

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2010-CP-10-8631

Cynthia D. Bales, as Personal Representative
of the Estate of Frank R. Bales,

Respondent

v.

Abel Martinez Martinez and the
South Carolina Department of Transportation,

Of whom Abel Martinez Martinez is Appellant,

Appellant

SUPPLEMENT TO THE RECORD ON APPEAL

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SC COURT OF APPEALS

INDEX

Transcript of Hearing of April 3, 2012 1
Certificate of Counsel 30

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)
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IN THE FAMILY COURT
2010-CP-10-8631

CYNTHIA D. BALES, as)
Personal Representative)
of the Estate of Frank)
Bales,)
)
) PLAINTIFF)
)
) VS.)
)
) ABEL MARTINEZ,)
)
) DEFENDANT)
-----)

TRANSCRIPT OF RECORD

APRIL 3, 2012
MONCKS CORNER, SC.

B E F O R E:

THE HONORABLE KRISTI L. HARRINGTON

A P P E A R A N C E S:

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AKIM ANASTOPOULO, ESQUIRE
ATTORNEYS FOR PLAINTIFF

JOSEPH WESTON, ESQUIRE
ATTORNEY FOR DEFENDANT

SHARON D. JONES,
OFFICIAL COURT REPORTER

I N D E X

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Motion to Reconsider 3

1
2
3
4
5
6
7
8
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P R O C E E D I N G S

THE COURT: Mr. Anastopoulos, I understand that the Plaintiff's son -- that's him in the courtroom.

MR. ANASTOPOULO: If that's okay with you.

THE COURT: I understand he's young. And I know that he -- I recall that he was here for at least one portion of the hearing, I just don't know how -- and mom's here. I just don't know how psychologically beneficial this all is.

MR. ANASTOPOULO: Okay. There's no problem.

THE COURT: I mean, this is -- not to be -- I mean, if that's what mom wants to do, that's fine. I just don't know that he needs to keep hearing it over and over and over again. But that's just my -- that's just my opinion, but --

MR. ANASTOPOULO: Just wait outside.

THE COURT: We don't have to be on the record for this.

(Off-record discussion.)

THE COURT: All right, counsel, let me -- on my little preliminary matter, let me get my files -- all right. Mr. Weston, you have filed now a motion for reconsideration of the default judgment, is that

1 correct?

2 MR. WESTON: That's correct, Your Honor.

3 THE COURT: Just basically tell me what it is that
4 you wish for me to consider?

5 MR. WESTON: Yes, Your Honor. As Your Honor
6 knows, the default judgment that was entered in this
7 case was broken into two basic types of damages that
8 are -- the basic types of damages are available in a
9 wrongful death action, the pecuniary damages to the
10 beneficiaries and also their loss of companionship and
11 the grief that they experienced as a result of a loss.

12 But we believe, Your Honor, as we argued at the
13 default damages hearing itself, that there are a number
14 of items that were included in the alleged losses
15 presented by the Plaintiff and that were, in fact,
16 awarded by Your Honor, that are not available in a
17 wrongful death case such as this.

18 The first one, Your Honor, the Plaintiff's
19 expert testified at the default damages hearing that
20 the beneficiaries had experienced \$1,502,166 in
21 pecuniary losses. In that amount, he included what he
22 referred to as a life value figure of \$417,046.

23 And you will remember, Your Honor, at the
24 default damages hearing, I brought up the fact that I
25 wasn't familiar with that term, "life value". That I

BALES V. MARTINEZ 4.3.12

1 had never seen it awarded in a wrongful death case and
2 never heard of anybody seeking those types of damages
3 in a wrongful death case.

4 And, in fact, Your Honor, the cases that the
5 expert cited, that he brought up on my cross
6 examination at trial, were the McNeil case, which is a
7 Federal District Court case. And a New Hampshire case
8 entitled Marcotte v. Timberlane/Hampstead School
9 District.

10 And as I pointed out in the brief that I filed
11 with the court, Your Honor, the McNeil case is not a
12 wrongful death case. The McNeil case is a case where a
13 young child suffered some medical -- from some medical
14 malpractice, and therefore had a shortened life
15 expectancy. And the court in McNeil allowed the child
16 to recover for that loss of life expectancy. They
17 didn't call it "life value", but they called it "the
18 loss of life expectancy".

19 Well, your Honor, as I pointed out in the brief,
20 the difference between the McNeil case, besides the
21 fact that it is not a wrongful death case and therefore
22 has no application of wrongful death cases, is the fact
23 that the McNeil case is dealing with personal damages
24 to the Plaintiff. And in a wrongful death case, as
25 Your Honor knows, and I have pointed this out in the

1 brief, the focus is not on decedent, the focus is on
2 the losses suffered by the beneficiaries as a result of
3 the loss of the decedent.

4 And in that case, Your Honor, it would be
5 improper to award the type of damages like you see in
6 McNeil in a wrongful death case, because those damages
7 weren't personal to the decedent. They have nothing to
8 do with the wrongful death case.

9 In essence what it boils down to, Your Honor, is
10 that by allowing the beneficiaries to recover for the
11 pecuniary losses from the loss of income from the
12 decedent, and then awarding this lump sum of life
13 value, it's essentially allowing a double recovery for
14 those losses for the Plaintiffs. It's -- it's calling
15 it something else, but that's what it's doing. It's
16 saying that the beneficiaries have lost this lump sum
17 value, when in fact the proper way, as indicated in the
18 Ballard case and all the cases that come before Ballard
19 after Ballard, is you look at the income that was being
20 produced by the decedent, you project that income out
21 over the course of the lifetime, and then you go ahead
22 and you reduce it to present value.

23 The court does not allow you to then -- and I
24 don't mean the court -- I mean the South Carolina case
25 law does not then allow the court to award damages for

BALES V. MARTINEZ 4.3.12

1 this nebulous life sum value, which isn't based upon
2 any case law or statutory authority.

3 Your Honor, the second case cited by the
4 Plaintiff, Timberlane, when you look at that case, they
5 are citing a New Hampshire -- a New Hampshire case, so
6 it has no application here in South Carolina. No South
7 Carolina court has adopted the reasoning behind this
8 case.

9 But the second thing is, when you look at the
10 case, the case talks about the New Hampshire wrongful
11 death statute allows for this value for -- this loss of
12 life value. So in that case, Your Honor, the New
13 Hampshire legislature has specifically said, this is a
14 type of damage we're going to allow in a wrongful death
15 case.

16 Well, South Carolina has never made that kind of
17 determination. The South Carolina courts have never
18 statutorily or by case law allowed for this life value
19 award. And it does appear, Your Honor, that Your Honor
20 did award the full amount as far as I can see from the
21 default damages award. Your Honor did award the full
22 amount of that \$417,046, because Your Honor awarded the
23 exact amount of pecuniary damages argued by the
24 Plaintiff's expert.

25 So, Your Honor, because of the fact that --

1 again, there is nothing in South Carolina saying you
2 can recover an item of damage like this. Because those
3 cases that were relied upon by the expert have nothing
4 to do with this case, and find no support in South
5 Carolina law.

6 We would ask that Your Honor remove that portion
7 of the award, the \$417,046 to the Plaintiff on the
8 grounds that it's not supported by the case law. It is
9 not a pecuniary loss. It is instead, effectively a
10 double award to the Plaintiff for the actual pecuniary
11 losses in the form of the lost wages and the other hard
12 damages cited by the expert. It's effectively allowing
13 a double recovery for those items.

14 Your Honor, with respect to the second matter
15 raised in our brief, it has to do with the punitive
16 damages. You will recall, Your Honor, at the default
17 damages hearing, the Plaintiffs did not present any
18 witnesses to the accident itself. They didn't call the
19 police officer to testify about the accident. They
20 simply had the decedent's widow, Mrs. Bales, testify
21 that it was her understanding that the Defendant had
22 run through a red light at a high rate of speed, and
23 that the Defendant did not have a driver's license and
24 was an illegal alien at the time of the accident.

25 They presented no witnesses with respect to

BALES V. MARTINEZ 4.3.12

1 actually what happened at the time of the accident,
2 even though, Your Honor, there were witnesses to the
3 accident listed on a police report. And, again, the
4 police officer was available for them to be -- to call
5 them, the police officer to testify at the hearing as
6 to what he understood happened in the accident.

7 But I argued at the default damages hearing,
8 that based upon that scanty bit of testimony about the
9 accident, without any kind of direct evidence as to
10 what actually occurred, that we believe it would be
11 inappropriate for Your Honor to issue a punitive
12 damages award, or in the alternative, to issue any kind
13 of substantial punitive damages award such as the one
14 that was being sought by the Plaintiff.

15 In your order, Your Honor did award the
16 Plaintiff \$200,000 in punitive damages. And we have
17 argued in our -- both at the default damages hearing, I
18 argued again, it would not be appropriate to award
19 punitive damages.

20 But in our brief, I think the closest thing you
21 can analogize it to is the Gamble v. Stevenson
22 decision. I know that has nothing to do with looking
23 at what a judge does in terms of awarding punitive
24 damages, but the Supreme Court did say, here's what a
25 court needs to look at in terms of what a jury does in

1 terms of awarding punitive damages and how you try to
2 justify what a jury does in terms of the amount of the
3 award. And I listed the various factors in Gamble in
4 the memorandum, Your Honor.

5 And among those are, again, the degree of
6 culpability of the defendant, essentially what happened
7 in terms of the accident itself. But the first few
8 factors -- the first three or four talk about what is
9 it that the Defendant did wrong, what is his degree of
10 culpability.

11 And in this instance, Your Honor, again, even
12 though it was a default damages hearing, the Plaintiffs
13 didn't choose to present any evidence as to the nature
14 of what the Defendant did the day of the accident --
15 even though they would have been witnesses available to
16 testify about that -- the Plaintiffs chose not to
17 introduce that testimony. They chose to introduce a
18 conclusory statement from Ms. Bales, who did not
19 witness the accident, as to what occurred.

20 And, Your Honor, based upon that, we believe
21 that the \$200,000 award is not supported by the
22 evidence present in this case. As I pointed out in the
23 brief, Your Honor, there's a big difference between
24 saying, oh, a Defendant went through a red light for
25 this reason versus, you know, another reason. There's

BALES V. MARTINEZ 4.3.12

1 a big difference between going through something one
2 mile an hour over a speed limit versus 50 miles an hour
3 over a speed limit. And a \$200,000 award based upon
4 that kind of conclusory statement is, Your Honor, we
5 believe excessive under the circumstances. That we
6 certainly understand Your Honor has the right to award
7 punitive damages based upon the fact that there was a
8 default in this case, and that the allegations in the
9 Complaint are deemed admitted.

10 We realize Your Honor had a basis for awarding
11 them if you believe the evidence supported it, but we
12 simply argue, Your Honor, again, that the evidence did
13 not support that award in this case. And nowhere near
14 a \$200,000 award in terms of the evidence that was
15 presented.

16 With respect to the third argument, Your Honor,
17 in our brief. And again, this was brought up at the
18 default damages hearing. The Plaintiff's expert
19 testified, and I cross examined him about this, that he
20 took the decedent's lost wages, Mr. Bale's lost wages,
21 and then he -- after reducing them to present value,
22 added three percent interest to them.

23 And you remember, Your Honor, I went through a
24 lengthy discussion with him about, you know, whether
25 Mr. Bales had ever had any money available for

BALES V. MARTINEZ 4.3.12

1 investment, why was he adding this three percent
2 interest to the figure. Because under South Carolina
3 law, I mentioned it earlier, you take the -- in a
4 wrongful death case, you take the future -- the present
5 lost wages and the future lost wages, you reduce them
6 to present value. There is nothing in South Carolina
7 law that says you then add interest to that amount. So
8 he was doing something that was not supported by the
9 case law and was unusual.

10 And the only thing that I can think of he was
11 trying to argue, is that maybe Mr. Bales was going to
12 invest the money. But again, when I cross examined him
13 about that, he said, no. I believe -- in fact, he
14 testified completely to the contrary. He said, no, I
15 believe all of Mr. Bales' income was going towards
16 current expenses. I'm not aware of any money that Mr.
17 Bales had for investment purposes.

18 And so, Your Honor, on that basis, allowing an
19 award of three percent interest, which again appears to
20 have been included in Your Honor's award, because
21 Mr. -- the Plaintiff's expert added in the
22 three percent interest to this \$1,502,166 figure, and
23 that's the exact amount Your Honor awarded for the
24 pecuniary loss.

25 So it appears that Your Honor did award that

BALES. V. MARTINEZ 4.3.12

1 three percent interest. And, you know, projected over
2 time, Your Honor, that's quite a substantial sum based
3 upon the alleged lost wages that were presented by the
4 Plaintiff's expert.

5 And, Your Honor, we didn't have available to us
6 the transcript of that proceeding, but if I'm not
7 mistaken, and I didn't say it in the brief because I
8 wasn't sure about this, but I think he may have added
9 the three percent to the benefits that he said the
10 Plaintiff -- the decedent lost as well, and the fringe
11 benefits loss to the beneficiaries, and also added it
12 to the other figure that he put in there for the
13 decedent's loss -- the loss of services. I think he
14 added three percent to all those figures.

15 And, again, I didn't mention it in the brief
16 because I wasn't positive about that. But to the
17 extent that he has, Your Honor, again that would be
18 inappropriate to award three percent interest on those
19 figures as well, because of the fact that there's
20 nothing in South Carolina law, nothing says you can do
21 that. Nothing that says you can add interest on top of
22 taking the damages and reducing them to present value.

23 Now, Your Honor, he didn't break out those
24 figures for the three percent. But I believe if Your
25 Honor is inclined to take out the three percent

BALES V. MARTINEZ 4.3.12

1 interest award, we could ask him for clarification as
2 to that amount, what was the figure he included in the
3 total for those -- for those interest figures.

4 So for that reason, again, we would ask that the
5 court take out that three percent interest -- whatever
6 that was, that was awarded in term of the expert's
7 testimony.

8 Thank you, Your Honor.

9 THE COURT: All right.

10 MR. POULIN: Thank you, Your Honor. Good
11 afternoon. In dealing with the three distinct issues
12 that the Defendant has asked you to reconsider, two of
13 them go to our expert's testimony and the one that goes
14 to the punitive damages. And, Your Honor, if I could
15 address the issue of punitive damages first.

16 Mr. Weston brought up the case of Gamble V.
17 Stevenson, and he did indicate -- I think correctly --
18 that the case is pointed toward a judicial review of a
19 jury verdict on punitive damages and what the judge
20 should review following a punitive damages award by the
21 jury, which is a little bit inapplicable here because
22 Your Honor heard all the evidence and made the decision
23 herself in regards to the order.

24 In that regard, Your Honor, we found a -- a long
25 line of case law in South Carolina dating back to the

BALES, V. MARTINEZ 4.3.12

1 1900s, and specifically the cases of Hopkins vs.
2 Hopkins. And I do have copies for Your Honor if you
3 would like me to hand them up. And one of the
4 contentions that the Defendant makes in regard to the
5 punitive damages is the witnesses that were brought to
6 the hearing.

7 He seems to indicate that the Plaintiff should
8 have brought fact witnesses to the hearing. And it is
9 our contention, Your Honor, that a damages hearing,
10 because the case is in default, that it is a different
11 type of hearing. It is not a trial to bring fact
12 witnesses that -- that witnessed the accident to
13 testify as to how the accident occurred, things of that
14 nature, which are contained within the Complaint.

15 And that brings us to the line of cases in South
16 Carolina where our courts have looked at this issue
17 before, specifically looked at punitive damages in the
18 realm of default judgments. In Hopkins vs. Hopkins,
19 which is 266 SC 23, the court said that essentially --
20 and I'm quoting from the case -- that *the lower court*
21 *on default has jurisdiction to render any judgment*
22 *which Plaintiff is entitled to under the relief*
23 *demanding in the Complaint.* So we're looking at the
24 facts and the relief as it's alleged in the Complaint.

25 The court follows that up, Your Honor, with

1 Blakely vs. Wright, which is 269 SC 6. And in that
2 case, the court even goes a little bit further. The
3 Appellate Court -- or, in fact, the Supreme Court and
4 says that, in fact, a Complaint need not even contain a
5 specific plea for punitive damages by name, so long as
6 the allegations contain sufficient ultimate facts,
7 which if proved, would justify the award of such
8 damages.

9 And these cases cite all the way back to the
10 McMahon vs. Pugh case from 1902, where our justices
11 stated that if every fact necessary to the action is
12 stated for the Plaintiff, even when no Answer is put in
13 it, the relief which the facts entitles to him as plead
14 in the Complaint, is what the court can consider in its
15 award.

16 And, Your Honor, as far as the Complaint goes --
17 in looking at cases from other jurisdictions, which of
18 course are not binding upon this court, but sometimes
19 other cases state the law or the theory more
20 succinctly, specifically the case of Hill v. Johnson,
21 which is a Georgia case, and 210 GA appeal 824. I
22 think they state it very succinctly when they say that
23 the allegations in the Complaint, as summarized -- and
24 in that case, it was summarized that the actions merit
25 an award of punitive damages.

BALES. V. MARTINEZ 4.3.12

1 And the court says that they must be taken as if
2 every item and paragraph in the Complaint were
3 supported by proper evidence. And that's because -- as
4 Mr. Weston acknowledged, when the case goes into
5 default, that the court can deem the allegations within
6 the Complaint admitted.

7 And, Your Honor, I believe we -- we talked about
8 the Complaint in the damages hearing, and I believe we
9 may have actually submitted it into evidence. In the
10 Complaint, paragraph No. 8 of the Complaint, it is
11 alleged that Defendant Martinez was not licensed to
12 drive.

13 It's further alleged in paragraph 9, that he had
14 been convicted or arrested on previous occasions before
15 for driving without a license, which establishes a
16 willful and wanton pattern of driving without a
17 license, not just one time in some sort of emergency
18 situation.

19 In paragraph 13, we alleged that the Defendant's
20 action were reckless, wilful and wanton, which of
21 course is the standard for punitive damages in South
22 Carolina.

23 Again, further in the paragraph, careless,
24 reckless, wilfulness and wantonness by the Defendant.
25 The same language is used in paragraph 14. And then

1 finally in the prayer for relief, the Plaintiff prayed
2 for a judgment against the defendants for actual and
3 punitive damages.

4 And, Your Honor, we believe under all of the
5 case law in South Carolina, and looking at the general
6 field in other jurisdictions, that's the -- the nature
7 of punitive damages in a default hearing, as opposed to
8 trials, is a little bit different wherein the court
9 instead should look to the Complaint.

10 And it has been said by our court, that the
11 court should not award greater damages than those pled
12 in the Complaint. But if the damages are pled in the
13 Complaint, and if the -- the reasons for such damages,
14 the willfulness, the recklessness, the wantonness and
15 the specific allegations are set forth in the
16 Complaint, because they are deemed admitted, that
17 punitive damages are perfectly appropriate. And we
18 believe that the damages in this case are appropriate
19 for those reasons.

20 Your Honor, the defendant's other two things
21 that they have asked you to reconsider deal with our
22 expert's testimony, Mr. Clyde Hiers. He's a certified
23 economist and CPA and a financial planner.

24 And just in general on those, if Your Honor will
25 recall, Mr. Hiers testified specifically to pecuniary

BALES V. MARTINEZ 4.3.12

1 loss. And he specifically stated in his testimony that
2 he did not include any amount for the other elements of
3 wrongful death that are permitted in South Carolina,
4 being mental shock, suffering, wounded feelings, grief,
5 sorrow, loss of society or companionship, and all of
6 those things additionally that Ms. Bales testified to,
7 and that we believe were included in Your Honor's
8 ruling.

9 Also, Your Honor, in reviewing your ruling, it
10 does not appear as if you set forth any specific amount
11 as to pecuniary and otherwise. Your Honor breaks her
12 ruling down into a distinction between actual damages
13 and punitive damages.

14 And while Your Honor does discuss Mr. Hier's
15 testimony, and the figures that he comes to -- and Your
16 Honor states that she believes them to be reasonable
17 and -- and generally accepted within his field, there
18 is no indication that Your Honor actually specifically
19 awards the exact amount -- for instance, life value or
20 the interest that Mr. Hiers had suggested would be the
21 proper amount.

22 And, in fact, at the end of the damages hearing,
23 the Plaintiff's prayed for relief in the amount of \$4
24 million in actual damages, which was not included in
25 your final order, when the actual damages were reduced

1 to \$1.7 million.

2 So it may be, in fact, Your Honor, that you have
3 already taken many of those things into consideration,
4 and then rolling that in with the other types of loss
5 that you are allowed to consider, such as the shock,
6 suffering, wounded feelings to come properly to the --
7 to the award that you came with.

8 Specifically, as to the life value, Your Honor,
9 Mr. Hiers I believe testified that, in fact, the life
10 value as he was calculating it, was a pecuniary loss to
11 the beneficiaries. And so as a pecuniary loss, it
12 would be awardable under South Carolina law.

13 And if I recall correctly, I believe he used the
14 McNeil case and the other case from New Hampshire. He
15 cited those as to -- sort of his reasoning, and how he
16 reached the number that he reached. But if I'm not
17 mistaken, and again, we didn't have time to order the
18 transcript either, to get it in on time, but I believe
19 he specifically calculated loss of household services
20 as an amount, which was \$241,527 for actual tangible
21 services that Mr. Bales had been providing.

22 I believe he talked about the family farm, a
23 small farm that they ran and doing chores on the farm.
24 And I believe that Mr. Hiers then went on to classify
25 the life values, the intangible pecuniary interests

BALES V. MARTINEZ 4.3.12

1 such as fixing things around the house and doing the
2 very basic things like -- in fact, the beneficiaries
3 are missing out on without his being available to do
4 those. And you know, for that reason, we think that
5 Your Honor was proper in considering it to the extent
6 that you did consider it.

7 And, again, I'm not sure that you awarded that
8 full amount, but in considering it the way you did,
9 that that is one element of damage that the court can
10 consider. And I believe Mr. Hiers kind of made that
11 distinction and talked about that. And, yes, he used
12 these other cases. And I believe he said it is a
13 guidance, but I don't think he specifically intended to
14 create an entire new category of damages.

15 And to the extent that that life value is the
16 value of his companionship and things of that nature,
17 while that wouldn't be a pecuniary loss, that would
18 still fall into the other aspect of damages that Your
19 Honor would be permitted to consider in coming to the
20 total actual damages amount of \$1.7 million dollars.

21 Finally, just briefly, to address the interest
22 standard, I -- I do remember I think a little bit more
23 clearly Mr. Hire's testimony on the subject,
24 specifically Mr. Weston's cross examination on the
25 issue. And Mr. Weston was pressing him about adding

1 interest and the income and things like that.

2 And as I recall, Mr. Hiers testified that his
3 method was actually more accurate, the way he did it,
4 and it was a generally accepted method within the
5 field, which of course would -- would bring it under
6 the -- the -- more specifically in South Carolina the
7 Watson V. Ford Motor standard of reliability of expert
8 testimony.

9 And Mr. Hiers testified, and I believe Mr.
10 Weston was correct about this, that in adding
11 three percent interest to the Plaintiff's lost earnings
12 going forward, he also in looking at the Plaintiff's
13 future potential medical needs, and the lost income
14 abated, added three percent interest to that amount,
15 which was ultimately subtracted from the total.

16 And he stated, I believe, that because his
17 calculations did not take into account inflation or
18 things like that, that was actually a more accurate,
19 he testified within his professional community, a more
20 accurate way to -- to determine the amount.

21 And he stated that, in fact, Mr. Weston's
22 suggested method of perhaps keeping the three percent
23 interest on the personal income abated, that would
24 later be taken out, but not adding it to the income,
25 would actually be the least accurate method of

BALES V. MARTINEZ 4.3.12

1 calculating the loss.

2 Mr. Hiers also testified, I believe, that his
3 report was very conservative in nature. It didn't take
4 into account any inflation. It didn't take into
5 account any raises that Mr. Bales perhaps would have
6 had in the future, which of course would have given the
7 family extra disposable income to invest. It also
8 didn't take into account Ms. Bale's financial
9 situation.

10 She has since had to go back to work because of
11 this tragedy and more than likely would have gone back
12 to work anyway now that Curtis is in school. And that
13 would have given the family more disposable income,
14 whereby much -- many of the bills could have been paid
15 out of Ms. Bales' salary, leaving Mr. Bale's salary to
16 invest.

17 And again, that interest that was added to his
18 future salary, was also subtracted from the amounts
19 that were deducted from the total actual values. And
20 our expert testified that that was, in his opinion, and
21 the way that his field did these types of calculations,
22 that that was the most accurate way to do it.

23 And for those reasons, Your Honor, we believe
24 that Your Honor's ultimate order was reasonable. It
25 was fair based upon the evidence. It was permissible

1 under South Carolina law.

2 I did do a little bit of research before coming
3 in today and I'm not sure if it's something that the
4 court would be interested in, but I do have copies for
5 all parties involved. And we went back and looked at
6 some wrongful death verdicts within -- in fact, tried
7 to look in Charleston County and find cases that are
8 similar to this one.

9 And the first one that popped out on me, that
10 was just back in June of 2011, was a case very similar
11 to this one. A middle aged man, married with one
12 child, that was killed in a motor vehicle accident
13 right here in Charleston County. I believe Judge Young
14 was over the case. And that was -- \$2,250,000 was the
15 jury verdict there or it looks like it may have settled
16 right before it went to the jury, but I believe the
17 case was presented.

18 Several other cases with very similar facts are
19 all in that range, such that we believe that Your
20 Honor's ultimate order was fair and reasonable under
21 the circumstances, and that it's not necessary for Your
22 Honor to deduct the amounts that the defendant now asks
23 you to deduct. Thank you.

24 THE COURT: Thank you.

25 MR. WESTON: Thank you, Your Honor. Again, Your

BALES V. MARTINEZ 4.3.12

1 Honor, I think reading Your Honor's order in this case,
2 you did specifically state that Mr. Hiers had testified
3 as to \$1,502,166, which included that life value figure
4 exactly. And Your Honor did say you found Mr. Hier's
5 calculations to be reasonable. So from the face of the
6 order, it appears that Your Honor did award those
7 pecuniary damages, even though you then converted
8 everything into a lump sum of \$1,700,000 for the -- for
9 the actual damages.

10 It does appear that Your Honor was saying in
11 the order that you were awarding that exact figure that
12 Mr. Hiers put forward, as to what he believed to be the
13 pecuniary loss.

14 Your Honor, in response to what Mr. Poulin said,
15 just because an expert says something is a pecuniary
16 loss, does not mean it is a pecuniary loss. And in
17 fact, what Mr. Poulin said was -- and he pointed out
18 that Mr. Hiers is saying, oh, well, I'm equating this
19 to the fact that the beneficiaries have lost his
20 services around the household. That's where this life
21 value number comes from.

22 Well, again, that's -- that's what I was
23 pointing out earlier, Your Honor. This is allowing a
24 double recovery. Because there's already been a figure
25 put forward by Mr. Hiers for loss of services for

BALES. V. MARTINEZ 4.3.12

1 the -- for the decedent. He is simply attempting to
2 convert something that is not a loss to the
3 beneficiaries, but rather a personal loss to somebody
4 and converting it into something. This is a loss to
5 the beneficiaries.

6 And that is instead -- those types of losses are
7 instead covered under the other damages allowed in a
8 wrongful death case, Your Honor. The loss of
9 companionship and the grief, what not. Those are the
10 other types of damages besides actual, hard pecuniary
11 losses to the beneficiaries.

12 So this is not -- this \$417,000 figure is not
13 based upon a dollar loss to the beneficiaries. It is
14 not a pecuniary loss to the beneficiaries, it is again
15 this fictitious lump sum that Mr. Hiers has come up
16 with based upon case law that even doesn't apply.

17 Your Honor, with respect to the punitive
18 damages, again, Your Honor, what we are simply pointing
19 out with respect to that is, yes, even though the
20 allegations are deemed admitted in the Complaint, that
21 we are still -- when we were talking about \$200,000 in
22 punitive damages, and there are witnesses available to
23 testify as to what exactly the defendant did, that when
24 you don't call those witnesses, and you instead produce
25 those conclusory statements as to what happened in the

BALES. V. MARTINEZ 4.3.12

1 accident, that that doesn't support that award.

2 And, Your Honor, Mr. Poulin said, well, those
3 are fact witnesses. Yes, but they are fact witnesses
4 as to damages. The same way Mr. Hiers was called as an
5 expert witness with respect to damages and Mrs. Bales
6 testified as a fact witness with respect to damages,
7 anybody testifying as to what the Defendant did or
8 supposedly did, would also be a fact witness as to
9 damages, because it's relates to those punitive
10 damages, the amount that the court might award.

11 And, Your Honor, again, we feel the amount of
12 the award was excessive based upon that lack of
13 evidence that was presented at the hearing. And there
14 was no showing by the Plaintiff, again, that they could
15 not have produced those witnesses.

16 The interest issue, Your Honor, I think we have
17 covered that. I won't -- I won't -- I won't have
18 anything further to say about that. Just that it is --
19 except to say that it's a new category of damages,
20 attempting to be advanced by Mr. Hiers. That -- that's
21 not the way you calculate those types of damages under
22 South Carolina law.

23 THE COURT: Thank you. Counsel, I am going to
24 take this matter under advisement. I should have your
25 ruling by the close of business this week. Keep in

1 mind that I'm in Berkeley all week, so it takes a while
2 to get the order oddly enough to Charleston and get it
3 filed.

4 MR. WESTON: Thank you, Your Honor.

5 MR. POULIN: Thank you, Your Honor.

6

7 _____
(Whereupon, the hearing adjourned.)

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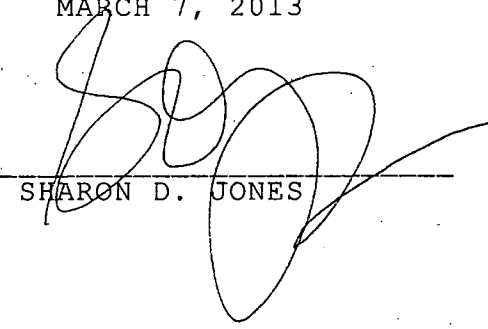
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CERTIFICATE OF REPORTER

I, SHARON D. JONES, OFFICIAL COURT REPORTER FOR THE 9TH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF COMMON PLEAS FOR CHARLESTON COUNTY, SOUTH CAROLINA, ON THE 3RD DAY OF APRIL, 2012.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

MARCH 7, 2013



SHARON D. JONES

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2010-CP-10-8631

Cynthia D. Bales, as Personal Representative
of the Estate of Frank R. Bales,

Respondent

v.

Abel Martinez Martinez and the
South Carolina Department of Transportation,

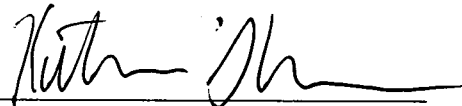
Of whom Abel Martinez Martinez is Appellant,

Appellant

CERTIFICATE OF APPELLANT

The undersigned hereby certifies that the Supplement to the Record on Appeal contains
all material proposed to be included by any of the parties and not any other material.

March 27, 2013



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Appellant

PROOF OF SERVICE

I hereby certify that I have this day served a copy of the Supplement to the Record on Appeal upon all parties to this matter by electronic mail and depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

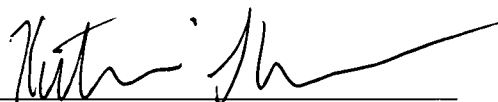
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