IN THE MISSOURI SUPREME COURT

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BRENT WERREMEYER AND TONYA WERREMEYER

Appellants/Respondents

v.

K.C. AUTO SALVAGE, CO., INC.

Respondent/Appellant

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SC 85551

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# APPELLANTS/RESPONDENTS' SUBSTITUTE BRIEF IN RESPONSE/REPLY TO RESPONDENT/CROSS-APPELLANT'S BRIEF

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## STATEMENT OF FACTS

Respondent/Appellant K.C. Auto Salvage Company, Inc. (KC Auto) alleges that there was insufficient evidence to support the jury's verdict. In determining whether the evidence was sufficient to support the jury's verdict, this Court considers the evidence and all reasonable inferences therefrom in the light most favorable to the verdict and considers only evidence which supports the verdict. See *Long v. Twehous Constractors, Inc.*, *904 S.W.2d 285 (Mo.App. 1995).* Furthermore, this Court is to disregard any contrary evidence or inference. Id. KC Auto's Statement of Facts is stated in a light most favorable to reversing the jury's verdict and fails to set forth all evidence in support of the verdict; consequently, Appellants/Respondents Werremeyers (Werremeyers) provide this additional Statement of Facts.

### I. INTRODUCTION

Brent and Tonya Werremeyer were in the market for a new used car when they spotted a Toyota 4 Runner (Toyota) for sale at K.C. Auto. The Werremeyers did not want a vehicle that had previously been wrecked, and therefore, asked K.C. Auto's salesman, John Tyson, if the Toyota had been wrecked. Mr. Tyson did not know whether it had been wrecked; nonetheless, he told the Werremeyers that the Toyota had not been wrecked. That representation was false. Mr. Tyson also told the Werremeyers that the Toyota had a clean title. That representation was also false. Based on these representations, the Werremeyers bought the Toyota for $17,500.00. They took $10,000.00 from their savings account and

borrowed the rest to pay for the car. (Tr. 124, 132, 133, 194, 352-254, 494, 500, 502 & 524).

Sometime after purchasing the vehicle, the Werremeyers were contacted by Sgt. Wilson from the Missouri Highway Patrol. Sgt. Wilson asked to inspect the Toyota. (Tr. 506). Sgt. Wilson informed the Werremeyers of the Toyota's true history. (Tr. 506-507). The top-half of the Toyota was from a stolen vehicle while the bottom half was from a vehicle that had been totaled in a wreck. (Tr. 350-352). Because the vehicle had been totaled, it had a salvage title. (Tr. 352-353). Sgt. Wilson also told the Werremeyers that Farmers Insurance Company had ownership interest in the top part of the vehicle because Farmers had paid the claim for the stolen vehicle. (Tr. 507). The Werremeyers had to pay Farmers $2,000 to buy back the top part of the vehicle. (Tr. 507).

The President of K.C. Auto acknowledged that the Toyota, as sold to the Werremeyers, had a fair market value of zero. (Tr. 472).

## II. KC AUTO'S REPRESENTATIONS

Mr. Tyson acknowledged that he did not know if the Toyota had been wrecked; nonetheless, he told the Werremeyers that the Toyota had not been wrecked. (Tr. 124, 132, 494 and 549). That representation was false. (Tr. 350-352). Mr. Tyson did not know if the Toyota had been repossessed; yet, he told the Werremeyers that it had been repossessed. (Tr. 124, 494 and 550). That representation was also false. (Tr. 350-352). Mr. Tyson knew that a repossessed vehicle should have a "repo title", but he represented that the Toyota had a clean

title. (Tr. 194). The representation was false. (Tr. 352-354). Finally, Mr. Tyson admitted that he did not know if the Toyota had been stolen. (Tr. 124). Despite his admitted ignorance and the fact that he previously told the Werremeyers that the car had been repossessed, Mr. Tyson told Sgt. Wilson of the Missouri Highway Patrol that the car was a "recovered stolen." (Tr. 355). That representation was false. (Tr.355).

While looking at the Toyota, Mr. Werremeyer noticed that there were scratches in the exact same place on all four windows. Mr. Werremeyer explained to Mr. Tyson that he knew that Toyota put identifying numbers or marks in the exact spot where the scratch marks were. He asked if Mr. Tyson knew what had happened. (Tr. 496). Mr. Tyson stated that the vehicle was a bank repossession and that the person it was repossessed from scratched out the VIN numbers on the windows so that the bank could not positively identify the car. (Tr. 496-497). Mr. Tyson did not state that it was his opinion that that is what had happened; he said it very matter of fact. (Tr. 497). At trial, Mr. Tyson admitted that he did not know how the scratch marks ended up on all four windows. (Tr. 127).

If the car had been repossessed as Mr. Tyson claimed, it should have had a "repo title"; nonetheless, Mr. Tyson did not tell Mr. Werremeyer that there may be a question about the Toyota's title because it should have a "repo title" instead of a clean title. (Tr. 130). Mr. Tyson did not tell Sgt. Wilson that the car had been repossessed; he told Sgt. Wilson that the car was a recovered stolen. (Tr. 355). If

that was true, the car should have had a salvage title. (Tr. 371). Nonetheless, Mr. Tyson sold the car representing that it had a clean title. (Tr. 194).

## III. EVIDENCE REGARDING THE MATERIALITY OF THE MISREPRESENTATIONS

Salesman Tyson acknowledged that whether a car has been wrecked is a very material factor to a purchaser. (Tr. 126). Because it is a fact that is important to purchasers, they frequently ask if a car has been wrecked. (Tr. 126). Mr. Tyson further admitted that if he tells a customer that a vehicle has been wrecked, generally, the customer will not purchase the car. (Tr. 126). Finally, he acknowledged that having a good "clean title" is also a very material fact to a purchaser. (Tr. 126). In fact it is first and foremost among the things he considers when purchasing an automobile for K.C. Auto. (Tr. 204).

Mr. Werremeyer did not want to buy a car that had been wrecked. (Tr. 494). Consequently, whether the car had been wrecked was a very important fact that he wanted to know before buying the car. (Tr. 494). Mr. Werremeyer asked Mr. Tyson if the Toyota had been wrecked and Mr. Tyson told him that it had not been wrecked. (Tr. 132 and 494). Mr. Werremeyer relied on what Mr. Tyson said in buying the car. (Tr. 524). If Mr. Werremeyer had been told that the Toyota had been wrecked, he would not have bought it. (Tr. 545).

## IV. EVIDENCE THAT THE TOYOTA'S DISTINGUISHING NUMBERS HAD BEEN REMOVED, COVERED AND/OR DEFACED.

K.C. Auto's salesman, John Tyson, admitted that K.C. Auto sold the Werremeyers a vehicle that was in such a condition that the identifying numbers had been removed from the windows. (Tr. 190-191). Mr. Tyson knew that the identifying numbers had been removed; he told Mr. Werremeyer that the previous owner scratched the VIN numbers off the window in an attempt to avoid repossession. (Tr. 496-497).

Sgt. Larry Wilson conducted the investigation into the Toyota on behalf of the Missouri State Highway Patrol. (Tr. 323 and 326). At the time of his investigation, Sgt. Wilson had been with the Highway Patrol about 30 years and was the on-sight supervisor of the Auto Theft Task Force in Kansas City. (Tr. 326). He testified that there were several irregularities about the Toyota that indicated that it had been tampered with.

First, there were scratches on the rivets that affixed the VIN number plate to the dashboard of the Toyota indicating that the VIN number had been tampered with. (Tr. 334). He could see the scratches on the rivets through the windshield. (Tr. 334). The scratches on the rivets raised suspicions because they are impossible to get to without removing the windshield. (Tr. 331). The VIN on the dashboard of the Toyota had been changed to match the VIN on the bottom half of the vehicle. (Tr. 351).

Second, the federal government certification sticker attached to the driver's door was not proper. (Tr. 334). The fact that the sticker was set at an angle and did not have a smooth edge indicated that it had been removed from one vehicle and placed on the Toyota. (Tr. 334).

Third, the bottom part of the EPA sticker on the underside of the hood had been torn off which raised additional suspicions in Sgt. Wilson's mind. (Tr. 337).

Fourth, the VIN numbers etched into all four windows had been scratched out; this fact also raised suspicions. (Tr. 362). Sgt. Wilson testified that the evidence that he discovered indicating that the car was made up of two separate vehicles was not evidence that an average citizen that does not deal with cars would have known about. (Tr. 359).

## V. THE JURY VERDICT

The jury returned a unanimous verdict in favor of the Werremeyers and against K.C. Auto. The jury awarded $9,000.00 in compensatory damages against both K.C. Auto and Copart, and awaded $20,000.00 in punitive damages against K.C. Auto. (Appendix at A-1.)

## POINTS RELIED ON WITH PRIMARY AUTHORITIES

### POINT I

**THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN OVERRULING K.C. AUTO'S MOTIONS FOR DIRECTED VERDICT AND JNOV BECAUSE THERE WAS SUFFICIENT EVIDENCE THAT THE WERREMEYERS RELIED ON K.C. AUTO'S REPRESENTATIONS, AND THAT THE REPRESENTATIONS WERE MATERIAL TO THE WERREMEYERS' DECISION TO BUY THE TOYOTA.**

*Wasson v. Schubert, 964 S.W.2d 520 (Mo.App. 1998)*

*Manufacturer's American Bank v. Stamatis, 719 S.W.2d 64 (Mo. App. 1986)*

### POINT II

**THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN OVERRULING K.C. AUTO'S MOTIONS FOR DIRECTED VERDICT AND JNOV BECAUSE THERE WAS SUFFICIENT EVIDENCE THAT K.C. AUTO VIOLATED §301.390 RSMO IN THAT AT THE TIME K.C. AUTO SOLD THE TOYOTA, DISTINGUISHING NUMBERS ON THE TOYOTA HAD BEEN REMOVED, COVERED, AND DEFACED.**

*State v. Smith, 972 S.W.2d 476 (Mo.App. 1998)*

*§301.390 RSMo*

## POINT III

**THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN OVERRULING K.C. AUTO'S MOTIONS FOR DIRECTED VERDICT AND JNOV BECAUSE THERE WAS SUFFICIENT EVIDENCE TO JUSTIFY A PUNITIVE DAMAGE AWARD IN THAT K.C. AUTO'S CONDUCT DEMONSTRATED A RECKLESS DISREGARD TO THE RIGHTS OF THE WERREMEYERS.**

*DeLong v. Hilltop Lincoln-Mercury, Inc., 812 S.W.2d 834 (Mo.App. 1991)*

*Grabinski v. Blue Springs Ford Sales, Inc., 203 F.3d 1024 (8th Cir. 2000)*

*MAI 10.01*

## POINT I

**THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN OVERRULING K.C. AUTO'S MOTIONS FOR DIRECTED VERDICT AND JNOV BECAUSE THERE WAS SUFFICIENT EVIDENCE THAT THE WERREMEYERS RELIED ON K.C. AUTO'S REPRESENTATIONS, AND THE REPRESENTATIONS WERE MATERIAL TO THE WERREMEYERS' DECISION TO BUY THE TOYOTA.**

### A. STANDARD OF REVIEW

This Court may reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's verdict. See *Seitz v. Lemay Bank & Trust Co., 959 S.W.2d 458, 461 (Mo.banc 1998).* In reviewing for a submissible case, this Court must accept all evidence and reasonable inferences favorable to the verdict and disregard any contrary evidence. See *Altenhoffen v. Fabricor, Inc., 81 S.W.3d 578, 584 (Mo.App. 2002).*

### B. INTRODUCTION

In it point relied on, K.C. Auto does not dispute that the evidence was sufficient to prove that its salesman represented to the Werremeyers that the Toyota had not been wrecked intending that the Werremeyers rely upon such representation. Nor does K.C. Auto dispute that the evidence was sufficient to prove that the representation was false. Finally, K.C. Auto does not deny that the evidence sufficiently proved that its salesman either knew that representation was

false or did not know whether the representation was true or false. Rather, K.C. Auto only claims that the evidence was insufficient to prove that the Werremeyers relied on Salesman Tyson's representation and that such representation was material to the Werremeyers. Contrary to K.C. Auto's argument, the evidence was sufficient prove both of these elements, and therefore, K.C. Auto's Point I should be denied.

## C. THE WERREMEYERS' RELIED ON SALESMAN TYSON'S STATEMENT THAT THE TOYOTA HAD NOT BEEN WRECKED.

K.C. Auto argues that because Mr. Werremeyer looked at and relied upon the title of the vehicle, he could not have relied upon its salesman's statements. Although K.C. Auto fails to cite any case law to support this position, it seems to assert that the Werremeyers had to prove that K.C. Auto's misrepresentations were the sole inducement to buy the car. This is not the law in Missouri. See *Manufacturer's American Bank v. Stamatis, 719 S.W.2d 64, 70 (Mo.App. 1986).* In that case, an action for fraudulent misrepresentation, the Court held that "it is not necessary that the representation be the **sole** inducement to act; it is sufficient if the misrepresentation is a material factor in the decision to act." Id. at 70. (emphasis added).

The test of whether a plaintiff relied on a represenatation is whether the representation "was a material factor influencing final action." See, *Grossoehme v. Cordell, 904 S.W.2d 392, 397 (Mo.App. 1995).* Here, K.C. Auto's salesman, John Tyson, acknowledged that whether a vehicle has previously been wrecked is

an important fact to buyers. (Tr. 126). He further admitted that if he tells a customer that a vehicle has been wrecked, generally, the customer will not buy the car. (Tr. 126). Furthermore, the Werremeyers testified that they relied on Tyson's representation that the Toyota had not been wrecked. (Tr. 501 and 524). If the Werremeyers had been told that the vehicle had been wrecked, they would not have bought the car. (Tr. 545). Thus, the Werremeyer's relied on K.C. Auto's misrepresentation.

K.C. Auto's argument that there can be no reliance in this case because Mr. Werremeyer inspected the title is not supported by Missouri law. See, *Wasson v. Schubert, 964 S.W.2d 520 (Mo.App. 1998).* In *Wasson*, the plaintiff sued for fraudulent misrepresentation in the sale of a home. Plaintiff alleged that defendants failed to disclose that there was a crack in the wall of the basement. Id. at 526. Defendants claimed that the plaintiffs were not entitled to rely on their misrepresentation because the plaintiffs had visually inspected the home themselves and had a mechanical inspection done. Defendants argued that because plaintiffs undertook their own investigation, they were not allowed to rely on the misrepresentations of another. Id. at 527. The Trial Court agreed and entered a directed verdict in favor of defendants. The Court of Appeals reversed.

In reversing the Trial Court, the Court of Appeals noted that when a party makes only a partial investigation and relies on the misrepresentations as well as the investigation, the party may maintain an action for fraud. Id. Although the plaintiffs viewed the house themselves and had a mechanical inspection done, the

Court of Appeals found that their actions only amounted to a partial inspection and that plaintiffs had in fact relied on the misrepresentations of the defendants. Id. If the visual inspection and professional mechanical inspection of the house in *Wasson* did not preclude the plaintiffs from relying on defendants' fraudulent misrepresentations, then the Werremeyers' simple inspection of the title of the vehicle in this case certainly does not preclude them from relying on K.C. Auto's fraudulent misrepresentations.

The *Wasson* Court further noted that even if a buyer undertakes his own investigation, he is still entitled to rely on a seller's misrepresentations if they are "distinct and specific representations." Id. K.C. Auto claims in its brief that "there is no evidence that the Werremeyers made any such specific request as to the history of the car they were purchasing." (See K.C. Auto's Brief at 28). K.C. Auto apparently overlooks the uncontroverted testimony of its salesman and Mr. Werremeyer. Both men testified that Mr. Werremeyer specifically asked if the car had been wrecked. (Tr. 132 and 494). Mr. Werremeyer also asked why the VIN numbers on all four windows had been scratched out. (Tr. 496-497).

In response to both questions, K.C. Auto's salesman provided false information. He made the specific representation that the Toyota had not been wrecked which was untrue. He also represented that the VIN numbers on the vehicle had been scratched out because the prior owner was attempting to avoid repossession. This representation was also false. These are distinct and specific representations upon which the Werremeyers had the right to rely. Id.

## D. THE REPRESENTATION THAT THE TOYOTA HAD NOT BEEN WRECKED WAS MATERIAL TO THE PURCHASE OF THE VEHICLE

As K.C. Auto points out, a representation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so. (See K.C. Auto's Brief at 28 citing *Grossoehme*, *904 S.W.2d at 397*). Mr. Tyson acknowledged that whether a car had been wrecked is a very material fact to a purchaser. (Tr. 126). Mr. Tyson further admitted that if he tells a customer that a vehicle has been wrecked, generally, the customer will not purchase the car. (Tr. 126). Thus, Tyson knew that telling the Werremeyers that the Toyota had not been wrecked would likely induce the Werremeyers to purchase the Toyota.

Mr. Werremeyer did not want to buy a car that had been wrecked. (Tr. 494). Consequently, whether the car had been wrecked was a very important fact he wanted to know before buying the car. (Tr. 494). Mr. Werremeyer asked Mr. Tyson if the Toyota had been wrecked and Mr. Tyson told him that it had not been wrecked. (Tr. 132 and 494). Mr. Werremeyer relied on what Mr. Tyson said in buying the car. (Tr. 524). If Mr. Werremeyer had been told that the Toyota had been wrecked, he would not have bought it. (Tr. 545). These facts demonstrate that Mr. Tyson's representation was material to the purchase of the Toyota.

For the reasons stated above, the Werremeyers respectfully request that this Court deny K.C. Auto's point I.

## POINT II

**THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN OVERRULING K.C. AUTO'S MOTIONS FOR DIRECTED VERDICT AND JNOV BECAUSE THERE WAS SUFFICIENT EVIDENCE THAT K.C. AUTO VIOLATED §301.390 RSMO IN THAT AT THE TIME K.C. AUTO SOLD THE TOYOTA, DISTINGUISHING NUMBERS ON THE TOYOTA HAD BEEN REMOVED, COVERED, AND DEFACED.**

### A. STANDARD OF REVIEW

This Court may reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's verdict. See *Seitz v. Lemay Bank & Trust Co., 959 S.W.2d 458, 461 (Mo.banc 1998).* In reviewing for a submissible case, this Court must accept all evidence and reasonable inferences favorable to the verdict and disregard any contrary evidence. See *Altenhoffen v. Fabricor, Inc., 81 S.W.3d 578, 584 (Mo.App. 2002).*

### B. INTRODUCTION

K.C. Auto admits that the Werremeyers were members of the class §301.390 RSMo. was designed to protect; that the injury the Werremeyers sustained was of the type the statute was designed to prevent; and that the violation of the statute proximately caused the Werremeyers' injury. However, K.C. Auto argues that there was insufficient evidence to find that it had violated the statute because there was allegedly no evidence that it had knowledge that distinguishing numbers on the Toyota had been removed, defaced or covered.

K.C. Auto's argument fails for two reasons: 1) the statute does not require that the defendant know that it is selling a vehicle that has had its distinguishing numbers removed, covered or defaced and 2) K.C. Auto's salesman told Mr. Werremeyer that the VIN numbers on the Toyota's windows had been scratched out by the previous owner in an attempt to avoid repossession; thus, the evidence sufficiently demonstrated that K.C. Auto knew that the distinguishing numbers on the Toyota had been scratched out.

## C. PROOF OF KNOWLEDGE IS NOT REQUIRED TO PROVE K.C. AUTO SOLD THE TOYOTA IN VIOLATION OF §301.390 RSMO

As demonstrated by the plain language of the statute, K.C. Auto did not have to knowingly sell the Toyota with removed, covered or defaced distinguishing numbers to be in violation of the statute. The statute states in part:

> No person shall sell, or offer for sale, or shall knowingly have the custody or possession of a motor vehicle, vehicle part, ...on which the original manufacturer's number or other distinguishing number has been destroyed, removed, covered, altered or defaced ….

The word "knowingly" modifies only "custody or possession"; it does not modify "sell or offer for sale."

In *State v. Smith, 972 S.W.2d 476, 478-479 (Mo.App. W.D. 1998),* the Court of Appeals was called upon to interpret §301.390 RSMo. The defendant in that case, like K.C. Auto here, argued that the State must prove that the defendant had knowledge of the altered VIN when it sold the car. The Court rejected defendant's

argument and found that the State was not required to show that the defendant had knowledge of the alteration at the time of sale to obtain a conviction under the statute. In reaching this conclusion, the Court noted that the plain language of the statute "indicates that the legislature clearly and deliberately wrote the statute so that 'knowingly' refers only to the crime of custody or possession, and not the crime of selling or offering for sale." Id. at 479. Thus, the plain language of the statute and the Court's holding in *State v. Smith* demonstrate that the Werremeyers were not required to prove that K.C. Auto acted knowingly when it sold the Toyota on which the original manufacturer's number and other distinguishing numbers had been removed, altered or defaced.

## D. THE EVIDENCE DEMONSTRATED THAT K.C. AUTO KNEW THAT THE TOYOTA'S DISTINGUISHING NUMBERS HAD BEEN REMOVED, ALTERED OR DEFACED

Even though knowledge is not a required element to prove K.C. Auto violated §301.390, Plaintiffs produced substantial evidence that K.C. Auto knew that the Toyota's distinguishing numbers had been removed, altered or defaced. Mr. Werremeyer testified that all four windows on the Toyota were scratched-up in the exact same spot. When he noticed the scratches, he told K.C. Auto's salesman that Toyota put identifying numbers in the exact spot where the scratches were on the windows. (Tr. 496). K.C. Auto's salesman told Mr. Werremeyer that the prior owner was trying to prevent the bank from repossessing the vehicle so he used something to scratch out the VIN numbers to prevent the bank from

positively identifying the Toyota. (Tr. 497). Thus, not only did K.C. Auto know that the vehicle it was holding for sale had the VIN numbers removed from all four windows, it also claimed to know that the prior owner of the vehicle intentionally removed them to avoid repossession.

In addition to the scratches on all four windows, Sgt. Wilson of the Missouri Highway Patrol identified several indicia that would have alerted K.C. Auto that the Toyota's distinguishing numbers had been removed, covered or defaced. (Tr. 350-360). First, the VIN on the dashboard of the Toyota had been changed to match the VIN on the bottom half of the vehicle. (Tr. 351). There were scratches on the rivets that affixed the VIN number plate to the dashboard of the Toyota indicating that the VIN number had been tampered with. (Tr. 334). The scratches on the rivets were visible through the windshield. (Tr. 334). Second, the federal government certification sticker attached to the driver's door was not proper. (Tr. 334). The fact that the sticker was set at an angle and did not have a smooth edge indicated that it had been removed from one vehicle and placed on the Toyota. (Tr. 334). Sgt. Wilson agreed that an average purchaser like the Werremeyers would not be familiar with these indicia; however, a person who sells used cars would be. (Tr. 359-360).

For the reasons stated above, K.C. Auto's Point II should be denied.

## POINT III

**THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN OVERRULING K.C. AUTO'S MOTIONS FOR DIRECTED VERDICT AND JNOV BECAUSE THERE WAS SUFFICIENT EVIDENCE TO JUSTIFY A PUNITIVE DAMAGE AWARD IN THAT K.C. AUTO'S CONDUCT DEMONSTRATED A RECKLESS DISREGARD TO THE RIGHTS OF THE WERREMEYERS.**

### A. STANDARD OF REVIEW

This Court may reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's verdict. See *Seitz v. Lemay Bank & Trust Co., 959 S.W.2d 458, 461 (Mo.banc 1998).* In reviewing for a submissible case, this Court must accept all evidence and reasonable inferences favorable to the verdict and disregard any contrary evidence. See *Altenhoffen v. Fabricor, Inc., 81 S.W.3d 578, 584 (Mo.App. 2002).*

### B. THE WERREMEYERS' EVIDENCE WAS SUFFICIENT TO SUPPORT AN AWARD OF PUNITIVE DAMAGES.

As set forth in MAI 10.01, punitive damages should be submitted to the jury where the defendant's conduct is "outrageous because of defendant's evil motive **or** reckless indifference to the rights of others." (emphasis added). Here, the evidence clearly demonstrated that K.C. Auto's blatant misrepresentations regarding the Toyota Four Runner were outrageous in that they demonstrated a reckless indifference to the rights of the Werremeyers.

K.C. Auto's salesman acknowledged that whether or not a car had been wrecked is something that is very important to purchasers. (Tr. 126). He admitted that if he tells a customer that a vehicle has been wrecked, generally the customer will not purchase the car. (Tr. 126). Consequenlty, even though he did not know if the Toyota had been wrecked, he told the Werremeyers that the Toyota had not been wrecked. (Tr. 124, 132). That representation was false. (Tr. 350-352).

Mr. Tyson also made a false representation about whether the Toyota had been repossessed. He did not know if the Toyota had been repossessed or not; yet, he told the Werremeyers that it had been repossessed. (Tr. 124, 494 and 550). While looking at the Toyota, Mr. Werremeyer noticed that there were scratches in the exact same place on all four windows. Mr. Werremeyer explained to Mr. Tyson that he knew that Toyota put identifying numbers or marks in the exact spot where the scratch marks were. He asked if Mr. Tyson knew what had happened. (Tr. 496). Mr. Tyson stated that the person the Toyota was repossessed from scratched out the VIN numbers on the windows so that the bank could not positively identify the car. (Tr. 496-497). At trial, Mr. Tyson admitted that he did not know how the scratch marks ended up on all four windows. (Tr. 127).

If the car had been repossessed as Mr. Tyson claimed, it should have had a "repo title"; yet, Mr. Tyson represented that the title was clean. (Tr. 130 and 194). That representation was false. (Tr. 352-354). Mr. Tyson knows that whether a vehicle has a clean title is a very important fact to purchasers; nonetheless, he did

not tell the Werremeyers that there may be a question about the Toyota's title because it should have a "repo title" instead of a clean title. (Tr. 130 and 194).

Tyson apparently forgot that he had misrepresented the Toyota as a bank repossession because a year later he told Sgt. Wilson of the Missouri Highway Patrol that the car was a "recovered stolen." (Tr. 355). That representation was false. (Tr.355). Mr. Tyson admitted that he did not know if the Toyota had been stolen; yet, he did not let his ignorance prevent him from telling a law enforcement officer that the vehicle was a recovered stolen. (Tr. 124). If that representation was true, the car should have had a salvage title. (Tr. 371). Nonetheless, when Mr. Tyson sold the car, he represented that it had a clean title. (Tr. 194).

As K.C. Auto acknowledged in its brief, "It may true as the Court of Appeals held, that the jury could have reasonably concluded that Tyson was willing to say whatever it took to sell a car…." (K.C. Auto's Brief at 27). Respondent's willingness to say whatever it took to sell a car regardless of its truth is sufficient to warrant the submission of a punitive damage claim. See *DeLong v. Hilltop Lincoln-Mercury, Inc.*, *812 S.W.2d 834 (Mo.App. 1991).*

In *DeLong*, the plaintiffs sued the defendant for fraudulently misrepresenting the condition of a car. The jury found in favor of the plaintiffs and awarded $3,000.00 in actual damages and $75,000.00 in punitive damages. The defendant appealed claiming, among other things, that the punitive damage award was excessive. Id. at 841. The Court of Appeals found no abuse of discretion in the jury's award and affirmed the award. Id.

The car salesman in *DeLong* represented to the plaintiffs that the car was a trade-in, even though it was not. Id. The salesman made this misrepresentation even though he knew the importance of the car's past to the plaintiffs. Id. The Court further noted that the salesman's refusal to provide the name of the prior owner despite the ease of doing so demonstrated a culpable mental state on the part of the salesman. Id. Despite the fact that the punitive damage award was twenty-five times the actual damage award, the Court of Appeals affirmed the jury's verdict. Id.

Similarly, here, K.C. Auto's salesman misrepresented the condition of the Toyota even though he knew that whether the Toyota had been wrecked was a "very material factor" in the purchase of the Toyota. Furthermore, the salesman completely fabricated a story to explain the scratches on the windows. Finally, the salesman even misrepresented the history of the car to the Missouri Highway Patrol. These facts and those set forth above demonstrate K.C. Auto's culpable mental state, and justify an award of punitive damages.

## C. UNDER THE GUIDEPOSTS SET FORTH BY THE U.S. SUPREME COURT, PUNITIVE DAMAGES WERE SUBMISSIBLE

In *State Farm Mutual Automobile Insurance Co., v. Campbell, 123 S.Ct. 1513 (2003),* the United States Supreme Court reiterated the three guideposts to be used in reviewing punitive damages: 1) the disparity between the compensatory damages and the punitive damages awarded; 2) the difference between the punitive damages awarded by the jury and the criminal or civil penalties

authorized or imposed in comparable cases; and 3) the degree of reprehensibility of the defendant's conduct. Id. at 1520 citing *BMW of North America, Inc. v. Gore, 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).*

Here, the jury determined that the Werremeyers suffered compensatory damages in the amount of $9,000.00. The jury awarded $20,000.00 in punitive damages against K.C. Auto. Thus, the disparity between the actual damages and the punitive damages is minimal. The punitive damages awarded against K.C. Auto are just over two times the actual damages awarded. No court, including the *Campbell* Court, has found a ratio of 2-to-1 or 3-to-1 to even be "close to the line of constitutional impropriety."

The second consideration involves a comparison of the punitive damages awarded and the civil or criminal penalties that may be imposed for comparable misconduct. Id. As noted in *Grabinski v. Blue Springs Ford Sales, Inc., 203 F.3d 1024, 1027 (8th Cir. 2000),* discussed below, the Missouri Legislature has authorized significant civil and criminal sanctions for cases of fraud and concealment that are roughly comparable to the statutory violations at issue here. See §407.100.6 RSMo authorizing a civil penalty of up to $1,000.00 for each violation, and §407.020.3 RSMo, providing that a person who, "with the intent to defraud," "willfully and knowingly engages" in any violation of the Missouri Merchandising Practices Act is guilty of a felony punishable by up to five years in prison and a fine of up to $5,000.00. Similarly, a violation of §301.390 RSMo is punishable by up to five years in prison and a fine of up to $5,000.00, or twice as

much as the money gained by the criminal activity. For the various statutes authorizing these specific punishments, see §557.011.2(1), §557.011.2(2), §557.016.1(4), §558.011.1(4), §560.011.1(1). In addition, §301.562.1, §301.562.2(3), and §301.562.2(5) give the Missouri Department of Motor Vehicles the authority to refuse the issuance or the renewal of a motor vehicle dealer's license to anyone who has been convicted of fraud or who has obtained money by fraud, deception or misrepresentation. The *Grabinski* Court concluded, "these legislative judgments weigh heavily in favor of an award for punitive damages." Id. at 1027.

The third consideration is the reprehensibility of the defendant's conduct. The *Cambpell* Court set forth five factors in determining reprehensibility:

1. Whether the harm caused was physical as opposed to economic. There is no dispute that, here, the harm caused was economic.

2. The tortuous conduct evidenced an indifference to or reckless disregard of the health or safety of others. Without repeating the evidence set forth above, Defendant's conduct did evidence an indifference to or a reckless disregard to the rights of the Werremeyers.

3. The target of the conduct had financial vulnerability. K.C. Auto does not dispute that the Werremeyers were financially vulnerable. See K.C. Auto's Brief at 37. The Werremeyers parted with $17,500.00 to purchase a vehicle that they had been told had not been wrecked: $10,000.00 came from the Werremeyers savings and the remaining money was borrowed. But for K.C.

Auto's misrepresentations about the vehicle, the Werremeyers would not have parted with the money. This demonstrates the financial vulnerability of the Werremeyers.

4. The conduct involved repeated actions or was an isolated incident. Here, K.C. Auto's conduct involved repeated misrepresentations. Again, without restating the evidence set forth above, K.C. Auto made several misrepresentations to the Werremeyers and then because it was apparently unable to keep track of its own misrepresentations, it told a totally different story to Sgt. Wilson of the Missouri Highway Patrol; a story that again proved to be false.

5. The harm was the result of intentional malice, trickery, or deceit or mere accident. Here, the harm resulted from K.C. Auto's deception of the Werremeyers. Respondent deceived the Werremeyers into believing that the Toyota had not been wrecked when in fact it had. It deceived the Werremeyers into believing that the VIN numbers on the vehicle had been scratched out because it was a repossessed vehicle when in fact it was not. As K.C. Auto acknowledged in its brief, "It may true as the Court of Appeals held, that the jury could have reasonably concluded that Tyson was willing to say whatever it took to sell a car…." (K.C. Auto's Brief at 27).

Thus, all three of the guideposts first set out by the U.S. Supreme Court in *Gore* and discussed again in *Campbell* weigh in favor of affirming the punitive damages against K.C. Auto. See, *Grabinski v. Blue Springs Ford Sales, Inc.*, *203 F.3d 1024 (8th Cir. 2000).*

In *Grabinski*, the plaintiffs sued the defendants claiming that the defendants had violated the Missouri Merchandising Practices Act and had acted fraudulently when they sold the defendants an automobile that had been damaged in a collision. Id. at 1025. The jury found against the defendants and awarded the plaintiffs actual damages totaling $7,835.00. Id. at 1026. The jury recommended and the Trial Court awarded punitive damages in the amount of $100,000.00 against the retailer, $50,000.00 against the wholesaler and an additional $60,000.00 against three other defendants.

In assessing the appropriateness of the punitive damage awards, the Eighth Circuit analyzed the award using the guideposts set forth in *Gore*. The Court first determined the ratio of the punitive damages to the individual defendants' pro rata share of the actual damages. The ratios were as follows: 99:1 for the wholesaler and 55:1 for the retailer. The Court also noted that the ratio for the collective punitive damages to the collective actual damages was approximately 27:1. The Court stated that the ratios are "somewhat high" but they are not dispositive; merely instructive. Id.

The Court then considered a comparison of the punitive damages award and the civil or criminal penalties that may be imposed for comparable misconduct, because "a reviewing Court engaged in determining whether an award of punitive damages is excessive should 'accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.'" Id. (citations omitted). The Eighth Circuit noted that the Missouri Legislature has

authorized significant civil and criminal sanctions in cases of fraud. Id. (citations omitted). The Court found that "these legislative judgments **weigh heavily** in favor of an award of punitive damages." (Id. at 1027) (emphasis added). These legislative judgments also weigh heavily in favor of an award of punitive damages against K.C. Auto.

Finally, the Court examined the reprehensibility of the defendants' conduct and noted that this element is "generally given the greatest emphasis." Id. In discussing this final element, the Court noted that the jury found that the dealer had defrauded the plaintiff by concealing that the car had previously been damaged. The Court further recognized that the jury instructions require the jury to determine that the defendants' conduct was "outrageous because of evil motive or reckless indifference to the rights of others." Id. The Court concluded that "the defendants' conduct was egregious and it demonstrated a clear and disturbing disregard for [plaintiff's] safety and her economic interest." Id. Similarly, here, K.C. Auto's conduct demonstrated a clear disregard for the Plaintiffs' economic interest, and therefore, an award of punitive damages was justified.

## D. K.C. AUTO'S RELIANCE ON THE *ALCORN* FACTORS IS MISPLACED

K.C. Auto relies on *Alcorn v. Union Pacific Railroad Company, 50 S.W.3d 226 (Mo.banc 2001).* Alcorn, unlike the case at bar, was a negligence case. Citing its previous decision in *Lopez v. Three Rivers Electric Coop, Inc., 26 S.W.3d 151 (Mo.banc 2000),* the Court in Alcorn discussed three factors that weigh against the

submission of punitive damage claims. However, those factors are to be considered in negligence cases. See *Lopez*, *26 S.W.3d at 160*. *Lopez*, similar to *Alcorn*, was a negligence action. That Court found, "in the context of a **negligence case**" the standards for punitive damages are "somewhat ambiguous." Id. (emphasis added). The Court, therefore, set forth factors to be considered in submitting punitive damages in negligence cases. Id. Because this is not a negligence action, the factors set forth in *Lopez* and again in *Alcorn* do not apply.

K.C. Auto argues, "it is inconceivable that a defendant not be allowed to offer mitigating factors to rebut a claim of punitive damages and if it does, as in the case at bar, that those mitigating factors should not be considered." (See K.C. Auto's Brief at 38). Neither the Werremeyers nor the Trial Court has ever suggested that K.C. Auto not be allowed to offer mitigating factors to rebut a claim of punitive damages. In fact, as K.C. Auto notes, it did introduce evidence of mitigating factors in this case. And, there is no evidence at all that those mitigating factors were not considered. Neither the Trial Court nor the Werremeyers have suggested that mitigating factors should not be considered. Rather, the Werremeyers argue that the factors set forth in *Alcorn* were factors established for negligence cases and not intentional tort cases.

In any event, the factors set forth in *Alcorn* are similar to those discussed in *Gore* and *Campbell*. As demonstrated above in the discussion of the *Gore* factors, even if the *Alcorn* factors are considered in this case, the evidence was sufficient to submit the issue of punitive damages to the jury.

## CONCLUSION

All three of K.C Auto's points allege the Trial Court erred in failing to enter judgment as a matter of law. K.C. Auto is entitled to judgment as a matter of law only if reasonable persons, viewing the evidence in the light most favorable to the Werremeyers, could not differ as to K.C. Auto's right to judgment. Here, twelve jurors and one judge considered the Werremeyers evidence against K.C. Auto and all thirteen persons concluded that the evidence supported an award of actual and punitive damages against K.C. Auto. The Honorable Forrest Hanna considered the evidence at the close of the case and again after the jury had returned its verdict. He found the evidence was sufficient to support an award of actual and punitive damages against K.C. Auto. All twelve jurors agreed and returned a unanimous verdict finding that K.C. Auto was liable for both actual and punitive damages.

For this reason and the reasons set forth above, the Werremeyers respectfully request that this Court affirm the Trial Court's judgment against K.C. Auto in all respects except for the Trial Court's order denying an award of prejudgment interest.

**APPELLANTS/RESPONDENTS' BRIEF IN REPLY TO K.C. AUTO'S RESPONDENT'S BRIEF**

**TABLE OF AUTHORITIES**
**FOR APPELLANT/RESPONDENTS' BRIEF**
**IN REPLY TO K.C. AUTO'S RESPONDENT'S BRIEF**

## POINT RELIED ON WITH PRIMARY AUTHORITIES

**THE TRIAL COURT ERRED IN OVERRULING THE WEREMEYERS' MOTION FOR PREJUDGMENT INTEREST BECAUSE THEY SATISFIED THE REQUIREMENTS OF §408.040.2 RSMO IN THAT THEY SENT A CERTIFIED LETTER TO K.C. AUTO OFFERING TO SETTLE THEIR CLAIM FOR $20,000.00, THE OFFER WAS LEFT OPEN FOR SIXTY DAYS, AND THE AMOUNT OF THE JUDGMENT ENTERED IN THIS CASE EXCEEDED $20,000.00.**

*Call v. Heard, 925 S.W.2d 840 (Mo.banc 1996)*

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

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

*§408.040.2 RSMo*

## ARGUMENT

## POINT I

**THE TRIAL COURT ERRED IN OVERRULING THE WERREMEYERS' MOTION FOR PREJUDGMENT INTEREST BECAUSE THEY SATISFIED THE REQUIREMENTS OF §408.040.2 RSMO IN THAT THEY SENT A CERTIFIED LETTER TO RESPONDENT/APPELLANT K.C. AUTO OFFERING TO SETTLE THEIR CLAIM FOR $20,000.00, THE OFFER WAS LEFT OPEN FOR SIXTY DAYS, AND THE AMOUNT OF THE JUDGMENT ENTERED IN THIS CASE EXCEEDED $20,000.00.**

### A. INTRODUCTION

In its Brief, K.C. Auto does not dispute that the Werremeyers properly complied with the mandates of the prejudgment interest statute, §408.040 RSMo. Rather, K.C. Auto argues that mere compliance with §408.040 does not mandate the award of prejudgment interest. (See K.C. Auto's Brief at 19). K.C. Auto's argument is not supported by the plain language of the statute, nor is it supported by the Court's interpretation of the statute in *Hurst v. Jenkins, 908 S.W.2d 783, 786 (Mo.App.W.D. 1995).*

Section 408.040.2 RSMo states in pertinent part:

> 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. (emphasis added).

In *Hurst*, the Court found that if the conditions of §408.040.2 are met, "then the prevailing party **shall** be awarded prejudgment interest...." *908 S.W.2d at 786* (emphasis added). K.C. Auto provides no authority to the contrary.

## B. THE CASES CITED BY K.C. AUTO ARE NOT APPLICABLE

K.C. Auto relies on *Schreibman v. Zanetti, 909 S.W.2d 692, 704 (Mo.App. 1995)* for the proposition that, "prejudgment interest is not recoverable on a tort claim unless the tortuous conduct confers a benefit on the defendant." (See K.C. Auto's brief at 15-16). The *Schreibman* case did not involve a situation where the plaintiff had complied with the mandates of §408.040.2 RSMo. In fact, the Court specifically noted that the plaintiff in that case "did not even mention [§408.040.2]" much less "establish that he complied with the statute." Id. at 705.

The plaintiff in *Schreibman* was seeking prejudgment interest allowed under common law. Under common law, prejudgment interest was only recoverable on a tort claim if the tortuous conduct conferred a benefit on the defendant. Here, the Werremeyers' claim for prejudgment interest is not based on common law, but rather, §408.040.2 RSMo. The statute has no requirement that the tortuous conduct confer a benefit on the defendant. Thus, the holding in *Schreibman* is inapplicable to the facts at issue here.

Similarly, *Weinberg v. Safeco Insurance Company, 913 S.W.2d 59 (Mo.App. 1995)* does not support K.C. Auto's argument. Again, that case involved a situation where plaintiffs were seeking prejudgment interest pursuant to common law. The Court in fact awarded prejudgment interest even though the damages awarded in that case were less than those sought by the plaintiffs. The Court was not addressing §408.040.2 RSMo, and therefore, *Weinberg* has no bearing on the issue in this case.

## C. PUNITIVE DAMAGES SHOULD BE CONSIDERED IN DETERMINING WHETHER THE JUDGMENT EXCEEDED THE DEMAND

K.C. Auto argues that punitive damages should not be considered in determining if the Werremeyers' judgment exceeded their demand. This argument is contrary to the plain language of the statute, the policy behind the statute, and this Court's prior conduct in *Call v. Heard, 925 S.W.2d 840 (Mo.banc 1996).*

### 1. K.C. Auto's Argument Is Contrary To The Plain Language Of The Statute

This Court has repeatedly found that if a statute is clear and unambiguous, the Court should apply the statute in accordance with its plain and ordinary meaning and should not engage in statutory construction. See *State v. Rowe, 63 S.W.3d 647 (Mo.banc 2002)* and *Kearney Special Road District v. County of Clay, 863 S.W.2d 841 (Mo.banc 1993).* The statute at issue here provides that if "the amount of the judgment" exceeds the prejudgment demand, then the claimant is

entitled to prejudgment interest. See §408.040.2. The statute does not distinguish between compensatory damages or punitive damages; rather, it simply uses the phrase: "amount of the judgment." The legislature chose not to limit prejudgment interest to "compensatory damages." Thus, the plain language of the statute provides no support for K.C. Auto's argument.

To the extent K.C. Auto is arguing that §408.040 RSMo is ambiguous, and therefore, requires statutory construction, its argument is contrary to this Court's decision in *Lester v. Sayles, 850 S.W.2d 858 (Mo.banc 1993).* In *Lester*, the defendant claimed that the prejudgment interest statute was unconstitutionally vague in that "the amount on which prejudgment interest is to be assessed cannot be determined from the language of the statute." Id. at 873. The Court rejected defendant's argument. The Court noted that subsection one of the statute states, "'[i]nterest shall be allowed on *all money due* upon any judgment or order of any court from the day of rendering the same until satisfaction be made by payment.'" (Court's emphasis). The Court found that by reading subsections one and two together, "any possible ambiguity or vagueness" is eliminated. The Court concluded, "The statute tolerates only one interpretation: prejudgment interest is to be calculated on the **entire amount of money due** where this amount exceeds the settlement offer." Id. (emphasis added).

K.C. Auto suggests that the interpretation placed on the statute by this Court in *Lester* does not apply here because punitive damages were not an issue before the *Lester* Court. K.C. Auto provides no support for the notion that the

prejudgment interest statute is capable of more than one interpretation depending on the circumstances of the case. In fact, this argument is contrary to the *Lester* Court's holding that "the statute tolerates **only one** interpretation." Id. at 873

Thus, pursuant to the plain language of the statute, and this Court's interpretation of the statute, prejudgment interest is owed on punitive damages.

**2. The Public Policy Of Encouraging Settlements And Deterring Delay In Litigation Is Furthered By Awarding Prejudgment Interest on Punitive Damages**

K.C. Auto argues that public policy would not be served if prejudgment interest was awarded on punitive damages. This argument ignores the fact that it is the public policy of this state to encourage the settlement of claims. See, *Andes v. Albano, 853 S.W.2d 936, 940 (Mo. banc 1993)* where this Court recognized that it is the policy of law to "encourage the peaceful settlement of disputes." (citations omitted). More specifically, this Court has found that "the prejudgment interest statute serves to further public policy of this State in that it promotes settlement and deters unfair benefit from the delay of litigation." See *Brown v. Donham, 900 S.W.2d 630, 633 (Mo.banc 1995).* As if to emphasize the point, the *Brown* Court reiterated, "The purpose of §408.040.2 is to encourage settlement." Id. at 634. Awarding prejudgment interest on punitive damages would encourage defendants to settle those claims where punitive damages are fairly certain to be awarded. Thus, contrary to K.C. Auto's argument, the policy of the State is furthered by an award of prejudgment interest on punitive damages.

If K.C. Auto's interpretation of the prejudgment interest statute is adopted, then the statute will fail to promote settlement and deter unfair benefit from the delay of litigation in cases where punitive damages are the bulk of the damages at issue. In cases, like the one at issue here, where the amount of potential compensatory damages is small but the amount of potential punitive damages is large, the prejudgment interest statute will provide little, if any, encouragement to defendants to settle. Why pay a settlement consisting primarily of punitive damages if there will not be any pre-judgment interest awarded on the punitive damage award? This is especially true in cases in which the only potential recovery, other than punitive damages, is a nominal damage award of $1.00. If a defendant will be required to pay prejudgment interest only on the $1.00 nominal damage award, then the prejudgment interest statute will not provide any incentive whatsoever to settle the case; nor will it deter or discourage the delay of litigation.

Under K.C. Auto's interpretation of the statute, those defendants whose conduct has been found to be outrageous because of their evil motive or reckless indifference to the rights or safety of others would receive more favorable treatment than those defendants whose conduct amounted only to simple negligence. Those defendants who owe only compensatory damages would have to pay prejudgment interest on the entire amount of money due; whereas, those defendants against whom punitive damages are awarded would not have pay prejudgment interest on the entire amount of money due.

For an out of state case interpreting a prejudgment interest statute similar to Missouri's, see *Majorowicz v. Allied Mutual Insurance Co.*, *569 N.W.2d 472, 538, 539 (Wis. App. 1997).* The prejudgment interest statute at issue in that case stated:

> If there is an offer of settlement by a party under this section which is not accepted and the party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the amount is paid.

In finding that the statute authorized prejudgment interest on punitive damages, the Court of Appeals noted that one of the objectives behind the statute was to encourage pretrial settlement and avoid delays. The Court further noted that the statute itself provides for payment of interest on the "amount recovered." Based on the plain language of the statute and the policy behind the statute, the Court found that the Trial Court appropriately awarded interest on punitive damages.

Similarly, here, the purpose behind Missouri's prejudgment interest statute is to encourage settlement and deter delays. As the *Majorowicz* Court noted, awarding prejudgment interest on punitive damages furthers this policy. Also, the plain language of the prejudgment interest statute provides for interest on the "amount of the judgment." This Court has previously interpreted the statute to require interest on the "entire amount of money due." Because punitive damages are part of the amount due to the Werremeyers, K.C. Auto is responsible for interest on the punitive damages pursuant to the plain language of the statute. Id.

See also *Demarest v. Progressive American Insurance Co., 552 So.2d 1329, 1338 (La.App. 1989)* where that Court found that awarding prejudgment interest on both compensatory and exemplary damages "would not only compensate a victorious victim for the loss of the use of the funds that were not available at the time the tort was committed, but also act as an incentive to settlement" or at discourage a defendant from delaying litigation.

Finally, see *Bass v. Spitz, 522 F. Supp. 1343, 1353-1354 (D.C.Mich. 1981)* Interpreting the Michigan prejudgment interest statute, the United States District Court found that prejudgment interest should be awarded on treble or exemplary damages. In so holding, the Court noted, "if the statute was interpreted to provide interest…on actual damages only, the real value of a recovery of treble damages or exemplary damages would dwindle as the time between the filing date and the date of judgment increased." Id. at 1354. The Court further recognized that two of the purposes behind the statute are "to prevent erosion in the value of a judgment, and to discourage a defendant from delaying litigation." Id. at 1354-1355. The Court concluded, "these purposes are best served by allowing interest on the full trebled amount of plaintiff's recovery." Id. at 1355.

Similarly, here, the purpose behind Missouri's prejudgment interest statute is to discourage or deter a defendant from delaying litigation. Allowing interest on punitive damages would be the most effective way to deter or discourage defendants from delaying litigation.

### 3. K.C. Auto's Argument Is Contrary To This Court's Conduct In *Call v. Heard*.

In support of its argument, K.C. Auto claims that "no Appellate Court in Missouri has ever awarded prejudgment interest on punitive damages." Although K.C. Auto refers to this Court's decision in *Call v. Heard, 925 S.W.2d 840 (Mo.banc 1996),* it apparently overlooked the fact that in that case, this Court affirmed the Trial Court's decision which awarded prejudgment interest on punitive damages.

In *Call*, the plaintiff sent a prejudgment interest demand letter offering to settle his claim for $10,000,000.00. Id. at 853. Defendants refused to settle and in a court tried case, the judge awarded $9.5 million in compensatory damages and $9.5 million in punitive damages. Id. at 844. Thus, plaintiffs' judgment exceeded their prejudgment interest demand only if the Court considered the award of punitive damages. The Trial Court awarded prejudgment interest, and thereby, must have found that punitive damages were properly considered in determining whether the judgment exceeded the prejudgment interest demand. This Court affirmed, and therefore, must have found that punitive damages were appropriately considered in determining if the judgment exceeded the demand.

## D. K.C. AUTO IS RESPONSIBLE FOR THE ENTIRE AMOUNT OF COMPENSATORY DAMAGES

Finally, K.C. Auto argues that this Court should not attribute the entire $9,000.00 compensatory damage award to K.C. Auto to satisfy the prejudgment

interest statutory requirement. First, it is not necessary for this Court to attribute the entire $9,000.00 judgment to K.C. Auto. Even if one cent of the compensatory damages is attributed to K.C. Auto, the requisites of §408.040.2 are satisfied. Second, pursuant to §537.067 RSMo, K.C. Auto and Copart are jointly and severally liable for the $9,000.00 judgment. Thus, K.C. Auto is liable for the entire amount of the judgment. See *Elfrink v. Burlington Northern Railroad, 845 S.W.2d 607, 615 (Mo.App. 1992).* This statute and case were both cited in the Werremeyers' original Brief; nonetheless, K.C. Auto has failed to address either of these authorities. K.C. Auto provides no authority for the proposition that it is not jointly and severally liable for the $9,000.00 judgment.

K.C. Auto does, however, rely on *Gibson v. Mussel, 844 F.Supp.1579 (W.D.Mo. 1994)* for the proposition that "it is not appropriate to attribute an entire judgment on a joint claim to one party to meet the statutory requirement that the judgment exceed the offer." (See K.C. Auto's Brief at 18). The *Gibson* case was a wrongful death claim involving two plaintiffs. The Court found, "for obvious reasons, it is not appropriate to attribute the entire judgment on a joint wrongful death claim to **one plaintiff** to meet the statute's requirement that the judgment exceed the offer." Id. at 1583 (emphasis added). Nowhere in that case does the Court find that it is inappropriate to attribute an entire judgment to a defendant who is jointly and severally liable with another defendant for the judgment obtained by the plaintiff. Thus, *Gibson* does not support K.C. Auto's argument.

For the foregoing reasons, the Werremeyers respectfully request that this Court reverse the Trial Court's order denying pre-judgment interest and remand this case back to the Trial Court with directions to amend its Judgment to include pre-judgment interest.

## CONCLUSION

For the foregoing reasons and for the reasons set forth in their original Brief, Appellants/Respondents Brent and Tonya Werremeyer respectfully request that this Court reverse the Trial Court's order overruling their motion to add prejudgment interest and remand this case to the Trial Court with instructions to add prejudgment interest to the amount of the judgment entered against K.C. Auto. In all other respects, the Werremeyers respectfully request that the Trial Court's judgment be affirmed.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of the foregoing were duly mailed, postage prepaid, this ___ day of December, 2003, to:

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## CERTIFICATION PURSUANT TO RULE 84.06

1. Appellants/Respondents' Attorneys: Christopher P. Sweeny, Turner & Sweeny, 10401 Holmes Road, Suite 450, Kansas City, Missouri, 64131, Missouri Bar No: 44838 and John E. Turner, Turner & Sweeny, 10401 Holmes Road, Suite 450, Kansas City, Missouri, 64131, Missouri Bar No: 26218.

2. This brief contains 10,216 words in compliance with Rule 84.06(b).

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Christopher P. Sweeny