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Damages

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DAMAGES

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IMPROPER ELEMENT OF DAMAGES SUBMITTED TO JURY

Brown v. Finger[1] involved the method by which verdicts resting in part on an improper element of damage are corrected. The plaintiff had instituted a suit for loss of consortium, and the jury was allowed to consider loss of wages which was improper.

The trial court, on motion for judgment n.o.v., granted a new trial *nisi* contingent on the plaintiff remitting what the trial court apparently computed as the maximum possible portion of the verdict attributable to loss of earnings by the wife. As, under the instructions to the jury, the loss of future earnings could have been considered by the jury, such a verdict could not be cured by a new trial *nisi*. The proper method for correcting such a verdict in that instance is to grant a new trial absolute. It has been well settled that where an improper element of damages has been submitted to a jury, its verdict cannot be cured by remission of an amount representing the erroneous item where the record does not show the amount of the improper item.

This case also lays at rest any doubts as to whether or not earnings of a wife may be recovered by the husband in a suit seeking loss of consortium. The loss of a wife's wages are not recoverable. The wife is entitled to sue for such a loss and thus the husband is precluded.

APPORTIONMENT OF DAMAGES

In *Shearer v. DeShon*[2] one defendant requested a charge to the effect that if the jury should find both defendants liable to the plaintiff, it could determine the amount of actual damages and apportion that amount between the defendants. The jury returned a verdict of $11,000.00 apportioned at $10,000.00 to one defendant and $1,000.00 as to the other. The defendant, DeShon, who requested the apportionment, and against whom the $10,000.00 verdict was returned, complained that the apportionment was not consistent with the relative culpability of the defendant. The court held that the requested instruction imposed no duty on

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1. 240 S.C. 102, 124 S.E.2d 781 (1962).
2. 240 S.C. 472, 126 S.E.2d 514 (1962).

the jury to apportion according to the relative culpability of the defendants; therefore DeShon could not complain of the apportionment.

PUNITIVE DAMAGES

In *South Carolina Nat'l Bank v. Florence Sporting Goods, Inc.*[3] the plaintiff brought claim and delivery proceedings against the defendant. The chattel mortgage held by the plaintiff covered nineteen boat-trailers, one of which was described as bearing serial number 18163. In the affidavit in claim and delivery one boat-trailer was described as bearing serial number 19114. There was no conflict in regards to the remaining eighteen boat-trailers. The conflict arose in connection with the taking by the sheriff of the boat-trailer with serial number 19114. The defendant counterclaimed in the action for the wrongful taking of this boat-trailer, which the defendant asserted belonged to him. The defendant also sought, and recovered, punitive damages for this taking.

The trial court, after a jury verdict for the defendant for actual and punitive damages, gave judgment n.o.v. for the plaintiff as to the punitive damages.

The Supreme Court found that the record showed no evidence to indicate willfulness on the part of the plaintiff in the taking of this boat-trailer. The plaintiff had substituted on its books prior to the bringing of the claim and delivery proceedings, the serial number 19114 for the boat-trailer bearing serial number 18163. The Supreme Court went further, however, noting that even if the trial judge were in error in holding that there was no evidence to indicate willfulness on the part of the plaintiff, that Section 10-2516 of the 1952 Code would preclude a recovery by the defendant of punitive damages. This section will not allow the recovery of punitive damages where the plaintiff posted the bond required by Section 10-2505 of the 1952 Code for any acts occurring after posting the bond. Since the only act complained of by the defendant which occurred prior to the filing of the bond was the substitution of the numbers on the bank's records and which the court held invaded no right of the defendant, he sustained no damage.

This additional ground adds little to the decision, however, since if the trial court erred in finding no willfulness on the part of the plaintiff, the posting of a bond would not preclude

3. 241 S.C. 110, 127 S.E.2d 199 (1962)

a finding of punitive damages. For if the trial court had erred and there was evidence to indicate willfulness, the act complained of would have occurred prior to the posting of the bond. Consequently, the bond would have no effect on punitive damages.

It was interesting to note the method in which the court arrived at a finding that a bond had been posted. The record was silent on this point, and the court presumed that the sheriff had required the bond prior to seizing the goods in claim and delivery.

MEASURE OF DAMAGES

Our Supreme Court has held that the obligations of a person assuming a mortgage upon purchasing real property is not one of indemnity. That question arose in *Jones v. Bates*.[4] The plaintiff had conveyed certain real property to the defendant, the consideration being $400.00 and the assumption of a note and mortgage, which at the time, had an unpaid balance of $8,059.95. The defendant in turn conveyed to a third party. Upon default by this third party foreclosure proceedings were instituted. As the Veterans Administration had guaranteed this loan, they eventually were called upon to pay the differential between the amount of the note and mortgage and what the property brought at public sale. The Veterans Administration in turn called upon the plaintiff to pay the deficiency. The plaintiff then entered into an agreement with the Veterans Administration whereby the plaintiff began making installment payments at the rate of five dollars per month.

The present action was instituted by the plaintiff to recover from the defendant the entire deficiency. The court found the plaintiff entitled to that amount which would place him in the same position as if the contract had been fulfilled. It, therefore, followed that the fact that the plaintiff had not paid the Veterans Administration the full amount was of no importance. As the defendant's obligation was not to indemnify the plaintiff, but to fulfill the contract, the defendant must pay that amount that would satisfy the note and mortgage.

DAMAGES RECOVERABLE AGAINST INJUNCTION BOND

In *Hyler v. Wheeler*[5] the defendant, after a successful decision in the principal case, brought the present proceedings to

4. 241 S.C. 189, 127 S.E.2d 618 (1962).
5. 240 S.C. 386, 126 S.E.2d 173 (1962).

ascertain the damages recoverable by reason of the plaintiff's enjoining ejectment proceedings.

The present defendant had previously obtained an order ejecting the present plaintiff from a dwelling where the plaintiff lived. The plaintiff then sought and obtained a temporary injunction enjoining her ejectment. She posted a $5,000.00 bond pursuant to this injunction. The defendant then moved to have the damages which she sustained as a result of the injunction assessed. The master found, and it was affirmed by the circuit court, that the defendant was entitled to damages due to the issuance of the injunction in an amount exceeding the $5,000.00 bond, although the liability of the sureties was limited to the amount of the bond together with the costs pursuant to the proceedings to determine the damages.

The Supreme Court upheld this finding, and the criteria for assessing the loss of use of the property which was that of the reasonable rental value.[6] The allowance of costs in excess of the bond was also affirmed by the Supreme Court. It should be noted that only those costs incurred in ascertaining the damages recoverable were allowed in excess of the bond.[7]

The court also held that any damages incurred during the period from the dissolving of the injunction until the premises were actually vacated were recoverable on the bond. The court stated that as the bond was effective to take possession of the property, it certainly was effective to guarantee its return: consequently the injunction bond protected Mr. Wheeler not only while the injunction was in force but also for a reasonable length of time thereafter until possession could be obtained. This, it was held, was not an extension of the liability on the bond by the sureties as the damages sustained during this period proximately flowed from the issuance of the injunction.

This result seems unduly harsh as to the sureties. At the time the bond was posted, Mrs. Hyler was in possession with the sheriff preparing to eject her under court order. It will be noted that this was the identical situation when the injunction was dissolved. Therefore, the court is seemingly holding the sureties responsible for the sheriff's not immediately ejecting Mrs. Hyler as was his duty. The court justified this on the basis that the

6. Lipscomb v. South Bound R. R. Co., 65 S.C. 148, 43 S.E. 388 (1902). The record showed that the property in question had a reasonable rental value, being a residence and in fact rented.

7. CODE OF LAWS OF SOUTH CAROLINA § 10-1601 (1952); Hill v. Thomas 19 S.C. 230 (1882).

delay in Mrs. Hyler's vacating the premises proximately flowed from the issuance of the injunction.

EXCESSIVE DAMAGES

During the period under review the question of excessive damages was raised in *Doremus v. Atlantic Coastline R.R.*,[8] *Reid v. Strickland*,[9] *Gaines v. Thomas*[10] and *Norton v. Ewaskio*.[11] The court found that in no case did the record indicate an abuse of discretion by the trial court. The last case cited, *Norton v. Ewaskio*,[12] presented the interesting question as to whether or not the known lack of wealth of the defendant would show prejudice, bias and passion on the part of a jury in finding punitive damages. The court stated that there was no requirement that the defendant be a man of means before punitive damages are justified.

MISCELLANEOUS

In *Hopkins v. Fidelity Ins. Co.*[13] the plaintiff was found to have sustained mental damages. This was an action brought by a mother for alleged damages occurring due to the fraud and deceit of the defendant in procuring a release from her which she maintained barred her from recovering for the death of her child. The court held that if the release was fraudulently obtained, this would not bar an action brought by the personal representative under Section 10-1952 of the 1952 Code. On the other hand, if a cause of action for the death of the child did not exist, then it is quite obvious that the mother sustained no damages by the release even if fraudulently obtained.

In the case of *Shoreland Freezers, Inc. v. Textile Ice & Fuel Co.*,[14] the plaintiff placed certain frozen foods with the defendant, a warehouse, for storage. Damage resulted to the goods for which the plaintiff sued the defendant.

The court held that even though the defendant may have been responsible for damage to the goods, it was, none-the-less, entitled to its storage charges. The reason for such a holding was that if the defendant made the losses good to the plaintiff for the

8. 242 S.C. 123, 130 S.E.2d 370 (1963).
9. 242 S.C. 166, 130 S.E.2d 416 (1963).
10. 241 S.C. 412, 128 S.E.2d 692 (1962).
11. 241 S.C. 557, 129 S.E.2d 517 (1963).
12. *Ibid.*
13. 240 S.C. 230, 125 S.E.2d 468 (1962).
14. 241. S.C. 537, 129 S.E.2d 424 (1963).

damage to the merchandise, the plaintiff was then in the position he would be in if no damage had occurred; consequently storage charges should be paid. Stated differently, if a warehouseman makes reimbursement for any damage to goods stored by him he has fulfilled his part of the contract, and entitled to storage charges.

The case of *Durant v. Palmetto Chevrolet Company*[15] is of particular interest regarding proof required to establish the value of automobiles. The question in this case, *inter alia*, was whether or not there was sufficient evidence as to the value of an automobile from which a jury could assess damages. The defendant had sold the plaintiff a new Chevrolet automobile in 1959. This car was defective, and the plaintiff subsequently traded the Chevrolet to a third party apparently as a down-payment on a Ford automobile. The defendant contended that there was no evidence tending to show the value of the Chevrolet automobile when it was disposed of by the plaintiff. The court recognized that the measure of damages in this case would be the differential in the value of the Chevrolet automobile at the time the plaintiff purchased it, and at the time he disposed of it. The court saw as the real basis for the defendant's contention the absence of opinion evidence as to the value of the Chevrolet on the day of the second sale. As there was testimony on the amount paid for the Ford, the court felt that the jurors as average men, well informed about automobiles, could calculate the amount allowed by this third party for the Chevrolet on the subsequent purchase of the Ford. Consequently, opinion evidence as to value was unnecessary.

15. 241 S.C. 508, 129 S.E.2d 323 (1963).