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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY

Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Appellate Case No. : 2014-002730

Adriane Green, individually and as Personal Representative of the Estate of
Adonous Green, deceased, Respondent,

v.

John Doe, James Cleveland and James I Ford, III, aka "Big Ford", Defendants,
Of whom James I. Ford, III, aka "Big Ford" is the Appellant.

FINAL BRIEF OF APPELLANT

W. Dean Murphy, III
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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 named Defendants were served with different variations of the pleadings and failed to answer or otherwise plead and were ordered in default.

On 22 October 2014 this matter came before the Honorable Kristi L. Harrington for a damages hearing. There was testimony from the Appellant, Respondent, co-Defendant and various other individuals. 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 had been placed by the South Carolina Department of Social Services into a private foster care home and was residing at 546 Beulah Tabernacle Drive, St. Stephens, Charleston County, South Carolina. 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 at the time residing. The Appellant, James I. Ford, III aka "Big Ford" dug the retention pond several years earlier.

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

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). Such damages would include pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship and the like. In the instant case the decedent was a minor child who had not ever been employed in any capacity. There was no testimony offered as to what his earning potential might have been had he lived, and there was no testimony offered which would have enabled the court, as the trier of fact, to arrive at a any monetary value.

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 contention of Appellant that there was insufficient evidence offered at the trial of this case to establish by the requisite standard of proof that the decedent suffered any conscious pain or suffering. In this case the only testimony offered as to how the decedent died was that offered by the Respondent who testified she **was told** (emphasis added) her son had drowned in a pond

(R. p. 23, lines 10-17). There was simply no testimony available to the court from which it could have determined that the decedent suffered any conscious pain and suffering as there were no eye witnesses to his death. While the trial judge has considerable discretion regarding the amount of damages to be awarded, there must be evidence to support such an award. Mellen v. Lane, 377 S. C. 261, 659 S.E.2d 236, 244 (Ct.App. 2008).

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.

In the present case the Appellant's presence in the court room was not even ascertained until after the Plaintiff had rested its case. From the transcript of the hearing it appears that the Plaintiff rested (R. p. 31, line 12) and the co-defendant, James Cleveland, then was allowed to take the witness stand where he testified briefly and was cross examined by plaintiff's attorney. The lower court then questioned Mr. Cleveland and at the conclusion of that testimony Mr. Ford was recognized for the first time by the trial Court (R. p. 41, line 16). It is unclear from the record why Mr. Ford's presence was not noted in the court room. What is clear is it does not appear that prior to the commencement of the damage hearing his name was sounded by any deputy or bailiff to ascertain if he was present. By the time it was known Mr. Ford was in the court room he had lost the

opportunity to cross examine all of the plaintiff's witnesses and his co-defendant, Mr. Cleveland; and he was not afforded any opportunity to do so, or even asked if he would like to do so.

Given the limited ability of a litigant who is in default to participate, to fail to ascertain a party is present so as to deny the right to participate is a denial of the due process right to participate in the legal proceedings and is as such error of a prejudicial nature.

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 Luckabaugh, 351 S.C. 122, 131, 568 S.E.2d 338, 342 (2002). The Court further stated "The requirement for appropriately detailed findings 'is designed...to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.'" *Ibid*, 132.

The lower court's Order fails to make any specific findings of fact which pertain to what factors were given weight in awarding actual damages as to the wrongful death action and the survival action. The Order simply states "Having found sufficient evidence and factual support, the Court hereby enters judgment in favor of Plaintiffs..." (R. p. 2).

Given there are specific factors which must be ascertained and specific criteria which are used in valuing both wrongful death and survival actions, the failure to make specific factual findings make it impossible for this appellate court to perform its review function.

ARGUMENT V

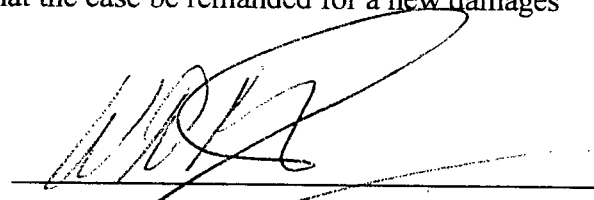
THE LOWER COURT ERRED IN FAILING TO TAKE APPROPRIATE NOTICE THAT THE SECOND AMENDED COMPLAINT WAS NOT SERVED ON ONE OF THE PARTIES TO THE ACTION.

The record of this case reflects that the Defendant, James Cleveland, was served with the First Amended Summons and Complaint and thereafter placed in default. Subsequently, the Respondent amended her complaint and there was filed a Second Amended Summons and Complaint. It was that Second Amended Summons and Complaint which was before the Court. That document was served upon the Appellant, but apparently was never served upon the Defendant, James Cleveland, such that at the time of the damages hearing, the Appellant was determined to be in default as to the Plaintiff/Respondent, but not as to any claim he may have had against his co-Defendant, in as much as that co-Defendant had not ever been served. This failure deprived the Appellant of the ability to file an effective cross-claim or allege any affirmative defense against the Defendant, James Cleveland.

In the case of *Bowers v. Robinson*, 429 S.E.2d 799, 311 S. C. 412 (1993) the Court was presented with a situation where a defendant was actually in default as to the original filed complaint, but the order of default judgment was entered upon an amended complaint which had not been properly served. The holding in that case was that the "trial court erred in entering a default judgment on the amended complaint" *Ibid*, 801.

CONCLUSION

Based upon the foregoing arguments, the Appellant respectfully requests that the Order of the lower Court be reversed as to its holdings and that the case be remanded for a new damages hearing and other relief not inconsistent herewith.



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ATTORNEY FOR APPELLANT

Charleston, South Carolina

27 April 2015

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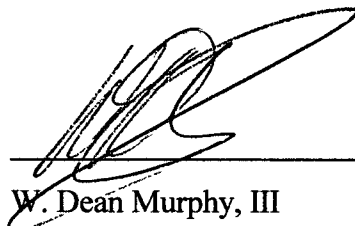
Adriane Green, Individually and as the Personal Representative
of the Estate of Adonous Green, Deceased.....Respondent,

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.

CERTIFICATION PER RULE 211

I certify that the Final Brief of Appellant filed herein complies with Rule 211 (b), S. C.
Appellate Rules of Practice.



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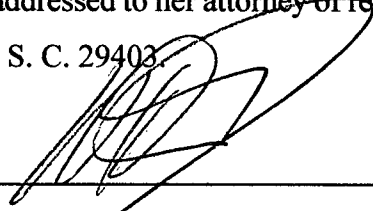
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James I. Ford, III, a/k/a "Big Ford" is the.....Appellant.

PROOF OF SERVICE

I certify that I have served the Final Brief on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on 27 April 2015, addressed to her attorney of record, Samuel K. Allen, 49 Immigration Street, Suite 100, Charleston, S. C. 29403.



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