RECEIVED
Sep 20 2021
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

Appellant's Reply re:
Petition for Writ of *Certiorari*

Gregg Meyers, SC Bar No. 9908
217 Lucas Street Unit F-1
Mt. Pleasant SC 29464
843-324-1589
attygm@gmail.com
Attorney for Plaintiff – Appellant

Other Counsel of Record:

Chris Dorsel
Senn Legal
3 Wesley Drive
Charleston SC 29407
Attorney for Respondent

Index

Table of Cases

Reply Argument

In reply, only these points seem necessary.

1. The record must be construed in the light most favorable to the appellant.

As noted in the Petition, on appeal from a directed verdict the record must 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). This, respondents refuse to do.

Instead, Respondents set out (starting at p. 4) what they contend "accurately"[1] sets forth the various factual disputes from the record—e.g., which officer the daughter informed (opposition at p. 4); that another officer "simply did not hear" (opposition at p. 4) the dispatcher plainly telling her that Jane Doe had dementia (as the objective recording and 911 call records reflect – e.g., R. App. 893); that officers contended "there was no indication whatsoever that Jane Doe had dementia (opposition at p. 4)[2] and that "there is nothing in the record to suggest that the officers should have

[1] Meaning the record viewed favorably to respondents. We agree that certain testimony was disputed but this appeal is from a grant of directed verdict, and each of the factual disputes must be viewed in the light most favorable to Jane Doe.

[2] In the opposition brief at pp. 5 – 6, and 8 – 9, respondents add information about things that happened "days after the incident" (opposition at p. 5). The daughter was compelled *due to the conduct of the respondents* to interrupt her caregiving to seek legal counsel (due to the charges made against her) and medical treatment (due to her own injuries). While these events show Jane Doe's substantial confusion, and relate to her damages, as a matter of law events after the night of the entry and arrest are irrelevant to assessing (in the light most favorable to Jane Doe) the information reasonably available to the officers the night of the arrest. E.g., *Graham v. Gagnon*, 831 F.3d 176, 185 (4th Cir. 2016). As testified by Dr. Broadway, Jane Doe's treating physician at MUSC (R. App. 552) their recommended "alone time" was two to six hours, a standard Jane Doe's family had maintained until disrupted by the warrantless entry and its aftermath.

known Jane Doe had dementia" (opposition at p. 7). Which, of course, ignores entirely that the dispatcher overtly told officer McGowan quite plainly that Jane Doe had dementia.

Each of those factual disputes should have been resolved by the jury, not by directed verdict. None of them is properly part of the appeal. To assess the state created danger cause of action the record must be viewed in the light most favorable to Jane Doe.

That legal error was compounded two ways by the Court of Appeals. First, by the Court viewing, as respondent's argue, each of the various officer's subjective beliefs about Jane Doe's dementia.

The proper standard under 42 U.S.C. § 1983 is to analyze not subjective beliefs but the information "reasonably available" to each officer at the scene. E.g., *Graham v. Gagnon*, 831 F.3d 176, 185 (4th Cir. 2016) (reversing grant of summary judgment for officers under § 1983 because "the district court . . . "improperly credited the officers' subjective beliefs about what might have happened. . . ." and failed to consider information reasonably available to them.) See also, *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992) (qualified immunity decisions "must be made on the basis of information actually possessed by the officer at the critical time . . . *or that was then reasonably available to him*.") (emphasis added, citations omitted).

In case it does not go without saying, when the record is viewed favorably to Jane Doe that would include that a jury could reasonably believe her daughter's testimony that she informed the transport officer, Kouris, that "she needed to call somebody for my mom." R. App. 385. That information was reasonably available to the officers at the scene.

From that error of law about how the record should be reviewed, comes the Court's second compounding error, reflected in respondents' argument (opposition at p. 6) that state created danger can exist only when there is "reckless behavior" or "deliberate indifference," as the Court

of Appeals has now found. Note that neither "reckless" nor "deliberate indifference" is any part of state created danger as set forth by the Fourth Circuit, nor do respondents contend otherwise.

> 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.

John Doe v. Rosa, 795 F. 3d 429, 439 (4th Cir. 2015). We have found no Fourth Circuit or U.S. Supreme Court case that imposes the additional requirements, erroneously relied on by the Court of Appeals and urged by respondents. In essence, respondents contend that the claim requires not only the elements articulated by the Fourth Circuit in *Doe v. Rosa*, but *in addition*, "and which was reckless or deliberately indifferent."

Recklessness or deliberate indifference are concepts which are required in some § 1983 contexts, such as care for prisoners. E.g., the Supreme Court case cited by the Court of Appeals, *Davidson v. Cannon*, 474 U.S. 344 (1986), was a prisoner safety case decided before *Deshaney v. Winnebago Cty. Soc. Servs. Dept*, 489 U.S. 189 (1989). Obviously, it could not have limited *DeShaney*. The Court of Appeals ignored Fourth Circuit cases, which impose no such limitation.

This error underlies the respondents' evolving contentions (opposition at pp. 8 – 9) about *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979), where officers were found liable for state created danger for leaving minors to fend for themselves on the side of a busy Chicago highway after arresting the adult that had been driving them.

Originally respondents contended, and the trial court accepted, that state created danger applied only when police created a danger and a third party caused the harm, the theory used by the trial court to direct the verdict.[3] While a third party often causes harm after the state creates a

[3] As noted in the petition, the trial court described that state created danger "was not created for

danger, various cases, including *White v. Rochford*, demonstrate that police liability is not limited to only harms caused by a third party. Nor is there any reason why it should.

Now that the Court of Appeals has accepted a new argument, not made in the trial court, that there must also be "recklessness" or "deliberate indifference," for there to be liability for state created danger, respondents attempt to distinguish the facts of *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979). Which can be done only by construing the record against Jane Doe, contrary to the applicable standard. The argument has shifted: respondents have apparently abandoned the argument that liability requires a third party to cause the harm and have moved to new elements not required by the Fourth Circuit or by the Supreme Court.

The supposed factual distinction between this record and *White v. Rochford* requires the record to be viewed against the applicable standard, and of course the argument says nothing about the other cases[4] that found § 1983 liability for state created danger without any third party to cause harm. None of those cases impose the criteria adopted by the Court of Appeals for liability under state created danger, and which entirely ignores the officers' obligations under state law towards vulnerable adults, as noted in the Petition.

In short, Jane Doe was a vulnerable adult and by their affirmative acts, the respondent officers increased her vulnerability.

---

these type facts." R. App. 433.

[4] *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); *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.

The Court of Appeals decision should be reviewed by the South Carolina Supreme Court.

2. **Warrantless entry is part of this appeal**.

Respondents contend (opposition at p. 7) that warrantless entry is not part of this appeal. It is a strange contention. The respondents apparently have not realized that the reason appellant has challenged the trial court's refusal to properly respond to the jury's question about warrantless entry is to seek a new trial concerning the warrantless entry.

Warrantless entry is very much a part of this appeal, and the case should be reviewed by the Supreme Court.

3. After sitting in her soiled adult diaper, Jane Doe presented at MUSC with a UTI.

At p. 5 the respondents dispute Dr. Broadway's testimony about the urinary tract infection (UTI) with which Jane Doe presented at MUSC shortly after the warrantless entry, but respondents refer to the wrong part of the record in doing so. Then at p. 9 the respondents flatly ignore and contradict the record in contending, falsely, that "there was no evidence of an acute UTI" (opposition at p. 9).[5]

At pages 565 - 566 of the Record, Dr. Broadway was asked to explain items in the MUSC medical record of Jane Doe's hospitalization after the warrantless entry and her daughter's arrest. There is no question MUSC found that Jane Doe presented with a UTI. In her testimony at p. 565, Dr. Broadway stated:

[5] Ever anxious to attack Jane Doe, respondents add, opposition at p. 9, that the ER visit to MUSC after the warrantless entry was "the first doctor [Jane Doe] had seen in months," when respondents are well aware that, since it is incurable and of long duration, Alzheimer dementia patients are typically seen once a year. R. App. 550, 570.

Q. Let me show you page 2 of the MUSC medical record. * * * Does this appear to be part of the medical record?

A. This does appear to be part of the medical record.

* * *

On p. 566:

Q. All right. Is there any uncertainty in this record or in your mind that [Jane Doe] did not indeed have a urinary tract infection?

A. No. There's no uncertainty in my mind.

Dr. Broadway agreed that to a reasonable degree of medical certainty it increased the risk to Jane Doe for developing a UTI if she spent "17 or more hours" in a soiled adult diaper she could no longer herself change. R. App. 566 – 567. Which is only to say that viewed favorably to Jane Doe, when police removed her adult daughter caregiver it increased the risk of harm to Jane Doe.

Dr. Bolus, a defense witness, gave this testimony under questioning by the respondents:

Q. Now, can a person develop a urinary tract infection by sitting in a dirty diaper for 12 to 15 hours?
A. That is certainly possible, yes.

R. App. 521. The point being only that viewed favorably to Jane Doe, a jury could find that the officers increased her risk of developing a UTI when they arrested and removed her caregiver.

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.

4. The jury re-charge failed to respond to even what the trial court construed as the jury's question.

Respondents contend (opposition at p. 10-11) that the initial jury charge cures the trial

court's obligation to respond properly to the jury's question,[6] but cite to only cases where the additional charge requested was not responsive to what the jury asked. Here, the trial court failed to give the instruction even she articulated she intended.

The trial court is obligated respond to the jury's request. As Judge Geathers has articulated in his dissent, the trial court erred in giving a misleading charge, omitting the only parts of the original charge that were actually responsive to the jury's question, even as identified and construed by the trial court (R. App. 952).[7]

The trial judge stated she intended to "reinstruct them on the elements of 42 U.S.C. 1983 and what must be proven in order to establish" (R. App. 952). She failed to do so. She omitted, as Judge Geathers put it, "the only language that would have directly responded to the jury's question," meaning the nominal damages charge. The result was an error of law that gave a misleading charge on the warrantless entry cause of action.

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). That omission is an error of law, in that it was a misleading charge that should be reversed. E.g., *Wright*

---

[6] R. App. 499, Court's Exhibit 25 reflects the jury's question:

> 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?

[7] The trial court's interpretation and statement of intention was:

> 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.

v. Hiester Construction Co., Inc., 389 S.C. 504, 517-518, 698 S.E.2d 822, 829 (Ct. App. 2010). Damage from the unconstitutional conduct of state actors is not necessary to find 1983 liability; the violation of a constitutional protection is itself the violation.

Conclusion

Without provocation and based on "evidence" not in any way preserved, officers made a nightime warrantless entry into the home of Jane Doe. Although dispatch had plainly related that Jane Doe had dementia, the officers elected to arrest and remove her caregiver daughter, who was asleep in her bed before officers arrived. Excepting Judge Geathers, the Court of Appeals has endorsed this police conduct and affirmed what are plain errors made by the trial court.

For the reasons set forth above, the petition should be granted and the case should be reviewed by the South Carolina Supreme Court.

Respectfully submitted,

Gregg Meyers, No. 9908
217 Lucas Street Unit F-1
Mt. Pleasant SC 29464
843-324-1589
attygm@gmail.com

RECEIVED
Sep 20 2021
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

Proof of Service

I hereby affirm that pursuant to SCACR 242(g) I certify that I have served upon counsel for the defendants/respondent one copy of the Appellant's

Reply re Petition for Writ of *Certiorari*

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

supctfilings@sccourts.org
South Carolina Supreme Court
1231 Gervais Street
Columbia SC 29201

Chris@sennlegal.com
3 Wesley Drive
Charleston SC 29407
Attorney for Respondents

And to

ctappfilings@sccourts.org
Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
PO Box 11629
Columbia, SC 29211

Done September 20, 2021.

Respectfully submitted,

Gregg Meyers, No. 9908
217 Lucas Street Unit F-1
Mt. Pleasant SC 29464
843-324-1589
attygm@gmail.c