THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas
Sixth Circuit Court
J. Ernest Kinard, Jr., Chief Administrative Judge

Case No. 2013- 002677

T. B. Patterson, Jr., Appellant,

v.

Justo P. Carmona Ortega, Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the court of common pleas err in upholding the magistrate's refusal to award complete relief for loss of use of his vehicle to appellant?

2. Did the court of common pleas err in upholding the magistrate's refusal to award any sum for lost income to appellant?

STATEMENT OF THE CASE

Please note that the appellant is an attorney appearing *pro se* who has chosen to use the third person to discuss the issues in the case.

The parties were involved in a motor vehicle accident on September 21, 2009, in Lancaster County, South Carolina, where the appellant resided; the respondent was a resident of Chester County. The appellant filed a complaint in tort for negligence in the Magistrate's Court of Chester County, on September 10, 2012, seeking damages for the loss of use of his vehicle and for loss of income, requesting $7,500.00 plus costs; the respondent's answer was filed on October 15, 2012, alleging multiple defenses. After the respondent admitted liability, both parties waived jury trial, and respondent waived his personal appearance, the Honorable Yale Zamore, Chester County Magistrate, heard the issue of damages in a bench trial on April 12, 2013. Judge Zamore filed his judgment and final order on May 16, 2013, awarding $526.39 for the rental expense for a replacement vehicle for one week while denying any compensation for the other sixteen days of loss of use of appellant's vehicle during repairs, $100.00 for a "token award" for inconvenience, while denying entirely appellant's claim for $4,925.00 for time lost from

his work as an attorney, at $300.00 per hour, and $80.00 costs. The total award was $706.39.

Appellant filed his notice of appeal in the Magistrate Court of Chester County and in the Court of Common Pleas of Chester County on June 13, 2013; it requested that the court modify the order of the magistrate court to award appellant the compensation due for his entire loss of use, in the amount of $1,776.27, and $5,723.73 for his billable time lost (maximizing the amount to the jurisdictional limit of the magistrate court), together with his costs in the magistrate and common pleas courts, $80.00 and $150.00 respectively. Respondent served his brief on appeal on July 12, 2013; appellant served his brief on appeal on July 16, 2013; and the Honorable J. Ernest Kinard, Jr., Chief Administrative Judge of the Court of Common Pleas of Chester County heard the appeal on July 17, 2013. Judge Kinard, noting that he had read the brief of appellant, invited the respondent to state his position, and permitted the parties to argue at length. He denied any relief from the order of the magistrate.

A final order, which stated the findings of the court and denied the appellant's request for relief, was signed by Judge Kinard on September 14, 2013; it was filed by the Clerk of Court, Chester County, on September 23, 2013. Appellant served his notice of appeal of Judge Kinard's decision on December 12, 2013, after receipt of copies of the filed final judgment that were mailed to him on November 11, 2013, and November 13, 2013, and subsequently filed it and proof of service in the Court of Appeals and in the Court of Common Pleas of Chester County.

ARGUMENT

1.

THE COURT OF COMMON PLEAS ERRED IN UPHOLDING THE MAGISTRATE'S REFUSAL TO AWARD COMPLETE RELIEF FOR LOSS OF USE OF HIS VEHICLE TO APPELLANT.

The magistrate failed to award appellant the full measure of damages to which he was entitled for the loss of use of his vehicle while it was being repaired after an accident for which respondent admitted liability. He ignored the standard for proof of loss of use damages and instead awarded out-of-pocket expenses for a replacement vehicle rented for only part of the time the vehicle of appellant was not available to him. When that was argued to the court of common pleas and the correct standard noted, the judge refused to grant any relief. The magistrate court erred in failing to assess the damages for loss of use properly and the court of common pleas erred in refusing to correct that error or reverse to have that error corrected by the magistrate.

The appellant sued respondent for loss of use of his vehicle and lost income resulting from a motor vehicle accident that occurred on September 21, 2009 (complaint, September 10, 2012); the respondent admitted liability and the matter was submitted to the Honorable Yale Zamore, Magistrate, Chester County at a bench trial (magistrate's judgment, May 16, 2013, page 1). The respondent waived his appearance, but was represented by counsel (magistrate's judgment, May 16, 2013, page 1); the only witness was appellant, an attorney appearing *pro se* (magistrate's judgment, May 16, 2013, pages 2 and 3). At the conclusion of the trial, the judge took the matter under advisement

(magistrate's judgment, May 16, 2013, page 5), and issued his ruling on May 15, 2013; the written judgment was recorded on May 16, 2013.

In its judgment, the court noted that appellant testified that he was without the use of his vehicle for three weeks and two days, and entered into evidence a copy of a vehicle leasing form from Enterprise Leasing Company with a receipt showing a total billing in the amount of $526.39 for one week's use of a 2009 Chevrolet Tahoe. (Magistrate's judgment, May 16, 2013, page 3; Plaintiff's exhibit, April 12, 2013). The court noted that one day of loss of use was caused by the necessity to replace the defective window first used by the repair shop; the judgment then noted that the only out-of-pocket expense was the rental for one week of the replacement vehicle and that the remaining claim, for a total of $1,776.27 (three weeks at $526.39 plus two days at $98.55) was based upon that quoted rental expense "but that does not appear to have actually been incurred."

After a finding that "[Appellant] has demonstrated he spent $526.39 for a replacement vehicle for one week and he paid $80.00 in court costs," the judge stated that, "I find him entitled to this." (Magistrate's judgment, May 16, 2013, pages 5 and 6). The court then elaborated on the decision, stating that [Appellant] clearly sustained the loss of use while his vehicle was being repaired and that it was proximately caused by the accident, but went on to add that "the record before the court substantiates only the expense for a replacement vehicle for one week and not for the entire time for the repairs." It further stated that [Appellant] had proved "an amount equal to one-week's rental expense but nothing more," adding that, "There was no way to reliably quantify 'loss of use' as a general circumstance under these conditions." (Magistrate's judgment, May 16, 2013, page 6).

The magistrate was mistaken in his view of the standard to measure the damages for loss of use. Our Supreme Court held long ago that "As bearing on the question of the value of the use of the property of which the owner was deprived, the **rental value or expense of hiring a substitute for that of which he was deprived is a pertinent consideration**." *Coleman v. Levkoff*, 128 S.C. 487, 491, 122 S.E. 875, _______ (1924) (emphasis added). Citing that case sixty years later, this court noted that a daily rental was a proper measure of loss of use (a stipulated rental value). *Hutson v. Cummins Carolinas, Inc.*, 280 S.C. 552, 314 S.E.2d 19 (Ct.App. 1984). In *Newman v. Brown et al.*, 228 S.C. 472, 476, 90 S.E.2d 649, _____ (1955), the Supreme Court also cited *Coleman, supra*, in approving the charge of the trial court that included the following:

> Now in addition to that, you could award **a reasonable sum of money to compensate the owner of the automobile for the loss of the use of her automobile** for a reasonable length of time during which it would have taken her to have the same repaired. (Emphasis added).

In addition, Ralph King Anderson, Jr., *South Carolina Requests to Charge—Civil*, 2009, § 13-14, Damages—Automobile—Negligence Cause of Action, in discussing loss of use, specifies that "In other words, recovery for loss of use based on customary rental charges is allowable even though a substitute is not rented. Rental value is the amount for which the property in question could have been rented on the market."

These arguments were presented to the Honorable J. Ernest Kinard, Jr., Chief Administrative Judge for the Court of Common Pleas of Chester County, by brief (appellant's brief, July 16, 2013, pages 2 and 3) and by argument (transcript, July 17, 2013, pages 6, 7, and 10) at the appeal hearing before him on July 17, 2013. The judge stated, "Well, it looks like he should have given you a little more money but I am not going to reverse it. It is just like trying it in front of a jury. They don't have to give you

what you testified to." (Transcript, July 17, 2013, page 6). Appellant made additional argument to and had discussion with the court, but the judge said that there was nothing he could do (transcript, July 17, 2013, pages 6, 7, 8, and 10); when appellant argued that the loss of use damages was fully developed and the court could award the proper measure of damages for that plus costs (transcript, July 17, 2013, page 7), the judge diverted the discussion to the costs ($80.00 in magistrate court and $150.00 for the appeal), and then questioned appellant about what type of law he practiced and where (transcript, July 17, 2013, page 7), and then concluded that he had never seen appellant, even though he had been to Lancaster as chief judge a lot (transcript, July 17, 2013, page 8). After appellant objected that he was not being made whole in any fashion and continued that the court could correct the loss of use damages error of the magistrate, the judge stated, "I think I['m] just going to deny you. Sorry." (Transcript, July 17, 2013, page 10).

The magistrate failed to utilize the proper standard under South Carolina law for the loss of use damages in this matter and the court of common pleas refused to correct that error. This court should reverse the judgment of the court of common pleas and direct entry of judgment in the amount of $1,776.27, for loss of use, together with costs of $80.00 in the magistrate court and $150.00 in the court of common pleas.

2.

THE COURT OF COMMON PLEAS ERRED IN UPHOLDING THE MAGISTRATE'S REFUSAL TO AWARD ANY SUM FOR LOST INCOME TO APPELLANT.

The magistrate refused to award appellant any damages for his time lost from work caused by the motor vehicle accident for which respondent admitted liability. In

doing so, he appeared to apply a standard to measure damages that he created which would make it impossible for a self-employed attorney to be eligible for compensation absent malpractice or malfeasance; that apparent standard would make it difficult if not impossible for any self-employed person to quantify damages without having failed to fulfill his obligations or commitments. The court of common pleas declined to examine any of the stated reasons for the denial of damages for time lost and to require the magistrate court to assess damages for lost income properly, apparently on the basis that the case was a "property damage case." Both the magistrate and the court of common pleas failed to assess damages in a proper manner and this court should reverse the judgment and return it to the courts below for an assessment of lost income damages in accordance with South Carolina law.

After stating that [Appellant] testified to the loss of sixteen hours and twenty-five minutes and his hourly rate was $300.00, for a total claim of lost income in the amount of $4,925.00, the magistrate noted that [Appellant] conceded that he had completed all his "work in hand," (magistrate's judgment, May 16, 2013, page 4) was unable to specify any cases or work he failed to obtain, and presented no letters complaining about unavailability from clients or potential clients to substantiate his claim for lost time with a demonstration of actual lost business. (Magistrate's judgment, May 16, 2013, pages 4 and 5). The magistrate then stated that "[Appellant] has claimed $300.00 per hour for his time but has not proven any tangible and quantifiable losses sustained as a result. These factors appear to fall into the general category of inconvenience." (Magistrate's judgment, May 16, 2013, page 6). The magistrate stated a token award should be made,

and set the amount of "token damages" at $100.00. (Magistrate's judgment, May 16, 2013, page 6).

While the court of common pleas characterized the action as a "property case" (transcript, July 17, 2013, page 8), it was a tort case for negligence: respondent caused a motor vehicle accident through his negligent operation of his truck and admitted liability. The task before both the magistrate and the court of common pleas was to assess damages. Both refused to do so.

To recover from a defendant on a claim for negligence, a plaintiff is required to show (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from that breach. *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 714 S.E.2d 869 (2011); *Tanner v. Florence County Treasurer*, 336 S.C. 552, 561, 521 S.E.2d 153, 158 (1999); *Andrews v. Piedmont Air Lines*, 297 S.C. 367, 377 S.E.2d 127 (Ct.App. 1989); *South Carolina Insurance Company v. James C. Greene & Co.*, 290 S.C. 171, 348 S.E.2d 617 (Ct. App. 1986). In this instance, respondent admitted liability, so that the court needed only to determine the proper measure of damages, as the magistrate noted. (Magistrate's judgment, May 16, 2013, pages 2 and 3).

Generally, the measure of damages in a tort case is "the amount needed to compensate the plaintiff for the losses proximately caused by the defendant's wrong so that the plaintiff will be in the same position he would have been in if there had been no wrongful injury." *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 312, 594 S.E.2d 867, 874 (Ct.App.2004); see also *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) ("The goal [of compensatory damages] is to restore the injured party to the

same position he or she was in before the wrongful injury occurred."); *Haselden v. Davis*, 353 S.C. 481, 486, 579 S.E.2d 293, 296 (2003) (Burnett, J., dissenting). *Turpin v. Lowther*, 404 S.C. 581, 745 S.E.2d 397 (Ct.App. 2013).

The magistrate noted that appellant testified that he had lost sixteen hours and twenty-five minutes of available work time because of the accident caused by the respondent and that his standard rate at the time was $300.00 per hour (magistrate's judgment, May 16, 2013, page 2 and 3); appellant valued that lost time at $4,925.00 (magistrate's judgment, May 16, 2013, page 5). But the magistrate did not regard that as sufficient to establish a compensable loss. Instead, he cited several things that appellant did not do, most of which would have established malpractice or malfeasance on the part of a practicing attorney; the rest had no relevance to a determination of the value of time lost. (Magistrate's judgment, May 16, 2013, pages 4 and 6). Whatever the basis he used, the magistrate decided the value of the appellant's lost time was nothing, stating "the [Appellant] has claimed $300.00 per hour for his time but has not proven any tangible and quantifiable losses sustained as a result." (Magistrate's judgment, May 16, 2013, page 6).

Appellant, a self-employed attorney, had only his time and his hourly charge to measure the value of his time. That would have been sufficient for any plaintiff who was an hourly employee of another: his lost income would be measured by the time he missed from work times his hourly wages. The fact that appellant was self-employed should not prevent his recovering his lost income in the same or a similar manner. In this case, both the magistrate and the court of common pleas refused to place any value on the time appellant lost from work and to compensate him for that loss. This court should reverse

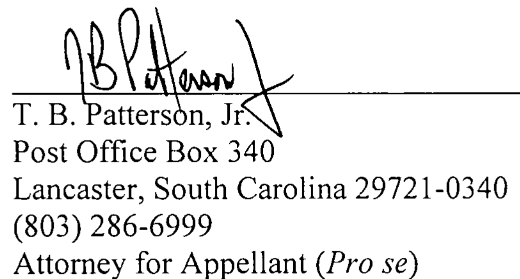
the decision of the court of common pleas ratifying the magistrate's judgment and either direct the entry of a verdict for the $4,925.00 appellant sought or remand the matter to the courts below for a determination of the value of the time lost by the appellant using the proper criteria for measuring that loss.

CONCLUSION

The court should reverse the decision of the court of common pleas with directions to enter a judgment in the amount of $6,931.27, comprising $1,776.27 for the loss of use of his vehicle and $4,925.00 for the time he lost from productive work due to the accident caused by the respondent, with the filing fees of $80.00 and $150.00 in the courts below, or, in the alternative, remand the matter with instructions for the courts below to determine the amounts owed to appellant using the proper criteria established by the law of South Carolina. In addition, the court should award appellant his costs and attorney's fees in this matter.

Respectfully submitted,

February 3, 2014



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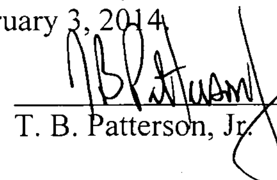
CERTIFICATE OF SERVICE

In accordance with the provisions of Rule 208(a)(1) SCACR, I hereby certify that a copy of this brief was mailed to Mr. Michael S. Traynham, Post Office Box 12009, Columbia, South Carolina 29211-2009, on February 3, 2014.



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February 3, 2014

Ms. Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, South Carolina 29211

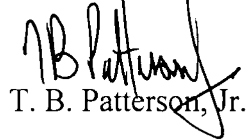
Re: Patterson v. Carmona Ortega, case no. 2013-002677

Dear Ms. Kitchings:

Enclosed please find the initial brief of appellant and a designation of matter for the record on appeal (both in an original and a copy), and a return envelope. Please file the brief and designation and send me a filed-stamped copy of each in the return envelope.

Thank you for your attention and assistance.

Sincerely yours,



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cc: Mr. Michael S. Traynham

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