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Damages

Thomas C. Salane

DAMAGES

I. VALUATION

A. *Certainty*

The South Carolina Supreme Court has long held that in certain tort actions, nominal damages may be recovered from the mere invasion of a party's rights without a demonstration of actual damages.[1] However, in a tort action based on negligence, it is fundamental that the person pleading negligence show by competent evidence that he has been injured by the negligence and that the negligence was the proximate cause of the injury.[2] Although mathematical certainty is not required in the proof of actual damages, neither the existence, causation, nor amount of damages can be left to conjecture, guess, or speculation.[3] Thus the question posed in *Gray v. Southern Facilities, Inc.*[4] was whether a depreciation in the value of real estate is a proper element of damages when the evidence showed no permanent, physical injury to the property. In the principal case, appellant property owner attempted to show by expert witness that the market value and sales potential of his property had been diminished by the respondent petroleum plant's single negligent act that allowed gasoline to flow into a stream adjacent to appellant's property.[5] Appellant's claim for damages was predicated upon the psychological factor that prospective buyers would be reluctant to purchase the property for fear of similar occur-

1. Jones v. Atlantic Coast Line Ry., 108 S.C. 217, 94 S.E. 490 (1917).

2. National Loan & Exchange Bank v. Lachovitz, 131 S.C. 432, 128 S.E. 10 (1925). *See generally,* C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §22 (1935), and 38 AM.JUR. *Negligence* §28 (1941).

3. Piggy Park Enterprises, Inc. v. Schofield, 251 S.C. 385, 162 S.E.2d 705 (1968).

4. 256 S.C. 558, 183 S.E.2d 438 (1971).

5. The general rule involved in the measure and elements of damages resuling from the pollution of a stream is that a landowner may recover for depreciation of market value if the injury is permanent or irreparable. If the injury is temporary or abateable, recovery is limited to the depreciation in rental or usable value of the property during the period of the pollution. Annot., 49 A.L.R.2d 253 (1956). South Carolina follows this general rule. Threatt v. Brewer Mining Co., 49 S.C. 95, 26 S.E. 970 (1897); Williams v. Haile Gold Mining Co., 85 S.C. 1, 66 S.E. 117 (1910).

rences in the future.[6] Under the circumstances of this case, the court concluded that it was unnecessary to decide whether, or under what circumstances, an injury to the reputation of real property might be a proper element of damages. The court noted that the evidence showed four petroleum plants, including that of the respondent's, operating upstream from the appellant's property but that no evidence was presented tending to connect the respondent rather than the other petroleum plants as the source of the alleged damage to appellant's property. In its holding, the court concluded:

> The evidence as to the diminution of market value is, in our view, speculative, not only as to the amount but speculative as to the portion thereof proximately and directly resulting from the one delict on the part of the respondents complained of and proved. Accordingly, such evidence was of no real probative value in ascertaining the amount of any actual damage to the market value of appellant's property resulting from respondent's single wrongful act.[7]

B. Salvage Rule

The valued policy statute,[8] requiring parties to a fire insurance contract to agree on and to include within the contract's terms the value of the insured building, was designed to eliminate future controversies between the parties in assessing the extent of loss recoverable should the building be damaged by fire. Prior to 1932, the South Carolina Supreme Court had applied various rules under the terms of the statute to measure the recoverable damage resulting from a partial loss

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6. In the instant case the petroleum spillage was ignited by causes unknown but no actual or physical damage resulted to appellant's home or property from the fire.

7. 256 S.C. at 571, 183 S.E.2d at 444.

8. S.C. CODE ANN. § 37-154 (1962). Prior to 1947, Section 37-154 provided in part:

> [I]n case of total loss by fire, the insured shall be entitled to recover the full amount of insurance *and a proportionate amount in case of partial loss* (Emphasis added).

Act No. 232, Acts of 1947, amended the valued policy statute to read, in its present form:

> [I]n case of total loss by fire, the insured shall be entitled to recover the full amount of insurance, *and in case of a partial loss the insured shall be entitled to recover the actual amount of the loss,* but in no event more than the amount of the insurance stated in the contract (Emphasis added).

by fire.[9] However, based on Section 37-154 as it existed prior to 1947, the court had determined that in all cases, the proper measure of damages should be in accordance with the "salvage rule."[10] Under this rule the amount of recovery was determined by subtracting the salvage value of the damaged building from the agreed value of the building as set forth in the policy, limited by the amount of insurance bought. The facts of *Division of General Services v. Ulmer*[11] revealed that a school building, partially destroyed by fire, had a stated policy value of $360,000, an actual value of $233,800, and was insured for $250,000. The salvage value of the portion of the building left after the fire was $85,000. In a declaratory judgment the lower court applied the salvage rule and determined the benefits recoverable amounted to $250,000. Division of General Services, the insurer, contended that the result of the 1947 amendment to Section 37-154 was to adopt the common law rule of recovery—i.e., the extent of damages recoverable is to be measured by the actual amount of loss sustained based on the cost of repairs. Use of the common law rule would result in a recovery by respondent school board of between $148,000 and $168,000.[12] Thus the question confronting the court was the effect of the 1947 amendment to the valued policy statute on the proper measure of damages to be applied in the collection of benefits growing out of a fire insurance policy. In redefining the measure of recovery under code section 37-154, the court concluded:

> The effect of the amendment was to abolish the salvage rule. The legislature has amended the law so as to provide recovery for the

9. The common law rule of recovery is measured by the actual amount of loss sustained based on the cost to repair. Columbia Real Estate & Trust Co. v. Royal Exchange Assurance, 132 S.C. 427, 128 S.E. 865 (1925); Parnell v. Orient Ins. Co., 126 S.C. 198, 119 S.E. 191 (1923). The percentage rule, based on maritime law, measures recovery by the portion of the agreed value that the amount of the insured's loss bears to the stated value of the property before the loss. Ford v. George Washington Fire Ins. Co., 139 S.C. 212, 137 S.E. 678 (1927).

10. Bruner v. Automobile Ins. Co. of Hartford, 165 S.C. 421, 164 S.E. 134 (1932). *See also,* Fowler v. Merchants' Fire Assurance Corp., 172 S.C. 66, 172 S.E. 781 (1934) and Aiken v. Home Ins. Co., 137 S.C. 248, 134 S.E. 870 (1926).

11. 256 S.C. 523, 183 S.E.2d 315 (1971).

12. The $20,000 differential in the estimated repair costs resulted from a question of whether the estimate should include modifications in compliance with recent changes in the building code.

"actual amount of the loss." Such is plain on its face and the words must be given their plain meaning.[13]

C. Collateral Source Rule

In *New Foundation Baptist Church v. Davis*[14] the South Carolina Supreme Court reaffirmed the use of the collateral source rule which holds that "total or partial compensation for injury which an injured party receives from a collateral source, wholly independent of the wrongdoer, does not operate to lessen the damages recoverable from the wrongdoer."[15] In the principal case, respondent New Foundation Baptist Church brought suit against appellant contractor for damages sustained when the floor of an addition to the sanctuary collapsed allegedly as a result of negligent construction. Respondent sought both actual and punitive damages but the jury returned a verdict for actual damages only. Asserting that the verdict was excessive, appellant contended that the actual damage should be measured by the actual cost of the repairs made ($3000), rather than the estimated cost of repairs which included the profits of the contractor ($4746). The actual repairs had been made by a contractor who was a member and trustee of the respondent church and who waived any profit he might receive from the repairs by donating his time and services. Having already applied the collateral source rule in a variety of factual situations,[16] the court found little difficulty in extending the rule to cover situations in which repairs are made without charge to the injured party by a third person.[17] The court concluded that "[t]he facts of this case are clearly one for the application of that rule. . . ."[18]

13. 256 S.C. at 533-34, 183 S.E.2d at 319.

14. 186 S.E.2d 247 (S.C. 1971).

15. *Id.* at 249. *See also,* 22 AM. JUR.2d *Damages* §206 (1965).

16. Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969) (continued military pay and Veteran Administration benefits); Powers v. Temple, 250 S.C. 149, 156 S.E.2d 759 (1967) (workman's compensation); Scott v. Southern Ry., 231 S.C. 28, 97 S.E.2d 73 (1957) (gratuitous loan of automobile); Joiner v. Fort, 226 S.C. 249, 84 S.E.2d 719 (1954) and Jeffords v. Florence County, 165 S.C. 15, 162 S.E. 574 (1932) (receipt of accident insurance benefits).

17. *Accord,* Ostmo v. Tennyson, 70 N.D. 558, 296 N.W. 541 (1941).

18. 186 S.E.2d at 249.

II. PERSONAL INJURY

A. *Future Damages*

Haltiwanger v. Barr[19] was an action for property damage and personal injuries sustained when appellant's intestate's automobile crossed three lanes and a median of a four-lane highway to collide with respondent Haltiwanger's automobile. Respondent's motion for summary judgment was granted and the issue of actual damages was submitted to the jury. Appealing the verdict of $64,000, the appellant contended that the verdict was so excessive as to show capriciousness and prejudice on the part of the jury.[20] A review of the evidence and testimony tended to reveal that respondent sustained a "residual permanent impairment" of fifteen percent to his spine; that the impairment had caused the respondent pain and suffering which might recur in the future; that corrective surgery may not alleviate the future pain and suffering; that the respondent might lose up to $26,000 in income by reason of impairment of health, and that respondent's life expectancy was 39.43 years.

In evaluating damages for future pain and suffering, the court noted that "recovery must be had for future pain and suffering . . . to the extent that these injuries are reasonably certain to result in the future from the injury complained of."[21] Despite evidence showing that respondent had received pay increases since the accident and that corrective surgery might be successful, the court affirmed the award concluding that "[t]he rule is not always easy to apply. Future damages in personal injury cases need not be proved to a mathematical certainty. Oftentimes a verdict involving future damages must be approximated. A wide latitude is allowed the jury."[22]

B. *Federal Employers' Liability Act*

Isgett v. Seaboard Coast Line Railroad Co.[23] involved an action brought by a railroad employee under the Federal

19. 186 S.E.2d 819 (S.C. 1972).

20. It should be noted that the court will not set aside a verdict because the amount indicates undue liberality on the part of the jury. The verdict must be *grossly* excessive to set it aside absolutely. Nelson v. Charleston & Western Carolina Ry., 226 S.C. 515, 86 S.E.2d 56 (1955). *See also,* C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 18 (1935).

21. 186 S.E.2d at 821.

22. *Id.*

23. 332 F.Supp. 1127 (D.S.C. 1971).

Employers' Liability Act[24] for personal injuries allegedly sustained as a result of defendant employer's negligence. Following the employee's death from injuries unrelated to the negligence, the executor of his estate was substituted under the appropriate sections of the South Carolina code.[25] As a finding of fact, the district court concluded that defendant employer, having knowledge of Isgett's diabetic condition, was negligent in failing to provide the plaintiff a safe place to work, in compelling the plaintiff to wear "safety shoes" which fostered blister injuries and diabetic ulcers on his feet, and in failing to exercise due care in certifying the plaintiff fit to return to work under such conditions. The result of defendant's negligence was a history of blister injury and gangrene that culminated in the amputation of both of plaintiff's feet.

As a conclusion of law, the United States District Court for South Carolina found that the plaintiff was entitled to damages under the Federal Employers' Liability Act. Although federal courts generally apply the state law as to damages, the court noted that because the action arose solely from the federal act, damages were to be settled according to the general principles of damages as administered in the federal courts.[26] Accordingly, the court awarded a total of $61,241.25[27] in damages to the executor of Isgett's estate. The measure of the entitlement was: (1) Hospital expenses—$3501.25; (2) Incidental and special damages including drug bills, the cost of a wheel chair and special modifications to

24. 45 U.S.C. § 51 provides in part:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

25. S.C. CODE ANN. § 10-209 (1962).

26. *See* Chesapeake & Ohio Ry. v. Kelly, 241 U.S. 485 (1916). *See also,* Note 1542, 45 U.S.C.A. § 51.

27. Due to the early demise of the plaintiff the award is considerably smaller than might be expected if the plaintiff had survived the cause of action. *Compare,* Hubbard v. Long Island R.R., 152 F.Supp. 1 (E.D.N.Y. 1957), and Dagnello v. Long Island R.R., 193 F.Supp. 552 (S.D.N.Y. 1960).

plaintiff's home and automobile, rehabilitation attempts, and attendance and supervision care—$5740.00; (3) Pain and suffering—$10,000; (4) Mental anguish—$15,000.00; (5) Loss of earnings at light work—$9,000.00; and (6) The loss of both legs and their attendant use—$18,000.00.

III. EMINENT DOMAIN

The power of eminent domain is firmly grounded in the concept of state sovereignty[28] and may be delegated by the state to its agencies and municipal corporations[29] or to private corporations acquiring land for a public use.[30] In any case, the South Carolina Constitution requires that "just compensation" be paid for any land acquired under the state's authority.[31] *Carolina Power & Light Co. v. Copeland*[32] involved a condemnation proceeding instituted by a power company under the appropriate provisions of the state code to acquire a right of way across a landowner's property for the construction of power lines.[33] The issue confronting the South Carolina Supreme Court was whether interest could be recovered by the landowner in a condemnation proceeding where the taking was by a private corporation. In the lower court, the jury returned a verdict in favor of the landowner for $38,000. The judge granted the condemnor's motion for a new trial on the ground of the excessiveness of the verdict unless the landowner agreed to reduce the verdict to $25,000. The landowner agreed and the judge, considering the question of interest, ordered that the condemnor pay interest on the ver-

28. Riley v. S.C. Hwy. Dep't., 238 S.C. 19, 118 S.E.2d 809 (1961).

29. Sease v. City of Spartanburg, 242 S.C. 520, 131 S.E.2d 683 (1963).

30. Atkinson v. Carolina Power & Light Co., 239 S.C. 150, 121 S.E.2d 743 (1961).

31. S.C. CONST. art. I, § 17 provides:

> Private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first paid therefor.

S.C. CONST. art. IX, § 20 provides:

> No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner or secured by a deposit of money, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.

32. 188 S.E.2d 188 (S.C. 1972).

33. *See* S.C. CODE ANN. §§ 24-12, 58-302, 48-779 (1962).

dict from the date the judgment on the verdict was entered, until the date the judgment was paid. Both condemnor and landowner appealed on the issue of the right to interest—the condemnor asserting that no interest should be allowed and the landowner asserting that the interest should be computed from the date of the initial taking.

The Supreme Court unanimously reversed and remanded the case on other grounds[34] but because the question of interest would be likely to arise after the new trial, the court attempted to dispose of the issue and was sharply divided.[35] The condemnor relied on a series of highway condemnation cases[36] which held that the absence of an express provision for the award of interest in the highway condemnation statutes[37] was not an oversight by the legislature and consequently should not be remedied by reading a provision for interest into the acts. Noting that no provision for interest appeared in the sections of the code authorizing condemnations by power companies,[38] Justice Littlejohn concluded that there was no authority for the allowance of interest in the principal case. Justice Brailsford and the majority of the court concluded, however, that the holdings in the highway condemnation cases were of no concern in a case where the taking was by a private corporation and that interest may be recovered on the award from the time of the judgment to the date of the payment of the award.[39] As to the question of interest from the date of the initial taking until the date of the judgment

34. The Court was also confronted with the issue of the admissibility of certain expert testimony concerning the valuation of the land taken and the special damages to the remainder. The Court unanimously reversed and remanded on the issue of the admissibility of the challenged testimony but was divided on the issue of the allowance of interest. A discussion of the evidentiary aspects of the case is included in the section on *Evidence, infra.*

35. The unusual construction of the opinion may provide a source of confusion as to the holding of the Court. Although the opinion by Justice Littlejohn, which reversed and remanded the case on the issue of the admissibility of the challenged evidence, is labeled the majority opinion, the opinion by Justice Brailsford in which he is joined by the remainder of the Court, sets out the majority's view on the question of the allowance of interest.

36. S.C. Hwy. Dep't. v. Sharpe, 242 S.C. 397, 131 S.E.2d 257 (1963); S.C. Hwy. Dep't. v. Schrimpf, 242 S.C. 357, 131 S.E.2d 44 (1963); and S.C. Hwy. Dep't. v. Southern Ry., 239 S.C. 1, 121 S.E.2d 236 (1961).

37. S.C. CODE ANN. §§ 33-135. 33-136 (1962).

38. *See* note 33, *supra.*

39. *See* Haig v. Wateree Power Co., 119 S.C. 319, 112 S.E. 55 (1922).

on the verdict, the court concluded that the right to interest depended upon he facts of each particular case and should be submitted by appropriate instructions to the jury for determination.[40]

IV. FRAUDULENT BREACH OF CONTRACT

In actions based solely upon breach of contract, the overwhelming majority of decisions deny recovery of exemplary or punitive damages.[41] However, it has long been held in South Carolina that a breach of contract committed with a fraudulent intent and accompanied by a fraudulent act will support a recovery of punitive damages.[42] Thus the question posed in *Vann v. Nationwide Ins. Co.*[43] was whether an insurance company's refusal to make payments under one portion of an automobile liability policy until the insured settled his liability claim under another section, constituted a "fraudulent act" that entitled the recovery of punitive damages. The appellant Vann, while driving an automobile insured by the respondent, was involved in a collision with an uninsured motorist. Appellant's insurance policy provided for medical benefits under one section and also included a provision entitling recovery for losses resulting from an accident involving an uninsured motorist. In the complaint, the appellant alleged that the refusal of the insurer to pay his liquidated claim for medical benefits until he submitted his claim for loss under the uninsured motorist provisions, constituted a breach of the insurance contract accompanied by a fraudulent act. The trial court granted the respondent's motion to strike all allegations of the complaint appropriate to the recovery of punitive damages. In affirming, the Supreme Court noted that to recover punitive damages, the breach of contract must be accom-

40. Justice Brailsford noted that because of varying factual situations, it would be impossible to prescribe a definite form of instruction to the jury but suggested reference to the instructions set forth in the Southern Ry. opinion, cited note 36, *supra*.

41. *See generally*, C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 81 (1935).

42. Corley v. Coastal States Life Ins. Co., 244 S.C. 1, 135 S.E.2d 316 (1964); Holland v. Spartanburg Herald-Journal Co., 166 S.C. 454, 165 S.E.2d 203 (1932); Prince v. State Mut. Life Ins. Co., 77 S.C. 187, 57 S.E. 766 (1907); Welborn v. Dixon, 70 S.C. 108, 49 S.E. 232 (1904).

43. 257 S.C. 217, 185 S.E.2d 363 (1971).

panied by a fraudulent act *independent* of the breach itself.[44] It is necessary to plead acts beyond the mere withholding of a contract obligation or benefit in order to infer a fraudulent act,[45] and under the circumstances of this case:

> [T]he refusal of the respondent to make payment of the amount due the appellant under the medical provision of the liability insurance policy unless the appellant would settle his liability claim under the uninsured motorist coverage provision was not a fraudulent act. There was no change of position of the appellant because of any alleged fraudulent act on the part of the respondent. The respondent did nothing that would prevent the appellant from seeking to recover any actual damages which he may have by reason of the alleged breach of the contract or alleged failure to pay.[46]

THOMAS C. SALANE

44. *See* Calder v. Commercial Cas. Ins. Co., 182 S.C. 240, 188 S.E. 864 (1936). Punitive damages are not recoverable for the mere failure or refusal to pay a debt. Patterson v. Capital Life & Health Ins. Co., 228 S.C. 297, 89 S.E.2d 723 (1955).

45. *Compare* Corley v. Coastal States Life Ins. Co., 244 S.C. 1, 135 S.E.2d 316 (1964).

46. 257 S.C. at 221, 185 S.E.2d at 364-65.