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SC Court of Appeals

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-07-2372

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.

RESPONDENT'S RETURN
Appellant's Petition for Reconsideration

The Respondent makes the following Return to the Appellant's Petition for Reconsideration dated July 30, 2015.

Not having raised a single point related to the alleged improper charges during the oral argument in this case, the Appellant now contends that the Court overlooked or misapprehended his contentions. In a case in which the charges are not readily available because they are absent from the record, and the Respondent does not concede that any erroneous charge was given, this argument appears attenuated at best.

A. Statutory Immunity.

In addition, with respect to the alleged error in charging on statutory immunity, the Appellant appears determined to argue the very points made on this subject in the Respondent's Brief, which, as the Appellant points out, was not accepted by the Court of Appeals.

It should suffice to say that (a), by his own testimony, McElveen, Sr., was not entitled to a charge on statutory immunity; (b), in any event, there was ample evidence of defamation and other conduct that was outside the scope of the immunity contemplated by S.C. Code Ann. § 63-7-390; and, therefore, (c) there was ample evidence of a lack of good faith. In addition, any error in the charge, given the jury's decision, was harmless beyond any reasonable doubt.

The Respondent made these points in the following manner, beginning at page 35, in his brief:

> III. Any Alleged Errors in the Jury Charge were Harmless because McElveen, Sr., was not entitled to a charge on Statutory Immunity because he did not Report the Alleged Abuse, and the Charge as a Whole was not Defective.
>
> The Appellant assigns two errors to the trial court's jury charge on statutory immunity for persons who report child abuse. There is no record of the actual jury charge given in this case,[1] however, the trial judge relied on Anderson's Requests to Charge in instructing the jury. Appellant argued in its post-trial motions that two errors were made with respect to liability for reporters of child abuse. Plaintiff's counsel did not recall a contemporaneous objection to the charge and recalled the charge differently than McElveen's counsel. Specifically, Plaintiff's

[1] Appellant claims the lack of a transcript "will not substantially affect either of Mr. McElveen's issues on appeal," Br. of Appellant, p. 6, however, the Respondent is clearly prejudiced by having to argue against a ghost-record of objections and jury-charges.

counsel remembered the court stating that fabrication of a report by the reporter would be an example of a report made in bad faith. (Post Trial Tr. P. 14-15). Defense counsel stated the charge was ambiguous and permitted the jury to infer that a statement fabricated by a child and reported by a reporter in good faith, could substantiate a finding of bad faith. (Post Tr. Tr. P. 7).

The trial judge ruled from the bench that any alleged error was harmless. Causes of action for libel, slander, abuse of process, assault and battery and civil conspiracy were submitted to the jury. The Appellant made no objection to the charges on damages for libel or slander, nor did he object to the charge on abuse of process. There is no claim made that the jury was not instructed on Constitutional Actual Malice.

When an appellate court reviews an alleged error in a jury charge it must consider the court's jury charge as a whole and in light of the evidence and issues presented at trial. Ardis v. Sessions, 383 S.C. 528, 532, 682 S.E.2d 249. If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error. Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575.

1. McElveen was not harmed by the charge on statutory immunity because he did not make a report of child abuse to law enforcement or the department of social services.

In light of the evidence presented at trial, McElveen, Sr., was not entitled to a charge on qualified immunity. South Carolina Code Section 63-7-390 provides that persons required or permitted to report abuse pursuant to S.C. Code Ann. § 63-7-310 (A) and (C), who act in good faith, are immune from liability which might otherwise result from the report. S.C. Code Ann. 63-7-390.[2] The immunity extends only to statements of "facts which gave the person reason to

[2] The alleged abuse in this case was reported prior to the recodification of the Children's Code in Title 63. Code sections identical to Section 63-7-310 and 390 were located at S.C. Code 20-7-510 and 540, respectively. 2008 Act No. 361, Section 2.

believe that the child's physical or mental health or welfare had been or might be adversely affected by abuse or neglect" made pursuant to section 63-7-310. *Id.* The immunity only applies to reports made consistently with section 63-7-310, which states that "reports" are to be made "to the county department of social services or to a law enforcement agency in the county where the child resides or is found." *Id.* § 63-7-310 (D).

McElveen has no standing to complain of a jury charge on statutory immunity because he did not report any alleged abuse to law enforcement.[3] All evidence in the record, and indeed the Appellant's brief itself, points to Linda McElveen making the report of abuse that led to Mr. McAlhaney's arrest. Br. Of App. P. 3. The jury found Linda McElveen liable for abuse of process and slander. No appeal was taken from the order confirming the verdicts against Linda McElveen and it is the law of the case, that the presumption of good faith was rebutted. Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 432, 699 S.E.2d 687, 691 (2010) (Noting an unappealed decision becomes the law of the case).

The evidence is clear that many of McElveen, Sr.'s, publications were communications outside the scope of the protection offered by the statute. McElveen, Sr., called Mr. McAlhaney a child abuser, child molester and a drug addict in a letter to the Governor of the State of South Carolina months before any report was made. He told the same thing to a neighbor on the street and a salesperson in a furniture store. None of these statements even come close to being the "reports" contemplated in the statute.

Additionally, it is very likely the jury was properly charged on good faith and the difference between statements fabricated by the child rather and those fabricated by the reporter. At the directed verdict stage, Defense counsel and the trial judge discussed the charge that would

[3] This is not to suggest that Mr. McElveen was not behind the allegations. *See* "Degree of Culpability," herein above p. 16.

be given. After denying Linda McElveen's directed verdict on statutory immunity, the judge made the following statement:

> "But to be absolutely clear, the jury will be instructed that if she was—if a child reported to her, she would be duty-bound to report it even though she—they may have—I'm not going on even though they may have benefitted from the reporting she has no choice but to report and that's absolute immunity."[4]

Thus, it is unlikely that the improper charge on "fabrication" was made, and even if it was, McElveen, Sr., suffered no harm because he was not entitled to the charge in any event.

Finally, if "fabrication" was used as an example of bad faith, as Plaintiff's counsel recalled at the subsequent hearing, its use as an example to introduce a concept, and not as a substantive charge is harmless. *See, e.g.,* Wells v. Halyard, 341 S.C. 234, 239, 533 S.E.2d 341,344 (Ct. App. 2000) (Holding that potentially misleading language in a charge that is merely used to introduce a concept during a charge that is not otherwise incorrect is harmless error).

B. Punitive Damages.

The Appellant also contends, "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." Appellant's Petition at 3. There is no such charge in the record and no indication that either the trial judge or the respondent's counsel recall such a charge having been made. Therefore, it should not be preserved for appeal.

The Respondent dealt with this issue at Page 39 of his Brief:

> 2. Any error in the charge was harmless when viewed together with the probable charge as a whole and the evidence in the record.

[4] It should be noted that this is an improper statement of the law, because none of the Defendants qualify as mandatory reporters under the statute. *See.* S.C. Code Ann. § 63-7-310(A) (identifying mandatory reporters).

As with the previous assignment of error, McElveen lacks standing to assert injury from an instruction regarding the liability of a person reporting child abuse. In his motion for a new trial, McElveen, Sr., requests a new trial on the grounds that the court erroneously charged that willful, wanton or reckless conduct could be found "if an ordinary, reasonable person would have checked further before reporting a child's disclosure." Defendants Motions for JNOV, New Trial Absolute and New Trial Nisi Remittitur, p. 2. At the hearing, Defense counsel stated "There was some language—punitive damages are assessable against a defendant if an ordinary, reasonable person would have checked further before reporting what was reported." (Post Trial Tr. p. 7). Neither the trial court nor Plaintiff's counsel had any recollection the language objected to by McElveen. (Post Trial Tr. p. 15). Judge Kinard recalled using Anderson's Requests to Charge for the general punitive damages charge. No argument has been made that the charges on slander, libel, abuse of process or civil conspiracy were improper. No argument has been made that the jury was not charged on the "actual malice" standard for assessing punitive damages against a defamation defendant.

Taking the (probable) charge as a whole, the single reference to an improper standard without context is not sufficient to establish the prejudice necessary for reversal. Anderson's standard charge on defamation damages includes the following:

> "To recover punitive damages, the plaintiff must prove, by clear and convincing evidence that the statement was [said][written] with 'actual malice,' that is, that the defendant either realized the statement was false or had serious reservations about its truth. While implied malice will support an award of actual damages, 'actual malice' must be shown to recover punitive damages."

Ralph King Anderson, Jr., South Carolina Request to Charge – Civil, 2002, § 14-21.[5] Defense counsel prepared charges that included the same charge. In light of the probable charge given

[5] The 2009 edition of Judge Anderson's book contains the identical charge. Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil, 2009, § 14-21.

and the likelihood that the jury was properly charged on the strict standard of "actual malice," there is little chance that the erroneous charge, if given, was prejudicial to plaintiff.

,,,,

C. Conclusion.

For the foregoing reasons, it is submitted that the Petition for Rehearing by the Appellant should be denied, and the decision by the Court of Appeals should be reconfirmed in all material particulars.

Respectfully Submitted,

By: _____

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August 10, 2015

Hilton Head Island, South Carolina.

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PROOF OF SERVICE

I, Robert V. Mathison, Jr., hereby certify that, on August 10, 2015, I filed and served by mail the original and copies of the Respondent's Return to the Appellant's Petition for Reconsideration by depositing the same, with sufficient first class postage prepaid, at the United States Post Office at Asheville, North Carolina, addressed as follows:

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

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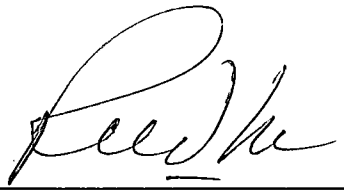

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