

The State of South Carolina
In The Supreme Court

RECEIVED

Oct 25 2022

S.C. SUPREME COURT

Appeal from Charleston County
Hon. Deadre Jefferson, Circuit Court Judge

Case No. 2014-CP-10-4591
Appeal 2017-002392

Estate of Jane Doe 202, by John Doe MM and John Doe HS, each of whom holds power of attorney for Jane Doe,

Appellant

v.

City of North Charleston,
Leigh Anne McGowan, individually,
Charles Francis Wohlleb, individually,
Anthony M. Doxey, individually,

Respondents

APPENDIX
Volume Four of Four

Gregg Meyers
217 Lucas Street Unit F-2
Mt. Pleasant SC 29464
843-324-1589
attygm@gmail.com
Attorney for Appellant

Chris Dorsel
Senn Legal LLC
PO Box 12279
Charleston SC 29422
843-556-4045
Chris@sennlegal.com
Attorneys for Respondents

Volume Four

Briefs in the Court of Appeals

Brief of appellant p. 912

Brief of Respondents p. 932

Reply brief of appellant p. 954

Decision of the Court of Appeals on which certiorari is sought p. 966

Petition for Rehearing p. 976

Order Denying the Petition for Rehearing p. 986

Certificate

Certificate of counsel p. 988

The State of South Carolina
In The Court of Appeals

Appeal from Charleston County
Hon. Deadre Jefferson, Circuit Court Judge

Case No. 2014-CP-10-4591

Jane Doe 202,

Appellant

v.

City of North Charleston,
Leigh Anne McGowan, individually,
Charles Francis Wholleb, individually,
Anthony M. Doxey, individually

Respondents

Appellant's Final Brief

Gregg Meyers, SC Bar No. 9908
Of Counsel, Pierce Sloan LLC
321 East Bay Street
Charleston SC 29401
843-722-7733, 843-722-7732 facsimile
greggmeyers@piercesloan.com

Attorney for Appellant

Table of Contents

Table of Cases, Statutes and Other Authorities	P.	i
Statement of Issue on Appeal	P.	1
Standard of Review	P.	1
Statement of the Case	P.	2
Argument	P.	9
1. The trial court erred in directing a verdict on the State Created Danger cause of action	P.	9
2. The trial court erred as a matter of law in its recharge to the jury when it omitted the instruction that 1983 liability can be found without proof of damages	P.	14
Conclusion	P.	16

Table of Cases, Statutes and Other Authorities

Cases

<i>Armijo v. Wagon Mound Public Schools</i> , 159 F.3d 1253 (10 th Cir. 1998)	13
<i>Doe v. Rosa</i> , 795 F.3d 429 (4 th Cir. 2015)	10
<i>Gamble v. International Paper Realty Corp.</i> , 323 S.C. 367, 474 S.E.2d 438 (1996)	1, 10
<i>Kneipp v. Tedder</i> , 95 F.3d 1199 (3 rd Cir. 1996)	13
<i>Minnesota v. Olson</i> , 495 U.S. 91, 110 S.Ct. 1684 (1990)	4
<i>Quesinberry v. Rouppasong</i> , 331 S.C. 589, 503 S.E.2d 717 (1998)	1, 10
<i>Rauch v. Zayas</i> , 284 S.C. 594, 327 S.E.2d 377 (Ct. App. 1985)	1, 14
<i>Reed v. Gardner</i> , 986 F.2d 1122 (7 th Cir. 1996)	13
<i>Sharps v. Sharps</i> , 342 S.C. 71, 535 S.E.2d 913 (2000)	1
<i>Sloane v. Kanawha County Sheriff Dept.</i> , 342 F.Supp.2d 545 (S.D. W.Va. 2004)	13
<i>White v. Rochford</i> , 592 F.2d 381 (7 th Cir. 1979)	12
<i>Wright v. Hiester Construction Co., Inc.</i> , 389 S.C. 504, 698 S.E.2d 822 (Ct. App. 2010)	1, 14

Statutes, Court Rules and Other Authorities

42 U.S.C. § 1983	<i>passim</i>
S.C. Code § 43-35-25	4, 12

Statement of Issues on Appeal

1. Did the trial court err in directing a verdict on the State Created Danger cause of action, on the ground that no third party was involved?
2. Did the trial court err in responding to a jury question about whether damages were needed to find 1983 liability?

Standards of Review

As to the trial court directing a verdict on the state created danger cause of action on a theory claimed to be incorrect as a matter of law, the factual record is to be viewed in the light most favorable to the appellant. *Quesinberry v. Rouppasong*, 331 S.C. 589, 503 S.E.2d 717 (1998); *Gamble v. International Paper Realty Corp.*, 323 S.C. 367, 474 S.E.2d 438 (1996). The court's decision reviewed for an error of law, which would be an abuse of discretion. *Sharps v. Sharps*, 342 S.C. 71, 79, 535 S.E.2d 913, 917 (2000).

As to the trial court's refusal to instruct the jury as requested in response to a question submitted during deliberations about evidentiary burden, review is of the charge as a whole and an error of law is committed if the charge is misleading. E.g., *Wright v. Hiester Construction Co., Inc.*, 389 S.C. 504, 517-518, 698 S.E.2d 822, 829 (Ct. App. 2010). A recharge must fairly respond to and cover "the parts of the initial charge which are necessary to answer the jury's request." *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985).

Statement of the Case

At 10:14 p.m. the night of March 27, 2014, North Charleston police officer McGowan responded to a “verbal disturbance” call made at 10:05 p.m. and arrived at Jane Doe’s¹ split-level residence to find a quiet scene. R. App. 891 (Exhibit 2), R. App. 350 (10-3-17 p. 202), R. App. 361 (10-5-17 p. 157). No one answered when she knocked on the door. R. App. 893 (Exhibit 2), R. App. 335 (10-3-17 p. 175). She proceeded to look about the front and back yard. Seven minutes later, at 10:21 p.m., McGowan reported finding fresh blood on the outside surface of a leather bag in the back yard, R. App. 337 (10-3-17 p. 177), which would later be described as such a quantity of fresh blood that an emergency was presented in the form of someone seriously bleeding that required warrantless entry. R. App. 330 (10-3-17 p. 156).

But McGowan took no immediate action. She agreed that she did not claim, “I have got an emergency on my hands.” R. App. 329 (10-3-17 p. 149). Instead, McGowan asked the dispatcher to get more information from the neighbor who called.

At 10:23 p.m. the dispatcher did as asked, and advised McGowan:

COMP ADV IT LOOKS TO BE A DISTURBANCE BTWN MOTHER AND DAUGHTER, ADV MOTHER DEMENTIA AND LOCKED THE DAUGHTER OUT OF THE HOUSE, ADV DAUGHTER WENT OFF TO THE LEFT OF THE RESD, ADV THE MOTHER SLEEPS ON THE COUCH IN THE LIVING ROOM.

R. App. at 893 (Exhibit 2). The audio dispatch of the recording, which is part of the record (with Vol. 2 of the R. App.), is clear that McGowan was told the mother, Jane Doe, had dementia. Audio recording, R. App. vol. 2. McGowan then spoke with the neighbor herself. R. App. 329.

¹ The plaintiff is referred to by pseudonym by order of the trial court. R. App. 001 (Order of February 13, 2015), which granted the motion to use a pseudonym through trial. Motion to Use Pseudonym. R. App. 079.

At 10:33 p.m., 19 minutes after McGowan first arrived, and 12 minutes after she claimed to have found substantial quantities of fresh blood, police forced warrantless entry into Jane Doe's house. R. App. 893 (Exhibit 20. Defendants McGowan and Wohlleb forced entry through a sliding door in the back of the house. R. App. 340 (10-3-17 p. 180), R. App. 30 (10-5-17 p. 156). Defendant Doxey entered shortly thereafter by the now open sliding glass door. R. App. 362 (10-5-17 p. 158).

Inside the house the officers encountered the plaintiff, then 66 years old, who had come downstairs. R. App. 361 (10-5-17 p. 157). Jane Doe has an aggressive form of Alzheimer's disease. R. App. 373 (10-6-17 p. 68). For 16 months before the warrantless entry she had been cared for by her daughter, R. App. 371 – 372 (10-6-17 pp. 66 – 67); R. App. 389 - 390 (10-6-17, pp. 151 – 152), who during the warrantless entry was asleep upstairs. R. App. 379 – 380 (10-6-17 p. 141 – 142). By March 2014, Jane Doe had lost the ability to prepare food for herself, dress herself, toilet herself, or even dial the telephone. R. App. 353 (10-3-17 at p. 213). When the officers encountered Jane Doe in her home after their forced entry, the officers asked the plaintiff if "everything was okay," and she told them it was. 361 – 362 (10-5-17 p. 157-158). In other words, the officers were told almost immediately that no emergency was present.

Rather than stop there and withdraw, the officers had Jane Doe escort them upstairs to her daughter's bedroom where defendant McGowan woke the daughter, demanding to know how much the daughter had to drink. R. App. 380 (10-6-17 p. 142). The daughter testified, "I can see a large figure in my room and I started yelling get out of my house. And I was flipped out of my bed...." R. App. 380 (10-6-17 p. 142). The daughter thought she was about to be raped, R. App.

383 (10-6-17 p. 145), and yelled to her mother to “stay out of it.” Id. She got a rug burn on her knee during that struggle on the floor with McGowan, R. App. 380 - 382 (10-6-17 pp. 142 – 144), and the day after she got out of jail she went to the emergency room for her other injuries from having been flipped to the floor. R. App. 391 – 392 (10-6-17 pp. 153 – 154). Officer McGowan claims the daughter attacked her, e.g., R. App. 331 (10-3-17 p. 166), but McGowan had no injury. R. App. 348 (10-3-17 p. 189).

Within eight minutes of making warrantless entry, police had arrested the daughter, R. App. 893 (Exhibit 2), and charged her with assaulting a police officer. E.g., R. App. 386 - 387 (10-6-17 p. 148 – 149). She was removed and taken to jail. R. App. 893 (Exhibit 2).

S.C. Code § 43-35-25(A) obligates police officers to report a vulnerable adult likely to be neglected. After removing the daughter who cared for her, no report was made about Jane Doe. No policy or practice of the NCPD was violated when Jane Doe was left behind to fend for herself.

Having made an arrest inside the house, McGowan and the other officers had to demonstrate that the warrantless entry that put them inside the house was proper. E.g., *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684 (1990) (arrest overturned due to lack of justification for warrantless entry). As noted above, the supposed extensive fresh blood on the bag was not preserved in any way: neither by taking the bag into evidence, nor by any of the three officers photographing it with the cell phone camera each of them carried. Police Chief Driggers agreed that without the blood the urgency for the warrantless entry was not present. R. App. 323 (10-3-17 p. 141). The bag was simply left behind. Only when defendant McGowan was deposed was

the bag understood to be what was claimed to have had substantial fresh blood on it on the night of March 27, 2014.

After the daughter was removed from the house, it is undisputed that no provision was made for Jane Doe's care. She was alone at night for the first time in 16 months, and was without food for over 13 hours, until her brother found out she had spent the night alone. R. App. 351 (10-3-17 p. 211). When asked to describe the state he found her in when he arrived to check on her, he testified:

I went first to check on my sister . . . because I knew she had been alone since the night before and made sure physically and mentally what was her state of mind.

Q. How did she seem in terms of her state?

A. She was a wreck, crying, shaking, just kept saying something bad happened. It was terrible. It was terrible.

R. App. 351 (10-3-17 p. 211). He got her something to eat, and drink, and calmed her down. R. App. 351 – 352 (10-3-17 pp. 211 – 212). It took 15 – 30 minutes to calm her. R. App. 352 (10-3-17 at p. 212).

Jane Doe remained in the same adult diaper for over 17 hours, until Jane Doe's brother could get her daughter, his niece, back to the house and the daughter could change Jane Doe and clean her up. R. App. 352 – 353 (10-3-17 at p. 212 – 213). Jane Doe's diaper had been soiled by a bowel movement. R. App. 388 (10-6-17 p. 150).

The following day, March 29, Jane Doe's brother found Jane Doe so profoundly confused that he called an ambulance and had her examined at MUSC, the Medical University of South Carolina. R. App. 354 (10-3-17 at p. 214). She was admitted to the hospital and was found to have a urinary tract infection. R. App. 566 – 567 (Dr. Broadway video deposition at pp. 29-

30); R. App. 576 – 874 (MUSC Record pp. 1-299). Jane Doe was hospitalized for 18 days. R. App. 395 (10-6-17 p. 157). Her doctor agreed to a reasonable degree of medical certainty that leaving her in an adult diaper for over 17 hours increased the risk to her of a urinary tract infection, and such infections can cause confusion. R. App. 566 – 567 (Video deposition transcript of Dr. Broadway at pp. 29 – 30).

By 2014, the leather bag that supposedly had substantial fresh blood on it the night of March 27, 2014, had been used by Jane Doe’s daughter, a photographer, R. App. 382 (10-6-17 p.144), for ten years by 2014. R. App. 376 (10-6-17 p. 133). She has used it as her bag for tools and for gardening. R. App. 376 – 377 (10-6-17 pp. 133-134). In those ten years, blood has occasionally contacted the outside of the bag, and has stained the outside of the bag. R. App. at p. 889 (Exhibit 1).² Short of forensic analysis, only one blood stain is visible, R. App. at p. 889, and that lone visible stain is smaller than a dime. R. App. at p. 889. The bag has never been wiped or cleaned, as it is a utilitarian bag. R. App. 376 (10-6-17 at p. 133). The daughter had no explanation for the claim of fresh blood on March 27. R. App. 378 (10-6-17 p. 135). She had not hurt herself that day. R. App. 377 – 378 (10-6-17 p. 134 – 135).

No bloods stains on the bag correspond to the “several” fresh blood spots claimed by police, each “about quarter or half dollar size,” some “dripping off the edge” as claimed by the officers. R. App. 359 (10-5-17 p. 155), R. App. at 889 (Exhibit 1). No evidence of the supposed substantial fresh blood was preserved by any evidentiary method, not even by any officer taking a photograph of the supposed fresh blood with the cell phone camera each carried. E.g., R. App.

² Exhibit 1 is the bag itself. For the record on appeal, photographs have been substituted for the item itself.

366 – 367 (10-05-17 p. 169 – 170). Nor did the defendants ever ask to test or to inspect the bag, even after it was identified.

The daughter has no prior criminal record and after her criminal defense counsel submitted a motion to challenge the warrantless entry, an agreement was reached that resulted in the charge against her being *nol prossed* and the charge has now been expunged.

This case was initiated for Jane Doe by those who hold her power of attorney, challenging for Jane Doe the allegedly fabricated “fresh blood” basis for warrantless entry and to challenge Jane Doe having been left to fend for herself after her daughter was removed by police. The primary theory of the case was the “state created danger” theory for liability under 42 U.S.C. § 1983 (state actors taking affirmative acts to increase risk of harm to another).³ During the charge conference, the trial court decided to direct a verdict as to State Created Danger cause of action, contending:

(a) that the claim “wasn’t pled.” R. App. 433 (10-11-17 p. 705),

(b) that no facts supported the theory. R.App. 432 (10-11-17 p. 704), and

(c) that the theory “was not created for these type facts.” R. App. 433 (10-10-17 p. 705), referring to the defense argument R. App. 421 (10-11-17 at p. 636) that “there is no third party – no one else came in and hurt” the plaintiff; see also, R. App. 421 (10-11-17 at p. 636); R. App. 401 (10-10-17 p. 285) “It’s the third party.” Meaning that as contended by the defense, without a third party’s involvement there can be no State Created Danger.

The initial charge to the jury appears at R. App. 438 - 471 (10-12-17 pp. 865 – 898). State Created Danger was, of course, removed from the charges given, but the charge included that

liability under 42 U.S.C. § 1983, can be proven without damages, R. App. 457 (10-12-17 at p. 884), and that such proof of liability would require an award of nominal damages. Id.

During deliberations the jury asked a series of questions which were handled without objection until the jury asked its last question, identified as Court's Exhibit 25. R.App. 499 (10-13-17 p. 952):

For there to be a violation of a civil right, 4th Amendment, the plaintiff must demonstrate through the preponderance of the evidence to be bodily harm or injury or mental i.e. damages?

The trial court, at R. App. 499 (10-13-17 p. 952), construed the question this way:

I'm trying really to figure out what they're asking. I'm not certain whether they have the concept of proximate cause or damages confused. I think the remedy is to just reinstruct them on the elements of 42 U.S.C. 1983 and what must be proven in order to establish.

To fully meet that objective in answering the jury's question, the plaintiff requested, R.App. 500 (10-13-17 at p. 953), that the recharge include that portion of the liability charge that explains that a constitutional violation can be proven without proof of damages (the nominal damage liability charge). That request was made to give the jury a proper response to the scope of its question about proving liability and would provide the jury with the correct context to answer its question whether proof of damage was required to find 1983 liability.

The court refused that request and gave a recharge R. App. 505 – 512 (10-13-17 p. 960 to 967) which omitted that 1983 liability can be proven without damages, the “nominal damage” aspect of the charge. The recharge included only, and in isolation, at R. App. 509 (10-13-17 p. 964), that:

³ The trial also challenged various training, or lack of training, aspects of North Charleston, which are not part of this appeal.

the plaintiff must prove by the greater weight or preponderance of the evidence that the constitutional violation was the proximate cause of her injuries.

The plaintiff's exception to that recharge is at R. App. 512 (10-13-17 p. 967). The charge the plaintiff requested was this portion of the court's initial charge R. App. 457 (at 10-12-17 p. 884) in the initial charge, which completes the proof elements for a claim under 42 U.S.C. § 1983):

if you return a verdict for the plaintiff on a section 1983 claim but the plaintiff has failed to prove actual or compensatory damages for her claims then you must award nominal damages of one dollar for that claim.

A person whose federal rights were violated is entitled to a recognition of that violation even if he or she suffered no actual injury. Nominal damages such as one dollar are designed to acknowledge the deprivation of a federal right even where you find no actual injury occurred.

Thirteen minutes after the recharge in response to its last question, the jury returned a defense verdict.

This appeal followed.

Argument

1. The trial court erred in directing a verdict on the State Created Danger cause of action under 42 U.S.C. § 1983.

In the record at pages 432 to 434 (10-11-17 p. 704 to 706), the trial court directed a verdict on the State Created Danger cause of action, removing the heart of the plaintiff's case.

The court's theory was based on the plainly erroneous impressions that:

(a) that the claim "wasn't pled." R. App. 433 (10-11-17 p. 705),

(b) that no facts supported the theory. R. App. 432 (10-11-17 p. 704), and

(c) that the theory "was not created for these type facts." R. App. 433 (10-11-17 p. 705),

referring to the defense argument, R. App. 421 (10-11-17 at p. 636) that "there is no third party –

no one else came in and hurt” the plaintiff; see also, R. App. 401 (10-10-17 at p. 285) (“It’s the third party”).

These are plainly erroneous legal conclusions for which the trial court must be reversed and a new trial ordered.

A. The trial court’s erroneous impression that the claim was not pled: in fact, it was pled explicitly.

The second amended complaint states, R. App.045:

67. Defendants . . . were deliberately indifferent to the danger each of them created for Jane Doe by their affirmative actions to remove her caregiver and leave Jane Doe to fend for herself.

In addition, the second amended complaint alleges (R. App. 045, ¶ 68) that each defendant had reason to believe Jane Doe was a vulnerable adult likely to be neglected due to the conduct of the defendants, and each violated a criminal statute which requires law enforcement to report a vulnerable adult.

Those allegations were incorporated into the second cause of action (Second Amended Complaint at R. App. 052 – 054, ¶¶ 112 to 119), which specifically alleged State Created Danger against the individual defendants for their having taken affirmative acts that increased the risk of harm to Jane Doe. The cause of action could hardly have been more specifically stated in the pleading.

The trial court erred in concluding that the cause of action was not pled.

The court’s erroneous conclusions that B. no facts supported the theory and C. that the theory was not created for “these type facts.”

State Created Danger applies any time a state actor takes affirmative action which *causes or increases* the risk of harm to another person. There are no particular “type of facts” of affirmative acts which cause or increase risk of harm that are required for the theory to apply.

The trial court erred as a matter of law and imposed an incorrect legal standard on the State Created Danger liability claim under 42 U.S.C. § 1983. That incorrect standard (that a third party was required for harm) was, of course, advocated by the defendants, as noted above.

In response to the motion for directed verdict, the trial court was required to view the evidence in the light most favorable to the plaintiff. *Quesinberry v. Rouppasong*, 331 S.C. 589, 503 S.E.2d 717 (1998); *Gamble v. International Paper Realty Corp.*, 323 S.C. 367, 474 S.E.2d 438 (1996). Any error of law is an abuse of discretion by the trial court. *Sharps v. Sharps*, 342 S.C. 71, 79, 535 S.E.2d 913, 917 (2000).

The elements for State Created Danger are that a state actor take affirmative acts which create or increase the risk of harm to another. E.g., *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015)(emphasis added, citations omitted):

[T]o establish § 1983 liability based on a state-created danger theory, a plaintiff must show that the state actor ***created or increased the risk of private danger, and did so directly through affirmative acts***, not merely through inaction or omission. Put another way, “state actors may not disclaim liability when they themselves throw others to the lions....”

Two affirmative acts by state actors are undisputed in this record: that the individual defendants McGowan, Wohlleb and Doxey made warrantless entry and that as a result of that warrantless entry, the plaintiff’s daughter was removed. E.g., R. App. at 893 (Exhibit 2). It is undisputed that for sixteen months prior to the warrantless entry, the daughter had provided her

mother's food, clothing, and toileting, and it is undisputable that the conduct of the defendants changed the *status quo* of the plaintiff's care, and undisputed that the defendants acted under color of state law.

The end result of the defendants' affirmative acts, it is undisputed, was to leave the plaintiff to fend for herself when she could no longer feed herself, toilet herself, change herself, or use a telephone to summon the help of others. It was also undisputed that after she had been alone for over 13 hours the plaintiff's brother testified that she was "a wreck, crying, shaking, just kept saying something bad happened. It was terrible. It was terrible." 351 (10-3-17 p. 211).

Dr. Broadway confirmed that when, three days later, the plaintiff had a urinary tract infection, that her having been in her soiled adult diaper for over 17 hours increased the risk of her having a UTI. R. App. 566 – 567 (Dr. Broadway video transcript pp. 29- 30). Even the defense expert, Dr. Bolus, agreed that a person could develop a urinary tract infection "by sitting in a dirty adult diaper for 12 to 15 hours." R. App. 521 (Bolus video dep. at p. 17).

The objective evidence includes that the police dispatcher, plainly and audibly, told officer McGowan that the plaintiff had dementia. R. App. vol 2 (Audio recordings) and R. App. at 893 (Exhibit 2). It is undisputed that the affirmative acts by the state actor defendants in removing the daughter changed the *status quo* for the plaintiff's care. It is undisputed that no notice was given to any other family member, no provision was made for the plaintiff's care, and no report about the plaintiff's isolation was made. S.C. Code § 43-35-25 imposes on law enforcement a duty to report when that officer has "reason to believe that a vulnerable adult has been or is likely to be abused, neglected, or exploited." Even under state law the defendants had an obligation to report which was not made.

The court's conclusion that no facts supported the State Created Danger claim was clearly erroneous. Affirmative acts had plainly increased the risk of harm to Jane Doe by isolating her.

The court's third reason for directing a verdict on the State Create Danger theory was that no third party had intervened to harm the plaintiff. In other words, because her harm derived from the affirmative acts of state actors who isolated her when she could not care for herself, the court believed that as a matter of law those facts could not support a State Created Danger claim under federal law.

The trial court plainly erred. A number of federal cases have long recognized that § 1983 liability does not require that a third person enter the picture as the instrument of harm after police officer conduct. The most directly parallel case is *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979), where liability for police officers included the emotional injury caused when Chicago police officers arrested an adult and left three minor children alone in the car in which the adult had been driving them on a busy highway in cold weather.

Liability under 42 U.S.C. § 1983 has also been recognized in other contexts that lacked third party involvement. E.g., police were found liable for an inebriated woman's injuries from a fall and prolonged exposure to cold after police stopped she and her husband walking home, separated her from her husband, and even though she was inebriated, compelled her to walk alone the last 1/3 of a block to her home. *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996). State actors have been held liable for suicides, where obviously no third party is involved, such as in *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253 (10th Cir. 1998) (school official liability for student suicide after he was sent home for threat to teacher); *Sloane v. Kanawha County*

Sheriff Dept., 342 F.Supp.2d 545 (S.D. W.Va. 2004) (law enforcement liability for suicide by 17 year old after interrogation). Police were also found liable under State Created Danger when they arrested a drunk driver but left behind, with the car keys, an intoxicated passenger, who then caused injury by driving the same car. *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1996).

The trial court plainly erred as a matter of law by finding that no 1983 liability can be found on a record that reflects police taking affirmative acts to remove the plaintiff's caregiver and the harm occurs from the resulting isolation that the officers caused. A new trial should be ordered.

2. The trial court erred in its recharge to the jury when it omitted the instruction that 1983 liability can be proven without proof of damages.

During its deliberations, the jury asked a question, identified as Court's Exhibit 25. R. App. 499 (10-13 p. 952):

For there to be a violation of a civil right, 4th Amendment, the plaintiff must demonstrate through the preponderance of the evidence to be bodily harm or injury or mental i.e. damages?

The trial court, at R. App. 499 (10-13 p. 952), construed the question:

I'm trying really to figure out what they're asking. I'm not certain whether they have the concept of proximate cause or damages confused. I think the remedy is to just reinstruct them on the elements of 42 U.S.C. 1983 and what must be proven in order to establish.

The plaintiff requested, R. App. 500 (10-13-17 at p. 953) that in response to that question the jury be again instructed as to liability so as to include the liability charge that even with no proof of damages, nominal damages must be awarded if a constitutional violation has occurred. Only by including that charge would a proper response be given to the jury's question. Proof of

damage is not required to find 1983 liability. The court refused that request, and gave a recharge, R. App. 505 - 512 (10-13-17 p. 960 to 967) which omitted the nominal damage method of proving 1983 liability and included only, and in isolation, at R. App. 509 (10-13-17 p. 964), that:

the plaintiff must prove by the greater weight or preponderance of the evidence that the constitutional violation was the proximate cause of her injuries.

The recharge is misleading because it omits that a constitutional violation alone entitles a plaintiff to nominal damages and suggests the erroneous proposition of law that there can be no constitutional violation found unless a jury also finds injuries proximately connected to the constitutional violation.

A jury charge may not be misleading. E.g., *Wright v. Hiester Construction Co., Inc.*, 389 S.C. 504, 517-518, 698 S.E.2d 822, 829 (Ct. App. 2010). A recharge must fairly respond to and cover “the parts of the initial charge which are necessary to answer the jury’s request.” *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985). The trial court committed an error of law when it provided an incomplete response to the jury’s question about whether damages were necessary for 1983 liability.

The trial court recognized that the jury was confused about “proximate cause or damages,” as noted above, but gave a recharge insufficient to address the recognized scope of the question, and that erroneous recharge, we contend, was misleading without the nominal damage charge that makes clear that proving damages is not required to prove a violation of 42 U.S.C. § 1983. That misleading element was prejudicial to the plaintiff, and (as expected) once the recharge was given, the jury, having deliberated for nearly a day, returned a defense verdict in 13 minutes. Compare R. App. 511 (10-13-17 p. 966) to R. App. 513 910-13-17 p. 968). The trial court abused its discretion and gave an erroneous charge that failed to respond to the question

asked, and which distorted the liability standard for 1983 liability. The plaintiff's exception is at R. App. 512 (10-13-17 p. 967). A motion for a new trial on that ground was denied by the trial court. R. App. 514 (10-13-17 at p. 973).

A recharge must fairly answer the question asked. The court's recharge failed to properly cover the breadth of the question asked.⁴ A new trial on this aspect of the case should be ordered due to the misleading nature of the recharge, because the charge given was misleading and failed to respond to the scope of the question asked.

Conclusion

For the reasons set forth above, the judgment should be reversed and a new trial ordered.

Respectfully submitted,

Gregg Meyers, S.C. Bar No. 9908
Of Counsel, Pierce Sloan LLC
321 East Bay Street
Charleston SC 29401
843-723-7733; 843-722-7732 facsimile
greggmeyers@piercesloan.com

⁴ The charge requested was this portion of the court's initial charge, R. App. 457 (10-12-17 p. 884) in the initial charge, which is required to complete the proof elements for a claim under 42 U.S.C. § 1983):

if you return a verdict for the plaintiff on a section 1983 claim but the plaintiff has failed to prove actual or compensatory damages for her claims then you must award nominal damages of one dollar for that claim.

A person whose federal rights were violated is entitled to a recognition of that violation even if he or she suffered no actual injury. Nominal damages such as one dollar are designed to acknowledge the deprivation of a federal right even where you find no actual injury occurred.

The State of South Carolina
In The Court of Appeals

Appeal from Charleston County
Hon. Deadre Jefferson, Circuit Court Judge

Case No. 2014-CP-10-4591

Jane Doe 202,

Appellant

v.

City of North Charleston,
Leigh Anne McGowan, individually,
Charles Francis Wholleb, individually,
Anthony M. Doxey, individually

Respondents

Proof of Service

I hereby affirm that I have served upon counsel for the defendant/respondent a copy of

Appellant's Final Brief

By placing a copy of the documents in the United States mail, first-class postage pre-paid,
addressed to:

Chris Dorsel
Senn Legal, LLC
3 Wesley Drive
Charleston SC 29407

Done September 17, 2018.

Gregg Meyers
Of Counsel
Pierce Sloan LLC
321 East Bay Street
Charleston SC 29401
843-722-7733, 843-722-7732 facsimile
greggmeyers@piercesloan.com

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2014-CP-10-4591
Appellate Case No. 2017-002392

Jane Doe 202, by John Doe MM and John Doe HS, each of whom holds power
of attorney for Jane Doe,.....Appellant,

v.

City of North Charleston; Leigh Anne McGowan, individually, Charles Francis
Wohlleb, individually, and Anthony M. Doxey, individually, Respondents.

INITIAL BRIEF OF RESPONDENTS

Sandra J. Senn
Christopher T. Dorsel
Senn Legal, LLC
Post Office Box 12279
Charleston, South Carolina 29422
(843) 556-4045
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ISSUES ON APPEAL iv

STATEMENT OF THE CASE..... 1

STATEMENT OF THE FACTS 2

STANDARD OF REVIEW 5

ARGUMENT..... 6

**I. DID APPELLANT PROPERLY PRESERVE HER APPEAL ON THE STATE
CREATED DANGER DOCTRINE WHEN THE COURT DID NOT DIRECT A
VERDICT ON THE ISSUE, WHEN THE COURT DID NOT ISSUE A WRITTEN
ORDER DIRECTING A VERDICT ON THE ISSUE, AND WHEN APPELLANT
DID NOT ARGUE ANY POST-TRIAL MOTIONS ON THIS ISSUE? 6**

A. Appellant did not properly preserve this issue for appeal. 6

B. In the alternative, the trial court did not err in its decision regarding the State
Created Danger Doctrine. 8

**II. DID THE TRIAL COURT ABUSE ITS DISCRETION IN NOT RECHARGING
THE JURY ON DAMAGES A THIRD TIME AND WHEN THE AGREED-UPON
JURY VERDICT FORM DOES NOT PROVIDE ANY AVENUE TO REVIEW
THIS ISSUE? 13**

CONCLUSION..... 16

TABLE OF AUTHORITIES

Cases

Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000) 6

Cole v. Raut, 378 S.C. 398, 663 S.E.2d 30 (2008) 5

Corbin v. Prioleau, 260 S.C. 171, 194 S.E.2d 875 (1973) 6

Crittenden v. Florence Sch. Dist. One, No. 4:16-CV-02014-RBH, 2017 WL 698647 (D.S.C. Feb. 22, 2017) 10

DeShaney v. Winnebago County DSS, 489 U.S. 189 (1989) 8, 10

Doe v. Berkeley Cnty. Sch. Dist., 189 F. Supp. 3d 573 (D.S.C. 2016) 10

Doe v. Rosa, 795 F.3d 429 (4th Cir. 2015) 9, 10

Elam v. S.C. Dep’t of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004) 5

Felder v. K–Mart Corp., 297 S.C. 446, 377 S.E.2d 332 (1989) 5, 15

Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999) 6

Kisela v. Hughes, ___ U.S. ___, 138 S.Ct. 1148 (2018) 12

Meyers v. Baltimore Cnty., 713 F.3d 723 (4th Cir. 2013) 11

Mullenix v. Luna, 577 U.S. ___, 136 S.Ct. 305 (2015) 12

Pearson v. Callahan, 555 U.S. 223 (2009) 11

Pinder v. Johnson, 54 F.3d 1169 (4th Cir. 1995) 10

Polcyn v. Martin, No. 6:03–2327–HFF, 2005 WL 2654259 (D.S.C. 2005) 10

Rauch v. Zayas, 284 S.C. 594, 327 S.E.2d 377 (Ct. App. 1985) 6

RFT Mgmt. Co. v. Tinsley & Adams, L.L.P., 399 S.C. 322, 732 S.E.2d 166 (2012) 5

Robinson v. Lioi, 536 F. App’x 340 (4th Cir. 2013) 10

Saucier v. Katz, 533 U.S. 194 (2001) 11, 12

<i>State v. Lee</i> , No. 2006-UP-326, 2006 WL 7286767 (Ct. App. Sept. 18, 2006).....	6
<i>Stevenson ex rel. Stevenson v. Martin Cty. Bd. of Educ.</i> , 3 F. App'x 25 (4th Cir. 2001).....	10
<i>Torchinsky v. Siwinski</i> , 942 F.2d 257 (4th Cir. 1991).....	12
<i>Watson v. Adams</i> , No. 4:12-CV-03436-BHH, 2015 WL 1486869 (D.S.C. 2015)	10, 12
<i>Welch v. Epstein</i> , 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000).....	5
<i>Wilder Corp. v. Wilke</i> , 330 S.C. 71, 497 S.E.2d 731 (1998)	7
<i>Winthrop Univ. Trustees for the State v. Pickens Roofing & Sheet Metals, Inc.</i> , 418 S.C. 142, 791 S.E.2d 152 (Ct. App. 2016).....	13, 14, 15

Other Authorities

89 C.J.S. Trial Section 476 (1954).....	6
Jean H. Toal, Amelia W. Walker & Margaret E. Baker, <i>Appellate Practice in South Carolina</i> (3d ed. 2016)	7

ISSUES ON APPEAL

- I. DID APPELLANT PROPERLY PRESERVE HER APPEAL ON THE STATE CREATED DANGER DOCTRINE WHEN THE COURT DID NOT DIRECT A VERDICT ON THE ISSUE, WHEN THE COURT DID NOT ISSUE A WRITTEN ORDER DIRECTING A VERDICT ON THE ISSUE, AND WHEN APPELLANT DID NOT ARGUE ANY POST-TRIAL MOTIONS ON THIS ISSUE?

- II. DID THE TRIAL COURT ABUSE ITS DISCRETION IN NOT RECHARGING THE JURY ON DAMAGES A THIRD TIME AND WHEN THE AGREED-UPON JURY VERDICT FORM DOES NOT PROVIDE ANY AVENUE TO REVIEW THIS ISSUE?

STATEMENT OF THE CASE

The original Summons and Complaint was filed on July 25, 2014, followed by an Amended Summons and Complaint on July 31, 2014, and a Second Amended Summons and Complaint on September 9, 2014. Defendants filed a Motion for Summary Judgment which was granted in part and denied in part by Order filed on August 10, 2016. In her Complaint, Plaintiff alleged eleven different causes of action. After Summary Judgment, Plaintiff was left with only three causes of action. The case was eventually tried before a Charleston County jury beginning on October 2, 2017, and ending on October 13, 2017. At trial, the court directed a verdict in Defendants' favor on Plaintiff's state law cause of action for Invasion of Privacy. (*See* Order, Jan. 12, 2018). Thereafter, the § 1983 claims against the City and the individual officers were submitted to the jury for consideration.

On October 13, 2017, the jury returned an answer of "no" to the following question: "Do you find that the Plaintiff has proven by a preponderance of the evidence that the City of North Charleston violated Rhonda Doe's constitutional rights by being deliberately indifferent with regard to training its officers?" (*See* Verdict Forms attached to Judgment in a Civil Case, Oct. 16, 2017). With regard to the three individual officer defendants, the jury answered "no" to the following question for each officer: "Do you find that the Plaintiff has proven by a preponderance of the evidence that [the individual officer] violated Rhonda Doe's constitutional rights by making a warrantless entry into Rhonda Doe's residence on the night of March 27, 2014?" (*Id.*). By answering in the negative to the first question on each Verdict Form, the jury returned a unanimous verdict for the Defendants as to each remaining cause of action.

Plaintiff made a Motion for a New Trial with the only argument being based on the failure to recharge the jury for a third time on damages. (Trial Tr. 973, Oct. 13, 2017). This Motion was

denied on the record as well as in an Order filed on October 16, 2017. (Trial Tr. 976:8–978:24, Oct. 13, 2017; Statement of Judgment by the Court, Oct. 16, 2017). Defendants submitted two post-trial motions for costs and fees based on state and federal law. (Defs.’ Pet. for Att’ys’ Fees and Costs pursuant to 42 U.S.C. § 1988; Defs.’ Mot. for Att’ys’ Fees and Costs pursuant to the S.C. Frivolous Proceedings Sanctions Act). These Motions were denied by the Court. (Order, Apr. 3, 2018).

STATEMENT OF THE FACTS

In 2013 and 2014, Jane Doe 202 was suffering from dementia. Her daughter, Daughter Doe, returned from Europe in late 2012 and moved in with her mother. Prior to her daughter’s return home, Jane Doe had been seeing doctors on a regular basis. However, from July 2013 until March 29, 2014, Daughter Doe did not take her mother to be seen by a doctor. (Broadway Trial Dep. 49–51; Trial Tr. 120–21, Oct. 6, 2017). The reason Jane Doe was finally taken to a doctor on March 29, 2014, was because she had increasing levels of confusion from being left alone on multiple occasions over a 48-hour period. (Bolus Trial Dep. 15–27). Jane Doe spent approximately two weeks in the hospital, and her condition and global functioning improved. (*Id.* at 27–29). Further, after her release, she was receiving in-home nursing care, seeing doctors on a regular basis, and was on medication. By all reports, Jane Doe improved considerably with this increased level of care. (*Id.* at 29–31). However, in early 2015, Jane Doe stopped receiving the home health care that had helped her, and she developed increased confusion. Daughter Doe eventually took her mother to the MUSC Institute of Psychiatry on March 31, 2015, where Daughter Doe left her for approximately 798 days until she was released to a nursing home on June 1, 2017. (Trial Tr. 558, Oct. 11, 2017). An MUSC representative testified that this length of stay in an acute facility was uncommon. (Trial Tr. 557–58, Oct. 11, 2017). Also uncommon was

the fact that MUSC petitioned the probate court for guardianship of Jane Doe as there was concern that her best interests were not being considered. (Trial Tr. 585–88, Oct. 11, 2017).

The date of the incident that placed this lawsuit in motion was March 27, 2014. On that night, one of Jane Doe’s neighbors called the police to report a domestic disturbance across the street. (Trial Tr. 402–07, Oct. 10, 2017). The City of North Charleston Police Department was dispatched to this domestic disturbance, and Officer McGowan was the first to arrive. (Trial Tr. 147, 172–73, Oct. 3, 2017). She noted that no one was in the yard and no one was answering the front or back doors when she knocked. (Trial Tr. 147–49, 174–77, Oct. 3, 2017). Further, she noted that the dome light of the vehicle in the driveway was on, a pair of high heel shoes were outside the driver’s side door, and a purse with what appeared to be blood on it was on the ground in the backyard. (*Id.*) Officer McGowan did not make an exigent entrance at that time, but rather continued to investigate and called dispatch to make contact with the complainant, Jake Sadler. (Trial Tr. 149–50, 177–78, Oct. 3, 2017). As McGowan was alone, she also waited on back-up officers, Doxey and Wohlleb, to arrive to determine the best course moving forward. (Trial Tr. 150–51, Oct. 3, 2017). Based on what they knew at the time, Officers McGowan and Wohlleb determined an exigent entrance was necessary to check on the welfare of the woman who had just been outside the house yelling and screaming. (Trial Tr. 179–80, Oct. 3, 2017).

While Appellant contends that there were ulterior motives for entering the house, the uncontested testimony is that the officers’ first questions to both Jane Doe and Daughter Doe were “Are you okay? Do you need any medical attention?” (Trial Tr. 182, 185–86, Oct. 3, 2017). All three officers interacted with Jane Doe and none of the officers had any indication that she was suffering from dementia, that she was incapable of caring for herself, or that she could not be left alone. (Trial Tr. 182–85, Oct. 3, 2017; Trial Tr. 164–66, 183–84, Oct. 5, 2017). Further, Daughter

Doe never told Officers McGowan, Wohlleb, or Doxey that her mother had dementia, that she could not be left alone, or that she could not care for herself. (*Id.*) The fact that the officers did not and likely would not have recognized that Jane Doe had dementia was confirmed by Jane Doe's own psychiatrist. (Broadway Trial Dep. 53–57).

Jane Doe was able to communicate with the officers that her daughter was upstairs and she led them to her daughter's room. (Trial Tr. 184–85, Oct. 3, 2017). Once there, the officers found Daughter Doe lying on top of her covers, with all of her clothing on, and with a large red wine stain down the front of her shirt. (*Id.*) After Daughter Doe woke up, the officers talked with her and asked if she was in need of medical assistance. (Trial Tr. 185–86, Oct. 3, 2017). The officers also advised Daughter Doe that her car was unlocked and her belongings were outside. (Trial Tr. 187–88, Oct. 3, 2017). Daughter Doe attempted to walk and was unsteady on her feet, and therefore, the officers offered to gather her belongings for her. (Trial Tr. 187, Oct. 3, 2017). After the two male officers left, McGowan was in the bedroom alone with Daughter Doe and with Jane Doe just outside in the hallway. (Trial Tr. 188, Oct. 3, 2017) At some point, Daughter Doe became agitated and was speaking in a demeaning fashion to her mother. (Trial Tr. 188–90, Oct. 3, 2017). Daughter Doe then proceeded to come toward her mother with her arms flailing, but due to Officer McGowan being caught in the middle, Daughter Doe struck McGowan and poked her in the eye. (*Id.*) Daughter Doe was then arrested for Assault on Police. (*Id.*).

The following day around lunch time, Jane Doe's brother, John Doe SH, checked on Jane Doe, fed her some ice cream and felt that she was fine enough to leave her alone again to bail Daughter Doe out of jail. (Trial Tr. 43–44, Oct. 4, 2017). Once Daughter Doe got home, she and John Doe SH left Jane Doe alone again so that Daughter Doe could go meet with a criminal defense attorney. (Trial Tr. 151, Oct. 6, 2017). Then, the following day, March 29, 2014, Daughter Doe

left her mother alone yet again so that Daughter Doe could go to the hospital from approximately 3pm to 7:30pm. (Trial Tr. 154–55, Oct. 6, 2017). While being left alone on March 29, Jane Doe wandered outside and had a neighbor call police to report a suspicious vehicle in her driveway. (Bolus Trial Dep. 23–25). A North Charleston officer responded and determined that the vehicle was actually Jane Doe’s daughter’s vehicle. (*Id.*). Once the family did come home, EMS was called and Jane Doe was transported to MUSC. (*Id.*).

STANDARD OF REVIEW

“The standard of review for an appeal of an action at law tried by a jury is restricted to corrections of errors of law. A factual finding of the jury will not be disturbed unless there is no evidence which reasonably supports the findings of the jury.” *Felder v. K–Mart Corp.*, 297 S.C. 446, 448, 377 S.E.2d 332, 333 (1989).

As to the first issue on appeal, when reviewing the trial court’s ruling on a motion for a directed verdict, the appellate court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *RFT Mgmt. Co. v. Tinsley & Adams, L.L.P.*, 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012) (citing *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004)). An appellate court will reverse the trial court’s ruling only if no evidence supports the ruling below. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 418 (Ct. App. 2000). In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Id.* at 300, 536 S.E.2d at 419.

As to the second issue on appeal, in reviewing an alleged error in jury instructions, reversal of the trial court’s decision is not warranted absent an abuse of discretion. *See Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (applying an abuse of discretion standard of review to an

alleged error in jury instructions). An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). Furthermore, on appeal, the charge is to be reviewed as a whole. *See Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999) (finding a jury charge should be reviewed as a whole, and if the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error). When the jury requests additional charges, it is sufficient for the court to charge only the parts of the initial charge which are necessary to answer the jury's request. *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985) (citing 89 C.J.S. Trial Section 476 (1954)). The trial court's failure to charge in greater detail is not reversible error if the details were fully covered in the original charge. *Id.* (citing *Corbin v. Prioleau*, 260 S.C. 171, 194 S.E.2d 875 (1973)). "The scope of the recharge—determining what is necessary to answer the jury's request—is committed to the sound discretion of the trial court." *State v. Lee*, No. 2006-UP-326, 2006 WL 7286767, at *1 (Ct. App. Sept. 18, 2006).

ARGUMENT

I. DID APPELLANT PROPERLY PRESERVE HER APPEAL ON THE STATE CREATED DANGER DOCTRINE WHEN THE COURT DID NOT DIRECT A VERDICT ON THE ISSUE, WHEN THE COURT DID NOT ISSUE A WRITTEN ORDER DIRECTING A VERDICT ON THE ISSUE, AND WHEN APPELLANT DID NOT ARGUE ANY POST-TRIAL MOTIONS ON THIS ISSUE?

A. Appellant did not properly preserve this issue for appeal.

Appellant's assertion that the court directed a verdict on the state created danger cause of action is not supported by the trial record. Nowhere in the record or court filings is there any mention of such a directed verdict being issued, and therefore, this issue was not properly preserved.

“There are four basic requirements to preserving issues at trial for appellate review.... [T]he issue must have been (1) raised to and ruled upon by the [trial] court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the [trial] court with sufficient specificity.” Jean H. Toal, Amelia W. Walker & Margaret E. Baker, *Appellate Practice in South Carolina* 185 (3d ed. 2016). “Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998).

Defendants made a directed verdict motion as to the State created danger doctrine at the end of Plaintiff’s case which the trial court took under advisement. (Trial Tr. 275, 284–87, 313, 316, Oct. 10, 2017). The defense rested the next day and Defendants renewed their directed verdict motion on the State created danger doctrine which was thoroughly argued by both sides, analyzed by the trial court, and ultimately denied. (Trial Tr. 635–69, Oct. 11, 2017). Prior to giving jury instructions, the court informed the parties that a directed verdict was being granted as to the state law claim for Invasion of Privacy. (Trial Tr. 702–04, Oct. 11, 2017). This was the only directed verdict granted in this case. Therefore, Appellant’s assertion in her issues on appeal that the court directed a verdict as to the State created danger doctrine is simply incorrect.

During the charge conference, the court addressed the state created danger doctrine in the following way:

Also as it regards the state created danger doctrine I do not believe there are any facts that have been produced that would support that theory. That of course does not preclude Mr. Meyers from arguing under the ambit of his theory of failure to train, which I’m still going to think about a little bit more but clearly the line of cases that deal with state created danger the type of facts that have been articulated in those cases simply do not in my estimation do not mirror the facts of this case. Each case of course is factually different but I don’t think that this doctrine was created for these type facts.

(Trial Tr. 704–05, Oct. 11, 2017). Appellant asserts that the above statements from the court amount to a directed verdict on the State created danger doctrine. However, a review of the trial transcript shows that at most, the court only said it was not inclined to charge the jury on the doctrine. The court did not preclude Appellant from arguing it as part of her case and did not specifically direct a verdict on this issue. This is confirmed by the fact that the court issued only one Directed Verdict Order, not on the State created danger doctrine, but on the Invasion of Privacy claim. (Order, Jan. 12, 2018). Further, Plaintiff did not raise any objections to the above statements by the court and did not raise this issue with the court during the charge conference or in his post-trial motions. (See Trial Tr. 704–06, Oct. 11, 2017; Trial Tr. 973, Oct. 13, 2017). Essentially, Appellant did not raise this issue at a time when the court could have provided an actual ruling directly on the State created danger doctrine. Instead, we are left with nebulous conversation during a charge conference. Therefore, the first issue presented by Appellant should be denied as it was not properly preserved for appellate consideration.

B. In the alternative, the trial court did not err in its decision regarding the State Created Danger Doctrine.

If the Court determines that Appellant’s first issue was properly preserved and that a directed verdict was entered on the State created danger Doctrine, the trial court did not commit reversible error in directing a verdict on this issue.¹ In discussing the issue at trial, the trial court correctly pointed out that there are no other cases in South Carolina or other jurisdictions that involve a similar fact pattern to the facts of the present case. (Trial Tr. 638–44, 704–05, Oct. 11,

¹ The United States Supreme Court has explained that “nothing in the language of the Due Process Clause itself requires the state to protect the life liberty, and property of its citizens against invasion by private actors.” *DeShaney v. Winnebago County DSS*, 489 U.S. 189, 195 (1989). However, the Court noted two exceptions to this general proposition which are the state custody exception and the state created danger doctrine. *Id.* at 199-201.

2017). The trial court stated that “clearly the line of cases that deal with state created danger the type of facts that have been articulated in those cases simply do not in my estimation do not mirror the facts of this case.” (Trial Tr. 705, Oct. 11, 2017). The line of 4th Circuit cases referenced by the court all involve the presence of a third-party, private actor. This is evidenced by the only holding directly cited by Appellant in her brief. In the 4th Circuit case of *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015), the 4th Circuit held that in order to establish § 1983 liability based on a state-created danger theory, Appellant must show that “the state actor created or increased the risk of **private danger**, and did so directly through affirmative acts, not merely through inaction or omission.” (emphasis added). Appellant relies on this holding in her brief and also the subsequent quote from *Doe v. Rosa*: “Put another way, ‘state actors may not disclaim liability when they themselves throw others to the lions...’” *Id.* These statements from the 4th Circuit both require third party involvement: “private danger” indicates a non-state actor causing harm and the mention of “lions” also necessarily involves the presence of third parties.

In her brief, Appellant states that “a number of federal cases have long recognized that 1983 liability does not require that a third person enter the picture...” in State created danger claims. However, the “number of federal cases” that Appellant cites are from circuits other than the Fourth Circuit. Appellant fails to cite a single opinion from the Fourth Circuit Court of Appeals that supports her position. Appellant cites only one district court case from West Virginia to support her position. However, perhaps a better guidepost on this issue is a recent decision from the federal District of South Carolina, which stated, “[a]s this Court has previously observed, ‘the Supreme Court and the Court of Appeals have given little definition to the state created danger exception, and the *DeShaney* Court did little more than imply that the exception existed.’” *Watson*

v. *Adams*, No. 4:12-CV-03436-BHH, 2015 WL 1486869, at *8 (D.S.C. 2015) (citing *Polcyn v. Martin*, No. 6:03–2327–HFF, 2005 WL 2654259, at *9 (D.S.C. 2005)).

A review of *Deshaney* and cases within the Fourth Circuit that cite the state created danger doctrine indicates that the Fourth Circuit has applied this doctrine only in situations involving harm by a third party. *DeShaney*, 489 U.S. 189 (1989) (DSS returned boy to father, despite knowing history of abuse, and boy subsequently killed by father); *Robinson v. Lioi*, 536 F. App'x 340 (4th Cir. 2013) (victim stabbed by estranged husband after defendant officer wrongfully avoided issuing warrant on husband); *Stevenson ex rel. Stevenson v. Martin Cty. Bd. of Educ.*, 3 F. App'x 25 (4th Cir. 2001) (alleging school defendant was responsible for assault on student by fellow students); *Doe v. Rosa*, 795 F.3d 429 (4th Cir. 2015) (alleging defendant did not protect campers from assault by camp counselor); *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995) (mother assured by officer that abusive husband would be detained, but after officer charged lesser offense, husband went to house and killed three children); *Polcyn v. Martin*, No. 6:03-2327-HFF, 2005 WL 2654259 (D.S.C. Oct. 17, 2005) (officers placed intoxicated wife in husband's vehicle where the husband assaulted her and she eventually jumped from or was pushed from the moving vehicle); *Crittenden v. Florence Sch. Dist. One*, No. 4:16-CV-02014-RBH, 2017 WL 698647 (D.S.C. Feb. 22, 2017) (student physically assaulted by school employees); *Doe v. Berkeley Cnty. Sch. Dist.*, 189 F. Supp. 3d 573 (D.S.C. 2016) (alleging principal through affirmative acts increased risk of student-on-student assault).

One South Carolina District Court case that did not involve a third party is the case of *Watson v. Adams*, where officers fabricated evidence in order to have the decedent arrested for DUI. *Watson v. Adams*, No. 4:12-CV-03436-BHH, 2015 WL 1486869 (D.S.C. 2015). The decedent eventually committed suicide in jail. While that case did not explicitly allege the state

created danger doctrine, the Court stated that it could “find no authority to support the proposition that a wrongful seizure or arrest that leads to a suicide is a state created danger.” *Id.*, at *8.

Based on the prevailing law in the Fourth Circuit, the presence of a third-party (i.e. private danger) is required to prevail on a State created danger cause of action. Appellant did not and cannot prove this element in her case. Further, implicit in the state created danger doctrine is that harm actually occurred. Here, the testimony from Jane Doe’s own doctor has indicated that there is no medical evidence that any harm actually occurred due to the police incident. Therefore, Appellant’s argument is essentially that harm could have occurred or might have occurred, which is wholly unsupported by Fourth Circuit case law.

At a minimum, the law on the State created danger doctrine was not clearly established in 2014, and therefore, the individual officers would be entitled to qualified immunity. In evaluating a defendant’s assertion of qualified immunity, the court is to apply the analysis set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), as modified by the Court’s later decision in *Pearson v. Callahan*, 555 U.S. 223 (2009). *See Meyers v. Baltimore Cnty.*, 713 F.3d 723, 731 (4th Cir. 2013). The Court’s holding in *Saucier* requires a two-step approach, under which a court first must decide whether the facts alleged or shown, taken in the light most favorable to the plaintiff, establish that the police officer’s actions violated a constitutional right. *Saucier*, 533 U.S. at 201. When a plaintiff has satisfied this initial step, a court next must determine whether the right at issue was “clearly established” at the time of the officer’s conduct. *Id.*; *see also Pearson*, 555 U.S. at 236 (modifying the *Saucier* approach such that lower courts are no longer required to conduct the analysis in the sequence set forth in *Saucier*). Thus, although a plaintiff may be able to prove that an officer has violated certain constitutional rights, the officer nonetheless is entitled to qualified immunity if a reasonable person in the officer’s position “could have failed to appreciate that his

conduct would violate those rights.” *Torchinsky v. Siwinski*, 942 F.2d 257, 261 (4th Cir. 1991) (citation and internal quotation marks omitted). Further, “[i]f the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.” *Saucier*, 533 U.S. at 202.

The United States Supreme Court has repeatedly told courts not to define clearly established law at a high level of generality in their qualified immunity analysis. *Kisela v. Hughes*, ___ U.S. ___, 138 S.Ct. 1148 (2018) (citing examples). “Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that ‘[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine [...] will apply to the factual situation the officer confronts.’” *Mullenix v. Luna*, 577 U.S. ___, 136 S.Ct. 305, 308 (2015) (per curiam) (quoting *Saucier*, 533 U.S. at 205).

Appellant cannot prove that the law regarding the state created danger doctrine was clearly established on March 27, 2014. This is evident from a recent 2015 ruling by one of our South Carolina federal courts. In that case, the federal judge explained that “[a]s this Court has previously observed, ‘the Supreme Court and the Court of Appeals have given little definition to the state created danger exception, and the *DeShaney* Court did little more than imply that the exception existed.’” *Watson, supra*. Essentially, the *Watson* court is stating that as of 2015, the law was not clearly established, and because the *Watson* case was decided the year after our subject incident, the law was not clearly established at the time the Defendant officers made entry into Plaintiff’s home and arrested Daughter Doe. Because the law was not clearly established on March 27, 2014, the individual defendants are entitled to qualified immunity as to any claim regarding the state created danger doctrine.

Based on the above, the trial court did not err in finding that the state created danger Doctrine was inapplicable to the facts of this case. Respondents contend there was no directed verdict as to the State created danger doctrine. However, assuming *arguendo* that there was, there was ample evidence in the record to support the trial court's ruling and it should therefore be affirmed. Finally, the individual officers would be entitled to qualified immunity.

II. DID THE TRIAL COURT ABUSE ITS DISCRETION IN NOT RECHARGING THE JURY ON DAMAGES A THIRD TIME AND WHEN THE AGREED-UPON JURY VERDICT FORM DOES NOT PROVIDE ANY AVENUE TO REVIEW THIS ISSUE?

Appellant's second issue on appeal does not allege that the trial court failed to give a necessary jury instruction. Appellant cannot allege this because the particular jury instruction at issue was in fact given to the jury not once, but twice. Appellant's second issue on appeal alleges that the trial court erred in not charging the jury for a third time on damages. Our South Carolina case law does not support this argument. The trial court did not abuse its discretion in making its decision to not charge the instruction at issue a third time, and therefore the verdict should be affirmed

The South Carolina Court of Appeals recently addressed the issue of jury instructions and recharging the jury on certain instructions. *See Winthrop Univ. Trustees for the State v. Pickens Roofing & Sheet Metals, Inc.*, 418 S.C. 142, 791 S.E.2d 152 (Ct. App. 2016), *reh'g denied* (Oct. 21, 2016), *cert. denied* (Nov. 15, 2017). In that case, the Court of Appeals succinctly stated the law regarding jury instructions and recharging the jury as follows:

In order to warrant reversal for refusal of the [circuit court] to give requested jury instructions, such refusal must have been both erroneous and prejudicial. When the jury requests additional charges, it is sufficient for the court to charge only the parts of the initial charge which are necessary to answer the jury's request. Its failure to charge in greater detail is not error if the details were fully

covered in the original charge. Moreover, an alleged error in a portion of the charge must be prejudicial to the appellant to warrant a new trial.

Id. at 165, 791 S.E.2d at 164 (internal quotations and citations omitted).

In her brief, Appellant asserts that the “trial court erred in its recharge to the jury when it omitted the instruction that 1983 liability can be proven without proof of damages.” (Br. of Appellant, at 13). In the initial jury instructions, the jury was charged on the elements of a 1983 cause of action. (Trial Tr. 870, Oct. 12, 2017). The court instructed the jury that the third element that Plaintiff must prove is “that the defendants actions were the proximate cause of the plaintiff’s damages.” (Trial Tr. 870–71, Oct. 12, 2017). As part of the ensuing instructions on damages, the court included the following instruction concerning nominal damages:

Ladies and gentlemen if you return a verdict for the plaintiff on a section 1983 claim but the plaintiff has failed to prove actual or compensatory damages for her claim then you must award nominal damages of one dollar for that claim.

A person whose federal rights were violated is entitled to a recognition of that violation even if he or she suffered no actual injury. Nominal damages such as one dollar are designed to acknowledge the deprivation of a federal right even where you find no actual injury occurred.

(Trial Tr. 884, Oct. 12, 2017). Appellant took no exception to the above referenced jury instructions. (Trial Tr. 899, Oct. 12, 2017). When the jury presented a question to the court regarding certain jury instructions, the court provided the above referenced jury instructions a second time, including the instructions on nominal damages. (Trial Tr. 924–47, Oct. 13, 2017). Appellant took no exception to the instructions as given this second time. (Trial Tr. 947–48, Oct. 13, 2017).

After a further jury question, the court, in its discretion, chose to instruct the jury on the elements of a 1983 action, which included the instruction that “the defendants actions were the

proximate cause of the plaintiff's damages." (Trial Tr. 960, Oct. 13, 2017). The court chose not to recharge the entire instruction on damages as the court had already done so twice. (Trial Tr. 955–58, Oct. 13, 2017).

Our South Carolina courts have held that when the court chooses to recharge the jury, a court's "failure to charge in greater detail is not error if the details were fully covered in the original charge." *Winthrop*, 418 S.C. at 165, 791 S.E.2d at 164. In the current case, the jury was initially given the full jury instructions on the elements of a 1983 cause of action and on damages, including nominal damages. The jury was then given these identical instructions a second time. Appellant argues here that it was error to not instruct the jury on damages a third time. Appellant cannot succeed on this argument as the details of damages, including nominal damages, were fully covered in both the initial charge and when the jury was given this charge a second time.

Even if Appellant could argue that not instructing the jury on damages for a third time was error, Appellant cannot prove that this error was prejudicial. *See id.* ("Moreover, an alleged error in a portion of the charge must be prejudicial to the appellant to warrant a new trial."). The primary reason Appellant cannot prove prejudice is the verdict form, which was agreed upon by all parties and submitted to the court. (Trial Tr. 757–58, Oct. 12, 2017). The first question posed on the verdict form for each defendant was whether a constitutional violation had been proven. For each defendant, the jury found that no constitutional violation had occurred. This was a factual finding by the jury that is supported by the evidence and which should not be disturbed now on appeal. *Felder*, 297 S.C. at 448, 377 S.E.2d at 333. Appellant's argument in his second issue on appeal is tantamount to invading the province of the jury, which is improper. *Id.* Therefore, even if Appellant could prove that there was an error in not recharging a third time, Appellant cannot

prove that the outcome would have changed and likewise, that Appellant was prejudiced by this error.

CONCLUSION

For all of the reasons stated herein, Respondents respectfully request that this Court find that Appellant's first issue on appeal was not properly preserved; in the alternative, that the trial court did not err in determining that the State created danger doctrine was inapplicable to the facts of this case; that the individual officers are entitled to qualified immunity on any claim related to the State created danger Doctrine; that the trial court did not err in determining that charging the jury for a third time on damages was unnecessary; and that Appellant was not prejudiced by the trial court's decision to not recharge the jury a third time on damages. Respondents respectfully request that this Court affirm the October 13, 2017, jury verdict in favor of Respondents on all causes of action; for costs and fees; and for all other measures of relief as this Court deems just and proper.

Respectfully submitted,



SANDRA J. SENN
CHRISTOPHER T. DORSEL
Senn Legal, LLC
Post Office Box 12279
Charleston, South Carolina 29422
(843) 556-4045
(843) 556-4046 (fax)
Sandy@SennLegal.com
Chris@SennLegal.com

Attorneys for Respondents

May 25, 2018
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2014-CP-10-4591
Appellate Case No. 2017-002392

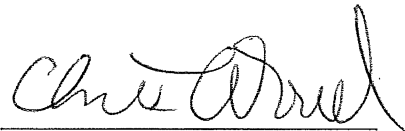
Jane Doe 202, by John Doe MM and John Doe HS, each of whom holds power of attorney for Jane Doe,.....Appellant,

v.

City of North Charleston; Leigh Anne McGowan, individually, Charles Francis Wohlleb, individually, and Anthony M. Doxey, individually, Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondents on Jane Doe 202, by depositing a copy of the same in the United States Mail, postage prepaid, on May 25, 2018, addressed to her attorney of record, Gregg Meyers, Post Office Box 22437, Charleston, South Carolina 29413.



CHRISTOPHER T. DORSEL
Senn Legal, LLC
Post Office Box 12279
Charleston, South Carolina 29422
(843) 556-4045
(843) 556-4046 (fax)
Chris@SennLegal.com
Attorney for Respondents

The State of South Carolina
In The Court of Appeals

Appeal from Charleston County
Hon. Deadre Jefferson, Circuit Court Judge

Case No. 2014-CP-10-4591
Appeal 2017-002392

Jane Doe 202,

Appellant

v.

City of North Charleston,
Leigh Anne McGowan, individually,
Charles Francis Wholleb, individually,
Anthony M. Doxey, individually

Respondents

Appellant's Final Reply Brief

Gregg Meyers, SC Bar No. 9908
Of Counsel, Pierce Sloan LLC
321 East Bay Street
Charleston SC 29401
843-722-7733, 843-722-7732 facsimile
greggmeyers@piercesloan.com

Attorney for Appellant

Table of Contents

Table of Cases, Statutes and Other Authorities	P.	i
Reply Argument	P.	1
1. The factual record must be viewed in the light most favorable to the plaintiff.	P.	9
2. “I’ve already ruled that state created danger is not Applicable.”	P.	1
3. The elements of State Created Danger do not require A third party’s intervention	P.	3
4. The jury verdict form is of no utility in resolving a question about jury re-instruction.	P.	5
Conclusion	P.	8

Table of Cases, Statutes and Other Authorities

Cases

<i>Amaechi v. West</i> , 237 F.3d 356, 363 (4 th Cir. 2001)	3
<i>Carey v. Piphus</i> , 435 U.S. 247, 98 S.Ct. 1042 (1978)	6
<i>Fettler v. Gentner</i> , 396 S.C. 461, 722 S.E.2d 26 (Ct.App. 2012)	2
<i>Hardaway Concrete Co. v. Hall Contracting Corp.</i> , 374 S.C. 216, 647 S.E.2d 488 (Ct. App. 2007)	3
<i>In re Michael H.</i> , 360 S.C. 540, 602 S.E.2d 729 (2004)	3
<i>Rauch v. Zayas</i> , 284 S.C. 594, 327 S.E.2d 377 (Ct. App. 1985)	8
<i>Sims v. Labowitz</i> , 885 F.3d 254 (4 th Cir. 2018)	3
<i>Watson v. Adams</i> , 2015 WL 1486869 (D.S.C. 2015)	4

Statutes, Court Rules and Other Authorities

SCRCP 43(i)	2
-------------	---

Reply Argument

Appellant makes these few points in Reply to Respondents' brief.

1. **The factual record must be viewed in the light most favorable to the plaintiff.**

The trial court repeatedly admonished respondent's counsel for personally attacking the plaintiff's family members. (E.g., "You can advocate without it getting personal." "You can explore mitigation without it getting personal," each on R. App p. 517 of the transcript of 10-11-17). There were many such instances. Those attacks continue in Respondents' brief, even though Respondents' acknowledge, Brief at 5, that the proper standard of review on this appeal from a grant of directed verdict requires that the facts be viewed in the light most favorable to the non-moving party. In this appeal, that requires the facts to be rendered favorable to the appellant. Respondents' "statement of the facts," utterly fails to adhere to the applicable standard of review.¹

2. **"I've already ruled that state created danger is not applicable."** R. App. 435 (10-11-17 p. 707). Respondents advance the novel theory, brief at 13, that the trial court made no ruling on the State Created Danger cause of action. Respondents concede, brief at 12, that they moved for directed verdict on the cause of action and after extensive argument the question was taken under advisement. Brief at 12. Respondents also concede they renewed their directed verdict motion as to

¹ To cite but one example, writing the daughter "left" the plaintiff at MUSC, brief at 2 (surrounded, of course, by full-time medical care) when it is undisputed that the daughter was not the person who held the plaintiff's power of attorney or health care power of attorney and who made such decisions. The caption of this appeal reflects that such decisions were made by Jane Doe's brother and son, as the Respondents are aware. The Respondents' "facts" should be entirely disregarded as violating the applicable standard of review, and as continuing the unrelenting personal attacks the trial court admonished Respondents against.

the cause of action. Brief at 12. They contend that the trial court ruled on only the Privacy cause of action. Brief at 12.

The Respondents simply misrepresent the record. The trial court refused to charge State Created Danger because, as put in the charge conference, at R. App. 435 (10-11-17 p. 707), “I’ve already ruled that state created danger is not applicable.” The court was referring to the court’s prior ruling which appears on the preceding page, R. App. 434 (10-11-17 p. 706), when this colloquy occurred with Respondent’s counsel, Mr. Dorsel, upon the trial court reaching the defendants’ request to charge on state created danger in discussing jury charges.

The Court: The defense presented its request to instruct number 6, which is state created danger. I assume you were anticipating that he was going to argue that and in the event I charged it you wanted me to use your instruction?

Mr. Dorsel: Correct.

The Court: But you still are of the position that it should not be?

Mr. Dorsel: Correct.

The Court: Okay. And I agree.

That is the colloquy which preceded the Court stating, shortly afterwards, on R. App. 435, “I’ve already ruled that state created danger is not applicable.”² For that reason, the Court gave to the jury no charge on State Created Danger.

² The Respondents imply, brief at 13, that counsel for appellant was required to object to the trial court’s ruling. Counsel is not in the habit of arguing with trial judges once an issue has been fully argued and the court announces its decision. Nor is such behavior appropriate trial conduct. *See Fetter v. Gentner*, 396 S.C. 461, 469, 722 S.E.2d 26, 31 (Ct.App.2012) (“This [c]ourt does not require parties to engage in futile actions in order to preserve issues for appellate review.”); Rule 43(i), SCRPC (“Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced.”).

The issue was raised to and ruled on the by the trial court, the requirements for preserving an issue for appeal. *Hardaway Concrete Co. v. Hall Contracting Corp.*, 374 S.C. 216, 224, 647 S.E.2d 488, 492 (Ct. App. 2007) (“In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court,” quoting, *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004). No jury instruction for state created danger was given.³ Even the trial court agreed it had “already ruled.” The Respondents have simply misrepresented the record.

3. **The elements of State Created Danger do not require a third party’s intervention.** Respondents may have misrepresented the record of the trial court’s ruling to exclude state created danger because they are aware that their substantive argument, brief at 8 – 9, that state created danger cannot exist without a third party’s intervention, has no support in federal law. Contrary to their argument, Brief at 9, no Fourth Circuit case limits state created danger to only circumstances involving third parties. And it has long been the law in the Fourth Circuit that the proper process by which to determine if a constitutional limit has been “clearly established” in a case involving constitutional rights is to review the decisions of sister circuits. As recently summarized in *Sims v. Labowitz*, 885 F.3d 254, 262 (4th Cir. 2018):

In this analysis [meaning the analysis of what is “clearly established”], we review “cases of controlling authority in [this] jurisdiction, as well as the consensus of cases of persuasive authority from other jurisdictions. *Amaechi*, 237 F.3d at 363.

The reference is to *Amaechi v. West*, 237 F.3d 356, 363 (4th Cir. 2001), meaning that since at least 2001 the Fourth Circuit Court of Appeals has reviewed decisions of other federal Courts of

³ The Respondent try also to confuse this issue, Brief at 7, with the “failure to train” issue. Failure to train is a theory of municipal liability. State Created Danger is an issue of personal liability. The trial court ruling deprived the jury of any instruction on State Created Danger, having “already ruled” that it was “not applicable.” R. App. 435.

Appeals to determine what rights have been “clearly established.” The analysis is not limited, as Respondents wish it was, to the cases decided by the Fourth Circuit and U.S. Supreme Court.

Nothing about the two elements of State Created Danger (affirmative acts and harm or increased risk of harm), elements established by the U.S. Supreme Court, requires the intervention of a third person.⁴ Any time state officers take affirmative action under color of state law, and by that affirmative action cause harm or increase the risk of harm, they take on the risk of State Created Danger and should be mindful not to do so. As set forth in the appellant’s opening brief, starting at page 12, cases from other Circuit Courts of Appeals established well before 2014 that a reasonable officer should have known that when told explicitly that Jane Doe had dementia, then chose to make warrantless entry to her residence, then chose to arrest and remove her caregiver daughter, officers should not have left Jane Doe to fend for herself when she lacked the capability to care for herself.⁵ As the Appellant’s Brief relates at p. 11, the plaintiff’s 2014 hospitalization two days after her caregiver had been removed from the home

⁴ Respondents cite no case, nor can we find one, holding that entry of a third party “is required to prevail on a State created danger cause of action.” Respondents Brief at 11. Contrary cases are cited by the appellant in the Initial Brief starting at p. 12.

⁵ The trial court made no ruling on qualified immunity, and no cross-appeal was noticed on the issue, but the Respondents still attempt to argue the issue. Brief at 11. To do so, they improperly state the facts in the light most favorable to Respondents, misstate the law, and improperly limit applicable law so as to omit decisions from other Circuit Courts of Appeals that found state created danger without the presence third parties. Those cases are cited in the Appellant’s Initial Brief starting at p. 12. Respondents also try to build an immunity argument, Brief at 12, out of random dicta in *Watson v. Adams*, 2015 WL 1486869 (D.S.C. 2015), a case in which state created danger was neither pleaded nor argued by the plaintiff (*Watson* at p. 5 n. 4 (only state issues under the wrongful death statute were at issue in the order), and which turned on issues of proximate causation, not immunity. *Watson* at 8: “the plaintiffs cannot show that the defendants were the proximate cause of Watson’s suicide.” Nor did Watson’s suicide occur while he was in custody, a fact which the Respondents affirmatively misrepresent. See *Watson*, at 8: “Watson took his life in his own home almost three months after he was arrested.”

was, by even the account of the defense expert, plausibly explained by the urinary tract infection she had at admission, and no one disputed that the risk of the UTI was increased by the 17 hour delay in changing her adult diaper, the time it took her daughter to get out of confinement and return home. It is undisputable that but-for the defendants' isolating the plaintiff from all family help, the plaintiff's adult diaper that was put on her the early evening of March 27 would have been changed well before it was, which was not until about 4 p.m. on March 28.

4. **The jury verdict form is of no utility in resolving a question about jury re-instruction.** Beginning in their brief at p. 13, Respondents propose that somehow the jury's responses on the verdict form constitute fact finding which means no challenge can be made to how the court instructed the jury in response to a question before the jury completed the verdict form. Put another way, the Respondents contend because there was a defense verdict, the instructions that led to that verdict cannot be challenged. The argument is perfectly circular, and has nothing to do with the issue on appeal.

When the Court received the last of the jury's questions, it was not entirely clear. The question was (R. App. 499, Court's Exhibit 25, 10-13-17 p. 952):

For there to be a violation of a civil right, 4th Amendment, the plaintiff must demonstrate through the preponderance of the evidence to be bodily harm or injury or mental i.e. damages?

The trial court, at R. App. 499 (10-13-17 at p. 952), openly contemplated that the jury might be asking about either or both of two different concepts:

I'm trying really to figure out what they're asking. I'm not certain whether they have the concept of proximate cause or damages confused. I think the remedy is to just reinstruct them on the elements of 42 U.S.C. 1983 and what must be proven in order to establish.

It is an incorrect statement of law to instruct a jury that the only way to prove “violation of a civil right, 4th Amendment,” is to prove by a preponderance of the evidence that bodily harm or mental injury occurred. A “violation of a civil right, 4th Amendment,” can also be proven without any showing of bodily harm or mental injury. E.g., *Carey v. Piphus*, 435 U.S. 247, 266 - 267, 98 S.Ct. 1042, 1054 (1978) (“We therefore hold that if, upon remand, the District Court determines that respondents' suspensions were justified, respondents nevertheless will be entitled to recover nominal damages....”).

To refuse to give the jury the nominal damages charge affirmatively distorted the law, and did so when the trial court was not certain exactly what the jury was asking and when the jury was asking whether liability required damages. Was the law correctly stated by the court initially? Yes. But when a jury indicates it needs clarity about whether damages must be shown to establish liability for a civil rights violation, the original charge failed to clarify the law. Omitting to instruct the jury on all avenues for civil rights liability, including nominal damages, mis-states the law. Doing so in isolation after a specific question is raised about what is needed to prove liability was necessarily misleading to the jury, and was deadly prejudicial to the appellant, where her UTI harm took time to develop once the thoughtless affirmative acts of state actors removed her caregiver.

Civil rights cases are important. Not just to the litigants but to the community. It is important to keep police officers from further damaging families through unwarranted intrusions into households already burdened by difficult challenges from the debilitating cruelties of a family member’s terminal Alzheimer’s disease, further complicated by the thoughtless action of removing a vulnerable adult’s caregiver.

Few families have the stomach to endure the personal attacks that Respondents have directed at the appellant's family during this litigation, as shown by the observations of the trial court. To not give the appellant a level playing field through a correct answer to a jury's important question about whether vindicating civil rights is contingent on monetary or bodily injury is prejudicial, and affirmatively distorted the applicable law no matter what the original charge was. The trial court's re-instruction should have included the nominal damages charge in order to make the response to the jury's question other than what it was: an affirmative misstatement of law that was prejudicial to the plaintiff.

The trial court erred as a matter of law in doing so, and it prejudiced the appellant by incorrectly instructing the jury that only monetary or bodily injury support civil rights violations.

A recharge must fairly respond to and cover "the parts of the initial charge which are *necessary* to answer the jury's request." *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985), emphasis added. When instructing a jury in response to a question about civil rights, it is *necessary* that the law be accurately stated and be complete. The trial court committed an error of law when it provided an incomplete and affirmatively incorrect response to the jury's question about whether damages were necessary for 1983 liability.

Conclusion

The trial court should be reversed on its directed verdict and its recharge to the jury. A new trial should be ordered.

Respectfully submitted,

Gregg Meyers, S.C. Bar No. 9908
Of Counsel, Pierce Sloan LLC
321 East Bay Street
Charleston, South Carolina 29401
843-722-7733, 843-722-7732 facsimile
greggmeyers@piercesloan.com

The State of South Carolina
In The Court of Appeals

Appeal from Charleston County
Hon. Deadre Jefferson, Circuit Court Judge

Case No. 2014-CP-10-4591

Jane Doe 202,

Appellant

v.

City of North Charleston,
Leigh Anne McGowan, individually,
Charles Francis Wholleb, individually,
Anthony M. Doxey, individually

Respondents

Proof of Service

I hereby affirm that I have served upon counsel for the defendant/respondent a copy of

Appellant's Final Reply Brief

By placing a copy of the document in the United States mail, first-class postage pre-paid,
addressed to:

Chris Dorsel
Senn Legal, LLC
3 Wesley Drive
Charleston SC 29407

Done September 18, 2018.

Gregg Meyers
Of Counsel
Pierce Sloan LLC
321 East Bay Street
Charleston SC 29401
843-722-7733, 843-722-7732 facsimile
greggmeyers@piercesloan.com

R. App. 965

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Estate of Jane Doe 202, by John Doe MM and John Doe HS, each of whom holds power of attorney for Jane Doe, Appellant,

v.

City of North Charleston; Leigh Anne McGowan, individually, Charles Francis Wholleb, individually, and Anthony M. Doxey, individually, Respondents.

Appellate Case No. 2017-002392

Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 5821
Submitted May 15, 2020 – Filed May 19, 2021

AFFIRMED

Gregg E. Meyers, of Mt. Pleasant, for Appellant.

Sandra J. Senn and Christopher Thomas Dorsel, both of Senn Legal, LLC, of Charleston, for Respondents.

HEWITT, J.: This is an appeal from a defense verdict in a case about whether police officers violated the civil rights of "Jane Doe," a vulnerable adult. The first issue is whether the trial court erred in directing a verdict on Jane Doe's claim that the officers created the risk Jane Doe would be harmed when they arrested Jane Doe's adult daughter and left Jane Doe unattended in her home. The other issue is

whether the trial court abused its discretion in handling the jury's second question about the charges for liability under 42 U.S.C. § 1983 (2018).

We affirm. We hold the trial court's grant of a directed verdict was correct, as the evidence did not rise to the level necessary for a claim that the police violated the constitution when they left Jane Doe at her house. On the jury charges, the trial court did not abuse its discretion when it repeated its earlier jury charges on liability and declined to repeat its instructions on damages.

FACTS

Daughter moved into Jane Doe's home in 2012 after it became clear Jane Doe was struggling to live alone. In 2013, Jane Doe was diagnosed with Alzheimer's disease and dementia.

The City of North Charleston Police Department dispatched police officers to Jane Doe's home one night in March 2014 after one of Jane Doe's neighbors reported a potential domestic disturbance. The neighbor reported seeing Daughter banging on the door and yelling for Jane Doe. The scene supposedly "seemed like a mess."

The first officer to arrive said no one was in Jane Doe's yard and no one answered knocks on the front and back doors. Other things were out of sorts as well: there was a pair of high heel shoes on the ground beside the driver's side door of the vehicle parked in the driveway, the vehicle's interior dome light was on, there were wine bottles in the back of the car, and a purse was on the ground in the backyard. The officer could not recall whether the vehicle's driver's side door was open, but the officer said the purse appeared to have fresh blood on it.

Other officers arrived, and they eventually determined an exigent entrance was necessary to check on the welfare of the woman who had reportedly been yelling outside the house. The officers did not have a warrant.

The officers met Jane Doe when they entered the house. They asked Jane Doe if she needed medical attention. All three officers reported that Jane Doe gave no indication in her response that she was suffering from dementia, was incapable of caring for herself, or could not be left alone. Jane Doe told the officers that Daughter was upstairs and led them to Daughter's room.

The parties disagree about what happened next. The officers said they found Daughter asleep in her bed but on top of her covers, fully dressed, and with a large

red wine stain down the front of her shirt. They also said Daughter woke up and spoke with the officers, who observed that she was unsteady on her feet and that she declined medical assistance. They claimed that when the two male officers left the bedroom to help gather Daughter's belongings, she began screaming at her mother and flailing her arms, and she struck the remaining female officer. For her part, Daughter claimed that a large figure woke her up in the middle of the night and flipped her out of the bed. Daughter stated she believed she was about to be raped and that she yelled for her mother to "stay out of it" while struggling with the figure.

Daughter was arrested for assaulting a police officer. Daughter claimed the officers refused her request that she be allowed to call someone to look after Jane Doe. The officers disputed this and said they did not recall Daughter ever telling them Jane Doe had dementia, could not be left alone, or could not care for herself. Daughter remained in jail overnight.

Jane Doe stayed in the home by herself until her brother came to check on her around lunchtime the next day, shortly after learning about the situation. He said that Jane Doe was "a wreck" but he was able to calm her down after fifteen or thirty minutes. After that, he left Jane Doe at the house so he could get Daughter out of jail. When Daughter returned home she discovered Jane Doe had been wearing a soiled diaper for some time.

The police came to the residence again two days later, after an unattended Jane Doe had a neighbor call police to report a suspicious vehicle in Jane Doe's driveway. The responding officer determined the vehicle was actually Daughter's vehicle. Once Jane Doe's family returned to the home, EMS was called and Jane Doe was transported to the hospital.

Jane Doe was initially taken to the hospital because she had increasing levels of confusion from being left alone on multiple occasions over a forty-eight hour period. While at the hospital, Jane Doe was also diagnosed with a urinary tract infection, and she stayed in the hospital for approximately two weeks.

Litigation, Trial, and Directed Verdict

Jane Doe brought this lawsuit against the City of North Charleston and the three officers involved in Daughter's arrest. Her complaint alleged eleven different causes of action.

Three claims went to trial: deprivation of civil rights by North Charleston; invasion of privacy against North Charleston; and deprivation of civil rights by the responding officers. The civil rights claims were brought pursuant to 42 U.S.C. § 1983.

A key dispute at trial was whether the officers knew or should have known Jane Doe had diminished mental abilities and was unable to care for herself. Jane Doe's doctor testified the officers likely would not have recognized that Jane Doe had dementia unless they had been told. There was conflicting evidence on the point: as already noted, the officers disputed Daughter's testimony that she insisted she be allowed to contact someone to look after Jane Doe. A recording of the police dispatcher's conversation captured the dispatcher mentioning over the radio that Jane Doe had dementia. Still, the officer testified she did not hear the dispatcher mention dementia, explaining she may have been focused on assessing the scene at that moment rather than the radio.

At the close of all the evidence, the trial court directed a verdict on Jane Doe's "state-created danger" theory of liability. The court gave several reasons for its ruling, including that the officers could not be responsible for a danger (Jane Doe's dementia) that already existed. Jane Doe's claims against North Charleston proceeded to the jury, as did Jane Doe's claims that the individual officers violated her civil rights by making a warrantless entry into her home.

Jury Charges

The trial court gave the following charge on nominal damages during the lengthy jury instructions:

Ladies and gentlemen[,] if you return a verdict for the plaintiff on a section 1983 claim but the plaintiff has failed to prove actual or compensatory damages for her claim[,] then you must award nominal damages of one dollar for that claim.

A person whose federal rights were violated is entitled to a recognition of that violation even if he or she suffered no actual injury. Nominal damages such as one dollar are designed to acknowledge the depr[i]vation of a federal right even where you find no actual injury occurred.

Later, at the jury's request, the trial court gave a second instruction covering the elements of each cause of action. The court re-administered the entire section 1983 charge, including all of the charges on damages.

The jury submitted two additional notes to the trial court. The relevant part of the final note stated: "For there to be a violation of a civil right, 4th Amendment, the plaintiff must demonstrate through the preponderance of the evidence to be bodily harm or injury or mental i.e. damages[?]"

The trial court believed the jury was confusing damages as an element of liability under section 1983, insisting it was convinced the jury was asking whether Jane Doe needed to prove bodily harm. After discussion, the court decided to reinstruct the jury on the elements of a section 1983 claim, and not the various damages the jury could award for a valid claim, to avoid further confusion. Jane Doe asked the court to reinstruct the jury on nominal damages, but the court declined. The court said it would reinstruct the jury on damages if the jury asked to be reinstructed on damages.

The jury returned a verdict in favor of North Charleston and the officers. The trial court denied Jane Doe's motion for a new trial. This appeal followed.

ISSUES

1. Did the trial court err by granting a directed verdict on the "state-created danger" portion of Jane Doe's civil rights claims?
2. Did the trial court err in declining to re-charge the jury on nominal damages?

STATE-CREATED DANGER

Jane Doe argues the trial court erred in directing a verdict on her claim that officers violated her civil rights when they arrested Daughter, removed Daughter from the house, and left Jane Doe home by herself. She claims the officers knew or should have known Jane Doe suffered from dementia and that the officers' actions unconstitutionally created a danger or increased the risk Jane Doe would be harmed.

The state-created danger doctrine arises from a line of U.S. Supreme Court cases finding that the government does not have a duty to protect people from privately-inflicted harm. A key case is *DeShaney v. Winnebago County Department of Social Services*, where the guardian of a young child alleged a child protection agency failed to respond to multiple child abuse complaints over an extended time

period and should have prevented a father from severely beating his son. 489 U.S. 189, 191–94 (1989). *DeShaney* is commonly understood to turn on the reasoning that the constitution does not require the government to affirmatively protect citizens from private harms. Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 *Touro L. Rev.* 1, 2–3 (2007). Instead, the government has limited responsibility for a citizen's safety and well-being if the government takes a person into custody or when "the government is responsible for creating the danger." *Id.* at 3 (citing *DeShaney*, 489 U.S. at 199–200).

After *DeShaney*, courts around the country developed numerous "tests" for liability under the state-created danger doctrine. See, e.g., *Jones v. Reynolds*, 438 F.3d 685, 690 (6th Cir. 2006); *Hart v. City of Little Rock*, 432 F.3d 801, 805 (8th Cir. 2005); *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995). These cases tend to have tragic facts because recovering against the government requires a plaintiff to carry a heavy burden. Pursuant to *DeShaney* and its progeny, there is no due process violation unless a plaintiff shows a state actor engaged in reckless behavior or acted with deliberate indifference. See *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986). Negligence and gross negligence are insufficient. See *Daniels*, 474 U.S. at 327.

This court previously employed the Fourth Circuit's formulation that due process does not require the government to affirmatively protect its citizen's rights; due process is a negative prohibition designed to protect people from the State rather than requiring the State to act. See *Pack v. Associated Marine Insts., Inc.*, 362 S.C. 239, 248–49, 608 S.E.2d 134, 139–140 (Ct. App. 2004) (quoting *Pinder v. Johnson*, 54 F.3d 1169, 1174 (4th Cir. 1995)). More recently, the Fourth Circuit explained a plaintiff must show "that the state actor created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omission." *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015).¹

Here, the trial court based its directed verdict, at least in part, on the fact that there was no evidence the officers' actions allowed a third party to harm Jane Doe. Although some jurisdictions require a third party "bad actor" to establish liability

¹ *Pinder* reads *DeShaney* to require a "special relationship" between the state actor and the plaintiff. *Pinder*, 54 F.3d at 1174–75. *Doe* appears to take a different view and says that "[w]hen the state itself creates the dangerous situation that resulted in a victim's injury, the absence of a custodial relationship may not be dispositive." 795 F.3d at 438 (quoting *Pinder*, 54 F.3d at 1177).

under the state-created danger doctrine, we were unable to find any precedent from South Carolina or the Fourth Circuit establishing this requirement.

Still, we find the trial court appropriately granted the police officers a directed verdict. *See* Rule 220, SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). The police did not take Jane Doe into custody, place any restraints on her freedom, or assume the responsibility of caring for her. At best, the testimony shows the officers may have been negligent or grossly negligent, for when the facts are viewed in Jane Doe's favor, the absolute most someone can say is that officers were told, either by Daughter or by the dispatcher, Jane Doe had dementia before they left Jane Doe home alone.

Nothing suggests the North Charleston officers knew a high probability of harm would follow their actions. There is no evidence the police had any reason to think Jane Doe was at risk of harming herself. Indeed, the circumstances and scene suggested Jane Doe had been home alone before Daughter came home intoxicated. The police had no reason to think Jane Doe was incapable of summoning help if she encountered any danger. It is undisputed that Jane Doe responded to the officers' questions and told them where to find Daughter.

We note that, as mentioned above, our analysis is controlled by the fact that negligence and gross negligence are insufficient to move forward on a claim that police action was so wanton that it amounts to a violation of due process. For these reasons, we affirm the trial court's grant of directed verdict on Jane Doe's "state-created danger" theory of liability.

JURY INSTRUCTION

Jane Doe also argues the trial court's refusal to re-charge the jury on nominal damages was misleading and "distorted" the standard for liability under section 1983.

The standard of review on this issue is weighted heavily in favor of affirming. "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." *State v. Lemire*, 406 S.C. 558, 565, 753 S.E.2d 247, 251 (Ct. App. 2013) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Also, "[w]hen the jury requests additional charges, it is sufficient for the [trial] court to charge only the parts of the initial charge which are necessary to answer the jury's request." *The Winthrop Univ. Trs. for the State v.*

Pickens Roofing & Sheet Metals, Inc., 418 S.C. 142, 165, 791 S.E.2d 152, 164 (Ct. App. 2016) (quoting *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985)). "Its failure to charge in greater detail is not error if the details were fully covered in the original charge." *Id.* (quoting *Rauch*, 284 S.C. at 597, 327 S.E.2d at 378).

We cannot say the trial court abused its discretion when it perceived the jury to be confusing the various types of available damages with the elements of a successful 1983 claim. The "injury" in a section 1983 case is the violation of the plaintiff's rights. *See Clark v. Link*, 855 F.2d 156, 161 (4th Cir. 1988) (elements are that the defendant acted under color of state law and deprived plaintiff of a federally-protected right). To this end, the threshold question for liability was whether the circumstances justified the officers' warrantless entry into Jane Doe's home.

The jury's question was an awkwardly worded and confusing one: "For there to be a violation of a civil right, 4th Amendment, the plaintiff must demonstrate through the preponderance of the evidence to be bodily harm or injury or mental i.e. damages[?]" The trial court interpreted the question as asking whether there had to be bodily harm for there to be a legal "injury," and the court believed this indicated the jury was confusing the concepts of an injury and damages. The court was convinced that the jury did not need to hear the entire charge on section 1983 a third time and the best way to answer the jury's question was to repeat the charges on "liability" the court had given twice before.

The trial court could just as well have reached the conclusion the jury was asking about damages and not liability. There is much force and appeal to the reasoning in the dissent. Still, given that we believe both views of the jury's question are possible, we believe the trial court did not abuse its discretion.

Again, we note precedent's instructions that it is sufficient for the trial court to re-charge only that which is necessary to answer the jury's question and that failing to re-charge in greater detail is not necessary when the original charge fully covered the details. *See Winthrop Univ. Trs.*, 418 S.C. at 165, 791 S.E.2d at 164 ("When the jury requests additional charges, it is sufficient for the [trial] court to charge only the parts of the initial charge which are necessary to answer the jury's request." (quoting *Rauch*, 284 S.C. at 597, 327 S.E.2d at 378)); *id.* ("[The trial court's] failure to charge in greater detail is not error if the details were fully covered in the original charge." (quoting *Rauch*, 284 S.C. at 597, 327 S.E.2d at 378)). Jane Doe's arguments on appeal do not challenge the sufficiency of the jury instructions on nominal damages,

but merely that they were not given for a third time, which precedent states is not an error.

CONCLUSION

For the foregoing reasons, the trial court's judgment is

AFFIRMED.²

LOCKEMY, C.J., concurs.

GEATHERS, J., dissenting: I respectfully depart from the well-written decision reached by the majority. The jury submitted a question seeking to determine whether the plaintiff was required to show an actual injury in order to establish a violation of her civil rights for purposes of her section 1983 claim.³ To respond to this question, it was necessary to repeat the initial nominal damages charge, which included the language quoted below, because the essence of this charge is the idea that a plaintiff does not have to incur a traditional injury to successfully prosecute a 1983 claim:

[I]f you return a verdict for the plaintiff on a section 1983 claim but the plaintiff has failed to prove actual or compensatory damages for her claim then you must award nominal damages of one dollar for that claim.

A person whose federal rights were violated is entitled to a recognition of that violation *even if he or she suffered no actual injury*. Nominal damages such as one dollar are designed to acknowledge the depr[i]vation of a federal right even where you find no actual injury occurred.

(emphasis added). In other words, the violation of a right is itself considered an injury. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) ("Because 'every violation [of a right] imports damage,' nominal damages can redress [the plaintiff's] injury even if he cannot or chooses not to quantify that harm in economic terms." (second alteration added) (citation omitted) (quoting *Webb v. Portland Mfg. Co.*, 29

² We decide this case without oral argument pursuant to Rule 215, SCACR.

³ Accompanying this question was the jury's request to obtain a copy of the language in section 1983, which the circuit court denied.

F. Cas. 506, 509 (C.C.D. Me. 1838) (No. 17,322))). In the absence of this key language, the circuit court's re-charge on the claim's general elements, especially proximate cause, likely confused the jury or gave the jury the impression that a traditional injury is required.

I am not suggesting that the circuit court always has to repeat a charge in its entirety when responding to a jury's question. However, in the instant matter, the court included the nominal damages language in the first two charges on the requirements for a section 1983 claim and omitted the nominal damages language in the third and final charge in response to the jury's question concerning an actual injury. Under these circumstances, I believe the omission of this key language de-emphasized it or removed it from the jury's consideration when, in fact, it was the only language that would have directly responded to the jury's question. *See Winthrop Univ. Trs. for the State v. Pickens Roofing & Sheet Metals, Inc.*, 418 S.C. 142, 165, 791 S.E.2d 152, 164 (Ct. App. 2016) ("When the jury requests additional charges, it is sufficient for the court to charge only the parts of the initial charge [that] are *necessary to answer the jury's request.*" (emphasis added) (quoting *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985))).

In sum, the denial of counsel's request to re-charge the jury on nominal damages was based on the erroneous conclusions that (1) the nominal damages charge was unnecessary to respond to the jury's question and (2) a re-charge on the claim's general elements, in the absence of the nominal damages language, would be more responsive. *See id.* Because the circuit court's ruling was based on errors of law, I would reverse and remand for a new trial. *See First Union Nat. Bank v. First Citizens Bank & Tr. Co. of S.C.*, 346 S.C. 462, 466, 551 S.E.2d 301, 303 (Ct. App. 2001) ("An abuse of discretion can occur where the trial court's ruling is based on an error of law."); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001) ("An abuse of discretion occurs where the trial court is controlled by an error of law or where the trial court's order is based on factual conclusions without evidentiary support.").

The State of South Carolina
In The Court of Appeals

Appeal from Charleston County
Hon. Deadre Jefferson, Circuit Court Judge

Case No. 2014-CP-10-4591
Appellate Case No. 2017-002392

The Estate of Jane Doe 202, by John Doe MM and John Doe HS,
each of whom holds power of attorney for Jane Doe,

Appellant

v.

City of North Charleston,
Leigh Anne McGowan, individually,
Charles Francis Wholleb, individually,
Anthony M. Doxey, individually

Respondents

Petition to Rehear and Memorandum in Support

Appellants petition the Court of Appeals to rehear its order of May 19, 2021, affirming the trial court grant of directed verdict and its handling of a question submitted by the jury during deliberations.

The following points set forth below have been overlooked or misapprehended by the panel of the Court of Appeals.

1. **The Court failed to apply the correct standard of review in its consideration of the directed verdict.**

On appeal from a directed verdict an appellate court is required to view the facts in the light most favorable to the non-moving party. E.g., *Adams v. Creel Sons*, 320 S.C. 274, 277 (S.C. 1995) (“the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party”). See, *Upchurch v. New York Times Co.*, 314 S.C. 531, 533 n.1 (S.C. 1993) (“We recite the facts in the light most favorable to appellants as the non-moving party in this appeal from the granting of a directed verdict”); *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 489, 649 S.E.2d 494, 497 (Ct. App. 2007) (“If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created”).

Beginning at p. 2 of its opinion, with “the parties disagree about what happened next. The officers said ...,” the panel proceeded to adopt a series of factual interpretations which, contrary to the standard applicable to appellate review of a directed verdict, consistently disregarded evidence of the appellant and adopted the version of events proposed by the respondents.¹ This

¹ For example, on pages 2 to 4 the panel sets forth the disputed testimony of the officers (“they [the officers] also said,” and “they [the officers] claimed,” “the officers disputed this...,” and “There was conflicting evidence on the point,” and “the officers disputed Daughter’s testimony,” and, most remarkably, given that the audio evidence and 911 records plainly supported it, “the officer testified she did not hear the dispatcher mention [Jane Doe’s] dementia.”) At p. 7 the panel opined “the Daughter came home intoxicated,” a conclusion actually contrary to the record. R. App. 377 – 381.

Also contrary to the applicable standard, the panel omitted that it was the state, albeit the Sheriff not North Charleston, that would not permit the daughter to make a phone call from the jail (e.g. R. App. 104, 387), omitted that (to say nothing of the criminal charge the state added to complicate her caregiving) it was the state’s injuries to the Daughter — for which she was at the hospital two days later — that was the reason Jane Doe was “unattended” when Jane Doe’s confusion *from her UTI* began to exhibit (R. App. 565-566; R. App. 759, medical records each noting delirium secondary to UTI)), and that Jane Doe’s subsequent hospitalization in 2014 was not “confusion from being left alone,” as put by the panel at p. 3, but “worsening agitation and

initial and plain error of law affected the panel's interpretation of the federal issues involving state created danger, and by itself is ground for reversal and a grant of a new trial.

In other words, the panel has erred as a matter of law in its view of the record. State created danger has to be evaluated accepting the appellant's version of events and all inferences from that version, which includes that officers were told, (undisputedly to officer McGowan by dispatch according to the unambiguous audio) but it must also be accepted as true that officers were told by the daughter that her mother had dementia and could not be left alone overnight, Opinion at p. 4, information that in the light most favorable to appellants, the officers at best ignored.

At p. 4 of the opinion the panel errs by accepting (at p. 4) the trial court's erroneous factual and legal conclusion that "the officers could not be responsible for a danger (Jane Doe's dementia) that already existed." Jane Doe's dementia was not the danger that already existed. Her dementia was a pre-existing condition, and the defendants take the plaintiff as she is found. E.g., *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 136 S.E.2d 286 (1964). The danger the officers imposed on Jane Doe by their affirmative acts was her isolation from her family caregivers.

aggressive behavior," as recorded by MUSC. R. App. 753. The medical evidence was undisputed that the events of the warrantless entry contributed to Jane Doe's agitation (e.g., R. App. 563) and that in July 2013 the family had discussed with MUSC ways of adapting the house so Jane Doe could be unsupervised for not more than 6 hours at a time. R. App. 816. Jane Doe's two-week hospital stay was related to her UTI as well as other effects set out at R. App. 753, including "an episode that appeared consistent with partial seizure activity," and a "long pd ["period"] of lethargy." Jane Doe herself informed her medical providers, R. App. 561 to 563 that "men came into the house" and caused her concern.

Should the panel correctly view the record favorably to the appellants, the panel must accept that the officers were told about Jane Doe's dementia yet chose to rearrange the family care for Jane Doe. The officers took affirmative action to enter the home without a warrant and to remove the daughter, doing nothing to assure that Jane Doe was provided for. At that time, Jane Doe could not feed herself, clothe herself, or toilet herself, which her doctor undisputedly testified increased the risk to Jane Doe of contracting a urinary tract infection with its resulting increases to confusion and agitation. R. App. 565 to 567. But the officers also took affirmative acts in saddling the Daughter with both a criminal charge she had to defend and left her with injuries which added an additional tasks for the Daughter that interfered with Jane Doe's care as the daughter consulted counsel and went herself to a hospital for evaluation. R. App. 389, 391-394.

Put simply, the panel erred in applying the wrong standard to its review of and recitation of the record and should reconsider its having done so, reverse the trial court for the same failing and order a new trial.

2. The panel erred in analyzing state created danger.

Under state law, dementia is not nothing. In construing federal law, the panel has erred in making it so. As noted above, the panel stated the facts with every concession to the police involved, rather than in the light most favorable to the appellants, but affirmed the trial court on other grounds in its opinion at p. 7 in this passage, emphasis added:

The police did not take Jane Doe into custody, place any restraints on her freedom, or assume responsibility of caring for her. At best, the testimony shows the officers may have been negligent or grossly negligent, for when the facts are viewed in Jane Doe's favor, *the absolute most someone can say* is that officers were told, either by Daughter or by the dispatcher, Jane Doe had dementia before they left Jane Doe home alone.

The panel then went on to opine that “Nothing suggests” officers “knew a high probability of harm would follow their actions,” as there was “no evidence the police had any reason to think Jane Doe was at risk of harming herself,” and “had no reason to think Jane Doe was incapable of summoning help if she encountered any danger.” In short, according to the panel, dementia is nothing for the officers to have concerned themselves with after their affirmative actions removed Jane Doe’s family caregiver.

Doe v. Rosa, 795 F.3d 429, 439 (4th Cir. 2015) articulated the “narrow limits” for 1983 liability, which in the light most favorable to appellants, this record satisfies:

Under the narrow limits set by *DeShaney* and *Pinder*, to establish § 1983 liability based on a state-created danger theory, a plaintiff must show that the state actor *created or increased the risk of private danger*, and did so directly through *affirmative acts*, not merely through inaction or omission. Put another way, “state actors may not disclaim liability when they themselves throw others to the lions,” but that does not “entitle persons who rely on promises of aid to some greater degree of protection from lions at large.” *Pinder*, 54 F.3d at 1177.

(emphasis in original). On this record, it was Jane Doe who the officers threw to the lions after affirmatively acting to remove her daughter and alter the family arrangements which had been providing for Jane Doe’s care.

The panel acknowledged that North Charleston’s officers were told, unarguably by the dispatcher and also by the daughter, that Jane Doe had dementia (R. App. 893 and the audio recording, on which the report is plainly audible) as well as by the daughter (R. App. 385: “I was begging him to let me have a phone call and I said I needed to call someone for my mom and he told me that my mom was the one who called the cops on me.”²)

² This false contention by the police at the scene — that Jane Doe had caused her daughter’s arrest — was how the officers affirmatively dismissed and discounted the daughter’s concern for

What the panel errs in omitting is any analysis, under state created danger but also under state law, that it was the police who took affirmative acts to rearrange the care provided by Jane Doe's family for her dementia and her diminishing capabilities. The police entered the house about 10:30 p.m. without a warrant, waking Jane Doe. After that warrantless entry the police elected to remove the daughter from the home, necessarily removing the daughter as a caregiver for Jane Doe, and made no provision to even give notice to other family members. The police undertook those affirmative acts knowing that Jane Doe had dementia and discounted the daughter's expressed concern by falsely claiming that Jane Doe had reported her daughter for abuse.

Jane Doe unarguably constituted a vulnerable adult under S.C. Code 43-35-10(11). S.C. Code 43-35-25(A) obligates any law enforcement officer "having reason to believe" a vulnerable adult "has been or is likely to be abused, neglected, or exploited" to report a vulnerable adult. The panel's decision permits police to take affirmative actions to isolate a person with dementia from her family caregivers, to increase the risk to her of dangers from that isolation, and to do so with impunity.

The panel erred by ignoring obligations properly imposed on police who undertake affirmative acts to rearrange the family care that was being provided for Jane Doe. The panel erred in dismissing the report of dementia as insignificant, (a) by failing to assess the affirmative acts police undertook, knowing Jane Doe had dementia, to isolate Jane Doe from her family

her mother's inability to be alone for a long period. MUSC found no evidence of abuse or neglect by the daughter. R. App. 756 ("No evidence was found during admission that patient had been recently assaulted or abused (i.e., no bruising or sign of injury. When patient was less delirious, she stated that her daughter was the nicest person and 'I never said that she hurt me.'").

caregivers (both the daughter who provided immediate care and the brother who lived nearby and could have been informed by phone) (b) affirmative acts to create a false narrative to discount the daughter's effort to alert them that her mother could not be alone for an extended period, and (c) by construing the record in the light most favorable to the officers rather than to the appellants about what the officers "knew" or "had reason to think." A jury was entitled to assess the officers' conduct in their disruption of Jane Doe's family-oriented care in light of the efforts to warn them against their course of conduct.

According to her doctor, as discussed above, the medical records and testimony reflect that both the police entering the home at night and the police-imposed isolation of Jane Doe when her daughter was removed unarguably confused Jane Doe and increased the risk for Jane Doe to develop the urinary tract infection that her doctor acknowledged, and her medical records reflect, was the cause of her increased confusion and aggression.³

The panel should reconsider its analysis and its approach to state created danger.

3. The panel erred in evaluating the court's response to the jury's question.

An error of law is necessarily an abuse of discretion, as Judge Geathers observed in dissent. Opinion at p. 10. While we appreciate the panel's agreement that "there is much force and appeal to the reasoning in the dissent," by Judge Geathers, the panel has erred in not construing as an error of law the trial court's having *omitted* the portion of the charge which

³ The panel observed on p. 4, that "Jane Doe's doctor testified the officers likely would not have recognized that Jane Doe had dementia *unless they had been told.*" Emphasis added. But of course, it is unarguably recorded on 911 audio and in police records that *the police were told* Jane Doe had dementia. E.g., R. App. 893. The panel's decision creates an easy way to evade even objectively unarguable evidence in construing the record favorably to the officer's claim that oh, she just didn't hear that part of the dispatcher's report. Opinion at 4. A jury should resolve the factual dispute.

actually responded to the jury's question, given the request to correct the omission by giving the proper charge. As Judge Geathers contends in his dissent, the appellants' request to charge was "the only language that would have directly responded to the jury's question." Opinion at p. 10.

The court might have merely answered, "No," to the jury's question, but the trial court having re-charged while omitting the pertinent part of the jury charge that was actually responsive to the jury question is an error of law, as Judge Geathers has noted. No doubt inadvertently, the trial court created a kind of misdirection for the jury panel by giving the instruction which actually omitted the charge responsive to the question presented.

The panel has erred in concluding "both views of the jury's question are possible." Opinion at 8. It is error because the trial court is not laboring in isolation to understand the jury's question: the appellants specifically requested the trial court address the concern that the panel appears to agree was the correct interpretation of the jury's question. We contend the trial court is not relieved of all responsibility to get it right when the correct proposition is presented to the trial court. The panel's opinion would be correct only if the appellants were silent in response to the jury's question and the court's proposed response.

The relief proposed by Judge Geathers should be awarded by the panel.

Conclusion

This record must be viewed in the light most favorable to Appellants. It has not been. The panel has erred as set forth above and the decision should be reconsidered using the proper standard, and the issues remanded for further proceedings.

Respectfully submitted,

s/ Gregg Meyers

Gregg Meyers, S.C. Bar No. 9908

217 Lucas Street F-1

Mt. Pleasant SC 29464

843-324-1589

attygm@gmail.com

Attorney for Appellants

Certificate of Service

Pursuant to SCACR 240(c)(1), counsel certifies that a copy of this Petition has been served on opposing counsel for the parties by email sent to counsel of record simultaneously with the email submission to the Court of Appeals pursuant to Administrative Order 2020-05-29-02, the order applicable to proceedings during the covid-19 pandemic.

Also pursuant to that order, the \$50 filing fee for the Petition, established by SCACR 240(d) will be separately forwarded to the Court by United States mail.

Respectfully submitted,

/s/ Gregg Meyers

Gregg Meyers, S.C. Bar No. 9908

217 Lucas Street F-1

Mt. Pleasant SC 29464

843-324-1589

attygm@gmail.com

Attorney for Appellants

The South Carolina Court of Appeals

The Estate of Jane Doe 202, by John Doe MM and John Doe HS, each of whom holds power of attorney for Jane Doe, Appellant,

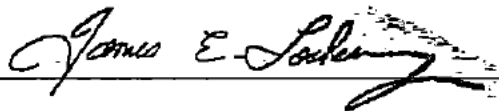
v.

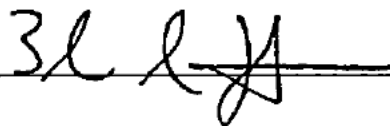
City of North Charleston; Leigh Anne McGowan, individually, Charles Francis Wholleb, individually, and Anthony M. Doxey, individually, Respondents.

Appellate Case No. 2017-002392

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


_____ C.J.


_____ J.

After careful consideration of the petition for rehearing, I would grant the petition consistent with my dissent.


_____ J.

Columbia, South Carolina

cc:

Gregg E. Meyers, Esquire
Christopher Thomas Dorsel, Esquire
Sandra J. Senn, Esquire
The Honorable Deadra L. Jefferson

FILED
Jun 11 2021

Certificate of Counsel

I hereby certify that the enclosed Record on Appeal contains all material proposed to be included by any of the parties and the appellate court rules for a petition for certiorari, and not any other material.



Gregg Meyers
217 Lucas Street F-1
Mt. Pleasant SC 29464
843-324-1589

Attorney for Appellant