, "An action upon any writing … for the payment of money" may be brought within ten years, this does not apply to an action founded on an otherwise *unsigned* contract. *E.J. Vitello Plumbing, Inc. v. Wayne M. Roberts, Inc.*, 955 S.W.2d 222, 223-24 (Mo. App. 1997).

Instead, where there is no evidence both parties "signed [a] writing" otherwise designed to be a contract, and instead they "orally accepted" it, what results is an "oral contract." *Id.* at 223. And "actions on oral contracts are limited to the five year statute of limitations" in § 516.120(1). *Id.* "A cause of action accrues under [this] statute when the damage resulting from the alleged breach is 'capable of ascertainment.'" *Id.* A demand for payment on an oral contract constitutes the time when such a breach is capable of

[5] To the extent the Court in *Frank Powell* suggested in dicta that § 516.110 "is the statute of limitation that is applicable to actions on surety bonds," the sole authority on which it relied for this was *Miner*, which this Court expressly overruled in *Griffin*. 817 S.W.2d at 652-63.

ascertainment, and the five-year limitations period begins running then. *Id.* A suit filed more than five years after that is barred. *Id.* (reversing judgment on unsigned written contract filed more than five years after last invoice).

An "assignee takes the obligation, contract, chose, or other thing assigned subject to the same restrictions, limitations, and defects as it had in the hands of the assignor." *St. Louis Union Tr. Co. v. Hunt*, 169 S.W.2d 433, 441 (Mo. App. 1943) (quoting 6 C.J.S. Assignments § 99). So, "[a]n assignee's claim or action is subject to a statute of limitations defense held by the assignor, and must be brought within the limitations period or be subject to dismissal." 6A C.J.S. Assignments § 134 (Mar. 2020).

C. RGH's claim on T&T's unsigned contracts with Four Star subject to the five-year limitation period in § 516.120 accrued by May 1997 at the latest, making its action against EMC to cover that in 2006 time-barred.

Under these principles, the trial court correctly held RGH's claim against EMC for liability on Four Star's alleged contract with T&T violates the five-year statute of limitations in § 516.120(1).

First, none of the alleged rental contracts between Four Star and T&T, the claim Four Star assigned to RGH, contained signatures (D36 p. 6; D37 p. 173; D48 pp. 31-45; D49 pp. 1-17).[6] Therefore, they are at best written

[6] In a footnote, Four Star points to the trial court's judgment observing that the "unsigned agreements" at issue were "between D&E and T&T," criticizing this by pointing to D&E's project manager, Steve Eoff, testifying he signed a "bid form" for T&T (Plt.Br. 20, n. 3) (citing D87 p. 2; D45 p. 141). The trial court obviously meant the agreement between *Four Star and T&T* on which RGH's claim is predicated, which were unsigned (D36 p. 6; D37 p. 173; D48 pp. 31-45; D49 pp. 1-17). Regardless, Mr. Eoff testified all he signed was a bid form, not an agreement with T&T to pay attorney fees or interest if D&E

promises that were orally accepted, and so are oral contracts within the five-year limitation period of § 516.120(1). *E.J. Vitello*, 955 S.W.2d at 223-24.

Second, Four Star's claim accrued at the latest in May 1997, when it sued T&T for the balance allegedly due (D36 pp. 1, 5; D39 pp. 2-3). Five years from then was May 2002. Therefore, Four Star had to bring any claims for money due under that contract at the latest by May 2002.

Third, RGH stands in Four Star's shoes with respect to any claims against EMC based on Four Star's alleged debt from T&T. In June 1999, Four Star assigned all right, title, and interest in its claim against T&T in to RGH (D41), and thereafter had no right, title, or interest in that claim. The "absolute assignment of an entire right or interest works as a divestiture of all right or interest in the assignor; and for the purposes of maintaining a civil action, the assignee becomes the real party in interest." *Skaggs Reg. Med. Ctr. v. Powers*, 419 S.W.3d 920, 922 (Mo. App. 2014). So, when an entire claim is assigned, the assignor no longer has standing bring a suit on it. *Jacobs v. Fodde*, 458 S.W.2d 588, 592 (Mo. App. 1970).

RGH therefore took any claim against EMC from that assignment "subject to the same restrictions, limitations, and defects as it had in the hands of Four Star." *Hunt*, 169 S.W.2d at 441 (quoting 6 C.J.S. Assignments § 99). And neither RGH nor EMC were parties to the judgment against T&T in the 1997 case (D36 p. 6; D41 p. 1; D43).

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did not pay T&T or that D&E would pay T&T for equipment rental (D36 p. 4; D37 p. 141; D58 p. 2). In any case, T&T was fired from the Project before the time RGH's alleged debt claim concerns (D37 pp. 140-41, 148).

So, collectively, any claim by RGH against EMC based on the alleged oral contract between Four Star and T&T had to be filed by May 2002 at the latest. But RGH did not file this case against EMC until September 2006, some four-and-a-half years later. Therefore, as in *E.J. Vitello*, the trial court correctly held RGH's claim against EMC is barred by the five-year statute of limitations in § 516.120(1).

The Court should affirm the trial court's judgment against RGH.

Cross-Appellant's Points Relied On

I. The trial court erred in granting Four Star summary judgment against EMC and denying EMC summary judgment against Four Star *because* under the undisputed facts, Four Star was not entitled to judgment as a matter of law and EMC was entitled to judgment as a matter of law that Four Star lacked standing or capacity to sue EMC in this case, as under § 351.450(5), R.S.Mo., when a corporation merges into another corporation and ceases to exist, only the surviving corporation has standing or capacity to sue for a claim of the merging corporation, and a plaintiff who loses standing or capacity loses the ability to file a new action under the one-year saving period in § 516.230, R.S.Mo. *in that* Four Star merged into U.S. Rentals in 1999 and ceased to exist, so when in 2005 it dismissed its claim against EMC in the 1997 case only U.S. Rentals, and not Four Star, could file a new action to bring Four Star's prior claim against EMC.

Jourdan v. Mo. Valley Inv. Co., 651 S.W.2d 169 (Mo. App. 1983)

W. Auto Supply Co. v. Gamble-Skogmo, Inc., 348 F.2d 736 (8th Cir. 1965)

Lewis v. Anderson, 477 A.2d 1040 (Del. 1984)

§ 351.450, R.S.Mo.

§ 516.230, R.S.Mo.

II. The trial court erred in granting Four Star summary judgment against EMC and denying EMC summary judgment against Four Star *because* under the undisputed facts, Four Star was not entitled to judgment as a matter of law and EMC was entitled to judgment as a matter of law that Four Star lacked standing or capacity to sue EMC in this case, as when a party assigns all right, title, and interest in a cause of action to another, the assignor thereafter loses standing or capacity to bring that cause of action, and a plaintiff who loses standing or capacity loses the ability to file a new action under the one-year saving period in § 516.230, R.S.Mo. *in that* Four Star assigned its entire claim against EMC to RGH in 1999, so when in 2005 it dismissed its claim against EMC in the 1997 case, only RGH, and not Four Star, was the real party in interest to file a new action against EMC.

State ex rel. Home Service Oil Co. v. Hess, 485 S.W.2d 616 (Mo. App. 1972) (E.D. en banc)

Ewing v. Pugh, 420 S.W.2d 14 (Mo. App. 1967)

Jacobs v. Fodde, 458 S.W.2d 588 (Mo. App. 1970)

Jourdan v. Mo. Valley Inv. Co., 651 S.W.2d 169 (Mo. App. 1983)

§ 507.010, R.S.Mo.

Rule 52.01

III. The trial court erred in ordering EMC to pay any interest that T&T may have owed to Four Star *because* under the undisputed facts, Four Star was not entitled to judgment awarding it any such interest, as § 107.170, R.S.Mo. does not require a surety to cover contractual interest a principal is ordered to pay and a surety is not liable for such interest unless it agreed in its bond to cover that interest *in that* EMC's bond does not mention interest on a judgment, let alone agree to cover interest that its principal or a subcontractor is liable to pay.

Austin v. Ransdell, 230 S.W. 334 (Mo. App. 1921)

Howard Constr. Co. v. Teddy Woods Constr. Co., 817 S.W.2d 556 (Mo. App. 1991)

City of St. Louis ex rel. Esmar v. Tru-Bounce, Inc., 562 S.W.2d 158 (Mo. App. 1978)

§ 107.170, R.S.Mo.

IV. The trial court erred in entering summary judgment for Four Star against EMC *because* a surety has the right to defend against liability for a default judgment against its principal by proving that the judgment is the product of fraud or collusion, and there is a genuine dispute of material fact whether Four Star and T&T colluded to defraud the court in the 1997 case to procure the default judgment against T&T for which Four Star now seeks to hold EMC liable *in that* viewing the record in the light most favorable to EMC, (1) Four Star represented to the court in the 1997 case that it rented equipment to T&T for use on the Project between September 1996 and January 1997, (2) this representation was false, (3) this false representation was material, (4) Four Star knew its representation was false, (5) Four Star intended the court to act on its false representation by awarding it a judgment against T&T that it believed it and its assignee could collect against EMC, (6) the court was ignorant that Four Star's representations were false, (7) the court relied on Four Star's false representations in entering the judgment, (8) the court had a right to rely on Four Star's false representations, and (9) EMC will be injured.

Home Ins. Co. of N.Y. v. Savage, 103 S.W.2d 900 (Mo. App. 1937)

Bell v. W. Sur. Co., 524 S.W.3d 109 (Mo. App. 2017)

R&L Lumber Co. v. Summit Fid. & Sur. Co., 170 N.W.2d 594 (Minn. 1969)

Calhoun v. Gray, 131 S.W. 478 (Mo. App. 1910)

Cross-Appellant's Argument

Standard of Review as to All the Cross-Appellant's Points

The general summary judgment standard of review is stated above at pp. 25-26.

Additionally, where "the only issue" in reviewing a summary judgment "is whether the trial court's judgment was correct as a matter of law," *A & L Holding Co. v. S. Pac. Bank*, 34 S.W.3d 415, 417 (Mo. App. 2000), if it was incorrect this Court will order summary judgment for the non-movant. *Levinson v. City of Kan. City*, 43 S.W.3d 312, 323 (Mo. App. 2001); *Dalton Invs., Inc. v. Nooney Co.*, 10 S.W.3d 590, 594 (Mo. App. 2000).

"Matters of statutory interpretation and the application of the statute to specific facts are also reviewed *de novo*." *Otte v. Edwards*, 370 S.W.3d 898, 900 (Mo. App. 2012).

> When statutory language is clear, courts must give effect to the language as written. Courts are without authority to read into a statute a legislative intent contrary to the intent made evident by the plain language. The [C]ourt should regard the statute as meaning what it says. [It] may not add words by implication to a statute that is clear and unambiguous.

Boggs v. Lay, 164 S.W.3d 4, 23 (Mo. App. 2005) (internal citations and quotation marks omitted).

I. The trial court erred in granting Four Star summary judgment against EMC and denying EMC summary judgment against Four Star *because* under the undisputed facts, Four Star was not entitled to judgment as a matter of law and EMC was entitled to judgment as a matter of law that Four Star lacked standing or capacity to sue EMC in this case, as under § 351.450(5), R.S.Mo., when a corporation merges into another corporation and ceases to exist, only the surviving corporation has standing or capacity to sue for a claim of the merging corporation, and a plaintiff who loses standing or capacity loses the ability to file a new action under the one-year saving period in § 516.230, R.S.Mo. *in that* Four Star merged into U.S. Rentals in 1999 and ceased to exist, so when in 2005 it dismissed its claim against EMC in the 1997 case only U.S. Rentals, and not Four Star, could file a new action to bring Four Star's prior claim against EMC.

Preservation Statement

EMC raised its argument in this point in response to the plaintiffs' motion for summary judgment (D36 pp. 15-16), in its own motion for summary judgment (D55 pp. 5-6), in its reply in support of its motion for summary judgment (D84 pp. 5-6, 8), and in its post-judgment motion (D89 pp. 2-6). Therefore, this point is preserved for appellate review. *D.E. Props. Corp. v. Food For Less*, 859 S.W.2d 197, 201 (Mo. App. 1993).

* * *

Under § 351.450(5), R.S.Mo., when a corporation merges into another and ceases to exist, while the merging has the ability to continue any existing

lawsuits in which it is involved until a judgment, it loses the ability to bring any new suit, which belongs solely to the surviving corporation. And to file a new action under the one-year saving statute in § 516.230, R.S.Mo., a party must have standing and capacity to sue at the time it institutes that new action, which a previously merged corporation does not.

Nonetheless, the trial court here held that despite Four Star merging into U.S. Rentals and ceasing to exist in 1999, Four Star could institute this new action against EMC in 2006. This was error. Under the undisputed facts, only U.S. Rentals, and not Four Star, could bring this action against EMC in 2006, and EMC was entitled to judgment as a matter of law against Four Star for this reason.

A. Under § 351.450(5), R.S.Mo., when a corporation merges into another and ceases to exist, only the surviving corporation has standing or capacity to sue for a claim of the merging corporation, and the merging corporation loses the ability to take advantage of the one-year saving statute in § 516.230, R.S.Mo once an existing case is dismissed after the merger.

It is undisputed that on June 15, 1999, Four Star was bought out by a Delaware company, U.S. Rentals, and effective August 1999 ceased to exist (D36 p. 5; D37 pp. 7-10, 13, 39, 49, 52, 131; D51; D92 pp. 10-53). Despite this, the trial court held Four Star could pursue its claims in this case against EMC in 2006, because Four Star previously had sued EMC when it existed in 1997, it dismissed EMC from that suit in 2005, and therefore the one-year saving statute in § 516.230, R.S.Mo. allowed it to refile the case against EMC (D87 pp. 1-2).

This misapplied both the corporate-merger-survival statute in § 351.450(5), and the one-year saving statute in § 516.230. Instead, the well-established law of Missouri is that once Four Star stopped existing in 1999, while § 351.450(5) allowed it to maintain its existing suit, it no longer had standing or capacity bring a new action. At that point, only Four Star's surviving corporation, U.S. Rentals, could file a new action under the saving statute in § 516.230, not Four Star.[7]

At the time of the merger in 1999, Four Star's case against T&T – and D&E, the project principal, and EMC, the surety – remained pending (D87 p. 1). As the trial court pointed out, both by Rule 52.13(c), which allows a party whose interest in a pending action is transferred away to continue the action, and by Missouri's corporate-merger-survival statute, § 351.450(5), which provides that "any claim existing or action or proceeding pending by or against any of such corporations may be prosecuted to judgment as if such merger or consolidation had not taken place," despite the merger, Four Star could continue the 1997 action (D87 p. 1).

But in November 2005, Four Star *dismissed* its claim against EMC, and a judgment was entered to that effect (D36 p. 6; D37 p. 174; D43 p. 11; D58 p. 6). Citing no authority, the trial court here held this did not diminish Four Star's right *thereafter* to file a new action against EMC in September 2006, because "[t]he savings statute [*sic*], § 516.230, provided Four Star the extended (and, for one year) continuing right to reassert its previously

[7] EMC explains below in Point II that Four Star also could not sue EMC in 2006 because it had assigned its claim to RGH in 1999.

dismissed bond claim against EMC, such that said claim of Four Star was still 'existing' for purposes of § 351.450(5)" (D87 p. 2).

The trial court was incorrect that a party whose interest is otherwise transferred away during a case and loses standing or capacity to bring a new action nonetheless can dismiss its original action and then take advantage of the one-year saving statute to file a new action anyway. Instead, the law of Missouri is the opposite: when a party's interest in a lawsuit is transferred away during that lawsuit, and it would lack capacity to bring a new lawsuit, if it dismisses that lawsuit then the one-year saving statute in § 516.230 only applies to its legally authorized successor, not it. Therefore, because Four Star merged into U.S. Rentals in 1999, once it dismissed EMC from its prior suit in 2005, under § 351.450(5) only U.S. Rentals, and not Four Star, thereafter had the ability to file a new action under the saving statute in § 516.230.

This Court's decision in *Jourdan v. Mo. Valley Inv. Co.*, 651 S.W.2d 169, 172-73 (Mo. App. 1983), is directly on point. The Court held a dismissal of a corporation's suit after that corporation had ceased to exist was proper, and only the corporation's successor, not it, had standing or capacity to file a new action under the saving statute. *Id.*

In *Jourdan*, a corporation filed an action against a defendant in May 1975 for actions occurring in 1970, subject to the five-year statute of limitations in § 516.120. 651 S.W.2d at 172. In 1976, while the case was pending, the State forfeited the corporation's charter. *Id.* Nonetheless, the corporation could continue its lawsuit under Rule 52.13(c), and did so until

June 1978, when it "voluntarily dismissed its petition." *Id.* "At this point, the time (five years) under § 516.120 had run." *Id.*

On month later, in July 1978, the corporation, despite not existing anymore, refiled the petition "in their corporate name …." *Id.* The defendants moved to dismiss, arguing that "because of charter forfeiture, [the corporation] had no standing to sue." *Id.* When the trial court agreed and dismissed the case in July 1980, the corporation's successors, their statutory trustees, asked the court to set aside the dismissal and allow them to refile an amended petition in their names. *Id.* at 170. The court allowed this. *Id.*

The trustees then filed an amended petition in their own names, and the defendant again moved to dismiss, arguing – as EMC did here – that the corporation had lost standing or capacity to sue by July 1978 when it filed its new action, and the trustees' 1980 amended petition was outside the five-year limitation period. *Id.* at 170-71. The trustees responded – essentially as the trial court ruled in its judgment here (D87 p. 2) – that their action was saved by the one-year savings period in § 516.230, as *the corporation* had re-filed its petition within that time. *Id.* at 171-73. The trial court disagreed and dismissed the action, holding that once the corporation lacked capacity to sue in its own right and had dismissed the prior action, only the real-party-in-interest that existed *at that time*, the statutory trustees, could file a new action under § 516.230, and as they had not, their action now was barred by the five-year statute of limitations in § 516.120. *Id.* at 171.

This Court affirmed. *Id.* at 172-73. It held:

> What occurred herein is that appellant corporation dismissed voluntarily its original action. This dismissal occurred after its

> charter had been forfeited and after the five-year statute had run. Appellant corporation then refiled its claim in its corporate name. Two years later, the petition was dismissed because the corporation had no capacity or standing to sue. This dismissal was set aside and the trustees sought to pursue the claim by amended petition. Respondent challenged this latter action as being beyond the provisions of § 516.230. The trial court agreed and dismissed the amended petition.
>
> **The trial court's action was correct. It is unquestioned that appellant corporation had no capacity to prosecute the action subsequent to January 1, 1976 by reason of the forfeiture of its charter. The appellant trustees herein, subject to the provisions of § 516.230, had one year in which to prosecute appellant corporation's claim. Election was made to prosecute the claim in the name of the corporate entity. This decision did not comport with the statute and did not give the corporation any standing to sue.** The one-year limitation under § 516.230 commenced to run from June 5, 1978, and the trustees and not the corporation had one year from that date to refile the petition.

Id. (internal citation omitted) (emphasis added). While the corporation could maintain its original suit, it lost capacity to bring a new suit during that time, and once it dismissed its original suit, only its successor, the trustees, could bring a new suit, and the saving statute in § 516.230 only applied to them, not the corporation.

The same is true here, and the trial court erred in holding otherwise. Like the corporation in *Jourdan*, after 1999, while Four Star could continue its original suit against EMC, once it dismissed that suit, only its surviving corporation, U.S. Rentals, could file the new suit under the saving statute in § 516.230.

B. Four Star lacked standing or capacity to sue EMC in this case in 2006 after it merged into U.S. Rentals in 1999 and ceased to exist.

Therefore, as in *Jourdan*, once Four Star merged into U.S. Rentals in 1999 and then dismissed its lawsuit against EMC in 2006, like the statutory trustees in *Jourdan* only U.S. Rentals had standing or capacity to refile that suit within the one-year period in § 516.230, because as of 1999 that chose of action vested in U.S. Rentals, "and no right of action remain[ed] in" Four Star. *W. Auto Supply Co. v. Gamble-Skogmo, Inc.*, 348 F.2d 736, 741 (8th Cir. 1965). "The one-year limitation under § 516.230 commenced to run from [November 2005], and [U.S. Rentals] and not [Four Star] had one year from that date to refile the petition." *Jourdan*, 651 S.W.2d at 173.

In its order denying EMC's post-judgment motion, the trial court held *Jourdan* was distinguishable because it did not involve Missouri's corporate-merger-survival statute, and the saving statute in § 516.230 meant that there had not been a "judgment" because Four Star's former action was a voluntary dismissal (D96 p. 1). Both holdings misapplied the law.

First, the effect of Missouri's corporate-merger-survival statute, § 351.450(5), is the same as the forfeiture statutes in *Jourdan*. Just like the forfeited corporation in *Jourdan*, which could continue its *pending* action in its own name but lacked standing or capacity to bring a *new* action once dismissed, even within the § 516.230 saving period, the same is true for a merging corporation. The merging corporation can continue any *pending* action in its own name, despite being merged into another, but lacks standing

or capacity to bring a *new* action, which only the successor corporation can bring. *W. Auto Supply*, 348 F.2d at 741 (applying § 351.450(5)).

Missouri adopted § 351.450(5) directly from Delaware, 8 Del. Code. Ann. §§ 259 and 261. *Id.* at 739. Both statutes "serve to codify the rule at common law which recognizes that a chose in action to enforce a property right upon merger vests in the successor corporation **and no right of action remains in the merging corporation.**" *Id.* at 741 (emphasis added).

So, just as with the forfeited corporation in *Jourdan*, while any pending actions can go on, per § 351.450(5) / Del. Code § 261, any **new** action must be brought by the successor corporation, in whom the sole right to it is vested per § 351.450(4) / Del. Code § 259. *Id.*; *see also Lewis v. Anderson*, 477 A.2d 1040, 1048 (Del. 1984) (merging corporation lacked standing or capacity to bring new suit and only successor corporation could bring it, as § 261 "does not impinge on or amend" § 259 "as to transfer of ownership of choses in action from the merged party to the surviving party").

Second, the saving statute in § 516.230 does not mean an existing action continues on, as the trial court suggested (D96 p. 1), but merely the statute of limitations is tolled for one further year for the appropriate party to file "a new action" after a dismissal. It provides in relevant part:

> If any action shall have been commenced within the times respectively prescribed in sections 516.010 to 516.370, and the plaintiff therein **suffer a nonsuit**, … such plaintiff may commence ***a new action*** from time to time, **within one year after such nonsuit** suffered or such judgment arrested or reversed; **and if the cause of action survive or descend to his heirs, or survive to his executors or administrators,**

> **they may, in like manner, commence a new action within the time herein allowed to such plaintiff**, ….

Id. (emphasis added).

So, if a plaintiff suffers a nonsuit, it may file *a new action* within one year after that, *despite* the statute of limitations running. *Id.* But if its cause of action survives or descends to someone else, the right to take advantage of that one-year period belongs to them, because they are filing a new action.

In *Jourdan*, this meant that when the corporation suffered its nonsuit in the first action by voluntarily dismissing its petition, but had ceased to exist by that point, only its statutory trustees, who by then were the real party in interest, had standing or capacity to bring its *new action* within one year. 651 S.W.2d at 172-73. So, too here: when Four Star suffered its nonsuit against EMC by voluntarily dismissing its action against EMC in 2005, but had ceased to exist in 1999, only its surviving corporation, U.S. Rentals, had standing or capacity to bring a new suit against EMC in 2006.

This makes sense, because all the saving statute is doing is tolling the statute of limitations period. The new action is a new action, just as it if were filed during the limitation period, and the party bringing it must have standing to sue *at that time*.

Under the undisputed facts, Four Star stopped existing in 1999 when it merged into U.S. Rentals. Regardless of the saving statute in § 516.230, Four Star lacked standing or capacity to sue EMC in 2006, by which time § 351.450(5) gave only U.S. Rentals that right. The trial court erred in holding otherwise and granting judgment to Four Star, rather than EMC. This Court should reverse the trial court's judgment and order judgment for EMC.

II. The trial court erred in granting Four Star summary judgment against EMC and denying EMC summary judgment against Four Star *because* under the undisputed facts, Four Star was not entitled to judgment as a matter of law and EMC was entitled to judgment as a matter of law that Four Star lacked standing or capacity to sue EMC in this case, as when a party assigns all right, title, and interest in a cause of action to another, the assignor thereafter loses standing or capacity to bring that cause of action, and a plaintiff who loses standing or capacity loses the ability to file a new action under the one-year saving period in § 516.230, R.S.Mo. *in that* Four Star assigned its entire claim against EMC to RGH in 1999, so when in 2005 it dismissed its claim against EMC in the 1997 case, only RGH, and not Four Star, was the real party in interest to file a new action against EMC.[8]

Preservation Statement

EMC raised its argument in this point in response to the plaintiffs' motion for summary judgment (D36 pp. 15-16), in its own motion for summary judgment (D55 pp. 5-6), in its reply in support of that motion (D84 pp. 5-6, 8), and in its post-judgment motion (D89 pp. 7-8). Therefore, this point is preserved for appellate review. *D.E. Props.*, 859 S.W.2d at 201.

* * *

In the summary judgment proceedings below, EMC explained that besides Four Star's merger with U.S. Rentals in 1999, Four Star also lost

[8] This point is an alternative to Point I, above. If Four Star somehow had standing to sue EMC in 2006 despite its merger with U.S. Rentals in 1999, then it still lacked standing due to its assignment to RGH in 1999.

standing or capacity to sue EMC when it assigned its claim at issue in this case to RGH in 1999, making it not the real party in interest when it sued EMC in 2006 (D36 pp. 15-16; D55 pp. 5-6; D84 pp. 5-6, 8). The trial court did not address this in its judgment. It merely found Four Star "assig[ned] its interest in the instant bond claim in 1999" to RGH but still could continue its then-pending action against T&T, D&E, and EMC (D87 pp. 1-2). *See* Rule 52.13(c); *see also US Bank Nat. Ass'n v. Cox*, 341 S.W.3d 846, 851 (Mo. App. 2011). But the court did not address the assignment's effect on Four Star's ability to file a new suit against EMC in 2006, more than six years later.

Under the undisputed facts, the trial court erred in entering judgment for Four Star for this reason, too, and instead EMC was entitled to judgment against Four Star. Four Star could not file a new action against EMC using the one-year saving statute in § 516.230 because it also lost its standing and capacity to sue EMC in 1999 by assigning its claim against EMC to RGH at that time. Therefore, in September 2006, Four Star had no standing or capacity to sue EMC for this reason, either, as it was not the real party in interest.

The "absolute assignment of an entire right or interest works as a divestiture of all right or interest in the assignor; and for the purposes of maintaining a civil action, the assignee becomes the real party in interest." *Skaggs*, 419 S.W.3d at 922. Therefore, under § 507.010, R.S.Mo. and Rule 52.01, which require that all suits be brought in the name of the real party in interest, when an entire claim is assigned, the assignor no longer has standing bring a suit on it, and a judgment entered for the assignor must be

reversed. *Jacobs*, 458 S.W.2d at 592 ("if there has been an assignment of the … damage claim it is equally true that the claimant would no longer have any interest in it and could not maintain an action based on it") (citing *Steele v. Goosen*, 329 S.W.2d 703, 711 (Mo. 1959); *Gen. Exch. Ins. Corp. v. Young*, 212 S.W.2d 396, 401 (Mo. 1948); *Ewing v. Pugh*, 420 S.W.2d 14, 18-19 (Mo. App. 1967) (reversing judgment for assignor in case brought after assignment of claim, as assignee was real party in interest)); *see also State ex rel. Home Service Oil Co. v. Hess*, 485 S.W.2d 616, 618-19 (Mo. App. 1972) (E.D. en banc) (issuing writ requiring dismissal of claim assignor brought after assignment of claim, as assignee was real party in interest).

Therefore, once Four Star dismissed its suit against EMC in 2005, it could not refile it at all, because it no longer had any right, title, or interest in that claim. The one-year saving statute in § 516.230 is not a method for a party who lacks capacity or standing to sue to bring suit anyway as long as it does so within a year of dismissing a prior suit. *See Jourdan*, 651 S.W.2d at 173. Instead, it is merely a vehicle by which a plaintiff *who has* standing and capacity *and never lost them* can avoid a statute of limitations running once, for one year. *Id.* The plaintiff still must be the real party in interest at the time it files the new action. *Id.*

At the time Four Star filed this action against EMC in 2006, its claim against EMC had been assigned to RGH for more than six years. Four Star had no standing or capacity to sue EMC at that time. The trial court erred in holding otherwise and granting judgment to Four Star. This Court should reverse the trial court's judgment and order judgment for EMC.

III. The trial court erred in ordering EMC to pay any interest that T&T may have owed to Four Star *because* under the undisputed facts, Four Star was not entitled to judgment awarding it any such interest, as § 107.170, R.S.Mo. does not require a surety to cover contractual interest a principal is ordered to pay and a surety is not liable for such interest unless it agreed in its bond to cover that interest *in that* EMC's bond does not mention interest on a judgment, let alone agree to cover interest that its principal or a subcontractor is liable to pay.[9]

Preservation Statement

EMC raised its argument in this point in response to the plaintiffs' motion for summary judgment (D36 pp. 22-25), in its own motion for summary judgment (D55 pp. 9-11), in its reply in support of that motion (D84 pp. 9-13), and in its post-judgment motion (D89 pp. 8-10). Therefore, this point is preserved for appellate review. *D.E. Props.*, 859 S.W.2d at 201.

* * *

In opposition to the plaintiffs' motion for summary judgment and in its own motion for summary judgment, EMC explained that if either of the plaintiffs somehow had the ability to sue it in the case below, its maximum potential liability was $18,873.18, the principal on the plaintiffs' claim against T&T (D36 pp. 22-25; D55 pp. 9-11). This is because under the undisputed facts, as a matter of law EMC could not be liable for T&T's

[9] This point is an alternative to Points I and II, above, and also as a contingent cross-appeal to RGH's appeal. If either plaintiff somehow properly sued EMC in this case, then the trial court erred in ordering Four Star to pay EMC interest that T&T owed Four Star.

liability to Four Star, which attorney fees and interest for which EMC did not agree in its bond to be liable.

The trial court agreed with EMC that it was not liable for any attorney fees T&T agreed to pay Four Star (D87 p. 3). It held this was because EMC's "bond language is not sufficiently broad to include attorney fees, and EMC is not co-extensively liable for such fees," as "the obligation of a surety does not extend beyond the terms of its contract" (D87 p. 3). The plaintiffs do not challenge that holding on appeal, and indeed in their own first point concede that EMC was not bound to pay any attorney fees (Plt.Br. 13-14, 16).

The trial court also agreed with EMC that it was not *statutorily* bound to pay interest T&T agreed to pay Four Star (D87 p. 3), which Four Star also does not challenge in its appeal (Plt.Br. 12-17). Instead, it held the language of EMC's bond *is contractually* broad enough to cover any interest T&T agreed to pay Four Star (D87 p. 3). It held this was because the bond states, "EMC also undertook obligations in the event D&E (or T&T) did not fulfill 'all the conditions of said contract' and 'all the undertakings stipulated….' 'and within the time mentioned……' '… and shall *pay* for all' … 'repairs on machinery ….equipment or tools consumed or used….'" (D87 p. 3) (emphasis the court's; alterations in the original). For this reason, the trial court ordered EMC to pay Four Star interest of 18% per year from February 21, 1997 until paid (D87 pp. 3-4), presently amounting more than $80,000.

This was error. The only language the trial court quotes from EMC's bond is language that § 107.170 statutorily requires of all payment surety bonds. Section 107.170.2(2) requires that a payment bond

> shall be conditioned *for the payment of* any and all materials, incorporated, consumed or used in connection with the construction of such work; all insurance premiums, both for compensation, and for all other kinds of insurance, on said work; and for all labor performed in such work whether by a subcontractor, a supplier at any tier, or otherwise.

(Emphasis added).

But just as this bare statutory language does not require a surety to pay attorney fees its principal owes (D87 p. 3), it equally does not require EMC to pay interest its principal owes, as the trial court also agreed (D87 p. 3). *See Austin v. Ransdell*, 230 S.W. 334, 335 (Mo. App. 1921).

In *Austin*, the first (and really only) decision substantially analyzing whether § 107.170 automatically includes a requirement to pay interest a principal agrees to pay, a school board had failed to obtain a sufficient bond under what today is § 107.170. *Id.* This made its members personally liable for any amounts that a bond would have to cover under the statute. *Id.* In ordering a new trial due to a procedural error, this Court clarified that this amount would not include interest, because this was a suit against the board for failure to perform a duty rather than under a contract, so it did not come under the *standard* interest statute, which today is § 408.040, R.S.Mo. *Id.* But by holding that, the Court necessarily held § 107.170 did not *itself* mandate a surety to cover interest, because otherwise that would have been an amount for which the board members would have been liable. *Id.*

Rather, sureties under § 107.170 only ever have been held liable for interest their principal was bound to pay if they were found liable for vexatious refusal (due to the statutory language in § 375.420, R.S.Mo. requiring insurers found liable for vexatious refusal to pay interest) or when

the surety agreed to pay interest. *See Howard*, 817 S.W.2d at 564 (vexatious refusal); *City of St. Louis ex rel. Esmar v. Tru-Bounce, Inc.*, 562 S.W.2d 158, 162 (Mo. App. 1978) (vexatious refusal); *Briggs*, 957 S.W.2d at 315 (surety did not dispute that it had to pay non-penal interest); *Energy Masters Corp. v. Fulson*, 839 S.W.2d 665 (Mo. App. 1992) (surety did not dispute that it had to pay non-penal interest).

So, just as the bare statutory language incorporated into EMC's bond did not include an agreement to pay attorney fees that § 107.170 does not by itself require EMC to pay (D87 p. 3), it does not include interest that § 107.170 by itself does not require EMC to pay, either.

The fact that EMC's bond refers to agreeing to cover the conditions of **a** "contract" does not change this. It refers to "*said* contract" – the contract between D&E and Greene County for the project "marked 'Greene County Highway Roadway Improvement Program, West Farm Road 182 (Plainview Road) Improvements, U.S. 160 to Farm Road 141'" (D38 pp. 1-2) (emphasis added), a copy of which was attached to the bond, but which the plaintiffs conspicuously never put into the record below. EMC was agreeing to fulfill the conditions of *that* contract, not some separate contract T&T had with Four Star. There is no evidence, nor did the plaintiffs provide any, that D&E's contract with Greene County required D&E to cover attorney fees or interest that a subcontractor may have agreed to pay a supplier.

Instead, EMC's liability to a supplier of a subcontractor of D&E is limited to what § 107.170 required it to pay, and what it agreed in its bond to pay: for "materials incorporated, consumed or used in connection with the

construction of such work ...." Just as it did not agree to pay attorney fees the subcontractor might have agreed to pay the supplier (D87 p. 3), it likewise did not agree to pay interest the subcontractor might have agreed to pay the supplier either, let alone 18% interest as a commercial term in that contract.

The trial court erred in holding any language in EMC's bond agreed to pay 18% interest that T&T owed Four Star. If either plaintiff somehow properly brought the action below, the Court should modify the judgment for it to only be for $18,873.18 plus 9% standard post-judgment interest from the date of that modification under § 408.040.2, R.S.Mo.

IV. The trial court erred in entering summary judgment for Four Star against EMC *because* a surety has the right to defend against liability for a default judgment against its principal by proving that the judgment is the product of fraud or collusion, and there is a genuine dispute of material fact whether Four Star and T&T colluded to defraud the court in the 1997 case to procure the default judgment against T&T for which Four Star now seeks to hold EMC liable *in that* viewing the record in the light most favorable to EMC, (1) Four Star represented to the court in the 1997 case that it rented equipment to T&T for use on the Project between September 1996 and January 1997, (2) this representation was false, (3) this false representation was material, (4) Four Star knew its representation was false, (5) Four Star intended the court to act on its false representation by awarding it a judgment against T&T that it believed it and its assignee could collect against EMC, (6) the court was ignorant that Four Star's representations were false, (7) the court relied on Four Star's false representations in entering the judgment, (8) the court had a right to rely on Four Star's false representations, and (9) EMC will be injured.[10]

Preservation Statement

EMC raised its argument in this point in response to the plaintiffs' motion for summary judgment (D36 pp. 19-22) and in its post-judgment

[10] This point is an alternative to Points I, II, and III, above, and also is a contingent cross-appeal to RGH's appeal. If either plaintiff properly sued EMC in this case, and if EMC somehow could be liable for interest T&T owed Four Star, then there remains a genuine dispute of material fact requiring a trial.

motion (D89 pp. 11-17). Therefore, this point is preserved for appellate review. *D.E. Props.*, 859 S.W.2d at 201.

* * *

In the summary judgment proceedings below, EMC explained that if either plaintiff somehow properly sued it, and if it somehow was liable for interest T&T owed Fours Star, then regardless, summary judgment still did not lie for either plaintiff. There remains a genuine dispute of material fact whether Four Star's default judgment against T&T is the product of fraud or collusion, just as the trial court held it was in the prior judgment it entered in 2012 after trial[11] (D116 p. 13). If so, then just as the trial court held in that prior judgment, the law of Missouri the default judgment is unenforceable against EMC.

A. Four Star's default judgment against T&T is just *prima facie* evidence of EMC's liability, which EMC can rebut by showing that judgment was procured by fraud or collusion.

In the judgment now on appeal, the trial court held EMC cannot claim the 2005 judgment is the product of fraud or collusion, because it believed "EMC cannot now collaterally attack or impeach the T&T Judgment, whether as to Four Star's standing thereto; the substance or merit of the claim asserted; or otherwise. At a minimum, such attacks are clearly not brought within a reasonable time" (D87 p. 2).

[11] The Honorable J. Dan Conklin entered the prior judgment in this case in 2012. When Judge Conklin retired in 2015, this case was assigned to his successor, the Honorable Jason Brown, who entered the judgment that is being appealed.

This was error. First, in a separate lawsuit against it, a surety always has a right to defend against a judgment recovered in an underlying suit against its principal. A prior default judgment against a principal or subcontractor is only *prima facie* evidence of the debt. *See generally*, *Picot v. Signiago*, 27 Mo. 125, 127-28 (1858) (judgment against surety holding it liable for prior entered default judgment against subcontractor of which neither it nor principal had notice was error); *State v. Thornton*, 8 Mo.App. 27 (1879) (prior judgment against principal without notice to surety is only *prima facie* evidence, and surety still has right to defend; judgment holding surety automatically liable to cover it reversed); *Calhoun v. Gray*, 131 S.W. 478, 480 (Mo. App. 1910) ("a judgment against a principal, instead of being conclusive, is only prima facie evidence against the surety to show the breach of the contract and liability thereunder," and "the surety is permitted to defend, as was done in this case, by showing a good defense to the action which might have been asserted by the principal").

The trial court cited the long footnote 7 in this Court's decision 2014 decision in this case. *See Four Star Enters. Equip., Inc. v. Empl. Mut. Cas. Co.*, 451 S.W.3d 776, 781 n.7 (Mo. App. 2014). But even the Court in that footnote held a prior default judgment is only *prima facie* evidence of the surety's liability, and if a surety can show the judgment was the product of fraud or collusion, it rebuts that presumption. *Id.* (relying in part on *Home Ins. Co. of N.Y. v. Savage*, 103 S.W.2d 900, 902 (Mo. App. 1937)).

In *Savage*, the Court held a default judgment against a principal is merely *prima facie* evidence of the principal's liability and damages: "When

plaintiff sued the principal and his sureties in this action, and the principal defaulted, the judgment rendered against the principal was admissible in evidence against the sureties to establish the default and fix the measure of damages; and such record judgment **is prima facie proof thereof**." *Id.* (emphasis added). "By definition, "prima facie evidence' means such evidence which, in law, is sufficient to satisfy the burden of proof to support a verdict in favor of the party by whom it is introduced when not rebutted by other evidence.'" *Cnty. of Boone v. Reynolds*, 549 S.W.3d 24, 29 (Mo. App. 2018) (citation omitted).

But the Court in *Savage* held one way the surety can rebut this *prima facie* proof can be rebutted is to show that the default judgment was the product of fraud or collusion: a default "judgment against the principal … **absent fraud [or] collusion** … is conclusive on the sureties." 103 S.W.2d at 902 (emphasis added); *accord*, *Bell v. W. Sur. Co.*, 524 S.W.3d 109, 114 (Mo. App. 2017) ("a judgment against the principal, [even when] obtained [by default], **absent fraud, collusion**, or clerical error in its entry, is conclusive on the sureties," quoting *Savage*, alterations in original, emphasis added).

This makes fraud and collusion defenses to the surety's liability under the default judgment, which the surety is entitled to assert when the claimant seeks to hold it to the default judgment. This is well-established throughout American law. *See, e.g.*:

- *Veros Credit, L.L.C. v. Sur. Bonding Co. of Am.*, No. 05-19-00586-CV, 2020 WL 2569911 at *1 (Tex. App. May 21, 2020) ("The default judgment is conclusive of the surety's liability **absent evidence of**

fraud, collusion, or that the default judgment altered the bond's terms) (emphasis added);

- *Fid. & Deposit Co. of Md. v. James*, 764 S.E.2d 351, 355 (W.Va. 2014) ("surety on a judgment bond is conclusively bound by a default judgment entered against its principal, even when the surety did not have notice of the prior suit against the principal, so long as the judgment is the type of judgment contemplated by the bond **and the surety cannot establish collusion or fraud**") (emphasis added);
- *McAlpine v. Zangara Dodge, Inc.*, 183 P.3d 975, 980 (N.M. App. 2008) ("Where it appears that the judgment against the defendant was obtained in a suit of which the surety had full knowledge, and which it had full opportunity to defend, the judgment therein is not only evidence, but conclusive evidence, against every defense **except that of fraud and collusion in obtaining it**") (emphasis added);
- *Int'l Fid. Ins. Co. v. China Constr. Am. (SC) Inc.*, 650 S.E.2d 677, 679 (S.C. App. 2007) ("**absent fraud, collusion**, or lack of jurisdiction, …, Surety may not now argue defenses which should or might have been raised in the action in which the judgment was recovered) (emphasis added);
- *Drill S., Inc. v. Int'l Fid. Ins. Co.*, 234 F.3d 1232, 1235 (11th Cir. 2000) (underlying judgment against principal is "conclusive evidence, against every defense **except that of fraud and collusion in obtaining it**") (emphasis added);

- *Axess Int'l, Ltd. v. Intercargo Ins. Co.*, 183 F.3d 935, 940 (9th Cir. 1999) ("there is no question as to the conclusiveness, as against the surety, of a judgment against the principal, if binding upon the latter **and free from fraud and collusion**") (emphasis added);
- *Int'l Fid. Ins. Co. v. Prestige Rent-A-Car, Inc.*, 715 So.2d 1025, 1029 (Fla. App. 1998) (default "judgment is prima facie evidence that the surety is liable, sufficient to support a verdict **unless it is rebutted by proof that it was obtained through fraud or collusion or that the loss of liability created by the judgment arose from acts other than those indemnified against under the conditions of the bond**" (emphasis added);
- *Ky. Ins. Guar. Ass'n v. Dooley Constr. Co.*, 732 S.W.2d 887, 888 (Ky. App. 1987) ("[w]here sureties have notice and opportunity to defend on an action against their principal they are generally bound by the judgment **except where such judgment is procured by collusion or fraud**") (emphasis added);
- *Johnson v. Smith*, 293 S.E.2d 644, 647 (N.C. App. 1982) ("such a judgment against the principal prima facie only establishes the sum or amount of the liability against the sureties, although not parties to the action, **but the sureties may impeach the judgment for fraud, collusion, or mistake, as well as set up an independent defense**) (emphasis added);
- *First Mobile Home Corp. v. Little*, 298 So.2d 676, 682-83 (Miss. 1974) ("a default judgment against a principal is conclusive against his

surety, **unless it is shown that the default judgment was obtained through consent of the debtor, or collusion so as to be a fraud upon the rights of the surety**") (emphasis added);

- *R&L Lumber Co. v. Summit Fid. & Sur. Co.*, 170 N.W.2d 594, 599 (Minn. 1969) (reversing judgment for surety and remanding for trial; default "judgment entered against [principal] was binding upon [surety], **absent fraud or collusion** …. If, as [surety] hints in its brief, there was any fraud on the part of plaintiff or any collusion between [claimant] and [principal], **[surety] has an opportunity to establish those facts during the trial of plaintiff's action on the bond. If fraud or collusion is found, [surety] will be relieved of its contractual obligation to pay the judgment entered against [principal]**") (emphasis added);
- *Farmers' Elevator Co. of Beresford v. U.S. Fid. & Guar. Co. of Baltimore, Md.*, 172 N.W. 519, 520 (S.D. 1919) ("When one is responsible by force of law or by contract for the faithful performance of the duty of another, a judgment against the other for a failure in the performance of such duty, **if not collusive**, is prima facie evidence in a suit against the party so responsible for that other. **If it can be made to appear that such judgment was obtained by fraud or collusion, it will be wholly set aside**") (emphasis added); and
- *Charles v. Hoskins*, 14 Iowa 471, 473 (1863) (same).

B. Viewing the record in the light most favorable to EMC, Four Star's default judgment against T&T was procured by fraud and collusion, just as the trial court held it was in the 2012 judgment in this case, making for a genuine dispute of material fact precluding summary judgment.

So, because Four Star's judgment against T&T is just *prima facie* evidence of EMC's liability, the law of Missouri per *Savage* and *Bell* – and the law of the United States generally – is that EMC now is entitled to proffer as its defense that the judgment was the product of collusion between T&T and Four Star as a fraud on both the court and on EMC's rights. Viewing the record in the light most favorable to EMC, the non-movant, and according it the benefit of all reasonable inferences, it established this defense, just as the trial court previously held it had after hearing the 2011 trial of this matter.

Viewing the record in the light most favorable to EMC, Four Star did not deliver materials that were incorporated or consumed in any part of the Project under a contract with any subcontractor. At some point before August 1996, D&E hired T&T as a subcontractor on the Project to install some block walls (D36 p. 4; D37 pp. 139-41). But D&E terminated T&T from working on the Project in August 1996 because T&T stopped showing up to work, and between September 17, 1996 and January 17, 1997, T&T did not perform any work on the Project at all (D36 p. 4; D37 pp. 140-41, 148). Thereafter, D&E itself, along with a different subcontractor, finished the job for which T&T had been hired (D36 p. 4; D37 pp. 140-41, 148).

Four Star's only allegations in both its 1997 case against T&T and in this case are that between September 1996 and January 1997, it rented equipment for use on the Project to T&T (D36 p. 5; D39 pp. 2-3). But this was

untrue, because by this point T&T had been fired from the Project and thereafter did not perform any work on the Project at all (D36 p. 4; D37 pp. 140-41, 148).

Therefore, viewing the record in the light most favorable to EMC and according EMC the benefit of all reasonable inferences, Four Star *did not* deliver any materials to T&T that were incorporated or consumed in any part of the Project during the time period alleged, because T&T was not on the Project during that period of time.

This means in turn that, viewing the record in the light most favorable to EMC, Four Star's claim against T&T was the product of fraud and collusion with T&T. Conspicuously, none of Four Star's alleged agreements with T&T are signed (D36 p. 6; D37 p. 173; D48 pp. 31-45; D49 pp. 1-17). And all the allegations about Four Star's transactions with T&T are that they occurred equally conspicuously shortly after D&E fired T&T from the Project (D36 p. 4; D37 pp. 140-41, 148). Indeed, *T&T's principal signed an affidavit so that Four Star could obtain the default judgment* ***against T&T*** (D103 pp. 10-12), which was false.

In Missouri, fraud has nine elements:

> 1) a representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of the falsity (or the speaker's awareness that he/she lacks knowledge of its truth or falsity); 5) the speaker's intent that the statement be acted upon by the other party in the manner contemplated; 6) that party's ignorance of the falsity; 7) reliance on the truth; 8) right to rely thereon; and 9) injury.

Hewlett v. Hewlett, 845 S.W.2d 717, 719 (Mo. App. 1993).

Viewing the record in the light most favorable to EMC, taking all its evidence as true, resolving conflicts in its favor, and according it the benefit of all inferences, Four Star's claims resulting in the 2005 default judgment plainly meet all nine elements of fraud, and the default judgment is the product of collusion between Four Star and T&T to prejudice EMC's rights:

- First, Four Star represented to the trial court in the 1997 case that it rented equipment to T&T for use on the Project between September 1996 and January 1997 (D36 p. 5; D39 pp. 2-3, 5-7).
- Second, this representation was false, because a month before that, in August 1996, T&T was fired from the Project, and thereafter did not perform any work on the Project at all (D36 p. 4; D37 pp. 140-41, 148). None of the alleged contracts between Four Star and T&T are signed (D36 p. 6; D37 p. 173; D48 pp. 31-45; D49 pp. 1-17).
- Third, this false representation was material, because without it Four Star's entire claim against T&T, and therefore D&E or EMC, fails.
- Fourth, Four Star knew its representation was false, because it could not have delivered any materials to the Project for T&T after T&T was fired, and in fact D&E finished T&T's part of the project itself (D36 p. 4; D37 pp. 140-41, 148). All of the allegations about Four Star's transactions with T&T are that they occurred conspicuously shortly after D&E fired T&T from the Project, lending a motive for T&T to collude with Four Star to get back at D&E for firing them (D36 p. 4; D37 pp. 140-41, 148). Further, T&T conspicuously did not answer Four Star's suit, and Four Star waited seven years to take a default

judgment against T&T (D36 p. 6; D42), which T&T's own principal supported by false affidavit (D103 pp. 10-12).

- Fifth, Four Star intended that the court in the 1997 case act on its false representations by awarding it a judgment against T&T that it believed it and its assignee, which was owned by Four Star's principals, could collect against EMC, a "deep pocket" (D36 p. 6; D42).
- Sixth, the court in the 1997 case was ignorant that Four Star's representations were false, because Four Star obtained a default judgment against T&T and dismissed EMC and D&E before they could explain using the evidence shown here that Four Star's claims were false (D36 p. 6; D37 p. 174; D42; D43 p. 11).
- Seventh, the court in the 1997 relied on Four Star's false representations, because it awarded Four Star the default judgment Four Star requested against T&T (D36 p. 62; D42).
- Eighth, the court had a right to rely on Four Star's false representations, as they were stated in court pleadings that are certified as true, Rule 55.03(c), and were supported by sworn affidavit (D103 pp. 10-12).
- Finally, unless EMC is not absolved of liability for Four Star's fraudulent representations, EMC will be injured by being monetarily liable to the plaintiffs.

Therefore, even if the default judgment Four Star obtained against T&T must be presumed conclusive on EMC, viewing the record in the light most favorable to EMC that presumption is rebutted because the judgment

was procured by fraud and collusion. *Savage,* 103 S.W.2d at 902; *Bell*, 524 S.W.3d at 114. EMC has presented "proof … that it was obtained through fraud or collusion, [and] that the loss or liability created by the judgment arose from acts other than those indemnified against under the conditions of the bond." *Prestige*, 715 So.2d at 1029. EMC has "shown that the default judgment was obtained through consent of [T&T], [and] collusion so as to be a fraud upon [its] rights …." *Little*, 298 So.2d at 682-83. EMC now must "ha[ve] an opportunity to establish those facts during the trial of [the] plaintiff[s'] action on the bond. If fraud or collusion is found, [EMC] will be relieved of its contractual obligation to pay the judgment entered against" T&T. *R&L Lumber*, 170 N.W.2d at 599.

An alleged supplier cannot simply sue a subcontractor, obtain a default judgment against the subcontractor alone, and then automatically hold the contractor's surety liable, when the surety has evidence there was no such debt and the default judgment was the product of fraud and collusion. But that is exactly what happened here.

Accordingly, if EMC was not entitled to judgment either entirely in its favor or against it limited only to the principal in the underlying judgment, then a genuine dispute of material fact precluding summary judgment for Four Star (or for RGH, if RGH somehow prevails in its appeal).

If the Court does not affirm the judgment against RGH and reverse the judgment in favor of Four Star, or does not limit EMC's liability solely to the principal in the 2005 judgment, then the Court should reverse the trial court's judgment and remand this case for trial.

Conclusion

The Court should reverse the trial court's summary judgment in favor of Four Star and remand this case for judgment in EMC's favor against Four Star. Alternatively, the Court should modify the amount of the summary judgment in favor of Four Star (or RGH, should RGH prevail in its appeal) to $18,873.18. Alternatively still, the Court should reverse the trial court's judgment in favor of Four Star and remand this case for trial.

In all other respects, the Court should affirm the trial court's judgment.

Respectfully submitted,

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b), as this brief contains 19,787 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this brief of the appellant, which is being maintained by Jonathan Sternberg, Attorney, P. C. per Rule 55.03(a), and that on June 25, 2021, I filed a true and accurate Adobe PDF copy of this brief of the respondent-appellant and its appendix via the Court's electronic filing system, which notified the following of that filing:

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