

IN THE MISSOURI SUPREME COURT

BRENT WERREMEYER AND TONYA WERREMEYER

Appellants\Respondents

v.

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

Respondent\Appellant

SC 85551

RESPONDENT\ CROSS APPELLANT'S SUBSTITUTE BRIEF

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II. JURISDICTIONAL STATEMENT

Respondent/Appellant K.C. Auto Salvage Co., Inc. agrees with the jurisdictional statement

contained in the brief of Appellants Brent and Tonya Werremeyer.

The appeal of Respondent/Cross-Appellant K.C. Auto Salvage Co., Inc. is from a judgment of the Circuit Court of Jackson County, Missouri assessing actual and punitive damages pursuant to a jury award for alleged fraud and a statutory violation in regard to the sale of a used vehicle.

The Missouri Court of Appeals-Western District affirmed the verdict.

After the opinion of the Court of Appeals this Court granted transfer of the appeal and therefore this Court has jurisdiction to hear this appeal per Article V, Section 10 of the Constitution of the State of Missouri and Supreme Court Rule 83.04.

III. STATEMENT OF FACTS

I. The Appeal of Brent and Tonya Werremeyer

Respondent/Appellant K.C. Auto Salvage Co., Inc. accepts the Statement of Facts presented by

Appellants/Respondents Brent and Tonya Werremeyer in their brief.

Appeal of Respondent/Appellant K.C. Auto Salvage Co., Inc.

This is a tale of two cars rolled into one.

History of the Combined Car

On August 30, 1996 Judith K. Brugger was driving her Toyota 4Runner on Highway 133 in Washington County, Nebraska. She lost control of the vehicle which left the roadway and overturned. (TR251-252) The whole top of the car was crushed. (TR253) State Farm Insurance determined that the vehicle was a total loss and paid off what it considered to be the fair market value to Mr. and Mrs. Brugger. (TR269) There was no dispute that the body was so badly damaged that it was impossible to repair. (TR275)

On or about April 14, 1998 Mr. Brugger got a letter from the Adams Toyota dealership in Raytown, Missouri thanking him for servicing his vehicle. (TR271) This aroused the suspicions of Mr. Brugger who contacted law enforcement officials in Nebraska. He subsequently mailed photos of his totally damaged Toyota 4Runner and packets of information to the Nebraska and Missouri State Highway Patrols. (TR273-274)

For reasons that are a mystery, the frame and chassis of the Brugger Toyota 4Runner found their way to the State of California.

Investigator Donald Pounds of the Nebraska State Highway Patrol called Larry Wilson, an auto theft expert with the Missouri Highway Patrol on February 13, 1998 advising Mr. Wilson that there was a lot of suspicion regarding the Toyota 4Runner in question and that it may be located in the Kansas City area. (TR327) Larry Wilson then proceeded to the location of the vehicle which was parked at a residence

in Jackson County, Missouri belonging to a friend of the plaintiffs.

While inspecting the vehicle Inspector Wilson found several discrepancies. The vehicle was supposed to have a cloth interior yet the vehicle he was looking at had a leather interior. He also noticed several scratch marks on the rivets that held the VIN I.D. plate on. He noticed that an abrasive had been used on the driver's door and the door behind the driver to scratch out an identification number. (TR329)

Based on these discrepancies Inspector Wilson concluded that the vehicle had been tampered with.

Inspector Wilson then called the National Insurance Crime Bureau in Chicago which is a repository for data bases from the manufactures and car dealers that record VIN numbers. He gave them the engine number on the vehicle and was told that the engine belonged to the Brugger vehicle. It was determined that the vehicle had the original engine in it. (TR339)

At this point in time Inspector Wilson believed that the vehicle had been subjected to a "body swing." This is where the original body of a vehicle is taken off the vehicle and another good body is swung over on the frame complete with the interior. (TR340)

Inspector Wilson then called the Toyota Motor Company in California and gave them another identification number he found on the body. He was told by Toyota that the number was assigned to a car sold by Sheridan Toyota in Santa Monica, California. Inspector Wilson then contacted the general manager of that dealership. He was subsequently referred back to the Toyota Motor Company and was told where other identification numbers were located internally within the vehicle on the radiator. (TR343) He found out that the numbers did not match and that the number on the radiator did not belong to the Brugger vehicle. (TR344) He then contacted the National Insurance Crime Bureau in Illinois. (TR344) This

organization sent him a 50 page computer printout involving the same type of vehicles. He eliminated all but 13 vehicles that could have been involved in a crime involving the Toyota in question. (TR345)

Inspector Wilson then called the Crime Bureau back and asked for shipping information on each of the 13 vehicles he had not eliminated and gave the clerk the identification number of each vehicle and all of the information he had on each vehicle from the previous run. He wanted to see if any of these 13 suspected stolen vehicles had been sent to Sheridan Toyota in California. Ultimately, it was determined that the body of the Toyota subsequently purchased by the Appellants/Respondents was stolen from a John Bolden in Hermosa Beach, California. (TR347)

Ultimately, Inspector Wilson went back to the Werremeyer vehicle and determined that the top or the swing part of the car had belonged to Bolden in California and that the frame and chassis part of the vehicle had come from the Brugger vehicle which was involved in the one car rollover accident in Nebraska. (TR351)

After paying the Brugger's for their car, State Farm Insurance had it salvaged and got a salvage title sometime in September 1996. (TR354) Therefore, a salvage title should have stuck with the car rather than a good clean title.

Inspector Wilson then ultimately traced the car through a computer information title history system, from the criminal perpetrators in California to the Copart Auto Auction in Kansas City, Kansas. Copart, acts as a broker for salvaged vehicles selling them to dealers such as K.C. Auto Salvage. Inspector Wilson ultimately found out that the car had been purchased from Copart by K.C. Auto Salvage.

Inspector Wilson then called John Tyson, the salesman at K.C. Auto Salvage who had gone out to bid on the car at Copart. K.C. Auto Salvage cooperated fully with his investigation and furnished him

with whatever documents he needed. (TR355, TR191)

Inspector Wilson also attempted to contact Copart. He contacted them several times but was unable to get anybody to provide information on the sale of the vehicle, who bought the vehicle, or any other vehicles that the criminal perpetrators in California may have sent to Copart. (TR355) Copart did not even return Inspector Wilson's phone calls. (TR359)

K.C. Auto Salvage Co., Inc. (herein after K.C. Auto) operates a collision repair center as well as selling used cars and damaged cars. (TR117) K.C. Auto has eight employees. It rarely puts out more than eight or ten cars for sale on its lot at any one time. (TR101-102) Approximately half of the cars sold by K.C. Auto have been bought physically damaged and repaired by K.C. Auto and subsequently put up for sale on their lot. (TR202)

K.C. Auto obtains its cars from auto auctions which are held weekly. There are typically 200 to 300 hundred bidders at an auto auction at Copart which operates an auto auction service in Kansas City, Kansas. (TR203) The buyers for K.C. Auto are given an opportunity to look at the cars. Approximately 350 to 400 cars a week are sold. (TR204)

In searching for vehicles to purchase, K.C. Auto looks to see if the car has a clean title, if the body is in good shape, if the mechanics are in good shape, if the mileage is good, and if the mileage is compatible with the condition of the car. (TR204)

If John Tyson, as a purchaser for K.C. Auto, finds a car that he thinks is marketable, he would go into the Copart office and ask to look at the title. (TR205)

At the time of the purchase of the Toyota 4Runner from Copart by K.C. Auto Tyson testified that he walked into the Copart office and asked the employees there if the title had been "checked out."

(TR205) He was told that it had been. (TR206)

K.C. Auto had been doing business with Copart for years. Tyson explained that Carfax is a company that can run a history of the title of any particular car. Tyson was told by the employees at Copart that a Carfax had been run on every car that was represented as having a clean title. (TR122) Had Tyson known that the clean title was incorrect he indicated that K.C. Auto probably still would have bought the car but would have paid much less money for it. (TR123)

Therefore, there is no dispute that the vehicle purchased at Copart by K.C. Auto and subsequently sold by K.C. Auto to the Werremeyers should not have had a clean California title. The vehicle should have at least had a California salvage title or a Nebraska salvage title. There is also no dispute that the car was in reality two cars rolled into one with the body or “swing portion” having been taken from the stolen Toyota in California and the frame or chassis having been taken from the wrecked Brugger vehicle in Nebraska. There is also no dispute that the criminal activity involving the vehicle took place by unknown perpetrators in California.

The Transaction Between Mr. and Mrs. Werremeyer and K.C. Auto

Brent and Tonya Werremeyer were in the market for another vehicle. Brent Werremeyer had previously purchased a car from K.C. Auto that had been wrecked and rebuilt and had a salvage title. He was allowed to look at that vehicle and see that it was a salvaged title. (TR492) He had spotted the Toyota 4Runner on the used car lot of K.C. Auto in Blue Springs and stopped by to check it out. At this time, he first met John Tyson, the salesman for K.C. Auto who had helped purchase the car at the Copart auction. On the first visit to K.C. Auto Brent Werremeyer was allowed to test drive the car for about 2 miles down Highway 40. (TR495) In fact, he was allowed to test drive the car on two occasions. (TR515) Salesman

Tyson, also allowed Brent Werremeyer to take the car to a mechanic which turned out to be Blue Springs Auto where the car was inspected. (TR515) It was determined that the car was out of alignment. K.C. Auto then sent the car out and got it properly aligned before Brent Werremeyer purchased the car. (TR516) The mechanic at Blue Springs Auto apparently found nothing wrong with the car of a serious nature.

Tyson told Brent Werremeyer that K.C. Auto would warrant the car for 90 days. (TR518) Tyson let Mr. Werremeyer inspect the car as much as Mr. Werremeyer wanted to. (TR519) There were extreme discrepancies in the testimony as to whether or not Tyson represented as a matter of fact to Werremeyer that the car had been repossessed or stolen and recovered and what the etchings on the windows were caused by.

At any rate, Werremeyer did not trust Tyson. (TR521)

After Tyson allegedly represented to Mr. Werremeyer as a fact that the car had been repossessed, Werremeyer still did not trust Tyson and asked to look at the title. (TR522)

Tyson then went into the office and got the title and showed it to Mr. Werremeyer who checked the VIN on the California title against the VIN on the vehicle. (TR522)

The last act in buying the car was the inspection of the California title by Mr. Werremeyer convincing him that it was a good title and he relied on the clean California title in purchasing the vehicle.

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¹ Tyson relied on the clean California title in purchasing the car at the Copart auto auction just as Werremeyer relied on the clean California title in purchasing the car

Inspection of the vehicle at Adams Toyota

Tom Turner is the service manager at Adams Toyota. He has been employed by Adams Toyota for 20 years with the last three being as a service manager. Prior to that he was a service advisor and prior to that a mechanic. (TR306)

Turner recalled getting a phone call from Mr. Brugger in Nebraska about the Adams dealership having serviced the Brugger vehicle which of course was impossible. Brent Werremeyer had periodically taken the 4Runner in for service subsequent to its purchase. Unaware to Mr. Werremeyer, Tom Turner put the car up on a lift and examined it closely to determine if it had been rebuilt. Service Manager Turner had received pictures from Mr. Brugger in Nebraska showing the severe damage to the body of the car and could not believe that the car was rebuildable. (TR308) Service Manager Turner could see no indication that the car had been repainted, that any body panels had been replaced, or anything that would alert someone to the fact that the car was not an originally manufactured vehicle. (TR308) Turner could find no indication that the car was really put together from two different vehicles. (TR309)

Turner had some of his technicians go over the car and the chassis underneath the vehicle and they could find nothing unusual about the car. (TR314-315)

After Brent Werremeyer purchased the car from K.C. Auto he had brought it in approximately four times from 1997 to 1999 to Adams Toyota for routine maintenance. (TR316) The etchings on the windows did not alarm Mr. Turner as to a possible stolen vehicle. (TR318) The etchings were open and

from K.C. Auto. (TR210-211)

obvious to anyone who looked at the windows. Turner suspected that the side glass on the doors had come from a salvage yard explaining the etchings. (TR312)

Concluding Facts

The Werremeyers purchased the car from K.C. Auto for \$17,500.00. They thought it was a fair price. (TR511) The 4Runner was eventually impounded by the Missouri Highway Patrol because Farmers' Insurance had paid Bolden, the theft victim in California, for the vehicle when it was stolen. It cost the Werremeyers about \$2,000.00 to repurchase the car from Framers. (TR507) The Missouri Highway Patrol had possession of the vehicle for five or six weeks. (TR508)

The Werremeyers subsequently sued K.C. Auto and Copart in the Circuit Court of Jackson County.

The case against K.C. Auto went to the jury on common law fraud and for violation of §301.390 Rs.Mo. alleging that K.C. Auto Salvage Co. sold to Mr. and Mrs. Werremeyer a motor vehicle in which the original manufacturer's number or other distinguishing number had been removed, altered, or defaced. (LF63-64) The jury returned a verdict of \$9,000.00 actual damages against both K.C. Auto and Copart and assessed \$20,000.00 in punitive damages against K.C. Auto. (LF71 and 74) and \$200,000.00 against Copart.

The motion of K.C. Auto for a new trial or in the alternative for judgment notwithstanding the verdict was overruled by the trial Court. (LF137) An appeal to the Missouri Court of Appeals - Western District followed. The Court of Appeals affirmed the judgment. This Court accepted transfer of the case.

IV. POINTS RELIED ON

I. THE TRIAL COURT CORRECTLY DENIED THE WERREMEYERS

REQUEST FOR PREJUDGMENT INTEREST BECAUSE:

A. PUNITIVE DAMAGES ARE NOT READILY ASCERTAINABLE

BEFORE TRIAL AND SHOULD NOT BE USED TO CALCULATE WHETHER PREJUDGMENT INTEREST WAS OWED IN THAT A DEFENDANT WOULD BE PRESSURED TO SETTLE EVEN WHEN THE AMOUNT OWED IS NOT DISPUTED, IN ORDER TO PROTECT ITSELF FROM LARGE AMOUNTS OF PREJUDGMENT INTEREST

B. MERE COMPLIANCE WITH §408.040 DOES NOT MANDATE THE AWARD OF PREJUDGMENT INTEREST BECAUSE THE COURT MAY WEIGH PRINCIPLES OF EQUITY AND PUBLIC POLICY IN DETERMINING A DEFENDANT'S LIABILITY FOR SUCH INTEREST PARTICULARLY WHERE THE DEFENDANT ATTEMPTED TO RECTIFY THE WRONG BUT THE PLAINTIFF WOULD NOT ALLOW IT TO DO SO

C. K.C. AUTO DID NOT COMMIT A TORT WHICH CONFERRED A BENEFIT ON IT SO THAT AN AWARD OF PREJUDGMENT INTEREST IS NOT PROPER

Hoskins v. Businessmen's Assurance et al., 116 SW3d 557 (Mo.App. W.D. 2003)

Schreibman v. Zanetti, 909 SW 2d 692 (Mo.App. W.D. 1995)

Weinberg v. Safeco Ins. Co. of Ill., 913 SW 2d 59 (Mo.App. E.D. 1995)

Gibson v. Mussel, 844 F. Supp 1579 (W.D. Mo. 1994)

THE TRIAL COURT ERRED IN NOT SUSTAINING K.C. AUTO'S MOTION FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE IN PURCHASING THE VEHICLE:

THE WERREMEYERS DID NOT RELY UPON ANY STATEMENT BY SALESMAN TYSON AS TO WHETHER OR NOT THE VEHICLE IN QUESTION HAD BEEN WRECKED BUT INSTEAD RELIED UPON THE CLEAN CALIFORNIA TITLE THAT CAME WITH THE VEHICLE IN THAT BRENT WERREMEYER TESTIFIED THAT HE DID NOT TRUST SALESMAN TYSON AND WANTED TO SEE THE TITLE AS THE LAST ACT BEFORE AGREEING TO PURCHASE THE VEHICLE

ANY STATEMENT BY SALESMAN TYSON AS TO THE CONDITION OF THE VEHICLE WAS THEREFORE IMMATERIAL TO ITS PURCHASE BY THE WERREMEYERS

Moorehouse v. Behlmann Pontiac-GMC Truck Service, Inc., 31 SW 3d 55
(Mo.App. E.D. 2000)

Constance v. B.B.C. Development, 125 SW 3d 571 (Mo.App. W.D. 2000)

Delong v. Hilltop Lincoln-Mercury, Inc., 812 SW 2d 834 (Mo.App. E.D. 1991)

Grossoehme v. Cordell, 904 SW 2d 392 (Mo.App. W.D. 1995)

THE TRIAL COURT ERRED IN NOT SUSTAINING K.C. AUTO'S MOTION FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

BECAUSE THERE WAS INSUFFICIENT EVIDENCE THAT K.C. AUTO VIOLATED
§301.390 Rs.Mo. IN THAT:

K.C. AUTO HAD NO KNOWLEDGE THAT THE VEHICLE IN QUESTION HAD
AN ALTERED VEHICLE IDENTIFICATION NUMBER AND THE STATUTE
REQUIRES SUCH KNOWLEDGE

Endicott v. St. Regis Investment Co., 443 SW 2d 122 (Mo.banc 1969)

Anteu v. Reynolds, 15 SW3d 762 (Mo.App. W.D. 2000)

§301.210 RS.Mo.

§301.390 RS.Mo.

THE TRIAL COURT ERRED IN NOT SUSTAINING K.C. AUTO'S MOTION FOR
DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT
BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO JUSTIFY A PUNITIVE
DAMAGE INSTRUCTION TO THE JURY IN THAT THE CONDUCT OF K.C. AUTO
SHOWED NO EVIL MIND OR INTENT BECAUSE:

K.C. AUTO ALLOWED BRENT WERREMEYER TO TEST DRIVE THE VEHICLE,
HAVE THE VEHICLE INSPECTED BY A MECHANIC, PAID FOR AN
ALIGNMENT OF THE VEHICLE, AND OFFERED TO NEGOTIATE A SOLUTION
TO THE PROBLEM INVOLVING THE VEHICLE BEFORE LITIGATION
COMMENCED.

K.C. AUTO COOPERATED FULLY WITH THE MISSOURI HIGHWAY PATROL
IN TRYING TO DETERMINE THE EXACT ORIGIN OF THE VEHICLE

THE WERREMEYERS WERE DAMAGED BY THE CRIMINAL ACT OF OTHERS
I.E. THE AUTO THIEVES, AND NOT BY ANY ACT OF K.C. AUTO

State Farm Mutual Auto Insurance Company v. Campbell, 123 S.Ct. 1513
(2003)

Alcorn v. Union Pacific RR. Co. and National RR. Passenger Corp., 50 SW
3d 226 (Mo.banc 1996)

Rodriguez v. Suzuki Motor Corporation, 936 SW 2d 104, (Mo.banc 1996)

Anderson v. Liberty Lobby, Inc., 477 v. U.S. 242 (1986)

V. ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED THE WERREMEYERS REQUEST FOR PREJUDGMENT INTEREST BECAUSE:

A. PUNITIVE DAMAGES ARE NOT READILY ASCERTAINABLE BEFORE TRIAL AND SHOULD NOT BE USED TO CALCULATE WHETHER PREJUDGMENT INTEREST WAS OWED IN THAT A DEFENDANT WOULD BE PRESSURED TO SETTLE EVEN WHEN THE AMOUNT OWED IS NOT

DISPUTED, IN ORDER TO PROTECT ITSELF FROM LARGE AMOUNTS OF PREJUDGMENT INTEREST

- B. MERE COMPLIANCE WITH §408.040 DOES NOT MANDATE THE AWARD OF PREJUDGMENT INTEREST BECAUSE THE COURT MAY WEIGH PRINCIPLES OF EQUITY AND PUBLIC POLICY IN DETERMINING A DEFENDANT'S LIABILITY FOR SUCH INTEREST PARTICULARLY WHERE THE DEFENDANT ATTEMPTED TO RECTIFY THE WRONG BUT THE PLAINTIFF WOULD NOT ALLOW IT TO DO SO**
- C. K.C. AUTO DID NOT COMMIT A TORT WHICH CONFERRED A BENEFIT ON IT SO THAT AN AWARD OF PREJUDGMENT INTEREST IS NOT PROPER**

The fact that the Appellants/Respondents complied with the administrative requirements of §408.040 Rs.Mo. has never been in issue. What ultimately happened after judgment throws complexity into the situation thereby showing that mere compliance with the statute does not automatically grant a party prejudgment interest.

No Appellate Court in Missouri has ever awarded prejudgment interest on punitive damages. The most extensive discussion on the issue was by the Western District in Hoskins v Business Men's Assurance et al, 116 SW3d 557 (Mo.App.W.D.2003)

The Court found the intent of the General Assembly to be that prejudgment interest is intended to compensate a plaintiff for his loss sustained as a result of defendant's tortious conduct and not to punish a

defendant.² This is to be contrasted with the purpose of punitive damages which is to punish and not to make the plaintiff whole for his/her loss. Therefore the awarding of prejudgment interest on punitive damages is wholly incompatible with the purposes behind the prejudgment interest statute.

Appellants\Respondents argue that the decision of the Western District below is contrary to this Court's decisions in Lester v Sayles, 850 SW2d 858 (Mo.banc1993) and Call v Heard, 908 SW2d 783 (Mo.banc1996)

In Lester the issue before this Court was whether prejudgment interest is due on the full amount of the final judgment or only on the difference between the final judgment and the plaintiffs' offer of settlement. (p.873) The jury verdict was for actual damages only. This Court ruled that prejudgment interest is due on the entire amount of money due where this amount exceeds the settlement offer. (p.873)

Appellants\Respondents now seek to stretch this phrase beyond the decision of this Court by arguing that the decision below is contra. This is a giant illogical leap because the Lester decision did not

² The Western District cited Brown v Donham, 900 SW2d 630, 633 (Mo.banc1995) wherein this Court stated that the two public policies served by the statute were the compensation to the plaintiff for the true cost of money damages and the promotion of settlement and deterrance of delay of litigation.

involve punitive damages and held only that the phrase “entire amount of the judgment” precluded a defendant from arguing that the amount of interest should be reduced by a calculation based on the difference between the judgment and the final offer of settlement.