The State of South Carolina
In The Court of Appeals

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

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

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SC Court of Appeals

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,
Anthony M. Doxey, individually

Respondents

Appellant's Final Reply Brief

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Reply Argument

Appellant makes these few points in Reply to Respondents' brief.

1. **The factual record must be viewed in the light most favorable to the plaintiff.** The trial court repeatedly admonished respondent's counsel for personally attacking the plaintiff's family members. (E.g., "You can advocate without it getting personal." "You can explore mitigation without it getting personal," each on R. App p. 517 of the transcript of 10-11-17). There were many such instances. Those attacks continue in Respondents' brief, even though Respondents' acknowledge, Brief at 5, that the proper standard of review on this appeal from a grant of directed verdict requires that the facts be viewed in the light most favorable to the non-moving party. In this appeal, that requires the facts to be rendered favorable to the appellant. Respondents' "statement of the facts," utterly fails to adhere to the applicable standard of review.[1]

2. **"I've already ruled that state created danger is not applicable."** R. App. 435 (10-11-17 p. 707). Respondents advance the novel theory, brief at 13, that the trial court made no ruling on the State Created Danger cause of action. Respondents concede, brief at 12, that they moved for directed verdict on the cause of action and after extensive argument the question was taken under advisement. Brief at 12. Respondents also concede they renewed their directed verdict motion as to

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[1] To cite but one example, writing the daughter "left" the plaintiff at MUSC, brief at 2 (surrounded, of course, by full-time medical care) when it is undisputed that the daughter was not the person who held the plaintiff's power of attorney or health care power of attorney and who made such decisions. The caption of this appeal reflects that such decisions were made by Jane Doe's brother and son, as the Respondents are aware. The Respondents' "facts" should be entirely disregarded as violating the applicable standard of review, and as continuing the unrelenting personal attacks the trial court admonished Respondents against.

the cause of action. Brief at 12. They contend that the trial court ruled on only the Privacy cause of action. Brief at 12.

The Respondents simply misrepresent the record. The trial court refused to charge State Created Danger because, as put in the charge conference, at R. App. 435 (10-11-17 p. 707), "I've already ruled that state created danger is not applicable." The court was referring to the court's prior ruling which appears on the preceding page, R. App. 434 (10-11-17 p. 706), when this colloquy occurred with Respondent's counsel, Mr. Dorsel, upon the trial court reaching the defendants' request to charge on state created danger in discussing jury charges.

The Court:	The defense presented its request to instruct number 6, which is state created danger. I assume you were anticipating that he was going to argue that and in the event I charged it you wanted me to use your instruction?
Mr. Dorsel:	Correct.
The Court:	But you still are of the position that it should not be?
Mr. Dorsel:	Correct.
The Court:	Okay. And I agree.

That is the colloquy which preceded the Court stating, shortly afterwards, on R. App. 435, "I've already ruled that state created danger is not applicable."[2] For that reason, the Court gave to the jury no charge on State Created Danger.

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[2] The Respondents imply, brief at 13, that counsel for appellant was required to object to the trial court's ruling. Counsel is not in the habit of arguing with trial judges once an issue has been fully argued and the court announces its decision. Nor is such behavior appropriate trial conduct. *See Fettler v. Gentner,* 396 S.C. 461, 469, 722 S.E.2d 26, 31 (Ct.App.2012) ("This [c]ourt does not require parties to engage in futile actions in order to preserve issues for appellate review."); Rule 43(i), SCRCP ("Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced.").

The issue was raised to and ruled on the by the trial court, the requirements for preserving an issue for appeal. *Hardaway Concrete Co. v. Hall Contracting Corp.*, 374 S.C. 216, 224, 647 S.E.2d 488, 492 (Ct. App. 2007) ("In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court," *quoting, In re Michael H.,* 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004). No jury instruction for state created danger was given.[3] Even the trial court agreed it had "already ruled." The Respondents have simply misrepresented the record.

3. **The elements of State Created Danger do not require a third party's intervention**. Respondents may have misrepresented the record of the trial court's ruling to exclude state created danger because they are aware that their substantive argument, brief at 8 – 9, that state created danger cannot exist without a third party's intervention, has no support in federal law. Contrary to their argument, Brief at 9, no Fourth Circuit case limits state created danger to only circumstances involving third parties. And it has long been the law in the Fourth Circuit that the proper process by which to determine if a constitutional limit has been "clearly established" in a case involving constitutional rights is to review the decisions of sister circuits. As recently summarized in *Sims v. Labowitz*, 885 F.3d 254, 262 (4th Cir. 2018):

> In this analysis [meaning the analysis of what is "clearly established"], we review "cases of controlling authority in [this] jurisdiction, as well as the consensus of cases of persuasive authority from other jurisdictions. *Amaechi*, 237 F.3d at 363.

The reference is to *Amaechi v. West*, 237 F.3d 356, 363 (4th Cir. 2001), meaning that since at least 2001 the Fourth Circuit Court of Appeals has reviewed decisions of other federal Courts of

[3] The Respondent try also to confuse this issue, Brief at 7, with the "failure to train" issue. Failure to train is a theory of municipal liability. State Created Danger is an issue of personal liability. The trial court ruling deprived the jury of any instruction on State Created Danger, having "already ruled" that it was "not applicable." R. App. 435.

Appeals to determine what rights have been "clearly established." The analysis is not limited, as Respondents wish it was, to the cases decided by the Fourth Circuit and U.S. Supreme Court.

Nothing about the two elements of State Created Danger (affirmative acts and harm or increased risk of harm), elements established by the U.S. Supreme Court, requires the intervention of a third person.[4] Any time state officers take affirmative action under color of state law, and by that affirmative action cause harm or increase the risk of harm, they take on the risk of State Created Danger and should be mindful not to do so. As set forth in the appellant's opening brief, starting at page 12, cases from other Circuit Courts of Appeals established well before 2014 that a reasonable officer should have known that when told explicitly that Jane Doe had dementia, then chose to make warrantless entry to her residence, then chose to arrest and remove her caregiver daughter, officers should not have left Jane Doe to fend for herself when she lacked the capability to care for herself.[5] As the Appellant's Initial Brief relates at p. 11, the

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[4] Respondents cite no case, nor can we find one, holding that entry of a third party "is required to prevail on a State created danger cause of action." Respondents Brief at 11. Contrary cases are cited by the appellant in the Initial Brief starting at p. 12.

[5] The trial court made no ruling on qualified immunity, and no cross-appeal was noticed on the issue, but the Respondents still attempt to argue the issue. Brief at 11. To do so, they improperly state the facts in the light most favorable to Respondents, misstate the law, and improperly limit applicable law so as to omit decisions from other Circuit Courts of Appeals that found state created danger without the presence third parties. Those cases are cited in the Appellant's Initial Brief starting at p. 12. Respondents also try to build an immunity argument, Brief at 12, out of random dicta in *Watson v. Adams*, 2015 WL 1486869 (D.S.C. 2015), a case in which state created danger was neither pleaded nor argued by the plaintiff (*Watson* at p. 5 n. 4 (only state issues under the wrongful death statute were at issue in the order), and which turned on issues of proximate causation, not immunity. *Watson* at 8: "the plaintiffs cannot show that the defendants were the proximate cause of Watson's suicide." Nor did Watson's suicide occur while he was in custody, a fact which the Respondents affirmatively misrepresent. See *Watson*, at 8: "Watson took his life in his own home almost three months after he was arrested."

plaintiff's 2014 hospitalization two days after her caregiver had been removed from the home was, by even the account of the defense expert, plausibly explained by the urinary tract infection she had at admission, and no one disputed that the risk of the UTI was increased by the 17 hour delay in changing her adult diaper, the time it took her daughter to get out of confinement and return home. It is undisputable that but-for the defendants' isolating the plaintiff from all family help, the plaintiff's adult diaper that was put on her the early evening of March 27 would have been changed well before it was, which was not until about 4 p.m. on March 28.

4. **The jury verdict form is of no utility in resolving a question about jury re-instruction**. Beginning in their brief at p. 13, Respondents propose that somehow the jury's responses on the verdict form constitute fact finding which means no challenge can be made to how the court instructed the jury in response to a question before the jury completed the verdict form. Put another way, the Respondents contend because there was a defense verdict, the instructions that led to that verdict cannot be challenged. The argument is perfectly circular, and has nothing to do with the issue on appeal.

When the Court received the last of the jury's questions, it was not entirely clear. The question was (R. App. 499, 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 R. App. 499 (10-13-17 at p. 952), openly contemplated that the jury might be asking about either or both of two different concepts:

> 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.

It is an incorrect statement of law to instruct a jury that the only way to prove "violation of a civil right, 4th Amendment," is to prove by a preponderance of the evidence that bodily harm or mental injury occurred. A "violation of a civil right, 4th Amendment," can also be proven without any showing of bodily harm or mental injury. E.g., *Carey v. Piphus*, 435 U.S. 247, 266 - 267, 98 S.Ct. 1042, 1054 (1978) ("We therefore hold that if, upon remand, the District Court determines that respondents' suspensions were justified, respondents nevertheless will be entitled to recover nominal damages....").

To refuse to give the jury the nominal damages charge affirmatively distorted the law, and did so when the trial court was not certain exactly what the jury was asking and when the jury was asking whether liability required damages. Was the law correctly stated by the court initially? Yes. But when a jury indicates it needs clarity about whether damages must be shown to establish liability for a civil rights violation, the original charge failed to clarify the law. Omitting to instruct the jury on all avenues for civil rights liability, including nominal damages, mis-states the law. Doing so in isolation after a specific question is raised about what is needed to prove liability was necessarily misleading to the jury, and was deadly prejudicial to the appellant, where her UTI harm took time to develop once the thoughtless affirmative acts of state actors removed her caregiver.

Civil rights cases are important. Not just to the litigants but to the community. It is important to keep police officers from further damaging families through unwarranted intrusions into households already burdened by difficult challenges from the debilitating cruelties of a

family member's terminal Alzheimer's disease, further complicated by the thoughtless action of removing a vulnerable adult's caregiver.

Few families have the stomach to endure the personal attacks that Respondents have directed at the appellant's family during this litigation, as shown by the observations of the trial court. To not give the appellant a level playing field through a correct answer to a jury's important question about whether vindicating civil rights is contingent on monetary or bodily injury is prejudicial, and affirmatively distorted the applicable law no matter what the original charge was. The trial court's re-instruction should have included the nominal damages charge in order to make the response to the jury's question other than what it was: an affirmative misstatement of law that was prejudicial to the plaintiff.

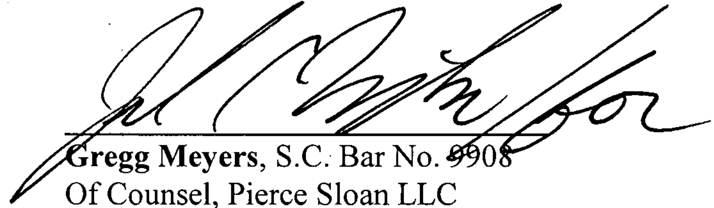
The trial court erred as a matter of law in doing so, and it prejudiced the appellant by incorrectly instructing the jury that only monetary or bodily injury support civil rights violations.

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), emphasis added. When instructing a jury in response to a question about civil rights, it is *necessary* that the law be accurately stated and be complete. The trial court committed an error of law when it provided an incomplete and affirmatively incorrect response to the jury's question about whether damages were necessary for 1983 liability.

Conclusion

The trial court should be reversed on its directed verdict and its recharge to the jury. A new trial should be ordered.

Respectfully submitted,



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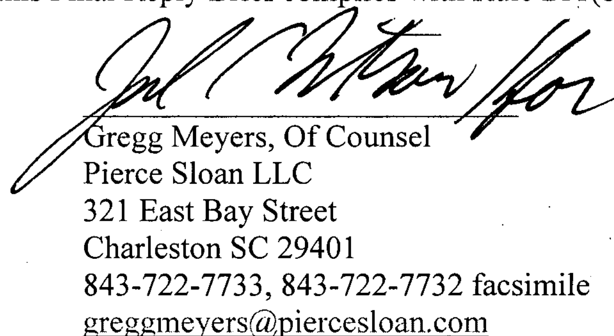
Certificate of Counsel

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

September 19, 2018



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