South Carolina Law Review

Volume 18 | Issue 1 Article 13

1966

# Damages

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## DAMAGES

### *A. Fraud and Deceit*

It is well established in South Carolina that the elements of actionable fraud are (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) his intent that it should be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.[1] Actual knowledge need not be established if the misrepresentation is made of the speaker's own knowledge with a reckless disregard as to its truth.[2] The measure of damages is the difference between the actual and the represented value, or the so-called "loss of bargain rule."[3]

In *Young v. Goodyear Service Stores*[4] the South Carolina Supreme Court affirmed a judgment of punitive damages where a vendor sold as new a second hand washing machine and failed to explain how his allegedly innocent mistake was brought about. The defendant contended that while liability for actual damages arises in an action for fraud and deceit when a false representation is recklessly made, in order for punitive damages to be imposed there must be actual knowledge. The court held, however, that the test for exemplary damages included not only intentional conduct, but also that which could be characterized as reckless, willful, or wanton as judged by the standard of the reasonably prudent man.

In a somewhat similar case the South Carolina Supreme Court held in *Corley v. Coastal States Life Ins. Co.*[5] that fraud could be inferred from an insurer's attempted settlement of a claim for a sum over 2,000 dollars less than the amount owing under a life insurance policy, and that an award of punitive damages was not error.

In South Carolina it seems clear that given facts which will support an action for fraud and deceit a fortiori a claim for punitive damages is proper, for in a sense the requirements are the same, *i.e.*, either actual knowledge and intent or reckless con-

1. Tallevast v. Herzog, 225 S.C. 563, 83 S.E.2d 204 (1954).
2. Aaron v. Hampton Motors, Inc., 240 S.C. 26, 124 S.E.2d 585 (1962).
3. Warr v. Carolina Power & Light Co., 237 S.C. 121, 115 S.E.2d 799 (1960).
4. 244 S.C. 493, 137 S.E.2d 578 (1964).
5. 244 S.C. 1, 135 S.E.2d 316 (1964).

duct. In some states however the rule of *Derry v. Peek*,[6] which excludes negligent misrepresentation from the action of fraud and deceit, is accepted.[7] Also many jurisdictions apply the "out of pocket rule" which allows the difference between the value of what was parted with and the value of what was received.[8] While this measure of damages is consistent with the tort forms of action and is fair when the defendant's conduct was merely negligent, in many cases where the wrongdoer acted intentionally or recklessly he could escape liability, *i.e.*, where the value received was worth the price paid. Dean Wigmore[9] has suggested that the proper measure of damages would be achieved by use of the "out of pocket formula" for negligent conduct, and the "loss of bargain rule" for willful or reckless misrepresentations. The idea in the former is to restore the plaintiff to his original position, while in the latter situation he will be given the value of the expected bargain. Wigmore admits however that since most states allow punitive damages for willful or reckless fraud, the cheater will probably be amply punished under either rule. It should be noted that in most states Wigmore's suggestion is achieved, in substance if not in form, for with negligent misrepresentation an action for rescission and restitution will lie, and there the "out of pocket rule" is applied.[10]

*B. Excessive Damages*

The rule as to excessive damages in South Carolina is that the South Carolina Supreme Court will not set aside a verdict merely because the amount indicates undue liberality on the part of the jury. That power, exercised either by setting the verdict aside or by granting a new trial nisi, rests solely with the trial judge. It is only when the verdict is so grossly excessive as to indicate that the jury was moved by passion or prejudice, or rather is such that it shocks the conscience of the court will it be set aside on appeal.[11]

In *Watson v. Wilkinson Trucking Co.*[12] the South Carolina Supreme Court affirmed an award of 40,000 dollars where the

6. 14 App. Cas. 337, (1889).
7. PROSSER, TORTS § 102, at 720 (3rd. ed. 1964).
8. *Id.* § 105, at 750.
9. MCCORMICK, DAMAGES § 121 (1935).
10. See generally PROSSER, TORTS § 105 (3rd ed. 1964).
11. Nelson v. Charleston & W. C. Ry., 226 S.C. 516, 86 S.E.2d 56 (1955).
12. 244 S.C. 217, 136 S.E.2d 286 (1964).

plaintiff had received a severe aggravating injury to his back which had been permanently damaged some fourteen years before. The court found that while the pre-existing injury was severe, the plaintiff had made a normal adjustment to it; but because of the negligence of the defendant, he now had a ruptured disc which would be of a permanently disabling nature. The court held that the plaintiff was entitled to all proximate damages, including those resulting from aggravation of a pre-existing condition,[13] and that while the award was substantial, it bore a reasonable relationship to the character of the injury.

A verdict of 25,000 dollars was sustained in *Oliver v. Blakeney*[14] for a whip lash injury. The plaintiff was a young woman with a calculated life expectancy of 50.37 years. Before the accident she was regularly employed at a weekly salary of forty-six dollars, but following it she had a total loss of wages for eight months and could work only part time. The medical testimony was to the effect that her injuries were of a permanent nature.

*C. Additur*

In *Hatchell v. McCracken*[15] the South Carolina Supreme Court held that in an action for unliquidated damages, an increase in the jury award by the trial judge constituted reversible error where the plaintiff was not given the option of a new trial. The court relied primarily upon the case of *Dimick v. Schiedt*[16] in which Mr. Justice Sutherland said that to allow additur would violate the seventh amendment's guarantee of a jury trial in civil cases. He reasoned that there is a distinction to be made between excessive and inadequate judgments. In the former case remittur merely removes an excess and that the remainder can be said to have been found by the jury. But in the latter situation the increase can in no regard be said to have been included in the verdict. He concluded that to deny the plaintiff a new trial merely by reason of the consent of the defendant to an increase would deny the plaintiff's constitutional right to the verdict of a jury.

Generally it can be said that the cases outside the federal courts[17] are widely split on this issue with the weight of au-

13. 15 AM. JUR. *Damages* §§ 80-81 (1938).
14. 244 S.C. 565, 137 S.E.2d 772 (1964).
15. 243 S.C. 45, 132 S.E.2d 7 (1963).
16. 293 U.S. 474 (1935).
17. The seventh amendment is not as yet made obligatory on the states. See, *e.g.*, Spiers v. Illinois, 123 U.S. 131 (1887).

thority favoring the view taken in the present case.[18] However, the distinction made in the *Dimick* case is somewhat strained. If remittur is allowed without the consent of the defendant, it seems somewhat illogical not to allow additur without the consent of the plaintiff. In both situations the aggrieved party has a recourse. In the former situation the defendant may appeal on the ground that the verdict is still excessive, and conversely in the latter the plaintiff may appeal from what he still considers an inadequate verdict.[19]

*D. Eminent Domain*

Generally when land is taken for public use, the landowner is entitled to compensation not only for the land taken, but also for the damage to his remaining land. The right to recover for the damage to his remaining land is not based upon the theory that this is a taking; and the damage need not be peculiar and special. The entire parcel is considered as a whole and the jury must decide how much the taking of a portion has decreased the value of the whole.[20] With this general rule in mind, the only South Carolina case on property taken by eminent domain which was reviewed by the South Carolina Supreme Court during this survey period may be considered.

*South Carolina State Highway Dep't v. Bolt*[21] involved a condemnation proceeding brought by the respondent state highway department to acquire a right-of-way for the construction of a controlled-access highway across the property of appellant James W. Bolt. The jury assessed the damages at 13,900 dollars. The landowner appealed primarily claiming that error was committed in not allowing the jury to consider as an element of damage loss of business and the cost of the construction of new buildings to replace those allegedly rendered worthless by the acquisition of the right-of-way. Bolt operated a commercial egg business on the land not taken and at the trial he introduced testimony to show that the close proximity of the new highway would so adversely affect the productivity of the chickens as to completely destroy his commercial egg business. His request that the jury

18. See generally 5 AM. JUR. 2d *Appeal and Error* § 946 (1962); Annot., 95 A.L.R. 1163 (1935); Annot., 16 A.L.R.2d 399 (1951); Annot., 17 A.L.R.2d 872 (1951); 50 C.J.S. *Juries* § 128, at 855 (1947); 66 C.J.S. *New Trial* § 207, at 512 (1947).

19. See Genzel v. Halvorson, 248 Minn. 527, 80 N.W.2d 854 (1957).

20. 18 AM. JUR. *Eminent Domain* § 265 (1938).

21. 242 S.C. 411, 131 S.E.2d 264 (1963).

be instructed to consider loss of business as an element of damage was refused and the supreme court of this state upheld the decision of the lower court: "[It] is the general rule that injury to or loss of business . . . is not considered as an element of damage in eminent domain proceedings in the absence of a statute expressly allowing such damages."[22] But it was held proper for the jury to consider such loss as it affected the market value of the remaining property.

*E. Computing Damages*

An interesting decision, though not novel for this state, was handed down in *Edwards v. Lawton*[23] in which an appeal was taken from a verdict for the plaintiff on the grounds that plaintiff's counsel was allowed over defendant's objection to show that the per diem formula was a good method of computing plaintiff's pain and suffering. The South Carolina Supreme Court affirmed, holding that to allow the use of the per diem formula for illustrative purposes, where the attorney was careful to point out that only the jury could place a monetary value on pain and suffering, was not error.

In *Roberts v. Lawrence*[24] the South Carolina Supreme Court held that although a highway contractor's bond which made the surety liable for reasonable attorneys' fees incurred in collecting on the bond in case of default named only the highway department or obligee, materialmen and laborers bringing a direct action were also entitled to such costs.

In early 1964 *Laird v. Nationwide Ins. Co.*[25] presented a novel question for our court concerning whether or not punitive damages were included under the Uninsured Motorists Act.[26] The South Carolina Supreme Court construed the statute as allowing recovery for only those damages which were *actual.* The impact of this decision was thwarted by the passage of an amendment to section 46-750.11 which added punitive damages to the amount of recovery under the act.[27]

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22. *Id.* at 418, 131 S.E.2d at 267.
23. 244 S.C. 276, 136 S.E.2d 708 (1964).
24. 243 S.C. 158, 133 S.E.2d 74 (1963). The present case was distinguished from Standard Oil Co. v. Powell Paving & Contracting Co., 139 S.C. 411, 138 S.E. 184 (1927).
25. 243 S.C. 388, 134 S.E.2d 206 (1964).
26. S.C. CODE ANN. §§ 46-701 to -750 (1962).
27. S.C. CODE ANN. § 46-750.31 (4) (Supp. 1964).