THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC Court of Appeals

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.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

The Court of Appeals issued its decision July 15, 2015. (App.p.1). Petitioner filed for rehearing July 30. (App.pp.9-16). The Court of Appeals denied rehearing August 20. (App.p.17). This Court granted a 20-day extension of the deadline for this petition.

QUESTION PRESENTED

> Should this Court grant certiorari to consider whether the Court of Appeals erred when it held that a jury verdict with an award of $6.5 million in punitive damages for two claims that had compensatory awards of just $62,000 was not a "grossly excessive" verdict that required reversal?

STATEMENT OF THE CASE

This is an appeal from a jury's verdict on two defamation claims. The compensatory awards are fairly modest—$1,000 for libel and $61,000 for slander—but the jury awarded $3.25 million in punitive damages on each claim; a total punitive award of $6.5 million.

The trial judge reduced the punitive verdict to $375,000 on a motion for a new trial *nisi remittitur*, but the judge denied a motion for a new trial absolute that argued the verdict was "grossly excessive" and could not properly be remitted. The Court of Appeals affirmed.

Rick McElveen—the petitioner—has an adult son and two grandsons. McElveen's son and daughter-in-law divorced in 1997. (R.p.821, ¶ 2).

Matt McAlhaney—the respondent—began dating McElveen's former daughter-in-law in the Spring of 2003.

Around this same time, McElveen filed a family court case seeking primary custody of his grandchildren, who were then ages 8 and 4. (R.p.821). He already had joint custody

of his oldest grandchild due to a provision of the divorce decree between his son and his former daughter-in-law. (R.pp.821-22, ¶¶ 2, 7). Because McElveen's youngest grandson was born out of wedlock, the statutory law provided that the mother had sole custody. S.C. Code Ann. § 63-17-20(B) (2010) (formerly codified at section 20-7-953(B) (1985)).

The litigation was ultimately resolved by a consent order awarding McElveen custody of both children. (R.p.835-45).

McElveen filed the family court suit because he feared his former daughter-in-law was using illegal drugs and engaging in other harmful activities. (R.p.822-23). Nobody disputes these fears were reasonable. At trial, the children's maternal grandfather explained 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 [] lifestyle at one time," (R.p.514), and that as far as maternal negligence, drug abuse, and alcoholism were concerned, McElveen "told the truth." *Id.* The trial record also includes McAlhaney's admission that he and McElveen's former daughter-in-law were using cocaine together 4 or 5 times a month for 4 or 5 months during this time. (R.p.327). McAlhaney said he stopped using cocaine after he realized his and his girlfriend's drug use might create an issue for her with the family court. (R.pp.327-29).

This lawsuit has its origin in McElveen's family court case.

The first alleged act of defamation occurred shortly after the temporary custody hearing, which was in September of 2003. The lawyer for McElveen's former daughter-in-law had given the family court judge a letter from Julia Sanford, the sister-in-law of then-Governor Mark Sanford. Displeased at this, McElveen wrote the Governor a letter stating

McElveen's belief that his former daughter-in-law had significant problems and that although his former daughter-in-law had recently begun a new romantic relationship that initially seemed positive, he subsequently learned the new boyfriend had "a drug addiction" and had been "abusive" to the children. See (R.pp.817-18).

McElveen's letter did not mention McAlhaney by name, but the Governor reacted by sending a "memo" to his family and the Governor attached McElveen's letter to the memo. (R.p.176). Julia Sanford shared these with McAlhaney after she received them from the Governor. *Id.*; see also (R.p.289).

The subsequent acts of defamation relate to McAlhaney's arrest in March of 2004 for first degree criminal sexual conduct with a minor and assault and battery of a high and aggravated nature. McAlhaney claimed McElveen was ecstatic at the arrest and began telling other people in the community McAlhaney was a deviant and a child molester. Two witnesses at trial corroborated this. McElveen disputed it.

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

The decision of the Court of Appeals incorrectly recites that McAlhaney's arrest was the result of allegations made by McElveen. (App.p.2). The posture of this case requires viewing the facts in McAlhaney's favor, but there is *no* evidence to support this statement as well as other statements in the court's decision. The alleged victim was McElveen's youngest grandson, who was then 4 years old, and the charges were the result of contact Linda McElveen (the child's grandmother) made with local law enforcement after one of the children reported the alleged abuse to her. (R.p.452-53). As McElveen's petition for

rehearing explained, the only evidence is that Linda 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. (App.p.13) (citing R.pp.551-53). There is no evidence McElveen planted the accusation in his grandson's mind. We do not even know the content of the allegation. The child did not testify at trial.

McAlhaney filed suit in July of 2005. In addition to claims for libel and slander, the complaint included claims for abuse of process and conspiracy. (R.pp.10-19).

The theory of these latter claims was that McElveen was the "mastermind" behind the criminal charges. According to McAlhaney's complaint, McElveen dreamed up the charges for the purpose of gaining custody of his grandchildren and McElveen also allegedly orchestrated a physical confrontation between other people and McAlhaney after learning that the criminal charges would be dropped. (R.pp.16-17). These supposed henchmen were named as defendants, along with McElveen's wife and McElveen's business.

McElveen answered the suit and claimed any statements he made about McAlhaney were either completely true or substantially true. McElveen also brought claims against McAlhaney and McAlhaney's uncle. These were tied to the distribution of a "book" McAlhaney and his uncle prepared and sent to several public figures and news organizations. (R.pp.377-78). The book alleged McElveen was dishonest in his business dealings and had somehow induced the grandson's report of abuse. (R.pp. 379-381).

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

The jury returned verdicts for McAlhaney on each claim; awarding actual damages of $1,000 for libel, $61,000 for slander, and $25,000 for abuse of process. (R.p.1). The jury also awarded McAlhaney $3.25 million in punitive damages for each of the two defamation claims. (R.p.1). The jury awarded "0" for punitive damages on abuse of process. (R.p.2).

The verdicts against the other defendants were relatively small. The jury awarded McAlhaney $2,000 for slander and $1,500 for abuse of process against McElveen's wife. (R.pp.1-2). As to McElveen's son (one of the alleged henchmen), the jury awarded McAlhaney $500 for slander and $5,665 for civil conspiracy. *Id.* Most of this award was for punitive damages. (R.p.2).

The jury rejected McElveen's claim against McAlhaney and McAlhaney's uncle. (R.p.3). All of these verdicts were returned on January 15, 2010.

McElveen, his wife, and his son filed a joint motion for a new trial. (R.pp.35-38). The trial court heard this motion six days after the verdict. (R.p.760).

The judge orally denied all post-trial motions except McElveen's motion for a new trial *nisi remittitur*. The judge then invited both sides to offer proposed orders with a remitted amount for the punitive awards against McElveen. (R.pp.783-89). The judge said he intended to cut the verdict to the maximum amount that he felt could be sustained on appeal. (R.p.791). Nearly six months later—in July of 2010—the judge issued a written order remitting the punitive award to $375,000.00. (R.p.8).

McElveen filed a timely appeal to the Court of Appeals and argued the punitive verdict was so large it could not be remitted. He also argued the trial judge had given two improper jury charges; one on liability, the other on punitive damages. (App.pp.19-40).

McAlhaney did not file a brief in the Court of Appeals.

The Court of Appeals conducted oral argument in April of 2015. Three months later, the panel published a unanimous decision to affirm. (App.pp.1-8). The thrust of the decision seems to be three-fold.

First, the decision differentiates its review of whether the verdict is excessive from the *de novo* review of punitive damages required by this Court and the U.S. Supreme Court. (R.p.3). The decision labels McElveen's argument as relying on the "procedural rule" that a court must order a new trial when a verdict is grossly excessive. *Id.* The decision applies the abuse of discretion standard to this issue. (R.p.3).

Second, the decision expresses "uncertainty" whether the jury actually intended to award $6.5 million in punitive damages. (R.p.6). The decision highlights two of the trial judge's statements to support this. (R.p.5). Of course, none of the parties ever argued the verdict was ambiguous. The trial judge's order plainly remits the verdict from $6.5 million to $375,000. (R.p.8).

Third, the decision analyzes McElveen's conduct and reasons this conduct was not simply wrongful, but "atrocious and intolerable." (R.p.6). According to the decision, the jury found McElveen repeatedly accused McAlhaney of heinous acts even though McElveen "knew" McAlhaney to be "innocent." (R.p.7). The decision further recites McElveen did all of this for a strategic advantage and for his own benefit rather than the good of the children. *Id.* Based on these facts, the decisions finds no abuse of discretion. *Id.* The decision summarily disposed of McElveen's arguments about the trial court's jury charges. (R.pp.7-8).

ARGUMENT

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 only $1,000 to fix warrants $3.25 million in punitive damages. This jury either hated McElveen, loved McAlhaney, or misunderstood what it was supposed to do.

There is also no way a responsible jury could find defamatory statements that caused $62,000 of *total* harm justify an award of $6.5 million in punishment. We know the jury wanted to ruin McElveen financially because the evidence established McElveen was a retired grandfather with a total net worth of only $2 million. (R.p.7). The jury also must have wanted to obliterate McElveen's ability to care for his grandchildren and to place McAlhaney in a position where he would never have to work again. Beyond these obvious deductions, we can only speculate.

Those areas of uncertainty should not obscure the critical fact, which McElveen believes is quite obvious: by any reasonable measure, these verdicts are shockingly disproportionate to McAlhaney's injuries and damages. As such, the awards could not be remitted but are required to be reversed. This Court should grant certiorari and reverse the Court of Appeals for holding otherwise.

A. 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."

"Unduly liberal" verdicts do not match 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)).

A "grossly excessive" verdict is different. When the verdict is shockingly disproportionate to the injuries the plaintiff suffered, this Court has said that it is the verdict itself, not just the amount of the verdict, that is defective. *Bowers*, 210 S.C. 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).

The decision to grant a new trial *nisi remittitur* is entrusted to the trial court's discretion, but this Court has also explained that if the trial court refuses to grant a new trial absolute when the verdict is grossly excessive, "it becomes the duty of [the appellate court], as well as of the trial court, to set [the verdict] aside absolutely." *Ray*, 245 S.C. at 360, 140 S.E.2d at 581. In such circumstances, failing to order a new trial "amounts to" an abuse of discretion. *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993).

B. The Court of Appeals did not fully engage in this analysis or discuss the substantive arguments McElveen offered in his brief. Instead, the decision offered an incorrect version of the facts and pronounced its view that there was no abuse of discretion.

The decision of the Court of Appeals never explains the central premise that is critical to its conclusion: that an award of $6.5 million is not shockingly disproportionate to

McAlhaney's injuries or damages. McElveen concedes the facts must be viewed against him and that those facts paint him in an unflattering light, but bad facts are not an answer to the question whether it was wildly inconsistent for the jury to assign such modest values for the actual harm McAlhaney experienced and such exorbitant sums for McElveen's punishment.

McElveen's brief to the Court of Appeals offered several possible comparisons to assist the court in determining whether the awards were excessive. First, he explained that no case in South Carolina had ever had this significant a remittitur. (App.pp.31-33). Second, he drew attention to the obvious disparity between the compensatory and punitive awards and proposed that this disparity was particularly odd when the underlying claims were for defamation, which includes several non-economic components intended to fully compensate the victim. (App.pp.33-36). Finally, McElveen argued that much of what he said about McAlhaney was substantially true and that the bulk of any damage to McAlhaney's reputation had been due to McAlhaney's arrest. (App.pp.36-37). Despite McAlhaney's consistent argument to the contrary, there was no actual *evidence* that McElveen was "behind" McAlhaney's arrest or the allegation of abuse.

The Court of Appeals did not engage any of these arguments. Instead, it held that because McElveen's conduct was atrocious, the court would not second-guess the trial judge's decision to deny a new trial absolute.

C. The decision of the Court of Appeals also offers no explanation of 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 found this verdict *was not.*

During its review of the punitive damage awards, the trial judge compared the punitive awards to the compensatory awards and noted the ratio "grossly exceeds" the single

digit multiplier sanctioned by the relevant jurisprudence. (R.p.7).[1] Yet, on the next page of the order, the trial judge held that while the awards were "clearly" so inflated that they must be stricken as violating fundamental fairness and due process, the awards were also not "so grossly excessive" that they mandated granting a new trial absolute. (R.p.8).

The decision of the Court of Appeals seems to emphasize these as different types of "excessiveness" analyses. One is a constitutional review of punitive damages which an appellate court undertakes *de novo* in accordance with this Court's holding in *Mitchell*. See 385 S.C. at 582-83, 686 S.E.2d at 182-83. The Court of Appeals called the other excessiveness analysis a "procedural principle" and applied a deferential standard of review. (App.pp.3-4). The Court of Appeals never explained how an award can be grossly unconstitutional, as the trial judge's order found this verdict was, but not grossly excessive, which the trial judge found this verdict was not. The distinction may be a meaningful one, but it is not intuitively so. At first blush, the findings seem contradictory.

As McElveen wrote in his petition for rehearing, precedent 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

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[1]As this Court has observed, the U.S. Supreme Court has not identified concrete limits but has remarked few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 588, 686 S.E.2d 176, 185 (2009).

(2000) ("Substantive due process protects a person from being deprived of life, liberty or property for arbitrary reasons."). 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. The decision of the Court of Appeals does not explain what the court means when it calls the guarantee against a grossly excessive verdict a procedural principle, but this right has a substantive core that can only be based in the constitutional guarantee of due process.

Several decisions discuss these general concepts, including the Court's recent decision in *Riley v. Ford Motor Co.*, which involved a decision of the Court of Appeals to reverse a trial court's order granting a new trial *nisi additur*. See Op. No. 27575 (S.C. Sup. Ct. filed Sept. 30, 2015) (Shearouse Adv. Sh. No. 38 at 16). But *Riley* does not answer the questions raised by the decision of the Court of Appeals in the present case. Yes, the facts are bad for McElveen when they are viewed against him, but the Court of Appeals did not recite the facts accurately, and the substantive points of McElveen's argument were never addressed by the court's decision.

Fairness to the Court of Appeals requires acknowledging that precedent does not detail a reticulated framework for reviewing these issues. Most of the cases do not offer a description of what makes an excessive verdict beyond reciting that these verdicts are so shockingly disproportionate to the injuries as to indicate the jury was based by passion, prejudice, or some other improper motive. E.g. *Easler v. Hejaz Temple of Greenville*, 285 S.C. 348, 356, 329 S.E.2d 753, 758 (1985). It is possible that there need not be any more to the framework. The best evidence of excessiveness may vary from case to case.

But the decision of the Court of Appeals leaves more questions than it answers. It did not engage McElveen's arguments in any detail, and it raises—on the court's own motion—the ideas that there are varying standards for reviewing punitive damage awards and that a grossly excessive award of punitive damages can somehow be saved from outright reversal if the award is excessive "constitutionally," but not "procedurally."

CONCLUSION

The Court should grant a writ of certiorari, review the decision of the Court of Appeals, and ultimately hold that the Court of Appeals erred in failing to reverse the jury's verdict as grossly excessive.

Respectfully submitted,

October 12, 2015

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

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Petition for Writ of Certiorari and Appendix* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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October 12, 2015
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Erin Bridges

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October 12, 2015

VIA HAND DELIVERY
Honorable Daniel E. Shearouse
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RE: McAlhaney v. McElveen
Case Tracking No.: 2015-001929

Dear Mr. Shearouse:

Please find enclosed for filing the original and seven (7) copies of the Petition for a Writ of Certiorari in this case, together with three (3) copies of the Appendix. I have also enclosed a Proof of Service of the Petition on counsel for the Respondent and a check in the amount of $100.00 for filing the Petition. I have filed a copy of the Petition and Proof of Service with the South Carolina Court of Appeals. Please return the additional copies to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges

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Paralegal to Blake A. Hewitt
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Enclosures
cc: Robert V. Mathison, Jr., Esquire
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The Honorable Jenny A. Kitchings