SC #086292

IN THE MISSOURI SUPREME COURT

JOSHUA F. SMITH,

Plaintiff/Respondent,

vs.

CHARLES G. SHAW,

Defendant/Appellant

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT

THE HONORABLE MARCO A. ROLDAN

SUBSTITUTE BRIEF OF APPELLANT CHARLES G. SHAW

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JURISDICTIONAL STATEMENT

This is a personal injury action arising from a car accident.

On April 14, 2000, a collision occurred between vehicles operated by Joshua Stark ("Stark") and Defendant/Appellant Charles G. Shaw ("Shaw"). Plaintiff/Respondent Joshua F. Smith ("Smith") was a passenger in the Stark vehicle and sustained various injuries. Following the wreck, Smith made personal injury claims against both Stark and Shaw. Before commencing this action, Smith settled his bodily injury claim against Stark for $25,000.00 and also received another $25,000.00 in underinsured motorist ("UIM") benefits from Stark's auto insurer.

As to his personal injury claim against Shaw, Smith (through his attorney) sent a certified letter to Geico Casualty Company ("Geico"), Shaw's auto insurer, wherein he offered to settle his claim against Shaw for "$25,000.00 or the per person liability limit, whichever is greater." This offer was left open "for sixty (60) days from the date of this letter." Geico offered to pay Smith its $25,000.00 liability limit, but it did not do so within the sixty-day deadline set forth in Smith's letter because it did not receive any documentation supporting Smith's claim until after the deadline had passed.

Smith rejected Geico's policy-limits offer and sued Shaw. The case was tried to a jury and resulted in a $200,000.00 verdict in Smith's favor. Following the trial, Shaw

moved the trial court to give him a credit against the verdict not only for Smith's receipt of $25,000.00 bodily injury benefits from Stark's insurer but also for the $25,000.00 that Stark's insurer paid Smith in UIM benefits. In its Judgment Entry of September 17, 2003, the trial court awarded Smith actual damages of $175,000.00, effectively overruling Shaw's motion for credit as to Smith's receipt of UIM benefits. The trial court's judgment also included an award to Smith of $41,337.70 in prejudgment interest.

On October 3, 2003, Shaw filed a motion to amend the judgment wherein he asked the trial court to eliminate the award of prejudgment interest. The trial court overruled this motion in an Order dated October 10, 2003.

Shaw appeals the trial court's refusal to give him credit for Smith's UIM settlement and its refusal to eliminate the award of prejudgment interest.

This appeal is within the general appellate jurisdiction of this Court under Article V, Section 3 of the Missouri Constitution. The appeal does not involve the validity of any treaty or statute of the United States, or the validity of any provision of the Constitution of this State, or the construction of the revenue laws of this State, or the title to any office of this State, or the imposition of the punishment of death, or any other matter within the exclusive or original jurisdiction of the Supreme Court of this State. This appeal does involve, however, the validity of a statute of this State.

This lawsuit was filed in the Circuit Court of Jackson County, Missouri, which is within the jurisdiction of the Missouri Court of Appeals, Western District, Section 477.070, RSMo 2000.

STATEMENT OF FACTS

On April 14, 2000, Smith -- while a passenger in a car being driven by Stark -- was injured in a car accident involving the vehicles driven by Stark and Shaw. (L.F. 1-5).

On July 14, 2000, Smith (through his attorney) sent Geico a certified letter offering to settle his personal injury claim for $25,000 or the per person liability limit, whichever was higher, and stating that the offer would be open for sixty (60) days "from the date of this letter." (L.F. 6). Geico did not receive the letter until July 21, 2000, seven (7) days after it was mailed. (L.F. 7).

Smith's letter didn't describe or include any information about what type of injuries Smith sustained or what treatment he'd had or what medical bills he'd incurred. (L.F. 43-44). After Geico advised Smith it couldn't evaluate his offer without first being provided documentation showing what injuries he'd sustained and what bills he'd incurred, Smith sent Geico another letter dated September 15, 2000 [exactly sixty-one (61) days after his certified letter] which purportedly enclosed medical information but which in fact enclosed nothing. (L.F. 39; 43-44). When Geico again advised Smith it couldn't evaluate his settlement offer without first receiving documentation to support the offer, Smith finally sent Geico his medical records and bills. (L.F. 43-44).

Once Geico finally received Smith's records and bills, it offered to pay Smith the

$25,000 policy limits he'd demanded in his certified letter. (L.F. 40-44). Significantly, Geico made this offer within twenty-one (21) days of when Smith finally provided his medical records and bills. Id. Despite this fact, Smith's counsel refused to accept Geico's "belated offer" and advised Geico that since it "did not timely offer the policy limits or accept our settlement offer," it had "now exposed (Shaw) to an excess jury verdict." (L.F. 41-42).

Smith's counsel further advised Geico that in his opinion, "Geico's handling of this loss and its failure to timely settle Joshua Smith's personal injury claim was handled negligently and/or in bad faith." (L.F. 46-47). After requesting that Geico send him a copy of its claims file "so I can evaluate this issue," Smith's counsel offered to settle Smith's personal injury claim for $100,000. Id. Geico declined this offer, after which Smith sued Shaw. (L.F. 1-7, 48-49).

This case was tried to a jury on April 28 and 29, 2003, more than two (2) years and nine (9) months after Smith sent his offer of settlement to Geico. (L.F. 23-24, 38; App. A1-A2). The jury returned a verdict in favor of Smith for $200,000.00. Id.

On May 15, 2003, Shaw filed a Motion for Credit Against Verdict wherein he asked the trial court to give him a total credit against the verdict of $50,000.00, to account for the $25,000.00 in bodily injury benefits the Smith had already received from Joshua Stark's

liability carrier **plus** the $25,000.00 in underinsured motorist ("UIM") benefits which Smith had also received from Stark's carrier. (L.F. 13-18.)

On May 19, 2003, Smith filed Plaintiff's Trial Brief Opposing Defendant's Request for a Credit for Underinsured Payment, wherein he asserted Shaw was entitled only to a credit of $25,000.00 for the bodily injury benefits Smith had received. (L.F. 19-22).

On September 17, 2003, the trial court entered judgment against Shaw in the sum of $175,000.00 for actual damages and $41,337.70 in prejudgment interest for a total judgment of $216,337.70, which judgment effectively gave Shaw credit for only the $25,000.00 in bodily injury benefits which Smith received from Joshua Stark's insurer. (L.F. 23-24, Appendix 1-2).

On October 2, 2003, Shaw filed a motion to amend the judgment, wherein he asked the trial court to amend the judgment so as to eliminate the award of prejudgment interest. (L.F. 25-68.) On October 7, 2003, Smith filed his suggestions in opposition to the motion to amend. (L.F. 69-71.) On October 10, 2003, the trial court issued an order overruling Shaw's motion to amend. (L.F. 72.)

Shaw filed his Notice of Appeal on October 27, 2003. (L.F. 73-74.)

POINTS RELIED ON

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN REFUSING TO GIVE SHAW A CREDIT FOR SMITH'S RECEIPT OF UIM BENEFITS BECAUSE THE UIM BENEFITS DID NOT CONSTITUTE A COLLATERAL SOURCE PAYMENT IN THAT SMITH DID NOT INCUR ANY EXPENSE, OBLIGATION OR LIABILITY IN SECURING THE POLICY THAT PAID HIM THE UIM BENEFITS.

Duckett v. Troester, 996 S.W.2d 641 (Mo.App.W.D. 1999)

Hagedorn v. Adams, 854 S.W.2d 470 (Mo.App.W.D. 1993)

Kaelin v. Nuelle, 537 S.W.2d 226 (Mo.App.E.D. 1976)

Washington ex rel. Washington v. Barnes Hospital, 897 S.W.2d 611 (Mo. banc 1995)

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN OVERRULING SHAW'S MOTION TO AMEND JUDGMENT BECAUSE SMITH WAS NOT ENTITLED TO AN AWARD OF PREJUDGMENT INTEREST UNDER SECTION 408.040.2, RSMo 2000, IN THAT SMITH'S OFFER TO SETTLE WAS NOT MADE IN A TORT ACTION; SMITH'S OFFER TO SETTLE WAS NOT LEFT OPEN FOR SIXTY DAYS; AND THE TRIAL COURT'S APPLICATION OF SECTION 408.040.2 DEPRIVED SHAW OF HIS

CONSTITUTIONALLY PROTECTED DUE PROCESS OF LAW RIGHTS BECAUSE SHAW WAS GIVEN NEITHER NOTICE NOR AN OPPORTUNITY TO CONTEST SMITH'S DELAY IN PROSECUTING HIS CASE.

Harrison v. Purdy Brothers Trucking Co., 312 F.3d 346 (8th Cir. 2002)

North v. Hawkinson, 324 S.W.2d 733 (Mo. 1959)

Abrams v. Ohio Pacific Exp., 819 S.W.2d 338 (Mo.banc 1991)

Cummins v. Kansas City Public Service Co., 66 S.W.2d 920 (Mo.banc 1933)

Section 408.040.2, RSMo. 2000

BLACK'S LAW DICTIONARY 26 (5th Ed. 1979)

Final Report of the Missouri Task Force on Liability Insurance, Civil Justice Recommendations, (January 6, 1987)

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN REFUSING TO GIVE SHAW A CREDIT FOR SMITH'S RECEIPT OF UIM BENEFITS BECAUSE THE UIM BENEFITS DID NOT CONSTITUTE A COLLATERAL SOURCE PAYMENT IN THAT SMITH DID NOT INCUR ANY EXPENSE, OBLIGATION OR LIABILITY IN SECURING THE POLICY WHICH PAID HIM THE UIM BENEFITS.

A. Standard of Review

On appeal, the appellate court reviews questions of law *de novo* and no deference is afforded the trial court's decision. Boulevard Investment Co. v. Capitol Indemnity Corp., 27 S.W.3d 856, 858 (Mo.App.E.D. 2000). Where a matter is heard *de novo*, the parties start over and no particular deference is given to the prior proceedings. Kinzenbaw v. Director of Revenue, 62 S.W.3d 49, 52 (Mo. banc 2001).

B. Discussion

1. The trial court erred as a matter of law by refusing to give Shaw a credit against the verdict for the $25,000.00 in UIM benefits received by Smith because the UIM benefits did not constitute a collateral source.

"The collateral source rule is an exception to the general rule that damages in tort should be compensatory only." Duckett v. Troester, 996 S.W.2d 641 (Mo.App.W.D. 1999) (*citing* Washington ex rel. Washington v. Barnes Hospital, 897 S.W.2d 611 (Mo. banc 1995)). The collateral source rule prevents a tortfeasor from reducing its liability to an injured person by proving that payments were made to the person from a collateral source. Duckett, 996 S.W.2d at 648. The justification for the rule is that "the wrongdoer should not benefit from the expenditures made by the injured party in procuring the insurance coverage." Id. Where the plaintiff has incurred no expense, obligation or liability in securing the insurance coverage in question, the collateral source rule has no application. Id.

This last principle is critical and worth repeating: *Where the plaintiff has incurred no expense, obligation or liability in securing the insurance coverage in question, the collateral source rule has no application.* Under this principle, Missouri courts hold that the collateral source rule has no application in cases where the plaintiff **has not himself**

purchased the insurance from which he received the "collateral" benefits, or at least where the plaintiff has not received such benefits as a part of his employment or from a government program. See, e.g., Washington by Washington v. Barnes Hospital, 897 S.W.2d at 619-620 and cases cited therein.

In this case, Smith did not receive $25,000.00 in UIM benefits from an insurance policy he purchased or from a policy purchased for him. Rather, the UIM benefits came from Stark's insurer -- the insurance carrier of the vehicle Smith was occupying at the time of the accident. In short, Smith did not pay any premiums in order to receive UIM benefits from Stark's insurer. Because Smith himself did not incur any expense or obligation to secure the UIM benefits he received from Stark's insurer, the UIM benefits Smith received are not collateral source as set forth and described in Duckett. Accordingly, Shaw is entitled to a credit of $25,000.

Further, to the extent Smith would rely on Kaelin v. Nuelle, 537 S.W.2d 226 (Mo.App.E.D. 1976) and Hagedorn v. Adams, 854 S.W.2d 470 (Mo.App.W.D. 1993) in contending that the UIM benefits received in this case were collateral source, such reliance would be misplaced. Kaelin and Hagedorn are readily distinguishable from this case for a couple of reasons. First, the Kaelin and Hagedorn courts held that *uninsured* motorist benefits (not *underinsured* motorist benefits) were collateral source payments and

therefore could not be introduced into evidence or made the subject of a credit against a judgment. Second, and more importantly, Kaelin and Hagedorn involved situations where the plaintiffs had received UM benefits *under insurance policies for which they themselves had paid the premiums*. Therefore Hagedorn and Kaelin are inapposite. Accordingly, the trial court erred in refusing to give Shaw a credit of $25,000 against the verdict because that amount should not have been considered paid from a collateral source.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN OVERRULING SHAW'S MOTION TO AMEND JUDGMENT BECAUSE SMITH WAS NOT ENTITLED TO AN AWARD OF PREJUDGMENT INTEREST UNDER SECTION 408.040.2, RSMo 2000, IN THAT SMITH'S OFFER TO SETTLE WAS NOT MADE IN A TORT ACTION; SMITH'S OFFER TO SETTLE WAS NOT LEFT OPEN FOR SIXTY DAYS; AND THE TRIAL COURT'S APPLICATION OF SECTION 408.040.2 DEPRIVED SHAW OF HIS CONSTITUTIONALLY PROTECTED DUE PROCESS OF LAW RIGHTS BECAUSE SHAW WAS GIVEN NEITHER NOTICE NOR AN OPPORTUNITY TO CONTEST SMITH'S DELAY IN PROSECUTING HIS CASE.

A. Standard of Review

On appeal, the appellate court reviews questions of law *de novo* and no deference is afforded the trial court's decision. Boulevard Investment Co. v. Capitol Indemnity Corp., 27 S.W.3d 856, 858 (Mo.App.E.D. 2000); see also Thatcher v. Trans World Airlines, 69 S.W.3d 80 (Mo.App.W.D. 2002) (an appellate court may review questions of law and make holdings as if it were the court of origin). Statutory construction is a question of law, not a matter of discretion. Buttress v. Taylor, 62 S.W.3d 672 (Mo.App.W.D. 2001). Whether a statute applies to a particular set of facts is also a question of law that the court of appeals

reviews *de novo*. State ex rel. Division of Child Support Enforcement v. Hill, 53 S.W.3d 137, 143 (Mo.App.W.D. 2001). Where a matter is heard *de novo*, the parties start over. Kinzenbaw v. Director of Revenue, 62 S.W.3d 49, 52 (Mo. banc 2001). Thus, the appellate court will conduct an independent review with regard to the award of prejudgment interest, granting no deference to the trial court's determination of the law. See Barry Serv. Agency Company v. Manning, 891 S.W.2d 882, 887 (Mo.App.W.D. 1995).

B. Discussion

In its Judgment Entry dated September 17, 2003, the trial court entered judgment against Shaw for $175,000.00 in actual damages and $41,337.70 in prejudgment interest, for a total sum of $216,337.70. Shaw filed a motion to amend judgment wherein he asked the trial court to eliminate the award of prejudgment interest. The trial court denied this motion, and in doing so, erred as a matter of law for three reasons. Each of these reasons will be addressed below.

1. Smith is not entitled to an award of prejudgment interest under section 408.040.2 because his settlement offer was not made in *a tort action*.

Section 408.040.2 states as follows:

> *In tort actions*, if a claimant has made a demand for payment of a claim or an offer of settlement of a claim, to the party, parties or their representatives and the amount of the judgment or order exceeds the demand for payment or offer of settlement, prejudgment interest, at the rate specified in subsection 1 of this section, shall be calculated from a date sixty days after the demand or offer was made, or from the date the demand or offer was rejected without counter offer, whichever is earlier. Any such demand or offer shall be made in writing and sent by certified mail and shall be left open for sixty days unless rejected earlier. Nothing contained herein shall limit the right of a claimant, in actions other than tort actions, to recover prejudgment interest as otherwise provided by law or contract.

§ 408.040.2 (emphasis added).

In Lester v. Sayles, 850 S.W.2d 858, 873 (Mo. banc 1993), this Court stated that because the Missouri legislature did not designate when an offer of settlement under section 408.040.2 must be communicated by certified letter, "[t]he statute, by its plain language requires no more than that 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 had answered the question." But not only was this statement *obiter dictum*

(since the settlement offer in Lester was made a year after suit was filed), it was also made with absolutely no consideration of section 408.040.2's phrase *in tort actions*.

In his dissenting opinion in Harrison v. Purdy Brothers Trucking Co., 312 F.3d 346 (8th Cir. 2002), Judge Beam criticized the majority's affirmation of the district court's award of prejudgment interest where the plaintiff had made an offer to settle under section 408.040.2 three (3) months before filing a lawsuit. Said Judge Beam,

> The court and the parties spend considerable time arguing over the statutory meaning and breadth of the word "representatives." However, they ignore a more fundamental problem. The offer of settlement . . . was not made in a tort action. Indeed, no tort action, as defined by Missouri law, existed when [plaintiff's counsel] sent his demand.
>
> In defining the meaning of the phrase *a tort action*, Missouri has adopted a "usual and ordinary sense" of the word "action." North v. Hawkinson, 324 S.W.2d 733, 744 (Mo. 1959). "Generally, an action is such a judicial proceeding as, conducted to termination, results in a judgment." Id. It is also clear that an "*action* is commenced by filing a petition with the court." Ostermueller v. Potter, 868 S.W.2d 110, 111 (Mo. 1993) (emphasis added).[1]

[1] Missouri courts have always defined the word "action" to mean a judicial proceeding

Judge Beam went on to state that although "there is obiter dictum in Lester v. Sayles that counsels a contrary conclusion," the Court in Lester "totally ignored the '[i]n a tort action' language that commences and, time wise, frames the section." Id.

This Court has never directly addressed the meaning of the phrase *in tort actions* as set forth in section 408.040.2. As Judge Beam astutely observes, the phrase commences and, time-wise, frames section 408.040.2. The phrase is clear and unequivocal, and under our well-established principles of statutory construction, it must be given its plain and ordinary meaning.

The primary role of courts in construing statutes is to ascertain the intent of the legislature from the language used in the statute and, if possible, give effect to that intent. Abrams v. Ohio Pacific Exp., 819 S.W.2d 338, 340 (Mo.banc. 1991). "In determining legislative intent, statutory words and phrases are taken in their ordinary and usual sense. That meaning is generally derived from the dictionary." Id.[2] This Court has held that "every

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which, when conducted to termination, results in a judgment. See State v. Kirkwood, 239 S.W.2d 333, 336 (Mo.banc 1951) and In Re Estate of Guthland, 438 S.W.2d 12, 15 (Mo.App. 1969).

[2] Black's Law Dictionary says that *action* "in its usual sense means a suit brought in a court; a formal complaint within the jurisdiction of a court of law." BLACK'S LAW

word, clause, sentence, and provision of a statute must have effect" and that "[c]onversely, it will be presumed that the legislature did not insert idle verbiage or superfluous language into a statute." Civil Service Comm'n v. Board of Aldermen, 92 S.W.3d 785, 788 (Mo.banc 2003).

This Court has also said that "[m]ore importantly, no statute should be construed to alter the common law further than the words import." Estate of Williams v. Williams, 12 S.W.3d 303, 307 (Mo.banc 2000). "Where doubt exists about the meaning or intent of words in a statute, the words should be given the meaning which makes the least, rather than the most, change in the common law." Id. "To read words or concepts into our statutes that the general assembly did not write shows disrespect to both the general assembly and for the common law." Id.

Our traditional principles of statutory construction dictate that the phrase *in tort actions* means that in order to trigger section 408.040.2's provisions, a tort claimant must make his offer of settlement or demand for payment in *a tort action*, that is, *after* he files a petition with the court. Failing to assign the phrase its proper meaning violates our basic tenets of statutory construction in several ways.

First, if the phrase isn't taken to mean that a party can trigger the statute's provisions

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DICTIONARY 26 (5th Ed. 1979).

only after commencing a tort action, then the phrase has no meaning and becomes mere verbiage, thus violating Civil Service Comm'n v. Board of Aldermen, supra. Second, reading the phrase to mean anything other than that an offer of settlement or demand for payment must be made during the pendency of a tort action contradicts our courts' traditional and consistent interpretation of the word *action*. See North v. Hawkinson, Ostermuller v. Potter, State v. Kirkwood, and In Re Estate of Guthland, supra.

Third, failing to read the phrase *in tort actions* as limiting the availability of prejudgment interest to only those parties who make offers of settlement or demands for payment after commencing a lawsuit violates the tenets expressed in Estate of Williams v. Williams, supra, that no statute should be construed to alter the common law further than the words import and that where doubts exist about the meaning or intent of words in a statute, the words should be given the meaning which makes the least, rather than the most, change in the common law.

Under our common law, prejudgment interest is not allowed on unliquidated claims such as tort claims. St. Louis Housing Authority v. Magafas, 324 S.W.2d 697 (Mo. 1959). Section 408.040.2, however, alters this principle by permitting recovery of prejudgment interest on tort claims under certain prescribed circumstances. Reading the phrase *in tort actions* as anything other than what it means effectively broadens the circumstances under

which a party can recover prejudgment interest and therefore results in the most, rather than the least, change in the common law.

Finally, and perhaps most significantly, failing to read *in tort actions* as requiring a party to make his offer of settlement or demand for payment during a pending lawsuit violates the core principle that the primary role of courts in construing statutes is to ascertain the intent of the legislature from the language and to give effect to that intent. Abrams v. Ohio Pacific Exp., supra.

The General Assembly passed section 408.040.2 after receiving the final report of the Missouri Task Force on Liability Insurance. See Final Report of the Missouri Task Force on Liability Insurance, Civil Justice Recommendations (January 6, 1987) (L.F. 66-67; App. A4-A5). The Task Force recommended that "[t]he General Assembly should enact legislation authorizing prejudgment interest on the entire amount of an award whenever a verdict exceeds a settlement demand." (App. A4). The Task Force stated that "[t]here are two reasons why Missouri should authorize prejudgment interest for damages in tort actions. First, a fundamental principle of law requires a person who causes an injury to another to fully compensate that injured person. Second, prejudgment interest statutes serve to speed the litigation process and encourage settlement of claims." Id.

The Task Force recommended that "interest would not begin to accrue until after the

plaintiff has made such a demand and the defendant has had an adequate amount of time (60 days) in which to evaluate it." (App. A4-A5). The Task Force pointed out that a prejudgment interest statute would give a defendant an incentive to settle:

> Delay in a major case which the defendant will lose anyway will make no sense because he will be incurring hourly defense costs and interest costs. Defendants are therefore given a good chance to evaluate cases sooner, determining what their chances are, and how much they will have to pay if they eventually lose, settling when it makes sound economic sense to do so.[3]

(App. A5).

As the Task Force advised the legislature, one of the objectives of a tort prejudgment interest statute is to encourage defendants to evaluate their cases sooner. Of course, as the

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[3] The language used by the Task Force in this passage shows that the Task Force contemplated a tort prejudgment interest statute being triggered *after* the filing of a lawsuit. Note the Task Force's references to *major case*, *defendant* & *defendants*, and *hourly defense costs*. Note also the Task Force's statement that "interest would not begin to accrue until after the *plaintiff* has made such a demand and the *defendant* has had an adequate amount of time (60 days) in which to evaluate it." (App. A4-A5). The Task Force could have said *claimant* instead of plaintiff and *tortfeasor* instead of defendant, but it didn't.

Task Force also pointed out, a defendant must have "an adequate amount of time (60 days) in which to evaluate" a demand. Id.

The two principles noted by the Task Force -- encouraging defendants in tort cases to evaluate their cases sooner (so that the plaintiff gets compensated sooner) and giving defendants an adequate amount of time to evaluate a demand -- go hand-in-hand. Defendants in a tort case cannot reasonably be expected to "determin[e] what their chances are, and how much they will pay if they eventually lose," if they don't have any information with which to evaluate a plaintiff's case. Id.

Although there is no formal legislative history surrounding section 408.040.2's passage, the Task Force's final report to the General Assembly essentially captures the legislature's intent behind the statute's adoption.[4] Given that the legislature's intent in adopting section 408.040.2 was to speed the litigation process by encouraging defendants to evaluate their cases sooner, and given that defendants cannot evaluate their cases sooner if they don't have any information with which to conduct their evaluation, the legislature's intent would be frustrated if there was no mechanism in place to allow

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4 Our courts of appeal have looked to the Task Force's report in determining the legislative intent behind other parts of the 1987 tort reform legislation. See Bishop v. Cummines, 870 S.W.2d 922, 924 fn.3 (Mo.App.W.D. 1994) and Moreland v. Columbia Mut.Ins.Co., 842 S.W.2d 215, 222 fn. 11 (Mo.App.S.D. 1992).

defendants to obtain the information necessary to evaluate a case.

Fortunately, there is such a mechanism in place -- the discovery process. Since the discovery process is available to a defendant only in the context of a pending lawsuit, reading the phrase *in tort actions* to mean anything other than that a plaintiff must make his offer of settlement or demand for payment during a pending lawsuit frustrates, rather than effectuates, the legislative intent behind section 408.040.2. Such a result violates the canon of statutory construction stated by this Court in Abrams v. Ohio Pacific Exp., supra, that the primary role of courts in construing statutes is to ascertain the intent of the legislature and give effect to that intent.

This case amply demonstrates how failing to give *in tort actions* its usual, ordinary, plain, and unequivocal meaning produces a result that frustrates section 408.040.2's objective of encouraging the settlement of claims.

It is not difficult to infer in this case that although Smith sent Geico a section 408.040.2 offer to settle, he never had any intention of settling his claim. Moreover, one can easily infer that the only reason Smith even bothered to generate a section 408.040.2 letter was to set the stage for the recovery of prejudgment interest at trial. Very simply, this case was destined for jury trial even before Smith's counsel sent his certified letter to Geico.

The net effect of all this craftiness is that Charles Shaw gets penalized in the amount of $41,337.70 in prejudgment interest for failing to accept an offer of settlement which he had absolutely no opportunity to evaluate before the deadline on the offer expired. This cannot be the result the legislature intended. The legislature could not have intended to impose a penalty of prejudgment interest upon a party who's never given a fair chance to properly evaluate a settlement offer.

Yet that is exactly what will happen in this case -- and it will continue to happen in other cases -- if the Court does not give section 408.040.2's phrase *in tort actions* its meaning as intended by the General Assembly and as mandated by our principles of statutory construction.[5]

2. Smith is not entitled to an award of prejudgment interest because his settlement offer was not left open for sixty days.

Section 408.042.2 also requires that a plaintiff leave his offer of settlement open for sixty days. Boehm v. Reed, 14 S.W.3d 149, 151 (Mo.App.W.D. 2000). Anything less

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5 "The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and `the manifest purpose of the statute, considered historically,' is properly given consideration." See Cummins v. Kansas City Public Service Co., 66 S.W.2d 920, 925 (Mo.banc 1933).

fails to comply with the sixty-day requirement and therefore does not trigger the running of prejudgment interest. Id.

Smith sent his settlement offer to Geico on July 14, 2000. The letter stated, in pertinent part, as follows:

> This letter is to advise that I have been retained by Joshua Smith in regard to injuries he suffered in the motor vehicle accident of April 14, 2000, involving your insured, Charles Guy Shaw. In accordance with Missouri Revised Statute 408.040, this letter is a formal offer to settle Joshua Smith's personal injury claim for $25,000 or the per person liability limit, whichever is greater. In accordance with that statute, this offer to settle *is open for* ***sixty (60) days from the date of this letter***. Please send me a copy of the [Geico] insurance policy at issue. If you have a statement from my client, Joshua Smith, please send it to me. I look forward to working with you in regard to a resolution of this case.

(L.F. 6) (emphasis added).

Geico didn't receive Smith's settlement offer until at least July 21, 2000, seven days after the offer was mailed. (L.F. 7).[6] According to the plain and unambiguous terms of the

[6] From looking at the Domestic Return Receipt, undersigned counsel cannot tell

letter, Smith left his offer open for sixty days *"from the date of this letter."* Id. Because Geico did not receive the letter until at least seven days after it was mailed, Smith's offer was effectively left open for only fifty-three days.

In law, one cannot accept an offer which has not been communicated to him. ACF Industries v. Industrial Commission, 309 S.W.2d 676, 680 (Mo.App. 1958). In fact, a proposal does not amount to an offer in the law of contracts until brought to the attention of the offeree. Id. Under these principles of contract law, Smith's offer did not become an offer in the law of contracts -- or under 408.040.2 -- until it was brought to Geico's attention, the offeree.

Here, Smith's offer was fatally defective from the beginning. There was no way Smith's offer could have complied with section 408.040.2 because it could not have been left open for a full sixty days. The trigger date on the sixty-day deadline to accept was the

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exactly when Geico received Respondent's letter. (L.F. 7). The handwritten date in the "Date of Delivery" space (box B) appears to say "7-21," while box D contains a stamp that says "RECEIVED JUL 27 2000." Nonetheless, there is at least a week that passed before Geico received the letter.

date of Smith's offer. Even assuming that Smith's letter could have reached Geico within three days, the normal time it takes for a letter to be delivered, Geico and Shaw never would have had at least sixty days to accept the offer because the offer would have allowed only 57 days in which to accept.

Simply put, to effectively trigger the sixty-day timeframe in the prejudgment interest statute, Smith should not have conditioned his settlement offer being open for sixty days from the date of his letter. But he did. Accordingly, because Smith's settlement offer could not have been left open for sixty days, the trial court erred in awarding Smith prejudgment interest under the prejudgment interest statute. Boehm, supra.

3. The trial court applied section 408.040.2 to deprive Shaw of his constitutionally protected due process of law rights because Shaw was given neither a hearing nor an opportunity to contest Smith's delay in prosecuting his claim.

In addition to the reasons discussed above, the trial court erred in refusing to eliminate the award of prejudgment interest in this case because the prejudgment interest statute -- as applied to this case -- deprived Shaw of his procedural due process rights to notice and a hearing.

Ordinary economic and commercial regulations are subject to rational basis scrutiny

under the due process clause of the Fourteenth Amendment of the Constitution. FCC v. Beach Comm., Inc., 508 U.S. 307, 313-314 (1993). To survive constitutional scrutiny under this standard, a statute must be rationally related to a legitimate governmental purpose. Heller v. Doe, 509 U.S. 312, 320 (1993). Procedural due process of law requires that a person facing deprivation of property must receive notice and an opportunity for a hearing appropriate to the nature of the case. Moore v. Bd. of Educ. of Fulton School, 836 S.W.2d 943, 947 (Mo. banc 1992).

The trial court's application of the prejudgment interest statute deprived Shaw of procedural due process by assessing Shaw $41,337.70 in prejudgment interest without giving him so much as a hearing regarding whether he engaged in any conduct that might merit the imposition of such an assessment.

Pursuant to section 408.040.2, the trial court assessed prejudgment interest against Shaw after finding that Smith "made a written offer to settle this claim for $25,000.00 on July 14, 2000," that Smith's offer was open for sixty days, and that "[n]o settlement was reached or finalized within such sixty (60) day period." [L.F.24; App. 2]. Of course, the trial court made no finding regarding whether Smith ever gave Shaw sufficient documentation to support his claim within the sixty-day period that Smith's offer to settle was left open. Nor did the trial court make any finding as to how much delay occurred in

the prosecution of Smith's case and who was responsible for creating such delay.

Clearly, Smith cannot legitimately argue that he did not delay in pursuing his claim against Shaw. After all, he waited almost eight months after he sent his settlement offer before deciding to file suit. Moreover, Smith intentionally waited until the sixty-first day after he sent his settlement offer to produce medical records and other information. This evidence undeniably supports the conclusion that there was a deliberate, profitable delay on Smith's part. Meanwhile, Shaw was left without recourse and never had an opportunity to contest Smith's delay at any point during the litigation.

By not giving a defendant the opportunity to contest a plaintiff's delay tactics -- which is precisely what happened here -- the prejudgment interest statute is arbitrary and capricious such that it effectively denies a defendant of his property without the defendant being afforded due process. This is especially true when the statute is taken to its extreme. For example, a plaintiff can send a settlement offer with absolutely no documentation supporting his claim and then wait until the day before the statute of limitations runs to file his tort suit. If it then takes another two years for plaintiff's case to be tried to a verdict, and the verdict exceeds plaintiff's settlement offer, the defendant is automatically assessed several years' worth of prejudgment interest as a result of delay that had nothing to do with

his own conduct and over which he had no control.[7]

The net effect of all the above is to create a presumption of fault on the part of a defendant, to attribute delay to that defendant, and then to deprive that de

fendant of his property without even considering the plaintiff's own fault or giving the defendant a chance to contest his fault through a hearing. Such a result is simply inconsistent with due process.

In this case, the trial court's application of section 408.040.2 unconstitutionally failed to take into account Smith's delay in prosecuting the case and Shaw's overall effort to settle the case. As a result, Shaw was deprived of his constitutionally guaranteed right to procedural due process of law.

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[7] This hypothetical lends further support to the argument that the plain terms of the prejudgment interest statute require that a settlement offer be made in a tort action.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's rulings on Shaw's Motion for Credit Against Verdict and Motion to Amend Judgment, and it should remand the case to the trial court with instructions that the Judgment Entry of September 17, 2003 be vacated and replaced by a new judgment entered in favor of Respondent for $150,000.00 in actual damages, plus plaintiff's costs.

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CERTIFICATE OF SERVICE

I hereby certify that one copy of this brief in the form specified by Rule 84.06(a) and one copy in the form specified by Rule 84.06(g) have been mailed this _____ day of October, 2004, to:

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RULE 84.06(c) CERTIFICATE

Pursuant to Mo.R.Civ.P. 84.06(c), counsel for Appellant certifies that this brief complies with the limitations in Rule 84.06(b) and that the brief contains 6,436 words. In addition, counsel for Appellant certifies that the disk containing Appellant's Brief has been scanned for viruses and is virus-free.

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APPENDIX

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