

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

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Case No. 2010-CP-10-8631

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**RECEIVED**  
FEB 21 2013  
SC Court of Appeals

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

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FINAL BRIEF OF APPELLANT

---

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TABLE OF CONTENTS

Table of Authorities ..... iii

Statement of Issues on Appeal ..... 1

Statement of the Case ..... 1

Statement of Facts ..... 3

Arguments

    I.    THIS COURT SHOULD REDUCE THE DEFAULT JUDGMENT  
          DAMAGE AWARD TO CONFORM TO THE EVIDENCE AND  
          SOUTH CAROLINA CASE LAW ..... 4

        A.    "LIFE VALUE" IS NOT A RECOGNIZED OR RECOVERABLE  
              ITEM OF ECONOMIC DAMAGE IN A WRONGFUL DEATH  
              CASE. .... 6

        B.    THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO  
              JUSTIFY THE AWARD OF PUNITIVE DAMAGES. .... 11

Conclusion ..... 13

## TABLE OF AUTHORITIES

### Cases

<u>Ballard v. Ballard</u> , 314 S.C. 40, 443 S.E. 2d 802 (1994).....	8, 9
<u>Baughman v. S. Ry.</u> , 127 S.C. 493, 121 S.E. 356 (1924) .....	4
<u>Bishop Logging Co. v. John Deere Indus. Equip. Co.</u> , 317 S.C. 520, 455 S.E.2d 183 (Ct. App. 1995).....	6
<u>Dawkins v. Fields</u> , 354 S.C. 58, 580 S.E.2d 433 (2003) .....	7
<u>Gamble v. Stevenson</u> , 305 S.C. 104, 406 S.E.2d 350 (1991) .....	12, 13
<u>Harris Teeter, Inc. v. Moore &amp; Van Allen, PPL</u> , 390 S.C. 275, 289-91, 701 S.E.2d 742, 749-50 (2010).....	8
<u>Jackson v. Midlands Human Resources Center</u> , 296 S.C. 526, 374 S.E.2d 505 (Ct. App. 1988).....	5
<u>Jordan v. Holt</u> , 362 S.C. 201, 608 S.E.2d 129 (2005) .....	6
<u>Lewis v. Cong. of Racial Equal. &amp;/or C. O. R. E., Inc.</u> , 275 S.C. 556, 274 S.E.2d 287 (1981).....	5, 8, 11
<u>Marcotte v. Timberland/Hampstead School District</u> , 733 A.2d 394 (N.H. 1999). 8, 10, 11	
<u>McNeill v. United States</u> , 519 F. Supp. 283 (D.S.C. 1981).....	8, 9, 10
<u>Piggy Park Enters., Inc. v. Schofield</u> , 251 S.C. 385, 162 S.E.2d 705 (1968) .....	5
<u>Scott v. Porter</u> , 340 S.C. 158, 170, 530 S.E.2d 389, 395 (Ct. App. 2000).....	10
<u>Southeastern Mobile Homes, Inc. v. Walicki</u> , 282 S.C. 298, 317 S.E.2d 773 (Ct.App.1984).....	6
<u>State v. Commander</u> , 396 S.C. 254, 721 S.E.2d 413 (2011).....	7
<u>Watson v. Ford</u> , 389 S.C. 434, 699 S.E.2d 169 (2010).....	8

Whisenant v. James Island Corp., 277 S.C. 10, 281 S.E.2d 794 (1981)..... 4

Wiggins v. Todd, 296 S.C. 432, 373 S.E.2d 704 (Ct. App. 1988)..... 6

Young v. Tide Craft, Inc., et. al., 270 S.C. 453, 242 S.E.2d 671 (1978) ..... 8

## STATEMENT OF ISSUES ON APPEAL

1. Is "life value" a recognized or recoverable item of economic damage in a wrongful death case?
2. Was the evidence presented sufficient to justify the award of punitive damages?

## STATEMENT OF THE CASE

This case arises out of a motor vehicle and/or motorcycle accident ("the Accident") that occurred on October 15, 2008 when Abel Martinez (hereinafter "Appellant") and Frank Bales collided, resulting in the death of Frank Bales. On October 15, 2010, a Summons and Complaint was filed by Cynthia D. Bales, as Personal Representative of the Estate of Frank Bales (hereinafter "Respondent"), in Charleston County against Appellant and the South Carolina Department of Transportation (hereinafter "SCDOT"). (See R. pp. 11-18). This wrongful death Complaint alleged that Mr. Martinez "entered into the intersection through a red light causing the [Respondent's] decedent to collide into Defendant Martinez's vehicle." (R. p. 13).

On September 26, 2011, Respondent's counsel, Akim Anastopoulo, filed a Motion for Entry of Default and Request for Hearing on Damages. (See R. pp. 21-32). After a hearing at which Appellant was unrepresented, the trial court issued an Order for Entry of Default on October 7, 2011. (See R. p. 1).

On January 11, 2012, the trial court held a bench trial to determine the appropriate damages to be awarded pursuant to the Entry of Default. (See generally R. pp. 136-182). At the default damages hearing, Respondent was represented by Akim Anastopoulo and Eric Poulin and Appellant was represented by Joe Weston, who filed a Notice of Appearance on behalf of Mr. Martinez on

January 11, 2012. (See P. p. 139, lines 18-21 and R. p. 33). On March 2, 2012, the trial court entered its Final Judgment in favor of Respondent, awarding damages totaling \$1,900,000.00, including \$1,700,000 in actual damages and \$200,000 in punitive damages, and mailed the Final Judgment on March 8, 2012. (R. p. 8).

Appellant filed a Motion to Reconsider the award of damages on March 15, 2012. (See R. pp. 35-60). The trial court heard oral arguments on the Motion to Reconsider on April 3, 2012 and issued an order denying the Motion to Reconsider on April 17, 2012. (See R. pp. 4-5). Appellant timely filed a Notice of Appeal on May 16, 2012. (See R. pp. 128-135).

Prior to filing the Notice of Appeal regarding the damages issues outlined below, Appellant filed a Motion for Relief from Default Judgment and a Memorandum in Support of the same on April 26, 2012. (See R. pp. 61-127). Notwithstanding this appeal, Appellant has requested that the trial court hear the Motion for Relief from Default Judgment during the pendency of the appeal.

Appellant hereby appeals the damages awarded in the trial court's Final Judgment and requests that this Court reduce the damages awarded as follows. First, Appellant requests that the damages be reduced by \$417,046, which Respondent's expert testified was the Respondent's decedent's "life value," because "life value" is not a recognized or accepted category of damage in South Carolina in a wrongful death case. Second, Appellant believes that the award of \$200,000.00 in punitive damages was improper, because the evidence submitted at the default damages hearing does not support the punitive damages award.

## STATEMENT OF FACTS

This case arises out of a motor vehicle and/or motorcycle accident ("the Accident") that occurred on October 15, 2008 when Abel Martinez (hereinafter "Appellant") and Frank Bales collided, resulting in the death of Frank Bales. At the default damages hearing, Respondent introduced evidence to support the requested wrongful death damages. The evidence included the testimony of the decedent's wife, Cynthia Bales, (see R. p. 143, line 10-p. 158, line 7), and the testimony and written report of Respondent's economic expert, Clyde Hiers, (see R. p. 159, line 9-p. 174, line 25 and R. pp. 183-190). Respondent's counsel was prevented from introducing inadmissible evidence, including the traffic collision report, (R. p. 147, line 9-p. 148, line 18), and Respondent counsel's opinions regarding the accident, (R. p. 149, line 2-p. 150, line 6).

In his written report and testimony, Mr. Hiers outlined the economic value of the wrongful death claim with the following present values: Lost Income Pre Trial of \$136,579, Lost Fringe Benefits Pre Trial of \$75,569, Lost Household Services Pre Trial of \$31,206, Lost Income Post Trial of \$430,329, Lost Fringe Benefits Post Trial of \$223,341, Lost Household Services Post Trial of \$241,527, Personal Consumption credit in the amount of \$53,431, and Life Value of \$417,046. (R. pp. 183-190). Thus, Mr. Hiers opined that the present value of the total economic loss is \$1,502,166. (R. p. 163, lines 3-14 and R. pp. 183-190). The trial court relied on the testimony and calculations of Mr. Hiers to determine the actual damages, including his calculations on "life value." (R. p. 7). Mr. Hiers testified that the "life value" of \$417,000 "is a number that is judicially created that assigns a value to a life over and above what society would think of as an economic engine." (R.

p. 172, lines 7-17). Further, Mr. Hiers testified that the “life value” was based upon two cases discussed in detail below. (R. p. 172, lines 19-22). Specifically, the calculation of “life value” includes \$12,000 per year based upon the decedent’s remaining life expectancy. (R. p. 172, lines 21-22).

There was no admissible evidence presented at the default damages hearing regarding the circumstances of the accident or the other factors to be considered for an award of punitive damages, as discussed in more detail below. The trial court did not permit the traffic collision report to be entered into evidence. (R. p. 147, line 9-p. 148, line 18). Further, Ms. Bales did not testify regarding the circumstances of the accident. No police officers or eyewitnesses were questioned regarding the circumstances of the accident. Rather, Respondent’s counsel “indicate[d] to the court what he believe[d] [about] the factual background as to the cause of the accident.” (R. p. 149, lines 2-4).

#### ARGUMENTS

#### I. THIS COURT SHOULD REDUCE THE DEFAULT JUDGMENT DAMAGE AWARD TO CONFORM TO THE EVIDENCE AND SOUTH CAROLINA CASE LAW

The burden of proving damages rests on the plaintiff. Baughman v. S. Ry., 127 S.C. 493, 121 S.E. 356 (1924). For damages to be recoverable, the evidence should be sufficient to “enable the court or jury to determine the amount thereof with reasonable certainty or accuracy.” Whisenant v. James Island Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981). While proof with mathematical certainty of the amount of loss is not required, “neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.” Id. If the plaintiff’s proof is speculative,

uncertain, or otherwise insufficient to permit calculation of his special damages, his claim should be denied. See Piggy Park Enters., Inc. v. Schofield, 251 S.C. 385, 162 S.E.2d 705 (1968).

The South Carolina Supreme Court explained why it is especially important that the damages awarded at a default judgment hearing be supported by the evidence in Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc., 275 S.C. 556, 274 S.E.2d 287 (1981):

In the case of unliquidated damages a defendant, though in default as to liability, has a right to expect that the judgment of the court, or the verdict of the jury, will be in keeping not only with the allegations of the complaint and the prayer for relief, but also the proof which has been submitted. . . . We raise the issue ex mero motu.

It is generally recognized that courts should closely scrutinize default judgments to prevent harsh results and drastic action. It is the policy of the law to favor the trial of cases on the merits.

In 46 Am.Jur.2d Judgments s 807, we find the following:

“Unfair, unjust, or unconscionable circumstances.

It has been declared that no rule can be formulated setting a definite boundary beyond which a court of equity cannot go as a matter of power, or will not go as a matter of policy, in preventing the enforcement of an unconscionable judgment. Indeed, there is authority for the rule that in a proper case, a court of equity may look behind a judgment at law in order to do justice between the parties, and that relief from a judgment may be decreed in equity where it is against conscience to execute the judgment...”

Whether a defendant is or is not in default, it is incumbent upon the judge and/or the jury to make a judicial determination of the amount of damages based on the proof, and such proof must be by the preponderance of the evidence.

Id. at 560-61, 274 S.E.2d at 289. See also Jackson v. Midlands Human Resources Center, 296 S.C. 526, 529, 374 S.E.2d 505, 506 - 507 (Ct. App. 1988) (“Although the defendant is in default as to

liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted.”)

In a case tried without a jury, “the trial judge's findings will be upheld on appeal unless the findings are without evidentiary support.” Jordan v. Holt, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005) (emphasis added). The appellate court is permitted to modify a default judgment “where damages improperly allowed may be segregated.” Wiggins v. Todd, 296 S.C. 432, 435, 373 S.E.2d 704, 706 (Ct. App. 1988) (citing Southeastern Mobile Homes, Inc. v. Walicki, 282 S.C. 298, 317 S.E.2d 773 (Ct.App.1984)). If certain elements of the damages awarded are unsupported by the evidence, the damage award can be reduced by the appellate court. See, e.g. Bishop Logging Co. v. John Deere Indus. Equip. Co., 317 S.C. 520, 538, 455 S.E.2d 183, 193 (Ct. App. 1995).

A. "LIFE VALUE" IS NOT A RECOGNIZED OR RECOVERABLE ITEM OF ECONOMIC DAMAGE IN A WRONGFUL DEATH CASE.

Respondent’s economic expert, Claude Hiers, improperly opined that the actual economic damages included a “life value” in the amount of \$417,000. (R. p. 172, lines 7-12). Because this opinion is a legal conclusion that mischaracterizes the decisions in two cases, this Court should reduce the damages awarded by \$417,000. Appellant’s counsel argued at both the default damages hearing and at the hearing on Appellant’s Motion to Reconsider that an award for the "life value" of the decedent is not a recognized or accepted category of pecuniary damage in South Carolina in a wrongful death case, and urged the Court to reject any damages based upon the "life value" argument. The trial court awarded Respondent the actual damages outlined by Mr. Hiers, which

included the "life value" figure of \$417,046.00. (R. pp. 7-8).

In his written report and testimony, Mr. Hiers outlined the economic value of the wrongful death claim with the following present values: Lost Income Pre Trial of \$136,579, Lost Fringe Benefits Pre Trial of \$75,569, Lost Household Services Pre Trial of \$31,206, Lost Income Post Trial of \$430,329, Lost Fringe Benefits Post Trial of \$223,341, Lost Household Services Post Trial of \$241,527, Personal Consumption credit in the amount of \$53,431, and Life Value of \$417,046. (R. pp. 183-190). Thus, Mr. Hiers opined that the present value of the total economic loss is \$1,502,166. (R. p. 163, line 14 and R. pp. 183-190). The trial court relied on the testimony and calculations of Mr. Hiers to determine the actual damages, including his calculations on "life value." (R. p. 7). Mr. Hiers testified that the "life value" of \$417,000 "is a number that is judicially created that assigns a value to a life over and above what society would think of as an economic engine." (R. p. 172, lines 15-17). Further, Mr. Hiers testified that the "life value" was based upon two cases discussed in detail below. (R. p. 172, lines 19-22). Specifically, the calculation of "life value" includes \$12,000 per year based upon the decedent's remaining life expectancy. (R. p. 172, lines 22-24).

It is well settled that "expert testimony on issues of law is usually inadmissible." State v. Commander, 396 S.C. 254, 264, 721 S.E.2d 413, 418 (2011) (citing Dawkins v. Fields, 354 S.C. 58, 66-67, 580 S.E.2d 433, 437 (2003)). Moreover, a trial court must find that a witness is an expert based not only on his knowledge, skill, experience, training, or education in her field, and also must find that the substance of his testimony is reliable. Watson v. Ford, 389 S.C. 434, 450, 699 S.E.2d

169, 177 (2010). An expert opinion is inadequate and inadmissible if it is not supported by some factual basis. Young v. Tide Craft, Inc., et. al., 270 S.C. 453, 467-69, 242 S.E.2d 671, 678 (1978). For an expert's opinion to be admissible, there must be some underlying basis for it, and the expert must show that in formulating his opinion "he has taken into consideration the material facts of the cas[e]." Id. For example, mere conclusory statements of an expert or opinions that are based entirely on generalities are insufficient evidence. Harris Teeter, Inc. v. Moore & Van Allen, PPL, 390 S.C. 275, 289-91, 701 S.E.2d 742, 749-50 (2010).

Not only is Mr. Hiers' damage calculation improperly based on legal conclusions rather than facts, but he also improperly relies on these cases and mischaracterizes the holdings. The South Carolina Supreme Court has clearly held that "[w]hether a defendant is or is not in default, it is incumbent upon the judge and/or the jury to make a judicial determination of the amount of damages based on the proof, and such proof must be by the preponderance of the evidence." Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc., 275 S.C. 556, 561, 274 S.E.2d 287, 289 (1981). Mr. Hiers testified that he based the "life value" figure on two court decisions, the South Carolina District Court's decision McNeill v. United States, 519 F. Supp. 283 (D.S.C. 1981) and a New Hampshire Supreme Court case, Marcotte v. Timberland/Hampstead School District, 733 A.2d 394, 143 N.H. 331 (N.H. 1999).

The seminal case in South Carolina as to the damages allowed in a wrongful death action is Ballard v. Ballard, 314 S.C. 40, 443 S.E. 2d 802 (1994). In Ballard, the South Carolina Supreme Court held that "the damages sustained by the statutory beneficiaries resulting from the death of the decedent, includ[e] pecuniary loss, mental shock and suffering, wounded feelings, grief, sorrow, and

loss of society and companionship.” Ballard, 314 S.C. at 41-42, 443 S.E.2d at 803 (1994). The case makes no mention of allowing pecuniary damages based on a loss of the decedent's "life value" or anything comparable. Id. The Appellant's research has likewise failed to reveal any South Carolina case where the Court allowed or recognized "life value" as being a recoverable category of pecuniary loss in a wrongful death case.

The cases cited by the Plaintiff's expert are not on point and do not provide a basis for a "life value" award in a wrongful death case. Importantly, McNeill v. United States, 519 F. Supp. 283 (D.S.C. 1981), a South Carolina District Court case, is not a wrongful death case, and, therefore, the court did not address permissible damages in a wrongful death action. Rather, McNeill involved a child who allegedly received improper medical care with the result that he was profoundly retarded and had a shortened life expectancy. McNeill, 519 F. Supp. at 286-87. The court held that a living Plaintiff whose life expectancy was shortened due to an injury was entitled to be compensated for "his shortened life expectancy." Id. at 289 (emphasis added). Unlike the instant case, the damages awarded to the Plaintiff for his shortened life expectancy were based upon a personal loss to the Plaintiff himself, rather than a loss to his statutory beneficiaries.

A personal loss such as the one discussed by the court in McNeill has no application in a wrongful death case, because a wrongful death action is based not on personal losses sustained by the decedent, but rather on the economic and emotional harm suffered by the decedent's beneficiaries. See S.C. Code § 15-51-20; Ballard, 341 S.C. at 41-42, 443 S.E.2d at 802 (damages recoverable for wrongful death are the damages sustained by the statutory beneficiaries). Personal

damages sustained directly by a decedent prior to his death, for things such as pain, suffering, mental anguish or loss of enjoyment of life, would properly be asserted in a survival action:

Unlike actual damages in a wrongful death action, actual damages in a survival action are awarded for the benefit of the decedent's estate rather than for the family. . . . Appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased.

Scott v. Porter, 340 S.C. 158, 170, 530 S.E.2d 389, 395 (Ct. App. 2000) (citations omitted). The McNeill case does not provide a basis for awarding damages for "life value" in a wrongful death case. Therefore, Mr. Hiers' reliance on this case was misplaced.

Respondent's expert also improperly based his opinion on a New Hampshire case, Marcotte v. Timberland/Hampstead School District, 733 A.2d 394 (N.H. 1999). Reliance on this case is misplaced, because a New Hampshire decision does not establish South Carolina law or have any precedential effect on the South Carolina courts. Furthermore, in Marcotte, the court allowed for recovery of "loss of life" damages in a wrongful death case involving a child, because the court found that the New Hampshire wrongful death statute expressly allowed for recovery of such damages:

The plain language of RSA 556:12 establishes that where the decedent's death was caused by the injury complained of in the action", "the probable duration his life but for the injury" may be considered as an element of damages in addition to the other enumerated damage elements.

Marcotte, 733 A.2d at 400.

Neither South Carolina's wrongful death statute nor the cases applying and interpreting that statute have established any right of recovery for pecuniary loss for the decedent's "life value." Respondent's expert opinion had no factual basis and, instead, was based on legal conclusions. Moreover, Respondent's expert's reliance on these cases is misplaced for the reasons outlined above. For the foregoing reasons, there was no evidence to support the damages awarded for "life value" in the amount of \$417,046. Therefore, Appellant respectfully requests this Court reduce the actual damages awarded by the trial court by \$417,046.

**B. THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO JUSTIFY THE AWARD OF PUNITIVE DAMAGES.**

The trial court awarded \$200,000 in punitive damages, although there was no evidentiary support for the award of punitive damages. Due process and fundamental justice require admissible evidence to support a punitive damage award, even where, as here, all of the allegations in the Complaint are deemed as admitted due to the default. Moreover, the South Carolina Supreme Court has clearly held that "[i]n the case of unliquidated damages a defendant, though in default as to liability, has a right to expect that the judgment of the court, or the verdict of the jury, will be in keeping not only with the allegations of the complaint and the prayer for relief, but also the proof which has been submitted." *Lewis*, 275 S.C. at 558, 274 S.E.2d at 289 (emphasis added).

There was no admissible evidence presented at the default damages hearing regarding the circumstances of the accident or the other factors to be considered for an award of punitive damages. The trial court did not permit the traffic collision report to be entered into evidence. (R. pp. 147-

148). Further, Ms. Bales did not testify regarding the circumstances of the accident. No police officers or eyewitnesses were questioned regarding the circumstances of the accident. Rather, Respondent's counsel "indicate[d] to the court what he believe[d] [about] the factual background as to the cause of the accident." (R. p. 149). Respondent's counsel's summary of his understanding of the circumstances surrounding the accident was the only information presented to the trial court concerning the accident and Appellant's actions.

Respondent's counsel alleged at the damages hearing, without introducing any eyewitness testimony or direct evidence to support his allegations, that the Appellant ran a red light and was speeding at the time of the accident, that the Appellant did not have a valid driver's license when the accident took place, and that that the Defendant pleaded guilty to an unspecified citation received as a result of the accident. (R. pp. 149-150). The testimony of Respondent's counsel as to the circumstances surrounding the accident, without any evidentiary support, was insufficient to support an award of punitive damages.

Although the allegations in the Complaint as to liability are deemed admitted for purposes of a default damages hearing, the lack of any direct evidence in this case as to the Appellant's actions, Appellant's ability to pay, Appellant's past conduct, or the circumstances surrounding the accident fails to support an award of \$200,000 in punitive damages to the Respondent.

The South Carolina Supreme Court's decision in Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991) is instructive as it relates to punitive damages. Gamble sets forth a number of factors that a Court should consider in any post-trial review of the merits of a punitive damage

award, including: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. Gamble at 305 S.C. at 112, 406 S.E.2d at 351.

Applying the Gamble factors to the instant case, the lack of any admissible evidence presented by the Respondent failed to establish a degree of culpability that would justify an award of \$200,000 in punitive damages. While the Respondent claims that the Defendant was speeding and ran a red light, she presented no evidence to directly support those allegations, and as a result there is no evidence to support an award of punitive damages. Furthermore, there was no evidence submitted on the other Gamble factors, including but not limited to, defendant's ability to pay, the likelihood the award will deter the defendant or others from conduct, the existence of similar past conduct, etc. Notwithstanding the allegations in the Complaint, Respondent failed to introduce sufficient admissible evidence to justify an award of punitive damages.

Based on the forgoing, the Appellant respectfully requests that this Court amend the default judgment to remove the punitive damage award or, in the alternative, that the Court substantially reduce the punitive damage award to reflect the lack of evidence to support a punitive damage award.

#### CONCLUSION

The default damage award of \$417,046 for the "life value" of the decedent is not a recognized category of damages in a wrongful death case in South Carolina. The only evidence offered in

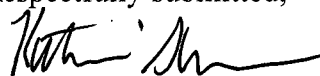
support of the “life value” damages was the testimony of Plaintiff’s expert, and he based his opinion exclusively on two cases that do not support his position for the reasons outlined above. Therefore, Appellant respectfully requests that this Court reduce the actual damages awarded by \$417,046.

In addition, the default damage award of \$200,000 in punitive damages is not supported by the admissible evidence presented at the hearing. Even though the allegations in the Complaint are deemed to be admitted for purposes of a default damages hearing, the Respondent is still required to introduce admissible evidence to support an award of punitive damages. Because no admissible evidence was presented to support the award of punitive damages, Appellant respectfully requests that this Court remove the punitive damages from the award or reduce them to an amount that is commensurate with the evidence presented.

For the reasons stated, this Court should reduce the damages awarded in the Final Judgment issued by the trial court.

February 20, 2013

Respectfully submitted,



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Of whom Abel Martinez Martinez is Appellant,

Appellant

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PROOF OF SERVICE

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I hereby certify that I have this day served a copy of the Final Brief upon all parties to this matter by 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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**SIGNATURE PAGE TO FOLLOW**

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CERTIFICATE OF COUNSEL

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The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

February 20, 2013



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