THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge
Common Pleas Case No. 2012-CP-07-03782

Appellate Case No.: 2015-002466

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

v.

CasePro, Inc., ...Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant Rebecca Delaney, as the Personal Representative of the Estate of Justin Nicholas Miller ("Appellant"), filed this action on November 1, 2012 in the Beaufort County Court of Common Pleas against Beaufort County and Respondent CasePro, Inc. ("Respondent"). The Complaint set forth causes of action for negligence, wrongful death, wrongful undertaking of duty, and negligent hiring, supervision, and retention, and sought damages allegedly incurred as a result of the same.

On January 9, 2013, Respondent filed an Answer in which it denied all allegations of negligence and asserted third-party claims against the United States of America. Respondent also filed a Motion to Dismiss. On February 21, 2013, the United States of America removed this action to federal court and filed a Motion to Dismiss the Third-Party Complaint.

On March 4, 2013, Appellant filed a Motion to Remand with the District Court. On July 2, 2013, The Honorable David C. Norton, U.S. District Court Judge, granted Appellant's Motion to Remand, returning this case, and all pending motions, to the Beaufort County Court of Common Pleas. Following remand, Respondent filed an Amended Motion to Dismiss and the United States of America renewed its Motion to Dismiss the Third-Party Complaint.

On November 12, 2013, The Honorable Maite Murphy, Circuit Court Judge, denied Respondent's Amended Motion to Dismiss. On November 22, 2013, Judge Murphy granted the United States of America's Motion to Dismiss the Third-Party Complaint.

On February 21, 2014, Appellant filed an Amended Complaint against Respondent. The Amended Complaint removed Beaufort County as a named defendant and added the South

Carolina Office of Veterans Affairs as a named defendant. On March 4, 2014, Respondent filed an Answer to the Amended Complaint, denying all allegations of negligence.

On October 17, 2014, The Honorable W. Jeffrey Young, Circuit Court Judge, granted a Motion for Summary Judgment in favor of the South Carolina Office of Veterans Affairs.

On November 10, 2014, Respondent removed this action to federal court. In response, Appellant filed a Motion to Remand. Judge Norton granted this Motion on April 23, 2015.

On May 22, 2015, Respondent filed a Motion for Summary Judgment. The Honorable Carmen T. Mullen, Circuit Court Judge, denied this Motion on August 17, 2015. Judge Mullen also denied Respondent's Motion for Reconsideration on September 24, 2015.

On October 6, 2015, the jury trial of this action began before The Honorable Diane S. Goodstein in Beaufort County. On October 16, 2015, the jury returned a verdict for Respondent and Judge Goodstein entered a judgment reflecting the jury's verdict.

STATEMENT OF FACTS

This case arises out of an unforeseeable sequence of events that occurred on February 24, 2012. On that day, Kalvin Hunt ("Hunt"), of the Marine Corps, voluntarily presented to the Naval Hospital Beaufort ("NHB") grounds accompanied by Edward Ray ("Ray"). Ray, now deceased, was an older gentleman who served as a Beaufort County Veterans Affairs officer.

Hunt and Ray were first greeted by Koren Pope ("Pope"), a medical support assistant employed by the Department of the Navy. Pope was working at the front desk where Hunt and Ray initially presented on February 24, 2012. Upon presentation, Ray asked Pope if she could help Hunt. (R. p. 2266). Pope observed Hunt was "neat, calm, and ... normal." (R. p. 2271).

At that point, Pope obtained some preliminary background information from Hunt (e.g., name, social security number). (R. p. 2267). Pope was unable to locate any information about Hunt in the NHB system. (R. p. 2267).

Pope called Registered Nurse Saundra Smith ("RN Smith"), the on-duty nurse in the department, for further assistance. Pope then instructed Hunt and Ray to have a seat in the waiting room, which they proceeded to do. (R. p. 2268). Shortly thereafter, RN Smith arrived in the waiting room and engaged in a conversation with Hunt and Ray. After a brief conversation, RN Smith asked Hunt and Ray to visit her office. RN Smith's office was a "good little way" from the waiting room and down a "very long hallway." (R. p. 2268). Hunt and Ray complied with this request and followed RN Smith to her office.

After entering the office, RN Smith inquired about the reason for Hunt's presentation. In response, Hunt indicated he "needed a medication refill." (R. p. 2288). Specifically, Hunt sought something to assist with sleep and anxiety issues. (R. p. 2288). RN Smith then informed Hunt the medications he sought were not on his list, and that he had two options: (1) RN Smith offered to get Hunt in to see an ED physician regarding his medication requests; or (2) Hunt could return for the first available appointment on the next working day. (R. p. 2289). Hunt "seemed fine" with these choices and indicated his preference to take an appointment the following Monday. (R. p. 2289).

While RN Smith was scheduling the appointment, Hunt "did one slight motion of rocking back and forth" and let out a "simple sigh of exasperation." (R. p. 2289). This prompted RN Smith to ask whether Hunt wanted to hurt himself, to which Hunt replied in the affirmative. (R. p. 2291). At that point, RN Smith determined that Hunt's condition warranted evaluation at the

ED. RN Smith directed Hunt to follow her to the ED. (R. p. 2292). Hunt complied with this request, and calmly followed RN Smith to the ED accompanied by Ray. (R. p. 2292).

On this date, Dr. Christian Jansen ("Dr. Jansen"), Registered Nurse Janice McDonald ("RN Janice McDonald"), and Registered Nurse Joe McDonald ("RN Joe McDonald") staffed the ED. These providers were the only three employees of Respondent who came in contact with Hunt and Ray at NHB on February 24, 2012. Hunt first appeared in the ED at 2:17 PM to RN Janice McDonald, who was performing triage. At the time, RN Janice McDonald received little information about Hunt, his condition, or reason for presenting to the ED, but generally understood Hunt's chief complaint related to prescriptions and that Hunt's grandmother was concerned about him. (R. p. 622, lines 9-13). After an initial exchange, RN Janice McDonald and Hunt entered a triage room. (R. p. 622, lines 24-25; R. p. 623, line 1). RN Janice McDonald described Hunt as calm, neat, well-kept, and polite. (R. p. 623, lines 15-17). RN Janice McDonald then engaged Hunt in order to help him feel comfortable. (R. p. 623, lines 23-25). In doing so, RN Janice McDonald observed Hunt was "flat and a little withdrawn, but he was appropriate when he spoke." (R. p. 624, lines 18-23).

RN Janice McDonald was initially comfortable being alone with Hunt in the triage room. (R. p. 625, lines 4-9). At one point near the end of this encounter, Hunt put his hands over his ears and shook his head. (R. p. 625, lines 19-22). RN Janice McDonald inquired as to whether Hunt was hearing voices or seeing things, which he denied. (R. p. 625, lines 22-25; R. p. 626, line 1). This created "a little bit" of discomfort in RN Janice McDonald. (R. p. 626, line 24). At the end of triage, Hunt indicated he had thought about suicide but had no specific plans to act upon such thought. (R. p. 681, lines 1-2). Hunt also denied having any thoughts of hurting others. (R. p. 681, lines 3-7). RN Janice McDonald concluded she did not believe Hunt was

suicidal; rather, he was angry and frustrated about his inability to get medications. (R. p. 627, lines 24-25; R. p. 628, lines 1-2). RN Janice McDonald then walked with Hunt and Ray to Bay Number 4 of the treatment area. (R. p. 678, lines 13-16). At that point, RN Joe McDonald assumed care of Hunt.

Upon transfer, RN Joe McDonald evaluated Hunt's presentation, demeanor, actions, and subtle motions. (R. p. 835, lines 23-24). As RN Joe McDonald described, this conduct could reveal "telltale signs" that there is an issue to be addressed. (R. p. 836, lines 2-3). RN Joe McDonald noted the absence of any such conduct and described Hunt as the "ideal patient." (R. p..836, line 7). In fact, RN Joe McDonald described Hunt as someone you could invite home to dinner on Sunday afternoon – he was that nice and pleasant. (R. p. 836, lines 13-14). RN Joe McDonald indicated Hunt's pleasant demeanor did not change throughout his nearly two hours in the ED, and Hunt never exhibited any "agitation, combativeness, stuporousness, unconsciousness, uncooperative behavior, or ETOH odor." (R. p. 836, lines 15-16; R. p. 843, lines 20-24).

Dr. Jansen was the physician staffing the ED on February 24, 2012. Prior to interacting with Hunt, Dr. Jansen obtained a treatment sheet from RN Joe McDonald. The treatment sheet listed "psyche disorder, suicide attempt, overdose" as the primary complaints. (R. p. 1256, lines 14-17). RN Joe McDonald also informed Dr. Jansen that Hunt was there voluntarily. Coupled with his calm demeanor, Dr. Jansen inferred Hunt "chose to come there" and wanted to be treated. (R. p. 1256, lines 24-25; R. p. 1257, lines 1-3). Dr. Jansen's initial interaction with Hunt was unremarkable and at no point did Dr. Jansen consider medicating or physically restraining him. (R. p. 1257, lines 22-25). Hunt explained to Dr. Jansen that his symptoms had been ongoing for several weeks. (R. p. 1259, lines 16-17). According to Dr. Jansen, this

mitigated the concern of Hunt engaging in extreme conduct or acting inconsistently with how he had otherwise presented throughout his time at NHB. (R. p. 1260, lines 7-12).

During the course of his treatment, Hunt explained that he was in the process of being dishonorably discharged from the Marines. (R. p. 1261, lines 1-3). Hunt expressed anger and depression related to this decision. (R. p. 1261, lines 17-20). He also communicated thoughts of hurting himself and hurting others, but did not articulate any specific plans in that regard. (R. p. 1263, lines 2-5). Dr. Jansen further noted Hunt did not demonstrate any confusion, hallucinating, frustration, agitation, hostility, or paranoia during his encounter in the ED. (R. p. 1262, lines 3-19). In light of this initial presentation, Dr. Jansen suggested Hunt's rights as a patient dictated that he could come and go as he pleased. (R. p. 1265, lines 22-25).

As part of his continued evaluation, Dr. Jansen also performed a physical examination of Hunt. This evaluation included constant verbal communication, instructions for Hunt to perform certain tasks, as well as Dr. Jansen touching various parts of Hunt's body. (R. p. 1276, lines 14-17). The physical examination of Hunt was unremarkable. Hunt was breathing normally, had a normal blood pressure, slightly elevated pulse rate, and normal skin color. (R. p. 1279, lines 13-25; R. p. 1280, lines 1-21). Dr. Jansen also noted the absence of any sweating or flushed appearance, two common markers of an "extremely agitated" patient. (R. p. 1280, lines 22-25; R. p. 1281, lines 1-3). Overall, Hunt cooperated for the entire physical examination. (R. p. 1276, lines 8-10). At that point, Dr. Jansen consulted with the psychiatric group at NHB to obtain a mental health evaluation of Hunt. (R. p. 1281, lines 17-20).

Arthur Manning ("Manning") was the Psychiatric Technician on duty on February 24, 2012. Manning explained that "there was not a concern of him like hurting someone right then

and there," despite his feeling that Hunt was disoriented and agitated. (R. p. 2347). Manning then left Hunt to report his findings directly to Dr. Beverly Hendelman ("Dr. Hendelman"), the on-call attending physician in the NHB Mental Health Unit. Based on Manning's report, Dr. Hendelman determined Hunt needed to be hospitalized at the Mental Health unit of Beaufort Memorial Hospital. This facility was capable of providing in-patient mental health treatment to Hunt, which was not available at NHB. (R. p. 2322). Dr. Jansen ultimately agreed with the recommendation offered by Dr. Hendelman and began the process of getting Hunt transferred to Beaufort Memorial Hospital.

At approximately 4:00 PM, Hunt approached RN Joe McDonald to use the restroom, which was in close proximity to the nurse station where RN Joe McDonald was standing. (R. p. 803, lines 1-12). Upon return, RN Joe McDonald offered Hunt a refreshment, which Hunt pleasantly declined. (R. p. 804, lines 15-17). Approximately two or three minutes later, Ray approached RN Joe McDonald to ask whether he and Hunt "could step out for fresh air." (R. p. 806, lines 7-9). RN Joe McDonald said "yes". (R. p. 807, lines 17-25; R. p. 808, lines 1-5). At this point, Hunt and Ray had both been in the ED for approximately one hour and thirty minutes. Hunt cooperated with all requests of the ED staff during this period.

Hunt and Ray proceeded to calmly walk outside. While outside with Ray, Hunt inexplicably removed some items of clothing and ran towards the front security gate. Neither Ray nor security guards at NHB were able to prevent Hunt's elopement. Within minutes of running off base, Hunt found an unattended fire truck, stole the fire truck, and drove the fire truck down Ribaut Road at high speeds, causing multiple motor vehicle accidents. Hunt also collided with Justin Miller, a pedestrian who was crossing Ribaut Road. Miller died as a result of this collision.

STANDARD OF REVIEW

The trial court is required to charge only the current and correct law in South Carolina. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). In reviewing jury charges for error, the Court of Appeals "must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 416, 717 S.E.2d 765, 771 (2011) (citing *Welch v. Epstein*, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (2000)). If the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error. *Id.* (citing *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497-498, 514 S.E.2d 570, 575 (1999)). A jury charge that is substantially correct and covers the law does not require reversal. *Id.* (citing *Keaton*, 334 S.C. at 496, 514 S.E.2d at 574). A refusal to give a requested charge constitutes reversible error only if the refusal was erroneous and prejudicial. *Jones v. Ridgely Communications, Inc.*, 304 S.C. 452, 456, 405 S.E.2d 402, 404 (1991).

ARGUMENT

I. THE CIRCUIT COURT APPROPRIATELY DENIED APPELLANT'S REQUESTED CHARGE, WHICH IMPROPERLY CHARACTERIZED THE DUTY OF CARE OWED BY A MEDICAL PROVIDER TO NON-PATIENT THIRD PARTIES.

A. Appellant's requested charge seeks an improper expansion of the duty of care owed by a medical provider to a non-patient third party as established by South Carolina law.

On the last day of trial, the Circuit Court charged the jury with all South Carolina law applicable to the present case. In describing the legal duty owed by a medical provider to a third party, the Circuit Court charged the following:

> 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, Appellant requested an addition to this charge. Specifically, counsel for Appellant stated:

> 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 patients is also owed to the reasonably foreseeable non-patient in the general zone of danger.

(R. p. 1895, lines 24-25; R. p. 1896, lines 1-6). Appellant articulated a similar argument earlier in the proceedings following a charge conference. (R. p. 1799, lines 17-25; R. p. 1800, lines 1-24). On both occasions, the Circuit Court denied Appellant's request and expressed its satisfaction with the jury charges provided. (R. p. 1896, lines 7-9).

1. Appellant's interpretation of the duty of care established by *Hardee v. Bio-Medical Applications of S.C., Inc.* is improper.

At trial, and in her Initial Brief to this Court, Appellant relies almost exclusively on *Hardee v. Bio-Medical Applications of S.C., Inc.* to support her expansive interpretation of the duty owed by a medical provider to a third party. 370 S.C. 511, 636 S.E.2d 629 (1998). In doing so, Appellant mischaracterizes this holding by providing no context for certain language cited in her brief and ignoring the clear intent of the Supreme Court to carve out a narrow, restrictive exception to the general rule that medical providers do not owe a duty to third party non-patients. *Id.* at 516, 632.

In *Hardee*, the Supreme Court began its analysis by noting that a physician's malpractice in treating a patient may form the basis of a negligence action against the physician by a third party in limited circumstances. This concept was originally derived from *Bishop v. S.C. Dep't of*

Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998). In *Bishop*, the Supreme Court held that a physician-patient relationship is "not a pre-requisite" for every legal action against a medical provider and that "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 92, 84 (citations omitted). The *Bishop* holding, however, failed to enumerate such "limited circumstances." Thus, the key issue before the Court in *Hardee* was whether the facts as presented fell within the narrow set of "limited circumstances" contemplated by *Bishop.*

The *Hardee* case involved a patient who received regular dialysis treatments three times per week. Upon completion of each dialysis treatment, the patient was released to go home. On this particular occasion, patient lost control of his vehicle and collided with the plaintiffs. Following the accident, the plaintiffs filed suit against the medical provider alleging it negligently administered the dialysis treatment. Specifically, the plaintiffs alleged that the medical provider "did not warn patient of the ill effects that could result from a dialysis treatment, that patient was experiencing insulin shock or suffering from low blood sugar at the time he left [its] facilities, and that [it] did not perform the normal post-treatment tests or monitoring prior to releasing patient." *Hardee* at 513, 630.

The plaintiffs proceeded to argue the medical provider "knew that the medical procedure it performed on patient could have substantial detrimental effects on patient's ability to operate a motor vehicle." *Id.* 516, 631. Thus, the plaintiffs argued, that if the provider failed to warn the patient of the risks associated with operating a motor vehicle, it "breached a duty [it] owes to those persons in the general field of danger (that is, the motoring public) which should

reasonably have been foreseen by [the medical provider] when it administered the treatment." *Id.*

Ultimately, the Supreme Court agreed that a medical provider generally "has a duty to warn of the dangers associated with medical treatment." *Id.* A "medical provider who provides treatment which it knows may have detrimental effects on a patient's capacities and abilities owed a duty to prevent harm to patients and to reasonably foreseeable third parties by warning the patient of the attendant risks and effects before administering the treatment." *Id.* at 516, 631-632. While acknowledging such a duty exists under the particular facts presented in *Hardee*, the Court further explained the opinion as a "very narrow holding that carves out an exception to the general rule that medical providers do not owe a duty to third party non-patients. Importantly, this duty owed to third parties is identical to the duty owed to the patient, i.e., a medical provider must warn a patient of the attendant risks and effects of any treatment." *Id.* at 516, 632. Finally, the Supreme Court acknowledged that this particular holding "does not hamper the doctor-patient relationship." *Id.* The duty of care described in *Hardee* was nothing more than a duty to warn. The holding did not outline a general duty to keep a patient, and the community at large, safe, and certainly could not be construed to require that a medical provider restrain a patient because of certain potential risks related to the treatment provided. As outlined above, this duty to warn was precisely the jury charge provided by Judge Goodstein at trial. Now, Appellant seeks to rely upon the exact case which extends a medical provider's duty to warn to non-patient third parties to suggest the charge was improper.

2. The facts of the present case are markedly different from those in *Hardee*.

In *Hardee*, the Supreme Court examined a provider's duty to warn within the context of affirmative medical treatment it provided for a patient. In other words, the duty arose in

conjunction with administering certain treatment where a provider could objectively, and with some degree of certainty, identify potential risks and ill effects. In *Hardee*, the medical provider was a dialysis center. Thus, the provider was in a position to know how the dialysis treatment typically affected patients, common risks associated with the treatment, and warnings it could provide to mitigate such risks. In *Hardee*, the risks and ill effects were not unique to each patient and the substance of the provider's warning of said risks and ill effects would remain the same.

In the present case, there was no affirmative treatment or medical procedure at issue. In essence, Appellant contends that Respondent had a duty to "keep Hunt safe at all times." (R. p. 1453, line 6). Unlike *Hardee*, where the provider had notice of the dialysis symptoms and the ability to warn, the ED staff had no notice that Hunt would act in the manner that he did. The testimony presented at trial clearly described Hunt as calm and cooperative. Hunt never demonstrated any violent tendencies and never articulated a specific plan to harm himself or others. Given this behavior, it was far beyond the ambit of reasonable foreseeability that Ray would allow Hunt to run away and that security officers in the area would allow Hunt to elope. The fact that Hunt then found a fire truck with the key in the ignition, stole the fire truck, caused multiple motor vehicle accidents, and ultimately collided with Justin Miller further demonstrates how the sequence of events could not be considered reasonably foreseeable.

At the time of the subject incident, Lieutenant Angela Brannon ("Lieutenant Brannon") served as head of the ED. In this capacity, she supervised the ED and medical providers therein. Among others, this included RN Janice McDonald, RN Joe McDonald, and Dr. Jansen. Lieutenant Brannon provided testimony regarding the policies and procedures within the ED in February 2012. Specifically, Lieutenant Brannon testified as follows:

> Q: Lieutenant Brannon, as you know, this case involves Calvin Hunt's stealing a fire truck and hitting a pedestrian after he'd left the Naval Hospital Beaufort. Are you aware of any policy in place at Naval Hospital Beaufort on February 24, 2012, that prevented patients from leaving the emergency department?
>
> A: No, I'm not aware.

(R. p. 2407). More specifically, NHB employed a zero-restraint policy, which is outlined as follows:

> Q: In the next sentence you state "NHB has a zero restraint policy for unruly patients"?
>
> A: Yes, that's correct.
>
> Q: So – we can't prevent them from leaving, but we can notify security. Can you tell me what you mean by a no restraint policy? Or I'm sorry, a zero restraint policy?
>
> A: Yes ... we are not supposed to be restraining patients. Preventing a patient by physically leaving or holding them down or locking them up is essentially a restraint. And if a patient does become unruly or [if] there is a threat to self or others, it's virtually impossible for any of the nurses there or the physicians to restrain that patient. So in that case, security would be notified.

(R. p. 2398).

At trial, RN Joe McDonald offered a similar explanation regarding the zero-restraint policy at NHB. RN Joe McDonald indicated that he "can't restrain anybody" and "unless told or indicate otherwise, [he] can't prevent [patients] from leaving." (R. p. 846, lines 3-4). The evidence presented at trial clearly demonstrated that Hunt voluntarily presented to NHB on February 24, 2012. He was not involuntarily committed, and there was no specific policy in place requiring RN Joe McDonald to prevent or otherwise restrain Hunt from leaving on his own volition. In fact, the zero-restraint policy required the exact opposite.

Appellant's argument is premised on the notion that Respondent had an expansive duty to third parties when treating Hunt. Appellant has generally characterized this duty as requiring Respondent to keep Hunt, and the community at large, safe. Stated otherwise, Appellant argues that Respondent should have restrained Hunt and confined him to the ED. As noted above, however, the ED maintained strict policies to the contrary. Thus, one must assume Appellant's true contention is that Respondent failed to exercise appropriate medical judgment in acting against ED policies to confine Hunt under the circumstances.

This theory, however, is inconsistent with Appellant's presentation of its case against Respondents. For example, Appellant has steadfastly claimed this lawsuit involves issues of ordinary negligence, and not medical malpractice. In fact, Appellant even described this incident at trial as one that could have been prevented with good, old-fashioned common sense. (R. p. 433, lines 23-24; R. p. 1812, lines 16-17).

The introduction of questions regarding the professional judgment exercised by certain providers further distinguishes the present case from that of *Hardee*. As noted above, the *Hardee* case involved certain, known risks resulting from the administration of dialysis treatment. The ill effects or risks of such treatment were common to all patients and there would be no degree of professional judgment necessary to issue certain warnings related to the same. In fact, a receptionist at the dialysis center could provide the exact same instructions to every single patient who presented for dialysis treatment. If the receptionist provided a generic warning regarding the potential risk of driving after treatment to every dialysis patient, the provider would have adhered to its duty of care as described in *Hardee*.

Unfortunately, the treatment of mental health patients is far more intricate and patient-specific. A standard warning issued by an ED receptionist or nurse (under an ordinary negligence standard of care) to a mental health patient could not possibly account for the endless ill effects or risks such a patient can often pose to him or herself. In these cases, providers are often required to call upon their professional skill and judgment to properly evaluate the patient, treat the patient, and mitigate all risks posed to the patient.

At trial, and in its Initial Brief, Appellant argues that the duty owed to a non-patient, third party is "identical" to the duty a medical provider owes his/her patient. Presumably, Appellant suggests that for every duty a medical provider owes to its patient, it likewise owes the exact same duty to non-patient, third parties. Quite simply, this premise wholly ignores, and manipulates, much of the *Hardee* holding.

First, the Supreme Court took great care to explain that the *Hardee* holding should be construed "very narrowly" and that the opinion does little more than "carve out" a limited exception to the general rule that no such duty to a non-patient, third party exists. The Court also used the term "identical" solely within the context of describing the specific duty enumerated in the holding (i.e., the duty to warn a patient of the attendant risks and effects of any treatment). If this Court were to adopt Appellant's interpretation of a medical provider's duty to third parties as "identical" to that owed to patients in all situations, it would essentially convert a narrow, limited exception into a general rule of boundless exposure to unknown third parties and unknown claims. Clearly, such an interpretation is inconsistent with South Carolina law.

B. Public policy does not support Appellant's proposed expansion of the narrow exception to the general rule that medical providers do not owe a duty of care to non-patient third parties.

Appellant would like this Court to find that Respondent had identical duties to Justin Miller as it did to Hunt, and specifically, that Respondent owed the duty to keep Hunt safe. Appellant concludes that the public policy of the state favors such an expansion of the duty owed by medical providers to non-patient third parties. However, this Court does not need to look further than S.C Code §§15-32-200 et seq., 15-36-10 et seq., and 15-79-110 et seq. to understand the public policy of the state involving medical professionals. This legislation provides specialized protections for medical professionals, including limitations on liability, procedural requirements for bringing suit against them, and heightened standards of care or immunity under certain circumstances. Appellant's proposed jury charge seeks to greatly expand the potential liability of medical providers by extending duties owed to patients to all persons within a zone of danger and based on an ordinary person standard of care. The public policy of this state does not support such an expansion.

Appellant attempts to support her argument by citing tragic events involving people with mental health issues and characterizing the treatment of mental health patients as a safety issue. While safety of patients is a priority for medical providers, so is providing that treatment expected of a physician in the same or similar circumstances. In fact, a physician's chief concern when treating a patient should be the patient's best interests and not what a lay jury, untrained in medicine and employing perfect hindsight, might later conclude the physician should have done. *Hook v. Rothstein,* 281 S.C. 541, 553, 316 S.E.2d 690, 697-698 (1984) (citing *Scaria v. St. Paul Fire and Marine Ins. Co.*, 68 Wis.2d 1, 227 N.W.2d 659 (1975)). Medical providers must weigh risks associated with various treatment options, including no treatment, in determining the best

course for a particular patient under the circumstances presented. Appellant cited only a portion of Dr. Oberg's testimony regarding patient safety in its brief in asserting that safety is the number one concern of a physician. Dr. Oberg also said, "We want to make the diagnosis. We want to help people." (R. p. 1662, line 25; R. p. 1663, line 1).

Although Appellant uses the term safety, the actual proposed duty by Appellant in this case is to establish a duty to keep the patient restrained or otherwise confined to the ED. The undisputed testimony in this case was that Hunt consistently sought treatment at NHB, was cooperative, never indicated an intent to leave, and was accompanied by an escort during the entire time he was at NHB. Appellant's characterization that Respondent allowed Hunt to leave is simply inaccurate. Respondent allowed Hunt and Ray to step outside of the small ED based on the reasonable belief that they would return in a few minutes. This was neither against NHB policy nor a deviation of accepted practice. As discussed, Hunt had consistently followed direction from medical providers at NHB and given no indication that he was a flight risk or an immediate threat of harm to himself or others.

Appellant argues the law in Georgia and North Carolina provides that a medical provider owes a duty to a non-patient with respect to mental health patients. However, Appellant's reliance on and interpretation of these cases is misplaced. First, in Georgia, *Bradley Center, Inc. v. Wessler*, 250 Ga. 199, 296 S.E.2d 693 (Ga.1982) involved an admitted patient in a treatment facility who consistently expressed thoughts of killing his ex-wife and her boyfriend. He in fact killed his ex-wife and her boyfriend after receiving a weekend pass privilege from the facility. The Court held that when the course of treatment of a mental patient involves the exercise of control over him by a physician who knows or should know that a patient is <u>likely</u> to cause bodily harm to others, an independent duty arises from that relationship and requires the

physician exercise that control with such reasonable care as to prevent harm to others at the hands of the patient. Importantly, Respondent did not exhibit the level of control required in *Bradley Center*, because Hunt was a voluntary patient in the ED as opposed to a patient under the care of a psychiatrist over a long period of time. Further, Hunt never expressed the intent to harm specific individuals in the manner or detail with which the patient did in *Bradley Center*.

Similarly, in *Pangburn v. Saad*, 73 N.C. App. 336, 326 S.E.2d 365 (N.C. 1985), Plaintiff asked the Court of Appeals in North Carolina to recognize a cause of action for injuries resulting from the wrongful release of mental patients. Again, the patient in this case had been committed to the hospital on numerous occasions involuntarily, and he threatened physical harm to his family and others. He was released from the facility prior to his scheduled date and he attacked his sister, who was the plaintiff in the case. The Court ruled that plaintiff sufficiently alleged willful, wanton or reckless negligence and intentional wrongdoing, and reversed the lower court's decision to grant defendant's motion to dismiss. As discussed, these cases are very different from this case in the level of control the medical provider exerted over the patient and the threats of harm expressed by the patients when compared to a lack of threats of harm by Hunt. These differences are also reflected in Hunt's cooperative and calm demeanor.

Appellant also discusses the applicability of the expansion of this duty in communicable disease cases. Respondent asserts that communicable disease examples are not applicable to this case. The threat of harm in those cases is known to the medical providers, and the potential results are predictable. In this case, those factors were not present based on Hunt's presentation, behavior in the ED, and the case-specific responses different mental health patients can have during treatment.

Appellant also cited *Bramlette v. Charter Medical – Columbia*, 302 S.C. 68, 393 S.E. 2d 914 (1990) and *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 502 S.E. 2d 78 (1998) in support of the assertion that South Carolina's public policy favors a recognition of the duty to keep patients safe. The *Bramlette* case involved an admitted patient who committed suicide while on a recreational outing. Importantly, *Bramlette* was not a third-party duty case, and it was a medical malpractice case which specifically stated that finding the provider liable required a departure from the standard of care of the profession. Further, the facts showed that the patient in that case was suicidal, meaning that he had expressed a plan or intent, as opposed to only ideations expressed by Hunt. In addition, the Court has specifically declined to extend the holding in *Bramlette* to other cases.

In *Bishop*, the Court held that a medical provider did not have a duty to a third party to properly diagnose and treat the patient, although it found that the medical provider had a duty to warn the identifiable person the patient intended to harm and in fact harmed. Although Respondent submits the facts in this case are notably different from *Bishop*, the holding in *Bishop* supports the Court's jury charge in this case and does not support Appellant's broad proposed expansion of third-party duty.

In sum, Appellant has not presented a public policy argument that refutes the clear intent of the legislature to limit liability of medical providers at the potential expense of the public. The Court has recognized this policy in limiting and narrowly applying exceptions to the general rule that medical providers do not owe a duty to non-patients, and the Circuit did not err in refusing the Appellants proposed jury charge.

CONCLUSION

For the reasons outlined above, Respondent respectfully requests that this Court affirm the judgment of the Circuit Court.

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

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge
Common Pleas Case No. 2012-CP-07-03782

Appellate Case No.: 2015-002466

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

v.

CasePro, Inc., ...Respondent.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the following Final Brief of Respondent complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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PROOF OF SERVICE

I certify that on the date indicated below, I served the *Final Brief of Respondent* upon Appellant by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

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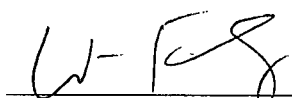

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