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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

Unpublished Opinion No. 2018-UP-221
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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JUN 12 2018
SC Court of Appeals

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Appellant, through her undersigned counsel, respectfully petitions for rehearing of the Court's decision of May 30, 2018.

Despite the voluminous record in this case, the essence of this appeal can be summarized as follows: under South Carolina law, does Respondent owe Appellant's son a duty, beyond a mere duty to warn, where Respondent is a company that employs medical providers in a hospital and Appellant's son is a pedestrian walking near the hospital less than twenty minutes after a criminally insane individual who, despite indicating to Respondent's medical providers that he had thoughts of hurting himself and others, had been given affirmative permission to elope from the hospital.

While the Court of Appeals (and the Circuit Court) answered this question in the negative, Appellant urges this Court's additional review of Faile, Bishop, Hardee, and Oblachinski. Such a review, Appellant believes, makes it difficult, if not impossible, to conclude that the Circuit Court charged the current and correct law of this state. Moreover, Appellant respectfully directs this Court's attention to evidence in the record which supports Appellant's requested jury charge and, again, urges that public policy supports Appellant's requested jury charge. Rehearing should be granted based on the arguments and points set forth herein.

I. The Court of Appeals erred in finding that the Circuit Court charged the current and correct law of the state.

The Court of Appeals begins its analysis by citing Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) and the rule that "there is no general duty to control the conduct of another or to warn a third person or potential victim of danger." Our Supreme Court, however, recognizes five exceptions to this rule: 1) where the defendant has a special relationship to the victim; 2) where the defendant has a special relationship to the injurer; 3) where the defendant voluntarily undertakes a duty; 4) where the defendant negligently or intentionally creates the risk; and 5) where a statute imposes a duty on the defendant. Id. citing HUBBARD & FELIX, THE SOUTH CAROLINA LAW OF TORTS 57-72 (1990). Appellant's case was pled, and ultimately tried, under exceptions two, that the Respondent had a special relationship with the injurer (R. 90 at ¶41(ii)-(iii)), and three, that the Respondent voluntarily undertook a duty (R. 90 at ¶41(iv)).

With respect to the second exception, our Supreme Court in Faile, explained that a duty -- *beyond a mere duty to warn* -- can arise under such circumstances:

The Restatement provides no duty exists “to control the conduct of a third person as to prevent him from causing physical harm to another unless ... a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct.” Restatement (Second) of Torts § 315 (a) (1965). Section 319 provides: “One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.” Restatement (Second) of Torts § 319 (1965).

Our courts have customarily applied § 315 and § 319 in conjunction with duty to warn cases.

...

The application of § 319 is not limited to duty to warn cases. The use of the § 319 custodial duty of care in such cases is a slight misnomer. Duty to warn cases normally involve a defendant who has legally released a third party from direct custodial control or who releases the third party after medical evaluation.

...

In the present case, Respondents do not assert DJJ had a duty to warn potential victims. Instead, Respondents assert a breach of the duty to supervise and control a dangerous juvenile by the custodial entity. Therefore, Respondents argue DJJ had a specific § 319 duty to control a dangerous person legally placed in its direct custodial care. While this Court has never explicitly recognized such a duty, at least two appellate decisions mention a similar duty in dicta.

...

This Court is reluctant to impose the duty to control unless there is an established authority relationship and a substantial risk of serious harm. See Hubbard & Felix, *supra*, at 64-65. Here, DJJ had custody of a known dangerous individual. **It had an independent duty to control and supervise Fredrico to prevent him from harming others as long as it retained custody of him by court order.**

350 S.C. at 334-339, 566 S.E.2d 546-548 (emphasis added).

While the duty found by our Supreme Court in Faile under the aforementioned second exception did not afford that litigant any relief, it is significant that the Faile Court noted that other reported decisions in this State did not involve claims of “a breach by the defendant of a common law duty to control a dangerous person in their custody.” Id. at 335, 546 citing Bishop v. S.C. Dep’t of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998) (plaintiff claimed defendant failed to warn victim of third party’s release from a mental hospital); Rogers v. South Carolina Dep’t of Parole & Cmty Corr., 320 S.C. 253, 464 S.E.2d 330 (1995) (plaintiff argued defendant failed to warn victim of a dangerous third party’s furlough); Rayfield v. South Carolina Dep’t of Corr., 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1998), cert. denied, 298 S.C. 204, 379 S.E.2d 133 (1998) (plaintiff asserted defendant was liable for breaching its statutory duties in paroling third party). Instead, past reported decisions had focused on whether the defendant should have warned the *victim*.

Similarly, the only legal duty examined by our Supreme Court in Hardee v. Bio-Med Applications of S.C., Inc., is that of a duty to warn. 370 S.C. 511, 636 S.E.2d 629 (2006) (“Appellants argue that if Respondent did not warn Patient of the risks of operating a motor vehicle, 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”). But, unlike the reported decisions that came before it, Hardee focused on whether the defendant medical provider should have warned the *patient*¹ who

¹ As discussed in Appellant’s Brief, the jury’s verdict is not surprising given that the only issue of negligence (in addition to claims for negligent hiring, supervision, and retention) that went to the

injured the *victim*. Hardee is, thus, highly instructive as to the law at issue in this appeal. First, Hardee rejects the view that a medical provider never owes a duty to a third-party non-patient as a result of actions or omissions the provider takes in regard to a patient's treatment. Id. at 515, 631. Second, Hardee notes that, as of 2006, our Supreme Court has "never defined what constitutes the limited circumstances in which a third party can maintain suit against a medical provider as outlined in Bishop." Id. Third, Hardee cites a generally applicable duty for medical providers and then found "an exception to the general rule that medical providers do not owe a duty to third party non-patients." Specifically, Hardee recognizes a duty which it describes as "identical to the duty owed to the patient." Id.

Our Supreme Court had the opportunity to again address this area of law in Oblachinski v. Reynolds, 391 S.C. 557, 706 S.E.2d 844 (2011). First, Oblachinski notes that "[f]oreseeability of injury, in and of itself, does not give rise to a duty." Id. Second, Oblachinski notes that "the duty recognized in Hardee mirrored the duty owed to the patient." Id. Third, Oblachinski found that in "both Bishop and Hardee, the actions hinged on conduct by the patient which injured the third-party plaintiff." Id. The claims in Oblachinski, however, arose when a doctor misdiagnosed a child as having been sexually abused and the plaintiff was arrested. Thus, the Oblachinski Court held: "[e]ven 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." Id.

jury involved Respondent's employees' alleged failure to warn a patient who at that moment was criminally insane.

In this case, Appellant's son was killed by a mental health patient, later adjudicated by the Circuit Court to be criminally insane, who had reported thoughts of hurting himself and others to Respondent's employees that same afternoon and had nevertheless been affirmatively given permission to elope from the hospital emergency room less than twenty minutes prior to a preventable tragedy. R. p. 2112, PL EX 20, p. 1308, line 1418; p. 807, line 8 – p. 808, line 5;p. 812, line 25-p. 813, line 12.

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 self-harm. 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"). In this case, the patient sustained physical injuries from his violent operation of the firetruck in addition to the injuries, and death, he caused others. R. p 487, line 10-15.

Appellant's requested jury charge fits squarely within the "narrow" holding of Hardee when accompanied by a review of Faile, Bishop, and Oblachinski. Specifically, Appellant's son, a foreseeable plaintiff, would not have been harmed but for the failure of Respondent, through its employees, to exercise due care with respect to a criminally insane patient. In other words, Appellant believes, the duties owed to both Hunt and Miller were identical. Rehearing is warranted.

II. The Court of Appeals overlooked evidence in the record which supports Appellant's requested jury charge.

The Court of Appeals held that, based upon its review of the record, "no evidence warranted an instruction that CasePro failed to mitigate known risks associated with Hunt's treatment or illness."

The person in charge of the Emergency Room that day, a physician employed by Respondent, testified 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." R. p. 1100, line 2—p. 1104, line 17. Nevertheless, the criminally insane patient was given affirmative permission to leave the Emergency Room for some "fresh air." This is despite the fact that the triage nurse reported that she became afraid for her safety when she was alone with Mr. Hunt during triage. R. p. 627, line 2. Based on her observations, the triage nurse described her criminally insane patient as "a slow simmer" — "he was just angry with the whole system." R. p. 659, line 24—p. 660, line 12. The criminally insane patient was also described, following a safety evaluation, as "very aggressive." R. p. 2347. Moreover, there is testimony in the record from a psychiatrist that it was "obvious" that the criminally insane patient was in need of hospitalization. R. pp. 2323-2324. This psychiatrist further testified that Respondent's employees did not manage the criminally insane patient safely on the date of this preventable tragedy: "he shouldn't have been allowed to leave." R. p. 2337. In addition, the record contains testimony from an expert witness in the field of emergency medicine who testified that Respondent's employees acted with "a careless disregard" for their criminally insane patient by: 1) not keeping him safe, 2) not placing him in a gown, 3) allowing him to wander, and 4) giving

him permission to leave the ER. R. p. 1448, line 11—p. 1450, line 10; p. 1450 line 10-13) (“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.”).

Based on the above, rehearing is warranted as the record contains evidence that Respondent failed to mitigate known risks associated with Hunt’s treatment or illness.

III. The Court of Appeals misapplied the public policy of this state with respect to Appellant’s requested jury charge.

In explaining its view of the public policy involved in this case, the Court of Appeals relies upon the “narrow” holding of Hardee and language from Faile. As previously discussed, Appellant believes that her requested jury charge fits within the “narrow” exception of Hardee. Moreover, as discussed above, Faile considered more than a duty to warn. Indeed, the language the Court of Appeals cited from Faile in support of its view of this state’s public policy was from a portion of that case discussing the duty to warn as set forth in section 319 of the Restatement (Second) of Torts. However, “[t]he application of § 319 is not limited to duty to warn cases.” 340 S.C. at 335, 566 S.E.2d at 546. Indeed, our Supreme Court concluded its Faile opinion: “This Court is reluctant to impose the duty to control unless there is an established authority relationship and a substantial risk of serious harm.” Id. at 338,548. Here, a special relationship existed between Respondent and a criminally insane patient which included the ability to control. The ability of Respondent’s employees to control is evidenced by the request by the criminally insane patient to leave the Emergency Room for some “fresh air.” And, as the Miller-Delaney family has experienced, the risk of serious harm resulting from Respondent’s employees failure to control

their criminally insane patient was great. For these reasons, as well as the reasons set forth in her Brief, Appellant requests rehearing on whether public policy supported her requested jury charge.

IV. The Court of Appeals Delaney should have found that the Circuit Court's refusal to provide the requested jury charge was both erroneous and prejudicial to warrant reversal.

The Court of Appeals did “not address [Appellant]’s second argument regarding prejudice because we find no error in the circuit court's refusal to issue the proposed jury charge.” As discussed above, the Court of Appeals erred in holding that the Circuit Court “charged the jury with the current and correct law of the state.” As a result, the Court of Appeals should have considered whether this failure was prejudicial. See Jones v. Ridgely Commc'ns, Inc., 304 S.C. 452, 456, 405 S.E.2d 402, 404 (1991) (“[T]o warrant reversal, the refusal to give a requested charge must have been erroneous and prejudicial.”) As discussed in Appellant’s brief, the Circuit Court charged the jury that the only potentially negligent acts and omissions from the Respondent’s 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

Respondent. This does not mean, however, that a reasonable jury would have rendered a verdict for Respondent if it had been charged on more than a duty to warn.

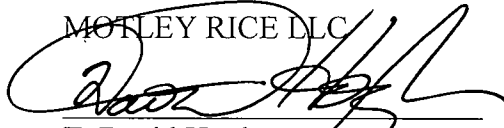
Because it cannot be found that the failure by the Circuit Court to give the requested charge, and permit the jury to consider negligence beyond a negligent failure to warn was harmless, rehearing is warranted.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that this Honorable Court grant rehearing.

Respectfully submitted, this 11th day of June, 2018.

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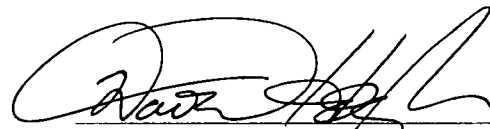
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CERTIFICATE OF SERVICE

The undersigned certifies that Appellant's Petition for Rehearing was served by US Mail
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"I will stand for my client's rights.
I am a trial lawyer."
-Ron Motley (1944-2013)

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June 12, 2018

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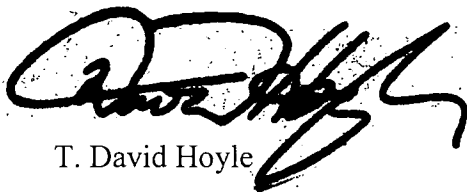
Re: Rebecca Delaney, as Personal Representative of the Estate of Justin Nicholas Miller vs. CasePro, Inc., Appellate Case No.: 2015-002466

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Appellant's Petition for Rehearing, with proof of service attached to the petition, in the above-referenced appellate case. Also enclosed is an additional copy of the petition, to provide a "clocked-in" copy of the document for my firm's files. Please file the petition and provide a "clocked-in" copy to me.

Thank you for your assistance. Please do not hesitate to contact me if you need any further information.

With kind regards,



T. David Hoyle

cc: Counsel of Record