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SC Court of Appeals

The State of South Carolina
In The Supreme Court

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 for A Writ of *Certiorari* To the Court of Appeals

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Certificate of Counsel

Petitioner's counsel certifies that on June 11, 2021, the Petition for Rehearing was denied by the Court of Appeals. R. App. 986. Judge Geathers, who had dissented from the initial opinion by Judge Hewitt in which Judge Lockemy joined, dissented from the order denying the petition to rehear. R. App. 986.

Questions Presented

1. Did the Court of Appeals err in affirming a directed verdict on the State Created Danger cause of action by construing the record favorably to the moving parties rather than to Jane Doe?

2. Did the Court of Appeals err in upholding the trial court's jury recharge when the recharge, as the dissent put it, "omitted the only language that would have directly responded to the jury's question," about whether damages were needed to find liability under 42 U.S.C. § 1983?

Statement of the Case

Before her death in June, 2018, Jane Doe 202[1] was afflicted with an aggressive form of early onset Alzheimer's disease. R. App. 373 (10-6-17 p. 68). Under S.C. Code § 43-35-10(11), she was a "vulnerable adult" given her pre-existing condition.

In 2012, before her condition was diagnosed, her capabilities had begun to deteriorate. She and her family met with an attorney who specialized in elder law to arrange her affairs. Among other things, her brother agreed to subordinate his half interest in their childhood home

[1] The plaintiff is referred to by pseudonym by order of the trial court. R. App. 001, which granted the motion to use a pseudonym. R. App. 079.

to provide her a life estate in that property. Her daughter returned from living in Europe to move in with her to help. For sixteen months before the warrantless entry, Jane Doe had been cared for by her daughter, R. App. 371 – 372 (10-6-17 pp. 66 – 67); R. App. 389 - 390 (10-6-17, pp. 151 – 152).

By March, 2014, when the events which underlie this appeal took place, Jane Doe 202 had been definitively diagnosed. She was under the care of an Alzheimer's specialist at MUSC, but had lost many functions. She was unable to drive, unable to place a telephone call, unable to dress herself, unable to toilet herself, unable to prepare food, and unable to even open a bottle cap or a food wrapper. R. App. 353 (10-3-17 at p. 213). Her daughter performed these basic functions for her. The daughter found a job that gave her flexibility to largely work from home, and to be absent for only a few hours at a time, as doctors advised. On those occasions when the daughter had to leave, such as on March 27, 2014, she prepared the house and kitchen so as to accommodate her mother's limitations by, for example, having food and drink readily available to her.

On March 27, 2014, the daughter returned a little after 9 p.m. from a rare evening work function for which she had departed a few hours earlier.

At 10:14 p.m. the night of March 27, 2014, North Charleston police officer McGowan arrived at Jane Doe's split-level home in North Charleston in response to a 911 call made at 10:05 p.m. by a neighbor reporting a "verbal disturbance." The officer found a quiet scene. R. App. 891 (Exhibit 2), R. App. 350 (10-3-17 p. 202), R. App. 361 (10-5-17 p. 157). No one answered when she knocked on the door. R. App. 893 (Exhibit 2), R. App. 335 (10-3-17 p. 175). She proceeded to look about the front and back yard. Seven minutes later, at 10:21 p.m., Officer McGowan reported finding fresh blood on the outside surface of a leather bag in the back yard,

R. App. 337 (10-3-17 p. 177), later described as such a quantity of fresh blood that it justified emergency action and warrantless entry. R. App. 330 (10-3-17 p. 156).

But Officer McGowan neither took immediate action nor reported any emergency. R. App. 329 (10-3-17 p. 149). Instead, she asked the dispatcher to get more information from the neighbor who made the 10:05 p.m. call. At 10:23 p.m. the dispatcher 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.

R. App. at 893 (Exhibit 2)(emphasis added). In the objective evidence of the audio recording, the dispatcher's information about the mother having dementia is clear and distinct. Audio recording, R. App. vol. 2. McGowan then took the time to speak with the neighbor. R. App. 329.

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, other officers had arrived and forced warrantless entry into Jane Doe's house. R. App. 893 (Exhibit 20). Defendants McGowan and Wohlleb forced entry through a sliding glass door in the back of the house. R. App. 340 (10-3-17 p. 180), R. App. 30 (10-5-17 p. 156). Defendant Doxey entered shortly thereafter by the sliding glass door forced open by his colleagues. R. App. 362 (10-5-17 p. 158).

Inside the house the officers encountered Jane Doe, then 66 years old, who had come downstairs. R. App. 361 (10-5-17 p. 157). The daughter was asleep upstairs. R. App. 379 – 380 (10-6-17 p. 141 – 142). 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, "yes." 361 – 362 (10-5-17 p. 157-158). In other words, the officers were told almost immediately upon entry 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 in a dark room with a flashlight in her face, demanding to know how much the daughter had had to drink. R. App. 380 (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…." R. App. 380 (10-6-17 p. 142). The daughter thought she was about to be raped, R. App. 383 (10-6-17 p. 145), and yelled to her mother to "stay out of it." Id. As a result of the struggle with officer McGowan, the daughter had a series of injuries later documented at a hospital emergency room. App. 380 - 382 (10-6-17 pp. 142 – 144); R. App. 391 – 392 (10-6-17 pp. 153 – 154). Officer McGowan claimed the daughter had attacked her, e.g., R. App. 331 (10-3-17 p. 166), but McGowan had no injuries, R. App. 348 (10-3-17 p. 189), and could not explain the daughter's injuries.

Within eight minutes of first making warrantless entry, police had arrested the daughter for assaulting a police officer, R. App. 893 (Exhibit 2); R. App. 386 - 387 (10-6-17 p. 148 – 149). The daughter was removed and taken to jail. R. App. 893 (Exhibit 2). Jane Doe was left alone, with no effort made to arrange for her care and no inquiry made about her ability to be alone. As noted above, she had not been alone for any extended period at any point in the previous sixteen months.

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, even though she had lost the capacities to fend for herself for any extended period.

Having made an arrest inside the house after warrantless entry, McGowan and the other officers had the burden of demonstrating a proper basis for having made warrantless entry. E.g.,

Minnesota v. Olson, 495 U.S. 91, 110 S.Ct. 1684 (1990) (arrest overturned due to lack of justification for warrantless entry). None made a record of the supposed extensive fresh blood on the bag. Nor was the bag preserved in any way. It was not taken into evidence. None of the three officers so much as photographed 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. R. App. 323 (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. The bag evidenced no substantial blood stains. R. App. 888 – 889 (photos of the bag).

After the daughter was removed from the house, she advised police that her mother could not be left alone. R. App. 968. It is undisputed that no provision was made for Jane Doe's care. The daughter was not permitted to make any phone call where she was detained, and the officers made no provision for Jane Doe. Jane Doe was alone at night and for an extended period for the first time in sixteen months. She would go without food for over 13 hours, until about noon the next day, March 28, when her brother got a phone message from the jail and learned his sister had spent the night alone because his niece had been arrested. R. App. 351 (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.

R. App. 351 (10-3-17 p. 211). He got her something to eat, and drink, and calmed her down. R.

App. 351 – 352 (10-3-17 pp. 211 – 212). It took 15 – 30 minutes to calm her. R. App. 352 (10-3-17 at p. 212).

As noted above, Jane Doe had lost the capacity to toilet herself. Because her daughter had been removed without any provision for her care, Jane Doe remained for over 17 hours in the same adult diaper, until Jane Doe's brother could get the daughter, his niece, back to the house and the daughter could change Jane Doe and clean her up. R. App. 352 – 353 (10-3-17 at p. 212 – 213). Jane Doe's diaper had been soiled by a bowel movement. R. App. 388 (10-6-17 p. 150).

Also a result of the affirmative acts of the state actors, Jane Doe's caregiver daughter now had added to her caregiving for Jane Doe both having to defend herself from a criminal charge and injuries that needed medical examination. The following day, March 29, the daughter arranged to be treated at an emergency room, and arranged for her uncle, Jane Doe's brother, to look after Jane Doe. Jane Doe's brother arrived to find Jane Doe so profoundly confused that he called an ambulance and had Jane Doe examined at MUSC, the Medical University of South Carolina. R. App. 354 (10-3-17 at p. 214). Jane Doe was admitted to MUSC hospital and was found to have a urinary tract infection. R. App. 566 – 567 (Dr. Broadway video deposition at pp. 29-30); R. App. 576 – 874 (MUSC Record pp. 1-299). Jane Doe was hospitalized for 18 days. R. App. 395 (10-6-17 p. 157). Her doctor agreed that to a reasonable degree of medical certainty, leaving Jane Doe in an adult diaper for over 17 hours increased the risk to her of contracting that urinary tract infection, and such infections can cause confusion. R. App. 566 – 567 (Video deposition transcript of Dr. Broadway at pp. 29 – 30).

Only when counsel was retained could it be discovered through deposition why police contended there was a basis for making warrantless entry. The leather bag that supposedly had substantial fresh blood on it the night of March 27, 2014, showed no sign of blood stains. R.

App. 888 – 889. The bag was about ten years old, R. App. 376 (10-6-17 p. 133), and was used by Jane Doe's daughter. R. App. 382 (10-6-17 p.144) to carry photography equipment, tools, and for gardening. R. App. 376 – 377 (10-6-17 pp. 133-134). After ten years, the exterior of the bag reflected only one blood stain, smaller than a dime and not apparent to the naked eye. R. App. at p. 888 - 889 (Exhibit 1).[2] The bag has never been wiped or cleaned, as it is a utilitarian bag. R. App. 376 (10-6-17 at p. 133). The daughter testified she had not hurt herself that day and to her knowledge the bag had no fresh blood on it on March 27. R. App. 377 – 378 (10-6-17 p. 134 – 135).

Nothing on the exterior of the leather bag corresponds to the "several" fresh blood spots each "about quarter or half dollar size," some "dripping off the edge" as claimed by the officers. R. App. 359 (10-5-17 p. 155), R. App. at 888 - 889 (Exhibit 1). As noted above, nothing was done by any officer to preserve any evidence of the supposed fresh blood. E.g., R. App. 366 – 367 (10-05-17 p. 169 – 170).

After the daughter's criminal defense counsel moved to challenge the warrantless entry, the criminal charge against her was *nol prossed* and is now expunged.

This case challenged the allegedly fabricated "fresh blood" basis for warrantless entry and the officers having left Jane Doe to fend for herself after their affirmative acts of entering her home, removing the daughter who cared for her, but making no effort to provide for Jane Doe knowing she had dementia. The primary theory of the case was that the officers' conduct constituted a "state created danger:" after being told that Jane Doe had dementia, the officers had

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

taken affirmative acts to isolate Jane Doe from her caregiver for an extended period, beyond the time recommended by medical providers, which increased the risk of harm to Jane Doe and arguably caused her hospitalization.[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." R. App. 433 (10-11-17 p. 705),

(b) that no facts supported the theory. R.App. 432 (10-11-17 p. 704), and

(c) that the theory "was not created for these type facts." R. App. 433 (10-10-17 p. 705), referring to the defense argument R. App. 421 (10-11-17 at p. 636) that "there is no third party – no one else came in and hurt" the plaintiff; see also, R. App. 421 (10-11-17 at p. 636); R. App. 401 (10-10-17 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 R. App. 438 - 471 (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, R. App. 457 (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. R.App. 499 (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?

[3] The trial also challenged various training, or lack of training, by North Charleston, as to persons with dementia, which claims are not part of this appeal.

The correct answer to this question is, of course, "No." However, the trial court, at R. App. 499 (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 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, R.App. 500 (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.

The court instead gave a recharge R. App. 505 – 512 (10-13-17 p. 960 to 967), omitting that 1983 liability can be proven without damages, the "nominal damage" aspect of the charge. The recharge included only, and in isolation, at R. App. 509 (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 R. App. 512 (10-13-17 p. 967). The charge the plaintiff requested was this portion of the court's initial charge R. App. 457 (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.

Having been recharged without the language responsive to the jury's question, thirteen minutes after the recharge in response to its last question, the jury returned a defense verdict. This appeal followed.

The Court of Appeals affirmed the trial court's directed verdict recounting that the evidence was in dispute between the daughter and the officers. The Court failed to construe the record in the light most favorable to Jane Doe, and affirmatively construed the record against Jane Doe as to the officer having being told that Jane Doe had dementia (R. App. 969, Opinion at p. 4) why she had been hospitalized (R. App. 968, Opinion at p. 3), what the police "had reason to think" about Jane Doe's capabilities (R. App. 972, Opinion at p. 7) and other aspects of the record.[4] The Court erroneously construed the State Created Danger theory, which has two elements, as having "numerous tests for liability," entirely ignoring cited appellate courts that construed State Created Danger in a manner where no third party caused harm but police were liable because they had themselves taken affirmative acts so as to increase the risk of harm to a person.

Having construed the record favorably to the police officers, rather than in the light most favorable to Jane Doe, a reversible error of law in itself on appeal from a directed verdict, the Court of Appeals concluded that the officers were at most negligent or grossly negligent (not elements of state created danger) so affirmed directed verdict. R. App. 972, Opinion at 7.

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[4] Among them the gratuitous errors that the daughter "came home intoxicated," R. App. 972, when that was not at all the daughter's testimony, e.g. R. App. 378 – 379, that the officer "did not hear" the dispatcher plainly explaining that Jane Doe had dementia, R. App. 969, that the officers disputed that the daughter had informed them that Jane Doe Could not be left alone. R. App. 969, and, most blatantly, that "the officers likely would not have recognized that Jane Doe had dementia ***unless they had been told***," R. App. 969, emphasis added, when the record viewed favorably to Jane Doe shows (even by undisputed objective evidence) they ***had in fact been told*** that Jane Doe had dementia.

Judge Geathers dissented from the Court's decision to uphold the trial court's erroneous re-charge to the jury which omitted the charge responsive to the question. The Court found "both views of the jury's question are possible," even as it conceded "there is much force and appeal to the reasoning in the dissent." R. App. 973, Opinion at 8. Judge Geathers found that the trial court had committed an error of law in omitting "the only language that would have directly responded to the jury's question," R. App. 975, Dissent at p. 10, and would have granted a new trial. Id.

A petition to rehear was denied, with Judge Geathers again dissenting. R. App. 986.

This petition presents a dissent in the Court of Appeals, substantial constitutional issues, novel issues about a vulnerable adult and recharging a jury in light of a question asked, and federal questions, each a basis for granting review under SCACR 242(b).

Argument

1. The Court erred by construing the record in the light most favorable to the police and applying an incorrect standard in reviewing the grant of directed verdict under 42 U.S.C. § 1983.

On appeal from a directed verdict, the record is to be construed in the light most favorable to the non-moving party. *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).

Neither the trial court nor the Court of Appeals has construed the record properly, skewing the analysis of the State Created Danger cause of action on which a verdict was directed.

Multiple federal courts construed the State Created Danger theory to find liability when the police themselves take affirmative action that increases the risk of harm to a person. As noted in our brief below, the most closely analogous case is *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979),

where State Created Danger liability for police officers included the emotional injury caused when officers stopped a car on a busy Chicago highway, arrested the adult driver, and left three minor children alone in the car on the side of that highway to fend for themselves. The Court did not discuss that case.

Nor did the Court discuss cited cases which arose in other contexts that lacked any third party involvement. E.g., *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996) (police liable for an inebriated woman's injuries from a fall and exposure to cold after they separated her from her husband and compelled her to walk alone the last 1/3 of a block to her home). Nor did the court discuss any cases finding liability for a suicide, where a third party obviously plays no role in the injury. *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). Nor did the court mention *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1996), which found police 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 using the keys to drive the same car.

State Created Danger applies when two elements are present: a state actor takes affirmative acts which *causes or increases* the risk of harm to another person. In this instance, viewed favorably to Jane Doe, officers were told that she had dementia and were deliberately indifferent to her condition after they took the affirmative acts of (a) entering her home without a warrant, (b) removed the caregiver for Jane Doe, and (c) ignoring the dispatcher's explanation the Jane Doe

had dementia as well as the caregiver, who testified that she too told police that Jane Doe could not be left alone. R. App. 972.

The Court of Appeals opinion makes no mention of the obligations imposed by state law on officers who encounter a vulnerable adult. The Court repeatedly construes the record not in the light most favorable to Jane Doe but as "disputed," R. App. 967 – 975, *passim,* concluding that "at best, the testimony shows the officers may have been negligent or grossly negligent," R. App. 972, weighing the evidence instead of viewing it in the light most favorable to Jane Doe: officers deliberately indifferent to her pre-existing condition ***about which they were explicitly told***. Viewed favorably to Jane Doe, the affirmative actions of the officers created Jane Doe's isolation from care, which increased her risk of harm given her pre-existing condition.

In the Fourth Circuit, the two elements for State Created Danger were reiterated relatively recently: a state actor must take affirmative acts which creates or increases 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…."

Viewing this record favorably to Jane Doe, the officers were undisputedly told by the dispatcher, and also by the daughter, about Jane Doe's pre-existing condition, which was that Jane Doe had dementia. She was a vulnerable adult under state law. The officers' affirmative acts removed her caregiver, which made her even more vulnerable by increasing the risk of harm to Jane Doe. It is undisputed that after she had been alone for an extended period for the first time in sixteen months, 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. Her treating

physician, Dr. Broadway, confirmed that when, three days later, Jane Doe had a urinary tract infection, that her having been left 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 Court of Appeals has erred as a matter of law by upholding the directed verdict and the petition should be granted so these important issues of state and federal law can be reviewed and the Court's errors corrected.

2. Judge Geathers's dissent correctly construes the jury recharge issue: the trial court omitted "the only language that would have directly responded to the jury's question" and a new trial should be granted.

The jury asked this question, identified as Court's Exhibit 25. R. App. 499 (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 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 to just reinstruct them on the elements of 42 U.S.C. 1983 and what must be proven in order to establish.

But then the trial court did not give the charge she described, omitting in her recharge, as Judge Geathers' dissent states, "the only language that would have directly responded to the jury's question," meaning the nominal damages charge.

The Court of Appeals construed two possible "views" of the jury's question, but then erred in affirming the trial court addressing only one of the "views" in the recharge. R. App. 973, Order at 8. While we do not agree there were two "views" of the question, as we share Judge Geathers'

view, if there were properly two "views" of the jury question then the trial court should properly have addressed each, with a recharge that addressed both "views," including the recharge requested by Jane Doe, rather than recharging the jury on just one of the "views." Doing so meant the recharge given was misleading, and failed to sufficiently cover the substance of the question asked.

Jane Doe explicitly requested that the trial court instruct the jury on the "other" view, the nominal damage charge.[5] Instead, the Court of Appeals affirmed the trial court having omitted language that responded to the question as Judge Geathers and the plaintiff understood it. The Court of Appeals erred in affirming the trial court. The re-charge was misleading, and should be reversed. E.g., *Wright v. Hiester Construction Co., Inc.*, 389 S.C. 504, 517-518, 698 S.E.2d 822, 829 (Ct. App. 2010). The re-charge omitted "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). Damages from the unconstitutional conduct of state actors is not necessary to find 1983 liability; the violation of a constitutional protection is itself a violation.

The recharge did not fairly answer the question asked and was affirmatively misleading.

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[5] The charge requested was this portion of the court's initial charge (at R. App. 457, 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.

The plaintiff's exception is at R. App. 512 (10-13-17 p. 967). A motion for a new trial on that ground was denied by the trial court. R. App. 514 (10-13-17 at p. 973).

Conclusion

For the reasons set forth above, the petition should be granted.

Respectfully submitted,

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Respondents

Proof of Service

I hereby affirm that pursuant to SCACR 226C I have served upon counsel for the defendants/respondent one copy of the Appellant's

Petition for *Certiorari* and Appendix

by causing the documents and a copy of this Proof of Service to be sent via an email method approved by the Supreme Court to:

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Respectfully submitted,

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