The State of South Carolina
In The Court of Appeals

Appeal from Charleston County
Hon. Deadre Jefferson, Circuit Court Judge

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SC Court of Appeals

Case No. 2014-CP-10-4591

Jane Doe 202, Appellant

v.

City of North Charleston,
Leigh Anne McGowan, individually,
Charles Francis Whollеb, individually,
Anthony M. Doxey, individually Respondents

Appellant's Initial Brief

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Statement of Issues on Appeal

1. Did the trial court err in directing a verdict on the State Created Danger cause of action, on the ground that no third party was involved?

2. Did the trial court err in responding to a jury question about whether damages were needed to find 1983 liability?

Standards of Review

As to the trial court directing a verdict on the state created danger cause of action on a theory claimed to be incorrect as a matter of law, the factual record is to be viewed in the light most favorable to the appellant. *Quesinberry v. Rouppasong,* 331 S.C. 589, 503 S.E.2d 717 (1998); *Gamble v. International Paper Realty Corp.,* 323 S.C. 367, 474 S.E.2d 438 (1996). The court's decision reviewed for an error of law, which would be an abuse of discretion. *Sharps v. Sharps*, 342 S.C. 71, 79, 535 S.E.2d 913, 917 (2000).

As to the trial court's refusal to instruct the jury as requested in response to a question submitted during deliberations about evidentiary burden, review is of the charge as a whole and an error of law is committed if the charge is misleading. E.g., *Wright v. Hiester Construction Co., Inc.*, 389 S.C. 504, 517-518, 698 S.E.2d 822, 829 (Ct. App. 2010). A recharge must fairly respond to and cover "the parts of the initial charge which are necessary to answer the jury's request." *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985).

Statement of the Case

At 10:14 p.m. the night of March 27, 2014, North Charleston police officer McGowan responded to a "verbal disturbance" call made at 10:05 p.m. and arrived at Jane Doe's[1] split-level residence to find a quiet scene. Exhibit 2, 10-3-17 p. 202, 10-5-17 p. 157. No one answered when she knocked on the door. Exhibit 2, 10-3-17 p. 175. She proceeded to look about the front and back yard. Seven minutes later, at 10:21 p.m., McGowan reported finding fresh blood on the outside surface of a leather bag in the back yard, 10-3-17 p. 177, which would later be described as such a quantity of fresh blood that an emergency was presented in the form of someone seriously bleeding that required warrantless entry. 10-3-17 p. 156.

But McGowan took no immediate action. She agreed that she did not claim, "I have got an emergency on my hands." 10-3-17 p. 149. Instead, McGowan asked the dispatcher to get more information from the neighbor who called.

At 10:23 p.m. the dispatcher did as asked, and advised McGowan:

> COMP ADV IT LOOKS TO BE A DISTURBANCE BTWN MOTHER AND DAUGHTER, ADV MOTHER DEMENTIA AND LOCKED THE DAUGHTER OUT OF THE HOUSE, ADV DAUGHTER WENT OFF TO THE LEFT OF THE RESD, ADV THE MOTHER SLEEPS ON THE COUCH IN THE LIVING ROOM.

The audio dispatch of the recording, which is part of the record, is clear that McGowan was told the mother, Jane Doe, had dementia. Audio recording. McGowan then spoke with the neighbor herself.

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[1] The plaintiff is referred to by pseudonym by order of the trial court. Order of February 13, 2015, which granted the motion to use a pseudonym through trial. Motion to Use Pseudonym.

At 10:33 p.m., 19 minutes after McGowan first arrived, and 12 minutes after she claimed to have found substantial quantities of fresh blood, police forced warrantless entry into Jane Doe's house. Exhibit 2. Defendants McGowan and Wohlleb forced entry through a sliding door in the back of the house. 10-3-17 p. 180, 10-5-17 p. 156. Defendant Doxey entered shortly thereafter by the now open sliding glass door. 10-5-17 p. 158.

Inside the house the officers encountered the plaintiff, then 66 years old, who had come downstairs. 10-5-17 p. 213. Jane Doe has an aggressive form of Alzheimer's disease. 10-6-17 p. 68. For 16 months before the warrantless entry she had been cared for by her daughter, 10-6-17 pp. 66 – 67, 151 – 152, who during the warrantless entry was asleep upstairs. 10-6-17 p. 141 - 142. By March 2014, Jane Doe had lost the ability to prepare food for herself, dress herself, toilet herself, or even dial the telephone. 10-3-17 at p. 213. When the officers encountered Jane Doe in her home after their forced entry, the officers asked the plaintiff if "everything was okay," and she told them it was. 10-5-17 p. 157-158. In other words, the officers were told almost immediately that no emergency was present.

Rather than stop there and withdraw, the officers had Jane Doe escort them upstairs to her daughter's bedroom where defendant McGowan woke the daughter, demanding to know how much the daughter had to drink. 10-6-17 p. 142. The daughter testified, "I can see a large figure in my room and I started yelling get out of my house. And I was flipped out of my bed...." 10-6-17 p. 142. The daughter thought she was about to be raped, 10-6-17 p. 145, and yelled to her mother to "stay out of it." Id. She got a rug burn on her knee during that struggle with McGowan on the floor, 10-6-17 pp. 142 – 144, and the day after she got out of jail she went to the emergency room for her other injuries from having been flipped to the floor. 10-6-17 pp.

153 - 154. Officer McGowan claims the daughter attacked her, e.g., 10-3-17 p. 166, but McGowan had no injury. 10-3-17 p. 21.

Within eight minutes of making warrantless entry, police had arrested the daughter, Exhibit 2, and charged her with assaulting a police officer. E.g., 10-6-17 p. 148 – 149. She was removed and taken to jail. Exhibit 2.

S.C. Code § 43-35-25(A) obligates police officers to report a vulnerable adult likely to be neglected. After removing the daughter who cared for her, no report was made about Jane Doe. No policy or practice of the NCPD was violated when Jane Doe was left behind to fend for herself.

Having made an arrest inside the house, McGowan and the other officers had to demonstrate that the warrantless entry that put them inside the house was proper. E.g., *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684 (1990) (arrest overturned due to lack of justification for warrantless entry). As noted above, the supposed extensive fresh blood on the bag was not preserved in any way: neither by taking the bag into evidence, nor by any of the three officers photographing it with the cell phone camera each of them carried. Police Chief Driggers agreed that without the blood the urgency for the warrantless entry was not present. 10-3-17 p. 141. The bag was simply left behind. Only when defendant McGowan was deposed was the bag understood to be what was claimed to have had substantial fresh blood on it on the night of March 27, 2014.

After the daughter was removed from the house, it is undisputed that no provision was made for Jane Doe's care. She was alone at night for the first time in 16 months, and was without food for over 13 hours, until her brother found out she had spent the night alone. 10-3-

17 p. 211. When asked to describe the state he found her in when he arrived to check on her, he testified:

> I went first to check on my sister . . . because I knew she had been alone since the night before and made sure physically and mentally what was her state of mind.
>
> Q. How did she seem in terms of her state?
>
> A. She was a wreck, crying, shaking, just kept saying something bad happened. It was terrible. It was terrible.

10-3-17 p. 211. He got her something to eat, and drink, and calmed her down. 10-3-17 pp. 211 - 212. It took 15 – 30 minutes to calm her. 10-3-17 at p. 212.

Jane Doe remained in the same adult diaper for over 17 hours, until Jane Doe's brother could get her daughter, his niece, back to the house and the daughter could change Jane Doe and clean her up. 10-3-17 at p. 212 – 213. Jane Doe's diaper had been soiled by a bowel movement. 10-6-17 p. 150.

The following day, March 29, Jane Doe's brother found Jane Doe so profoundly confused that he called an ambulance and had her examined at MUSC, the Medical University of South Carolina. 10-3-17 at p. 214. She was admitted to the hospital and was found to have a urinary tract infection. Dr. Broadway video deposition at pp. 29-30. MUSC Record 1-299. Jane Doe was hospitalized for 18 days. 10-6-17 p. 157. Her doctor agreed to a reasonable degree of medical certainty, that leaving her in an adult diaper for over 17 hours increased the risk to her of a urinary tract infection, and such infections can cause confusion. Video deposition transcript of Dr. Broadway at pp. 29 – 30.

By 2014, the leather bag that supposedly had substantial fresh blood on it the night of March 27, 2014, had been used by Jane Doe's daughter, a photographer 10-6-17 p.144, for ten

years by 2014. 10-6-17 p. 133. She has used it as her bag for tools and for gardening. 10-6-17 p. 133-134. In those ten years, blood has occasionally contacted the outside of the bag, and has stained the outside of the bag. Exhibit 1.[2] Short of forensic analysis, only one blood stain is visible, and that lone visible stain is smaller than a dime. The bag has never been wiped or cleaned, as it is a utilitarian bag. 10-6-17 at p. 133. The daughter had no explanation for the claim of fresh blood on March 27. 10-6-17 p. 135. She had not hurt herself that day. 10-6-17 p. 134 – 135.

No bloods stains on the bag correspond to the "several" fresh blood spots claimed by police, each "about quarter or half dollar size," some "dripping off the edge" as claimed by the officers. 10-5-17 p. 155, Exhibit 1. No evidence of the supposed substantial fresh blood was preserved by any evidentiary method, not even by any officer taking a photograph of the supposed fresh blood with the cell phone camera each carried. E.g., 10-05-17 p. 169 – 170. Nor did the defendants ever ask to test or to inspect the bag, even after it was identified.

The daughter has no prior criminal record and after her criminal defense counsel submitted a motion to challenge the warrantless entry, an agreement was reached that resulted in the charge against her being *nol prossed* and the charge has now been expunged. E.g., 10-9-17 p. 182.

This case was initiated for Jane Doe by those who hold her power of attorney, challenging for Jane Doe the allegedly fabricated "fresh blood" basis for warrantless entry and to challenge Jane Doe having been left to fend for herself after her daughter was removed by

[2] Exhibit 1 is the bag itself. For the record on appeal, photographs have been substituted for the item itself.

police. The primary theory of the case was the "state created danger" theory for liability under 42 U.S.C. § 1983 (state actors taking affirmative acts to increase risk of harm to another).[3] During the charge conference, the trial court decided to direct a verdict as to State Created Danger cause of action, contending:

(a) that the claim "wasn't pled." (10-10-17 p. 705),

(b) that no facts supported the theory (10-10-17 p. 704), and

(c) that the theory "was not created for these type facts." (10-10-17 p. 705), referring to the defense argument (10-10-17 at p. 636) that "there is no third party – no one else came in and hurt" the plaintiff; see also, 10-10-17 at p. 285 ("It's the third party"). Meaning that as contended by the defense, without a third party's involvement there can be no State Created Danger.

The initial charge to the jury appears at 10-12-17 pp. 865 – 898. State Created Danger was, of course, removed from the charges given, but the charge included that liability under 42 U.S.C. § 1983, can be proven without damages, 10-12-17 at p. 884, and that such proof of liability would require an award of nominal damages. Id.

During deliberations the jury asked a series of questions which were handled without objection until the jury asked its last question, identified as Court's Exhibit 25 (10-13-17 p. 952):

> For there to be a violation of a civil right, 4th Amendment, the plaintiff must demonstrate through the preponderance of the evidence to be bodily harm or injury or mental i.e. damages?

The trial court, at 10-13-17 p. 952, construed the question this way:

> I'm trying really to figure out what they're asking. I'm not certain whether they have the concept of proximate cause or damages confused. I think the remedy is

[3] The trial also challenged various training, or lack of training, aspects of North Charleston, which are not part of this appeal.

> to just reinstruct them on the elements of 42 U.S.C. 1983 and what must be proven in order to establish.

To fully meet that objective in answering the jury's question, the plaintiff requested (10-13-17 at p. 953) that the recharge include that portion of the liability charge that explains that a constitutional violation can be proven without proof of damages (the nominal damage liability charge). That request was made to give the jury a proper response to the scope of its question about proving liability and would provide the jury with the correct context to answer its question whether proof of damage was required to find 1983 liability.

The court refused that request and gave a recharge (10-13-17 p. 960 to 967) which omitted that 1983 liability can be proven without damages, the "nominal damage" aspect of the charge. The recharge included only, and in isolation, at 10-13-17 p. 964, that:

> the plaintiff must prove by the greater weight or preponderance of the evidence that the constitutional violation was the proximate cause of her injuries.

The plaintiff's exception to that recharge is at 10-13-17 p. 967. The charge the plaintiff requested was this portion of the court's initial charge (at 10-12-17 p. 884 in the initial charge, which completes the proof elements for a claim under 42 U.S.C. § 1983):

> if you return a verdict for the plaintiff on a section 1983 claim but the plaintiff has failed to prove actual or compensatory damages for her claims then you must award nominal damages of one dollar for that claim.
>
> A person whose federal rights were violated is entitled to a recognition of that violation even if he or she suffered no actual injury. Nominal damages such as one dollar are designed to acknowledge the deprivation of a federal right even where you find no actual injury occurred.

Thirteen minutes after the recharge in response to its last question, the jury returned a defense verdict.

This appeal followed.

Argument

1. The trial court erred in directing a verdict on the State Created Danger cause of action under 42 U.S.C. § 1983.

In the record at 10-10-17 p. 704 to 706, the trial court directed a verdict on the State Created Danger cause of action, removing the heart of the plaintiff's case. The court's theory was based on the plainly erroneous impressions that:

(a) that the claim "wasn't pled." (10-10-17 p. 705),

(b) that no facts supported the theory (10-10-17 p. 704), and

(c) that the theory "was not created for these type facts." (10-10-17 p. 705), referring to the defense argument (10-10-17 at p. 636) that "there is no third party – no one else came in and hurt" the plaintiff; see also, 10-10-17 at p. 285 ("It's the third party").

These are plainly erroneous legal conclusions for which the trial court must be reversed and a new trial ordered.

A. The trial court's erroneous impression that the claim was not pled: in fact, it was pled explicitly.

The second amended complaint states:

> 67. Defendants . . . were deliberately indifferent to the danger each of them created for Jane Doe by their affirmative actions to remove her caregiver and leave Jane Doe to fend for herself.

In addition, the second amended complaint alleges (¶ 68) that each defendant had reason to believe Jane Doe was a vulnerable adult likely to be neglected due to the conduct of the defendants, and each violated a criminal statute which requires law enforcement to report a vulnerable adult.

Those allegations were incorporated into the second cause of action (Second Amended Complaint at ¶¶ 112 to 119), which specifically alleged State Created Danger against the individual defendants for their having taken affirmative acts that increased the risk of harm to Jane Doe. The cause of action could hardly have been more specifically stated in the pleading.

The trial court erred in concluding that the cause of action was not pled.

The court's erroneous conclusions that B. no facts supported the theory and **C. that the theory was not created for "these type facts."**

State Created Danger applies any time a state actor takes affirmative action which *causes or increases* the risk of harm to another person. There are no particular "type of facts" of affirmative acts which cause or increase risk of harm that are required for the theory to apply.

The trial court erred as a matter of law and imposed an incorrect legal standard on the State Created Danger liability claim under 42 U.S.C. § 1983. That incorrect standard (that a third party was required for harm) was, of course, advocated by the defendants, as noted above.

In response to the motion for directed verdict, the trial court was required to view the evidence in the light most favorable to the plaintiff. *Quesinberry v. Rouppasong,* 331 S.C. 589, 503 S.E.2d 717 (1998); *Gamble v. International Paper Realty Corp.,* 323 S.C. 367, 474 S.E.2d 438 (1996). Any error of law is an abuse of discretion by the trial court. *Sharps v. Sharps*, 342 S.C. 71, 79, 535 S.E.2d 913, 917 (2000).

The elements for State Created Danger are that a state actor take affirmative acts which create or increase the risk of harm to another. E.g., *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015)(emphasis added, citations omitted):

> [T]o establish § 1983 liability based on a state-created danger theory, a plaintiff must show that the state actor ***created or increased the risk of private danger, and did so directly through affirmative acts***, not merely through inaction or omission. Put another

way, "state actors may not disclaim liability when they themselves throw others to the lions…."

Two affirmative acts by state actors are undisputed in this record: that the individual defendants McGowan, Wohlleb and Doxey made warrantless entry and that as a result of that warrantless entry, the plaintiff's daughter was removed. E.g., Exhibit 2. It is undisputed that for sixteen months prior to the warrantless entry, the daughter had provided her mother's food, clothing, and toileting, and it is undisputable that the conduct of the defendants changed the *status quo* of the plaintiff's care, and undisputed that the defendants acted under color of state law.

The end result of the defendants' affirmative acts, it is undisputed, was to leave the plaintiff to fend for herself when she could no longer feed herself, toilet herself, change herself, or use a telephone to summon the help of others. It was also undisputed that after she had been alone for over 13 hours the plaintiff's brother testified that she was "a wreck, crying, shaking, just kept saying something bad happened. It was terrible. It was terrible." 10-3-17 p. 211.

Dr. Broadway confirmed that when, three days later, she had a urinary tract infection, that her having been in her soiled adult diaper for over 17 hours increased the risk of her having a UTI. (Dr. Broadway video transcript pp. 29- 30). Even the defense expert, Dr. Bolus, agreed that a person could develop a urinary tract infection "by sitting in a dirty adult diaper for 12 to 15 hours." Bolus video dep. at p. 17.

The objective evidence includes that the police dispatcher plainly and audibly told officer McGowan, that the plaintiff had dementia. Audio recordings and Exhibit 2. It is undisputed that the affirmative acts by the state actor defendants in removing the daughter changed the *status quo* for the plaintiff's care. It is undisputed that no notice was given to any other family member,

no provision was made for the plaintiff's care, and no report about the plaintiff's isolation was made. S.C. Code § 43-35-25 imposes on law enforcement a duty to report when that officer has "reason to believe that a vulnerable adult has been or is likely to be abused, neglected, or exploited." Even under state law the defendants had an obligation to report which was not made.

The court's conclusion that no facts supported the State Created Danger claim was clearly erroneous. Affirmative acts had plainly increased the risk of harm to Jane Doe by isolating her.

The court's third reason for directing a verdict on the State Create Danger theory was that no third party had intervened to harm the plaintiff. In other words, because her harm derived from the affirmative acts of state actors who isolated her when she could not care for herself, as the court believed that as a matter of law those facts could not support a State Created Danger claim under federal law.

The trial court plainly erred. A number of federal cases have long recognized that 1983 liability does not require that a third person enter the picture as the instrument of harm after police officer conduct. The most directly parallel case is *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979), where liability for police officers included the emotional injury caused when Chicago police officers arrested an adult and left three minor children alone in the car in which the adult had been driving them on a busy highway in cold weather.

Liability under 42 U.S.C. § 1983 has also been recognized in other contexts that lacked third party involvement. E.g., police were found liable for an inebriated woman's injuries from a fall and prolonged exposure to cold after police stopped she and her husband walking home, separated her from her husband, and even though she was inebriated, compelled her to walk

alone the last 1/3 of a block to her home. *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996). State actors have been held liable for suicides, where obviously no third party is involved, such as in *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253 (10th Cir. 1998) (school official liability for student suicide after he was sent home for threat to teacher); *Sloane v. Kanawha County Sheriff Dept.*, 342 F.Supp.2d 545 (S.D. W.Va. 2004) (law enforcement liability for suicide by 17 year old after interrogation). Police were also found liable under State Created Danger when they arrested a drunk driver but left behind, with the car keys, an intoxicated passenger, who then caused injury by driving the same car. *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1996).

The trial court plainly erred as a matter of law by finding that no 1983 liability can be found on a record that reflects police taking affirmative acts to remove the plaintiff's caregiver and the harm occurs from the resulting isolation that the officers caused. A new trial should be ordered.

2. The trial court erred in its recharge to the jury when it omitted the instruction that 1983 liability can be proven without proof of damages.

During its deliberations, the jury asked a question, identified as Court's Exhibit 25 (10-13 p. 952):

> For there to be a violation of a civil right, 4th Amendment, the plaintiff must demonstrate through the preponderance of the evidence to be bodily harm or injury or mental i.e. damages?

The trial court, at 10-13 p. 952, construed the question:

> I'm trying really to figure out what they're asking. I'm not certain whether they have the concept of proximate cause or damages confused. I think the remedy is to just reinstruct them on the elements of 42 U.S.C. 1983 and what must be proven in order to establish.

The plaintiff requested (10-13 at p. 953) that in response to that question the jury be again instructed as to liability so as to include the liability charge that even with no proof of damages, nominal damages must be awarded if a constitutional violation has occurred. Only by including that charge would a proper response be given to the jury's question. Proof of damage is not required to find 1983 liability. The court refused that request, and gave a recharge (10-13-17 p. 960 to 967) which omitted the nominal damage method of proving 1983 liability and included only, and in isolation, at p. 964, that:

> the plaintiff must prove by the greater weight or preponderance of the evidence that the constitutional violation was the proximate cause of her injuries.

The recharge is misleading because it omits that a constitutional violation alone entitles a plaintiff to nominal damages and suggests the erroneous proposition of law that there can be no constitutional violation found unless a jury also finds injuries proximately connected to the constitutional violation.

A jury charge may not be misleading. E.g., *Wright v. Hiester Construction Co., Inc.*, 389 S.C. 504, 517-518, 698 S.E.2d 822, 829 (Ct. App. 2010). A recharge must fairly respond to and cover "the parts of the initial charge which are necessary to answer the jury's request." *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985). The trial court committed an error of law when it provided an incomplete response to the jury's question about whether damages were necessary for 1983 liability.

The trial court recognized that the jury was confused about "proximate cause or damages," as noted above, but gave a recharge insufficient to address the recognized scope of the question, and that erroneous recharge, we contend, was misleading without the nominal

damage charge that makes clear that proving damages is not required to prove a violation of 42 U.S.C. § 1983. That misleading element was prejudicial to the plaintiff, and (as expected) once the recharge was given, the jury, having deliberated for nearly a day, returned a defense verdict in 13 minutes (compare 10-13-17 p. 966 to 10-13-17 p. 968). The trial court abused its discretion and gave an erroneous charge that failed to respond to the question asked, and which distorted the liability standard for 1983 liability. The plaintiff's exception is at 10-13-17 p. 967. A motion for a new trial on that ground was denied by the trial court. 10-13-17 at p. 973.

A recharge must fairly answer the question asked. The court's recharge failed to properly cover the breadth of the question asked.[4] A new trial on this aspect of the case should be ordered due to the misleading nature of the recharge, because the charge given was misleading and failed to respond to the scope of the question asked.

---

[4] The charge requested was this portion of the court's initial charge (at 10-12-17 p. 884 in the initial charge, which is required to complete the proof elements for a claim under 42 U.S.C. § 1983):

> if you return a verdict for the plaintiff on a section 1983 claim but the plaintiff has failed to prove actual or compensatory damages for her claims then you must award nominal damages of one dollar for that claim.
>
> A person whose federal rights were violated is entitled to a recognition of that violation even if he or she suffered no actual injury. Nominal damages such as one dollar are designed to acknowledge the deprivation of a federal right even where you find no actual injury occurred.

Conclusion

For the reasons set forth above, the judgment should be reversed and a new trial ordered.

Respectfully submitted,

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Jane Doe 202, Appellant

v.

City of North Charleston,
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Charles Francis Wholleb, individually,
Anthony M. Doxey, individually Respondents

Proof of Service

I hereby affirm that I have served upon counsel for the defendant/respondent a copy of

Appellant's Initial Brief and Designation

By placing a copy of the documents in the United States mail, first-class postage pre-paid, addressed to:

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Done March 26, 2018.

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RECEIVED
MAR 28 2018
SC Court of Appeals

March 26, 2018

Hon. Jenny Abbott Kitchings
Clerk of Court
Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: Doe 202 v North Charleston et al., 2014-CP-0-4591

Dear Ms. Kitchings:

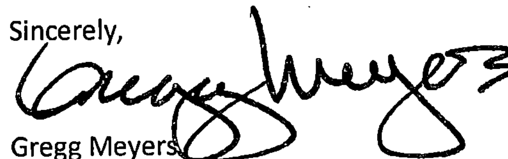
Pursuant to SCACR 208 and 209, enclosed please find a copy of:

A proof of service,
An initial brief of appellant, and
Appellant's designation of matter to be included in the record.

Please file these documents with the court.

Thank you very much.

Sincerely,



Gregg Meyers

Enclosures:
Proof of Service
Initial Brief
Designation

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