46785

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JUL 30 2015
SC 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.

PETITION FOR REHEARING

This petition is filed pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules. Rule 221 governs petitions for rehearing. Rule 240 governs motions and petitions generally.

The Court issued its decision on July 15, 2015. See Op. No. 5328 (Shearouse Adv. Sh. No. 27 at 96). This petition is timely under Rule 221(a).

The appellant resubmits the arguments from his brief on the merits and additionally submits that the Court may have overlooked or misapprehended the following points in its decision:

I. An incorrect charge on liability would have a high potential of influencing the jury's verdict, and the record suggests that the trial court's charge on statutory immunity was incorrect.

The statutory law grants immunity to someone who participates in an investigation of suspected child abuse or neglect. See S.C. Code Ann. § 63-7-390. The limit on this immunity is that the person must have acted in good faith. *Id.* Good faith is rebuttably presumed. *Id.*

It appears the trial judge charged the jury that this immunity does not apply if the child's statement of abuse is fabricated. See (R.pp.35-36, ¶1) (from Mr. McElveen's post-trial motion) and (R.p.765) (from the hearing on the post-trial motion). That charge is not faithful to the language of the statute because, as Mr. McElveen's post-trial motion described, it allowed the jury to find against Mr. McElveen if his youngest grandchild, acting wholly on his own, fabricated an allegation of molestation, reported that allegation to his grandfather, and Mr. McElveen repeated the allegation to police. (R.pp.35-36). This issue appears on pages 16 and 17 of Mr. McElveen's brief. The respondent did not file a brief.

The respondent may say that any error here was harmless because the jury must have found that Mr. McElveen did not act in good faith. While the jury seems to have made that finding, it is equally true that an incorrect charge on immunity and the standard for liability would have a strong likelihood of influencing such a finding. An error that gives the jury the wrong way to define "good faith" calls the jury's entire evaluation of this issue into question. Using an incorrect equation tends to produce an incorrect answer.

The respondent may further say that any error here was harmless because Mr. McElveen was not the reporter. Fair enough—Mr. McElveen actually uses the same point

in section III of this petition. But that point cuts against the key argument of the respondent's case for high damages, which is that Mr. McElveen was some sort of "mastermind" who influenced this report of abuse. Either Mr. McElveen *was* heavily involved in the process, in which case the charge on immunity matters a great deal, or Mr. McElveen was not the principal actor, in which case the damages award against him looks even more hysterical.

It is important to remember that the respondent's theory of the case was to attack more than Mr. McElveen—the respondent attacked the court system itself. Nobody disputes that the child in question *did indeed* make a report of abuse, nobody disputes that independent authorities like the sheriff's office and a court-appointed guardian ad litem were participating in these events, and nobody disputes that the underlying family court litigation was resolved *by consent*, in a way that nobody questions. There can also be no serious dispute that Mr. McElveen's former daughter-in-law *was* engaged in the harmful conduct Mr. McElveen alleged. Despite these broad areas where there is no room for reasoned disagreement, the respondent cast aspersions on the system and told the jury to blame Mr. McElveen. This theory made the issues of immunity and liability more important, not less.

II. The record further suggests that the trial court's charge on punitive damages was incorrect and that the objection to this charge *was* lodged below and *is* preserved for this Court's review.

The trial judge also apparently charged that the jury could award punitive damages if it found that a reasonable person would have checked into an allegation of abuse before reporting it to law enforcement. See (R.p.36, ¶2) (from Mr. McElveen's post-trial motion) and (R.p.766) (from the hearing on this motion). The Court appears to hold that this argument is not preserved for review.

Although we do not know with certainty because we do not have the transcript, Mr. McElveen's trial counsel stated during the hearing on his motion for a new trial that he *had* objected to this charge. (R.p.766, lines 18-24). Admittedly, it is not clear whether this was a separate objection from the objection to the charge on immunity, see (R.p.800, lines 2-21), but that does not matter as long as there *was* an objection.

A "reasonable person" standard is a negligence standard, 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), but 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).

Like the incorrect charge on liability, the charge on punitive damages went to an issue that was at the heart of this case. It is difficult to imagine how an incorrect charge on the standard for punitive damages would not have a reasonable probability of influencing the jury's verdict. This argument appears on pages 16 and 17 of Mr. McElveen's brief. Again, the respondent did not file a brief.

III. The decision misstates key facts and does not explain multiple points of analysis.

First, the decision repeatedly characterizes Mr. McElveen as "making" the criminal allegations against the respondent and that he did so for the purpose of gaining an advantage in family court. At one point, the decision describes the jury's verdict as indicating that Mr. McElveen "lied on repeated occasions" and "accused" the respondent of criminal activity even though Mr. McElveen "knew [the respondent] to be innocent."

There is no evidentiary support for these characterizations. The investigator who took the report of abuse testified that Linda McElveen made the initial phone call to the police, that a local child advocacy center then conducted a forensic interview with the child, and that arrest warrants were prepared after the forensic interview. (R.pp.551-53). When asked whether Mr. McElveen had any "say so" in this, the officer responded "no." (R.p.554).

The respondent would say that this supports his "mastermind" theory—that Mr. McElveen works through surrogates and does not do any "dirty work" himself. A party is free to adopt any theory of the case imaginable, but to be meritorious, there must be some support for that theory in the evidence, and there is no evidence that the respondent's arrest was based on anything Mr. McElveen did. Mr. McElveen did not make the call to law enforcement, and Mr. McElveen did not give the child's forensic interview. There is no evidence that Mr. McElveen knew the respondent to be innocent of anything. We must assume that the allegation of molestation was false because of the posture of this case, but the allegation itself was not allowed into evidence, and it bears repeating that the respondent was not declared to be innocent—he was simply not prosecuted. There is no evidence that Mr. McElveen somehow planted this accusation in his grandson's mind, and there is no evidence that any of Mr. McElveen's actions were "for his personal benefit" and "not for the good of the children." The children's maternal grandfather testified at trial and he movingly explained that his daughter (the children's mother) "is a liar," (R.p.506), that "Mr. McElveen is a good man, trying to raise two grandchildren because of [their mother's] lifestyle and your (unable to transcribe) lifestyle at one time," (R.p.514), and that as far as maternal negligence, drug abuse, and alcoholism were concerned, Mr. McElveen "told the truth." *Id.*

Second, the Court's decision refers to the rule requiring reversal of a grossly excessive verdict as a "procedural rule," but the full meaning and effect of this statement is unclear. Decisional law describes "grossly excessive" verdicts as being based on "passion, caprice, and prejudice" rather than the evidence. *Sanders v. Prince*, 304 S.C. 236, 238-39, 403 S.E.2d 640, 642 (1991); *Small v. Springs Indus.*, 292 S.C. 481, 487, 357 S.E.2d 452, 455 (1987). This language is reminiscent of the due process guarantee against deprivation of property for arbitrary reasons. See *Worsley Companies, Inc. v. Town of Mount Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000) ("Substantive due process protects a person from being deprived of life, liberty or property for arbitrary reasons."). These are "inherently vicious verdicts"— see *Bowers v. Charleston & W. C. Ry. Co.*, 210 S.C. 367, 375, 42 S.E.2d 705, 708 (1947)—and when the jury's verdict is based on passion or sympathy rather than the evidence, the jury has violated its instructions as well as both parties' rights to trial in a fair and impartial forum. This is a "procedural" right in that it relates to the machinery of the trial process, but it has a substantive core that can only be constitutional in nature.

Third, the Court expresses uncertainty about the amount of punitive damages the jury actually intended to award. The trial judge's order is quite clear—in the very same paragraph where the judge held that the verdicts were not grossly excessive, the judge explained that he was reducing the punitive awards from a total of $6.5 million. (R.p.8). The respondent did not suggest that the verdict was ambiguous; indeed, the respondent did not file a brief. The verdict form itself also belies the suggestion that the jury intended to award only $3.25 in punitive damages. The form has separate blanks for punitive damages under each cause of action, (R.pp.1-3), and under the respondent's claim against Mr. McElveen for abuse of

process, the jury clearly wrote "0" for punitive damages. (R.p.2). This suggests that the jury understood each award under an individual cause of action did not encompass the awards in the other claims.

Fourth, the Court includes the jury's $25,000 award for abuse of process when comparing the actual damages award to the punitive damages award. The justification for this inclusion is unclear when the record illustrates that the jury specifically declined to award the respondent punitive damages for abuse of process. (R.p.2).

Finally, the decision never explains how a jury's verdict can be grossly unconstitutional—as the trial judge found this verdict *was*—but not grossly excessive, which the trial judge summarily found this verdict *was not*. Candor requires acknowledging that the facts are bad for Mr. McElveen when they are viewed in the respondent's favor, but even those bad facts do not constitute a cogent rationalization of why harm that costs only $62,000 to fix justifies a punitive award of $6.5 million against a retired grandfather with a net worth of only $2 million. The jury must have wanted to ruin Mr. McElveen's financial life, obliterate his ability to care for his grandchildren, and place the respondent in a position where he would never have to work again. We do not know what motivated this. The jury may have hated Mr. McElveen—the jury may even have been *trying* to force Mr. McElveen into bankruptcy in an effort to reverse the outcome of the family court case—but despite what we do not know, it is evident that these awards bear no rational relationship to the injury that the respondent suffered. They are vastly out of step with any other case Mr. McElveen's counsel has been able to discover. This includes other defamation cases where the injuries have caused even more financial damage. See Brief of Appellant, pp.9, 13.

CONCLUSION

There is no way a reasonable jury could understand the law, follow the right jury instructions, and conclude that a letter to the Governor which cost $1,000 to fix warrants $3.25 million in punitive damages. There is no way a reasonable jury could find that harm costing only $62,000 to fix (or even $87,000, by the Court's math) warrants $6.5 million in punishment. This jury either hated Mr. McElveen, loved the respondent, or misunderstood what it was supposed to do. The Court should withdraw its opinion, reverse the trial court pursuant to the arguments contained in the appellant's brief and this petition, and remand this case for a new trial.

Respectfully submitted,

July 30, 2015

Blake A. Hewitt, #73674
John S. Nichols, #4210
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599

Attorneys for Appellant