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Unpublished Opinion No. 2018-UP-221 (S.C. Ct.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

PETITIONER'S REPLY TO RESPONDENT'S RETURN

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Summary of Arguments in Reply

Respondent's Return in Opposition cherry picks and goes outside the Record on Appeal to claim this case is about a calm, cooperative mental health patient whose criminal, homicidal conduct was the result of a "speculative, remote risk of harm," which was completely unforeseeable and unpreventable. Moreover, Respondent urges this Court to accept the illogical and unsupported conclusion that, under South Carolina law, the only potential duty that emergency-room personnel owe to a reasonably foreseeable third party in this case is to warn the mental-health patient notwithstanding that: (1) the mental-health patient was awaiting inpatient psychiatric admission; (2) the emergency-room personnel had actual knowledge that the patient had expressed thoughts of hurting himself and others; and (3) the emergency-room personnel permitted the mental-health patient to leave the emergency room despite actual knowledge of the patient's thoughts of hurting himself and others. Certiorari is warranted.

Arguments in Reply

I. The risk of harm in this case was neither so speculative nor remote to preclude the existence of a legal duty – beyond a duty to warn.

Respondent takes issue with Petitioner's characterization of Kalvin Hunt as "criminally insane" calling it "improper." Resp't Br. 14. The Circuit Court, however, took judicial notice of an Order from the Beaufort County Court of General Sessions and published that order in its entirety to the jury. (App. pp. 1692-1699, R. p. 1680, line 25 – p. 1687, line 2). That Order establishes that Mr. Hunt was charged with: "murder; assault and battery, first degree; assault, beat or wound a police officer while resisting arrest (times two); hit and run; duties of driver involved in accident with minor personal injury (times six); grand larceny, value $10,000 or more." (App. 1694, R. p. 1682, lines 11-18). That Order further establishes that:

> In the evaluation report, the SCDMH examiners found that [Mr. Hunt], at the time of the commissions of the acts charged, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong, or to recognize the particular acts charged as morally or legally wrong.

(App. p. 1695, R. p. 1683, lines 10-17). The Beaufort County Court of General Sessions found, after reviewing all the evidence, that: "at the time of the commission of the alleged offense, [Mr. Hunt], as a result of mental disease or defect, did not have the capacity to distinguish moral or legal right from more or legal wrong." (App. pp. 1695-1696, R. p. 1683, line 24 – R. p. 1684, line 4). As a result, Mr. Hunt was found not guilty by reason of insanity. (App. p. 1696, R. p. 1684, lines 5-7).

In the civil case that forms the basis of this appeal, the jury received as evidence: medical records from Mr. Hunt's visit to the Naval Hospital Beaufort (App. pp. 2121-2134, R. 2106-2119); multiple 911 calls (Plaintiff's Exhibit 1 with Beaufort County Clerk of Court); and a time-stamped video, which had been redacted from its 7 minutes and 57 second entirety so as not to show the seconds before and including impact, of Mr. Hunt intentionally striking Petitioner's son. (Plaintiff Exhibit 23 with Beaufort County Clerk of Court). From this evidence, the following timeline from February 24, 2012 is known:

- 2:17 pm: Mr. Hunt arrived at the Emergency Room. (App. pp. 2123, R. p. 2108).
- 2:30 pm: Nursing Triage[1] (including a nursing assessment of "suicidal ideation") ended, and Mr. Hunt was placed in bed number 4. (App. p. 2125, R. p. 2110; App. p. 2124, R. p. 2109).

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[1] According to Janice McDonald, the triage nurse: "I was afraid of my own safety." (App. p. 633, R. p. 627, line 2). Mrs. McDonald also testified that Mr. Hunt told her about an altercation with his superior officer that led to Mr. Hunt's impending separation from the military. (App. p. 638, R. p. 632, lines 18-22). Towards the end of triage, Mr. Hunt put his hands over his ears, and rocked back and forth. (App. pp. 642-643, R. p. 636, line 22—p. 637, line 4). Mrs. McDonald described Hunt's affect as "flat" with "little or no emotion . . just not forthcoming . . . a good way to describe it, like dead, flat." (App. pp. 658-659, R. p. 652, line 18—p. 653, line 1). Following triage, Mrs.

- 2:50 pm: The doctor on duty in the Emergency Room, Dr. Jansen, first saw Mr. Hunt and charted that the "current / associated complaints" included "suicidal thoughts and thoughts of hurting others but no specific plan." (App. p. 2127, R. p. 2112).
- 3:20 pm: a psychiatric technician began his safety evaluation of Mr. Hunt.[2] (App. p. 2126; R. 2111).
- 4:09 pm: Beaufort County Sherriff's Office received a 911 call indicating that Mr. Hunt ran out of the main gate of Naval Hospital Beaufort partially clothed. (Plaintiff's Exhibit 1; App. p. 544, R. p. 538 lines 14 –23).
- 4:17 pm: Beaufort County Sherriff's Office received a 911 call from a caller who reported that there had been a fatality on Ribaut Road.

Testimony in this case from the treatment nurse Joe McDonald indicates that sometime between 3:55 pm and 4:05 pm, Mr. Hunt, with Mr. McDonald's permission, used the bathroom unattended. (App. p. 809, R. p. 803, lines 1-22). Shortly thereafter, Mr. Ray, the Veteran's Affairs Officer, asked Mr. McDonald, "could we [Mr. Ray and Mr. Hunt] step out for some fresh air"? (App. p. 813, R. p. 807, lines 8-24). Mr. McDonald responded "yes", and Mr. Hunt was permitted to leave the Emergency Room. (App. pp. 813-814, R. p. 807, lines 25—p. 808, line 5).

Thus, the tragic event that forms the basis of this case occurred <u>12-22 minutes</u> after Mr. Hunt was given affirmative permission to leave the ER. This narrow time-frame is a critical fact of Petitioner's case and evidence that the harm (death) which happened to Petitioner's son was far from remote. Respondent correctly notes that Petitioner relies repeatedly on <u>Hardee v. Bio-Medical Applications of S.C., Inc.</u>, 370 S.C. 511, 515, 636 S.E.2d 629, 631 (2006). In <u>Hardee</u>, the driver's dialysis treatment ended at approximately 9:51 am and he left the dialysis center at 10:10

McDonald told the other personnel in the Emergency Room, "I think he's angry and frustrated." (App. pp. 633-634, R. p. 627, line 24—p. 628, line 1).

[2] Arthur Manning, the psychiatric technician, observed: "It did not seem that he was oriented to like what was going on right then and there. I remember that his — the way he was talking to me, it was very disorganized. It didn't seem like he had a grasp of like time right then and there, and I also felt that the way that he was talking and his —demeanor and body language was *very aggressive*." (App. pp. 2362, R. p. 2347, CT EX 10) (Emphasis added).

am. Record on Appeal, Vol. I, at p. 18, Hardee v. Bio-Medical Applications of South Carolina. The fatal collision which gave rise to the case which culminated in this Court's opinion in Hardee occurred approximately 18 minutes later. Id. In this case, the record indicates that Hunt was not legally responsible for his actions 12-22 minutes after leaving the ER because he was not guilty by reason of insanity. Mr. Hunt's criminal insanity is appropriate to consider in addressing whether a duty, beyond a duty to warn Mr. Hunt not to harm himself[3] and/or others, exists.

Respondent attempts to further confuse the issues concerning whether a duty exists by stating that "it is more difficult to conceive of a more speculative, remote risk of harm than Hunt eloping from NHB, avoiding security officers[4], locating a fire truck with the key[5] in the ignition, stealing the fire truck, causing multiple motor vehicle accidents, and ultimately colliding with Justin Miller." Resp't Br. 18. "[I]t is not necessary that the details of the particular injury be foreseen; due care to prevent a particular type of injury is required so long as injury of that general kind is foreseeable." FELIX & HUBBARD, THE SOUTH CAROLINA LAW OF TORTS 48 (4th ed. 2011). See also McQuillen v. Dobbs, 262 S.C. 386, 393, 204 S.E.2d 732, 736 (1974) ("The law is well settled that in order to establish liability it is not necessary that the person charged with negligence should have contemplated the particular event which occurred. It is sufficient that he should have foreseen that his negligence would probably cause injury to something or someone.").

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[3] Mr. Hunt was injured as a result of the fire engine finally coming to rest against a tree resulting in Hunt being transported to MUSC in Charleston and staying in the hospital for three days. (App. p. 492, R. p. 489, lines 3-8; App. pp. 2095-2099, R. pp. 2080-2084).

[4] Respondent does not offer any citation in the Record on Appeal for this assertion. In addition, no security officer testified at the trial of this action – either live or by way of deposition.

[5] Sammy Negron, the City of Beaufort Fire Chief, testified that fire engines do not require a key to start the engine. (App. 1377, R. 1368 lines 8-20). On the day of this tragedy, the fire engine was responding to "a call for a medical emergency at the Laurel Hill Apartments" which is near Naval Hospital Beaufort. (App. 1385, R. 1376 lines 5-20).

In this case, Mr. Hunt harming others was clearly foreseeable to personnel in the ER as a result of Mr. Hunt's own statements to Dr. Jansen indicating he had "thoughts of hurting others" and Mr. Hunt's aggressive demeanor and body language to which Mr. Manning testified. This was confirmed by Petitioner's expert, Dr. Baker, who opined that based on his review of the medical records and the information available to nurse Janice McDonald, nurse Joe McDonald, and Dr. Chris Jansen, it was foreseeable that Mr. Hunt would actually harm others: "All the information was there. If you did not protect Mr. Hunt from himself, and protect the staff, and protect the community, Mr. Hunt was going to take action." (App. pp. 1483-1484, R. p. 1474, line 17 – p. 1475, line 11). For these reasons, the duties inherent upon Respondent exceeded the potential duty to warn Mr. Hunt and reached to the reasonably foreseeable consequences of Mr. Hunt's behavior based on Respondents' failure to keep Mr. Hunt safely in the ER.

II. Respondent's depiction of Mr. Hunt as "calm" and "cooperative" is contradicted elsewhere in the Record on Appeal and there was substantial evidence that Hunt should not have been allowed to leave the Emergency Room but should have been closely supervised and admitted to the hospital.

Dr. Beverly Hendelman, a civilian employee of the U.S. government, is a psychiatrist. (App. p. 2338, R. p. 2323, CT EX 9). She was working on February 24, 2012 as a staff psychiatrist at the Naval Hospital Beaufort. Id. Dr. Hendelman did not see Mr. Hunt because it was "obvious" that he was in need of hospitalization. Dr. Hendelman shared this recommendation with Dr. Jansen by telephone. (App. pp. 2338-2339, R. pp. 2323-2324, CT EX 9). According to Dr. Hendelman both "danger to self" and "danger to others" are a criteria for hospital admission. (App. p. 2340, R. p. 2325, CT EX 9). At her deposition, Dr. Hendelman reviewed the ER records and testified that based on Dr. Jansen's charting of "suicidal thoughts and thoughts of hurting others," it was a requirement that Mr. Hunt be admitted to the hospital because he is a danger to self and a danger to others by his own admission. Id. She further testified as follows:

> Q. Would it have been the safe thing to do to have kept Kalvin Hunt under close supervision?
>
> A. I would prefer to keep my patients under close supervision when they tell me that kind of information.
>
> Q. When they say they have thoughts of hurting others, correct?
>
> A. Yes.
>
> Q. Would it be the reasonable and safe thing to do to take precautions to prevent someone like Kalvin Hunt from leaving the facility prior to him being admitted after he has indicated he has thoughts of harming others?
>
> A. I prefer to keep them under close supervision and stay right with them when they have suicidal or homicidal thoughts.

(App. p. 2350, R. 2335, CT EX 9). Dr. Hendelman further testified that Respondent's employees working in the Emergency Room did not manage Mr. Hunt safely on February 24, 2012: "he shouldn't have been allowed to leave." (App. p. 2352 R. p. 2337, CT EX 9).

Respondent strains in its Return to turn the issue of whether there is a duty, beyond a duty to warn, into the question of whether Mr. Hunt could or should have been physically restrained. Respondent even quotes testimony from Angela Brannon concerning a "zero restraint policy" which was not contained in the portion of Ms. Brannon's deposition which was played to the jury at trial and, therefore, is not part of the Record on Appeal. See Resp't Br. 13 and citation[6] to R. p.

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[6] From a search of the undersigned's file, the cited testimony appears to be from page 74, line 5 through page 75, line 1 of Ms. Brannon's deposition which was taken on September 27, 2015. As reflected on the "clip sheet" which is a part of Court's Exhibit 11, these page and lines were not rendered to the DVD played to the jury as evidence on October 13, 2015. See App. pp. 1341-1343, R. pp. 1332-1333; App. pp. 2413-2345, R. pp. 2398-2420. While the Circuit Court considered objections to page and line designations of Ms. Brannon's deposition, objections by the Plaintiff to Defendant's page and lines were heard off the record at a bench conference on October 13, 2015 from 3:47 pm – 4:00 pm. (App. pp. 1332-1339, R. pp. 1323-1330). Thus, it is not clear if the testimony at issue from Ms. Brannon was designated by the Defendant or if an objection to it was sustained. However, it is clear that the Record on Appeal does not contain this testimony. As a result, this Court cannot consider this testimony. See Rule 210(h), SCACR.

2398. Regardless of this attempted diversion, an appropriate question is whether nurse Joe McDonald breached a legal duty to Petitioner's son by giving Mr. Hunt affirmative permission to leave the ER 12-22 minutes before Justin Miller's death or whether Dr. Jansen, upon learning that Mr. Hunt had suicidal ideations and thoughts of hurting others, should have instructed his nurses to keep Mr. Hunt under close supervision, or, at least, in the ER. Indeed, Mr. McDonald testified that if Dr. Jansen "had told me not to let him leave, it would have been different." (App. p. 821, R. p. 815, lines 20-21).

Petitioner's expert, Dr. Baker, testified that both Mr. and Mrs. McDonald and Dr. Jansen knew, or should have known, that Mr. Hunt "was a patient who was at high risk, the highest risk, for doing something . . . a patient who's on the edge who's going to do something. You have all the signs and symptoms of a patient who is going to act." (App. p. 1480, R. p. 1471, lines 14-22). For example, Mrs. McDonald noted, even after a cursory review of the available past medical records, that Mr. Hunt had a significant past medical history for mental health issues. (App. p. 1470, R. p. 1461, lines 4-20). In addition, Mrs. McDonald noted that Mr. Hunt had a flat affect and a depressed mood as well as an elevated heart rate. (App. p. 1472, R. p. 1463, lines 4-19). According to Dr. Baker, Mr. McDonald knew that Mr. Hunt had Post Traumatic Stress Disorder which can lead to sudden, unpredictable behavior. (App. p. 1474, R. p. 1465, lines 4-23). Dr. Baker described a "progression of behavior" of an "aggressive, agitated, unsettled" Mr. Hunt which led to his elopement and the death of Petitioner's son. (App. pp. 1475-1476, R. p. 1466, line 15—p. 1467, line 1). In addition, according to Dr. Baker, Dr. Jansen noted Mr. Hunt's symptoms as "severe" among choices of mild, moderate, or severe. (App. p. 1478, R. p. 1469, lines 10-15). Dr. Baker testified that severe "is a modifier that tells us that this is a patient who is getting ready to explode. This is a patient who is going to do something." (App.

p. 1478, R. p. 1469, lines 15-18). In Dr. Baker's opinion, one of the biggest red flags was the uniform description of Mr. Hunt as angry:

> Angry is -- is a very large red flag in a patient who comes in, who is having thoughts of harming himself or harming someone else. Because angry patients frequently are preparing -- will -- will take action in some way. They're either going to act out against themselves; they're going to act out against the staff; and they're going to -- or they're going to act out against the community, if they elope. And so, when you have an angry person who is having those types of feelings, it is even more important, the duty to secure the patient, make Mr. Hunt safe, safe room, disrobed, clothes off, gown on, shoes and socks off, okay, make him safe against himself, safe for the staff, and safe for the community, becomes even more important, because angry patients who are having these type of thoughts, this type of thinking that's not clear, will often act out quickly and suddenly and irrationally, with little or no warning.

(App. pp. 1467, R. p. 1467, lines 5-22). Respondent's expert, Dr. Oberg, when cross examined for impeachment purposes with TINTINALLI'S ON EMERGENCY MEDICINE, agreed that patients who present with suicidal ideation require specific measures for patient protection including, most importantly: "those expressing suicidal ideations should not be allowed to leave the Emergency Room before a medical or psychiatric evaluation is completed." (App. p. 1672, R. p. 1660, line 2—p. 1664, line 11; App. 1677, R. p. 1665, lines 3-5).

In other words, this case – had the Circuit Court charged that there was a duty beyond a duty to warn – could have been decided by a jury based on evaluating the totality of the evidence and whether nurse Joe McDonald should have said "no" instead of "yes."

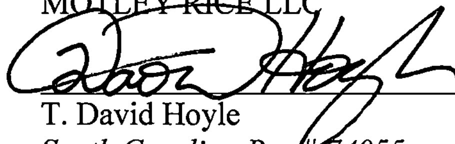
Instead, the jury was charged that the <u>only</u> legal duty that existed on the part of Respondent's employees was a duty to provide a warning to a mental health patient who was later adjudicated not guilty by reason of insanity for his criminal, homicidal conduct a mere twelve to twenty-two minutes after leaving the ER. Certiorari is warranted.

Conclusion

For the reasons set forth above and in the Petition, this Honorable Court should grant a Writ of Certiorari to review the Court of Appeals' opinion.

Respectfully submitted this 19th day of October, 2018

MOTLEY RICE LLC



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PROOF OF SERVICE

I certify that on the date indicated below, I served the *Petitioner's Reply to Respondent's Return* upon Respondent by placing same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

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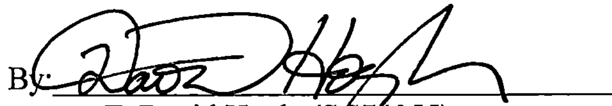
By: 

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