

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Jerry M. Angelo, Special Referee

Case No. 2011-CP-17-460
Appellate Case No. 2014-001585

Teri N. Jacobs, Jr.,.....Respondent,

v.

Jerry W. Page and James Page, individually and d/b/a James
Page Farms.....Defendants,

Of whom Jerry W. Page is the Appellant.

FINAL BRIEF OF APPELLANT

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OCT 30 2014

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN AWARDING \$115,200.00 IN LOST WAGES WHEN THAT ELEMENT OF DAMAGES WAS NOT SOUGHT IN THE RESPONDENT'S COMPLAINT?
2. DID THE TRIAL COURT ERR IN AWARDING \$30,000.00 IN FUTURE MEDICAL EXPENSES WHEN NO COMPETENT EVIDENCE EXISTS TO SUPPORT THEIR AWARD?
3. DID THE TRIAL COURT VIOLATE THE APPELLANT'S DUE PROCESS RIGHTS IN AWARDING \$100,000.00 IN PUNITIVE DAMAGES WHEN IT USED EVIDENCE THAT WAS NOT IN THE RECORD AND APPLIED THE INCORRECT STANDARD IN REACHING ITS DECISION?

STATEMENT OF THE CASE

The Respondent filed the Summons and Complaint in the Dillon County Court of Common Pleas on November 18, 2011 seeking damages for an automobile versus livestock collision. The Appellant, Jerry W. Page, was personally served a copy of the Summons and Complaint on December 3, 2011. The Appellant failed to file a responsive pleading and was adjudged to be in default by Order of Judge Paul M. Burch dated February 1, 2012. Judge Burch referred the matter to the Honorable Jerry M. Angelo as Special Referee for a hearing on damages. The damages hearing was held on May 14, 2014 at which the Appellant participated *pro se*. The Order of Special Referee was filed in the Dillon County Court of Common Pleas on June 13, 2014 and the Appellant received a copy of the filed Order of Special Referee on or about July 2, 2014. The Order

of Special Referee found actual damages for the Respondent in the amount of \$257,700.00 broken down as follows: \$2,500.00 for property damage, \$30,000.00 for future medical costs, \$50,000.00 in future pain and suffering, \$60,000.00 in actual damages to the plaintiff's physical body and health, and \$115,200.00 in lost wages. Additionally, the Order of Special Referee ordered the Appellant pay punitive damages in the amount of \$100,000.00. The Appellant served his Notice of Appeal on July 22, 2014.

ARGUMENTS

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT AWARDED \$115,200.00 IN LOST WAGES WHEN THAT ELEMENT OF DAMAGES WAS NOT SOUGHT IN THE RESPONDENT'S COMPLAINT.

The trial court on Page 8 of its Order delineated several elements of actual damage it awarded to the Respondent. Included in this breakdown was \$115,200.00 in lost wages. (R. p. 8, line 11) The Respondent in his Complaint pled numerous specific elements of damage, none of which included a prayer for lost wages. (R. p. 13, lines 7-29). The Respondent is bound by his pleadings and never sought to amend those pleadings before, during or after the hearing. Therefore, the trial court committed reversible error in awarding an element of damages not sought in the Respondent's Complaint.

The South Carolina Court of Appeals, in Charleston County School Dist. v. Laidlaw Transit, Inc., 559 S.E.2d 362, 348 S.C. 420 (S.C. App. 2001), stated as follows: "It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. Any allegations, statements, or other admissions contained in the pleading are conclusive against the pleader, and a party

cannot subsequently take a contrary or inconsistent position.” (Citations omitted.) The Court on several occasions has confirmed the principle that for an element of damage to be recovered, it must be pled in the complaint. See e.g., Tilley v. Pacesetter Corp., 585 S.E.2d 292, 355 S.C. 361 (2003) (“This court requires parties to plead for pre-judgment interest in order for it to be recovered. If no request for pre-judgment interest is made in the pleadings, it cannot be recovered on appeal.”) (Citations omitted.); Green v. Waidner, 324 S.E.2d 331, 284 S.C. 35 (S.C. App. 1984) (“It is well settled that instructions should be confined to issues raised by the pleadings and evidence, and an instruction which tenders an issue not raised is error.”) (Citations omitted.) Just as it would be erroneous for the court to instruct a jury on an issue not raised in a pleading, likewise, it is erroneous for a trial court sitting without a jury to issue an award for an element of damages not sought in the plaintiff’s complaint. Therefore, this Court should reverse the trial court’s award of lost wages in the amount of \$115,200.00 and remand the case to the trial court to amend its order by deleting such damages.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN AWARDING \$30,000.00 IN FUTURE MEDICAL EXPENSES WHEN NO COMPETENT EVIDENCE EXISTS TO SUPPORT THEIR AWARD.

The trial court committed reversible error when it awarded \$30,000.00 in future medical expenses when no competent evidence exists to support that award. The standard of review in an action at law tried without a jury “is limited to determining whether the (trial court’s) findings are supported by competent evidence and correcting errors of law.” Mathis v. Brown and Brown of S.C., Inc., 698 S.E.2d 773, 389 S.C. 299 (2010).

The trial court's order awarded the Respondent "30,000.00 for future medical costs." (R. p. 8, line 9). The only evidence presented to support the trial court's award was the Respondent's inadmissible hearsay testimony regarding his treatment with Dr. Chokshi, an orthopedic spine surgeon. The Respondent testified that Dr. Chokshi "told me I got bones broken in my neck and I got torn shoulder blades – muscles in my shoulder blades." (R. p. 21, line 15 – p. 22, line 1). The Respondent further testified Dr. Chokshi "recommended me immediately to get surgery, as soon as possible. (R. p. 22, lines 2-5). The Respondent also testified Dr. Chokshi said the surgery would cost "I think around about \$30,000.00 dollars." (R. p. 22, lines 18-20).

The medical records submitted by the Respondent in support of his claim for damages include those of Dr. Chokshi, the physician who allegedly advised the Respondent that he needed "immediate surgery." Contrary to the Respondent's inadmissible hearsay testimony, Dr. Chokshi's report indicates that x-rays showed no fracture and the cervical MRI taken showed only degenerative changes in portions of the Respondent's neck. Dr. Chokshi ordered physical therapy to relieve the Respondent's neck pain. (R. pp. 41-44). On April 8, 2009, the Respondent presented to Dr. Chokshi complaining of a painful left shoulder. X-rays taken by Dr. Chokshi that day revealed "mild A/C arthritis." Dr. Chokshi ordered an MRI "prior to considering surgical treatment." (R. pp. 45-46). The MRI taken on April 15, 2009 showed "no internal derangements or significant abnormalities of the left shoulder." (R. pp. 47-48). The Respondent never returned to Dr. Chokshi nor did he return to physical therapy as Dr. Chokshi did not order any additional therapy. (R. p. 56). Thus, the only competent evidence of record, Dr. Chokshi's medical chart and other medical records, confirms that

the Respondent does not need surgery. As such, the award for \$30,000.00 in future medical costs based solely upon the Respondent's inaccurate, inadmissible hearsay testimony should be reversed.

The case of Brown v. Allstate Insurance Company is instructive concerning the trial judge's role with regard to the admission and consideration of evidence in a non-jury setting. 523 S.E.2d 807, 337 S.C. 499 (S.C. App. 1999) and 542 S.E.2d 723, 344 S.C.21 (2001). Both the Court of Appeals and the Supreme Court issued decisions in this case involving allegations of breach of contract and bad faith failure to pay a property damage claim. Allstate denied Brown's claim for comprehensive damage following a fire loss to his 1984 Corvette on the ground that Brown caused the damage to his own vehicle. During the bench trial, the judge allowed Brown to testify that he was not charged with arson by the local authorities. On appeal, both parties agreed that the admission of that evidence was in error. The Court of Appeals reversed the trial court's judgment for Brown on his breach of contract claim and quoted with approval the following from an 8th Circuit Court of Appeals decision:

"In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made." Brewers and Malsters Local Union No. 6 v. NLRB, 301 F2d. 216 (8th Cir. 1962).

The Court of Appeals determined that admission of Brown's testimony regarding lack of prosecution for arson unduly prejudiced the trial court's decision because the trial court did not specifically reject that evidence in its order of judgment. The Supreme

Court reversed the Court of Appeals because it found that sufficient competent evidence was contained within the record to support the judgment of the trial court. The Supreme Court stated “The majority essentially adopts a new rule for trial judges sitting without a jury. According to the majority, if incompetent evidence is admitted on the ultimate issue of the trial, the trial judge must affirmatively reject this evidence, even if it is clear he is making a judgment based on competent evidence in the record. We reject this rule because it would require trial judges to rule on all admitted evidence in a bench trial. **A trial judge’s role in a bench trial is to admit all evidence and then evaluate it in a non-jury setting.**” (Emphasis added)

In contrast to the trial in Brown v. Allstate Insurance Company, here the trial court relies solely on the incompetent hearsay evidence presented by the Respondent in reaching its decision to award \$30,000.00 for future medical costs. The record simply contains no competent evidence to support the trial court’s award of future medical damages in the amount of \$30,000.00. See also, Wigfall v. Fobbs, 367 S.E.2d., 156, 295 S.C. 59 (1988) in which the Supreme Court reversed the trial court’s finding in an adverse possession case because testimony relied upon by the trial court was inadmissible hearsay. The decision is silent on the issue of whether the hearsay statements were admitted over the objection of the opposing party.

It is well settled in South Carolina that the existence or amount of damages cannot be left to conjecture, guess or speculation. Pearson v. Bridges, 544 S.E.2d 617, 34 S.C. 366 (2001). Additionally, the standard of proof for awarding future damages is that they must be “reasonably certain to occur.” Id. In this case, the Respondent presented no competent evidence beyond inadmissible hearsay that he would incur future medical

expenses. Therefore, this court should reverse the trial court's award of \$30,000.00 in future medical expenses and remand the case to the trial court with instructions to amend its order deleting such damages.

III. THE TRIAL COURT VIOLATED THE APPELLANT'S DUE PROCESS RIGHTS IN AWARDING \$100,000.00 IN PUNITIVE DAMAGES WHEN IT USED EVIDENCE THAT WAS NOT IN THE RECORD AND APPLIED THE INCORRECT STANDARD IN REACHING ITS DECISION.

The trial court erroneously considered evidence not in the record and applied the wrong standard when it awarded punitive damages in the amount of \$100,000.00. (R. p. 5, line 14 – p. 8, line 14) The trial court relied on Gamble v. Stevenson, 506 S.E.2d 350, 305 S.C. 104 (1991) in analyzing whether it was appropriate to award punitive damages against the Appellant. While the court addressed each of the Gamble factors, nevertheless, the South Carolina Supreme Court established a new standard for the award of punitive damages in Mitchell v. Fortis Insurance Company, 686 S.E.2d 176, 385 S.C. 570 (2009). In Mitchell, the court established a three part test to analyze whether a punitive damage award comported with Constitutional Due Process. The Court stated that consideration should be given to the degree of reprehensibility of the defendant's conduct, the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award, and the difference between the punitive damages awarded and civil penalties authorized or imposed in comparable cases.

In addition to failing to apply the correct standard, the trial court also considered evidence not appearing in the record. The trial court stated when considering the Appellant's ability to pay, "in this case, Plaintiff's exhibit 2 indicates that over and above

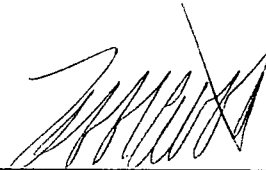
whatever Defendant's net worth may be, he does receive yearly subsidies from the USDA that are substantial" (R. p. 8, lines 3-5). Contrary to the trial court's pronouncement, a review of the hearing transcript indicates that the only exhibit entered into the record by Respondent was exhibit number 1 which contained various subparts, none of which included the information referenced by the court in assisting it to reach its punitive damage award. (R. p. 15, line 4 – p. 18, line 9) Given that the trial court used an incorrect standard when considering whether to award punitive damages against the Appellant and considered evidence not in the record in awarding substantial punitive damages against the Appellant, the ineluctable conclusion is that the Appellant's due process rights have been violated. Therefore, the court should reverse the punitive damage award of \$100,000.00 and remand the matter to the trial court for reconsideration utilizing the correct standard and only the evidence of record.

CONCLUSION

This court should reverse the trial court's award of \$115,200.00 in lost wages because that element of damages was not pled in the complaint. Additionally, this court should reverse the trial court's award of \$30,000.00 for future medical costs when the record contains no competent evidence to support future medical costs thus rendering them purely speculative. Finally, the court should reverse the trial court's award of punitive damages because the Appellant's Due Process rights were violated when the trial court applied the wrong standard for consideration of punitive damages and relied upon evidence not contained in the record in reaching its award. Therefore, the Appellant requests this Court remand the matter to the trial court with instructions to amend the order to delete the award of \$115,200.00 in lost wages and \$30,000.00 for future medical

costs. Additionally, the remand order should require the trial court to once again review the record to determine if punitive damages are appropriate using the correct standard and amend the order as appropriate.

Respectfully submitted,



~~OCT 28~~ 30, 2014

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Jerry M. Angelo, Special Referee

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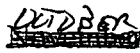
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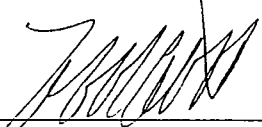
Jerry W. Page and James Page, individually and d/b/a James
Page Farms.....Defendants,

Of whom Jerry W. Page is the Appellant.

CERTIFICATE OF COUNSEL

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

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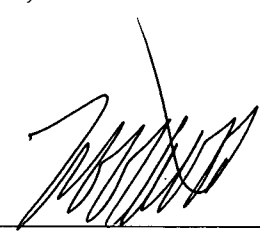
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Of whom Jerry W. Page is the Appellant.

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant on George D. Jebaily and Suzanne H. Jebaily, Other Counsel of Record, by hand delivering a copy of it to George D. Jebaily and Suzanne H. Jebaily, Esquire, at Jebaily Law Firm, PA, 291 W. Evans Street, Post Office Box 1871, Florence, SC 29503.

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Re: Teri N. Jacobs, Jr.
vs. Jerry W. Page and James Page,
individually, and d/b/a James Page
Farms Of whom Jerry W. Page is the
Appellant
Appellate Case No. 2014-001585
Case No. 2011-CP-17-460
Our File #2014117

Dear Ms. Kitchings:

Please find enclosed for filing the following documents regarding the above referenced matter:

1. One unbound and fourteen (14) bound copies of the Final Brief of Appellant; and
2. Original and one (1) copy of Proof of Service.

I would appreciate you filing the original Proof of Service and stamping as received the copy of same and returning the copy to me in the enclosed self-addressed, stamped envelope:

If you have any questions or concerns, please do not hesitate to let me know.

With kindest regards, I am

Yours very truly,



MICHAEL C. ABBOTT

MCA/kch
Enclosures

cc: George D. Jebaily, Esquire
Suzanne H. Jebaily, Esquire
Mr. Jerry W. Page

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