

Summary of SC90054, *Ronald Joe Hayes, et ux. v. Trisha G. Price*

Appeal from the Jasper County circuit court, Judge George Crocker Baldrige
Argued and submitted Nov. 5, 2009; opinion issued May 25, 2010

Attorneys: Hayes was represented by David W. Ransin of David W. Ransin P.C. in Springfield, (417) 881-8282, and Price was represented by John Mullen and Nikki Cannezzaro of Franke, Schultz & Mullen P.C. in Kansas City, (816) 421-7100.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man injured in a motorcycle collision appeals the trial court's judgment overruling his motion for prejudgment interest and reducing the amount of his damages award based on a comparative-fault apportionment found by the jury. In a unanimous decision written by Judge Patricia Breckenridge, the Supreme Court reverses the judgment in part and affirms it in part as modified. The trial court properly overruled the man's motion for prejudgment interest because his settlement offer included a demand for document production and statements of third persons and did not meet the statutory requirements. The trial court erred in submitting the comparative-fault instruction to the jury because it was not supported by the evidence and erred in reducing the amount of damages awarded to the man based on the jury's assessment of some fault to the man pursuant to the improper instruction. The judgment is modified to reflect that the man is to receive the full amount of the damages award.

Facts: In September 2004, Ronald Hayes and a friend were riding their motorcycles in Joplin. They were traveling southbound on Maiden Lane, a four-lane road that does not have a turn lane. As they approached the intersection at 13th Street, Hayes was riding behind his friend in the right side of the curb-side lane. A Ford Bronco was next to them in the left lane of southbound Maiden Lane, waiting to turn left to go east on 13th Street. At the same time, Trisha Price stopped in the left lane of northbound Maiden Lane, intending to turn left to go west on 13th Street. The southbound Bronco created a blind zone blocking Price's and Hayes' views of each other. At the time of the collision, both Hayes and Price had a green light, although Hayes had the right-of-way because he was proceeding straight through the intersection, while Price was turning. Hayes was traveling at approximately 30 mph in a 35-mph zone. Hayes did not see Price until just before impact. Before filing suit, Hayes sent Price a demand letter, pursuant to section 408.040.2, RSMo 2000, for the purpose of qualifying for prejudgment interest. In the letter, Hayes offered to release Price from liability if she paid him \$325,000 and produced a number of documents and sworn witness statements from Price and her parents. Price did not accept the offer. Hayes filed suit, and the case was tried to a jury in February 2006. Hayes submitted his case to the jury on the theory that Price was negligent for failure to yield. Price submitted a comparative-fault instruction for failure to keep a careful lookout. Hayes objected and moved to exclude any matter regarding comparative fault. The trial court overruled his motion and submitted Price's proffered instruction to the jury. The jury returned a verdict in favor of Hayes in the amount of \$625,000 and apportioned 20 percent of the fault to Hayes and 80 percent to Price. As a result of the apportionment, the trial court reduced Hayes' damages awarded by \$125,000. It also overruled Hayes' motion for prejudgment interest. Hayes appeals.

REVERSED IN PART; AFFIRMED IN PART AS MODIFIED.

Court en banc holds: (1) The trial court erred in submitting to the jury the comparative-fault instruction for failure to keep a careful lookout because this instruction was not supported by the evidence. The essence of such an instruction is a failure to see and a failure to act. The inquiry is two-fold: if the driver was keeping a careful lookout, whether the driver could have seen the danger; and, if the driver could have seen the danger, whether the driver had the ability to take some precautionary measure such as veering, using a horn or slowing to prevent the accident. The evidence must support a finding that a driver had the means and ability to have avoided the collision. Here, prior to entering the blind zone caused by the Bronco, there was no evidence Hayes had information to alert him that he should not proceed through the intersection. Price began to turn only after Hayes' view was obstructed by the Bronco. There is no evidence that, at the point Hayes exited the blind zone – when he would have seen Price making a turn had he been keeping a careful lookout – there was sufficient time for swerving, beeping or decelerating that would have prevented the collision. Although Hayes' friend made a gesture while Hayes still was in the blind zone, there was no evidence that the gesture was an indication of danger that Hayes should have seen and recognized as requiring evasive action. Further, Hayes had the right to assume that Price would yield to oncoming traffic until he was reasonably aware that she was not doing so, and until he was so aware, he was not required to take evasive action. Price failed to present substantial evidence supporting the submission of the comparative-fault instruction. Submission of this improper instruction prejudiced Hayes because it allowed the jury to assess a portion of fault to him. The portion of the trial court's judgment assessing 20 percent of the fault to Hayes and reducing his damages award accordingly is reversed. Rule 84.14 authorizes an appellate court to modify the judgment by eliminating the reduction in damages due to the erroneous assessment of comparative fault. Judgment is entered to reflect that Price is 100 percent at fault and that Hayes' damages award is \$625,000, the full amount the jury assessed.

(2) The trial court did not err in overruling Hayes' request for prejudgment interest because Hayes' settlement offer included a demand for document production and statements of third persons. Section 402.040.2 allows a plaintiff to recover prejudgment interest if the plaintiff makes a demand for payment or offer of settlement to the opposing party and any subsequent judgment in the case exceeds the amount specified in the demand or settlement offer. To receive prejudgment interest, the settlement demand must be definite in its terms and the amount demanded must be readily ascertainable in dollars and cents. Here, Hayes' letter demanded settlement in the amount of \$325,000 but also made four non-monetary demands that required the participation of Price's parents, who were not parties to the action, to reach a settlement. While the phrase "offer of settlement" is broader than the phrase "demand of payment" in section 408.040.2 and arguably could include non-monetary demands, the context of both phrases makes it clear the legislature intended that the offer be capable of ascertainment in an amount of certain dollars and cents so the offer amount can be compared with the actual judgment amount. By their nature, non-monetary demands cannot be compared with the actual judgment amount to determine if prejudgment interest should be awarded. Additionally, allowing a party to make non-monetary demands beyond the monetary demand for settlement in an offer pursuant to section 408.040.2 would be contrary to the public policies served by the statute of compensating the claimant for the true cost of money damages incurred due to the delay of litigation and of promoting settlement and deterring unfair benefit from the delay of litigation. Here, by including demands for indemnity agreements, titles and sworn statements in his settlement offer, Hayes obstructed Price's ability to accept unequivocally because, to accept, Price needed the cooperation of third parties. The settlement offer was not capable of ascertainment in an amount for certain dollars and cents, impeded settlement and did not meet the requirements of section 408.040.2.