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SC Court of Appeals

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
Appellate Case No. 2017-002392

The Estate of 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 Wholleb, individually,
Anthony M. Doxey, individually

Respondents

Petition to Rehear and Memorandum in Support

Appellants petition the Court of Appeals to rehear its order of May 19, 2021, affirming the trial court grant of directed verdict and its handling of a question submitted by the jury during deliberations.

The following points set forth below have been overlooked or misapprehended by the panel of the Court of Appeals.

1. **The Court failed to apply the correct standard of review in its consideration of the directed verdict**.

On appeal from a directed verdict an appellate court is required to view the facts in the light most favorable to the non-moving party. E.g., *Adams v. Creel Sons*, 320 S.C. 274, 277 (S.C. 1995) ("the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party"). See, *Upchurch v. New York Times Co.*, 314 S.C. 531, 533 n.1 (S.C. 1993) ("We recite the facts in the light most favorable to appellants as the non-moving party in this appeal from the granting of a directed verdict"); *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 489, 649 S.E.2d 494, 497 (Ct. App. 2007) ("If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created .... ").

Beginning at p. 2 of its opinion, with "the parties disagree about what happened next. The officers said …," the panel proceeded to adopt a series of factual interpretations which, contrary to the standard applicable to appellate review of a directed verdict, consistently disregarded evidence of the appellant and adopted the version of events proposed by the respondents.[1] This

[1] For example, on pages 2 to 4 the panel sets forth the disputed testimony of the officers ("they [the officers] also said," and "they [the officers] claimed," "the officers disputed this…," and "There was conflicting evidence on the point," and "the officers disputed Daughter's testimony," and, most remarkably, given that the audio evidence and 911 records plainly supported it, "the officer testified she did not hear the dispatcher mention [Jane Doe's] dementia.") At p. 7 the panel opined "the Daughter came home intoxicated," a conclusion actually contrary to the record. R. App. 377 – 381.

Also contrary to the applicable standard, the panel omitted that it was the state, albeit the Sheriff not North Charleston, that would not permit the daughter to make a phone call from the jail (e.g. R. App. 104, 387), omitted that (to say nothing of the criminal charge the state added to complicate her caregiving) it was the state's injuries to the Daughter — for which she was at the hospital two days later — that was the reason Jane Doe was "unattended" when Jane Doe's confusion *from her UTI* began to exhibit (R. App. 565-566; R. App. 759, medical records each noting delirium secondary to UTI)), and that Jane Doe's subsequent hospitalization in 2014 was not "confusion from being left alone," as put by the panel at p. 3, but "worsening agitation and

initial and plain error of law affected the panel's interpretation of the federal issues involving state created danger, and by itself is ground for reversal and a grant of a new trial.

In other words, the panel has erred as a matter of law in its view of the record. State created danger has to be evaluated accepting the appellant's version of events and all inferences from that version, which includes that officers were told, (undisputedly to officer McGowan by dispatch according to the unambiguous audio) but it must also be accepted as true that officers were told by the daughter that her mother had dementia and could not be left alone overnight, Opinion at p. 4, information that in the light most favorable to appellants, the officers at best ignored.

At p. 4 of the opinion the panel errs by accepting (at p. 4) the trial court's erroneous factual and legal conclusion that "the officers could not be responsible for a danger (Jane Doe's dementia) that already existed." Jane Doe's dementia was not the danger that already existed. Her dementia was a pre-existing condition, and the defendants take the plaintiff as she is found. E.g., *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 136 S.E.2d 286 (1964). The danger the officers imposed on Jane Doe by their affirmative acts was her isolation from her family caregivers.

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aggressive behavior," as recorded by MUSC. R. App. 753. The medical evidence was undisputed that the events of the warrantless entry contributed to Jane Doe's agitation (e.g., R. App. 563) and that in July 2013 the family had discussed with MUSC ways of adapting the house so Jane Doe could be unsupervised for not more than 6 hours at a time. R. App. 816. Jane Doe's two-week hospital stay was related to her UTI as well as other effects set out at R. App. 753, including "an episode that appeared consistent with partial seizure activity," and a "long pd ["period"] of lethargy." Jane Doe herself informed her medical providers, R. App. 561 to 563 that "men came into the house" and caused her concern.

Should the panel correctly view the record favorably to the appellants, the panel must accept that the officers were told about Jane Doe's dementia yet chose to rearrange the family care for Jane Doe. The officers took affirmative action to enter the home without a warrant and to remove the daughter, doing nothing to assure that Jane Doe was provided for. At that time, Jane Doe could not feed herself, clothe herself, or toilet herself, which her doctor undisputedly testified increased the risk to Jane Doe of contracting a urinary tract infection with its resulting increases to confusion and agitation. R. App. 565 to 567. But the officers also took affirmative acts in saddling the Daughter with both a criminal charge she had to defend and left her with injuries which added an additional tasks for the Daughter that interfered with Jane Doe's care as the daughter consulted counsel and went herself to a hospital for evaluation. R. App. 389, 391-394.

Put simply, the panel erred in applying the wrong standard to its review of and recitation of the record and should reconsider its having done so, reverse the trial court for the same failing and order a new trial.

2. **The panel erred in analyzing state created danger**.

Under state law, dementia is not nothing. In construing federal law, the panel has erred in making it so. As noted above, the panel stated the facts with every concession to the police involved, rather than in the light most favorable to the appellants, but affirmed the trial court on other grounds in its opinion at p. 7 in this passage, emphasis added:

> The police did not take Jane Doe into custody, place any restraints on her freedom, or assume responsibility of caring for her. At best, the testimony shows the officers may have been negligent or grossly negligent, for when the facts are viewed in Jane Doe's favor, *the absolute most someone can say* is that officers were told, either by Daughter or by the dispatcher, Jane Doe had dementia before they left Jane Doe home alone.

The panel then went on to opine that "Nothing suggests" officers "knew a high probability of harm would follow their actions," as there was "no evidence the police had any reason to think Jane Doe was at risk of harming herself," and "had no reason to think Jane Doe was incapable of summoning help if she encountered any danger." In short, according to the panel, dementia is nothing for the officers to have concerned themselves with after their affirmative actions removed Jane Doe's family caregiver.

Doe v. Rosa, 795 F.3d 429, 439 (4th Cir. 2015) articulated the "narrow limits" for 1983 liability, which in the light most favorable to appellants, this record satisfies:

> Under the narrow limits set by *DeShaney* and *Pinder,* to 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," but that does not "entitle persons who rely on promises of aid to some greater degree of protection from lions at large." *Pinder*, 54 F.3d at 1177.

(emphasis in original). On this record, it was Jane Doe who the officers threw to the lions after affirmatively acting to remove her daughter and alter the family arrangements which had been providing for Jane Doe's care.

The panel acknowledged that North Charleston's officers were told, unarguably by the dispatcher and also by the daughter, that Jane Doe had dementia (R. App. 893 and the audio recording, on which the report is plainly audible) as well as by the daughter (R. App. 385: "I was begging him to let me have a phone call and I said I needed to call someone for my mom and he told me that my mom was the one who called the cops on me."[2])

[2] This false contention by the police at the scene — that Jane Doe had caused her daughter's arrest — was how the officers affirmatively dismissed and discounted the daughter's concern for

What the panel errs in omitting is any analysis, under state created danger but also under state law, that it was the police who took affirmative acts to rearrange the care provided by Jane Doe's family for her dementia and her diminishing capabilities. The police entered the house about 10:30 p.m. without a warrant, waking Jane Doe. After that warrantless entry the police elected to remove the daughter from the home, necessarily removing the daughter as a caregiver for Jane Doe, and made no provision to even give notice to other family members. The police undertook those affirmative acts knowing that Jane Doe had dementia and discounted the daughter's expressed concern by falsely claiming that Jane Doe had reported her daughter for abuse.

Jane Doe unarguably constituted a vulnerable adult under S.C. Code 43-35-10(11). S.C. Code 43-35-25(A) obligates any law enforcement officer "having reason to believe" a vulnerable adult "has been or is likely to be abused, neglected, or exploited" to report a vulnerable adult. The panel's decision permits police to take affirmative actions to isolate a person with dementia from her family caregivers, to increase the risk to her of dangers from that isolation, and to do so with impunity.

The panel erred by ignoring obligations properly imposed on police who undertake affirmative acts to rearrange the family care that was being provided for Jane Doe. The panel erred in dismissing the report of dementia as insignificant, (a) by failing to assess the affirmative acts police undertook, knowing Jane Doe had dementia, to isolate Jane Doe from her family

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her mother's inability to be alone for a long period. MUSC found no evidence of abuse or neglect by the daughter. R. App. 756 ("No evidence was found during admission that patient had been recently assaulted or abused (i.e., no bruising or sign of injury. When patient was less delirious, she stated that her daughter was the nicest person and 'I never said that she hurt me.'").

caregivers (both the daughter who provided immediate care and the brother who lived nearby and could have been informed by phone) (b) affirmative acts to create a false narrative to discount the daughter's effort to alert them that her mother could not be alone for an extended period, and (c) by construing the record in the light most favorable to the officers rather than to the appellants about what the officers "knew" or "had reason to think." A jury was entitled to assess the officers' conduct in their disruption of Jane Doe's family-oriented care in light of the efforts to warn them against their course of conduct.

According to her doctor, as discussed above, the medical records and testimony reflect that both the police entering the home at night and the police-imposed isolation of Jane Doe when her daughter was removed unarguably confused Jane Doe and increased the risk for Jane Doe to develop the urinary tract infection that her doctor acknowledged, and her medical records reflect, was the cause of her increased confusion and aggression.[3]

The panel should reconsider its analysis and its approach to state created danger.

3. **The panel erred in evaluating the court's response to the jury's question**.

An error of law is necessarily an abuse of discretion, as Judge Geathers observed in dissent. Opinion at p. 10. While we appreciate the panel's agreement that "there is much force and appeal to the reasoning in the dissent," by Judge Geathers, the panel has erred in not construing as an error of law the trial court's having *omitted* the portion of the charge which

[3] The panel observed on p. 4, that "Jane Doe's doctor testified the officers likely would not have recognized that Jane Doe had dementia *unless they had been told*." Emphasis added. But of course, it is unarguably recorded on 911 audio and in police records that *the police were told* Jane Doe had dementia. E.g., R. App. 893. The panel's decision creates an easy way to evade even objectively unarguable evidence in construing the record favorably to the officer's claim that oh, she just didn't hear that part of the dispatcher's report. Opinion at 4. A jury should resolve the factual dispute.

actually responded to the jury's question, given the request to correct the omission by giving the proper charge. As Judge Geathers contends in his dissent, the appellants' request to charge was "the only language that would have directly responded to the jury's question." Opinion at p. 10.

The court might have merely answered, "No," to the jury's question, but the trial court having re-charged while omitting the pertinent part of the jury charge that was actually responsive to the jury question is an error of law, as Judge Geathers has noted. No doubt inadvertently, the trial court created a kind of misdirection for the jury panel by giving the instruction which actually omitted the charge responsive to the question presented.

The panel has erred in concluding "both views of the jury's question are possible." Opinion at 8. It is error because the trial court is not laboring in isolation to understand the jury's question: the appellants specifically requested the trial court address the concern that the panel appears to agree was the correct interpretation of the jury's question. We contend the trial court is not relieved of all responsibility to get it right when the correct proposition is presented to the trial court. The panel's opinion would be correct only if the appellants were silent in response to the jury's question and the court's proposed response.

The relief proposed by Judge Geathers should be awarded by the panel.

Conclusion

This record must be viewed in the light most favorable to Appellants. It has not been. The panel has erred as set forth above and the decision should be reconsidered using the proper standard, and the issues remanded for further proceedings.

Respectfully submitted,

s/ Gregg Meyers

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Certificate of Service

Pursuant to SCACR 240(c)(1), counsel certifies that a copy of this Petition has been served on opposing counsel for the parties by email sent to counsel of record simultaneously with the email submission to the Court of Appeals pursuant to Administrative Order 2020-05-29-02, the order applicable to proceedings during the covid-19 pandemic.

Also pursuant to that order, the $50 filing fee for the Petition, established by SCACR 240(d) will be separately forwarded to the Court by United States mail.

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