THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2012-CP-07-03782

Rebecca Delaney, as Personal Representative of the Estate of Justin Nicholas Miller, Appellant,

v.

CasePro, Inc., Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. DID THE CIRCUIT COURT ERR IN REFUSING TO CHARGE THE JURY IN A WRONGFUL DEATH CASE THAT THE DUTY OWED BY A MEDICAL PROVIDER TO A REASONABLY FORESEEABLE THIRD PARTY INJURED AND KILLED BY A MENTAL HEALTH PATIENT'S ACTIONS IS IDENTICAL TO THE DUTY OWED BY THE MEDICAL PROVIDER TO THE MENTAL HEALTH PATIENT?

STATEMENT OF THE CASE

On November 1, 2012, Rebecca Delaney, as the Personal Representative of the Estate of Justin Nicholas Miller, filed a wrongful death and survival action in the Beaufort County Court of Common Pleas bringing claims for negligence, wrongful death, and negligent undertaking of duty on the part of CasePro, Inc. employees as well as negligent hiring, supervision, and retention of those employees. Ms. Delaney also named Beaufort County as a defendant.

On January 9, 2013, CasePro, Inc. answered Plaintiff's complaint denying all allegations of negligence, brought third-party claims against the United States of America, and filed a Motion to Dismiss.

On February 21, 2013, the United States of America removed this action to the United States District Court for the District of South Carolina.

On March 4, 2013, Plaintiff filed a Motion to Remand with the District Court.

On March 18, 2013, the United States of America filed a Motion to Dismiss the third-party complaint.

On July 2, 2013, the District Court (Judge Norton) granted Plaintiff's Motion to Remand and this action, with pending motions, was remanded to the Beaufort County Court of Common Pleas.

On August 6, 2013, CasePro, Inc. filed an Amended Motion to Dismiss.

On August 8, 2013, the United States of America paid the required filing fee and renewed its Motion to Dismiss the third-party complaint.

On November 12, 2013, the Circuit Court (Judge Murphy) denied CasePro, Inc.'s Amended Motion to Dismiss.

On November 22, 2013, the Circuit Court (Judge Murphy) granted the United States of America's Motion to Dismiss the third-party complaint.

On February 21, 2014, Plaintiff filed an amended complaint against CasePro, Inc. and substituted the South Carolina Office of Veterans Affairs as a defendant for Beaufort County.

On March 4, 2014, CasePro, Inc. filed an answer to the amended complaint denying all allegations of negligence.

On August 28, 2014, the South Carolina Office of Veterans Affairs filed a Motion for Summary Judgment.

On October 17, 2014, the Circuit Court (Judge J. Young) ruled that it was granting the South Carolina Office of Veterans Affairs' Motion for Summary Judgment. An order reflecting this ruling was subsequently signed and filed.

On November 10, 2014, CasePro, Inc. removed this action to the United States District Court for the District of South Carolina alleging "bad faith" and "fraudulent joinder" by Plaintiff and her counsel.

On December 10, 2014, Plaintiff filed a Motion for Remand with the District Court.

On April 23, 2014, the District Court (Judge Norton) granted Plaintiff's

Motion for Remand finding "no evidence of bad faith has been presented, and this court will not presume such bad faith on the part of Plaintiff's counsel."

On May 22, 2015, CasePro, Inc. filed a Motion for Summary Judgment.

On August 3, 2015, the Circuit Court (Judge Mullen) denied CasePro, Inc.'s Motion for Summary Judgment.

On August 17, 2015, CasePro, Inc. filed a Motion for Reconsideration of the denial of its Motion for Summary Judgment.

On September 24, 2015, the Circuit Court (Judge Mullen) denied CasePro, Inc.'s Motion for Reconsideration.

On October 6, 2015, the trial of this action began before The Honorable Diane Goodstein and a jury in Beaufort. Pursuant to CasePro, Inc.'s motion, the Circuit Court bi-furcated the trial with respect to liability/damages and punitive damages.

On October 16, 2015, the jury returned a verdict for CasePro, Inc. and Judge Goodstein entered judgment for CasePro, Inc.

This appeal followed.

STATEMENT OF FACTS

On February 24, 2012, in Beaufort, South Carolina, Appellant Rebecca Delaney's son, Justin Nicholas Miller, a pedestrian, was struck, run over, and killed by a stolen fire truck driven by Kalvin Hunt at a high rate of speed (56 mph), crossing from the northbound lanes of Ribaut Road to the southbound lanes of Ribaut Road through the painted median. (R. p. 478, line 24; p. 489, line 18–p. 490, line 14; pp. 2080–2105, PL EX 3). The Beaufort County Sherriff's Office

received multiple 911 calls about Kalvin Hunt between 4:09 pm and 4:17 pm that day. (R. p. 538, lines 22–25). The first 911 call reported that Kalvin Hunt ran out of the main gate of the Naval Hospital Beaufort partially clothed, while the last 911 call reported that there had been a fatality on nearby Ribaut Road. (R. p. 2079, PL EX 1). During this brief period of time, other 911 calls reported the stealing of the firetruck (which was on a medical emergency call) and multiple, other motor vehicle collisions with the stolen firetruck. Id. The carnage was recorded by a video camera permanently mounted to the firetruck. (R. p. 2120, PL EX 23; p. 1327, line 15–p. 1377, line 23).

Immediately prior to these tragic events, Mr. Hunt, accompanied by Edward Ray, the Beaufort County Veterans Affairs Officer, had been in the Emergency Room of the Naval Hospital Beaufort from approximately 2:17 pm until around 4:00 pm that day. (R. pp. 2108–2119, PL EX 20).

Mr. Hunt was taken to the Emergency Room for a chief complaint of suicidal ideation. (R. p. 2109, PL EX 20). During triage, Janice McDonald, the triage nurse who was employed by CasePro, Inc., was alone with Hunt and became "afraid of my own safety." (R. p. 627, line 2; p. 603, line 11–p. 612, line 1). Mrs. McDonald briefly reviewed Mr. Hunt's prior medical records and learned that he had a history of PTSD, alcohol and drug dependence, depression, and had been prescribed medications for bipolar disorder, psychosis, and schizophrenia including the drug Seroquel. (R. p. 630, line 18–p. 635, line 22). Mr. Hunt was unable to recall the names of his medications or report how long he had not been taking his medications after cutting his pills in half for some

indeterminate period of time. (R. p. 624, lines 4–15). Mr. Hunt also told Mrs. McDonald about an altercation with his superior officer that led to Hunt being in the process of being separated from the military. (R. p. 632, lines 18–22). Towards the end of triage, Mr. Hunt put his hands over his ears, and rocked back and forth. (R. p. 636, line 22–p. 637, line 4). Mrs. McDonald described Hunt's affect as "flat" with "little or no emotion . . . just not forthcoming . . . a good way to describe it, like dead, flat." (R. p. 652, line 18–p. 653, line 1). Following triage, Mrs. McDonald placed Mr. Hunt in the stretcher closest to the nurse's station and the doctor's office. (R. p. 656, lines 18–23). She also told the other personnel in the Emergency Room, "I don't believe he's suicidal; I think he's angry and frustrated." (R. p. 627, line 24–p. 628, line 1). Mr. Hunt's nursing care was thereafter assumed by Joe McDonald, the treatment nurse who was also employed by CasePro, Inc. and Janice McDonald's husband. (R. p. 776, line 10–p. 777, line 20).

At 2:50 pm, Dr. Christian Jansen, an employee of CasePro, Inc., met with Mr. Hunt and recorded in the medical records that Mr. Hunt had "thoughts of hurting others but no specific plan." (R. p. 2112, PL EX 20; p. 1308, lines 14–18). Dr. Jansen's records describe Mr. Hunt as "depressed", "angry", and with a "delayed" train of thought. (R. p. 1261, lines 17–20; p. 1308, line 25–p. 1309, line 1). Dr. Jansen consulted with a psychiatrist, Dr. Beverly Hendleman, by telephone who told him that Hunt "obviously needed to be admitted." (R. p. 1314, lines 1–3; p. 2329, lines 7–10, PL EX 9). Despite the fact that Dr. Jansen had a general rule that "until a person with psychiatric problems is fully evaluated as a

flight risk, and you know how seriously ill they are, they do not leave the department for a smoke or anything," Dr. Jansen did not give any such orders to Mr. McDonald, the treatment nurse. (R. p. 1100, line 2–p. 1104, line 17). Nor, did Dr. Jansen tell Mr. McDonald about Hunt's thoughts of hurting others. (R. p. 877, lines 7–10).

Sometime between 3:55 pm and 4:05 pm, Hunt, with Mr. McDonald's permission, used the bathroom unattended. (R. p. 803, lines 1–22). Shortly thereafter, Mr. Ray, the Veteran's Affairs Officer, asked Mr. McDonald, "could we step out for some fresh air"? (R. p. 807, lines 8–24). Mr. McDonald responded "yes" and Mr. Hunt was permitted to leave the Emergency Room. (R. p. 807, lines 25–p. 808, line 5). Shortly thereafter, Mr. McDonald heard radio traffic on a scanner about multiple collisions on Ribaut Road and the thought crossed his mind that Mr. Hunt could be involved. (R. p. 812, lines 1–6; p. 877, line 21–p. 878, line 1). Shortly thereafter, about 20 minutes after giving Mr. Hunt permission to leave the Emergency Room, Mr. Ray returned to the Emergency Room without Mr. Hunt and explained that Mr. Hunt had run away. (R. p. 812, line 25–p. 813, line 12).

STANDARD OF REVIEW

"A trial court must charge the current and correct law." In re Estate of Pallister, 363 S.C. 437, 451, 611 S.E.2d 250, 258 (2005). "Ordinarily, a trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence." Ross v. Paddy, 340 S.C. 428, 437, 532 S.E.2d 612, 617 (Ct. App. 2000). However, the trial court should confine the jury

instructions to the issues made by the pleadings and supported by the evidence. Fairchild v. S.C. Dep't of Transp., 385 S.C. 344, 350-51, 683 S.E.2d 818, 822 (Ct. App. 2009). When reviewing a jury charge for alleged error, an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial. Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999). "An alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict." Wells v. Halyard, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000).

ARGUMENT

I. THE CIRCUIT COURT ERRED BY REFUSING TO GIVE APPELLANT'S REQUESTED CHARGE WHICH CORRECTLY STATES THE LAW APPLICABLE TO THE ISSUES AND EVIDENCE.

A. APPELLANT REQUESTED A CHARGE WHICH CORRECTLY STATES SOUTH CAROLINA LAW.

On the next to last day of trial, the Circuit Court, following a bench conference, requested proposed jury charges from the parties. (R. p. 1579, lines 1–12). Appellant submitted, *inter alia*, Plaintiff's Request to Charge 23 which provides:

> A medical provider owes a duty to a foreseeable non patient within a zone of danger that is identical to the duty owed to the patient. *Hardee v. Bio-Medical Applications of S.C., Inc.*, 370 S.C. 511 (S.C. 2006).

(R. p. 2060, Plaintiff's Requested Jury Instructions). The following morning, the Circuit Court held an informal charge conference in chambers. (R. p. 1799, lines 3–14). During the charge conference, the Circuit Court indicated that it would not give this requested charge but instead would charge the jury that a medical

provider's duty to warn flows to foreseeable non-patients in the general zone of danger. Following the charge conference, Appellant, by counsel, reiterated her requested charge on the record:

> While I acknowledge that there is a duty to warn a patient, and that, that duty extends to a reasonably foreseeable, non-patient third party within the general zone of danger, it is Plaintiff's position that, based upon the evidence in this case, including the testimony of Dr. Terrence Baker, who was qualified as an expert witness here in this courthouse, that the duty owed to non-patient, third parties is, in fact, broader than merely a duty to warn; and that, under the case law in this state, specifically the Hardee case, which states the duty owed to third parties is identical to the duty owed to the patient, that any obligation that a plaintiff brings forth evidence of with respect to a medical provider and a patient, flows to a non-patient, third party who's reasonably foreseeably in the zone of danger.

(R. p. 1800, lines 3–19). The Circuit Court responded: "Thank you so much. I'm not going to change the charge as it is. I'm just not going to do it." (R. p. 1800, line 25–p. 1801, line 2). This was consistent with the Circuit Court's view, stated earlier during argument over the qualification of Dr. Terrence Baker as an expert witness in the field of emergency medicine, that only a medical provider's duty to warn a patient extends to non-patient third parties. (R. p. 1425, line 3–p. 1427, line 17).

During the jury charge, the Circuit Court charged, "about the acts that the Plaintiff claims were negligent. . . . One act that the Plaintiff alleges is duty to warn, and the other is negligent retention." (R. p. 1882, line 21–p. 1883, line 3). With respect to a medical provider's duty, the Circuit Court charged:

> Ladies and gentlemen, when a person provides medical services to another person, a duty to warn may arise. This duty to warn arises when a reasonably prudent person,

> under the same or similar circumstances would have provided a warning. The duty to warn a patient flows to foreseeable persons in the general field of danger.

(R. p. 1883, lines 14–20). Following the entire jury charge, the Circuit Court inquired if there were any exceptions or additions. (R. p. 1895, line 20–21). Appellant, by counsel, responded:

> We believe that the Hardee case sets forth the duty owed to third parties is identical to the duty due to the patient. We, therefore, we would request that your Honor add to the medical providers duty to warn charge to include it's not merely a duty to warn, but it is any duty owed to the patient is also owed to the reasonably foreseeable non-patient in the general zone of danger.

(R. p. 1895, line 24–p. 1896, line 6). The Circuit Court declined to add to the given charge and noted Plaintiff's exception for the record. (R. p. 1896, lines 7–9).

B. SOUTH CAROLINA LAW SUPPORTS THE CIRCUIT COURT GIVING THE REQUESTED CHARGE.

An essential element in a negligence-based cause of action is the existence of a legal duty of care owed by the Defendant to the Plaintiff. Without a duty, there is no actionable negligence. Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 82 (1998). As a general rule, only a patient can maintain an action against a medical provider for medical negligence. Id. However, a doctor-patient relationship is not always required in a legal action against a medical provider. Hardee v. Bio-Medical Applications of S.C., Inc., 370 S.C. 511, 515, 636 S.E.2d 629, 631 (2006). This is because:

> Not every cause of action asserted against a medical provider, however, is an action for medical malpractice. Thus, [the Court's] statement in Bishop affirms the validity

> of the general rule prescribing the class of permissible plaintiffs in medical malpractice actions, but also recognizes that causes of action may accrue in other contexts by virtue of a medical provider's actions or omissions.

Id.

In Hardee, our Supreme Court recognized that a reasonably foreseeable third party, who is harmed by a patient's actions, may maintain a negligence cause of action against a medical provider. In Hardee, the plaintiffs were injured when a patient of a dialysis center lost control of his automobile and struck their vehicle shortly after leaving one of his dialysis treatments. See id. at 513, 636 S.E.2d at 630. The Hardees sued the dialysis center for negligence, asserting it should have warned the patient of the risks of operating a motor vehicle after a dialysis treatment. The trial court granted summary judgment in favor of the dialysis center, but the Supreme Court, reversed, finding the center had a duty to warn a dialysis patient of the risks associated with operating a motor vehicle, and by failing to do so, it may have breached a duty owed to reasonably foreseeable third parties who could be injured by the patient's actions. Id. at 516, 636 S.E.2d at 631-32.

Importantly, the duty recognized in Hardee mirrored the duty owed to the patient. As stated in Hardee, "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." Hardee, 370 S.C. at 516, 636 S.E.2d at 632. 557, 562, 706 S.E.2d 844, 846 (2011). The central feature of the holding in Hardee is that "a medical provider's breach of a potential duty to reasonably

foreseeable third parties is inextricably connected to a breach of duty to the patient." Rydde v. Morris, 381 S.C. 643, 650, 675 S.E.2d 431, 435 (2009). As a result, the holding in Hardee "does not hamper the doctor-patient relationship." 370 S.C. at 516, 636 S.E.2d at 632.

Moreover, the duty recognized in Hardee specifically extends to "conduct by the patient which injured the third-party plaintiff." Oblachinski v. Reynolds, 391 S.C. 557, 562, 706 S.E.2d 844, 846 (2011).

C. THE EVIDENCE IN THE RECORD SUPPORTS THE CIRCUIT COURT GIVING THE REQUESTED CHARGE.

Koren Pope, a civilian employee of the U.S. Government, was working as a Medical Support Assistant on the afternoon of Friday, February 24, 2012 at the Naval Hospital Beaufort. (R. p. 2265, CT EX 3). Ms. Pope's responsibilities included check in as the first point of contact for someone coming into the Medical Home Port Team 2 on the second floor which is a mix of family practice, pediatrics, and internal medicine. (R. p. 2265, CT EX 3). A medical doctor was not, however, working that afternoon in the Medical Home Port Team 2. (R. p. 2270, CT EX 3). A gentleman approached Ms. Pope's desk and said: "I'm Mr. Ray with the Department of the VA and I want to know if you can help this young man." (R. p. 2266, CT EX 3). Ms. Pope asked the man with Mr. Ray his name and he responded Kalvin Hunt. (R. p. 2267, CT EX 3). Ms. Pope could not find Mr. Hunt in the computer system with the last four of the social security number which Mr. Hunt provided. Id. As a result, Ms. Pope contacted Saundra Smith, a registered nurse in the Medical Home Port Team 2. (R. pp. 2267–2268, CT EX

3). Ms. Smith then came and escorted Mr. Hunt and Mr. Ray to her office. Id.

Ms. Smith, a civilian employee of the U.S. Government, found Mr. Hunt in the electronic medical record system and was able to access his past medical history. (R. pp. 2276, 2279, CT EX 3-A). Mr. Hunt reported to Ms. Smith that he was anxious. (R. p. 2287, CT EX 3-A). Mr. Hunt also requested refills for his medications for anxiety and sleep. (R. p. 2288, CT EX 3-A). When Ms. Smith informed Mr. Hunt that the first available time that he could be seen by a medical doctor in the Medical Home Port Team 2 was the following Monday, Mr. Hunt "just did one slight motion of rocking back and forth. He just kind of sighed, kind of moaned (indicating)." Ms. Smith, concerned, asked if Mr. Hunt was okay and offered to take Mr. Hunt to the Emergency Room. (R. p. 2289, CT EX 3-A). Mr. Hunt declined the offer to go to the ER. (R. p. 2290, CT EX 3-A). Ms. Smith was also concerned because Mr. Hunt could not remember how long he had been in Beaufort and asked a question that she has asked less than a handful of times in a 30 year nursing career. (R. pp. 2290–2291, CT EX 3-A). Ms. Smith asked Mr. Hunt if he had thoughts of hurting himself and he answered "yes." (R. p. 2291, CT EX 3-A). Ms. Smith then immediately began walking Mr. Hunt, with Mr. Ray, to the Emergency Room on the first floor of the Naval Hospital Beaufort where she turned Mr. Hunt over to nurse Janice McDonald. (R. pp. 2291–2294, CT EX 3-A). Upon her return to her office, Ms. Smith documented her encounter with Mr. Hunt in the electronic medical record system. (R. p. 2296, CT EX 3-A; pp. 2106–2107, PL EX 19). Among the chronic medical problems which were auto populated on this record were: adjustment disorder with disturbance of

emotions and conduct, anxiety, adjustment disorder with anxious mood, anxiety disorder NOS, delusional disorder, personality disorder, and depression. (R. p. 2106, PL EX 19).

Mrs. McDonald began the triage of Mr. Hunt around 2:15 pm. (R. p. 616, lines 13–15). According to Mrs. McDonald, Mr. Hunt was the only patient in the Emergency Room from the time he arrived until the time he left. (R. p. 618, lines 7–10). As previously discussed, Mrs. McDonald became afraid for her safety when she was alone with Mr. Hunt during triage. (R. p. 627, line 2). Mr. Hunt had an inch to an inch and three quarter inch stack of paper medical records with him. (R. p. 629, lines 12–13). Mrs. McDonald briefly flipped through these records. (R. p. 630, lines 21–25). Mrs. McDonald did not access any electronic medical records for Mr. Hunt. (R. p. 628, lines 10–14). As a result, according to Mrs. McDonald's testimony, she was not aware that Mr. Hunt had past medical problems involving delusional disorder, personality disorder, or adjustment disorder with disturbance of emotions and conduct. (R. p. 634, line 21–p. 635, line 9). Based on her observations during triage, however, Mrs. McDonald described Mr. Hunt as "a slow simmer" – "he was just angry with the whole system." (R. p. 659, line 24–p. 660, line 12).

Dr. Christian Jansen was the person in charge of the emergency room and everything in the emergency room on February 24, 2012. (R. p. 1172, line 21–p. 1173, line 12). Dr. Jansen was also aware that Mr. Hunt had thoughts of hurting others. (R. p. 1175, lines 4–9). Dr. Jansen testified that he did not have a specific recollection of telling his nurses this information. (R. p. 1176, lines 8–15). In

addition, Dr. Jansen testified that he did not recall telling his nurses that Mr. Hunt needed to stay within the Emergency Room. (R. p. 1176, line 16–p. 1178, line 9). While it was clear in his mind that Mr. Hunt needed to be admitted to a hospital, Dr. Jansen did not instruct Mr. Hunt to stay in the Emergency Room. (R. p. 1193, line 13–p. 1195, line 11).

Arthur Manning, was an E-5 in the United States Navy with a military occupational specialty of psychiatric technician. (R. p. 2340, CT EX 10). Mr. Manning was paged to the Emergency Room to conduct a "safety evaluation" of Mr. Hunt. (R. p. 2341, CT EX 10). Upon arrival in the Emergency Room, Mr. Manning spoke with Dr. Jansen who told him that Mr. Hunt "wasn't opening up" to him. (R. p. 2345, CT EX 10). Mr. Manning spoke with Mr. Hunt:

> It did not seem that he was oriented to like what was going on right then and there. I remember that his – the way he was talking to me, it was very disorganized. It didn't seem like he had a grasp of like time right then and there, and I also felt that the way that he was talking and his – demeanor and body language was very aggressive.

(R. p. 2347, CT EX 10). After Mr. Manning finished his evaluation of Mr. Hunt, he told Dr. Jansen what his recommendation was going to be to Dr. Hendelman, a psychiatrist, and left the Emergency Room to meet with Dr. Hendelman. (R. p. 2349, CT EX 10).

Dr. Beverly Hendleman, a civilian employee of the U.S. government, is a psychiatrist. (R. p. 2323, CT EX 9). She was working on February 24, 2012 as a staff psychiatrist at the Naval Hospital Beaufort. Id. Dr. Hendelman did not see Mr. Hunt because it was "obvious" that Mr. Hunt was in need of hospitalization. Dr. Hendelman shared this recommendation with Dr. Jansen by telephone. (R.

pp. 2323–2324, CT EX 9). According to Dr. Hendleman both "danger to self" and "danger to others" are criteria for hospital admission. (R. p. 2325, CT EX 9). However, according to Dr. Hendleman, the responsibility to admit Mr. Hunt from the Emergency Room belonged with Dr. Jansen. (R. p. 2333, CT EX 9). Dr. Hendleman further testified that the CasePro, Inc. employees working in the Emergency Room did not manage Mr. Hunt safely on February 24, 2012: "he shouldn't have been allowed to leave." (R. p. 2337, CT EX 9).

As previously discussed, Mr. McDonald, the treatment nurse, allowed Mr. Hunt to leave the Emergency Room less than 20 minutes before the death of Appellant's son. Mr. McDonald testified that if Dr. Jansen "had told me not to let him leave, it would have been different." (R. p. 815, lines 20–21).

Dr. Terrence Baker has been a physician for forty years, is board certified in multiple specialties, including emergency medicine, and is the current president of the American College of Emergency Physicians. (R. p. 1387, line 18–p. 1392, line 3). Dr. Baker, at the request of Appellant, was qualified – following voir dire and a proffer of testimony outside the presence of the jury – as an expert witness in emergency medicine. (R. p. 1440, line 11–p. 1441, line 11). Dr. Baker testified that both Mr. and Mrs. McDonald and Dr. Jansen knew, or should have known, that Mr. Hunt "was a patient who was at high risk, the highest risk, for doing something . . . a patient who's on the edge who's going to do something. You have all the signs and symptoms of a patient who is going to act." (R. p. 1471, lines 14–22). For example, Mrs. McDonald noted, even after a cursory review of the available past medical records, that Mr. Hunt had a significant past

medical history for mental health issues. (R. p. 1461, lines 4–20). In addition, Mrs. McDonald noted that Mr. Hunt had a flat affect and a depressed mood as well as an elevated heart rate. (R. p. 1463, lines 4–19). According to Dr. Baker, Mr. McDonald knew that Mr. Hunt had Post Traumatic Stress Disorder which can lead to sudden, unpredictable behavior. (R. p. 1465, lines 4–23). Dr. Baker described a "progression of behavior" of an "aggressive, agitated, unsettled" Mr. Hunt which led to his elopement and the death of Appellant's son. (R. p. 1466, line 15–p. 1467, line 1). In addition, according to Dr. Baker, Dr. Jansen noted Mr. Hunt's symptoms as "severe" among choices of mild, moderate, or severe. (R. p. 1469, lines 10–15). Dr. Baker testified that severe "is a modifier that tells us that this is a patient who is getting ready to explode. This is a patient who is going to do something." (R. p. 1469, lines 15–18). In Dr. Baker's opinion, one of the biggest red flags was the uniform description of Mr. Hunt as angry:

> Angry is -- is a very large red flag in a patient who comes in, who is having thoughts of harming himself or harming someone else. Because angry patients frequently are preparing -- will -- will take action in some way. They're either going to act out against themselves; they're going to act out against the staff; and they're going to -- or they're going to act out against the community, if they elope. And so, when you have an angry person who is having those types of feelings, it is even more important, the duty to secure the patient, make Mr. Hunt safe, safe room, disrobed, clothes off, gown on, shoes and socks off, okay, make him safe against himself, safe for the staff, and safe for the community, becomes even more important, because angry patients who are having these type of thoughts, this type of thinking that's not clear, will often act out quickly and suddenly and irrationally, with little or no warning.

(R. p. 1467, lines 5–22). As a result, in Dr. Baker's opinion, the CasePro, Inc. employees acted with "a careless disregard" for Kalvin Hunt by: 1) not keeping

Kalvin Hunt safe, 2) not placing Kalvin Hunt in a gown, 3) allowing Kalvin Hunt to wander, and 4) giving Kalvin Hunt permission to leave the ER. (R. p. 1448, line 11–p. 1450, line 10). "It was careless. It was reckless to allow Mr. Hunt to go outside, essentially, unsupervised, where he ran away, stripped naked, got into the fire truck, and – created a death." (R. p. 1450, lines 10–13).

Dr. Erik Oberg has been a board certified emergency room physician for five years. (R. p. 1644, lines 9–12). He testified as an expert in the field of emergency medicine for CasePro, Inc. because he wants to lend a hand for doctors. (R. p. 1642, line 24–p. 1645, line 8). According to Dr. Oberg, it would have been helpful for the CasePro, Inc. employees to review Mr. Hunt's past medical history on February 24, 2012. (R. p. 1654, lines 11–18). By way of example, someone diagnosed with adjustment disorder, at the time of diagnosis is not able to regulate his emotions and conduct. (R. p. 1652, lines 6–15). Similarly, someone diagnosed with delusional disorder, at the time of diagnosis, has false fixed beliefs, such as seeing a black cat that's not there. (R. p. 1652, line 22–p. 1653, line 7). Moreover, Dr. Oberg, when cross examined for impeachment purposes with TINTINALLI'S ON EMERGENCY MEDICINE, agreed that patients who present with suicidal ideation require specific measures for patient protection. (R. p. 1660, line 2–p. 1664, line 11). For example, personal and clothing items that could be used for self-injury or a suicide attempt should be removed from the patient and from the treatment room. (R. p. 1664, lines 3–8). In addition, the history of previous psychiatric illness and treatment should be determined to identify patterns of relapse. (R. p. 1666, lines 12–16). And, most importantly,

those expressing suicidal ideations should not be allowed to leave the Emergency Room before a medical or psychiatric evaluation is completed. (R. p. 1665, lines 3–5).

D. PUBLIC POLICY SUPPORTS THE CIRCUIT COURT GIVING THE REQUESTED CHARGE.

This litigation does not take place in a vacuum. Appellant requests that this Honorable Court take judicial notice of the National Institute of Mental Health's estimate that 4.2% of all U.S. adults experience serious mental illness.[1]

As CasePro, Inc.'s expert, Dr. Oberg, testified, thoughts of self-harm and thoughts of hurting others need to be taken seriously. (R. p. 1645, lines 12–14). Recent cautionary illustrations include a pilot crashing a plane into the French Alps; a shooter killing patrons of a Batman movie in Colorado; and the "American Sniper" slaying in Texas. (R. p. 1645, line 15–p. 1646, line 3).

Closer to home, South Carolina has long recognized a cause of action in negligence for the breach of a medical provider's duty to prevent a known suicidal patient from committing suicide. Bramlette v. Charter Medical-Columbia, 302 S.C. 68, 73, 393 S.E.2d 914, 917 (1990) citing Sloan v. Edgewood Sanatorium, Inc., 225 S.C. 1, 80 S.E.2d 348 (1954) (recognizing a duty to "safeguard and protect the patient from any known possibility of self-harm or reasonably apprehended danger"). Indeed, consistent with the Hippocratic oath,

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[1] These disorders generally are found within the 4th edition of the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) and include diagnoses of schizophrenia, paranoia, bipolar disorder, and psychotic disorder, among other mental conditions resulting in significant impairment. Further information and additional statistics are available at: http://www.nimh.nih.gov/health/statistics/prevalence/serious-mental-illness-smi-among-us-adults.shtml (last visited April 6, 2016).

patient safety is the number one objective of an emergency room physician. (R. p. 1662, line 6–p. 1663, line 5). Likewise, treatment nurse Joseph McDonald, testified that he was responsible that day for monitoring patients, including Mr. Hunt, in order "[t]o keep them safe; keep them stable." (R. p. 774, lines 22–25).

The crux of Appellant's case was that had medical providers kept Mr. Hunt safe, Appellant's son – a pedestrian walking near the Naval Hospital Beaufort – would also have been kept safe. As explained by Dr. Baker: "if Mr. Hunt is safe, then, the staff is safe and the community is safe. And so, there was a duty to keep Mr. Hunt safe at all times, against himself and against the staff, and against the community at large." (R. p. 1453, lines 4–8).

Appellant submits that patient safety, particularly for mental health patients, is consistent with the public policy of South Carolina. Similarly, public policy should support a duty of care, beyond a duty to warn, under the facts of this case. This is because "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." WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53, 325-326 (4th ed. 1971) quoted in Hardee 370 S.C. at 516, 636 S.E.2d at 632, FN 2.

The Circuit Court was cognizant of these public policy considerations when it rejected Respondent's view of the law that no duty, at all, exits under the facts of this case:

> [if] a person walked into an emergency room, and they're not specific, but they say I'm walking out of here, I'm going to kill people, you hear me; do you hear me; I'm going to go kill people; I'm leaving right now, and I'm

> going to kill me some people; and they say, have a nice day, that can't possibly, can't possibly be the law. In my judgment, that cannot possibly be the law. It just can't.

(R. p. 1770, lines 15–22). Despite this statement, however, the Circuit Court viewed the instant case as solely a duty to warn case because that was the only type of duty discussed in Hardee as flowing from a physician to a non-patient in the general zone of danger. However, Bishop cited communicable disease cases for the proposition that, under certain circumstances, a non-patient can maintain an action against a medical provider. See Molien v. Kaiser Foundation Hospitals, 616 P.2d 813 (Cal. 1980); Hofmann v. Blackmon, 241 So. 2d 752 (Fla. Ct. App. 1970); Wojcik v. Aluminum Co. of America, 183 N.Y.S.2d 351 (Sup. Ct. 1959). As demonstrated by the recent Ebola crisis, the risk of harm from certain communicable diseases is great – both in terms of potential harm (death) and the number of people in harm's way. As a result, a medical provider's negligence with respect to a patient with a communicable disease puts the public at large in harm's way. With Ebola, steps were taken to ensure that emergency rooms were screening for and isolating those who may have been infected with Ebola in order to protect the public at large. See, e.g., Lauren Sausser, "Can Local Hospitals Deal with Ebola? DHEC Chief Visits MUSC, Roper as Patient with Flu-Like Symptoms, THE (Charleston) POST & COURIER, pg. 01A (October 14, 2014) (discussing DHEC Director's efforts to ensure protocols of screening and isolation were in place at South Carolina's hospitals for the Ebola virus which kills approximately 50 percent of all patients who become infected) and Anne Kathryn Flanagan, "Patient evaluated for Ebola downgraded to no-risk," THE

(Columbia) STATE (November 7, 2014) ("patient was immediately placed in the specialized isolation unit and . . . remains in isolation and the initial assessment indicates the patient is very unlikely to have Ebola"). Under South Carolina law and consistent with this state's public policy, the duty of a medical provider to isolate a patient with Ebola would almost certainly extend to a foreseeable non-patient third party injured (or killed) by the patient.

Appellant submits that the public policy is the same for a person injured (or killed) by a mental health patient who indicated to medical professionals that he had thoughts of hurting himself and others and was affirmatively given permission to leave by the medical professionals less than twenty minutes before doing what he said he had thoughts of doing.

Finally, Appellant submits that the law of our neighboring states is also instructive as to the public policy reasons which support Appellant's requested charge. Georgia law, for example, holds:

> where the course of treatment of a mental patient involves an exercise of 'control' over him by a physician who knows or should know that the patient is likely to cause bodily harm to others, an independent duty arises from that relationship and falls upon the physician to exercise that control with such reasonable care as to prevent harm to others at the hands of the patient.

Bradley Center, Inc. v. Wessner, 296 S.E.2d 693, 695-696 (Ga. 1982). Likewise, North Carolina has adopted Georgia's view that a medical provider owes a duty to a non-patient with respect to a mental health patient. Pangburn v. Saad, 326 S.E.2d 365 (N.C. Ct. App. 1985). In addition, a federal court, interpreting North Carolina law, has found that a medical provider can owe a duty to a non-patient to

involuntarily commit a mental health patient. Currie v. USA, 644 F. Supp. 1074, 1082 (M.D.N.C. 1986) ("Thus, the court believes that therapists have some duty not to let known dangerous mental patients whom they treat run around in public.") aff'd other grounds 836 F.2d. 209 (4th Cir. 1987). Moreover, the law of other states reiterate the public policy reasons supporting Appellant's requested charge. See, e.g., Schuster v. Altenberg, 424 N.W.2d 159, 165 (Wis. 1988) (finding both a duty to warn and a duty to institute commitment proceedings extends to foreseeable non-patient third parties); Naidu v. Laird, 539 A.2d 1064, 1073 (Del. 1988) (finding both a duty to warn and a duty to control the actions of a mentally ill patient extend to a foreseeable non-patient third party); Davis v. Puryear, 673 So.2d 1298 (La. Ct. App. 1996) (finding a duty to non-patient for medical provider to take reasonable care to prevent a mental health patient's elopement); Estates of Morgan v. Fairfield Family Counseling Ctr., 673 N.E.2d 1311, 1324 (Ohio 1997) (finding that "[s]ociety has a strong interest in protecting itself from those mentally ill patients who pose a substantial risk of harm" and analogizing the duty owed to those third parties potentially harmed by the mentally ill to the duty owed by a medical provider to the public in an infectious disease case).

The above authorities support that, on public policy grounds, the Circuit Court erred in refusing to give Appellant's requested charge.

II. THE CIRCUIT COURT'S REFUSAL TO GIVE THE REQUESTED CHARGE CONTRIBUTED TO THE JURY'S VERDICT.

Every litigant is entitled to the historic, fact-finding function of an

impartial jury of his or her peers. See S.C. Const. art. I, § 14; S.C. Code §14-7-1050; and Day v. Kilgore, 314 S.C. 365, 368, 444 S.E.2d 515, 517 (1994) ("Every litigant, both civil and criminal, is entitled to an impartial neutral finder of fact."). To protect these fundamental rights, a trial judge "shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. "The Constitution of this State requires that the trial judge declare the law, but no particular verbiage is necessary. It is sufficient if the precepts stated to the jury adequately cover that law which is applicable." State v. Rabon, 275 S.C. 459, 462, 272 S.E.2d 634, 636 (1980).

In the instant case, the only theories of negligence that the jury was charged on were: 1) CasePro, Inc.'s negligent retention of Dr. Jansen and 2) CasePro, Inc.'s employees' negligent failure to warn Kalvin Hunt not to leave the Emergency Room.

As previously discussed, CasePro, Inc.'s expert, Dr. Oberg, agreed that a learned treatise which he consults several times a week states that someone presenting with symptoms of suicidal ideation "[s]hould not be allowed to leave the E.D. before a medical or psychiatric evaluation is completed." (R. p. 1665, lines 3–7). Similarly, Dr. Hendelman testified that "danger to self, danger to others or gravely disabled, requires admission to the hospital" and Kalvin Hunt "needed to be admitted." (R. pp. 2324–2325, CT EX 9). This is consistent with the testimony from Dr. Baker, Appellant's expert, that there was "a careless disregard" for Kalvin Hunt by CasePro, Inc. employees by: 1) not keeping Kalvin Hunt safe, 2) not placing Kalvin Hunt in a gown, 3) allowing Kalvin Hunt to

wander, and 4) giving Kalvin Hunt permission to leave the ER. (R. p. 1448, line 11–p. 1450, line 13). Yet, these four theories of negligence were not encompassed by the Circuit Court's jury charge and, as such, were not considered by the jury. Instead, the jury only considered the theory articulated by Dr. Baker that "Mr. Hunt should have been warned that going outside was -- would be dangerous to himself, the staff, and the community." (R. p. 1451, lines 8–22). The failure to provide this warning, according to Dr. Baker, "was careless, and it violated the duty, the responsibility of Nurse Joe McDonald to keep Mr. Hunt safe." (R. p. 1452, lines 22–24).

As reflected in the jury's verdict, the failure to warn Mr. Hunt was not sufficient evidence of negligence. Upon reflection, this is not surprising because the jury heard considerable testimony that shed light on the then existing mental state of Mr. Hunt. Testimony was elicited from six witnesses (Koren Pope, Saundra Smith, Janice McDonald, Joseph McDonald, Arthur Manning, Dr. Christian Jansen) about Mr. Hunt's appearance, affect, mood, behavior, and ideations while he was at the Naval Hospital Beaufort. The jury heard testimony that he was "angry," "depressed," "anxious," and "disoriented as to his Social Security Number." The jury also watched a video of Kalvin Hunt driving the stolen firetruck which deliberately struck multiple vehicles before striking Appellant's son who was crossing the street. (R. p. 2120, PL EX 23). In addition, the jury heard the Circuit Court take judicial notice of and publish in its entirety an Order from the Beaufort County Court of General Sessions adjudicating Mr. Hunt not guilty by reason of insanity for the murder of Appellant's son. (R. p.

1680, line 14–p. 1687, line 2).

For purposes of evaluating the prejudice that resulted from only a "negligent failure to warn" claim going to the jury, Appellant believes that the following words which the jury heard from the NGRI Order are particularly germane:

> In the evaluation report, the SCDMH examiners found that Defendant, at the time of the commissions of the acts charged, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong, or to recognize the particular acts charged as morally or legally wrong.
> . . .
>
> After reviewing all the evidence, I find that, at the time of the commission of the alleged offense, the defendant, as a result of mental disease or defect, did not have the capacity to distinguish moral or legal right from moral or legal wrong.

(R. p. 1683, line 10–p. 1684, line 4). In other words, the Circuit Court charged the jury that the only potentially negligent acts and omissions from the CasePro, Inc. employees on the day in question which the jury could consider were the medical providers' failure to warn Mr. Hunt not to do something at a time when he "lacked the capacity to distinguish moral or legal right from moral or legal wrong" or to recognize particular acts charged as morally or legally wrong because of "mental disease or defect." Based upon the evidence adduced at trial, it is clear that at the time he was permitted to leave the Emergency Room, Mr. Hunt, who had expressed a desire to harm himself or others, was not in a mental state to understand right and wrong. He did not have an appreciation as to the potential consequences of leaving the Emergency Room. A reasonable jury

having only been charged on "failure to warn" could have found that a sufficient warning would not have changed Mr. Hunt's behavior and thus rendered a verdict for CasePro, Inc. This does not mean, however, that a reasonable jury would have rendered a verdict for CasePro, Inc. if it had been charged on more than a duty to warn.

Because it cannot be found that the failure by the Circuit Court to give the requested charge, and permit the jury to consider negligence beyond a negligent failure to warn was harmless, a new trial is warranted.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests this Honorable Court reverse the Judgment of the Circuit Court.

Respectfully submitted, this 30th day of June, 2016.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2012-CP-07-03782

Rebecca Delaney, as Personal Representative of the Estate of Justin Nicholas Miller, Appellant,

v.

CasePro, Inc., Respondent.

PROOF OF SERVICE

I certify that I have served Appellant's Final Brief and Record on Appeal on CasePro, Inc. by depositing same in the United States Mail, with sufficient first class postage attached, on June 30, 2016 to its attorneys of record, Douglas W. Mackelcan, Esq. and D. Gary Lovell, Jr., Esq. of CARLOCK, COPELAND & STAIR, LLP located at 40 Calhoun Street, Suite 400 Charleston, South Carolina 29401-3531.

June 30, 2016

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