IN THE MISSOURI SUPREME COURT

NO. SC88890

CORTEZ STRONG,

Respondent/Cross-Appellant

vs.

AMERICAN CYANAMID COMPANY

Appellant/Cross-Respondent.

On Appeal from the Circuit Court of the City of St. Louis
Hon. Michael B. Calvin, Circuit Judge
Case # 992-08880

RESPONDENTS/CROSS APPELLANT'S SUBSTITUTE REPLY BRIEF

Stanley P. Kops, Esq.
102 Bala Ave.
Bala Cynwyd, PA 19004
(610) 949-9999
(610) 949-9773 (Fax)

Stephen R. Woodley, Esq. # 36023
GRAY, RITTER & GRAHAM
701 Market St., Suite 800
St. Louis, MO 63101
(314) 241-5620

Thomas P. Germeroth, Esq # 47611
KOLKER & GERMEROTH
101 South Hanley Road, Suite 1320
St. Louis, MO 63105
(314) 727-4529

Edward D. Robertson, Jr., # 27183
Mary Doerhoff Winter # 38328
Anthony L. DeWitt # 41612
BARTIMUS, FRICKLETON,
ROBERTSON & GORNY, P.C.
715 Swifts Highway
Jefferson City, MO 65109
(573) 659-4454
(573) 659-4460 Fax

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

IV. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION TO AMEND THE JUDGMENT TO ADD PREJUDGMENT INTEREST BECAUSE PLAINTIFF IS ENTITLED TO PREJUDGMENT INTEREST IN THAT PLAINTIFF MET ALL OF THE REQUIREMENTS OF §408.040 RSMo. (2005)

Appellant Cyanamid asserts that it cannot be charged with prejudgment interest when, it claims, Strong caused delay in the case getting to trial. A review of the docket sheets and the procedural history, including the two writs[1] taken by Cyanamid when it initially lost key motions before the trial court, reveals that this claim is more hopeful than accurate. It is also irrelevant. Section 408.040.2 determines when prejudgment interest is due. It makes no allowance for delay caused by either party.

Strong set out in his initial brief the case law of Missouri, including *Lester v. Sayles*, 850 S.W.2d 858, 874 (Mo. banc 1993), which clearly holds that "[o]nce a settlement demand is made pursuant to Section 408.040.2 it is immaterial

[1] The Appellant brought successive writs of prohibition to first the Eastern District Court of Appeals (See ED No. 80206 and ED No. 86097), and then the Supreme Court (SC 86749).

whether plaintiff made any subsequent offers of settlement." Further, *McCormack v. Capital Electric Construction Co., Inc.*, 159 S.W.3d 387(Mo.App. W.D. 2004) notes that a prejudgment interest demand remains valid despite the passage of both time and procedural delays prior to a final judgment. The only issues relevant to the question whether prejudgment interest is due are, (1)whether the prejudgment interest letter conforms to § 408.040.2 and, (2) the judgment amount is greater than the amount demanded in the proper per-judgment interest letter. As both statutory conditions are satisfied here, assigning blame for delay is a fruitless undertaking under the plain meaning of the statute.

Cyanamid next argues that the language of § 408.040, RSMo., does not support the award of prejudgment interest on future damages. Section 408.040.2 makes an award of prejudgment interest mandatory on "the amount of the judgment." If a judgment includes future damages, those future damages are part of "the amount of the judgment."

Foreign authority is the best Cyanamid can offer, and that authority is easily dismissed.

First: *Gonzalez v. Tounjian*, 665 N.W.2d 705 (N.D. 2003). The North Dakota statute permitted an award of prejudgment interest as a matter of discretion by the jury or the trial court. "In an action for the breach of an obligation not arising from contract and in every case of oppression, fraud, or malice, interest may be given in the discretion of the court or jury." N.D.C.C. § 32-03-05. That statute makes no mention of "the amount of the judgment" – indeed, it does not

mention judgment at all. That the North Dakota Supreme Court determined that prejudgment interest on future damages was inherently contrary to the policy of North Dakota law that provides discretion to award prejudgment interest does not authorize this Court to abrogate § 408.040.2, even if the Court disagrees with the policy the Missouri statute announces in clear and unambiguous terms.

Next: *John's Heating Service v. Lamb,* 46 P.3d 1024 (Ak. 2002). Alaska's prejudgment interest law is apparently judge-made law. In *John's Heating Service* (likely a going concern in Alaska), the Alaska Supreme court followed its own common law precedent in reversing an award of prejudgment interest on future damages. To repeat: Where there is a statutory basis for prejudgment interest and the statute is mandatory, this Court can refuse to award prejudgment interest only if it is also willing to abrogate a state statute.

Finally, moving to warmer climes, Cyanamid cites *Alvarado v. Rice*, 614 So.2d 498 (Fla. 1993). Florida law, like Alaska law, rests on a common law determination that "prejudgment interest is merely another element of pecuniary damages." *Argonaut Ins. Co. v. May Plumbing Co*., 474 So.2d 212, 214 (Fla. 1985). Alvarado stands for the proposition of Florida common law that a medical malpractice claimant cannot receive prejudgment interest on past damages for out-of-pocket expenses that the patient never actually paid. Section 408.040.2 trumps Florida common law.

Next Cyanamid attempts a first-time-on-appeal constitutional challenge to § 408.040.2. Cyanamid did not raise its constitutional challenge before the trial

court at all. *See* Cyanamid's Opposition to Plaintiff's Motion to Amend Judgment [to include prejudgment interest] and for New Trial. (LF 4127 et seq.). In footnote 14 of its Brief, Cyanamid argues that the Court of Appeals was wrong in finding that Cyanamid waived any constitutional right to a hearing on the question of whether Strong's delays in this case should offset any award of prejudgment interest.

Ignoring its failure to raise a constitutional challenge to § 408.040.2 at the trial court, Cyanamid now states that it "requested a hearing at the first logical time that it could – when Strong filed his motion for pre-judgment interest after the jury verdict." The truth is – as revealed by Cyanamid's filings in the trial court – the words "constitution" or "constitutional" do not appear in Cyanamid's papers before the trial court nor does Cyanamid cite any section of any constitution there. The first appearance of any constitutional language is in Appellants' Brief before the Eastern District Court of Appeals.

The Court of Appeals was correct in finding that Cyanamid did not raise the constitutional issue at the earliest possible time. Cyanamid has waived its right to do so now on appeal. As *McCormack* held:

> Capital had ample notice that the McCormacks intended to seek prejudgment interest, and yet it failed to raise any constitutional challenge to the statute at an earlier stage that would have allowed the trial court a full opportunity to identify and rule on the issue prior to the entry of judgment. Given the waiver, the trial court properly

> declined to consider the issue in ruling on the motion to amend judgment. By waiting until the post-trial motion, Capital also failed to preserve the constitutional challenge for consideration on appeal.

Id. at 404-05.

The trial court erred in ignoring the mandatory provision of § 408.040.2 and in failing to award prejudgment interest on this judgment.

REPLY OF CROSS-APPELLANT STRONG TO RESPONSE OF CROSS-RESPONDENT JAWAID

V. THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF DR. DIEHL BECAUSE THE TESTMONY WAS PROPER REBUTTAL IN THAT IT DIRECTLY REBUTTED THE STANDARD OF CARE EVIDENCE OFFERED BY DR. JAWAID

A. Jawaid's Argument that Testimony about "Guidelines" is not Equivalent to Testimony about the "Standard of Care" is a Distinction Without a Difference

Prior to trial, Defendant Jawaid had endorsed (and plaintiff had cross-endorsed) Dr. Elizabeth Diehl as an expert witness of the standard of care. Plaintiff completed his case in chief without calling Dr. Diehl, expecting that Dr. Jawaid would call Dr. Diehl in her case. After Dr. Jawaid testified, she surprised Plaintiff and withdrew her endorsement of Dr. Diehl because it was then safe for

Dr. Jawaid to argue that she had not testified to a standard of care when she testified that her patient-care decisions were "guided by" the Red Book. The jury could easily have assumed that a book provided a standard of care. Such a use of semantics should not be countenanced by the Court. Whether it was phrased in the form of guidelines, the antidote to the potential confusion was to permit Dr. Diehl to testify as to the standard of care. The trial court refused to allow the testimony.

The import of this argument focuses on the need for rebuttal. If a guideline cannot be considered a reference to a standard of care, then there was nothing to rebut. However, if the jury could believe that Dr. Jawaid testified that the Red Book provided direction as to the degree of skill and learning ordinarily used by pediatric physicians, then rebuttal was necessary to assist the jury in determining Dr. Jawaid's liability for Cortez Strong's paralysis.

Cross-Respondent Jawaid argues that a "guideline" is not a standard of care. Here is what Dr. Jawaid said in direct testimony:

2 Q With regard to vaccines, Doctor, was there a
3 particular resource that you utilized for information
4 about vaccines and infectious diseases in children?
5 A Yes. We were guided by the Red Book of the
6 American Academy of Pediatrics.
7 Q Let me show you what I've marked as Exhibit M,

and is that the 1986 Red Book?

A Yes, sir.

Q And for purposes of treating Cortez in 1987 and any other child who at that point in time might have needed vaccinations, would that have been your guide for what to do?

A Yes.

(Tr.1968). In an overly formalistic approach that ignores Dr. Jawaid's testimony which equated (though Jawaid denies it) the Red Book as something she used to receive direction on how to treat her patients, defendant Jawaid suggests that the absence of the words "standard of care" changes the meaning of "guided by." As a result, Dr. Jawaid contends that no new standard of care issue was opened in her case that would have permitted rebuttal evidence concerning the proper standard of care for treating Cortez Strong. The transcript reveals that that is exactly the position Dr. Jawaid took at trial.

When Dr. Jawaid was on the stand, we asked no questions of her regarding what the standard of care was. In fact, during my entire case in chief we did not offer any evidence on standard of care at all, so there is nothing to rebut as to the standard of care with regard to the evidence that I offered.

(Tr.2020).

With all due respect, the distinction between "guided by" an authoritative text and "standard of care" is too fine to pass legal or linguistic muster. To suggest that Jawaid did not offer standard of care testimony because she did not use those specific words is to require incantation, not common meaning. Missouri courts do not countenance such fine semantic differences. *Hickman v. v. Branson Ear, Nose and Throat, Inc.*, ___ S.W.3d ___, (Mo. banc 2008)(No. SC 88887, decided June 30, 2008) (testimony that "total thyroidectomy is the proper procedure for what Mr. Hickman's diagnosis was," and that leaving one lobe of the thyroid does not meet the standard of care for a surgeon deemed sufficient to meet standard of MAI 11.06 – that the defendant "failed to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of the defendant's profession"). *Accord, Blevens v. Holcomb,* 469 F.3d 692, 695 (8th Cir. 2006); *Redel v. Capital Region Medical Center,* 165 S.W.3d 168, 175 (Mo. App. E.D. 2005); *Ladish v. Gordon,* 879 S.W.2d 623, 634 (Mo. App. W.D. 1994).

B. Good Cause Existed To Rebut Jawaid's Testimony

Dr. Diehl had testified in her deposition that the standard of care in Missouri required a pediatrician to advise on both the IPV and OPV vaccines. (TR.202; LF:4017) The Red Book did not. Thus, Dr. Diehl would have testified that following the Red Book violated the standard of care. Dr. Diehl, who was

designated as both parties' expert, would have thus impeached Dr. Jawaid's testimony.

While the trial court has wide discretion on issues of admission of evidence, *Richardson v. State Highway & Transp. Com'n.,* 863 S.W.2d 876, 881 (Mo. banc 1993) and this Court's review is limited to whether the trial court abused that discretion, *id*., the circumstances here in this multi-party, multi-issue case militate in favor of a finding of abuse of discretion. Judicial discretion is abused if the trial court's ruling is clearly against the logic of circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Id.*

The exclusion of Dr. Diehl's testimony offends the logic of the circumstances. Jawaid was allowed to testify with impunity in her case in chief regarding the "guidelines" that she followed in treating her patients. Her testimony in this regard should have been subject to rebuttal because the issue of the guidelines was merely a clever semantic device for discussing the standard of care[2] using different words. Plaintiff sought to offer the testimony of Dr. Diehl to impeach Dr. Jawaid's credibility to the jury.

---

[2] See, e.g., *Pierce v. Platte-Clay Elec. Coop*., 769 S.W.2d 769, 773 (Mo. banc 1989), rejecting the use of REA guidelines as determinative of the standard of care, but affirming their use as evidence of the standard of care in a negligence case.

"Said another way, abuse of discretion means an untenable judicial act that defies reason and works an injustice." *McClure v. Wingo,* 886 S.W.2d 141, 142 (Mo.App.1994). Here the trial court's decision is untenable because its rationale, that the evidence put on by Dr. Jawaid was "nothing new," (Tr.2023), ignores the testimony at issue. It defies reason because Dr. Jawaid specifically relied on the Red Book in defense of her conduct, and directly equated that book with the standard of care. It works an injustice because it allowed Dr. Jawaid to present the false impression to the jury that the standard of care in Missouri was as stated in the Red Book "guidelines," without being subject to rebuttal by her own expert witness who testified directly contrary to that position.

The court's decision was immediate on this issue, and the oral argument was brief. The trial court's exclusion was an abuse of discretion because it shows a lack of careful deliberation. If the court had carefully deliberated on the issue, it would have recognized that from the jury's perspective there is no difference between "Red Book Guidelines" and "standards of care."

Dr. Diehl's testimony would have directly contradicted Dr. Jawaid's testimony and would have impeached Dr. Jawaid's credibility before the jury. The trial court's failure to permit the testimony prejudiced Plaintiff.

C. Conclusion

Strong recognizes that the burden in an evidentiary issue is high, and that abuse of discretion is difficult to describe. *Richardson v. State Highway & Transp.*

Com'n., 863 S.W.2d 876, 881[14,15,16] (Mo.banc 1993); *Egelhoff v. Holt,* 875 S.W.2d 543, 549-50 (Mo. banc 1994); *Nash v. Stanley Magic Door, Inc.* 863 S.W.2d 677, 682[10] (Mo.App.1993); Courts rarely find it. *Pollard v. Whitener,* 965 S.W.2d 281, 286 (Mo.App. W.D.1998); *McClure v. Wingo,* 886 S.W.2d 141, 142 (Mo.App.1994); *Pierce v. Platte-Clay Electric Co-op., Inc.,* 769 S.W.2d 769, 774 (Mo. banc 1989); *Anglim v. Missouri Pacific Railroad Co.,* 832 S.W.2d 298, 303 (Mo. banc), *cert. denied,* 506 U.S. 1041, 113 S.Ct. 831, 121 L.Ed.2d 701 (1992).

Nevertheless, Cross-Appellant Strong believes this is one of those cases where the trial court abused its discretion, and a new trial should be granted as to Dr. Jawaid.

CONCLUSION

Plaintiff/Cross-Appellant Strong has shown that it met all the requirements for awarding Pre-Judgment Interest in this case. Strong has likewise shown that the refusal to permit introduction of Dr. Diehl's testimony in rebuttal was an abuse of discretion. For these reasons Strong respectfully asks this court to reverse the refusal to award prejudgment interest and remand this matter to the trial court for imposition of prejudgment interest with respect to American Cyanamid. Strong further requests that this Court reverse the denial of the motion for new trial with respect to Dr. Jawaid and remand this action for a new trial as to Dr. Jawaid only.

Respectfully Submitted,

Edward D. Robertson, Jr., # 27183
Mary Doerhoff Winter # 38328
Anthony L. DeWitt # 41612
BARTIMUS, FRICKLETON,
ROBERTSON & GORNY, P.C.
715 Swifts Highway
Jefferson City, MO 65109
573-659-4454
573-659-4460 Fax

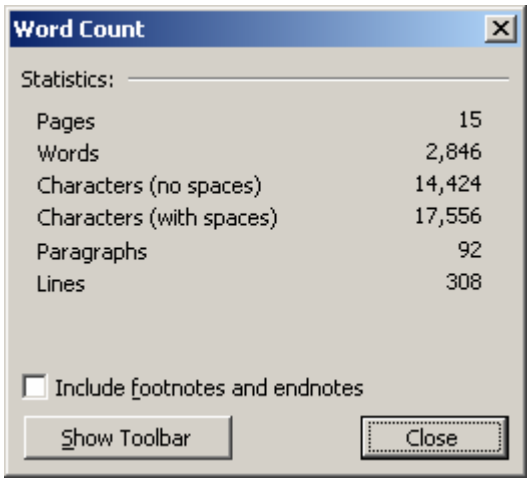
Stephen R. Woodley, Esq.
GRAY, RITTER & GRAHAM
701 Market St., Suite 800
St. Louis, MO 63101
(314) 241-5620

Thomas P. Germeroth, Esq.
KOLKER & GEMEROTH
101 South Hanley Road, Suite 1320
St. Louis, MO 63105
(314) 727-4529

Stanley P. Kops, Esq.
LAW OFFICES OF STANLEY P. KOPS
102 Bala Ave.
Bala Cynwyd, PA 19004

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 84.06(c) in that beginning with the Table of Contents and concluding with the last sentence before the signature block the brief contains 2,846 words. The word count was derived from Microsoft Word. Disks were prepared using Norton Anti-Virus and were scanned and certified as virus free.



Respectfully submitted,

_____

Edward D. Robertson, Jr. #27183
Anthony L. DeWitt, # 41612
BARTIMUS, FRICKLETON,
ROBERTSON & GORNY, P.C.
715 Swifts Highway
Jefferson City, MO 65109
(573) 659-4454 (office)
(573) 659-4460 (fax)

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and accurate copy of the foregoing document was served via prepaid United States mail this 28th day of July, 2008, to the following:

Thomas P. Germeroth, Esq.
101 South Hanley Road, Suite 1320
St. Louis, MO 63105

Stephen R. Woodley, Esq.
Gray, Ritter & Graham
701 Market St., Suite 800
St. Louis, MO 63101

Stanley P. Kops, Esq.
102 Bala Ave.
Bala Cynwyd, PA 19004

J. Thaddeus Eckenrode
Eckenrode-Maupin
7711 Bonhomme Ave., Suite 400
St. Louis, MO 63105
Attorney for Defendant/Respondent Jawaid

Michael D. O'Keefe
James W. Erwin
Dale R. Joerling
Thompson Coburn LLP
One US Bank Plaza
St. Louis, MO 63101
Attorneys for Appellant/Cross –Respondent American Cyanamid Co.

Roger W. Yoerges
Gregory S. Chernack
Stephanie E. Litos
Wilmer Cutler Pickering Hale & Dorr LLP
2445 M Street, N.W.

Washington, DC 20037-1420
Attorneys for Appellant/Cross –Respondent
American Cyanamid Co.

Ann K. Covington
Bryan Cave LLP
Riverview Office Center
221 Bolivar Street
Jefferson City, MO 65101