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SC Court of Appeals

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Georgetown County
Court of Common Pleas
William H. Seals Jr., Circuit Court Judge

Case No. 2019-CP-22-00503
App. No. 2022-001756

Casey A. Wesley, individually and as personal
representative of the Estate of Howard Wayne Wesley,

Respondent,

v.

Jay Thomas Johnson, M.D.,

Appellant.

**INITIAL BRIEF OF APPELLANT
JAY THOMAS JOHNSON, M.D.**

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STATEMENT OF THE ISSUES ON APPEAL

Where the Plaintiff asserts a claim of medical negligence against an emergency room physician for the death of her husband who was killed by his son three days after the physician discharged the son from the ER, did the Trial Court err in holding that the physician owed a duty to his patient's father under Bishop v. S.C. Department of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998), or Hardee v. Bio-Medical Applications of SC, 370 S.C. 511, 636 S.E.2d 629 (2006)?

- I. Is there any evidence to support imposing a duty on Dr. Johnson to warn his patient's father under the special relationship exception articulated in Bishop?
 - A. Does the Bishop exception apply where the patient presented to the emergency room seeking a voluntary commitment to a mental health facility?
 - B. Does the Bishop exception apply where there is no evidence that the patient made any specific threat to harm his father?

- II. Is there any evidence to support imposing a duty on Dr. Johnson to his patient's father as a reasonably foreseeable third-party victim under the narrow exception articulated in Hardee?
 - A. Does the Hardee exception apply where Dr. Johnson did not provide any treatment to his patient which he knew would have detrimental effects on his patient's potential for violence?
 - B. Does the Hardee exception apply where any duty owed would have been to warn the patient of the attendant risks and effects before administering any potentially detrimental treatment?

STATEMENT OF THE CASE

This medical malpractice action arises out of the death of Howard Wayne Wesley ("Wayne" or "father") who was killed by this son, Andrew Tucker Wesley ("Tucker"), on June 19, 2017. Mr. Wesley's widow, Casey Wesley, brings this action in her capacity as the personal representative of his estate, asserting causes of action for survival and wrongful death as well as a cause of action for loss of consortium. She alleges that Dr. Jay Thomas Johnson was negligent in his care and treatment of Tucker while he was a patient in the emergency room at Waccamaw Community Hospital on June 14-16, 2017.

The Plaintiff initially filed a summons and complaint on May 28, 2019, asserting claims against Dr. Johnson, the Hospital, and another E.R. physician, Joseph Michael Ratliffe, M.D. [See ROA ___; Docket Sheet.] However, she subsequently filed an amended complaint on January 30, 2020. [ROA ___; Amended Complaint.] The Hospital and Dr. Ratliffe filed answers, but they since have been dismissed from this action. [ROA ___; Stipulation of Dismissal (Ratliffe), filed 12/03/20. ROA ___; Stipulation of Dismissal (Waccamaw), filed 6/6/22.]

Dr. Johnson filed his answer to the amended complaint on February 12, 2020, denying the allegations of medical negligence and asserting various defenses. [ROA ___; Answer.] Dr. Johnson moved for summary judgment by motion filed October 5, 2020, on the grounds that the he did not owe any duty of care to the father of his patient under Bishop v. S. C. Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998), and related precedents. [ROA ___; Motion. ROA ___; Memorandum in Support, filed January 18, 2021.] The motion came before the Honorable Bentley D. Price, who granted summary judgment to Dr. Johnson, ruling that under the controlling precedent of Bishop, there was no duty to protect Mr. Wesley in the absence of "any evidence the medical staff knew or reasonably should have known that Tucker Wesley made specific threats of

harm to his father." [ROA ___; Order p. 6, filed 2/10/21.] Plaintiff filed a motion for reconsideration on February 12, 2021, reasserting the same arguments and arguing that discovery was not yet complete because Tucker, the hospital staff, and a consulting psychiatrist had not yet been deposed. [ROA ___; Motion, p. 18 n. 5.] Judge Price granted the motion to reconsider, directing that "the parties should complete discovery; and the Motions for Summary Judgment can be reconsidered without the necessity of refileing." [ROA ___; Order, filed 2/22/21.]

After discovery was completed, Dr. Johnson and the Plaintiff both filed motions for summary judgment on the duty issue. [ROA ___; Plaintiff motion for partial summary judgment, filed 8/31/22. ROA ___; Johnson motion for summary judgment, filed 9/1/22.] The motions came before the Honorable William H. Seals Jr., who denied Dr. Johnson's motion and granted partial judgment to Plaintiff, holding that:

A reasonably foreseeable third party, as explained in the Bishop and Hardee cases, may initiate an action against a physician under limited circumstances. In this case, taking into account the patient's history of mental illness, diagnosis of paranoid schizophrenia with an antisocial personality disorder, and history of violence targeting at his father, the court finds that this constitutes those limited circumstances.

[ROA ___; Form 4 Order, filed 11/18/22.] Dr. Johnson timely filed a notice of appeal on December 14, 2022. [ROA ___; NOA.]

STANDARD OF REVIEW

The issue of whether Dr. Johnson owed a duty to the father of his patient is a question of law for the court and subject to de novo review on appeal:

A motion for summary judgment on the basis of the absence of a duty is a question of law for the court to determine. *See Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007) (recognizing that whether a duty exists is a question of law for the courts).

Oblachinski v. Reynolds, 391 S.C. 557, 706 S.E.2d 844, 845 (2011); Town of Summerville v. City of N. Charleston, 378 S.C. 107, 662 S.E.2d 40, 41 (2008) ("[T]his court reviews questions of law de novo."). *See also S.C. Pub. Int. Found. v. Calhoun Cnty. Council*, 432 S.C. 492, 854 S.E.2d 836, 837 (2021) ("When the parties file cross-motions for summary judgment, the issue becomes a question of law for the Court to decide de novo.")

ARGUMENT

**THERE IS NO EVIDENTIARY BASIS TO SUPPORT IMPOSING A DUTY ON
DR. JOHNSON OWED TO HIS PATIENT'S FATHER UNDER THE PRECEDENT OF
BISHOP V. S.C. DEPARTMENT OF MENTAL HEALTH OR
HARDEE V. BIO-MEDICAL APPLICATIONS.**

I. Applicable Law on Duties to Warn – The General Rules with Limited Exceptions

The existence of a legal duty of care owed by the defendant to the plaintiff is an essential element of any negligence cause of action. Rogers v. S.C. Dep't of Parole & Community Corrections, 320 S.C. 253, 464 S.E.2d 330, 332 (1995). In this case, the question is whether Dr. Johnson owed any duty to his patient's father.

The general negligence rule is "one has no duty to control the dangerous conduct of another or to warn a potential victim of such conduct." 464 S.E.2d at 332; Bishop v. S. C. Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78, 81 (1998). In a medical malpractice cause of action, "the general rule [is] that medical providers do not owe a duty to third party non-patients." Hardee v. Bio-Medical Applications of S.C., Inc., 370 S.C. 511, 636 S.E.2d 629, 632 (2006). Exceptions to

these general rules can be found in certain limited circumstances as articulated in Bishop and Hardee.

The Court has recognized an exception to the general negligence rule where a special relationship exists:

[W]hen a defendant has the ability to monitor, supervise, and control an individual's conduct, a special relationship exists between the defendant and the individual, and the defendant may have a common law duty to warn potential victims of the individual's dangerous conduct.

Bishop, 502 S.E.2d at 81 (citing Rogers, supra). Such a special relationship may exist between a physician/psychiatrist and his patient where the physician/psychiatrist has custody and control of the patient such as under an involuntary commitment order, but a duty to warn the victim only arises where the physician/psychiatrist is aware of a specific threat made by the patient to harm a specific, identifiable person. Bishop, id. ("This duty to warn arises when the individual has made a specific threat of harm directed at a specific individual.").

In Hardee, the Court made a very narrow holding that carved out an exception to the general medical malpractice rule in limited circumstances where a physician provides treatment to a patient that creates a risk of harm to reasonably foreseeable third parties:

[A] medical provider who provides treatment which it knows may have detrimental effects on a patient's capacities and abilities owes a duty to prevent harm to patients and to reasonably foreseeable third parties by warning the patient of the attendant risks and effects before administering the treatment.

636 S.E.2d at 631-32. However, under that exception, the duty to the foreseeable third party is a duty to warn the patient of the risk.

In granting partial summary judgment to the Plaintiff, Judge Seals held that:

A reasonably foreseeable third party, as explained in the Bishop and Hardee cases, may initiate an action against a physician under limited circumstances. In this case, taking into account the patient's history of mental illness, diagnosis of paranoid schizophrenia with an antisocial personality disorder, and history of violence targeting at his father, the court finds that this constitutes those limited circumstances. [ROA ___; 11/18/22 Order.]

The circumstances in this case and evidence of record as set forth below do not support imposing a duty on Dr. Johnson owed to the father under either exception. A duty owed to the father cannot be found under the "special relationship" exception articulated in Bishop because Tucker presented to the ER for voluntary commitment, and moreover, no one had informed the ER staff or Dr. Johnson of any specific threat of harm made by Tucker against his father. A duty owed to the father cannot be found under the very narrow medical malpractice exception recognized in Hardee because Dr. Johnson did not administer any treatment that had any potential detrimental effect of provoking Tucker to kill his father as a foreseeable victim; and in any event, such duty would have been to warn Tucker – the patient, not his father.

II. Statement of the Facts

The evidence submitted by the parties on their cross motions for summary judgment establishes the following undisputed facts.

The deceased Wayne Wesley was the father of Tucker Wesley. The Plaintiff Casey Wesley was married to Mr. Wesley at the time in question. Karin Wesley is the mother of Tucker. At the time in question, Tucker was 23 years old. He lived in an apartment at his father's boat shop and worked for his father.¹

¹ It appears that Tucker began living at the boat shop in late 2014. [ROA ___; Karin Wesley Dep. p 71.]

Tucker had a history of mental illness and had been diagnosed as a paranoid schizophrenic with an antisocial personality disorder. He had been hospitalized in various facilities, numerous times over a span of years dating from 2012. Some of the hospitalizations were voluntary, but on other occasions, they were court-ordered involuntary commitments. Tucker was a regular patient in the Waccamaw Mental Health Center, an outpatient clinic, and he had been seen in the Waccamaw Community Hospital emergency room a number of times. However, the Waccamaw Hospital does not have inpatient mental health beds. [See generally ROA ___-___; Plaintiff Ex. 7 – selected excerpts of medical records. See also ROA ___-___; Plaintiff's Ex. 5 – Karin Wesley Journal.]

On Wednesday, June 14, 2017, Tucker had an argument with his father and called his mother to come get him. [ROA ___; Plaintiff Ex. 1 – Karin Wesley Dep. p. 105.] Mother/Karin recounted in her journal that the father had described the argument as "Tucker was verbally aggressive and defiant," and that Tucker "was very angry/upset with his dad" about working conditions. [ROA ___; Plaintiff Ex. 5 – Journal 0003.] Karin also noted in her journal that: "On Wednesday the 14th of June, Tucker was agitated; verbally abusive to Wayne; argumentative, defiant, destructive with Wayne's business/jobs over the past few days/weeks." [ROA ___; Ex. 5 - 0015.]

When Mother/Karin arrived at the boat shop to pick up Tucker, they discussed whether he wanted to go to a hospital. [ROA ___-___; Plaintiff Ex. 1 - Karin Wesley Dep. pp. 105-107.] Tucker himself called McLeod Hospital to try to get admitted, but was unsuccessful. He then called his caseworker [Lashanda Nesmith] who told him to go to the ER. On the drive to the emergency room at Waccamaw Hospital, Tucker told his mother that: "I planned on killing you today." [ROA ___; Plaintiff Ex. 1 – Karin Wesley Dep. p. 108/15-16.]

Karin did not accompany Tucker into the hospital; instead, she dropped him off at the emergency room. She then drove around to the other side of the hospital and informed two security guards that she had dropped her son off at the ER and that he was in a full-blown psychosis and he had planned to kill her. [ROA ___-___; Plaintiff Ex. 1 – Karin Wesley Dep. pp. 109-110.] Meanwhile, Tucker voluntarily checked by himself into the ER. At some point later on Wednesday, Karin called into the hospital and relayed information about Tucker's story. [ROA ___; Plaintiff Ex. 1 – Karin Wesley Dep. p. 111.] The ER record notes that "his mother called and states that he threatened to kill his neighbor and her." [ROA ___; Plaintiff Ex. 7 – Waccamaw ER records 0011.]

The initial ER triage paperwork stated as the reason for visit: "hearing voices, schizophrenia, voluntary com." [ROA ___; Plaintiff Ex. 7 – Waccamaw ER records 0014.] The ER record notes that Tucker was "well known to the emergency department with a long-standing history of schizophrenia reports recurrent auditory hallucinations." [ROA ___; Plaintiff Ex. 7 – 0011.] However, the notes indicate that on this ER visit, he did not appear overtly psychotic and he denied suicidal or homicidal ideations. [Id.] During his ER visit, Tucker was examined by three ER physicians and he was also evaluated by a consulting psychiatrist (via teleconference).

Dr. Gibson, the first ER physician to see Tucker on Wednesday, initiated steps to prepare an Application for Involuntary Emergency Hospitalization for Mental Illness as provided in S.C. Code Ann. §§44-17-410, et seq. [ROA ___; Plaintiff Ex. 7 – 0049-0051.]² Dr. Gibson prepared a certification in support of the application and recommended involuntary emergency hospitalization based on his statement that: "Pt well known to the ER long standing hx of schizophrenia. Admits to medical [sic] compliance. Mother states he threatened to kill her & a

² The application was prepared by a registered nurse (Garvey). [ROA ___; Plaintiff Ex. 7 – 0049]

neighbor. No SI." [ROA ____; Plaintiff Ex. 7 – 0051.] However, it does not appear that the application was forwarded to the probate court for filing.

Meanwhile, the next day on Thursday, Tucker was seen by Dr. Ratliffe, the ER physician who came on duty that morning, he noted that Tucker was "not grossly psychotic and is much more cooperative than when I previously [sic] seen him." Dr. Ratliffe was awaiting on a psychiatric recommendation. [ROA ____; Plaintiff Ex. 7 – 0006.]

In the early afternoon, Tucker was evaluated by a psychiatrist (Dr. Beck) who saw no indication for hospitalization. [ROA ____; Plaintiff Ex. 7 – 0027-28.] As Dr. Beck recorded, Tucker "came to the ED after an argument with his father. He said that he thought, 'Screw it. I'll go to the hospital.' He lives above his father's boat shop, does not like it and says that he wants to go to a psychiatric hospital and wait for a social worker to find him a new apartment." [Id.] Dr. Beck further reported that "his mood is 'not so good' because of the argument with his father. His energy and appetite are 'very good.' He denied suicidal or homicidal ideation and he has never attempted suicide. Specifically he is not homicidal toward his mother or his neighbor...." [Id.]

At some point on Thursday, the Stepmother/Casey Wesley called the ER and spoke with Dr. Ratliffe to express her concerns about Tucker.³ Stepmother/Casey testified that: "I knew [Dr. Ratliffe] had taken care of him before. And I just told him the last thing I had heard was my husband said he was having increased agitation and to please keep him and get him placed." [ROA ____; Plaintiff Ex. 3 – Casey Wesley Dep. p. 41/3-6.] Dr. Ratliffe testified: "[S]he said that she was concerned about Tucker and wanted him to get help. ... She was concerned, as I've listed it, with agitation, anger, has been escalating the last few days, and she was concerned that he would decompensate if discharged." [ROA ____; Plaintiff Ex. 8 - Ratliffe Dep p. 105/2-9.]

³ Casey was a former employee at the same ER.

Following his conversation with Stepmother/Casey, Dr. Ratliffe noted in the medical record on Thursday afternoon that he disagreed with Dr. Beck's recommendation, based on his knowledge of Tucker's history and the Stepmother's concerns:

Based on his previous history I certainly understand her concern. At this point I think it's reasonable to see if Case Management can get the patient a spot another facility as he is continuing to complaint of auditory hallucinations and is actually requesting help.

[ROA ___; Plaintiff Ex. 7 – 0004]. The medical record shows that the ER staff already had found a placement for Tucker at Lighthouse [Behavioral Health in Conway], but Tucker and his family objected to that facility and requested that placement be found at a different facility. [Id.; See also ROA ___; Plaintiff Ex. 8 - Ratliffe Dep. p. 105.]

On Friday morning, Dr. Johnson came on duty in the ER. After evaluating Tucker and reviewing the consult from Dr. Beck, Dr. Johnson decided to discharge Tucker. Dr. Johnson noted in the medical record that Tucker was back on his medication and he had no thoughts of harming himself or others, and that the psychiatrist (Dr. Beck) had "recommended outpatient management with no indication for involuntary commitment." [ROA __; Plaintiff Ex. 7 – 0003.] Dr. Johnson also completed a Reexamination and Amendment to Certificate of Licensed Physician documenting his opinion that Tucker was no longer in need of immediate, involuntary admission based on his improved symptoms and "Dr, Beck feels safe for out pt treatment." [ROA ___; Plaintiff Ex. 7 – 0048.]

When Mother/Karin was contacted by an ER nurse on Friday morning and informed that Tucker was being discharged, Karin demanded to speak with a physician. She testified that she spoke with Dr. Johnson and told him that Tucker had guns, that he had attacked people, that he had multiple ER visits. [ROA ___; Plaintiff's Ex. 1 – Karin Wesley Dep. p. 117.] According to her journal, Mother/Karin disputed the physician's conclusion that Tucker was not in psychosis,

and she told Dr. Johnson about Tucker's past experiences: "He's had a shot gun, a rifle, a bow and arrow, he's physically assaulted 3 unsuspecting people ...and not one time did we see it coming." [ROA ____; Plaintiff Ex. 5 - 009.]

Tucker was discharged on Friday morning at which time he was given a prescription for Abilify and paperwork informing that he had an appointment for his regular bi-weekly injection at the Waccamaw Mental Health Center on Monday, June 19, 2017. [ROA ____; Plaintiff Ex. 7 – 0015.] Tucker was picked up by his mother/Karin on Friday and she took him home to his apartment at his father's shop and had the prescription for Abilify filled. [ROA ____; Plaintiff Ex. 1 – Karin Wesley Dep. p. 125.]

After an apparently uneventful weekend, Mother/Karin picked up Tucker on Monday to take him to his appointment at Waccamaw Mental Health Center. At the time she picked him up, she thought he looked shabby, but she observed that he was calm and laid back. [ROA ____; Plaintiff Ex. 1 – Karin Wesley Dep. p. 133/7-16.] Karin delivered Tucker to his appointment at approximately 2:00 pm, but she did not go in with him. Tucker got his injection and met with his caseworker (Ms. Nesmith) who noted that he was calm and cooperative. [ROA ____; Plaintiff Ex. 17 - Nesmith Dep. p. 35.] After the appointment, Mother/Karin returned Tucker to the boat shop around 3:00 pm– during the ride home he was quiet. [ROA ____; Plaintiff Ex. 1 – Karin Wesley Dep. p. 135/9. See also ROA ____; Plaintiff Ex. 5 - Journal 0014.] When she left the shop, Tucker was with his father. [ROA ____; Plaintiff Ex. 1 – Karin Wesley Dep. p. 139.] Approximately an hour later, Karin learned that Tucker had killed his father.

III. Discussion of Caselaw Development of Exceptions Recognizing a Physician's Duties to a Third Party

A. **Bishop only recognizes an exception imposing a duty to warn a potential victim where there is a special relationship with the patient and the patient makes a specific threat against a specific, identifiable person.**

As noted above, the general rule is "one has no duty to control the dangerous conduct of another or to warn a potential victim of such conduct." Rogers v. Department of Corrections, 464 S.E.2d at 332. The Rogers action was brought on behalf of a victim who had been murdered by a former prisoner several weeks after he was released on furlough. In addressing an exception for a duty to warn a third party in the context of that situation, the Court held there were two requirements to impose any such duty – (1) there must be a special relationship between defendant and the wrong-doer, and (2) there must have been a specific threat to the plaintiff victim:

[W]hen a defendant has the ability to monitor, supervise, and control an individual's conduct, a special relationship exists between the defendant and the individual, and the defendant may have a common law duty to warn potential victims of the individual's dangerous conduct. [citations omitted] We hold such a duty to warn arises when a person being released from custody has made a specific threat of harm directed at a specific individual.

Id. Ultimately, the Court found that the correctional authorities were not under a duty to warn the victim upon the prisoner's release because there was no evidence presented that the prisoner had ever made a specific threat to harm the victim.

A question of what duty a physician owes to warn a third-party victim was presented to the Court of Appeals in Gilmer v. Martin, 323 S.C. 154, 473 S.E.2d 812 (Ct. App. 1996), an action in which a psychiatrist was sued when his patient set fire to a nursing home where she was employed. The plaintiff's action was based on a claim that the psychiatrist should have warned his patient's employer that the patient was dangerous and posed a threat of harm to patients at the nursing home. The trial court granted summary judgment to the defendant psychiatrist, holding that the

psychiatrist owed no duty to warn his patient's employer because the psychiatrist was not aware of any specific threat of harm towards the plaintiff victim. In affirming summary judgment for the defendant, the Court of Appeals discussed the holding in Rogers, stating: "[I]t is not simply foreseeability of the victim which gives rise to a person's liability for failure to warn; rather, it is the person's awareness of a distinct, specific, overt threat of harm which the individual makes towards a particular victim." Id. at 814. The Supreme Court granted a writ of certiorari to review the Court of Appeals' opinion, but it was dismissed as improvidently granted. 326 S.C. 267, 487 S.E.2d 854 (Mem - June 16, 1997).

While the Supreme Court had declined to review the decision in Gilmer, the Supreme Court did take up a question as to the duty to warn in the context of mental health professionals in Bishop.⁴ There, a mother, who had been involuntarily committed to the Department of Mental Health, physically abused her child the day after a probate court duly ordered her release.⁵ The Supreme Court discussed its earlier holding in Rogers and found that "the Department [of Mental Health] had a special relationship with mother because the Department had custody and control of mother." Bishop, 502 S.E.2d at 82. The Court further stated that "if the Department knew or should have known a specific threat was made by mother, the Department had a duty to warn the threatened third party of mother's release." Id. On the evidence in that case, the Court held that the Department of Mental Health owed a duty to warn of the mother's release because the admitting

⁴ The Court had granted a writ of certiorari in Bishop on May 29, 1997, just weeks before dismissing the writ in Gilmer.

⁵ The mother/patient was involuntarily committed on March 1, 1990; she was released the next day on March 2nd; and she assaulted her child on March 3rd.

documents⁶ established that the Department was aware mother had made specific threats to harm her child, ruling: "This knowledge was sufficient to trigger the Department's duty to warn victim of mother's release because a specific threat had been made by mother to harm a specific person." 501 S.E.2d at 82.⁷

The facts as established by the evidence in this case do not support imposing a duty on Dr. Johnson to warn the father under the special relationship exception articulated in Bishop. First, it is arguable as to whether there was a special relationship since Tucker presented to the ER for a voluntary commitment, the paperwork for involuntary emergency hospitalization was never filed with the probate court, and no court order was ever issued. Second, and more conclusively, there is no evidence that Dr. Johnson was aware or should have been aware that Tucker had made a specific threat of harm directed at his father. To the contrary, the evidence in the Waccamaw ER records from June 14th only show that Mother/Karin reported to the ER that Tucker told her that he had planned to kill her and a neighbor, but there is no evidence in those records that Tucker repeated or admitted making that threat against his mother to any of the medical staff during those three days he was in the ER. And, while the ER records show that Stepmother/Casey contacted

⁶ Specifically, the child's grandmother had provided information about the threat to the child in her affidavit supporting the involuntary commitment.

⁷ The Court ultimately held that the Department could not be held liable because the Department's failure to warn was not a proximate cause of the injury to the child. In so holding the Court relied on the evidence that the custodial grandmother, who had the mother committed, allowed the mother to visit with the victim child unsupervised just days after she had threatened to harm the child. Arguably, a comparable proximate cause reasoning can be applied in this case where the mother – who herself had been threatened – picked Tucker up from the ER on Friday and directly transported him back to the boat shop where the father allowed Tucker to return to his apartment; and where the mother transported Tucker to the mental health clinic on Monday, and returned him to the boat shop where the father again allowed Tucker to return. Appellant moved for summary judgment on the lack of proximate cause as well as the lack of any duty, but the trial court did not rule on the proximate cause issue.

the ER to voice her concerns, there is no evidence that she made any mention of a threat to harm the father.⁸ To the extent that the consulting psychiatrist (Dr. Beck) made note of the argument that Tucker had with his father, Dr. Beck made no mention of any physical fight or any threat to harm the father. Dr. Beck specifically noted that Tucker was not homicidal toward his mother, and he concluded that he saw no reason for hospitalization. [ROA ____; Plaintiff Ex. 5 0027-28.]

B. Hardee recognizes only a very narrow exception imposing a duty to a reasonably foreseeable victim to warn the patient where the physician's treatment of the patient creates a risk of unsafe or dangerous behavior.

In Bishop, the Court also separately addressed an issue of whether the patient's victim could impose liability on the Department for the physician's alleged medical malpractice. The Court referenced a possible exception to the general rule that a physician only owes a duty to the patient, but the Court found that the facts did not support imposing a duty to the third-party victim:

A reasonably foreseeable third party, who is harmed by a physician's malpractice in treating a patient, may initiate an action against a physician for malpractice under limited circumstances. [Citations omitted.] However, in the matter sub judice, the Department did not owe victim a duty to properly diagnose and treat mother. This duty was owed only to mother.

502 S.E.2d at 84.

The Court again addressed an issue of whether a physician owed a duty to a "reasonably foreseeable third party" in Hardee, under circumstances where a dialysis patient was involved in an automobile accident after leaving the defendant dialysis center. In finding that the dialysis center owed a duty to the accident victims *to warn the patient* that the dialysis treatment could impair her driving abilities, the Court held:

⁸ The fact that neither Casey nor Karin reported any concern for the father's safety to the ER staff is fully consistent with their deposition testimony that neither one of them ever believed that Tucker would try to harm his father. [ROA ____; Karin Wesley Dep. p.158/4-6. ROA ____; Casey Wesley Dep. p. 27/17-20.]

Generally, a medical provider has a duty to warn of the dangers associated with medical treatment. Thus, a medical provider who provides treatment which it knows may have detrimental effects on a patient's capacities and abilities owes a duty to prevent harm to patients and to reasonably foreseeable third parties by warning the patient of the attendant risks and effects before administering the treatment. Therefore, if Respondent knew that Patient could experience ill effects following dialysis treatment, Respondent owed Appellants a duty to warn Patient of the risks of driving.

636 S.E.2d at 631-32. However, the Court carefully qualified its ruling as "a very narrow holding":

[T]his is *a very narrow holding* that carves out an exception to the general rule that medical providers do not owe a duty to third party non-patients. Importantly, this duty owed to third parties is identical to the duty owed to the patient, i.e., a medical provider must warn a patient of the attendant risks and effects of any treatment.

636 S.E.2d at 632; (emphasis added). Under the very narrow holding articulated in Hardee, the circumstances in this case do not support imposing a duty on Dr. Johnson owed to the father as necessary to state a third-party cause of action for medical malpractice.

In Hardee, the dialysis center provided treatment that impaired the patient's ability to safely operate a vehicle and obligated the center *to warn the patient* of the risks. In contrast, the circumstances in this case do not justify imposing any duty on Dr. Johnson to warn Tucker because there is no evidence that Dr. Johnson provided any treatment that created a risk that Tucker would become violent. Moreover, if a duty had been owed to Mr. Wesley, as a reasonably foreseeable third party, it was a duty to warn the patient – Tucker – not his father. Any duty to warn Mr. Wesley directly must be evaluated under the Bishop analysis, as discussed above, and could only be imposed upon proof of a specific threat of harm to a specific person of which there is none. As to the interplay between these two exceptions, it is noteworthy that while the Bishop court did recognize a duty to warn the victim of the patient's threat under the special relationship exception, the Court did not recognize any such duty to the victim on the medical malpractice cause of action.

Plaintiff argues that Tucker's father was a foreseeable victim based on expert opinions that the father was "in group of people who were most at risk of Tucker carrying out a homicidal or violent act," or that "Tucker's family members were the most likely to be harmed by Tucker ... and potentially his father."⁹ However, those opinions about foreseeability do not meet the circumstances necessary to establish an exception to the general rule that a physician does not owe a duty to a third party.

As the Court of Appeals specifically stated in Gilmer, "it is not simply foreseeability of the victim which gives rise to a person's liability for failure to warn; rather, it is the person's awareness of a distinct, specific, overt threat of harm which the individual makes towards a particular victim." Gilmer, 473 S.E.2d at 814. The Supreme Court followed this reasoning in Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007), where a child/patient who had been sexually abused by his physician made a negligence claim against the physician's psychiatrist for failure to warn "reasonably foreseeable" future minor patients. In affirming the dismissal of claims against the defendant psychiatrist, the Court held: "[A] physician/psychiatrist is not liable under common law negligence principles for failing to report or warn about the predilection for child molestation of her patient in the absence of a specific threat to an identifiable party." Id. at 251. In analyzing the claim under the "special relationship" exception as articulated in Bishop, the Supreme Court stated that: "The key [to the exception] is there must be a specific threat made by the patient to harm a readily identifiable third party." 645 S.E.2d at 251. The Court rejected that plaintiff's argument that the psychiatrist had a duty to warn the victim because "he was a member of a readily identifiable group of future patients," relying upon the Gilmer decision for the proposition that

⁹ ROA ____; Dr. Bourne, p. 90-91. ROA ____; Dr. Frierson, p. 70.

foreseeability of the victim does not impose a duty to warn a third party in the absence of a specific threat to a specific victim. Id.

Comparably, in this case, it is not enough if, as the experts opine, that the parents were in the zone of foreseeable, potential victims. The KEY is whether Dr. Johnson was aware of a distinct, specific, overt threat of harm which Tucker made towards his father – and there is no evidence that Tucker made any such threat of harm towards his father.

C. Episodes from Tucker's past history do not constitute the type of limited circumstances delineated in Bishop or Hardee to warrant imposing a duty on Dr. Johnson to his patient's father.

In the absence of any evidence that Tucker made a specific threat to harm his father in connection with his June 2017 ER visit, Judge Seals still found that Tucker's "history of mental illness, diagnosis of paranoid schizophrenia with an antisocial personality disorder, and history of violence targeting at his father" constitute the limited circumstances delineated in Bishop and Hardee. While there are excerpts of medical records in the evidence of record which document Tucker's history of mental illness and a history of some of his hospitalizations, the fact of his mental health issues and his many hospitalizations do not justify imposing on Dr. Johnson a duty owed to Tucker's father because those records do not provide any relevant evidence on the key question of whether Dr. Johnson was aware or should have been aware of any specific threat made by Tucker towards his father during the relevant time frame.

The only medical record submitted to the trial court on the motions for summary judgment that references any violence by Tucker against his father is a single page from the Waccamaw Center for Mental Health from July 2014. [ROA ___; Plaintiff Ex. 13 – 0147.] The note from the clinic psychiatrist (Dr. Phelps) mentions "assault on father" without any other details about the

incident,¹⁰ and while the psychiatrist expressed concern that Tucker was dangerous and that he might hurt/kill someone, including his parents, the only mention of any "specific" threat was his observation that Tucker appeared to target his mother.¹¹ There is no evidence that Dr. Johnson was aware of this 2014 clinic note, but even if Dr. Johnson reviewed that old clinic note on June 16, 2017, Dr. Phelps' notation and concern does not reasonably support an inference that Tucker had made a specific threat to harm his father during the relevant time frame of the ER visit from June 14-16, 2017.

Arguably, even if the medical records had contained evidence that Tucker had made any specific threats to harm the father in 2014, the Court would be presented with a serious public policy question of whether an ER physician should be responsible for knowing of a single threat made in voluminous medical records from multiple hospitalizations over many years. In Bishop, the Court imposed a duty to warn based on a threat that was reported as part of the involuntary commitment just three days prior to the assault on the child. Nothing in Bishop or subsequent case law would support imposing a duty on a physician to warn of some vague threat mentioned in an old medical record from years ago.

¹⁰ Other evidence from the personal journal of Tucker's mother indicates that this incident occurred in May 2014, when Tucker angrily beat his father in the head after he told the nurse at the Waccamaw Mental Health Clinic that Tucker was not taking his medication and behaving as if he was in psychosis. [ROA ___; Karin Wesley journal 0035.] Those details are not in the medical records submitted on summary judgment.

¹¹It appears from Mother's journal that the interaction with Dr. Phelps on or about July 29, 2014, resulted in Tucker's commitment to Bryan Psychiatric Hospital and then Morris Village until he was discharged on October 14, 2014. [ROA ___; Plaintiff Ex. 5 – Karin Wesley journal 0040-0042.]

In regards to the supposed "history of violence targeting his father" to which Judge Seals refers, any other evidence (beyond Dr. Phelps' notation in July 2014) was not in the medical records that even possibly could have been available for Dr. Johnson to consider on June 16, 2017. There are references to Tucker's many hospitalizations and incidents of threats and violent behavior in his mother's journal, but that journal was not available to Dr. Johnson and cannot provide a relevant basis for considering whether Dr. Johnson owed a duty under Bishop or Hardee. And, even if her journal entries were relevant, they only reference the one incident of violence involving Tucker's father in May 2014.

There is evidence from testimony of Stepmother/Casey that Tucker threw a soda can at his father several weeks before he killed him, but there is no evidence that this incident was reported to the ER staff or otherwise made known to Dr. Johnson. [ROA ___; Plaintiff Ex. 3 – Casey Wesley Dep. p. 21.] Likewise, there is testimony from Tucker's brother (Reed Wesley) that Tucker was frequently violent with their father, and that Tucker had threatened to kill their father, but he could not say when the threat was made. [ROA ___, ___-___; Reed Wesley Dep. p. 26/7-10, pp. 28/8 – 29/3.] Most significantly, Reed never talked to the healthcare professionals about anything to do with Tucker. [ROA ___; Id. p. 59/8-13.]

CONCLUSION

On de novo review of the duty issue and the evidence of record, the Court will find that there no evidence to support imposing a duty on Dr. Johnson to warn his patient's father under the special relationship exception articulated in Bishop because Tucker sought voluntary commitment, and there is no evidence that the patient made any specific threat to harm his father. Further, the Court will find that there is no evidence to support imposing a duty on Dr. Johnson to his patient's father as a reasonably foreseeable third-party victim under the very narrow exception articulated

in Hardee because Dr. Johnson did not provide any treatment to his patient which he knew would have detrimental effects on his patient's potential for violence, and any duty owed would have been to warn the patient/Tucker of the attendant risks and effects before administering any potentially detrimental treatment.

WHEREFORE, based on the foregoing, Appellant respectfully submits that the Trial Court's order holding that the physician owed a duty to his patient's father should be reversed and judgment should be entered for Dr. Johnson because there is no evidence to support imposing any duty to the patient's father under Bishop or Hardee.

Respectfully submitted,

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