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S.C. SUPREME COURT

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Unpublished Opinion No. 2018-UP-221 (S.C. Ct.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.

Appendix: Volume 2

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JURY QUALIFICATION

1 crossed off the Church of Latter-Day Saints.
2 They had very little activity in the community,
3 but that is one thing that they did.

4 THE COURT: I'm not going to do that.
5 Ladies and gentlemen, this is my concluding
6 question is this -- do you know any reason why
7 you ought not, should not, could not be a juror
8 in this case being ready, willing and able to
9 listen to the evidence and make up your minds
10 based solely on what you hear in court while
11 court is in session being completely unaffected,
12 not affected by the -- case law uses the word
13 extraneous -- matters outside of the court?

14 For example, do you not like litigation in
15 general such that it would keep you from being
16 able to be fair and impartial to each of these
17 parties? Do you have an orientation one way or
18 the other? Are you concerned about these issues
19 or any individuals that I spoke of that might be
20 witnesses in this matter? Is there anything about
21 this matter, about these issues, or perhaps there
22 was something that you didn't tell me earlier
23 because you were shy and now we have been around
24 each other for a while and we have warmed up, you
25 are more comfortable telling me now, you know,

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JURY QUALIFICATION

1 that which you were not so comfortable about?

2 You know, it would be hard to tell me now
3 that at home you have tickets to Tahiti and you
4 are supposed to leave Thursday afternoon and you
5 forgot about this this morning but now you are
6 more comfortable to tell me, I'm supposed to leave
7 for Tahiti at 4:00 Thursday, that is all right.
8 No problem. You better have a big suitcase, we
9 are all going with you.

10 But in other words, is there anything,
11 anything at all that we need to talk about?
12 Because, ladies and gentlemen, if you are a juror
13 in this case you must be ready, willing, and able
14 to listen to the evidence and to make up your
15 minds based solely on what you hear in this
16 courtroom while court is in session and you must
17 be completely and totally fair and impartial to
18 the Plaintiff and to the Defendant. If there's
19 anything whatsoever that we need to discuss, I
20 want you to please come forward and give us an
21 opportunity to talk about, to include those
22 tickets to Tahiti.

23 And we reached this point in jury
24 qualification in my County, in Dorchester County,
25 and we reached this point in this trial and I

JURY QUALIFICATION

1 always look out here to this young man who was
2 sitting here and he stood up and said, Judge, my
3 wife is in labor at Tricounty Hospital, I'd like
4 to be there for the birth of my first child. You
5 know, is anyone's spouse in labor?

6 (No response.)

7 THE COURT: Very well. Is there anyone
8 that people need to talk about, please do so
9 now.

10 (No response.)

11 THE COURT: We need Jeopardy music. I find
12 that the panel is qualified. We are going to
13 have three alternates. The alternates, do you
14 strike the jury from a blind person or small
15 child? Plaintiff, do you waive it?

16 MR. HOYLE: We waive, Your Honor. We are
17 not in Horry County, Judge.

18 THE COURT: And I would just take note,
19 guess what, Chief Justice is taking care of that
20 but I'll ask, Will y'all work on it?

21 THE COURT: Let me tell you what's
22 happening next, ladies and gentlemen, these
23 lawyers will receive the final sheets. They are
24 called strike sheets. We need to come up with
25 another term. I'll do that one day. They need

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JURY QUALIFICATION

1 one more time to look at you. So, they will
2 probably leave the courtroom and retire to the
3 nice rooms that they have outside of the
4 courtroom, and they are going to take ten
5 minutes once they receive their sheets. Did you
6 get that? And then they are going to return to
7 the courtroom.

8 When they return to the courtroom I'll turn
9 it over to the clerk and then she's going to hear
10 numbers, first from the Plaintiff and then from
11 the Defense. Four from each with regards to the
12 jury, and then one each with each of our
13 alternates. And the numbers that you are hearing
14 are not your juror numbers. You have learned it
15 by now. Like, juror number nine, she knows that.
16 And juror number 68 knows that she's juror 68,
17 right? Yeah. We take those numbers and process
18 those numbers, Thanksgiving turkey on the bone as
19 opposed to what you buy where it is sliced. Thing
20 of life.

21 The numbers that you are hearing are not your
22 juror numbers. We process those numbers when we
23 go through this propose, and then once that occurs
24 then we are going to select a jury. And then I
25 have a few comments for our remaining jurors at

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JURY QUALIFICATION

1 that point in time. So, y'all ready? Ready for
2 your sheets?

3 THE COURT: Okay. One through 20, please.
4 On the numbers, 1 through 20 are the jurors.
5 Twenty-one, 22, and 23 are alternate number one.
6 Twenty-four, 25, 26 alternate number two.
7 Twenty-seven, 28 and 29 alternate number three.
8 Math was not my thing.

9 THE CLERK: You are doing well.

10 THE COURT: Please keep that in mind,
11 Counselor, as you go through your strikes.
12 Okay, most importantly, 1 through 20 will be
13 your jury.

14 THE COURT: Y'all be at ease, if anyone
15 needs a comfort break be at ease. I need you
16 back in the courtroom at 25 until 4:00.

17 (Whereupon, a brief recess was taken.)

18 THE COURT: Plaintiff ready to select a
19 jury?

20 MR. HOYLE: Yes, Your Honor.

21 THE COURT: And the Defense?

22 MR. LOVELL: Yes, Your Honor.

23 THE COURT: All right. Turning it over to
24 you.

25 THE CLERK: We will be striking between 1

JURY QUALIFICATION

1 and 20. For the Plaintiff.

2 MR. HOYLE: Your Honor, Plaintiff strikes

3 juror number 12.

4 MR. LOVELL: Strike juror number 4.

5 THE CLERK: Plaintiff?

6 MR. HOYLE: Plaintiff strikes juror number

7 16.

8 THE CLERK: Defendant?

9 MR. LOVELL: Defendant strikes juror number

10 20.

11 MR. HOYLE: Plaintiff strikes juror number

12 8.

13 THE CLERK: Defense?

14 MR. LOVELL: Defense strikes juror number

15 15.

16 THE CLERK: Plaintiff?

17 MR. HOYLE: Plaintiff strikes juror number

18 9.

19 THE CLERK: Defense?

20 MR. LOVELL: Defense strikes juror number

21 14.

22 THE CLERK: We will be striking for

23 alternates, jurors 21 through 23. For the

24 Plaintiff?

25 MR. HOYLE: Plaintiff strikes juror number

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JURY QUALIFICATION

1 21.
2 THE CLERK: Defense?
3 MR. LOVELL: Defense strikes juror number
4 23.
5 THE CLERK: Twenty?
6 MR. LOVELL: Twenty-three, sorry.
7 THE CLERK: Second alternate, 24 through
8 26.
9 MR. HOYLE: Madam Clerk, Plaintiff strikes
10 juror number 25.
11 THE CLERK: Defense?
12 MR. LOVELL: Defense strikes juror number
13 24.
14 THE CLERK: And for alternate number three,
15 27 through 29.
16 Plaintiff?
17 MR. HOYLE: Madam Clerk, Plaintiff strikes
18 juror number 27.
19 THE CLERK: Defense?
20 MR. LOVELL: Defense strikes number 29.
21 THE CLERK: For the Plaintiff the strikes
22 are 8, 9, 12, 16; is that correct?
23 MR. HOYLE: I apologize, Madam Clerk, would
24 you say that one more time?
25 THE CLERK: Number 8, number 9, number 12,

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JURY QUALIFICATION

1 number 16?

2 MR. HOYLE: That is right.

3 THE CLERK: For the Defense, number 4,
4 number 14, number 15, number 20?

5 MR. LOVELL: That is correct.

6 THE CLERK: Alternate number one strike for
7 the Plaintiff, 21. Strike for the Defendant,
8 23.

9 Alternate number two, Plaintiff strikes 25;
10 Defendant, 24.

11 Alternate three, Plaintiff strikes 27;
12 Defense strikes 29.

13 THE COURT: Is that correct on behalf of
14 the Plaintiff?

15 MR. HOYLE: Yes, Your Honor.

16 MR. LOVELL: That is correct, Your Honor.

17 THE COURT: Are there any matters regarding
18 the qualification or selection of the jury from
19 the Plaintiff?

20 MR. HOYLE: One moment, Your Honor.

21 THE COURT: Certainly.

22 MR. HOYLE: Your Honor, may we take up a
23 matter of law concerning jury qualification?

24 THE COURT: Sure. Sure. Let me see you at
25 sidebar, counsel.

JURY QUALIFICATION

1 (Off-the-record discussion held.)

2 THE COURT: Ladies and gentlemen, there is
3 a matter that I must take up outside of your
4 presence. If you will follow our bailiffs
5 across the hall, we will be with you shortly.

6 (Jury panel exits the courtroom at 3:45 p.m.)

7 THE BAILIFF: Jury is clear and door is
8 closed, Your Honor.

9 THE COURT: Thank you so much. Yes, sir.

10 MR. HOYLE: Your Honor, good afternoon, for
11 the record, David Hoyle, on behalf of the
12 Plaintiff. I reluctantly bring this motion, but
13 in reviewing the first 20 jurors on our strike
14 sheets, five of those persons are identified on
15 the Clerk of Court's random strike sheet as
16 having a race of black and/or African American.
17 Of those five persons, I struck one of those
18 individuals. The remaining three strikes I
19 utilized involved persons who were Caucasian. I
20 note that the Defendant in contrast struck one
21 Caucasian and used his other three strikes with
22 respect to African Americans or persons of
23 color. As a result, pursuant to Batson case law
24 as recognized by our state, I respectfully make
25 a Batson challenge. I believe that it is the

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JURY QUALIFICATION

1 right of the voir dire panel that has been
2 chosen to have the right to sit on a jury has
3 been violated.

4 Certainly, from the Plaintiff perspective a
5 non-race gender reason is used and we think that
6 it's prejudice to us and we would make this motion
7 and ask this Court to grant that motion after
8 hearing from the Defendant and dismiss this panel.

9 MR. LOVELL: Your Honor, we object to this
10 motion. These are race-neutral strikes. I can
11 give you reasons behind them.

12 THE COURT: All right.

13 MR. LOVELL: As to -- sorry, I have to
14 look. As to juror number 4 on the strike sheet,
15 65 on the original, 24 year old woman. The
16 education was none. Listed employment as
17 server. Our concern is that the decedent is
18 close to the age of that young lady. And we
19 feel, and I justify my strike in that
20 educational background lacking, and age equal to
21 that of the decedent, and also lack of any
22 significant work history. We felt that she
23 would not be an appropriate juror with respect
24 to this case.

25 THE COURT: Three reasons, close to the age

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JURY QUALIFICATION

1 of decedent, no education mentioned and lack of
2 work history.

3 MR. LOVELL: Inadequate work history as a
4 server. She had a work history. She mentioned
5 that she was a server. And I forgot the name of
6 the place.

7 THE COURT: All right.

8 MR. LOVELL: The next one.

9 THE COURT: Number nine on the strike
10 sheet, 336. Sorry, that was the Plaintiff's
11 strike, I'm sorry. The next one is number 14,
12 Mary Smalls, Juror 338.

13 MR. LOVELL: Your Honor, Ms. Smalls
14 indicated that both she and her husband are
15 retired from the postal service. She indicated
16 a college education. My concerns there were
17 that with their employment history in a
18 governmental entity, i.e., postal service, there
19 is relationship between the Navy, governmental
20 entity, and our client that deals with them. I
21 felt like she might not understand the
22 contractual relationships between contractors
23 and subcontractors and the other. And that was
24 my basis for the strike of that lady.

25 THE COURT: All right.

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JURY QUALIFICATION

1 MR. LOVELL: I believe that the final one,
2 Your Honor, was juror number 306, which is
3 number 15 on the strike sheet. Twenty-two year
4 old gentlemen, again, close in age to the
5 decedent, within a few years. Also his
6 employment history, a little conflicting between
7 the original jury sheet. He indicated that he
8 was a contractor for Hargray, another sheet that
9 we had showed Food Lion. Anyway, I think that
10 his education is inadequate to understand this.
11 And he has also listed high school education. I
12 felt that would impact his ability to understand
13 the issues in this case. Those are the reasons,
14 Your Honor, that I give in support.

15 THE COURT: Okay. Yes, sir.

16 MR. HOYLE: Your Honor, briefly. In
17 response, Justin Nicholas Miller was 28 years
18 old when he died. To the explanation that we
19 have heard today about other voir dire panel
20 being close in age from my friend Mr. Lovell,
21 after hearing that, we started looking at the
22 jurors that were not struck. I would
23 respectfully direct the Court's attention to
24 strike Juror 20, age 30. Alyson Belcount,
25 exactly 28. And my notes, she sits as a pet

JURY QUALIFICATION

1 sitter.

2 Going to the alternate explanation,
3 insufficient work history, i.e., server in a
4 restaurant, is somehow a reason to strike them
5 from the jury, as a race-neutral reason, we would
6 respectfully submit that juror number 30,
7 Ms. Belcount, would cast doubt on those reasons.

8 MR. LOVELL: Your Honor, I struck her.

9 THE COURT: Yes. Any other arguments?

10 MR. HOYLE: One moment, Your Honor.

11 THE COURT: All right.

12 MR. HOYLE: Beg the Court's indulgence,
13 Your Honor.

14 THE COURT: All right. All right.

15 (Pause.)

16 MR. HOYLE: Your Honor, I certainly stand
17 corrected in response to the juror number 30,
18 but direct the Court's attention to Juror 348 on
19 the strike sheet listed as juror number 8, I
20 believe, a Caucasian female. Occupation, ice
21 cream server. I believe that that level of work
22 experience would be equivalent to others that
23 Mr. Levell has stated his reasons for strikes.

24 THE COURT: What is her age?

25 MR. HOYLE: She was 46, Your Honor.

JURY QUALIFICATION

1 THE COURT: All right. Anyone else that
2 you want to point out? I just want to make sure
3 that I hear you.

4 MR. HOYLE: Again, I beg the Court's
5 indulgence.

6 THE COURT: All right.

7 (Pause.)

8 MR. HOYLE: Also direct the Court's
9 attention to juror number 30. I apologize, Your
10 Honor, 31 who is on the strike sheet as number
11 16, Karl L. Bergman, white male. It lists his
12 age at 37 and he is a taxi driver and a writer.

13 THE COURT: Any others?

14 MR. HOYLE: Not at this time, Your Honor.

15 THE COURT: Any response?

16 MR. LOVELL: Your Honor, Ms. Steinhebel,
17 348, general manager of the Hilton Head Island
18 Ice Cream Company, 46. Her education is
19 different than those that we talked about.

20 THE COURT: Different how?

21 MR. LOVELL: She is a general manager, as
22 opposed to the server. That was the thing. And
23 age is also an issue there. And Mr. Bergman
24 says that he's a taxi driver and a writer and
25 waiter. He is 56 years old, not 30 years old,

JURY QUALIFICATION

1 Your Honor. And he has a BA.

2 THE COURT: Anything further?

3 MR. HOYLE: No, Your Honor.

4 THE COURT: Very well. Very well. Of
5 course, we know that when there is a Batson
6 challenge and there's reasons given, we look to
7 Batson versus Kentucky analysis to determine
8 whether or not the folks who are seated who had
9 similar characteristics of those who were
10 struck, and there appear to be three, if you
11 will, recurring things on behalf of the
12 Defendant: Education and age and employment.
13 And under the Batson versus Kentucky analysis, I
14 do not believe that -- well, let me reverse
15 that.

16 While there has been a challenge, I think
17 that the challenge is unsuccessful because I do
18 believe that the Defendant has articulated
19 race-neutral reasons for the strike. And under
20 the Batson versus Kentucky analysis it appears
21 that that is consistent throughout the striking of
22 the jury in its entirety. I would respectfully
23 deny the motion, noting the exceptions.

24 MR. HOYLE: Thank you, Your Honor.

25 THE COURT: Anything with regard to the

JURY QUALIFICATION

1 Plaintiff?

2 MR. HOYLE: Nothing with regards to the

3 jury?

4 MR. LOVELL: . Nothing, Your Honor.

5 THE COURT: Very well. Bring them back in.

6 (Jury enters the courtroom at 3:55 p.m.)

7 THE BAILIFF: All jurors present, Your

8 Honor.

9 THE COURT: Thank you very much. Let's

10 have a jury please.

11 THE CLERK: Juror 199, Joshua King.

12 Juror 298, Debra Regecz.

13 Juror 348, Shelly Steinhebel.

14 Juror 213, Dan Lawrence.

15 Juror 64, John Chechire.

16 Juror 34, James Blaine.

17 Juror 232, Dorothy Mashburn.

18 Juror 258, Kiesha Mitchell.

19 Juror 78, Kevin Courtney.

20 Juror 31, Karl Bergman.

21 Juror 274, Catherine Onorato.

22 Juror 153, Robert Gwinn.

23 Our first alternate is Dorinda Ballenger,

24 juror number 24.

25 Our second alternate, Juror 283, Richard

JURY QUALIFICATION

1 Patti.

2 And our third alternate, Juror 141, Michael
3 Glover.

4 THE COURT: All right. Ladies and
5 gentlemen, those of you who are now in our
6 audience, I'm going to ask you to please step
7 back across the hall, back to the jury assembly
8 room for just a moment. Our clerk will be in in
9 just a moment.

10 (Panel exits the courtroom at 4:00 p.m.)

11 THE COURT: Ladies and gentlemen, we are
12 not going to begin the trial today. We are
13 going to begin the trial in the morning at 9:30.
14 In the morning at 9:30. Now, there is some
15 instruction that I do need to give to you and I
16 want to take just a few moments to do that. And
17 I'll begin with seating assignments. You three
18 are our alternates, you have the entire row all
19 to yourselves. If y'all want to change it up
20 and move up and down, enjoy. But I do need you
21 to stay on that row just so I can keep up with
22 you as our alternates. So, if you would do that
23 for me I would be most grateful to you in that
24 regard.

25 Now, those of you, the rest of you, the rest

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JURY QUALIFICATION

1 of our 12, we have no assigned seating, except for
2 one seat and that is this seat, yes, sir. That is
3 the seat of the presiding juror. You look like a
4 very fine presiding juror. You look prepared.
5 The first thing that he did, pull out that
6 notebook and pull out that pen ready to go. I
7 think you would make an excellent presiding juror,
8 if you will. I'll tell you what your additional
9 tasks are. I promise that you will be able to
10 handle it.

11 The first one, once the jury has concluded
12 the deliberation, at the conclusion of the case,
13 you write the verdict on the verdict form. That
14 is pretty simple. You can handle that one. You
15 will, during those deliberations, you will preside
16 in the jury room just to be sure that everybody
17 gets a chance to talk. That is it. No more or
18 less. Everybody gets a chance to talk, that is
19 it. You don't control the deliberations. Don't
20 control the discussions. You let it go and be
21 sure that everybody has a chance to talk.

22 And thirdly, in the event that the jury needs
23 to communicate with me, for whatever reason, take
24 that down in writing and have the bailiff to give
25 that to me. And your number is?

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JURY QUALIFICATION

1 FOREPERSON: 213, excuse me.

2 THE COURT: Okay. And if you will do that
3 for me, I would be so grateful. And you can
4 keep that seat throughout the trial. Ladies and
5 gentlemen, we have to talk about a few matters
6 before you leave me this evening, and all of
7 you, y'all are so smart. Everybody is bringing
8 out pen and paper. We will provide that for you
9 tomorrow. We will provide note paper and
10 writing implements for you to take notes. And
11 there's a -- and I'll give you some instruction
12 about the taking of notes. So, you just -- you
13 can hold up today, there will not be anything
14 that I tell you today that I won't repeat eight
15 times first thing in the morning and you will be
16 sick of me telling you in the morning by the
17 time the trial starts. You will say, We have
18 got it, stop.

19 What I'll tell you about taking the notes --
20 really, two things. I have talked a little bit
21 about the bailiff taking the notes and y'all will
22 be able to take notes. The James Bond movie, For
23 Your Eyes Only, I'll tell you that your notes are
24 for your eyes only. We will talk about that.
25 That will be tomorrow.

0266

JURY QUALIFICATION

1 Here is what I want to tell you about
2 tonight. And I have to tell you that I had a
3 very -- I had an experience recently in court and
4 I don't think that the juror intended anything
5 nefarious, but I need to be sure that I have
6 served my duty both to you and to these litigants
7 and to our system of justice and made absolutely
8 clear to you certain things. Number one, you must
9 not discuss this matter or allow anyone to discuss
10 it with you until I tell you it is time for you to
11 begin your deliberations. I want to state that as
12 clearly as I know how.

13 You cannot talk about this case. You cannot
14 talk about what you are hearing. You cannot talk
15 about the lawyers. You cannot talk about anything
16 that you are listening to and hearing. You
17 cannot. It is important. You can't even talk
18 about it a little bit. Let me tell you why that
19 is so, tomorrow morning you will be sworn in as a
20 juror in this case and there will be no one who
21 will be allowed to listen to the evidence and make
22 the findings of fact in this case but you. Under
23 our way of life, under our system of justice, you
24 are the only, the sole, the exclusive finders of
25 the facts. It is absolutely critical in that role

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JURY QUALIFICATION

1 that you are able to listen to all of the evidence
2 that is presented to you open-mindedly and that
3 you not make up your mind about anything until you
4 have heard everything. I cannot tell you how
5 absolutely critical that is to your duty as
6 jurors.

7 What we know from over 200 years of trying
8 cases is that when somebody begins to talk about
9 something they cannot help but begin to form an
10 opinion about it. You cannot form an opinion
11 about anything until you have heard everything.
12 You must listen open-mindedly to all of the
13 evidence that is presented to you. Evidence will
14 come in one piece at the time.

15 If you begin to talk about it, then you will
16 begin to take a position. You will begin to be
17 able to form an opinion. You will be in a place
18 to do that. I don't want you to be in a place to
19 do that. I want you to be able to listen
20 open-mindedly to everything. That is the reason
21 for the instruction not to discuss this case with
22 anyone, with your family, no fluff talk about the
23 case, Oh, come on, just a little bit. No pillow
24 talk. You cannot talk to your family. You cannot
25 talk to your friends. You cannot talk to your

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JURY QUALIFICATION

1 fellow jurors walking in. You cannot talk about
2 the case.

3 You can talk about a lot of things. I hope
4 tomorrow morning you are able to talk about the
5 Yankees having been successful and won, beat the
6 Astros tonight. That would be a wonderful thing
7 to be able to talk about rather than poor old
8 red-rimmed eyed judge because the Yankees lost.
9 But you cannot talk about this case. You cannot.
10 I had a problem with that with one of my jurors
11 very recently and I'm very sensitive about it. So
12 please, ladies and gentlemen, you cannot talk
13 about this case.

14 It's going to get weird at times, but you
15 cannot discuss this case or anyone that has
16 anything to do with it. It is absolutely critical
17 that you adhere to that instruction. Here is the
18 next instruction that is absolutely critical: You
19 cannot do any, none, zero, zip, zip investigation.
20 Don't listen to anything about this case. Don't
21 go to the Internet to do any kind of research
22 about this case. If you hear a funny word and you
23 want to go look up that word, do not look up that
24 word. Do not.

25 You must, let me say that once more, you must

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JURY QUALIFICATION

1 receive all of the information from which you will
2 make up your minds here in court while court is in
3 session. If you were to go to the Internet this
4 case has to be thrown away. If you were to look
5 at the newspaper, go to the Internet, read
6 anything on the Internet about this case, go to
7 the television or the radio and receive
8 information from the radio, the television, the
9 Internet, this case has to be scrapped and it's
10 contempt of court.

11 It is not -- it is a terrible thing to have
12 happened. So, please be in mind, no Columbo. You
13 know, we have become information sponges and it's
14 readily available on our telephone, on our Ipads,
15 on our tablets, on our computers. It's become a
16 normal function, almost like breathing to go -- if
17 you have a question, to go grab it from the
18 Internet. You cannot do it about this case. If
19 you do it about this case, then it's over. That
20 is how big of a deal it is. It doesn't matter
21 where we are in it. We could be at the end of it.
22 Beyond the end of it. It has to be done, it has
23 to be thrown away. So, please, please adhere to
24 the admonition, do not discuss this matter.

25 Do not allow anyone to discuss it with you.

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JURY QUALIFICATION

1 Do not do any research. Do not listen to
2 anything. Do not read anything about this case.
3 Do not do any research about this case. Radio,
4 television, newspaper, Internet. You have to
5 receive all of the information here in court while
6 court is in session.

7 Now, anybody work at night? Not tonight.
8 Not during this trial. And the reason for that is
9 that it isn't fair to you and it isn't fair to
10 these litigants for you to try to work all night
11 and pay close attention during the day. Every
12 once in a while there might be a manager or
13 employer that is not happy about that. Just get
14 me a name and phone number, I'll be happy to have
15 a little talk in the morning with whomever might
16 be concerned about that. I have to have you
17 rested at night so you can pay attention during
18 the day.

19 So now, cell phones, tablets and other
20 communication devices, you must leave your cell
21 phones, your tablets or other device which is
22 capable of communication outside of the courtroom.
23 In other words, it can have Internet access, you
24 must leave that somewhere other than the
25 courthouse. You cannot have a cell phone, tablet,

0271

JURY QUALIFICATION

1 Ipad, computer with you while you are serving on
2 the jury. The reason for that is we had a case
3 several years ago, the jury was actually in
4 deliberations, they reached a point where they had
5 to discuss it and one of the jurors said, Oh, I'll
6 phone a friend. They pulled out the cell phone,
7 phoned a friend. That information was received
8 and the entire trial had to be scrapped. That is
9 the reason why we now have an admonition, no cell
10 phones, tablets or other communication devices are
11 allowed with you.

12 Now, having said that, we are so tethered to
13 these things, if you forget and realize that you
14 are in the courthouse and have your cell phone,
15 let the bailiff know and they will take possession
16 of it and take it until the morning or mid lunch
17 and then you can take it away from the courthouse.
18 And do not take it with you while you are serving
19 on the jury. Do not think that you can turn it
20 off and put it in your pocket book. Gremlins will
21 turn it on and it will ring right in the middle of
22 court. You know that will happen. And if you
23 find out that that happens, please let us know.
24 And you cannot have cell phones or other devices
25 with you while serving on the jury. If there are

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JURY QUALIFICATION

1 questions about this or other parts of the
2 discussion, I want you to let me know. Tell your
3 presiding juror and he will write it down and let
4 me know.

5 I must be absolutely clear. You cannot talk
6 about this case. You cannot talk about this case
7 with anyone. You cannot do any investigation.
8 You cannot read anything, listen to anything about
9 this case. Radio, television, newspaper,
10 Internet. You have to receive every piece of
11 information on which you will make up your minds
12 here in court while court is in session.

13 You are going to go home tonight and no doubt
14 someone is going to be curious about what have you
15 been up to today. It's been perfectly fine to
16 say, I showed up for jury summons, I've been
17 selected to serve on a jury. The next question,
18 civil case or criminal case? The most that you
19 can say, It is a civil matter as opposed to a
20 criminal matter. That is as much as you can talk
21 about. You can't talk about the rest of it. I
22 don't want anyone upset with my jurors. You put
23 it on the judge. Say, The Judge has instructed me
24 I can't talk about it. Put it on me. Not you.

25 You must not allow anyone to discuss this

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JURY QUALIFICATION

1 matter with you. And it's very difficult to keep
2 that information, but it has a way of working its
3 way back to me. So, please, please, please adhere
4 to my admonitions. They are for your ability to
5 serve on this jury, as I am so grateful to you, as
6 are our litigants today, so grateful for you being
7 here.

8 So in just a moment I will ask you to go to
9 your jury room and say, Hi jury room, and then the
10 bailiffs will go over how to come and go from your
11 jury room in the morning and then we will
12 reconvene in the morning at 9:30.

13 Let me give you an overview of what will
14 happen when you arrive. You will be sworn in as a
15 juror in this case. I'll then give you
16 preliminary remarks. I'll then give you a very
17 brief outline of how we will be proceeding, just
18 so you can know in outline form where we are in
19 the trial. Then we are going to get right into
20 the trial in this case.

21 So, ladies and gentlemen, as I conclude my
22 remarks today please remember to not discuss this
23 matter or allow anyone to discuss it with you.
24 Please do not investigate, please do not read
25 anything, listen to anything about this matter,

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JURY QUALIFICATION

1 radio, television, newspaper, Internet. You must
2 receive all of the information for which you will
3 make up your minds here in court. Have a
4 wonderful evening. I can't wait to see you in the
5 morning at 9:30.

6 (Jury exits the courtroom at 4:15 p.m.)

7 THE BAILIFF: The jury is clear, Your
8 Honor.

9 THE COURT: All right. We have motions.
10 Let me ask this question: Have you had an
11 opportunity -- have you all had an opportunity
12 to confer with regards to all of your motions?

13 MR. HOYLE: In all candor, Your Honor, no,
14 we have not.

15 THE COURT: All right. Okay. Well, have
16 you read each other's motions?

17 MR. HOYLE: Yes, Your Honor.

18 THE COURT: Yes, and yes.

19 MR. MACKELCAN: Yes.

20 THE COURT: Okay. How do you feel about
21 them? How do you -- we can proceed in one of
22 two ways. If you think that you can make
23 substantial, and I really do mean substantial
24 progress, I would propose to give you the
25 balance of the day to do that. Otherwise, then

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PRE-TRIAL MOTIONS

1 we would start at 9 in the morning, but that
2 would only give us 30 minutes to handle what you
3 cannot agree to. Otherwise, we will just start
4 plowing through them. Plaintiff's position?

5 MR. HOYLE: I would respectfully suggest
6 that Mr. MacKelcan and I talk for five minutes
7 and then have a comfort break. Five to discuss,
8 five comfort break, and then advise Your Honor
9 of where we are. And if we can't agree,
10 perhaps, come up with a protocol of the most
11 logical way to proceed this afternoon.

12 (Brief recess.)
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PRE-TRIAL MOTIONS

1

2 CERTIFICATE

3

4 STATE OF SOUTH CAROLINA:

5 COUNTY OF BEAUFORT:

6 I, MONA L. MANLEY, Court Reporter, certify that I was
7 authorized to and did stenographically report the foregoing
8 proceedings and that the transcript is a true and complete record
9 of my stenographic notes.

8

DATED this 10th day of March, 2016.

9

10

11 /s/ Mona L. Manley

12

MONA L. MANLEY
Official 14th Circuit Court Reporter
(850) 893-6662
mmanley@sccourts.org

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1 IN THE COURT OF COMMON PLEAS IN THE
2 FOURTEENTH JUDICIAL CIRCUIT, IN
3 AND FOR BEAUFORT COUNTY, SOUTH CAROLINA

4 Rebecca Delaney, as Personal Representative of the
5 Estate of Justin Miller,

6 Plaintiff,

7 vs. CASE NO. 2012-CP-07-03782

8 CasePro, Inc,

9 Defendants.

10 -----/

11 PRE-TRIAL MOTIONS

12 VOLUME 3

13

14 * * *

15 TRIAL BEFORE: Honorable Diane Goodstein

16 DATE: October 6, 2015

17 TIME: Commenced at 9:30 a.m.
18 Concluded at 5:30 p.m.

19 PLACE: Beaufort County Courthouse
20 Beaufort, South Carolina

21 REPORTED BY: Mona Whiddon, Stenographer

22

23

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1 APPEARANCES:

2 REPRESENTING THE DEFENDANT, CasePro:

3 Doug MacKelcan, III, Esquire
4 Dennis Gary Lovell, Jr, Esquire
5 Alendra Marie Saber, Esquire
6 Carlock Copeland & Stair, LLP
7 40 Calhoun St, Suite 400
8 Charleston, SC 29401

9 REPRESENTING THE PLAINTIFF(S):

10 Thomas David Hoyle, Esquire
11 Temitope Olamide Leyimu, Esquire
12 William Christopher Swett, Esquire
13 Motley Rice LLC
14 20 Bridgeside Blvd.
15 Mt. Pelasant, SC 29464

16 and

17 Crystal Lynn Castleberry, Esquire
18 Castleberry Law Offices
19 3712 Swallowtail Drive
20 Morgantown, WV 26508

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22

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PRE-TRIAL MOTIONS

1 PROCEEDINGS

2 THE COURT: All right. And what --

3 MR. HOYLE: Judge, this may shock you, but we
4 did not simplify matters real much. But we did
5 agree to a proposed protocol.

6 THE COURT: Okay.

7 MR. HOYLE: There are two motions that
8 Mr. MacKelcan would like to have heard first and
9 then at which time we will proceed with the
10 Plaintiff's pretrial motions and then the, what I
11 call the kitchen sink, Defendant's pretrial
12 motions. And then if time permits discuss the page
13 and line --

14 THE COURT: Okay.

15 MR. HOYLE: -- designations with respect to
16 the depositions.

17 THE COURT: Okay. Great. All right. Good.

18 MR. MACKELCAN: May it please the Court?

19 THE COURT: Yes, sir.

20 MR. MACKELCAN: All right. Your Honor, the
21 first motion is the Rule 42(b) motion for separate
22 trials that Defense has filed. We respectfully
23 request that the Court order separate trials for
24 liability and damages, which is within your
25 discretion under Rule 42(b). I know that Your

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1 Honor is new to this case, and that it's been going
2 on for a long time, but it is really the perfect
3 case for separate trials.

4 This is a case where there is no overlap in
5 the liability witnesses with the damages witnesses.
6 It's a case where my client's involvement with
7 Calvin Hunt began at 2:17 on -- well, let me back
8 up a second.

9 To the extent that Your Honor finds that my
10 client is responsible for the actions of the ER
11 staff, starts at 2:17. Ends at about 4:00.
12 Everything that happened after that really doesn't
13 have anything to do with the care provided to
14 Calvin Hunt in the emergency room.

15 And when you start to look at the evidence
16 that's going to come or potentially come in, it's
17 going to be at least proposed, we've got a dashcam
18 video of the fire truck that shows Mr. Miller being
19 hit by the fire truck. It shows a lot of other
20 incidents. Highly prejudicial to the Defendant.
21 And really doesn't have any bearing on liability
22 whatsoever.

23 There's been 9-1-1 calls that have been
24 proposed. Similarly, that's all after everything
25 has been done with CasePro. Photographs of the

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PRE-TRIAL MOTIONS

1 Plaintiff. All of the damages witnesses from the
2 Plaintiff and her family members, medical
3 providers. Those are only damages witnesses. And
4 then we have all of the witnesses that are related
5 to the hospital.

6 You know, there's -- there's no disagreement
7 as to what happened factually from the moment
8 Calvin Hunt left the emergency room -- well, I take
9 that -- there's some that we don't know, so I guess
10 it's not even a disagreement. There's a gap in
11 time there where we don't exactly know what
12 happened from the time he walked out with Mr. Ray
13 outside, and then we know he ran through the guard
14 gate. So between that we don't know exactly what
15 happened. But we don't have a difference of
16 opinion, we just don't know.

17 But after he runs out the guard gate
18 there's -- you know, we know what happens. He was,
19 you know, running around. He got into a fire
20 truck. He drove the fire truck down the road,
21 crashed into a bunch of cars, swung the fire truck
22 around and drove it down the road and directed the
23 fire truck into Mr. Miller. And it's -- it's a
24 terrible tragedy. And, you know, all of that
25 highly emotional testimony and evidence related to

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1 damages really don't have anything to do with the
2 care provided by my client's employees in the
3 emergency department. It doesn't go to Calvin
4 Hunt's mental state. I mean, this -- this is a --
5 that period is over. There's a temporal difference
6 there.

7 And again -- but the main thing is there's no
8 overlap in witnesses. It's distinct and the
9 prejudicial effect of the damages testimony is
10 extremely high here of the liability. Thank you.

11 MR. HOYLE: Your Honor, if I may hand up a
12 written opposition to this motion.

13 THE COURT: Thank you.

14 MR. HOYLE: Your Honor, first, I would note
15 that the case law in this case state is that a
16 trial should only be bifurcated if issues are so
17 distinct that a trial of each alone would not
18 result in injustice. That's our Court of Appeals
19 in the Creighton case cited in our papers
20 334 S.C. 96. I also note the Professor Flannigan
21 states in his treatise that "issues are not
22 distinct when the same evidence is admissible on
23 both issues."

24 I want to go back to the very concept of
25 negligence that we all learned in law school. My

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1 recollection of negligence and the burden that the
2 Plaintiff has to prove with respect to each and
3 every element of negligence is that there's
4 something called proximate cause with respect to
5 negligence. We have to have the burden to prove
6 that the negligence, the errors, acts and omissions
7 of these Defendants through their agents and
8 employees was a but for cause and fact of Justin
9 Nicholas Miller's death.

10 I think it's important to note Mr. MacKelcan
11 said that Calvin Hunt left the ER around 4:00.
12 That's true. My client's son was dead at 4:17 p.m.
13 in the afternoon, so about 15 minutes later, less
14 than the time it takes to cook some grits. The
15 issues attendant to what Calvin Hunt did in that
16 remaining 20 minutes go absolutely to his mental
17 state.

18 The State of South Carolina in this very
19 courtroom charged him with murder, and three
20 psychiatrists came in and testified that he lacked
21 the ability to know the difference from moral right
22 and moral wrong and legal right and legal wrong.
23 They said he did not have the capacity to conform
24 his conduct to legal right and legal wrong. And
25 the Court of General Sessions for this county found

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1 by preponderance of the evidence that because of
2 that mental defect he was not guilty by reason of
3 insanity.

4 The mental state of Calvin Hunt is directly at
5 issue in this case. He was brought to the Naval
6 Hospital around 2:00 in the afternoon that fateful
7 Friday, because he hadn't been taking his medicine
8 and his grandmama said he wasn't acting right. And
9 he gets brought to the emergency room, specifically
10 the emergency room at the Naval hospital, after he
11 tells a nurse somewhere else in the hospital that
12 he has thoughts of hurting himself and he begins
13 moaning and rocking back and forth.

14 Within the four walls of the emergency room he
15 tells a nurse employed by CasePro and a doctor
16 employed by CasePro that he has thoughts of hurting
17 others. They write that in the records, thoughts
18 of hurting others. And despite that, they still
19 give him permission to leave.

20 I think that the unusual events that follow
21 once he leaves the Naval hospital, the man taking
22 off his clothes -- there's evidence on the 9-1-1
23 calls from people seeing a naked man running
24 through the streets of Beaufort County. There's
25 all the calls of the carnage being laid down Ribaut

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1 Road as this fire truck hits five different
2 vehicles before ultimately crossing the center
3 line. Actually the fire truck crosses three lanes
4 of traffic to make contact with my client's son and
5 leading to his injuries and death.

6 Those issues directly reflect on the mental
7 state of Calvin Hunt. Somebody who was within
8 their emergency room -- was the only patient for
9 some two hours. Some two hours he's the only
10 patient there. So, certainly the fact that he says
11 that he's a danger to himself and others and then
12 20 minutes later, less than 20 minutes later,
13 somebody is dead, I think directly goes to the
14 issue of proximate cause.

15 Every case is like this. There's no reason to
16 separate the general negligence from the damages.
17 There is exactly going to be some overlap piece.
18 There's a survival claim in addition to wrongful
19 death. There will be testimony, hopefully
20 tomorrow, in this courtroom about that. There are
21 going to be issues related to whether or not it's
22 foreseeable that Calvin Hunt did what he did.

23 There is going to be testimony in this case as
24 to the manner and cause of my client's son's death.
25 And so all of those things go directly to

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1 Plaintiff's negligence claims, specifically the
2 proximate cause responsibility that we have to
3 prove by preponderance of the evidence.

4 So I respectfully disagree with the assertion
5 that the conduct of the case of employees can be
6 looked at in a vacuum. Because the evidence here
7 is relevant to both issues of both liability and
8 damages. They overlap. We respectfully submit
9 that the case law in this state says that
10 bifurcation is inappropriate and we would oppose
11 this motion to do so.

12 One final thought, Your Honor. I've been
13 sitting here, it's now 20 minutes to the hour of
14 five, since about 9:00 this morning. It took us a
15 good long while to strike this jury. I do not know
16 how it would promote judicial efficiency to further
17 prolong what's going to likely be a trial that goes
18 into a second week by bifurcating liability and
19 damages.

20 Truthfully, the only witness that it may call
21 out in my case-in-chief is Mrs. Delaney. I still
22 think with respect to my burden to show by
23 preponderance of the evidence that any errors and
24 omissions by these folks were a proximate cause of
25 my client's death, I would still need testimony

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1 with respect to what happened outside of guard gate
2 once Calvin Hunt left the Naval hospital.

3 THE COURT: How so? Tell me a little more
4 about that. In other words, you say that -- that
5 there is a differentiation of witnesses between the
6 liability and damages. So set --

7 MR. HOYLE: Well, I think -- I think this goes
8 directly to foreseeability. We had an extended
9 summary judgment hearing in this case, as some of
10 the courthouse personnel may recall. I think it
11 lasted over two hours. And the case the Plaintiffs
12 primarily relied on is the Hardy case from the
13 South Carolina Supreme Court.

14 And, Judge to me, in all candor,
15 foreseeability is a big issue. Because I think a
16 lot of people when they first hear these facts
17 would say, well, gosh, how in the world could
18 anybody have ever foreseen that. And I think when
19 you know what was known in the emergency room that
20 day or what information they also had available to
21 them in the form of Calvin Hunt's records. For
22 example, he had persistent thoughts, nightmares and
23 memories of a family member running over another
24 family member with an automobile. It gets a little
25 more connected.

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1 And so I think that it is absolutely essential
2 for my case-in-chief with respect to liability to
3 be able to call Trooper Perry from the highway
4 patrol to talk about the accident reconstruction of
5 the MAIT team, to talk about the various activities
6 that he took with this fire truck.

7 I certainly think with respect to the mental
8 state of Calvin Hunt, I think having 12 jurors
9 listen to the 9-1-1 calls and the present sense
10 impressions from various people along Ribaut Road
11 from that Friday afternoon will give them a sense
12 that, perhaps, this wasn't some calm, cool,
13 collected individual. Perhaps this really was
14 somebody in need of help and intervention.

15 Because, again, it's not like he left the ER
16 and did this five days later or even five hours
17 later. From the time he left the Naval hospital to
18 the time he was driving the fire truck was a matter
19 of minutes. I think our best estimate is actually
20 less than five minutes. So I think there is that
21 necessary connection between the two.

22 THE COURT: Okay.

23 MR. MACKELCAN: Your Honor, Mr. Hoyle said
24 "every case is like this." I can tell you every
25 case is not like this. This is an unbelievably

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1 unique case as a result of just factually. It's
2 legally been incredibly unique because of the way
3 that the Plaintiff has chosen to plead the case
4 working around the medical malpractice laws,
5 working around the contract. It's unique because
6 of the nature of a relationship between a
7 government contractor and health care. So this is
8 the furthest thing from "like every other case."

9 But I think also that he referenced the
10 criminal case, and you're going to hear from us on
11 that as well. The key on the criminal case was not
12 guilty by reason of insanity at the time of the
13 alleged acts. The alleged acts all happened off of
14 the Naval base. There's no dispute of the timing
15 of the events, we recognize that.

16 But there's also no dispute factually that
17 Mr. Hunt at all times when he was in the emergency
18 room was with Mr. Ray, the Veteran Affairs officer,
19 who he came to the Naval hospital with and was with
20 the entire time. He was there in some level of
21 official looking capacity. He remained calm and
22 cooperative the entire time. He was never anxious
23 or agitated with anybody. And they calmly walked
24 outside after having been there for that amount of
25 time, and he did so clothed.

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1 Okay. So, you know, to say that this is --
2 that it's the same, clearly something happened to
3 this guy. I mean, I think we all recognize that.
4 But the question is, you know, is it relevant to
5 the liability of our medical providers what all of
6 these things that he did later, when the evidence
7 doesn't suggest that any of that was going on in
8 the emergency room?

9 And the criminal case, of course, was based on
10 a capacity evaluation order by Judge Mullen, which
11 is privileged material. Interestingly, it's a
12 40-page document of which dozens of people are
13 interviewed. Dr. Jansen, Joe McDonald and Janice
14 McDonald were not interviewed, which we find very
15 interesting that that would be a 40-page document
16 determining somebody's mental capacity and they
17 were not even asked any questions.

18 So I think that that -- first of all, that
19 document is going to be -- is privileged and
20 inadmissible and, again, we'll get to that later.
21 But to the extent that any of the outcome of the
22 criminal case is just not relevant to this case
23 and, again, highly prejudicial. It's a different
24 standard. It's based on different information.

25 Mr. Hoyle also mentioned calling J.L. Perry,

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1 the accident reconstructionist. And I think that's
2 kind of exactly my point is, what does an accident
3 reconstruction or highway patrolman -- what's the
4 relevance? What's the purpose? How is there
5 probative value that outweighs the prejudicial
6 effect for him to testify about that when we can
7 keep them separate, have the liability issues as to
8 proximate cause. Certainly proximate cause is a
9 major issue, I mean, there's no question. But --

10 THE COURT: But I don't think they can prove
11 proximate cause without going into the temporal
12 relationship between his time at the hospital and
13 the time of these events and the progression of
14 these events. How can they prove proximate cause?

15 MR. MACKELCAN: Your Honor, I think you're
16 asking the wrong person. I don't know that I've
17 had that many Plaintiff's cases so I --

18 THE COURT: But are you trying to say it's
19 possible to do that. You're asking us to prove
20 proximate cause without proving proximate cause.

21 MR. MACKELCAN: Well, I think that there are
22 certain aspects --

23 THE COURT: You're not going to stipulate it,
24 right?

25 MR. MACKELCAN: There are certain aspects of

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1 what would be a part of that that don't need to be
2 in. Like a -- like the fire truck video, the
3 accident reconstruction, testimony about damages,
4 family members, all of that kind of thing.

5 I understand that he has to prove a causal
6 link, but it doesn't need to involve everything
7 that is proposed. And it may be that we would have
8 to deal with that from an evidentiary standpoint
9 once the separate trials are -- if Your Honor
10 orders separate trials, then we deal with that,
11 hey, how is that going to work. Because I think
12 that it can work.

13 I think the other point, then, my last point,
14 was efficiency. If you look at the case law that
15 we cited, separate trials actually is more
16 efficient. This is a case where if you get a
17 defense verdict to liability we could go home this
18 week, maybe, if that happened.

19 This is always a case where Judge Norton in
20 Federal Court has dismissed this exact case. The
21 brother of the decedent filed a case in federal
22 court and -- as well as one of the car wreck
23 victims, and he considered that at summary judgment
24 and dismissed the case based on -- purely based on
25 respondeat superior, that under the terms of the

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1 contract and the nature of the relationship between
2 the government and CasePro that CasePro was not
3 responsible for the actions of their health care
4 workers while they were at work at the Naval
5 hospital.

6 So from an efficiency standpoint, I'm not
7 suggesting that Your Honor is going to do that, but
8 it certainly is a possibility. And so for those
9 reasons I think, actually, efficiency is supported
10 by separate trials in this case.

11 MR. HOYLE: Judge, just very briefly in
12 response. I'll work backwards.

13 THE COURT: Okay.

14 MR. HOYLE: This was Plaintiff's memorandum in
15 opposition to the summary judgment in this court.
16 I'm asking my paralegal to find the transcript from
17 a very lengthy hearing in this courtroom in front
18 of Judge Mullen. Judge Mullen denied the motion
19 for summary judgment on the exact same basis
20 Mr. Mackelcan articulated. It's a lengthy
21 transcript. I remember being here for a while and
22 then subsequently denying a motion to reconsider.
23 I don't represent the folks who had those cases in
24 Federal Court. It was an entirely different record
25 that Judge Norton was considering. It's an

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1 entirely different standard that he has to apply as
2 a Federal Court Judge as opposed to a Judge of the
3 Court of Common Pleas since we have a scintilla
4 standard after Hancock v. Mid-South Management. So
5 I would respectfully suggest that that's a red
6 herring that my friend Mr. MacKelcan is
7 referencing.

8 But going back to this issue. Asking the
9 Plaintiffs to try a case in a vacuum where you only
10 look at a certain narrow time period before the
11 harm to the Plaintiff actually occurs. And then
12 saying, well, gosh, I don't know how they're going
13 to prove proximate cause, that's -- that's their
14 problem, Judge.

15 But I do want to respond to a few things that
16 were said. There's conflicting evidence in the
17 record at this point. And, again, there's a lot in
18 the records, given the fact that we've had
19 extensive briefing in this case, as to whether or
20 not Calvin Hunt was calm or not calm. One of the
21 individuals described him as agitated. Another
22 person said, I was afraid to be alone with him.
23 Their own employee, Nurse Janice McDonald, in a
24 handwritten statement -- that didn't get produced
25 to me until after I'd taken her deposition, but

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1 neither here nor there, we'll deal with that on
2 cross -- said that she didn't want to let him get
3 between her and the door. So there's some issues
4 as to how calm Calvin Hunt was actually there that
5 day.

6 And, again, going back to the mental state.
7 There's been some discussions about Officer -- or
8 Trooper Perry. I think the path of the fire truck
9 is particularly relevant because it's not like he
10 accidentally clipped -- and I apologize because
11 Ms. Delaney's sitting here -- it's not like he
12 accidentally clipped a pedestrian. He
13 intentionally did what he did. He may have lacked
14 the mental capacity to know what he was doing, but
15 it was an intentional act, which it isn't a
16 surprise, because he told medical providers less
17 than two hours earlier that he wanted to go hurt
18 people.

19 Dr. Jansen, their doctor, testified at his
20 deposition of thoughts of hurting others. I said,
21 what does that mean to you as a board certified
22 emergency room physician. He looked at me and he
23 said, I think that's self-explanatory. I said,
24 don't need to go to medical school to know what it
25 means when somebody says they want to hurt others.

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1 He said, no, not really. Another medical doctor in
2 this case, Dr. Hendelman, a psychiatrist that
3 Dr. Jansen called on the telephone as a consultant,
4 she told Dr. Jansen that it was, quote, obvious.

5 Obvious that this patient needed to be
6 admitted. Dr. Jansen wrote that in the medical
7 records after he learned later that afternoon that
8 there was a dead 28-year-old on Ribaut Road. He
9 actually went and typed up a memo and he actually
10 put in that memo that psychiatrist Hendelman told
11 me it was obvious the patient needed to be
12 committed.

13 So I think bifurcation doesn't help anything.
14 It doesn't promote efficiency. And I think it
15 squarely -- it prejudices the Plaintiff in the
16 ability to prove her case. And, again, I have the
17 burden. And in order to show that proximate cause
18 element I think I've got to show that connection of
19 what happened between Point A and Point B, between
20 4:00 and 4:17. I'm not going to drag this thing
21 out and have these 12 people sit here for a month
22 because I want to just drag this thing out. I'm
23 going to be as efficient as with the witnesses that
24 need to come in here and explain that causal
25 connection.

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1 And so I would respectfully request that this
2 Court deny this motion and allow this case to
3 proceed like the vast majority of trials in this
4 state to where liability and damages, with the
5 exception of potentially punitive damages, are
6 considered in one setting. Thank you, Your Honor.

7 THE COURT: All right. Okay. What's the
8 other motion?

9 MR. MACKELCAN: The other motion is -- Your
10 Honor, it was filed as a motion in limine. It
11 really requests two things. It's part a motion in
12 limine and part really is requesting a
13 determination from you as to what the law of the
14 state is. It deals with the wrongful death
15 statute.

16 This is a case where the decedent died
17 intestate. His mother filed to become personal
18 representative. Sometime later Mr. Miller's
19 brother filed a petition in the probate court to
20 have his mother removed as the personal
21 representative and to have -- to have a -- I guess
22 it's a reduction, or limit her share of the estate
23 as a result of failing to provide for Justin in his
24 minority.

25 That -- the outcome of that was, essentially,

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1 a settlement that resulted in a division of the
2 estate, 34 percent, to Christopher Miller who lives
3 here in Beaufort, one brother, the other half
4 brother who lives with Mrs. Delaney in West
5 Virginia, 34 percent and Ms. Delaney at 32 percent
6 and she remained the personal representative. It's
7 a consent order in the probate court, public
8 record, is what it says.

9 Plaintiff has taken the position that that
10 enables Plaintiff to recover damages under the
11 wrongful death statute for the two brothers. We
12 believe that that is not the appropriate reading of
13 the wrongful death statute. That the wrongful
14 death statute identifies who the heir is, it goes
15 face down intestacy, that's Mrs. Delaney. She
16 testified to that in her deposition, she is the
17 only heir.

18 We don't take issue with how they want to
19 divide the estate. But for the purpose of a
20 wrongful death case, any recovery goes directly to
21 the beneficiaries. It doesn't go into the estate,
22 it goes directly to the beneficiary. In this case
23 the beneficiary is Mrs. Delaney.

24 So that's essentially it. We're asking for an
25 order from the Court identifying her as the sole

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1 statutory beneficiary for the purposes of awarding
2 damages in this case.

3 THE COURT: Okay.

4 MR. HOYLE: Your Honor, good afternoon again.
5 Just a little bit of housekeeping for the record.
6 This motion was originally filed by Mr. MacKelcan,
7 I think, back in May or June and it was asked to be
8 heard. Judge Mullen actually entered a Form 4
9 order denying that motion without prejudice saying
10 it was proper for the trial court judge to hear it.
11 I'm not going to be hyper-technical about it, but I
12 do want to note for the record that I do not
13 believe this motion has since been refiled.

14 Nevertheless, we're at, essentially, a
15 pretrial hearing at the moment, and so I think it's
16 appropriate to address these issues. And so I've
17 handed up a response in opposition that's several
18 pages long. Mr. MacKelcan is correct that there is
19 an order filed in the Beaufort County Probate
20 Court. It was filed on July 2th, 2013.

21 And, certainly, I don't want to read to Your
22 Honor from our papers, but the short version of
23 that is that back in the mid 1990s when there was a
24 big discussion about these so-called deadbeat dads
25 and the Congressman Gingrich was the speaker and

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1 there was legislation going on in Washington
2 dealing with so-called welfare reform and David
3 Beasley was our Governor, our general assembly
4 amended both the wrongful death act and intestacy
5 code, the intestacy provisions of the probate code,
6 to provide that an interested person could file a
7 verified petition in the probate court -- that's
8 the only court that could decide it -- to determine
9 whether or not a parent should take under either,
10 one, the wrongful death act or, two, the intestacy
11 statute if that parent, quote, failed to provide
12 for the decedent in his minority.

13 I'll be honest with you, Judge, there's not a
14 lot of case law interpreting either of those
15 statutes. And I will note just for the record, and
16 so everybody's clear, there may be a reporter back
17 there in the probate court when this verified
18 petition was filed, counsel for Ms. Delaney
19 vigorously contested that. There was a three-day
20 hearing downstairs with Judge Fulp as the presiding
21 Probate Judge, and there were witnesses from West
22 Virginia that were here. It was quite a scene in
23 this courthouse, and I'll just leave it at that.

24 But nevertheless, Judge Fulp in his wisdom had
25 a judicially mandated and judicially supervised

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1 settlement conference. And he practically locked
2 the lawyers for Christopher Miller and the lawyers
3 for Ms. Delaney in a room, and we agreed to
4 something that makes a lot of sense. And that was
5 the distribution that Mr. MacKelcan requested.
6 That was actually what is -- I'm not a probate
7 lawyer, so I apologize, it's actually something
8 known as a 62-3-912 agreement among successors. I
9 imagine, you've been a circuit judge long enough,
10 you've probably dealt with that back in the day
11 when probate appeals went to the circuit court.

12 And in that agreement among successors, it was
13 done pursuant to a statute that allows, quote,
14 competent successors to, again, quote, agree among
15 themselves to alter the interest, shares or amounts
16 under the laws of intestacy in a written contract
17 executed by all who are affected by its provisions.

18 Well, because Justin Miller died without issue
19 and he died unmarried, Mr. MacKelcan's correct that
20 at law the sole heir was Rebecca Delaney. And if
21 Rebecca Delaney had been completely disallowed by a
22 finding of probate court or if somehow she had --
23 did not survive her son, it would go to the next
24 parentela, which is -- would be the two brothers.
25 And we cite in our papers long case law in this

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1 state that says that's what happens in that kind of
2 a scenario.

3 We would submit that under South Carolina law
4 the probate court is given significant discretion
5 in the ruling on the 62-3-912 agreements. And, in
6 fact, the probate court has exclusive jurisdiction
7 to determine heirs. So under a case from, gosh,
8 1904, the Kitchen v. Southern Railroad case which
9 we cite in our papers, it's found at 68 S.C. 554,
10 the word heir and the word distributee means the
11 same thing unless there is something to change the
12 ordinary meaning of heir. That case goes on to
13 cite -- to say in order to understand who is the
14 heir it is necessary only to inquire to whom by the
15 law of the land would the estate pass in the case
16 of intestacy.

17 So it's our position, which we set forth in
18 our papers, that as a result of these probate
19 proceedings the heirs for those who benefit under
20 the wrongful death act are now Rebecca, Christopher
21 and Donovan. And we believe that to suggest
22 otherwise would lead to an illogical result and run
23 contrary to the intent of the general assembly in
24 passing that legislation back in 1996. And as Your
25 Honor is aware courts are required in construing a

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1 statute to reject an interpretation when such an
2 interpretation leads to an absurd result.

3 The Defendant's argument basically is that
4 even if the probate court had said, we find by
5 preponderance of the evidence Parent A did not
6 provide for the decedent in his minority and we're
7 going to consider her to have predeceased her son,
8 that the circuit court still has to come in and
9 say, oh, no, no, Person A who's been completely
10 disallowed is the sole heir at law for the wrongful
11 death.

12 And that really doesn't make sense, because
13 the purpose of this legislation was to deal with
14 both the wrongful death statute and the intestacy
15 statute. And I would note, our statute is very
16 curious, there's like 18 or 19 states around the
17 country that have similar statutes. Ours is the
18 only state that lets a probate judge, in addition
19 to completely disallowing something, to limit. The
20 probate judge can essentially say, I'm going to
21 limit that person's share 5 percent, 95 percent or
22 somewhere in between.

23 And so we really believe that the codes can't
24 be read in the isolation that they are suggested,
25 and instead that this court should look at the -- I

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1 hate to use the term so-called, deadbeat dad
2 statute, but that's what I'm going to call it --
3 and the wrongful death act as a whole to produce a
4 harmonious result. Because the purpose of the
5 legislation was to amend this wrongful death act as
6 well as the laws of intestacy.

7 In other words, you know, I think what the
8 Defendant is trying to do is to, essentially,
9 rewrite that 1996 legislation and lead us to
10 something that just doesn't make good sense. I'll
11 submit there is no case on this, no reported case
12 on this. I'm not even aware of any trial court
13 orders on this. We do have a very well -- I think
14 reasonably well written eight-page response which
15 we've handed to Your Honor. If you would like any
16 of the cases that we cite in there, we're happy to
17 provide those to Your Honor. And I'm happy to
18 answer any questions that you may have or to hear
19 from Mr. MacKelcan.

20 THE COURT: Okay. Yes, sir?

21 MR. MACKELCAN: Your Honor, I just got their
22 memo in opposition when I started this motion, so I
23 can't speak to that. But I think that sort of
24 what's been unspoken is what they're trying to do
25 is add beneficiaries to increase the value of the

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1 case. I mean the brother who lived here with the
2 decedent, they have an expert witness who has
3 provided us a loss of, you know, his economic
4 losses for him. There's no economic losses for
5 Mrs. Delaney.

6 It's clear that the Plaintiff sees value in
7 extra beneficiaries. And to say that that's the
8 intent of the statute, I mean, the deadbeat dad
9 statute, what it says is -- and, again, it doesn't
10 say change who the beneficiaries are, it says
11 change how you divvy it up. So there's an award.
12 And if you look at the 15-51-40 it's very different
13 from 15-51-20. 15-51-20 says who the beneficiaries
14 are. 15-51-40 talks about the damages. And what
15 that says is there's this award, and one of the
16 parents can go to the probate court and say, hey,
17 this was a deadbeat dad, we shouldn't split this
18 50/50. That's not fair. I should get more.
19 That's not what we have here. That's not what we
20 had in the probate court.

21 Mr. Hoyle also said that the probate court has
22 the authority to determine who to heir is. That
23 didn't happen here. I think it's important to know
24 what that order and recognize what that order is
25 and what it's not. Probate court did not say who

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1 the heir was. Probate court simply stated, this is
2 how to divide the estate. They didn't talk about
3 the wrongful death case. They didn't talk about
4 wrongful death beneficiaries. It was purely about
5 the estate.

6 Now, there's a survival action in this case.
7 Certainly how that is distributed, if there is a
8 recovery, that would be relevant. But for the
9 purposes of awarding damages under wrongful death,
10 it's just a misreading of the statute. It's adding
11 beneficiaries to drive up the value of the case and
12 that's -- that's just not what the statute says nor
13 what the legislature intended when they passed it.

14 So for that reason we believe that the -- that
15 Rebecca Delaney is the appropriate sole statutory
16 beneficiary for damages.

17 THE COURT: Okay.

18 MR. HOYLE: Just briefly, in response, Your
19 Honor. Going back to it, and Mr. MacKelcan
20 actually came and watched the spectacle downstairs.
21 This was not something that I engineered to, quote,
22 unquote, achieve value in extra beneficiaries.
23 Ms. Castleberry and I, actually, vigorously
24 contested this in a three-day proceeding.

25 But, nevertheless, Mr. MacKelcan has raised

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1 the fact that I have hired an economist. That's
2 true. Because Justin and one of his brothers lived
3 together here in Beaufort. They had an apartment
4 together, they shared certain household chores.
5 The economic loss from an economist for those kind
6 of things isn't very much, but I thought given the
7 procedural posture of the case that made sense to
8 do so.

9 But what's also important to note is that
10 Christopher Miller, the oldest brother of these
11 three brothers, tried to become the personal
12 representative of this estate, because he wanted
13 his damages considered. These two young men,
14 Christopher and Justin, both were diagnosed with
15 what we now know as autism spectrum disorders. And
16 together -- as I mentioned, they were able to live
17 independently.

18 Since this tragedy, and it is a tragedy, I
19 agree with that, Christopher has not been able to
20 live independently. He's no longer able to live
21 with his best friend, the person that he could do
22 his activities with. And while there's testimony
23 in this case that he has a limited IQ and he has
24 overwhelming cognitive deficits that may render
25 him, perhaps, less than high functioning, I

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1 should -- to the extent that's even a good thing to
2 talk about, he wanted to make sure that he had a
3 voice in these proceedings. And so that's --
4 that's certainly my effort with respect to the
5 economist. It's not because I'm trying to gin up
6 damages here.

7 The point -- reality is, though, if you were
8 to go downstairs and ask Connie Simmons, she's the
9 clerk of the probate court down there, to pull the
10 jacket for this case -- for the probate estate of
11 Justin Miller dying intestate and without heirs --
12 excuse me, intestate without issue, a guy with a
13 net worth of about \$1,600 in personal property,
14 and, yet, downstairs at this probate proceeding
15 there were three lawyers from my firm,
16 Ms. Castleberry. There were lawyers from Peters
17 Murdaugh firm in Hampton. Sammy Svalina a member
18 of the Beaufort County bar.

19 I don't think they can -- realistically --
20 I'll say because I was there with their air
21 conditioning realistically accommodate that many
22 people in the probate courtroom. People weren't
23 there fighting about \$1,700. The most valuable
24 asset of this estate, quite frankly, and I hate my
25 client has to hear me say this, but the most

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1 economically valuable thing to this estate was the
2 wrongful death and survival claim.

3 And, again, going back to the intent here. It
4 really is an absurd result to say that a probate
5 court could go through such a proceeding, totally
6 zero somebody out, and according to Mr. MacKelcan,
7 well, that's the only person whose damages would
8 get considered.

9 I think it is unique, because I'm not aware of
10 any other statutory quirk or mechanism that would
11 have you, quote, unquote, adding beneficiaries.
12 But if you're altering -- going back to that
13 compromised language -- if you're altering the
14 intestate interest, if you're altering who the
15 heirs are, which would be the same thing as if the
16 probate judge had actually issued a ruling saying,
17 oh, I'm going to limit Ms. Delaney to 5 percent,
18 10 percent or what have you, and give the
19 remaining -- give that money to the next parentela,
20 it would be the same result, that's what happened
21 by this judicially supervised settlement agreement
22 which was reduced to writing into a consent order.

23 And as Your Honor well knows, it's the public
24 policy of this state to encourage the resolution of
25 disputes. That's why we spent two days in

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1 mediation back in January and, yet, nine months
2 later here we are. But, nevertheless, I'm happy to
3 hand up the order from the probate court if that's
4 something that's needed. I think our papers speak
5 for themselves.

6 THE COURT: I need -- I definitely need the
7 statutory language, I need the cases that you've
8 talked about. So I definitely need those.

9 MR. HOYLE: We'll hand those up momentarily,
10 Your Honor, or, perhaps, email them to your law
11 clerk if we don't have them handy. I honestly
12 don't know.

13 THE COURT: Yeah.

14 MR. HOYLE: Thank you, Your Honor.

15 THE COURT: Yes, absolutely.

16 Now, those are the two and then we're back to
17 the Plaintiff? Yes?

18 MR. MACKELCAN: Your Honor, just briefly, and
19 I haven't spoken about the case that we cited yet,
20 but it's a case -- it's an older case, but it is a
21 case that dealt with a man who was seeking to be a
22 beneficiary in a wrongful death case. He was never
23 adopted but raised from age nine months as the
24 child of this -- the decedent in this particular
25 case. And he petitioned to be the beneficiary and

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1 the court denied it. And so -- because he wasn't
2 officially an heir. He'd never been formally
3 adopted.

4 So, although there is a shortage of case law
5 on this issue, I think that just goes to show that
6 it's a strict reading of the statute. And the
7 statute says what it says. And it's -- in this
8 case it does not add beneficiaries.

9 The other thing I think is important.
10 Mr. Hoyle said that Mr. Chris Miller's damages were
11 not that much. Well, no, Chris Miller, based on
12 Perry Woodside's expert, you know, damages --

13 THE COURT: The economist.

14 MR. MACKELCAN: -- he said not that much.
15 Well, it's \$350,000. I mean, I tell you, that's a
16 lot to my client. That's a lot to me. And, you
17 know, we're -- that's not going to be the end of
18 it. So it is a very significant issue in this
19 case.

20 And the second part of the motion was the
21 motion in limine, which -- requesting that the
22 court not allow testimony regarding those damages
23 to the extent -- so that they wouldn't confuse the
24 jury as to who the beneficiary is and how they are
25 supposed to award damages in the case.

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1 THE COURT: Let me ask you this question.
2 What about the survival action? Because that --
3 that clearly with regards to the estate, probate
4 judge it's -- the law of this case, is it not, that
5 at least with regards to the survival action that
6 the beneficiaries are designated now by that order
7 in the probate court, right?

8 MR. MACKELCAN: Yes.

9 THE COURT: Okay.

10 MR. MACKELCAN: Yeah, there's no disagreement
11 with that. I think that the survival action
12 proceeds goes to the estate. Yes, they can divide
13 the estate how they want. It's how you value the
14 wrongful death case or the cause of action for
15 wrongful death.

16 THE COURT: Okay.

17 MR. MACKELCAN: Yeah, there's no disagreement
18 with that.

19 THE COURT: Okay. All right. Got it. Now,
20 you wanted to pass up that case that you have? All
21 right.

22 Now, at this point I'm going to -- what are we
23 going to do, going to shift to the Plaintiff?

24 MR. HOYLE: Yes, Your Honor.

25 THE COURT: All right.

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1 MR. HOYLE: One moment, Your Honor. Beg the
2 Court's indulgence.

3 THE COURT: Okay.

4 MR. HOYLE: These are the Plaintiffs' motions,
5 Your Honor --

6 THE COURT: All right.

7 MR. HOYLE: -- that were filed last Wednesday
8 with the court clerk.

9 THE COURT: Okay.

10 MR. HOYLE: Your Honor, I apologize in
11 advance, but I believe that there are 17 separate
12 pretrial motions that have been filed and are
13 consolidated motions in limine.

14 THE COURT: Okay.

15 MR. HOYLE: I'll just start with No. 1. That
16 seems like the logical thing to do.

17 THE COURT: Yes.

18 MR. HOYLE: Your Honor, No. 1 is prescribing
19 fault to a nonparty, and we've already seen that a
20 little bit with respect to the short claim
21 statements of nonargumentative facts that
22 Defendant, CasePro, is going to seek to impute
23 fault to others, potentially, the United States
24 Department of the Navy, Calvin -- excuse me, Office
25 of Veterans Affairs, Edward Ray and, perhaps,

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1 others.

2 As Your Honor knows, there's not much case law
3 in this state since 2005 on our Uniform
4 Contribution Among Tortfeasors Act Reform, but
5 there is the Fagnant case that Judge Harwell in our
6 federal courts issued back on the last day of 2013
7 that says that the plain text 2005 statute simply
8 codified a defendant's retention of a right to
9 assert an empty chair defense at trial and receive
10 a setoff for any settlement obtained from a joint
11 and severable tortfeasor.

12 I'll represent to Your Honor that we've not
13 received any other monetary recoveries in this case
14 from any other source, so there's not going to be a
15 setoff here. But what we would simply ask this
16 Court to do is since these nonparties are not going
17 to be on the verdict form and particularly the
18 United States Department of Navy under Sovereign
19 Immunity and Principles of Federalism could not be
20 on a verdict form in the Court of Common Pleas,
21 that this Court prohibit the Defendant, their
22 witnesses and their counsel from ascribing any
23 fault or liability to any nonparty.

24 The sole parties in this case are Rebecca
25 Delaney as the personal representative of the

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1 estate and the Defendant, CasePro, Incorporation
2 from Texas. And we would respectfully ask that the
3 decision for this jury to consider as to relative
4 degrees of fault would be the parties that are in
5 the courtroom and not extraneous third parties.
6 Thank you, Your Honor.

7 THE COURT: Okay. Yeah.

8 MR. MACKELCAN: Your Honor, I think that it's
9 important to read the language that says, likewise,
10 the Fagnant court found that the plain language of
11 the 2005 Tort Reform Act codified a Defendant's
12 retention of the right to assert an empty chair
13 defense at trial and received a setoff for any
14 settlement obtained from a joint and severable
15 tortfeasor. Those are two different things. Empty
16 chair defense, receiving setoff from a joint and
17 severable tortfeasor.

18 You've already heard us talk about proximate
19 cause. It's impossible to discuss this case
20 without discussing the actions of other parties.
21 First -- I mean, Plaintiff's own expert witness
22 produced a report at his deposition that ascribes
23 fault to Edward Ray's employer. They start with
24 that. That's the first person that Calvin Hunt met
25 with. You've got Calvin Hunt. You've got federal

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1 employees. That's independent of our arguments
2 related to the contract and the vicarious liability
3 aspect.

4 But, I mean, Calvin Hunt got into an
5 unoccupied running fire truck. And so these are
6 central to proximate cause. And I think it's the
7 law of the state that you can make an empty chair
8 defense at trial. I believe that, certainly, to
9 not allow us to do that would be completely tying
10 our hands behind our back in this case.

11 MR. HOYLE: Your Honor, just briefly on some
12 of those.

13 THE COURT: All right.

14 MR. HOYLE: Mr. MacKelcan ended by talking
15 about the fire truck. I don't know the subsection
16 off of the top of my head, but there is a
17 subsection of the South Carolina Tort Claims Act
18 that grants absolute immunity to any governmental
19 agency that is involved in the provision of fire,
20 police or emergency medical services at the time a
21 claim accrues or arises. So I think as a matter of
22 law that there is no liability to the fire
23 department.

24 More troubling is the discussion about Edward
25 Ray. And I'll admit an expert that we can talk

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1 about later had some thoughts about Mr. Ray, but
2 we're not going to elicit that testimony from this
3 witness stand. And in point of fact, I originally
4 did name the employer of Edward Ray, and Mr. Ray
5 passed away before his deposition could be taken
6 and we could obtain what information he had. Quite
7 frankly, I think any information about what Mr. Ray
8 did or didn't do that day or what he did or didn't
9 know died with him.

10 And after Judge Jeff Young granted summary
11 judgment to the state office of Veterans Affairs in
12 this very courtroom Mr. MacKelcan and his
13 colleagues removed me to Federal Court and alleged
14 that I had fraudulently joined the state office of
15 Veterans Affairs. And said that because we
16 couldn't meet -- provide at least a scintilla of
17 evidence, that it was clear that we had solely
18 named the state office of Veterans Affairs for
19 nefarious purposes, to home cook them here in
20 Beaufort County.

21 And Judge Norton didn't even hold a hearing on
22 that. He said that they'd not come forward with
23 any evidence that Plaintiffs' counsel had acted in
24 bad faith. He wasn't going to presume that we had
25 done that, and he sent the case for the second time

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1 back here to Beaufort County.

2 So I respectfully think it's a little
3 disingenuous now to hear statements from opposing
4 counsel that Edward Ray somehow has all this great
5 culpability when in pleading the federal court they
6 made a big ballyhoo about the fact the summary
7 judgment had been granted.

8 Moreover, I think the fact the summary
9 judgment was granted is the law of the case at this
10 case as far as we're concerned. And if the state
11 office of Veterans Affairs -- if I can't -- this is
12 going to sound horrible -- but if I can't obtain a
13 judgment against them and collect money from
14 them -- for my client from them, I really don't
15 know that it's appropriate for Mr. MacKelcan to
16 point the finger at them.

17 Similarly, going back to the US Navy or other
18 federal folks, you know, federal government's not a
19 party here. They're not going to have a lawyer
20 here. They would need to consent to be tried here.
21 That would all have to be handled somewhere else.
22 And I will note that this case has been removed
23 twice to federal court and sent back here. And so,
24 you know, I really don't know that any of those are
25 appropriate arguments for those reasons.

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1 But as a threshold matter I think the
2 Defendant could probably in closing argument argue
3 an empty chair in certain circumstances. But I
4 think there's a difference between eliciting
5 testimony from live witnesses or from witnesses
6 that we're going to have to, unfortunately, play
7 for several hours on videotape that tends to show
8 that nonparties bear some liability or
9 responsibility for this incident.

10 And so with that, I would respectfully rely on
11 our papers and ask that the court prohibit the
12 Defendant from eliciting evidence asserting fault
13 or blame against a nonparty.

14 THE COURT: Okay.

15 MR. MACKELCAN: Your Honor, briefly, I think
16 it's important with the summary judgment as to the
17 South Carolina Department of Veterans Affairs, my
18 understanding was that that was granted because
19 there was a -- Mr. Hunt was not a veteran, and so
20 as a result Mr. Ray was not acting in his official
21 capacity. So as a result South Carolina Department
22 of Veterans Affairs could not be held liable for
23 the negligence, if any, of Mr. Ray. So Mr. Ray
24 himself could have been a defendant, personally.

25 But this all goes to the intervening and

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1 superseding proximate cause, you know. There's a
2 lot going on in this case and for us to not be able
3 to argue that these other events and actions of
4 other parties impacted the foreseeability here, I
5 mean, you're going to hear that word more than
6 you've probably heard in a while.

7 But this is -- it's an unforeseeable case, and
8 in order to establish unforeseeability we've got to
9 be able to say why all of the different steps that
10 happened they are just unbelievable, you know. And
11 I think that that's really the key here, is that
12 what the Plaintiff is attempting to do is to take a
13 small part of the story, ignore the rest of the
14 story except the end and hold CasePro liable for
15 that. And I think we're entitled to be able to
16 argue those intervening superseding proximate
17 causes.

18 THE COURT: Okay. We're really getting to the
19 end of our day. Let me ask this question. I have
20 the Plaintiff's motions in limine. I know that we
21 had some things that were e-mailed. Do you have
22 them in paper form here?

23 MR. MACKELCAN: Yeah, we do.

24 THE COURT: All right. Great. Because I -- I
25 think what probably makes more sense is for me to

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1 take these documents with me and for us to
2 reconvene in the morning.

3 MR. HOYLE: And, Judge, I have written
4 responses in opposition to their kitchen sink
5 motions in limine, which I'll hand up via our fine
6 clerk of court and provide copies to opposing
7 counsel as well.

8 MR. LOVELL: Judge, can I ask you the easiest
9 question you'll be asked today?

10 THE COURT: Yes.

11 MR. LOVELL: When the jury comes, do you want
12 to us to stand up or stay in our seats? Every
13 Court does it differently, and I get rebuked when I
14 stand up and sometimes I get rebuked when I don't.

15 THE COURT: I will never rebuke you.

16 MR. LOVELL: Okay.

17 THE COURT: It will be your choice.

18 MR. LOVELL: I just want us to be on the same
19 page. So we'll flip a coin, Judge.

20 MR. HOYLE: We stand up.

21 THE COURT: You guys need to -- I'll let you
22 all hammer that out. What I never do is I never
23 chastise lawyers for that, ever. It's your choice,
24 it's just your choice.

25 (Discussion is held off the record.)

PRE-TRIAL MOTIONS

1 THE COURT: All right. In the morning the
2 jury is coming in at 9:30, and we need to be here
3 at nine. We need to be here at nine. I hate to do
4 it, have the court personnel come in early, but
5 we'll be here at nine. See you all bright and
6 early, 9:00. And it very well may be that on your
7 papers I'll be able to make a determination without
8 oral arguments and let you know, hopefully, call
9 what we need to argue. All right. Thank you.

10 MR. HOYLE: Thank you, Your Honor.

11 THE COURT: Yes. Thank you.

12 (Trial adjourned for the day at 5:30 p.m.)
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PRE-TRIAL MOTIONS

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CERTIFICATE

STATE OF SOUTH CAROLINA:

COUNTY OF BEAUFORT:

I, MONA L. WHIDDON, Court Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 5th day of March, 2016.

/s/ Mona L. Manley
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STATE OF SOUTH CAROLINA
14TH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT
COURT OF COMMON PLEAS
CASE NUMBER 2012-CP-07-03782

REBECCA DELANEY, AS PERSONAL
REPRESENTATIVE OF THE ESTATE
OF JUSTIN NICHOLAS MILLER

PLAINTIFF

VOLUME ONE

ORIGINAL

VERSUS

CASEPRO, INCORPORATED

DEFENDANT

OCTOBER 7 THROUGH 16, 2015
PRETRIAL MOTIONS AND TRANSCRIPT OF TRIAL
BEAUFORT, SOUTH CAROLINA

INDEX TO VOLUMES:

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Volume Two - Pages 428 - 819
Volume Three - Pages 820 - 1232
Volume Four - Pages 1233 - 1575 & Keyword Index

Wanda H. Rowe, CVR-M
Official Court Reporter

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BEAUFORT, SOUTH CAROLINA

CASEPRO, INCORPORATED

DEFENDANT

B E F O R E:

HON. DIANE S. GOODSTEIN, JUDGE

AND A JURY

WANDA H. ROWE, CVR-M
OFFICIAL COURT REPORTER

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this trial was taken by Court Reporter
Mona Manley.

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1 DAY TWO, WEDNESDAY, OCTOBER 7,
2 2015, BEGINNING 9:52 A.M.

3 NOTE: DAY ONE, TUESDAY, OCTOBER
4 6, 2015, WAS TAKEN BY COURT
5 REPORTER MONA MANLEY.

6 PRETRIAL MOTIONS/RULINGS:

7 BAILIFF: All rise. This court is now in session.
8 The Honorable Diane Goodstein presiding.

9 THE COURT: Thank you so much, and please be
10 seated, and good morning, everyone. All right. I know
11 we're getting started a little bit later than normal,
12 but I've been going through some of the information
13 again, and working a little bit with my clerk. But I do
14 need to disclose, just so everyone is aware, I have gone
15 online. You know, actually, I've asked Judge Mullen's
16 law clerk, only because she has the ability to go online
17 and pull documents that I don't, to keep me from having
18 to bother the clerk's office; because I wanted to see
19 the order of adjudication of Mr. Hunt, because as I was
20 going through these documents, there was some issue in
21 my mind whether or not I was dealing with a not guilty
22 by reason of insanity or incompetency.

23 So, I just need to disclose for you all that I have
24 accessed only that document, and I don't know if I

1 actually have it yet. I don't have it yet, but I'm
2 looking for it, because I wanted to look at it, to be
3 certain that it was, in fact, an NGRI, rather than a
4 determination of incompetency. So, I mean, that's the
5 extent of the disclosure. As you know, if I get
6 information other than from you guys, I'm to let you
7 know that, and that's the reason for the disclosure, to
8 let you guys know that. I wanted to be certain that the
9 disposition was an NGRI. Any concerns or comments about
10 that from the Plaintiffs?

11 MR. HOYLE: None from the Plaintiff, your Honor.

12 THE COURT: From the Defendant?

13 MR. LOVELL: No, your Honor.

14 MR. MACKELCAN: No, your Honor.

15 THE COURT: Okay. Now, as so often happens with me
16 and motions in limine, two things occur. Number one is,
17 I am reluctant to rule in a vacuum, and I don't. And
18 that happens with most motions in limine, but I'm always
19 being grateful that Counsel presents them, just so I can
20 be looking and listening. So, if I don't rule on your
21 motion in limine and find it to be premature, please
22 understand, it's not because I don't think that your
23 time and your energy was not well spent, and that I'm
24 not appreciative of it; it's just because I just got
25 here, and I am reluctant, always, to rule in a vacuum.

1 Because the worst thing I feel like I can do to
2 trial lawyers is rule one way before I get to hear a
3 case, and then, lo and behold, I change on you in the
4 middle of a trial. What a terrible thing to do to a
5 trial lawyer. I'd rather keep you in the dark. And in
6 my experience, I think that serves you better, because
7 while trial lawyers can do anything, truly, and do, I
8 think, if I can keep you from being in that position,
9 that's better for you, and certainly better for me.
10 Because it's a difficult thing to make a decision one
11 way, and then, realize mid-stream, oh, my goodness,
12 based upon what I'm hearing, I shouldn't have done that.
13 It's not a happy place for a judge to be. So, please
14 understand that, that's where I am on many, actually,
15 many of these issues.

16 For example, I cannot rule on the 911 tape, if I
17 hadn't heard it. I can't rule on a videotape if I
18 hadn't seen it. It is impossible for me to do that. It
19 is impossible for me to rule on whether or not the --
20 what is the -- whether or not the standard of care has
21 any relevance, when I haven't heard the first bit of
22 testimony about that case. Can't do that, either.

23 So, bear with me as I try to go through and -- as I
24 go through, and I'll tell you on the things I have made
25 a determination and the ones I'm reserving.

1 All right, now, the first one is, not going to
2 bifurcate the trial. I'm just simply not. I know it's
3 of exercise of discretion. And based upon what I have
4 heard to this point, I think that, to bifurcate
5 liability and damages would be excruciatingly difficult,
6 and I think that I would be -- end up in the trial
7 regretting that, and trying to ascertain how do I get to
8 proximate cause without also including information that
9 could be considered by the jury with regards to damages.
10 It would just be impossible. So, I'm not going to
11 bifurcate the trial.

12 Having said that, that doesn't have anything to do
13 with 403. 403 is still there, and there are still going
14 to be determinations that have to be made. And so,
15 while I'm not going to bifurcate the trial, that doesn't
16 mean I'm not going to consider 403, either. So, that's
17 the first thing.

18 The second thing is, is that the beneficiaries
19 under 15-51-20, are the beneficiaries under 51-51-20. I
20 am aware and have read 15-51-40. I have read the order
21 from the probate court. The motion wasn't even brought
22 under probate matter under 51-51-40. The order from the
23 probate court only addresses the estate. And there is a
24 difference between a wrongful death action and a
25 survival action.

1 A survival action under South Carolina law is
2 brought by the estate, on behalf of the estate.
3 Wrongful death beneficiaries are statutory
4 beneficiaries, and that's, simply, they're statutory
5 beneficiaries. Whether or not there is a relationship
6 to intestacy is, in my mind, coincidental, because they
7 are the statutory beneficiaries. You could have a will
8 and a wrongful death action, and the wrongful death
9 statutory beneficiaries are the beneficiaries.

10 So, irrespective of what happens in this case with
11 regards to the survival action, clearly, with regards to
12 the survival action, those are matters brought by the
13 estate, and that order controls, because it controls the
14 estate.

15 But with regards to the wrongful death action, the
16 wrongful death action, those statutory beneficiaries
17 have not been altered. They haven't been altered by the
18 probate court. They haven't been altered by motion,
19 unless there is a motion that has been brought in the
20 probate court, pursuant to 15-51-40 that I am aware of,
21 and I am aware of not. So, that's that issue.

22 The next issue is -- all right. Let me see. Ah,
23 the empty chair argument. The empty chair argument. At
24 this point, I am going to reserve making a
25 determination, because -- actually, let me withdraw

1 that.

2 There's been a lot of discussion about the *South*
3 *Carolina Uniform Contribution Among Tortfeasors Act*.
4 And the issues, as I understand the issues in this case,
5 the sovereign immunity is involved in this case.

6 There were actions that were brought against
7 different entities, for which summary judgment was
8 granted. And a summary judgment, as I understand it,
9 may have been brought pursuant to sovereign immunity.
10 It may have been brought due to a lack of proof. So, at
11 this point, I am reluctant to talk to the Defendants
12 that they cannot introduce any evidence of
13 responsibility of third parties. I think that would be
14 error, and I'm not going to allow that. Now, if it
15 isn't relevant for some reason, as we get into the
16 trial, then, I have more information, you can raise it
17 at that time.

18 Having said that, judicial estoppel may be an
19 issue. I don't know that, but it may. But it is
20 impossible for me to know that at this point. So, that
21 would be my position on the ability of the Defendants to
22 argue the empty chair, if you will, or to allege that
23 fault lies with someone other than Defendant, so.

24 Now, next. Now, with regards to an in limine
25 exclusion of mention of the *Federal Tort Claims Act*

1 against the United States government, it's got to have
2 relevance. And I don't know why, as I sit here, I don't
3 know what the relevance would be, and I don't want to
4 make it up, and I don't want to hear about what it might
5 be. Either it is relevant or it isn't relevant.

6 I would appreciate, during your opening statements,
7 if you not state, you know, we've been to the federal
8 court; we've done this; we've been to the state court,
9 and this has happened. I would appreciate not doing
10 that. If it becomes relevant, it's introduced in the
11 trial, you can certainly argue it in your closing
12 arguments. But I'm going to instruct you at this
13 juncture, please do not talk about proceedings such as
14 the *Federal Tort Claims Act*, and what may have happened
15 in other courts at this point, because I don't know what
16 the relevance would be, at this juncture. .

17 Now, excluding statements? Yes, I can make
18 evidentiary rulings as they happen in the case, and will
19 be permitted to do that. With regards to -- I can, with
20 regards to excluding at this juncture, testimony of
21 witnesses, I'm not going to do that in a vacuum.
22 Collateral payment, collateral benefit, collateral -- I
23 gather, to make collateral source rule. In collateral
24 source rule --

25 MR. HOYLE: Your Honor, we'll withdraw that,

1 because, as I stated yesterday, we've not received any
2 payments from any source.

3 THE COURT: I understand. And you've got the
4 unrelated claims. Not mentioning it again, it's
5 impossible for me to rule in a vacuum, and I'll be
6 prepared to rule if it appears at trial.

7 Now, it says, *criticism of Donovan Delaney's*
8 *absence at trial.*

9 MR. MACKELCAN: Your Honor, we're not going to do
10 that, so we've already discussed that, so.

11 THE COURT: Okay. Okay. Okay. Failure to call
12 equally available witness. That's just -- that's how
13 you try cases. I'm not going to tell you not to do
14 that.

15 And again, statements, I'm not going to rule in a
16 vacuum on statements. And there are lots, lots of those
17 motions.

18 There's comparative fault. What about -- there's
19 some concern about comparative fault in here. Again, I
20 can't rule in a vacuum. If that's the issue that's been
21 raised, that's more appropriate post-testimony, so. I
22 will just refrain from ruling on that.

23 Now, that's the Plaintiff's motions in limine.

24 Now, the Defendant's motion in limine. Here we go.
25 Again, regarding the professional standard of care, I

1 understand the concern, because it hadn't been brought
2 as a malpractice case. I get that. I don't know. I
3 don't know. I mean, it's, again, it's impossible for me
4 to rule at this point, without hearing the case.

5 That is the money that you exchange pursuant to the
6 personal services contract. Here's what my concern is
7 about that. My concern about that is that, there must
8 be some proof of the relationship between the Defendant,
9 the treating entity, and the Defendant, and the doctors,
10 and the nurses. And I don't know what that proof is at
11 this point. Obviously, who pays. Who pays somebody's
12 salary, who pays money, is a pretty good indicator of
13 control. So, again, it's impossible for me to rule in a
14 vacuum, and I will simply do that in the course of the
15 trial.

16 And I gather, there's a request to exclude the
17 video of Mr. Hunt. Again, I think it's impossible. If
18 I hadn't seen it, how am I going to rule on it? So,
19 just make the motion at the time, and I'll take a look
20 at it. Again, photographs are the same. 911 calls are
21 the same.

22 Now, the peer review of Dr. Jansen. Again, when we
23 get to that point, here's what gets excluded. It has to
24 be a peer review committee which has been established
25 pursuant to our statute. The question is, is that what

1 we're dealing with, and are we dealing with the
2 information pursuant to that, and is the information
3 being used as a sword and a shield. And I'm not going
4 to make that determination. Again, in a vacuum.

5 But, I will tell you that, for testimony and for
6 testimony to be excluded based on the peer review
7 statute, it has to be peer review committee, which has
8 been organized pursuant to the statute. And then, the
9 information has to be information that has been received
10 in that context and kept within that context. So, if
11 it's otherwise, then, I have to deal with it at that
12 point.

13 And the reason is, is that, I do believe that peer
14 review information can be used as a sword and a shield.
15 And I don't think -- in other words, I don't think you
16 can get something that's helpful, and then, run out and
17 use it in litigation; and then, when an opposing party
18 seeks to see if there's anything on the other side of
19 that assertion that you can hide whatever is in the peer
20 review committee. So, I have concerns about that.

21 So, but I don't know what we're dealing with. And
22 again, I'm not going to rule on that. But I certainly
23 would preview in that regard.

24 Having said that, I do want to also tell you that,
25 if peer review information is available outside of peer

1 review as easily as it is within peer review, then, that
2 doesn't make it discoverable within the context of a
3 peer review committee, because we are to protect those
4 peer review committees as much as we possibly can.
5 Okay. As long as it hasn't been used as a sword and a
6 shield.

7 Prior medical and psychological records. Don't you
8 just love that? It's like that law school, that book
9 they tell students to read before they begin law school,
10 *Getting to Maybe*. I feel like I'm getting to maybe.

11 The criminal responsibility and capacity to conform
12 the -- the capacity to perform an evaluation. Don't
13 know. Depends. Depends on if it's relevant. Depends
14 on how it's offered, as well as the outcome of the
15 criminal proceedings and the military criminal records
16 and the documents from the Solicitor's Office.

17 And Number 12 is, *all evidence, testimony, and*
18 *questioning regarding the Hampton County lawsuit*. It
19 depends.

20 And 13 is the same. It depends.

21 Okay. So, I'm a little bit concerned. I mean, I
22 really would like to hear just a little bit of
23 discussion about -- and from both sides, and this is the
24 Defendant's motion. I think I'll start with Defendant.
25 Well, actually, let me start with the Plaintiff. I know

1 that's a little bit backwards, because, when I was going
2 through the testimony about standard of care, that this
3 wasn't brought as a malpractice action. Talk to me a
4 little bit about that. Why isn't this a malpractice
5 case?

6 MR. HOYLE: Well, I think -- good morning, your
7 Honor.

8 THE COURT: Good morning.

9 MR. HOYLE: Under our case law, a malpractice
10 action can only be brought by the patient. Our Supreme
11 Court said that in the *Bishop* case. There's tons of
12 cases in our case that say that. Justin Miller was not
13 a patient of the hospital. He wasn't a patient of Dr.
14 Jansen. He wasn't a patient of these nurses. He was a
15 foreseeable third party.

16 And if you look at the *Hardee* case, the *Hardee* case
17 is what talks about the duty owed to a foreseeable third
18 party. And in this particular litigation, Judge Mullen
19 sat where you are sitting today, and struggled with the
20 thin line, perhaps, that we straddling or getting close
21 to, because our case law says that the duty owed to a
22 foreseeable third party has to be identical to the duty
23 owed to the patient. Otherwise, you're infringing on
24 the doctor/patient relationship.

25 But there's nothing in *Hardee* that says that there

1 has to be standard of care testimony. And in fact, the
2 law of this case from day one has been that's it's been
3 an ordinary negligence case. I know you don't want to
4 -- we won't tell the jury about all our trips to the
5 federal courthouse in Charleston, but at the very first
6 hearing in front of Judge David Norton, Mr. Mackelcan
7 agreed on the record with Judge Norton, and that
8 transcript's been filed and a part of this record here,
9 that this was an ordinary negligence case, garden-
10 variety negligence case.

11 We came back here to this courthouse after the
12 first remand, and Judge Murphy, your colleague from
13 Dorchester County, heard a motion to dismiss. And that
14 the motion to dismiss was based on several issues in the
15 papers, one of which was the failure to comply with the
16 notice of intent statute. That portion of Mr.
17 Mackelcan's motion was withdrawn. He said, well, Judge,
18 they haven't pled it as a med/mal case; so, it's a
19 garden-variety negligence case; I'll let that one fly.
20 And she denied that motion on other bases.

21 So, from Plaintiff's perspective, we know that the
22 case law in this state says, not every lawsuit against a
23 medical provider is a professional liability case. It
24 can be a garden-variety negligence case. It can be, you
25 know, the cases that are out there involve everything

1 from a patient who wasn't properly watched, slipping and
2 falling on her way to the bathroom. And you know, in
3 all honesty, there's some analogy here. Calvin Hunt
4 wasn't watched, and he left.

5 And so, from Plaintiff's standpoint, this is not a
6 professional negligence case. The issues are confusing,
7 and they are close to, perhaps, what a professional
8 negligence case may be, but it's not pled that way, and
9 I know that there's going to be a lot of discussion the
10 second Mr. Lovell or Mr. Mackelcan stands up about
11 experts in this case.

12 The Defendants -- or excuse me -- the Defendant
13 disclosed an expert.

14 THE COURT: Let me stop you now, and let me ask you
15 this question.

16 MR. HOYLE: Yes.

17 THE COURT: What does the -- what does the
18 Plaintiff allege that the Defendant did that was
19 negligent, careless?

20 MR. HOYLE: That's separate and apart from our
21 negligent hiring, supervision, and retention. The
22 actual negligence of the employees within the four walls
23 of the emergency room that day --

24 THE COURT: Yes.

25 MR. HOYLE: -- were failing to keep Calvin Hunt

1 under close watch, and failing to keep him under their
2 line of sight, and giving him permission to leave.

3 THE COURT: And what do you use as the duty, the
4 alleged duty, for the jury to ascertain whether or not
5 there was then a violation of that duty? How does that
6 work?

7 I'm with you with the negligent hiring and
8 supervision. I got that. With regards to keeping the
9 watchful eye, keeping the constant, watchful eye, tell
10 me, what do you use as a duty?

11 MR. HOYLE: Well, I'll go back to where we were at
12 our summary judgment proceedings, your Honor.

13 THE COURT: Okay.

14 MR. HOYLE: And there was testimony from Dr.
15 Hendelman. Dr. Hendelman's a U.S. General Services
16 civilian employee that doesn't work for CasePro. And
17 she's the person that Dr. Jansen, the CasePro employee,
18 called on the telephone that day. And Dr. Jansen wrote
19 down that, based on this conversation, Dr. Hendelman
20 told us then that it was obvious this patient needed to
21 be admitted.

22 When we deposed Dr. Hendelman, Dr. Hendelman never
23 used the word *standard of care*. She didn't use those
24 words. She talked about the way we practice. And I'll
25 just read -- if you have the patience, I'll read this

1 exchange from the deposition.

2 Question:

3 THE COURT: And let me tell you, here's what --
4 before you -- I'm going to tell all of you guys, and
5 I'll remind you of it. Lawyers are brilliant. And
6 because you're brilliant, when you read, you read very
7 fast, and you can't help it, because you're brilliant.

8 And so, if I don't have a happy court reporter at
9 the end of the day, I get a new court reporter. If you
10 will notice, my court reporter ended up, yesterday,
11 obviously was not happy. This particular court reporter
12 loves me, so I want her to continue to love me. So, I'm
13 going to ask you guys to remember that. Because you are
14 brilliant, you will read very fast, which is going to
15 stress my court reporter. So, remember that, and read
16 slowly for me. After my reminding you that you're
17 brilliant, you'll do it.

18 MR. HOYLE: Your Honor, I'm glad my wife's not
19 here, because she would stand up and argue with you such
20 that she'd probably be found in contempt.

21 THE COURT: Well, I'll give you an affidavit at the
22 end of the trial that you're all brilliant, and you all
23 can take them with you.

24 MR. HOYLE: We'll take judicial notice of that.
25 Thank you, your Honor.

1 THE COURT: Yes.

2 MR. HOYLE: But going back to Dr. Hendelman. Dr.
3 Hendelman -- let me back up a step. Dr. Hendelman
4 testified:

5 Question: Would you agree with me that,
6 if someone comes in with thoughts of harming
7 others, and they articulate that, it is
8 foreseeable that they may actually harm
9 others, if they are not kept under close
10 supervision?

11 Answer: Yes. Definitely.

12 You'll recall, yesterday, I also mentioned to your
13 Honor that Dr. Jansen, in his deposition, the CasePro
14 employee doctor, told me in his deposition that thoughts
15 of harming others was self-explanatory; said it was
16 common sense; don't need to go to medical school to know
17 what that means.

18 So, these line of questions were asked of Dr.
19 Hendelman as a followup to what I just read into the
20 record.

21 Question: If someone comes into the
22 E.R. with suicidal ideations, a history of
23 depression, and PTSD, and says that he has
24 thoughts of hurting others, is it obvious
25 to you that, that person needs to be admitted?

1 Answer: Okay. By definition, a person
2 who is a danger to self, danger to others,
3 has to be committed -- has to be admitted
4 to the hospital. Not committed, but admitted.

5 Question: Has to be?

6 Answer: That's part of our -- the way
7 we practice, yes.

8 Question: So, if someone comes in the
9 E.R. and says they are thinking about harming
10 others, is that person required to be
11 admitted?

12 Answer: That would be a requirement
13 of admission, yes, based on the rule of
14 danger to self, danger to others, or greatly
15 disabled.

16 Question: But again, this document, --
17 referring to a medical record --
18 -- this document, which was filled out,
19 looks like, on February 24, 2012, states
20 that Calvin Hunt had thoughts of hurting
21 others, correct?

22 Answer: Yes.

23 Question: Based on this document
24 alone, is it your testimony that it was a
25 requirement that Calvin Hunt be admitted?

1 Answer: Yes. It was based on the fact
2 that he was a danger to self and a danger to
3 others. He needed to be admitted, yes.

4 Question: Why?

5 Answer: Because he is a danger to self
6 and a danger to others, by his own admission.

7 Question: And that's pretty obvious,
8 correct? Because it is by his own admission?

9 Answer: That makes him in need of
10 hospitalization.

11 Question: And then, add to that, if that
12 person also comes to a medical facility and
13 says he has thoughts of hurting others, is
14 that pretty concerning?

15 Answer: Then, he needs to be hospitalized.

16 Question: And kept under close supervision
17 until he can be hospitalized, correct?

18 Answer: If he came to my office, I would
19 want to supervise him.

20 Question: So that he doesn't hurt others,
21 correct?

22 Answer: So, that, yes, to keep him safe
23 and keep others safe, yes.

24 Question: If someone comes into your
25 office and says that they have thoughts of

1 hurting others, and they have a history of
2 depression, history of violence, been in
3 the psyche ward before, prior occasions of
4 striking individuals, would you let that
5 person walk right out of your office and go
6 into the public?

7 Answer: No.

8 Question: Because that would be needlessly
9 endangering the public; wouldn't it?

10 Answer: Yes. And the person themselves.

11 The fact that Dr. Hendelman consulted with Dr.
12 Jansen that day, and told him it is obvious this patient
13 needs to be admitted, I think, brings us well within
14 garden-variety negligence. If something is obvious,
15 it's obvious. It's not hidden, it's not concealed.
16 It's not some big secret.

17 Going back to what we were talking about yesterday,
18 when we were arguing the bifurcation motion, Calvin Hunt
19 didn't go off and do these things some days later. He
20 didn't even do them some hours later. My client's son
21 was dead less than 20 minutes after Calvin Hunt left the
22 emergency room.

23 With all due respect to the Court of General
24 Sessions, I think it's pretty safe to assume that, if he
25 was not guilty by reason of insanity the second he saw

1 the fire truck and the second he killed a human being,
2 he probably wasn't -- didn't have all of his wits about
3 him when he was still in the Defendant's employees' line
4 of sight.

5 So, this is a -- I hate to say it, Judge, but this
6 is a case where, I think, really, common sense and
7 things being obvious can lead us to sufficient evidence
8 in the record, such that we can survive directed
9 verdict, just like we survived summary judgment,
10 without, necessarily, a retained expert.

11 I retained an expert, because the Defendant's
12 retained an expert, and said they got a guy who's a
13 doctor up at Trident Hospital in North Charleston. He
14 says the actions and inactions of the folks, the CasePro
15 employee, that day were appropriate. That was his word,
16 appropriate.

17 I think I can make this representation at this
18 point. She sometimes punches me if I say things she
19 doesn't like.

20 It would be my expectation that, if our retained
21 expert came to testify in this courtroom, while he may
22 have standard of care opinions, that it would be our
23 expectation at this point in time that the questions
24 that we would ask him on direct would be confined to
25 whether or not he believed actions or inactions were

1 appropriate or not appropriate.

2 I think we can try this case without ever uttering
3 the words *standard of care*. That's, at least, the way I
4 view the *Hardee* case, and the way that we've pled this
5 as a simple negligence case. But I'm certainly happy to
6 answer any additional questions that your Honor has on
7 that point.

8 THE COURT: Okay.

9 MR. MACKELCAN: Your Honor, there's a number of
10 things to respond to, and I want to start with Dr.
11 Hendelman, because she was mentioned repeatedly. While
12 all of this was happening, Dr. Hendelman was on the
13 fourth floor of the Naval Hospital. She's a G.S.
14 federal employee. She is a 60-something, I'm not sure
15 exactly, board-certified psychiatrist. She is a medical
16 doctor. She is a psychiatrist, and she was the doctor
17 employed by the government on that day.

18 She's not an E.R. doctor. She didn't offer any
19 opinions as to the conduct of the E.R. doctor or the
20 nurses. Dr. Hendelman's information came from a
21 psychiatric technician who was a gentlemen who --
22 active-duty military, specifically trained to interview
23 mental health patients.

24 This is a young man in his mid-twenties, who
25 testified that he had interviewed at least 1,500

1 military men who were having mental health problems. He
2 had a standard set of questions that he asked all of
3 them. He testified in his deposition that he was
4 familiar with suicidal ideation. He knew the difference
5 between ideation and plan and intent, and he understood
6 homicidal ideation. And he'd dealt with people with
7 PTSD.

8 Although not a medical doctor, he was the first
9 step that Dr. Jansen took, and this is pursuant to
10 hospital policy, to get a psychiatric consultation. Mr.
11 Manning was the last person to communicate from a
12 medical standpoint with Mr. Hunt, before Mr. Ray asked
13 for them to go outside.

14 Mr. Manning took the findings of his 25-minute
15 interview with Mr. Hunt, that happened in the emergency
16 room, where everybody could hear. There was no raising
17 of voices. There was no problem. These are separated
18 by curtains. Okay? Joe McDonald was ten feet from
19 Arthur Manning while this is going on.

20 Manning finishes up his interview. He says, okay,
21 we'll see you later. Doesn't say anything to anybody in
22 the emergency room; goes upstairs and talks to Dr.
23 Hendelman.

24 So, this idea that Dr. Hendelman used the word
25 obvious to Dr. Jansen, and that means that it's ordinary

1 negligence, I think, is a real stretch.

2 You know, we're talking about somebody who has
3 received a report from the psyche tech of his interview.
4 Then, she calls an emergency room doctor. They're on
5 the phone. Dr. Jansen's in his office in the emergency
6 room. Dr. Hendelman never bothers to go downstairs.
7 She stays up on the fourth floor. Despite Dr. Jansen's
8 request that she see the patient; she stays up there.

9 And Dr. Jansen is a 60-something physician, board-
10 certified, emergency room doctor. So, what is obvious
11 to two medical doctors with a combined 75 years of
12 experience as doctors, is certainly not obvious to the
13 average, ordinary person, which is what the standard
14 would be here.

15 THE COURT: In other words, you do not think this
16 is a *Bessinger versus DeLoach* case?

17 MR. MACKELCAN: No. And so, the other thing is,
18 this expert's depositions, Dr. Jansen -- we did joint
19 discovery in this case, your Honor. There were five
20 cases, and we corroborated for awhile and did joint
21 discovery. There were five plaintiffs' attorneys in
22 there asking him questions. The deposition lasted over
23 nine hours. So, to pull out bits and pieces of things
24 that he said, I don't think is an accurate reflection of
25 his testimony.

1 I also want to address what Mr. Hoyle said that I
2 said, early on in this case with a motion to dismiss.
3 We did initially file a motion to dismiss, based on
4 failure to comply with the expert affidavit statute.
5 Upon Mr. Hoyle's conversation with him, he said, well,
6 we're not -- this is an ordinary negligence case, and
7 we're, you know, common sense exception and all that.
8 And that was why that statement was made.

9 I hadn't made a determination at that point whether
10 it was or whether it wasn't. I was relying on his
11 representations of how he intended to pursue the case.
12 Clearly, maybe that was a mistake at this point, and I
13 should have pursued that, but that was very early on in
14 this case, based on a representation from another lawyer
15 about how they intended to proceed with their case.

16 The part of this, though, that is crucial, that Mr.
17 Hoyle didn't address at all, and also ties into the last
18 thing I was discussing, the 131-page contract that, in
19 great detail, outlines the relationship between CasePro
20 and the United States Navy, Page 21 has a specific
21 section that deals with lawsuits, and how that's
22 supposed to work. And it's U.S.C. 10, 1089, I believe
23 is the number. And it says, if there's a personal
24 injury based on the acts or omissions of these
25 healthcare workers while they're working at the Naval

1 Hospital, you've got to follow the *United States Code*
2 for that lawsuit.

3 And it doesn't specify medical malpractice. It
4 doesn't specify who the patient is, any of that. It's,
5 if there is a personal injury suit based on the actions
6 of these workers, you go 1089. The language in the
7 Plaintiff's complaint in Paragraphs 40 and 50 is
8 specifically designed to circumvent that paragraph in
9 the contract, because it says that's does allege acts of
10 medical negligence, and actually references 1089.

11 So, even if, where, because Justin Miller wasn't a
12 patient, this isn't a medical malpractice case under the
13 *South Carolina Code*, and the requirements for, you know,
14 pre-suit affidavit notice and intent and all that. It
15 is clearly a medical negligence case under 1089, and
16 under the contract.

17 I think, in hearing the Plaintiffs talk about these
18 distinctions, I think your Honor probably got a feel for
19 the issue that we have here. There was reference to,
20 maybe not by name, but reference to the *Dawkins* case by
21 the facts. And *Dawkins* case was where the language is
22 pulled from the idea that not every case against a
23 medical provider is a medical malpractice case.

24 Well, the *Dawkins* case involved an older woman who
25 was presented at the emergency room with balance issues

1 and dizziness. Her daughter brought her there; told the
2 whoever was up front that, that was the problem; asked
3 if she could go back with her into the room; and they
4 said, no, you can't. They took her back in the room;
5 left her there; she fell and broke her ankle.

6 The Court was very specific that no medical
7 treatment had been provided to Mrs. Dawkins at the time.
8 And the supervision, they noticed specifically that the
9 daughter was not allowed to go back there with her.

10 In this case, we have Mr. Hunt who presented with
11 Mr. Ray, Veterans Affairs Officer. Whether he was in
12 his official capacity or not, he was with Mr. Hunt the
13 entire time. Never left his side. He was with him
14 before he even got to the emergency room. He had met
15 with him earlier that day, so he was there the entire
16 time.

17 But importantly, they get to the Naval Hospital,
18 and they go to the general practice area. They speak
19 with a nurse. Medical judgment and treatment begins
20 before CasePro personnel are even involved. She takes
21 him down to the emergency room. Janice McDonald does a
22 triage. We've got records of it. She takes him to the
23 bed.

24 Joe McDonald is watching him for an hour and a
25 half, observing him. They have some limited

1 interaction, but he's watching him. And Mr. Ray, who's
2 been sitting by him the whole time.

3 Dr. Jansen meets with Calvin Hunt. We have a
4 record of that. We've got our blowups for you to see.
5 I mean, evaluating the patient, he contacts for a
6 consultation, pursuant to Naval policy. Psyche tech
7 comes down, and we've already talked about the psyche
8 tech, and you know what happens from there.

9 So, the differences are extreme in terms of
10 medical treatment. There is no question in this case,
11 Calvin Hunt received considerable medical treatment
12 while he was at the Naval Hospital, both from CasePro
13 personnel and from government employees and active-duty
14 military. Really significant difference there.

15 And this all goes to the confusion of the jury.
16 Are they supposed to evaluate as to how a nurse or a
17 doctor should treat a patient, or the ordinary person?

18 I mean, this is, you know, there is a lot of --
19 you've seen the motions in limine. There's issues about
20 whether medical records were presented, or whether they
21 should have been looked at, whether they were even
22 available. How do you deal with somebody with mental
23 health issues? Clearly, within the context of a medical
24 negligence case, it's not the same as somebody who
25 doesn't get any medical treatment, is left by herself in

1 a room before anybody sees her, and she falls. That's a
2 slip-and-fall. Okay? This isn't a slip-and-fall
3 premises liability case, and that's really the basis of
4 our position on it.

5 It's going to be prejudicial to CasePro for them
6 to present all of this professional negligence-type.
7 It's not just the term *standard of care*; it's all that
8 is encompassed in medical duties and medical
9 obligations, performance in medical care, that is
10 prejudicial to CasePro. The jury is hearing all these
11 things that they should have or shouldn't have done.

12 THE COURT: I got you.

13 MR. MACKELCAN: Okay.

14 THE COURT: I'm with you. That was very helpful.
15 Yes.

16 MR. HOYLE: Your Honor, just a few points. Let me
17 start where Mr. Mackelcan began. He talked a lot about
18 Arthur Manning. Arthur Manning was an enlisted man in
19 the United States Navy, who is not a licensed healthcare
20 provider professional in any jurisdiction. He has an
21 MOS, a psychiatric tech. That's something that is
22 unique to the military. That's not something that's
23 recognized in the civilian world.

24 Let me go back to the Hardee case. Hardee, which
25 was written by Chief Justice Toal in 2006, confirms the

1 language I cited to you from *Bishop*; that a medical
2 malpractice action is instituted by a patient, and is
3 predicated upon the physician's deviation from accepted
4 standards of professional care in treating that patient.
5 Not every cause of action asserted against a medical
6 provider, however, is an action.

7 THE COURT: Brilliance.

8 MR. HOYLE: I've been slapped. For medical
9 malpractice. Thus, our statement in *Bishop* affirms the
10 validity of the general rule prescribing the class of
11 permissible plaintiffs in medical malpractice actions.
12 That ain't us.

13 But going back to the case, it also recognizes that
14 causes of action may accrue in other context, by virtue
15 of the medical provider's actions or admissions.

16 Let me talk a little bit about *Hardee*. *Hardee* is
17 another good, old-fashioned, common-sense case.
18 Fellow's in there getting dialysis treatment. They
19 could have given him some milk. Probably not milk, but
20 they could have given him some juice and cookies, told
21 him to wait 15 minutes before he left driving his car.
22 They didn't do any of that.

23 He gets in his car. Less than 15 minutes later, he
24 runs a red light, because he's passed out, and he kills
25 two people. I think, if you read -- it's a short

1 opinion, but if you read in between the lines, I think
2 our court really believed in Hardee; that this was a
3 case that cried out for there to be a duty, because it
4 was good, old-fashioned common sense.

5 And in fact, the Hardee case actually says that the
6 argument presented by the plaintiff in that case was at
7 a healthcare facility, quote:

8 *Breached a duty a medical provider*
9 *owes to those persons in the general field of*
10 *danger, that is the motoring public, which*
11 *should reasonably been foreseen by the*
12 *respondent when it administered the treatment.*

13 Again, this is going back to foreseeability, which
14 we learned about in law school. And it's clear in the
15 Hardee case that the plaintiff is not bringing a medical
16 malpractice case. They can't. They're not a patient.

17 I think a good example or analogy of this is, if
18 you were to think about a few months ago, when we had
19 the fear in this country about Ebola, and if you were to
20 think back to that time frame, I believe even former
21 DHEC Director Templeton even pretended to have Ebola,
22 and went into the Roper hospital in Charleston, just to
23 see what they would do when she presented with certain
24 symptoms.

25 But imagine somebody going into an emergency room

1 and saying, I just got back from West Africa; I've got a
2 fever; I'm bleeding in places I don't want to go, I
3 don't want to be bleeding from. And instead of the
4 hospital or the emergency room admitting them, and
5 keeping them there, the person says, hey, can I leave;
6 and they say, yes. And then, that person goes out to
7 Walmart, and a hundred people get Ebola.

8 The touchstone in that scenario is whether or not
9 it was foreseeable that the person who had come there
10 seeking treatment, if they weren't kept under close
11 watch, could harm others within the general field of
12 danger.

13 Mr. Mackelcan referred to the *Dawkins* case as a
14 slip-and-fall. Well, I'll respectfully submit that the
15 *Hardee* case is a car wreck case who was somebody running
16 a red light, because they passed out less than 15
17 minutes after they left the healthcare facility.

18 And this case, it's also a car wreck case. It may
19 just be a fire truck, but it's still a motor vehicle
20 collision. A pedestrian that was lawfully on the
21 roadway in Beaufort County was struck and killed,
22 because persons did not exercise good, old-fashioned
23 common sense and tell somebody that they knew was a
24 danger to others to stay where he was. Instead, they
25 affirmatively gave him permission to leave. I think,

1 just like our scenario with Ebola, that's pretty
2 obvious.

3 THE COURT: Got it. I got it, you all. I got it.
4 Do you disagree that's what it is? That's not what it
5 is? I got it.

6 All right. Make sure that I have those cases on
7 both your parts. Just make sure I have them. And we're
8 going to get to it, so let's take ten-minutes' comfort
9 break for anyone; and then, we're going to come on back.

10 Yes?

11 MR. MACKELCAN: Can I just make one quick request.

12 THE COURT: Sure.

13 MR. MACKELCAN: Going back to before we start
14 talking about the ordinary professional, you had
15 mentioned the videos and the photos and the 911.

16 THE COURT: Yes.

17 MR. MACKELCAN: Based on the presentation at
18 mediation, I anticipated a lot of that being in the
19 opening. And so, I was wondering if that's something
20 you could look at before.

21 THE COURT: I'm going to, but I hadn't seen them.

22 MR. MACKELCAN: Okay.

23 THE COURT: Now, unless you can as they come in.

24 MR. HOYLE: And your Honor, I'll represent, I've
25 written the opening. I know what I'm going to say. I'm

1 not showing the video from the fire truck. I'm not
2 showing the autopsy pictures at opening. I'm going to
3 show some childhood pictures of my client that Mr.
4 Mackelcan has seen, and some photographs, and an aerial
5 map. I'm not showing anything that anyone needs to have
6 any concern about.

7 THE COURT: All right. Here's what I need you to
8 do during the break, is you reassure Mr. Mackelcan has
9 seen what you intend to show this jury, and be sure
10 there's no objection.

11 MR. HOYLE: Okay.

12 MR. MACKELCAN: And then, the other question was,
13 the second part of beneficiary motion dealt with whether
14 the Plaintiff can present evidence of the damages of the
15 two brothers. I wasn't totally clear that was part of
16 the ruling, as well.

17 THE COURT: Survival, and then, the estate. What
18 about the survival action? would be my response back to
19 you.

20 MR. MACKELCAN: Well, the damages in the survival
21 action are the damages of Justin Miller.

22 THE COURT: Of the estate, right?

23 MR. MACKELCAN: Well, no. The damages are
24 calculated to Justin Miller's damages.

25 THE COURT: Right. Of the estate. His. In other

1 words, the estate stands in his shoes, correct?

2 MR. MACKELCAN: Correct. But what I'm asking about
3 is whether evidence of the grief and sorrow and loss of
4 the brothers, which are the calculation of damages under
5 the wrongful death statute, that is what we had moved to
6 exclude.

7 THE COURT: Yes, I understand. It's excluded.

8 MR. MACKELCAN: Okay.

9 THE COURT: Because those would be the damages of
10 the decedent in the survival action.

11 MR. MACKELCAN: Correct. And I just want to make
12 sure we were clear on that.

13 MR. HOYLE: Your Honor, and just for clarification
14 purposes, because I hope Mr. Mackelcan doesn't stand up
15 a half a dozen times in my opening, I am going to
16 reference the fact that Justin Miller had brothers. I'm
17 not going to talk about the fact that they grieved for
18 their brother's death, but I think I should be allowed
19 to introduce who the decedent was, and who his family
20 was, and where he came from, and those kind of things.
21 Background information for the jury.

22 MR. MACKELCAN: We don't have any problem with that
23 as purely related to the damages.

24 THE COURT: Got you. Okay. Great. Great. You
25 all take ten minutes.

1 OFF THE RECORD 10:41 A.M.

2 BACK ON THE RECORD 10:50 A.M.

3 BY THE COURT:

4 BAILIFF: Thank you so much. Court is now back in
5 session.

6 THE COURT: Thank you so much, and please be
7 seated.

8 MR. MACKELCAN: I've got a copy of Hardee and
9 Dawson, if you want them.

10 THE COURT: Yay, my hero. Thank you. In between
11 Mr. Hoyle and Mr. Mackelcan, you all have got me in good
12 shape. Thank you so much. Both of you. I appreciate
13 it.

14 Who's going to make the opening for the Plaintiff?

15 MR. HOYLE: I will, your Honor.

16 THE COURT: Who's going to make the openings for
17 the Defendant?

18 MR. LOVELL: I am, your Honor.

19 THE COURT: Wonderful. I just -- because I like to
20 tell the jury that. Great.

21 MR. HOYLE: And your Honor, we will be moving --
22 need to move the monitor that's on wheels closer to the
23 jury box, as well as set up some easels, in order to --
24 for my opening. Do you want us to do that now, or after
25 the jury comes in? When do you want us to make those

1 logistical arrangements?

2 THE COURT: Have you seen -- have you all seen
3 everything that they --

4 MR. MACKELCAN: Yes. Yes, ma'am.

5 THE COURT: Anybody got any concerns?

6 MR. MACKELCAN: No.

7 THE COURT: Yea.

8 MR. HOYLE: And we have no concerns with their
9 demonstrative items.

10 THE COURT: Yes, go ahead and do that now. Go
11 ahead and set that up now. And are you going to show
12 the boards? Is that why the boards?

13 MR. HOYLE: I have three boards and a monitor.

14 THE COURT: I need you to do two things for me.
15 Mark the boards for identification purposes, and if you
16 have a tape of what's going to be on the monitor, I need
17 that marked for identification purposes. If not, just
18 get with Wanda at some point and mark it for
19 identification purposes. Okay? Great.

20 MS. CASTLEBERRY: Judge, I have a question. I
21 anticipate that some of the photographs may be sought to
22 be admitted into evidence, so I know there will be some
23 objections. So, we'll just take that as we go along,
24 correct?

25 THE COURT: That's exactly right. That's exactly

1 right.

2 MS. CASTLEBERRY: I definitely wouldn't publish
3 anything. I just would, you know, consult with whoever
4 is going to take that witness, and then, we'll approach
5 and you can --

6 THE COURT: Absolutely.

7 MS. CASTLEBERRY: Okay.

8 THE COURT: Absolutely.

9 MS. CASTLEBERRY: Thank you.

10 BAILIFF: Now, you're going to lose the view of the
11 jury. Is that okay with you?

12 THE COURT: No, it's not, actually. Just move it
13 just a tiny bit. Bing. You're done. That's perfect.
14 That's perfect.

15 Oh, and do we have pen and paper for the jurors to
16 write? Pen and paper.

17 MR. HOYLE: You want me to go sit back up here,
18 Judge?

19 THE COURT: Say what?

20 MR. HOYLE: You want me to go sit back in the jury
21 box?

22 THE COURT: No.

23 MR. HOYLE: Or are you satisfied that you have a
24 view of the panel?

25 THE COURT: Do we have the file from the clerk's

1 office? Do we have the file from this case from the
2 clerk's office?

3 MADAM CLERK: Huh-uh. I can call them.

4 THE COURT: That would be lovely.

5 MADAM CLERK: I'll speak to them about it.

6 THE COURT: Great.

7 MR. MACKELCAN: Your Honor, one additional matter.
8 We've got a motion to bifurcate punitive damages, in
9 addition to the motion for a separate trials, and we
10 didn't talk about that. I wanted to make sure that was
11 --

12 THE COURT: Oh, you stinker, you. I was just
13 thinking about that. Yes, yes. And just wanted -- so,
14 you have done that. Okay.

15 MR. MACKELCAN: We have done that.

16 THE COURT: I understand. Now, how do you perceive
17 that going forward?

18 MR. MACKELCAN: My interpretation is that it's a
19 matter of right, so.

20 THE COURT: It is. It is. It absolutely is.

21 MR. MACKELCAN: I just wanted to raise that,
22 because it hadn't been.

23 THE COURT: I was just looking at your answer.
24 Your answer is that these people don't work for us; and
25 therefore, they work for the government; it's not us.

1 So, what your position is, if there is liability that is
2 found, then, any punitive damages would go forward in a
3 bifurcating manner. Yes?

4 MR. MACKELCAN: Yes.

5 THE COURT: Okay. And your response? It is a
6 matter -- it's the shall. It's the shall.

7 MR. HOYLE: I don't think there's much I think of.

8 THE COURT: It's the shall. Yes, yes, I got it. I
9 was just looking --

10 MR. HOYLE: Elections have consequences, Judge.
11 That's all I'll say.

12 THE COURT: Exactly. But I am so glad you
13 clarified that, because I knew that was a question. I
14 just asked my law clerk.

15 MR. MACKELCAN: And that was why I called the other
16 motion the rule for separate trials, so that they were
17 distinct, but.

18 THE COURT: Perfect. Perfect. Okay. That's
19 correct. All right. So, all right.

20 I want to talk about, as a practical matter, we'll
21 talk about how we do that, on whether or not I charge
22 punitive damages. It wouldn't be my intention to charge
23 punitive damages unless there is a determination of
24 liability, more likely than not, because this is going
25 to be confusing. Because what -- and the reason for

1 that is, that I inject clear and convincing evidence
2 into, then, what would be a liability determination, in
3 an actual damage determination; that the jury we're
4 dealing with, whether or not there is liability, whether
5 or not there are actual damages, so that I would not
6 charge the issue of punitive damages, unless there was a
7 finding of liability (a); and then, actual damages (b).

8 You all understand? I'm sorry I'm barking at you
9 all with my voice. I apologize for the quality of my
10 voice. But that would be my inclination at that point.
11 And the reason that, that's where I am at this point,
12 because when I give them the beginning charge, I talk
13 about the burden of proof. You've got -- you've pled
14 negligence on behalf of third parties.

15 MR. MACKELCAN: Oh, okay.

16 THE COURT: And comparative negligence, which, of
17 course, has a burden of proof that belongs to the
18 defendant. And so, I wanted to be sure that I could --
19 that, as I went through that, to talk about the greater
20 weight or the preponderance of the evidence. And I'm
21 not going to talk to them with regard to clear and
22 convincing evidence until that becomes an issue.

23 MR. HOYLE: And your Honor, just for my
24 clarification, you referenced the Defendant's answer in
25 which the third party, then, the United States of

1 America. The United States of America has been
2 dismissed from this action. There is no pending third-
3 party claim by CasePro, Incorporated, against the
4 government. I just wanted to make sure --

5 THE COURT: Negligence, he raises negligence of
6 third parties. Intervening negligence.

7 MR. HOYLE: I just wanted to tell you.

8 THE COURT: And I'm not going to get into that.
9 I'm just going to put that there are defenses that are
10 raised for which the Defendant has the burden of proof.
11 Only --

12 MR. HOYLE: I was checking.

13 THE COURT: Only as a -- and I do that, only in the
14 context of briefly going over the burden of proof.

15 MR. HOYLE: Thank you, your Honor.

16 THE COURT: So they don't think it's beyond a
17 reasonable doubt, quite frankly. So.

18 MR. HOYLE: I understand everything you just said.
19 Thank you, Judge.

20 THE COURT: Got it. Great. Everybody ready? Can
21 you believe it?

22 MR. HOYLE: Plaintiff's ready.

23 THE COURT: Thank you.

24 MR. LOVELL: We are, your Honor.

25 THE COURT: Thank you. Let me have the jury.

1 BAILIFF: Yes, your Honor.

2 BAILIFF: Are you ready, your Honor?

3 THE COURT: I'm ready.

4 BAILIFFS: All right. Jury's entering the
5 courtroom, your Honor.

6 THE COURT: Thank you.

7 JURY ENTERS COURTROOM 11:09 A.M.

8 THE COURT: Good morning, ladies and gentlemen.

9 RESPONSES FROM JURORS.

10 THE COURT: You hate to begin your good morning,
11 ladies and gentlemen, with an apology, but alas, that's
12 where I find myself, and it's really truthful this
13 morning. Everybody please be seated.

14 First of all, I apologize for keeping you in your
15 jury room. I am absolutely aware of every tick of the
16 clock that you are in your jury room, which is why, when
17 we began yesterday and I said that part of your jury
18 service is going to be cooling your heels, if you'll
19 remember that comment, and that's what that is. And the
20 reason for that, I can assure you, we're not out here
21 telling jokes and having a big time. There are just
22 certain things that I must do.

23 And daggone it, inevitably, it takes me longer than
24 I think it's going to, to take me, and the longer that
25 I've been doing this job, you think it would take me

1 less time, and I always think it's going to take me less
2 time than it does. So, I apologize for keeping you in
3 your jury room while I do the things that I needed to
4 do.

5 So, please know that we are certainly aware -- I am
6 certainly aware that you are in your jury room,
7 hopefully, getting to know a little bit about each
8 other. You might find out you're related by the end of
9 this trial. But we are certainly aware that you are in
10 there. And what we're working on is to try to let me do
11 the work that I must do, and hopefully, to clarify some
12 issues, which will, in the end, perhaps, limit the time
13 that we'll be here together.

14 The second thing that I want to apologize for this
15 morning is my voice. I'm losing it. I don't always
16 sound like this. And I probably shouldn't say this, but
17 I see it as God's message to my husband. When I lose my
18 voice, he's doing what he's supposed to be doing,
19 because twice a year, I lose my voice for three days.
20 It gives him a break. So, in any event, this --
21 apparently, he's been a good man for the first part of
22 the year, because I've now lost my voice.

23 So, ladies and gentlemen, I apologize to you for
24 barking at you, and if you have difficulty either
25 hearing me or understanding me, please do not hesitate

1 to raise your voice, and say, okay, Dillon girl, try
2 that again. Because it is important that you are able
3 to (a) hear -- I'm not working, am I? And (b) --
4 understand what I'm saying to you. So, please keep that
5 in mind. It will not hurt my feelings if you raise your
6 hand and say, I cannot hear you; I cannot understand
7 you. So, please don't hesitate to let me know that.

8 Now, ladies and gentlemen, in just a moment, you
9 are going to be sworn in as a jury in this case. And
10 then, I am going to make some preliminary remarks to
11 you, and we will get right into the trial of this case.
12 At this time, please stand, and raise your right hands
13 to be sworn. Each of you, raise your right hand as you
14 are sworn in as a jury in this case.

15 JURORS SWORN, BY MADAM CLERK:

16 MADAM CLERK: Good morning. Do you solemnly swear
17 or affirm that you shall well and truly try the issues
18 joined in this case, and a true verdict give, according
19 to the evidence, so help you God?

20 RESPONSES FROM JURORS.

21 THE COURT: Thank you. And please be seated. And
22 was there anyone who did not take the oath? Wonderful.

23 GENERAL CHARGE, BY THE COURT:

24 THE COURT: Now, ladies and gentlemen, the case
25 that we're about to try is the case of Rebecca Delaney

1 as the personal representative of the estate of Justin
2 Nicholas Miller, who is the plaintiff, versus CasePro,
3 Inc., who is the Defendant. The plaintiff is the person
4 who has brought the action against a defendant.

5 Ladies and gentlemen, the defendant in this case is
6 CasePro, Inc., a corporation. It is an entity.
7 However, because it is an entity does not mean that it
8 is not entitled to any --

9 BAILIFF: I'm trying to get to the circuit to cut
10 that microphone, so it doesn't back feed, your Honor.

11 THE COURT: Perfect. Thank you.

12 BAILIFF: Sorry.

13 THE COURT: Thank you for your technological
14 brilliance. All right. Thank you. Because I know that
15 was a problem yesterday, so thanks for that very much.

16 BAILIFF: It's quite all right.

17 THE COURT: Because, obviously, I need it right.

18 So, ladies and gentlemen, I've just introduced the
19 case to you. The Defendant is a corporation. Under our
20 law, a corporation is entitled to the same measure of
21 justice, same measure of justice, as would be the
22 natural person. We do not distinguish under our law
23 between entities and natural persons. Each required to
24 and entitled to the same measure of justice as would be
25 a natural person. So, I want to begin with that.

1 Now, ladies and gentlemen, before we begin this
2 trial, I want to tell you that this trial probably will
3 be different from what you might expect. I'm going to
4 ask if you'll just take this board down for me. Hello.

5 Many people do not have the chance to attend
6 actual court sessions, as you are now doing. And they
7 think, from watching television or movies, or reading
8 books, that trials are always full of high drama,
9 intense action, riveting circumstances.

10 I will tell you, ladies and gentlemen, that, while
11 all of these things may be true at times, this trial is
12 not for entertainment. It is a fundamental part of our
13 democracy, a search for the truth, and an effort to make
14 sure that justice is done between the parties before the
15 Court. Search for the truth, and making sure that
16 justice is done is often slow, deliberate, and
17 repetitive, the opposite of what you may have seen on
18 television or on movies, or read in books.

19 Ladies and gentlemen, this courtroom, lo, this
20 courthouse, is a place of honor, dedicated to the
21 protection and preservation of citizens' rights through
22 what many have called, and I submit to you, the greatest
23 system of justice that people have ever created.

24 Ladies and gentlemen, the attorneys appearing
25 before you are advocates for the parties they represent.

1 But before they were ever allowed to represent the first
2 client, they were sworn as officers of the Court, and
3 they are sworn to uphold the integrity and the fairness
4 of our judicial system, and to help you in the search
5 for the truth in their role as advocates for their
6 clients.

7 You should expect them to be professional,
8 competent, and ethical in their representation of their
9 clients' interests. And remember that you have taken an
10 oath to try this case and to reach a fair and just
11 verdict. And you're expected to be professional,
12 reasonable, and ethical.

13 I want to thank you for accepting this most
14 important responsibility of jury service, and for your
15 contributions to our justice system.

16 Now, I want to talk to you about how we're going to
17 proceed. I'll begin by talking to you a little bit
18 about your note keeping, because you probably want to
19 know if you can take notes now, so let's talk about
20 that.

21 Ladies and gentlemen, there is an ongoing debate
22 about the taking of notes. It has been ongoing for as
23 long as I have been a judge, and that's been a long
24 time. And the debate goes like this: there is a
25 concern about note taking, and that concern is that

1 judges and others worry that jurors can miss something
2 as it's coming from the witness stand while they take a
3 note. They can have their attention diverted taking a
4 note, and miss something as it comes from the witness
5 stand.

6 So, I'm going to tell you, do not allow the taking
7 of a note to allow you to miss something as it's coming
8 from the witness stand. I will tell you that listening
9 to the witnesses, observing the witnesses, is more
10 important than the taking of a note.

11 The other criticism, concern, about note taking is
12 that, during deliberation, if one juror has a note, and
13 another juror doesn't have a note, that there can be an
14 undue amount of influence placed upon the note. I'm
15 going to tell you now that your ability to take notes is
16 provided to you, and to you, individually. Your notes
17 are not to be shared with anyone during deliberations,
18 so don't expect you to hold up your notes and say, I
19 must be right, because I got a note. Your notes are
20 for you. For you to choose to take a note or not, take
21 a note, it is solely up to you.

22 Some folks are -- and I'm one of these people. It
23 helps me sometimes to write a word or two, because it
24 aids my concentration. It's easier for me to
25 concentrate if I can write a word or two. And oftentimes,

1 I'll go back and look at my notes, and they're not
2 particularly helpful. The taking of a note or two is
3 only helpful to aid me and assist me in concentration.
4 You use your note pad however it may be helpful to you.
5 There's no requirement to take notes. If you're a note
6 taker, enjoy taking a note. If you are not a note
7 taker, put it down; don't worry about it, because it's
8 there to assist you, if it assists you, and for no other
9 reason.

10 Your notes are to be shared with no one else, and
11 I will tell you that your notes are there to allow you
12 to refresh your recollection, prior to our
13 deliberations, if that's helpful for you.

14 So, I don't want you to feel any pressure to take a
15 note. It is much more important for you to listen to
16 the witnesses, and to observe the witnesses, to listen
17 to the Court, listen to these attorneys, than it is to
18 take a note. It's simply to allow you the ability, if
19 it is of assistance for you to take a note.

20 Now, here's what we're going to do. First, you
21 have a what? A page? Has everybody -- yes. You had,
22 like, a cardboard front. Why don't you turn that over.
23 That's perfect. Now, turn your cardboard front over,
24 and on that very first page, write your juror number.

25 Did we give you the -- did you get the trick pen?

1 You got the trick pen. We can get you another writing
2 implement in here.

3 COURT REPORTER: Tom? Just make sure it works.
4 And it does.

5 THE COURT: Well, better the trick pen than the
6 whoopie cushion, right? Now, thank you for that.

7 If your writing implement stops, we have other
8 ones. If you run out of paper, we have more paper. So,
9 please, just let us know. Just write the juror number
10 on that sheet of paper, and tuck that sheet of paper in,
11 turn it over. Yeah. All right. In other words, when
12 you open your cardboard, you'll see your juror number.
13 You turn that page over, and that will begin your notes,
14 if you choose to take them.

15 Now, every time that we leave each other, you'll
16 leave your notepad in your seat or under your seat,
17 whichever is your pleasure. We will protect them during
18 the breaks. We'll guard them during lunch. We will
19 guard them at the end of the day. You don't take your
20 notepads back and forth with you.

21 Now, what the bailiffs, no doubt, will do is
22 collect them, and return your notepads to you, which is
23 why I wanted you to put your juror number on that sheet,
24 because bailiffs can look at your notepad number, and
25 not look at your notes.

1 Let me share with you what happens to the notes,
2 just so you know. When you have completed your service
3 on this jury, and you've completed your deliberations,
4 if you, at that time, wish to take your notes with you,
5 you just tear them out, and take them with you. That is
6 perfectly fine.

7 If you don't take your notes with you, let me tell
8 you what happens. Your notepads are brought to my
9 chambers, and I take them out, and I tear them up, and I
10 obliterate them, so that no one would see your notes.
11 The reason I mention this to you now is so that you
12 understand that there is anonymity and there is privacy
13 in those notes. I will tear them up myself. They come
14 to me. If you were to take them home, that's perfectly
15 fine. But if you don't, that's perfectly fine, too.
16 They come to me, and I actually, myself, risk the paper
17 cut by tearing them up. So, that's what will happen to
18 your notes. All right.

19 Now, ladies and gentlemen, before this case begins,
20 I want to tell you how we're going to be proceeding.
21 The first thing that will occur is that you're going to
22 hear opening statements from an attorney from each side.
23 You're first going to hear from Mr. Hoyle in his opening
24 statement, on behalf of Ms. Delaney, who is the personal
25 representative of the estate of Justin Nicholas Miller.

1 And then, you're going to hear an opening statement from
2 Mr. Lovell, on the behalf of the defendant, CasePro,
3 Inc.

4 Now, what are opening statements? Well, opening
5 statements are an opportunity for each side to discuss
6 with you what they believe the issues are in this case.
7 They also may want to outline what they believe the
8 testimony will show. They are not arguments. Those
9 arguments will come at the conclusion of the case.

10 The purpose of the opening statement is just as I
11 have explained, to allow each side to introduce their
12 case to you. Once the opening statements are finished,
13 then, each side will have an opportunity to present
14 evidence to you.

15 What is evidence? Well, evidence may take many
16 forms. It will be sworn testimony of witnesses. It may
17 be photographs. It may be diagrams and the like.
18 Ladies and gentlemen, it is so important that you pay
19 close attention to all the evidence that is presented by
20 each side.

21 Ladies and gentlemen, be mindful that evidence
22 comes it one piece at a time, and it is absolutely
23 essential that you pay close attention to all the
24 evidence that is presented by each side.

25 Now, ladies and gentlemen, once the evidence has

1 been received, Plaintiff will go first. The Defendant
2 will have an opportunity to present evidence, and once
3 the evidence is in, then, each side will have an
4 opportunity to present what are called closing arguments
5 to you.

6 Now, those are true arguments, and what I mean by
7 that is, that, each side, no doubt, will emphasize
8 certain portions of the evidence to try to convince you
9 to agree with their version of the facts. I want you to
10 keep in mind, ladies and gentlemen, that what the
11 attorneys say is important, but also keep in mind that
12 what the attorneys say is not evidence. The evidence
13 comes from the sworn witnesses in the case, and from any
14 exhibits which are admitted into evidence.

15 Now, once the arguments are finished, I will
16 explain to you the law which is applicable to this case.
17 You will then retire to your jury room, and you will
18 make the findings of fact. And then, you will take the
19 law and apply the law to those facts. And that is how
20 you will reach is verdict, which will then be a true and
21 just verdict under the oath that you just took.

22 Now, ladies and gentlemen, I want to talk about the
23 burden of proof in this case. The Plaintiff has the
24 burden of proving her claims. The Defendant has pled
25 what are called affirmative defenses, and as to those

1 affirmative defenses, the Defendant has the burden to
2 prove those affirmative defenses. I will be more
3 specific with you when I give you the concluding
4 instruction on the law, but I wanted to explain to you
5 the burden of proof that is applicable in this case.

6 Ladies and gentlemen, you may be familiar with the
7 burden of proof applicable to a criminal case. It seems
8 to be, perhaps, a little more common knowledge in our
9 communities, and that is beyond a reasonable doubt.
10 That is not the burden of proof that is applicable to a
11 civil case, and this is a civil case.

12 The burden of proof that is applicable in a civil
13 case is by the greater weight or the preponderance of
14 the evidence. By the greater weight or the
15 preponderance of the evidence, and I'm going to explain
16 that to you in three different ways. The first way that
17 I'm going to tell you is with words, and I will tell you
18 that, if you are considering an issue, if it is more
19 likely true than not true, if it is more likely true
20 than not true, the preponderance has been met.

21 I'm going to give you two visual examples about
22 what we mean when we talk about the greater weight or
23 the preponderance of the evidence. I want you to
24 imagine the set of scales, and as you are considering
25 Plaintiff's claims and the Defendant's defenses, as you

1 consider each, if those scales should remain evenly
2 balanced, or tip in favor of the opposing side, then,
3 the side who is propounding, either the claim or the
4 defense, will have failed to meet her or its burden of
5 proof.

6 If, however, when you're considering the
7 Plaintiff's claim or the Defendant's defense, if the
8 scale should tip ever so slightly in favor of the claim
9 or affirmative defense, then, the Plaintiff or the
10 affirmative defense will have met their burden of proof.

11 Ladies and gentlemen, thirdly, if you are
12 considering Plaintiff's claim, I want you to imagine for
13 the claim a football field of evidence. It's great
14 during football season, because I can do this. Anything
15 beyond the 50-yard line, the preponderance has been met.
16 Imagine the affirmative defense for the Defendant.
17 Football field. Anything beyond the 50-yard line of
18 evidence, the preponderance has been met.

19 The effect of that, I will give you more
20 instruction when I give you the concluding instruction,
21 but I did want you to understand what we mean by the
22 burden of proof is by the greater weight or the
23 preponderance of the evidence.

24 Now, ladies and gentlemen, I want to talk a little
25 bit about our duties, because we have different duties.

1 You are the finders of the facts in this case. You're
2 the judges of the facts. Ladies and gentlemen, no one
3 else will be permitted to weigh the evidence in this
4 case and to render a decision about what the facts are
5 in this case but you. You are the sole, you are the
6 only, you are the exclusive judges of the facts.

7 The facts as deemed by a trial jury, as determined
8 by a trial jury, are the facts for all time, because
9 under our system of justice, there's ordinarily no way
10 to correct an erroneous determination of the facts by
11 trial jury. Those are simply the facts for all time.

12 So, if I do anything, or I make any gesture, or I
13 say anything that you think may be indication of an
14 opinion regarding the facts by me, I'm going to ask you
15 at this moment, please disregard it, because it's
16 unintended. Ladies and gentlemen, the law does not
17 allow me to have an opinion regarding the facts. I
18 don't have an opinion regarding these facts. That is a
19 matter solely for you to determine.

20 So, if I do or say something with regards to the
21 facts, and you think that I've done, please disregard
22 that, because I can assure you, it's unintended, because
23 I don't have an opinion regarding these facts. The law
24 doesn't let me have an opinion. I don't have an
25 opinion. So, if I've done something or said something,

1 please disregard that, because it's certainly
2 unintended.

3 Now, ladies and gentlemen, it is my duty to
4 determine the law applicable to this case. I'm the
5 judge of the law in this case. That's my duty. If you
6 came into court, and you had an opinion regarding what
7 the law is, or what it ought to be, and it should differ
8 from what I tell you the law is, well, maybe you want to
9 have a conversation with your legislator at some point
10 in the future, but for our system to work correctly, you
11 must accept and you must apply the law exactly as I
12 state it to you.

13 I cannot tell you what the facts are, and you
14 cannot disagree with me about what the law is. You must
15 accept it, and apply it exactly as I state it to you.
16 And again, the way that, that would work is that, once
17 you have this case for your deliberation, then, you'll
18 make the determination of fact. You'll make findings of
19 fact, and you'll take the law as I give it to you, and
20 you'll apply it to those facts. And that is how you
21 will render your verdict.

22 Now, again, if you came into court with a
23 preconceived idea about what the law is, you are, by
24 your oath, now obligated to abandon that preconceived
25 idea, because you must accept the law as I give it to

1 you.

2 Now, how does that work during the course of the
3 trial? I'm going to talk to you a little bit about
4 that, simply so you'll understand what is happening.
5 Ladies and gentlemen, no doubt, at some point during
6 this trial, you're going to hear these lawyers say,
7 objection, and I want to explain to you what is
8 occurring.

9 You now know that a trial is an organized activity.
10 As in sports or business, or any other structured
11 activity, there are certain rules that both sides must
12 obey when presenting evidence. These rules have a
13 purpose. The purpose is to ensure that the information
14 that you receive is the most trustworthy and reliable
15 information that's available.

16 Our rules of evidence cover the presentation of
17 information to a trial jury. These lawyers are
18 obligated, under those rules of evidence, to call a
19 possible violation of the rules to my attention. It is
20 their duty. And because it is their duty, you must not
21 hold an attorney's objection against his or her client;
22 nor should you conclude, from my ruling on the
23 objection, that I favor one side or the other, because I
24 can assure you, I do not.

25 It is my duty to rule on the admissibility of

1 evidence. So, if you hear one of these lawyers say
2 objection, what that does is, that says to me that I
3 must determine the admissibility of evidence. In other
4 words, is that piece of evidence, that piece of
5 testimony, piece of evidence, admissible at all, or not.

6 But ladies and gentlemen, once it is admitted,
7 whether or not you believe it, the weight you give to
8 it, and the inferences that you draw from it are a
9 matter solely for you to determine.

10 These attorneys will say, objection. They also may
11 say, your Honor, we have a matter of law; or they may
12 say, your Honor, may we approach. I want you to know
13 that, when they say objection, I very well may be able
14 to rule on the objection; I'll know the basis for the
15 objection and make a rule on it. If I overrule the
16 objection, that means I don't think that there's been a
17 violation, and that bit of testimony or evidence can be
18 received. If I say that the objection is sustained,
19 that means that bit of testimony or evidence cannot be
20 received in the fashion or form in which it is being
21 offered.

22 Now, ladies and gentlemen, if I ask the lawyers to
23 approach, or, if I, from time to time, need to ask you
24 to exit the courtroom so that I can hear a matter
25 outside your presence, what I'm doing is that, I may

1 need to hear a word or two from the lawyers, or perhaps
2 a little more from the attorneys, to allow me to rule on
3 the admissibility of that evidence.

4 No one's trying to keep anything from you. It's
5 simply to allow me the ability to hear a little bit from
6 the lawyers, and I wouldn't want anything that I might
7 say in ruling on the admissibility of evidence to be
8 construed by you as a comment on the facts. So, that's
9 the reason that I'll ask them to approach, or,
10 occasionally, may need to ask you to step to your jury
11 room. It is just to give me the space, the ability, to
12 do the work that I must do.

13 Now, ladies and gentlemen, with regards to our
14 presiding juror, I want to talk just a little bit about
15 your duties. They are very simple. They are very
16 simple. They're very limited, and I don't intend to
17 give to you control over the jury, or control over the
18 jury's deliberation or consideration. They're very,
19 very limited.

20 It's just that, in the event that the jury needs to
21 communicate with me, for example, it's too hot, it's too
22 cold, we're having trouble understanding you, we're
23 having trouble hearing, that somebody is designated to
24 write it down, and give it to one of our bailiffs, to
25 give it to me. It's pretty simple. It's just to be

1 sure that, during the deliberations, that just everybody
2 -- somebody has to say, okay, anybody else have anything
3 to say; has everybody had an opportunity to say what
4 they need to say. And somebody's got to be the
5 scrivener. Somebody has to write.

6 So, rather than -- it is just to allow some order
7 as to those very simple matters. It isn't beyond that.
8 It isn't to give to the presiding juror any kind of
9 control over the jury or the jury's activities or the
10 jury's deliberation.

11 However, however, it is important that you remember
12 that you are, during the course of this trial, not to
13 talk about this matter, not to discuss this matter with
14 anyone, to include your fellow jurors. You are not to
15 talk about this case or anyone who has anything to do
16 with it, until I specifically say it is time to begin
17 your deliberations.

18 You must rest assured that you will know, without a
19 shadow of a doubt, that the time for you to talk about
20 this matter has come, because I'm going to tell you that
21 the time to begin your deliberations has come. I will
22 be specific. I will be clear. Until that time has
23 come, you must not discuss this case, or anyone who has
24 anything to do with it, with your family, your friends,
25 or your fellow jurors.

1 You must not discuss this case with anyone, and you
2 must not do any kind of investigation. You must not
3 visit the Internet. You must not do any kind of
4 investigation. You must not read anything. You must
5 not listen to anything about this case that might be in
6 the news, on the radio, television, or on the Internet,
7 or in the newspaper.

8 Ladies and gentlemen, it is absolutely critical
9 that you receive all of the information for which you
10 will make up your minds here in Court, while Court is in
11 session. In fact, should anyone try to talk to you
12 about this matter, to include your fellow jurors, I ask
13 you to get their name or a description, if it's somebody
14 that you don't know, and you can't get their name, and
15 report that to me upon your return to the courthouse,
16 and I will deal with that individual.

17 Now, ladies and gentlemen, I finally urge you to
18 pay close attention to these witnesses. Listen to them,
19 observe them. Please do not let your thoughts wander,
20 so that, at that conclusion of all the evidence and the
21 arguments of counsel and my charge on the law, you will
22 be prepared to deliberate, and to take the law as I give
23 it to you, and apply it to the facts as you find them to
24 be, and thus, render a truly just verdict.

25 And lastly, ladies and gentlemen, if you are a

1 person who concentrates with your eyes closed, in that I
2 don't know you very well, and I don't know that you are
3 concentrating with your eyes closed, I may think, and
4 I'm sure wrongfully, that you are sleeping. I know none
5 of you would do that.

6 So, so that I don't make that error, I'm going to
7 ask you to please listen with your eyes, concentrate
8 with your eyes open, so that I will not make that
9 mistake that you are sleeping. Because if you are
10 concentrating with your eyes closed, and I misconstrue
11 that you are sleeping, it would be necessary for me to
12 take action to be sure that you're awake and not asleep.

13 Ladies and gentlemen, in order to preserve
14 everyone's rights, I will now turn to these parties, and
15 see if they have any additional objections to my opening
16 remarks. From Plaintiff?

17 MR. HOYLE: None from the Plaintiff.

18 MR. MACKELCAN: None at this time, your Honor.
19 Thank you.

20 THE COURT: Very well. Ladies and gentlemen, I ask
21 that you please draw close as we listen to the opening
22 statements of our attorneys.

23 Mr. Hoyle.

24 MR. HOYLE: May it please the Court, your Honor?

25 THE COURT: Yes, sir.

1 OPENING STATEMENT ON BEHALF OF

2 THE PLAINTIFF, BY MR. HOYLE:

3 MR. HOYLE: Picture in your mind two brothers.

4 Young men, inseparable, both created in the image of
5 their Maker, and both living a life that, despite
6 challenges, have lived together at the Stewart Town
7 Apartments in Port Royal, and Hunting Island State Park,
8 at the Beaufort County Public Library.

9 February 24, 2012, begins like any other Friday.
10 Tonight is going to be movie night in front of the T.V.
11 Justin, the younger of the two, his mother's middle
12 child, will make dinner. The weekend will have
13 activities at church. They talk about World of Warcraft
14 and model trains. Christopher, the oldest, complains
15 that they're out of Captain Crunch.

16 The two brothers, both of whom live in an apartment
17 by themselves, walk everywhere. In fact, they walk
18 several miles each day. February 24, 2012 is no
19 exception and like any other day, until a few minutes
20 after 4:00 o'clock in the afternoon, when tragedy
21 strikes, because a doctor and two nurses didn't do what
22 they should have done. The evidence will show that the
23 doctor and the two nurses should have used common sense.

24 Let me back up. While Justin and Chris were out
25 walking that day, visiting the library, going into town,

1 not that far away, another young man was not having a
2 good day. In fact, he had recently not had many good
3 days at all. Calvin Hunt, a young man from South
4 Carolina, who had enlisted in the Marine Corps following
5 high school graduation, and subsequently had gotten into
6 some trouble, was living here in Beaufort County, living
7 with his mother and other families.

8 Calvin's family became concerned. They were
9 worried about him, because he had quit taking his anti-
10 psychotic medication, and he wasn't acting right.
11 Arrangements were made for Calvin to go the Naval
12 Hospital here in Beaufort. He arrives around 2:00
13 o'clock in the afternoon on that Friday with a family
14 friend, 59-year-old gentleman named Edward Ray, who
15 worked for the County as a Veterans Affairs officer.
16 The two men arrive at the base, go into the Naval
17 Hospital, and they go upstairs.

18 You'll hear testimony from a lady by the name of
19 Koren Pope. Ms. Pope has trouble finding Calvin Hunt in
20 the computer system, so she calls one of her colleagues,
21 a nurse, Sandra Smith, who also lives here in Beaufort
22 County. And Ms. Sandra Smith asked Mr. Ray and Mr.
23 Hunt to come on back to her office.

24 Now, Ms. Smith, who is a registered nurse, doesn't
25 have any trouble finding Calvin Hunt in the computer

1 system. She's able to pull up his records, and she's
2 able to see some of the medications that he needs to
3 have refilled. But it's a Friday afternoon, and in this
4 part of the Naval Hospital, which is essentially the
5 family practice part of the hospital, they call it the
6 Medical Homeport, there's not a doctor. There's not a
7 doctor present, so there's nobody to write a
8 prescription that day.

9 Nurse Saundra Smith offers to make Mr. Hunt an
10 appointment, so that he can come back on Monday; and she
11 also says that, if he wants to get his prescriptions
12 refilled that day, that he can go downstairs to the
13 emergency room.

14 As they work through the logistics of making that
15 appointment for the following Monday, Calvin Hunt, this
16 young man, let's out a sign. And Nurse Saundra Smith, a
17 trained, registered nurse, has some concern. And you'll
18 hear her testimony, perhaps even later today, about what
19 she did in response.

20 In response to that concern, she asked him a
21 question, because she wanted to know if he was okay. In
22 response to that question, Calvin told her that he had
23 thoughts of killing himself. Immediately, Ms. Smith, a
24 registered nurse, who, without question, is a civilian
25 employee of the Department of the Navy, walks Mr. Hunt

1 and Mr. Ray downstairs, to the emergency room.

2 But the emergency room is a little bit of a
3 different creature than the Naval Hospital. The
4 evidence will show that the E.R. at the Naval Hospital
5 in Beaufort, back in 2012, had been outsourced, and the
6 doctor and the nurses who were there that day were
7 actually getting their paychecks from a company called
8 CasePro out in Texas.

9 For almost two hours, Calvin Hunt, this young man
10 who enlisted in the Marine Corps, had gone off overseas,
11 in service to his country, is the only patient, the only
12 patient, in what one of the witness you will hear from
13 will describe as an itty-bitty emergency room. It's got
14 four beds in it. You're just separated by a curtain.
15 And if you were to imagine in your mind's eye, the left
16 portion of the gallery of this courtroom, essentially,
17 from where the rail at your jury box ends, all the way
18 to that wall, back there by the window, that's about the
19 size of the emergency room.

20 In fact, you'll hear testimony from one of these
21 witnesses that, if somebody in one part of the E.R. were
22 to sneeze, somebody in a different part of the E.R.
23 could say bless you. It's that small.

24 Working in the emergency room that day was one
25 medical doctor, just one, and two registered nurses.

1 About 30 minutes after Calvin's brought down to the
2 emergency room, the one doctor who's there goes and
3 talks to him. The doctor writes in the medical records
4 that Calvin, to him, appears to be disoriented. And
5 importantly, he also writes in the medical records,
6 that, by his own admissions, Calvin told him that, not
7 only did he have suicidal thoughts, he also had
8 homicidal thoughts.

9 That's right. On February 24, 2012, while two
10 young men named Justin and Chris were out walking the
11 streets in Beaufort County, a young man named Calvin
12 told a doctor in an emergency room right here in
13 Beaufort County, that he had thoughts of hurting other
14 people.

15 Now, despite the fact that Calvin is the only
16 patient in this itty-bitty E.R., the doctor, Dr. Jansen,
17 who gets his paycheck from a company in Texas, Dr.
18 Jansen does not order his nurses to call security, keep
19 Calvin within their line of sight, or to prevent Calvin
20 from leaving, even though he knows that he has, in his
21 emergency room, a United States Marine, with all of the
22 training that goes along with that, who's off his anti-
23 psychotic medication, who has thoughts of hurting
24 others.

25 During this almost two hours that Calvin sits there

1 as the only patient, the doctor, Dr. Jansen, calls
2 another physician on the telephone, a psychiatrist by
3 the name of Beverly Hendelman. Dr. Hendelman doesn't
4 get her paycheck from a company in Texas. She gets her
5 paycheck from the U.S. Treasury. And Dr. Hendelman
6 tells Dr. Jansen on the telephone that it's obvious that
7 Calvin needs to be admitted. Obvious. Dr. Jansen even
8 writes that down in the records that, that's what Dr.
9 Hendelman told him, that it was obvious.

10 Despite all this, as the clock nears 4:00 o'clock
11 in the afternoon, one of the E.R. nurses, a gentleman
12 that you'll see on this witness stand, Joe McDonald, who
13 also gets his paycheck from a company out in Texas, gave
14 Calvin and the man who brought him, Edward Ray,
15 permission to leave. The evidence will show, you'll
16 hear this testimony from Joe McDonald himself, that he
17 was asked, can we get some fresh air. To which he
18 responded with a single word: yes.

19 Now, I suspect many of you know where the Naval
20 Hospital is, but for those of you that don't, this is an
21 aerial view of the Naval Hospital. It's a pretty big
22 complex, and the emergency room sits on the first floor
23 roughly in here.

24 This is Ribaut Road, a road that many of you
25 likely travel on as part of your daily lives. And over

1 here, less than a tenth of a mile away from the Naval
2 Hospital, sits an apartment complex, an apartment
3 complex named -- that's the Laurel Hill Apartments.

4 The evidence is going to show, ladies and
5 gentlemen, that, shortly after Joe McDonald gave Calvin
6 Hunt permission to walk out of the emergency room and
7 walk out of the Naval Hospital, that Calvin Hunt began
8 disrobing, taking his clothes off; and then, he ran from
9 the outside of the Naval Hospital to the Laurel Hill
10 Apartments.

11 At the Laurel Hill Apartments, there was a medical
12 emergency. The Laurel Hill Apartments, you see, are
13 apartments for senior citizens, and on that day, there
14 had been a medical emergency, a 911 call made, because
15 somebody, an older gentleman, had fallen out of the bed,
16 and his wife wasn't able to get him up.

17 And the way it works in Beaufort County is that,
18 sometimes, an ambulance will respond when there is a
19 medical emergency, but oftentimes, firefighters can get
20 there quicker. And on this day, a fire truck was
21 dispatched to the Laurel Hill Apartments, so that those
22 brave firefighters, using their EMT training, could tend
23 to the man who fell out of his bed. That man would
24 later die that day.

25 Calvin Hunt, by the time he gets from there to

1 here, is completely naked; climbs into the fire truck;
2 and he proceeds to leave the Laurel Hill Apartments and
3 travel on Ribaut Road. He's going to travel down Ribaut
4 Road in the direction of Parris Island. And then, at
5 some point, dramatically, he's going to make a u-turn in
6 a fire truck, and he starts back up Ribaut Road the
7 other way. And along the way, he's going to strike
8 numerous vehicles. He's not accidentally hitting these
9 vehicles, ladies and gentlemen. These are intentional
10 acts.

11 As he makes his way up Ribaut Road, the Highway
12 Patrol will later estimate he was driving in excess of
13 50 miles an hour in a fire truck. And he comes back up
14 Ribaut Road, and he gets near a location that some of
15 you all may be familiar with. We'll talk about it more
16 as it goes on. It sits in between the Dollar General
17 and the bowling alley on Ribaut Road. And the fire
18 truck's all the way over here, in the right-most lane of
19 travel, and it begins to turn. The reason it begins to
20 turn is because there's two boys, two young men, Justin
21 and Chris, walking down the road.

22 All of that happens less than 20 minutes. About
23 the time it takes to cook grits, after Nurse Joe
24 McDonald said yes, Justin Miller is dead. His older
25 brother, Christopher, who's with him, screams in horror.

1 The evidence is going to show in this case, ladies
2 and gentlemen, that this harm should never have
3 happened, because a person presenting to a doctor with
4 thoughts of hurting others, with a history of depression
5 and suicidal thoughts, needs to be admitted and kept
6 under close watch until that can happen. The evidence
7 will show you this is especially true that these
8 concerns are by the patient's own admission.

9 In other words, if someone has thoughts of hurting
10 others, the concern is self-explanatory, common sense.
11 As Dr. Hendelman told Dr. Jansen, it is obvious that a
12 person who says he wants to hurt others is in need of
13 hospitalization and supervision. Obvious means obvious.

14 In this case, the defendant on trial is not the
15 United States Navy. The defendant is not Calvin Hunt.
16 The defendant is a company from Texas called CasePro,
17 Incorporated. And although diversified, this company's
18 primary business is providing personnel to staff U.S.
19 military clinics that the government has decided to
20 outsource.

21 Now, one of CasePro's defenses in this case is
22 that Dr. Jansen and the two nurses that Dr. Jansen was
23 working with that day were not really their employees,
24 and that they should be cleared of liability.

25 The evidence will show, however, that, for each of

1 the three persons in the E.R., Dr. Jansen, Nurse Joe
2 McDonald, Nurse Janice McDonald, that CasePro reviewed
3 their applications for a job in this outsourced E.R.;
4 that CasePro reviewed the qualifications and credentials
5 of these three persons; that CasePro hired each of the
6 three and gave them an employee handbook; made them sign
7 a bunch of company policies, like a drug use and alcohol
8 use policy, a sexual harassment policy. Any of you all
9 who have ever had a job know what that is.

10 The evidence will also show that CasePro determined
11 how much money Dr. Jansen and the two nurses were going
12 to make. Determined how many days off they're going to
13 have; how many weeks of vacation they were going to
14 have. How much they were going to contribute as a match
15 to 401(k).

16 CasePro out in Texas actually issued a paycheck
17 every pay period to Dr. Jansen and these two nurses;
18 made deductions for Social Security, FICA; and issued
19 them a W-2 every January. They even provided the
20 Workers' Compensation insurance in case they got hurt on
21 the job.

22 In addition, CasePro actually scheduled when and
23 how often these people were going to work. Whether or
24 not they were working on a Tuesday or a Thursday, that,
25 that was a decision made out of Texas. That's what the

1 evidence is going to show.

2 In addition, the evidence will show that CasePro
3 determined any pay raises these three folks got, whether
4 or not their benefits were going to change. And most
5 important, the evidence is going to show that CasePro
6 had the ability to fire Dr. Jansen, Nurse Joe McDonald,
7 or Nurse Janice McDonald, if he or she was not up to
8 par.

9 Now, in this community, here in Beaufort County,
10 CasePro had a contract for several years to provide one
11 medical doctor and two registered nurses for each hour
12 of the day that the emergency room was open at the Naval
13 Hospital in Beaufort. In other words, that's 24/7, 52.

14 If someone went into the emergency room at 2:00
15 o'clock in the afternoon, 2:00 o'clock in the morning,
16 they were not going to be treated by somebody wearing a
17 military uniform who was a doctor or nurse, but rather
18 an employee of CasePro.

19 The evidence will show, though, that, in 2010, some
20 two years earlier, some two years prior to this tragedy
21 that brings us here today, some two years prior to that
22 fateful Friday, the commanding officer, commanding
23 officer, the high-ranking military official of the Navy
24 base, wanted a doctor gone, wanted him fired. And that
25 doctor was Dr. Jansen. But Dr. Jansen didn't wear a

1 uniform. He wasn't in the Navy. He didn't have to
2 return a salute. Instead, he got his paycheck from
3 CasePro, and a CasePro CEO made the decision not to fire
4 him, despite the commanding officer's concern.

5 Now, following Justin's death on that fateful
6 Friday, and CasePro being served with this lawsuit, all
7 the way back in November of 2012, you may wonder whether
8 or not CasePro acknowledged a mistake, said that its
9 doctor messed up, or accepted responsibility. Well,
10 obviously, folks, here we are. And ladies and gentlemen
11 of the jury, I submit that, that's exactly what
12 courthouses are for.

13 If you go back in history some 800 years, where
14 water met on side the River Thames in England, King John
15 of England agreed to a list of freedoms that were going
16 to be protected. Among those rights protected forever
17 was the right to a trial by jury.

18 You know, I took my boys, who are four-and-a-half
19 and sixteen months to Charlestown Landing two weekends
20 ago, before the floods. And it was interesting to go
21 out there and see where the English first came to South
22 Carolina in 1670.

23 I learned a few things. I learned that, when they
24 came over here, to what we now know as South Carolina,
25 they brought with them 23 cannons, and apparently, five

1 or six cats. But they also brought with them those
2 lists of freedoms that King John had agreed to several
3 hundred years earlier in England. And actually, if you
4 were to look at our *Constitution* today for South
5 Carolina, you would see words about a right to trial by
6 a jury that word-for-word from the *Magna Carta*. And I
7 think that's remarkable, because this is a tradition
8 that you all have embarked upon that dates back 800
9 years. So, let me say thank you to each and every one
10 of you.

11 I would respectfully submit that there is no
12 greater service that you can perform on behalf of your
13 community than being a part of this tradition of juries
14 deciding disputes, in which the least powerful among us
15 can seek amends for wrongs done by even the most
16 powerful. And that is the case here.

17 I know that yesterday was exhausting, ladies and
18 gentlemen, but I hope that you can tell by all of the
19 questions yesterday and the attention that you were
20 paid, that this is a significant, important case, not
21 only for Justin's family and for CasePro, but for this
22 community, which, for almost three years, actually, over
23 three years, has wanted questions about how and why this
24 tragedy happened.

25 Now, as this trial continues, ladies and gentlemen,

1 you will hear much evidence, and you should remember the
2 words of the Judge of what is said by me and Mr. Lovell
3 making a statement is not evidence. And I'm going to go
4 ahead and warn you, there's going to be a lot of
5 evidence. Some of that evidence will come from
6 witnesses that testify live on that witness stand. Some
7 of the evidence will come from witnesses who are
8 testifying because of where they are or who they work
9 for, by videotaped deposition, on television screens.
10 And there will also be photographs, documents, and
11 perhaps, even some videos that you will see and
12 consider. There will also be other evidence in this
13 case.

14 I will respectfully submit, ladies and gentlemen,
15 that I fully anticipate that the lawyers on the other
16 side will talk to you, not just about what happened in
17 the emergency room that day, but they may also talk
18 about Justin and his family.

19 As I mentioned earlier, at the beginning, both
20 Justin and his older brother Christopher had some
21 difficulties. Both of them were young adults living
22 independently, living together. The both of them on the
23 autism spectrum. These two young men also have a
24 younger brother, Donovan Delaney, who also is on the
25 autism spectrum. This is a family who has a number of

1 challenges.

2 You will hear some evidence in this case about the
3 mother, Rebecca Delaney, my client, who's sitting right
4 here, who, herself, has had a number of health issues, a
5 number of surgeries, and who, herself, is also disabled.
6 But I don't want you to get distracted by any of that.
7 I don't want you to take your attention away from
8 anything that tries to confuse you or lead you away from
9 what one doctor and two nurses did on that fateful
10 Friday.

11 As the Judge told you, as part of your service, you
12 are going to have to determine this case by the
13 preponderance or the greater weight of the evidence,
14 meaning whether or not it is -- imagine those scales,
15 whether or not it is ever so slightly more likely than
16 not. Or to use the Judge's football analogy, whether or
17 not the nose of the football breaks the plane of the 50-
18 yard line. You, and you alone, will determine whether
19 or not the persons who knew the most about Calvin Hunt
20 on February 24, 2012 were negligent, and whether or not
21 that negligence was a cause of Justin's death. In other
22 words, ladies and gentlemen, each of you, collectively,
23 are going to decide whether some good, old-fashioned
24 common sense could have prevented this tragedy.

25 I respectfully ask that you pay good attention,

1 listen to all the evidence, and know that I will talk to
2 you again at the end of this trial. But until then, I
3 want to reiterate, this is a lawsuit not about a naked
4 man, not about a fire truck. This is a lawsuit about
5 common sense, a lawsuit about how we treat our service
6 members. A lawsuit about how we treat the mentally ill.
7 This is a lawsuit about responsibility. Tragically,
8 this is a lawsuit about those who failed to care for
9 service members and needlessly endangered the public.
10 The result in this case, like so many others, was the
11 death of an innocent person.

12 MR. HOYLE SHOWING PHOTOGRAPHS TO JURY.

13 MR. HOYLE: This tragedy shouldn't happen to a
14 pedestrian along Ribaut Road. It just shouldn't. Not
15 in your community. Because all a nurse had to do was
16 say no, instead of yes.

17 THE COURT: Thank you, Mr. Hoyle. Mr. Lovell?

18 MR. LOVELL: Thank you, your Honor.

19 THE COURT: Yes.

20 OPENING STATEMENT ON BEHALF OF

21 DEFENDANT, BY MR. LOVELL:

22 MR. LOVELL: Good morning.

23 RESPONSES FROM JURORS.

24 MR. LOVELL: On behalf of CasePro, I want to thank
25 you for the time you spent yesterday and the time you're

1 going to spend with us for the rest of the week.

2 This case is about a little more than just common
3 sense. And the Judge is going to tell you, as we get to
4 the end of the case, she's going to instruct you on the
5 law. But I want to point out a couple things I'd like
6 for you to focus on. Excuse me. Let me get my flip
7 chart.

8 Unfortunately, I'm not a very high-tech lawyer.
9 So, I like the charts and documents, and I want to talk
10 to you about a couple things. As we go through this
11 case, there are really four points I'd like for you to
12 think about. The Plaintiff has pled in this case that
13 this is a case of, he calls it, common sense, of
14 ordinary negligence. But as you go through the case, I
15 believe the evidence will show you that this case is not
16 really about that.

17 This is a case about medical care rendered by
18 medical professionals in assessing a patient who
19 presented to them, and their assessments are judged in
20 the condition the patient that day with the information
21 they have. So, as you listen to the evidence, ask
22 yourself, has the Plaintiff really met their burden of
23 proof; have they proven what they've set out here. Is
24 this really just an ordinary care case, or is this
25 something more that required more from these physicians

1 than just what you or I or lay people walking in off the
2 street could do in judging this patient.

3 Secondary, I want you to focus on, are the signs
4 and symptoms that were present with Calvin Hunt when he
5 was in front of Nurse Janice McDonald, Nurse Joe
6 McDonald, Dr. Jansen; even when he was in front of the
7 Psychiatric Tech Manning, who came and saw him in the
8 E.R.; or even the signs and the symptoms that Dr.
9 Hendelman had, the psychiatrist who assessed him,
10 really, by phone, she wouldn't come down to the E.R. at
11 Dr. Jansen's request.

12 But also, as you go through, look very carefully at
13 what symptoms were not present; that he did not tell any
14 of these four, five providers, I have a plan to hurt
15 myself; I have a plan to go hurt someone else.

16 You'll hear the testimony about what he told each
17 of these people, and I ask that you listen very
18 carefully on that, because it's an important issue as
19 these professionals are assessing this patient.

20 Another thing that's a part of this case that we
21 have to take into consideration is a little bit of how
22 the medical care facility that he's at has to act with
23 regard to the patient, Mr. Hunt. You know,
24 unfortunately, patients have rights, too. You can't
25 just put them in handcuffs the first time they say I've

1 had thoughts of hurting myself; maybe in the past I've
2 had thoughts of hurting others, but I don't have a plan.
3 You can't put them under medical restraints or physical
4 restraints. Until you've had a chance to have them
5 assessed fully, have discussions with them about it, you
6 can't do that. Patients' rights come into this, and
7 you'll hear more about that as the trial goes along.

8 And the other issue that I ask that you to consider
9 as you go about -- and this is something at the end of
10 this trial I anticipate the Judge will talk to you
11 about, and it's a legal issue. It's a legal concept,
12 and it's what is foreseeable. I call it foreseeability,
13 to make it into one word. What is the normal and
14 natural things that you would expect to occur when faced
15 with a patient like this, who comes in with the signs
16 and symptoms that he presents with, and things that he
17 doesn't present with. What are the reasonably
18 foreseeable things that might happen?

19 At the end of this case, when we do our closing
20 argument, you'll hear us say on this issue here, from
21 the testimony -- you'll hear from every healthcare
22 provider, Ms. Pope; Ms. Smith, Nurse Smith; Nurse Janice
23 McDonald; Nurse Joe McDonald; Dr. Jansen; from Mr.
24 Manning, the psychiatric tech; and even Dr. Hendelman --
25 the one thing that's not foreseeable is what happened in

1 this case; that a guy who was in the hospital
2 voluntarily; who came on his own free will, with Mr.
3 Ray, who is a friend of his family; seeking a medication
4 refill; that gentleman who stays in the medical clinic
5 with Ms. Pope and with Ms. Smith, voluntarily, the
6 evidence is going to show you the time frames. I ask
7 that you listen to those. When they talk to him -- and
8 you'll hear the testimony of Ms. Smith about how she
9 elicited from Mr. Hunt this idea that he had thoughts of
10 hurting others. It didn't come out with him coming in
11 and saying, you know, I'm thinking about hurting others.
12 You'll hear the testimony. But listen to that
13 carefully.

14 But when she heard him say that, after she had
15 talked to him about filling medications and getting an
16 appointment for Monday, once that happened, she said,
17 you know, that clicked something in the Naval Hospital,
18 at this point, you're going to the E.R. to be evaluated,
19 because something's not right.

20 Well, Mr. Hunt and Mr. Ray, who were there
21 together, walked calmly down with Ms. Smith to the E.R.
22 You'll hear testimony that he was in the E.R.
23 voluntarily, with Ms. Janice McDonald, the triage nurse.
24 You'll hear her tell you about how she observed him that
25 day.

1 And one thing you're going to see, and you'll get
2 tired of looking at it by the end of the trial, are a
3 bunch of medical records. And you will have the
4 originals with you, when you go deliberate. You'll have
5 a triage sheet from Nurse McDonald, and I ask that you
6 look at the things that she's listed on here. Now,
7 she's given history when the patient comes in from
8 Saundra Smith, the clinic nurse, that he has had
9 suicidal ideations. What's not present - plan, active
10 plan. She gets a history. Also, he's got some alcohol
11 and drug dependence, depression. He's got post-
12 traumatic stress disorder.

13 So, she knows at this point this is someone I'm
14 going to triage in my E.R., and I'm going to get him to
15 an E.R. doctor as soon as I can. He came in to her at
16 about 2:17. She takes the medical history. And she'll
17 tell you about her ability to communicate with Mr. Hunt,
18 but he was communicative with her. He could tell her
19 about certain parts of his medical history; that he
20 smoked; he had depression; some medications he was on.

21 She'll tell you when she saw him, he looked alert;
22 he was oriented to person, place, and time. You'll hear
23 all these things, and the reason that I point them out
24 in opening, ladies and gentlemen, as you listen to the
25 testimony, think about what the providers, the nurses,

1 and the doctors that were seeing this gentleman at the
2 time were faced with. Was it foreseeable this patient
3 with these signs and symptoms was going to go do what he
4 did ultimately?

5 This is the second page of the triage note. You'll
6 again see the nurse's comments:

7 *He's alert; oriented to place and time;*
8 *his speech is clear.*

9 Again, signs and symptoms that aren't present:
10 he's not agitated; he's not combative; he's not
11 uncooperative.

12 You'll see all this evidence. I ask that you
13 listen very carefully to the testimony and to the
14 statements from the nurses when they talk to you about
15 what they were observing. The patient stayed in the
16 triage room voluntarily with Janice McDonald. She told
17 him at the conclusion, you're now going to go into the
18 E.R. and be seen by an E.R. doctor; there's a
19 possibility they may do some tests; there's a
20 possibility you may be admitted; but he'll talk to you
21 about that.

22 Mr. Hunt voluntarily walked into the E.R. with this
23 -- with Ms. Janice McDonald. He went into Bay 4. And
24 Mr. Ray's with him the whole time. The man who came
25 with him, who helped him come to the hospital, the V.A.

1 representative, is a friend of his grandmother's, stays
2 with him the whole time, goes into Bay 4. The nurses
3 will tell you and the evidence will show you that they
4 put him in Bay 4 for a reason, because it's the closest,
5 in a very small environment, to the nursing station,
6 where Joe McDonald, Janice McDonald's husband, who's
7 also a nurse at the hospital, would be observing
8 everybody. It's also right near the E.R. doctor's room,
9 where he can see what's going on. So, the patient was
10 put in there, he was supervised, he was observed.

11 Within 20 minutes of him coming in, Dr. Jansen was
12 sitting in there talking to him. You're going to hear
13 the evidence that, at the time that Dr. Jansen talked to
14 him -- and again, you'll have records of what's going
15 on. The evidence will show you, he looked for certain
16 things. He takes a history from the patient.

17 You'll hear the evidence about the chief
18 complaints. He had some suicidal thoughts. He was
19 depressed. But he was really there for medication
20 refill. The reality is, that's what brought him to the
21 Naval Hospital to start. He ran out of his medications,
22 but he was seeking help, and he continued to seek help.

23 Dr. Jansen will tell you about all of his
24 assessment of the patient. Importantly, he talked about
25 the patient had suicidal thoughts and thoughts of

1 hurting others, but no specific plan. He had these
2 general thoughts that caused concern enough for Dr.
3 Jansen, at the end of his evaluation, which took 20
4 minutes or so, to decide, I need to get the psychiatric
5 people at the Naval Hospital to assess him. That is the
6 protocol that the Navy sets forth. If you have a
7 patient who comes in with suicidal ideations, you get
8 the psychiatric people involved.

9 You'll see in Dr. Jansen's notes what he found; and
10 again, importantly, what he didn't find, as he's
11 assessing the patient. He has depression. He doesn't
12 have a plan. He's a little bit disoriented to where he
13 is, but he doesn't have fearful hostility. He doesn't
14 have other things that would make you think that he's
15 got a psychosis or schizophrenia, or that he's under the
16 influence of alcohol or drugs, and he hasn't had a
17 suicide attempt. The doctor noted, in his conversation,
18 in the past, this gentleman had discussed suicide
19 gestures, but he has no plan.

20 Mr. Hunt, at the conclusion of Dr. Jansen's
21 evaluation, was told that the psychiatric tech would be
22 coming down to see him. Mr. Hunt stayed in the E.R.
23 He's still there voluntarily, because he has done
24 nothing to suggest a plan that suggests anything else
25 needs to be done.

1 You'll hear Mr. McDonald talk about his
2 observations of this gentleman in the E.R.; that he was
3 calm; that he was polite; that he talked when you spoke
4 to him; and on one occasion, he got up and went to the
5 restroom; asked if he could go; he was allowed.
6 Restroom's right here, right next to where Mr. McDonald
7 is. He can hear what's going on. Nothing unusual.

8 The gentleman walked out. Mr. McDonald said, would
9 you like some water? The gentleman, Mr. Hunt, said, no,
10 thank you. Went back to the room; sat in the same room
11 where he and Mr. Ray were; and that, this whole time
12 that this gentleman is in the E.R., every one of these
13 people will say he was like a model patient. He was
14 cooperative; he talked to us when we talked to him; he
15 wasn't agitated; he wasn't upset; he sat there and did
16 what we asked him to do; and he remained in the E.R.
17 voluntarily, this whole time, with Mr. Ray.

18 You'll hear the testimony from all of these
19 providers that this gentleman was calm; he was
20 collected; he was cooperative; and at no point did
21 anyone there think that he was a potential risk of harm
22 to himself or anyone else in that E.R., with any type of
23 an active plan.

24 They have to respect -- and you're going to hear
25 Dr. Jansen and the others talk about patient rights and

1 the fact that they're in the process of getting a
2 physical -- I mean, a psychiatric evaluation. Mr.
3 Manning, the psyche tech, comes down; spends half an
4 hour with Mr. Hunt. He's the last medical provider
5 that's talking to the gentleman for any length of time.

6 When Mr. Manning exits the E.R., he knows the
7 situation that's going on; he sees Joe McDonald there;
8 he sees Mr. Hunt there. Mr. Manning tells them, I'm
9 going to go up and talk to the psychiatrist, but that's
10 all he says. The psychiatric tech, with the specialty
11 knowledge he has, doesn't say, you better watch this
12 guy; you better do something to restrain him; you better
13 do anything other than what was going on. All he says
14 is, he's got some issues; I'm going to go upstairs and
15 talk to Hendelman; we'll get back to you. Or words to
16 that effect.

17 Dr. Hendelman, you will hear testimony from by
18 video, I think. She's going to tell you that this guy,
19 when she was told the information that the psychiatric
20 tech told her, Mr. Manning, that he was an obvious
21 person to be admitted. Dr. Jansen will tell you that he
22 spoke to Dr. Hendelman afterwards and said, hey, you
23 know, what do you think; I'd like for you to come down
24 and see the guy. Hendelman tells him, no, you don't
25 need to; it's not going to change my opinion; he needs

1 to be admitted. Dr. Jansen says, okay; we'll admit him.

2 The problem at the Naval Hospital at the time is,
3 admission to the Naval Hospital psychiatric facility
4 won't work, because they don't have one. They don't
5 have the ability to take care of these patients on the
6 weekends, so he has to go to Beaufort Memorial Hospital.

7 Dr. Jansen will tell you, he already suspected this
8 gentleman might be going to the hospital for further
9 evaluation, and that he had taken some steps to check on
10 beds when Dr. Hendelman told him he needs to be
11 admitted. Since the psychiatric persons are on board
12 with that, he then goes down to start a process. The
13 problem is that, when he came down, the patient had gone
14 outside with Mr. Ray.

15 Now, you'll hear Joe McDonald tell you about the
16 circumstances surrounding Mr. Ray and Mr. Hunt leaving
17 the facility. He's going to tell you -- and he wrote a
18 note, you'll see it in all the records you get -- that,
19 when the patient had come out of the bathroom, he went
20 back and sat with Mr. Ray in Bay Number 4; and that, for
21 some period of time after that, Mr. Ray and the patient
22 walked up; and Mr. Ray said words to the effect, hey,
23 we're going to go out and get some air; can we go get
24 some air.

25 And Mr. McDonald, knowing that everything had been

1 cooperative; this patient hadn't shown any signs of
2 agitation; hadn't shown any signs he wasn't going to do
3 what people ask him to do; had hung out with Mr. Ray the
4 whole time, all day, at this point, two hours; hadn't
5 shown any suggestion that he was anything other than a
6 calm man who was getting help and seeking help, and
7 going through the process, said, sure, go ahead,
8 expecting that they would go out; have a smoke. This
9 gentleman was a smoker. Get fresh air, whatever they
10 were going to do, and come back to continue the
11 evaluation that Mr. Hunt had voluntarily started on his
12 own, that had been going on for a couple of hours now;
13 and that, at no point did Mr. Hunt give any intimation
14 that he was going to do anything other than continue to
15 cooperate.

16 So, as you go through the next couple, three days
17 of trial, ladies and gentlemen, think about these four
18 issues. As you listen to the testimony, think about
19 foreseeability. Is it professional medical judgment
20 that's required here. The medical doctors and nurses
21 have to use professional judgment to decide if these
22 signs or symptoms mean we need to do something
23 different; or is it the ordinary care. The Plaintiff's
24 got the burden of proof on all of these.

25 Do the signs and symptoms that were present,

1 versus, and the ones that weren't present, suggest that
2 this gentleman was going to be a flight risk, much less
3 go steal a fire truck that's a hundred yards, 200 yards
4 away.

5 I think you saw, in the Plaintiff's photograph, the
6 Naval Hospital. The E.R. back over here. They would
7 have had to exit this way, go in this direction on
8 Pinckney Boulevard. The clothes that were found when,
9 for whatever reason, this gentleman began to disrobe,
10 are over here. And then, he ran down the road to the
11 apartment complex back here. The question is, is any of
12 that foreseeable in a guy who has been calm, collected,
13 cooperative in an E.R.? The evidence will show, we
14 think not.

15 Seven healthcare providers saw this gentleman
16 before he eloped. Mr. Edward Ray, a V.A. worker with
17 many years experience, was with him the whole time.

18 We have a patient that followed all of the rules
19 asked of him.

20 You're going to hear, potentially, from some
21 experts. You'll hear from an expert for the Plaintiffs,
22 a Dr. Terrence Baker. I'm going to cross-examine him.
23 I ask you to listen very carefully to his
24 qualifications, his experience, sort of where he makes
25 most of his money, whether it's in the courtroom or

1 actually in teaching or treating patients.

2 But also, I ask that you look at the assumptions
3 that he makes and the opinions that he brings and tries
4 to give you in that courtroom, that witness stand, and
5 how valid they are. And look at some of the things he's
6 written before he walked in here, and compare them to
7 what he says on this courtroom -- or in this courtroom.
8 I'll bring this to your attention on cross-examination.

9 We may be bringing to you a Dr. Oberg, who's an
10 E.R. doctor up in Charleston. He will come in and
11 explain to you what doctors and healthcare providers do
12 when they look at these signs and symptoms, and whether
13 or not what this patient was presenting with makes any
14 of that occur; whether how he presented that day would
15 make things foreseeable in this situation. And we hope
16 that he'll help you understand some of the issues that
17 are involved when you're dealing with a patient like
18 this.

19 CasePro is a corporation, I think the Judge told
20 you at the very beginning that corporations get treated
21 the same as people. Well, that sounds great, but
22 doesn't really tell you anything. Let me tell you a
23 little bit about CasePro. Mike McCabe is here. CasePro
24 was founded by his mother some years back. It is a
25 company that does do contracts with the military. They

1 have, for years, been run by Mike, as his mother moved
2 toward retirement. They do contract with the Navy and
3 other departments of the government in staffing E.R.
4 facilities just like this. They've been doing it for a
5 few years, and they continue to do it.

6 In this particular situation at the Naval Hospital,
7 there were two companies that staffed this E.R. before
8 CasePro took the contract. So, this was not the first
9 time the military had dealt with a company like CasePro.

10 He will tell you their relationship with the Dr.
11 Jansen and the McDonalds is that they do hire them; they
12 pay them; they provide their paychecks; they work with
13 scheduling. But all of the control over what goes on in
14 that E.R., all of the policies, all of the procedures,
15 everything the E.R. doctors and nurses can do is
16 dictated by the Navy. It's dictated by the government.

17 So, any of the protocols that are in place,
18 anything that's done, CasePro's not allowed to say what
19 the doctor and what the nurses can do. They don't have
20 control over the day-to-day activities. They also do
21 not provide the employees privileges to work in the
22 hospital. The Navy does that. So, they have the call
23 on whether the privileges are granted, or not.

24 At the beginning of the trial, the Judge told you
25 there are two parts to the case. The Plaintiff goes

1 first. We go last. I always have to ask people, please
2 do not make up your mind about the case, the issues in
3 this case, until you've heard all of the evidence,
4 because the Plaintiff will put up their witnesses first.
5 I will not put my witnesses up 'til last. They may call
6 the McDonalds during the Plaintiff's case in chief, and
7 I may get to ask them some questions, but we'll still
8 have other witnesses at the end. So, I ask that you
9 promise if you can wait 'til the end to make up your
10 mind.

11 I want you to remember what the Judge said about
12 burden of proof as you listen to the case. The burden
13 of proof is on the Plaintiff, Ms. Delaney, in proving
14 all of her claims against my client. We raised some
15 defenses, but those defenses don't have to be considered
16 at all until the Plaintiff has met her burden of proof.
17 And we contend, when you finish reviewing the evidence
18 in this case, ladies and gentlemen, on the four things
19 that we talked about here, you're going to find that the
20 Plaintiff has not met their burden of proof.

21 The last thing I want to leave you with is one
22 instruction I think you will get at the end of the
23 trial, and it relates to sympathy. Sympathy is
24 something we all have in situations like this, where a
25 tragedy has occurred and a young man has lost his life.

1 But what the Judge will tell you is that, as you listen
2 to this case and you decide the issues, sympathy really
3 cannot play a factor in your deliberations and your
4 discussions.

5 It's easy to let sympathy affect your ability to
6 think about things, and sometimes the Plaintiffs in
7 these cases like to throw sympathy out there to make you
8 feel real sympathetic and not think about what the real
9 issues are. And we just ask that you set sympathy
10 aside; decide this case on the facts as you hear them
11 today in a jury room, and the rest of the week here in
12 the witness box as you deliberate; and that you decide
13 this case based on the facts that you see, without
14 allowing sympathy to sway you.

15 I want to thank you for your time, and ask that, at
16 the end of our case, you listen to us when we do our
17 closing, as well. Thank you.

18 BY THE COURT:

19 THE COURT: Thank you so much. All right.
20 Counsel, please approach.

21 OFF-THE-RECORD BENCH CONFERENCE, OUT
22 OF HEARING OF JURORS. PRESENT:
23 THE COURT, MR. HOYLE, MS. CASTLEBERRY,
24 MR. LOVELL, MR. MACKELCAN.
25 END BENCH CONFERENCE.

1 BY THE COURT:

2 THE COURT: Ladies and gentlemen, this is a good
3 time for us to take our break and let you have your
4 lunch. It's now 12:30. I'm going to ask you when you
5 return and we're ready, we'll continue with this matter
6 at a quarter till two. That gives you about an hour and
7 15 minutes.

8 Remember, during the lunch break, do not discuss
9 this matter or allow anybody else to discuss it with
10 you. Do not do any investigation. Leave your cells
11 phones or other communication devices away from the
12 courthouse. Do not listen to anything. Do not read
13 anything about this matter on radio, television,
14 newspaper, Internet. And if you forget and bring your
15 cell phone or other communication device back with you,
16 please let us know, and we will take care of it until
17 our afternoon break.

18 Ladies and gentlemen, leave your notebooks in your
19 seat. We will guard them over lunch. And I look
20 forward to seeing you at 1:45. Thank you. Now, go with
21 your bailiff.

22 JURORS LEAVE COURTROOM 12:35 P.M.

23 BAILIFF: Jury is clear, your Honor.

24 OBJECTIONS AND RULINGS:
25

1 THE COURT: Thank you so much. All right, Counsel,
2 911, there's an objection to the admissibility of the
3 911 tape, on the basis of?

4 MR. MACKELCAN: Relevance.

5 THE COURT: Got it.

6 MR. MACKELCAN: And it's a recording that has some
7 panic to it. And so, I think it's intended to create
8 some emotion in the jury, when it doesn't have a whole
9 lot of probative value to the case.

10 THE COURT: Okay. All right. Well, let me hear
11 it. And then, on the other side of hearing it -- or I
12 could ask -- I guess, I'll be listening for it -- what
13 issue, which is of consequence to this matter, does this
14 make more probable or less probable?

15 MR. HOYLE: Good afternoon, your Honor. The 911
16 recording details virtually the moment Calvin Hunt
17 leaves the Naval Hospital, until our client has been hit
18 by the fire truck. There are a series of calls that are
19 made. First, from a masters of arms at the guard shack,
20 saying someone in his underwear ran past.

21 Then, to the manger of the Laurel Hill Apartment
22 complex that says there's a naked man running through
23 the neighborhood. That same woman then observes the
24 naked man get in the fire truck.

25 It essentially -- I hate to use the word, play-by-

1 play, but there's essentially a sequential explanation
2 of everything that happened. It was reported in real
3 time by citizens of this community who called 911, and
4 who their present sense impressions were recorded. Some
5 of them, as Mr. Mackelcan said, were excited utterance.
6 They were shocked that there was this fire truck driving
7 50-plus miles an hour down Ribaut Road, causing the
8 carnage that its -- that is happening.

9 But it goes to what we talked about yesterday,
10 proximate cause. It goes to showing the time frame,
11 from the time Calvin Hunt left, until Justin Miller is
12 no longer with us. It is important for our case. And I
13 think it's more efficient for our case than calling all
14 of these people who called the 911 and said, oh, I saw a
15 fire truck go by and hit this car at Hardees, hit this
16 car at the gas station, hit this car, wherever. We can
17 play it in a sequential sequence as it was recorded.

18 We have here, sitting out in the lobby of the
19 courthouse, the records custodian for the sheriff's
20 office. She can authenticate it. And I believe we can
21 get it in as a business record.

22 But with respect to -- I didn't hear a 403
23 argument, but I'll go ahead and address that. There's
24 case law in this state, *State v Shuler*, recorded at 353
25 South Carolina 176, a 2003 case, in which the court held

1 that the 911 tape at issue was not so unfairly
2 prejudicial as to substantially outweigh its probative
3 value. I hit myself that time, Judge.

4 THE COURT: I know. It's great.

5 MR. HOYLE: And so, I think that it does tend to
6 make facts at issue in this litigation more probable
7 than not. It's clearly relevant. Any danger of
8 prejudice is not substantially -- does not substantially
9 outweigh that. And I'll also state, as an officer of
10 the Court, we're not offering it as a way to elicit
11 sympathy or shock or anything of that. We are merely
12 offering this into evidence to try and meet our burden.
13 We certainly have that burden. We've got to show a
14 causal connection between a fire truck a couple miles
15 away from the Naval Hospital striking a pedestrian, and
16 what happened within the four walls of the Naval
17 Hospital.

18 This gives us that temporal context for these
19 twelve jurors to make that decision.

20 THE COURT: All right. Let me hear the 911 tape.

21 MR. HOYLE: Mr. Knowles? He's going to play the
22 tape. I'll warn you, it's 28 minutes, your Honor.

23 THE COURT: Okay.

24 MR. HOYLE: Your Honor, may we pause the tape so
25 Ms. Delaney can leave?

1 THE COURT: Yes.

2 MR. HOYLE: And your Honor, while we deal with
3 that, I also want to mention that, while we will seek to
4 introduce the 911 call and publish it, the sheriff's
5 office also recorded the radio transmissions from their
6 dispatch center to the various officers and other
7 responders. We do want to lay a foundation and move
8 that into evidence, but not publish, but we do think it
9 should be a part of the record, as portions of this may
10 become relevant later in this trial.

11 THE COURT: Okay.

12 MR. HOYLE: But not all of them, because it's some
13 two hours and 18 minutes of various recordings. At
14 times, they're talking to different people at the same
15 time. Does that make sense?

16 THE COURT: Yes.

17 MR. HOYLE: So, I essentially want to present the
18 911 calls.

19 C.D. OF REDACTED AUDIO RECORDING

20 OF 911 CALLS PLAYING.

21 PAUSE PLAYING C.D. OF REDACTED AUDIO

22 RECORDING OF 911 CALLS.

23 MR. HOYLE: Your Honor, that is the entirety of --

24 RESUME PLAYING C.D. OF REDACTED

25 AUDIO RECORDING OF 911 CALLS.

1 END PLAYING OF C.D. OF REDACTED

2 AUDIO RECORDING OF 911 CALLS.

3 MR. KNOWLES: Yeah, I think that's it. Yeah.

4 MR. HOYLE: I'll stand up again. Your Honor, that
5 is the entirety of the 911 calls that were produced by
6 the Beaufort County Sheriff's Office.

7 In addition to our prior argument, I just want to
8 point out that I heard in opening Mr. Lovell talk about
9 how Calvin was calm, cool, collected. He talked about
10 foreseeability. I believe that what we just heard on
11 this 911 call is directly relevant to the mental state
12 of Calvin Hunt. Was this someone who was calm, cool,
13 collected, behaving himself, doing what he was supposed
14 to do; or was this someone who was a paranoid
15 schizophrenic off his medication, out of control?

16 We believe that this audio recording, which, again,
17 we can authenticate, goes directly to several of the
18 issues in this case. Thank you, your Honor.

19 THE COURT: Okay. Yes.

20 MR. MACKELCAN: Very briefly. The only thing I'd
21 have to add is, it seems a little bit cumulative that
22 there -- there was one incident at --

23 THE COURT: Let me tell you that I agree with that
24 completely, on the cumulative. I agree on the
25 cumulative nature of it where there are many calls that

1 are the same, appear to be at the impact of the corner
2 of Ribaut and the bridge. I agree completely with that.

3 Let me ask this question. How is the recording
4 time stamped, because it isn't done on the tape itself.
5 So, you argued that it was admissible because it is the
6 best evidence of temporal context, correct? Tell me how
7 so.

8 MR. HOYLE: I would -- the tape itself may not be
9 quantitatively helpful, as far as what you're talking
10 about. I think it's qualitatively helpful, in that,
11 it's giving you the logical sequence of events. The
12 gate, the apartment complex, which way -- which route
13 the vehicle is traveling, where he is at a specific
14 time.

15 THE COURT: Mr. Hoyle, are you certain of that?
16 Are you certain that the 911 operator does not have the
17 ability to tell you exactly when those calls came?

18 MR. HOYLE: I honestly do not know that
19 information. I think that will be appropriate questions
20 for the 911 record custodian. I don't want to make a
21 misrepresentation to the Court. That's why I'm,
22 unfortunately, not answering your question.

23 THE COURT: I got you. So, I need to know that.
24 Here's what I would not allow to come in. I would not
25 allow the duplication with that accident at this portion

1 of the case. I think it's -- if there is a punitive
2 portions of the case, I do think that the number of the
3 people in the public who are affected does become
4 relevant on the issue of punitive damages, if we reach
5 that point.

6 MR. HOYLE: Yes, your Honor.

7 THE COURT: So, but insofar as the relevance with
8 regards to the liability portion, I do not believe that
9 the number of phone calls -- that they are duplicative.

10 I do think, though, that it's important that the
11 testimony is some cars. Some said five cars, somebody
12 said two cars, somebody said couple of cars, that you're
13 allowed to, if you wish, to go into the five cars, for
14 example, or whatever is the accurate number.

15 MR. HOYLE: Um-hmm.

16 THE COURT: I do think that the relevance is
17 important, if it's temporally stamped in some form or
18 fashion. I presume it is, but you'll let me know that.
19 Just from having dealt with 911 tapes a lot, they
20 typically are. So, you'll need to let me know that
21 affirmatively.

22 And there are a couple of phone calls, but they may
23 be included -- I think that they are included, at that
24 accident site at Ribaut and the bridge, where someone is
25 calling in there's an accident, and they say we know

1 about it. And so, there's not enough information given
2 to tie that back to the fire truck. But I think that
3 you'll find that, that's just part of a number of phone
4 calls about the wrecks that occurred at Ribaut and the
5 bridge at the CVS and the Hardee's. So, those will need
6 to be redacted.

7 MR. HOYLE: If I could confer with my co-counsel?

8 THE COURT: Yes.

9 MR. HOYLE: We can certainly make those redactions,
10 your Honor.

11 THE COURT: Okay. And before I make a final
12 conclusion, I really, really do want to have that
13 information about whether or not the 911 custodian can
14 identify times. How are they time stamped? Okay?

15 MR. HOYLE: Thank you, your Honor.

16 THE COURT: All right. So, I think that deals with
17 the 911 tape.

18 MR. HOYLE: My I ask that my colleague, Ms. Leavy,
19 be excused to go meet with the records custodian?

20 THE COURT: Sure. Absolutely.

21 MR. HOYLE: To obtain some of that information.

22 THE COURT: And then, you all work on that, and
23 then, we'll just reconvene.

24 MR. HOYLE: Your Honor, I know that it is the lunch
25 hour, and I certainly don't want to keep anyone from

1 lunch, most importantly, your Honor and the courthouse
2 personnel. I know that, sequentially, today, they're
3 going to be some other issues that we need to take up.

4 THE COURT: Right.

5 MR. HOYLE: I'm going to raise one.

6 THE COURT: Okay.

7 MR. HOYLE: Okay. My co-counsel has raised that we
8 have a trooper from the Highway Patrol who is sitting
9 out in the lobby, and there are some photographs that he
10 took that we will seek to enter into evidence, and have
11 him walk through, with the jury, about his investigation
12 scene. I understand that there are some objections
13 about that.

14 Also, I wanted to raise this while my client is
15 physically out of the room. We will -- I will, later
16 this afternoon, be attempting to introduce into evidence
17 -- I think I've narrowed it down to four or five autopsy
18 photographs. I believe that they do go to two issues in
19 this case. Four of these photographs directly go to
20 Plaintiff's survival cause of action. And then, the
21 other one goes to corroborate that the injuries were
22 sustained as a result of a crush injury, as a result of
23 being run over by a vehicle. That's going to be the
24 testimony with respect to the last photograph.

25 I understand there's a blanket objection to any

1 autopsy photos coming in from the Defendant. I just
2 wanted to put that out there in case your Honor wanted
3 case law, wanted to see the photographs, anything like
4 that, so that we could work around your scheduling and
5 not further inconvenience you later today with these
6 issues.

7 THE COURT: Thank you. I appreciate that very
8 much. So, with regards to the --- first of all, the
9 photographs, are there objections? I'm looking at
10 everyone. Are there objections to all of the
11 photographs?

12 MR. MACKELCAN: No. Your Honor, I think the
13 objections to the Highway Patrol photographs are the
14 same objections to the autopsy photographs. So, what we
15 are objecting to is not pictures of the fire truck or
16 pictures of the fire truck crashed into trees, but we
17 are objecting to pictures of Mr. Miller's dead body.

18 THE COURT: Okay. And as I understand it, that it
19 is the position of the defense that, that is not an
20 issue.

21 MR. MACKELCAN: Whether or not he died? That is
22 not an issue.

23 THE COURT: Or whether or not he died as a result
24 of being struck by the fire truck.

25 MR. MACKELCAN: That is not an issue.

1 THE COURT: Okay. And so, now, I'm going to turn
2 and ask, I gather, then, that the Plaintiffs maintain
3 that the issue has to do with survival, as opposed to --

4 MR. HOYLE: NODDED HEAD.

5 THE COURT: Okay. So, talk to me about the
6 evidence that the photographs would corroborate on the
7 issue of survival.

8 MR. HOYLE: Your Honor, I don't know. I'll need a
9 moment on the Highway Patrol photographs.

10 THE COURT: Okay.

11 MR. HOYLE: I can talk to you about the autopsy
12 photographs.

13 THE COURT: Okay.

14 MR. HOYLE: These are pre-dissection photographs
15 taken in the autopsy suite of MUSC before any work by
16 the pathologist was done.

17 THE COURT: Okay.

18 MR. HOYLE: And there's a case -- Ms. Leyimu has
19 run away. I think I sent her away. But nevertheless, I
20 can't think of the case off of the top of my head, but
21 there is case law that came out last year in which our
22 Supreme Court spoke about the admissibility of autopsy
23 photos. And the Court clearly said, gruesomeness, in
24 and of itself, is not a reason to keep it out.

25 THE COURT: That's right.

1 MR. HOYLE: These particular photographs -- may I
2 approach?

3 THE COURT: Sure. And you're going to --

4 MR. HOYLE: I really don't want -- I'm the most
5 uncomfortable person with these things. So, these two
6 photographs --

7 THE COURT: Now, you're showing me photographs that
8 have been marked as Plaintiff's Exhibits 5, 6, 7, 8, and
9 9. Okay. And they would be for identification purposes
10 at this point, because there's an objection to them.
11 So, they're not in evidence.

12 ITEM IDENTIFIED AS AUTOPSY
13 PHOTOGRAPH
14 MARKED PLAINTIFF'S EXHIBIT NUMBER 5
15 FOR IDENTIFICATION.

16 ITEM IDENTIFIED AS PHOTOGRAPH
17 MARKED PLAINTIFF'S EXHIBIT NUMBER 6
18 FOR IDENTIFICATION.

19 ITEM IDENTIFIED AS AUTOPSY
20 PHOTOGRAPH
21 MARKED PLAINTIFF'S EXHIBIT NUMBER 7
22 FOR IDENTIFICATION.

23 ITEM IDENTIFIED AS PHOTOGRAPH
24 MARKED PLAINTIFF'S EXHIBIT NUMBER 8
25 FOR IDENTIFICATION.

1 ITEM IDENTIFIED AS PHOTOGRAPH
2 MARKED PLAINTIFF'S EXHIBIT NUMBER 9
3 FOR IDENTIFICATION.

4 THE COURT: Now, that testimony would be elicited
5 from, I gather, medical examiner or pathologist.

6 MR. HOYLE: Dr. Michael Caplan. He is the board-
7 certified, forensics pathologist who conducted this
8 autopsy at MUSC, and is actually outside. He will offer
9 testimony concerning 5 and 6, which are a view of the
10 right side of the decedent's body.

11 I don't want to give it all away, but my
12 understanding, from meeting with Dr. Caplan, is that
13 there is evidence in these photographs of hemorrhaging
14 that's externalized to the body that shows the blood was
15 circulating at a particular time past a certain injury
16 taking place to the body. So, it's connecting the dots
17 between was blood still flowing when X event to the body
18 happened. And the reason these four photographs are
19 relevant, because it's showing something that you can
20 see on one view of the body, as opposed to the other
21 view of the body.

22 THE COURT: Okay.

23 MR. HOYLE: And with respect to the photograph
24 that's marked Exhibit Number 9, --

25 THE COURT: 9, yes.

1 MR. HOYLE: -- this is a view of the decedent's
2 abdominal cavity. A number of organs were avulsed from
3 the body. That means that they were ripped from the
4 body.

5 THE COURT: Yes.

6 MR. HOYLE: And Dr. Caplan will testify as to the
7 nature of these injuries being consistent with crush
8 injuries from a vehicle striking the body and dragging
9 him for some period of time.

10 There will be discussion -- I don't know if this
11 photograph is the most illustrative, but there will be
12 some discussion about whether or not blood was still
13 circulating and whether or not there was consciousness
14 when some of these avulsion injuries took place.

15 THE COURT: Okay. 9 is out.

16 MR. HOYLE: Okay.

17 THE COURT: And, now, talk to me about 7 and 8.

18 MR. HOYLE: 7 and 8 are merely comparison. It's
19 look at one side, look at the other. These are the two
20 photographs that Dr. Caplan will be able to use to
21 illustrate to us that blood was still flowing at a
22 particular time. He will use these merely to contrast
23 what is shown in 5 and 6.

24 THE COURT: All right. Now, as you know, the issue
25 is conscious pain and suffering, and what, if any,

1 evidence would you offer, with regards to conscious pain
2 and suffering?

3 MR. HOYLE: We will offer evidence as to conscious
4 pain and suffering; that there was a period of
5 consciousness.

6 THE COURT: There was a period of consciousness and
7 --

8 MR. HOYLE: To a reasonable degree of medical
9 certainty.

10 THE COURT: And photographs 5 and 6.

11 MR. HOYLE: Go to corroborate that as a result of
12 showing the blood was circulating when certain injuries
13 occurred.

14 THE COURT: Okay. All right.

15 MR. HOYLE: And your Honor, just for the record,
16 there are about 150 photographs.

17 THE COURT: Sure.

18 MR. HOYLE: I've done my best to narrow this down.
19 I also have gone back and forth in my own mind, if your
20 Honor were to rule these inadmissible, my intention, at
21 this point in time, I don't believe, would be to publish
22 these to the jury. But I do think they should go back
23 to the jury room, to further corroborate Dr. Caplan's
24 sworn testimony.

25 THE COURT: All right. Well, here's what I would

1 do with regards to these photographs. There's no
2 difference between 5 and 6 that I can ascertain, and
3 that's why I asked you that. Is that correct? There's
4 no difference between 5 and 6?

5 MR. HOYLE: Maybe -- I will merely tell you these
6 are the photographs that Dr. Caplan selected. So, I'm
7 not going to say under oath that there's no difference.

8 THE COURT: So, you need to find that out.

9 MR. HOYLE: Okay.

10 THE COURT: And whether or not. And then, is there
11 any difference between 7 and 8, because it seems to me
12 that they are just duplicates of each; that they're the
13 same photo, effectively. And so, and I would need to
14 hear his testimony before I would ascertain whether or
15 not these photographs are corroborative, and that's
16 Plaintiff's Number 5 and Plaintiff's Number 7. If they
17 show something different and they're not duplicative,
18 then, you would need to let me know that.

19 But I want to know the testimony that he would --
20 you would elicit that these photographs would be
21 corroborative of. Okay. Is that clear? Are you all
22 clear with that? You all clear with that?

23 MR. LOVELL: Yes, your Honor.

24 MR. HOYLE: I'm absolutely clear on that, your
25 Honor.

1 THE COURT: And I think my -- an answer with regard
2 to the temporal part of the tape. And I think I'm
3 supposed to make a finding of fact with regards to
4 Number 9. Exhibit Number 9, even I am absolutely -- I
5 don't know, unless you can tell me -- what you're
6 telling me is that this was a crush injury; and then,
7 this young man's body was ripped apart; and that's what
8 the photograph shows. And I do not believe that, that
9 photograph is corroborative of any issue in this case,
10 particularly when it isn't contested that he was hit by
11 a fire truck and killed by a fire truck. The issue of
12 survival certainly is, and the duration of the survival
13 is an issue. But Number 12 --

14 MR. HOYLE: 9.

15 THE COURT: Number 9, Number 9 doesn't seem to
16 corroborate what you've told me, as opposed to the other
17 two photographs. But I can assure you that, given the
18 nature of that particular photograph, any probative
19 value of Number 9 is far exceeded by the prejudicial
20 effect. Okay?

21 MR. HOYLE: I respect your ruling. Thank you, your
22 Honor.

23 THE COURT: All right.

24 OFF THE RECORD 1:17 P.M.

25 BACK ON THE RECORD 2:05 P.M.

1 CONTINUE OBJECTIONS:

2 BAILIFF: All rise. Court is now back in session.

3 THE COURT: All right. Please be seated. All
4 right. You say you're ready for the Highway Patrol
5 person and photos. Need to decide between the photos
6 and the Highway Patrol. Are you all offering
7 photographs with the Highway Patrol?

8 MR. HOYLE: I believe we've reached an agreement on
9 the photos.

10 THE COURT: Let me know what that is, please.

11 MS. CASTLEBERRY: Your Honor, we just reached an
12 agreement, and we took any photograph that depicted the
13 body under the fire truck.

14 THE COURT: Very well. Is that correct?

15 MR. MACKELCAN: It is, your Honor.

16 THE COURT: And any of the photographs that
17 remained were not objectionable?

18 MR. MACKELCAN: It's just at the accident scene and
19 the fire truck.

20 THE COURT: Very well. Can we go ahead and mark
21 those and move them into evidence.

22 MS. CASTLEBERRY: I've marked those, your Honor,
23 but I'd move to have them admitted into evidence.

24 THE COURT: Wonderful. Could we make a record of
25 that, please.

1 MS. CASTLEBERRY: Your Honor, we've marked this as
2 an exhibit -- Plaintiff's Exhibit -- we have it marked
3 as Exhibit 3.

4 THE COURT: Okay. That's just one photograph
5 that's going to be offered?

6 MR. HOYLE: It's collective.

7 MS. CASTLEBERRY: It's collective. It's a
8 collective exhibit, your Honor.

9 THE COURT: All right. So, it would be Plaintiff's
10 Exhibit 3. And we need to go ahead and mark them as A,
11 B, C, and D.

12 MS. CASTLEBERRY: Okay. Okay.

13 THE COURT: I don't want them to -- if they get
14 separated, if you don't mind doing that. And somebody
15 can take a look, just to --

16 MR. HOYLE: Your Honor, while they do that, I do
17 have a brief update on the record custodian from the
18 sheriff's office.

19 THE COURT: Okay.

20 MR. HOYLE: She will be coming here -- I don't know
21 the technical term. I've heard that they are called CAD
22 sheets. And she should be able to give us a time frame
23 for the -- a time for a call. But what she did tell us
24 on the telephone a few minutes ago is that, the way that
25 disc that you heard here in open court was prepared is,

1 they are in sequential order with which they were
2 received at the call center.

3 I've asked Mr. Knowles to make the redactions that
4 your Honor requested, as far as cumulative recordings,
5 and we are going to render that to a C.D. And to the
6 extent your Honor finds --

7 THE COURT: I can just feel there's information in
8 there that is critical on this issue.

9 MR. HOYLE: -- finds that, that 911 call should be
10 admissible in court, we would respectfully move the
11 redacted version into evidence, as opposed to the
12 original.

13 THE COURT: Okay.

14 MR. HOYLE: A lot of moving pieces, Judge.

15 THE COURT: That's okay. Got it.

16 MS. CASTLEBERRY: Your Honor, we're ready to seek
17 admission of Plaintiff Exhibit Numbers 3, and it would
18 be A through Z, and we want to move to have that
19 admitted at this time.

20 THE COURT: And those are the photographs

21 MR. MACKELCAN: No objection.

22 THE COURT: No objection. Very well.

23 ITEMS IDENTIFIED AS PHOTOGRAPHS

24 MARKED PLAINTIFF EXHIBIT NUMBERS

25 3-A THROUGH 3-Z, ADMITTED AS EVIDENCE.

1 MS. CASTLEBERRY: And we will be using the monitor
2 as the mirror image of these for him to illustrate this.

3 THE COURT: Okay. Very well.

4 MS. CASTLEBERRY: Thank you.

5 MR. LOVELL: Your Honor, while he's using that, may
6 I walk around to that side to see it?

7 THE COURT: Oh, absolutely. Please.

8 MR. LOVELL: Thank you.

9 THE COURT: And you need not even ask, Counsel. If
10 any of you need to move around, be sure you're able to
11 see, please. Okay. Not a problem.

12 MR. LOVELL: Thank you.

13 THE COURT: Jury? Bring the jury? Yes?

14 MR. HOYLE: Yes, Judge.

15 THE COURT: All right? Yes?

16 BAILIFF: Are you ready, your Honor?

17 THE COURT: Yes.

18 BAILIFF: The jury is entering the courtroom, your
19 Honor.

20 JURORS ENTER COURTROOM 2:15 P.M.

21 BAILIFF: The jury is seated, your Honor.

22 THE COURT: Thank you. Thank you. All right.

23 Ladies and gentlemen, I hope you had a very pleasant
24 lunch. At this time, we will continue the Plaintiff's
25 case. Please call your next witness. Yes.

1 MS. CASTLEBERRY: Your Honor, Plaintiff calls first
2 witness, Corporal J.L. Perry.

3 THE COURT: Thank you.

4 BAILIFF: Go forward to be sworn, please, sir.

5 MADAM CLERK: Corporal Perry, right here, please,
6 sir. Place your left hand on the Bible, and raise your
7 right.

8 Do you solemnly swear or affirm that the testimony
9 you're about to give in this matter is the truth, the
10 whole truth, and nothing but the truth, so help you God?

11 CORPORAL JAMIE PERRY: Yes.

12 MADAM CLERK: Please be seated here, and state and
13 spell your name for us.

14 CORPORAL JAMIE PERRY: My name's Jamie Perry. It's
15 J/a/m/i/e, P/e/r/r/y.

16 THE COURT: Your witness.

17 CORPORAL JAMIE PERRY

18 DIRECT EXAMINATION, BY MS. CASTLEBERRY:

19 Q Good afternoon, Corporal Perry.

20 A How are you doing?

21 Q You've already stated your name. Can you tell us
22 where you live.

23 A I live in Jasper County.

24 Q Okay. What's your occupation?

25 A I am a South Carolina Highway Patrolman.

1 Q Okay. And how long have you been a Highway
2 Patrolman?

3 A Seventeen years.

4 Q And can you tell us a little bit of your training
5 to become a Highway Patrol.

6 A Prior to becoming Highway Patrol, I was in the U.S.
7 Navy. And then, after that, I came with the Highway
8 Patrol in 1998, January of 1998. Job duties are
9 basically traffic and law -- traffic and criminal law
10 enforcement, along with accident investigation.

11 Q And just a little bit about your training for the
12 Highway Patrol.

13 A Actually, I've been on 17 years. I've been to the
14 school for -- for accident -- not reconstruction, but
15 just accident investigation. Over the years, I've
16 probably investigated over some, I'd say, 1,700
17 collisions over the 17 -- 17 years.

18 Q Thank you so much. So, what is your rank?

19 A Corporal.

20 Q And where are you assigned?

21 A Jasper and Beaufort.

22 Q Okay. And tell us a little bit about your job
23 duties.

24 A I'm a corporal, which is first line supervision,
25 but also, I still do traffic, and I work collisions.

1 Q Let me turn your attention to February 24, 2012.
2 Do you have a specific recollection of that date,
3 Corporal?

4 A Yes, I do.

5 Q And how is it that you have a specific recollection
6 of that date?

7 A I remember getting dispatched to an incident that
8 day around 4:30. About 4:23 p.m., Dispatch called me
9 via radio and stated that there was a stolen fire truck,
10 and it was being pursued by Beaufort County Sheriff's
11 Office.

12 Q Did you have an understanding of where it was? You
13 said Beaufort County. Where, in Beaufort County?

14 A They did say Ribaut Road.

15 Q And so, what did you do?

16 A I was, at the time, at the Ridgeland Patrol Office.
17 I was doing some paperwork. I immediately left the
18 patrol office, and activated my lights and siren to try
19 to get there as quickly as possible.

20 Q About how long did it take you to get from your
21 Jasper office to Ribaut Road?

22 A I'd say, approximately, with the traffic, about 25
23 minutes, even with blue lights and siren.

24 Q Okay. Did you find that there was any congested
25 traffic as you made your way over there?

1 A Yes. Once I got into Beaufort, it, yeah, it got
2 sort of congested.

3 Q And did you approach a particular area?

4 A Yes. I -- I came though -- came over, like, the
5 Broad River Bridge, and turned on Savannah Highway,
6 which, I think at the time, was 802. Now, it's, I
7 think, 128. And went down Parris Island Gateway to
8 Ribaut Road, and went that way, north.

9 Q Were you assigned to a particular task by the
10 dispatch?

11 A I was just going, at the time, to try to assist,
12 you know. That was before I actually knew there was a
13 collision.

14 Q Okay. So, you were directed to -- you said there
15 was a stolen fire truck. Were you directed to the area
16 of the fire truck?

17 A Yes, ma'am.

18 Q And when you approached that scene, can you tell
19 the jury what you saw.

20 A Like I say, I was driving north on Ribaut Road.
21 When I got on-scene, I observed the fire truck to my
22 left, on the south side of Ribaut Road that was -- it
23 had struck several trees. Also, on the road, I noticed
24 there was some -- some like skid marks from the tire,
25 indicating that -- skid marks going from the northbound

1 lane of Ribaut Road, crossing the center line and the
2 median, and going across the southbound, into the trees.

3 Q What else did you observe at the scene?

4 A As far as the fire truck, there was -- it had
5 severe damage to the front and to the side. I also
6 noticed that the -- the fire hose was knocked off, and
7 there was other debris.

8 And also, at the right-rear of the fire truck,
9 that's where I noticed a white male that was deceased,
10 underneath the vehicle.

11 Q Were there any EMTs present at that time?

12 A Yes, there was.

13 Q What about the person who had been driving the fire
14 truck? Do you know what his name was?

15 A At the time, I -- I didn't know. They told me he
16 had already been transported, and I got that from a
17 Beaufort City officer.

18 Q Did you come to find out later the name of the
19 person who had been driving the fire truck?

20 A Yes, ma'am. Once I went to Beaufort Memorial to
21 check on him, yes.

22 Q And who did you find out the person driving the
23 truck was?

24 A It was Kalvin Hunt.

25 Q So, let's go back to the scene. What are some of

1 the things that you did at the scene where the fire
2 truck was located?

3 A The first thing, when I got there, I had somebody
4 tell me that there was a witness, and I -- I spoke with
5 him, which, his name is Christopher Miller. End up
6 being the brother of the deceased. I spoke with him and
7 asked him what had happened, and he informed me, you
8 know, how the collision -- or, he informed what had
9 happened.

10 Then, I started to take photos of the scene, of the
11 fire truck and the marks in the roadway and the debris.

12 MS. CASTLEBERRY: Your Honor, may I approach the
13 witness?

14 THE COURT: You may.

15 BY MS. CASTLEBERRY:

16 Q Corporal Perry, I'm going to show you what's been
17 marked as Plaintiff's Exhibit 3, and it would be
18 Plaintiff's A through C, and ask you if you recognize
19 those photographs.

20 A Okay.

21 Q Do you recognize those photographs?

22 A Yes, ma'am.

23 Q Are those the photographs that you took that day
24 at the scene?

25 A Yes, ma'am.

1 Q And are those a fair and accurate representation of
2 what you saw?

3 A Yes, ma'am.

4 MS. CASTLEBERRY: Your Honor, may I ask that the
5 witness step down from the witness stand to explain some
6 of the photos, please?

7 THE COURT: Yes. And let me just share with you,
8 when you step away from the microphone, you will no
9 longer have the microphone.

10 A Yes, ma'am.

11 THE COURT: So, forget your inside voice; use your
12 outside voice when you do that. And do you have
13 pointers? Do you have pointers? Because I do. If you
14 don't, I do. And the reason for that is, when you step
15 down to point, inevitably, your body is going to block
16 the monitor. So, you need to be able to stand by it so
17 you can point.

18 A Yes, ma'am.

19 THE COURT: Like a stick. I get so excited when we
20 use these. Hold on. Now. These used to be called
21 laser printers -- or pointers. They're now called cat
22 toys, so. If you will each take a cat toy, and --
23 that's correct, cat toys. And just go ahead and see if
24 it will show up on the monitor. Is it working? I can't
25 tell if it's working. Yes, it's working. And the only

1 reason is that, now, here's what I need you to do,
2 because Counsel and the witness are both going to be
3 having a conversation. You all have to be able to see
4 the monitor. So, I'm mindful and I don't want Corporal
5 Perry to block. So, if you all can't see, raise your
6 hand.

7 And we'll nag you all if we can't hear, just so you
8 all know. Need big voices.

9 JUROR: She needs to speak up just a little.

10 MS. CASTLEBERRY: Oh, I'm sorry.

11 JUROR: That's okay.

12 BY MS. CASTLEBERRY:

13 Q Officer, can you just tell us what this picture
14 depicts.

15 A This is after I got on the scene. This is, I
16 guess, the side view. Right there would be the road,
17 actually, to the -- to the left, Ribaut Road. And this
18 is -- I pulled up to the side of it, looking at the
19 right side of the fire truck.

20 COURT REPORTER: *Right side of?*

21 A The fire truck.

22 Q Okay. And this is more of an angle. This is
23 showing the rear of the fire truck. And like I said,
24 the road would be out here. But this is off the right
25 -- right side of the road on Ribaut Road, the southbound

1 side.

2 Q And Corporal Perry, without getting into any detail
3 about this, can you just point out the location of the
4 deceased.

5 A It would be, actually, about right in there, just
6 right before that wheel.

7 Q So, it would be in front of the rear-right wheel
8 well?

9 A Yes.

10 Q Thank you.

11 A And this is the rear of it. I'm just getting a
12 photo. I'm trying to get a 360 of the -- of the whole
13 fire truck. So, this is the rear of the fire truck.

14 Q Okay. And it was significantly wedged in between
15 those trees, correct?

16 A Yes, it is.

17 Q And what would -- you've done a lot of these
18 accident reconstructions and done investigations. What
19 was your estimate of the damage to the fire truck?

20 A It appeared to be totaled. It had severe front
21 damage, and even on the sides. It appeared to
22 definitely be totaled.

23 And this is the rear of it, also. And as you can
24 see, the -- some of the trash that -- where the -- it's
25 actually coming from the northbound side, and this is

1 south. And then, tracks are seen cutting across, and
2 leading right up to the fire truck.

3 Q And that's what you told us before, that the fire
4 truck had crossed the center line, and gone into the
5 trees.

6 THE COURT: A little more volume would be
7 wonderful.

8 MS. CASTLEBERRY: Okay.

9 BY MS. CASTLEBERRY:

10 A Yes, ma'am. Yes, ma'am. And these, I think I got
11 a little bit better photo of it, also, but the tracks a
12 little back farther, you can see it crossing the median.

13 Here's some more. You can sort of see it plain.
14 You can see the tracks there. They're up against that
15 curb, and just leads up to the fire truck.

16 And this is the roadway. This is going to be
17 looking north, to -- actually, no, I'm sorry. This is
18 the southbound lane of Ribaut Road.

19 Q Okay. And that shows some of the traffic
20 congestion --

21 A Yes.

22 Q -- and some other things that happened. Was it
23 your understanding that other vehicles were involved in
24 this collision?

25 A It was a little bit farther south, actually.

1 Q Is that, that same picture, only a closer-up view?

2 A Yes. Yes. And this is the front of the fire
3 truck, which, you can see, it's got significant damage.

4 Q And that would go along with your testimony that
5 you believed it was actually totaled as a result of
6 this?

7 A Yes, ma'am.

8 Q And this is going to be the left side -- the left
9 front of the vehicle, of the fire truck.

10 Q Okay. And you had told us previously that the
11 hoses had come down from the fire truck. They had
12 previously been rolled up or something.

13 A Yes. Yes, ma'am.

14 Q That's a little bit clearer picture of that, right?

15 A Yes, ma'am. Yes, ma'am. Just another side view of
16 the left side.

17 And this, this also, you can sort of see the -- you
18 can see the tracks there where he, you know, ran off to
19 the side of the road there.

20 Q And that would have been right around -- can you
21 see where I'm pointing at? I guess it would be right
22 here.

23 A Um-hmm. Yes.

24 This is just a better view of, really, of where the
25 location -- we've got the store there, but this is just

1 showing the whole fire truck off the road.

2 Q And I noticed here to the left side of the picture,
3 it looked like there was a tree down.

4 A Yes.

5 Q So, did he actually run through some trees and
6 cause some other damage through that?

7 A Yes. Yes, he did. He struck several trees.

8 And this is just -- this is showing the -- store
9 here again.

10 Q And so, there were some police tape there. So,
11 what was the purpose of roping off those areas?

12 A Just securing the scene where nobody -- nothing
13 gets -- no evidence gets lost or -- or messed with.

14 Q Okay.

15 A And it was -- it was already like that before I
16 even got to the scene.

17 Q And what view would that -- I don't know what angle
18 I'm looking at.

19 A This is sort of, if you remember the one before
20 where the store was at, --

21 Q Yeah.

22 A -- the store would be, like, right in here. I'm
23 just looking in the parking lot at the store and taking
24 photographs.

25 Q And again, without belaboring this point, where

1 would the body have been located?

2 A It would be about right in there.

3 Q That's just a closer up?

4 A It's a closer view, yes. This is the front, again.
5 Part of up front, basically.

6 Q Corporal, were you there when the tow truck arrived
7 to take the fire truck away?

8 A I really don't recall. I think I might have been
9 gone to the hospital, but I'm not a hundred percent sure
10 on that.

11 Q Okay. And that was a significant task; would you
12 say?

13 A Yes. Yeah, it -- it was.

14 This is just the back of the vehicle again. And
15 that's the back of it.

16 Showing a little bit of the -- you can tell the
17 front and side.

18 Q And the trees down?

19 A Yes. Um-hmm. The tree that was -- that was
20 struck, knocked down.

21 Pretty much the same thing. As you can see, the
22 hose and the debris.

23 COURT REPORTER: Speak up just a little.

24 A Okay. All right. Sorry.

25 Q And I think those are all duplicates, too. You can

1 just return to the stand, and I'll ask you some more
2 questions.

3 A Okay.

4 Q Corporal, when you arrived at the scene, you said
5 there were other law enforcement personnel there, right?

6 A Yes, ma'am.

7 Q And Mr. Hunt had already been taken away, you said,
8 by a squad car?

9 A Yes. Um-hmm.

10 Q Do you have an understanding of how he was arrested
11 there; how he was taken out of the fire truck?

12 A I was told that he was arrested. I guess, he had
13 some injuries from the collision. And also, there was,
14 I'm going to say, a few officers that were injured,
15 also, trying to make the arrest on him.

16 Q Were those officers, to your knowledge, also
17 transported to the hospital?

18 A Yes, they went to Beaufort Memorial, also.

19 Q How long were you at the scene, approximately?

20 A I was there, I took the photos, and got, you know,
21 got my -- you know, I talked with the witness. Soon as
22 I got that, I went to Beaufort Memorial, to talk to Mr.
23 Hunt. But when I got there, he was sedated, so I was
24 unable to talk with him.

25 I did get a blood and urine sample from him.

1 Because, at the time, I didn't know if it was, you know,
2 going to be alcohol-related or whatever. I did do that.

3 And I end up going back to the scene a little later
4 on. I was probably at the scene until probably about
5 7:00, 7:00 o'clock that night.

6 Q So, you said you never actually spoke to Mr. Hunt
7 that day?

8 A Not that day, no.

9 Q Do you have an understanding as to why he was
10 sedated?

11 A From -- and this is from the, I guess, the -- I
12 mean, the --

13 MR. LOVELL: Objection, your Honor. We're about to
14 get into hearsay.

15 A Okay.

16 MS. CASTLEBERRY: Your Honor, we would just note
17 that there was part of his investigation he was to find
18 out certain information about Mr. Hunt.

19 THE COURT: I understand. I understand. It's
20 still hearsay. Sustained.

21 BY MS. CASTLEBERRY:

22 Q So, you said you stayed 'til about 7:00 o'clock.

23 A Yes. Um-hmm.

24 Q And did you perform any other duties that day with
25 respect to this accident?

1 A No, not -- not that day.

2 Q Later, did you?

3 A On the 27th, which was three days later, Mr. Hunt
4 was -- at some point, he was transported to MUSC, and we
5 went up there, because he was about to get released.
6 So, we went to wait 'til he got released, and we took
7 him into custody, and brought him back to Beaufort
8 County Detention Center.

9 MS. CASTLEBERRY: Okay. I don't have any further
10 questions of this witness.

11 THE COURT: Cross-examination.

12 MR. LOVELL: Very briefly, your Honor.

13 THE COURT: Sure.

14 CORPORAL JAMIE PERRY

15 CROSS-EXAMINATION, BY MR. LOVELL:

16 Q Good afternoon, Corporal. I'm Gary Lovell.

17 A How are you doing, sir?

18 Q Looking at the photos of this fire truck, would it
19 be fair to say that, when it first left the roadway, it
20 was in the southbound lanes?

21 A It was northbound.

22 Q Okay.

23 A It was in the northbound.

24 Q Okay. On the opposite side of where it ended up.

25 A Yes, sir. Yes, sir.

1 Q So, it had to go from the northbound lane across --
2 I think there's a center dividing lane.

3 A Yes.

4 Q Two lanes of southbound, across the curbing, over
5 the curbing, some distance down that, into all those
6 trees, and then, come to rest.

7 A Yes, sir.

8 Q So, it must have been moving on pretty fast at that
9 point, when it left the travel portion of the roadway.

10 A Yes. I don't know the exact speed, but I know it's
11 probably -- the fire truck probably has that speed.

12 Q Yeah. I saw in the MAIT report, 56 was the
13 minimum. Does that sound about right?

14 A That's probably about right, yes, sir.

15 Q And he had also had some other collisions before he
16 ever got to this point.

17 A Yes, sir.

18 MR. LOVELL: That's all. Thank you, your Honor.

19 THE COURT: All right. Re-direct?

20 MS. CASTLEBERRY: No, your Honor, we have no re-
21 direct.

22 THE COURT: Is this witness free to leave?

23 MS. CASTLEBERRY: Yes, he is free to leave. Thank
24 you, Corporal.

25 THE COURT: Any objection?

1 MR. LOVELL: None, your Honor.

2 THE COURT: You are free to go.

3 A Thank you.

4 THE COURT: Call your next witness, please.

5 MR. HOYLE: Your Honor, at this time, Plaintiff
6 calls Dr. Michael Caplan to the stand.

7 THE COURT: Okay.

8 BAILIFF: This way, sir. Come forward and be
9 sworn, please, sir.

10 MADAM CLERK: Doctor, right here. Would you please
11 place your left hand on the Bible, and raise your right?
12 Do you solemnly swear or affirm that the testimony
13 you're about to give in this matter is the truth, the
14 whole truth, and nothing but the truth, so help you God?

15 DOCTOR MICHAEL JEFFREY CAPLAN: I do.

16 MADAM CLERK: Thank you. Have a seat here, sir.
17 Say your name and spell your name for us.

18 DOCTOR MICHAEL JEFFREY CAPLAN: My name is Michael
19 Jeffery Caplan. Last name is spelled, C/a/p/l/a/n.

20 DR. MICHAEL JEFFREY CAPLAN

21 DIRECT EXAMINATION, BY MR. HOYLE:

22 Q Doctor, good afternoon.

23 A Good afternoon.

24 Q Doctor, where are you currently employed?

25 A I'm currently employed at the New York Suffolk

1 County Office of the Medical Examiner in Long Island,
2 New York.

3 Q You're a long way from home, Doctor.

4 A Yes, I am.

5 Q Now, just so we're all clear at the outset, are you
6 charging any party, either the Plaintiff or the
7 Defendant, for your time being here in court today to
8 testify?

9 A No, I'm not.

10 Q But my firm, Motley Rice, has agreed to reimburse
11 your travel expenses. Is that fair?

12 A Yes.

13 Q And just so we're all clear, you flew coach,
14 correct?

15 A Yes, sir, I did.

16 Q Okay. Just making sure. Doctor, before we get
17 into your background, did you give a deposition in this
18 case?

19 A No, I did not.

20 Q So, we're going to hear some things for the first
21 time here today. Is that fair?

22 A Yes.

23 Q Okay. Can you please give the Court and jury the
24 benefit of your education.

25 A Yes. So, I obtained my undergraduate degree in

1 forensic science at Michigan State University in 1983.
2 And forensic science really is -- is the method of
3 science that's applied to anything involving the law or
4 public interest or public safety.

5 After I obtained my degree in forensic science, I
6 then went to medical school. I went to the University
7 of Connecticut School of Medicine, where I graduated
8 with an M.D. degree in 1987.

9 And following that, I then did a residency in
10 pathology, the specialty of medicine which involves how
11 the human body reacts to disease. That was at the
12 University of Michigan from 1987 to 1992.

13 Following that, I did a one-year fellowship in
14 forensic pathology, again, using pathology; but
15 addressing matters of public interest and health and
16 safety. That was at the New York City Office of the
17 Chief Medical Examiner.

18 And I also completed a one-year fellowship in
19 pediatric pathology, and that's dealing specifically
20 with diseases of children, infants, and unborn babies,
21 and that was at the University of Pittsburgh Medical
22 Center from 2003 to 2004.

23 Q Doctor, are you licensed to practice medicine in
24 any state?

25 A Yes, I am.

1 Q Which states, please?

2 A Currently, I'm licensed to practice in the State of
3 New York.

4 Q Previously, were you licensed to practice medicine
5 in the State of South Carolina?

6 A Yes, I was.

7 Q What years were you licensed here, sir?

8 A I was licensed during the years of 2004 through
9 2008, and 2011 through 2014.

10 Q Do you hold any board certifications?

11 A Yes, I do.

12 Q And what are those, sir?

13 A I'm certified by the American Board of Pathology in
14 anatomic pathology, clinical pathology, forensic
15 pathology, and pediatric pathology.

16 Q And what does it mean for a medical doctor to be
17 board certified? Can you explain that to this Court and
18 jury.

19 A Yes. So, board certification is -- it's a
20 qualification that's -- the criteria are put out by the
21 individual specialty board in the field. So, for
22 example, some boards, there's an American Board of
23 Internal Medicine, Board of Surgery. And Pathology has
24 an American Board of Pathology. And so, to be board
25 certified by the American Board of Pathology, you have

1 to fulfill two requirements. One is that you have to
2 complete a training program that's approved by the
3 board, and also, by what we call the ACGME, American
4 Council on Graduate Education. [sic]. And also, you have
5 to sit for an examination, and receive a passing score.
6 If you fulfill both of those requirements, the
7 completion of the -- of the approved training program
8 and pass the examination, then, you are certified by the
9 American Board of Pathology in that specialty.

10 Q Doctor, have you offered any articles that have
11 been published in the peer review journals.

12 A Yes, I have.

13 Q And approximately how many articles have you
14 published in the peer review journals?

15 A I have co-authored somewhere around -- about ten.
16 Eight to ten.

17 Q And Doctor, what do you consider to be your area of
18 clinical expertise?

19 A I would say that -- that my area of -- of strongest
20 specialty would be pediatric forensic pathology, and
21 specifically, head injuries in -- in infants and
22 children.

23 Q Now, Doctor, have you been qualified in any court,
24 criminal or civil, to render an expert opinion?

25 A Yes, I have.

1 Q Does that include states here in -- does that
2 include South Carolina?

3 A Yes, it does.

4 Q In what field have you been so qualified to testify
5 as an expert witness in those courts, including here in
6 South Carolina?

7 A I have been -- I have been approved as -- I have
8 been qualified as an expert in forensic pathology, and
9 also, in pediatric pathology.

10 MR. HOYLE: Your Honor, at this time, Plaintiff
11 moves to have Dr. Caplan qualified to render opinions in
12 the field of forensic pathology.

13 MR. LOVELL: No objection, your Honor.

14 THE COURT: Very well. All right. Ladies and
15 gentlemen, let me tell you what's just occurred, and I
16 will give you more instruction about this when I give
17 you the concluding instruction. But I will tell you, at
18 this juncture, that, normally, under our rules of
19 evidence, witnesses are not allowed to testify regarding
20 their opinions or their reasons for those opinions.

21 There is an exception, when, by virtue of someone's
22 knowledge, experience, training, fashion, they have
23 become an expert in some field. Typically, it is an art
24 or science. And those witnesses deemed to be expert
25 witnesses are allowed to testify regarding to their

1 opinions within their expertise, and the reasons for
2 those opinions.

3 Ladies and gentlemen, as I say, I will give you
4 instructions regarding expert opinion testimony when I
5 give you the concluding charge. But I will tell you now
6 that expert opinion testimony is given for the purpose
7 of helping you understand the evidence, and of course,
8 not for the purpose of controlling judgment.

9 You may proceed.

10 BY MR. HOYLE:

11 Q Doctor, can you explain to the jury what forensic
12 pathology is.

13 A Yes. So, forensic pathology is -- is a specialty
14 of pathology. And I was saying before that pathology is
15 a specialty of medicine that deals with the body's
16 reaction to disease. Disease being anything apart from
17 the state of normal health. So, infection or cancer
18 would be a type of disease.

19 Forensic pathology come from the word, forensics,
20 which means forum or public place. So, forensic
21 pathology uses the methods and the techniques of
22 pathology to address, specifically, matters that may be
23 of public interest, that is, that may involve safety,
24 public health, anything that could be of -- could
25 potentially affect the community.