

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. 2012-CP-17-062
Appellate Case No. 2014-001580

Jammie Anderson.....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

Michael C. Abbott
ABBOTT & MCKISSICK LAW FIRM, LLC
702 W. Evans Street
Post Office Box 148
Florence, SC 29503
(843) 669-0089
Attorney for Appellant

RECEIVED

OCT 30 2014

SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities.....	ii
Statement of Issues on Appeal.....	1
Statement of the Case.....	1
Arguments	
1. THE TRIAL COURT ERRED IN AWARDING \$1,360.00 IN LOST WAGES WHEN THAT ELEMENT OF DAMAGES WAS NOT SOUGHT IN THE RESPONDENT’S COMPLAINT.....	2
2. THE TRIAL COURT ERRED IN AWARDING \$100,000.00 IN LOST CAREER OPPORTUNITY WHEN THAT ELEMENT OF DAMAGES WAS NOT SOUGHT IN THE RESPONDENT’S COMPLAINT AND NO COMPETENT EVIDENCE EXISTS TO SUPPORT THE AWARD.....	3
3. THE TRIAL COURT VIOLATED THE APPELLANT’S DUE PROCESS RIGHTS IN AWARDING \$100,000.00 IN PUNITIVE DAMAGES WHEN IT APPLIED THE INCORRECT STANDARD IN REACHING ITS DECISION.....	4
Conclusion.....	5

TABLE OF AUTHORITIES

CASES

<u>Charleston County School Dist. v. Laidlaw Transit, Inc.</u> , 559 S.E.2d 362, 348 S.C. 420 (S.C. App. 2001).....	2
<u>Gamble v. Stevenson</u> , 506 S.E.2d 350, 305 S.C. 104 (1991).....	5
<u>Green v. Waidner</u> , 324 S.E.2d 331, 284 S.C. 35 (S.C. App. 1984).....	3
<u>Mathis v. Brown and Brown of S.C., Inc.</u> , 698 S.E.2d 773, 389 S.C. 299 (2010).....	4
<u>Mitchell v. Fortis Insurance Company</u> , 686 S.E.2d 176, 385 S.C. 570 (2009).....	5
<u>Pearson v. Bridges</u> , 544 S.E.2d 617, 344 S.C. 366 (2001).....	4
<u>Tilley v. Pacesetter Corp.</u> , 585 S.E.2d 292, 355 S.C. 361 (2003).....	3

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN AWARDING \$1,360.00 IN LOST WAGES WHEN THAT ELEMENT OF DAMAGES WAS NOT SOUGHT IN THE RESPONDENT'S COMPLAINT?
2. DID THE TRIAL COURT ERR IN AWARDING \$100,000.00 IN LOST CAREER OPPORTUNITY WHEN THAT ELEMENT OF DAMAGES WAS NOT SOUGHT IN THE RESPONDENT'S COMPLAINT AND NO COMPETENT EVIDENCE EXISTS TO SUPPORT THE AWARD?
3. DID THE TRIAL COURT VIOLATE THE APPELLANT'S DUE PROCESS RIGHTS IN AWARDING \$100,000.00 IN PUNITIVE DAMAGES WHEN IT 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 February 7, 2012 seeking damages for an automobile versus livestock collision. The Appellant, Jerry W. Page, was personally served a copy of the Summons and Complaint on February 15, 2012. The Appellant failed to file a responsive pleading and was adjudged to be in default by Order of Judge Paul M. Burch dated April 11, 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 \$169,060.00 broken

down as follows: \$3,700.00 for property damage, \$60,000.00 in actual damages to the Respondent's physical body and health, \$4,000.00 to compensate for Respondent's permanent scarring, \$1,360.00 in lost wages, and \$100,000.00 in lost career opportunity. 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 \$1,360.00 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 \$1,360.00 in lost wages. (R. p. 8, line 5) The Respondent in his Complaint pled numerous specific elements of damage, none of which included a prayer for lost wages. (R. p. 13, lines 7-30). 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 \$1,360.00 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 \$100,000.00 IN LOST CAREER OPPORTUNITY WHEN THAT ELEMENT OF DAMAGE WAS NOT SOUGHT IN THE RESPONDENT’S COMPLAINT AND NO COMPETENT EVIDENCE EXISTS TO SUPPORT THE AWARD.

The trial court committed reversible error when it awarded \$100,000.00 in lost career opportunity for the reasons stated in Argument I, above and because 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 “\$100,000.00 in lost career opportunity.” (R. p. 8, line 5). The only evidence presented to support the trial court’s award was the Respondent’s testimony regarding his inability to continue training to become a volunteer fireman. (R. p. 17, line 19 – p. 19, line 11). Absent from Respondent’s testimony was any information regarding the cost in dollars to him for not becoming a volunteer fireman. Additionally, Respondent failed to present any testimony regarding the average number of calls he might take or the estimated fee he would receive per call.

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 upon which the trial court could base an award for lost career opportunity beyond mere speculation. Therefore, this court should reverse the trial court’s award of \$100,000.00 in lost career opportunity 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 APPLIED THE INCORRECT STANDARD IN REACHING ITS DECISION.

The trial court erroneously applied the wrong standard when it awarded punitive damages in the amount of \$100,000.00. (R. p. 5, line 7 – p. 8, line 9) 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.

Given that the trial court used an incorrect standard in awarding substantial punitive damages against the Appellant, it is clear that the Appellant's Due Process rights have been violated. Therefore, this 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.

CONCLUSION

This court should reverse the trial court's award of \$1,360.00 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 \$100,000.00 for lost career opportunity when such damages were not sought in the complaint and the record contains no competent evidence to support damages for lost career opportunity 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 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 \$1,360.00 in lost wages and \$100,000.00 for lost career opportunity. 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,



~~0170~~
November 30, 2014

Michael C. Abbott
ABBOTT & MCKISSICK LAW FIRM, LLC
702 W. Evans Street
Post Office Box 148
Florence, SC 29503
(843) 669-0089
mcabbott@abbottmckissicklaw.com
Attorney for Appellant

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. 2010-CP-17-062
Appellate Case No. 2014-001580

Jammie Anderson,.....Respondent,

v.

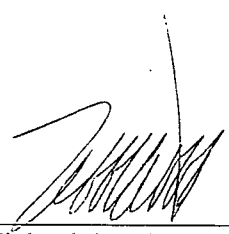
Jerry W. Page and James Page, individually and d/b/a James
Page Farms.....Defendants,

Of whom Jerry W. Page is the Appellant.

CERTIFICATE OF COUNSEL

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

~~OCT 30~~
November 30, 2014



Michael C. Abbott
ABBOTT & MCKISSICK LAW FIRM, LLC
702 W. Evans Street
Post Office Box 148
Florence, SC 29503
(843) 669-0089
Attorney for Appellant

RECEIVED

OCT 30 2014 -

SC Court of Appeals

-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-17-062
Appellate Case No. 2014-001580

Jammie Anderson.....Respondent,

v.

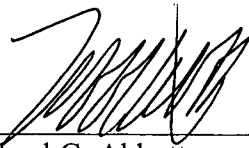
Jerry W. Page and James Page, individually d/b/a James
Page Farms.....Defendants,

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.

October 30, 2014



Michael C. Abbott
ABBOTT & MCKISSICK LAW FIRM, LLC
Post Office Box 148
Florence, SC 29503

RECEIVED
184396690089

OCT 30 2014

SC Court of Appeals

Abbott &
McKissick
Law Firm, LLC

Michael C. Abbott
Robert D. McKissick

P.O. Box 148
702 W. Evans Street
Florence, SC 29503

(843) 669-0089
(843) 669-0085 Fax
mcabbott@abbottmckissicklaw.com

October 30, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Jammie Anderson, Respondent
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. 2014-001580
Case No. 2011-CP-17-062
Our File #2014117

Dear Ms. Kitchings:

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

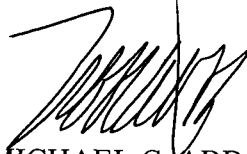
1. One unbound and fourteen (14) bound copies of the Final Brief of Appellant; and
2. Original and one (1) copy of Proof of Service.

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

RECEIVED

OCT 30 2014

SC Court of Appeals