

IN THE MISSOURI SUPREME COURT

BRENT WERREMEYER AND TONYA WERREMEYER

Appellants/Respondents

v.

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

Respondent/Appellant

SC 85551

APPELLANTS/RESPONDENTS' SUBSTITUTE BRIEF

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POINT RELIED ON WITH PRIMARY AUTHORITIES

POINT I

THE TRIAL COURT ERRED IN OVERRULING APPELLANT/RESPONDENTS' MOTION FOR PREJUDGMENT INTEREST BECAUSE APPELLANT/RESPONDENTS SATISFIED THE REQUIREMENTS OF §408.040 RSMO IN THAT THEY SENT A CERTIFIED LETTER TO RESPONDENT/APPELLANT KC AUTO OFFERING TO SETTLE THEIR CLAIM FOR \$20,000.00, THE OFFER WAS LEFT OPEN FOR SIXTY DAYS, AND THE AMOUNT OF THE JUDGMENT ENTERED IN THIS CASE EXCEEDED \$20,000.00.

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

Lester v. Sayles, 850 S.W.2d 858, 873 (Mo.banc 1993).

Hurst v. Jenkins, 908 S.W.2d 783, 786 (Mo.App.W.D. 1995)

§408.040 RSMo

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the Honorable Forest W. Hanna entered in the Circuit Court of Jackson County, Missouri. The Court overruled Appellants/Respondents' post trial motion seeking to amend the judgment to add prejudgment interest. Thus, the issue on appeal is whether the Circuit Court erred in failing to award Appellants/Respondents prejudgment interest. The issue presented involves the application of §408.040 RSMo to the facts at issue here.

After an opinion was handed down by the Missouri Court of Appeals for the Western District, this Court granted transfer of the appeal. This Court, therefore, has jurisdiction to hear this appeal. See Article V, Section 10 of the Missouri Constitution and Supreme Court Rule 83.04.

STATEMENT OF FACTS

The only issue raised in this brief is whether the Trial Court erred in failing to award prejudgment interest to the Appellants/Respondents Brent and Tonya Werremeyer. Thus, the facts set below are only those pertinent to that issue.

I. BACKGROUND

On March 11, 1997, Appellants/Respondents, Brent and Tonya Werremeyer bought a vehicle from Respondent/Appellant K.C. Auto Salvage Company, Inc. (K.C. Auto). K.C. Auto had bought the car at an auction run by Copart of Kansas, Inc. K.C. Auto's salesman told the Werremeyers that the vehicle had a good, clean title and had never been wrecked. Both of these representations were false. After the Werremeyers purchased the vehicle, it was discovered that the vehicle had been through a "chop shop" and was comprised of two vehicles. The chassis and engine were from a vehicle that had been totaled, and the body was from a vehicle that had been stolen. The Missouri Highway Patrol seized the Werremeyer vehicle and the Werremeyers had to repurchase the stolen part of the vehicle in order to get the vehicle back. The Werremeyers then brought this action against K.C. Auto for fraudulent misrepresentation. The Werremeyers also made a statutory claim against K.C. Auto for selling a vehicle with altered vehicle identification numbers. (L.F. 18-29).

II. PREJUDGMENT DEMAND

On November 9, 1998, Appellants/Respondents Brent and Tonya Werremeyer sent a letter to Respondent/Appellant K.C. Auto offering to settle

their claim for \$20,000.00. (L.F. 84) The letter stated that the demand was being made pursuant to §408.040 RSMo and would remain open for sixty days. (L.F. 84). The demand letter was sent certified mail. John Tyson, an employee of Respondent/Appellant K.C. Auto received and signed for the letter on November 10, 1998. (L.F. 85). Respondent/Appellant K.C. Auto did not accept the offer to settle and the case proceeded to trial. When Appellants/Respondents Brent and Tonya Werremeyer filed their Amended Petition, they specifically pled that they were seeking an award of prejudgment interest. (L.F. 20).

III. JUDGMENT

The case was tried the week of December 11, 2000. On December 14, 2000, the jury returned a verdict in favor of Appellants/Respondents Brent and Tonya Werremeyer and against both Respondents/Appellants K.C. Auto and Copart. (L.F. 71 & 79). The jury assessed compensatory damages in the amount of \$9,000.00. (L.F. 71 & 79). The jury further found that Respondent/Appellant K.C. Auto was liable for punitive damages in the amount of \$20,000.00. (L.F. 74 & 79). Pursuant to the jury verdict, the Court entered judgment in favor of Appellant/Respondents Brent and Tonya Werremeyer in the amount of \$9,000.00 for compensatory damages against both K.C. Auto and Copart. And the Court entered judgment against Respondent/Appellant K.C. Auto for \$20,000.00 in punitive damages. (L.F. 78 & 79).

IV. POST-TRIAL MOTIONS

On December 16, 2000, Appellants/Respondents Brent and Tonya Werremeyer filed their motion to amend the judgment to add prejudgment interest to their judgment against Respondent/Appellant K.C. Auto. (L.F. 80 & 137). On December 19, 2000, Respondent/Appellant K.C. Auto filed its suggestions in opposition to Appellant's motion to amend. (L.F. 86). In addition to Appellant/Respondents Brent and Tonya Werremeyer's motion to amend, Respondent/Appellants K.C. Auto and Copart filed motions for new trial and JNOV. (L.F. at 97 and 116-119).

On April 2, 2001, the Court overruled, without explanation, Appellant/Respondents' motion to amend the judgment to add prejudgment interest. (L.F. 138). The Court sustained Respondent/Appellant Copart's motion for new trial on the issue of punitive damages only unless Appellant/Respondents Brent and Tonya Werremeyer would accept a remittitur of punitive damages. (L.F. 138). The remittitur was accepted, and therefore, Copart's motion for new trial was overruled. The Court overruled all other motions. (L.F. 138). Appellants/Respondents then filed a motion requesting the Court to amend, correct or otherwise indicate in its order the reason why the Appellants/Respondents' motion for prejudgment interest was overruled. (L.F. 142). On April 13, 2001, the Court, without explanation, overruled that motion. (L.F. 144). Respondent/Appellants KC Auto and Copart appealed; Appellants/Respondents cross-appealed. Copart has since settled and been dismissed.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN OVERRULING APPELLANT/RESPONDENTS' MOTION FOR PREJUDGMENT INTEREST BECAUSE APPELLANT/RESPONDENTS SATISFIED THE REQUIREMENTS OF §408.040 RSMO IN THAT THEY SENT A CERTIFIED LETTER TO RESPONDENT/APPELLANT KC AUTO OFFERING TO SETTLE THEIR CLAIM FOR \$20,000.00, THE OFFER WAS LEFT OPEN FOR SIXTY DAYS, AND THE AMOUNT OF THE JUDGMENT ENTERED IN THIS CASE EXCEEDED \$20,000.00.

I. STANDARD OF REVIEW

The issue here involves the applicability of §408.040 RSMo; consequently, the standard of review for this issue is de novo. *See Cole, ex rel Cole v. Warren County R-III School District*, 23 S.W.3d 756, 760 (Mo.App. 2000). In that case, the Court stated, “The applicability of a statute is a question of law, and we will review the Trial Court’s judgment de novo.” *Id.* citing *Williams v. Keims*, 996 S.W.2d 43, 44-45 (Mo. 1999).

II. APPLICABLE RULE OF LAW

Under Missouri law, specifically §408.040 RSMo, a plaintiff is entitled to prejudgment interest in tort actions so long as the requirements of the statute are met. The statute states in pertinent part as follows:

1. Interest **shall** be allowed on **all money due** upon any judgment or order of any court from the day of rendering the same until satisfaction be made by payment, accord or sale of property....

2. In tort actions, if a claimant has made a demand for payment of a claim or an offer of settlement of a claim, to the party, parties or their representatives and **the amount of the judgment** or order exceeds the demand for payment or offer of settlement, prejudgment interest, at the rate specified in subsection 1 of this section, **shall** be calculated from a date sixty days after the demand or offer was made, or from the date the demand or offer was rejected without counter-offer, whichever is earlier. 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).

As stated by the Court of Appeals in *Hurst v. Jenkins*, 908 S.W.2d 783, 786 (Mo.App.W.D. 1995), a prevailing party is entitled to prejudgment interest if 1) a demand or offer of settlement is made in writing, sent certified mail, and left open for sixty days; and 2) the amount of the judgment exceeds the demand or offer of settlement. The *Hurst* Court further found that if the conditions of the statute are met, “then the prevailing party **shall** be awarded prejudgment interest....” *Id.* (emphasis added).

**III. THE REQUIREMENTS OF §408.040 RSMO WERE SATISFIED,
AND THEREFORE, PREJUDGMENT INTEREST SHOULD HAVE
BEEN AWARDED.**

Appellants/Respondents Brent and Tonya Werremeyer met the conditions of §408.040 RSMo., and therefore, the Trial Court erred in failing to award prejudgment interest.

**A. The Werremeyer's Prejudgment Demand Was Made In
Writing, Sent Certified Mail And Left Open For Sixty Days.**

On November 9, 1998, Appellants/Respondents Brent and Tonya Werremeyer sent a letter to Respondent/Appellant K.C. Auto offering to settle their claim for \$20,000.00. (L.F. 84) The letter stated that the demand was being made pursuant to §408.040 RSMo and would remain open for sixty days. (L.F. 84). The demand letter was sent certified mail. John Tyson, an employee of Respondent/Appellant K.C. Auto received and signed for the letter on November 10, 1998. (L.F. 85). Respondent/Appellant K.C. Auto did not accept the offer to settle and the case proceeded to trial. Thus, Appellants/Respondents satisfied the conditions of §408.040.2 RSMo requiring Appellants/Respondents to send by certified mail a written offer of settlement to Respondent/Appellant K.C. Auto.

B. The Judgment Exceeded The Werremeyer's Demand.

On December 14, 2000, the Court entered judgment in favor of Appellants/Respondents Brent and Tonya Werremeyer in the amount of \$9,000.00 for compensatory damages against both Respondent/Appellant K.C. Auto and

Copart. Pursuant to §537.067, KC Auto and Copart are jointly and severally liable for the \$9,000.00 judgment. Thus, KC Auto is liable to the Werremeyers for the entire amount of the judgment. See, Elfrink v. Burlington Northern Railroad, 845 S.W.2d 607, 615 (Mo.App. 1992). The Court also entered judgment in the amount of \$20,000.00 for punitive damages against Respondent/Appellant K.C. Auto. (L.F. 78-79). Thus, the Werremeyers obtained a total judgment of \$29,000.00 against KC Auto, an amount which exceeded their \$20,000.00 offer of settlement. Pursuant to the plain language of the statute and the Court's decision in Hurst v. Jenkins, *supra*, the Trial Court was required to award prejudgment interest to Appellants/Respondents and erred in failing to do so. *Id.* at 786.

C. Punitive Damages Should Be Considered In Determining Whether The Judgment Exceeded The Demand.

The Trial Court denied Appellants/Respondents' Motion to Amend the Judgment to Add Prejudgment Interest without explanation. However, the Court of Appeals affirmed the Trial Court's judgment on the basis that prejudgment interest cannot be awarded on punitive damages. This holding is contrary to this Court's interpretation of §408.040. See, Lester v. Sayles, 850 S.W.2d 858, 873 (Mo.banc 1993).

In Lester, the defendant argued that §408.040 was unconstitutionally vague in that it "fails to articulate the amount upon which prejudgment interest is calculated. *Id.* This Court rejected the defendant's argument and found that §408.040 RSMo "tolerates only one interpretation: prejudgment interest is to be

calculated on the **entire amount of money due....**” *Id.* (emphasis added). Consequently, in determining whether the judgment exceeded the prejudgment demand, punitive damages must be considered. *See Call v. Heard*, 925 S.W.2d 840 (Mo.banc 1996).

In *Call*, this Court affirmed the Trial Court’s decision awarding prejudgment interest in a case where the award for compensatory damages did **not** exceed the prejudgment demand. The prejudgment demand was for \$10,000,000.00; the compensatory damage award was only \$9,500,000.00. With the addition of the punitive damage award, the entire amount of money due under the judgment exceeded the \$10,000,000.00 demand. By affirming the Trial Court’s judgment awarding prejudgment interest, this Court must have found that the requisites of §408.040 RSMo were satisfied and that punitive damages should be considered in calculating prejudgment interest.

Similarly, here, the judgment for compensatory damages did not exceed the prejudgment demand; however, the judgment for compensatory and punitive damages did exceed the prejudgment demand. Following this Court’s decisions in *Call* and *Lester*, prejudgment interest should have been awarded and the Trial Court erred in failing to do so.

CONCLUSION

The Werremeyers satisfied the requisites of §408.040 RSMo by making a prejudgment demand in writing, sending it certified mail, leaving it open for sixty days, and obtaining a judgment in an amount that exceeded their demand. Thus,

the Trial Court erred in failing to award prejudgment interest. For the foregoing reasons, Appellants/Respondents Brent and Tonya Werremeyer respectfully request that this Court reverse the Trial Court's order overruling their motion to add prejudgment interest and remand this case to the Trial Court with instructions to amend the judgment to add prejudgment interest. In all other respects, Appellants/Respondents respectfully request that the Trial Court's judgment be affirmed.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies and a disc of the foregoing were duly mailed, postage prepaid, this _____
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CERTIFICATION PURSUANT TO RULE 84.06

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2. This brief contains 2426 words in compliance with Rule 84.06(b).
3. This brief contains 390 lines.
4. The disc has been scanned and is virus free.

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