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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas

Th Honorable William H. Seals, Jr.  
Circuit Court Judge

Case No. 2019-CP-22-00503  
Appellate Case 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 RESPONDENT CASEY A. WESLEY, INDIVIDUALLY AND AS  
PERSONAL REPRESENTATIVE OF THE ESTATE OF HOWARD WAYNE WESLEY**

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## STATEMENT OF ISSUES ON APPEAL

- I. Whether the circuit court correctly granted a motion for partial summary judgment finding a legal duty exists where the undisputed facts are that that Respondent's late husband, Howard "Wayne" Wesley, was a reasonably foreseeable third-party harmed by Appellant's malpractice in discharging and failing to properly treat his patient, Andrew "Tucker" Wesley?

## STATEMENT OF THE CASE

This is a medical malpractice action arising out of the wrongful and negligent discharge of Andrew "Tucker" Wesley from the Waccamaw Community Hospital ("WCH") in June 2017. **(Compl.)**. Appellant, Jay Thomas Johnson, M.D. ("Dr. Johnson"), wrongfully and negligently revoked involuntary commitment papers and discharged Tucker Wesley from WCH on June 16, 2017. **(Compl.)**. Tucker, a paranoid schizophrenic, killed his father on June 19, 2017, following the discharge. **(Compl.)**.

Respondent, Casey Wesley ("Respondent"), is the widowed wife of Tucker's father, Howard "Wayne" Wesley, and the personal representative of his Estate. **(Compl.)**. Respondent served a Notice of Intent to File Suit under S.C. Code §15-79-125 and supporting affidavit of David J. Bourne, M.D. ("Dr. Bourne"), on March 5, 2019.<sup>1</sup> **(Notice of Intent; Compl.; Aff. of David J. Bourne, M.D.)**. Respondent initiated suit on May 28, 2019, and filed an amended complaint on January 30, 2020. **(Compl.; Am. Compl.)**. Dr. Johnson answered and denied the

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<sup>1</sup> Respondent also sued WCH and Dr. Michael Ratliffe, another emergency room physician at WCH. **(Compl.; Am. Compl.)**. Respondent has settled her claim against WCH and dismissed Dr. Ratliffe as a defendant. See **(Stipulation of Dismissal filed Dec. 3, 2020; Order Approving Settlement entered Feb. 1, 2022; Stipulation of Dismissal as to Some Defendants filed June 6, 2022)**.

Dr. Johnson is now the remaining defendant in this action.

allegations. (**Answer filed June 20, 2019; Am. Answer filed June 21, 2019; Answer to Am. Compl. filed Feb. 12, 2020**).

In 2020, Dr. Johnson filed a motion for summary judgment, asserting he owed no legal duty to Wayne because he was an unforeseeable third-party victim of harm caused by Tucker, his former patient. (**Mot. Summ. J. filed Oct. 5, 2020**).<sup>2</sup> Those motions came before the Honorable Bentley D. Price on January 19, 2021. (**Form 4 Order entered Feb. 2, 2021**). Judge Price initially granted the motions, but quickly granted Respondent's motion to reconsider. (**Form 4 entered Feb. 2, 2021; Order entered Feb. 10, 2021; Order Granting Pl.'s Mot. for Recons. entered on Feb. 22, 2021**).<sup>3</sup>

WCH thereafter settled with Respondent. See (**Order Approving Settlement entered Feb. 1, 2022; Stipulation of Dismissal as to Some Defendants filed June 6, 2022**). Respondent and Johnson carried on with discovery. See (**Hrg. Tr. Nov. 17, 2022 at 3:13-17; 13:8-13**).

Respondent then moved for partial summary judgment, seeking an order that Dr. Johnson owed Wayne Wesley a legal duty in this case as a matter of law based upon Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998) and Hardee v. Bio-Medical Applications of South Carolina, Inc., 370 S.C. 511, 636 S.E.2d 629 (2006). See (**Pl.'s Mot. For Partial Summ. J. filed Aug. 31, 2022**). Appellant later filed a cross-motion for summary judgment. (**Def.'s Mot. for Summ. J. filed Sept. 1, 2022, at 1**).

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<sup>2</sup> WCH, who was a defendant in this case at that time, (but has since settled with Respondent) filed a similar motion. See (**Mot. Summ. J. filed Jan. 11, 2021**).

<sup>3</sup> Respondent's motion for reconsideration focused on the legal framework governing non-patient duty rules. See (**Pl.'s Mot. to Reconsider, Alter, or Amend filed Feb. 12, 2021**); see also (**Order Granting Pl.'s Mot. for Recons. entered Feb. 22, 2021, at 1**) (describing the issues Respondent asked the Court to reconsider).

The parties' cross motions for summary judgment came before the Honorable William H. Seals, Jr., on November 17, 2022. See (Hr'g. Tr. Nov. 17, 2022). The parties extensively briefed their arguments in advance of the hearing, and submitted exhibits containing evidentiary material, including excerpts from certain depositions, documentary evidence, and affidavits. See (Def.'s Memo. in Support of Mot. For Summ. J. filed Nov. 14, 2022 & Exs. 1-2); (Pl.'s Memo. in Support of her Partial Mot. For Summ. J. and in Opp. To Def.'s Mot. for Summ. J. filed Nov. 15, 2022 & Exs. 1-17); (Def.'s Memo. in Opp. to Pl.'s Mot. for Summ. J. filed Nov. 16, 2022 & Exs. 1-2). Both parties agreed the record was thoroughly developed and ready for review and the decision could be made as a matter of law based upon the undisputed evidence. See (Hr'g. Tr. Nov. 17, 2022, at 3:13-17; 13:8-13).

Judge Seals granted Respondent's motion for partial summary judgment and denied Appellant's motion. **(Form 4 Order entered Nov. 18, 2022)**. Judge Seals stated his ruling as follows:

After careful consideration, reviewing the case law, memorandums, and oral arguments of both sides, the court will grant the Motion for Partial Summary Judgment by Attorney Ivey and deny the Motion for Summary Judgment by Attorney Hood. 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.

**(Form 4 Order entered Nov. 18, 2022)**.

Appellant did not file a motion to reconsider, alter, or amend Judge Seals' order, but proceeded to file a Notice of Appeal on December 14, 2022. **(Notice of Appeal)**.

## STATEMENT OF THE FACTS

*“I have personal experience with the patient, he has become very violent and homicidal past. . . . I spoke to [Respondent] . . . She is very concerned about the patient’s previous violent behavior, felt his agitation and anger have been escalating the last 3-4 days, and was concerned that the patient would decompensate if discharged. Based on his previous history I certainly understand her concern. At this point I think it is reasonable to see if case management can get the patient a spot at another facility as he is continuing to complain of auditory hallucinations and is actually requesting help.”*

- *Dr. Ratliffe’s Note on Tucker’s Chart on June 15, 2017 at 2:30 p.m.*

**(Pl.’s Memo. in Support of her Partial Mot. for Summ. J. and in Opp. to Def.’s Mot. for Summ. J. filed Nov. 15, 2022,<sup>4</sup> Ex. 7, at Bates No. A Wesley\_WCH 0004)** (emphasis added).

Dr. Johnson followed Dr. Ratliffe as the next day shift physician at WCH. **(Pl.’s Memo., Ex. 7, at Bates No. Wesley, WCH RRF 0033)**. Within approximately the first 25 minutes of his shift, Dr. Johnson unwound Dr. Ratliffe’s plan of care, revoked the then current involuntary commitment papers completed by Dr. Gibson, and discharged Tucker. **(Pl.’s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0003, 0048)**. Tucker violently assaulted his father following his discharge, resulting in his death. **(Pl.’s Memo., Ex. 7, Karin Wesley Depo., at 144:13-25)**.

I. Brief history of Tucker’s mental illness at the time he presented to WCH:

Tucker Wesley’s psychological problems started near the end of high school. **(Pl.’s Memo., Ex. 1, Karin Wesley Depo., at 11:23-15:19); (Pl.’s Memo., Ex. 1, Karin Wesley Depo., at 12:13-13:9, 14:17-25, 15:7-11)**. For example, in July 2012, Tucker came to his mother’s house, banging on her door with a shotgun in hand, and then proceeded to intimidate her, Wayne

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<sup>4</sup> Citations to “Pl.’s Memo.” shall hereinafter refer to Plaintiff/Respondent’s Memorandum in Support of her Motion for Partial Summary Judgment and Memorandum in Opposition to Defendant/Appellant’s Motion for Summary Judgment, which was filed with the circuit court on November 15, 2022.

(Tucker's father), and Wayne's coworker with the loaded gun, before ultimately firing the gun at a neighbor's truck. **(Pl.'s Memo., Ex. 1, Karin Wesley Depo., at 22-30)**.

By 2013, Tucker had been diagnosed as a schizophrenic, paranoid type, with antisocial personality disorder. **(Pl.'s Memo., Ex. 2, Bates No. Three Rivers Center for Behavior Health 0014)**. Tucker's condition causes him to experience delusional beliefs, hallucinations, homicidal ideations, and an abnormal propensity for violence, and resulted in a significant number of hospitalizations and commitments over a short period of time. See generally, **(Pl.'s Memo., Ex. 5, Karin Wesley Journal, at Bates No. Karin Wesley 0001-0060)** (documenting more than 20 hospitalizations and involuntary commitments between 2012 to 2017); **(Pl.'s Memo., Ex. 7, Bates No. A Wesley\_WCH 0004)** (describing Tucker's violent and homicidal).

Tucker's violent and homicidal past was well-documented in Tucker's medical records and known to his medical providers. See, e.g., **(Pl.'s Memo., Ex. 7, Bates No. A Wesley\_WCH 0004, 0006, 0011, 0051); (Pl.'s Memo., Ex. 13); see also (Pl.'s Memo., Ex. 13, Bates No. Waccamaw Center for Mental Health 0147)** ("There is a grave concern this individual may hurt and/or kill someone or multiple people including his parents, staff here at WCMHC or the community at large.").<sup>5</sup>

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<sup>5</sup> A harrowing prediction that Tucker would hurt or kill multiple people, including his parents, was recorded in Tucker's medical records by Dr. Richard Phelps years before the incident that is the subject of this case. **(Pl.'s Memo., Ex. 13, Bates No. Waccamaw Center for Mental Health 0147)**.

Dr. Phelps found Tucker's severe psychosis and history of violence, including his prior acts of "setting up a bow and arrow as a trap in his apartment, [a]ssault on his father, [and] walking down the street with a loaded weapon and entering business than (sic.) discharging the weapon into a parked and unoccupied car" so concerning that he spoke with an attorney out of Columbia about whether he could go beyond contacting local police and also contact state police or federal law enforcement, like ATF, regarding his concerns over Tucker's condition. **(Pl.'s Memo., Ex. 13, Bates No. Waccamaw Center for Mental Health 0147)**.

The details of Tucker's hospitalization at WCH from June 14-16, 2017, including the period during which Tucker was under the care of Dr. Johnson, are detailed below. These facts are followed by a summary of the expert forensic psychiatrists' opinions in this case who uniformly opined that Wayne was one of the most likely people to be harmed by Tucker after his discharge.<sup>6</sup>

I. Tucker's hospitalization at WCH from June 14-16, 2017:

- a. June 14, 2017: *Tucker presents to the WCH emergency room in active psychosis after getting into a fight with his father.*

On June 14, 2017, Tucker was living in an apartment in his father's boat restoration shop. (Pl.'s Memo., Ex. 1, Karin Wesley Depo., at 104:24-105:1). The living/work situation was not working. (Id. at 104:4-15).

Karin Wesley, Tucker's mother, picked Tucker up from Wayne's boat shop that morning. (Id. at 103:1-25). Later that day, Wayne called her and explained he needed to get away from Tucker. (Pl.'s Memo., Ex. 5, Karin Wesley Journal, at Bates No. 0003). Similarly, Tucker called his mom that afternoon and explained "I've got to get out of here, I can't stay here anymore," referring to his father boat shop (where he was living and working at the time). (Pl.'s Memo., Ex. 1, Karin Wesley Depo., at 103:1-25, 105:10-15).

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Tucker's family had these same fears, too. His mother explained that she and Tucker's father structured their lives and Tucker's post-diagnosis so that he was not alone. (Pl.'s Memo., Ex. 1, Karin Wesley Depo., at 82:13-25, 124:4-11) ("[W]e know he's dangerous. We've lived every little angle of it and we are on constant vigilance about it, and *we're doing everything to keep him from hurting other people and us*, and we take him to where he's supposed to be. . . .") (emphasis and double added).

<sup>6</sup> As further discussed *infra*, *all* of the experts agree Wayne was one of the people most likely to be harmed by Tucker. (Pl.'s Memo., Ex. 11, Dr. Bourne Depo., at 90:22 – 92:2); (Pl.'s Memo., Ex. 12, Dr. Frierson Depo., at 70:10-20).

Karin told Tucker that he was very agitated and needed to go to the hospital, which Tucker voluntarily did. (**Id. at 105:16-107:14**). On the way there, Tucker “went nuts,” even stating to his mother that he had planned to kill her but he forgot the bullets. (**Id. at 107:17-108:16**)

After dropping Tucker off at the entrance to the emergency room out of fear for her own safety, Karin reported to two hospital security guards that Tucker had threatened her and that he was in full-blown psychosis. (**Id. at 109:9-110:24**) (“I said he’s threated to kill me. He’s had planned to kill me today. He’s in full-blown psychosis. And I said, he’s (sic.) masks his symptoms.”). The security guards asked Karin for her telephone number and told her that someone from WCH would call her. (**Id. at 110:20-22**). When no one did, Karin called the main line at WCH and spoke to an emergency room nurse, relaying her concerns based upon Tucker’s illness and recent actions. (**Id. at 111:11-23**); (**Pl.’s Memo., at Ex. 5, Karin Wesley Journal, at Bates No. Karin Wesley 0008**). Karin explained that Tucker can appear calm while he is in psychosis.<sup>7</sup> (**Pl.’s Memo., Ex. 5, Karin Wesley Journal, at Bates No. Karin Wesley 0008**); (**Pl.’s Memo., Ex. 1, Karin Wesley Depo., at 162:22-163:13**).

Karin contemporaneously documented these events in her diary, in the same way she documented other observations of Tucker’s behavior over the years. See generally (**Pl.’s Memo., Ex. 5, Karin Wesley Journal, at Bates No. Karin Wesley 0001-0060**).

Tucker reported to the WCH emergency room providers that he was constantly hearing voices in his head and having strange thoughts. (**Pl.’s Memo., Ex. 7, at Bates No. A**

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<sup>7</sup> Dr. Foust of the Medical University of South Carolina once warned Karin and Wayne: “‘I’ve never seen anything like it; get him off your insurance.’ . . . He’s doing to bleed you dry. And what he was referred to was Tucker’s ability to mask his symptoms. How cool, calm, and collected he was.” (**Pl.’s Memo., Ex. 1, Karin Wesley Depo., at 64:18-65:1**).

Wesley\_WCH 0008, 0011, 0014). Tucker specifically relayed that he was “constantly hearing voices and having strange thoughts for the last 2 days” and had similar symptoms before. (Pl.’s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0008). He told the providers that the voices were telling him to do things. (Pl.’s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0011).

Dr. Bryan Gibson, the attending emergency room physician at WCH on June 14, 2017, examined Tucker and concluded that Tucker was mentally ill and posed a substantial risk of harm to himself or to others such that involuntary emergency hospitalization was necessary. (Pl.’s Memo., Ex. 7, at Bates No. A Wesley\_WCH RRFP 0033); (Pl.’s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0051). Dr. Gibson documented Tucker’s chart as follows:

**Patient well known to the emergency department with a long-standing history of schizophrenia reports recurrent auditory hallucinations.** He does not appear overtly psychotic on examination however **reports persistent ‘voices’ in his head telling her (sic.) things to do.** He denies suicidal or homicidal ideations although mother called and states that he threatened to kill his neighbor and her.

(Pl.’s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0011) (emphasis added).<sup>8</sup>

Dr. Gibson and the charge nurse that day, Deb Gainey, completed an Application for Involuntary Emergency Hospitalization for Mental Illness, supported by a Certificate of Licensed Physician. (Pl.’s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0049-0051). Dr. Gibson certified that Tucker:

IS MENTALLY ILL AND because of this mental condition CURRENTLY POSES A SUBSTANTIAL RISK of physical harm to self and/or others to the extent that INVOLUNTARY EMERGENCY HOSPITALIZATION is recommended.

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<sup>8</sup> Tucker was well-known to the WCH emergency department. WCH produced more than 900 pages of records between two Tideland Health facilities relating to the treatment of Tucker. (Pl. Memo., Ex. 9, Dr. Johnson Depo., at 63:24-64:7). 709 pages of records were produced pertaining to treatment of Tucker at WCH alone.

(Pl.'s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0051) (emphasis in original). Dr. Gibson stated that his recommendation for involuntary emergency hospitalization was based on Tucker's symptoms and specific examples of behavior demonstrating a probable risk of harm, including the threat he made to kill his mother. See (Pl.'s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0051).

Dr. Gibson executed a Certificate of Licensed Physician supporting an Application for Involuntary Emergency Hospitalization for Mental Illness. (Pl.'s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0049-0051). Next, Tucker was put in blue paper scrubs and a uniformed security guard was placed at the end of his bed. (Pl.'s Memo., Ex. 8, Dr. Ratliffe Depo., at 152:21-153:8); (Pl.'s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0056).

- b. *June 15, 2017: Dr. Ratliffe agrees Tucker must be held pending admission to an inpatient mental health facility and continues to try to find him a bed.*

Dr. Michael Ratliffe was the attending physician on June 15, 2017.<sup>9</sup> (Pl.'s Memo., Ex. 5, at Bates No. A Wesley\_WCH 0006-0008). Dr. Ratliffe evaluated Tucker twice that day and continued to hold Tucker pursuant to the Application for Involuntary Emergency Hospitalization for Mental Illness completed by Dr. Gibson and nurse Gainey the day prior. (Id.). Dr. Ratliffe instructed staff to continue to try to find Tucker a bed at an inpatient mental health care facility. (Id.).

Dr. Ratliffe first observed Tucker at 7:23 a.m. on June 15, 2017. (Pl.'s Memo., Ex. 5, at Bates No. A Wesley\_WCH 0006). Dr. Ratliffe stated: "Patient is well known to this provider and

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<sup>9</sup> Drs. Gibson, Ratliffe, and Johnson are all part of the Palmetto Emergency Physicians Group, which is a physician group that contracts with WCH and Georgetown Community Hospital for emergency room physician services. (Pl.'s Memo., Ex. 7, Dr. Ratliffe Depo., at 22:14-24:13). Dr. Ratliffe is senior to both Dr. Gibson and Dr. Johnson. (Id. at 31:6-32:8).

most of the usual emergency Department staff” and noted Tucker “**admit[ted] to hearing voices**” and requested to be transferred to McLeod or Three Rivers. (**Id.**) (emphasis added).

In between Dr. Ratliffe’s first and second observations of Tucker on June 15, 2017, Billy F. Beck, M.D., interviewed Tucker via remote video conference. (**Pl.’s Memo., Ex. 5, at Bates No. A Wesley\_WCH 0027-0032**). WCH’s records indicate that Tucker was agitated that morning, both before the remote interview with Dr. Beck and while he waited for the results. (**Pl.’s Memo., Ex. 5, at Bates No. A Wesley\_WCH 0056**). Dr. Beck documented the following after his brief, remote conversation with Tucker:

23 year old male, with a history of Schizophrenia, who presented to the ED with auditory hallucinations. **Mr. Wesley says that he has heard voices for a long time and they have worsened over the past couple of days.** He hears voices telling him that the FBI is coming to pick him up and there are things in his body. **He admits that he has not been compliant with oral Abilify,** but does take his Prolixin injection every two weeks. **He later says that he 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.**

**His mood is “not so good” because of the argument with his father.** His energy and appetite are “very good.” He denies suicidal or homicidal ideation and he has never attempted suicide. Specifically he is not homicidal toward his mother or his neighbor. **In addition to voices he has “strange thoughts”** such as people trying to harm him. He denies mania, anxiety or trauma.

(**Pl.’s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0027**) (emphasis added).

After documenting Tucker was hearing voices and upset with his father, Dr. Beck stated there was no need for emergency involuntary hospitalization because: (1) Tucker denied suicidal or homicidal ideations; (2) access to guns; (3) contracted for safety; and (4) agreed to take his medication. (**Pl.’s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0027-0028**).

After reviewing Dr. Beck's notes, speaking twice to Respondent,<sup>10</sup> and reexamining Tucker, Dr. Ratcliffe *rejected* Dr. Beck's statement that there was no need for an involuntary hold and overrode Dr. Beck's opinion. (Pl.'s Memo., Ex. 5, at Bates No. A Wesley\_WCH 0004);(Pl.'s Memo., Ex. 3, Casey Wesley Depo., at 40:21-24).

Dr. Ratcliffe documented his reasons for rejecting and overriding Dr. Beck's opinion in the second note he entered on Tucker's chart on June 15, 2017:

1430...patient was seen by psychiatry, consult and psychiatry spell patient's symptoms including auditory hallucinations were mostly chronic and felt he could have close outpatient follow-up and not require hospitalization.

**However I have personal experience with the patient, he has become very violent and homicidal in the past, and although he currently does not have access to a gun he has previously been hospitalized for homicidal ideation after walking around with a rifle.**

I spoke to the patient's [step]mother who is one of our former emergency department nurses and currently head of local hospice. **She is very concerned about the patient's previous violent behavior, felt his agitation and anger have been escalating the last 3-4 days, and was concerned that the patient would decompensate if discharged.**

**Based on his previous history I certainly understand her concern. At this point I think it is reasonable to see if case management can get the patient a spot as**

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<sup>10</sup> Respondent, a registered nurse with experience in the emergency room setting (at this hospital, nonetheless), spoke to Dr. Ratcliffe twice on June 15, 2017. (Pl.'s Memo., Ex. 5, at Bates No. A Wesley\_WCH 0004). She shared her concerns, particularly as it related to Tucker's escalating anger and agitation and her opinion was that he would decompensate if discharged. (**Id. at 40:25-41:21**); (Pl.'s Memo., Ex. 8, Dr. Ratcliffe Depo., at 105:2-9) ("[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."). Respondent testified to the fact that a few weeks prior to this hospitalization, Wayne told her that Tucker was exhibiting increased agitation and had "thr[own] a Pepsi can at his head." (Pl.'s Memo., Ex. 3, Casey Wesley Depo., at 21:11-16).

Respondent had *never* gotten involved to the point of having a conversation with Tucker's medical providers prior to this occasion. (Pl.'s Memo., Ex. 3, Casey Wesley Depo., at 41:19-21).

**another facility as he is continuing to complain of auditory hallucinations and is actually requesting help.**

The patient was accepted at Lighthouse, however he apparently was discharged from there 2-3 weeks ago, had an unspecified poor experience, and the patient and family have been very politely requests that he be seen at another facility if at all possible.

**(Pl.'s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0004)** (emphasis added).

When Dr. Ratliffe's shift ended on June 15, 2017, he had seen Tucker "at least twice that day and spoke to him. . . . And when [he] left his shift [Tucker] was in blue paper scrubs with a uniformed security guard sitting at the end of his bed as a one-on-one sitter. Involuntary paperwork was appropriately filled out, and the case manager was actively looking for . . ." a facility for him to be admitted on an in-patient basis. **(Pl.'s Memo., Ex. 8, Dr. Ratliffe Depo., at 152:21-153:8).**

II. Dr. Johnson abruptly changed course as soon as his shift started on June 16, 2017:

Dr. Johnson quickly, and without explanation, unwound the medical judgment of his partners, Dr. Gibson and Ratliffe, on June 16, 2017. Dr. Johnson started his shift at 7:00 am on June 16, 2017. **(Pl.'s Memo., Ex. 7, at Bates No. Wesley\_WCH RRF 0033).** At 7:20 a.m. (i.e., 20 minutes into his shift), Dr. Johnson entered a daily note on Tucker's chart. **(Pl.'s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0003).** He made no mention of Dr. Ratliffe's notes, particularly the final note he entered stating that it was reasonable to continue to hold Tucker and seek inpatient treatment because of the concern he would decompensate if discharged. **(Pl.'s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0003).**

Five minutes later, at 7:25 a.m., Dr. Johnson completed a "REEXAMINATION and AMENDMENT to CERTIFICATE OF LICENSED PHYSICIAN" form.<sup>11</sup> **(Pl.'s Memo., Ex. 7,**

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<sup>11</sup> All Dr. Johnson was required to do as the day-shift physician was observe Tucker and document a daily note. **(Pl.'s Memo., Ex. 8, Dr. Ratliffe Depo., at 82:4-16).** Dr. Johnson did not have to

at Bates No. A Wesley\_WCH 0048). Dr. Johnson expressed in this form that he was “of the opinion that the person [Tucker] is no longer in need of immediate, emergency admission.” (**Id.**). By signing the form, Dr. Johnson certified that he had reviewed and considered the Certificate of Licensed Physician that Dr. Gibson had previously completed<sup>12</sup> and conducted a current examination as to Tucker’s present condition and treatment needs. (**Id.**). In completing this amendment, Dr. Johnson revoked Dr. Gibson’s Certificate and terminated the involuntary

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reexamine Tucker or make any determination as to whether the Application for Involuntary Emergency Hospitalization was appropriate. (**Id.**).

Tucker would have still been subject to an involuntary hold on Monday, June 19, 2017 had Dr. Johnson not reexamined him and amended the application. See (**Pl. Memo. at 36-38**); (**Pl. Memo., Ex. 14, Hon. Tiffany Provence Depo. at 12:7-18, 16:22-17:3**); (**Pl. Memo., Ex. 15, Aff. of Leigh Powers Boan**). The preliminary probable cause hearing would not have been conducted until Thursday, June 22, 2017, at the earliest. (**Pl. Memo., Ex. 15, Aff. of Leigh Powers Boan**).

<sup>12</sup> To amend a Certificate of Licensed Physician supporting an Application for Involuntary Emergency Hospitalization for Mental Illness, a physician must: (1) reexamine the patient; and (2) review the original Certificate of Licensed Physician. (**Pl.’s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0048**).

Accordingly, the amendment form references the original Certificate in several places. (**Id.**). The physician amending the Certificate must specifically identify the original Certificate that he is certifying he has reviewed prior to making his decision. (**Id.**). The form requires the physician amending the Certificate to insert the name of the physician who completed the original Certificate and the date and time the original Certificate was completed. (**Id.**).

Dr. Johnson did not evidence that he had reviewed Dr. Gibson’s original Certificate. (**Id.**). Instead of Dr. Gibson’s name and the date and time he completed his Certificate (6-14-14 at 18:26), see (**Plf.’s Memo., Ex. 7, A Wesley\_WCH 0051**), Dr. Johnson inserted in his own name and the date and time he completed the amended Certificate. (**Pl.’s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0048**) (“I, THE UNDERSIGNED LICENSED PHYSICIAN, have reviewed the CERTIFICATE OF LICENSED PHYSICIAN previously completed by Johnson, M.D. [he struck out the “M.D.” pre-printed on the form and wrote in “D.O.”, again, in reference to his status] [on] 6/16/17 0725 (time/date) including the specific facts indicated on the Certificate that were present at the time of the previous examination.”).

commitment process and abandoned the efforts undertaken to find Tucker a bed in an in-patient mental hospital. (**Id.**); (**Pl.’s Memo.**; **Hrg. Tr. Nov. 17, 2022, at 28:6-11**).

An emergency room nurse called Tucker’s mother, Karin, and told her to come pick Tucker up. (**Pl.’s Memo., Ex. 1, Karin Wesley Depo., at 116:12-19**). When Karin learned Dr. Johnson was going to discharge Tucker, she demanded to speak to a physician, and was placed on the line with Dr. Johnson. (**Pl.’s Memo., Ex. 1, Karin Wesley Depo., at 116:12-19**). She explained to Dr. Johnson his abrupt, dramatic decision to revoke the involuntary hospitalization papers and discharge Tucker was a dangerous decision. (**Id.**). For 19 minutes, she explained Tucker’s history of mental illness, his history of violence, his remarkable ability to mask his symptoms, and her fear of what may happen if he was released without treatment. (**Id. at 117:17-18**); (**Pl.’s Memo., Ex. 5, Karin Wesley Journal, at Bates No. Karin Wesley 0009-0011**).

Karin’s contemporaneous diary entry described this phone call in detail:

. . . Dr. Johnson gets on the phone. He is an ER doctor. He said that the on-sight (sic.) psychiatrist evaluated Tucker. (I have never heard of an on-sight psychiatrist. He is always telepsyched at this ER). Dr. Johnson said upon evaluation, Tucker does not need to be committed. He said that Tucker says he doesn’t hear the voices anymore. **\*\*I think he may have even added that Tucker told him that the only reason he committed himself was to get away from me and Wayne.\*\*** Then I try to explain to him the events that led to him walking in to the ER on Wednesday afternoon. **I share Tucker’s history (weapons, threats, prior hospitalizations), his symptoms, his ability to mask symptoms.**

\* \* \*

I tell him that Tucker is in psychosis (and the behaviors that he’s been exhibiting, and his ability to mask behaviors). His response: He is not in psychosis. His tone: HE is NOT in psychosis. It was condescending and disrespectful. He spoke to me as if I were trying to force my son to go away in the hospital. Like I had some personal motive to falsely commit Tucker. As if I were annoying him, Dr. Johnson.

\* \* \*

**I tell him 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. Dr. Johnson's response was, "if this is the case then why isn't he institutionalized?" I responded that they don't institutionalize people with mental illness. They put them in behavioral hospitals, until they are out of "crisis". I am shocked by his determination to contradict me on every point that he is ignorant to the facts of symptoms, behaviors, and now the hospitalization of the mentally ill. Actually, I feel like I'm providing him with information that he should already be aware of, due to the fact most or all of the incidents involved Tucker being committed thru Waccamaw Hospital's ER.**

\* \* \*

**He tells me that he Tucker is not taking his oral meds, Abilify. I inform Dr. Johnson that mentally ill people don't believe that they are mentally ill, and if they do take the meds and feel better they will stop taking the meds. I explain that this is why he receives the anti-psych injection.**

\* \* \*

I tell Dr. Johnson that Tucker receives an (anti-psychotic) injection every two weeks at Waccamaw Mental Health. Every 14 days he sees his caseworker and gets the injection. We have a system in place. His caseworker will call to remind him, and most of the time his dad will get him to this appointment. If for some reason, he misses the appointment, the caseworker will call one or both parents to see why he missed and we get him there immediately ... this has happened on rare occasions.

\* \* \*

Dr. Johnson says that he is only the ER doctor, and that the psychiatrist makes the decision.

\* \* \*

I shared with Dr. Johnson another ER visit when Tucker had passed a psychiatric evaluation. Dr. Gammel was on duty and called me to say that Tucker had passed a telepsych evaluation and he was being discharged. I shared that I told Dr. Gammel that I was fearful of Tucker in his present state, and his dad was out of town. I explained the dangerous events acted out towards me that led to the pick-up and transport by the sheriff dept. for

commitment. Dr. Gammel said that he could over-ride a psych evaluation. I wanted Dr. Johnson to over-ride this evaluation.

\* \* \*

Dr. Johnson said that Tucker has an appt at 2:30 on 6/19/17 for his injection at Waccamaw Mental Health. He had other patients to see, and that Tucker was being discharged.

**(Pl.’s Memo., Ex. 5, at Bates No. Karin Wesley 0009-0011)** (emphasis added).

Dr. Johnson recalled the conversation, but in less detail—he did not contemporaneously document the conversation like Karin had done. **(Pl.’s Memo., Ex. 9, Dr. Johnson Depo., at 79-80)**. Years later in his deposition, his memory was that he described Tucker’s condition that morning and told Karin that Tucker requested to be discharged home. **(Pl.’s Memo., Ex. 9, Dr. Johnson Depo., at 79:3-15)**.<sup>13</sup> He recalled Karin expressing her concerns with Tucker’s agitation and hallucinations, but testified he didn’t think it was a big deal and disregarded her concerns. See **(Id. at 80:4-12)**. Dr. Johnson claimed, years later in his deposition, that by the end of the conversation “it sounded like she was agreeable with the plan.” **(Id. at 79:33-25)**.

Dr. Johnson, like Dr. Gibson and Dr. Ratliffe, had treated Tucker previously. **(Pl.’s Memo., Ex. 9, Dr. Johnson Depo., at 41:10-20)**. Dr. Johnson knew “that he [Tucker] had a mental health diagnosis of schizophrenia.” **(Id. at 42:4-8)**. Dr. Johnson admitted to having access to the Tideland Health records (i.e., Georgetown Memorial Hospital and Waccamaw Community Hospital) and testified that in the 25 minutes of decision-making time: “I believe I scanned through it, a couple of them. There was, like I said, thousands of pages of documents.” **(Id. at 63:24-64:7)**.

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<sup>13</sup> Dr. Johnson did not document that Tucker requested to be discharged home. **(Pl.’s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0003)**. In fact, there is no record of this statement in any of the records relating to this hospitalization. **(Pl.’s Memo., Ex. 7)**. The only indication in the record is that Tucker was requesting help and placement in a psychiatric hospital. **(Pl.’s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0004, 0027)**.

With respect to case management's notes on the file, Dr. Johnson testified: "I can't remember if I reviewed any of the case management notes." (**Id. at 71:2-3**). Dr. Johnson did not recall whether he reviewed either of Dr. Ratliffe's notes in Tucker's chart from June 15, 2017, or Dr. Gibson's notes and involuntary commitment papers from June 14, 2017. (**Id. at 74:2-5; 78:15-20**).<sup>14</sup>

Dr. Johnson told Karin to come pick up Tucker because he had other rounds and to take him to the Waccamaw Center for Mental Health the following week. (**Pl.'s Memo., Ex. 1, Karin Wesley Depo., at 124:15-17**). Karin abided by the doctor's orders to come pick up her son. (**Id. at 124:24-25**). Tucker's first comments after being abruptly discharged by Dr. Johnson were more complaints about his father. (**Pl.'s Memo., Ex. 1, Karin Wesley Depo., at 124:24-125:9**) ("He referred to Wayne as a cocksucker – no, wait. He said I don't care about that cocksucker.").

III. After Dr. Johnson discharged Tucker, he brutally beat and stabbed his father to death:

On Monday, June 19, 2017, Tucker beat and stabbed his father to death. (**Id. at 143:12-144:25**). Karin's account is as follows:

I don't know the order. I had heard the coroner's report of **12 stabs**. Then Reed went and saw his body and said **he was beat to death, too**. I don't know if he was beat to death or he was dead first. And his best friends, they helped clean up the blood and **they found pipes**. **So he was either beaten with a pipe, a big steel pipe**, a big – **the motor** – a big cylinder, or if he grabbed it – we don't know if he grabbed it to defend himself. **But he stabbed him 12 times; a few times in the chest and the back, and beat him**. **His face was all beaten**, and that's all I know. **It was brutal**.

(**Id. at 144:13-25**) (emphasis added).

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<sup>14</sup> As noted earlier, the "REEXAMINATION and AMENDMENT to CERTIFICATE OF LICENSED PHYSICIAN" Dr. Johnson completed on June 16, 2017 does suggest that Dr. Johnson reviewed Dr. Gibson's recommendation for emergency, involuntary hospitalization. See (Pl.'s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0048).

Tucker called 911 and reported to the operator that he had killed his father. (**Id. at 143:19-20**). He sat beside Wayne's dead body and waited for the police to arrive. (**Id. at 144:3-4**). Tucker told investigators that he was hearing voices in his head and the voices told him to kill Wayne:

Q And did he admit during this interview to hearing voices?

A Yes.

Q Okay. And the voices were some kind of F.B.I. or law enforcement voices?

A Correct.

Q Okay. And these voices told him to kill his father?

A Correct.

(**Pl.'s Memo., Ex. 10, Ofc. Griffith Depo. at 50:5-13**) (emphasis added). Tucker was charged with murder but later determined incompetent to stand trial as a result of his mental illness. (**Supp. Exs. to Johnson Memo. in Supp. of Mot. for Summ. J. filed Jan. 18, 2021, Karin Wesley Depo., at 168:15-169:9**).

IV. The evidence showing Wayne Wesley was a reasonably foreseeable third-party victim of harm caused by Tucker:

Tucker's mental illness often manifested in violent behaviors. See (**Pl.'s Memo., Ex. 3, Casey Wesley Depo., at 28:21-29:6**); (**Pl.'s Memo., Ex. 4, Reed Wesley Depo., at 37:7-9**); (**Pl.'s Memo., Ex. 1, Karin Wesley Depo., at 59:21-60:3**); (**Pl.'s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0004**). Importantly, some of Tucker's prior acts of violence were directed at Wayne. (**Id.**). This was documented within Tucker's medical records, which were accessible to Dr. Johnson on June 16, 2017. (**Pl.'s Memo., at Ex. 13**); (**Pl.'s Memo., Ex. 9, Dr. Johnson Depo., at 63:24-64:7**).

- a. *Tucker carried out prior acts of violence against Wayne that were recorded in WCH's records. There's no dispute that these records were accessible to Dr. Johnson when he evaluated Tucker on June 16, 2017.*

By way of example of Tucker's violence toward his father,<sup>15</sup> it is worth mentioning that Tucker violently assaulted Wayne in May 2013 after a doctor's appointment. (**Pl.'s Memo., at Exs. 1 & 3**). The assault began by Tucker cold-cocking Wayne while he was driving. (**Id.**). When Wayne pulled over, Tucker ran around the truck and attacked Wayne on the side of the road. (**Id.**). Tucker was admitted to WCH after the roadside assault and ultimately treated at the Medical University of South Carolina. (**Id.**).

Tucker's assault upon his father was documented in Tucker's medical records and it is undisputed these records were available to Dr. Johnson. (**Pl.'s Memo., at Ex. 13**); (**Pl.'s Memo., at Ex. 9, Dr. Johnson Depo., at 63:24-64:7**).

c. *The contents of the June 14-16, 2017 hospital records further establish that Wayne was a reasonably foreseeable third party victim of harm.*

Dr. Johnson explained in his deposition that by the time Tucker came under his care on June 16, 2017, Tucker had been hospitalized and committed so many times that there were thousands of pages of medical records accessible to him. (**Pl.'s Memo., Ex. 9, Dr. Johnson Depo., at 63:24-64:7**). He said he only scanned through *a couple of them*. (**Id.**).

Reference to the June 2017 hospitalization records alone details Tucker's mental illness, his violent and homicidal past, and the conflict between he and his father. The conflict between Tucker and Wayne was the impetus for his hospitalization. See (**Pl.'s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0027**) ("He later says that he came to the ED after an argument with his father. . . . He lives above his father's boat shop, does not like it and says that he wants to go to a

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<sup>15</sup> This is just one example. See (**Pl.'s Memo., Ex. 4, Reed Wesley Depo., at 37:7-9**) (Tucker's brother testified that Tucker physically assaulted their father on multiple occasions and more than anyone else because he was around him the most).

psychiatric hospital and wait for a social worker to find him a new apartment. His mood is 'not so good' because of the argument with his father.”).

Dr. Ratliffe documented his personal experience with Tucker and his knowledge of Tucker’s violent and homicidal history in his second note on Tucker’s chart on June 15, 2017. **(Pl.’s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0004)** (“I have person experience with the patient, *he has become very violent and homicidal in the past.*”) (emphasis added). That was the last, or immediately preceding note available to Dr. Johnson when he opened Tucker’s chart on June 16, 2017. **(Id.)**.

Respondent’s warnings of Tucker’s escalating anger and history of violent behavior were also documented in Dr. Ratliffe’s note. **(Id.)** (“She [referring to Respondent] is very concerned about the patient’s previous violent behavior, felt his agitation and anger have been escalating the last 3-4 days, and was concerned that the patient would decompensate if discharged.”). Karin Wesley also conveyed concerns, but directly to Dr. Johnson. **(Pl.’s Memo., Ex. 5, at Bates No. Karin Wesley 0009-0011)**. She described Tucker’s prior acts of violence and his remarkable ability to mask his symptoms. **(Id.)**.

There are volumes of additional medical records explaining the broader history of Tucker’s severe mental illness, violent tendencies, and prior assaults. See **(Pl.’s Memo., at Ex. 13); (Pl.’s Memo., at Ex. 9, Dr. Johnson Depo., at 63:24-64:7)**.

- d. *The experts in this case all agreed that Wayne was a reasonably foreseeable victim of harm based upon the facts of this case.*

Respondent and Dr. Johnson’s psychiatric expert witnesses agreed that Wayne was one of the people most likely to be harmed by Tucker. This is an important and undisputed fact supporting the circuit court’s determination that Dr. Johnson owed Wayne a legal duty.

Respondent's expert, Dr. Bourne, explained that "[t]hose in close intimate contact with [Tucker] . . . [s]pecifically the people towards whom he had expressed homicidal rage or whom he had attacked in the past, and that would be primarily his family members" were foreseeable third parties who may be harmed by Tucker if he was discharged. (**Pl.'s Memo., Ex. 11, Dr. Bourne Depo., at 90:22 – 92:2**). Wayne fell into each of these categories (he was in close, intimate contact with Tucker, Tucker had expressed homicidal rage and attacked him in the past, and he was a close family member). (**Id.**). Dr. Bourne placed Wayne and such other family members who were in intimate contact with Tucker "at a significantly higher risk than other people." (**Id.**).

Significantly, Dr. Johnson's expert, Dr. Richard Frierson's, opinion was consistent with Dr. Bourne's opinion. Dr. Frierson, a board certified forensic psychiatrist, identified three people as those most likely to be harmed by Tucker: (1) Tucker's mother; (2) **Tucker's father**; and (3) Tucker's neighbor. (**Pl.'s Memo., Ex. 12, Dr. Frierson Depo., at 11:14-23, 70:10-20**). Dr. Frierson said Tucker's family members were most likely to be harmed by him and he placed emphasis on his father, Wayne, because of Tucker's prior assaults upon him. (**Plf.'s Memo., Ex. 12, Dr. Frierson Depo., at 70:10-20**).

### **STANDARD OF REVIEW**

This Court applies the same standard applied by the circuit court when reviewing a grant of summary judgment. Wright v. PRG Real Estate Mgmt., Inc., 426 S.C. 202, 211-12, 826 S.E.2d 285, 290 (2019). That standard is set by Rule 56(c) of the South Carolina Rules of Civil Procedure, which provides a circuit court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Once the moving party has met the initial burden of demonstrating the absence

of a genuine issue of material fact, the nonmoving party cannot simply rest on the mere allegations or denials contained in the pleadings, but rather must come forward with specific facts showing that there is a genuine issue for trial. Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001). On a motion for summary judgment, “the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009). Summary judgment is appropriate where, as is the case here, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC.

### ARGUMENT

South Carolina, like many other states, permits non-patients to bring medical malpractice claims against a physician when the non-patient is harmed by the physician’s malpractice in treating his patient and the injured non-patient is a reasonably foreseeable third party.<sup>16</sup>

The South Carolina Supreme Court first announced this rule in Bishop v. South Carolina Dep’t of Mental Health, stating there: “A reasonably foreseeable third party, who is harmed by a

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<sup>16</sup> While no duty was found to exist in Bishop, the South Carolina Supreme Court pronounced that South Carolina would follow California, Florida, and New York in allowing third parties to recover for a physician’s malpractice under certain circumstances. 331 S.C. at 91-92, 502 S.E.2d at 84. These jurisdiction’s rules of non-patient duty are expressed in, *inter alia*: Molien v. Kaiser Foundation Hospitals, 27 Cal. 3d 916, 167 Cal. Rptr. 831, 616 P.2d 813 (1980); Hofmann v. Blackmon, 241 So. 2d 752 (Fla. 4<sup>th</sup> DCA 1970); Wojcik v. Aluminum Co. of America, 18 Misc. 2d 740, 183 N.Y.S.2d 351 (N.Y. Sup. 1959).

Other jurisdictions also follow the same or a similar rule. See, e.g., Warren v. Dinter, 926 N.W.2d 370, 377 (Minn. 2019); Volk v. DeMeerler, 187 Wash.2d 241, 386 P.3d 254 (Wash. 2016); Estates of Morgan v. Fairfield Family Counseling Ctr., 77 Ohio St. 3d 284, 673 N.E.2d 1311 (Ohio 1997); Ritchie v. Krasner, 221 Ariz. 288, 211 P.2d 1272, 1279 (Ariz. Ct. App. 2009); Plowman v. Fort Madison Cmty. Hosp., 869 N.W.2d 393, 401 (Iowa 2017); Horton v. Or. Health & Sci. Univ., 277 Or. App. 821, 373 P.3d 1158, 1162 (Or. App. 2016).

physician's malpractice in treating a patient, may initiate an action against a physician under limited circumstances." 331 S.C. 79, 92, 502 S.E.2d 78, 84 (1998). The Court has applied the rule in two subsequent cases: first, in Hardee v. Bio-Medical Applications of South Carolina, Inc., 370 S.C. 511, 636 S.E.2d 629 (2006); and, then again, in Oblachinski v. Reynolds, 391 S.C. 557, 706 S.E.2d 844 (2011). In Hardee, the Court found a legal duty exists when a medical provider is negligent in their acts or omissions in discharging a patient and a foreseeable third party is injured. 370 S.C. 511, 636 S.E.2d 629 (2006). The duty the provider owes to reasonably foreseeable parties harmed by the patient is the same as the duty the provider owes to the patient. Id. at 516, 632.

Respondents' motion for partial summary judgment was correctly decided under the above precedent and should be affirmed. Of these three cases, Hardee is the case where the Court found the facts supported imposition of a duty and, like this case, involved a medical provider's omissions and failures in discharging its patient. From a factual standpoint, this case stands on all fours with Hardee and is materially different from the facts in the cases Dr. Johnson cites.

Hardee involved negligent acts and omissions in administering dialysis and injuries caused by the patient after leaving the provider's care. 370 S.C. at 513, 636 S.E.2d at 630. The patient in Hardee was a diabetic, who after receiving hemodialysis treatment, left the medical clinic. Id. The patient went into insulin shock while he was driving, which caused him to lose control of his vehicle and strike plaintiffs' vehicle, resulting in serious injury to the plaintiffs. Id.

The plaintiffs' allegations of malpractice in Hardee were focused on the clinic's *omissions* in evaluating, monitoring, and discharging its patient following the dialysis treatment. Id. at 513, 630. The plaintiffs alleged the clinic failed to explain to the patient the ill effects that could result from his dialysis treatment (particularly in his diabetic condition), failed to perform normal post-treatment tests on the diabetic patient, and failed to monitor him prior to his release. Id. The

Supreme Court used the first of these omissions to demonstrate why the clinic owed a legal duty to third parties. Id. at 515-16, 631-32.

The throughline of Dr. Johnson’s argument is that treatment triggers a duty to third parties under Hardee, and he owed no duty to Wayne because he neglected to treat Tucker. (**App. Br. at 1, 16**). Dr. Johnson’s suggestion that he should be able to avoid liability because he refused to treat and negligently discharged Tucker is completely undercut by Hardee. See Hardee, 370 S.C. 511, 636 S.E.2d 629 (2006). The Court was clear in Hardee that acts *and omissions* can give rise to negligence, even when the duty is owed to a non-patient, third party. Id. at n. 1.<sup>17</sup>

In fact, the Supreme Court held the duty the clinic owed extended to an expansive class of third parties:

Appellants argue that . . . **Respondent breached a duty a medical provider owes to those persons in the general field of danger (that is, the motoring public) which should reasonably have been foreseen by Respondent when it administered the treatment.**

We believe South Carolina tort law ought to recognize such a duty.

. . . 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 . . . .

Id. at 515-16, 631-32 (footnote omitted) (emphasis added).

The clinic owed a legal duty to the entire “motoring public” and the plaintiffs fell within this expansive class of third parties to whom a duty was owed. Id.

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<sup>17</sup> The notion behind the general rule of no duty to non-patients is grounded in the theory that “by ‘misfeasance’ the defendant has created a new risk of harm to the plaintiff, while by ‘nonfeasance’ he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs.” W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on The Law of Torts § 56, at 373 (5th ed. 1984). The situation is quite the opposite here. Dr. Johnson made Tucker, and Wayne’s permanent situation much worse.

The circuit court correctly decided this case under Hardee. The duty, breach, and causation in this case are the same as the allegations in Hardee. The class of people to whom a duty was owed is much smaller than in Hardee, and there is no factual dispute that Tucker's father, Wayne, was within this small group of people.

Dr. Johnson's focus on Doe v. Marion, 373 S.C. 390, 394, 645 S.E.2d 245, 248 (2007), Gilmer v. Martin, 323 S.C. 154, 473 S.E.2d 812 (Ct. App. 1996), and Rogers v. S.C. Dep't of Parole & Community Corrections, 320 S.C. 253, 464 S.E.2d 330 (1995), is misplaced.<sup>18</sup> See, e.g., (App. Br. at 4-21). This is *not*, and never has been, a case involving a duty to warn based upon a specific threat of harm. See (Hr'g. Tr. Nov. 17, 2022 at 10:11-23); (Pl.'s Mot. to Reconsider, Alter, or Amend filed Feb. 12, 2021); (Pl.'s Memo.). Instead, this is a case where duty is *not* dependent on the existence of a specific threat of harm towards the non-patient plaintiff.

The circuit court's order should be affirmed because a medical provider owes a duty to a foreseeable third party who is injured as a result of the provider's negligent acts or omissions in discharging its patient and there is no genuine issue of material fact in this case that Wayne was a reasonably foreseeable third party injured as a result of Dr. Johnson's negligence in discharging

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<sup>18</sup> In each of those cases, the non-patients argued the medical providers owed a duty to warn them of their patient's predilection for certain acts. See Doe v. Marion, 373 S.C. 390, 394, 645 S.E.2d 245, 248 (2007) (alleging that the psychiatrist-defendant was negligent in failing to warn authorities of his patient's predilection for child molestation); Gilmer v. Martin, 323 S.C. 154, 473 S.E.2d 812 (Ct. App. 1996) (alleging that the psychiatrist-defendant failed to warn nursing home patients that his patient, one of its employees, was dangerous and posed a threat of harm to the patients at the nursing home); Rogers v. S.C. Dep't of Parole & Community Corrections, 320 S.C. 253, 464 S.E.2d 330 (1995) (arguing the Department of Parole and Community Corrections should have warned the plaintiff's mother of the inmate's release on furlough because the inmate was serving time for previous break-ins at the mother's home). There are no allegations in any of these cases that the plaintiffs were harmed as a result of the acts and omissions the provider took in treating or discharging its patient. Id.

Tucker. Therefore, this Court should affirm the circuit court's grant of partial summary judgment finding Dr. Johnson owed Wayne a legal duty.

**I. The circuit court's order must be affirmed because a physician owes a legal duty to reasonably foreseeable third parties who are harmed by the physician's malpractice in discharging his patient.**

The circuit court correctly found that Dr. Johnson owed a duty to Wayne in this case. Wayne was within the general field of danger upon Tucker's discharge from the hospital. More to the point, he was one of a handful of people who the experts in this case agreed were in a very specific field of danger. This is not just the opinion of Respondent's expert forensic psychiatrist, but it is also the opinion of Dr. Frierson, Dr. Johnson's expert. Because the parties' experts universally agree that Wayne was one of the most likely people to be injured by Tucker in the event he was discharged, the circuit court's decision granting summary judgment must be affirmed.

The facts bearing on this analysis are not in dispute. Wayne was Tucker's father. (**Am. Compl.**); (**App. Br. at 2**). Tucker had the most intimate and regular contact with his father—he lived and worked in his father's boat shop. (**Pl.'s Memo., Ex. 1, Karin Wesley Depo., at 104:24-105:1**); (**App. Br. at 6**). Tucker had a long-standing history of schizophrenia and reported persistent voices in his head telling him to do things. (**Pl.'s Memo., Ex. 7, at Bates No. A. Wesley\_WCH 0011, 0051**); (**App. Br. at 8**).

Tucker had become very violent and homicidal in the past. (**Pl.'s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0004**); see generally (**App. Br.**). Wayne and Karin arranged for Tucker to live and work at Wayne's boat shop because they knew their son was dangerous and they were trying to do everything they could to keep him from hurting them or other people. (**Pl.'s Memo., Ex. 1, Karin Wesley Depo., at 82:13-25, 124:4-11**); see generally (**App. Br.**). Tucker had previously obtained access to guns, committed homicidal acts, and violently assaulted Wayne.

**(Pl.’s Memo., Ex. 1, Karin Wesley Depo., at 22-30); (Pl.’s Memo., Ex. 5, Karin Wesley Journal); (Pl.’s Memo., Ex. 13); (Pl.’s Memo., Ex. 7, A Wesley\_WCH 0004); (Pl.’s Memo., Ex. 4, Reed Wesley Depo., at 37:7-9); see generally (App. Br.). Tucker had threatened to kill his mother, his father, and his neighbor on different occasions. (Pl.’s Memo., Ex. 4, Reed Wesley Depo., at 37:7-9); (Pl.’s Memo., Ex. 7, A Wesley\_WCH 0004, 0011, 0051); (App. Br. at 14); (App. Br. at 19-20).**

Tucker presented to the emergency room on June 14, 2017, after an argument with his father. **(Pl.’s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0027); (App. Br. at 7).** Tucker reported to multiple providers that he was hearing voices in his head. **(Pl.’s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0004, 0006, 0008, 0011, 0027, 0031, 0049, 0051); (App. Br. at 8).** Tucker described the voices as “constant,” “persistent,” “worsen[ing] over the past couple of days [prior to June 15, 2017],” “all over the place” and telling him to do certain things. **(Id.).**

Respondent reported to Dr. Ratliffe that Tucker’s agitation and anger had been escalating the days prior to the hospitalization and that she was concerned Tucker would decompensate if discharged. **(Pl.’s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0004); (App. Br. at 9).** Hospital guards observed Tucker to be agitated during the hospitalization. **(Pl.’s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0056).** Tucker told providers that he did not want to return to his father’s boat shop or to live there anymore and that his mood was not good because of the altercation with his father. **(Id.); (App. Br. at 9).** He wanted psychiatric help and to find another place to stay, away from his father. **(Pl.’s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0027); (App. Br. at 9).**

Dr. Johnson had access to Tucker’s electronic medical records, not just from this June 2017 period of care, but from periods of prior care. **(Pl.’s Memo., at Ex. 9, Dr. Johnson Depo., at 63:24-64:7); (App. Br. at 18-19).** But what’s more, is that Dr. Johnson spoke to Tucker’s mother,

Karin, on June 16, 2017. (Pl.’s Memo., Ex. 5, at Bates No. Karin Wesley 0009-0011); (Pl.’s Memo., Ex. 9, Dr. Johnson Depo., at 79-80); (App. Br. at 18). Karin told Dr. Johnson that Tucker had access to weapons, had physically assault people in the past, had been previously hospitalized, and could mask his symptoms. (Pl.’s Memo., Ex. 5, at Bates No. Karin Wesley 0009-0011); (App. Br. at 10-11).<sup>19</sup>

The facts only show, as confirmed by the experts in this case – *including Dr. Johnson’s own expert* – that Wayne was a reasonably foreseeable third party who would be harmed by Tucker if he was not properly treated and placed. (Pl.’s Memo., at Ex. 9, Dr. Johnson Depo., at 63:24-64:7); (Pl.’s Memo., Ex. 11, Dr. Bourne Depo., at 90:22 – 92:2); (Pl.’s Memo., Ex. 12, Dr. Frierson Depo., at 70:10-20); (Pl.’s Memo., at Ex. 13). Critical to the experts were those family members who had close contact with Tucker. (Pl.’s Memo., Ex. 11, Dr. Bourne Depo., at 90:22 – 92:2); (Pl.’s Memo., Ex. 12, Dr. Frierson Depo., at 70:10-20) (“[Do] you agree that Tucker’s family members were the most likely to be harmed by Tucker? . . . In general, I would say yes.”).<sup>20</sup>

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<sup>19</sup> Karin’s conversation with Dr. Johnson, during which she detailed Tucker’s history of violence and the particulars of his illness, completely eviscerates Dr. Johnson’s argument that he can only be charged with knowledge of what was reflected in the medical records available to him on June 16, 2017.

<sup>20</sup> The information available to Dr. Johnson beyond the basic of facts of Tucker’s familial, living, and work arrangements just add to the foreseeability here. Most of the cases extending a duty to non-patients find the patient’s immediate family members to be reasonably foreseeable third parties. See, e.g., Hofmann v. Blackmon, 241 So. 2d 752 (Fla. 4<sup>th</sup> DCA 1970) (finding a duty owing to members of the patient’s immediate family who lived in the same house); Pangburn v. Saad, 73 N.C. App. 336, 338-39, 326 S.E.2d 365, 367-68 (N.C. App. Ct. 1985) (finding a duty owing to the patient’s brother); Estates of Morgan v. Fairfield Family Counseling Ctr., 77 Ohio St. 3d 284, 673 N.E.2d 1311 (Ohio 1997) (finding a duty owing to the patient’s parents); Volk v. DeMeerler, 187 Wash.2d 241, 386 P.3d 254 (Wash. 2016) (finding a duty owing to the patient’s sons and girlfriend); Stewart v. Fakhrudin, 2010 WL 2134150 (Ct. App. Tenn. 2010) (unpublished opinion) (finding a duty owing to the patient’s daughter); Wojcik v. Aluminum Co. of America, 18 Misc. 2d 740, 183 N.Y.S.2d 351 (N.Y. Sup. 1959) (finding a duty owing to a

Dr. Johnson does not dispute the foregoing facts in his brief.<sup>21</sup> Instead, he attempts to avoid the inescapable conclusion that the evidence *only* supports affirming the circuit court’s conclusion of the existence of a duty by reading into Hardee a requirement that plainly does not exist: “proof of a specific threat of harm to a specific person.” (**App. Br. at 16**). His flawed analysis is as follows:

[I]n 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.

(**App. Br. at 18**).<sup>22</sup>

Dr. Johnson is wrong. The existence of a specific threat of harm towards Wayne is **not** the key. The dialysis patient in Hardee did not threaten the unrelated motorists he later collided with. 370 S.C. at 513-14, 636 S.E.2d at 630. There were no notes in the patient’s records that he had made a distinct, specific, overt threat of harm toward the motorists. See id. generally. They were complete strangers. Id. Those facts do not need to exist for a duty to arise.

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patient’s spouse); Molien v. Kaiser Foundation Hospitals, 27 Cal. 3d 916, 167 Cal. Rptr. 831, 616 P.2d 813 (1980) (finding a duty owing to a patient’s spouse).

<sup>21</sup> The only suggestion Dr. Johnson makes to the contrary is by way of a footnote reference to inadmissible evidence. (**App. Br. at n. 8**). The opinions of fact witnesses who are not qualified to render expert opinion on forensic risk of violence assessment do not constitute admissible evidence. See Rule 56(e), SCRE 701.

<sup>22</sup> Dr. Johnson incorrectly conflates the Bishop/Marion/Gilmer analysis, applied in cases where the duty alleged is a duty to warn based upon a specific threat, into the Hardee analysis (a case involving injury to complete strangers and no prior threats of harm), and applies the facts of this case to that singular analysis. See (**App. Br. at 15-18**) (Dr. Johnson’s interpretation of Hardee); (**App. Br. at 18-20**) (Dr. Johnson’s application of the facts).

The circuit court properly concluded that Dr. Johnson owed a duty to Wayne as a matter of law. Therefore, the order granting Respondent's motion for partial summary judgment and denying Dr. Johnson's motion for summary judgment must be affirmed.

**a. The duty a medical provider owes reasonably foreseeable third parties under Hardee extends beyond a duty to warn the third parties of a specific threat of harm.**

Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998) further undermines Dr. Johnson's interpretation of the applicable case law. Bishop involves an involuntary commitment of a mother by the South Carolina Department of Mental Health based upon threats the mother allegedly made against her 3-year-old daughter. See id. at 83-84, 80.<sup>23</sup> The designated examiners evaluated the mother, determined she was not mentally ill, and she was subsequently released pursuant to a probate court order. Id. at 84, 80. After her release, she was allowed an unsupervised period of visitation with her daughter (the grandmother had custody of the young child). Id. The mother allegedly marked her young daughter's body with a green felt tip magic marker, including her abdominal and vaginal areas. Id. The grandmother asserted the South Carolina Department of Mental Health owed the 3-year-old a duty to warn and to prevent her from harm. Id.

The case was decided on different grounds than are present here. First, the South Carolina Department of Mental Health was exempt from civil liability under S.C. Code §§15-78-60 and 44-17-900. Id. Second, the Court found proximate cause lacking because the grandmother's decision to leave her daughter alone with the young child constituted an intervening act of negligence

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<sup>23</sup> The mother's prior specific threats to harm her child were noted in the documents admitting the mother into custody of the Department of Mental Health. Id. at 88, 82.

breaking the causal chain as a matter of law. Id. at 88, 82. (“Even though the Department failed to warn of mother’s release thus breaching its duty to warn, its breach of this duty was not a proximate cause of the harm suffered by victim.”). Based upon these findings, the Court determined, as a matter of law, that the South Carolina Department of Mental Health “could not reasonably foresee grandmother would allow mother to visit with victim unsupervised since only three days earlier grandmother had mother involuntarily committed because the mother was threatening to harm victim.” Id. at 90, 83-84.<sup>24</sup>

While the Court did not find a duty for these reasons, the Court used the case to establish that South Carolina would follow the jurisdictions that recognize third parties’ right to recover for a physician’s malpractice under certain circumstances:

[S]ome jurisdictions allow third parties to recover for a physician’s malpractice under certain circumstances. See Molien v. Kaiser Foundation Hospitals, 27 Cal.3d 916, 167 Cal.Rptr. 831, 616 P.2d 813 (1980) (because a negligent misdiagnosis of a communicable disease may foreseeably cause injury to close member’s of a patient’s family, the physician’s duty of care extends to them); Hoffman v. Blackmon, 241 So.2d 752 (Fla. App. 1970) (a doctor is liable to persons infected by his patient if he negligently fails to diagnose a contagious disease); Wojcik v.

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<sup>24</sup> In disposing this case on such grounds, the Court was careful to note “[i]t is generally for the jury to determine whether the defendant’s negligence was a concurring proximate cause of the plaintiff’s injuries.” Id. at 89, 83. The majority believed the evidence was only susceptible to the inference that the South Carolina Department of Mental Health could not have reasonably foreseen the grandmother’s intervening negligence. Id. at 84, 90.

Justice Toal disagreed, expressing her dissent in the following terms: “[I]t is improper for us to rule upon the issue as a matter of law because it is quintessentially a question of fact. . . . The majority declares that the evidence is susceptible of only one inference. There are at least two other reasonable inferences.” Id. at 93-94, 85.

The circuit court properly denied Dr. Johnson’s motion for summary judgment on proximate cause, as it is a question of fact in this case and there is no support for his outrageous argument that, by picking up Tucker from WCH (pursuant to Dr. Johnson’s orders), taking him to the Waccamaw Center for Mental Health for his appointment on Monday (again, pursuant to Dr. Johnson’s instruction), and returning him each time to Wayne’s boat shop, where he lived and worked, she was the cause of Wayne’s death. (**App. Br. at 14, n. 7**).

Aluminum Co. of America, 18 Misc. 2s 740, 183 N.Y.S.2d 351 (N.Y. Sup. 1959) (doctor is liable for failing to warn patient’s family of patient’s contagious disease).

The physician-patient relationship is not a requisite in every legal action against a medical provider. 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.

Id. at 91-92, 84 (citation omitted) (noting the jurisdictions that do not allow third parties to recover for a physician’s malpractice before proceeding to discuss these cases and pronounce the new exception to the rule).

The law and facts in that case, including S.C. Code §§15-78-60 and 44-17-900, and the grandmother’s intervening negligence, just did not make for such “limited circumstances.” The facts were such that it was not reasonably foreseeable that the daughter would be a victim of harm by the mother because the opportunity should not have presented for her to commit the act.<sup>25</sup> Here, the facts are significantly different—Tucker was discharged back to his father’s boat shop, where he lived and worked, and Tucker’s father was instructed to closely supervise Tucker.<sup>26</sup>

Importantly, the Court in Bishop favorably cited cases which involved a medical provider’s negligent acts or omissions in diagnosis or treating the patient (and none of which involved a specific threat of harm), in support of the existence of a legal duty. See id. (citing Molien v. Kaiser Foundation Hospitals, 27 Cal.3d 916, 167 Cal.Rptr. 831, 616 P.2d 813 (1980) for the proposition

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<sup>25</sup> “Duty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.” Hardee v. Bio-Medical Applications of South Carolina, Inc., 370 S.C. 511, n. 2, 636, S.E.2d 629 (quoting William L. Prosser, Handbook of the Law of Torts § 53, 325-26 (4th ed. 1971)).

<sup>26</sup> Dr. Johnson’s discharge instructions directed “Close family supervision if possible.” (**Pl.’s Memo., Ex. 7, at Bates No. A Wesley\_WCH 0015**). Dr. Bourne explained “[w]hen the patient is voicing homicidal rage towards family members, *the last thing you want to do* is force a closer connection with the family under those circumstances at the time, because that will only add heat to the fire and get things more agitated.” (**Pl.’s Memo., Ex. 11, Dr. Bourne Depo. at 90:5-11**) (emphasis added).

that because a negligent misdiagnosis of a communicable disease may foreseeably cause injury to close member's of a patient's family, the physician's duty of care extends to them; also citing to Hoffman v. Blackmon, 241 So.2d 752 (Fla. App. 1970) for the proposition that a doctor is liable to persons infected by his patient if he negligently fails to diagnose a contagious disease).

As these cases demonstrate, failing to warn a patient of specific threats of harm (when made) or failing to explain to a patient the risks and potential detrimental effects of treatment (when treatment is provided) is not the only way a medical provider can deviate from accepted standards of professional care in treating a patient.<sup>27</sup> It is the physician's deviation from the standard of care that gives rise to the duty and the duty owed to the third party is the same duty owed to the patient.

Other states that follow the same rule have found the existence of a legal duty on factual circumstances similar to those present here. See, e.g., Pangburn v. Saad, 73 N.C. App. 336, 338-39, 326 S.E.2d 365, 367-68 (N.C. App. Ct. 1985) (holding staff psychiatrists at a state mental hospital owed a duty to plaintiff where her brother, who had been involuntarily committed and then negligently released stabbed her after coming home); Perreira v. State, 768 P.2d 1198 (Co. 1989) (holding state hospital and psychiatrist owed police officer who was killed by paranoid schizophrenic a duty to exercise due care in determining whether an involuntarily committed patient had a propensity for violence and presented unreasonable risk of serious bodily harm to

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<sup>27</sup>Bishop involved two theories of duty, one of which was dependent on an allegation of a specific threat of harm. 331 S.C. 79, 502 S.E.2d 78 (1998).

The duty to report or warn third parties of the dangerous propensities of a patient is distinct from the duty to prevent harm to reasonably foreseeable third parties resulting from the medical provider's treatment of a patient. They are two separate duties and analyzed as such in Bishop.

others upon release); Estates of Morgan v. Fairfield Family Counseling Ctr., 77 Ohio St. 3d 284, 673 N.E.2d 1311 (Ohio 1997) (holding that estate of parents who were killed by their schizophrenic son could maintain against the son's psychotherapist and psychiatric institute where the plaintiffs alleged that the medical providers were negligent in the manner in which they treated his schizophrenia); Volk v. DeMeerler, 187 Wash.2d 241, 386 P.3d 254 (Wash. 2016) (holding that psychiatrist who knew of patient's history of homicidal thoughts, recent instability, and history of non-compliance with his antipsychotic medications owed a duty to patient's former girlfriend and sons when patient killed his former girlfriend, one of her son's, and attempted the murder of the other); Stewart v. Fakhruddin, 2010 WL 2134150 (Ct. App. Tenn. 2010) (unpublished opinion) (holding psychiatrist who had provided outpatient treatment to a patient after an incident of domestic violence owed a duty to a patient's daughter when the patient shot and killed his wife and the plaintiff alleged that the psychiatrist failed to recognize his patient's propensity for violent acts directed towards his immediate family and failed to provide appropriate medications and safety plan).

The circuit court's order must be affirmed under Hardee and Bishop.

**b. Oblachinski v. Reynolds, 391 S.C. 557, 706 S.E.2d 844 (2011) and Delaney v. United States, 260 F. Supp. 3d 505 (D.S.C. 2017) further support affirming the circuit court.**

Other cases involving questions of the duty owed to non-patients under South Carolina law further support affirmance of the circuit court's order in this case. See Oblachinski v. Reynolds, 391 S.C. 557, 706 S.E.2d 844 (2011); Delaney v. United States, 260 F. Supp. 3d 505 (D.S.C. 2017) (applying South Carolina law).

The South Carolina Supreme Court applied the third-party medical malpractice duty rule most recently in Oblachinski v. Reynolds, 391 S.C. 557, 706 S.E.2d 844 (2011). In Oblachinski,

the Director of the Lexington County Children’s Center misdiagnosed a four-year old girl with a torn hymen, which led to an incorrect conclusion that the young girl had been sexually abused by the plaintiff. Id. at 559, 845. The plaintiff consequentially was criminally indicted for sexually abusing a minor. Id. at 560. He brought a third-party medical malpractice claim against the Children’s Center based on the misdiagnosis. Id. The Court found a legal duty did not exist because the wrongly accused plaintiff was directly injured by the medical provider, not by his patient. Id. at 562, 846. The Court explained as follows:

... [F]oreseeability of injury, in and of itself, does **not** give rise to a duty. . . .

In both Bishop and Hardee, the actions hinged on conduct by the patient which injured the third-party plaintiff. Here, Oblachinski asks us to extend the limited duty recognized in Hardee to a non-patient injured by the negligence of the doctor in diagnosing the patient.

Id. at 562, 846 (internal quotations and citations omitted, emphasis in original).<sup>28</sup>

The South Carolina Supreme Court placed emphasis on the fact that it was the dialysis clinic patient who injured the motorists in Hardee and the Department of Mental Health’s patient

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<sup>28</sup> While this point is further expanded infra, it is noted here too, that the South Carolina Supreme Court did *not* opine that it was declining to impose a legal duty: (1) because the 4-year-old patient did not convey a specific threat to harm the plaintiff; or (2) because the harm that befell Oblachinski was not the result of a failure to warn the minor patient of the risks and potential detrimental effects of his diagnosis (e.g., I am making this diagnosis but could be wrong, which would result in consequences). The harm in Oblachinski resulted from the provider’s misdiagnosis, not the provider’s failure to warn the patient of the risks and effects attendant to the treatment.

Moreover, the facts of Oblachinski, like the facts here, begs the questions of what type of warning to the patient of the risks and effect of treatment can a provider issue when misdiagnosing a condition or opting to not to treat a patient, and how is such warning effective when it is made to an incompetent patient? If a physician could condition every diagnosis, he makes on the chance that he could be wrong and it could cause detrimental effects and avoid liability by doing so, physicians could effectively insulate themselves from liability in every case.

who injured her daughter in Bishop. Id. Unlike those cases (and the facts that present here), the four-year-old patient in Oblachinski did not carry-out or perform any act that injured plaintiff.

The Supreme Court was clear it was basing its decision in Oblachinski solely on the particular public policy considerations at hand in that case, which do not present here:

Even though the harm which befell Oblachinski as a result of the misdiagnosis may have been reasonably foreseeable, we believe important policy concerns weigh against extending a duty to him in this case.

...

Medical diagnoses of sexual abuse as well as a child's ability to accurately relate the history of such incidents are not as absolute and infallible as they ought to be, given the serious consequences that may result. In our view, the good faith willingness of medical providers to identify the existence of sexual abuse should not be chilled or otherwise compromised by subjecting them to malpractice actions.

Id. at 562-63, 846-47.

Had the South Carolina Supreme Court intended Hardee to only impose a duty here the medical provider fails to warn the patient of the risks and potential detrimental effects of treatment, the Court would not have proceeded with its duty analysis in Oblachinski. It would be an open-and-shut analysis because it is a misdiagnosis case.

Judge Norton interpreted Hardee the same way in Delaney v. United States, 260 F. Supp. 3d 505 (D.S.C. 2017). There, a marine presented to the Beaufort Naval Hospital emergency department stating that he had suicidal ideations. Id. at 507. The naval hospital's plans were to transfer the marine to the Beaufort Memorial Hospital because they had a psychiatry department that could evaluate him; however, during the transferring process, the marine was permitted to go outside for "some fresh air." Id. When he went outside, he jumped the security gate and managed to take control of an unattended and running fire truck. Id. at 508. He took off in the fire truck

traveling at high speed, collided with several cars, and struck and killed plaintiff's decedent who was a pedestrian in his path. Id.

The government moved for summary judgment arguing that the medical providers at the U.S. Naval Hospital did not owe the pedestrian a duty when the marine was seeking to voluntarily committee himself and undergo a mental evaluation. Id. at 509. Judge David Norton found that the naval hospital did not owe a duty based upon the unpredictability of the marine's acts. Id. at 513 (“Delaney asks the court to interpret Bishop and Hardee as supporting the proposition that the US Naval Hospital had a legal duty to keep Hunt safe—even though he was voluntary committing himself to undergo a mental health evaluation—and that this duty extends to Justin Miller, a pedestrian who Hunt ran over with a stolen fire truck.”). The harm caused by the marine was unrelated to the naval hospital's treatment – he escaped. Id.<sup>29</sup>

These cases demonstrate that the Bishop/Hardee exception is a narrow one that is not often met on the facts of the case. There is no doubt the exception is met in this case. Dr. Johnson's acts and omissions taken with respect to Tucker—particularly his wrongful and negligent revocation

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<sup>29</sup> Because the act committed by the patient was so unpredictable, Judge Norton commented that to find a duty, he would have to interpret Hardee “rather expansive[ly]” and make an Erie guess, sitting on the case as a federal judge. See id. at 512-13 and at n. 9 (citing Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)).

As with the South Carolina Supreme Court's opinion in Oblachinski, the court's reasoning against the imposition of a duty was in no part based upon the lack of a specific threat or a duty to warn the third-party plaintiff or limited to a duty to warn the patient of the risks and potential detrimental effects of treatment.

The harm that Tucker carried-out was the direct and proximate result of Dr. Johnson's misdiagnosis, negligent treatment, and wrongful discharge of Tucker, unlike the facts in Delaney. See (**Am. Compl. at ¶¶ 69(i)-(vii); (Aff. of David J. Bourne)**). Tucker's chief complaint was that he was hearing voices in his head, telling him to do things, and he murdered his father when the voices in his head told him to.

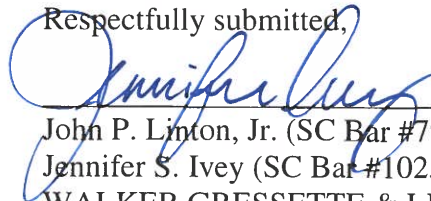
of the involuntary commitment papers—created a risk of harm to Tucker, Wayne, Tucker’s mother, and her neighbor. That harm was realized with respect to Wayne. There’s no evidence that Dr. Johnson explained to Tucker of the risks and potentially detrimental effects of what he chose to do, much less did he convey the same to Wayne or anyone else he placed in danger.

Dr. Johnson owed a duty to Wayne as a matter of law because there is no genuine dispute of material fact that he was a reasonably foreseeable third party harmed by Dr. Johnson’s negligence in assessing Tucker’s condition and discharging him from WCH on June 16, 2017.

### CONCLUSION

This Court should affirm the order granting Respondent partial summary judgment for the reasons stated herein. The circuit court’s Order Granting Plaintiff’s Motion for Partial Summary Judgment should be **AFFIRMED**.

Respectfully submitted,



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May 5, 2023  
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