

IN THE MISSOURI SUPREME COURT

JOSHUA SMITH,

Respondent

vs.

CHARLES G. SHAW

Appellant

S.C. #86292

SUBSTITUTE BRIEF OF RESPONDENT, JOSHUA SMITH

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JURISDICTIONAL STATEMENT

Joshua Smith was injured in a motor vehicle wreck that occurred in Eastern Jackson County, Missouri, on April 14, 2000, involving Appellant, Charles Shaw, who was driving on the wrong side of the highway when he struck the vehicle in which Joshua Smith was a passenger. Joshua Smith filed suit against Shaw in the Circuit Court of Jackson County, Missouri, for his injuries. (L.F. 1-7).

The case was tried to a jury on April 28 and April 29, 2003, resulting in a verdict of \$200,000. (L.F. 12). Appellant did not file a motion for new trial. After the jury verdict, Appellant's insurance company, Geico, paid the policy limits of \$25,000 plus prejudgment interest and post judgment interest of \$5,948.65 to Joshua Smith. On May 2, 2003, Joshua Smith filed a partial satisfaction of judgment for the \$30,948.65 paid him. (S.L.F. 30-31). On May 15, 2003, Appellant filed a Motion for Credit alleging he was entitled to a credit for \$25,000 for an underinsurance payment Joshua Smith received prior to trial from Farmers/Mid-Century. (L. F. 13-18). On May 19, 2003, Joshua Smith filed his Suggestions in Opposition to Shaw's motion for a credit of the underinsurance payment. (L.F. 19-22). The trial court signed a Judgment Entry on June 2, 2003, denying Appellant's motion for a credit for the underinsurance payment. (S.L.F. 32-33). Appellant did not timely appeal the trial court's June 2, 2003, Judgment. That judgment became final 30 days thereafter.

Geico next paid the court costs of \$767.70. On August 4, 2003, Joshua Smith filed a satisfaction of judgment for the court costs. (S.L.F. 34-35).

On August 5, 2003, Appellant filed a motion to set aside the June 2, 2003, Judgment Entry alleging his counsel did not receive the June 2, 2003, Judgment Entry within the time to file a motion for new trial. (S.L.F. 36-46). On August 12, 2003, Joshua Smith filed Suggestions in Opposition to Defendant's Motion to Set Aside Judgment. (S.L.F. 47-54). On August 29, 2003, Appellant filed Reply Suggestions. (S.L.F. 55-58). On September 17, 2003, without a hearing, the trial court entered a "new" judgment that was identical to the June 2, 2003, Judgment Entry with the exception of being dated September 17, 2003. (L.F. 23-24).

On October 2, 2003, Appellant filed a motion to amend the "new" September 17, 2003, Judgment Entry asking that the prejudgment interest award be eliminated. (L.F. 25). The trial court overruled Appellant's motion to amend that judgment on October 10, 2003. (L.F. 72). On October 15, 2003, Appellant then filed a motion to reconsider his motion to amend the "new" September 17, 2003, judgment. (S.L.F. 60). Respondent filed Suggestions in Opposition to this motion. (S.L.F. 62-75). The trial court denied that motion. (S.L.F. 76) Appellant filed his Notice of Appeal on October 27, 2003, concerning the denial of his Motion to Amend the "new" September 17, 2003, judgment as to the prejudgment interest award. (L.F. 73-74).

On July 13, 2004, the Western District Court issued its Opinion affirming the Judgment in part and reversing in part. Both Appellant and Respondent filed Motions for Rehearing and/or Transfer. The Western District denied both motions. Both parties filed Motions for Transfer to this Court. Both Motions were sustained by this Court on

September 28, 2004. Jurisdiction is therefore properly before this Court, the same as on original appeal. (Missouri Constitution, Article V, Section 10).

Respondent suggests this Court should sua sponte consider whether there was jurisdiction for the Western District Court to hear Appellant's appeal and whether the trial court could enter a "new" judgment on September 17, 2003, based on this record.

* * *

STATEMENT OF FACTS

Joshua Smith was injured in a two vehicle collision that occurred on April 14, 2000, on 40 Highway approximately 3 miles west of SW Adams Dairy Parkway in Blue Springs, Jackson County, Missouri. (L.F. 1-3). Appellant Shaw was driving a black GMC Jimmy westbound on 40 Highway when he crossed into the wrong (oncoming) lane and struck a Toyota Celica operated by Joshua Stark head-on. Joshua Smith was a passenger in the Stark vehicle. (L.F. 1-2). The Blue Springs Police officer who investigated this wreck took photographs of the vehicles, which showed the violent nature of this collision. (See Plaintiff's Exhibits 32, 36, 38 and 39, which are included in the Appendix as A-1, A-2, A3 and A-4.)

Shaw was charged and he pled guilty to improper lane usage by crossing into the opposite lane of traffic, causing an injury accident in violation of Blue Springs Ordinance 340.190. (L.F. 3). (See Plaintiff's Exhibit 3 included in the Appendix as A-5.) Shaw admitted this motor vehicle collision was 100% his fault. (A-34).

Joshua Smith was taken from the accident scene by ambulance to Independence Regional Health Center where he was admitted for a left pelvis fracture, multiple facial lacerations, left knee pain, multiple fractured teeth, injury to his finger, injury to his face, nose, and shoulder and multiple contusions and abrasions. (See Plaintiff's Exhibits 44, 46, 53, 62, 64, 76 and 87, which are included in the Appendix as A-17, A-18, A-19, A-20, A-21, A-22, A-23 and A-27). Joshua Smith underwent several surgeries for injuries he received in this collision. He has future surgeries projected relating to his teeth, hip

and scarring. His medical expenses at trial were over \$27,000. (See Plaintiff's Exhibits 10, 10A and 86, which are included in the Appendix at A-24 - A-26).

The Stark vehicle was insured by Farmers/Mid-Century Insurance, which provided liability coverage of \$25,000 and underinsured motorist coverage of \$25,000 applicable to Joshua Smith's injury claim. (L.F. 13). Farmers/Mid-Century paid both the bodily injury liability limit of \$25,000 and the underinsured motorist benefit of \$25,000 to Joshua Smith prior to suit being filed against Charles Shaw. (L.F. 13). Joshua Smith was required by Farmers/Mid-Century to sign a release and trust agreement for the underinsurance payment. (A-45-48).

The Farmers/Mid-Century insurance policy provided for a subrogation right to recover any insurance payment from Joshua Smith if he recovered from Shaw. That policy specifically provided in paragraph 5. "**Our Right to Recover Payment:** In the event of any payment under this policy, we are entitled to all the rights of recovery of the person to whom payment was made against another. That person must sign and deliver to us any legal papers relating to that recovery, do whatever else is necessary to help us exercise those rights and do nothing after loss to prejudice our rights. When a person has been paid damages by us under this policy and also recovers from another, the amount recovered from the other shall be held by that person in trust for us and reimbursed to us to the extent of our payment." (A-61).

Prior to trial and pursuant to Request for Admissions, Shaw admitted all of the medical treatment provided to Joshua Smith, and as reflected on Plaintiff's Exhibit 10,

was reasonable and necessary and that the charges were reasonable. (See Plaintiff's Exhibit 7, included in the Appendix as A-29).

On July 14, 2000, Joshua Smith offered to settle his injury tort claim against Shaw for \$25,000 or the per person liability limit, whichever was greater, of Shaw's Geico liability insurance policy. (L.F. 6). The offer was in writing and sent by certified mail to Geico pursuant to Missouri Revised Statute §408.040. The offer was left open for sixty (60) days. (L.F. 6, 7 and 31). No settlement was reached or concluded within sixty (60) days of July 14, 2000, or at any time thereafter. (L.F. 4-5 and 12).

On March 7, 2001, Joshua Smith filed suit against Charles Shaw. Attempts were made to serve Shaw to no avail. (See A-69 and A-70). Rather than suffer a non-suit for failure to prosecute, Joshua Smith on December 19, 2001, dismissed his Petition without prejudice and re-filed this action the same date. (L.F. 1-7 and A-70 and A-72). When the Jackson County process server still could not find Shaw to serve him the Summons and Petition, Joshua Smith filed an Application for Appointment of a Special Process Server. (S.L.F. 1 and A-72 and A-73). On February 13, 2002, a special process server was appointed to try and locate Shaw, so he could be served. (S.L.F. 2 and A-73).

On May 24, 2002, the special process server found Shaw and served him in the Western Reception Diagnostic Center in St. Joseph, Missouri, where Shaw was serving time for two (2) felony convictions, one in Jackson County – trafficking in drugs, manufacturing 90 plus grams of methamphetamines and the other in Lafayette County – possession of drug paraphernalia with intent to deliver and sell. (S.L.F. 11, 12 and A-32). Respondent learned in Shaw's deposition that he had lived in motels for a "good year,"

beginning in April 2001, because his house burned down while meth was being cooked. This occurred in April 2001, in Odessa, Missouri. (See A-7-24). Shaw also admitted he used meth and liked it. (A-14-16).

Joshua Smith, in paragraph 9 of his Petition for Damages, pled specific facts related to his claim for prejudgment interest under Missouri Revised Statute §408.040.

“9. Plaintiff prays for prejudgment interest against Defendant pursuant to Missouri Revised Statute 408.040. On July 14, 2000, Plaintiff sent a certified letter to Defendant Shaw’s insurance company, Geico Casualty Company, and made an offer to settle with Defendant Shaw for \$25,000. The offer was sent by certified mail return receipt requested and left open for sixty (60) days. (See “Plaintiff’s Exhibit 2,” which is attached hereto and incorporated by reference.) No settlement was timely reached.

Plaintiff requests the Court to determine the amount of prejudgment interest owed Plaintiff after the judgment and verdict is rendered pursuant to Missouri Revised Statute 408.040.” (L.F. 4 and 5).

Appellant Shaw, in his Answer, did not deny any of the specific allegations set forth in paragraph 9 of Joshua Smith’s petition. Appellant’s Answer in total said:

“9. Defendant admits that plaintiff sent a certified letter to the defendant’s insurance company on or about July 14, 2000.” (L.F. 9).

Joshua Smith's tort action was tried to a Jackson County jury on April 28, and April 29, 2003,¹ resulting in a verdict of \$200,000 for Joshua Smith. (L.F. 12). Joshua Smith offered Plaintiff's Exhibit 2 (the July 14, 2000, prejudgment interest letter) into evidence and it was received. (L.F. 6 and 7). Appellant did not file a motion for new trial. Respondent, as the prevailing party, was asked by Judge Roldan to prepare the judgment entry, which counsel did per his letter of May 1, 2003. (See A-40-44). A copy of this letter and the proposed judgment entry with the prejudgment interest letter were sent to Shaw's attorney, Mike White, and to Respondent's co-counsel, John Turner. (See A40-44). In response, Mike White wrote to Judge Roldan offering his comments about Mr. Gelbach's judgment entry agreeing as to the calculations for prejudgment interest but suggesting the verdict should be reduced by an additional \$25,000 for an underinsurance payment made by Farmers. Mr. White made the calculations for prejudgment interest on \$150,000 and said the total judgment with prejudgment interest should be \$185,547.30. He also included a copy of the "trust agreement" Joshua Smith signed and agreed to in order to receive the underinsurance payment from Farmers. (See A-45-48). Under Farmers' policy, Joshua Smith was to hold in trust any recovery he received from Shaw and to reimburse Farmers to the extent of its payment or \$25,000. (See A-49 – A-64 and specifically A-61).

¹ This was less than a year after Shaw was finally found and served the Petition and Summons.

Appellant's insurance company, Geico, paid the liability policy limits of \$25,000 plus prejudgment interest and post judgment interest of \$5,948.65 to Joshua Smith. Joshua Smith filed a partial satisfaction of \$30,948.65 on May 2, 2003. (S.L.F. 30-31).

On May 15, 2003, Appellant filed a Motion for Credit alleging he was entitled to a credit against the verdict for the Farmers' underinsurance payment of \$25,000. (L. F. 13-18). In that pleading, Shaw's counsel submitted his proposed judgment entry for the Court's signature and included his calculations for prejudgment interest and Joshua Smith's right to same pursuant to Missouri Revised Statute §408.040. Mr. White's Judgment Entry in relevant part said:

“The Court finds that Plaintiff made a proper demand pursuant to Missouri Revised Statute §408.040 for prejudgment interest. The Court finds that Plaintiff, Joshua Smith, made a written offer to settle this claim for \$25,000 on July 14, 2000, and the offer was left open for sixty (60) days. The offer was sent by certified mail, return receipt requested. No settlement was reached or finalized within such 60-day period. The Court finds that all requirements of Missouri Revised Statute §408.040 had been met and that Plaintiff is entitled to prejudgment interest from the 61st date of his offer to settle through April 29, 2003. The Court hereby awards Joshua Smith prejudgment interest of \$35,547.39.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that Plaintiff, Joshua Smith, shall receive a money judgment against Defendant, Charles G. Shaw, in the sum of \$150,000 for

actual damages and \$35,547.39 in prejudgment interest for a total judgment of \$185,547.30. All court costs are assessed against Defendant.

Dated:

THE HONORABLE MARCO A. ROLDAN

Copies to:

Andrew J. Gelbach
John E. Turner
Michael B. White”

(L.F. 17 & 18).

On May 19, 2003, Joshua Smith filed his Suggestions in Opposition to Shaw’s motion for the underinsurance credit. (L.F. 19-22).

The trial court entered a Judgment Entry on June 2, 2003, giving Appellant a credit pursuant to Missouri Revised Statute §537.060 for the liability coverage of \$25,000 paid under Stark’s (as a tort-feasor) policy and denied Appellant’s motion for a credit for the Farmers’ underinsurance payment. (S.L.F. 32-33). Appellant did not timely appeal the trial court’s June 2, 2003, judgment.

Geico next paid the court costs of \$767.70. Joshua Smith filed a satisfaction for the court costs on August 4, 2003. (S.L.F. 34).

On August 5, 2003, Appellant filed a Motion to Set Aside the June 2, 2003, Judgment alleging he did not receive the judgment until the thirty (30) day time period to file a motion for a new trial had expired. (S.L.F. 36-46). On August 12, 2003,

Respondent filed his Suggestions In Opposition To Shaw's Motion To Set Aside Judgment. (S.L.F. 47-54).

On September 17, 2003, the trial court, without a hearing, granted Appellant's Motion to Set Aside the June 2, 2003, Judgment Entry and entered a "new" judgment that was identical to the June 2, 2003, Judgment Entry only dated September 17, 2003. (L.F. 23-24 and S.L.F. 59). Both judgments are included at A-65-68.

On October 2, 2003, Appellant filed a motion to amend the "new" September 17, 2003, judgment with suggestions, but did not file a Motion for New Trial. (L.F. 25-68). The sole relief sought by Appellant was a request that the trial court "eliminate the award of prejudgment interest." (L.F. 25). Appellant did not request in that motion a credit for the Farmers' underinsurance payment. (L.F. 25-68). On October 7, 2003, Respondent filed Suggestions in Opposition. (L.F. 69-71). On October 10, 2003, Judge Roldan overruled Appellant's motion to amend the "new" September 17, 2003, Judgment Entry. (L.F. 72). On October 10, 2003, Appellant then filed a motion to reconsider his motion to amend the "new" September 17, 2003, Judgment Entry asking the Court to consider his Reply Suggestions. (S.L.F. 60-61). On October 24, 2003, Joshua Smith filed his Suggestions in Opposition to Appellant's Motion to Reconsider. (S.L.F. 62-75). The trial court denied Appellant's Motion to Reconsider. (S.L.F. 76).

Appellant filed his Notice of Appeal to the Missouri Court of Appeals, Western District, on October 27, 2003, concerning the denial of his Motion to Amend the September 17, 2003, Judgment Entry related to the prejudgment interest award. (L.F.73-74).

On July 13, 2004, the Missouri Court of Appeals, Western District, entered its opinion finding that Appellant was entitled to a credit for Farmers' underinsurance payment of \$25,000 because Respondent did not actually pay the premium and that Joshua Smith "incurred no expense, obligation or liability ... in securing the insurance coverage." The Court of Appeals affirmed Judge Roldan's decision awarding prejudgment interest under Missouri Revised Statute §408.040 finding that Appellant acknowledged in his pleadings filed in support of his post judgment motion to amend the September 17, 2000, judgment that Joshua Smith's offer to settle remained open for sixty (60) days and that Shaw did not raise any issue as to the sixty (60) day offer period in the trial court and hence waived same.

Both parties sought rehearing and/or transfer to the Western District. The Court of Appeals denied both motions.

Both parties sought transfer to this Court. Those motions were sustained.

* * *

POINTS RELIED ON WITH PRIMARY AUTHORITIES

POINT I

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN REFUSING TO GIVE APPELLANT SHAW CREDIT FOR THE UNDERINSURANCE PAYMENT RECEIVED BY RESPONDENT BECAUSE:

A) APPELLANT FAILED TO PROPERLY PRESERVE THIS ALLEGED ERROR IN THAT HE FAILED TO RAISE THIS ALLEGED ERROR IN A MOTION FOR NEW TRIAL OR A MOTION TO AMEND;

B) APPELLANT IS NOT ENTITLED TO A CREDIT PURSUANT TO §537.060 RSMo IN THAT THE \$25,000 UIM PAYMENT WAS NOT MADE BY A JOINT TORT-FEASOR; IT WAS MADE PURSUANT TO A CONTRACT;

C) THE UIM BENEFITS WERE FROM A COLLATERAL SOURCE IN THAT THEY WERE FROM A SOURCE WHOLLY INDEPENDENT OF APPELLANT SHAW; AND

D) EVEN IF THE UIM BENEFITS WERE NOT FROM A COLLATERAL SOURCE, APPELLANT IS NOT ENTITLED TO A CREDIT IN THAT THE COLLATERAL SOURCE RULE GOVERNS THE ADMISSIBILITY OF EVIDENCE, NOT CREDITS OR OFFSETS AGAINST A JURY VERDICT.

Collier v. Roth, 434 S.W.2d 502 (Mo. 1968).

Elfrink v. Burlington Northern R. Co., 845 S.W.2d 607 (Mo.App. E.D.

1992).

Hagedorn v. Adams, 857 S.W.2d 470 (Mo.App. W.D. 1993).

Washington by Washington v. Barnes Hospital, 897 S.W.2d 611 (Mo. En. Banc. 1995).

Missouri Revised Statute §537.060.

Missouri Supreme Court Rule 78.07.

POINT II

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING RESPONDENT SHAW'S MOTION TO AMEND THE JUDGMENT BY ELIMINATING THE AWARD OF PREJUDGMENT INTEREST BECAUSE:

A) APPELLANT CANNOT RELY ON AN INVITED ERROR ON APPEAL AND APPELLANT INVITED THIS ALLEGED ERROR IN THAT HE SPECIFICALLY REQUESTED IN HIS PROPOSED JUDGMENT THAT THE COURT AWARD PREJUDGMENT INTEREST;

B) THE PLAIN LANGUAGE OF §408.040 RSM_o DOES NOT REQUIRE THAT A PREJUDGMENT DEMAND BE MADE WHILE A TORT ACTION WAS PENDING IN THAT, AS THIS COURT FOUND IN LESTER V. SAYLES, A DEMAND OR SETTLEMENT OFFER CAN BE MADE BEFORE OR AFTER SUIT IS FILED;

C) APPELLANT SHAW'S ARGUMENT THAT RESPONDENT SMITH'S SETTLEMENT OFFER WAS NOT LEFT OPEN FOR SIXTY DAYS WAS WAIVED IN THAT IN HIS MOTION AND SUGGESTIONS TO AMEND THE JUDGMENT HE SPECIFICALLY ADMITTED IN PLEADINGS FILED WITHIN THE TRIAL COURT THAT RESPONDENT SMITH "LEFT HIS OFFER OPEN FOR SIXTY DAYS AS SET FORTH IN §408.040.2"; AND THIS POINT WAS NEVER PRESENTED TO OR RULED BY THE TRIAL COURT PRESERVING NOTHING FOR APPELLATE REVIEW;

D) APPELLANT SHAW FAILED TO PROPERLY PRESERVE ANY CONSTITUTIONAL CHALLENGE TO §408.040 IN THAT HE DID NOT RAISE HIS CONSTITUTIONAL CHALLENGE AT THE EARLIEST OPPORTUNITY; AND

E) THE APPLICATION OF §408.040 IS NOT UNCONSTITUTIONAL IN THAT THIS ISSUE HAS ALREADY BEEN DECIDED BY THIS COURT IN LESTER V. SAYLES WHERE THIS COURT FOUND THAT §408.040 IS NOT UNCONSTITUTIONAL.

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

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

Brown v. Donham, 900 S.W.2d 630 (Mo. En Banc. 1995).

State ex rel. Nixon v. American Tobacco Company, Inc., 34 S.W.3d 122

(Mo. En Banc 2000).

Missouri Revised Statute §408.040.

Supreme Court Rule 55.07.

Supreme Court Rule 55.09.

Supreme Court Rule 55.33.

Final Report of the Missouri Task Force on Liability Insurance, Civil Justice

Recommendations (January 6, 1987).

ARGUMENT

I. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN REFUSING TO GIVE APPELLANT SHAW CREDIT FOR THE UNDERINSURANCE PAYMENT RECEIVED BY RESPONDENT BECAUSE:

A) APPELLANT FAILED TO PROPERLY PRESERVE THIS ALLEGED ERROR IN THAT HE FAILED TO RAISE THIS ALLEGED ERROR IN A MOTION FOR NEW TRIAL OR A MOTION TO AMEND;

B) APPELLANT IS NOT ENTITLED TO A CREDIT PURSUANT TO §537.060 RSMo IN THAT THE \$25,000 UIM PAYMENT WAS NOT MADE BY A JOINT TORT-FEASOR; IT WAS MADE PURSUANT TO A CONTRACT;

C) THE UIM BENEFITS WERE FROM A COLLATERAL SOURCE IN THAT THEY WERE FROM A SOURCE WHOLLY INDEPENDENT OF APPELLANT SHAW; AND

D) EVEN IF THE UIM BENEFITS WERE NOT FROM A COLLATERAL SOURCE, APPELLANT IS NOT ENTITLED TO A CREDIT IN THAT THE COLLATERAL SOURCE RULE GOVERNS THE ADMISSIBILITY OF EVIDENCE, NOT CREDITS OR OFFSETS AGAINST A JURY VERDICT.

A. STANDARD OF REVIEW

The standard for review for Point I is de novo. Uxa ex rel. Uxa v. Marconi, 128 S.W.3d 121 (Mo.App. E.D. 2003).

B. APPELLANT FAILED TO PROPERLY PRESERVE THIS ALLEGED ERROR, AND THEREFORE, THIS POINT HAS BEEN WAIVED AND SHOULD BE DENIED.

Appellant failed to raise this alleged error in his post trial motion as is required by Supreme Court Rule 78.07, and therefore, Appellant's Point I has not been properly preserved for review and no review should be afforded to Appellant. Missouri Supreme Court Rule 78.07 requires, in jury tried cases, that any allegations of error be raised in a motion for new trial or in a motion to amend the judgment. Specifically, the rule states in pertinent part:

(1) Except as otherwise provided in this rule 78.07(a)(1), allegations of error **must** be included in a motion for new trial in order to be preserved for Appellate review.

...

Allegations of error based on matters occurring or becoming known after final submission to the Court or jury **shall** be stated specifically.

(2) Allegations of error relating to the form or language of the judgment **must** be raised in a motion to amend the judgment in order to be preserved for Appellate review. (emphasis added).

Here, Appellant Shaw did not file a motion for new trial at all. He did file a motion to amend the judgment. However, that motion included only an allegation that the trial court had committed error in awarding prejudgment interest. (L.F. 25). Thus, Appellant failed to properly preserve this issue for review and he has waived same.

Not only did Appellant Shaw fail to raise this alleged error in his Motion to Amend, but he specifically invited the error by requesting that the trial court “issue an amended judgment for a total sum of \$175,000.” (L.F. 27). The jury had awarded Respondent Smith \$200,000.00 in damages. (L.F. 12). Prior to trial, Respondent Smith had settled with a joint tort-feasor (Joshua Stark) for \$25,000 and also received \$25,000 in UIM benefits from Farmers. It was undisputed that Appellant Shaw was entitled to a \$25,000 credit for the \$25,000 received from the joint tort-feasor pursuant to Missouri Revised Statute §537.060. (L.F. 19-22). The trial court then entered judgment against Appellant Shaw in the sum of \$175,000, which, as Appellant recognizes, gave Appellant Shaw credit only for the joint tort-feasor’s payment of \$25,000. (See Appellant’s Brief at 10). Although the trial court entered judgment denying Appellant Shaw credit for the \$25,000 in UIM benefits, Appellant Shaw did not file a motion for new trial or a motion to amend the judgment asserting this alleged error. Rather, Appellant Shaw specifically requested that the trial court enter an amended judgment for a total sum of \$175,000 eliminating only the award for prejudgment interest. (L.F. 27).

Appellant’s specific request that the trial court enter judgment in the amount of \$175,000, an amount which does not provide an offset for UIM benefits, rises to the level of invited error. Our Courts have consistently held that an Appellant cannot rely on an invited error on appeal. See e.g., Kettler v. Kettler, 884 S.W.2d 729 (Mo.App. E.D. 1994).

Appellant has not sought or asked for plain error review in any of his Points Relied On in his Substitute Brief. Even if he had, plain error review would not be

appropriate because “plain error is not a doctrine available to revive issues already abandoned by a selection of trial strategy or oversight.” See King v. Unidynamics Corp., 943 S.W.2d 262, 266 (Mo.App. E.D. 1997) (citation omitted). Here, counsel for Appellant Shaw either consciously chose not to raise this alleged error in his motion for amended judgment as part of his strategy, or he failed to raise the alleged error because of oversight. Either way, plain error review is not available. Id. He certainly cannot ask for plain error review in his Substitute Reply Brief.

Furthermore, Appellant only appealed the trial court’s denial of his Motion to Amend the September 17, 2003, judgment concerning the award of prejudgment interest. (L.F. 73). Appellant is bound by that decision and he cannot now change that position on appeal. See Khulusi v. Southwestern Bell Yellow Pages, Inc., 916 S.W.2d 227 (Mo.App. W.D. 1995). Appellant has abandoned this point, and it should be denied.

Finally, the trial court cannot be convicted of reversible error for this point where Appellant did not present the credit issue in the Motion to Amend the September 17, 2003, Judgment Entry and that is the only judgment appealed from. See State ex rel. Nixon v. American Tobacco Company, Inc., 34 S.W.3d 122 (Mo. En Banc. 2000).

C. APPELLANT IS NOT ENTITLED TO A CREDIT PURSUANT TO §537.060 RSMo IN THAT THE \$25,000 UIM PAYMENT WAS NOT MADE BY A JOINT TORT-FEASOR; IT WAS MADE PURSUANT TO A CONTRACT.

Missouri Revised Statute §537.060 provides that a party’s damages shall be reduced by the amount received from a settling tort-feasor. The statute provides:

When an agreement by release, covenant not to sue or not to enforce a judgment is given in good faith to one of two or more persons liable in tort for the same injury or wrongful death, such agreement shall not discharge any other tort-feasors for the damages unless the terms of the agreement so provide; however, such agreement shall reduce the claim by the stipulated amount of the agreement or in the amount of the consideration paid, whichever is greater.

The statute is clear. A credit is to be given to a tort-feasor when payment is made by another tort-feasor. Payments made by an underinsured motorist carrier are not payments made by a tort-feasor, and therefore no credit is due. See Gaunt v. State Farm Mutual Auto Insurance Company, 24 S.W.3d 130 (Mo.App. W.D. 2000), where the Court held that an uninsured motorist carrier is not to be treated as a tort-feasor, but as a contractually obligated party to pay based on the damages and the coverage provided.

In Elfrink v. Burlington Northern R. Co., 845 S.W.2d 607 (Mo.App. E.D. 1992), the Court reversed the trial court for reducing plaintiffs' judgments by the amounts of their uninsured motorists settlements even though the premiums were not paid for by the plaintiffs. The Court said the trial court erred in reducing the judgments by the uninsured motorist settlement amounts in accordance with Missouri Revised Statute §537.060 because that statute governs contribution between tort-feasors and American Family and Shelter were not joint tort-feasors. Section 537.060 does not and cannot reduce defendant's liability by the collateral payments received by the plaintiffs [citing Kaelin, *supra*.] "The right of the injured party to recover from an uninsured motorist carrier arises from the insurance contract, rather than in tort." See Automobile Club Inter-

Insurance Exchange v. Farmers Ins. Co., 646 S.W.2d 838, 840 (Mo.App. 1982) and Gaunt v. State Farm Mutual Automobile Insurance Company, supra. The same is surely true for an underinsurance payment made by an insurance company and not a joint-tortfeasor. See State ex rel. Shelton v. Mummert, 879 S.W.2d 525, 528 (Mo. En Banc. 1994).

D. THE COLLATERAL SOURCE RULE APPLIES BECAUSE THE UIM BENEFITS WERE PAID FROM A SOURCE WHOLLY INDEPENDENT OF APPELLANT SHAW.

1. A Collateral Source is One that is Wholly Independent of the Defendant.

For at least 100 years, our Appellate Courts have said even gratuitous services provided to the plaintiff are recoverable as damages and the tort-feasor is not entitled to reduce the damages he caused for those gratuitous services. See Kaiser v. St. Louis Transit Co., 84 S.W. 199 (Mo.App. 1904). “The gift is to the sufferer, and not to the tort-feasor, according to reason and to most cases dealing with the question...”

In Burens v. Wolfe Wear-U-Well Corp., 158 S.W.2d 175 (Mo.App. 1942), the court held a “wrongdoer cannot diminish his liability to the extent of such contributions, nor will he be permitted to benefit by payments made to the injured person from collateral sources, whether in compensation or as GRATUITIES.” (emphasis added) at 179.

In Douthet v. State Farm Mutual Automobile Insurance Company, 546 S.W.2d 156 (Mo. En Banc. 1977), this Court said if there is to be a windfall, it should go to the injured person; the tort-feasor has no right to benefit from such payments. “The

Defendant did not create or pay for and was not the source of the workmen's compensation payments received by Plaintiff. If Defendant's company is allowed credit therefore, it receives a windfall... In such a situation, if there is to be a windfall, it should go to the injured person..." Id. at 160. "In such instances, the collateral source doctrine is applied and the courts consistently hold that the tort-feasor has no right to benefit from such payments." Id. at 159.

In Collier v. Roth, 434 S.W.2d 502, 506-507 (Mo. 1968), this Court said that under the collateral source rule [recognized and applied in Missouri, Burens v. Wolfe Wear-U-Well Corp, supra] it is a well-established rule in the law of damages that a wrongdoer is not entitled to have the damages to which he is liable reduced by proving that Plaintiff has received or will receive compensation or indemnity for the loss from a collateral source, wholly independent of him, or, stated more succinctly, the wrongdoer may not be benefited by collateral payments made to the person he has wronged."

"The Plaintiff against whom a tort is committed has his cause of action at the moment that the tort occurs. Things which happen later and let an injured Plaintiff escape some of the ultimate consequences of the wrong done him do not inure to the benefit of the defendant. If friends of a man against whom a tort is committed make up a purse to pay for his medical services, that does not cut down what the Plaintiff may recover from the tort-feasor..." To like effect see Kaelin v. Nuelle, 537 S.W.2d 226 (Mo.App. 1976) and Hagedorn v. Adams, 854 S.W.2d 470 (Mo.App. W.D. 1993).

In Aaron v. Johnston, 794 S.W.2d 724 (Mo.App. W.D. 1990) the court stated the issue this way: "The issue thus presented poses a conflict between two competing

interests, one being that an injured plaintiff shall not receive double recovery for a single loss, and the other being that payments made to plaintiff by a third person, independent of defendant, should not relieve the wrongdoer of responsibility for the full damage caused by his tortious conduct. The issue is most often resolved in plaintiff's favor by application of the 'collateral source' rule." This case involved gratuitous payment of compensation to the injured plaintiff. The Court said if "such continued pay is gratuitous, a third-person tort-feasor is not entitled to reduction of damages for the amount of such gratuity" at 726.

The double recovery issue discussed in Aaron is not even at issue here. Pursuant to the Farmer's policy under which Respondent Smith was paid \$25,000.00 in UIM benefits, those benefits have to be repaid. The policy stated in part:

"When a person has been paid damages by us under this policy and also recovers from another, the amount recovered from the other shall be held by that person in trust for us and reimbursed to us to the extent of our payment." (A-61).

Thus, the general policy of preventing double recovery is not at issue here.

Some Missouri case law (the cases relied on by Appellant) has gone astray by quoting and following language quoted from a 1984 Florida case, Florida Physician's Insurance Reciprocal v. Stanley, 452 So. 2d 514 (Fla. 1984). That court said:

"The policy behind the collateral source rule simply is not applicable if the plaintiff has incurred no expense, obligation, or liability in obtaining the services for which he seeks compensation."

Florida courts since Stanley (1984 case) have distinguished its holding significantly and referred to the collateral source discussion in Stanley as dicta. For example, see Velilla v. VIP Care Pavilion, Ltd., 861 So.2d 69 (Fla.App. 2003), where the court held it was reversible error to allow evidence that the Plaintiff's deceased mother was entitled to Medicaid. Citing Parker v. Hoppock, 695 So.2d 424 (Fla.App. 1997) the Court said: "While there is dicta in Stanley that the common-law collateral source rule excluding testimony about benefits received by a plaintiff should be limited to those benefits earned in some way by the plaintiff, the term 'collateral source' has never been limited to those benefits that a plaintiff has earned or paid for."

Kaelin v. Neulle, 537 S.W.2d 226 (Mo.App. 1976) and Hagedorn v. Adams, 854 S.W.2d 470 (Mo.App. W.D. 1993) both stand for the proposition that a tort-feasor is not entitled to have damages for which he is liable reduced by proving the plaintiff has received or will receive compensation or indemnity for the loss from a collateral source. Hagedorn specifically held that the collateral source rule is applicable to uninsured motorist payments. The Court said "under the collateral source rule... a wrongdoer is not entitled to have damages for which he is liable reduced by proving that Plaintiff has received or will receive compensation or indemnity for the loss from a collateral source. Collier v. Roth, 434 S.W.2d 502 (Mo. 1968). The collateral source rule is applicable to uninsured motorist payments...."

Appellant says Kaelin and Hagedorn are "readily distinguishable" from this case. Appellant says Kaelin and Hagedorn involved uninsured motorist benefits and not underinsured motorist benefits. This Court in State ex rel. Shelton v. Mummert, 879

S.W.2d 525 (Mo. En Banc. 1994), said the rationale in an uninsured motorist claim is equally true in an underinsured motorist case related to an insurance carrier being estopped from relitigating liability and damages. The rationale in Kaelin and Hagedorn are equally applicable in an underinsurance motorist case. Appellant cites no authority for its argument that there is a real, justified or distinguishable difference between an uninsured motorist and an underinsured motorist case. Appellant's argument to the contrary is without merit.

2. Cases Suggesting that the Collateral Source Rule Does Not Apply Unless the Plaintiff Incurred an Expense, Obligation or Liability Should Be Overruled.

Appellant cites the cases of Duckett v. Troester, 996 S.W.2d 641 (Mo.App. W.D. 1999) and Washington by Washington v. Barnes Hospital, 897 S.W.2d 611 (Mo. En Banc. 1995) for the proposition that where the plaintiff has incurred no expense, the collateral source rule has no application. The reference the Appellant relies upon is actually a quote from a Florida case, which was cited in Washington where the issue was whether or not the Appellant could show that free public schools were available to educate a brain- damaged child. This case and the Florida case cited by the Appellant do not support the Appellant's position here. In fact, in Washington, this Court cited other Missouri cases, which have held that even gratuitous payments to a plaintiff have been found to be a collateral source for which the defendant is not entitled to a credit. These cases are found at 897 S.W.2d 620. See Douthet v. State Farm Mutual Automobile Insurance Company, 546 S.W.2d 156, 156-60 (Mo. En Banc. 1977); Cornelius v. Gipe,

625 S.W.2d 880, 882 (Mo.App. W.D. 1981); Hood v. Heppler, 503 S.W.2d 452, 454-55 (Mo.App. 1973) and Weeks-Maxwell Construction Company v. Belger Cartage Service, Inc., 409 S.W.2d 792, 796 (Mo.App. 1966).

Joshua Smith asserts that Missouri law does not and should not require that the injured victim actually pay for the collateral payment or the insurance benefit before the collateral source rule applies, particularly, as to a negligent tort-feasor. Between the innocent Plaintiff and the wrongdoer it is hands down who should get the benefit. The innocent victim, here Joshua Smith should get the benefit.

This Court, in Washington, did not hold that the claimant must actually pay the insurance premium or earn the insurance benefit or collateral source before the collateral source rule applied to prevent a reduction in the damages caused by a wrongdoer. This Court said the “wrongdoer may not be benefited by collateral source payments made to the person he has wronged” citing Collier v. Roth, supra. This Court pointed out that “Missouri courts have split on the issue of whether the collateral source rule applies to evidence of gratuitous services rendered to a Plaintiff” at 620. This Court listed a number of Missouri cases going both ways. It is time for this Court to end this split and to set forth a bright line test. A NEGLIGENT TORT-FEASOR DOES NOT GET THE DAMAGES HE CAUSED REDUCED BY A COLLATERAL SOURCE PAYMENT, MADE WHOLLY INDEPENDENT OF THE WRONGDOER.

If this Court does not affirm the trial court’s decision, cases will surely be decided next on whether a spouse or child who did not ACTUALLY pay the premium for the insurance policy will be entitled to the benefit of the “collateral source” rule. According

to the Western District, if the plaintiff did not ACTUALLY pay for the insurance, he or she would not get the benefit of the collateral source rule and the wrongdoer would get a windfall reduction of the damages he caused by the amount of the collateral source insurance payment.

3. Even if the Collateral Source Rule Requires that the Injured Party Incur an Expense, Obligation or Liability, the Rule Applies Here Because Respondent was Obligated to Reimburse the UIM Carrier.

The trial court had no record before it as to who actually paid the premium for the underinsurance coverage at issue. The case law cited herein shows that issue should not be relevant as to the negligent tort-feasor and who gets this “windfall.” A wrongdoer should not be allowed to reduce the damages he caused plaintiff by any collateral source payment, made wholly independent of him. Nonetheless, if the Court decides that payment of the insurance premium or incurring some obligation or liability is a prerequisite for the collateral source rule to apply, Joshua Smith did incur an “expense, obligation and liability” per the “Trust Agreement” and settlement with Farmers because Farmers’ policy specifically requires Joshua Smith to reimburse Farmers if he collects his judgment from Charles Shaw. Farmers’ policy provides:

“When a person has been paid damages by us under this policy and also recovers from another, the amount recovered from the other shall be held by that person in trust for us and reimbursed to us to the extent of our payment.” (Appendix A-61, p.12 of the policy).

Joshua Smith signed a “Trust Agreement” and release in order to receive the underinsurance payment from Farmers. He, as an insured under the Farmers’ policy, has legal and contractual obligations related to the underinsurance payment he received. Joshua Smith will have to pay back the \$25,000 if he collects his judgment from Appellant. As such, Joshua Smith has incurred “expense, obligation and liability in securing the insurance” and the collateral source rule would clearly apply. Kaelin and Hagedorn, supra.

Joshua Smith qualified as an insured under that policy by being a passenger in the car. The policy and trust agreement obligates Joshua Smith to repay the underinsurance money back to Farmers if he recovers from Shaw. By accepting Farmers underinsurance payment and signing a trust agreement and release, Joshua Smith became contractually obligated according to the terms of the policy and the agreement. He received a benefit under the policy and he therefore had certain legal obligations and liabilities, such as repayment, delivering legal papers, doing “whatever else” was necessary to help the insurance company exercise its rights to seek repayment from Shaw. Appellant wants to totally ignore these facts. Respondent did incur “expense, obligation and liability in securing the insurance coverage” and the collateral source does apply.

If the Court adopts Appellant’s argument and allows a credit against the judgment, then Appellant will not be made whole. He will lose \$25,000.00 of his judgment as a result of the credit given to Appellant, and he will lose \$25,000.00 of his judgment as a result of the payback provision in Farmers’ policy. The net result is that Respondent will lose \$50,000.00 as a result of the \$25,000.00 UIM payment. That is not right.

The only way to give Appellant the credit he asserts and avoid the unjust result discussed above is to unilaterally deprive Farmers of its subrogation right of repayment from Respondent. Can a Court unilaterally take away Farmers contractual subrogation right of repayment under these circumstances? The logical answer is NO!

E. EVEN IF THE UIM BENEFITS WERE NOT FROM A COLLATERAL SOURCE, APPELLANT IS NOT ENTITLED TO A CREDIT IN THAT THE COLLATERAL SOURCE RULE GOVERNS THE ADMISSIBILITY OF EVIDENCE, NOT CREDITS AGAINST A JURY VERDICT.

The collateral source rule is an evidentiary rule, which relates not to reducing a judgment but whether evidence of mitigating damages is admissible and can be considered by the jury or fact finder. See Washington by Washington v. Barnes Hospital, 897 S.W.2d 611, 620 (Mo. En Banc. 1995) where this Court stated, “The collateral source rule is ... a combination of rationales applied to a number of different circumstances to determine **whether evidence of mitigation of damages should be precluded from admissions.**” (emphasis added) (citations omitted). Thus, even if the collateral source rule did not apply here, Appellant was entitled only to admit evidence of the mitigation of damages. He was not entitled to a post-verdict credit.

Appellant Shaw did not offer any mitigation evidence at trial. In a letter to the trial court, Appellant’s counsel stated, “since I forgot to put the additional \$25,000 in underinsured motorist benefits on the record during the trial, I am now including a copy of the Trust Agreement, which Mr. Smith signed in connection with his receipt of the underinsured motorist benefits.” (Appendix A-45-A-47). Thus, the trial court could not

have erred in the failure to introduce evidence that Respondent had received \$25,000.00 in underinsured motorist benefits because Appellant did not offer any such evidence at trial and the Court did not refuse to allow the jury to consider it.

Instead of attempting to admit evidence of the UIM benefits during trial, Shaw filed a post-judgment “MOTION FOR CREDIT AGAINST VERDICT”. Under these circumstances what legal basis was there for a tort-feasor’s request for a reduction of Plaintiff’s judgment after trial for an insurance company’s payment of underinsurance? There is none. And Appellant has cited none.

The Washington case involved an evidentiary ruling and whether the trial court erred in not allowing into evidence the plaintiffs’ ability to obtain free public special education in a medical malpractice case where the plaintiffs first introduced evidence that special private schooling expenses would be required for their seriously brain damaged child. There was no issue of whether the wrongdoer or negligent tort-feasor was entitled to a credit against a judgment and no discussion of the applicability of Missouri Revised Statute §537.060 to a collateral source insurance payment. This Court, in Washington, correctly held that the collateral source rule did not preclude defendants from introducing evidence regarding the availability of free public special education where the plaintiffs first opened the door as to that issue and where plaintiffs introduced evidence of their dire financial situation.

In conclusion, the trial court did not err in refusing to give Appellant, the negligent tort-feasor, a reduction of the damages he caused or a credit for the underinsurance payment since it was from a collateral source and under Missouri Revised Statute

§537.060, the payment by Farmers was not made by a tort-feasor and so no credit is applicable. Appellant also waived this point by not including this request in his Motion to Amend the September 17, 2003, Judgment Entry or by offering this evidence of mitigation during trial. The judgment of the trial court should be affirmed.

II. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING APPELLANT SHAW'S MOTION TO AMEND THE JUDGMENT BY ELIMINATING THE AWARD OF PREJUDGMENT INTEREST BECAUSE:

A) APPELLANT CANNOT RELY ON AN INVITED ERROR ON APPEAL AND APPELLANT INVITED THIS ALLEGED ERROR IN THAT HE SPECIFICALLY REQUESTED IN HIS PROPOSED JUDGMENT THAT THE COURT AWARD PREJUDGMENT INTEREST;

B) THE PLAIN LANGUAGE OF §408.040 RSM_o DOES NOT REQUIRE THAT A PREJUDGMENT DEMAND BE MADE WHILE A TORT ACTION WAS PENDING IN THAT, AS THIS COURT FOUND IN LESTER V. SAYLES, A DEMAND OR SETTLEMENT OFFER CAN BE MADE BEFORE OR AFTER SUIT IS FILED;

C) APPELLANT SHAW'S ARGUMENT THAT RESPONDENT SMITH'S SETTLEMENT OFFER WAS NOT LEFT OPEN FOR SIXTY DAYS WAS WAIVED IN THAT HE SPECIFICALLY ADMITTED IN PLEADINGS FILED WITH THE TRIAL COURT THAT RESPONDENT SMITH "LEFT HIS OFFER OPEN FOR SIXTY DAYS AS SET FORTH IN §408.040.2" AND THIS POINT WAS NEVER PRESENTED TO OR RULED BY THE TRIAL COURT PRESERVING NOTHING FOR APPELLATE REVIEW;

D) APPELLANT SHAW FAILED TO PROPERLY PRESERVE ANY CONSTITUTIONAL CHALLENGE TO §408.040.2 IN THAT HE DID NOT

RAISE HIS CONSTITUTIONAL CHALLENGE AT THE EARLIEST OPPORTUNITY; AND

E) THE APPLICATION OF §408.040 IS NOT UNCONSTITUTIONAL IN THAT THIS ISSUE HAS ALREADY BEEN DECIDED BY THIS COURT IN LESTER V. SAYLES WHERE THIS COURT FOUND THAT §408.040 IS NOT UNCONSTITUTIONAL.

A. STANDARD OF REVIEW

The standard for review for Point II is abuse of discretion. See Brockman v. Soltysiak, 49 S.W.3d 740 (Mo.App. E.D. 2001) and Becher v. Deuser, 69 S.W. 363 (Mo. 1902). In Becher, this Court held that where the trial judge refused to amend a judgment, the Appellate Court should not require him to make the amendment unless it clearly and conclusively appears that he violated his duty and acted arbitrarily in the face of legal and proper evidence. For the reasons set forth herein, the trial court's decision should be affirmed whether it is reviewed under an abuse of discretion or de novo standard.

B. APPELLANT INVITED THIS ALLEGED ERROR BY SPECIFICALLY REQUESTING IN HIS PROPOSED JUDGMENT THAT THE COURT AWARD PREJUDGMENT INTEREST.

In his Motion for Credit Against Verdict, Appellant prayed that the trial court execute the proposed judgment that was attached to the Motion. (L.F. 17-18). The proposed judgment that was attached to the Motion stated in part:

“The Court finds that all requirements of Missouri Revised Statute § 408.040 had been met and that Plaintiff is entitled to pre-judgment interest.... The Court hereby awards Joshua Smith prejudgment interest....” (L.F. 18).

Appellant cannot complain on appeal that the trial court awarded prejudgment interest when he specifically asked the trial court to award prejudgment interest. Our Courts have consistently held that an Appellant cannot rely on an invited error on appeal. See e.g., Kettler v. Kettler, 884 S.W.2d 729 (Mo.App. E.D. 1994). For this reason alone, Respondent respectfully requests that Appellant’s Point II be denied.

Not only did Appellant ask that the trial court award prejudgment interest, his insurer, Geico, actually paid the amount of prejudgment interest that was due on the policy limit of \$25,000. In addition, Geico paid its policy limits and post judgment interest. On May 2, 2003, Joshua Smith filed a Partial Satisfaction of Judgment for the \$30,948.65 that was paid to him by Geico. (S.L.F. 30-31).

C. AS THIS COURT FOUND IN LESTER V. SAYLES, §408.040 RSMo PROVIDES FOR PREJUDGMENT INTEREST EVEN IF THE DEMAND OR SETTLEMENT OFFER IS MADE BEFORE SUIT IS FILED.

1. The Plain Language of §408.040.2 RSMo Does Not Support Appellant’s Argument.

Section 408.040.2 states as follows:

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 or 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. (emphasis added).

By seizing on the first three words of the statute and ignoring the use of the words “claimant” and “claim”, Appellant argues that Respondent Smith’s demand must have been made after he filed his tort action in order for the trial court to award prejudgment interest under §408.040. The plain language of the statute does not support this argument.

Contrary to Appellant’s assertions, the opening three words, “in tort actions,” do not indicate that a plaintiff is required to make a demand or offer of settlement during the tort action to recover prejudgment interest; rather, the first three words indicate that the section applies to tort actions, i.e. Respondent’s personal injury action against Appellant for his negligence in causing a motor vehicle collision. As evidenced by the final sentence of the section, the statute is not intended to apply to actions other than tort actions. Thus, what this statute says is that a claimant is entitled to prejudgment interest “in a tort action” when he has made a demand or settlement offer and the subsequent judgment exceeds the demand or offer. Because the statute is addressing when

prejudgment interest can be awarded as part of a judgment, the legislature obviously had to refer to tort actions because it is only in a lawsuit that a judgment is awarded. The statute specifies when prejudgment interest can be awarded in tort actions. It does not indicate that the demand or offer of settlement must be made after or during the tort action. See Lester v. Sayles, 850 S.W.2d 858 (Mo. En Banc. 1993).

The Defendants in Lester argued, among other things, that §408.040 RSMo violated due process under the void-for-vagueness doctrine because §408.040 did not expressly state whether prejudgment interest may be triggered by a demand made before the filing of the lawsuit or only by a demand made after the filing. This Court rejected the argument stating, “In our review, there is no ambiguity. The statute, by its plain language, requires no more than Plaintiff make a demand for payment of a claim or an offer of settlement. By placing no limitation on when the Plaintiff may make this offer, the legislature has answered the question.” (Id. at 873). This Court found that a demand or settlement offer can be made before or after suit is filed under §408.040. Appellant’s argument to the contrary is without legal merit or basis.

Appellant has not cited any Missouri Appellate cases that support his argument that a lawsuit must be filed first and then a settlement offer or demand made to trigger a right to prejudgment interest under Missouri Revised Statute §408.040. Common sense dictates Appellant’s argument, for policy reasons alone, should not be the law. If this Court were to adopt Appellant’s argument, every injured person in every claim would have to hire an attorney and actually file a civil lawsuit and then make a written offer of settlement to trigger a right to prejudgment interest under §408.040. This approach

would not foster settlements, but would encourage and mandate more and more lawsuits. That is surely not what the legislature intended in passing §408.040. If it was, the legislature would or could have amended §408.040 some time in the past 11 years after Lester was handed down specifying that the settlement offer or demand must be made after suit is filed to trigger a right to prejudgment interest.

From the words used by the legislature and as interpreted by this and other Courts, a claimant can make an offer of settlement before or after suit is filed under §408.040. Point II should be denied.

2. The Final Report of the Missouri Task Force on Liability Insurance, Civil Justice Recommendations, Supports the Award of Prejudgment Interest.

In an attempt to persuade this Court to ignore its decision in Lester v. Sayles, Appellant relies heavily on the Final Report of the Missouri Task Force on Liability Insurance, Civil Justice Recommendations (January 6, 1987). Although Appellant cites extensively from the final task force report, he omits the following language:

Under the task force's recommendation, the plaintiff's demand to settle the case would have to be made in writing by certified mail to each defendant, or his insurer, or his counsel **if** suit has been filed. (See Appellant's Appendix at A4).

This language indicates that the prejudgment demand may be sent to the defendant himself or the insurer if no suit has been filed. In other words, the demand does not have to be made after a lawsuit is filed. It is only by overlooking this language that Appellant can claim that the Final Report supports his position.

Perhaps it is this plain language of the Task Force's Final Report that explains why Appellant is unable to cite any Missouri State Court cases supporting his illogical argument. In fact, Appellant has not been able to cite any Missouri State Court cases whatsoever that support his argument. Rather, he cites this Court to a lone dissenting judge in a Federal Court case. Harrison v. Purdy Brothers Trucking Company, Inc., 312 F.3d 346 (Eighth Circuit 2002). The issue in Harrison according to the majority was whether the insurer of the Defendant trucking company was its "representative" under §408.040 for the purpose of receiving the settlement demand, triggering a right to prejudgment interest. The Court said "We suspect the Missouri Supreme Court would recognize an insurer to be a party's 'representative' §408.040. One of the obvious goals of the statute is to encourage settlements, even before a suit is filed. See Lester v. Sayles, 850 S.W.2d 858, 873 (Mo. En Banc. 1993) (recognizing the statute is triggered by a demand made prior to filing suit.) In many instances Plaintiff's counsel initiates settlement discussions with a Defendant's insurer prior to filing suit. If the statute were to exclude insurers from the term 'representative' the primary goal of the statute would be frustrated, not furthered. We doubt the Missouri legislature intended such a result."

In asserting his argument that the Task Force's Final Report supports Appellant's position, he emphasizes the fact that the report refers to "plaintiff" rather than "claimant." See Appellant's Brief at 27 where he states, "The task force could have said claimant instead of plaintiff ..., but it didn't." (emphasis original). Appellant argues that because the task force failed to use the word "claimant", the task force believed that the prejudgment interest statute could not be triggered until after filing a lawsuit. Even if

Appellant's argument was correct, the legislature apparently disagreed with the task force because the legislature did use the word claimant instead of plaintiff. Thus, even pursuant to Appellant's own argument, the statute, because it uses the word claimant instead of plaintiff, does not require that a demand or offer of settlement be made after the filing of a lawsuit. (See Appellant's Brief at 27, Note 3).

The plain language of the statute, this Court's decision in Lester v. Sayles, and even the Task Force's Final Report support the trial court's decision in awarding prejudgment interest. Thus, Respondent respectfully requests that Appellant's Point II be denied.

D. APPELLANT SHAW ADMITTED THAT RESPONDENT SMITH "LEFT HIS OFFER OPEN FOR SIXTY DAYS AS SET FORTH IN §408.040.2"

1. Appellant Admitted in His Proposed Judgment That the Offer Was Left Open for Sixty Days.

In his Motion for Credit Against Verdict, Appellant prayed that the trial court execute his proposed judgment that was attached to the Motion. (L.F. 16). Appellant's proposed judgment stated in part, "The Court finds that Plaintiff, Joshua Smith, made a written offer to settle ... and the offer was left open for 60 days." (L.F. 17 (emphasis added)). Appellant's proposed judgment further stated, "The Court finds that all requirements of Missouri Revised Statute § 408.040 had been met and that Plaintiff is entitled to pre-judgment interest...." Thus, Appellant acknowledged in the judgment, it urged the trial court to enter, that Respondent's settlement offer was left open for 60 days.

2. Appellant Admitted in His Suggestions in Support of His Motion to Amend That the Offer Was Open for Sixty Days.

Specifically, Appellant stated, “As noted above, Plaintiff’s counsel sent his offer of settlement letter to Geico on July 14, 2000, offering to settle his claim for \$25,000. **He left his offer open for sixty (60) days as set forth in §408.040.2.**” (emphasis added) (L.F. 31).

Shaw’s Answer and his pleadings are binding upon him. He cannot change his position on appeal for the first time and argue that the offer was not left open for sixty (60) days. See Khulusi v. Southwestern Bell Yellow Pages, Inc., 916 S.W.2d 227 (Mo.App. W.D. 1995). The trial court was entitled to rely on Appellant’s admitted pleadings and Judge Roldan cannot be convicted of reversible error for doing so.

3. Appellant’s Answer Did Not Deny that the Offer Was Open for Sixty Days

Joshua Smith, in his Petition for Damages, pled:

“9. Plaintiff prays for prejudgment interest against Defendant pursuant to Missouri Revised Statute 408.040. On July 14, 2000, Plaintiff sent a certified letter to Defendant Shaw’s insurance company, Geico Casualty Company, and made an offer to settle with Defendant Shaw for \$25,000. The offer was sent by certified mail return receipt requested and left open for sixty (60) days. (See “Plaintiff’s Exhibit 2,” which is attached hereto and incorporated by reference.) No settlement was timely reached.

Plaintiff requests the Court to determine the amount of prejudgment interest

owed Plaintiff after the judgment and verdict is rendered pursuant to Missouri Revised Statute 408.040.” (L.F. 4 and 5).

These are the very elements our Appellant Courts have said entitle a claimant to prejudgment interest under Missouri Revised Statute §408.040 as a matter of law. Lester v. Sayles, supra.

Shaw, in his Answer to paragraph 9, said this in total:

“9. Defendant admits that Plaintiff sent a certified letter to the Defendant’s insurance company on or about July 14, 2000.” (L.F. 9).

Shaw did not deny any of the facts or matters specifically pled by Joshua Smith in paragraph 9 of his petition. Accordingly, these facts and matters are deemed admitted. See Supreme Court Rules 55.09, 55.07 and 55.08 and Hurst v. Jenkins, 908 S.W.2d 783 (Mo.App. W.D. 1995).

Supreme Court Rule 55.09 provides in pertinent part:

“Specific averments in a pleading to which a responsive pleading is required... are admitted when not denied in the responsive pleadings.”

Supreme Court Rule 55.07 provides in pertinent part:

“A party shall respond to all specific averments as provided in the Rule 55.07 and shall not generally deny all the specific averments.”

Here, Shaw did not specifically deny anything related to Smith’s claim for prejudgment interest in paragraph 9. His general denial in his “Third Defense” is not sufficient. (L.F. 8). As such, he admitted the allegations in paragraph 9 and he cannot convict the trial court of error in awarding prejudgment interest under Missouri Revised Statute §408.040.

In Hurst v. Jenkins, 908 S.W.2d 783 (Mo.App. W.D. 1995), the Court addressed a similar issue. When a party, in his answer, admits allegations in the petition, they are a judicial admission as to those matters. Judicial admissions waive or dispense with the production of evidence and concede for the purpose of the litigation that a certain proposition is true. (at 786.)

Appellant Shaw's failure to specifically deny any of the specific allegations in paragraph 9 of Smith's petition, constitutes a judicial admission as to every fact and averment therein and establishes the requisite elements necessary for Respondent Smith's right to prejudgment interest under §408.040 as a matter of law. Hurst v. Jenkins, supra.

4. Appellant Never Presented Any Issue to the Trial Court that Respondent's Offer to Settle Was Not Left Open for Sixty (60) Days, Thereby Waiving This Point and Preserving Nothing for Appellate Review.

In his Motion to Amend, Appellant Shaw gave only three (3) reasons why the Court should amend the September 17, 2003, Judgment concerning the award of prejudgment interest:

- (1) Plaintiff's presuit settlement offer did not satisfy the requirement in R.S.Mo. §408.040, which states that an offer be made in a tort action. Here, plaintiff's settlement offer was made prior to suit being filed;
- (2) Plaintiff's offer of settlement also failed to satisfy the requirements of R.S.Mo. §408.040.2 because plaintiff failed to provide defendant,

through GEICO, defendant's insurance carrier, with information sufficient to allow him to evaluate plaintiff's offer of settlement within sixty (60) days as set forth in R.S.Mo.2;²

- (3) R.S.Mo. §408.040.2 violates due process because it impedes a party's ability to gain access to courts and penalizes defendants who decide to try a case rather than settle a case.

Shaw's argument in this Court that Smith's settlement offer was not left open for sixty (60) days was never presented to or ruled by the trial court preserving nothing for Appellant review. To the contrary, Shaw admitted Joshua Smith "left his offer open for sixty (60) days as set forth in §408.040." (L.F. 31).

Appellant counsel's speculation as to what date the letter was actually received or delivered to Geico or what date stamp appears on the certified card, shows why a party must admit or deny specific allegations in each paragraph of a petition and why you must specifically plead all defenses in your answer. Appellant wholly failed to do this here. (L.F. 8-9).

² Missouri Revised Statute §408.040 does not require the claimant to send medical records or bills or any supportive material. It is interesting to note that Farmers, with the same information that Geico had, was able to investigate, evaluate and pay Joshua Smith for his injuries and pay a total of \$50,000 (\$25,000 liability coverage and \$25,000 underinsurance coverage) prior to filing suit against Geico's insured, Charles Shaw, but Geico could not.

Appellant filed no pleading and he presented NO evidence to Judge Roldan on when the prejudgment interest letter was actually received by Geico, who's date stamp appears on the green card, etc. From the state of Appellant's record the "facts" have not been flushed out or determined because Shaw failed to raise this issue in the trial court so as to allow Respondent an opportunity to respond and the trial court to consider the "facts." Appellant presented no evidence or pleading for the trial court to even consider this issue and as such, it has been waived.

It is well established that an Appellate Court will not convict a trial court of reversible error on points never presented to it or ruled upon by it. See State ex rel., Nixon v. American Tobacco Company, Inc., 34 S.W.3d 122 (Mo. En Banc. 2000) and Khulusi v. Southwestern Bell Yellow Pages, Inc., 916 S.W.2d 227 (Mo.App W.D. 1995). An "Appellate Court will not convict the trial court of error on an issue that was never before it to decide." Citing Estate of Munzert, 887 S.W.2d 764 (Mo. App. E.D. 1994) and Ibarra v. Missouri Poster and Sign Estate Co., Inc., 838 S.W.2d 35, 40 (Mo.App. W.D. 1992). Appellant did not ever argue to the trial court that Smith's settlement offer was not left open for sixty (60) days as a basis to deny prejudgment interest. Judge Roldan cannot be convicted of reversible error on a point never presented to him or ruled by him. Appellant has waived this point.

5. Cases Cited By Appellant Are Not Applicable.

Ignoring Shaw's failure to properly raise and present this point to the trial court and ignoring his answer and other pleadings and suggestions wherein Shaw judicially admitted Joshua Smith's offer was left open for sixty (60) days, Shaw's reliance on

Boehm v. Reed, 14 S.W.3d 149 (Mo.App. W.D. 2000) is misplaced. In Boehm the Plaintiff conditioned her sixty (60) day settlement offer on the insurance company paying funeral and medical bills within thirty (30) days. The Western District held the thirty (30) day payment condition reduced Ms. Boehm's settlement offer to thirty (30) days. The Court found that the offer, therefore, did not comply with the sixty (60) day requirement under Missouri Revised Statute §408.040. Here, no such condition was imposed by Joshua Smith. Joshua Smith's settlement offer was specifically left open for sixty (60) days.

The only other case cited by Shaw for support of this point is ACF Industries, Inc. v. Industrial Communications, 309 S.W.2d 676 (Mo. 1958). That case involved a proceeding for unemployment benefits and did not involve §408.040 or a prejudgment interest award.

In Hurst v. Jenkins, 908 S.W.2d 783 (Mo.App. W.D. 1995) the Western District considered whether an insurer had complied with a settlement offer made by the Plaintiffs' counsel under Missouri Revised Statute §408.040 that was left open "for 60 days from the date of this letter." The letter in Hurst was similar to the letter in this case. It said:

"In accordance with Missouri Revised Statute 408.040, this letter is a formal demand for payment of the policy limits of all liability insurance coverages that apply to this case. My willingness to recommend a policy limits settlement with my clients is conditional upon the above events occurring [sic] and this documentation being provided to me timely. My willingness to recommend a

policy limits settlement is open for 60 days from the date of this letter. (Id. at 784) (emphasis added).”

The Court said that in construing §408.040, the primary rule is to ascertain the legislative intent from the words used, considering the words in their plain and ordinary meaning. The Court held that pursuant to §408.040.2 if a claimant makes a demand for payment or an offer of settlement and the demand or offer is left open for sixty (60) days and the amount of the later judgment exceeds the demand or the offer, the prevailing party shall be awarded prejudgment interest. Judge Breckenridge wrote “[t]he plain meaning of these statutory provisions is that, unless the parties conclude a settlement within the sixty-day period after demand is made, the response of the other party to the demand or offer of settlement is irrelevant. (at 786 and 787). The Court affirmed the award of prejudgment interest. Here no settlement was concluded within sixty (60) days or any time period. Joshua Smith’s case was tried to a jury. His verdict and judgment exceeded his settlement offer and Respondent was entitled to an award for prejudgment interest as a matter of law.

Appellant’s argument is also flawed because Geico, Appellant’s insurer, did not make an offer to pay the policy limits of \$25,000 within sixty (60) days after it alleges it received Smith’s settlement letter. Geico admits it did not offer the policy limits within either time period. Certainly, no settlement was reached or finalized within any period of time.

Respondent would point out that the statute does not say sixty (60) days “after receipt.” It simply says “any such demand or offer shall be made in writing and sent by

certified mail and shall be left open for sixty (60) days unless rejected earlier.” This statute does not say the offer must be left open for sixty (60) days after receipt of the writing. The statute does provide for a shorter period than sixty (60) days if the offer is rejected earlier. Joshua Smith mailed the settlement offer by certified mail on July 14, 2000, as required by the statute. (L.F. 7). The offer was left open for sixty (60) days. (L.F. 6). That is all the statute requires.

In conclusion, Joshua Smith is entitled to an award for prejudgment interest because Shaw admitted the elements required under §408.040 in his pleadings and suggestions. Shaw admitted the allegations in paragraph 9; he filed pleadings with the trial court admitting the offer was left open for sixty (60) days; and he failed to present this point to the trial court and thus preserved nothing for Appellate review. Finally, Appellant, in his proposed judgment, specifically requested that the trial court award prejudgment interest and he should not be heard to complain now. For all of these reasons, Respondent respectfully requests that this Court affirm the trial court’s award of prejudgment interest.

E. APPELLANT SHAW FAILED TO PROPERLY PRESERVE ANY CONSTITUTIONAL CHALLENGE TO §408.040 IN THAT HE DID NOT RAISE HIS CONSTITUTIONAL CHALLENGE AT THE EARLIEST OPPORTUNITY.

When a statute is being challenged as unconstitutional, there are special rules of review. “First, a statute is presumed to be constitutional and will not be held to be unconstitutional unless it clearly and undoubtedly contravenes the constitution.” Lester at 872 citing Adams by and through Adams v. Children’s Mercy Hospital, 832 S.W.2d

898, 903 (Mo. En Banc. 1992). “Moreover, a statute will be enforced by the courts unless it plainly and palpably affronts fundamental law embodied in the constitution.” “Finally, the burden of proof is on the party claiming that the statute is unconstitutional.” Adams, 832 S.W.2d at 903. Appellant has not met this burden.

From a pleading standpoint, Appellant must raise the constitutional point at the earliest opportunity or it is waived and he must cite the specific constitutional provision he is alleging was violated or it is waived. See City of St. Louis v. Butler Co., 219 S.W.2d 372 (Mo. 1949) and Murphy v. Timber Trace Association, 779 S.W.2d 603 (Mo.App. W.D. 1989). In City of St. Louis, this Court said to preserve a constitutional question for appellate review, the question must be raised at the earliest or first available opportunity, sections of the constitution claimed to be violated must be specified and the point must be adequately covered in the brief. Appellant failed to satisfy any of these requirements.

Appellant did not raise any constitutional issue until October 2, 2003, when he filed his Motion to Amend the September 17, 2003, Judgment Entry. That is not the earliest opportunity Appellant had to raise this issue. Appellant could have raised it in his Answer, but he did not. (L.F. 8-9). Therefore, this point has been waived.

The first time Shaw made any constitutional allegation was in his October 2, 2003, Suggestions in Support of Defendant’s Motion to Amend the September 17, 2003, Judgment Entry. His claim then was this:

R.S. Mo. §408.040.2 violates due process because it impedes a party's ability to gain access to courts and penalizes defendants who decide to try a case rather than settle. (L.F. 27).

In Shaw's Substitute Brief at page 33 he changed his constitutional claim. He says:

“The trial court applied section 408.040.2 to deprive Shaw of his constitutionally protected due process of law rights because Shaw was given neither a hearing nor an opportunity to contest Smith's delay in prosecuting this claim.”

What specific part of what constitution does Shaw allege was violated by the award of prejudgment interest – the Missouri Constitution or United States Constitution? Shaw did not cite the trial court to any specific constitutional provision he alleged §408.040 violated. Thus, Appellant has not properly preserved this point for review.

Appellant says the “trial court erred in refusing to eliminate the award pre-judgment interest in this case because the pre-judgment interest statute – as applied to this case – deprived Shaw of his procedural due process rights to notice and a hearing.” (Brief p.33). He then cites three (3) cases in support of this argument. The first is FCC v. Beach Comm., Inc., 508 U.S. 307, 313-314 (1993), which involved the Cable Communications Policy Act. The Court held the act was constitutional because there was a rational basis for the distinction between facilities that served separately owned and managed buildings and those that served one or more buildings under common ownership and management for purposes of the franchise requirement for operation of cable system.

The second case, Heller v. Doe, 509 U.S. 312, 320 (1993) involved a class of involuntarily committed mentally retarded individuals who brought suit challenging the

constitutionality of Kentucky's commitment procedure. The Court held the law was constitutional.

The last case cited, Moore v. Board of Education of Fulton Public School, No. 58, 836 S.W.2d 943 (Mo. En Banc. 1992), involved a tenured teacher who appealed the school board's decision to terminate his contract. This Court held the termination hearing did not violate due process. None of these cases are factually or legally on point.

Shaw claims some constitutional violation of due process alleging he was giving "neither a hearing nor an opportunity to contest Smith's delay in prosecuting his claims." (Substitute Brief at 33). The record shows this is not true.

Shaw and Geico had notice of Joshua Smith's claim for prejudgment interest under Missouri Revised Statute §408.040 from the get-go. (L.F. 4-7). Shaw in his Answer to Smith's Petition did not make any allegation of delay as a legal basis to deny the claim for prejudgment interest. All Shaw said to paragraph 9 was "Defendant admits that Plaintiff sent a certified letter to the Defendant's insurance company of or about July 14, 2000." (L.F. 9). In his answer Shaw did not raise any constitutional issue or ask the trial court for a hearing or allege any delay. (L.F. 8-9). In his post trial motion for a credit, Shaw did not allege any constitutional violations or ask for a hearing on any alleged delay as a basis for the trial court to eliminate the award of prejudgment interest. (L.F. 13-16). Shaw in his Motion to Amend Judgment did not allege any constitutional violation or request a hearing on any alleged delay. (L.F. 25-65). This record shows that Shaw never properly raised this point and has waived same for all the reasons set forth herein.

F. THE APPLICATION OF §408.040 IS NOT UNCONSTITUTIONAL IN THAT THIS ISSUE HAS ALREADY BEEN DECIDED BY THIS COURT IN LESTER V. SAYLES, WHERE THIS COURT FOUND THAT §408.040 IS NOT UNCONSTITUTIONAL.

Ignoring the above, Shaw's alleged constitutional challenge is hard to follow. Is he alleging Missouri Revised Statute §408.040 is unconstitutional on its face because it denies due process of law? This Court over 10 years ago ruled that issue against Appellant. See Lester v. Sayles, 850 S.W.2d 858 (Mo. En Banc. 1993). This Court in Lester held that §408.040, as applied, did not deny Defendants any due process of law rights. (Id. at 873-874).

There was nothing ever presented by Appellant to Judge Roldan about wanting a hearing to contest Smith's alleged delay as a basis for denying prejudgment interest under §408.040. Again, Judge Roldan cannot be convicted for a point never properly or timely presented to him or ruled by him.

Even if he had requested or obtained a hearing on this alleged delay, this Court has already ruled that delay, even caused by the Plaintiff, is not a basis to deny prejudgment interest under Missouri Revised Statute §408.040. Lester, 850 S.W.2d at 873. The Defendants in Lester argued that §408.040 allowed Plaintiffs to penalize Defendants by the addition of a premium (prejudgment interest) to the judgment for delay occasioned solely by Plaintiffs' own action or inaction. This Court denied Defendants' point. Delay, even caused by the Plaintiff, is not a basis to deny prejudgment interest under §408.040.

Shaw alleges he did not have an opportunity to contest Smith's delay. That is not true. He could have raised it in his Answer. He could have raised it in his proposed Amended Answer. (S.L.F. 22-26). He could have raised it in his letter to Judge Roldan with his proposed Judgment Entry. He could have raised it in his post-trial motions to amend and/or to reconsider. Shaw waived this point by never pleading it or asking the trial court for a hearing. In fact, in Shaw's proposed judgment, Appellant Shaw specifically asked the trial court to award prejudgment interest to Respondent. Judge Roldan cannot be reversed for not conducting a post-trial hearing never requested by Appellant.

This Court in Brown v. Donham, 900 S.W.2d 630 (Mo. En Banc. 1995) held there is no right to a post trial hearing related to an award of prejudgment interest under Missouri Revised Statute §408.040. This Court said "if a claim for prejudgment interest has been framed by the pleadings or tried by consent, the trial court can award prejudgment interest. Rule 55.33 (b); Chambers by Abel v. Rice, 858 S.W.2d 230, 232 (Mo. App. S.D. 1993). An after-trial evidentiary hearing is unnecessary if the Court otherwise is fully advised in the matter.

Here, the trial court was fully advised of the prejudgment interest issue. Both parties submitted Judgment Entries for the Court to consider with prejudgment interest being awarded. Both Judgment Entries provided for an award of prejudgment interest under §408.040. The only difference was whether the calculation was based on a judgment for \$175,000 or \$150,000. There were no material facts in dispute and no issue ever presented by Appellant to the trial court on Respondent's right to prejudgment

interest under §408.040. A hearing was totally unnecessary and the trial court did not deprive Shaw of any constitutional due process right by not conducting an evidentiary hearing on who caused any “delay.”

Finally, Shaw was not prejudiced by the lack of a hearing or an opportunity to contest this alleged delay. This record establishes that after Shaw was served, Joshua Smith conducted discovery and tried the case in less than one year in Jackson County, Missouri. The earlier “delay” was caused by the inability to find Shaw, who was living in motels because his house burned down where methamphetamine was being cooked. It was only after a special process server was appointed that Shaw was found in prison having pled guilty to two felonies involving drugs. This actual delay was caused by Shaw not Smith. Respondent’s attorney early on asked Appellant’s attorney, Mike White, to accept service of process for Shaw and he refused. Appellant, at page 35 of his brief, goes off on a personal attack of Respondent accusing him of “intentional,” “deliberate,” and “profitable delay,” without any reference to the record on appeal. Why? How does this have anything to do with Appellant’s alleged constitutional violation or in what way the trial court committed prejudicial reversible error? It surely does not. Appellant was not given an “opportunity to contest” alleged “delay tactics” because he never timely preserved this issue and he did not ask the trial court for a timely evidentiary hearing. Again, Judge Roldan cannot be reversed for a point never timely presented to him or ruled by him. If Appellant wants to end the “profitable delay,” he should pay the jury verdict and the resulting judgment. To date, Respondent has been paid only a small

fraction of what the jury and the court said he was legally entitled to for Shaw's admitted negligence.

In conclusion, Point II should be denied because Joshua Smith made a settlement offer in his tort action for injuries related to a motor vehicle wreck. Appellant, by his Answer and other pleadings, judicially admitted the necessary elements for Joshua Smith to receive an award of prejudgment interest under §408.040 as a matter of law. Appellant did not raise any issue about the sixty (60) day offer with the trial court, and hence, nothing is preserved for appellate review. The award of prejudgment interest under §408.040 did not violate due process of law. The statute is constitutional. Finally, Appellant never requested a timely evidentiary hearing on any alleged delay, and he has waived this point. The award of prejudgment interest should be affirmed.

CONCLUSION

For all the foregoing reasons, this Court should affirm the trial court's judgment awarding prejudgment interest and denying a credit for the underinsurance payment as a collateral source payment for which no credit is due Charles Shaw.

* * *

Respectfully submitted,

#26003

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Substitute Brief of Respondent, Joshua F. Smith, was mailed to attorney, Mr. Mike White, HARRIS, MCCAUSLAND & SCHMITT, P.C., 9233 Ward Parkway, Suite 270, Kansas City, Missouri 64114, on the 5th day of November 2004, and to the Missouri Court of Appeals, Western District, 1300 Oak Street, Kansas City, Missouri, 64106, and that same is in the form specified by Rule 84.06(a) and one copy in the form specified by Rule 84.06(g).

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