THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2014-CP-10-4591
Appellate Case No. 2017-002392

Jane Doe 202, by John Doe MM and John Doe HS, each of whom holds power of attorney for Jane Doe,.....Appellant,

v.

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

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

The original Summons and Complaint was filed on July 25, 2014, followed by an Amended Summons and Complaint on July 31, 2014, and a Second Amended Summons and Complaint on September 9, 2014. Defendants filed a Motion for Summary Judgment which was granted in part and denied in part by Order filed on August 10, 2016. In her Complaint, Plaintiff alleged eleven different causes of action. After Summary Judgment, Plaintiff was left with only three causes of action. The case was eventually tried before a Charleston County jury beginning on October 2, 2017, and ending on October 13, 2017. At trial, the court directed a verdict in Defendants' favor on Plaintiff's state law cause of action for Invasion of Privacy. (*See* Order, Jan. 12, 2018).[1] Thereafter, the § 1983 claims against the City and the individual officers were submitted to the jury for consideration.

On October 13, 2017, the jury returned an answer of "no" to the following question: "Do you find that the Plaintiff has proven by a preponderance of the evidence that the City of North Charleston violated Rhonda Doe's constitutional rights by being deliberately indifferent with regard to training its officers?" (R. pp. 4-5). With regard to the three individual officer defendants, the jury answered "no" to the following question for each officer: "Do you find that the Plaintiff has proven by a preponderance of the evidence that [the individual officer] violated Rhonda Doe's constitutional rights by making a warrantless entry into Rhonda Doe's residence on the night of March 27, 2014?" (R. pp. 6-11). By answering in the negative to the first question on each Verdict Form, the jury returned a unanimous verdict for the Defendants as to each remaining cause of action.

[1] This Order was inadvertently left out of the Designation of Matter filed by Respondents and therefore, is not included in the Record on Appeal.. The undersigned is currently working on a motion to allow a Supplemental Record to be submitted to the Court.

Plaintiff made a Motion for a New Trial with the only argument being based on the failure to recharge the jury for a third time on damages. (R. p. 514, lines 4-14). This Motion was denied on the record as well as in an Order filed on October 16, 2017. (R. pp. 2-3 & 515-517). Defendants submitted two post-trial motions for costs and fees based on state and federal law. (R. pp. 80-320). These Motions were denied by the Court. (R. pp. 12-32).

STATEMENT OF THE FACTS

In 2013 and 2014, Jane Doe 202 was suffering from dementia. Her daughter, Daughter Doe, returned from Europe in late 2012 and moved in with her mother. Prior to her daughter's return home, Jane Doe had been seeing doctors on a regular basis. However, from July 2013 until March 29, 2014, Daughter Doe did not take her mother to be seen by a doctor. (R. p. 568, line 25 – p. 570, line 14 & p. 374, line 3-p. 375, line 1). The reason Jane Doe was finally taken to a doctor on March 29, 2014, was because she had increasing levels of confusion from being left alone on multiple occasions over a 48-hour period. (R. p. 519, line 24 – p. 530, line 15). Jane Doe spent approximately two weeks in the hospital, and her condition and global functioning improved. (R. p. 530, line 16 – p. 533, line 21). Further, after her release, she was receiving in-home nursing care, seeing doctors on a regular basis, and was on medication. By all reports, Jane Doe improved considerably with this increased level of care. (R. p. 533, line 22 – p. 535, line 8). However, in early 2015, Jane Doe stopped receiving the home health care that had helped her, and she developed increased confusion. Daughter Doe eventually took her mother to the MUSC Institute of Psychiatry on March 31, 2015, where Daughter Doe left her for approximately 798 days until she was released to a nursing home on June 1, 2017. (R. p. 415, lines 15-24). An MUSC representative testified that this length of stay in an acute facility was uncommon. (R. p. 414, line 20 – p. 415, line 17). Also uncommon was the fact that MUSC petitioned the probate court for

guardianship of Jane Doe as there was concern that her best interests were not being considered. (R. p. 416, line 6 – p. 419, line 10).

The date of the incident that placed this lawsuit in motion was March 27, 2014. On that night, one of Jane Doe's neighbors called the police to report a domestic disturbance across the street. (R. p. 406, line 4 – p. 411, line 19). The City of North Charleston Police Department was dispatched to this domestic disturbance, and Officer McGowan was the first to arrive. (R. p. 324, lines 11-23 & p. 332, line 7 – p. 333, line 19). She noted that no one was in the yard and no one was answering the front or back doors when she knocked. (R. p. 324, line 11 – p. 326, line 2 & p. 334, line 10 – p. 337, line 4). Further, she noted that the dome light of the vehicle in the driveway was on, a pair of high heel shoes were outside the driver's side door, and a purse with what appeared to be blood on it was on the ground in the backyard. (*Id.*) Officer McGowan did not make an exigent entrance at that time, but rather continued to investigate and called dispatch to make contact with the complainant, Jake Sadler. (R. p. 326, line 7 – p. 327, line 9 & p. 337, line 25 – p. 338, line 5). As McGowan was alone, she also waited on back-up officers, Doxey and Wohlleb, to arrive to determine the best course moving forward. (R. p. 327, line 14 – p. 328, line 10). Based on what they knew at the time, Officers McGowan and Wohlleb determined an exigent entrance was necessary to check on the welfare of the woman who had just been outside the house yelling and screaming. (R. p. 339, line 19 – p. 340, line 24).

While Appellant contends that there were ulterior motives for entering the house, the uncontested testimony is that the officers' first questions to both Jane Doe and Daughter Doe were "Are you okay? Do you need any medical attention?" (R. p. 341, lines 5-16 & p. 344, line 20 – p. 345, line 1). All three officers interacted with Jane Doe and none of the officers had any indication that she was suffering from dementia, that she was incapable of caring for herself, or

that she could not be left alone. (R. p. 341, line 2 – p. 344, line 4, p. 363, line 3 – p. 365, line 5, & 368, line 14 – p. 369, line 12). Further, Daughter Doe never told Officers McGowan, Wohlleb, or Doxey that her mother had dementia, that she could not be left alone, or that she could not care for herself. (*Id.*) The fact that the officers did not and likely would not have recognized that Jane Doe had dementia was confirmed by Jane Doe's own psychiatrist. (R. p. 571, line 24 – p. 575, line 8).

Jane Doe was able to communicate with the officers that her daughter was upstairs and she led them to her daughter's room. (R. p. 343, line 5 – p. 344, line 19). Once there, the officers found Daughter Doe lying on top of her covers, with all of her clothing on, and with a large red wine stain down the front of her shirt. (*Id.*) After Daughter Doe woke up, the officers talked with her and asked if she was in need of medical assistance. (R. p. 344, line 20, - p. 345, line 1). The officers also advised Daughter Doe that her car was unlocked and her belongings were outside. (R. p. 345, line 23 – p. 347, line 8). Daughter Doe attempted to walk and was unsteady on her feet, and therefore, the officers offered to gather her belongings for her. (R. p. 346, lines 2-17). After the two male officers left, McGowan was in the bedroom alone with Daughter Doe and with Jane Doe just outside in the hallway. (R. p. 347, line 5-8). At some point, Daughter Doe became agitated and was speaking in a demeaning fashion to her mother. (R. p. 347, line 9 – p. 349, line 8). Daughter Doe then proceeded to come toward her mother with her arms flailing, but due to Officer McGowan being caught in the middle, Daughter Doe struck McGowan and poked her in the eye. (*Id.*) Daughter Doe was then arrested for Assault on Police. (*Id.*).

The following day around lunch time, Jane Doe's brother, John Doe SH, checked on Jane Doe, fed her some ice cream and felt that she was fine enough to leave her alone again to bail

Daughter Doe out of jail. (R. pp. 356-357 and Trial Tr. 99-102, Oct. 4, 2017).[2] Once Daughter Doe got home, she and John Doe SH left Jane Doe alone again so that Daughter Doe could go meet with a criminal defense attorney. (R. p. 389, lines 8-15). Then, the following day, March 29, 2014, Daughter Doe left her mother alone yet again so that Daughter Doe could go to the hospital from approximately 3pm to 7:30pm. (R. p. 392, line 18 – p. 393, line 13). While being left alone on March 29, Jane Doe wandered outside and had a neighbor call police to report a suspicious vehicle in her driveway. (R. p. 527, line 12 – p. 529, line 5). A North Charleston officer responded and determined that the vehicle was actually Jane Doe's daughter's vehicle. (*Id.*). Once the family did come home, EMS was called and Jane Doe was transported to MUSC. (*Id.*).

STANDARD OF REVIEW

"The standard of review for an appeal of an action at law tried by a jury is restricted to corrections of errors of law. A factual finding of the jury will not be disturbed unless there is no evidence which reasonably supports the findings of the jury." *Felder v. K–Mart Corp.*, 297 S.C. 446, 448, 377 S.E.2d 332, 333 (1989).

As to the first issue on appeal, when reviewing the trial court's ruling on a motion for a directed verdict, the appellate court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *RFT Mgmt. Co. v. Tinsley & Adams, L.L.P.*, 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012) (citing *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004)). An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 418 (Ct. App. 2000). In deciding such motions, neither the trial court

[2] This portion of the transcript was inadvertently left out of the Designation of Matter filed by Respondents and therefore, is not included in the Record on Appeal.. The undersigned is currently working on a motion to allow a Supplemental Record to be submitted to the Court

nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Id.* at 300, 536 S.E.2d at 419.

As to the second issue on appeal, in reviewing an alleged error in jury instructions, reversal of the trial court's decision is not warranted absent an abuse of discretion. *See Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (applying an abuse of discretion standard of review to an alleged error in jury instructions). An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). Furthermore, on appeal, the charge is to be reviewed as a whole. *See Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999) (finding a jury charge should be reviewed as a whole, and if the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error). When the jury requests additional charges, it is sufficient for the court to charge only 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) (citing 89 C.J.S. Trial Section 476 (1954)). The trial court's failure to charge in greater detail is not reversible error if the details were fully covered in the original charge. *Id.* (citing *Corbin v. Prioleau*, 260 S.C. 171, 194 S.E.2d 875 (1973)). "The scope of the recharge—determining what is necessary to answer the jury's request—is committed to the sound discretion of the trial court." *State v. Lee*, No. 2006-UP-326, 2006 WL 7286767, at *1 (Ct. App. Sept. 18, 2006).

ARGUMENT

I. DID APPELLANT PROPERLY PRESERVE HER APPEAL ON THE STATE CREATED DANGER DOCTRINE WHEN THE COURT DID NOT DIRECT A VERDICT ON THE ISSUE, WHEN THE COURT DID NOT ISSUE A WRITTEN ORDER DIRECTING A VERDICT ON THE ISSUE, AND WHEN APPELLANT DID NOT ARGUE ANY POST-TRIAL MOTIONS ON THIS ISSUE?

A. Appellant did not properly preserve this issue for appeal.

Appellant's assertion that the court directed a verdict on the state created danger cause of action is not supported by the trial record. Nowhere in the record or court filings is there any mention of such a directed verdict being issued, and therefore, this issue was not properly preserved.

"There are four basic requirements to preserving issues at trial for appellate review.... [T]he issue must have been (1) raised to and ruled upon by the [trial] court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the [trial] court with sufficient specificity." Jean H. Toal, Amelia W. Walker & Margaret E. Baker, *Appellate Practice in South Carolina* 185 (3d ed. 2016). "Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it." *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998).

Defendants made a directed verdict motion as to the State created danger doctrine at the end of Plaintiff's case which the trial court took under advisement. (R. p. 399, line 2 – p. 405, line 9). The defense rested the next day and Defendants renewed their directed verdict motion on the State created danger doctrine which was thoroughly argued by both sides, analyzed by the trial court, and ultimately denied. (R. p. 420, line 1 – p. 429, line 7). Prior to giving jury instructions, the court informed the parties that a directed verdict was being granted as to the state law claim for Invasion of Privacy. (R. p. 430, line 25 – p. 432, line 6). This was the only directed verdict granted in this case. Therefore, Appellant's assertion in her issues on appeal that the court directed a verdict as to the State created danger doctrine is simply incorrect.

During the charge conference, the court addressed the state created danger doctrine in the following way:

> Also as it regards the state created danger doctrine I do not believe there are any facts that have been produced that would support that theory. That of course does not preclude Mr. Meyers from arguing under the ambit of his theory of failure to train, which I'm still going to think about a little bit more but clearly the line of cases that deal with state created danger the type of facts that have been articulated in those cases simply do not in my estimation do not mirror the facts of this case. Each case of course is factually different but I don't think that this doctrine was created for these type facts.

(R. p. 432, ln. 23 – p. 433, ln. 9). Appellant asserts that the above statements from the court amount to a directed verdict on the State created danger doctrine. However, a review of the trial transcript shows that at most, the court only said it was not inclined to charge the jury on the doctrine. The court did not preclude Appellant from arguing it as part of her case and did not specifically direct a verdict on this issue. This is confirmed by the fact that the court issued only one Directed Verdict Order, not on the State created danger doctrine, but on the Invasion of Privacy claim. (Order, Jan. 12, 2018). Further, Plaintiff did not raise any objections to the above statements by the court and did not raise this issue with the court during the charge conference or in his post-trial motions. (R. pp. 432-434 & 514). Essentially, Appellant did not raise this issue at a time when the court could have provided an actual ruling directly on the State created danger doctrine. Instead, we are left with nebulous conversation during a charge conference. Therefore, the first issued presented by Appellant should be denied as it was not properly preserved for appellate consideration.

B. In the alternative, the trial court did not err in its decision regarding the State Created Danger Doctrine.

If the Court determines that Appellant's first issue was properly preserved and that a directed verdict was entered on the State created danger Doctrine, the trial court did not commit reversible error in directing a verdict on this issue.[3] In discussing the issue at trial, the trial court

[3] The United States Supreme Court has explained that "nothing in the language of the Due Process Clause itself requires the state to protect the life liberty, and property of its citizens against invasion by private

correctly pointed out that there are no other cases in South Carolina or other jurisdictions that involve a similar fact pattern to the facts of the present case. (R. p. 423, line 24 – p. 429, line 7 & p. 433, line 23 – p. 434, line 8). The trial court stated that "clearly the line of cases that deal with state created danger the type of facts that have been articulated in those cases simply do not in my estimation do not mirror the facts of this case." (R. p. 433, lines 3-7). The line of 4th Circuit cases referenced by the court all involve the presence of a third-party, private actor. This is evidenced by the only holding directly cited by Appellant in her brief. In the 4th Circuit case of *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015), the 4th Circuit held that in order to establish § 1983 liability based on a state-created danger theory, Appellant 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." (emphasis added). Appellant relies on this holding in her brief and also the subsequent quote from *Doe v. Rosa*: "Put another way, 'state actors may not disclaim liability when they themselves throw others to the lions...'" *Id.* These statements from the 4th Circuit both require third party involvement: "private danger" indicates a non-state actor causing harm and the mention of "lions" also necessarily involves the presence of third parties.

In her brief, Appellant states that "a number of federal cases have long recognized that 1983 liability does not require that a third person enter the picture..." in State created danger claims. However, the "number of federal cases" that Appellant cites are from circuits other than the Fourth Circuit. Appellant fails to cite a single opinion from the Fourth Circuit Court of Appeals that supports her position. Appellant cites only one district court case from West Virginia to support her position. However, perhaps a better guidepost on this issue is a recent decision from

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actors." *DeShaney v. Winnebago County DSS,* 489 U.S. 189, 195 (1989). However, the Court noted two exceptions to this general proposition which are the state custody exception and the state created danger doctrine. *Id.* at 199-201.

the federal District of South Carolina, which stated, "[a]s this Court has previously observed, 'the Supreme Court and the Court of Appeals have given little definition to the state created danger exception, and the *DeShaney* Court did little more than imply that the exception existed.'" *Watson v. Adams*, No. 4:12-CV-03436-BHH, 2015 WL 1486869, at *8 (D.S.C. 2015) (citing *Polcyn v. Martin,* No. 6:03–2327–HFF, 2005 WL 2654259, at *9 (D.S.C. 2005)).

A review of *Deshaney* and cases within the Fourth Circuit that cite the state created danger doctrine indicates that the Fourth Circuit has applied this doctrine only in situations involving harm by a third party. *DeShaney,* 489 U.S. 189 (1989) (DSS returned boy to father, despite knowing history of abuse, and boy subsequently killed by father); *Robinson v. Lioi*, 536 F. App'x 340 (4th Cir. 2013) (victim stabbed by estranged husband after defendant officer wrongfully avoided issuing warrant on husband); *Stevenson ex rel. Stevenson v. Martin Cty. Bd. of Educ.*, 3 F. App'x 25 (4th Cir. 2001) (alleging school defendant was responsible for assault on student by fellow students); *Doe v. Rosa*, 795 F.3d 429 (4th Cir. 2015) (alleging defendant did not protect campers from assault by camp counselor); *Pinder v. Johnson,* 54 F.3d 1169 (4th Cir. 1995) (mother assured by officer that abusive husband would be detained, but after officer charged lesser offense, husband went to house and killed three children); *Polcyn v. Martin*, No. 6:03-2327-HFF, 2005 WL 2654259 (D.S.C. Oct. 17, 2005) (officers placed intoxicated wife in husband's vehicle where the husband assaulted her and she eventually jumped from or was pushed from the moving vehicle); *Crittenden v. Florence Sch. Dist. One*, No. 4:16-CV-02014-RBH, 2017 WL 698647 (D.S.C. Feb. 22, 2017) (student physically assaulted by school employees); *Doe v. Berkeley Cnty. Sch. Dist.*, 189 F. Supp. 3d 573 (D.S.C. 2016) (alleging principal through affirmative acts increased risk of student-on-student assault).

One South Carolina District Court case that did not involve a third party is the case of *Watson v. Adams,* where officers fabricated evidence in order to have the decedent arrested for DUI. *Watson v. Adams*, No. 4:12-CV-03436-BHH, 2015 WL 1486869 (D.S.C. 2015). The decedent eventually committed suicide in jail. While that case did not explicitly allege the state created danger doctrine, the Court stated that it could "find no authority to support the proposition that a wrongful seizure or arrest that leads to a suicide is a state created danger." *Id.*, at *8.

Based on the prevailing law in the Fourth Circuit, the presence of a third-party (i.e. private danger) is required to prevail on a State created danger cause of action. Appellant did not and cannot prove this element in her case. Further, implicit in the state created danger doctrine is that harm actually occurred. Here, the testimony from Jane Doe's own doctor has indicated that there is no medical evidence that any harm actually occurred due to the police incident. Therefore, Appellant's argument is essentially that harm could have occurred or might have occurred, which is wholly unsupported by Fourth Circuit case law.

At a minimum, the law on the State created danger doctrine was not clearly established in 2014, and therefore, the individual officers would be entitled to qualified immunity. In evaluating a defendant's assertion of qualified immunity, the court is to apply the analysis set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), as modified by the Court's later decision in *Pearson v. Callahan*, 555 U.S. 223 (2009). *See Meyers v. Baltimore Cnty.*, 713 F.3d 723, 731 (4th Cir. 2013). The Court's holding in *Saucier* requires a two-step approach, under which a court first must decide whether the facts alleged or shown, taken in the light most favorable to the plaintiff, establish that the police officer's actions violated a constitutional right. *Saucier*, 533 U.S. at 201. When a plaintiff has satisfied this initial step, a court next must determine whether the right at issue was "clearly established" at the time of the officer's conduct. *Id.*; *see also Pearson*, 555 U.S. at 236

(modifying the *Saucier* approach such that lower courts are no longer required to conduct the analysis in the sequence set forth in *Saucier*). Thus, although a plaintiff may be able to prove that an officer has violated certain constitutional rights, the officer nonetheless is entitled to qualified immunity if a reasonable person in the officer's position "could have failed to appreciate that his conduct would violate those rights." *Torchinsky v. Siwinski*, 942 F.2d 257, 261 (4th Cir. 1991) (citation and internal quotation marks omitted). Further, "[i]f the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Saucier*, 533 U.S. at 202.

The United States Supreme Court has repeatedly told courts not to define clearly established law at a high level of generality in their qualified immunity analysis. *Kisela v. Hughes*, ___ U.S. ___, 138 S.Ct. 1148 (2018) (citing examples). "Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine [...] will apply to the factual situation the officer confronts." *Mullenix v. Luna*, 577 U.S. ___, 136 S.Ct. 305, 308 (2015) (per curiam) (quoting *Saucier*, 533 U.S. at 205).

Appellant cannot prove that the law regarding the state created danger doctrine was clearly established on March 27, 2014. This is evident from a recent 2015 ruling by one of our South Carolina federal courts. In that case, the federal judge explained that "[a]s this Court has previously observed, 'the Supreme Court and the Court of Appeals have given little definition to the state created danger exception, and the *DeShaney* Court did little more than imply that the exception existed.'" *Watson, supra.* Essentially, the *Watson* court is stating that as of 2015, the law was not clearly established, and because the *Watson* case was decided the year after our subject incident, the law was not clearly established at the time the Defendant officers made entry into

Plaintiff's home and arrested Daughter Doe. Because the law was not clearly established on March 27, 2014, the individual defendants are entitled to qualified immunity as to any claim regarding the state created danger doctrine.

Based on the above, the trial court did not err in finding that the state created danger Doctrine was inapplicable to the facts of this case. Respondents contend there was no directed verdict as to the State created danger doctrine. However, assuming *arguendo* that there was, there was ample evidence in the record to support the trial court's ruling and it should therefore be affirmed. Finally, the individual officers would be entitled to qualified immunity.

II. DID THE TRIAL COURT ABUSE ITS DISCRETION IN NOT RECHARGING THE JURY ON DAMAGES A THIRD TIME AND WHEN THE AGREED-UPON JURY VERDICT FORM DOES NOT PROVIDE ANY AVENUE TO REVIEW THIS ISSUE?

Appellant's second issue on appeal does not allege that the trial court failed to give a necessary jury instruction. Appellant cannot allege this because the particular jury instruction at issue was in fact given to the jury not once, but twice. Appellant's second issue on appeal alleges that the trial court erred in not charging the jury for a third time on damages. Our South Carolina case law does not support this argument. The trial court did not abuse its discretion in making its decision to not charge the instruction at issue a third time, and therefore the verdict should be affirmed

The South Carolina Court of Appeals recently addressed the issue of jury instructions and recharging the jury on certain instructions. *See Winthrop Univ. Trustees for the State v. Pickens Roofing & Sheet Metals, Inc.*, 418 S.C. 142, 791 S.E.2d 152 (Ct. App. 2016), *reh'g denied* (Oct. 21, 2016), *cert. denied* (Nov. 15, 2017). In that case, the Court of Appeals succinctly stated the law regarding jury instructions and recharging the jury as follows:

> In order to warrant reversal for refusal of the [circuit court] to give requested jury instructions, such refusal must have been both erroneous and prejudicial. When the jury requests additional charges, it is sufficient for the court to charge only the parts of the initial charge which are necessary to answer the jury's request. Its failure to charge in greater detail is not error if the details were fully covered in the original charge. Moreover, an alleged error in a portion of the charge must be prejudicial to the appellant to warrant a new trial.

Id. at 165, 791 S.E.2d at 164 (internal quotations and citations omitted).

In her brief, Appellant asserts that 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." (Br. of Appellant, at 13). In the initial jury instructions, the jury was charged on the elements of a 1983 cause of action. (R. p. 443, line 12 – p. 445, line 6). The court instructed the jury that the third element that Plaintiff must prove is "that the defendants actions were the proximate cause of the plaintiff's damages." (R. p. 444, lines 5-7). As part of the ensuing instructions on damages, the court included the following instruction concerning nominal damages:

> Ladies and gentlemen 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 claim 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 depravation of a federal right even where you find no actual injury occurred.

(R. p. 457, lns. 9-19). Appellant took no exception to the above referenced jury instructions. (R. pp. 472, lns. 1-3). When the jury presented a question to the court regarding certain jury instructions, the court provided the above referenced jury instructions a second time, including the instructions on nominal damages. (R. p. 474, line 3 – p. 497, line 17). Appellant took no exception to the instructions as given this second time. (R. p. 498, lines 1-2).

After a further jury question, the court, in its discretion, chose to instruct the jury on the elements of a 1983 action, which included the instruction that "the defendants actions were the proximate cause of the plaintiff's damages." (R. p. 505, lns. 21-22). The court chose not to recharge the entire instruction on damages as the court had already done so twice. (R. p. 501, line 13 – p. 504, line 13).

Our South Carolina courts have held that when the court chooses to recharge the jury, a court's "failure to charge in greater detail is not error if the details were fully covered in the original charge." *Winthrop*, 418 S.C. at 165, 791 S.E.2d at 164. In the current case, the jury was initially given the full jury instructions on the elements of a 1983 cause of action and on damages, including nominal damages. The jury was then given these identical instructions a second time. Appellant argues here that it was error to not instruct the jury on damages a third time. Appellant cannot succeed on this argument as the details of damages, including nominal damages, were fully covered in both the initial charge and when the jury was given this charge a second time.

Even if Appellant could argue that not instructing the jury on damages for a third time was error, Appellant cannot prove that this error was prejudicial. *See id.* ("Moreover, an alleged error in a portion of the charge must be prejudicial to the appellant to warrant a new trial."). The primary reason Appellant cannot prove prejudice is the verdict form, which was agreed upon by all parties and submitted to the court. (R. p. 436, line 22 – p. 437, line 3). The first question posed on the verdict form for each defendants was whether a constitutional violation had been proven. For each defendant, the jury found that no constitutional violation had occurred. This was a factual finding by the jury that is supported by the evidence and which should not be disturbed now on appeal. *Felder*, 297 S.C.at 448, 377 S.E.2d at 333. Appellant's argument in his second issue on appeal is tantamount to invading the province of the jury, which is improper. *Id.* Therefore, even if

Appellant could prove that there was an error in not recharging a third time, Appellant cannot prove that the outcome would have changed and likewise, that Appellant was prejudiced by this error.

CONCLUSION

For all of the reasons stated herein, Respondents respectfully request that this Court find that Appellant's first issue on appeal was not properly preserved; in the alternative, that the trial court did not err in determining that the State created danger doctrine was inapplicable to the facts of this case; that the individual officers are entitled to qualified immunity on any claim related to the State created danger Doctrine; that the trial court did not err in determining that charging the jury for a third time on damages was unnecessary; and that Appellant was not prejudiced by the trial court's decision to not recharge the jury a third time on damages. Respondents respectfully request that this Court affirm the October 13, 2017, jury verdict in favor of Respondents on all causes of action; for costs and fees; and for all other measures of relief as this Court deems just and proper.

Respectfully submitted,

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