SC90054

RONALD JOE HAYES and TERESA HAYES,
husband and wife,
Plaintiffs-Appellants

vs.

TRISHA G. PRICE,

Defendant-Respondent.

Appeal from the Circuit Court of Jasper County, Missouri
The Honorable George C. Baldridge, Senior Judge
Jasper County Case No. 05AO-CC00035

APPELLANTS' SUBSTITUTE BRIEF

David W. Ransin, P.C.
David W. Ransin
Missouri Bar No. 30460
1650 E. Battlefield Road, Suite 140
Springfield, MO 65804
Telephone: (417) 881-8282
Fax: 417-881-4217
Internet: david@ransin.com
Attorney for Plaintiffs-Appellants

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II. JURISDICTIONAL STATEMENT

This is an appeal by plaintiff Ron Hayes from the trial court's judgment in a personal injury civil action arising from a car/motorcycle collision filed in and tried before the Circuit Court of Jasper County, Missouri, after a jury verdict in his favor, based upon rulings allowing the defendant's submission of a "lookout" comparative fault verdict directing instruction, and the trial court's denial of prejudgment interest under Sec. 408.040.2 R.S.Mo.

This action does not involve the construction of the Constitution of the United States or of this State, the validity of a treaty or statute of the United States, or any authority exercised under the laws of the United States, the construction of the Revenue Laws of this State, title to any office under this State or a criminal offense involving a sentence of death or life imprisonment. Thus, this appeal was originally within the general appellate jurisdiction of the Missouri Court of Appeals, Southern District, V.A.M.S. Const. Art. V, Sec. 3. After issuance of the opinion by the Court of Appeals, both plaintiff and defendant timely filed their separate Applications for Transfer pursuant to Rule 83.04 which were granted, therefore this appeal is within the proper jurisdiction of this Court pursuant to V.A.M.S. Const. Art. V, Sec. 10.

III. STATEMENT OF FACTS

A. Overview

This is an appeal limited to a review of only two points, first, of the trial court's judgment reducing the amount of the verdict by 20% fault assessed against plaintiff Ron Hayes based upon the trial court's submission of the defendant's "lookout" comparative fault verdict directing instruction (Appendix, 6), and second, its denial of plaintiff's request for prejudgment interest when the net verdict exceeded the prejudgment demand for settlement. It must also be noted that the version of Sec. 408.040.2 R.S.Mo. applicable to this action is in the form existing at the time of filing suit, which has been amended by H.B. 393 effective August 28, 2005 (Appendix, 4). Only plaintiff Ron Hayes appeals as the jury returned a verdict against the claim of his wife on her consortium claim. Because no issue raised in this appeal pertains to any damage evidence, the transcript and legal file omit the same.

B. Undisputed General Substance of the Underlying Suit

On September 25, 2004 as defendant Trisha Price approached the four-way intersection of Maiden Lane and 13th Street in Joplin, Missouri, northbound on Maiden Lane with her car in the left lane of the four-lane road (i.e., there were no separate turn lanes), she made a left turn to the west on 13th Street and drove directly into the left side of plaintiff Ron Hayes, who was driving his motorcycle straight through the intersection southbound, causing him serious injuries requiring multiple surgeries to his left leg and hip, and resulting in his permanent disability at age 43

(Appendix, 7). Both drivers had a "green ball" on their respective traffic control signals. T. 323. Plaintiff was driving about 30 mph in a 35 mph zone. T. 350. Plaintiff was not doing anything unsafe or reckless, and according to defendant's expert witness, plaintiff was not "even close to violating" any traffic law or any "rule of the road." T. 324. An unidentified vehicle in the southbound left lane, often referred to as an SUV or "the Bronco," was stopped waiting to turn left to the east on 13th Street, which created a "blind zone" blocking the view of each other for both plaintiff and defendant until just seconds before the collision. T. 106, 107, 140; Appendix, 8.

C. Facts Material to this Appeal: POINT ONE: Comparative Fault

Plaintiff submitted his case to the jury on the theory of defendant's failure to yield, and over plaintiff's objection, defendant was permitted to submit a comparative fault instruction and make argument to the jury in closing based upon the affirmative defense of plaintiff's failure to keep a careful lookout under M.A.I. 17.05. T. 164-175, 200-203, 206-207; L.F. tab 3, page 22, 23. Plaintiff moved in limine to exclude any matter regarding any comparative fault of plaintiff which was deferred by the trial court. L.F. tab 4, page 26, item 10. Both parties moved for directed verdicts, and all motions were denied. L.F. tab 1, page 9; tabs 6, 7, and 8; T. 123-126, 161-162.

This wreck happened on a Saturday morning in clear and dry weather as plaintiff and his friend, Greg Cook, were each riding their separate motorcycles to a

motorcycle charity event for blind children. T. 37-39, 94-95. The expert accident reconstructionist retained by defendant opined that the scene had open, clear visibility and there was nothing about the intersection that in any way contributed to the wreck. T. 323. Defendant was driving northbound on Maiden Lane in Joplin, Missouri which is a four-lane north and south bound road. (Tr. 137). As defendant approached the intersection with 13th Street, defendant came to a stop in the left lane in preparation to turn left. (Tr. 139). At the same time, plaintiff and Mr. Cook were riding their motorcycles southbound on Maiden Lane. (Tr. 94). An SUV, possibly a Ford Bronco, driven by an unidentified individual, was stopped in the inside left southbound lane of Maiden Lane preparing to turn left. (Tr. 106, 107, 140).

The motorcycles approached the intersection in a "staggered" formation, with Mr. Cook in the lead riding in the left half of the right hand, or curb lane, separated by about ½ second, or several motorcycle lengths. T. 40, 48, 120. Plaintiff was following at the same speed, and was in the right half of the same lane. T. 39-40, 112, 114.

As plaintiff approached the intersection, his attention was directed to his right where a car was stopped at the two lane cross street heading east, as he wanted to be sure it did not make a right turn in front of him. T. 108-109. When plaintiff drove through the intersection, he did not see the defendant's car turning toward him from his left until just before impact. T. 110.

As defendant approached the intersection and began to slow down to wait for

traffic to clear, she saw both southbound motorcyclists well north of the area and to the right of the Bronco. T. 244-249. Defendant then brought her car to a full stop, and began her left turn just as the first motorcyclist was passing her heading southbound from in front of her and to her left. T. 140-142. The first motorcyclist was just north of the southwest corner at that point. T. 156-157. When defendant started her turn, plaintiff was not visible to her. T. 301.

As she made her left turn, defendant never saw plaintiff heading toward her after he came out of the "blind zone" from alongside of the Bronco until the impact. T. 143, 145, 153, 154, 256-257. As the defendant continued her turn the collision occurred. T. 112-114, 143.

Plaintiff did not retain any liability expert witnesses of his own, but he did present the deposition testimony by video tape of Mr. McKinzie, the liability accident reconstruction expert retained by defendant, during plaintiff's case in chief. T. 259-327.

Mr. McKinzie, a former Kansas Highway Patrolman experienced in accident reconstruction since 1984, conducted a time-distance analysis for the defense, and testified that he calculated that it would take defendant between 3.1 and 3.9 seconds to accelerate from the defendant's stopped position until impact with plaintiff depending on her possible starting positions and the arc traveled. T. 261, 329, 336, 340. He calculated that plaintiff would be in the blind zone about 139 to 171 feet to the north of the area of impact when defendant began her turn. T. 269, 350. He

believed defendant's speed at impact would be about 10.4 to 12.9 mph. T. 262, 341. With the Bronco in its adjacent stop bar, he testified that both drivers had an opportunity of about 2 seconds or 88 feet north of the area of impact to view each other prior to impact if plaintiff was traveling about 30 mph as he came out of the blind zone created by the Bronco. T. 267, 269, 303-304, 314, 360.

Defendant's expert used 3/4 second for perception time, and 3/4 second for reaction time, for a total 1.5 seconds for perception/reaction time for both drivers. T. 352-354. Both defendant and plaintiff would have only about 2 seconds to react and try to avoid the collision, and using assumed figures more favorable to defendant, in his opinion defendant had both the time and ability to stop prior to impact if she had looked to the north after beginning her turn. T. 314-321.

Mr. McKinzie testified that in his opinion plaintiff did nothing that in any way contributed to this crash. T. 277-279.

In his opinion, it was reasonable for plaintiff as he approached the intersection to pay attention to the car to his right to make sure it did not pull out in front of him. T. 283. When plaintiff came out of the blind zone, it was too late for him to do anything and there was still going to be a collision even if he saw defendant before impact. T. 284-285. A reasonably safe separation between the two motorcycles would be ½ to one second, which would be equal to about 45 feet at one second. T. 296, 302. In that position, it would be physically impossible for defendant to turn in between the two motorcycles without hitting plaintiff. T. 297, 302-303, 370-372. In

his opinion, it was not likely that plaintiff swerved from the left lane into the right lane while he was in the blind zone as was suggested by defendant's testimony. T. 297-299.

Further testimony by Mr. McKinzie was presented by defendant during her case in chief through additional video tape from the expert's second deposition taken the day before trial began (as he could not attend trial due to a last minute scheduling conflict). T. 332-334. This time, Mr. McKinzie testified that the motorcycles first came out of the blind zone such that plaintiff and defendant became visible to each other only 34 to 35 feet away from the area of impact, or about 3/4 second to 8/10 second. T. 351, 352, 354. He again opined that by the time plaintiff came out of the blind zone at 30 mph it was too late for plaintiff to do anything to avoid a collision. T. 372. He also reaffirmed his prior testimony that he did not find anything that plaintiff did or failed to do that directly or indirectly caused this crash. T. 378. Defendant's expert could not categorize anything that plaintiff did as careless. T. 378-379.

There was no other testimony or evidence regarding whether plaintiff had the time, means or ability to avoid this crash in any fashion.

Over plaintiff's objections that the submission of a "lookout" comparative fault verdict directing instruction was not supported by any evidence, the trial court permitted Instruction No. 10 based on M.A.I. 17.05, as offered by defendant. T. 164-167, 171; L.F. tab 9.

Over plaintiff's objection, the trial court also permitted defendant to argue in closing that plaintiff shared fault in directly contributing to cause this wreck and his injuries. T. 200-203, 206-207.

D. Facts Material to This Appeal: POINT TWO: Prejudgment Interest

Before filing suit, plaintiff made a demand for settlement "pursuant to the terms of Section 408.040(2) of the Revised Statutes of Missouri for the sole purpose of qualifying a judgment awarding prejudgement interest on this claim." L.F. tab 13, Exhibit C, pages 56-60; Appendix, 5.

The offer stated that it could be only accepted by payment of the amount of $325,000 in addition to the production of specific information, documentation, and sworn witness statements. Id.

The parties to the demand were plaintiff Ronald Hayes individually as the releasing party, and defendant Trisha Price plus her parents Patrick and Gaylia Price, as the parties to be released. Id., at 56. Plaintiff expressly reserved the right to file suit against any party while the offer was pending. Id., at 57.

The letter was sent by certified mail and received on December 22, 2004. Id., at 60. That demand was kept open for 60 days, it was never accepted by defendant, plaintiffs filed suit on January 13, 2005, depositions of the defendant and her parents were taken on February 28, 2005, and the case proceeded to trial beginning February 14, 2006. L.F. tabs one, pages 1, 9.

The letter was sent to defendant's counsel and extended an offer to settle

plaintiff's claim against "your clients" in exchange for:

". . . the delivery of copies of the titles to all vehicles owned or driven by, or available for the use of Patrick, Gaylia, or Trisha Price on September 25, 2004, certified copies of all indemnity agreements in any form from any source whatsoever, all applicable liability insurance coverages, including declaration pages, primary, excess, or otherwise, issued on those vehicles, or to or for the benefit of, or on behalf of Patrick, Gaylia, or Trisha Price, or any other named insured, which insure or stand to indemnity any of them for any of their potential liability arising in any fashion from the collision in this matter and to compensate the damages claimed by Ronald Hayes, a sworn statement of Patrick, Gaylia, and Trisha Price taken in person by [the plaintiff's attorney] at [his] cost, and recorded and transcribed by a court reporter, in addition to the payment of $325,000.00, and reimbursement of all court costs, payable in cash or its equivalent, and all of which must be delivered to [the plaintiff's attorney's] office within 10 days of acceptance, in exchange for a R.S.Mo. §537.060 release." Id., at 56.

The offer to settle was not conditioned or contingent on the actual content of any of the additional information or items requested by plaintiff. Id.

During the 60 days the offer was held open, no one made any effort to accept the offer, nor were any counteroffers made. No complaints were communicated by defendant or her counsel about who were or were not parties to the offer, or that any terms were indefinite. No protests or requests for clarification were expressed by

them regarding the terms of plaintiff's offer. No communications ensued expressing any difficulty by defendant or her counsel in procuring any cooperation of any party or in obtaining the requested additional information or documentation.

After the verdict was returned for an amount exceeding the prejudgment offer, even after accounting for the 20% comparative fault reduction, plaintiff moved for the addition of prejudgment interest pursuant to his rights under Sec. 408.040.2 R.S.Mo. by tendering a Judgment including the same. L.F. tab 11. Instead, the trial court entered a Judgment on March 3, 2006 in the form tendered by defendant for the reduced amount based on the 20% comparative fault reduction without any prejudgment interest. L.F. tab 12.

E. Facts Common to Both Points Regarding Post Trial Matters

The jury returned its verdict in favor of plaintiff Ron Hayes, assessing his total damages at $625,000, finding in favor of defendant on the consortium claim made by Mrs. Hayes, and apportioning 20% fault to plaintiff Ron Hayes, and 80% fault to defendant. T. 228; L.F. tab 10. Judgment was entered in the form tendered by defendant on March 3, 2006 which reduced the jury's verdict by $125,000 based on the 20% comparative fault assessment. L.F. tab 12.

Plaintiff then filed his Motion to Amend the Judgment, in the Alternative Motion for Judgment Notwithstanding the Verdict, limited to the identical two points presented here. L.F. tab 1, page 10; tab 13. Defendant filed her suggestions in opposition claiming that the verdict director submission "was supported by ample

evidence," (L.F. 63), and that no prejudgment interest should be granted because the offer to settle failed to conform to the statutory requirements as it required defendant to "procure the conduct of persons who were not and are not parties to this action," (L.F. 65), and that such "demand for third-party performance renders the contract unenforceable," (L.F. 67), in reply to which plaintiff filed his rebuttal suggestions. L.F. tab 1, page 11; tabs 14 and 15. The trial court overruled both of plaintiff's motions after a hearing on May 2, 2006. L.F. tab 1, page 11; tab 17.

Plaintiff filed his Notice of Appeal with the Jasper County Circuit Clerk on May 12, 2006. Id.

On September 27, 2006, plaintiff filed his Motion Nunc Pro Tunc to Amend Judgment to reflect the trial court's ruling denying prejudgment interest which had been inadvertently omitted from the text of the original Judgment, the motion was sustained, and a Judgment Amended Nunc Pro Tunc was filed the same date. L.F. tab 18, page 97; tab 19, page 100; Appendix, 2-4.

On February 29, 2009, the Southern District of the Missouri Court of Appeals issued its opinion granting Point I and holding that giving the comparative fault verdict director was prejudicial error, and thus the appellate court modified the judgment by adjusting the amount due plaintiff from $500,000 to $625,000. Hayes v. Price, SD27730 (Mo. App. S.D. 2-24-09) slip op. 7, 11. Defendant filed her Application for Transfer on this point. Secondly, the Court of Appeals denied Point II holding that because plaintiff's settlement offer would not have resulted in an

enforceable contract even if it had been accepted by defendant, the offer did not comply with the requirements of Section 408.040.2 R.S.Mo. Hayes, at 10-11. Plaintiff filed his Application for Transfer on Point II. This Court granted both applications for transfer.

IV. POINTS RELIED ON AND AUTHORITIES

A. FIRST POINT: COMPARATIVE FAULT

The trial court erred as a matter of law to the prejudice of plaintiff when it submitted defendant's verdict directing Instruction No. 10 to the jury and allowed defendant to argue that plaintiff was comparatively at fault for his "failure to keep a careful lookout" in closing argument,

> **In that a submission of comparative fault under M.A.I. 17.05 inherently requires substantive evidence that the opposing party had both the means and the ability to avoid the collision, and such a submission is improper as a matter of law without such evidence,**
>
> > **Because defendant submitted absolutely no substantive evidence that plaintiff had both the means and the ability to avoid the collision, and in fact, defendant's only expert witness testified that he did not find anything that plaintiff did or failed to do that directly or indirectly caused this crash, thus leaving the issue open to sheer speculation and constituting a roving commission for the jury.**

Bell v. United Parcel Services, 724 S.W.2d 682 (Mo. App. 1987)

Wiskur v. Johnson, 156 S.W.3d 477 (Mo. App. 2005)

Heberer v. Duncan, 449 S.W.2d 561 (Mo. banc 1970)

Butler v. Hicks, 554 S.W.2d 449 (Mo. App. 1977)

M.A.I. 17.05

B. SECOND POINT: PREJUDGMENT INTEREST

The trial court erred as a matter of law to the prejudice of plaintiff when it refused to add prejudgment interest under Sec. 408.040.2 RSMo. to the judgment,

In that the trial court has no discretion to deny and must award prejudgment interest under Sec. 408.040.2 RSMo. to the judgment if plaintiff satisfied all the requirements plainly set forth in the statute,

Because plaintiff was entitled under the principle of freedom of contract to tailor his demand as he saw fit so long as all the explicit requirements set forth in Sec. 408.040.2 R.S.Mo. were satisfied, since the additional items and information required to be produced by defendant in plaintiff's demand did not violate any express requirement of the statute, nor frustrate its intended purpose.

Hurst v. Jenkins, 908 S.W.2d 783 (Mo. App. W.D. 1995)

McCormack v. Capital Elec. Const. Co., 159 S.W.3d 387 (Mo. App. 2005)

Lester v. Sayles, 850 S.W.2d 858 (Mo. banc 1993)

Hemann v. Camolaur, Inc., 127 S.W.3d 706 (Mo. App. W.D. 2004)

Section 408.040.2 R.S.Mo.

V. STANDARD OF REVIEW

A. Comparative Fault

The issue of whether the jury was properly instructed is a question of law and is to be determined on the record with little deference given to the trial court's decision. Kuzuf v. Gebhardt, 602 S.W.2d 446, 449 (Mo. banc 1980). This Court should review the evidence and inferences therefrom in a light most favorable to the submission of the instruction. Egelhoff v. Holt, 875 S.W.2d 543, 548 (Mo. 1994); Vandergriff v. Missouri Pac. R.R., 769 S.W.2d 99, 104 (Mo. banc 1989). Reversal due to comparative fault instructional errors are required where the errors are of such a nature that there is substantial potential for prejudicial effect. Baldridge v. Lacks, 883 S.W.2d 947, 956 (Mo. App. 1994).

B. Prejudgment Interest

Plaintiff claims that the trial court erred as a matter of law in overruling his Motion to Amend the Judgment, Alternative JNOV because he was entitled to an award of prejudgment interest calculated under Sec. 408.040.2 R.S.Mo. by operation of the statute as a matter of law. This argument presents issues regarding the interpretation of Sec. 408.040.2 R.S.Mo. and its application to this case, and the interpretation of a statute under these circumstances is a question of law, therefore, this point requires de novo review on appeal. Ochoa v. Ochoa, 71 S.W.3d 593, 595 (Mo. banc 2002); Smith v. Shaw, 159 S.W.3d 830, 833 (Mo. banc 2005).

VI. ARGUMENT

A. POINT ONE: COMPARATIVE FAULT

Defendant was erroneously allowed to submit and argue that plaintiff was comparatively at fault for his "failure to keep a careful lookout" under M.A.I. 17.05 and the jury assessed 20% fault against plaintiff on that basis, thus significantly reducing his judgment by $125,000 to plaintiff's prejudice.

Submission of comparative fault under M.A.I. 17.05 inherently requires proof that plaintiff had both the means and the ability to avoid the collision, and absent the same, it is reversible error to submit this theory of comparative fault to the jury.

A failure to keep a lookout submission contains two inherent components, the ability to see and the ability, including time and means, to avoid. Heberer v. Duncan, 449 S.W.2d 561, 563 (Mo. banc 1970); Bunch v. McMillian, 568 S.W.2d 809, 811 (Mo. App. 1978). It is plaintiff's burden to supply substantial evidence of both components and this court may not "imagine the existence of evidence, when none in fact exists, or supply the missing evidence, to flush out an otherwise insubmissible case, nor can it spring inferences from nowhere upon which to predicate submissibility." Lewis v. State Security Ins., Co., 718 S.W.2d 539 (Mo. App. 1986) (quoting from Wallander v. Hicks, 526 S.W.2d 848, 850 (Mo. App. 1975)). Bell v. United Parcel Services, 724 S.W.2d 682, 685 (Mo. App. 1987).

"A comparative fault instruction is not warranted in every negligence suit. Rather, the defendant bears the burden of producing evidence to support the

instruction." Wendt v. General Acc. Ins. Co., 895 S.W.2d 210, 215 (Mo. App. 1995). A comparative fault instruction must be supported by substantial evidence and cannot be based upon mere speculation or conjecture. Id.; Benedict v. Northern Pipeline Constr., 44 S.W.3d 410, 423 (Mo. App. 2001). It is error for the trial court to give a comparative fault instruction that is not supported by substantial evidence. Stevens v. Craft, 956 S.W.2d 351, 358-59 (Mo. App. 1997); McLeod v. Beloate, 891 S.W.2d 476, 478 (Mo. App. 1994). Reversal on appeal is required if the error was prejudicial. Blackwell v. Simmons, 202 S.W.3d 715, 716 (Mo. App. 2006).

Over plaintiff's objection, the court submitted the following verdict director at defendant' s request:

INSTRUCTION 10

In your verdict, you must assess a percentage of fault to plaintiff Ronald Hayes whether or not you believe defendant Trisha Price was partly at fault, if you believe:

First, plaintiff Ronald Hayes failed to keep a careful lookout,

Second, plaintiff Ronald Hayes was thereby negligent, and

Third, such negligence of plaintiff Ronald Hayes directly caused or directly contributed to cause any damage plaintiff Ronald Hayes may have sustained.

L.F. tab 10.

"For a lookout submission to be proper, substantial evidence must show that the breach of that duty as the proximate cause of the accident. Cypret v. Templeton,

912 S.W.2d 630, 632 (Mo. App. 1995)." Wiskur v. Johnson, 156 S.W.3d 477, 480 (Mo. App. 2005).

"Even though a motorist negligently fails to keep a careful lookout and to see another motorist and to realize that a collision will likely occur if he does not take some precautionary measure, this alone does not warrant a lookout instruction, unless in addition there is substantial evidence that he 'had the means and ability to have so acted that a collision would have been avoided' if he had kept such a lookout." Boehm v. St. Louis Public Service Co., Mo., 368 S.W.2d 361, 367 (Mo. 1963); Moore v. Ready Mix Concrete Co., 329 S.W.2d 14, 25 (Mo. Banc 1959); Creech v. Riss & Co., 285 S.W.2d 554, 563 (Mo. 1955); Miller v. St. Louis Public Service Company, 389 S.W.2d 769 (Mo. 1965). "Having the means and ability to avoid a collision means not only the mechanical appliances, such as steering apparatus with which to swerve, signaling equipment with which to warn, or braking apparatus with which to slow down or stop, but also the existence of sufficient time and distance, considering the movements and speeds of the vehicles, to enable the party charged to take effective action in avoidance. Zalle v. Underwood, Mo., 372 S.W.2d 98, 102 [(Mo. 1963)]." Stegall v. Wilson, 416 S.W.2d 658, 662 (Mo. App. 1967).

Even where evidence showed a driver failed to look before entering a blind intersection it was error to give M.A.I. 17.05 absent evidence that had the driver kept a lookout he could have taken effective action to avoid the collision. Heberer v. Duncan, 449 S.W.2d 561, 563 (Mo. banc 1970).

Failure to see that which is visible, standing alone, is insufficient to warrant

giving M.A.I. 17.05; there must be evidence the driver could have taken timely and effective evasive action. Butler v. Hicks, 554 S.W.2d 449 (Mo. App. 1977).

The rules stated in Dick v. Carbon, 926 S.W.2d 172 (Mo. App. 1996) are applicable here. On similarly deficient facts, the court held that even such minimal evidence does not constitute substantial evidence sufficient to support the failure to keep a careful look out comparative fault verdict directing instruction as to the plaintiff. Id., at 173. A defendant seeking such a comparative fault instruction bears the burden to show that had plaintiff been keeping a careful lookout, plaintiff could have reacted in time to avoid the crash, and cited Wendt v. General Acc. Ins. Co., 895 S.W.2d 210, 216 (Mo. App. 1995). Id. Substantial evidence is not mere inference alone and the party offering the instruction must show that the party alleged to have failed to keep a careful lookout had both the means and ability to have avoided the collision. Id.

Having the means and ability to avoid the crash include evidence that sufficient time and distance were available considering the movement and speed of the vehicles. Thurman v. Anderson, 693 S.W.2d 806, 807 (Mo. banc 1985). Just as was considered in Dick, even if this Court assumes defendant's evidence was sufficient to show plaintiff here failed to keep a careful lookout, there is no evidence in the record to support the necessary element that plaintiff had either the means or ability, much less both, to avoid the collision if indeed he had kept a careful lookout. Dick, at 173. More importantly, despite retaining an expert accident reconstructionist, absolutely no evidence was presented by defendant to show directly or inferentially that

plaintiff's stopping distance or ability to swerve out of the way was sufficient to avoid the crash if plaintiff reacted immediately at the very first instant defendant asserts that he should have. As a matter of law, this evidence is not sufficient to support the comparative fault instruction, and submission of that instruction was improper, and caused severe prejudice to plaintiff. Instead of remanding, this Court can itself order that the Judgment be modified to eliminate the reduction in the damages for comparative fault. Id.

In Finninger, it was held that the trial court committed reversible error in its submission of an instruction on contributory or comparative negligence of a plaintiff driver, where the defendant driver of the car which injured plaintiff provided no direct evidence that plaintiff had seen defendant in time to avoid the collision, nor did defendant prove it circumstantially, thus providing nothing more than speculative deductions. Finninger v. Johnson, 692 S.W.2d 390, 394-95 (Mo. App. 1985).

To submit either "failure to swerve" or "lookout" instructions, the submitting party must show when the opposing party knew or should have known about the potential danger, and that they had sufficient time to take effective precautionary action. Morgan v. Toomey, 719 S.W.2d 129, 130-133 (Mo. App. 1986).

The submission of a jury instruction on "failure to keep careful lookout" must be supported by substantial evidence from which a jury could find that the allegedly negligent party could have seen the other vehicle or person in time to have taken effective precautionary action if the party had exercised the highest degree of care in keeping a lookout. Lewis v. State Sec. Ins. Co., 718 S.W.2d 539, 540 (Mo. App.

1986).

Under relatively similar facts and speeds, the court in Janicke determined that some appreciable time is required for a driver such as plaintiff here within which to react effectively before a "lookout" submission can be properly predicated, otherwise the jury would be forced to engage in various surmises and speculation as to what evasive action plaintiff could have taken, and absent proper evidence, the submission is prejudicial error and the judgment must be reversed. Janicke v. Hough, 400 S.W.2d 645, 649-50 (Mo. App. 1966).

Here, defendant herself testified that she never saw plaintiff until the instant before impact, and no other lay witness testified that plaintiff had both the means and the ability to avoid the collision, thus neither defendant's testimony nor that of any other lay witness amounted to substantive evidence sufficient to support the M.A.I. 17.05 submission of "failure to keep a careful lookout." T. 143, 145, 153, 154, 256-257.

Defendant's only expert witness, testifying by deposition only, stated very specifically that plaintiff did not have either the opportunity or the means to avoid the collision. T. 277-279, 378-379.

It was clearly improper and inherently prejudicial to plaintiff to submit a verdict director on comparative fault and allow defendant to argue such to the jury as the jury returned a verdict assessing 20% fault against plaintiff, thus reducing his recovery by $125,000. Since this instruction was the sole means for the jury to assess any percentage of fault against plaintiff, the error was prejudicial.

To correct this error, either this Court must amend the judgment to reflect the correct result of 0% fault against plaintiff, and 100% fault against defendant, with a total judgment principal amount of $625,000, with such amended judgment dated and effective as of March 3, 2006, or remand and order the trial court to do the same.

B. POINT TWO: PREJUDGMENT INTEREST

The issues presented here are limited to whether plaintiff is entitled to prejudgment interest on his judgment as a matter of law after satisfying all the requirements plainly set out in Sec. 408.040.2 R.S.Mo. in light of his unambiguous demand for settlement which also included terms in addition to the payment of a discrete sum certain. Although Sec. 408.040.2 R.S.Mo. as it applies to this particular case has since been repealed and reenacted with significant amendments, denial of interest under these facts will continue to cause serious ramifications in other cases critically disrupting the use and application of the new and the old versions of the statute, and thus will likely affect all tort litigants in many future cases. Adding new requirements not expressly included in the statute will render it a useless tool in terms of promoting settlements.

Plaintiff properly requested relief under Sec. 408.040.2 R.S.Mo., fully satisfied all the express requirements, was entitled to prejudgment interest as a matter of law, yet was erroneously denied prejudgment interest on the total of the principal amount plus court costs in his judgment against defendant, and has been thereby prejudiced. The statute imposes a duty on the trial court to grant the interest when the requirements are met, and no discretion is allowed. Sec. 408.040.2 R.S.Mo. states:

> 408.040. Interest on judgments, how regulated - tort cases, prejudgment interest allowed when, procedure.
>
> 2. In tort actions, if a claimant has made a demand for payment of a claim or an offer of settlement of a claim, to the party, parties or their

> representatives and the amount of the judgment or order exceeds the demand for payment or offer of settlement, prejudgment interest, at the rate specified in subsection 1 of this section, shall be calculated from a date sixty days after the demand or offer was made, or from the date the demand or offer was rejected without counter offer, whichever is earlier. Any such demand or offer shall be made in writing and sent by certified mail and shall be left open for sixty days unless rejected earlier. Nothing contained herein shall limit the right of a claimant, in actions other than tort actions, to recover prejudgment interest as otherwise provided by law or contract.

The facts in Hurst v. Jenkins, 908 S.W.2d 783 (Mo. App. W.D. 1995) are squarely on point and should be controlling here. The issues in Hurst were limited to the propriety of prejudgment interest after a judgment for the plaintiffs in an automobile collision claim. Two contentions were raised: (1) plaintiffs did not make a proper settlement demand as it requested "documentation and information" regarding insurance coverage, in addition to the other driver's net worth, and his statement detailing his version of the collision; that is: "because it was conditioned upon the occurrence of events other than the payment of money"; and, (2) prejudgment interest should be denied because the insurance carrier offered to pay the policy limits. Id., at 784, 785. Also, as here, full compliance with the explicit requirements of Sec. 408.040.2 R.S.Mo. was judicially admitted. Id., at 786.

The court of appeals in Hurst properly denied both contentions. First, since all

the clearly-stated terms of the statute admittedly had been met, requesting additional information and conduct did not invalidate the demand under the statute. Id., at 786. Secondly, the defendant's attempted acceptance on less than the demanded terms (a counteroffer, thus an obviously unenforceable "acceptance") was deemed to be completely "irrelevant," and neither invalidated the demand, nor the plaintiffs' right to prejudgment interest under the statute. Id., at 786-87. The court of appeals found no reason to engage in a collateral analysis by resorting to extrapolation from basic contract principles and predicting whether the defendant's attempted acceptance would be enforceable. "The plain meaning of these statutory provisions is that, unless the parties conclude a settlement within the sixty-day period after the demand is made, the response [,or complete absence thereof,] of the other party to the demand or offer of settlement is irrelevant except to determine the date on which the prejudgment interest begins to accrue." Id. (parenthetical commentary/observation added).

If defendant here had accepted plaintiff's offer but timely asserted that her parents affirmatively and absolutely refused to act or consent, or claimed full performance was impossible, then the issue of enforcement and the result might be different, but such is not the case here. It should be no surprise that different facts might yield a different result. Instead, defendant is now rewarded handsomely for never even trying to accept the offer and she engaged in no negotiations at all, which is completely contrary to the purpose of Sec. 408.040.2 R.S.Mo. in terms of promoting settlements. Such requires two sides coming to the table.

The prejudgment interest statute serves two important public policies. Lorabee v. Washington, 793 S.W.2d 357, 360 (Mo. App. 1990). The first is to ensure compensation to claimants for the true cost of money damages they have incurred due to the delay of litigation. The second is to promote settlement and to deter unfair benefit from the delay of litigation where liability and damages are fairly certain. Id. The statute does not guarantee a settlement will result, but without the encouragement of early demands with incentive to keep them low, and a correlated risk to the defense to ignore the same at their peril, settlements will be fewer and less frequent. Furthermore, nothing in the statute requires that the offer stand in bare form as outlined in its requirements without any other terms added. Freedom of contract is a very basic principle of extreme importance to our system of laws and commerce.

"Our courts have recognized that Section 408.040.2 serves two public policies: (1) it compensates claimants for the true cost of money damages they have incurred due to the delay of litigation; and (2) it promotes settlement and deters unfair benefit from the delay of litigation. Brown v. Donham, 900 S.W.2d 630, 633 (Mo. banc 1995)." McCormack v. Capital Elec. Const. Co., 159 S.W.3d 387, 402 (Mo. App. 2005). It is also very important to not limit one's analysis to only one side of the two-part purpose of the statute, that being the obligation of the plaintiff to allow defendant to buy her peace, to the exclusion of the reciprocating obligations on the defendant to come to the table to negotiate, and to avoid recalcitrance and delay. In fact, while the statute's ultimate goal is settlement, its first and primary goal is to encourage negotiations, with the hope that a full and early settlement will result. Without

negotiations, with active participation by both sides, settlement is not even remotely possible. It should also be noted that the statute does not require that a defendant must be entitled to buy her peace by simply paying this sum to plaintiff. To suggest such should be true creates and imposes legal requirements not contained in the plain words of the statute nor anywhere else in the law.

Also, it is very important to point out by contrast that defendant has not and cannot state any beneficial public policy to be promoted by the rule she advances, nor any interest or public policy which would be harmed or violated by the award of prejudgment interest to plaintiff here.

In the instant case, at the time this offer was extended, liability was fairly certain, and Mr. Hayes' damages were significant enough to raise the great likelihood that defendant did not have sufficient insurance coverage or other resources by which to begin to properly compensate him for his expected lifetime losses, therefore, it was critical for his counsel to diligently investigate those resources and determine the full extent of the same, along with possible additional liable parties or theories of vicarious liability as early in the case as feasible. If it were quickly determined that there were no other liable parties and the resources for compensation were relatively limited, then it was definitely in Mr. Hayes' best interest to avoid suit entirely and proceed with a settlement at a time and point where his costs and attorney fees could be compromised and kept to a minimum, thus netting him the largest fund possible which could be protected and leveraged in a structured settlement payable over time. Such is in keeping with good public policy that our law should support. Thus, the

additional items and information requested as part of his demand for settlement were quite reasonable and necessary under these circumstances.

The wreck was on September 25, 2004; the demand was received about three months later on December 22, 2004; and trial commenced on February 14, 2006, more than a year after the demand expired. L.F. tab 2, page 15; tab 13, page 60; tab 1, page 9, respectively. The strong public policies upon which Sec. 408.040.2 R.S.Mo. is founded would have been fully served by an early settlement upon the terms plaintiff demanded if defendant had only accepted the offer. Instead of complaining back then, defendant complains now that even if she had tried to accept the offer that it would not have been enforceable. This is a false argument. There was no contingency in the offer allowing plaintiff to back out. Had the parties to whom the offer was directed responded with a timely and unconditional acceptance, regardless of what the additional information and documentation would have revealed, there is no reason those parties could not have fully enforced the offer against plaintiff. Enforceability would only be an issue if there was an acceptance and there was none. Such is not even an issue here and should be left for another case on other facts.

The principle of freedom of contract applies here. Plaintiff was entitled to tailor his demand as he deemed necessary. The mere fact that Sec. 408.040.2 R.S.Mo. is silent regarding other possible settlement terms is not a valid basis to deny prejudgment interest if such other terms are included in the demand. The fact that the offer included defendant's parents as parties is not a valid basis to deny relief under the statute. Mr. and Mrs. Price were indeed "parties" to the claim with potential

vicarious liability, and were parties to the tendered global release. It is immaterial that they were not parties to "the action" at the time of the demand because the lawsuit had not yet been filed. There was never any complaint raised by anyone until well after trial that Mr. and Mrs. Price were included as parties to the demand. Any argument now about whether Mr. and Mrs. Price were parties to "the action" is a complete red herring, and has no legal or factual bearing on the issues presented here.

Furthermore, any argument by defendant that Mr. and Mrs. Price were "not parties to the action" is likely to create serious disruption of future attempts to comply with Sec. 408.040.2 R.S.Mo. In light of the significantly greater burdens placed on a plaintiff seeking prejudgment interest under the newly amended statute, these issues will remain just as critical, if not even more so, as they were under the former version of Sec. 408.040.2 R.S.Mo. For example, in a situation of an employee/driver collision, it is very likely that a demand might be made upon both the employee and the employer, offering a full release to both. However, it is very conceivable that suit and judgment might later only involve one or the other. Under this decision, a judgment defendant might well invoke this holding to escape all responsibility for failing to engage in any negotiations, in addition to avoiding all prejudgment interest as a matter of law, simply by waiting until after the judgment and attacking the demand as having been made against persons or entities "not parties to the action," without ever being required to prove any hardship, prejudice or impossibility of the terms of the demand. Such a scenario would surely frustrate all its purposes, and effectively render the statute useless.

Sec. 408.040.2 R.S.Mo. very plainly requires the trial court as a matter of law to include prejudgment interest in the judgment if the dollar "amount of the judgment" exceeds the dollar amount of the prejudgment "demand for payment" so long as all other requirements of the statute are met; this is mandatory as a matter of law and is not the least bit discretionary. McCormack v. Capital Elec. Const. Co., 159 S.W.3d 387, 402 (Mo. App. 2005). The trial court may not add words or requirements by implication to a statute that is not ambiguous. Emery v. Wal-Mart Stores, Inc., 976 S.W.2d 439, 449 (Mo. banc 1998).

Plaintiff made his prejudgment demand for settlement in the amount of $325,000 under Sec. 408.040.2 R.S.Mo. on December 21, 2004, in writing by certified mail to the proper parties; such demand was not revoked and remained open for acceptance for the full 60 days required by Sec. 408.040.2 R.S.Mo. without acceptance by defendant; the jury returned its verdict in an amount much greater than the demand, even after the $125,000 comparative fault reduction, and thus, as a matter of law, prejudgment interest at 9% per annum must be added to the total judgment beginning at the expiration of the 60 days, and continuing until the judgment is paid in full.

The facts in Brown v. Donham, 900 S.W.2d 630 (Mo. banc 1995) were very different from the instant case in that here there was never any attempted acceptance by defendant, and thus there was never any issue of “unequivocal acceptance” as it existed in Brown. Inasmuch as there was never any attempt by this defendant to accept the demand, analyzing whether the demand would have been enforceable if

accepted since it was never accepted is meaningless. This particular demand could very well have been accepted with the defendant's parents' cooperation, and thus would have been completely enforceable, as the content of the requested information was not stated as a condition precedent to acceptance. The plaintiff in Brown also requested insurance policies in her prejudgment demand, but did so in such a way as to run afoul of the "readily ascertainable" requirement of the statute, thereby destroying her right to interest. Id., at 631-34.

Plaintiff's prejudgment letter here was a "demand for payment" for a precise, finite dollar amount of money, was made in writing, and was sent by certified mail, and thus met all the requirements of Sec. 408.040.2 R.S.Mo. The fact that his demand included additional items and information to be produced by defendant as part of her acceptance in addition to the payment of money is totally immaterial so long as the additional requirements do not shorten the duration during which the demand is kept open, or would otherwise violate any express requirement in the statute.

Judicial rewriting of Sec. 408.040.2 R.S.Mo. to add a new "enforceability" test is neither valid nor prudent. The newly amended version of the statute contains many more requirements concerning what the plaintiff must produce to secure prejudgment interest, and if Brown is allowed to serve as a basis to divine legislative purpose into each new provision, a Pandora's Box of problems will ensue.

In Boehm v. Reed, 14 S.W.3d 149 (Mo. App. 2000) the plaintiff made a slightly similar offer but phrased it in such a way as to cause the 60-day requirement to be shortened to only 30 days, thus violating the explicit requirements of Sec.

408.040.2 R.S.Mo. The demand for payment made by plaintiff here did not incorporate any such terms which would shorten the time within which defendant was allowed to accept the offer. The court in Boehm did not hold that adding further requirements of producing items and information beyond the payment of money as part of the demand for settlement would violate Sec. 408.040.2 R.S.Mo. and thus justify a court's refusal to add prejudgment interest to the judgment.

The trial court here was swayed by defendant's argument that the statute did not expressly permit the addition of other terms to the settlement demand, and thus plaintiff's demand violated the statute, and prejudgment interest was denied. L.F. tab 14. The fact that Sec. 408.040.2 R.S.Mo. plainly sets out the simple requirements and does not speak to whether other terms are or are not permissible is a red herring, is an incorrect interpretation of the statute, and an inappropriate basis upon which to deny plaintiff relief.

Proper interpretation of Sec. 408.040.2 R.S.Mo. was discussed in Smith v. Shaw, 159 S.W.3d 830, 833 (Mo. banc 2005), and Lester v. Sayles, 850 S.W.2d 858 (Mo. banc 1993). In Smith, at 834, this Court stated that in determining legislative intent, statutory words and phrases are taken in their ordinary and usual sense, and that there is no need for the rule of statutory construction where the words are plain and offer only one meaning such that no ambiguity exists. Here, there is no ambiguity in the plain words of the statute. The only "ambiguity" is a bootstrap argument that absent express permission in the words of the statute, plaintiff is prohibited from adding further terms to his demand if he wishes to qualify for prejudgment interest

under Sec. 408.040.2 R.S.Mo. Such is absurd. That contention would prohibit a plaintiff from making a 75-day demand, or from requiring payment in a certain form such as cash or its equivalent, or from naming the parties to be included on the settlement payment, since such details are not included in the express terms of the statute.

In Lester the opposing party similarly read into the statute requirements/prohibitions which do not exist and the argument failed just as defendant's argument should fail here. There, based on the defendant's opposition to awarding prejudgment interest, the issue was whether plaintiff should be permitted to proceed with filing suit before or after the statutory demand was made. Lester, at 873. The court held there was no ambiguity, the plain language of the statute controlled, and since it placed no limitation on when a plaintiff may make his offer, the legislature already answered the question in plaintiff's favor. Id. In identical fashion, the legislature placed no such limitation as argued to the trial court by this defendant, and the question is answered: plaintiff's demand was proper and prejudgment interest is required as a matter of law.

Another more recent case examined Sec. 408.040.2 R.S.Mo. and determined that even though court costs were not expressly referred to in the statute, since any judgment by law includes court costs, there is no ambiguity and the plain reading of the statute prevails. Hemann v. Camolaur, Inc., 127 S.W.3d 706, 712-14 (Mo. App. 2004). Since by law plaintiff has the right of freedom of contract to fashion his demand as he sees fit, there is no ambiguity and the plain reading of the statute

prevails here.

The implication of defendant's argument before the trial court is that under either the new or old version of the statute, a defendant should be under no burden whatsoever to even attempt to accept a demand, and should be freely allowed to wait years until after trial and after judgment to first attack a presuit, prejudgment interest demand without any requirement to argue, much less substantiate, any claim of difficulty, impossibility or prejudice. Certainly, such would not be in keeping with promoting early low settlement offers and negotiations, or good public policy, if the defendant stood to benefit by strategic recalcitrance and sand bagging. No good faith negotiations would ever ensue, and thus, ultimately, fewer settlements will be produced.

Furthermore, the requested information was reasonable, since the parents of a young, questionably emancipated, financially dependent daughter driving her parents' car, could have developed to support a claim of vicarious liability, joint venture, or agency if she was running an errand or shopping for the parents. And, sleeping at the parents' house, keeping belongings there, and receiving mail there, could have supported a "resident relative" claim, thus entitling the daughter to the parents' higher coverage limits under the same policy if she did not own a vehicle.

Instead of promoting the ultimate purpose of this statute, defendant's position will only serve to frustrate a fundamental and important purpose, that being the deterrence of one side unfairly benefitting from the cost and delay of litigation if the insurance company for a defendant makes no offer to settle, and refuses to share

important information designed to bring all claims against all possible parties to a swift and early, final conclusion in less than six months after a serious car/motorcycle collision, thus avoiding all the costs and delays of a lawsuit, jury trial and appeal many years later.

To correct this error of law, the Judgment must be reversed and the trial court ordered to calculate and include prejudgment interest on the total of the principal amount plus court costs beginning upon the expiration of the 60 day period and continuing until the Judgment is paid in full, and to enter its Amended Judgment dated and effective as of the date of the original Judgment, March 3, 2006.

VII. CONCLUSION

Defendant was permitted to blend sheer speculation and conjecture by arguing obvious general concepts such as that driving a motorcycle can be dangerous and imposing a duty to keep a careful lookout where none exists, and thereby directly implying to the jury that such alone was sufficient "proof" upon which the jury could base a finding of comparative fault against plaintiff without even a scintilla of the legal requirements of substantial proof of time, means and ability to avoid the crash, all to the great prejudice against plaintiff. The law is clear that a lookout submission is error as a matter of law absent proper evidence, and it is equally clear that this verdict and judgment are based upon an erroneous submission. The only way to correct this error is to reverse the existing Judgment, and either enter a corrected Judgment for the full verdict without any comparative fault reduction fully effective as of March 3, 2006, or remand and order the trial court to do the same.

Sec. 408.040.2 R.S.Mo. is simple and straightforward. If plaintiff satisfies its plain requirements, prejudgment interest is required as a matter of law. Carving exceptions into the statute will render it useless. The mere fact that plaintiff included additional terms unique to the particular case that are not expressly set forth in the statute does not vitiate his right to prejudgment interest, and the judgment must be reversed. This Court should reverse the existing Judgment, and either enter a correct Judgment which includes prejudgment interest beginning upon the expiration of the 60-day period and continuing until the Judgment is paid in full, effective as of March 3, 2006, or remand and order the trial court to do the same.

Respectfully submitted:

David W. Ransin, #30460
David W. Ransin, P.C.
1650 E. Battlefield Road, Suite 140
Springfield, MO 65804-3766
Tele: 417-881-8282
Fax: 417-881-4217
Internet: david@ransin.com
Attorney for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned certifies that in compliance with rule 84.06(b), the enclosed disk has been scanned for viruses using AVG, and the disk is virus free. The disk Format is WordPerfect 12 and the brief contains 9746 words of type. Two copies of Appellants' Brief and one disk were served upon all attorneys of record in the above action by sending a copy by U.S. Mail and email to the business office of said attorney the 11th day of June, 2009.

Nikki Cannezzaro
Franke, Schultz & Mullen, P.C.
8900 Ward Parkway
Kansas City, MO 64114
NCannezzaro@fsmlawfirm.com

David W. Ransin #30460
David W. Ransin, P.C.
1650 E. Battlefield Road, Suite 140
Springfield, MO 65804-3766
Tele: 417-881-8282
Fax: 417-881-4217
Internet: david@ransin.com
Attorney for Plaintiff-Appellant

IN THE SUPREME COURT OF MISSOURI

Ronald Joe Hayes and Teresa Hayes, as husband and wife,	)	
	)	Supreme Court No. SC90054
Plaintiffs-Appellants,	)	
	)	Court of Appeals Southern District
	)	No. SD27730
v.	)	
	)	Circuit Court for Jasper County
Trisha G. Price,	)	No. 05AO-CC00035
	)	
Defendant-Respondent.	)	

APPENDIX