

No. 88581

**IN THE
SUPREME COURT OF MISSOURI**

Respondents/Plaintiffs

vs.

CITY OF OAK GROVE, MISSOURI

Appellant/Defendant

**Appeal from the Circuit Court of Jackson County, Missouri
Sixteenth Judicial Circuit
Civil Action No. 02CV233809
Honorable W. Stephen Nixon**

SUBSTITUTE REPLY BRIEF OF APPELLANT

James H. Ensz MO 23860
Steven T. Majors MO 52859
ENSZ & JESTER, P.C.
2121 City Center Square
1100 Main Street
Kansas City, Missouri 64105
Telephone: 816-474-8010
Facsimile: 816-471-7910
jensz@enszjester.com
Attorneys for Appellant

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STATEMENT OF FACTS

Although Respondents are allegedly dissatisfied with the "completeness and fairness of Appellant's Statement of Facts," they do not take issue with any of those relevant to property loss or interest that might be assessable against that loss. Respondents quibble that Appellant City's action with regard to the adjustment of their claim kept them from starting the repair of their flood-damaged property. Appellant allows the possibility that a finder of fact might have penalized Appellant for the full extent of that delay. At p. 10 of its initial Substitute Brief, Appellant takes such into account when it states: "Based on the evidence, the property was taken for as long as thirteen months or as little as two months, as opposed to the thirty-one months contemplated by the court's prejudgment interest award."

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN ADDING PREJUDGMENT INTEREST TO THE JURY'S AWARD OF DAMAGES IN THIS INVERSE CONDEMNATION CASE BECAUSE THE "TAKING" CONSTITUTING THE INVERSE CONDEMNATION WAS A "TEMPORARY PARTIAL TAKING" WITH REGARD TO WHICH (1) INTEREST COULD NOT BE MATHEMATICALLY COMPUTED BY THE COURT, AS WAS DONE BY THE COURT, AND (2) PREJUDGMENT INTEREST, IF ANY, THAT COULD HAVE BEEN ASSESSED WOULD HAVE BEEN A MATTER TO BE PROVED BY PLAINTIFF AND INCLUDED IN THE JURY'S DAMAGES AWARD AS PART OF ITS VERDICT, SUCH THAT THE AWARD OF PREJUDGMENT INTEREST TO PLAINTIFF BY THE COURT WAS NEITHER AUTHORIZED AS A MATTER OF LAW, SUPPORTED BY THE EVIDENCE, OR THE JURY'S VERDICT.

A. Appellant's Alleged Violation of Civil Rule 83.08(b).

Although Respondents claim that Appellant altered the basis of its claim made in its Court of Appeals Brief, Substitute Respondents' Brief, pp. 12-17, such is not true. Admittedly, the point relied upon in the Substitute Brief more narrowly defines the issue before this court than did the recitation of the same general issue in the appellate court so that the precise issue before this court is more easily identified. This is consistent with

the dictates of Civil Rule 83.08(b) which in the first instance actually allows Appellant to file a brief to fully replace the brief considered by the Court of Appeals, which Court of Appeals Brief is abandoned. The civil rule then goes on to say that the "substitute brief shall include all claims the party desires this court to review. ..."

From the first opportunity it had after the trial court unilaterally added the mathematically calculated prejudgment interest on the verdict, Appellant's Appendix, p.2 (A-2), Appellant has argued that in this case prejudgment interest was a matter for jury determination and that the court could not make such an award because the principal amount against which interest was chargeable was not established. Appellant City of Oak Grove, Missouri's Motion and Suggestions in Support of its Motion to Amend Judgment, LF 142-148. In its Amended Appellant Brief under the subcategory of "Case Law – Prejudgment Interest," pp. 28-32, Appellant re-asserts the argument. Supplemental Appendix, A8-12 (attached). After the appellate court initially ruled in Appellant's favor on the prejudgment interest issue, in response to Respondents' Motion for Rehearing, the appellate court requested letter briefs from the parties on the prejudgment interest issue. Appellant, both in its initial letter brief, pp. 10-12, Supplemental Appendix, A13-15 (attached), and its reply letter brief, pp. 1-2, Supplemental Appendix, A16-17 (attached), made more understandable the need for a jury rather than a court decision on prejudgment interest in this case, because the principal amount of damages had not been established. It did this by referring to what had occurred in the instant action as a "temporary" rather than a "permanent" taking of

property and by referring to the guidance given by this Court in *Byrom v. Little Blue Valley Sewer District, et al*, 16 S.W.3d 573, 577-578 (Mo. banc 2000). In other words, before the Court of Appeals made its final decision it had before it, the claim and arguments, properly preserved, that this court now has in front of it.

Even should there have been some question as to whether Appellant had preserved its argument, *State ex rel. Zobel v. Burrell*, 167 S.W.3d 688, 699, f.n. 2 (Mo. banc 2005) cited by Respondents at p. 12 of their Substitute Brief holds for the proposition that a party will not automatically be denied the opportunity to present an argument before this court even when it unquestionably is presenting a new one. In *Linzenn v. Hoffman*, 937 S.W.2d 723, 726-727 (Mo. banc 1997), cited at p. 12 of Respondents' Brief, there was a primary issue that was the basis of the Court's decision for review. Almost, as an aside, this court chose not to consider a laundry list of other claims, not considered in the Court of Appeals Briefs. The remaining case cited by Respondents in support of their argument that the Appellant has violated Civil Rule 83.08(b) is *State v. Davidson*, 982 S.W.2d 238, 243 n.2 (Mo. banc 1998) found at p. 13 of Substitute Respondents' Brief. Appellant does not take issue with the holding in that case which supports the literal wording of the last sentence of Civil Rule 83.08(b) that in filing its Substitute Brief, Appellant abandons that not included in its Supreme Court Substitute Brief that was included in its Appellant Court Brief. Admittedly, the only arguments retained from the Appellate Brief are those covered in Argument II of that Brief. Arguments I, III, and IV have been abandoned by Appellant.

B. Application of Prejudgment Interest in Inverse Condemnation Cases.

To begin with, if this Court chooses to treat inverse condemnation claims as torts and governed by § 408.040.2 RSMo, then any rationale for the application of prejudgment interest is not a factor and Respondents are precluded from claiming prejudgment interest because they failed to send the required sixty-day demand letter. Respondents recognize as much at p. 17 of their Substitute Brief.

Even if § 408.040.2 RSMo is not applicable, there is no reason to treat inverse condemnation claims any different than any other type of claim for the purpose of determining whether prejudgment interest should be available. Respondents argue at length that as a general proposition, Article I, Section 26 of the Missouri Constitution and standards of fair compensation require that Respondents be fully compensated for the taking of their property by government and where that property is taken for a period of time and then returned in an action of inverse condemnation that they should be paid for the loss of use of their property for the time the property is taken (most often an interest assessment against the value of the property). Cases cited in support include direct condemnation cases and inverse condemnation cases where property is totally taken for an established period of time, pp. 20-26, Respondents' Substitute Brief. Appellant agrees with the proposition and specific holdings in these cases, but there must be evidence of record to clearly support the principal amount against which interest is to be applied and evidence as to the length of time for which interest is to be applied. In this case, such evidence was lacking, and it was not ascertainable by the court after a jury verdict which

may even have included prejudgment interest as part of the damage award. Substitute Brief of Appellant, pp. 9-11.

It is the universal, common law of Missouri that there must be an ascertainable amount of money shown to be due at the start of trial, or as would relate to an inverse condemnation claim, an established property value that has been taken and that has been established at the start of trial, in order for prejudgment interest to be automatically awarded as a procedural matter by a court. See Substitute Brief of Appellant, pp. 13-14. Otherwise, prejudgment interest is a matter of proof to be submitted to the jury or other trier of fact as a substantive matter to be included in the verdict or factual findings. Substitute Brief of Appellant, pp. 16-17.

Respondents ignore the distinguishing factors between this "temporary partial" inverse condemnation case and the "total taking" inverse condemnation cases they consider. Although in *Byrom, supra* at p. 4, this Court did not specifically consider the issue of prejudgment interest, it did recognize that there were distinctions between permanent and temporary takings and between total and partial takings and that the measure of damages was dependent on how classified, and finally and most importantly, whatever the loss claimed for the period of time taken, the loss "**must be shown**" (emphasis added by Appellant). *Byrom v. Little Blue Valley Sewer District, et al*, 16 S.W.3d at 577. To the extent interest was claimed as a measure of damages, it had to be proved in this case, but was not.

C. Effect of Trial Court's Pretrial Ruling on its Award of Prejudgment

Interest.

Respondents spend most of their brief, pp. 26-41, making the untenable argument that because the trial court made a pretrial ruling that was superseded by the presentation of facts and a jury instruction that were inconsistent with that court ruling, which made that ruling untenable, the parties are stuck with that ruling anyway. Respondents argue that this is true, even if this leads to a manifestly unjust result since Appellant allegedly accepted the court's original ruling and must now live with it. Such is neither equitable, nor fortunately, is it the law.

The trial court's pretrial ruling premised on an oral motion made by Respondents' attorney is considered at pp. 4-5 of Substitute Brief of Appellant and pp. 9-10 of the Substitute Respondents' Brief. Admittedly, after Respondents' attorney made his motion, Appellant's attorney agreed that it was his understanding of the law that if prejudgment interest was awardable at all, which he denied that it was, it was awardable by the court. The trial court then ruled that based on its understanding of the law that if a taking was found, prejudgment interest was available to Respondents from the time of the taking and it would simply be a matter of his making a mathematical calculation at the conclusion of trial to then add the interest. This interim determination by the court would have been subject to being discarded at the conclusion of the case, after it had been shown to be erroneous, by the evidence presented at trial. *Sierra Club v. U.S. Army Corp. of Eng.*, 771 F.2d 409, 413 (CCA 8, Mo. 1985).

At the conclusion of the presentation of evidence, the scope of Respondents' case was dependent on the evidence presented during the trial which did not allow for a definitive ruling on damages or any prejudgment interest, a part of those damages. That Respondents then chose to have the court give a damages verdict directing instruction, A-6, that allowed Respondents to recover for the "loss of use" of their property and did not specifically instruct the jury in closing argument how interest might be calculated as part of that loss was Respondents' decision, not Appellant's. Appellant's counsel was under no obligation to object to a jury instruction which Respondents chose to have the court give nor was he under obligation to advise Respondents' counsel that he needed to discuss interest as part of his damages argument. Unlike the factual situation in the *St. John's Bank & Trust Co. v. Intag, Inc.*, 938 S.W.2d 627, 629-630 (Mo. App. E.D. 1997) cited by Respondents at p. 30 of its Substitute Respondents' Brief, there was nothing done by Respondents or their counsel to which to pose an objection. The first time Appellant had reason to object was when the trial court unilaterally added prejudgment interest to the judgment on the verdict, A-2, which objection was timely made in Appellant's Motion to Amend Judgment, LF 142-147.

Perhaps the most curious argument made by Respondents is that Appellant has stipulated to the trial court's award of prejudgment interest. Assuming the discussion between court and counsel constitutes a stipulation to which Appellant may be legally bound, pp. 4-5 of the initial Substitute Brief of Appellant, it was presumed as part of the stipulation that the trial court could mathematically calculate an interest award. It was a

given that the mathematical calculation would then accurately state the prejudgment interest established by an ascertainable principal amount (property loss) from and to dates not subject to question. There was an established date of loss from which the principal amount might be measured – May 8, 2002. There was evidence of dates ranging from two months to thirteen months as to the time it took to restore the property. But, the actual value of the property loss for the purposes of applying an interest figure is undeterminable. Initial Substitute Brief of Appellant, pp. 3-4, 10-11. Nevertheless, the trial court calculated interest on the entire verdict, which included not only the property loss value but the loss of use of the property which might already have included interest. The trial court calculated the interest on the \$110,000.00 jury verdict to have run from May 8, 2002, to the date of the verdict, December 15, 2004. This would have been a period of thirty-one months as opposed to the two to thirteen months supported by the evidence.

Four conclusions have to be reached: (1) the trial court's decision on prejudgment interest was incorrect and excessive; (2) based on the evidence and jury award, the trial court could not compute a prejudgment interest award; (3) nobody stipulated to a prejudgment interest award by the court that could not have been made; and (4) the only entity that could have awarded prejudgment interest in this case was the jury.

Where a stipulation is based on a mutual misunderstanding of the facts and the law by the court and the attorneys and fails to serve its intended purpose, the stipulation is not

to be honored. *Pierson v. Allen*, 409 S.W.2d 127, 130 (Mo. 1966); *Ball v. Excel Corp.*, 985 S.W.2d 411, 415 (Mo. W.D. 1999).

CONCLUSION

Appellant reiterates the position taken in the Substitute Brief of Appellant that this court should issue its mandate to the trial court to reverse its award of prejudgment interest and then show Respondents' judgment against Appellant to be fully satisfied.

Respectfully Submitted,

ENSZ AND JESTER, P.C.

James H. Ensz MO 23860
Steven T. Majors MO 52859
ENSZ & JESTER, P.C.
2121 City Center Square
1100 Main Street
Kansas City, Missouri 64105
Telephone: 816-474-8010
Facsimile: 816-471-7910
jensz@enszjester.com
Attorneys for Appellant

CERTIFICATE OF WORD PROCESSING PROGRAM

The undersigned hereby certifies that this Brief was prepared on a computer, using Microsoft Word. A diskette containing the full text of the Brief is provided herewith, and has been scanned for viruses and is believed to be virus-free.

Attorney for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Brief herein is in compliance with Missouri Rule of Civil Procedure 84.06. According to the word count of the word processing system used to prepare the Brief, the Brief contains 2,573 words, 227 lines.

Attorney for Appellant

CERTIFICATE OF SERVICE

Counsel for Appellant certifies that a copy of the foregoing SUBSTITUTE
REPLY BRIEF OF APPELLANT was mailed, *via* U.S. Mail, postage prepaid, this
_____ day of October, 2007 to:

Jason K. Rew, Esq.
COCHRAN OSWALD & ROAM, LLC
601 NW Jefferson
P.O. Box 550
Blue Springs, MO 64013

Scott A. Hunter, Esq.
HUNTER & NANTZ, LLC
Rivergate Business Center
600 Broadway, Suite 670
Kansas City, MO 64105
Attorneys for Respondents

Attorney for Appellant

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