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Damages

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DAMAGES

I. WRONGFUL DEATH

The South Carolina Supreme Court has often stated that the damages recoverable for statutory wrongful death¹ include "loss of companionship, and deprivation of the use and comfort of the intestate's society."² Damages for personal injury short of death, however, have traditionally been more restricted. The common law rule provided the husband a right of action for loss of consortium with his wife but did not provide the wife with a similar right.³ Section 10-2593 of the 1962 South Carolina Code,⁴ as enacted June 25, 1969, remedied this inequity by giving a statutory right to either spouse to maintain an action for damages "arising from an intentional or tortious violation of the right to the companionship, aid, society and services of his or her spouse." Thus the question posed in *Green v. Southern Railway Co.*⁵ was whether a widow could bring an action for loss of consortium under this statute independent of the Wrongful Death Act. The United States District Court for South Carolina held that recovery under the Wrongful Death Act was the widow's exclusive remedy, thereby limiting the applicability of code section 10-2593:

The obvious purpose of this statute is to extend to the wife the right to recover for loss of companionship, et cetera, of her husband which right existed in favor of the husband only under common law. There is no indication in the statute of an intent to go

1. S.C. CODE ANN. § 10-1951 (1962) provides:

Whenever the death of a person shall be caused by the wrongful act, neglect or default of another . . . the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured . . .

S.C. CODE ANN. § 10-1952 (1962) provides:

Every such action shall be for the benefit of the wife or husband and child or children of the person whose death shall have been so caused . . .

S.C. CODE ANN. § 10-1954 (1962) provides:

In every such action the jury may give such damages . . . as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought. . .

2. *Gomillion v. Forsythe*, 218 S.C. 211, 225, 62 S.E.2d 297, 303 (1950); *see, e.g., Brooks v. United States*, 273 F. Supp. 619, 626 (D.S.C. 1967); *Hardy v. United States*, 187 F. Supp. 756, 762 (D.S.C. 1960).

3. C. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* § 92 (1935). Until 1969 South Carolina followed this common law rule. *Page v. Winter*, 240 S.C. 516, 126 S.E.2d 570 (1962). *See also* 9 S.C.L.Q. 491 (1957).

4. S.C. Code Ann. § 10-2593 (Supp. 1970).

5. 319 F. Supp. 919 (D.S.C. 1970).

further than the common law and allow each spouse a right to recover for the wrongful death of the other spouse under this statute as well as under the Wrongful Death Act. Especially is this true since a complete remedy for the wrongful death already exists by virtue of the Wrongful Death Act.⁶

II. PUNITIVE DAMAGES

In *Gilbert v. Duke Power Co.*⁷ the South Carolina Supreme Court rejuvenated two aging decisions⁸ which permitted the admission of certain evidence in mitigation of punitive damages. From the *Gilbert* opinion, the deducible facts are that Gilbert's mother tendered payment of his power bill to the appellant, Duke Power Company. Because of a mistake of fact, Duke Power refused to accept payment and on the same day discontinued electrical service to Gilbert's house. Gilbert brought an action for wrongful termination of his electrical service and the jury returned a verdict in his favor for an unspecified amount of actual and punitive damages. The supreme court reversed and remanded, finding error in the trial court's refusal to permit the appellant's attorney to cross examine the respondent in regard to seven other occasions when his electrical service had been terminated as a result of non-payment. Thus the court held that "the proffered testimony was relevant on the question of willfulness and could be properly considered in the assessment of punitive damages."⁹

The significance of *Mastropole v. Transit Homes, Inc.*¹⁰ lies primarily in the disproportionate relationship of actual damages awarded to punitive damages awarded.¹¹ In this case, the plaintiffs, owners of a mobile home, sued the defendant, a common carrier, for damages to their home resulting from negligent inspection and transportation. The jury returned a verdict in favor of the Mastropoles for \$5,103.00 actual damages and \$45,000.00 punitive damages. The supreme court refused

6. *Id.* at 920.

7. 255 S.C. 495, 179 S.E.2d 720 (1971).

8. *Westbrook v. Jefferies*, 173 S.C. 178, 175 S.E. 433 (1934); *Gwynn v. Citizens' Telephone Co.*, 69 S.C. 434, 48 S.E. 460 (1904).

9. 255 S.C. at 502, 179 S.E.2d at 724.

10. 254 S.C. 332, 175 S.E.2d 465 (1970).

11. It should be noted that there is no definite mathematical rule as to the proportion which punitive damages should bear to actual damages. *Hicks v. Herring*, 246 S.C. 429, 436, 144 S.E.2d 151, 154 (1965). However, it is generally held that punitive damages must bear some reasonable relation to the injury inflicted and the cause thereof. 22 AM. JUR. 2d *Damages* § 266 (1965).

to consider the excessiveness of the verdict for punitive damages because of the failure of appellant's counsel to argue the issue in his brief. The court further spurned review of the actions of the trial judge in submitting the issue of punitive damages to the jury and in refusing to grant judgment *non obstante veredicto* as to punitive damages because of the failure of appellant's counsel to make timely motions during the trial for withdrawal or for a directed verdict.

III. FRAUD AND DECEIT

In *Carter v. Boyd Construction Co.*,¹² the plaintiff, Carter, a subcontractor for Boyd, sustained a finger injury while on the job and filed a claim against St. Paul Fire and Marine Insurance Co., Boyd's Workmen's Compensation carrier. St. Paul denied liability on the grounds that Carter was a subcontractor rather than an hourly employee. Actually Carter was at one time an hourly wage employee of Boyd, but his status was subsequently changed to that of a subcontractor. Premiums for Workmen's Compensation insurance, however, continued to be regularly deducted from Carter's pay by Boyd and then paid to St. Paul. Some time after this change of status, Carter questioned whether or not he was fully protected by Workmen's Compensation benefits, but was assured by Boyd that he was protected. Boyd then contacted the State Agent for St. Paul concerning the same question and was assured in writing that as long as St. Paul was collecting a premium for Carter, he would be considered an employee. Upon denial of liability by St. Paul, Carter sued both Boyd and St. Paul for actual and punitive damages for fraud and deceit and, in the course of the trial, the court granted a non-suit as to Boyd and the jury returned a verdict for \$3,000.00 actual damages against St. Paul. The South Carolina Supreme Court reversed and remanded in an elucidative opinion discussing in part what it "deem[ed] to be the correct principles of law applicable to damages in the instant case."¹³ Apparently South Carolina follows the general rule that restricts recovery for fraud to such damages which are the natural and proximate consequences of the fraud.¹⁴ Thus, as to actual damages, the court concluded that:

Certainly Carter's injury and lost time, doctor's bills, permanent injury, etc. did not result directly, naturally or proximately from

12. 255 S.C. 274, 178 S.E.2d 536 (1971).

13. *Id.* at 282, 178 S.E.2d at 540.

14. *Thomas v. American Workmen*, 197 S.C. 178, 183, 14 S.E.2d 886, 888 (1941).

any fraud on the part of St. Paul. Should the jury conclude from the evidence that but for fraud on the part of St. Paul the employment status of Carter would have been changed so that he would have been entitled to Workmen's Compensation benefits at the time of his injury, then it would seem to logically follow that the measure of actual damages would be the amount of benefits which he would have been entitled to on his Workmen's Compensation claim.¹⁵

In regard to punitive damages for fraud and deceit, the court did not discount the possibility that they might be warranted on retrial, but cautioned that the tortfeasor must have known the representation to have been false or have made the representation in such a reckless manner as to be charged with consciousness of his wrongdoing.¹⁶

IV. PERSONAL INJURY

A. *Amendment to Elements of Damage*

Section 10-692 of the 1962 Code of Laws of South Carolina¹⁷ has repeatedly been liberally construed in favor of amendments to pleadings.¹⁸ In fact, recent cases have stated that "the court's power of amendment to pleadings is so large that its exercise will rarely be disturbed."¹⁹ Thus the decision in *Anders v. Nash*²⁰ affirming allowance by the trial judge of amendment to the elements of damage is not surprising. In that case the plaintiff, a pedestrian, was struck by an auto driven by the defendant, Nash. After the jury was drawn, counsel for the plaintiff moved to amend the complaint²¹ in order to specifically

15. 255 S.C. at 282-83, 178 S.E.2d at 540.

16. *Id.*

17. S.C. CODE ANN. § 10-692 (1962) provides:

The court may, before or after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading, process or proceeding by . . . (c) inserting other allegations material to the case . . .

18. See, e.g., *Lipscomb v. Poole*, 247 S.C. 425, 147 S.E.2d 692 (1966); *Bank for Sav. & Trusts v. Towe*, 231 S.C. 268, 98 S.E.2d 539 (1957).

19. *Kirven v. Lawrence*, 244 S.C. 572, 578, 137 S.E.2d 764, 766 (1964); *accord*, *Lipscomb v. Poole*, 247 S.C. 425, 147 S.E.2d 692 (1966); *Hicks v. Giles*, 241 S.C. 129, 127 S.E.2d 196 (1962).

20. 180 S.E.2d 878 (S.C. 1971).

21. The pertinent portions of the plaintiff's original complaint were:

3. As a result of being struck by the automobile, the plaintiff was hospitalized for an extensive period of time and was treated by several physicians. Among others her injuries consisted of a fracture of the pelvis, fracture and dislocation of the right shoulder, cerebral concussion and multiple bruises and abrasions. One or more of these injuries have rendered the plaintiff

allege mental anguish, embarrassment, humiliation, and disfigurement as elements of damage. Over objection by the defendant, the trial judge granted the motion as to mental anguish and disfigurement, but refused the motion as to embarrassment and humiliation. On appeal the defendants contested the amendment as to disfigurement, contending that it caught them by surprise, thereby prejudicially depriving them of an opportunity to properly meet the matter. The supreme court found no abuse of discretion since “[t]he allegations of the complaint with respect to damages were very broad and . . . might properly be construed as embracing recovery for disfigurement.”²² The court further stated:

[A]t the most, the effect of the amendment was to include an additional element of damage resulting from the wrongful acts originally set forth in the complaint. The medical testimony upon which plaintiff relied was introduced in evidence through depositions taken before trial, at which counsel representing defendants cross examined the doctors. This medical testimony constituted a full disclosure of the physical condition of Mrs. Anders, and we find no basis upon which to hold that the amendment operated as a surprise or resulted in legal prejudice to defendants.²³

B. *Computation of Compensatory Damages*

Harris v. Marion Concrete Co.,²⁴ concerned personal injury actions arising out of an automobile collision. In its opinion the United States District Court presented a concise summary of the elements of compensatory damages:

Under the law of South Carolina one who negligently injures another party is liable for compensatory damages in proportion to the character and extent of the injury. In determining the amount of compensation for personal injuries, it is proper to consider the physical and mental pain and suffering endured, the expense incurred for necessary medical treatment, the loss of time and income which results, the impairment of ability to work and earn a

permanently partially disabled in the use of her right arm *and have affected her normal and customary ability to walk and maneuver*. This has caused and will cause a substantial loss of employment, wages and other income. *The plaintiff has suffered and will suffer greatly from these injuries* (emphasis added).

22. 180 S.E.2d at 880.

23. *Id.*

24. 320 F. Supp. 16 (D.S.C. 1970).

livelihood, and the character of the injury, and the amount that would make the injured party whole as respects permanent injuries.²⁵

C. *Allegations of Damages as Evidence*

In *McGowan v. Gillenwater*,²⁶ the Fourth Circuit Court of Appeals reaffirmed its position on the presentation of pleadings to the jury:²⁷

We find the district judge did not abuse his discretion in barring from the jury the amount of damages alleged in the complaint. This was no part of the proof, and it had no role to play in the jury's consideration of the case. . . . The function of the pleadings is to notify court and counsel of the bare bones of the controversy, and rarely do they have any evidentiary value.²⁸

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25. *Id.* at 20.

26. 429 F.2d 586 (4th Cir. 1970).

27. *Williams v. Nichols*, 266 F.2d 389 (4th Cir. 1959); *accord*, *Craven v. Associated Transport, Inc.*, 40 F.R.D. 8 (D.S.C. 1966).

28. 429 F.2d at 586.