THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2007-CP-07-2373

Matthew S. McAlhaney, ... Respondent,

v.

Richard K. McElveen a/k/a Richard K. McElveen, Sr., Individually and d/b/a Battery Creek Marina, The Great Pumpkin, LLC, Linda McElveen, Richard K. McElveen, Jr., and Billy Joe Byrd, ... Defendants,

of whom Richard K. McElveen, Sr., is the ..... Appellant.

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STATEMENT OF ISSUES ON APPEAL

This case involves a substantial damages award in a defamation suit between private figures. The compensatory damage awards are relatively modest—$1,000 for libel and $61,000 for slander—but the jury gave a significant award of punitive damages: $3.25 million for each claim, a total punitive award of $6.5 million. The trial judge substantially reduced the punitive verdict—he cut it from $6.5 million to $375,000—but the judge denied the appellant's motion for a new trial absolute. The issues on appeal are:

I. Whether the Jury's Award of Punitive Damages Is So Large That the Verdict Could Not Properly Be Remitted but must Be Reversed.

II. Whether Reversal Is Required by the Two Improper Charges—one on Liability, the Other on Punitive Damages—that Were Given to the Jury.

STATEMENT OF THE CASE

This is an appeal from a jury's verdict on claims for libel, slander, and abuse of process. The original suit involved five defendants, but this appeal concerns only one of them; Richard ("Rick") McElveen, Senior.

Mr. McElveen has two grandsons. His son is the father of these children, and the children's parents divorced in 1997.

Matt McAlhaney—the plaintiff—began dating Mr. McElveen's former daughter-in-law in the Spring of 2003. Around this same time, Mr. McElveen filed a case in family court seeking primary custody of his grandchildren, then ages 8 and 4. Mr. McElveen feared that his former daughter-in-law was using illegal drugs and engaging in other harmful activities. See (Pl's Ex. 3) (Mr. McElveen's complaint). Nobody disputes that he was right.

This defamation suit has its roots in Mr. McElveen's custody case. Put simply, the allegations are that Mr. McElveen made several false statements about Mr. McAlhaney during his quest to be awarded custody of his grandchildren.

The first alleged act of defamation occurred shortly after the temporary custody hearing. During this hearing, which occurred in September of 2003, the lawyer for Mr. McElveen's former daughter-in-law produced a letter from Julia Sanford, the sister-in-law of then-Governor Mark Sanford. See (Pl's Ex. 2). This letter was offered in support of Mr. McElveen's former daughter-in-law, and Mr. McElveen believed it was offered in a way that unfairly emphasized the author's relationship to the Governor. See (Trial Tr., p.462, ll. 13-20) (Mr. McElveen's description of this hearing).

Mr. McElveen responded to this experience by writing the Governor and expressing his frustration. Mr. McElveen believed that his former daughter-in-law was a troubled woman with significant problems, and he wrote that although his former daughter-in-law had recently begun a new romantic relationship that initially seemed positive, Mr. McElveen subsequently learned that the boyfriend had "a drug addiction" and had been "abusive" to the children. See (Pl's Ex.1). The letter did not mention Mr. McAlhaney by name, but a copy made its way to Mr. McAlhaney after the Governor shared the letter with his family.[1]

The family court issued its temporary order after the hearing. This order kept all of the existing custody arrangements in place. This meant that Mr. McElveen and his former daughter-in-law continued to share joint custody of the oldest grandchild. This had been a

[1]The Governor reacted to the letter by sending a memo to his family, and he attached Mr. McElveen's letter to the memo. (Trial Tr., p.130). Julia Sanford shared the letter with Mr. McAlhaney after she received it from the Governor. *Id.*; see also (Trial Tr., p.99).

part of the divorce decree between Mr. McElveen's son and his ex-wife. Because the youngest grandchild was born out of wedlock, the statutory law provided that the mother had sole custody. See S.C. Code Ann. § 63-17-20(B) (Supp. ____) (formerly codified at section 20-7-953(B) (Supp. ____)). The family court appointed a guardian ad litem and ordered the parties to abstain from several activities including using alcohol or illegal drugs in the children's presence. The family court issued this order in October of 2003. See (Pl's Ex. 4) (the temporary order).

In March of 2004, Mr. McAlhaney was arrested and charged with first degree criminal sexual conduct with a minor and assault and battery of a high and aggravated nature. The alleged victim of these crimes was Mr. McElveen's youngest grandson. At that time, this child was 4 years old.

These charges were the result of contact that Linda McElveen, Mr. McElveen's wife (and the children's grandmother) made with local law enforcement after one of the children reported the alleged abuse to her. The investigator with the Sheriff's office explained that Mr. McElveen had nothing to do with the warrant and arrest process, see (Trial Tr., p.361-64), but Mr. McAlhaney claimed that the child's allegation was false and that Mr. McElveen had influenced the allegation in some way. Mr. McAlhaney also claimed that Mr. McElveen was ecstatic at his arrest and began telling other people in the community that Mr. McAlhaney was a deviant and a child molester.

Shortly after Mr. McAlhaney's arrest, the family court conducted an emergency hearing and awarded temporary custody of the children to Mr. McElveen. This order was entered at the end of March 2004. See (Pl's Ex.10) (the emergency order).

Mr. McAlhaney fought his criminal charges. In doing so, he assisted his uncle in preparing a "book" that the uncle sent to several public figures and news organizations. (Trial Tr., pp.187-188). This book was not admitted into evidence at trial, but the trial testimony generally established that the thesis of the book was that Mr. McElveen had a low quality of character and was willing to do anything to win custody of his grandchildren. *Id.* at 189-191. Mr. McElveen's letter to the Governor was included in this "book." *Id.* at 189.

Mr. McAlhaney was never prosecuted for the criminal charges. The solicitor's office dismissed them in February of 2005.

The custody case was ultimately resolved via a consent order that granted Mr. McElveen custody of both of his grandchildren. The order was filed in January of 2005. See (Pl's Ex. 11).

Mr. McAlhaney initiated this lawsuit six months later. See (Complaint, pp.1-10).

Mr. McElveen answered this suit and claimed, among other defenses, that any statements he made about Mr. McAlhaney were either completely true or substantially true. In addition to defending the suit, Mr. McElveen brought counterclaims against Mr. McAlhaney and third-party claims against Mr. McAlhaney's uncle. These claims were tied to the distribution of the so-called "book." See, e.g., (McElveen's 2nd Am. Ans., pp.7-21).

This case was tried over 5 days in January of 2010. The trial judge submitted 3 claims against Mr. McElveen to the jury. These were libel, slander, and abuse of process.

The jury returned a verdict in Mr. McAlhaney's favor on each claim and awarded actual damages of $1,000 for libel, $61,000 for slander, and $25,000 for abuse of process. See (verdict form). The jury awarded Mr. McAlhaney $3.25 million in punitive damages for

each of the defamation claims, but the jury did not award Mr. McAlhaney any punitive damages on the abuse of process claim. *Id.*

The jury's awards against the other defendants were relatively modest. As to Linda McElveen, the jury awarded Mr. McAlhaney $2,000 for slander and $1,500 for abuse of process. As to Mr. McElveen's son, the jury awarded Mr. McAlhaney $500 for slander and $5,665 for civil conspiracy. $5,000 of the civil conspiracy award against Mr. McElveen's son was for punitive damages.

The jury returned defense verdicts on Mr. McElveen's counterclaim and his third-party claim. *Id.* All of these verdicts were returned on January 15, 2010.

On January 21, 2010, Mr. McElveen, his wife, and his son filed a joint motion for a new trial. See (Joint Mot. for a New Trial, pp.1-4). The trial judge conducted a hearing on this motion the same day. See (Tr. of Post-Trial Hr'g, p.1).

During the hearing, the judge denied all post-trial motions except Mr. McElveen's motion for a new trial *nisi remittitur*. The judge resolved this last motion by inviting both sides to offer proposed orders with a remitted amount for the punitive awards against Mr. McElveen. (*Id.* at 24-30). During this invitation, the judge indicated that he intended to cut the verdict to the maximum amount that he felt could be sustained on appeal. (*Id.* at 32).

The judge ultimately remitted the $6.5 million punitive award to $375,000.00. The judge's order reasons that although Mr. McAlhaney's harm was primarily economic, the jury's decision could have been based on a finding that Mr. McElveen purposefully sought to discredit Mr. McAlhaney and that he did so maliciously. (Post-Trial Or., p.3). The order notes that the punitive awards vastly exceed the awards of compensatory damages, and it also

notes that because Mr. McElveen is retired and has a net worth of only $2 million, Mr. McElveen obviously cannot pay the verdict. *Id.* at 4. Though the order finds that the awards are impermissibly excessive and that they grossly exceed the constitutional limit, it also finds that the awards do not "cross the threshold" from an unduly liberal verdict, which the court can remit, to a grossly excessive verdict, which the court must reverse. *Id.* at 4-5.

The court issued this order July 2, 2010. Mr. McElveen filed this appeal July 29th.

This description has endeavored to present only the background that is necessary for understanding the issues in this appeal. This description has also endeavored to present that background fairly and describe the parties' allegations in a neutral light. This was a protracted case with several different factual disputes, and it was also a contentious case where both sides accused other people (parties and witnesses) of giving false testimony.

There is a final bit of procedural history that it may be helpful to acknowledge. It has taken several years for the parties to perfect this appeal, and the reason for this delay is that a significant portion of the trial transcript has been lost. The transcript ends during the fourth day of what was a five-day trial. There is no contemporaneous record of the parties' closing arguments, their closing motions, or the judge's charges to the jury.

This is raised for explanatory purposes only . Although it would be helpful to have a complete record, the missing portions will not substantially affect either of Mr. McElveen's issues on appeal, and the law generally provides that reversal is not required simply because the transcript has been lost. See (Mot. to Remand) (Mr. McElveen's motion for a limited remand and the cases cited therein). The parties were able to conduct a hearing to discuss the missing transcript in March of 2013. That transcript is in the record. See (Tr.pp.1-22).

ARGUMENT

There are two reasons this Court should reverse the verdicts against Mr. McElveen.

First, the amount of the jury's punitive damages award is so large that the verdict could not properly be remitted. As far as Mr. McElveen has been able to discover, there is no case in South Carolina where there has been this significant of a remittitur, and if the trial judge was right—if $350,000 is the maximum award that due process will allow—that means that 94% of the jury's verdict was unconstitutional. If this award is not grossly excessive, it is difficult to imagine what sort of award *will* meet that standard. The punitive award is vastly out of step with the compensatory awards, and it is difficult to make sense of that disparity when the claims are for defamation. Moreover, most of what Mr. McElveen said about Mr. McAlhaney was re-published by Mr. McAlhaney and was substantially true. Mr. McAlhaney may be a fine person, but as a matter of law, someone who *admits* having regularly used cocaine cannot cry foul about being called a drug addict.

Second, two of the charges that the trial judge gave the jury are incorrect. The law requires an adult to report a child's allegation of abuse to law enforcement, and the law gives immunity to the adult for this reporting. Though we do not know exactly what the judge charged, it appears that he charged the jury that this immunity does not apply if the child's statement is fabricated. The judge also appears to have told the jury that it could award punitive damages if it believed a reasonable adult would have investigated a child's claim of abuse before reporting it. That is a negligence standard; it is not the standard for punitive damages. These cannot be harmless errors. If the jury received bad charges on liability and damages, there is a reasonable chance that it affected the verdict.

I. This Court Should Hold That the Jury's Award of Punitive Damages Is So Large That it Could Not Be Properly Remitted but must Be Reversed.

A trial judge may not remit a verdict if the amount of the verdict is "grossly excessive." Instead, the power to grant a new trial *nisi remittitur* is limited to verdicts that are "unduly liberal." Several cases describe the differences between these types of verdicts.

"Unduly liberal" verdicts are excessive, but the degree of their excess suggests that although the verdict is appropriate, the amount of the verdict does not match with the court's view of the acceptable damages for the particular case. *Bowers v. Charleston & W. C. Ry. Co.*, 210 S.C. 367, 375, 42 S.E.2d 705, 708 (1947). These verdicts are defective, but the defect is not fatal because the verdict has a reasonable relationship to the plaintiff's injury and damage. *Ray v. Simon*, 245 S.C. 346, 360, 140 S.E.2d 575, 581 (1965) (citing *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964)).

This is different from a "grossly excessive" verdict. When the verdict is shockingly disproportionate to the injuries that the plaintiff suffered, the court has said that it is the verdict itself, not just the amount of the verdict, that is defective. *Id* at 375, 42 S.E.2d at 708. This does not mean that the jury acted in bad faith. The jury may have based its decision on sympathy, mistake, a misapprehension of the law, or a misapprehension of the facts. If the verdict is so excessive that it suggests such an error occurred, that verdict is improper and the case must be reversed for a new trial absolute. *Nelson v. Charleston & W. C. Ry. Co.*, 231 S.C. 351, 98 S.E.2d 798 (1957).

These judgments are generally entrusted to the trial court's discretion, but if the trial court refuses to grant a new trial absolute when the verdict is grossly excessive, that refusal

amounts to an abuse of discretion. *Wachovia Bank Nat'l Ass'n v. Beane*, 397 S.C. 612, 616, 725 S.E.2d 715, 717 (Ct. App. 2012).

There are three reasons this Court should hold that this verdict is grossly excessive. First, as far as Mr. McElveen has been able to discover, no case in South Carolina has ever had a remittitur this large. Second, this punitive verdict vastly exceeds the jury's award of compensatory damages, and when the claims are for defamation, that disparity does not make any sense. Third, it is undisputed that significant portions of what Mr. McElveen said about Mr. McAlhaney were republished by Mr. McAlhaney and were substantially true. Because this verdict is grossly excessive, the Court should order a new trial.

a. As far as Mr. McElveen has been able to discover, no case in South Carolina has ever had this significant a remittitur. Indeed, no other case comes close.

One of the largest remittiturs Mr. McElveen has been able to discover occurred in *Beckham v. Sun News*, 289 S.C. 28, 344 S.E.2d 603 (1986). This was a defamation case where the jury awarded $1 million in actual damages, $2.5 million in punitive damages, and the trial judge reduced the punitive award to $1 million. This appears to be one of the largest remittiturs in terms of the percentage that the verdict was reduced; the trial judge trimmed the verdict by $1.5 million, which was a 60% reduction. This verdict was ultimately reversed on appeal due to an erroneous jury charge.

One of the largest remittiturs that has been upheld on appeal appears to have occurred in *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 529 S.E.2d 758 (Ct. App. 2000). In that case, the trial court reduced a verdict of $1.75 million, all of which was compensatory, to $525,000.00. This was a personal injury case, and because the parties had stipulated to the

amount of the plaintiff's medical bills, the jury's primary task for the verdict was to place a value on the plaintiff's non-economic damages like her pain and suffering.

The largest financial reduction in a verdict appears to have occurred in *Mitchell v. Fortis Insurance Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009). In *Mitchell*, the Supreme Court reduced a jury's award of $15 million in punitive damages to $10 million. This was obviously a significant reduction in terms of dollar value, but in terms of the percentage of the verdict that was remitted, this is not one of the more significant cases.

The law usually reasons by analogies, but unless this survey is incomplete, no case is analogous to the present case. The remittitur that occurred here is in a class by itself; the jury returned a verdict of $6.5 million, and the trial judge slashed the verdict by over $6 million. The judge had to trim $6,125,000 off of the jury's verdict in order to get to $375,000.00. This was a 94% reduction. This verdict was not "a little" liberal; the judge believed that 94% percent of the verdict was excessive. No other case comes close.

There is another component to this argument of excessiveness. An excessive award of punitive damages can amount to an arbitrary deprivation of property that violates someone's right to due process, see *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and the Supreme Court of the United States has said that due process will usually be violated if a punitive award exceeds a compensatory award by more than a single digit ratio. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). In the present case, the trial judge noted that the punitive award for libel exceeded the compensatory award by a ratio of 3,250 to 1. The ratio for the slander awards was just over 53 to 1. The judge indicated that he was remitting the verdict to the maximum amount that he believed was

constitutional. Thus, the judge reasoned that 94% of the jury's punitive award violated the constitution.

If 94% of the jury's verdict is constitutionally defective, that must be some indication that the verdict is "grossly" excessive. There is a point in the reduction beyond which the verdict can no longer be called the *jury's* verdict. See *South Carolina State Highway Dep't v. Miller*, 237 S.C. 386, 394-95, 117 S.E.2d 561, 565 (1960) (using a case from a foreign jurisdiction that described this point). The location of that point may be inexact, but that uncertainty should not justify a proposition that seems obviously nonsensical. In describing the ratio between punitive and compensatory damages, the trial court wrote that the verdict "grossly" exceeded the constitutional boundary. (Post-Trial Or., p.4). If a verdict is grossly unconstitutional, it is hard to see how that verdict is not also grossly excessive.

b. The punitive verdict vastly exceeds the award of compensatory damages, and when the claims are for defamation, that disparity does not make sense.

To the extent that money can ever fully compensate an injured person for his or her injuries, a jury's award of compensatory damages is designed to carry out that function. In a defamation case, the compensatory damages are divided into two categories: "general" damages and "special" damages.

General damages are the injury to the plaintiff's reputation, his mental suffering, his hurt feelings, his emotional distress, and "similar types of injuries which are not capable of definite money valuation." *Erickson v. Jones Street Publishers*, 368 S.C. 444, 465 n.6, 629 S.E.2d 653, 664 n.6 (2006). Special damages include things like the decrease in the value of the plaintiff's property, his business, or his occupation. These are the tangible losses that

are usually easier to value. *Id.* at 465 n.6, 629 S.E.2d at 664 n.6. The damage in a defamation case can be severe—the plaintiff's reputation may have suffered a significant and lasting injury. But the jury's compensatory award is supposed to make the plaintiff completely whole. It is supposed to fully compensate him, injured reputation and all. See *Albertini v. Veal*, 292 S.C. 561, 566, 357 S.E.2d 716, 720 (Ct. App. 1987).

Punitive damages are different. As the label implies, the primary purpose of punitive damages is punishment; punishing the wrongdoer and deterring others from similar wrongdoing. See *O'Neill v. Smith*, 388 S.C. 246, 251, 695 S.E.2d 531, 534 (2010) (describing the purposes of punitive damages). This illuminates the reason that a punitive award must have some sort of reasonable relationship to the compensatory award. The law generally provides that the punishment should fit the crime.

These verdicts do not meet that standard. Consider the libel verdict first. The value that the jury associated with completely compensating Mr. McAlhaney for all of the injuries he suffered to his property and his reputation was $1,000.00. (Verdict Form). Everyone ought to agree that this is a modest verdict. Yet, for the punitive award on this claim, the jury gave Mr. McAlhaney $3.25 million. This is the opposite of a modest award. There must be some reasonable relationship between the punitive verdict and the harm that the plaintiff suffered, but here there is none. Even in the case of the most vicious defamation, an injury that costs $1,000 to fix cannot deserve anything close to $3.25 million in punishment.

The same is true for the slander verdict. The compensatory award for slander was $61,000.00. While this award is substantially greater than $1,000.00, this sum is still grossly

disproportionate to a $3.25 million punitive award. The jury found that $61,000 would completely compensate Mr. McAlhaney for all of his economic harm, all of his hurt feelings, and all of the injury to his reputation. It is difficult to imagine what sort of conduct could cause only $61,000 worth of damage but deserve over $3 million of punishment. One struggles to describe any sort of reasonable relationship between the punitive verdict and the plaintiff's injury, and if the verdict is *not* reasonably related to the plaintiff's injury, it is a grossly excessive verdict that must be reversed. *Ray*, 245 S.C. at 360, 140 S.E.2d at 581.

Even when compared to other defamation cases this case appears to be in a class by itself. As far as Mr. McElveen has been able to discover, this is the only defamation case with this significant of a disparity between compensatory and punitive damages. *Miller v. City of West Columbia* is a defamation case where the plaintiff's career was completely ruined by the defendant's wrongful conduct. This humiliating and career-ending injury merited an award of $250,000 in compensatory damages and $500,000 in punitives. 322 S.C. 224, 471 S.E.2d 683 (1996). The underlying tort in *Owners Insurance Co. v. Clayton* involved an allegation of theft that led to the plaintiff being charged with a crime. Like the present case, the plaintiff in *Owens* was not prosecuted. The *Owens* jury awarded $500,000 for compensatory damages and $750,000 for punitives. 364 S.C. 555, 557, 614 S.E.2d 611, 613 (2005). Webster's dictionary defines "gross" as "glaringly noticeable." *The Merriam-Webster Dictionary* 318 (2004). Everyone ought to agree that differences between the verdict in the present case and the verdict in these other cases are glaringly noticeable.

There is another aspect to the oddity of this verdict. The jury believed that Mr. McElveen should have to pay Mr. McAlhaney $6.5 million, but Mr. McElveen testified that

his net worth was only $2 million and the trial judge charged the jury that one of the factors to consider in a punitive award was the defendant's ability to pay it.[2] Either the jury was of the view that this 57 year-old retired grandfather should be bankrupted and required to re-enter the workforce while raising his grandchildren or the jury ignored this instruction completely. Under either scenario, the verdict is not a verdict that can be upheld. Either it was based on passion or prejudice, or it was based on a mistake.

c. It is undisputed that much of what Mr. McElveen said about Mr. McAlhaney was re-published by Mr. McAlhaney and is not actionable.

A defamatory statement is a false statement that harms someone's reputation, but in some cases, the plaintiff's reputation can be harmed by the disclosure of the truth. The defendant in a defamation case has the burden of proving that his statements are either completely true or substantially true. A foreign jurisdiction described the rule this way: it wrote that an allegedly defamatory statement is true as long as "the substance, the gist, the sting, of the [statement] is true." *Gomba v. McLaughlin*, 504 P.2d 337, 339 (Colo. 1972).

As far as Mr. McAlhaney's libel claim is concerned, the substance, gist, and sting of Mr. McElveen's letter to the Governor was that he believed Mr. McAlhaney had a drug problem and had acted inappropriately with Mr. McElveen's grandchildren. Nobody could reasonably contend that these statements are false. When asked how often he and the children's mother used illegal drugs together, Mr. McAlhaney guessed that it was somewhere

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[2]The judge indicated that this portion of his charge was substantially similar to the charge in the first edition of Ralph King Anderson's *South Carolina Requests to Charge - Civil* (2002). See (Mar. 7 Tr. pp.8-9). The model charge in that book instructs the jury that it may consider the defendant's wealth or ability to pay in assessing punitive damages. *Id.* at § 13-21.

in the neighborhood of 20 times. (Tr. p. 96). He said that he began dating Mr. McElveen's former daughter-in-law in April of 2003, he said that they used cocaine together 4 or 5 times a month for 4 or 5 months, and he said that he stopped using cocaine after he realized that his and his girlfriend's drug use might create an issue with her having custody of an 8 year old and a 4 year old. *Id.* at 137-138. This was about the same time Mr. McElveen initiated his custody request. Mr. McAlhaney also admitted that one of the grandchildren had observed he and the child's mother having sexual relations, see (Tr.p.97), and that he had administered corporal punishment to one of the children. See (Tr.p.98). Mr. McElveen testified that the child had significant bruising as a result of this punishment. (Tr.p.453).

This libel claim is absurd. Put aside the fact that the letter to the Governor was a private letter that was published by the plaintiff and his uncle, the gist of the letter was that Mr. McElveen believed Mr. McAlhaney had a drug problem and had acted inappropriately with Mr. McElveen's grandchildren. This was true. Nobody can seriously suggest otherwise.

The same is true of the slander claim. Although being accused of child molestation and child abuse is surely a serious accusation, the reality is that Mr. McAlhaney *was* arrested and charged with these crimes. There is no evidence that Mr. McElveen was behind this allegation, and the point is this: if Mr. McAlhaney's reputation was damaged, it was damaged by his arrest. *Assuming* that Mr. McElveen reacted to the arrest by telling other people that Mr. McAlhaney was a child molester, those statements could not have caused Mr. McAlhaney's reputation any serious damage. To make awards that are this big, the jury had to hate Mr. McElveen, feel sympathy for Mr. McAlhaney, or misunderstand the law. Because each scenario is improper, the verdicts against Mr. McElveen cannot stand.

II. The Court Should Hold That Reversal Is Required by the Two Improper Charges—one on Liability, the Other on Punitive Damages—that Were Given to the Jury.

The statutory law grants immunity to someone that participates in an investigation of suspected child abuse or neglect. See S.C. Code Ann. § 63-7-390 (___). The only limitation on this immunity is that the person have acted in good faith, and the statute provides that good faith is rebuttably presumed. *Id.*

Though we do not have the precise language of the judge's charge, it appears that the judge charged the jury that this immunity does not apply if the child's statement is fabricated. See (Post-Trial Motion pp.1-2) (from Mr. McElveen's post-trial motion) and (Post-Trial Tr.pp.6) (from the hearing on the post-trial motion). This charge is not faithful to the language of the statute. As Mr. McElveen's post-trial motion described, this charge would have allowed the jury to find against Mr. McElveen if his youngest grandchild, acting wholly on his own, fabricated an allegation of molestation and reported that allegation to his grandfather. This would impose liability without fault, and although states are free to set their own standards of liability for defamation, the Supreme Court has instructed that states cannot impose liability without fault. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

The charge on punitive damages appears to have been similarly defective. The judge apparently charged that the jury could award punitive damages if it found that an ordinary, reasonable person would have checked into an allegation of abuse before reporting it to law enforcement. See (Post-Trial Motion pp.2) (from Mr. McElveen's post-trial motion) and (Post-Trial Tr. pp.7) (from the hearing on this motion). This is a negligence standard; negligence is the failure to act as a reasonable person would have acted. See, e.g., *Litchfield*

Co. of S.C. v. Sur-Tech, Inc., 289 S.C. 247, 249, 345 S.E.2d 765, 766 (Ct. App. 1986). Punitive damages require recklessness—they require some awareness or knowledge on the part of the defendant that he or she is acting negligently. *Rogers v. Florence Printing Co.*, 233 S.C. 567, 577-78, 106 S.E.2d 258, 263-64 (1958). Justice Toal's concurring opinion in *Holtzscheiter v. Thomson Newspapers* suggests that punitive damages are not appropriate in a defamation case unless the plaintiff proves, by clear and convincing evidence, that the defendant acted with "actual malice." This would mean that punitive damages are not appropriate unless the plaintiff proves that the defendant knew the defamatory statement was false or had serious reservations about its truth. 332 S.C. 502, 524-25, 506 S.E.2d 497, 509 (1998). Put aside the question whether the law requires actual malice or recklessness; this part of the charge cannot have been correct. Both standards are different from negligence.

To constitute reversible error, an erroneous jury charge must cause prejudice. A recent application of this principle occurred in *Sulton v. HealthSouth Corp.*, where the Supreme Court held that an erroneous charge on the standard for liability required reversal. The court wrote that the erroneous charge went to the heart of the case and was not cured by the fact that other parts of the charge stated the standard correctly. 400 S.C. 412, 418, 734 S.E.2d 641, 644 (2012).

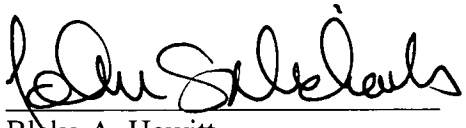
The same is true here. These erroneous charges went to two issues—the standard for liability and the standard for punitive damages—that were at the heart of this case. The size of these verdicts and the disparity between the compensatory and punitive awards strongly suggests that either the jury misunderstood the court's instructions or the jury ignored them. In either case, Mr. McElveen would be prejudiced.

CONCLUSION

The Court should hold that the amount of the jury's verdict against Mr. McElveen is so excessive that it suggests the jury either acted based on sympathy, passion, prejudice, or a mistake. Because this verdict is grossly excessive, the judgment against Mr. McElveen must be reversed.

The Court should also hold that two of the charges that the trial judge gave the jury are incorrect and that these errors were not harmless. If the jury received bad charges on liability and damages, there is a reasonable chance that it affected the verdict. For these reasons, the Court should that Mr. McElveen is entitled to a new trial absolute.

Respectfully submitted,



December 2, 2013

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2007-CP-07-2373

Matthew S. McAlhaney, ... Respondent,

v.

Richard K. McElveen a/k/a Richard K. McElveen, Sr., Individually and d/b/a Battery Creek Marina, The Great Pumpkin, LLC, Linda McElveen, Richard K. McElveen, Jr., and Billy Joe Byrd, ... Defendants,

of whom Richard K. McElveen, Sr., is the .....Appellant.

APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

The appellant proposes that the following be included in the Record on Appeal:

1. Mr. McAlhaney's Complaint;
2. Mr. McElveen's Second Amended Answer;
3. the jury's verdict form;
4. the Joint Motion for a New Trial (filed by the McElveen defendants);
5. the order denying the post-trial motions;
6. Mr. McElveen's Motion to Remand and Reconstruct the Record;
7. the trial transcript;
8. the transcript of the hearing on the post-trial motions;
9. the transcript of the hearing to reconstruct the record;
10. Plaintiff's Exhibits 1, 2, 3, 4, 10, 11.

I certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully submitted,

December 2, 2013

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of whom Richard K. McElveen, Sr., is the ..... Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Initial Brief of Appellant* and *Designation of Matter to be Included in the Record on Appeal* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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