IN THE SUPREME COURT OF MISSOURI

SC 90054

RONALD JOE HAYES AND TERESA HAYES
Plaintiffs/Appellants,

vs.

TRISHA G. PRICE
Defendant/Respondent

Appeal from the Circuit Court of Jasper County, Missouri
Honorable George C. Baldwin, Senior Judge
Jasper County Case No. 056AO-CC00035

RESPONDENT'S SUBSTITUTE BRIEF

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Trisha Price agrees with Appellant's Jurisdictional Statement to the extent such Statement relates to the jurisdiction of this Court. However, Trisha Price takes issue with Appellant's Jurisdictional Statement to the extent such Statement contains allegations of trial court error as Trisha Price maintains that the trial court properly (1) submitted the issue of plaintiff's comparative fault to the jury in that such claim was properly supported by the evidence offered at trial, and (2) denied plaintiff's request for prejudgment interest in that plaintiff failed to meet all the requirements of § 408.040 necessary to entitle plaintiff to prejudgment interest.

STATEMENT OF FACTS

The Statement of Facts contained in plaintiff's brief is not a fair and concise Statement of Facts *without argument* as required by Rule 84.04(c) of the Missouri Rules of Civil Procedure. Further, plaintiff's Statement of Facts, especially in light of this Court's standard of review as it relates to plaintiff's claim of error regarding the submissibility of comparative fault (which requires this Court to consider only evidence favorable to defendant's submission), is incomplete. Trisha Price, therefore, offers the following additional facts:

Facts material to submissibility of comparative fault.

The plaintiff testified at trial that riding a motorcycle can be dangerous. (Tr. 101). Plaintiff had been involved in an accident riding his motorcycle before the accident giving rise to the present case. (Tr. 104). Both the plaintiff and his riding partner, Greg Cook testified that it is very difficult for people in cars to see motorcycles on the road. (Tr. 49, 102). Therefore, according to the plaintiff, a motorcycle rider must guard against this risk by driving defensively and must be cognizant of everyone around him. (Tr. 102, 103). Additionally, the plaintiff testified that riding with a partner who can sometimes alert you to danger is safer than riding alone. (Tr. 103). Mr. Cook testified that when riding with a partner, the more experienced rider is in the front, lead position. (Tr. 49, 50). The lead rider's job is to watch for dangerous situations and warn the riders behind him if he encounters any. (Tr. 49, 50).

As the plaintiff and Mr. Cook were riding southbound on Maiden Lane on the day of the accident, Mr. Cook was riding in front of the plaintiff. (Tr. 49). This is how they always rode. (Tr. 49). Plaintiff and Mr. Cook, however, were traveling in separate lanes. (Tr. 107, 139-140). Mr. Cook was in the outside lane, while plaintiff was riding in the inside lane. (Tr. 143). As they approached the intersection with 13th Street, Mr. Cook saw Ms. Price stopped on Maiden Lane preparing to turn left. (Tr. 50). Mr. Cook made eye contact with Ms. Price and held up two fingers in an attempt to tell her that there were two motorcycles traveling through the intersection. (Tr. 50). At this point, Ms. Price had not started her turn. (Tr. 142). When Ms. Price started her turn, plaintiff was 171 feet and 3.9 seconds from the point of impact. (Tr. 305). Thus, at the time Mr. Cook was driving through the intersection signaling to Ms. Price, plaintiff was more than 171 feet from the point of impact. (Tr. 124 and 305). Additionally, at this time, plaintiff was at least 4 seconds from impact. (Tr. 260).

As the lead motorcyclist, Mr. Cook's job was to warn other cyclists of dangerous situations. (Tr. 50). The plaintiff testified that he knew that the type of gesture used by Mr. Cook was meant for oncoming traffic as a warning that they needed to stop for, or yield to, a second motorcycle. (Tr. 108). Plaintiff additionally admitted that when traveling behind another motorcycle, a motorcyclist must look for signals of danger from the lead cyclist. (Tr. 104). However, when Mr. Cook signaled the danger, plaintiff was not looking ahead. (Tr. 108-110).

Plaintiff saw the Bronco that was obstructing his view of Ms. Price's car, which he admitted caused him to be coming out of a blind spot - from Ms. Price's perception - at the intersection. (Tr. 106, 113). Plaintiff, however, from his vantage point could have seen Ms. Price's car stopped at the intersection through the Bronco, had he been keeping a careful lookout. (Tr. 279, 343, 357). He also admitted that he knew vehicles could be turning left from the northbound lanes like Ms. Price was about to do. (Tr. 106). However, as he approached the intersection, Mr. Hayes was not looking at the road in front of him, not looking to the left where Ms. Price's car was behind the Bronco and not looking at Mr. Cook who was making the two-finger gesture that he knows was an effort to tell an oncoming vehicle to stop or yield to the motorcycle that was following Mr. Cook. (Tr. 108, 109). Instead, the plaintiff was focused on a vehicle to his right all of this time, watching to make sure that it did not make a right turn and pull out in front of him. (Tr. 109).

When Ms. Price started her turn, the plaintiff was not visible to her. (Tr. 301). The plaintiff continued to travel south on Maiden at 30 miles per hour. (Tr. 114). As Ms. Price continued her turn and the plaintiff drove south without stopping, slowing down or taking any evasive action, the collision occurred. (Tr. 112-114, 143). The front of plaintiff's motorcycle collided with the right front corner of defendant's vehicle. (Tr. 248). If the plaintiff had been driving less than 30 miles per hour, there would have been an opportunity to avoid the collision. (Tr. 276, 372). He was more than 170 feet and at least 4 seconds from the point of impact

This case went to trial in February of 2006 in the Circuit Court of Jasper County,

Missouri. (L.F. 30). The case was submitted on the basis of comparative fault. The jury's instruction number 10, which was submitted by the defendant, stated:

> In your verdict, you must assess a percentage of fault to plaintiff Ronald Hayes whether or not you believe defendant Trisha Price was partly at fault, if you believe:
>
> First, plaintiff Ronald Hayes failed to keep a careful lookout,
>
> Second, plaintiff Ronald Hayes was thereby negligent, and
>
> Third, such negligence of plaintiff Ronald Hayes directly caused or directly contributed to cause any damage plaintiff Ronald Hayes may have sustained.

(L.F. 25). The jury found that the plaintiff did not keep a careful lookout, was thereby negligent and assessed him twenty percent fault. (L.F. 26). The plaintiff now appeals the lower court's submission of the "failure to keep a careful lookout" instruction.

Facts material to prejudgment interest argument.

On December 21, 2004, the plaintiff's attorney sent a demand letter that he now argues entitles him to prejudgment interest pursuant to Mo. Rev. Stat. § 408.040(2). (L.F. 38, 47-48). The letter contained an offer to settle the plaintiff's claim for:

> the delivery of copies of the titles to all vehicles owned or driven by, or available for the use of Patrick, Gaylia, or Trisha Price on September 25, 2004, certified copies of all indemnity agreements in any form from any source whatsoever, all applicable liability insurance coverages, including declaration pages, primary, excess, or otherwise, issued on those vehicles, or to or for the benefit of, or on

> behalf of Patrick, Gaylia, or Trisha Price, or any other named insured, which insure or stand to indemnity any of them for any of their potential liability arising in any fashion from the collision in this matter and to compensate the damages claimed by Ronald Hayes, a sworn statement of Patrick, Gaylia, and Trisha Price taken in person by [the plaintiff's attorney] at [his] cost, and recorded and transcribed by a court reporter, in addition to the payment of $325,000.00, and reimbursement of all court costs, payable in cash or its equivalent, and all of which must be delivered to [the plaintiffs attorneys] office within 10 days of acceptance, in exchange for a R.S.Mo. § 537.060 release.

(L.F. 47). (Patrick and Gaylia Price are the parents of the defendant and have never been parties to this matter.) Plaintiff now appeals the trial court's denial of plaintiff's request for prejudgment interest.

POINTS RELIED ON

POINT I

THE TRIAL COURT PROPERLY SUBMITTED THE ISSUE OF PLAINTIFF'S COMPARATIVE FAULT TO THE JURY BECAUSE A COMPARATIVE FAULT CLAIM MAY BE SUBMITTED TO THE JURY UNDER A "FAILURE TO KEEP A CAREFUL LOOKOUT" INSTRUCTION WHERE THERE IS EVIDENCE THAT THE PLAINTIFF COULD HAVE PERCEIVED A DANGEROUS SITUATION AS HE APPROACHED THE INTERSECTION AND HAD THE TIME AND ABILITY TO TAKE EVASIVE ACTION IN THAT THE EVIDENCE IN THE PRESENT CASE ESTABLISHED THAT THE PLAINTIFF WAS NOT LOOKING AT THE ROAD AHEAD IN THE AREA OF THE DEFENDANT'S CAR AND THE INTERSECTION WHERE THE ACCIDENT OCCURRED, AND HAD PLAINTIFF LOOKED AHEAD HE WOULD HAVE SEEN DEFENDANT'S CAR OR, AT A MINIMUM, HIS FRIEND GESTURING A WARNING, AND FURTHER HAD PLAINTIFF KEPT A CAREFUL LOOKOUT, HE WOULD HAVE HAD AT LEAST 4 SECONDS AND OVER 170 FEET TO SLOW DOWN OR OTHERWISE MANEUVER HIS MOTORCYCLE IN SUCH A WAY TO AVOID THE ACCIDENT. *(Reply to Appellant's Point I).*

Hemeyer v. Wilson, 59 S.W.3d 574 (Mo. App. 2001)

Ingold v. Missouri Ins. Guar. Ass'n, 768 S.W.2d 114 (Mo. App. 1988)

Riscaldante v. Melton, 927 S.W.2d 899 (Mo. App. 1996)

Wiskur v. Johnson, 156 S.W.3d 477, 480 (Mo. App. 2005)

POINT II

THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S CLAIM FOR PREJUDGMENT INTEREST BECAUSE A SETTLEMENT DEMAND PURSUANT TO MO. REV. STAT. § 408.040(2) MUST CONTAIN A "REASONABLY ASCERTAINABLE" SETTLEMENT AMOUNT AND CANNOT DEPEND UPON THE CONDUCT OF THIRD PARTIES IN THAT PLAINTIFF'S DEMAND LETTER DID NOT CONTAIN A "REASONABLY ASCERTAINABLE" MONETARY DEMAND AS SUCH DEMAND SOUGHT ITEMS TO WHICH NO MONETARY VALUE COULD REASONABLY BE ASCERTAINED SUCH AS CERTIFIED COPIES OF INDEMNITY AGREEMENTS AND VARIOUS INSURANCE POLICIES AND COPIES OF TITLES TO ALL VEHICLES OWNED OR DRIVEN BY OR AVAILABLE FOR THE USE OF NOT ONLY DEFENDANT TRISHA PRICE BUT ALSO HER PARENTS AS WELL AS SWORN STATEMENTS TAKEN BY COURT REPORTERS OF DEFENDANT AND THESE THIRD PARTIES AND FURTHER SUCH DEMAND WAS DEPENDANT UPON THE ACTIONS OF THIRD PARTIES SUCH AS THE PRODUCTION OF AUTOMOBILE TITLES, INSURANCE POLICIES AND INDEMNITY AGREEMENTS BY NON-PARTIES TO PLAINTIFF'S CLAIM, DEFENDANT'S PARENTS, AS WELL AS THEIR STATEMENTS UNDER OATH BEFORE A COURT REPORTER. *(Reply to Appellant's Point II).*

Mo. Rev. Stat. § 408.040(2)

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

Mendota Ins. Co. v. Hurst, 965 F. Supp. 1282 (W.D. Mo. 1997)

Werner v. Ashcraft Bloomquist, Inc., 10 S.W.3d 575 (Mo. App. 2000)

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY SUBMITTED THE ISSUE OF PLAINTIFF'S COMPARATIVE FAULT TO THE JURY BECAUSE A COMPARATIVE FAULT CLAIM MAY BE SUBMITTED TO THE JURY UNDER A "FAILURE TO KEEP A CAREFUL LOOKOUT" INSTRUCTION WHERE THERE IS EVIDENCE THAT THE PLAINTIFF COULD HAVE PERCEIVED A DANGEROUS SITUATION AS HE APPROACHED THE INTERSECTION AND HAD THE TIME AND ABILITY TO TAKE EVASIVE ACTION IN THAT THE EVIDENCE IN THE PRESENT CASE ESTABLISHED THAT THE PLAINTIFF WAS NOT LOOKING AT THE ROAD AHEAD IN THE AREA OF THE DEFENDANT'S CAR AND THE INTERSECTION WHERE THE ACCIDENT OCCURRED, AND HAD PLAINTIFF LOOKED AHEAD HE WOULD HAVE SEEN DEFENDANT'S CAR OR, AT A MINIMUM, HIS FRIEND GESTURING A WARNING, AND FURTHER HAD PLAINTIFF KEPT A CAREFUL LOOKOUT, HE WOULD HAVE HAD AT LEAST 4 SECONDS AND OVER 170 FEET TO SLOW DOWN OR OTHERWISE MANEUVER HIS MOTORCYCLE IN SUCH A WAY TO AVOID THE ACCIDENT. *(Reply to Appellant's Point I).*

A. Standard of Review.

A trial court's submittal of a defendant's "failure to keep a careful lookout" instruction to a jury is only error if it is unsupported by evidence. Rickman v. Sauerwein, 470 S.W.2d 487, 489 (Mo. 1971). In determining whether such instruction was

supported, this Court is required to view the evidence and any reasonable inferences therefrom in the light most favorable to the jury's verdict. Seitz v. Lemay Bank and Trust Co., 959 S.W.2d 458, 461 (Mo. banc 1998); Hemeyer v. Wilson, 59 S.W.3d 574, 582 (Mo. App. 2001). Further, this Court must disregard any evidence to the contrary. Id. A verdict will only be reversed for insufficient evidence when there is "a complete absence of probative fact to support the jury's conclusion." Id. "Negligence is ordinarily a question for the jury and always is when the evidence on the issue is conflicting or where, the facts being undisputed, different minds might reasonably draw different conclusions from them." Id.

B. Argument and Analysis.

Plaintiff attempts to skew this Court's analysis of the submission of plaintiff's comparative fault to the jury by including facts in his brief that must be disregarded by this Court. Rather than providing a fair and concise statement of the facts relevant to the issues presented to this Court, plaintiff's Brief essentially includes only facts contrary to the jury verdict on the issue of plaintiff's comparative fault. However, under this Court's standard of review, all such facts relied upon by plaintiff must be disregarded. See Hemeyer, 59 S.W.3d at 582.

At trial, defendant presented ample evidence of the plaintiff's comparative fault including his failure to look at the road ahead and notice defendant's vehicle or his partner's gesture to the defendant before the collision occurred. This is evidence not only of plaintiff's ability to see danger of a collision, but also avoid that danger by taking some type of evasive action. Therefore, the lower court properly submitted a jury

instruction regarding the plaintiff's failure to keep a careful lookout.

Missouri courts have held that a "failure to keep a careful lookout" submission contains two inherent components, "the ability to see and the ability, including time and means, to avoid." Bell v. United Parcel Services, 724 S.W.2d 682, 685 (Mo. App. 1987). A defendant can make a submissible case on a plaintiff's failure to keep a careful lookout using circumstantial evidence. Countryman v. Seymour R-II School Dist., 823 S.W.2d 515, 517 (Mo. App. 1992). The essence of a lookout instruction is a failure to see and a failure to act. Wiskur v. Johnson, 156 S.W.3d 477, 480 (Mo. App. 2005) (citing Lovelace v. Read, 486 S.W.2d 417, 418 (Mo. 1972)). The failure to see involves a motorist's failure to become aware of other motorists, pedestrians, or objects that present a dangerous situation, and the failure to act is the motorist's failure to take precautionary action to avoid that danger. Id. (citing Miller v. St. Louis Public Service Co., 389 S.W.2d 769, 771 (Mo. 1965)). "In other words, the 'lookout' duty requires motorists to exercise the highest degree of care to discover the presence of other persons and objects upon the streets and highways and to become aware of dangerous situations and conditions." Id. (citing Allen v. Andrews, 599 S.W.2d 262, 265 (Mo. App. 1980)). "It is sufficient to show that plaintiff *reasonably* could have seen danger . . . in time to have taken evasive action." Riscaldante v. Melton, 927 S.W.2d 899, 902 (Mo. App. 1996) (emphasis in original).

In Hemeyer v. Wilson, the Western District examined the evidence presented to the jury and held that plaintiff had made a submissible case for the defendant driver's failure to keep a careful. 59 S.W.3d 574, 582 (Mo. App. 2001). In Hemeyer, the evidence showed that the defendant driver was looking at a fisherman on the river below before crossing the bridge over the river. Id. When the defendant driver turned his attention back to the road/bridge upon which he was traveling, he observed a pickup in front of him which he struck in the rear. Id. Viewing the evidence in the light most favorable to the plaintiff, the Hemeyer Court noted that the defendant driver looked away from the road for approximately 4 seconds, or up until the point of impact. Id. at 582. At the time the defendant looked away from the road in front of him, he was 150 feet behind the vehicle he rear-ended. Id. at 583. The defendant was traveling at 65 miles per hour, while the vehicle he rear-ended was traveling at 40 miles per hour. Id. Despite its recognition that there was no expert testimony or direct evidence that had the defendant been looking forward he would have been able to avoid the accident, the Hemeyer Court held that the evidence created a submissible case for failure to keep a careful lookout. Id. at 584.

In this case, the jury was similarly presented with facts that would permit the submission of a "failure to keep a careful lookout" comparative fault instruction. The plaintiff testified that he is aware of the fact that it is very difficult for people in cars to see motorcycles on the road. (Tr. 102). Therefore, it is necessary for him to guard against the risk by driving defensively and being cognizant of everyone around him. (Tr. 102, 103). The plaintiff and his riding partner, Greg Cook, testified that one way to guard

against this danger is to ride with a partner who may be able to alert you to danger ahead. (Tr. 49, 50, 103).

Evidence was presented that on the day of the accident, the plaintiff and Mr. Cook were riding together, with Mr. Cook in the lead position. (Tr. 49). As Mr. Cook came to the subject intersection, he saw the defendant preparing to turn left, made eye contact with her and held up two fingers in an attempt to tell her that there were two motorcycles traveling through the intersection. (Tr. 50). At this point, defendant had not started her turn. (Tr. 142). When defendant started her turn, plaintiff was 171 feet from the point of impact. (Tr. 305). Thus, at the time Mr. Cook was driving through the intersection signaling to defendant, plaintiff was more than 171 feet from the point of impact. (Tr. 124 and 305). Additionally, at this time, traveling at 30 miles per hour, plaintiff was at least 4 seconds from the area of impact. (Tr. 260).

As the plaintiff drove behind Mr. Cook towards the intersection, he testified that he saw the Ford Bronco that was obstructing his view of the defendant and admitted that it put him in a blind spot for other drivers. (Tr. 106, 113). Plaintiff, however, from his vantage point could have seen defendant's car stopped at the intersection through the Bronco, had he been keeping a careful lookout. (Tr. 279, 343, 357). He admitted that he knew vehicles could be turning left from the northbound lanes like the defendant was about to do. (Tr. 106). He undoubtedly was aware of this danger.

Plaintiff additionally admitted that when traveling behind another motorcycle, a motorcyclist must look for signals of danger from the lead cyclist. (Tr. 104). Despite making such acknowledgment, the plaintiff also testified that, as he approached the intersection, he was not looking at the road in front of him where the defendant was waiting to turn and where Mr. Cook was making a gesture that he knew meant an oncoming car needed to stop or yield to the motorcycle behind Mr. Cook. (Tr. 108, 109). Rather, the plaintiff only looked to the right at a stopped car waiting to turn right. (Tr. 109). He kept his focus on the vehicle to his right from in excess of 170 feet from the intersection to the point of impact, or for at least 4 seconds. (Tr. 108, 109, 124, 305). Had plaintiff been looking ahead, not only would he have been able to observe defendant's vehicle through the Bronco, but also as Mr. Cook traveled through and plaintiff approached the intersection, plaintiff would have seen Mr. Cook's signal, thereby further confirming the dangerous situation and condition ahead. (Tr. 279, 343, 357). Plaintiff, however, traveled through the intersection, coming out of a blind spot without looking ahead and without stopping, slowing down or taking any action to avoid the collision. (Tr. 112-114, 143).

The defendant's expert testified that plaintiff was well into the blind spot when defendant began her turn. (Tr. 349-359). Plaintiff was at least 170 feet from the area of impact when defendant began her turn. (Tr. 350). There were 2 seconds, roughly 34 to 35 feet, between the plaintiff exiting the blind spot and the collision. (Tr. 267, 351). If the plaintiff had reduced his speed when he was over 170 feet from the point of impact had he observed defendant's vehicle or Mr. Cook's warning signal, plaintiff could have

avoided the accident. (Tr. 276). Defendant's expert testified that if plaintiff had been traveling less than 30 miles per hour, the accident could have been avoided. (Tr. 276). Had plaintiff been traveling less than 30 miles per hour, he would have had an opportunity to avoid the collision. (Tr. 272). In other words, if the plaintiff had kept a careful lookout and heeded the potential danger he should have seen not only from defendant's vehicle and but also from his partner's gesture to the defendant, and the fact that he was exiting a blind spot at a busy intersection, he would have been able to avoid the collision. The evidence presented at trial clearly establishes not only that plaintiff failed to keep a careful lookout, but also that he had the time and means to avoid the accident.

Just like the driver in Hemeyer, the plaintiff was looking away from the road ahead where he was traveling. There (in Hemeyer), at 65 miles per hour, the driver had 4 seconds to avoid the accident after he could have seen the danger ahead and the court found submission was proper. 59 S.W.3d at 582. Here, at 30 miles per hour, less than 1/2 the speed of the defendant in Hemeyer, plaintiff had at least 4 seconds to avoid the collision. (Tr. 124, 305). Further, defendant's expert recognized that if plaintiff had been traveling less than 30 miles per hour, the accident could have been avoided in 2 seconds. (Tr. 276). Thus, certainly plaintiff could also have avoided the accident in 4 seconds when the danger should have been discovered at 30 miles per hour. Plaintiff recognized that he was in a blind spot and would be exiting it at the intersection. Plaintiff similarly was aware of the dangers associated thereto. Further, even this Court has recognized that blind intersections are points of danger. See Domitz v. Springfield Bottlers, Inc., 221

S.W.2d 831 (Mo. 1949). Additionally, when plaintiff's riding partner, Mr. Cook exited the blind spot and first saw the defendant, he made the hand gesture to her which should have provided notice of the danger to plaintiff, had he been keeping a careful lookout. Defendant had not yet begun to turn. This was also obviously before the plaintiff exited the blind spot and more than 3.9 seconds from the point of impact. (Tr. 124, 260, 305, 350). Thus, had plaintiff been keeping a careful lookout he would have had time to avoid the accident, by applying his brakes to slacken his speed. Therefore, plaintiff had both the time, and means, to avoid the accident.

The plaintiff's argument is based on the faulty assumption that his ability to see the defendant's vehicle prior to the collision is the only relevant issue of fact upon which to base a "failure to keep a careful lookout" instruction. However, "all circumstances must be considered together; plaintiffs may not pick and choose among the circumstances shown by their evidence." Ingold v. Missouri Ins. Guar. Ass'n, 768 S.W.2d 114, 115 (Mo. App. 1988). His analysis fails because 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. The fact that the plaintiff did not see the defendant as he approached the intersection does not change the fact that the plaintiff should have been alert to potentially hazardous conditions at the intersection, and should have reduced his speed and maintained a cautious lookout.

Lastly, in his brief, plaintiff attempts to rely on the testimony of defendant's expert witness, Steve McKinzie, for the proposition that Mr. McKinzie specifically testified that plaintiff did not have either the opportunity or means to avoid the collision. First, under

this Court's standard governing the review of the trial court's submission of the comparative fault instruction, this Court must disregard all evidence contrary to the jury's verdict on the comparative fault issue. Rickman, 470 S.W.2d at 489. Accordingly, such reference in plaintiff's Brief must be disregarded. Moreover, the testimony cited by plaintiff is taken out of context and was limited to a specific fact scenario proposed by plaintiff's counsel. The facts proposed by plaintiff's counsel to the expert, however, are not in accord with the facts presented at trial, especially when viewed in the light most favorable to the jury's verdict on the comparative fault issue. As such, this testimony must not be considered.

II

THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S CLAIM FOR PREJUDGMENT INTEREST BECAUSE A SETTLEMENT DEMAND PURSUANT TO MO. REV. STAT. § 408.040(2) MUST CONTAIN A "REASONABLY ASCERTAINABLE" SETTLEMENT AMOUNT AND CANNOT DEPEND UPON THE CONDUCT OF THIRD PARTIES IN THAT PLAINTIFF'S DEMAND LETTER DID NOT CONTAIN A "REASONABLY ASCERTAINABLE" MONETARY DEMAND AS SUCH DEMAND SOUGHT ITEMS TO WHICH NO MONETARY VALUE COULD REASONABLY BE ASCERTAINED SUCH AS CERTIFIED COPIES OF INDEMNITY AGREEMENTS AND VARIOUS INSURANCE POLICIES AND COPIES OF TITLES TO ALL VEHICLES OWNED OR DRIVEN BY OR AVAILABLE FOR THE USE OF NOT ONLY DEFENDANT TRISHA PRICE BUT ALSO HER PARENTS AS WELL AS SWORN STATEMENTS TAKEN BY COURT REPORTERS OF DEFENDANT AND THESE THIRD PARTIES AND FURTHER SUCH DEMAND WAS DEPENDANT UPON THE ACTIONS OF THIRD PARTIES SUCH AS THE PRODUCTION OF AUTOMOBILE TITLES, INSURANCE POLICIES AND INDEMNITY AGREEMENTS BY NON-PARTIES TO PLAINTIFF'S CLAIM, DEFENDANT'S PARENTS, AS WELL AS THEIR STATEMENTS UNDER OATH BEFORE A COURT REPORTER. *(Reply to Appellant's Point II).*

A. Standard of Review.

The interpretation of Mo.Rev.Stat. § 408.040(2) is a question of law. Smith v. Shaw, 159 S.W.3d 830, 933 (Mo. banc 2005). Therefore, de novo review is warranted. Id.

B. Argument and Analysis.

The trial court properly refused to add prejudgment interest, pursuant to Mo. Rev. Stat. § 408.040(2), to the judgment below because the plaintiff's settlement demand was defective. The settlement amount was not "reasonably ascertainable" and settlement was improperly dependant upon the actions of third parties.

Under the prior version of Mo. Rev. Stat. § 408.040(2) that applies to this action, if a plaintiff made a "demand for payment" or "offer of settlement" of a claim to the defendant, and the amount of the judgment against that defendant is in excess of the demand or offer, the plaintiff may be entitled to prejudgment interest. It is obvious that an "offer" or "demand" must be simply for a specific dollar amount as the statute indicates that if the amount of the judgment is in excess of the *amount* of the demand or offer, then the plaintiff may be entitled to prejudgment interest.

Courts have held that a demand under this statute must be definite in its terms. Brown v. Donham, 900 S.W.2d 630, 633 (Mo. banc 1995). In Brown, the plaintiff, a passenger in defendant's vehicle, brought suit against defendant for injuries she sustained when defendant fell asleep at the wheel. Id. Plaintiff made a pretrial demand for "payment of the policy limits of all insurance coverages" pursuant to 408.040. Id. Following the jury verdict in the amount of $450,000, plaintiff sought an award of

prejudgment interest. Id. Defendant disputed plaintiff's claim for prejudgment interest arguing that the requirements of 408.040 were not met. Id. Despite defendant's objections, the trial court awarded prejudgment interest to plaintiff. Id. On appeal, this Court examined the requirements of 408.040, and particularly that a demand must be definite in its terms. Id. In its analysis, this Court recognized that a demand is just like an offer in contract. Id. Under the law of contract, it is well settled that "to have a contract, there must be a definite offer and an acceptance." Id. The offer must have terms definite enough to make the promises reasonably certain. Id. This Court further recognized that the statute's purpose is to encourage settlement and settlement does not occur unless there is "unequivocal acceptance of a definite offer or demand, resulting in an enforceable contract." Id. at 634.

In Brown, this Court held that for a demand to be sufficiently definite under the statute, the amount due has to be "reasonably ascertainable." Id. at 633. While a demand does not have to always be in the form of dollars and cents, it must be "capable of ascertainment in a certain dollars and cents amount." Id. Based upon these principles, this Court concluded that plaintiff's demand for "policy limits of all insurance coverages" was not definite in its terms as the amount due was not "readily ascertainable." Id. Particularly, under the facts of Brown, the term "policy limits" did not indicate a fixed and definite amount.

In Mendota Ins. Co. v. Hurst, the U.S. District Court for the Western District of Missouri followed the reasoning in Brown and found a settlement demand for "policy limits" that included that certain documentation from the defendant be provided to the plaintiff's attorney in a timely manner did not have a reasonably ascertainable settlement amount. 965 F.Supp. 1282, 1288 (W.D. Mo. 1997). Additionally, "if the fulfillment of the contract depends on the act or consent of a third party, the contract is unenforceable until the third party so acts or consents." Werner v. Ashcraft Bloomquist, Inc., 10 S.W.3d 575, 578 (Mo. App. 2000).

The plaintiff's offer of settlement contained in the demand letter stated that he would settle his claim for

> the delivery of copies of the titles to all vehicles owned or driven by, or available for the use of Patrick, Gaylia, or Trisha Price on September 25, 2004, certified copies of all indemnity agreements in any form from any source whatsoever, all applicable liability insurance coverages, including declaration pages, primary, excess, or otherwise, issued on those vehicles, or to or for the benefit of, or on behalf of Patrick, Gaylia, or Trisha Price, or any other named insured, which insure or stand to indemnify any of them for any of their potential liability arising in any fashion from the collision in this matter and to compensate the damages claimed by Ronald Hayes, a sworn statement of Patrick, Gaylia, and Trisha Price taken in person by [the plaintiff's attorney] at [his] cost, and recorded and transcribed by a court reporter, in addition to the payment of $325,000.00, and reimbursement of all court costs, payable in cash or its equivalent, and all of

> which must be delivered to [the plaintiff's attorney's] office within 10 days of acceptance, in exchange for a R.S.Mo § 537.060 release.

(L.F. 47).

The plaintiff's demand failed to trigger the accrual of prejudgment interest in this case. That is, in addition to the demand for $325,000.00 plus costs, the plaintiff demanded the following:

> 1. copies of the titles to all vehicles owned or driven by, or available for the use of Patrick, Gaylia, or Trisha Price on the day of the collision;
>
> 2. "certified copies of all indemnity agreements in any form from any source whatsoever, all applicable liability insurance coverages, including declaration pages, primary, excess, or otherwise, issued on those vehicles, or to or for the benefit of, or on behalf of Patrick, Gaylia, or Trisha Price, or any other named insured, which insure or stand to indemnify any of them for any of their potential liability arising in any fashion from the collision in this matter and to compensate the damages claimed by Ronald Hayes"; and
>
> 3. sworn statements from Patrick, Gaylia, and Trisha Price taken in person by the Plaintiff's attorney.

At no time has Patrick or Gaylia Price been named as a party to this action. Further, it was not until the present appeal that plaintiff even set forth any basis, albeit without merit, for asserting a claim against such third parties. These additional non-monetary demands that are contingent upon the cooperation of third parties render the conditions uncertain, unattainable without the cooperation of third parties and the amount of the

demand unascertainable.

The plaintiff's injection of third-party conduct into his December 21, 2004, demand necessarily makes the amount of the demand unknown in that the defendant is unable to ascertain what will be involved in obtaining the performance of Patrick and Gaylia Price. Moreover, the demand for third-party performance renders the contract unenforceable in that Missouri law is well settled that if the fulfillment of the contract depends on the act or consent of a third party, that contract is unenforceable until the third party so acts or consents. Werner, 10 S.W.3d 575.

In his Brief, plaintiff relies principally upon Hurst v. Jenkins, claiming that such case is "squarely on point and should be controlling here." Appellants' Substitute Brief, p. 29. Plaintiff's reliance upon Hurst v. Jenkins, 908 S.W.2d 783 (Mo. App. W.D. 1995) is clearly misplaced. Particularly, in Hurst, while the defendant raised two contentions with respect to the propriety of the trial court's award of prejudgment interest, the Western District Court of Appeals did not address the merits of the arguments raised by the defendant. Rather, in Hurst, because the defendant admitted in its answer to plaintiff's petition that plaintiff had met all of the requirements of § 408.040, the Western District recognized that a judicial admission such as that made by the defendant waived or dispensed with the production of evidence and conceded for the purpose of the litigation that the propositions were true. Id. Accordingly, the Western District essentially dismissed defendant's arguments based upon its findings that the admissions made by the defendant negated any merit that defendant's claims may have possessed.

Thus, because the Court of Appeals, Western District did not squarely address the

issues raised in the present matter, Hurst v. Jenkins has no applicability to the facts and circumstances of the present case. Further, even assuming that this Court were to construe the Hurst opinion as addressing the merits of defendant's arguments, the Hurst case is undoubtedly distinguishable from the present matter in that in the present case, defendant has not at any point made a judicial admission with respect to plaintiff meeting the requirements of § 408.040.

Additionally, in his Brief, plaintiff argues that awarding prejudgment interest would promote a beneficial public policy. The plaintiff goes on to state that the early circumstances of this matter were a defendant who had insurance coverage and other resources that were possibly insufficient to protect her and it was, therefore, critical for the plaintiff's attorney to diligently investigate both those resources and possible additional liable parties or theories of vicarious liability as early in the case as was possible. The plaintiff concludes this argument by stating that the additional items and information requested as part of his settlement demand were reasonable and necessary under the circumstance.

However, the Missouri courts have acknowledged the tension between "making a § 408.040.2 demand at the earliest time possible to start the clock running on interest and the need to obtain enough information to determine the proper amount to demand for settlement." Brown, 900 S.W.2d at 634. This Court has stated that, while it is understandable that a plaintiff's attorney may not want to limit the demand if additional insurance coverage may apply, by attempting to preserve that flexibility in the demand the plaintiff is precluded from making a "readily ascertainable" demand that would

support prejudgment interest under the statute. Id. Therefore, because plaintiff's demand attempted to preserve the flexibility of other insurance, the settlement amount was not "reasonably ascertainable" and the settlement was improperly dependant upon the actions of third parties, the lower court properly denied prejudgment interest.

CONCLUSION

To conclude, submission of the defendant's "failure to keep a careful lookout" jury instruction was proper because it was supported by evidence. The defendant knew of a danger of collision not only because he was leaving a blind spot at the intersection but also he should have seen defendant's vehicle had he kept a careful lookout. Plaintiff would have further known of a danger of collision had he kept a careful lookout and seen his riding partner making a gesture to the defendant that he knew meant to yield to the next motorcycle. Plaintiff also would have had sufficient time and means after recognizing the danger to avoid the collision according to the evidence viewed in the light most favorable to defendant. Particularly, plaintiff had over 4 seconds and 171 feet to recognize the danger ahead of him and take evasive action to avoid it. Therefore, the lower court's submission of the comparative fault instruction must be affirmed.

Additionally, the lower court properly denied the plaintiff prejudgment interest pursuant to Mo. Rev. Stat. § 408.040(2) because his settlement demand was defective. The settlement amount was not "reasonably ascertainable" because the demand included the production of various documents and the actions of non-parties. The demand was further defective because the settlement was improperly dependant upon the actions of third parties. Therefore, the lower court's denial of prejudgment interest must be affirmed.

WHEREFORE, for the foregoing reasons, defendant Trisha Price prays for an Order of this Court affirming the decisions of the trial court and for such other and further relief as this Court deems just and proper.

Respectfully Submitted,

_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Substitute Brief of Defendant/Respondent were mailed this ____ day of July, 2009, to:

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RULE 84.06(c) CERTIFICATION

Undersigned counsel for Defendant/Respondent hereby certifies that this Substitute Brief contains the information required by Rule 55.03. Additionally, this Brief complies with the limitations contained in Rule 84.06(b), in that it contains 6,698 words counted using Corel WordPerfect 10. Furthermore, this Substitute Brief complies with Rule 84.06(g) in that the computer disk provided to the Court containing this Substitute Brief has been scanned for viruses and that it is virus-free and has been formatted in Coral WordPerfect 10.

Respectfully submitted,

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APPENDIX