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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Unpublished Opinion No. 2018-UP-221 (S.C. Ct.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 11

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

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 In doing so, RN Janice McDonald observed Hunt was "flat and a little withdrawn, but he was appropriate when he spoke."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

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

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

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

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

(R. p. 1883, lines 14-20). Following the entire jury charge, Appellant requested an addition to this charge. Specifically, counsel for Appellant stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(R. p. 2398).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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CERTIFICATE OF COUNSEL

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

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The Estate of Justin Nicholas Miller, ...Appellant,

v.

CasePro, Inc., ...Respondent.

PROOF OF SERVICE

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

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William J. Farley, III

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

CasePro, Inc., Respondent.

Appellate Case No. 2015-002466

Appeal From Beaufort County
Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion No. 2018-UP-221
Submitted March 1, 2018 – Filed May 30, 2018

AFFIRMED

Thomas David Hoyle, William Christopher Swett, and Temitope Olamide Leyimu, all of Motley Rice, LLC, of Mount Pleasant, and Crystal Lynn Castleberry, of Castleberry Law Offices of Morgantown, West Virginia, for Appellant.

Dennis Gary Lovell, Jr., Douglas Walker MacKelcan, III, and William Joseph Farley, III, all of Carlock Copeland & Stair, LLP, of Charleston, for Respondent.

PER CURIAM: In this civil matter, Rebecca Delaney, as personal representative for the estate of her son, Justin Miller, appeals the circuit court's order entering judgment in favor of CasePro, Inc. (CasePro). Delaney argues the circuit court erred in refusing to issue Delaney's requested jury charge because her requested jury charge correctly stated the law applicable to the issues and evidence. Moreover, Delaney asserts the circuit court's refusal to give the requested charge contributed to the jury's verdict. We affirm.

1. We find the circuit court did not err in refusing to issue Delaney's proposed jury charge.[1] The circuit court must charge only the current and correct laws of South Carolina. *Welch v. Epstein,* 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000). To warrant reversal by the appellate court, the circuit court's refusal to give a requested charge must have been both erroneous and prejudicial. *Jones v. Ridgely Commc'ns, Inc.*, 304 S.C. 452, 456, 405 S.E.2d 402, 404 (1991). Despite Delaney's assertion that South Carolina law, public policy, and the evidence in the record supported giving the proposed charge, we find the circuit court charged the jury with the current and correct law of the state.

Absent a recognized exception, South Carolina law does not recognize a general duty to control the conduct of another or to warn a third person or potential victim of danger. *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002). While true that, in very limited circumstances, a reasonably foreseeable third party may maintain a suit against a medical provider for negligence, our courts have not recognized an expansive duty owed to the reasonably foreseeable third party in a general zone of danger. *See Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 92, 502 S.E.2d 78, 84 (1998) (recognizing the possibility that a reasonably foreseeable third party could bring a claim against a medical provider in certain circumstances but finding that, although the department

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[1] As to the duty CasePro owed to Miller, Delaney requested the circuit court charge the jury that "[a] medical provider owes a duty to a foreseeable nonpatient within a zone of danger that is identical to the duty owed to the patient." The circuit court, however, provided the jury with the following instruction as to the duty to warn:

> [W]hen a person provides medical services to another person, a duty to warn may arise. This duty to warn arises when a reasonably prudent person, under the same or similar circumstances[,] would have provided a warning. The duty to warn a patient flows to foreseeable persons in the general field of danger.

of mental health owed a duty to properly diagnose and treat a person who was involuntarily committed, it did not owe the same duty to the victim, who was physically abused by the person upon the person's release); *Hardee v. Bio-Med. Applications of S.C., Inc.*, 370 S.C. 511, 516, 636 S.E.2d 629, 631–32 (2006) (finding a medical provider that knows its treatments may have detrimental effects on a patient's capacities and abilities owes to the patient and to reasonably foreseeable third parties in the "general field of danger"—in that case, "the general motoring public"—an identical duty to warn of the associated risks and effects of the treatment, prior to its administration, to prevent harm to the patient and reasonably foreseeable third parties). Instead, South Carolina courts have emphasized that the recognition of a medical provider's duty to a foreseeable third party was a "very narrow holding." *See Hardee*, 370 S.C. at 516, 636 S.E.2d at 632 ("[T]his is a very narrow holding that carves out an exception to the general rule that medical providers do not owe a duty to third party [nonpatients]."). Indeed, our supreme court has been reluctant to extend the duty recognized in *Hardee* beyond its intended narrow scope. *See Oblachinski v. Reynolds*, 391 S.C. 557, 562, 706 S.E.2d 844, 846 (2011) (interpreting the *Hardee* holding narrowly and declining to extend the limited duty from *Hardee* to a nonpatient injured by a physician's negligent diagnosis, even though the ensuing harm to the nonpatient resulting from the misdiagnosis could have been reasonably foreseeable).

Contrary to Delaney's arguments in the instant case, the circuit court's instruction properly reflects the current law of South Carolina. Not only does South Carolina law reject Delaney's broad expansion of *Hardee*'s limited exception, the evidence adduced at trial did not warrant expanding CasePro's duty to Miller beyond the duty to warn. While evidence indicated CasePro's employees—Dr. Christian Jansen, Janice McDonald, and Joe McDonald—could physically restrain Hunt only if he was violent or uncooperative at the time of their interaction, nothing indicated that Hunt acted in that manner. Moreover, the record does not contain evidence to show that Hunt had a specific plan to harm himself or others. Thus, no evidence warranted an instruction that CasePro failed to mitigate known risks associated with Hunt's treatment or illness.

Last, we hold that public policy does not support a duty greater than the duty to warn. Although Delaney asserts public policy requires a more expansive charge than the one given at trial, our supreme court acknowledged the holding in *Hardee* presented a very narrow exception to South Carolina's general rule that medical providers do not owe a duty to third party nonpatients. *See Hardee*, 370 S.C. at 516, 636 S.E.2d at 632 ("[T]his is a very narrow holding that carves out an exception to the general rule that medical providers do not owe a duty to third

party [nonpatients]."). Moreover, granting such a broad expansion runs counter to the recognized policy that one does not have a general duty to protect the public from speculative harm of a dangerous individual within one's control. *See Faile*, 350 S.C. at 335, 566 S.E.2d at 546 ("We have held a defendant has a duty to exercise reasonable care by issuing warnings after the third party has made specific threats to a specific individual. The rationale behind this line of cases is an individual does not have a duty to protect the public from speculative harm from a dangerous individual within his control."); *id.* ("However, whe[n] the custodian knows of a specific, credible threat from a person in their care the injury is no longer speculative in nature.").

Accordingly, because the circuit court's instruction properly informed the jury of the correct and current law of South Carolina, we find the circuit court did not err in refusing to give Delaney's proposed jury instructions.

2. We do not address Delaney's second argument regarding prejudice because we find no error in the circuit court's refusal to issue the proposed jury charge. *See Jones*, 304 S.C. at 456, 405 S.E.2d at 404 ("[T]o warrant reversal, the refusal to give a requested charge must have been erroneous and prejudicial."); *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive). Thus, because Delaney cannot prove the circuit court's refusal was both erroneous and prejudicial to warrant reversal, the circuit court's order entering judgment in favor of CasePro is

AFFIRMED.[2]

LOCKEMY, C.J., and WILLIAMS and KONDUROS, JJ., concur.

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[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion No. 2018-UP-221
Appellate Case No. 2015-002466

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

Appellant

v.

CasePro, Inc.,

Respondent

RECEIVED
JUN 12 2018
SC Court of Appeals

PETITION FOR REHEARING

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

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

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

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

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

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

> The Restatement provides no duty exists "to control the conduct of a third person as to prevent him from causing physical harm to another unless ... a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct." Restatement (Second) of Torts § 315 (a) (1965). Section 319 provides: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." Restatement (Second) of Torts § 319 (1965).
>
> Our courts have customarily applied § 315 and § 319 in conjunction with duty to warn cases.
>
> ...
>
> **The application of § 319 is not limited to duty to warn cases.** The use of the § 319 custodial duty of care in such cases is a slight misnomer. Duty to warn cases normally involve a defendant who has legally released a third party from direct custodial control or who releases the third party after medical evaluation.
>
> ...
>
> In the present case, Respondents do not assert DJJ had a duty to warn potential victims. Instead, Respondents assert a breach of the duty to supervise and control a dangerous juvenile by the custodial entity. Therefore, Respondents argue DJJ had a specific § 319 duty to control a dangerous person legally placed in its direct custodial care. While this Court has never explicitly recognized such a duty, at least two appellate decisions mention a similar duty in dicta.
>
> ...
>
> This Court is reluctant to impose the duty to control unless there is an established authority relationship and a substantial risk of serious harm. See Hubbard & Felix, supra, at 64-65. Here, DJJ had custody of a known dangerous individual. **It had an independent duty to control and supervise Fredrico to prevent him from harming others as long as it retained custody of him by court order**.

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

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

Similarly, the only legal duty examined by our Supreme Court in Hardee v. Bio-Med Applications of S.C., Inc., is that of a duty to warn. 370 S.C. 511, 636 S.E.2d 629 (2006) ("Appellants argue that if Respondent did not warn Patient of the risks of operating a motor vehicle, Respondent breached a duty a medical provider owes to those persons in the general field of danger (that is, the motoring public) which should reasonably have been foreseen by Respondent when it administered the treatment"). But, unlike the reported decisions that came before it, Hardee focused on whether the defendant medical provider should have warned the *patient*[1] who

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

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

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

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

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

South Carolina has long recognized a cause of action in negligence for the breach of a medical provider's duty to prevent a known suicidal patient from self-harm. Bramlette v. Charter Medical-Columbia, 302 S.C. 68, 73, 393 S.E.2d 914, 917 (1990) citing Sloan v. Edgewood Sanatorium, Inc., 225 S.C. 1, 80 S.E.2d 348 (1954) (recognizing a duty to "safeguard and protect the patient from any known possibility of self-harm or reasonably apprehended danger"). In this case, the patient sustained physical injuries from his violent operation of the firetruck in addition to the injuries, and death, he caused others. R. p 487, line 10-15.

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

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

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

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

him permission to leave the ER. R. p. 1448, line 11—p. 1450, line 10; p. 1450 line 10-13) ("It was careless. It was reckless to allow Mr. Hunt to go outside, essentially, unsupervised, where he ran away, stripped naked, got into the fire truck, and — created a death.").

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

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

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

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

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

The Court of Appeals did "not address [Appellant]'s second argument regarding prejudice because we find no error in the circuit court's refusal to issue the proposed jury charge." As discussed above, the Court of Appeals erred in holding that the Circuit Court "charged the jury with the current and correct law of the state." As a result, the Court of Appeals should have considered whether this failure was prejudicial. See Jones v. Ridgely Commc'ns, Inc., 304 S.C. 452, 456, 405 S.E.2d 402, 404 (1991) ("[T]o warrant reversal, the refusal to give a requested charge must have been erroneous and prejudicial.") As discussed in Appellant's brief, the Circuit Court charged the jury that the only potentially negligent acts and omissions from the Respondent's employees on the day in question which the jury could consider were the medical providers' failure to warn Mr. Hunt not to do something at a time when he "lacked the capacity to distinguish moral or legal right from moral or legal wrong" or to recognize particular acts charged as morally or legally wrong because of "mental disease or defect." Based upon the evidence adduced at trial, it is clear that at the time he was permitted to leave the Emergency Room, Mr. Hunt, who had expressed a desire to harm himself or others, was not in a mental state to understand right and wrong. He did not have an appreciation as to the potential consequences of leaving the Emergency Room. A reasonable jury having only been charged on "failure to warn" could have found that a sufficient warning would not have changed Mr. Hunt's behavior and thus rendered a verdict for

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

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

CONCLUSION

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

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

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion No. 2018-UP-221
Appellate Case No. 2015-002466

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

Appellant

v.

CasePro, Inc.,

Respondent

RECEIVED
JUN 12 2018
SC Court of Appeals

CERTIFICATE OF SERVICE

The undersigned certifies that Appellant's Petition for Rehearing was served by US Mail on June 11, 2018 to the following Counsel for Respondent:

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"I will stand for my client's rights.
I am a trial lawyer."
–Ron Motley (1944–2013)

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RECEIVED
JUN 12 2018
SC Court of Appeals

June 12, 2018

Via HAND-DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

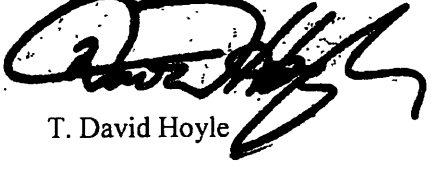
Re: Rebecca Delaney, as Personal Representative of the Estate of Justin Nicholas Miller vs. CasePro, Inc., Appellate Case No.: 2015-002466

Dear Ms. Kitchings:

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

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

With kind regards,



T. David Hoyle

cc: Counsel of Record

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

Appellate Case No.: 2015-002466

RECEIVED
JUN 25 2018
SC Court of Appeals

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

v.

CasePro, Inc., ...Respondent.

RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING

Respectfully,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

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Rebecca Delaney, as Personal Representative of
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v.

CasePro, Inc., ...Respondent.

RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING

RESPONDENT CasePro, Inc., by and through its undersigned counsel, respectfully submits this Return to Appellant's Petition for Rehearing pursuant to Rule 240, SCACR. To prevail, Appellant must demonstrate the Court overlooked or misapprehended the Appellant's argument. Rule 221, SCACR. The purpose for a petition for rehearing is not to have the case tried in the Appellate Court a second time. Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 564 S.E. 2d, 322 (2001).

In her Petition, Appellant begins by citing Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) to identify five exceptions to the general rule in South Carolina that there is no general duty to control the conduct of another or to warn a third person or potential victim of danger. However, Appellant fails to state with any particularity how the Court of Appeals overlooked or misapprehended Faile or its predecessor Bishop S.C. Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78, (1998). To the contrary, it is clear from the Opinion that this Court specifically considered Faile and Bishop in finding that the evidence produced at trial did not warrant expanding CasePro's duty to Miller beyond the duty to warn. The Opinion correctly states the evidence indicated CasePro's employees could only physically restrain Hunt if he was violent or uncooperative at the time of their interaction, neither of which was not present in the record. Further, this Court appropriately noted that the evidence did not show Hunt had a specific plan to harm himself or others. These two criteria specifically address the

exceptions Appellant raises for the first time in the Petition. The language cited from Faile noted that, in that case, the Department of Juvenile Justice had custody of a known, dangerous individual. Those facts were not present in this case. CasePro did not have custody of Kalvin Hunt, and Mr. Hunt had not made a specific threat of harm to any specific individual. Thus, the Court of Appeals correctly determined the criteria for a general duty to control had not been met in this case.

Appellant's discussion of Hardee v. Bio-Med Applications of S.C., Inc., 370 S.C. 511, 636 S.E.2d 629 (2006) also does not provide support that this Cour overlooked or misapprehended points related to its analysis of Hardee. Appellant discussed the duty owed to the patient being identical to that owed to third parties within the general field of danger, and that is exactly what Judge Goodstein charged the jury as the law of South Carolina. As discussed thoroughly in the Brief of Respondent, the broad expansion of the very narrow exception from Hardee is not warranted under the facts of this case.

Finally, Appellant references Bramlette v. Charter Medical-Columbia, 302 S.C. 68, 73, 393, S.E.2d 914, 917 (1990) in support of her Petition. However, Bramlette has been discussed in prior briefs and can be distinguished from this case in that it was not a third party duty case, it was a medical malpractice case, and the patient was suicidal, none of which were true for Kalvin Hunt in this case.

Accordingly, the Court should deny Appellant's Petition for Rehearing.

Respectfully,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
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Diane Schafer Goodstein, Circuit Court Judge
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CasePro, Inc., ...Respondent.

PROOF OF SERVICE

I certify that I have served ***Respondent's Return to Appellant's Petition for Rehearing***, upon the parties below by depositing a copy of it in the United States Mail, postage prepaid, on June 22, 2018, addressed as follows:

Anne McGinness Kearse, Esq.
T. David Hoyle, Esq.
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28 Bridgeside Boulevard
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Attorneys for Respondent CasePro, Inc.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

RECEIVED
JUN 25 2018
SC Court of Appeals

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

Appellate Case No.: 2015-002466

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

v.

CasePro, Inc., ...Respondent.

D. Gary Lovell, Jr.
S.C. Bar No.: 69293
Douglas W. MacKelcan
S.C. Bar No.: 76332
William J. Farley, III
S.C. Bar No.: 101033
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Attorneys for Respondent

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the following Respondent's Return to Appellant's Petition for Rehearing complies with Rule 240 of the South Carolina Appellate Court Rules.

Respectfully submitted,

D. Gary Lovell, Jr.
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Douglas W. MacKelcan
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REPLY TO SC OFFICE

June 22, 2018

RECEIVED
JUN 25 2018
SC Court of Appeals

VIA FEDERAL EXPRESS
Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Rebecca Delaney, as Personal Representative of the Estate Justin Nicholas Miller v. CasePro, Inc.
Beaufort County Case No.: 2012-CP-07-03782
Appellate Court Case No.: 2015-002466
CCS File No.: 549-46690

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies (all unbound) of Respondent's Return to Appellant's Petition for Rehearing, Proof of Service, and Certificate of Counsel (Compliance with Rule 240) in this case. Please provide me with a clocked copy in the enclosed, self-addressed, stamped envelope. By copy of this letter, I am serving the same upon all counsel of record. If you have any questions, please feel free to contact me

Sincerely,

D. GARY LOVELL, JR.

DGL:tjr
Enclosures

cc: T. David Hoyle, Esq. (w/encls via mail)
Crystal L. Castleberry, Esq. (w/encls via mail)

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The South Carolina Court of Appeals

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

v.

CasePro, Inc., Respondent.

Appellate Case No. 2015-002466

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_______________ CJ.

_______________ J.

_______________ J.

Columbia, South Carolina

cc:
Thomas David Hoyle, Esquire
Crystal Lynn Castleberry, Esquire
Douglas Walker MacKelcan, III, Esquire
Dennis Gary Lovell, Jr., Esquire

FILED
Aug. 16, 2018

William Christopher Swett, Esquire
Temitope Olamide Leyimu, Esquire
William Joseph Farley, III, Esquire