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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Op. No. 5328 (S.C. Ct. App. filed July 15, 2015)

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. . . . . .Petitioner.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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 a/k/a Richard K. McElveen, Sr. is Appellant.

Appellate Case No. 2010-167969

Appeal From Beaufort County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 5328
Heard April 23, 2015 – Filed July 15, 2015

AFFIRMED

Blake Alexander Hewitt and John S. Nichols, Bluestein Nichols Thompson & Delgado, LLC, of Columbia; and Scott Wayne Lee, Law Offices of Scott W. Lee, PA, of Beaufort, for Appellant.

Robert V. Mathison, Jr., Mathison & Mathison, of Hilton Head Island, for Respondent.

FEW, C.J.: Richard K. McElveen, Sr. appeals the trial court's denial of his motion for a new trial, arguing the trial court erred in ruling the jury's award of punitive damages against him was not so grossly excessive as to shock the conscience of the court. We affirm.

I. Facts and Procedural History

This appeal arose from a custody dispute between McElveen and his former daughter-in-law—Molly McCullers McElveen (McCullers)—over her two children, who are McElveen's grandchildren. When the custody dispute began, Matthew McAlhaney was dating McCullers. In an attempt to gain an advantage in the custody dispute, McElveen made allegations that McAlhaney was a drug addict, a child abuser, and a child molester. McElveen wrote a letter to Governor Mark Sanford alleging McAlhaney was a drug addict and had abused the children, and McElveen and his wife met with an investigator from the Beaufort County Sheriff's Office and accused McAlhaney of sexually abusing the children. Based on McElveen's accusations, the sheriff's office arrested McAlhaney, and he spent a night in jail before being released. Several weeks later, McElveen emailed the investigator and alleged that "numerous folks . . . say [McAlhaney] is gay, a deviant or capable of anything."

After McAlhaney's arrest, McElveen told his neighbor that McAlhaney had been arrested for molesting one of the children. According to the neighbor, McElveen "seemed very thrilled, almost beaming about the fact that . . . McAlhaney had been arrested." In addition, McElveen told a furniture salesperson—who testified she lived near McAlhaney's mother and had never met McElveen—that McAlhaney supplied drugs to McCullers, abused one or both of the children, and was a "deviant soul." The solicitor's office investigated McElveen's allegations, but ultimately dismissed the charges against McAlhaney.

McAlhaney filed a lawsuit against McElveen for libel, slander, and abuse of process. A jury found in favor of McAlhaney and awarded him actual damages of $1,000 for libel, $61,000 for slander, and $25,000 for abuse of process. In addition, the jury awarded punitive damages of $3.25 million on the libel cause of action and $3.25 million on the slander cause of action. McElveen moved for a new trial absolute, claiming "the verdicts were so excessive . . . as to shock the conscience of the court and clearly indicate that the figure reached was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives," or—in the alternative—for a new trial nisi remittitur on the ground that the verdicts were "unduly excessive."

The trial court denied the motion for a new trial. However, the court conducted a post-trial review of the punitive damages award and reduced it to a total of $375,000.

II. Law and Analysis

McElveen raises three arguments on appeal. First, he argues the trial court erred by not granting him a new trial based on the size of the punitive damages award. He also raises two issues regarding the trial court's charge to the jury.

A. Punitive Damages

The primary issue before this court is whether the award of punitive damages was so grossly excessive that the trial court abused its discretion in not granting a new trial absolute. In presenting this issue, McElveen does not rely on the due process-based duty of a trial court to conduct a post-trial review of an award of punitive damages.[1] *See Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583-87, 686 S.E.2d 176, 183-85 (2009) (noting courts must conduct a post-trial review of a punitive damages award to determine whether the award violates the defendant's due process rights). Rather, McElveen relies on the state-law procedural principle that the trial court should order a new trial absolute when the verdict is "so grossly excessive so as to shock the conscience of the court and clearly indicates that the figure reached was the result of caprice, passion, prejudice, partiality, corruption or other improper motives." *Rush v. Blanchard*, 310 S.C. 375, 379-80, 426 S.E.2d 802, 805 (1993). McElveen argues it was unnecessary for the trial court to engage in the due process-based review of the award because "the amount of the jury's punitive damages award is so large that the verdict could not properly be remitted," and thus the only appropriate remedy is a new trial.

Focusing our review, therefore, on the trial court's decision denying the motion for new trial absolute under state law, we may not reverse the decision unless the trial court committed an abuse of discretion. *See Rush*, 310 S.C. at 380, 426 S.E.2d at 805 (providing the "decision to grant a new trial is left to the sound discretion of the trial court and ordinarily will not be disturbed on appeal," and affirming the trial court's denial of a new trial absolute because the circuit court did not abuse its discretion); *see also RRR, Inc. v. Toggas*, 378 S.C. 174, 182-83, 662 S.E.2d 438,

[1] Neither party has appealed the trial court's decision to reduce the punitive damages award to $375,000.

442 (Ct. App. 2008) (finding the trial court's decision to deny a motion for a new trial absolute on the basis of excessive punitive damages was within its discretion), *aff'd*, 381 S.C. 490, 674 S.E.2d 170 (2009). We note that this standard of review is different from the de novo standard we use to review a punitive damages award under the due process clause. *See Mitchell*, 385 S.C. at 583, 686 S.E.2d at 183 (holding an appellate court must conduct its due process review of a punitive damages award de novo).

The trial court conducted a thorough post-trial hearing on McElveen's motions regarding the punitive damages award. Discussing the evidence, the court noted "the jury found egregious conduct" and "they decided that Mr. McElveen . . . was malicious and wicked and . . . deserved to be punished." The court stated "the jury fe[lt] like [McElveen] accuse[d] someone—for ulterior motives[—]for being a child molester and ha[d] them incarcerated" and "you need to sustain the most powerful message delivered that that's bad conduct." The court found,

> The evidence was there to show [McElveen] engaged in a long series of efforts. . . . McAlhaney was only brought into it so that McElveen . . . could get custody of the grand kids and because of that he engaged in all these procedures that ended up with [McAlhaney] being incarcerated and locked up and being accused of committing heinous crimes.

The trial court stated, "Plaintiff[is] obviously harmed when he's incarcerated and accused of being a child molester. Locked up. Small town. It's in the paper. Everybody knows and once you are accused of that it just stays with you and you are stigmatized for life, even if you are subsequently exonerated."

In its order denying McElveen's motion, the trial court found "the jury could have easily found the harm was the result of intentional malice and trickery and that [McElveen] sought to discredit [McAlhaney] in order to prevail in a contentious custody dispute." The trial court stated "evidence was . . . presented that the conduct was not an isolated incident, but rather involved repeated occasions ranging from a letter to the governor to defaming [McAlhaney] as a child molester to a furniture salesperson." The court found McAlhaney presented evidence "from which the jury could and did find that McElveen['s] conduct was intentional, deliberate and malicious and was thus reprehensible." The court concluded its order by finding its due process review required the punitive damages be reduced:

> [T]he punitive verdicts . . . on the libel and slander causes of action . . . clearly indicate that they are so inflated as to [be] violative of principles of fundamental fairness and due process.

However, the court ruled a new trial was not warranted under the state-law procedural principle upon which McElveen relies in this appeal:

> I find that the punitive awards are not so grossly excessive that they clearly mandate the granting of a new trial absolute, and do not cross the threshold between an unduly liberal verdict versus a grossly excessive verdict.

We find the evidence in the record supports the trial court's analysis and decision. First, we are not convinced McElveen is correct that the jury intended to award $6.5 million in punitive damages. During the post-trial hearing, the trial court indicated the punitive damages verdict could be interpreted as a total of $3.25 million. In a conversation with counsel, the court noted McElveen's net worth "approached two million, not even quite two million." Referring to the punitive damages award, the trial court then stated, "[$]3.25 million he's in bankruptcy tomorrow. So the award was too---while his ability to pay is just a factor, he can't pay it so it has to be reduced." McElveen's counsel then stated, "Actually, there[are] two 3.25 million dollar punitive verdicts." The trial court responded, "Well, that depends on how you read it. I told you all to send declaration form."

It is not clear what the trial court meant by "declaration form." What is clear, however, is the trial court recognized the amount of the punitive damages verdict was ambiguous from the verdict form.[2] At one other point in the post-trial proceedings, the trial court stated it "cut" the punitive damages verdict "from three million."[3]

The two punitive damages verdicts against McElveen were for libel and slander. On the facts of this case, the libelous and slanderous conduct was intertwined as

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[2] In its final order, however, the trial court stated, "I find that the punitive damages awards should be reduced from $6,500,000 to $375,000."

[3] The trial court made this statement during a hearing to reconstruct the record of the last day of trial, conducted while the appeal was pending pursuant to an order of this court.

part of the same plan the jury found McElveen executed to gain a strategic advantage in his custody dispute by falsely accusing McAlhaney of heinous crimes. It is possible the jury intended to award only $3.25 million in punitive damages, but wrote the same amount in both of the places on the verdict form the court provided. Apparently, neither side requested the trial court ask the jury before it was discharged about its intent as to the total amount of punitive damages.[4]

This court has recently recognized the time to clarify ambiguities in a jury verdict is before the jury is discharged. *See Allegro, Inc. v. Scully*, 409 S.C. 392, 419-20 n.10, 762 S.E.2d 54, 69 n.10 (Ct. App. 2014) ("If a jury verdict form is ambiguous or unclear, the jury should be returned to the jury room in order to clarify or conform the verdict to its intent before the jury is excused."), *cert. granted*, (Apr. 22, 2015). In this case, the uncertainty of the jury's intent as to the amount of total punitive damages is significant. If the jury considered McElveen's conduct as one course of action and intended to make one punitive damages award of $3.25 million, the ratio of actual damages—$87,000—to punitives is far more reasonable than if the jury had intended to award $3.25 million on the libel cause of action alone. In the latter scenario, the ratio of punitive to actual damages is 3,250 to 1. In the former scenario, the ratio—37.36 to 1—is still high under the due process clause, but far less likely to shock the conscience of the court and require a new trial absolute under state law.

Turning to McElveen's conduct, the purpose of punitive damages is "punishment" for wrongful conduct, and punitive damages "are allowed . . . as a warning and example to deter the wrongdoer and others from committing like offenses in the future." *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964) (citation omitted). McElveen's conduct was not simply wrongful; it was atrocious and intolerable. *Cf. Ford v. Hutson*, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981) (defining the tort of "outrage" as "conduct . . . so 'extreme and outrageous' as to exceed 'all possible bounds of decency' and must be regarded as 'atrocious, and utterly intolerable in a civilized community'" (citation omitted)). The record supports the trial court's statement that McElveen's conduct occurred on "repeated occasions," and our review of the record indicates it went on for at least one year. We agree with the trial court's finding that the parties presented evidence "from which the jury could and did find that McElveen['s] . . . conduct was

[4] The portion of the trial in which the verdict was published is not in our record because the court reporter was unable to produce a transcript from the final day of trial.

intentional, deliberate and malicious and was thus reprehensible." We must view the facts in the light most favorable to the nonmoving party—McAlhaney. *See Toggas*, 378 S.C. at 182-83, 662 S.E.2d at 442 (providing that when reviewing a trial court's denial of a motion for a new trial, this court "must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party"). In this light, the jury found McElveen maliciously lied on repeated occasions by accusing McAlhaney—a man he knew to be innocent—of the most heinous crimes, and he did so with disregard for the consequences to McAlhaney, McCullers, and even to McElveen's grandchildren. Moreover, he did all of this for the purpose of improperly gaining a strategic advantage in, and illegally influencing the outcome of, family court proceedings regarding the welfare of the children. Finally, he did it for his personal benefit—not for the good of the children. As the trial court so aptly understated, we "need to sustain th[is] most powerful message . . . that that's bad conduct." We hold the trial court did not abuse its discretion in denying McElveen's motion for a new trial.

B. Other Issues

McElveen raises two additional issues, as to which we affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court improperly charged the jury regarding statutory immunity: *See Clark v. Cantrell*, 339 S.C. 369, 389-90, 529 S.E.2d 528, 539 (2000) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion. . . . When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues."); *Berberich v. Jack*, 392 S.C. 278, 285, 709 S.E.2d 607, 611 (2011) ("An erroneous jury instruction will not result in reversal unless it causes prejudice to the appealing party."); *Fountain v. First Reliance Bank*, 398 S.C. 434, 444, 730 S.E.2d 305, 310 (2012) ("One who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused. . . . An abuse of the privilege occurs in one of two situations: (1) a statement made in good faith that goes beyond the scope of what is reasonable under the duties and interests involved or (2) a statement made in reckless disregard of the victim's rights.").

2. As to whether the trial court improperly charged the jury regarding punitive damages: Rule 51, SCRCP ("No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection."); *Clark v. S.C. Dep't of Pub. Safety*, 353 S.C. 291, 308, 578 S.E.2d 16, 24 (Ct. App. 2002) (finding a jury charge issue unpreserved because the appellant failed to object to the charge), *aff'd*, 362 S.C. 377, 608 S.E.2d 573 (2005).

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

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.

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

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The South Carolina Court of Appeals

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Of Whom Richard K. McElveen a/k/a Richard K. McElveen, Sr., is Appellant.

Appellate Case No. 2010-167969

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.

John Cannon Jr. C.J.

Thomas E. Huff J.

J.

Columbia, South Carolina

FILED

August 20, 2015

cc:
Blake Alexander Hewitt, Esquire
John S. Nichols, Esquire
Robert V. Mathison, Jr., Esquire
Scott Wayne Lee, Esquire

THE STATE OF SOUTH CAROLINA
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of whom Richard K. McElveen, Sr., is the .....Appellant.

BRIEF OF 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 (R. p.821) (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 (R. p.819). 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 (R. p.652, lines 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 (R. pp.817-18). 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

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[1]The Governor reacted to the letter by sending a memo to his family, and he attached Mr. McElveen's letter to the memo. (R. p.176). Julia Sanford shared the letter with Mr. McAlhaney after she received it from the Governor. *Id.*; see also (R. p.289).

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) (2010) (formerly codified at section 20-7-953(B) (1985)). 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 (R. p.827) (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 (R. pp.551-54), 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 (R. p.830) (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. (R. pp.377-78). 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. (R. pp. 379-381). Mr. McElveen's letter to the Governor was included in this "book." (R. p.379).

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 (R. p.835).

Mr. McAlhaney initiated this lawsuit six months later. See (R. pp.10-19).

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., (R. pp.26-30).

This case was tried over 5 days in January of 2010. The tri al 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 (R. p.1). 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. See (R. p.1).

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. See (R. p.3). 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 (R. pp.35-38). The trial judge conducted a hearing on this motion the same day. See (R. p.760).

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. (R. pp.783-89). 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. (R. p.791).

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. (R. p.6). 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. (R. p.7). 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. (R. pp.7-8).

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 (R. p.39) (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 (R. pp.795-816).

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 Properly Be 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. (R. p.7). 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. (R. p.1). 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 in the neighborhood of 20 times. (R. p.286). He said that he began dating Mr. McElveen's

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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 (R. pp.802-803). 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.

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. (R. pp.327-28). 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 (R. p.287), and that he had administered corporal punishment to one of the children. See (R. p.288). Mr. McElveen testified that the child had significant bruising as a result of this punishment. (R. p.643).

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 (2010). 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 (R. pp.35-36) (from Mr. McElveen's post-trial motion) and (R. p.765) (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 (R. p.36) (from Mr. McElveen's post-trial motion) and (R. p.766) (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).

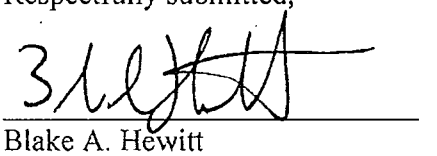
The same is true here. These erroneous charges went to two issues—the standard for liability and the standard for punitive damages—that were at the heart of this case. The size of these verdicts and the disparity between the compensatory and punitive awards strongly suggests that either the jury misunderstood 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,



September 9, 2014

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