THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

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

Appellate Case No. 2015-001929

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.

AMENDED RETURN TO PETITION FOR WRIT OF CERTIORARI

Robert V. Mathison, Jr.
D. Michael Mathison
Mathison & Mathison
Post Office Box 5271
Hilton Head Island, SC 29938
T: (843) 785-6503
F. (843) 785-6170
Email: rmathlaw@aol.com

Louis O. Dore
Dore Law Firm, PA
Post Office Box 2478
Beaufort, SC 29901
T: (843) 522-9112
F: (843) 522-8050
Email: dorelaw@embarqmail.com

Hilton Head Island, South Carolina.
December 3, 2015.

QUESTION PRESENTED

I. Did the Court of Appeals and trial court properly conclude that a jury verdict of $6.5 million in punitive damages award was not "shocking" as a matter of law, where the jury found the Defendant knowingly and repeatedly made false allegations of Child Abuse, Drug Addiction and Child Molestation in an effort to gain an advantage in a child custody dispute?

TABLE OF CONTENTS

Question Presented . . . . ii.

Table of Contents . . . . ii.

Table of Authorities . . . . iii.

STATEMENT OF THE FACTS 1

STATEMENT OF THE CASE 6

ARGUMENT 8

The Court should deny the Petition for Certiorari, because the trial court properly exercised its discretion in denying Petitioner a New Trial Absolute and remitting the punitive damages award because trial court properly reviewed the verdict in light of the evidence of egregious conduct in the record and properly applied the law 8

A. The Trial Court and Court of Appeals applied the proper standard, and considered the evidence in concluding that the punitive damage award could be premised on the reprehensibility of Petitioner's Conduct, and not on improper considerations or errors of law 9

B. The trial court and Court of Appeals properly considered the evidence in the record and the law charged, rather than mathematical formulae, in concluding the punitive damage award was premised on the reprehensibility of Petitioner's conduct 10

C. Petitioner's Ratio Arguments impose artificial constraints on the lower court, ignore the facts of the case and potential harm to Mr. McAlhaney 12

D. A review of the Evidence and the Law Charged shows the Jury's verdict was grounded in the facts, and nothing else. 15

CONCLUSION 21

TABLE OF AUTHORITIES

Case Law:

South Carolina Cases:

Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 635-6, 529 S.E.2d 758, 762-63, (Ct. App. 2000). 9

Bowers v. Charleston & W.C. Ry. Co., 210 S.C. 367, 375, 42 S.E.2d 705, 709 (1947). 12

Elder v. Gaffney Ledger, Inc., 333 S.C. 651, 511 S.E.2d 383 (Ct. App. 1999). . . 15

Elder v. Gaffney Ledger, Inc., 341 S.C. 108, 553 S.E.2d 899 (2000). 15

Gamble v. Stevenson, 304 S.C. 104, 406 S.E.2d 350 (1991) 7, 8, 11, 16-21

Hollis v. Stonington Development, LLC, 394 S.C. 383, __, 714 S.E.2d 904, 914 (Ct. App. 2011) 20

Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 508-09, 506 S.E.2d 497, 501 (1998) 14

Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012) 19, 20

Mickle v. Blackmon, 252 S.C. 202, 248, 166 S.E.2d 173 (1969) 10

Miller v. City of West Columbia, 322 S.C. 224, 233, 471 S.E.2d 683, 687 (1996). 14, 16, 20

Mitchell v. Fortis Insurance Company, 385 S.C. 570, 686 S.E.2d 176 (2009) 11,13, 14, 16

Nelson v. Charleston & W. C. Ry. Co., 231 S.C. 351, 362, 98 S.E.2d 798, 802 (1957) 11

Rush v. Blanchard, 310 S.C. 375, 379-80, 426 S.E.2d 802, 805 (1993) 10

Other Jurisdictions:

BMW of North America v. Gore, 517 U.S. 559, 575 (1996) 11, 13

Mathias v. Accor Economy Lodging Inc. and Motel 6 Operating L.P., 347 F.3d 672, 677 (7th Cir.2003) 12

State Farm Fire & Cas. Co. v. Radcliff, 987 N.E.2d 121 (Ind. App. 2013) 15

TXO v. Production Corp. v. Alliance Resources, 509 U.S. 443, 460 (1993) . . . 14, 15

Court Rules:

Rule 242, SCRCP 9

STATEMENT OF THE FACTS

In April of 2003, the Respondent, Matthew S. McAlhaney ("Mr. McAlhaney") began dating Molly McCullers ("Ms. McCuller's). Prior to their relationship, Ms. McCullers had two children with Richard K. McElveen, Jr. ("McElveen, Jr."), the son of the Petitioner, Richard K. McElveen, Sr. ("McElveen, Sr." or "Petitioner"). As the result of a 1997 custody action, McElveen, Sr., and Ms. McCullers shared joint custody of the older child, however, Ms. McCullers retained sole custody of her younger child.

On September 11, 2003, McElveen, Sr., filed a new action in the Family Court (2003-DR-07-1245) seeking custody of both of Ms. McCuller's children and requesting an immediate temporary change in custody. McElveen, Sr., testified about the difficulty he encountered satisfying his burden of proof in family court. (R. p 637, line 17-p. 638, line 1). Petitioner filed a number of affidavits to support his case including one in which he alleged that Mr. McAlhaney was a drug abuser. Petitioner never alleged in any court filing that Mr. McAlhaney had engaged in child abuse. (R. p. 210; R. p. 696-697).

Mr. McAlhany assisted Ms. McCullers in retaining counsel and appeared with her at the temporary hearing on September 22, 2003. Mr. McAlhaney and Ms. McCullers obtained drug screenings on the date the family court pleadings were served. (R. pp. 202-204; p. 285, lines 17-24). The results of the clear drug tests were submitted to the court and opposing counsel at the hearing. (R. 202-204). Mr. McAlhaney admitted to previous recreational drug use but denied ever having a drug addiction, and denied using drugs at the time the family court action was filed. (R p. 222; p 299, line 14-p. 3011, line 22).

At the September 22nd, hearing in the family court case, Ms. McCullers' attorney handed up an affidavit prepared by Julia Sanford, Mr. McAlhaney's neighbor. Ms.

Sanford was the sister-in-law of the sitting governor, Mark Sanford, but no mention of that fact was made in her affidavit. (R. pp. 172-174).

On September 29, 2003, the court notified the parties to the custody proceeding that McElveen's motion for temporary custody had been denied. (R. pp. 205-206). On the very same day, McElveen sent a letter to Governor Sanford stating McAlhaney had a "drug addiction" and that he had been "abusive to the children." (R. p. 817-819). Although McAlhaney was not identified by name, members of the governor's staff were aware that the letter referred to Matt McAlhaney. (R. pp. 186-87; R pp. 209, line 12-p. 210, line 2). The Governor then distributed copies of the letter to members of his family many of whom knew Mr. McAlhaney personally and recognized him as the person in the letter. (R. pp. 209, line 7-11; R. pp. 131-82.)

McElveen admitted that he included the statements about Mr. McAlhaney in the letter "because he had started putting himself in the picture." (R pp. 483-484). Linda McElveen, the wife of McElveen, Sr., believed it was necessary to call Mr. McAlhaney a child abuser and a drug addict to discourage Julia Sanford from testifying in the custody case. (R. pp. 456-457).

In November of 2003, Mr. McAlhaney's uncle, Mike McEachern, wrote and visited McElveen, Sr., in an effort to get the Petitioner to stop publishing defamatory statements about Mr. McAlhaney. Petitioner told Mr. McEachern that if Mr. McAlhaney continued to interfere in his custody dispute that Petitioner would give Mr. McAlhaney "all the attention he needed." (R. pp. 364-366). Mr. McAlhaney hired an attorney, Cory Fleming, who wrote a cease and desist letter to McElveen. (R. pp. 214-215).

In February of 2004, both McElveen, Sr., and McElveen, Jr., tried to fight Mr. McAlhaney at a Dixie Youth baseball tryout. (R. pp. 218-220). McElveen, Sr., testified that McElveen, Jr., reached back to punch McAlhaney before McElveen, Sr., stopped his son, snatched a bat out of McAlhaney's hand and invited McAlhaney to "take it on down the road." (R. pp. 485; l. 4-10; p. 486, line 5-p. 488, line 16; p. 644, line 8-p. 645, line 6; p. 646, line 3-646, line 9; p. 647, line 12-p. 648).[1]

The week after the incident at the field, Mr. McElveen and his wife, Linda McElveen, told McAlhaney and McCullers that they planned to take the children for an extended weekend trip to Lake Greenwood. The children went to stay with the McElveens on the evening of Thursday, February 26, and were to be returned to their mother on Sunday, February 29th. (R. p. 225, lines 11-18). Instead of going to Greenwood, Linda and McElveen, Sr., went to the Beaufort County Sheriff's Office on Friday, February 27, 2004, and reported that Matt McAlhaney had molested their grandson. (R. pp. 225-226; p. 567).[2] According to all the testimony at trial, Linda McElveen disclosed the alleged abuse to the Beaufort County Sheriff's Office. (R. p. 329, line 13-15). McElveen, nevertheless, testified that he and the children had enjoyed a "fantastic weekend" at Lake Greenwood and that he did not have any contact with investigators during the weekend of February, 27th. (R. pp. 732-736, p. 758). However, Detective Brian Baird's notes showed that Mr. McElveen was at the Sheriff's office and that McElveen discussed the molestation allegations with Baird himself on February 27th. (R. p. 567, line 1-p. 571; line 13). Baird also testified that Mr. and Mrs. McElveen

[1] McElveen later told investigators that Mr. McAlhaney threatened him with a baseball bat. (R. p. 279).
[2] On February 26th, Linda McElveen contacted her sister, a school teacher and her husband's attorney about the molestation allegations, but supposedly did not tell her husband. (R. pp. 451-452).

provided information included in the warrants issued on March 1st. (R. p. 583, lines 11-20). McElveen also wrote a letter to investigators dated March 1, entitled "Things I Forgot to Mention." (R. p. 567, line 10 - p. 571, line 13).[3] Additionally, McElveen, Jr., testified that his father was at the house in Beaufort after the McElveens returned from the police station. (R. p. 527, line 16 - p. 529, line 19).

Detective Brian Baird testified that the quality and quantity of contact and information from the McElveens' was unusual. (R. p. 571, line 18-p. 572, line 18). He testified that it was unusual not to tell one's spouse of abuse allegations before reporting it to law enforcement. (R. p. 569, lines 7-11), and that McElveen wrote him emails indicating people were calling Mr. McAlhaney "gay," "deviant" and "capable of anything," but failed to identify any of the people allegedly stating these things. (R. p. 587, line 6 – p. 588, line 14). McElveen also suggested McAlhaney had intimidated witnesses in his emails. (R p. 745, line 19-p. 748, line 8).

On Sunday, February 29, 2004, two days after the report, McElveen, Jr., called Molly McCullers and claimed the McElveens and her children would not be back from Lake Greenwood due to car trouble. (R. p. 240, line 3-p. 241, line 1.). Investigators had not contacted the child's mother over the weekend, because they were led to believe by Mr. and Mrs. McElveen that Ms. McCullers was in Florida. (R. p. 581, lines 2-10).

On the morning of Monday, March 1, 2004, McElveen, Sr., filed a motion for an emergency custody hearing, and he obtained an ex parte restraining order that transferred

[3] Detective Baird was impeached with his own notes on (1) whether McElveen was at the Sheriff's office on February 27th (Compare R. p. 551, l. 22-23 and p. 567-568); and on (2) whether he received medical evidence before issuing the warrants (Compare R. p. 552, line 23-p. 553, line 8 and R. p. 573, line 4-22).

sole custody to McElveen that same day. (R. p. 742, l. 11-14).[4] Mr. McAlhaney's charges were cited as a basis for the custody switch. (R. p. 242-43). That afternoon, Mr. McAlhaney learned that warrants for Criminal Sexual Conduct with a Minor and Assault and Battery of a High and Aggravated Nature had been issued against him. (R. pp. 226, 228). The warrants were issued without investigators speaking with the child's mother, Mr. McAlhaney and or a medical examiner. (R. pp. 581, line 2-10, p. 573, l. 4-22).

Also on March 1, 2004, McElveen told his neighbors, Jan and Bruce Szelewa, that Matt McAlhaney had molested his grandson. Jan Szelewa testified that McElveen seemed "thrilled, almost beaming about the fact that Matt McAlhaney had been arrested." (R. p. 159, line 23-p. 160, line 25). The same week, the Beaufort Gazette published an article about Mr. McAlhaney's arrest. The article included specific details about Mr. McAlhaney's civic associations that were included in his affidavit that had been filed in the underlying Family Court case. (R. pp. 176-177).

On another occasion, while shopping at Furniture Warehouse, McElveen told Julia Peters, a salesperson he had never met, that his ex-daughter-in-law's boyfriend had sexually abused his grandson. (R. p. 346, line 4- p. 349, line 13). Ms. Peters testified that McElveen told her of the alleged abuse in "elaborate detail," and seemed "strangely victorious" and "very excited" to "spread the word" about how he gained custody of the children. (Id.; R. p. 353, line 8-11).

In December of 2003, two Beaufort County solicitors interviewed the child outside the presence of the McElveens. After the interview, the solicitors informed the

[4] Ms. McCullers subsequently suffered a mental breakdown as a result of the investigations. Her parents intervened in her custody case and a resolution was reached by consent order in 2005. (R. p. 495, line 3-p. 496, line 1).

McElveens that the case would not go forward. (R. p. 357, line 7-p. 358, line 23; p. 459, line 16-p. 460, line 11).

Shortly thereafter, on December 24th, Rick McElveen, Jr., and a group of people that believed they were attacking a child molester, stalked, trapped and assaulted Mr. McAlhaney in the parking lot of a Beaufort restaurant. (R. p. 436, lines 6-14; R. pp. 259-264). After laying in wait for two hours, the group blocked the exits of the parking lot with their vehicles, and assaulted Mr. McAlhaney in his automobile, punching him in the face and breaking his nose. (R, p. 534; l. 6-p. 535; l. 21) (Id., R. pp. 259-264).[5]

On February 16, 2004, the Solicitor's office formally nolle prossed the charges against Mr. McAlhaney. (R. p. 358-359). During the year the charges were pending, Mr. McAlhaney's income dropped $61,000.00, he incurred significant attorney's fees in clearing his name,[6] and he suffered physical injury and medical costs for his broken nose. Even defense witnesses testified that Mr. McAlhaney enjoyed a great public reputation prior to the molestation allegations. (R, p. 588, line 19- p. 589, line 12). Mr. McAlhaney testified regarding the injury to his family name, personal and business reputation and his sense of safety in his hometown as a result of the events. (R. pp. 269-270, pp. 274-280).

STATEMENT OF THE CASE

On July 29, 2005, Mr. McAlhaney filed the complaint in this action alleging causes of action for abuse of process, civil conspiracy, libel and slander against Richard K. McElveen, Sr., Richard K. McElveen, Jr., and Linda McElveen. He also brought actions for assault and battery, slander and civil conspiracy against Billy Jo Byrd.

[5] As a result of the incident, Richard K. McElveen, Jr., pled guilty to misdemeanor assault, and Defendant Billy Jo Byrd was tried and convicted of Assault and Battery.

[6] This included $1,000.00 for the cease and desist letter and $25,000.00 in defending the criminal charges. (R. pp. 270-272).

The case was tried before a jury the week of January 11, 2010. The jury returned a mixed verdict finding against Richard K. McElveen, Sr., Richard K. McElveen, Jr., and Linda McElveen on the Plaintiff's causes of action; but returning a defense verdict on the Plaintiff's claims against Billy Jo Byrd. (R. p. 1).[7] There is no record of the final day of testimony, the closing arguments, the motions made at the close of evidence or the jury charges given in this case. Other records reflect that (1) the jury was charged on the Gamble Factors[8]; and (2) the jury was not charged on constitutional ratios of punitive damages to compensatory damages. (R. pp. 783, 786)

The jury awarded actual damages against McElveen, Sr., in the amount of $86,000.00: $25,000.00 for Abuse of Process, $1,000.00 for Libel, and $61,000.00 for Slander. The jury awarded punitive damages of $6,500,000.00, divided equally between the Slander and Libel causes of action.[9] The Jury awarded actual damages against Linda McElveen for Slander ($2,000.00) and for Abuse of Process ($1,500.00). The jury returned a slander verdict against Rick McElveen, Jr. for $500.00. (Id. R. p. 1)

The Defendants filed post-trial motions on January 21, 2010, and a hearing was held on the same date. (R. pp. 35-38; R. pp. 760-794). At the hearing, Judge Kinard denied the motion for a new trial absolute and reviewed the evidence in the record supporting the punitive damages verdict. The court stated:

> "The jury feels like when you accuse someone—and they found unjustifiably so—for ulterior motives for being a child molester and have them incarcerated, you need to sustain the most powerful message delivered that that's bad conduct."

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[7] *Cf.* Br. of Appellant, App. p. 26. Causes of action against two corporate defendant's

[8] Gamble v. Stevenson, 304 S.C. 104, 406 S.E.2d 350 (1991)

[9] There was ambiguity about whether the jury returned one $3.25 million verdict for libel and slander, or two separate $3.25 million verdicts for each cause of action. See, App. p. 5-6.

The court engaged in a punitive damage review using the factors listed in Gamble v. Stevenson, 304 S.C. 104, 406 S.E.2d 350 (1991), and identified specific evidence in the record supporting almost all of the factors. (R. pp. 783-789)

The trial court found the verdict unduly liberal, and granted the Defendant's motion for *nisi remittitur*. The court's final order dated July, 1, 2010, formally denied all motions except the Petitioner's motion for a New Trial Nisi. The punitive damage award was remitted to $375,000.00, based primarily on McElveen's ability to pay. (R. pp. 4-9).

Richard K. McElveen timely filed his appeal. Neither Richard K. McElveen, Jr., nor Linda McElveen appealed the verdicts against them. On Appeal, the Petitioner argued that the verdict could not be remitted and should have been set aside, based on the disparity between the punitive damages and the actual damages. The Court of Appeals unanimously disagreed, holding "the evidence in the record supports the trial court's analysis and decision." (App. p. 8). The Court of Appeals characterized the Petitioner's conduct as "atrocious and intolerable," (App. p. 6), and agreed in the trial court's assessment that the jury intended "to sustain the most powerful message . . . that that's bad conduct." (App. p. 8).

ARGUMENT

I. The trial court properly exercised its discretion in denying Petitioner a New Trial Absolute and remitting the punitive damages award because the trial court properly reviewed the verdict in light of the evidence of egregious conduct in the record and properly applied the law.

The trial court properly considered the evidence in the record and the applicable law in determining the award was not so grossly excessive as to indicate Petitioner was denied a fair trial. The reprehensibility of the Petitioner's conduct speaks to the size of the award, which directly related to the egregious conduct and the injury likely to result

from false accusations of child molestation. The jury concluded that McElveen maliciously and knowingly made false allegations of child molestation, drug addiction and child abuse against Mr. McAlhaney. These allegations exposed McAlhaney to financial loss, public humiliation and a violent attack by a mob that believed he was a pedophile. Based on the evidence in the record, and without instructions on punitive damage ratios, the jury delivered a verdict. The trial court was not shocked by the verdict. The Court of Appeals was not shocked by the verdict. Nevertheless, the Petitioner asks this Court to superimpose a "shocked conscience" on the lower courts, based on bright-line numerical rules divorced from the facts.

A writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons. Rule 242(a), SCACR. This petition was filed in response to a unanimous affirmation of a trial court's discretionary decision. The Petitioner has pointed to no precedents contradicted by this decision and has not identified any constitutional rights were ignored by the trial court or Court of Appeals. Accordingly, the Court should decline to issue a writ of certiorari.

A. The Trial Court and Court of Appeals applied the proper standard, and considered the evidence in concluding the punitive damage award could be premised on the reprehensibility of Petitioner's conduct, and not on improper considerations or errors of law.

STANDARD OF REVIEW: NEW TRIAL ABSOLUTE

The decision to grant a new trial absolute based on the excessiveness of a verdict rests in the sound discretion of the trial court and ordinarily will not be disturbed on appeal. Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 635-6, 529 S.E.2d 758, 762-63, (Ct. App. 2000). The trial court must set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice,

prejudice, or other considerations *not reflected by the evidence* affected the amount awarded. Id. In reviewing a decision on a motion for a new trial, the appellate court must consider the testimony in the light most favorable to the nonmoving party. Id.

In determining whether the trial court's denial of a new trial absolute amounts to an error of law, the reviewing court must be convinced that the jury was motivated by something outside the evidence. Mickle v. Blackmon, 252 S.C. 202, 248, 166 S.E.2d 173 (1969). In Rush v. Blanchard , 310 S.C. 375, 379-380, 426 S.E.2d 802, 805 (1993), this Court described an invalid verdict as one that is "so grossly excessive so as to shock the conscience of the court and *clearly indicates* that the figure reached was the result of passion, prejudice or caprice." (emphasis added). "A verdict which may be supported by any rational view of the evidence, or as to which reasonable and disinterested men might draw different inferences, is not of this class." Mickle v. Blackmon, 252 S.C. at 248, 166 S.E.2d 173 (1969). It is not enough that the size of the verdict merely "suggests" passion or caprice;[10] the "limited appellate jurisdiction in law cases authorizes review only when the case is free from doubt, the evidence admitting of only one reasonable inference, so that error in the circuit court's refusal of relief from an excessive or inadequate verdict may be said to be one of law rather than of fact." Id. Put simply, the inquiry is not whether a verdict is excessive, but whether it is understandable based on the evidence.

B. The trial court and Court of Appeals properly considered the evidence in the record and the law charged, rather than mathematical formulae, in concluding the punitive damage award was premised on the reprehensibility of Petitioner's conduct, and not improper considerations or errors of law.

[10] Petitioner has advanced a different formulation of the rule that dramatically increases the scope of appellate intervention: "If the verdict is so excessive that it *suggests*" sympathy, mistake or a misapprehension of the law, "the case *must* be reversed." Petition, at 8.

After the hearing on Petitioner's Motion for a New Trial Absolute, Judge Kinard ruled the "the punitive awards [were] 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." (R. p. 8). Ordinarily, the only means of discovering the existence of passion and prejudice influencing the verdict is to compare the verdict with the evidence before the trial court. Nelson v. Charleston & W. C. Ry. Co., 231 S.C. 351, 362, 98 S.E.2d 798, 802 (1957). The record demonstrates the trial court properly analyzed applicable law and the evidence in the record before making its determination. At the hearing on Petitioner's post-trial motions the trial judge conducted a review of the verdict pursuant to the factors set forth in Gamble v. Stevenson, 304 S.C. 104, 406 S.E.2d 350 (1991). (R. pp. 783-786). In its Order, the court analyzed the verdict under the due process guideposts of BMW of North America v. Gore, 517 U.S. 559, 575 (1996), as required by Mitchell v. Fortis Insurance Company, 385 S.C. 570, 686 S.E.2d 176 (2009). (R. 4-8).

The Gore Court set forth three guideposts for conducting a due process analysis of punitive damages.[11] The first and most important factor for the court to consider is the reprehensibility of the defendant's conduct. Mitchell, at 587, 686 S.E.2d at 185, *quoting* Gore, 517 U.S. at 565. The most commonly cited indicium of an unreasonable award is the ratio, Id.; however, courts have refused to impose rigid, bright-line rules for damage ratios, and where the defendant's conduct is egregious, and the compensatory damages relatively modest, ratios exceeding a single digit may not offend due process. Gore, 517

[11] (1) [T]he reprehensibility of the defendant's conduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Mitchell, 385, S.C. 585, 686 S.E.2d at 184, *citing* Gore, 517 U.S. at 575.

U.S. at 582. Bright line rules are also inapt in cases where the conduct is horrendous and the damages are difficult to quantify. Mathias v. Accor Economy Lodging Inc. and Motel 6 Operating L.P., 347 F.3d 672, 677 (7th Cir. 2003).

The trial court was aware that the verdict exceeded judicially accepted "ratios," but also noted that this jury was not charged on "ratios" or constitutional trends in punitive damage awards. (R. p. 786). When a verdict is not "in accord with accepted judicial standards for measuring damages under the facts of a particular case," but otherwise evinces "due regard for the facts of the case and the instructions of the court," a new trial nisi rather than a new trial absolute is the appropriate and expedient remedy. *See* Bowers v. Charleston & W.C. Ry. Co., 210 S.C. 367, 375, 42 S.E.2d 705, 708 (1947). Recognizing the foregoing principals, the trial court responded to Petitioner's ratio argument as follows:

> "The jury feels like when you accuse someone—and they found unjustifiably so—for ulterior motives for being a child molester and have them incarcerated, you need to sustain the most powerful message delivered that that's bad conduct. Which this jury did. (R. pp. 786-787).

This sums up the only issue in this case: The verdict is completely understandable based on the evidence and the law provided to the jury.

C. Petitioner's Ratio Arguments impose artificial constraints on the lower court, ignore the facts of the case and the potential harm to Mr. McAlhaney.

Petitioner urges several ratio based theories that, in his view, mandate shock on behalf of the court. These arguments contradict the traditional discretion provided to trial judges and seek to impose bright-line rules on judges and juries, where courts have consistently rejected them. Additionally, Petitioner avoids the real inquiry, which requires consideration of *potential harm*, not just actual damages. Finally, Petitioner

attempts to remove the award from the factual context of the case, instead of considering the facts as they were presented to the jury.

Ultimately, the court reduced the punitive damage verdict to $375,000.00. (R. p. 7; p. 785, line 15-21). Judge Kinard provided reasons for reducing the verdict to the amount selected, which included both constitutional and practical considerations. The court noted that there was no insurance in this case—a fact to which the jury was not privy—and considered the possible hardship on McElveen's dependents. (R p. 7; R. p. 785). Pragmatically, the court also considered the likelihood of Mr. McAlhaney recovering the verdict and the chances of reversal in the changing landscape of punitive damage jurisprudence. (R. pp. 7-8, 783, 789). Contrary to the Petitioner's claims (App., p. 32-33), the trial court never declared the verdict "94% unconstitutional," he merely acted as a good judge and looked after the innocents involved.

Although the trial court found the punitive damage award violated due process limitations, it does not follow that the court was required to grant a new trial absolute based on that finding. This Court has previously held that a remittitur can cure a punitive verdict that is "grossly excessive" under a ratio analysis,[12] and petitioner cites no authority *requiring* a New Trial Absolute based on a specific ratio.[13] Accordingly, there was no error in remitting a verdict that "grossly exceeded" judicially prescribed ratios; and the Court of Appeals properly refused to reverse the trial court on that basis.

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[12] *See e.g.*, Mitchell, (finding punitive damages 100 times greater than actual damages to be "grossly excessive" under due process analysis, but nevertheless remitted the award rather than setting aside the entire verdict).

[13] As this court has recently noted, where there is no "categorical rule" circumscribing the discretion of the trial court, it would be an error of law for the Court of Appeals to invent one. *See* Riley v. Ford Motor Co., Op. No. 27575, S.C. Supreme Ct., filed September 30, 2015; Shearhouse Adv. Sh. No. 38 at 22-23.

Petitioner's arguments are also flawed because Petitioner never actually makes the proper comparison between the punitive award and the injury the Plaintiff *could* have suffered had the Petitioner's machinations succeeded. *See* TXO v. Production Corp. v. Alliance Resources, 509 U.S. 443, 460 (1993), *quoted in* Mitchell, 385 S.C. at 591, 686 S.E.2d at 187 (noting relevance of potential harm to "ratio analysis.").

The potential injury to Mr. McAlhaney was much greater than the compensatory award. "[A] person's reputation is invaluable," Miller v. City of West Columbia, 322 S.C. 224, 233, 471 S.E.2d 683, 687 (1996), and allegations of child abuse, drug addiction and child molestation are patently injurious to a person's reputation.[14] The stigma of child molestation allegations is permanent, regardless of subsequent exoneration, and the reputational harm is difficult to quantify. Furthermore, these horrific accusations subjected Mr. McAlhaney to hatred and physical injury. Mr. McAlhaney was assaulted by a group of people who believed he was a child molester. (R. p. 436). The jury could reasonably conclude that an angry mob would not have engaged in the premeditated attack on Mr. McAlhaney, but for their belief that he preyed on children. If bystanders had not intervened to distract the assailants, there is no telling what end Mr. McAlhaney might have met in that parking lot. (R. p. 263). The potential harm also includes long-term incarceration and permanent placement on the sex-offender registry. These ramifications were evident to the jury, even though they were not easily quantified.

Furthermore, the numerical horror in the Petitioner's argument dissipates if the compensatory awards are viewed together as a single continuous course of conduct, for which the jury awarded a total of $91,000.00 in actual damages and $3.25 million in

[14] *See* Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 508-09, 506 S.E.2d 497, 501 (1998) (defining a defamatory statement whose defamatory meaning is obvious on its face as defamation *per se*).

punitive damages, a ratio of only 35:1.[15] This would coincide with the evidence, which the lower courts viewed as showing a continuous, escalating and intertwined scheme of malicious conduct by the Petitioner. (App. p. 5-6). Petitioner tries to compartmentalize each cause of action to create numerical shock, falsely isolating Petitioner's individual misdeeds and obscuring the broad view of the facts as presented to the jury. Clearly, $1,000.00 did not "fix" the Petitioner's conduct or cure McAlhaney's potential injury (Petition for Certiorari, p. 7), and any argument based on that premise cannot stand.

Finally, this case is not an outlier when compared to other verdicts. The Court of Appeals upheld a defamation verdict with a 30:1 ratio, in a case where the plaintiff was falsely accused of taking bribes. Elder v. Gaffney Ledger, Inc., 333 S.C. 651, 511 S.E.2d 383 (Ct. App. 1999); *rev'd on other grounds by* 341 S.C. 108, 553 S.E.2d 899 (2000). Other courts have sustained defamation verdicts much larger than the instant case.[16] Notably, none of those cases involved claims of child molestation, which left the plaintiff "stigmatized for life." (R. p. 784).

D. A review of the Evidence and the Law Charged shows the Jury's verdict was grounded in the evidence, and nothing else.

The jury's verdict is consistent with the law charged and the facts in the record. As both the trial court and Court of Appeals concluded, it is easy to see how the reprehensibility of the Petitioner's conduct alone produced the verdict. (R. p. 784; App. p.

[15] As the trial court and Court of Appeals noted, the verdict form could be read as awarding one verdict in the amount of $3.25 million or two verdicts totaling $6.5 million. (App. p. 5-6). The Respondent finds himself in the unusual position of urging the question of damages resolved in favor of the lower amount. If the facts are to be viewed favorably to the non-moving party, resolving this ambiguity in favor of the lower number makes Petitioner's arguments much more attenuated.

[16] *See, e.g.* State Farm Fire & Cas. Co. v. Radcliff, 987 N.E.2d 121 (Ind. App. 2013). (Sustaining a $14.5 million defamation verdict, where the culpable party falsely accused an individual of insurance fraud and initiated proceedings against the individual based on those claims). *See, also*, TXO, 509 U.S. 443 (upholding punitive damage award of $10,000,000, against actual damages of $15,000.00 in a slander of title action.).

6-7).[17] The jury was instructed on the Gamble factors,[18] [19] (R. pp. 783-785), almost all of which weigh in favor of a substantial punitive verdict. Both lower courts independently reviewed the evidence and understood how the verdict was reached.

(1-3) Degree of Culpability, Awareness and Duration of Conduct: The jury found that McElveen, Sr., was the most culpable Defendant, given his unique standing to benefit from the horrendous allegations. As the sole plaintiff in the underlying custody action and the only person threatened with a defamation lawsuit, McElveen, Sr., was the only defendant who stood to gain from this campaign to impugn Mr. McAlhaney. McElveen's testimony indicated he initially maligned Mr. McAlhaney because he tried to help Molly McCullers in her custody dispute. (R. p. 583). After repeated difficulties in meeting his burden of proof in family court, he was awarded lasting custody of Ms. McCuller's children as an immediate result of the molestation allegations. McElveen testified that it was "immaterial" to him whether Mr. McAlhaney was charged or prosecuted, (R. p. 492, line 24; p. 493, line 11; 738, line 14-25), evincing reckless disregard for McAlhaney's health, safety and rights.

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[17] "[T]he jury could have easily found the harm was the result of intentional malice and trickery and that the Defendant sought to discredit the Plaintiff in order to prevail in a contentious custody dispute. Additionally, evidence was thus presented that the conduct was not an isolated incident, but rather involved repeated occasions ranging from a letter to the governor to defaming the Plaintiff as a child molester to a furniture salesperson. Evidence was presented from which the jury could conclude and did find that McElveen, Sr.'s, conduct was intentional, deliberate and malicious and was thus reprehensible." (R. p. 6.)

[18] The Gamble factors are used as a tool to "ensure that an award of punitive damages is not so grossly disproportionate to the severity of the offense as to offend constitutional due process." Miller v. City of West Columbia, 322 S.C. 224, 233, 471 S.E.2d 683, 687 (1996).

[19] The factors are: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) "other factors" deemed appropriate. Gamble 406 S.E.2d 350, 305 S.C. 104 (S.C. 1991). The first four Gamble factors are encompassed in the Gore guidepost of "reprehensibility." Mitchell, at 587, 686 S.E.2d at 185, fn. 7.

There was considerable circumstantial evidence pointing to his involvement in the molestation report to law enforcement. The report to police was coordinated with an unusually long, out-of-town weekend visitation, one week after McElveen threatened McAlhaney at a little league event. The jury could find the McElveens lied to investigators about the whereabouts of the child's mother, and the child's mother was misled about the whereabouts of her children, all while McElveen surreptitiously pursued an *ex parte* transfer of custody.

McElveen's stubborn effort to distance himself from his wife's "disclosure" on February 27th, was powerful evidence of his bad faith, concealment and lack of credibility.[20] McElveen's own witnesses, Detective Brian Baird, testified that McElveen was at the sheriff's office discussing the alleged molestation on February 27th. His own son testified that McElveen was at his house in Beaufort after going to the Sheriff's Department. McElveen wrote a letter dated March 1, entitled "Things I Forgot to Mention," proving he met with investigators that weekend. (R. p. 567-570) (R p. 732-736). Despite these facts, McElveen stubbornly claimed to be at Lake Greenwood having "a fantastic weekend" (R. p. 758) when the records and his own witnesses clearly showed he was in Beaufort trying to secure warrants for Mr. Mcalhaney's arrest.

McElveen repeatedly misrepresented his involvement with investigators to downplay his role in McAlhnaey's persecution. McElveen's deposition testimony

[20] It was not a coincidence that Linda McElveen was the official source of the molestation allegations. Defense witness, Detective Brian Baird, admitted it was "unusual" that Linda McElveen did not tell her husband about the alleged molestation. (R. p. 569) Indeed, she had already told her sister, a school teacher and her husband's attorney (R. p. 451-452), but supposedly waited to tell McElveen himself until they were at the police station, in front of a witness. The jury could infer this was intentional because of the Petitioner's history with Mr. McAlhaney, and the likelihood that any allegations from McElveen himself would be viewed with intense skepticism.

indicated he contacted law enforcement "three or four" times. (R. p. 492)[21] However, Detective Baird testified about the unusual number and nature of McElveen's communications, in which he told investigators that the community was full of people calling Mr. McAlhaney "gay," "deviant," and "capable of anything." McElveen implied that Mr. McAlhaney had threatened witnesses to silence them from coming forward.

McElveen's statements were not limited to law enforcement. He called McAlhaney a child molester to anybody he could, "hailing down" his neighbors, and recounting the alleged molestation in "elaborate detail" to total strangers. Jan Szelewa, Bruce Szelewa and Julia Peters heard about the molestation directly from McElveen, Sr. (R. p. 159-160; R. p. 346-48, 350).[22]

McElveen was fully aware that his conduct was wrongful and could expose him to liability, but continued his campaign in repeated unprivileged publications to multiple parties over an extended period of time.[23] Despite having just received a clear, random drug test from McAlhaney, McElveen authored the September 29, 2003, letter calling McAlhaney a drug addict. Before writing the letter to the Governor, McElveen had never suggested any child abuse by McAlhaney in any of his family court affidavits; never mentioned it in any family court filing, nor did he report any abuse to the *guardian*

[21] When confronted with his own emails at trial, McElveen refused to say how many times he had contacted law enforcement, demanding Plaintiff's counsel first reveal how many emails the Plaintiff had before he would answer. (R. p. 745).

[22] There was also evidence that McElveen was responsible for the publication of the article following Mr. McAlhaney's arrest. The article contained details from an affidavit McAlhaney had filed in McElveen's custody case in which McAlhaney was not a named party. (R. pp. 320-322; R. p. 176-177). As was argued to the jury, only a person with knowledge of this particular affidavit would know to look for it in a case file that did not bear McAlhaney's name.

[23] The trial court noted the campaign lasted "a good little while" and the Court of Appeals found the conduct lasted at least a year. (App. p. 784; App. p. 6).

ad litem or any member of law enforcement. (R. pp. 694, lines 19-p. 701, line 14; p. 617, lines 4-11). Yet he wrote a letter to the Governor calling Mr. McAlhaney a child abuser.

Despite efforts to get McElveen to cease and desist from making defamatory statements, McElveen instead escalated the attack on Mr. McAlhaney's character, following through on his threat to give McAlhaney "all the attention he needed." At trial, McElveen directly contradicted multiple witnesses, including his own.[24] In resolving the credibility disputes, the jury must have found a considerable amount of his testimony was knowing falsehoods.

(4-5) Similar past conduct and the Deterrent Effect on Defendant: The evidence supports a finding that McElveen engaged in repeated accusations against Mr. McAlhaney, and not merely an isolated occasion. There was also evidence from Dale McCullers' deposition that McElveen falsely accused him in family court affidavits filed in 1997 and 2003 of physically abusing his daughter in connection with custody proceedings. (R. p. 505, lines 17-p. 507, line 8; p. 5111, line 12-p. 512, line 10). The similarity is, in fact, uncanny. *See* Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 360, 725 S.E.2d 112, 119 (Ct. App. 2012) ("Magnolia") (for analysis of case law on admissibility of past acts as proof of punitive damages if past acts are substantially similar). The evidence showed McElveen's *modus operandi* of putting identical language in the mouths of others when fabricating

[24] Compare, e.g., Testimony of Julia Peters (R. pp. 346-347) and Assistant Solicitor Angela McCall-Tanner (R. pp. 357-360) with Testimony of Richard K. McElveen, Sr. (R. pp. 666-669 and pp. 497-498).

allegations of abuse.[25] Given McElveen's past similar conduct, the deterrent effect of the damage award is especially important. [26] [27]

(7) The Defendant's Ability to Pay: As discussed above, the court considered Petitioner's ability to pay in remitting the punitive damages verdict. The evidence at trial was that McElveen's net worth was around $2 million. However, ability to pay is not a determinative factor in a punitive damage analysis.[28] Even if the evidence does not establish a defendant's ability to pay, a punitive award can be upheld if there are sufficient findings on other relevant factors. [29]

(8) Other factors: It is important to note that McElveen's allegations were used in the abuse of legal processes designed to protect children. McElveen abused the trust of numerous well-intentioned people during his campaign.[30] The misuse of the state's inclination to protect the vulnerable is a deeply cynical and disturbing form of misconduct and should properly be regarded as reprehensible.

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[25] *See* McElveen's affidavit in which he quotes Dale McCullers calling his daughter "a monster capable of anything." (R. p. 683); McElveen's account to Julia Peters calling him a "monster." (R. p. 668); McElveen's email to Brian Baird stating unidentified people said McAlhaney was "capable of anything." (R. p. 744).

[26] At the time this case was tried, the "deterrent effect on others" was still a proper consideration for the jury. *Cf.* Hollis v. Stonington Development, LLC, , 394 S.C. 383, __, 714 S.E.2d 904, 914 (Ct. App. 2011) (noting the deterrent effect on others in not a proper consideration in a punitive damages analysis). However, deterrent effect of punitive damages on the individual Defendant remains a valid factor. Id.

[27] Gamble Factor Number (6), "Whether the award is reasonably related to the harm that is likely to result" is discussed above at p. 16.

[28] Magnolia, 397 S.C. 377, 348, 775 S.E.2d 112, 128; *citing* Miller, 322 S.C. 224, 231-32, 471 S.E.2d 683, 687-88 (1996) (rejecting appellant's argument that the trial court erred in failing to strike the punitive damages award because the record did not establish that he had an ability to pay and holding the trial court was not required to make specific findings of fact for each Gamble factor.)

[29] "[E]ven if the record did not establish that [appellant] ... had an ability to pay, the judge's findings on the remaining factors are sufficient to uphold the jury's award of punitive damages." Magnolia, at 232, 471 S.E.2d at 687.

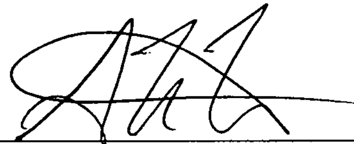
[30] The jury was instructed on the roles of the grand jury, *guardian ad litem*, the judiciary and investigators in child abuse cases. (R. pp. 590-594, 5999, 611-612, 616).

Applying the evidence to the law charged, the court cannot say that the punitive damage award was motivated by something *outside of the evidence* as a matter of law.

CONCLUSION

The trial court properly exercised its discretion in denying the Petitioner a new trial absolute. A new trial absolute is reserved for those rare cases rare where there is no explanation for a verdict other than a mistake or motivations outside the record. Both the trial court and Court of Appeals reviewed the record in this case and came to the same conclusion: The Petitioner's "atrocious and intolerable" conduct required the strongest message possible. Both courts understood exactly how the jury reached its verdict on these facts. Accordingly, the Petition for Writ of Certiorari should be DENIED.

Respectfully Submitted,



By: ______________________

D. Michael Mathison
S.C. Bar # 101803
Robert V. Mathison, Jr.
S.C. Bar # 3685
Mathison & Mathison
Post Office Box 5271
Hilton Head Island, SC 29938

Louis O. Dore
Dore Law Firm, PA
Post Office Box 2478
Beaufort, SC 29901

ATTORNEYS FOR THE RESPONDENT
Matthew S. McAlhaney

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 5328 (S.C. Ct. App. filed July 15, 2015)
Appellate Case No. 2015-001929

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.

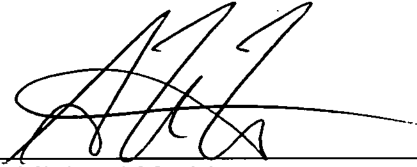
of whom, Richard K. McElveen, Sr., is the . . . . Petitioner.

PROOF OF SERVICE

I, D. Michael Mathison, hereby certify that, on December 3, 2015, I filed and served the original and copies of the Respondent's Amended Return to the Petitioner's Petition for a Writ of Certiorari, by delivering the original and six copies of same to the Clerk of the Supreme Court of South Carolina, and by delivering one copy to opposing counsel, in each instance addressed as follows:

The Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

Blake A. Hewitt, Esquire
John S. Nichols, Esquire
Bluestein, Nichols, Thompson & Delgado, LLC
1614 Taylor Street
Columbia, South Carolina 29201



D. Michael Mathison
S.C. Bar No. 101803
Attorney for the Respondent
Matthew S. McAlhaney