

SUPREME COURT NO. SC87827

**IN THE
SUPREME COURT OF MISSOURI**

**KAREN LINDQUIST, AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF MICHAEL LINDQUIST,
DECEASED,
Plaintiff/Cross-Appellant,**

v.

**MID-AMERICA ORTHOPAEDIC SURGERY INC.,
Defendant/Appellant.**

DEFENDANT/APPELLANT'S REPLY BRIEF

**Appeal from the Circuit Court of
City of St. Louis, Missouri
Cause No. 002-8663
Honorable Mark H. Neill**

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REPLY IN SUPPORT OF PRIMARY APPEAL BY MID-AMERICA

INTRODUCTION

In its initial brief, Defendant Mid-America Orthopaedic Surgery Inc. raised a claim of Trial Court error regarding the Trial Court's award of post judgment interest. Mid-America's point relied on is set forth again here for the Court's reference.

I. THE TRIAL COURT ERRED IN AWARDING POST JUDGMENT INTEREST DATING BACK TO THE JUNE 18, 2003 JUDGMENT BECAUSE UNDER RSMo. § 408.040 INTEREST SHOULD RUN ONLY FROM THE FEBRUARY 21, 2006 JUDGMENT IN THAT (a) THERE IS NO JUNE 18, 2003 JUDGMENT, (b) NO MONEY WAS DUE TO PLAINTIFF UNTIL THE FEBRUARY 21, 2006 JUDGMENT, AND (c) PLAINTIFF'S OWN APPEALS RENDERED SATISFACTION OF JUDGMENT IMPOSSIBLE.

In response, Plaintiff Karen Lindquist ("Plaintiff") advanced three arguments: (1) that RSMo § 512.160.4 entitles her to post judgment interest; (2) that Mid-America is jointly liable with Scott Radiological under RSMo § 538.230; and (3) that a portion of the interest should be calculated based on the statutory amendment to § 408.040 that was enacted on August 28, 2005. (See Plaintiff's Second Brief, p. 6). Plaintiff's second argument is directed to her own point on appeal challenging the constitutional validity of RSMo § 538.230. Mid-America has already addressed that argument in its first brief, and that argument is not the proper subject of this reply brief.

Mid-America will now address the remaining points raised by Plaintiff.

ARGUMENT

(1) RSMo § 512.160.4 Does Not Apply In This Case And Does Not Support An Award of Post-Judgment Interest

Mid-America briefly addressed RSMo § 512.160.4 in its initial brief, but given Plaintiff's reliance on this statute in her second brief, Mid-America will now address the statute in greater detail. The statute provides:

“Upon the affirmance of any judgment or order, or upon the dismissal of any case, the appellate court may award to the respondent such damages not exceeding ten percent of the amount of the judgment complained of as may be just, and when such judgment shall be affirmed for part of the sum of which judgment was rendered by the Trial Court, such part of said judgment shall bear lawful interest from the date of the rendition of the original judgment in the Trial Court.” (emphasis added)

A plain reading of the statutory language demonstrates that it has no application to the instant case. In this case, Plaintiff appealed from the Trial Court's October 16, 2003 Order, which entirely set aside the judgment in her favor, entered JNOV in favor of Scott Radiological, and ordered a new trial. It is well established that “[t]he first rule of statutory construction is to determine and give effect to the legislative intent.” Knob Noster Education v. Knob Noster R-VIII School Dist., 101 S.W.3d 356, 361 (Mo.App. W.D. 2003). This is accomplished by, “first consulting the language of the statute, giving its terms their plain and ordinary meaning.” Id. Further, “[w]here the language of the statute is clear, a court must give effect to the language as written.” Id.

The statute does not apply to this case for multiple reasons: 1) there was no judgment in favor of Plaintiff at the time she appealed and therefore there could not have been an “affirmance of any judgment or order.” (2) There was not a “dismissal of any case.” (3) The appellate court did not enter an award of interest as part of its opinion or mandate. (4) The appellate court may only award interest to the respondent, and Plaintiff in the first appeal was the appellant.

Plaintiff also seems to argue that the judgment was affirmed in part and that she is entitled to interest under that portion of RSMo § 512.160.4 which states: “and when such judgment shall be affirmed for part...such part of said judgment shall bear lawful interest...”. First, the “and” at the beginning of the clause indicates that it should be read in conjunction with the prior clause which allows the appellate court to award to the respondent upon the affirmance of a judgment. Secondly, and most importantly, there was no affirmance, not even in part, in favor of the Plaintiff. Plaintiff, as appellant, benefited from the reversal, in part, of the Trial Court’s Order granting a new trial, but this is not an affirmance. The only aspects of the Trial Court’s October 16, 2003 ruling that were affirmed, were the JNOV in favor of Scott Radiological and the motion for new trial as to past economic damages in favor of Mid-America. Otherwise, the Appellate Court reversed the Trial Court’s order granting a new trial. The statute, by its plain language, does not entitle Plaintiff to interest as Plaintiff was not the respondent and had no judgment or order in her favor affirmed.

Plaintiff also cites Contour Chair-Lounge Co. v. Laskowitz, 330 S.W.2d 817 (Mo. 1959), in support of her argument that RSMo § 512.160 entitles her to post-judgment

interest. Laskowitz is easily distinguished. Although the procedural history is complex, it can be condensed as follows: Laskowitz, made a claim against Contour-Chair and obtained a judgment for \$9,729, and Contour-Chair appealed. The judgment was affirmed in part and reversed in part with directions to the Trial Court to enter judgment for \$5,239. Id. at 825. The Appellate Court found that RSMo 512.160.4 applied.

The instant case is different. In Laskowitz, when the appeal was taken, Laskowitz had a judgment in his favor. Plaintiff Lindquist had no judgment in her favor when the appeal was taken because it was entirely set aside by the Trial Court. Laskowitz's judgment was clearly affirmed for part (\$5,239 of the \$9,729 judgment). Lindquist had no judgment to be affirmed, rather she was the appellant. Finally, Laskowitz was the respondent, and therefore fell within the language of RSMo § 512.160.4.

Lastly, Plaintiff argues that MoBar CLE Manual, Missouri Damages, § 20.88 *Effect of Appeal on Postjudgment Interest* supports her opinion. Again, this is a secondary authority and is not controlling. Although authored by conscientious members of the Bar who provide a valuable service, their paraphrasing of statutes and case law is not the law. Conveniently, Plaintiff also cites only the portions of § 20.88 which support her argument and omits the following two passages: “When a judgment is set aside by the trial judge and rendered anew on retrial, interest runs only from the date of the new judgment” and when a judgment is “reinstated on retrial, interest runs only from the date of entry of the judgment on retrial.” (See attached as **Appendix Tab 1**). Rather than arguing over select portions of a secondary authority, Mid-America would prefer to focus

on the relevant statutes and case law, which as demonstrated herein, support Mid-America's position.

The first rule of statutory construction is to interpret and apply the plain language of the statute. Hallmark Cards, Inc. v. Director of Revenue, 159 S.W.3d 352, 354 (Mo. banc 2005) ("In determining the meaning of a statute, the starting point is the plain language of the statute itself.") Plaintiff herein had no judgment in her favor when she first appealed to the Missouri Court of Appeals. No judgment in her favor was affirmed in whole or in part. She was the appellant, not the respondent, and the appellate court made no award of interest in her favor. By its plain terms, RSMo § 512.160.4 does not apply.

(2) Reinstate The Verdict v. Reinstate The Judgment

Plaintiff uses several pages of her second brief to argue that the Court of Appeals mandate in the first appeal which directed that the action be "remanded with instructions to reinstate the original jury verdicts on all issues except with respect to past economic damages and is remanded for a new trial on past economic damages," has the same meaning as if the Court of Appeals had directed that the Trial Court "reinstate the judgment." (See generally Plaintiff's Second Brief p. 11-15). This is just not the case.

The flaw in this analysis is readily apparent from the Plaintiff's own Brief. Opposing Counsel spends a considerable amount of time detailing the meaning of the words "verdict", "judgment," and "reinstate". The amount of time spent discussing the words illustrates the independent meaning of each. Buried in that lengthy analysis is the statement from opposing counsel that a "verdict has no independent legal power."

(Plaintiff's Second Brief p. 13). The Defendant agrees with that. Interest does not accrue from the date of a jury's verdict under RSMo § 408.040, but rather, accrues from the entry of judgment. The Missouri Court of Appeals did not direct the Trial Court to "reinstate the judgment" because there can be but one judgment in an action, and the Missouri Court of Appeals was remanding for further Trial Court proceedings – that being a trial on past economic damages. Only after further Trial Court proceedings, could the Trial Court enter judgment, which it did on February 21, 2006.

A case cited in Plaintiff's brief, highlights the importance of this distinction. In Reimers v. Frank Connet Lumber Co., 273 S.W.2d 348 (Mo. 1954), plaintiff received a verdict and judgment was entered for \$35,000. The defendant filed a motion for new trial which was sustained, and plaintiff appealed. In its first opinion,¹ the Missouri Supreme Court in Reimers, stated: "It follows that the Trial Court's order granting defendant a new trial is reversed with directions to reinstate the verdict **and judgment** for plaintiff." Id. at 349 (emphasis added). The Supreme Court also issued its mandate which stated: "It is further considered and adjudged by the Court that the said cause be remanded to the said circuit court of Jackson County with directions to reinstate the verdict **and judgment** for plaintiff." Id. (emphasis added). Thus in Reimers, the Missouri Supreme Court gave

¹ After the Court's first opinion, plaintiff filed a "Motion to Amend and Particularize the Mandate with Respect to Statutory Interest on the Verdict and Judgment Reinstated on Appeal Herein." The Court denied the Motion, finding the mandate conformed to the opinion.

specific directions in both its opinion and mandate for the Trial Court to “reinstate the verdict and judgment.” The matter was not remanded for further proceedings, rather the Trial Court was merely to reinstate the judgment. Reimers is procedurally and factually distinct from the case at bar.

What the Reimers opinion does illustrate, is that when an appellate court intends for the judgment to be reinstated, as opposed to when the matter is remanded for further proceedings, it will clearly state that the judgment be reinstated. The Missouri Court of Appeals, in this case, did not order that the judgment be reinstated. Rather, the Missouri Court of Appeals found that the damages award for past economic damages was disproportionate to the proof at trial and affirmed the Trial Court’s grant of a new trial as to past economic damages. Lindquist v. Scott Radiological Group, Inc., 168 S.W.3d 635, 651 (Mo.App. E.D. 2005). The Missouri Court of Appeals also affirmed the Trial Court’s decision to grant JNOV to Scott Radiological, finding insufficient evidence in the record to support a verdict against Scott Radiological. Id. at 655.

(3) Controlling Case Law

Plaintiff challenges the case law presented to this Court by Mid-America in its opening brief. Plaintiff makes the following contention: “Mid-America’s position is meritless, and Mid-America’s ‘authority’ for the position has been distinguished, overruled, and displaced by the statute.” (Plaintiff’s Second Brief p. 15). Plaintiff overreaches, and Mid-America takes issue with Plaintiff’s representation that it has offered to this Court cases which have been overruled. With the advent of computerized legal databases, the process of Shepardizing (or Key citing) has become quick and

convenient. Using the most prominent of these companies, Westlaw, will quickly show that none of the ten cases cited in support of Mid-America's Point Relied On have been overruled.

Plaintiff attempts to distinguish the cases cited by Mid-America on the basis that those Courts relied on Scullin v. Wabash R. Co., 90 S.W. 1028 (Mo. 1905), which was overruled in Reimers.² This is not a valid criticism. Plaintiff challenges the case of Erwin v. Jones, 191 S.W.1047 (Mo.App. 1917), which is relied on by Mid-America. After setting out in two paragraphs the procedural and factual history, Plaintiff says of the outcome of Erwin: "That isn't fair." (Plaintiff's Second Brief p. 15). Plaintiff may disagree with the court's holding, but Erwin remains good law. While it is true that the Erwin court relied in part on Scullin in reaching its decision, it also relied on State ex rel Missouri Pac. Ry. Co. v. Broaddus, 111 S.W. 508 (Mo. 1908) and the post-judgment interest statute, stating: "To hold that it [the judgment] does draw interest prior to its rendition would be in direct conflict with the statute." 191 S.W. at 1047 (Mo. App. 1917). Under Missouri law, specifically RSMo § 408.040 (2004), it remains improper to award interest on a judgment that has not been rendered, or to award interest from a date prior to the rendering of a judgment. See Minor v. Lillard, 306 S.W.2d 541, 547 (Mo. 1957) ("We know of no authority for interest to be allowed on a judgment retroactive to a time prior

² Westlaw cites this case as "overruled in part", a fair characterization of this Court's language in Reimers which stated that Scullin, "in so far as it indicates a contrary meaning of the opinion and mandate in this case, should not be followed".

to its rendition”). In this case, the judgment was rendered on February 21, 2006. Any award of interest prior to the rendering of this February 21, 2006 judgment is in contravention of RSMo § 408.040 (2004) and Missouri case law.

Additionally, Plaintiff challenges Mid-America’s reliance on Southern Real Estate and Financial Co. v. City of St. Louis, 115 S.W.2d 513 (Mo.App. 1938). (See Plaintiff’s Second Brief p. 17). Plaintiff states that Mid-America’s reliance on the case is “meritless” and that the case should be doubted because it examined 1939 statutes. (See Plaintiff’s Second Brief p. 17 and 18). To the contrary, as recently as 2000, the Missouri Court of Appeals cited to and relied upon the rationale of Southern Real Estate. See Investors Title Co. v. Chicago Title Ins. Co., 18 S.W.3d 70, 73 (Mo.App. E.D. 2000) (“we find the reasoning of Southern Real Estate sound and adhere to its holding in this case”). The Investors Title Court noted: “[t]he legislature reenacted Section 408.040.1 after our Supreme Court in Jesser ratified the Southern Real Estate court’s interpretation of Section 2841 [the predecessor statute]. Thus, by enacting Section 408.040.1 with language mirroring that of the prior law, we presume that the legislature adopted the Southern Real Estate court’s interpretation of the relevant language.” Id. at 73. Thus the Southern Real Estate court’s holding has recently been specifically reaffirmed, and Plaintiff’s challenge based on the vintage of the holding is of no merit.

(4) The Appropriate Interest Rate is 9%, Not The Floating Rate Utilized In the 2005 Tort Reform Act

Plaintiff asks for interest from June 18, 2003 through August 27, 2005 at a rate of 9% per annum, pursuant to RSMo § 408.040 (2004). Thereafter, Plaintiff argues she is

entitled to interest under § 408.040 (2005) as amended by HB 393 (2005), which provides a floating interest rate utilizing the Intended Federal Funds Rate plus 5%.³

The sole authority cited by Plaintiff, Senn v. Commerce-Manchester Bank, 603 S.W.2d 551 (Mo. banc 1980), which, when viewed in isolation appears to support Plaintiff's argument. The Senn court addressed as an issue of first impression in Missouri the effect of a statutory change in the post judgment interest rate on judgments awaiting appellate review. Id. at 553. The Court determined that "judgments bear interest as a result of the statute" and held that as of the effective date of the amendment, the rate did change.

However, in our case, the Missouri Legislature has specifically provided as part of HB 393 (2005) that the provisions of the Act "shall apply to all causes of action filed after August 28, 2005."⁴ (emphasis added). This action was not filed after August 28, 2005. Statutes are generally presumed to operate prospectively, unless the legislative intent that they be given retroactive operation clearly appears from the express language of the act or by necessary or unavoidable implication. Dept. of Soc. Serv. v. Villa Capri Homes, Inc., 684 S.W.2d 327, 332 (Mo. 1985). The Legislature, by express language, has stated that the provisions of HB 393 (2005), which include the change in interest rate, apply only to actions filed after August 28, 2005. The Legislature's pronouncement is

³ Plaintiff argues for this calculation on page 19 of her brief, but then on page 24 asks the Court award 9% interest through February 21, 2006, with the "new" rate of Federal Funds + 5% thereafter.

⁴ The only exception to this provision is RSMo § 512.099, which is of no application.

controlling and application of RSMo § 408.040 (2005) would be in contravention of the clear expression of the Legislature. As a member of the defense bar, counsel for Mid-America may wish that Plaintiff is correct and that the Tort Reform provisions of HB 393 (2005) applied to all trials and judgments after August 28, 2005, but such is simply not the case. The Trial Court awarded 9%, and that is the appropriate rate of post judgment interest. (LF 211-212).

The controlling statute is RSMo § 408.040 (2004) and the applicable interest rate for whatever award of post-judgment interest this Court deems appropriate is 9% which should run from the date of the only Judgment, February 21, 2006.

(5) Single Judgment Rule

Plaintiff did not address Mid-America's argument that there can be but one judgment in any action. See Johnson-Mulhern Prop. v. TCI Cablevision, 980 S.W.2d 171, 172 (Mo.App. E.D. 1998) ("Generally, there can be but one judgment in a case and a judgment is not final for purposes of appeal unless it disposes of all counts in the petition."); see also Brickner v. Normandy Osteopathic Hospital, 746 S.W.2d 108, 119 (Mo.App. E.D. 1988) ("Since there can be but one judgment in any case, the judgment on the \$1,000,000 verdict was held in abeyance pursuant to the Trial Court's order of a new trial and our mandate on the first appeal.") The judgment in this matter was not entered until February 21, 2006, and accordingly there was no legally operative judgment on June 18, 2003. A judgment is the "final determination of the right of the parties in an action." RSMo § 511.020. (See attached as **Appendix Tab 2**) There was no final determination of the rights of the parties in this action until February 21, 2006, and Plaintiff had no right

to recover from Mid-America prior to that date. Plaintiff in as much acknowledges that the February 21, 2006 judgment is the one judgment in this case by entering into a stipulated partial satisfaction of judgment which states it is a partial satisfaction “of the judgment entered by the court on February 21, 2006.” (Plaintiff’s Second Brief p. A-12 and A-13). There can be but one judgment in a case, and that judgment must be the “final determination” of the action.

(6) Prior Satisfaction Impossible

Plaintiff also did not adequately address the Investors Title Co. v. Chicago Title Ins. Co., 18 S.W.3d 70, 72 (Mo.App. E.D. 2000) or Gomez v. Construction Design, Inc., 157 S.W.3d 652 (Mo.App. W.D. 2005) cases, which were cited by Mid-America in support of its argument that Plaintiff’s own appeals rendered satisfaction of the judgment impossible. Plaintiff does not discuss either of these cases, but rather Plaintiff’s response is that application of the principles set forth in these cases, and denying her interest during the pendency of the first appeal and retrial on the issue of past economic damages would be “perverse.” (See Plaintiff’s Second Brief, p. 15) Plaintiff also argues that the cases do not apply to her because she was not a “judgment creditor”. (See Plaintiff’s Second Brief, p. 18). The argument that Plaintiff was not a judgment creditor, supports Mid-America’s point that on October 16, 2003 there was no judgment in her favor and no money due to Plaintiff. The Missouri Supreme Court interpreted the word “due” to mean “time for payment.” Kennard v. Wiggins, 353 Mo. 681, 687; 183 S.W.2d 870 (Mo. 1944). As Plaintiff concedes she was not a “judgment creditor,” that is a concession that no money was “due” at the time of the first appeal. The Kennard Court also indicated

that if “there could be no process for collection of money” then the judgment was not due. Id. Post-judgment interest under RSMo § 408.040 is allowed on “all money **due** upon any judgment” (emphasis added). No money was due in this case until February 21, 2006.

There was no judgment in Plaintiff’s favor that could be satisfied as of October 16, 2003, and any delay in Plaintiff’s ultimate recovery was caused by Plaintiff choosing to appeal the Trial Court’s Order of October 16, 2003 granting a new trial. Plaintiff could have more promptly proceeded to a new trial, but chose to embark on the more lengthy appellate process. Mid-America cannot be blamed or faulted for the delay merely because it filed a motion for new trial. A motion for new trial is required by the rules of civil procedure to preserve any claim of error for appellate review. Rule 78.07. Mid-America has researched other jurisdictions and submits to this Court the following authorities from the Maryland Court of Appeals and the Kansas Supreme Court on this point. The Baltimore City Passenger Railway Co. v. Sewell, 37 Md. 443, 1873 WL 5668 (Md. 1873); Kansas City, Ft. S & M R. Co. v. Berry, 55 Kan. 186, 40 P. 288 (Kan. 1895) (the Kansas Supreme Court refused to award interest where the Trial Court originally found, contrary to the jury’s finding, that defendant was not liable. The Kansas Supreme Court stated: “It cannot be said that the delay in entering judgment resulted from any action of the defendant. It is true that the defendant has at all times contested the plaintiff’s right of recovery, has at all times denied liability; but the contention of the defendant was sustained by the district court, which held there was no liability.”). In The Baltimore City, Plaintiff argued he was entitled to interest for the sixteen month delay

caused by defendant's motion for new trial. Mid-America recognizes that this language is not controlling, but is illustrative. The Maryland Court of Appeals stated:

“The verdict, being an intermediate step in the progress of litigation, liable to be suspended or annulled by the subsequent action of the court, it does not seem to us consistent with judicial deliberation that the delay occasioned by motions for new trial, or in arrest of judgment, (although such motions should be ultimately overruled,) should be made the occasion of an increase of damages, by way of interest, on the presumption that such motions were groundless, and without cause. The motion for a new trial, or arrest, is a valuable and necessary incident to the right of trial by jury, and no restraint should be placed upon it inconsistent with its freest exercise.”

Mid-America denied liability and defended this action. The Trial Court, in its Order of October 16, 2003 found the motion for new trial to be well taken and it was granted. To award to Plaintiff the over one million dollars in interest which she now seeks, would be to penalize Mid-America for successfully pursuing a motion for new trial. This would put defendants in an impossible position – either forego a motion for new trial and any right to appellate review, or risk the imposition of hundreds of thousands (or millions) of dollars in interest should the plaintiff choose to appeal the grant of new trial and ultimately be successful.

Satisfaction of judgment was not possible until after the Trial Court entered judgment on February 21, 2006, and any award of interest prior to that time is contrary to law and inequitable.

CONCLUSION

For the foregoing reasons, and those set forth in Mid-America's opening brief, the Trial Court erred in awarding post-judgment interest for the over two and a half year period between June 18, 2003, and February 21, 2006. There can be but one judgment in an action, and that judgment, the "final determination of the right of the parties in the action" pursuant to RSMo § 511.020, was rendered on February 21, 2006.

Mid-America respectfully requests this Honorable Court, pursuant to Rule 84.14, reverse in part the February 21, 2006 Judgment of the Trial Court awarding post-judgment interest to Michael and Karen Lindquist from June 18, 2003. Mid-America requests this Court not remand the action, but rather enter the judgment that the Trial Court should have properly entered. Rule 84.14 ("give such Judgment as the court ought to give").

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CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the foregoing were sent by United States mail, along with an electronic copy on disc, postage pre-paid, this 3rd day of January, 2007, to following counsel of record:

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CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Rule of Civil Procedure 84.06(c), the undersigned attorney certifies that:

1. This brief includes the information required by Missouri Rule of Civil Procedure 55.03.
2. This brief complies with Missouri Rule of Civil Procedure 84.06(b) and Local Rule 360(a)(1)(a).
3. This brief contains approximately 4,475 words according to the Word Count feature of Microsoft Word.
4. The submitted disk has been scanned for viruses and is virus-free.

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