THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion No. 2018-UP-221 (S.C. Ct. App. filed May 30, 2018)
Appellate Case No. 2015-002466
Case No. 2012-CP-07-03782

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

Petitioner

v.

CasePro, Inc.,

Respondent

PETITION FOR WRIT OF CERTIORARI

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September 10, 2018

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Certificate of Counsel

Counsel for the Petitioner certifies that the petition for rehearing was made on June 12, 2018 (App. pp. 2525-2536) and denied by the Court of Appeals on August 16, 2018 (App. pp. 2544-2545).

Questions Presented

I. Whether The Court of Appeals erred in finding that the Circuit Court charged the current and correct law of the state.
II. Whether The Court of Appeals overlooked evidence in the record which supports Appellant's requested jury charge.
III. Whether The Court of Appeals misapplied the public policy of this State with respect to Appellant's requested jury charge.
IV. Whether The Court of Appeals should have found that the Circuit Court's refusal to provide the requested jury charge was both erroneous and prejudicial to warrant reversal.

Statement of the Case

Pursuant to Rules 240 and 242, SCACR, Petitioner Rebecca Delaney, as Personal Representative of the Estate of Justin Nicholas Miller, files this Petition to review *Delaney v. CasePro, Inc.*, 2018-UP-221 (S.C. Ct. App. filed May 30, 2018). The questions presented in this petition involve novel questions of law concerning the duties owed by an emergency room physician and nurses to a reasonably foreseeable third party harmed by a mental health patient, twenty minutes after that patient, who was awaiting an impatient psychiatric admission, was given permission to leave the emergency room when the ER staff had actual knowledge that the patient had expressed thoughts of hurting himself and others. In the alternative, these questions are subject to past decisions of this Court, primarily Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998), Hardee v. Bio-Med Applications of S.C., Inc., 370 S.C. 511, 636 S.E.2d 629 (2006), and Oblachinski v. Reynolds, 391 S.C. 557, 706 S.E.2d 844 (2011), which the Court of Appeals misapprehended.

Procedural History

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. Subsequently, Ms. Delaney substituted the State Office of Veterans Affairs as a defendant (in place of Beaufort County) which later was granted summary judgment.

This case was called for trial on October 6, 2015 following extensive motions practice, dozens of depositions, and having twice been removed to and remanded back from federal court. During the course of the two-week long trial, the Circuit Court directed a verdict in favor of Ms. Delaney with respect to her claims that CasePro, Inc. was responsible under principles of *respondeat superior* for the actions and inactions of emergency room physician Dr. Christian Jansen, nurse Janice McDonald, and nurse Joe McDonald while within the scope of their employment at Naval Hospital Beaufort on February 6, 2012. (App. p. 1806; R. 1794, lines 21-25). The Circuit Court further granted a directed verdict in favor of CasePro, Inc. with respect to Ms. Delaney's survival cause of action. (App. p. 1774; R. 1762, line 17 – 1763, line 15). No appeal has been taken from either of those directed verdicts.

The central issue of this appeal is the law that the Circuit Court charged the jury prior to its returning a verdict for CasePro, Inc. With respect to Ms. Delaney's claims for negligence, the Circuit Court charged that that the only potential duty owed by CasePro, Inc.'s employees, which flowed to a foreseeable person in the general field of danger, was a failure to *warn* a mental health patient. That mental health patient, twenty minutes after being given permission to leave the

emergency room, murdered Ms. Delaney's son by striking him with a stolen firetruck driven at a high rate of speed and was later found not guilty by reason of insanity because, at the time of his crime, 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." (App. p. 1695; R. p. 1683, line 10—p. 1684, line 4). The undersigned implored the Circuit Court for a more expansive jury charge because, under these facts, if there is a potential legal duty to a third person, logically, it must be more than a duty to warn a person who, at that moment, was criminally insane. It is clear that the mental health patient lacked the requisite mental capacity to appreciate the risks associated with any warning issued by the ER staff at that time. Specifically, Ms. Delaney sought a charge based on Hardee that: "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." The Circuit Court declined to give this requested charge and the Court of Appeals affirmed, holding that the Circuit Court charged the current and correct law of this state. This petition for a writ of certiorari followed.

Summary of Arguments in Support of Petition for Writ of Certiorari

The Court of Appeals erred in relying on Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) for the proposition that "there is no general duty to control the conduct of another or to warn a third person or potential victim of danger" without also citing the five exceptions to that rule. Petitioner's case was pled, and ultimately tried, under exceptions two, that the Respondent had a special relationship with the injurer (App. p. 93; R. 90 at ¶41(ii)-(iii)), and three, that the Respondent voluntarily undertook a duty (App. p. 93; R. 90 at ¶41(iv)), to this general rule. With respect to the second exception, this 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.
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> ...
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> **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.
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> ...
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> 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.
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> ...
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> 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). The Court of Appeals further erred by misapprehending this Court's decisions in Bishop, Hardee, and Oblachinski. This Court in Bishop, citing cases finding that a physician owes a duty to third-party non-patients in the

prevention of communicable diseases, held that: "[t]he physician-patient relationship is not a requisite in every legal action against a medical provider." 331 S.C. at 92, 502 S.E.2d at 84. This Court in Hardee further explained that: "[t]his 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." 370 S.C. at 515; 636 S.E.2d at 631. In Hardee, this Court further recognized that "causes of action may accrue in other contexts by virtue of a medical provider's actions or omissions." Id. at 515, 631. In that case, however, the duty sought to be imposed on medical providers for the benefit of third-party non-patients was a duty to warn the *patient* who injured the *victim*. Id. In reaching this holding, this Court noted: "[i]mportantly, 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." In this case, 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 jury involved CasePro, Inc.'s employees' alleged failure to warn a patient who at that moment was criminally insane.

This Court had the opportunity to again address this area of law in Oblachinski and rejected a physician's duty to a non-patient third party when a doctor misdiagnosed a child as having been sexually abused and the plaintiff was arrested. Noting that in "both Bishop and Hardee, the actions hinged on conduct by the patient which injured the third-party plaintiff," 391 S.C. at 562, 706 S.E.2d at 846 , this Court in Oblachinski 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.

As discussed below, important policy concerns as well as unique facts, place this case squarely within the narrow holding of Hardee when accompanied by a review of Faile, Bishop,

and Oblachinski. Specifically, Petitioner'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, Petitioner believes, the duties owed to both the mental health patient and a pedestrian walking near the hospital were identical. Certiorari is warranted.

Arguments in Support of Petition for Writ of Certiorari

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

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, 331 S.C. at 86, 502 S.E.2d at 82. 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, 370 S.C. at 515, 636 S.E.2d at 631. 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, this Court recognized that, "causes of action may accrue in other contexts by virtue of a medical provider's actions or omissions" for a reasonably foreseeable third party who is harmed by a patient's actions. In Hardee, the only cause of action considered by this Court was negligent failure to warn. Importantly, that duty mirrored the duty owed to the patient. 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, this duty has been effectively limited to "conduct by the patient which injured the third-party plaintiff." Oblachinski, 391 S.C. at 562, 706 S.E.2d at 846. In this case, however, the Court of Appeals erred by concluding that "failure to warn" is the only cause of action that may accrue in favor of a non-patient third-party by virtue of a medical provider's actions or omissions. To the extent that this is a novel issue, certiorari is warranted. In the alternative, to the extent that the Court of Appeals misapplied the law of this state based upon Hardee when accompanied by a review of Faile, Bishop, and Oblachinski, certiorari is warranted. Either way, the Court of Appeals erred in finding that the Circuit Court charged the current and correct law of the state.

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 [the mental health patient]'s treatment or illness."

CasePro, Inc. called an expert witness in emergency medicine, Dr. Oberg, who while being impeached during cross examination with TINTINALLI'S ON EMERGENCY MEDICINE, agreed that patients who present with suicidal ideation require specific measures for patient protection. (App. p. 1672; 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. (App. p. 1676; R. p. 1664, lines 3–8). In addition, the history of previous psychiatric illness and treatment should be determined to identify patterns of relapse. (App. p. 1678; 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. (App. p. 1677; R. p. 1665, lines 3–5).

The person in charge of the emergency room the day of this tragic incident, Dr. Jansen, follows 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." (App. p. 1109; R. p. 1100, line 2–p. 1104, line 17). Dr. Jansen did not give any such orders to Mr. McDonald, the treatment nurse, nor did Dr. Jansen tell Mr. McDonald about the mental health patient's thoughts of hurting others. (App. p. 883; R. p. 877, lines 7–10).

Nevertheless, the mental health 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 the mental health patient during triage. (App. p. 633; 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." (App. p. 665; R. p. 659, line 24—p. 660, line 12). The criminally insane patient was also described, following a safety evaluation, as "very aggressive." (App. p. 2362; R. p. 2347). Moreover, there is testimony in the record from the on-call psychiatrist that it was "obvious" that the criminally insane patient was in need of hospitalization. (App. p. 2338; 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." (App. p. 2352; R. p. 2337). In addition, the record contains testimony from an expert witness in the field of emergency medicine retained by Ms. Delaney, Dr. Baker, who testified that CasePro, Inc.'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. (App. p. 1457; R. p. 1448, line 11—p. 1450, line 10; p. 1450 line 10-13) ("It was careless. It was reckless to allow [the mental health patient] to go outside, essentially, unsupervised, where he ran away, stripped naked, got into the fire truck, and — created a death.").

Based on the above, certiorari is warranted as the Court of Appeals overlooked evidence in the record which supports Appellant's requested jury charge.

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

As CasePro, Inc.'s expert, Dr. Oberg, testified, thoughts of self-harm and thoughts of hurting others need to be taken seriously. (App. p. 1657; 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. (App. p. 1657; 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, patient safety is the number one objective of an emergency room physician. (App. p. 1674; R. p. 1662, line 6–p. 1663, line 5). Likewise, treatment nurse Joe McDonald, testified that he was responsible that day for monitoring patients, including the mental health patient, in order "[t]o keep them safe; keep them stable." (App. p. 780; R. p. 774, lines 22–25).

The crux of Ms. Delaney's case was that had medical providers kept the mental health patient safe, her son, Justin – a pedestrian walking near the Naval Hospital Beaufort – would also

have been kept safe. As explained by Dr. Baker: "if [the mental health patient] is safe, then, the staff is safe and the community is safe. And so, there was a duty to keep [the mental health patient] safe at all times, against himself and against the staff, and against the community at large." (App. p. 1462; R. p. 1453, lines 4–8).

Petitioner submits that patient safety, particularly for mental health patients, is consistent with the public policy of South Carolina. Similarly, public policy[1] 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. This Court should grant certiorari.

[1] 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.

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

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 the mental health patient prior to leaving 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." (App. p. 1677; R. p. 1665, lines 3–7). Similarly, the on-call psychiatrist, who Dr. Jansen consulted with by telephone that day, testified that "danger to self, danger to others or gravely disabled, requires admission to the hospital" and this mental health patient "needed to be admitted." (App. p. 2339; 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 the CasePro, Inc. employees by: 1) not keeping the mental health patient safe, 2) not placing the mental health patient in a gown, 3) allowing the mental health patient to wander, and 4) giving the mental health patient permission to leave the ER. (App. p. 1457; 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 a failure to warn theory of negligence. As reflected in the jury's verdict, the failure to warn the mental health patient was not sufficient evidence of negligence. Upon reflection, this is not surprising because the jury heard considerable testimony that shed light on his then existing mental state. Testimony was elicited from six witnesses (Koren Pope, Saundra Smith, Janice McDonald, Joe McDonald, Arthur Manning, Dr. Christian Jansen) about his 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 him driving a stolen firetruck which deliberately struck multiple vehicles before striking Ms. Dealney's son, Justin, who was crossing the street. (App. p. 2135; 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 him not guilty by reason of insanity for the murder of Appellant's son. (App. p. 1692; R. p. 1680, line 14–p. 1687, line 2) ("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.").

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 the mental health patient 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, the mental health patient, who had expressed a desire to harm himself or others, was not in a mental state to understand right and wrong and did not have an appreciation as to the potential consequences of leaving the Emergency Room. Under the law of this state, the jury should have been charged on more than a duty to warn. Certiorari is warranted.

Conclusion

For the foregoing reasons, this Court should grant this petition for writ of certiorari. The decision of the Court of Appeals and the judgment of the Circuit Court should be reversed.

Respectfully submitted this 10th day of September, 2018

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