IN THE SUPREME COURT OF MISSOURI

SC90054

RONALD JOE HAYES and TERESA HAYES,
husband and wife,
Plaintiffs-Appellants

vs.

TRISHA G. PRICE,

Defendant-Respondent.

Appeal from the Circuit Court of Jasper County, Missouri
The Honorable George C. Baldridge, Senior Judge
Jasper County Case No. 05AO-CC00035

APPELLANTS' SUBSTITUTE REPLY BRIEF

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I. TABLE OF AUTHORITIES

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II. REPLY TO STATEMENT OF FACTS

In Respondent's Substitute Brief, the parties were referred to as "plaintiff" and "Ms. Price." The Appellant and Respondent here will be consistently referred to in their non-personal perspectives as "Plaintiff" and "Defendant" as they were aligned at trial.

Despite the best of sincere and dedicated human efforts and with all due respect for the same, a few typographical errors in citations can be expected and tolerated, and this author certainly cannot "throw the first stone" in that regard, however, the number and type of incorrect or wholly unsupported citations to the record in Respondent's Substitute Brief require specific notation. By doing so, no slight or unkindness should be inferred by anyone other than that it is an effort to be as accurate as possible in this matter.

POINT I

Legal File citations:

On page 7, the citations to L.F. 25 and L.F. 26 apparently should instead cite to L.F. 34 and L.F. 35-36, respectively. Plaintiff cannot discern what the corrections should be to the citations of L.F. 38, 47-48 on page 7, and L.F. 47 on page 8. Those references do not support the corresponding statements.

Transcript citations:

Numerous statements of "fact" are tendered by Defendant in her Statement of Facts which are either simply unrelated and not supported by the citation to the

Transcript (errors), or the statements are improper argumentative conclusions and unfair characterizations concerning issues such as what could or could not have been seen, times, speeds, and distances, which are not supported by the plain reading of the testimony, and are often compounded by repetition. For brevity, these references are set forth below by the page number where they appear in Respondent's Substitute Brief, followed by the Transcript page citation in the sequence each appear on that page of her brief:

Page 5: Tr. 143, 142, 305, 124, 305, 260, 108-110;

Page 6: Tr. 279, 343, 357, 108, 109, 301, 276, 372;

Page 16: Tr. 305, 124, 305, 260, 279, 343, 357;

Page 17: Tr. 108, 109, 109, 108, 109, 124, 305, 279, 343, 357;

Page 18: Tr. 276, 276, 272, 124, 305, 276;

Page 19: Tr. 124, 260, and 305.

Of most critical importance is Defendant's complete mischaracterization of her own expert witness' testimony on page 276 of the Transcript. At pages 6 and 18 of Respondent's Substitute Brief, Defendant claims that her expert testified that if Plaintiff had slowed, that **Plaintiff** had the ability to avoid this wreck. Instead, a careful reading beginning on page 275 through page 276 with the entire question and answer, demonstrates that her expert testified instead that had Plaintiff slowed, it was **Defendant**, and not Plaintiff, who would have had the ability to avoid the wreck:

11 Q. Okay. Now, if we go all the way back

preceding the collision to where Trisha Price is stopped and makes her conscious choice to pull forward, when she has only pulled, instead of 2 feet from Ron's leg, 2 feet from her stopped position, is this crash still avoidable?

A. The crash is -- is avoidable from the point that she stops the vehicle before she turns. It's the decision to make the turn that makes it unavoidable. Once that maneuver begins, because of the -- this cone, as you describe, is blocking the view of oncoming traffic, there's only 2 seconds between a vehicle exiting that cone and becoming visible until the collision occurs. Basically about 88 feet.

If the vehicle's traveling at 30 miles an hour, probably going to be a collision. If it's traveling slower than that, there's an opportunity that it may be avoided. It's all going to boil down to how attentive the driver of the vehicle was making the left-hand turn and whether they were actually looking back to the north or whether they were following the -- the direction their vehicle was traveling in

8 performing guidance for the vehicle.

9 Q. That's Trisha Price?

10 A. Yes.

Defendant also repeats erroneous claims that Plaintiff could have seen Defendant's car stopped at the intersection through the Bronco. Respondent's Substitute Brief, at 6, 16, and 17; citing Tr. 279, 343, and 357. Not only does this amount to argument and not fact, but the proposition was never established by any evidence other than that either driver may possibly have been able to see something, but neither did.

When the actual testimony is read in context, the difference is obvious: (Tr. 278, line 21 through Tr. 280, line 4):

21 Q. So it's your opinion, based on your

22 analysis, that you have found absolutely nothing that

23 Ron did or failed to do that in any way contributed to

24 this crash?

25 A. Well, from the information that I have -- I

1 have gleaned from his deposition, my answer would be

2 no. There would obviously have --

3 Q. Meaning "that's correct"?

4 A. Meaning that's correct. There would

5 probably be other questions that I would present to

him as -- as an investigator, if you go so far as to look at what his -- his thought process was as he -- as he approached the intersection. You know, we're not talking about this Bronco as being an -- a completely opaque object. Obviously it has windows in it. And -- and as both vehicles approached the outside boundaries of the cone, meaning to the east and to the north, then, at least by one description, they -- they were available to be seen by each other.

So at that point, both of them should have shared the responsibility of there's a vehicle maybe going to turn here, because I don't see it coming north. Do I need to be cautious of it occupying my path as I'm driving southbound?

And the same would hold true for Mrs. Price. If she detected both of the motorcycles headed southbound and she knew she had to turn, then she probably should have either been counting motorcycles or having a better opportunity to determine what the separation of the two was and could she fit in between them. And I don't recall that -- that -- I -- I don't remember

what she specifically said about -- about when was the last time she saw them. I -- I just don't recall that.

(Tr. 343, line 19 through 25):

Q. Okay. Converse is true also. The motorcycle's view of Trisha Price's vehicle was also obscured by this Bronco; is that true?

A. It would be partially obscured. Obviously the Bronco has -- has glass windows that are not opaque, so a person could see through there, but -- but it would be limited.

(Tr. 357, line 10 through line 2):

Q. Is there any information that he saw Trisha Price's vehicle prior to approaching this intersection?

A. Not that I recall.

Q. You think it's at least theoretically possible, because of the opaqueness of the windows of the Bronco, that he could possibly have seen the vehicle, but there's no evidence of that; is that correct?

A. Well, that -- that issue is one of detection and identification. Obviously, because the vehicle has glass in it, then a vehicle on the far side of it would be available to be seen. But how conspicuous it would be is another issue. We don't know about glare. We don't know -- because we don't know exactly what kind of this vehicle is that's in that left-hand turn lane. So I have to answer, yes, that it is possible it was available to be seen.

POINT II

The parenthetical statement in the second to last sentence on page 8 of Respondent's Substitute Brief, is plainly false and not supported by any citation to the Transcript. Patrick and Gailya Price were expressly named as parties to the claim itself, the demand was sent to the attorney representing all three persons as his "clients," they were expressly named as parties to the offer extended by Plaintiff, and they were expressly named as parties in the tendered release which would have released all liability for all claims against each of them. (L.F. 56-59).

III. REPLY TO POINTS RELIED

REPLY TO POINT I

The trial court erred by improperly submitting the issue of Plaintiff's comparative fault to the jury,

because the issue of comparative fault may not be submitted to the jury under a "failure to keep a careful lookout" instruction where there is neither evidence that the Plaintiff could have perceived a real threat of a collision as he approached the intersection, and that he had the time and ability to effectively take evasive action, nor where he had no duty to presume and anticipate Defendant's negligent left turn in front of him,

in that the evidence did not establish that Plaintiff could have reasonably perceived any actual threat of a collision with Defendant's car before he came out of the blind spot, and that he would have then had sufficient time to slow down or take any other evasive action to effectively avoid the collision, and Plaintiff had no duty to presume danger and slow his vehicle or to anticipate Defendant's negligent left turn in front of him.

REPLY TO POINT II

The trial court erred as a matter of law by improperly denying Plaintiff's claim for prejudgment interest,

because Sec. 408.040.2 R.S.Mo. only requires that a settlement demand contain a precise, finite dollar amount of money to be paid, and nothing in the statute prohibits a party from tailoring their demand to include the production of other pertinent information in addition to the payment of money so long as such requirements do not shorten the 60 day time period or otherwise violate any express provision of the statute,

in that Plaintiff's letter demanded "the payment of $325,000.00" which is a "reasonably ascertainable monetary demand," and thus the only requirement set forth in Sec. 408.040.2 R.S.Mo. contested by Defendant was precisely satisfied, and nothing in the record supports any contention that full and timely compliance with the demand was impossible.

IV. REPLY ARGUMENT

REPLY TO POINT I

A. Standard of Review

Defendant fails to point out that the Rickman v. Sauerwein, 470 S.W.2d 487 (Mo. 1971) case involved a defendant's comparative fault lookout submission which was approved because the plaintiff had an unobstructed view, and between 15 to 30 seconds of time within which to take evasive action to effectively avoid the collision. Id. at 489. The Seitz v. Lemay Bank and Trust Co., 959 S.W.2d 458 (Mo. banc 1998) case is cited for a related principle, but Defendant did not point out that the case concerned a bailment claim and did not involve any comparative fault submission issues. Hemeyer v. Wilson, 59 S.W.3d 574, 582 (Mo. App. 2001) poses the issue but is framed as whether Defendant here made a submissible case of comparative fault, and the conclusion must be that she has not if there is a complete absence of probative fact to support the jury's conclusion.

B. Argument and Analysis

First, it must be carefully noted that Defendant elected to submit her claim of comparative fault under MAI 17.05, Failure to Keep a Careful Lookout. However, close analysis of the argument she asserts here on appeal demonstrates that it more accurately falls under MAI 17.04, Failure to Act After Danger of Collision Apparent. She claims:

- because of the obscured view, Plaintiff knew or by the use of the highest

degree of care could have known that there was a reasonable likelihood of collision in time thereafter to have

-stopped, or

-slackened speed,

-but Plaintiff failed to do so.

The crux of this first point is that Defendant could not prove at trial that Plaintiff "failed to act after danger of collision was apparent," and did not try to do so, but nonetheless argues the same on appeal here.

At trial, as also demonstrated by her Brief's artful twisting of paraphrases from the evidence and argumentative inferences, Defendant instead tried the issue of comparative fault by nothing more than innuendo, not by fact and substance. For example, Defendant takes pains to point out that riding a motorcycle is dangerous; as such, insinuating that motorcyclists have a duty to be more careful than drivers of other vehicles; that Mr. Cook's signal to Defendant was meant for Plaintiff; that Defendant's car might have been visible through the windows of the Bronco, completely ignoring that such was at a time when her car was sitting still and posing no actual threat of collision; arguing that Plaintiff was "focused" only on the car to his right when actually he testified he was glancing in all directions; and finally, arguing that Plaintiff could see Defendant, but not vice versa.

Perhaps the most significant defect in Defendant's argument is where she claims that at a speed of less than 30 mph Plaintiff could have avoided the wreck,

when in fact her own retained accident reconstruction expert testified that it was Defendant and not Plaintiff who had the ability to avoid the wreck if Plaintiff had been driving slower than 30 mph in a 35 mph zone. Tr. 275-76.

Therefore, Defendant cannot ignore the complete absence of probative facts on the key causation requirement, and also avoid Plaintiff's lack of any duty to anticipate her negligent left turn, by submitting MAI 17.05 under the guise that this is a "lookout" defense, when it is actually a defense of "failed to act after danger of collision was apparent." Defendant did not plead comparative fault under MAI 17.04, did not submit the same, and should not be allowed to merge the theories here. L.F. 22-23.

Plaintiff had no duty to slow down merely because he was approaching an intersection where other traffic existed or because he sees another vehicle in the street ahead of him. Miller v. Greis, 396 S.W.2d 642, 646 (Mo. 1965); Mullen v. St. Louis Public Service Company, 389 S.W.2d 838, 842-43 (Mo. banc 1965). Imposing such a duty that the average driver encounters numerous times during every mile of urban traffic driven every day would be impracticable and would likely render the public roadways unusable. Plaintiff already was driving his motorcycle well below 35 mph limit, and to obligate him to slow further for every intersection without any actual impending danger is not required by the law or by reality. Tr. 136, 192, and 350. In sum, the lookout submission was not proper in this case as there was no danger of any collision until just 2 seconds before the impact, at a time when there was absolutely

no chance for Plaintiff to timely react and take effective evasive action.

With regard to her burden to carry the causation issue, Defendant correctly cites the Bell case for the inherently necessary ingredient which is missing from the comparative fault/lookout submission in this case: proximate cause. Bell v. United Parcel Services, 724 S.W.2d 682, 685 (Mo. App. 1987). Defendant wishes for this Court to supply the missing ingredient by sheer inference, and it cannot do so. As Bell instructs us, "this court may not 'imagine the existence of evidence, when none in fact exists, or supply the missing evidence, to flush out an otherwise insubmissible case, nor can it spring inferences from no where upon which to predicate submissibility' Lewis v. State Security Ins., Co., 718 S.W.2d 539 (Mo. App.1986) (quoting from Wallander v. Hicks, 526 S.W.2d 848, 850 (Mo. App.1975))." Id. Just as in Bell, our record here "is silent regarding visibility, speeds or distances" with respect to Plaintiff, and leaves such a lookout submission in "the nebulous twilight of speculation, conjecture and surmise." Id. at 685-86.

Defendant next cites Countryman v. Seymour R-II School District, 823 S.W.2d 515 (Mo. App. 1992), for the correct proposition that a lookout submission can be supported by circumstantial evidence, but she fails to direct this Court's attention to the sentence immediately preceding that which she cited: "To support a case on the theory of failure to keep a lookout, there must be evidence that defendant saw or could have seen plaintiff in time to have avoided the collision." Countryman, at 517. Thus, circumstantial or direct, there must be evidence on those issues. At the trial of

this case, there was no evidence that Plaintiff "saw or could have seen" Defendant "in time to have avoided the collision," plain and simple. Even merely "seeing" the Defendant's car alone is not enough to raise a duty and impose liability. At best, Defendant argues the chain of speculation that Plaintiff should have seen his partner's actions which were directed toward Defendant (Tr. 110-112), and from that then he should have deduced exactly what he could not see for himself, and then he should have reacted in an uncertain way to avoid the collision, all within an unknown, but very short time. It is a nice domino-like theory, but one supported only by an attorney's argument, and not supported by evidence, direct or circumstantial, and only by speculative inference upon inference, thus the submission was in error.

The Wiskur v. Johnson, 156 S.W.3d 477 (Mo. App. 2005) case is correctly cited for the essential lookout "duty" owed by both Plaintiff and Defendant in this case. That duty was not violated by Plaintiff here. Just as important to note is that Defendant fails to recognize in the portion she quotes that the court requires what must be "seen" is something "that present[s] a dangerous situation," and a car patiently waiting to make a left turn does not present a dangerous situation. Id. at 480. And, despite the lack of a duty, Defendant completely ignores the essence of a lookout submission in terms of proximate cause which the court in Wiskur addressed in the balance of the same paragraph cited by Defendant. It is simply not enough for Defendant to present circumstantial evidence of only a failure to look or to see, and then to merely draw further inferences from there as to the critical requirement of

proximate cause: the time to react and the ability to effectively avoid the wreck. Defendant must, and did not, present evidence that if Plaintiff had looked, that he also had both the time to react and the means to effectively avoid the collision. Id. Even assuming Plaintiff became aware of the turning car as soon as he came out of the blind spot, absent evidence of that critical "essence" of proximate cause, the submission was erroneous as a matter of law. Id. at 480-81.

Defendant next discusses the case of Riscaldante v. Melton, 927 S.W.2d 899 (Mo. App. 1996). This appears to be limited for the proposition of duty (looking out for the danger), and not for the required element of proximate cause. Respondent's Substitute Brief, 14. However, the facts of the collision and the decision in Riscaldante are noteworthy for several distinguishing reasons. That case involved a similar issue on appeal where the plaintiff contended the lookout defense was submitted in error at an intersectional collision where the plaintiff was driving in either the middle lane or far right lane at about thirty to thirty-five miles per hour. However, an expert accident reconstructionist also testified that plaintiff would have had "no problem seeing defendant's vehicle travel west across the center line into the southbound lanes" before colliding with him. Id. at 901. In stark contrast to the instant case, the plaintiff there was proven to have had ample time within which to take evasive action as he could have seen the approaching vehicle with a "clear and unobstructed view" from a distance of more than 200 feet over a time of five seconds. Id. When viewed in its entirety, the Riscaldante decision bears far more weight in

favor of Plaintiff's position here than for Defendant's, and requires reversal of the lower court's ruling permitting the lookout submission.

Likewise, it is not at all obvious why Defendant cites to the case of Hemeyer v. Wilson, 59 S.W.3d 574 (Mo. App. 2001) at page 15 of her Brief. In very similar fashion to Riscaldante, there was ample evidence and testimony from an expert that the plaintiff had an unobstructed view of the approaching vehicle from nearly 400 feet away over a time of about four seconds. Hemeyer, at 582. Furthermore, the court in Hemeyer engaged in a very scholarly description of the key propositions that control in our instant case: that Defendant had to prove both that Plaintiff could have seen Defendant in time to have taken effective precautionary action, and that Plaintiff had "the means and ability" to avoid the collision; and finally, that proof of failure to keep a careful lookout, standing alone, is not enough to support such a submission. Id. Simply put, applying these holdings to the instant case requires reversal.

The next several pages of her Brief are purely devoted to arguments from the facts, which are not based on any law, and only seek to draw strained inferences from her very limited evidence. The bottom line is that Defendant's entire contention on appeal is based on the contingent premise upon premise that instead of looking at a vehicle he could see to his right which actually presented a collision hazard, Plaintiff should have been looking straight ahead, and should have observed his friend's gesture which was directed solely to Defendant, and he should also have interpreted the gesture instead as a warning to Plaintiff about a stationary, unknown vehicle, thus

this should have caused him to slow further for something he did not, and likely could not, see, that even if seen did not pose any immediate danger of collision as it was stopped, that thus he should have been driving at a slower, unknown speed, well below the 35 mph speed limit, and thus in turn allowing him a longer, also still unknown, time within which to react, all the while in the complete absence of any proof, even circumstantial at the least, as to whether such unknown speed and unknown time given the unknown distance would have been sufficient for Plaintiff to effectively have taken some unknown evasive action to avoid the collision. Such is simply too far of a stretch for this or any Court to undertake on the paucity of evidence, especially in light of Defendant's own hired expert who thoroughly evaluated all aspects of this collision, and completely exonerated Plaintiff of any wrong doing or ability to avoid the collision. (Tr. 277-285, 323-324, 352-354, 360-361, 371-372, 378-379).

On page 18 of her Brief, while raising Hemeyer again, Defendant implies but does not come right out and state or cite any legal authority for her argument that Plaintiff was negligent for not anticipating Defendant's careless left turn across oncoming traffic without her first making sure the coast was clear. Such a contention is simply contrary to the established law of this state. "Missouri law does not require motorists . . . to anticipate negligence on the part of a fellow motorist unless and until there is apparent danger of a collision. Buck v. Union Electric Co., 887 S.W.2d 430, 434-35 (Mo. App. 1994)." Wise v. Pottorff, 987 S.W.2d 407, 410 (Mo. App. 1999).

The driver in that case had "every right to assume" that the other driver "would stay in his own lane of travel." Id. Also, "no authority in Missouri exists that limits or modifies a motorist's right to assume that a fellow motorist will remain in his own lane of travel - not even inclement weather conditions such as ice." Id. If Missouri law does not impose liability on a driver passing another vehicle on an ice covered interstate highway for failing to anticipate the chance of the other vehicle possibly spinning out of control on the ice, then driving on a sunny Saturday morning through an intersection below the posted speed limit does not impose any liability on a driver for not slowing down in anticipation of every remotely possible hazard, seen or unseeable. From a public policy standpoint, imposing the duty asserted by Defendant would bring all traffic at intersections everywhere to near grid-lock as vehicles unnecessarily slowed for unseen hazards. Such is neither compelled by logic nor the law.

Additionally, on page 18 of her Brief, Defendant completely misreads her own expert's testimony by claiming that "if plaintiff had been traveling less than 30 miles per hour, the accident could have been avoided in 2 seconds." Tr. 276. If the intended implication is that **Plaintiff** could have avoided the wreck, such is false. Defendant's expert testified that if Plaintiff was driving at a slower speed, then **Defendant** would have had the ability to avoid the wreck by stopping sooner during her blind left turn. Id. The record is completely silent as to what speed, time or distance would have had to exist before **Plaintiff** could have had any feasible chance

to avoid the collision once Defendant began her left turn across two oncoming lanes of traffic without first assuring her passage was safe and clear.

Defendant next argues that "blind intersections are points of danger," citing Domitz v. Springfield Bottlers, Inc., 221 S.W.2d 831 (Mo. 1949). Respondent's Substitute Brief, 19. Any reliance on Domitz is completely misplaced in this instance. That case involved the owner's liability for a large truck parked so close to an intersection as to obstruct the safe view and travel of motorists in the area. Id. 832-33. Nothing in Domitz supports any duty or liability to be imposed on a motorist traveling next to and passing another vehicle which is temporarily stopped in its lane and waiting to make a safe and prudent left turn. Somehow, Defendant seems to imply that any motorist entering or exiting a "blind spot" created by driving past such a stopped vehicle must slow down regardless of the total lack of any apparent danger, which is simply not supported in any fashion in the law.

The last case Defendant cites is Ingold v. Missouri Ins. Guar. Ass'n, 768 S.W.2d 114 (Mo. App. 1988) which is not worthy of much discussion as it is not on point legally or factually. Defendant makes the totally unsubstantiated assertion that "the evidence submitted to the jury indicated that the plaintiff was aware of dangerous conditions which should have placed him on alert of the possibility of a collision," but offers no supporting citation to any such evidence. There was no actual danger. There was none even apparent. Saying otherwise many times in her Brief does not make it so. She wants to twist and contort carefully selected paraphrases of testimony out of

context from which to craft her string of speculative "causation" dominoes, but she refuses to acknowledge the contrary testimony of her own hired expert accident reconstruction witness. In fact, on page 20 of her Brief, Defendant tells this Court that Mr. McKinzie's repeated and consistent testimony that Plaintiff never had a chance to avoid this collision "must be disregarded." What this Court cannot disregard is the total lack of proper evidence of the ability to see, an actual immediate hazard or danger of collision, and most importantly, proximate cause, the ability and means to avoid harm. As such, the comparative fault careful lookout submission was error and requires reversal.

REPLY TO POINT II

A. Standard of Review

The standard of review is correctly stated.

B. Argument and Analysis

Plaintiff's demand letter was clear and precise. Defendant fails to state how a demand for "the payment of $350,000.00" is not "reasonably ascertainable" or "definite in its terms." Instead, it appears that she leaps past logic and makes unsubstantiated claims that the additional requests made in the demand for things other than the payment of money are not clear, thus, although not addressed in the statute, such supposed lack of clarity in her mind now invalidates the demand under that same statute. Such is simply not the law.

"When statutory language is clear, courts must give effect to the language as written. Emery v. Wal-mart Stores, Inc., 976 S.W.2d 439 (Mo. banc 1998) at 449. 'Courts are without authority to read into a statute a legislative intent contrary to the intent made evident by the plain language.' Id. 'The court should regard the statute as meaning what it says.' Id. We may not add words by implication to a statute that is clear and unambiguous. Id. Section 408.040.2 is clear." Boggs ex rel. Boggs v. Lay, 164 S.W.3d 4, 23 (Mo. App. 2005), citing Emery v. Wal-Mart Stores, Inc., 976 S.W.2d 439 (Mo. banc 1998).

Nothing in Sec. 408.040.2 R.S.Mo. prohibits a party from crafting their demand to fit the needs of the particular case so long as such does not invalidate the

provisions expressly required by the statute. No court can read into the statute what the legislature did not put there. Defendant asks this Court to violate that key principle.

In fact, the Smith v. Shaw, 159 S.W.3d 830 (Mo. banc 2005) case cited by Defendant in her "Standard of Review" section actually resolves this issue in Plaintiff's favor. The court in Smith cited its well-known case of Lester v. Sayles, 850 S.W.2d 858, 873 (Mo. banc 1993) deciding the issue of when a prejudgment interest demand might be made in relation to the filing of suit. "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. Absent an express limitation, the statute does not prohibit a plaintiff from making the very offer of which Defendant now complains.

In identical fashion, Smith tells us that by placing no limitation on what other terms the plaintiff may make in his offer, the legislature has directly answered the pending question. Plaintiff here made his request "painfully" clear and precise with extraordinary attention to detail, not only about the precise amount of the payment down to the penny and form of payment, but also in describing the details of the other items to be produced, in addition to attaching the form of the release required for acceptance. The legislature did not prohibit the plaintiff from specifying the form of payment, the format of the payees on any check, the time within which payment must

be made, the inclusion of court costs, the form of the release, nor did it prohibit a plaintiff from requesting additional pertinent items and things related to the particular case. Therefore, according to Smith as cited by Defendant, the issue has been already resolved in Plaintiff's favor.

The next case cited by Defendant is Brown v. Donham, 900 S.W.2d 630 (Mo. banc 1995). Her argument centers upon basic rules of contracts in terms of offers and acceptance. Defendant never accepted this offer, so any discussion of acceptance is immaterial to this appeal and should be disregarded as should issues of "enforceability." Nonetheless, the Brown decision does merit brief discussion due to its facts. There the plaintiff was denied prejudgment interest. However, the plaintiff's mistake in Brown was that the demand was for "policy limits" and was not for a specific amount of money that could be readily ascertained, thus clearly justifying the result reached by the court. Brown, at 633-34. Those facts and that same issue do not exist here. It is true that Brown holds that a demand must be definite, but Defendant never complained of any indefiniteness at the time of the original offer, and here on appeal she fails to demonstrate any actual indefiniteness or that the terms of the demand were not "readily ascertainable" despite her present argument of the same.

The genuineness of Defendant's protests is tested by the timing of the same. Plaintiff included a specific request for prejudgment interest under Sec. 408.040.2 R.S.Mo. in his petition's prayer. L.F. 17. In response, Defendant asserted no specific

denial, no counter assertion, and no affirmative defense. L.F. 20-24. The only time any complaint as is now asserted on appeal was presented was well after trial when it came time to enter the Judgment. L.F. 37-77.

The Mendota Ins. Co. v. Hurst, 965 F. Supp. 1282 (W.D. Mo. 1997) case also merits discussion as the plaintiff there requested not only the payment of money, but additional information and materials. However, the denial of interest under the statute was based not on the request of things other than money, but was because the plaintiff fell into the same trap as occurred in Brown, and the court expressly relied on Brown in reaching and announcing its decision. Id. at 1289. At no time did the court in Mendota implicate the additional requests as a basis in its denial of prejudgement interest as Defendant falsely implies in her argument. The case Defendant cites very plainly does not support the contention she asserts here.

At the bottom of page 25 of her Brief, Defendant invokes semantics rather than true facts. She states: "At no time has Patrick or Gaylia Price been named as a party to this action." If by "action," Defendant means this lawsuit, that is correct, but if so, such is as immaterial as it is misleading insofar as it relates to the state of affairs during the 60 day time limit of the demand. If by "action," Defendant means Plaintiff's claim and his offer to settle and to release specifically named parties, then such assertion is blatantly false. As addressed in the above Reply to Statement of Facts, Point II, page 10: Patrick and Gailya Price were expressly named as parties to the claim itself, as parties to the offer extended by Plaintiff, and as parties in the

tendered release which would have released all liability claims against them. (L.F. 56-59). Nothing in the record support any claim that their information, documentation, or cooperation was in any way "unascertainable" or "unobtainable."

At pages 24 and 26 of her Brief, Defendant also cites the case of Werner v. Ashcraft Bloomquist, Inc., 10 S.W.3d 575 (Mo. App. 2000) which is easily distinguished and offers no support for Defendant's position. Werner does not even involve Sec. 408.040.2 R.S.Mo. Instead, it pertains to a contract action on a commercial remodeling project. The argument cited by Defendant here involves the defense to the enforcement of the contract due to the claimed inability to perform because of the lack of consent or cooperation of someone who was a true third party. First, enforcement is not at issue here. Perhaps if Defendant had accepted the offer to settle and later encountered performance difficulties of a similar nature and enforcement defenses were pertinent, then this case might apply, but absent those facts and those issues, it does not, and Werner offers absolutely no support for Defendant's position in this appeal, nor for the trial court's denial of the requested prejudgment interest. Second, Defendant persists in calling her parents "third parties" when they clearly were not strangers to the claim, the facts, the demand, or the release. Simply calling her parents "third parties" assuming they had no connection whatsoever to the instant matter might suggest an inference that acceptance and full timely compliance with the demand was problematic, but such is not true here, nor does Defendant make any attempt to prove the same with anything but innuendo.

This is not enough to carry the issue in Defendant's favor in light of the record.

Defendant's attempts to distinguish the decision in Hurst misses its mark. First, as noted above, page 25, Plaintiff properly pleaded his right to prejudgment interest, while Defendant failed to dispute the same, thus conceding the issue to Plaintiff. Second, Defendant never placed any information or evidence in the record to support her current contention that she could neither ascertain nor attain compliance with the demand, thus waiving that argument as wholly without foundation in fact. Finally, in the Court of Appeals below, Respondent's Brief, at page 21 Defendant admitted: "In this case, the plaintiff may have complied with the procedural requirements of the statute." Defendant's representation that she "has not at any point made a judicial admission with respect to plaintiff meeting the requirements of Sec. 408.040," wilts in the light of the above to the contrary. Respondent's Substitute Brief 27. Without repeating what Plaintiff set forth in his Substitute Brief on this issue, Hurst is squarely on point and compelled the trial court as a matter of law to grant prejudgment interest to plaintiff and to include the same in its Judgment.

Finally, Defendant devotes pages 27-28 to nothing more than merely complaining about Plaintiff's arguments advanced as public policy reasons supporting the form of his demand, and his explanations of why the additional information and items he requested were perfectly reasonable under the circumstances of the case, but at no time does Defendant offer any counter justifications supported by valid public

policy concerns to rebut the arguments of Plaintiff. Thus, a reply is not possible without re-arguing his case.

CONCLUSION

There is a complete absence of proper evidence to support the trial court's submission of the careful lookout instruction. Absent evidence proving that Plaintiff had the ability to see Defendant's car, and had the time and means to avoid the collision as well as a duty to do so, the submission was error as a matter of law, and severely prejudiced Plaintiff by taking away 20% of the damages the jury determined he suffered as a result of Defendant's negligent act of blindly turning left into oncoming traffic without first making sure the coast was safe and clear. The facts, law and justice require that the Judgment assessing comparative fault against Plaintiff be reversed.

Defendant claims Plaintiff's statutory prejudgment interest demand was "defective" because it was not "reasonably ascertainable," and because her ability to accept the offer was "dependant [sic] upon the actions of third parties." Besides not being supported by any facts in the record, neither of those terms are prohibited in Sec. 408.040.2 R.S.Mo. This Court cannot write such a prohibition into the statute; that is purely the province of the legislature. When applied strictly as written to the facts of this case as this Court is bound to do, Sec. 408.040.2 R.S.Mo. requires the trial court to award prejudgment interest in its Judgment, and therefore, the Judgment below denying the same must be reversed as a matter of law.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned certifies that in compliance with rule 84.06(b), the enclosed disk has been scanned for viruses using AVG, and the disk is virus free. The disk Format is WordPerfect 12 and the brief contains_____ words of type. Two copies of Appellants' Reply Brief and one disk were served upon all attorneys of record in the above action by sending a copy by U.S. Mail and email to the business office of said attorney the 23rd day of July 2009.

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