

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Kristi L. Harrington, Circuit Court Judge

Appellate Case # 2014-002730

Adriane Green, Individually and as the Personal Representative
of the Estate of Adonous Green, Deceased.....Respondent,

v.

John Doe, James Cleveland and James I Ford, III, a/k/a "Big Ford" of whom
James I. Ford, III, a/k/a "Big Ford" is the.....Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities.....	ii
Statement of Issues on Appeal.....	iii
Statement of the Case.....	1
Arguments.....	3
Conclusion.....	8

TABLE OF AUTHORITIES

Cases

<u>Bowers v. Robinson</u> , 429 S.E.2d 799, 311 S. C. 413 (1993)	7
<u>Clark v. Dept. of Public Safety</u> , 353 S.C. 291, 578 S.E.2d 16 (S.C. App., 2002)	4,7
<u>Doe v. SBM</u> , 327 S.C. at 356, 488 S.E.2d at 881 (Ct.App. 1997)	6
<u>Howard v. Holiday Inns, Inc.</u> , 271 S. C. 238, 246 S.E.2d 880 (1978)	5
<u>In re Treatment and Care of Luckabaugh</u> , 351 S.C. 122, 131, 568 S.E.2d 338, 342 (2002)	7
<u>Knoke v. South Carolina Department of Parks, Recreation and Tourism</u> , 324 S.C. 136, 478 S.E.2d 256 (1996)	3
<u>Limehouse v. Hulsey</u> , 404 S.C. 93, 744 S.E.2d 566 (2013)	5
<i>See Also</i> <u>Limehouse v. Hulsey</u> , 397 S.C. 49, 723 S.E.2d 211 (S.C. App., 2011)	6
<u>Lucht v. Youngblood</u> , 266 S.C. 127, 221 S.E.2d 854 (1976)	3
<u>Rutland v. South Carolina Department of Transportation</u> , 390 S. C. 78, 83; 700 S.E.2d 451 (Ct.App. 2010)	4
<u>Self v. Goodrich</u> , 300 S. C. 349, 387 S.E.2d 713 (Ct.App. 1989)	3
<u>Welch v. Epstein</u> , 342 S.C. 279, 536 S.E.2d 408 (Ct.App. 2000) citing <u>Smith v. Wells</u> , 258 S.C.316, 188 S.E.2d 470 (1972); <i>Scott, supra</i> .	3
<u>Zorn v. Crawford</u> , 252 S.C. 127, 165, S. E. 2d 640 (1969)	3

Other Authorities

Rule 52, South Carolina Rules of Civil Procedure

STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR IN AWARDING \$500,000.00 AS ACTUAL DAMAGES IN THE WRONGFUL DEATH ACTION BASED UPON THE LACK OF EVIDENCE PRESENTED TO SUPPORT SUCH AN AWARD AT THE DAMAGE HEARING?
- II. DID THE LOWER COURT ERR IN AWARDING \$500,000.00 AS ACTUAL DAMAGES IN THE SURVIVAL ACTION BASED UPON THE LACK OF EVIDENCE PRESENTED TO SUPPORT SUCH AN AWARD AT THE DAMAGE HEARING?
- III. WAS THE APPELLANT DENIED THE OPPORTUNITY TO CROSS EXAMINE ALL OF THE WITNESSES AT THE DAMAGE HEARING THEREBY DEPRIVING HIM OF HIS CONSTITUTIONAL DUE PROCESS RIGHTS?
- IV. DID THE LOWER COURT ERR IN ISSUING AN ORDER WHICH FAILED TO COMPLY WITH THE REQUIREMENTS OF RULE 52 OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE?
- V. DID THE LOWER COURT ERR IN FAILING TO NOTE THAT THE SECOND AMENDED COMPLAINT WAS NOT SERVED ON ONE OF THE PARTIES TO THE ACTION?

STATEMENT OF THE CASE

This action was commenced in 2011 when the Plaintiff/Respondent filed a Summons and Complaint seeking judgment against various Defendants for actual and punitive damages. There were amendments to the initial pleadings and the last variation consisted of a Second Amended Complaint naming the present Defendants as parties and seeking relief from them based upon theories of premises liability for survival and wrongful death actions. The Defendants failed to appear for their noticed depositions. The named Defendants failed to respond to any written discovery. The Appellant was held in Default, by Order of the Court on 31 January 2014, some eight months prior to a damages trial. No responsive pleadings were filed, no requests of the court were made, nor was there any communication(s) with the Plaintiff's counsel that could have been construed as a response.

On 22 October 2014, this matter came before the Honorable Kristi L. Harrington for a damages hearing. The named Defendants were noticed of all court hearings, including but not limited to, the damages hearing on 22 October 2014. The hearing and testimony according to the trial transcript began at 3:26 p.m. The notice to the parties was clearly adequate as all parties appeared at the Court.

At the conclusion of other matters, the Court called the case on the date noticed and published on the public roster. The Court called the case out loud. The Plaintiff and Mr. Cleveland came inside the bar. Plaintiff's Counsel gave a statement of the case at the beginning of the trial in response to the request of the Court. Plaintiff's referred to Mr. Ford on three occasions prior to any testimony. The first witness was a long-standing acquaintance of Mr. Ford. Mr. Ford never identified himself to the Court or any of the Parties until the records indicates.

There was testimony from the Appellant, Respondent, co-Defendant (James Cleveland) and various other individuals. The materials provided to the Court for consideration were extensive including over three thousand seven hundred (3700) pages

of documents related to the case. No objection was raised to any of the documents. An Order was signed on 13 November 2014. A Notice of Intent to Appeal was filed and served by Appellant on or about 19 December 2014.

The Respondent was the mother of Adonous Green, a deceased minor who drowned in a retention pond on or about 3 June 2011. At the time of the deceased minor child's death, he was staying at 546 Beulah Tabernacle Drive, St. Stephens, Charleston County, South Carolina, but the address was not his legal residence. The deceased child was an invitee by the very nature of the fact that he was guest at the home. The retention pond in which the deceased minor child drowned was located on real property owned by the Defendant James Cleveland and which was an adjacent property located in close proximity to the address at which the minor child was staying at the time.

Mr. Ford identified himself during the trial and the Court gave him full access to the Court. The Appellant, James I. Ford, III a/k/a "Big Ford" testified that he was paid to dig the retention pond several years earlier. He further testified that he did not get any permits and performed his services by way of direction of a layperson.

The record is clear and does not demonstrate that either of the Defendants raised any objection at the trial of the case. The Defendants were given opportunity to call or recall any witnesses that they desired. The Appellant never preserved any issues for appeal by way of objection, nor at anytime was the issue of default, admissibility, desire to present further evidence, desire to raise additional claims, desire to raise an affirmative defense, or sufficiency of the evidence in any way brought to the Courts attention by the Appellant. The Court gave the Defendants opportunity to raise any issues, call witnesses, rebuttal, and even allowed argument.

ARGUMENT AS TO ALL ISSUES ON APPEAL

Respondent request that the Order of the Lower Court entered on 14 November 2014 be affirmed for any ground(s) appearing in the Record on Appeal.

ARGUMENT I

THE LOWER COURT ERRED IN AWARDING \$500,000.00 AS ACTUAL DAMAGES IN THE WRONGFUL DEATH ACTION BASED UPON THE EVIDENCE PRESENTED AT THE DAMAGE HEARING.

The trial Court in this case awarded to the Plaintiffs the sum of \$500,000.00 in the wrongful death action. "In a wrongful death case, the issue of damages is not directed toward the value of the human loss that was lost, but rather the damages sustained by the beneficiaries as the result of the death." Zorn v. Crawford, 252 S.C. 127, 165, S. E. 2d 640 (1969); Self v. Goodrich, 300 S.C. 349, 387 S.E. 2d 713 (Ct.App. 1989). Damages recoverable in a wrongful death action include: (1) pecuniary loss; (2) mental shock and suffering; (3) wounded feelings; (4) grief and sorrow; (5) loss of companionship; and (6) deprivation of the use and comfort of the intestate's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries. Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct.App. 2000) citing Smith v. Wells, 258 S.C.316, 188 S.E.2d 470 (1972); *Scott, supra*. In damages matters very similar to this case our courts have held more substantial verdicts to be appropriate.

In Lucht v. Youngblood, 266 S.C. 127, 221 S.E.2d 854 (1976), our Supreme Court observed that losses to parents for the untimely death of a child "are intangibles, the value of which cannot be determined by any fixed yardstick." The "loss to the beneficiaries must be estimated by the jury in the exercise of their sound judgment under all the facts and circumstances of the case." In Knoke v. South Carolina Department of Parks, Recreation and Tourism, 324 S.C. 136, 478 S.E.2d 256 (1996), the Court concluded a wrongful death verdict of \$3.0 million for the death of a twelve-year-old

child was not an excessive verdict. The court stated in Clark v. Dept. of Public Safety, 353 S.C. 291, 578 S.E.2d 16 (S.C. App., 2002), "Although there was no evidence of pecuniary loss introduced at trial, 353 S.C. 311, both parents testified to their grief, shock, and sense of loss. In the absence of pecuniary loss, the \$3,000,000 verdict was to compensate Jeremy's parents for these intangible damages which, as previously noted by this Court, cannot be determined by any fixed measure." Id 43.

The Respondent testified (Transcript, page 29, line 21 through page 32 line 6) about her and the family's grief, shock, and sense of loss. After reviewing the submissions, the Court further inquired (Transcript, page 68, line 21 through page 69 line 12) about the deceased's school and future professional interest. By very nature of a the loss, death of a child, as endured by Plaintiff, and the non-pecuniary elements involved, the verdict granted by the court was not the result of passion or other improper motive, nor was it so excessive as to shock the conscience.

ARGUMENT II

IT WAS ERROR FOR THE LOWER COURT TO AWARD \$500,000.00 AS ACTUAL DAMAGES IN THE SURVIVAL ACTION BASED UPON THE LACK OF EVIDENCE PRESENTED TO SUPPORT SUCH AN AWARD AT THE DAMAGE HEARING.

It has long been established that actual damages in a survival action are awarded for the benefit of the decedent's Estate. The test of a survival action in South Carolina has been determined to be "whether the decedent suffered conscious pain and suffering". Rutland v. South Carolina Department of Transportation, 390 S.C. 78, 83; 700 S.E.2d 451 (Ct.App. 2010).

It is the position of the Respondent that the issue of conscious pain and suffering was uncontested at the trial. The court was given the investigative findings of the investigative professional in this case. (Exhibit 5 to transcript). The submission included statements that the deceased struggled, the death certificate finding of drowning, and the

statements about available resuscitative efforts at the scene. The Court went further and clearly took judicial notice of the understood scientific principles associated with drowning and that the decedent suffered conscious pain or suffering when that issue was raised by counsel for the Respondent. (Transcript, page 65, Line 1, page 66 line 7).

The Court had substantial documentation available to determine that the decedent suffered any conscious pain and suffering especially, given the fact that it was an uncontested issue. During a bench trial, the judge like a jury, is not to leave its basic common sense behind but to apply the facts of the case with that common sense and come to a finding. There is no testimony that the drowning death was instantaneous or without pain or suffering.

ARGUMENT III

THE APPELLANT WAS DENIED THE OPPORTUNITY TO CROSS EXAMINE ALL OF THE WITNESSES AT THE DAMAGE HEARING THEREBY DEPRIVING HIM OF HIS CONSTITUTIONAL DUE PROCESS RIGHTS.

In the recent case of Limehouse v. Hulsey, 404 S.C. 93, 744 S.E.2d 566 (2013), the South Carolina Supreme Court took the opportunity to review its decision in the case of Howard v. Holiday Inns, Inc., 271 S.C. 238, 246 S.E.2d 880 (1978) which limited the right of a party previously placed in default to participate in a subsequent hearing for damages to the right to cross examine witnesses and to object to evidence. At the conclusion of the Court's review, it stated "we adhere to the procedures adopted in Howard". Id. Page 578.

The Court clearly allowed the parties wishing to participate in the hearing the right to the right to object to evidence and cross-examine witnesses. The fact Mr. Ford chose not to object to evidence and cross-examine witnesses cannot be found to be error of the Court. As the Court called the case, Mr. Ford was referred to on multiple occasions prior to any testimony being admitted (Transcript, page 6, lines 10-18), and all this is

evidenced by the fact that the other pro se Defendant was acknowledged when he made his presence known. (Transcript, page 47, lines 14-23) The Appellant had been aware of the lawsuit for **about a year** (emphasis added), but chose to not propound a defense and watch silently until Mr. Cleveland called witnesses in his own Defense to acknowledge his presence in the Courtroom. (Transcript, page 55, line 7-9). Although the Appellant is not trained in the law, he attended a year and a half of college, was self-employed, and his testimony makes it clear that he understood the process. (Transcript, page 55, line 15 through page 56, line 5). The Appellant took the opportunity to present a closing argument. (Transcript, page 70, line 7 through page 71, line 9). The Appellant clearly was allowed to participate beyond what is required under Husley. The Respondent should not continue to be punished for Appellant's failure to participate in his own defense.

Further, an allegation of error as to the introduction of evidence during a default damages proceeding will not be preserved for appellate review absent a contemporaneous objection. Doe v. SBM, 327 S.C. at 356, 488 S.E.2d at 881 (Ct.App. 1997). Here, as in Hulsey, the Appellant failed to object to any testimony, admission of evidence or limited involvement in the proceeding. As such, this allegation of error is not preserved for our review. *See Also* Limehouse v. Hulsey, 397 S.C. 49, 723 S.E.2d 211 (S.C. App., 2011).

ARGUMENT IV

THE LOWER COURT ERRED IN ISSUING AN ORDER WHICH FAILS TO COMPLY WITH THE REQUIREMENTS OF RULE 52 OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

In pertinent part, Rule 52(a) of the South Carolina Rules of Civil Procedure states "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon...". The present case was tried upon the facts without a jury such that Rule 52, SCRPC, applies. "This Court has held that this rule is directorial in nature so where a trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an

explicit or specific factual finding. *In re Treatment and Care of Lucabaugh*, 351 S.C. 122, 131, 568 S.E.2d 338, 342 (2002).

The lower Court's Order should not be vacated based on the lack of an explicit or specific factual finding. The Order is sufficient when the reasoning can be determined from the record. *Clark v. Dept. of Public Safety*, 353 S.C. 291, 578 S.E.2d 16 (S.C. App., 2002). The Court was cautious to make a record sufficient to support her decision. The hearing had five witnesses and exhibits totaling over four thousands pages in total. The Appellant has given no issue of contested fact(s) to support his opinion that a more specific order is necessary to outline his argument for review.

ARGUMENT V

THE LOWER COURT ERRED IN FAILING TO TAKE APPROPRIATE NOTICE THAT THE SECOND AMNDED COMPLAINT WAS NOT SERVED ON ONE OF THE PARTIES TO THE ACTION.

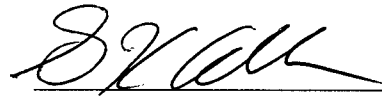
The Appellant was determined to be in default as to the Plaintiff/Respondent, as it relates to the Second Amended Complaint that was the subject of the hearing on damages. The Order addresses the issues in the Complaint and found against the Defendants as to liability, causation, and damages. The Appellant never appeared in the case in any manner prior to the trial of this case. The Appellant never placed any issue of default, cross-claims, or allegations of any affirmative defense against the Defendant, James Cleveland into the record at the trial of this case. The issue of appropriate default as to Mr. Cleveland therefore is moot and has no bearing given the fact that the Appellant was appropriately in default. Nothing about the trial of this case cut off any remedy available to the Appellant as to James Cleveland.

The facts of *Bowers v. Robinson*, 429 S.E.2d 799, 311 S.C. 412 (1993) are procedurally complex compared to this case. The Court, in *Bowers*, was presented with a situation where the Appellant was the party that had not been adequately served. The

Appellant in this case is attempting to raise service issue as to a party not part of this Appeal.

CONCLUSION

Based upon the foregoing arguments, the Respondent respectfully requests that the Order of the lower Court be affirmed. If the court finds argument IV to be persuasive, a more economical remedy would be to solely remand for the issuing of an Order identifying the material facts the trial court found undisputed and the grounds for its decision.



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12 May 2015