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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge

Case No.: 2014-CP-10-4591

Appellate Case No. 2021-002392

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

v.

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

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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Counter-Statement of the Questions Presented

1. Did the Court of Appeals correctly hold that the trial court correctly directed a verdict on Petitioner's "state created danger" theory of liability as the facts and record in this case did no support a finding that the officers' action were reckless or deliberately indifferent?

2. Did the Court of Appeals correctly hold that, based on precedent, the trial court did not err in deciding to not recharge the jury a third time on the elements and damages of § 1983 claims, when the trial judge had fully covered those elements in both her initial charge and recharge to the jury?

Counter-Statement of the Case

Petitioner devotes ten pages of her Petition to her Statement of the Case. Respondents will not do the same. However, because Petitioner's Statement of the Case both leaves out relevant facts and interprets facts contrary to the record, Respondent will address Petitioner's Statement of the Case.

Petitioner asserts that Jane Doe's daughter ("Daughter") told the police that Jane Doe could not be left alone. Petition at p. 15-16). Petitioner is careful not to say that Daughter told any of the three individual defendants that her mother couldn't be left alone because that would be a misstatement of the facts. What the record shows is that Daughter never told Officers McGowan, Doxey, or Wholleb that her mother had dementia or that her mother could not be left alone. R. App. P. 341, line 2 – p. 344, line 4, p. 363, line 3 – p. 365, line 5, 368, line 14 – p. 369, line 12, p. 384, line 12 – p. 385, line 5, & p. 390, line 25 – p. 391, line 9. Rather she allegedly

told the transport officer, Officer Kouris, that her mother could not be left alone. *Id.* It is undisputed that Officer Kouris did not relay this information to the officer defendants, and therefore, Petitioner's "factual" statement that Daughter told "the police" does not accurately state what is in the record.

Petitioner also overstates the dispatch to Officer McGowan. Petitioner presents this evidence to the Court to make it appear that the dispatcher gave a thorough explanation of the Jane Doe's medical condition (*See* p. 15-16 "dispatcher's explanation the (sic) Jane Doe had dementia…."). Petitioner cites to the dispatch that states "ADV Mother Dementia." This is not a medical diagnosis, but rather a dispatcher relaying what a 911 caller said. Officer McGowan testified that she was at the scene of a domestic disturbance, in the dark of night, vigilant about potential attackers, and she simply did not hear anything about dementia that night. R. App. 388-389.

Further, Petitioner omits facts in the record about the officers entering the house and having a conversation with Jane Doe where she appeared lucid, could answer questions, and could direct them upstairs to her daughter's room. R. App. 341, line 2 – p. 344, line 4, p. 363, line 3 – p. 365, line 5, & 368, line 14 – p. 369, line 12. The officers testified that there was no indication whatsoever that Jane Doe had dementia. *Id.* This is consistent with the testimony of her treating physician. Dr. Jessica Broadway testified that if the officers encountered Jane Doe in her home – her familiar surroundings – and only spoke with her for a brief time, a reasonable person would likely not have been aware that Jane Doe either had dementia or could not be left alone. R. App. 571, line 24 – p. 575, line 8. Therefore, and as was argued at the trial, even with the dispatch saying mother dementia, the officers had no indication from their interaction with Jane Doe that she had dementia. And again, Daughter never told the officer Defendants that her

mother had dementia, or that Daughter was the caregiver, or that Jane Doe could not be left alone.

Petitioner omits several important facts about the days after the incident and about the medical testimony in this case. The incident involving the arrest of daughter occurred late on the night of March 27, 2014. On the late morning of March 28, 2014, Jane Doe's brother went to check on her. He found her dressed appropriately and not in need of any medical attention. He fed Jane Doe ice cream, calmed her down, and then left her alone again to go to the jail. R. App. p. 907-910. When Daughter returned home on March 28, 2014, she was able to address her mother's needs and get her calmed down. Then Daughter left Jane Doe alone again so she and Jane Doe's brother could go see a criminal attorney. R. App. p. 389, lines 8-15. The following day, March 29, 2014, Daughter went to the emergency room and once again left Jane Doe alone for approximately four to five hours. R. App. p. 392, line 18 – p. 393, line 13.

With regard to the medical testimony, Petitioner states that Dr. Jessica Broadway testified to a reasonable degree of certainty that leaving Jane Doe alone increased the risk of contracting a urinary tract infection ("UTI"). Petition, p. 9. This is not Dr. Broadway's testimony. Instead, Dr. Broadway was given six facts to assume as true for the purpose of the question. Her testimony then was as follows: "They[1] could increase the risk of developing a urinary tract infection if those facts are – if those assumptions are facts." R. App. 567.

Petitioner also makes the following misleading statement in her Petition: "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.'" Petition, p. 17. First, when asked this question, Dr. Bolus answered, "That is certainly possible, yes." R. App. 521. Second, this testimony is taken

[1] Referring to the hypothetical conditions posed with the question.

out of context. Dr. Bolus explained that a UTI usually takes one to two weeks to develop. If a person were to develop an acute UTI from sitting in a soiled diaper for seventeen hours as Petitioner alleges, Dr. Bolus explained that the person would have delirium that would make him or her unable to communicate and you would also expect to see redness or irritation on the person's bottom. Neither of those conditions were present on March 29, 2014, when Jane Doe went to the emergency room.[2] Therefore, although Dr. Bolus testified that it is possible to develop a UTI, her actual opinion was that there was no medical evidence that being left alone led to an acute UTI. R. App. 521-525.

Argument

1. The Court of Appeals correctly held that the record in this case does not indicate police action so wanton that it amounted to a violation of due process, and correctly affirmed the trial court's grant of a directed verdict on the "state-created danger" theory of liability.

The Court of Appeals unanimously agreed that Petitioner's "state-created danger" theory of liability did not apply to the facts of this case. As the Court correctly pointed out, "there is no due process violation unless a plaintiff shows a state actor engaged in reckless behavior or acted with deliberate indifference… Negligence and gross negligence are insufficient." Opinion at p. 6.

Petitioner incorrectly states that the Court of Appeals did not use the proper standard and did not take the facts in the light most favorable to Petitioner. A review of the Court of Appeals opinion does not indicate this. First, this case presents an interesting factual situation in that the Petitioner, Jane Doe, was unable to provide any testimony, and Daughter was not present while the officers were outside or talking with Jane Doe. Petitioner's arguments appear to concentrate

[2] This was Jane Doe's first visit with a doctor in eight months. R. App. p. 568, line 25 – p. 570, line 14 & p. 374, line 3-p. 375, line 1.

on two issues, neither of which is relevant to this appeal. The first issue is whether there was blood on the purse and Petitioner goes so far as to imply that "blood on the purse" was fabricated only after the lawsuit was filed (*See* Petition at p. 8). This is contradicted by the record that includes McGowan telling the dispatcher on the night of the incident that there is a purse with what appeared to be fresh blood on it. R. App. disk submitted. The Court of Appeals said just this: "the officer said the purse appeared to have fresh blood on it." The Court of Appeals took the facts as presented in the record, but regardless, whether the purse had blood or did not have blood is irrelevant. Petitioner has not appealed the warrantless entry, which is where the purse could be relevant, and therefore, the purse is of no consequence to the appeal.

Petitioner also cites to the Court of Appeals' "gratuitous error" of stating that the "circumstances and scene suggested Jane Doe had been home alone before Daughter came home intoxicated." Opinion at. p. 7. This is not a statement of fact by the Court of Appeals and it has no relevance to the remainder of the opinion.

Petitioner points to the dispatch recording as "objective proof" that the officers were told about Jane Doe's dementia. However, Petitioner leaves out the fact that only one of the three individual defendants, Officer McGowan, was a party to that dispatch call and that she testified at trial was that she does not recall hearing the word dementia on the night of the arrest. The Court of Appeals held that this testimony may give rise to a claim for negligence or gross negligence, but it does not indicate actions so wanton to constitute a due process violation.

Further, Petitioner fails to include the fact that the uncontroverted evidence is that the officers spoke with Jane Doe and found her to be coherent, aware of her surroundings, able to communicate with them and direct them upstairs. There is nothing in the record to suggest that the officers should have known Jane Doe had dementia during their brief interaction with her.

Additionally, Petitioner argues that Daughter "told police" that her mother had dementia and could not be left alone. However, a review of the record shows that Daughter testified that he told non-defendant transport Officer Kouris this, but never told the three defendant officers.

Petitioner asserts that the case of *White v. Rochford*, 592 F.2d 381, 382 (7th Cir. 1979) is the most analogous factual case to the case at bar. If that is indeed so, then the *White* case further confirms that the trial court and the Court of Appeals were correct in determining the "state-created danger" theory does not apply to this case. In the *White* case, a man was drag racing a car at night in October on the Chicago Skyway with three minor children as passengers, the youngest being five-years-old. *Id.* at 382. He was pulled over and arrested. The man, the minor's uncle, "pleaded with the officers to take the children to the police station or phone booth so that they could contact their parents." *Id.* The officers refused and left the minor children in an abandoned vehicle on the side of the road, forcing the minors to cross an eight-lane highway on a cold Chicago night. *Id.*

There are two major differences between the *White* case and the case at bar. Any police officer would see a small child in the vehicle and appreciate the fact that leaving the child on the side of the road at night could create a risk of harm. Dementia is not obvious, and as Jane Doe's own doctor testified, it is likely the officers would not have known Jane Doe had dementia during their brief interaction. Second, in *White*, the uncle pleaded with the defendant officers to provide aid to the minor children. In our case, Daughter testified that she did not tell any of the defendant officers about dementia or that Jane Doe could not be left alone and did not plead with the defendant Officers to provide aid to her mother. The facts in *White* lend themselves to a finding that the officers engaged in reckless behavior or deliberate indifference. The facts in our case do not.

If the record in this case indicated that the officers fully knew about Jane Doe's medical condition and that she could not be left alone, if the record showed that Daughter pleaded with McGowan, Wholleb, and Doxey to provide care for her mother, then the "state-created danger" theory might potentially apply to the facts of this case. However, that is not what the record shows in our case and the Court of Appeals correctly held that the officers' actions did not constitute reckless behavior or deliberate indifference.

Finally, contrary to Petitioner's assertions, there was no medical testimony that leaving Jane Doe alone was the cause of her UTI. Petitioner attempts to turn "could" and "possible" into "certain." As the record reflects, after Jane Doe was left alone during the night after the arrest, Daughter left Jane Doe alone again with no supervision the next day to see a criminal lawyer and again the following day for four to five hours while Daughter went to the hospital. After being left alone for four to five hours, 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.*). When Jane Doe went to the emergency room, which was the first doctor she had seen in months[3], there was no evidence of an acute UTI. Based on these facts in the record, there is no proof that being left alone caused any specific harm to Jane Doe.

For all the reasons stated above and in line with the unanimous opinion of the Court of Appeals, Respondent respectfully asks this Court to deny the Petition for Writ of C*ertiorari* on Petitioner's "state-created danger" theory of liability.

[3] R. App. p. 568, line 25 – p. 570, line 14 & p. 374, line 3-p. 375, line 1.

2. The Court of Appeals correctly held that the trial court did not abuse its discretion in choosing not to recharge the jury a third time on the elements and damages involved in a § 1983 claim when the initial charge and the recharge covered this legal issues in full.

The majority opinion, as opposed to both the Petition and the dissent, relied on precedent to find no abuse of discretion in recharging the jury. The Court of Appeals correctly held that Petitioner's "arguments on appeal do not challenge the sufficiency of the jury instruction on nominal damages, but merely that they were not given for a third time, which precedent states is not an error." Opinion at p. 8-9.

The precedent noted by the Court of Appeals are the cases of *Rauch v. Zayas*, 284 S.C. 594 (Ct. App. 1985) and *The Winthrop Univ. Trustees for the State v. Pickens Roofing & Sheet Metals, Inc.*, 418 S.C. 142 (Ct. App. 2016). Both of these cases dealt with trial judges discretionary decisions on recharging the jury. The *Rauch* case is perhaps more on point to the facts of this case. In *Rauch*, the jury sent three questions back to the court concerning damages – "(1) Is the actual damage amount stated by the bills in the courtroom or is the amount determined by the jury? (2) is the "actual" separate from the pain and suffering award? and (3) Would an amount determined by the jury be the final amount awarded." *Rauch* 284 S.C. at 596. In response, the trial judge recharged the jury on actual damages, but he omitted the element of future damages. *Id.* The Plaintiff asked the court to instruct the jury that future damages were actual damages, and the judge refused. *Id.* at 596-597. The jury returned a verdict of $1,000.

On appeal, the Court of Appeals held that when the jury requests to rehear charges, the court need only include the portions of the initial charge that are responsive, a "failure to charge in greater detail is not error if the details were fully covered in the original charge," and the alleged error must be prejudicial to warrant a new trial. *Id.* at 597. The *Rauch* court held that the

initial charge covered actual damages in full, and the court's decision not to recharge the jury on future damages was not an error. *Id.*

The issue that Petitioner has not addressed is the fact that the trial court in our case fully instructed the jury on the elements of liability and damages for 1983 claims not once, but twice. Importantly, Petitioner does not claim that the initial charge or the first recharge did not fully cover the elements of liability and damages. Rather, Petitioner argues that the trial court erred in not fully recharging the jury a third time. Petitioner is essentially arguing that the trial court failed to recharge the jury in greater detail. However, as precedent sets out, the "failure to charge in greater detail is not error if the details were fully covered in the original charge." *Id.*

For the reasons cited above and based on precedent, Respondents respectfully ask this court to find that there was no error or abuse of discretion and to deny the Petition for Writ of C*ertiorari* on Petitioner's second question presented for review.

Conclusion

Respondents respectfully request that this Honorable Court deny Petitioners' Writ of C*ertiorari* on all grounds.

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