THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III

Case No. 2017-CP-26-1571
Appellate Case No. 2019-001665

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SC Court of Appeals

David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer,.....Respondent,

v.

Southern Myrtle Inpatient Services, LLC, Nirlep A. Patel, M.D. and Rachel Ash-Bernal M.D. ..... Defendants,

Of which
Southern Myrtle Inpatients Services, LLC is.....Appellant.

RECORD ON APPEAL
VOLUME I
Pages 0001-0414

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STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS
David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer, Plaintiff, vs. Southern Myrtle Inpatient Services, LLC, Nirlep A. Patel, M.D., and Rachel Ash-Bernal, M.D., Defendants.	Civil Action No.: 2017-CP-26-1571 **ORDER DENYING POST-TRIAL MOTIONS AND ENTERING JUDGMENT AGAINST DEFENDANT SOUTHERN MYRTLE INPATIENT SERVICES, LLC**

THIS MATTER comes before the Court on Defendant Southern Myrtle Inpatient Services, LLC's *Motion for Judgment Notwithstanding the Verdict or, in the Alternative, Motion to Alter or Amend Judgment or, in the Alternative, Motion for New Trial.* This wrongful death case was tried to verdict over five days (May 20-24, 2019). The Jury returned a verdict in favor of the Plaintiff against Defendant Southern Myrtle Inpatient Services, LLC ("SMIS") and awarded the sum of $3,500,250.00. After careful review of the pleadings, consideration of the evidence and testimony submitted at trial, and reading the extensive briefing submitted by both Parties, I conclude that Defendant's Motions must be **DENIED** and Plaintiff's Motion for Award of Costs and Interest is **GRANTED.**

I. FACTUAL BACKGROUND

The facts of this case involve Matthew Scheer, a 26-year-old young man, whose father, David Scheer, brought him to Grand Strand Regional Medical Center ("GSRMC") on the morning of October 2, 2015, for what David reported to be a sudden change in Matthew's mental status. The medical records reflect that the healthcare professionals at GSRMC's emergency department found Matthew to have "*paranoia and hallucinations*" and determined him to be suffering from an acute onset psychosis. The medical records state that Matthew was having

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auditory, visual, and tactile hallucinations, that he was "*hearing voices and believ[ing] someone is plotting against him by poisoning him*," and that he had "*insomnia and anorexia due to believing that all 'food he used to eat is contaminated now.'*"

Sometime around noon that day, Dr. Amanda Battisti, an emergency medicine physician GSRMC, advised Matthew's father to take his son to the Lighthouse Center in Conway ("Lighthouse") for further evaluation and treatment. Records from Lighthouse reflect that David brought Matthew to the facility as instructed but that Lighthouse's medical director determined that Matthew could not be admitted as a patient because, after reviewing some of Matthew's lab work done at GSRMC, he had concerns that Matthew was "not medically stable" and advised that Matthew should be taken back to a hospital. David and Matthew then returned to GSRMC, where Matthew was again seen by the same emergency medicine physician. Dr. Battisti noted no change in Matthew's condition since the time she had seen him earlier in the day and arranged for Matthew to be admitted to the hospital.

At around 4:00 PM on October 2, 2015, Matthew was admitted to GSRMC with David Scheer being listed as Matthew's "*emergency contact*" and the "*person to notify*." Matthew's hospital record also included his father's mobile telephone number. Testimony from David Scheer, coupled with Matthew's medical records, demonstrated that at all times he was with his father, Matthew was calm and cooperative, though medical providers noted he was psychotic and delusional.

At or around the time of Matthew's admission to GSRMC, Defendant Nirlep Patel (a hospitalist) was made his attending physician and a request for a consultation with a psychiatrist was placed. Although the psychiatric consultation did not occur, later that same afternoon, Dr. Patel evaluated Matthew. While Dr. Patel's notes in the medical chart reflect that he intended to

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place an order for an anti-anxiety medication to be administered *p.r.n.* (as needed), the records also indicate that Defendant Patel never entered the order into the hospital's system. Dr. Patel testified that he left GSRMC around 7:00 PM. David Scheer testified that, believing his son to be in a safe place, he left the hospital to retrieve some toiletries and clean clothes for his son. Further, David testified that before departing from GSRMC, he first stopped by the nursing station and confirmed that the hospital's system/records had him listed as being his son's emergency contact and also had his mobile telephone number correctly recorded.

The medical records evidence that, at around 1:15 AM on October 3, 2015, Matthew approached the nursing staff and ripped off his hospital armbands. The records further reflect that Matthew was shirtless, "*pacing in the hallways*," and exclaiming that the healthcare providers "*could not control him.*" The staff noted that Matthew was "*becoming aggressive*" with them and yelling that they were "*devil worshippers*" and that "*Obama is Satan.*"

The on-call hospitalist, Dr. Rachel Ash-Bernal, was called and came to speak with Matthew. At this point, Matthew had not been seen by a psychiatrist nor had he received any anti-anxiety or anti-psychotic medications. The medical records reflect that the healthcare providers asked Matthew if he would like to speak with his father and that Matthew refused.

Dr. Ash-Bernal's physician's note states: "*I asked if [Matthew] wanted to leave the hospital against medical advice or stay in-house for treatment.*" The records and testimony demonstrate that Defendant Ash-Bernal warned her psychotic patient about the dangers of leaving in a delusional state and then allowed the young man to be discharged against medical advice. After what the medical record's times demonstrated to be a short interaction with Matthew, Dr. Ash-Bernal filled out Against Medical Advice ("AMA") paperwork and allowed

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Matthew to walk out of the hospital's doors and into a major storm.[1] The AMA paperwork which Dr. Ash-Bernal completed for Matthew acknowledged that Matthew was psychotic and at risk of death due to his mental illness. Further, Dr. Ash-Bernal's note states: *"[I]t was explained to [Matthew] that he could die from infection, seizures or as a result of his psychiatric illness and he insisted on leaving."* Dr. Ash-Bernal wrote that Mathew "*seemed able to weigh the information*" because he "*interrupted his religious rant to think about the question [whether he wanted to leave].*" Dr. Ash-Bernal testified that she did not call Matthew's emergency contact, David Scheer, about Matthew's change in condition because she believed that the privacy provisions within HIPAA (Health Insurance Portability and Accountability Act of 1996) would not have allowed her to disclose her patient's condition and desire to leave the hospital. David Scheer testified that he was only a few minutes' drive away from GSRMC, and, had Dr. Ash-Bernal called him about his son, he would have immediately come to the hospital. Evidence presented at trial demonstrated that Dr. Ash-Bernal's employer, Defendant Southern Myrtle Inpatient Services, LLC ("SMIS"), had provided training sessions to its employees regarding HIPAA. However, the evidence also demonstrated that SMIS's training focused only on the provisions of HIPAA that do not allow for the disclosure of patient information and failed to include training about situations and circumstances where HIPAA allows for patient information to be disclosed.[2]

Dr. Ash-Bernal discharged Matthew from the hospital at around 1:30 AM on October 3, 2015. Approximately half an hour after Matthew's discharge, Duane Doherty, a witness

[1] Evidence presented in the case demonstrated that, at the time of Matthew's release from GSRMC, Hurricane Joaquin was near the east coast and bringing torrential wind and rain.

[2] As discussed later, HIPAA contains provisions that, generally speaking, would permit the limited disclosure of a mentally ill patient's healthcare information to family members when the disclosure would be in the patient's best interest. HIPAA also contains provisions that permit disclosure to persons able to prevent or lessen a threat to the safety of the patient or others.

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standing on a balcony in a beachfront hotel approximately two miles away from the hospital, observed a young man fitting Matthew's description remove all of his clothes and run into the water screaming. Mr. Doherty testified that he observed the young man swim out into the ocean, where he was eventually knocked down by a large wave and never resurfaced. Matthew's body was never recovered, and the South Carolina Probate Court determined that he drowned in the ocean on October 3, 2015.

II. DEFENDANT'S MOTIONS

A. DEFENDANT'S MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT

Defendant SMIS moves for a judgment notwithstanding the verdict and asserts: (1) there was an improper introduction of evidence with regard to Plaintiff's allegation of SMIS's failure to train its employee doctors, claiming this issue was not properly pled and that the only expert to opine as to corporate training standards was Plaintiff's hospitalist; and (2) there was no evidence that anything SMIS did or did not do with regard to training its employees proximately caused Matthew Scheer's death. For the reasons discussed below, Defendant SMIS's Motion for a Judgment Notwithstanding the Verdict is **DENIED.**

1. Legal Standard

In deciding whether to grant or deny a JNOV, the trial court is concerned only with the existence or non-existence of evidence. Long v. Norris & Assocs., Ltd., 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000). "In ruling on motions for a [judgment notwithstanding the verdict], the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 429–30, 445 S.E.2d 439, 440 (1994). If

there is more than one reasonable inference that can be drawn from the evidence, or when the inference is in doubt, a judgment notwithstanding the verdict must be denied. Bailey v. Segars, 346 S.C. 359, 366, 550 S.E.2d 910, 913 (Ct. App. 2001) (*citing* Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). A directed verdict motion should be denied if, liberally construing the facts in the opposing party's favor, any evidence exists by which a verdict for the opposing party would be reasonably possible. Sims v. Giles, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001). When considering JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000); Erickson v. Jones Street Publishers, L.L.C., 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006).

Rule 50(b), SCRCP, provides, in part, that "[a] party who had moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside to have judgment entered in accordance with his motion for a directed verdict." Rule 50(b), SCRCP. The party making the motion for judgment notwithstanding the verdict must have moved for directed verdict at the conclusion of all the evidence. Bellew v. Liberty Life Ins. Co., 270 S.C. 301 (1978); Government Employees Ins. Co. v. Mackey, 260 S.C. 306 (1973); Johnson v. Hoechst Celanese Corp., 317 S.C. 415 (Ct. App. 1995). The party is limited to moving on the same grounds as asserted in the motion for directed verdict. Roland v. Palmetto Hills, 308 S.C. 283 (Ct. App. 1992); Glover v. N.C. Mutual Life Ins. Co., 295 S.C. 251 (Ct. App. 1988). In considering a motion for a judgment notwithstanding the verdict, the trial court is to apply the same approach to the evidence as it applies in ruling on a motion for directed verdict, and "is required to view the evidence and the inferences that reasonably can be drawn therefrom in the

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light most favorable to the party opposing the motions." Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148-49 (1999).

A JNOV is appropriate only in rare circumstances. *See* Linnen v. Commercial Cas. Co., 152 S.C. 450, 150 S.E. 127, 128 (1929) (speaking to a directed verdict, which is the same standard as a JNOV and noting that it is only "rare cases in which a directed verdict is proper"). In denying a motion for a directed verdict or judgment notwithstanding the verdict, the trial court can only be reversed by the appellate court when there is not a scintilla of evidence to support the nonmoving party's case. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 477, 514 S.E.2d 126, 130 (1999). "[U]nder the scintilla rule which prevails in South Carolina, if there is a scintilla of evidence, which is any material evidence that if true would tend to establish the issue in the mind of a reasonable juror, the case should be submitted to the jury for its determination." Woodle v. Brown, 223 S.C. 204, 209-10, 74 S.E.2d 914, 917 (1953). A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 415 S.E.2d 393 (1992). The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision. Smalls v. South Carolina Dep't of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000); Hunter v. Staples, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999). "The verdict will be upheld if there is any evidence to sustain the factual findings implicit in the jury's verdict." Shupe v. Settle, 315 S.C. 510, 515, 445 S.E.2d 651, 654 (Ct. App. 1994) (*citing* Hilton Head Island Realty, Inc. v. Skull Creek Club, 287 S.C. 530, 339 S.E.2d 890 (Ct. App. 1986)).

2. Plaintiff's Claims and Their Evidentiary Support

David Scheer, acting as the personal representative of Matthew Scheer's Estate, filed the Complaint in this action on March 23, 2017, with claims made against Defendants Southern

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Myrtle Inpatient Services, LLC ("SMIS") and Nirlep A. Patel, M.D. Within these claims, the pleading alleged SMIS failed to properly educate and train its physicians with regard to the temporary detainment of patients, stating in Paragraph 25:

> The Defendants, individually, and by and through their agents and servants, deviated from the applicable standards of care, and were negligent, grossly negligent, and careless in the following particulars:
>
> a. allowing Matthew to leave GSRMC;
>
> b. failing to give Matthew antipsychotic medications;
>
> c. ***failing to contact Matthew's father to inform him that Matthew was attempting to leave GSRMC***;
>
> d. ***failing to educate and otherwise train physicians as to the applicable legal standards and mechanisms to detain a mentally ill patient against his/her will; and***
>
> e. ***in such other and further particulars as discovery or evidence at trial may reveal.***

(Plaintiff's Complaint, filed March 23, 2017, *emphasis added*).

On August 10, 2017, Plaintiff filed an Amended Complaint, adding Dr. Rachel Ash-Bernal as a Defendant. Within this amended pleading, Paragraph 50 alleges:

> The Defendants, individually, and by and through their agents and servants, deviated from the applicable standards of care, and were negligent, grossly negligent, careless and reckless, in the following particulars:
>
> a. failing to give Matthew antipsychotic medications;
>
> b. failing to ensure that Matthew received a psychiatric consultation in a timely manner;
>
> c. ***failing to contact Matthew's father to inform him that Matthew was desiring/attempting/planning to leave GSRMC***;
>
> d. failing to involuntarily commit Matthew and otherwise ***allowing Matthew to leave GSRMC***;
>
> e. ***failing to educate and otherwise train physicians and staff as to the ability, means, and mechanisms to detain a mentally ill patient against his/her will; and***

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f. in such other and further particulars as discovery or evidence at trial may reveal.

(Plaintiff's Amended Complaint, filed August 10, 2017, *emphasis added*). As demonstrated by Plaintiff's pleadings, claims against SMIS relating to negligent training of its physicians were at issue since the inception of the case. In response to Plaintiff's allegations concerning SMIS's physicians having not called Matthew's emergency contact, Defendants specifically raised HIPAA's privacy rules as a defense, contending that the Act's privacy provisions prohibited SMIS's doctors from contacting David Scheer and advising him of a change in Matthew's condition and desire to leave the hospital at approximately 1:15 AM on October 3, 2015.

While privacy laws generally protect patient information from disclosure to outside parties, there are exceptions that allow for the disclosure of health information when a provider has a good faith belief that a disclosure of patient information is in the patient's best interest or may lessen the threat of harm to a patient or the public.[3]

In response to the Defendants having raised HIPAA as a basis for their actions, inactions, and release of Matthew without temporarily detaining him and calling his emergency contact, Plaintiff contended SMIS failed to properly train its physicians on both the legal standard for commitment of a mentally ill patient and on the permissible disclosures of health information in situations/circumstances where disclosure would be in the patient's best interest and/or serve to lessen the potential for harm to a patient or the public. Discovery was conducted on this very topic and, as part of this process, SMIS produced a PowerPoint presentation that the company used to train and educate the hospitalists it employed.

The case proceeded to trial, beginning on May 20, 2019. The matters presented at trial demonstrated that negligent training of the hospitalists, on the topic of permissible disclosures of

[3] *See* 45 CFR §§ 164.510 and 164.512, more specifically, 164.510(b)(3) and 164.512(j).

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patient information, was very much among the allegations and claims asserted against the hospitalists' employer, Defendant SMIS.

Plaintiff presented the testimony of Robert Robinson, M.D., who was duly qualified as an expert in hospital medicine (the very same type of medical services SMIS provides to patients at GSRMC). Dr. Robinson noted that doctors in his profession, hospitalists, receive continuing education from a variety of sources (including their employer) and that this training includes issues pertaining to permissible disclosures of patient information under HIPAA. Dr. Robinson testified that SMIS's training materials for hospitalists (he had reviewed PowerPoint presentations that SMIS had produced during discovery) were materially deficient because they focused only on prohibited disclosures under HIPAA and failed to provide any information as to the permissible disclosures for a patient's best interest and/or to lessen the potential for harm. Additionally, based on his review of the deposition testimony, Dr. Robinson was critical of the lack of knowledge of SMIS's employees on the topic of permissible disclosures of patient information. I find that Dr. Robinson's testimony creates, at a minimum, a scintilla of evidence from which the jury could conclude that SMIS's allegedly deficient training constituted ordinary negligence, as recognized in Dawkins v. Union Hosp. Dist., 408 S.C. 171, 758 S.E.2d 501 (2014), which is discussed in greater detail in the sections below.

Testimony presented at trial could be viewed by the jury as demonstrating that SMIS's employee, Defendant Rachel Ash-Bernal, lacked adequate education and training on the particulars of detaining a mentally ill patient against his will. Notably, GSRMC's form to place a temporary involuntary hold on a patient requires the signature of only one physician;[4] while

[4] GSRMC's form entitled "*Application for Involuntary Emergency Hospitalization for Mental Illness*" form tracks and makes specific reference to S.C. Code § 44-17-410, which requires only one doctor's signature for a temporary hold to be placed on a mentally ill person who poses a

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SMIS's employee testified that she believed two signatures were needed. Dr. Ash-Bernal further testified that if her patient expressed a desire to leave, she had to respect the patient's wishes and it was not up to her to judge the prudence of that decision. Plaintiff presented evidence, both from Dr. Robinson and Dr. Timothy Malone (a psychiatrist) that when a patient admitted for psychosis desires to leave the hospital against medical advice, the physician must temporarily detain the patient if he/she, because of mental illness, poses a substantial risk of physical harm to himself and/or others. Further, Plaintiff's experts testified that the physician must determine if the patient has the mental capacity to sign the AMA form, and, if the patient lacks that capacity, the doctor must place an involuntary hold. Viewing the evidence in the light most favorable to the Plaintiff, the jury could have viewed Dr. Ash-Bernal to have a lack of knowledge on the process for the involuntary detainment of a patient and found this lack of knowledge to be the result of SMIS's having failed "to educate and otherwise train [its] physicians as to the applicable legal standards and mechanisms to detain a mentally ill patient against his/her will," just as Plaintiff pled in his Complaint and Amended Complaint.

During the presentation of his case, Plaintiff also published the testimony of SMIS's corporate representative, from a deposition taken in discovery pursuant to Rule 30(b)(6), SCRP, on these very issues. This testimony demonstrated that:

- SMIS has taken no actions to educate or train its physicians about their power to temporarily detain a patient to prevent injury to themselves or others;
- SMIS promulgated no policies or procedures that would guide or otherwise be applicable to Drs. Patel or Ash-Bernal;
- SMIS expects its physicians to be knowledgeable on privacy policies of the hospital in which he/she is working;
- SMIS has taken no action to ensure that its doctors are knowledgeable on hospital policies and procedures;

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substantial risk of physical harm to himself and/or others.

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- SMIS is not knowledgeable about permissible disclosures of patient information under HIPAA;
- SMIS has never sought to educate the physicians it employs on HIPAA's permissible disclosures (seemingly a position contrary to the PowerPoint presentations the company produced);
- SMIS does not know or have any mechanism to confirm its employee's attendance at training seminars;
- SMIS is not sure if it provided any training to Drs. Ash-Bernal or Patel;
- SMIS provides some training online to its employees;
- SMIS has online corporate training on HIPAA, but has never looked into whether Drs. Patel and Ash-Bernal have attended that training;
- SMIS provided training from an overarching corporate standpoint, but relies solely upon clinicians and hospitals for specific training; and
- SMIS cannot speak to whether Dr. Ash-Bernal has received training on "dos and don'ts" of HIPAA.

Based upon Plaintiff's expert's testimony, SMIS' own 30(b)(6) testimony, and the testimony of Dr. Ash-Bernal, the Jury could reasonably conclude that SMIS failed to take appropriate action to educate and train its physicians on these important issues, and had no mechanism in place to determine if its physicians had been otherwise educated or trained on permissible disclosures under HIPAA.

As detailed above, Plaintiff's direct corporate liability claims were plead, addressed in discovery, and at trial, ample evidence was submitted to support the Jury's verdict. Plaintiff's Complaint, first filed in March of 2017, included direct corporate liability claims against Defendant SMIS for its failure to properly train and educate its physicians on legal issues affecting patient care. Plaintiff's Amended Complaint included these allegations as well. For well over two years, these issues were litigated prior to trial. SMIS claims that these issues were not plead with exact specificity must fail.

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Further, at trial, Plaintiff's witness, Dr. Robinson, who was duly qualified as an expert in hospital medicine, testified that for more ten years he had personally supervised and trained hospital staff on permissible disclosures under HIPAA. Dr. Robinson opined, that based on his review of all the evidence, including the HIPAA training materials that SMIS provided to its physicians and the deposition testimony of Dr. Ash-Bernal, that SMIS's training was deficient because it only focused on HIPAA restrictions on disclosure and provided no guidance on permissible disclosures. Coupled with Dr. Ash-Bernal's demonstrable lack of familiarity with permissible disclosures under HIPAA from her deposition testimony (which was presented to the jury by video) during Plaintiff's case, Dr. Robinson opined that SMIS's employee (Dr. Ash-Bernal) lacked crucial knowledge about how HIPAA regulations would permit her to contact David Scheer and apprised him of Matthew's condition and intent to leave the hospital against medical advice. Further, SMIS's 30(b)(6) testimony was presented to the jury about these issues and demonstrated the company's lack of any meaningful efforts to train and supervise its physicians in any capacity. In sum, there was competent testimony supporting the Jury's finding of a legal obligation to train its employees, a negligently performed undertaking of that duty, and a breach of that duty.

To be competent to testify as an expert, "a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." O'Tuel v. Villani, 318 S.C. 24, 28, 455 S.E.2d 698, 701 (Ct.App.1995). A medical practitioner's experience teaching and interacting with persons in the applicable specialty are sufficient to support his qualification as an expert. Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252–53, 487 S.E.2d 596, 598 (1997). "[A]n expert is not limited to any class of persons acting

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professionally." Botehlo v. Bycura, 282 S.C. 578, 586, 320 S.E.2d 59, 64 (Ct. App. 1984). "Defects in an expert witness' education and experience go to the weight, rather than the admissibility, of the expert's testimony." Gooding at 253, 487 S.E.2d at 598.

In the present case, as I determined at trial, Dr. Robinson's qualifications to opine as to the sufficiency of this training were established by his education and training as an internal medicine physician and his experience in both working for companies who provide such training, and in personally conducting training to other medical providers. Any defect in his education and experience on this topic goes to the weight, not the admissibility, of his testimony. The admission of this expert testimony was proper, and it was squarely within the Jury's province to make a determination if his opinions about the propriety of the SMIS training were sufficient.

3. Proximate Cause

Defendant argues there was no evidence to support the jury finding that SMIS's failure to properly educate and train its physicians caused injury to Matthew Scheer. The Court disagrees and finds there was ample testimony submitted to support a finding of proximate cause. That is to say, and as discussed in greater detail below, there was evidence that Defendant SMIS's failure to properly train and educate its physicians resulted in the failure of the company's employees to call Matthew's father (or detain Matthew) and thereby prevent Matthew's death.

A negligent act or omission is a proximate cause of injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred. Vinson v. Hartley, 324 S.C. 389, 401, 477 S.E.2d 715, 721 (Ct. App. 1996). In other words, if the accident would have happened as a natural and probable consequence, even in the absence of the alleged breach, then a plaintiff has failed to demonstrate proximate cause. Where the injury complained of is not reasonably foreseeable, there is no liability. Crolley v.

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Hutchins, 300 S.C. 355, 387 S.E.2d 716 (Ct. App.1989). In order for conduct to amount to negligence for which compensation can be collected, the defendant must have foreseen, or by the exercise of ordinary care should have foreseen, the probability that his conduct would likely cause injury to another. Vinson, 324 S.C. at 401, 477 S.E.2d at 721. Hurd v. Williamsburg Cty., 353 S.C. 596, 612, 579 S.E.2d 136, 144 (Ct. App. 2003), *aff'd*, 363 S.C. 421, 611 S.E.2d 488 (2005).

Proximate cause is the efficient or direct cause of an injury. Small v. Pioneer Machinery, Inc., 329 S.C. 448, 464, 494 S.E.2d 835, 843 (Ct. App. 1997); Vinson, 324 S.C. at 401, 477 S.E.2d at 721. Proximate cause does not mean the sole cause. Small, 329 S.C. at 464, 494 S.E.2d at 843. A defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury. Id. The issue of proximate cause may be resolved by either direct or circumstantial evidence. Hurd at 613, 579 S.E.2d at 145. "Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." McNair v. Rainsford, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998). Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law. Hurd at 613–14, 579 S.E.2d at 145.

At trial, there was ample evidence to conclude that, had Dr. Ash-Bernal been properly trained and knowledgeable about permissible disclosures, she would have contacted David Scheer and thus prevented Matthew's death. David Scheer testified that, had he been called about the change in his son's behavior and condition, he would have come to help his son, just as he had done on the previous day. Also, Dr. Malone (Plaintiff's psychiatry expert) testified that had Matthew received proper treatment and care, he would have responded positively and would

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most likely be doing well to this day. Dr. Malone specifically opined that proper care and treatment would have involved contacting and involving family in Matthew's case to ensure he had social support to help care for his psychiatric condition. In sum, construing all evidence and inferences in Plaintiff's favor, there was ample evidence submitted for the Jury to conclude that SMIS's failure to train its physicians was a contributing/proximate cause of Matthew's death.

B. DEFENDANT'S MOTION TO AMEND

Even though Plaintiff brought claims of corporate negligence that were separate and distinct from the allegations of medical negligence committed by Defendants Patel and Ash-Bernal, nonetheless, Defendant SMIS contends that it cannot be held liable if its agents were not found liable by the jury. This contention is mistaken and directly contrary to current South Carolina law. Critically, Defendant's position is only true when a plaintiff's claims are based solely on the doctrine of *respondeat superior*. In this case, Plaintiff asserted both vicarious liability claims and direct corporate liability claims against Defendant SMIS.

Defendant's motion references Longshore v. Saber Sec. Services, Inc., 365 S.C. 554, 619 S.E.2d 5 (2005), which notes that the dissenting opinion in Sabb v. South Carolina State Univ, supports the proposition that South Carolina law requires an employee to commit a tort for the employer to be liable for negligently training the employee. *See* Sabb, 350 S.C. 416, 431–33, 567 S.E.2d 231, 238–39 (2002) (Pleicones, J., dissenting). However, Longshore's favorable reference to the Sabb dissent is contrary to the subsequent Supreme Court case of Morrow v. Fundamental Long-Term Care Holdings, LLC, *infra*.

Quite recently, the South Carolina Supreme Court specifically confirmed, in Morrow v. Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015),

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that vicarious and direct corporate claims involving medical negligence are **not** dependent on one another, nor are they predicated upon a finding of negligence against the employee.

> The Morrows correctly assert that the theory of vicarious liability is different than the theory of direct corporate liability. *See* Martin C. McWilliams, Jr. & Hamilton E. Russell, III, *Hospital Liability for Torts of Independent Contractor Physicians,* 47 S.C. L. Rev. 431 (1996). Vicarious liability attaches to a parent company or employer as the result of negligence on behalf of its employees, such as through the doctrine of respondeat superior. *Id.* at 439. Conversely, ***direct corporate liability attaches due to a breach of a duty which runs directly between a parent company and a patient***, arising from negligence in actions such as leaving a hospital underfunded, understaffed, or ***undertrained so as to provide substandard care.*** *Id.* at 462. Accordingly, ***the two theories of vicarious liability and corporate liability can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of the other***.

Morrow, *supra* (*emphasis added*).

In addition to medical negligence, direct corporate liability for the failure to train and educate its employees has been recently confirmed in other fields as well. *See e.g.* James v. Kelly Trucking Co., 377 S.C. 628, 661 S.E.2d 329 (2008) (training of trucking company employees). In James, the South Carolina Supreme Court stated:

> [T]he employer's liability under such a theory does not rest on the negligence of another, but on the employer's own negligence. Stated differently, ***the employer's liability under this theory is not derivative, it is direct.***

Id. at 631 (emphasis added). In this case, the Jury was properly charged on these issues of direct corporate liability.[5]

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[5] On that issue, the Jury was charged as follows:

DIRECT CORPORATE LIABILITY:

IN ADDITION, PLAINTIFF HAS ALLEGED AND DEFENDANT SOUTHERN MYRTLE INPATIENT SERVICES, LLC, HAS DENIED THAT IT FAILED TO PROPERLY EDUCATE AND TRAIN DRS. ASH BERNAL AND PATEL RELATING TO AS THE APPLICABLE STANDARDS TO DETAIN A MENTALLY ILL PATIENT AND AS TO THE PERMISSIBLE DISCLOSURES OF HEALTH

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Dr. Ash-Bernal's testimony as to her knowledge of HIPAA provisions and her exercise of "good faith judgement" regarding Matthew Scheer were for the Jury's consideration. Her credibility and the weight to give her testimony were matters for the Jury to determine. The Jury was free to conclude that Dr. Ash-Bernal exercised her best judgment in her treatment of Matthew Scheer,[6] but that this judgment was handicapped as a result of SMIS's failure to properly train her on the process for temporarily detaining a patient and HIPAA's permissible disclosures of information for the patient's best interest and for public safety. At trial, there was ample evidence to conclude that, if Dr. Ash-Bernal had been properly trained and knowledgeable about temporary involuntary holds and permissible disclosures of patient information, she would have made effort to keep Matthew from leaving and/or contacted David Scheer (Matthew's emergency contact who had left his number with his nurses earlier that evening) and thus prevented Matthew's death. Harkening back to the issue of proximate cause, David Scheer testified that if called, he would have promptly come to help Matthew. As mentioned previously, Dr. Malone opined that proper care and treatment would have involved contacting and involving Matthew's family to ensure he had social support to help with his psychiatric condition and further testified that if Matthew had received proper treatment for his psychiatric condition, he would likely have responded positively and would be doing well to this day. Thus, construing all

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INFORMATION. YOU MAY CONSIDER THOSE ALLEGED ACTIONS OR FAILURES OF THE CORPORATE DEFENDANT ALONG WITH THE OTHER ALLEGATIONS.

Defendant SMIS took no objection to this instruction.

[6] The Jury was charged precisely as follows:

WHERE DOCTORS IN GOOD STANDING DISAGREE OR WHEN MEDICAL AUTHORITIES ARE DIVIDED WITH REGARD TO A SPECIFIC COURSE OF TREATMENT OR CARE, THEN THE DOCTOR IS BOUND *ONLY TO EXERCISE HIS OR HER BEST JUDGMENT* IN DETERMINING WHICH COURSE ON THE WHOLE IS BEST FOR THE PATIENT.

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the evidence and inferences in Plaintiff's favor, evidence was presented by which the jury could conclude that a failure by SMIS to train its doctors was a contributing cause of Matthew's death.

In addition to the aforementioned testimony, the Jury was also provided information and testimony relating to GSRMC's policies and procedures, including its Notice of Privacy Practices that was admitted into evidence. Notably, while there was evidence presented that Defendant SMIS expects its physicians to follow the HIPAA compliant hospital privacy policies, there was also evidence submitted that Dr. Ash-Bernal was not familiar with those policies which permit disclosure to "A person or persons able to prevent or lessen a serious threat to health or safety." Further, the 30(b)(6) testimony of Defendant SMIS established that the company expected its physicians to be familiar with and follow GSRMC's policies, but took **no** actions to train or ensure that its physicians were trained and knowledgeable on those policies. Given the evidence showing Dr. Ash-Bernal's lack of familiarity with policies applicable to her work, the Jury could reasonably conclude that her employer had failed to properly train her on the process for the temporary detainment of mentally ill patients, permissible disclosures of health information under HIPAA and other related hospital privacy policy, and thus found/concluded that this lack of training and knowledge, which her employer failed to ensure, contributed to Matthew's death.

Lastly, the evidence established that Defendant SMIS undertook to provide certain HIPPA training to its physicians but did so in an inappropriate manner. "While there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken." Wright v. PRG Real Estate Mgmt., Inc., 426 S.C. 202, 826 S.E.2d 285, 290 (2019) (*citing* Vaughan v. Town of Lyman, 370 S.C. 436, 446, 635 S.E.2d 631, 637 (2006)). Here, the evidence established that Defendant SMIS undertook some effort to train its physicians

about HIPAA, but focused solely on the restrictions and failed to provide any training on the permissible disclosures. Dr. Robinson testified that such a limited focus was materially deficient for SMIS's employed physicians, and that training such as this, would give a hospitalist (both his and Dr. Ash-Bernal's practice specialty) an incorrect idea that disclosure of patient information is never permitted. In essence, he testified that it was dangerous to scare physicians about HIPAA's restrictions and not to empower them with the knowledge of HIPAA's permissible disclosures that can reduce the risk of harm to the patient (and the public). It was soundly within the Jury's province to conclude it was this failure by SMIS that was a contributing cause to Matthew's death.

C. DEFENDANT'S MOTION FOR A NEW TRIAL

Defendant SMIS's moves for a new trial based on three evidentiary rulings by the Court relating to: (1) Matthew's death certificate; (2) a statement from the United States Department of Health and Human Services (HHS) regarding permissible disclosure of patient information pursuant to HIPAA; (3) and Dr. Robinson's testimony relating to Defendant SMIS's training of the hospitalist it employed. In addition to the reasons enumerated below, I reiterate and otherwise adopt my rulings on these matters made during the trial and see no reason to now find differently on these evidentiary issues, which were well reasoned and appropriate for the facts of this case. Moreover, I find that SMIS cannot demonstrate any particular prejudice resulting from the admission of this evidence.

"The admission of evidence is within the trial court's discretion." R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000). "The [circuit] court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law." Id. "To warrant reversal based on the

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admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fowler v. Nationwide Mut. Fire Ins. Co., 410 S.C. 403, 408, 764 S.E.2d 249, 251 (Ct. App. 2014).

1. "Suicide" on the Death Certificate

At trial, Defendant sought to have Matthew Scheer's entire death certificate excluded from evidence. In its post-trial motion, Defendant SMIS now concedes that the admission of the death certificate into evidence was proper but claims the failure to redact the manner of death listed as "suicide" was in error and prejudicial. Rule 803(9), SCRE (*emphasis added below*) creates an exception to the hearsay exclusionary rule for:

> *Records of Vital Statistics.* Records or data compilations, in any form, of births, fetal deaths, **deaths**, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

This Court further relied upon LaCount v. Gen. Asbestos & Rubber Co., where the South Carolina Supreme Court held that "the death certificate, as we have said, was ***prima facie* evidence of the facts therein stated.** This [p]rima facie evidence is evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." LaCount, 184 S.C. 232, 192 S.E. 262, 266 (1937) (*emphasis added*) (*internal citations omitted*).

In this case, there was no dispute as to the manner of Matthew's death. The Defense put up no testimony or evidence to counter the eyewitness testimony of Mr. Dougherty, who testified that, the early morning hours of October 3, 2015, he saw Matthew leave his clothes on the beach (later identified by his mother), enter the Atlantic Ocean during a storm, and that Matthew did not reemerge from the water. Simply put, there was no evidence to suggest that Matthew's death was anything other than an intentional taking of his own life (albeit in a state of psychosis), and

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even if it was not Matthew's intention to die, this would not change the fact that, had he not been released at approximately 1:30 AM without someone to care for him, Matthew would not have been afforded the opportunity to run naked into the ocean during a storm. Thus, it could not have been error to admit the death certificate into evidence without redaction of the cause of death. Whether Matthew's death was his own intentional drowning in a state of psychosis or a psychotic ideation that compelled him to enter the ocean during a storm of no particular consequence – either occurrence would have been avoided, had he not been permitted to leave the hospital unattended. Further, having submitted no evidence to dispute Mr. Dougherty's observations, the clothes on the beach, or the absence of any contact with Matthew since October 3, 2015, the Defense did not suffer any prejudice as a result of the admission of the death certificate into evidence.

2. HHS Statement

At trial, in accordance with Rule 803, SCRE, the Court properly admitted a statement from the United States Department of Health and Human Services, signed by the director of the department and addressed to "Our Nation's Healthcare Providers." Rule 803, S.C.R.E., provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> **(8) Public Records and Reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report.

HHS is the agency that enforces HIPAA, and the document at issue is precisely the type of statement from a public office or agency that is envisioned by Rule 803. Further, the document is self-authenticating under Rule 902, so no foundation need have been laid for its admission.

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Defendant SMIS argues that there is no evidence that this letter was kept in the ordinary course of business, but notably there is no such requirement under Rule 803(8). While there is no reason to believe that this document from U.S. Department of Health and Human Services was not kept in the normal course of the agency's businesses, this issue is without consequence, for only the business records exception contained in Rule 803(6) requires evidence of a document being kept in the ordinary course of business. The Defense's argument conflates these evidentiary standards, and the admission of this evidence was appropriate under Rule 803(8).

Further, the Defense cannot claim any prejudice due to the admission of this letter, as it is merely a summary of the governing HIPAA laws recited in its own Motion. There was no serious dispute over the language of the governing law at trial, but only a factual dispute as to its application in this case. Thus, Defendant SMIS cannot establish prejudice due to the admission of the HHS letter that correctly stated/summarized the regulatory provisions on permissible disclosures of patient information.

3. Dr. Robinson's Testimony Regarding SMIS's Training of the Physicians It Employed

As part of Defendant's motion for a new trial, SMIS reasserts its contention that Dr. Robinson should not have been permitted to testify as to the HIPAA training materials that the company presented to the physicians that it employed. This identical issue was brought forth in Defendant's *Motion for a Judgment Not Withstanding the Verdict*, and there is no need to restate all of the reasons why this argument fails. Thus, Defendant's motion for a new trial, as it pertains to matters dealing with Dr. Robinson's testimony, is denied for all the reasons addressed in the pages above as if they were repeated verbatim.

D. DEFENDANT'S MOTION TO ALTER OR AMEND THE JUDGMENT AS RELATING TO CAPS ON NON-ECONOMIC DAMAGES

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S.C. Code § 15-32-220 places a limit on the amount of non-economic damages to be awarded in a medical malpractice case, unless the defendant is found to have acted in a grossly negligent manner, at which point the cap on non-economic damages is inapplicable. Defendant SMIS asserts that there was no evidence to support a finding that it acted in a grossly negligent, willful, wanton, or reckless manner and claims that the Judgment should be reduced. However, as demonstrated in the Supplemental Verdict Form, it should be noted that the Jury found not only gross negligence, but also found **by clear and convincing evidence** that SMIS's conduct was willful, wanton, and/or reckless.

Additionally there was no need for the Jury to even find beyond simple negligence, as negligence relating to a failure to train an employee sounds in "ordinary negligence" and does not trigger a claim of medical malpractice. *See* Dawkins v. Union Hosp. Dist., 408 S.C. 171, 758 S.E.2d 501 (2014). SMIS's negligence involves a failure to train, which is not a medical action but is administrative in its nature, and Dawkins specifically noted: "The statutory definition of medical malpractice found in S.C. Code Ann. § 15-79-110(6) does not impact medical providers' ordinary obligation to reasonably care for patients with respect to nonmedical, **administrative**, ministerial, or routine care. Thus, medical providers are still subject to claims sounding in ordinary negligence." Id. at 177-78, 758 S.E.2d at 504-05 (*emphasis added*). Furthermore, unlike training on topics such as how to read a CT scan or correctly perform a cardiac ablation, the training at issue, HIPAA disclosures and patient detainment, are not specifically medical in their nature. By way of example, non-medical personnel at a healthcare facility, from administrators to janitorial staff, are expected to follow HIPAA's rules for when patient information is to be disclosed and when it is to be kept confidential. Defendant SMIS incorrectly seeks to characterize all of the claims made against the corporation as medical malpractice

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claims. Such a characterization ignores the fact that the Jury was charged on both medical malpractice claims against the Defendant physicians and on ordinary negligence claims against the Defendant corporation (SMIS). While standard of care testimony is often required to make claims of medical malpractice, our courts are clear that ordinary negligence claims do not carry the same burden. Our case law and S.C. Code § 15-36-100(C)(2) provide that expert testimony is not needed to establish medical malpractice when the claims pertain to "negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant." *See eg.*, Green v. Lilliewood, 272 S.C. 186, 249 S.E.2d 910 (1978) (holding that a tubal ligation procedure that rendered intrauterine device and other birth control devices useless constituted a matter of common knowledge); Thomas v. Dootson, 377 S.C. 293, 659 S.E.2d 253 (Ct. App. 2008) (recognizing expert testimony was not required for a claim arising from a surgical drill that burned skin on contact because issues would fall within the common knowledge or experience of laymen); Hickman v. Sexton Dental Clinic, P.A., 295 S.C. 164, 367 S.E.2d 453 (Ct. App. 1988) (where a patient testified that an unsupervised dental assistant rammed a sharp object into her mouth, even without the support of expert testimony, the evidence presented was sufficient for the jury to infer a breach of duty to the patient)

Although Dr. Robinson was not admitted as an expert as to the corporate standard of care relative to HIPAA training, Defense counsel, himself questioned Dr. Robinson on where a hospitalist's education and training comes from and elicited testimony that in his area of practice, the employers of hospitalists seek to ensure that their physicians are properly educated and trained:

> Q: And I thought I heard you say on direct that Southern Myrtle Inpatient Services, the, the employer of Dr. Ash-Bernal and Patel -- there's actually

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two PowerPoints that they sent on, on HIPAA. They may be squished into one, but there was actually two of them, but I thought you to say that that was a -- they did a negligent PowerPointing; right, negligently did a PowerPoint for the providers; is that -- was your opinion earlier today?

A: My opinion was that they excluded key elements of the HIPAA law in such a way that it did not allow for the providers who are undergoing that training to appreciate and understand when they can disclose a patient's information to family members or whomever may need that information.

Q: And I just wanted to be clear that as a physician, as a hospitalist, a nocturnist or somebody working at CVS you don't only get your education from your employer; correct?

A: No. We. Don't solely get our education from our employer as it relates to our medical care or any knowledge for that matter, but it is the responsibility of the employer to ensure that we do receive adequate education in the HIPAA law and that they provide that and follow up and ensure that we have completed said education in HIPAA.

(Trial Testimony of Dr. Robert Robinson).

Standing alone and without even considering the other evidence, Dr. Robinson's non-expert testimony above, and other testimony, was sufficient to submit the case to the jury on the issue of corporate negligence (and, likewise, to support the verdict). As discussed above, ordinary negligence does not require expert testimony and Plaintiff did not have to establish negligence relating to failure to train and educate by expert testimony. To this point, by the SMIS's own admissions given during the company's 30(b)(6) deposition testimony that was presented to the Jury (discussed previously), the Defendant company made no efforts to ensure that the physicians it employed were properly knowledgeable about the mechanics/process to detain a mentally ill patient and/or permissible disclosures of a patient information under HIPAA.

While Plaintiff did not present specific testimony that SMIS had a "legal duty" to train on HIPAA, I find that the evidence at trial created a jury question as to SMIS's duty to adequately train its doctors as to HIPAA provisions. The existence of such a duty in negligence is not

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typically established by expert testimony but by the trial court. In ordinary negligence actions "[t]he court must determine, as a matter of law, whether the law recognizes a particular duty." *See* Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 135-36, 638 S.E.2d 650, 656 (2006) (holding that a facility has duty to supervise and care for a patient with special needs admitted to facility); Shaw v. Psychemedics Corp., 426 S.C. 194, 197, 826 S.E.2d 281, 282 (2019) (holding that a drug testing lab has duty to an employee who gave sample to be tested).

Further, whether or not such a duty existed automatically, there was evidence that SMIS undertook to train through its PowerPoint presentations, and thus created the duty and it had an obligation to conduct the training in a non-negligent manner. Wright v. PRG Real Estate Mgmt., Inc., *supra*, (holding that even when "there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken"). To this point, Plaintiff's offered testimony that these training materials were deficient.

Defendant's motion to amend the verdict conflates the legal standards for punitive damages and gross negligence. In order to avoid the application of the damages cap from S.C. Code § 15-32-220, all Plaintiff need to show is gross negligence. *See* S.C. Code § 15-32-220(e) (stating: "[t]he limitations for noneconomic damages rendered against any health care provider or health care institution do not apply if the jury or court determines that the defendant was grossly negligent"). Our courts have defined gross negligence in a number of ways. In Anderson v. Ballenger, 166 S.C. 44, 55, 164 S.E. 313, 317 (1932), the Court described gross negligence as "the failure to exercise slight care." In other cases, it has been described as "the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." *See* Richardson v. Hambright, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988). "Gross negligence is a relative term, and means the absence of

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care that is necessary under the circumstances." Hicks v. McCandlish, 221 S.C. 410, 415, 70S.E.2d 629 (1952).[7]

Ordinarily, the question of whether a defendant's conduct rises beyond negligence to gross negligence is one for the jury. *See* Hollins v. Richland Cty. Sch. Dist. One, 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1993) (holding that whether School District exercised "slight care" in sending a note home with eleven-year-old was a question for the jury). "In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury." Faile v. S.C. Dep't. of Juvenile Justice, 350 S.C. 315, 332, 566 S.E.2d 536, 545 (2002).

In the present case, the Jury concluded by clear and convincing evidence that SMIS's conduct was reckless, willful, and wanton. Ample evidence was submitted for the Jury to conclude that SMIS was grossly negligent for its failure to train its employees. In addition to the expert testimony of Dr. Robinson discussed previously, Plaintiff published the 30(b)(6) deposition testimony of Defendant SMIS on these issues. Although stated above, this testimony bears repeating, as it could be viewed by the Jury as demonstrating the following:

- SMIS has taken no actions to educate or train its physicians about their power to temporarily detain a patient to prevent injury to themselves or others;
- SMIS promulgated no policies or procedures that would guide or otherwise be applicable to Drs. Patel or Ash-Bernal;

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[7] This Court charged the Jury as follows:

> GROSS NEGLIGENCE IS THE FAILURE TO EXERCISE EVEN THE SLIGHTEST CARE. GROSS NEGLIGENCE IS A RELATIVE TERM AND MEANS THE ABSENCE OF CARE THAT IS NECESSARY UNDER THE CIRCUMSTANCES.
>
> GROSS NEGLIGENCE CONNOTES THE FAILURE TO EXERCISE A SLIGHT DEGREE OF CARE. GROSS NEGLIGENCE INVOLVES AN INTENTIONAL, CONSCIOUS FAILURE TO DO SOMETHING WHICH ONE OUGHT TO DO OR THE DOING OF SOMETHING ONE OUGHT NOT TO DO. GROSS NEGLIGENCE MAY BE FOUND IF A DEFENDANT IS SO INDIFFERENT TO THE CONSEQUENCES OF HIS/HER CONDCUT AS NOT TO GIVE SLIGHT CARE TO WHAT HE/SHE IS DOING.

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- SMIS expects its physicians to be knowledgeable on privacy policies of the hospital in which he/she is working;
- SMIS has taken no action to ensure that its doctors are knowledgeable on hospital policies and procedures;
- SMIS is not knowledgeable about permissible disclosures of patient information under HIPAA;
- SMIS has never sought to educate the physicians it employs on HIPAA's permissible disclosures (seemingly a position contrary to the PowerPoint presentations the company produced);
- SMIS does not know or have any mechanism to confirm its employee's attendance at training seminars;
- SMIS is not sure if it provided any training to Drs. Ash-Bernal or Patel;
- SMIS provides some training online to its employees;
- SMIS has online corporate training on HIPAA, but has never looked into whether Drs. Patel and Ash-Bernal have attended that training;
- SMIS provided training from an overarching corporate standpoint, but relies solely upon clinicians and hospitals for specific training; and
- SMIS cannot speak to whether Dr. Ash-Bernal has received training on "dos and don'ts" of HIPAA.

Based upon SMIS's own 30(b)(6) testimony and that of its employee (Dr. Ash-Bernal), the Jury could reasonably conclude that SMIS failed to take adequate measures to ensure the education and training of its physicians on these issues, and had absolutely no mechanism in place to determine if the company's physicians had been otherwise educated and trained on permissible disclosures of patient information under HIPPA or on the process and mechanism for the temporary detainment of a mentally ill patient. Put simply, there was ample evidence for the Jury's determination that SMIS failed to exercise slight care or the degree of care necessary under the circumstances. Thus, the Court should not and will not interfere with the Jury's specific finding of gross negligence, and the Motion to reduce the damages award based upon the damages cap is denied.

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III. PLAINTIFF'S MOTION FOR AWARD OF COSTS AND INTEREST PURSUANT TO OFFER OF JUDGMENT

Following the verdict, Plaintiff filed a *Motion for Award of Costs and Interest*, in accordance with South Carolina Code §15-35-400 and Rule 68, SCRCP, and stemming from an Offer of Judgment that was previously served on and rejected by Defendant SMIS. Defendant SMIS does not oppose Plaintiff receiving an award of costs and interest but asserts: (1) for the purpose of determining the length of time used to compute interest, the date of the entry of judgment should be considered to be June 6, 2019, and not the date of this Order; and (2) the calculation of interest should not be based on the amount of the verdict but should be based on the amount of the judgment that was enrolled.

On December 21, 2017, Plaintiff filed and served an offer of judgment to Defendant SMIS in the amount of $1,000,000.00, which SMIS did not accept. Several months after the expiration of the offer of judgment and prior to trial, the Plaintiff settled all of his claims with Grand Strand Regional Medical Center for the sum of $600,000.00. The case proceeded to trial in May of 2019, at which time the Jury rendered a verdict totaling $3,500,250.00 against SMIS. On June 6, 2019, an Order for an entry of judgment, which reflected the setoff for the prior settlement with GSRMC, was filed against SMIS.

Plaintiff has expressed no objection to June 6, 2019, being considered the date of the entry of judgment being. I find the date of the entry of judgment to be June 6, 2019, and should be used for the purpose of calculating interest accrued from the time of the Offer of Judgment to the entry of judgment.

I find that based on the plain language of Rule 68, SCRCP, the interest calculation should be based upon the $3,500,250.00 verdict amount. The language of Rule 68(b) provides:

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> **Consequences of Non-Acceptance.** If an offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror shall recover from the offeree: (1) any administrative, filing, or other court costs from the date of the offer until the entry of the judgment; (2) if the offeror is a plaintiff, **eight percent interest** computed on the amount of the verdict or award from the date of the offer to the entry of judgment; or (3) if the offeror is a defendant, reduction from the judgment or award of eight percent interest computed on the amount of the verdict or award from the date of the offer to the entry of the judgment.
>
> (*Emphasis Added*).

Nothing in the Rule or in South Carolina Code §15-35-400 ever speaks to the calculation of interest being based on the amount of the final entry of judgment, and only the term "the amount of the verdict or award" is used. Plaintiff's Offer of Judgment to Defendant SMIS was filed on December 21, 2017, and expired on January 10, 2018, while the settlement with GSRMC, which created the $600,000.00 setoff, did not occur until August of 2018. Thus, at the time the Offer of Judgment expired, Defendant SMIS did not know that there would ever be a set off and could not have factored the setoff into the company's decision to reject the offer. Additionally, the Plaintiff did not have the benefit of the proceeds from the settlement with GSRMC until many months later. Given that the plain language of Rule 68 speaks only of "the amount of the verdict or award" and that the Rule appears designed to encourage litigants to accept settlement offers and/or demands, I find that the calculation of interest should use the amount of the verdict, which was $3,500,250.00.

I find that in accordance with Rule 68, SCRCP, Plaintiff is entitled to an award of eight percent (8%) interest computed on the amount of the verdict (**$3,500,250.00**) from the date of the offer of judgment (December 21, 2017) until the entry of the verdict (June 6, 2019), which comes to a total of **$408,138.74**. Additionally, Plaintiff is entitled to the administrative filing fees and court costs that were incurred during this same time period, which consisted of 13 filing

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fees at $31.74 each, totaling **$412.62**. While these amounts should be added to the verdict, there must also be a setoff of **$600,000.00** for the settlement Plaintiff previously reached with Grand Strand Regional Medical Center.

	$ 3,500,250.00	Verdict
+ $	408,138.74	Interest
+ $	412.62	Cost
– $	600,000.00	Setoff
	$ 3,308,801.36	Total Judgment Amount

Adding the interest and costs to the verdict and also accounting for the setoff relating to the prior settlement, I conclude that the total judgment to be enrolled against Defendant Southern Myrtle Inpatient Services, LLC, shall be **$3,308,801.36**.

IV. CONCLUSION

For these reasons enumerated above, viewing all of the evidence and inferences to be drawn from the evidence in the light most favorable to the non-moving party, Defendant's post-trial motions are **DENIED** and Plaintiff's Motion for Award of Costs and Interest is **GRANTED**. The Clerk of Court is hereby directed to enter judgment against Defendant Southern Myrtle Inpatient Services, LLC, in the amount of **$3,308,801.36.**

AND IT IS SO ORDERED.

_____
John C. Hayes, III
Circuit Court Judge

August _____, 2019

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Horry Common Pleas

Case Caption: David L Scheer , plaintiff, et al VS Southern Myrtle Inpatient Services LLC , defendant, et al

Case Number: 2017CP2601571

Type: Order/Other

So Ordered

s/John C. Hayes III 2049

Electronically signed on 2019-08-15 14:22:56 page 33 of 33

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STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS
David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer, Plaintiff, vs. Southern Myrtle Inpatient Services, LLC, Nirlep A. Patel, M.D., and Rachel Ash-Bernal, M.D., Defendants.	Civil Action No.: 2017-CP-26-1571 **VERDICT FORM**

Please check one of the two options below:

1. ___✓___ **We, the Jury, unanimously find in favor of the Plaintiff.**

OR

_____ **We, the Jury, unanimously find in favor of all of the Defendants.**

If you find unanimously for the Defendants, you have completed your deliberations and the foreperson should sign and date at the end of the verdict form.

If you answered Question 1 in favor of the Plaintiff, also answer the following question:

2. **What percentage of the total fault do the following bear?**

- Southern Myrtle Inpatient Services, LLC ___100___ %
- Dr. Nirlep Patel ___0___ %
- Dr. Rachel Ash-Bernal ___0___ %
- Matthew Scheer* ___0___ %

=100%

(*Note that the any of the above may be between 0%–100% at fault, but if you are answering this question, the total percentage of fault must add up to 100%*)

**If you find Matthew to have been mentally incompetent at the time he left the hospital, then he cannot be assigned any fault for his death.*

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If you answered Question 1 in favor of the Plaintiff, also answer the following question:

3. For the survival claim brought by the Estate of Matthew Scheer, list the amount of damages you find for any conscious pain, agony, sorrow, mental anguish and emotional distress suffered by Matthew Scheer as a result of Defendant(s)' negligence:

$ 500,000. for the Estate of Matthew Scheer

If you answered Question 1 in favor of the Plaintiff, also answer the following question:

4. For the wrongful death claim brought by Estate of Matthew Scheer, list the amount of damages you find for the any grief, shock, sorrow, wounded feelings, loss of Matthew's companionship and society, and loss of Matthew's advice on family matters that each parent has suffered and/or will suffer in the future as a result of Matthew's death:

$ 1,500,000 for David Scheer

$ 1500,000 for Debra Scheer

If you answered Question 1 in favor of the Plaintiff, also answer the following question:

5. Do you find that any of the Defendants acted in a grossly negligent, willful, wanton, or reckless manner, and that such conduct was a proximate cause of Matthew Scheer's death?

• Southern Myrtle Inpatient Services, LLC	✓ Yes	~~No~~
• Dr. Nirlep Patel	~~Yes~~	✓ No
• Dr. Rachel Ash-Bernal	~~Yes~~	✓ No

PLEASE SIGN AND DATE.

[signature] May 24, 2019
Foreperson

Please let the bailiffs know when you have finished your deliberations.

STATE OF SOUTH CAROLINA COUNTY OF HORRY David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer, Plaintiff, vs. Southern Myrtle Inpatient Services, LLC, Nirlep A. Patel, M.D., and Rachel Ash-Bernal, M.D., Defendants.	)	IN THE COURT OF COMMON PLEAS Civil Action No.: 2017-CP-26-1571 **SUPPLEMENTAL VERDICT FORM**

Regardless of how you respond, your answer to the following question must be unanimous:

1. Do you find by clear and convincing evidence that Defendant Southern Myrtle Inpatient Services, LLC's conduct was done in a wanton, willful, or reckless manner?

✓ Yes _____ No

If you answered "Yes" to the above, also answer Question 2.

2. Please state the amount of punitive damages you render against Defendant Southern Myrtle Inpatient Services, LLC.

$ 750,000

PLEASE SIGN AND DATE BELOW.

Foreperson May 24, 2019

Please let the bailiffs know when you have finished your deliberations.

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STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS Civil Action No.: 17-CP-26-1594
David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer, Plaintiff, vs. Nirlep A. Patel, M.D., Southern Myrtle Inpatient Services, LLC, and Grand Strand Regional Medical Center, LLC, Defendants.	**COMPLAINT** **(Jury Trial Demanded)**

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The Plaintiff, complaining of the above-named Defendants, would respectfully show:

Plaintiff has completed all pre-suit filing requirements of South Carolina Code § 15-79-125, including the filing of a Notice of Intent to File Suit, which was filed with the Clerk of Court's office, and by participating in a pre-suit mediation conference between the parties. Further, in accordance with S.C. Code § 15-36-100, an Affidavit of Merit, signed by a duly qualified individual and stating at least one negligent act or omission, is attached hereto and incorporated by reference.

THE PARTIES, JURISDICTION, AND VENUE

1. Plaintiff David L. Scheer, is the duly appointed Personal Representative of the Estate of Matthew J. Scheer, deceased.

2. At the time of his death, Matthew J. Scheer (hereinafter sometimes referenced as "Matthew") was a resident of South Carolina.

3. Defendant Nirlep A. Patel, M.D. (hereinafter sometimes referenced as "Dr. Patel"), is a physician residing and practicing medicine in Horry County.

4. Defendant Southern Myrtle Inpatient Services, LLC (hereinafter sometimes referenced as "SMIS"), healthcare provider, organized and existing under the laws of South Carolina and doing business in Horry County.

5. Defendant and Grand Strand Regional Medical Center, LLC (hereinafter sometimes referenced as "GSRMC"), is a healthcare provider, organized and existing under the laws of South Carolina and doing business in Horry County.

6. Venue is proper in this Court because the events that give rise to this action occurred within Horry County.

7. At all times pertinent to this action, Dr. Patel was the actual and/or apparent agent of GSRMC.

8. At all times pertinent to this action, Dr. Patel was the actual and/or apparent agent of Southern Myrtle Inpatient Services, LLC.

9. Southern Myrtle Inpatient Services, LLC is liable for the negligence Dr. Patel under the doctrine of *respondeat superior*.

10. GSRMC's operation of its emergency department and the services of its hospitalists is a non-delegable duty under the laws of South Carolina.

11. At all times pertinent to this action, Dr. Patel was acting within his duties as an employee of SMIS and as a physician at GSRMC.

12. At all times pertinent to this action, a doctor-patient relationship existed between Matthew J. Scheer and the healthcare providers at GSRMC, including but not limited to Dr. Patel.

FACTS COMMON TO ALL CAUSES OF ACTION

13. Accompanied by his father, Matthew J. Scheer arrived at the emergency department of Grand Strand Regional Medical Center on October 2, 2015.

14. At the time Matthew presented to GSRMC, he was suffering from a psychiatric episode that included auditory hallucinations, visual hallucinations, and insomnia.

15. Matthew was admitted to hospital under the care of Dr. Patel and the other physicians at GSRMC.

16. Obtaining a patient history provided primarily by Matthew's father, Dr. Patel charted that and described Matthew as having an "acute psychotic episode" and tangential thinking. Although Matthew denied having hallucinations, the healthcare providers noted that he was having visions and that he had recently had a "psychotic episode where he ran out into the woods." In part, the following was noted in Matthew's chart:

> Mr. Scheer is a 26 y/o male with a h/o epilepsy who presents to the ED do paranoia and hallucinations. Associated sx include insomnia and anorexia due to believing that that all "food he used to eat is contaminated now." Pt's father reported he had an extended complex vision last night lasting a couple of hours. Pt reports hearing voices and believes someone is plotting against him by poisoning him.

17. Matthew suffered from epilepsy and had been prescribed Keppra, an anti-epileptic drug, to prevent seizures. Matthew's father reported that his son had not been taking his prescription medication for the past several days.

18., After Matthew's admission to GSRMC, his father departed from the hospital. Shortly thereafter, Mr. Scheer expressed a desire to leave GSRMC. Dr. Patel and the other healthcare provider allowed Mr. Scheer to leave the hospital. Matthew was discharged from GSRMC at or around 1:45 AM on October 3, 2015.

19. Dr. Patel's discharge summary states, in part:

> He was not here under involuntary commitment, he was admitted under voluntary psychiatric evaluation therefore he cannot be kept here against his will. The patient requests to leave against medical advice. He was advised that this could be potentially dangerous that he could potentially become ill either from infection, seizures or result of a psychiatric illness, but he still insisted on leaving. He understood the risks of that. Vitals were stable and unremarkable at the time of the patient leaving. The patient left against medical advice later that night. All questions answered to the best of my ability.

20. Shortly after leaving GSRMC, Matthew was seen running into the Atlantic Ocean during a violent storm and was drowned.

21. On October 3, 2015, Matthew died as a result of Defendants' deviations from the applicable standards of care, negligence, gross negligence, and carelessness as described herein.

22. Regardless of the circumstances through which a patient comes to a hospital, if a physician believes that the patient, because of mental illness/instability, has the likelihood of causing injury to himself or to others, then the physician has the ability to temporarily detain the patient against his will.

23. Regardless of the circumstances through which a patient comes to a hospital, if a physician believes that the patient, because of mental illness/instability, has the likelihood of causing injury to himself or to others, then the standard of care requires the physician to temporarily detain the patient against his will.

24. South Carolina law provides a means for a mentally ill patient to be temporarily detailed against his will. South Carolina Code § 44-17-410 states that that a mentally ill patient may be temporarily detailed against his will upon:

> (1) written affidavit under oath by a person stating:
>
> (a) a belief that the person is mentally ill and because of this condition is likely to cause serious harm to himself or others if not immediately hospitalized;
>
> (b) the specific type of serious harm thought probable if the person is not immediately hospitalized and the factual basis for this belief;
>
> (2) a certification in triplicate by at least one licensed physician stating that the physician has examined the person and is of the opinion that the person is mentally ill and because of this condition is likely to cause harm to himself

through neglect, inability to care for himself, or personal injury, or otherwise, or to others if not immediately hospitalized. The certification must contain the grounds for the opinion.

25. The Defendants, individually, and by and through their agents and servants, deviated from the applicable standards of care, and were negligent, grossly negligent, and careless in the following particulars:

a. allowing Matthew to leave GSRMC;

b. failing to give Matthew antipsychotic medications;

c. failing to contact Matthew's father to inform him that Matthew was attempting to leave GSRMC;

d. failing to educate and otherwise train physicians as to the applicable legal standards and mechanisms to detain a mentally ill patient against his/her will; and

e. in such other and further particulars as discovery or evidence at trial may reveal.

26. In summary, the standard of care required Defendants to keep, at least temporarily, Mr. Scheer at GSRMC, to provide antipsychotic medications, and to contact Mr. Scheer's father to inform him that Mr. Scheer was trying to leave GSRMC. By having failed to do those things, Defendants violated the standard of care thereby resulting in Matthew's death.

FOR A FIRST CAUSE OF ACTION
(Wrongful Death)

27. At the time of his death, Matthew J. Scheer was twenty-six (26) years old.

28. Matthew was survived by his father (David L. Scheer) and his mother (Debra A. Scheer). David and Debra are Matthew's statutory beneficiaries under the laws of South Carolina law, including but not limited to SC Code § 15-51-20 and SC Code § 15-51-40.

29. As a direct and proximate result Matthew's death, David and Debra have suffered pecuniary loss, grief, shock, sorrow, wounded feelings, loss of companionship and society, and the loss of Matthew's advice on family matters, for which they, as his statutory beneficiaries, are entitled to compensation.

FOR A SECOND CAUSE OF ACTION
(Survival Action)

30. As a direct and proximate result of the negligent, careless, and reckless acts as set forth above, Matthew J. Scheer, while he lived, suffered the following injuries and damages, for which he, through his estate, is entitled compensation for:

a. loss of enjoyment of life;
b. pain;
c. agony;
d. sorrow;
e. mental anguish and emotional distress;
f. grief;
g. and other injuries and damages.

WHEREFORE, having fully pleaded, the Plaintiff prays for damages against the Defendants in a sum sufficient to compensate David L. Scheer, Debra A. Scheer, and the Estate of Matthew J. Scheer for their actual losses, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

Francis M. "Brink" Hinson, IV (SC Bar # 74917)
William R. Padget (SC Bar # 72579)
FINKEL LAW FIRM LLC
1201 Main Street, Suite 1800
Columbia, SC 29201
803-765-2935 (telephone)
803-252-0786 (facsimile)

-and-

Nicholas D. Mermiges (SC Bar # 101640)
LAW OFFICE OF NICK MERMIGES, LLC
1720 Main Street, Suite 202
Columbia, SC 29201
803-724-1258 (telephone)
803-724-1201 (facsimile)

March 8th, 2017
Columbia, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS
David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer, Plaintiff, vs. Southern Myrtle Inpatient Services, LLC, Nirlep A. Patel, M.D., Rachel Ash-Bernal, M.D., and Grand Strand Regional Medical Center, LLC, Defendants.	Civil Action No.: 2017-CP-26-1571 **AMENDED COMPLAINT** **(Jury Trial Demanded)**

The Plaintiff, complaining of the above-named Defendants, would respectfully show:

Plaintiff has completed all pre-suit filing requirements of South Carolina Code § 15-79-125, including the filing of a Notice of Intent to File Suit, which was filed with the Clerk of Court's office, and by participating in a pre-suit mediation conference between the parties. Further, in accordance with S.C. Code § 15-36-100, an Affidavit of Merit, signed by a duly qualified individual and stating at least one negligent act or omission, is attached hereto and incorporated by reference.

THE PARTIES, JURISDICTION, AND VENUE

1. Plaintiff David L. Scheer, is the duly appointed Personal Representative of the Estate of Matthew J. Scheer, deceased.

2. At the time of his death, Matthew J. Scheer (hereinafter sometimes referenced as "Matthew") was a resident of South Carolina.

3. Defendant Southern Myrtle Inpatient Services, LLC (hereinafter sometimes referenced as "SMIS"), is a healthcare provider, organized and existing under the laws of South Carolina and doing business in Horry County.

4. Defendant Nirlep A. Patel, M.D. (hereinafter sometimes referenced as "Dr. Patel"), is a physician residing and practicing medicine in Horry County.

5. Defendant Rachel Ash-Bernal, M.D. (hereinafter sometimes referenced as "Dr. Ash-Bernal"), is a physician residing and practicing medicine in Horry County.

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6. Defendant Grand Strand Regional Medical Center, LLC (hereinafter sometimes referenced as "GSRMC"), is a healthcare provider, organized and existing under the laws of South Carolina and doing business in Horry County.

7. Venue is proper in this Court because the events that give rise to this action occurred within Horry County.

8. At all times pertinent to this action, Dr. Patel was the actual and/or apparent agent of Southern Myrtle Inpatient Services, LLC.

9. At all times pertinent to this action, Dr. Ash-Bernal was the actual and/or apparent agent of Southern Myrtle Inpatient Services, LLC.

10. At all times pertinent to this action, Dr. Patel was the actual and/or apparent agent of GSRMC.

11. At all times pertinent to this action, Dr. Ash-Bernal was the actual and/or apparent agent of GSRMC.

12. Southern Myrtle Inpatient Services, LLC, is liable for the negligence of Dr. Patel under the doctrine of *respondeat superior*.

13. Southern Myrtle Inpatient Services, LLC, is liable for the negligence of Dr. Ash-Bernal under the doctrine of *respondeat superior*.

14. At all times pertinent to this action, Dr. Patel was acting within his duties as an employee of Southern Myrtle Inpatient Services, LLC, and as a physician at GSRMC.

15. At all times pertinent to this action, Dr. Ash-Bernal was acting within her duties as an employee of Southern Myrtle Inpatient Services, LLC, and as a physician at GSRMC.

16. At all times pertinent to this action, a doctor-patient relationship existed between Matthew J. Scheer and the healthcare providers working with SMIS, including but not limited to Dr. Patel and Dr. Ash-Bernal.

17. At all times pertinent to this action, a doctor-patient relationship existed between Matthew J. Scheer and the healthcare providers working at GSRMC, including but not limited to Dr. Patel and Dr. Ash-Bernal.

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LAW APPLICABLE TO ALL CLAIMS

18. The negligent acts, omissions, and liability of all Defendants includes that of their agents, principals, employees, and/or servants, both directly and vicariously, pursuant to principles of corporate liability, apparent authority, agency, ostensible agency, non-delegable duty, and/or *respondeat superior*.

19. At all times referenced in this Complaint, and as to all allegations in this Complaint, the agents, principals, employees, and/or servants of each Defendant were acting within the course and scope of their employment.

20. Matthew Scheer sought services at GSRMC, as an institution, and Matthew Scheer was treated by healthcare providers at GSRMC, who reasonably appeared to be the employees and/or agents of GSRMC. GSRMC's operation of its emergency department and the services of its hospitalists are non-delegable duties under the laws of South Carolina.

21. GSRMC has a duty and an obligation to ensure that the healthcare personnel working as its emergency department personnel; hospitalists and nurses are properly trained and educated. This training and education includes an understanding as to means by which a mentally ill person, likely to cause injury to himself/herself or others, can be detained/committed against his/her will.

22. All of the above-named Defendants (through their actions or inactions, or the actions or inactions of their agents and/or employees) are liable for all damages alleged herein since their multiple and separate negligent, grossly negligent, reckless, and/or willful and wanton acts and omissions are a proximate cause of Plaintiff's damages, injuries, and losses.

23. Because the Defendants were grossly negligent, willful, wanton, and/or reckless, and this conduct was the proximate cause of the claimants' noneconomic damages, the claimants in this action should not have caps or limitations placed upon the noneconomic damages that they may recover.

24. The claimants of the Wrongful Death Action, brought herein, are Matthew Scheer's statutory beneficiaries.

25. The claimant of the Survival Action, brought herein, is the estate of Matthew Scheer.

26. In the event that the laws of South Carolina are determined to cap or otherwise limit the noneconomic damages that may be recovered in this action, these caps/limits apply separately to the two claimants in this action. That is to say, in the event that any caps on noneconomic damages are held to be applicable to these claims, these caps must be applied on a

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separate and independent basis to the claimant of the Wrongful Death Action (i.e. Matthew's statutory beneficiaries, see S.C. Code § 15-51-20 and S.C. Code § 15-51-40) and to the claimant of the Survival Action (i.e. Matthew's estate). The claimants in these two actions are distinct and separate from one another.

FACTS COMMON TO ALL CAUSES OF ACTION

27. Accompanied by his father, Matthew J. Scheer arrived at the emergency department of Grand Strand Regional Medical Center on October 2, 2015.

28. At the time Matthew presented to GSRMC, he was suffering from a psychiatric episode that included auditory hallucinations, visual hallucinations, and insomnia. Obtaining a patient history, the healthcare providers in GSRMC's emergency department charted Matthew as having "delusional disorder," "psychotic disorder," "acute psychosis," and "bipolar disorder."

29. Matthew's father reported to the healthcare providers at GSRMC that Matthew suffered from epilepsy and had been prescribed Keppra, an anti-epileptic drug, to prevent seizures. Matthew's father also reported that Matthew had not been taking his prescription medication for the past several days.

30. The following excerpt is taken from Matthew's chart at GSRMC:

> Mr. Scheer is a 26 y/o male with a h/o epilepsy who presents to the ED c/o paranoia and hallucinations. Associated sx include insomnia and anorexia due to believing that all "food he used to eat is contaminated now." Pt's father reported he had an extended complex vision last night lasting a couple of hours. Pt reports hearing voices and believes someone is plotting against him by poisoning him.

31. The healthcare providers at GSRMC's emergency department directed Matthew's father to "immediately" take Matthew to the Lighthouse Care Center. Matthew's father took Matthew to the Lighthouse Care Center as instructed. However, because an elevated white blood cell count and elevated bilirubin had been noted at GSRMC, the Lighthouse Care Center refused to provide care for Matthew and sent him back to the hospital. Thereafter, Matthew's father brought Matthew back to the emergency room at GSRMC.

32. Upon Matthew's second presentation at GSRMC's emergency department, the healthcare providers there found Matthew's mental condition to be unchanged from his visit earlier that day.

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33. Matthew was admitted to GSRMC under the care of the physicians there. At the time of Matthew's admission to GSRMC and at all times thereafter during Matthew's stay at the hospital, Dr. Patel was Matthew's attending physician and principally responsible for Matthew's medical care.

34. Obtaining a patient history provided primarily by Matthew's father, Dr. Patel charted and described Matthew as having an "acute psychotic episode" and tangential thinking. Although Matthew denied having hallucinations, the healthcare providers noted that he was having visions and that he had recently had a "psychotic episode where he ran out into the woods."

35. Defendants, including Dr. Patel, did not order or otherwise provide any anti-psychotic medication for Matthew.

36. Although a psychiatric consult had been ordered for Mathew, it was never provided to him. Defendants, including Dr. Patel, did not ensure that Matthew received a psychiatric consult in a timely fashion.

37. At some point after Matthew's admission to GSRMC, his father departed from the hospital. At the time of his departure, Matthew's father made it known to the healthcare providers that he would be close by and how he could be reached. Contact information for Matthew's father had been recorded in the medical record around the time of his presentation to GSRMC.

38. Sometime after his father left the hospital, Matthew became loud and disruptive.

39. Because Matthew had become loud and disruptive, Dr. Ash-Bernal, and/or Dr. Patel, came to see Matthew. Dr. Ash-Bernal, and/or Dr. Patel, asked Matthew if he wanted to leave GSRMC against medical advice, to which Matthew responded in the affirmative.

40. At the time he stated his desire to leave GSRMC, Matthew was suffering from psychosis and did not have the mental ability to accept the risk of leaving the hospital against medical advice. Suffering from psychosis, Matthew not did have the ability to make rational decisions and understand the reality around him.

41. Dr. Patel, Dr. Ash-Bernal, and the other healthcare providers at GSRMC allowed Matthew to leave the hospital. He was discharged from GSRMC at or around 1:45 AM on October 3, 2015.

42. At the time Matthew was permitted to leave GSRMC, he was mentally ill. Because of his mental illness, if he was not kept in the hospital, he was likely to harm himself through neglect, the inability to care for himself, personal injury, or otherwise.

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43. The physician's note provided by Dr. Ash-Bernal reads as follows:

> Pt refused IV, PO Keppra. I was called to patient room by nursing staff since pt was yelling at nursing staff stating they were all "devil worshipers" and "Obama is Satan." Pt is a voluntary psychiatric admission and when asked if he wanted to leave the hospital against medical advice or stay in-house for treatment he stated "I want to leave right now." Pt has was [*sic*] yelling in his room, disrupting the other pts rest time. Pt indicated he understood that it was recommended he remain in the hospital for further evalaution [*sic*] of his psychiatric issues but he refused to stay. Pt seemed able to weigh the information (he interrupted his religious rant to think about the question) and it was explained to him that he could die from infection, seizures or as a result of his psychiatric illness and he insisted on leaving. Pt may not be restrained in the hospital since he is a voluntary admission. Pt vitals stable. AMA papers signed, pt left the hospital.

44. Dr. Patel's discharge summary states, in part:

> He was not here under involuntary commitment, he was admitted under voluntary psychiatric evaluation and therefore he cannot be kept here against his will. The patient requests to leave against medical advice. He was advised that this could be potentially dangerous that he could potentially become ill either from infection, seizures or result of a psychiatric illness, but he still insisted on leaving. He understood the risks of that. Vitals were stable and unremarkable at the time of the patient leaving. The patient left against medical advice later that night. All questions were answered to the best of my ability.

45. Shortly after leaving GSRMC, Matthew was seen running into the Atlantic Ocean during a violent storm and drowned.

46. On October 3, 2015, Matthew died as a result of Defendants' deviations from the applicable standards of care, negligence, gross negligence, and carelessness as described herein.

47. Regardless of the circumstances through which a patient comes to a hospital, if a physician believes that the patient, because of mental illness/instability, has the likelihood of causing injury to himself or to others, then the physician has the ability to temporarily detain the patient against his will.

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48. Regardless of the circumstances through which a patient comes to a hospital, if a physician believes that the patient, because of mental illness/instability, has the likelihood of causing injury to himself or to others, then the standard of care requires the physician to temporarily detain the patient against his will.

49. South Carolina law provides a means for a mentally ill patient to be temporarily detained against his will. South Carolina Code § 44-17-410 states that a mentally ill patient may be temporarily detained against his will upon:

(1) written affidavit under oath by a person stating:

(a) a belief that the person is mentally ill and because of this condition is likely to cause serious harm to himself or others if not immediately hospitalized;

(b) the specific type of serious harm thought probable if the person is not immediately hospitalized and the factual basis for this belief;

(2) a certification in triplicate by at least one licensed physician stating that the physician has examined the person and is of the opinion that the person is mentally ill and because of this condition is likely to cause harm to himself through neglect, inability to care for himself, or personal injury, or otherwise, or to others if not immediately hospitalized. The certification must contain the grounds for the opinion.

50. The Defendants, individually, and by and through their agents and servants, deviated from the applicable standards of care, and were negligent, grossly negligent, careless and reckless, in the following particulars:

a. failing to give Matthew antipsychotic medications;

b. failing to ensure that Matthew received a psychiatric consultation in a timely manner;

c. failing to contact Matthew's father to inform him that Matthew was desiring/attempting/planning to leave GSRMC;

d. failing to involuntarily commit Matthew and otherwise allowing Matthew to leave GSRMC;

e. failing to educate and otherwise train physicians and staff as to the ability, means, and mechanisms to detain a mentally ill patient against his/her will; and

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f. in such other and further particulars as discovery or evidence at trial may reveal.

51. In summary, the standard of care required Defendants to provide antipsychotic medications to Matthew, to ensure that Matthew received a psychiatric consultation in a timely manner, to contact Matthew's father to inform him that Matthew was trying to leave GSRMC, and to keep, at least temporarily, Matthew at GSRMC. Additionally, Defendant GSRMC failed to educate and otherwise train its physicians and staff as to the ability, means, and mechanisms to detain a mentally ill patient against his/her will.

FOR A FIRST CAUSE OF ACTION
(Wrongful Death)

52. Plaintiff hereby incorporates by reference and realleges every allegation contained within the paragraphs above as if fully set forth herein.

53. As described in the paragraphs above, the Defendants, individually, and by and through their agents and servants, deviated from the applicable standards of care, and were negligent, grossly negligent, careless and reckless, thereby proximately causing Matthew's death.

54. At the time of his death, Matthew J. Scheer was twenty-six (26) years old.

55. Matthew Scheer's statutory beneficiaries are the claimants of this Wrongful Death Action.

56. Matthew was survived by his father (David L. Scheer) and his mother (Debra A. Scheer). David and Debra are Matthew's statutory beneficiaries under the laws of South Carolina, including but not limited to SC Code § 15-51-20 and SC Code § 15-51-40.

57. As a direct and proximate result Matthew's death, David and Debra have suffered pecuniary loss, grief, shock, sorrow, wounded feelings, loss of companionship and society, and the loss of Matthew's advice on family matters, for which they, as his statutory beneficiaries, are entitled to compensation.

FOR A SECOND CAUSE OF ACTION
(Survival Action)

58. Plaintiff hereby incorporates by reference and realleges every allegation contained within the paragraphs above as if fully set forth herein.

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59. As described in the paragraphs above, the Defendants, individually, and by and through their agents and servants, deviated from the applicable standards of care, and were negligent, grossly negligent, careless and reckless, thereby proximately causing Matthew's death.

60. Matthew Scheer's estate is the claimant of this Survival Action.

61. As a direct and proximate result of the negligent, grossly negligent, careless, and reckless acts as set forth above, Matthew J. Scheer, while he lived, suffered the following injuries and damages, for which he, through his estate, is entitled compensation:

a. loss of enjoyment of life;
b. pain;
c. agony;
d. sorrow;
e. mental anguish and emotional distress;
f. grief;
g. and other injuries and damages.

WHEREFORE, having fully pleaded, the Plaintiff, individually and as the Personal Representative of the Estate of Matthew J. Scheer, prays for damages against the Defendants in a sum sufficient to compensate claimants David L. Scheer, Debra A. Scheer, and claimant the Estate of Matthew J. Scheer, for their actual losses, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

s/ Francis M. Hinson, IV
Francis M. "Brink" Hinson, IV (SC Bar # 74917)
William R. Padget (SC Bar # 72579)
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803-765-2935 (telephone)
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-and-

Nicholas D. Mermiges (SC Bar # 101640)
LAW OFFICE OF NICK MERMIGES, LLC
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August 10, 2017
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ELECTRONICALLY FILED - 2017 Sep 01 11:33 AM - HORRY - COMMON PLEAS - CASE#2017CP2601571

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**Civil Action No. 2017-CP-26-1571**
	)	
David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer,	)	**ANSWER TO PLAINTIFF'S AMENDED COMPLAINT ON BEHALF OF THE DEFENDANT SOUTHERN MYRTLE INPATIENT SERVICES, LLC**
Plaintiff,	)	
v.	)	
Southern Myrtle Inpatient Services, LLC, Nirlep A. Patel, M.D., Rachel Ash Bernal, M.D., and Grand Strand Regional Medical Center,	)	
Defendants.	)	

TO: FRANCIS M. HINSON, IV, ESQUIRE, ATTORNEY FOR PLAINTIFF:

The Defendant, Southern Myrtle Inpatient Services, LLC, reserving all rights to file Rule 12 Motions, hereby answers the Amended Complaint of Plaintiff as follows:

FOR A FIRST DEFENSE

1. Defendant denies each and every allegation of the Complaint not hereinafter specifically admitted, qualified, or explained.

2. Defendant admits the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the Amended Complaint.

3. Defendant denies the allegations of paragraphs 10 and 11 of the Amended Complaint.

4. Defendant admits the allegations of paragraphs 12, 13, 14, and 15 of the Amended Complaint in so far as Southern Myrtle Inpatient Services, LLC is responsible for the actions of its employees under the theory of *respondeat superior*, but categorically denies any negligence by Drs. Patel or Ash Bernal.

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5. Defendant admits so much of paragraphs 16 and 17 of the Amended Complaint, as a doctor-patient relationship existed between Matthew Scheer, Dr. Patel and Dr. Ash-Bernal at the times they were providing care to Mr. Scheer, but denies the remainder of the allegations as stated.

6. Defendant denies the allegations of paragraph 18, of the Amended Complaint regarding the negligent acts, omissions and liability by Dr. Patel and Dr. Ash Bernal, but admits it would be responsible for the actions of Dr. Patel and Dr. Ash Bernal under the doctrine of *respondeat superior*.

7. Defendant admits the allegations of paragraph 19 of the Amended Complaint.

8. Defendant admits so much of paragraph 20 of the Amended Complaint, as Mr. Scheer was seen at GSRMC and denies remainder of the allegations as stated.

9. Paragraph 21 of the Amended Complaint is not directed to this Defendant, so it has no duty to admit or deny said allegation.

10. Defendant denies the allegation of paragraph 22 and 23 of the Amended Complaint.

11. Defendant admits the allegations of paragraph 24 of the Amended Complaint.

12. Defendant admits the allegations of paragraph 25 of the Amended Complaint.

13. Defendant denies the allegations of paragraph 26 of the Amended Complaint.

14. Defendant admits the allegation of paragraph 27 of the Amended Complaint.

15. Defendant denies the allegation of paragraph 28 of the Amended Complaint, as stated and would crave reference to the medical records for a more accurate and complete response to said allegation.

16. Defendant admits the allegation of paragraphs 29 and 30 of the Amended Complaint.

17. Defendant admits so much of paragraph 31 of the Amended Complaint as the emergency department made a request to take Mr. Scheer to Lighthouse Care Center, but the

admission was refused and he returned back to GSRMC, but has no information sufficient to formulate any beliefs for the remainder allegations, and denies same.

18. Defendant admits the allegation of paragraph 32 of the Amended Complaint.

19. Defendant denies the allegations of paragraph 33 of the Amended Complaint.

20. Defendant admits on information and belief of the allegations of paragraph 34 of the Amended Complaint, but would crave reference to the medical records for a more complete and accurate response to his condition upon his admission to the hospital.

21. Defendant admits the allegation of paragraph 35 of the Amended Complaint.

22. Defendant admits so much of paragraph 36 of the Amended Complaint, as Dr. Patel ordered a psychiatric consult, but denies the remainder of the allegation and avers that Dr. Patel has no duty or control over any psychiatrist he requested to provide a consult.

23. Defendant has no information sufficient to formulate a brief as to the allegations of paragraph 37 of the Amended Complaint, and therefore denies same.

24. Defendant admits so much of paragraph 38 of the Amended Complaint as Mr. Scheer had an outburst, which was described in the medical records, but denies the remainder of the allegations as stated.

25. Defendant admits so much of paragraph 39 of the Amended Complaint as Dr. Ash Bernal came to see Mr. Scheer, he left against medical advice, but denies the remaining allegations as stated.

26. Defendant denies the allegations of paragraph 40 of the Amended Complaint.

27. Defendant admits so much of paragraph 41 of the Amended Complaint, as it alleges Matthew Scheer voluntarily left the hospital against medical advice, but denies the remainder of the allegations as stated.

28. Defendant denies the allegations of paragraph 42 of the Amended Complaint.

29. Defendant admits the allegation of paragraph 43 and 44 of the Amended Complaint.

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30. Defendant has no information sufficient to formulate a belief as to the allegation of paragraph 45, and therefore denies same.

31. Defendant denies the allegations of paragraph 46 of the Amended Complaint.

32. Defendant denies the allegations the paragraphs 47 and 48 of the Amended Complaint.

33. Defendant admits so much of paragraph 49 of the Complaint as this is a statement of South Carolina Code, but denies remaining allegations as stated.

34. Defendant denies the allegations of paragraph 50, with subparts.

35. Defendant denies the allegations of paragraph 51 of the Amended Complaint.

36. Defendant denies the allegations of paragraph 52 of the Amended Complaint, except as previously admitted herein.

37. Defendant denies the allegations of paragraph 53 of the Amended Complaint.

38. Defendant admits the allegations of paragraph 54 of the Amended Complaint.

39. Defendant has no information sufficient to formulate beliefs of paragraph 55 of the Amended Complaint, denies same.

40. Defendant admits on information and belief of the allegations of paragraph 56 of Amended Complaint.

41. Defendant denies the allegations of paragraph 57 of the Amended Complaint.

42. Defendant denies the allegations of paragraph 58 of the Amended Complaint, except as previously admitted herein.

43. Defendant denies the allegations of paragraph 59 of the Amended Complaint.

44. Defendant admits the allegations of paragraphs 60 and 61 of the Amended Complaint.

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FOR A SECOND DEFENSE

45. The Complaint fails to state facts sufficient to constitute a cause of action against this Defendant.

FOR A THIRD DEFENSE

46. This Defendant provided no medical care treatment to Matthew J. Scheer, but avers Defendants Patel and Ash Bernal acted in accordance with accepted standards of medical care, exercised sound medical judgment in his care and treatment of Plaintiff and bears no liability to Plaintiffs for an unfortunate result from properly employed medical care.

FOR A FOURTH DEFENSE

47. Any injury or damage sustained by the Plaintiff as a result of the matters alleged in the Complaint were caused and occasioned by events over which Defendant had no control or right of control, thereby relieving Defendant from any liability or responsibility herein and Defendant pleads an unavoidable accident as a complete bar to this action.

FOR A FIFTH DEFENSE

48. Any injury or damage sustained by the Plaintiff as a result of the matters alleged in the Complaint were a proximate result of one or more independent, efficient and intervening causes which the Defendant affirmatively pleads as a complete bar to this action.

FOR A SIXTH DEFENSE

49. Defendant avers that punitive damages are unconstitutional, have no meaningful standard by which they can be ascertained, subject Defendant to a double recovery and violate equal protection and due process of law.

50. Further, Defendant pleads all applicable punitive damages caps available under South Carolina law.

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FOR A SEVENTH DEFENSE

51. Defendant pleads all caps on damages and special defenses as set forth in the South Carolina Medical Malpractice Tort Reform Act and all caps on punitive damages set fully by statute.

FOR AN EIGHTH DEFENSE

52. Plaintiff's decedent, in leaving the hospital against medical advice is solely negligent, careless, reckless, willful, wonton, and assumed the risk of injury, which acts as the bar to his claim, or in the alternative, was contributorily negligent and reckless which act as a set off to any injuries and damages sustained by Plaintiff.

WHEREFORE, having fully answered the Complaint, the Defendant prays that it be dismissed, with prejudice, for their costs and for such other and further relief as the Court deems just and proper.

s/Julius W. McKay, II
Julius W. McKay, II
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Attorneys for Defendant Southern Myrtle Inpatient Services, LLC

Columbia, South Carolina
September 1, 2017.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	CIVIL ACTION NO.: 2017-CP-26-1571
David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer, Plaintiff, v. Southern Myrtle Inpatient Services, LLC, Nirlep A. Patel, M.D., and Rachel Ash-Bernal, M.D., Defendants.	)	**DEFENDANT SOUTHERN MYRTLE INPATIENT SERVICES, LLC'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, MOTION TO ALTER OR AMEND JUDGMENT OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL**

Defendant, Southern Myrtle Inpatient Services, LLC ("Southern Myrtle"), by and through its undersigned counsel, hereby submits this Motion and Memorandum in Support of the above referenced motions.

I. BRIEF FACTUAL BACKGROUND COMMON TO ALL MOTIONS.

This lawsuit arises out of the care and treatment rendered to Matthew Scheer on October 2nd and 3rd in 2015, by the Defendants while he was a patient at Grand Strand Regional Medical Center. This matter came before the Court for a jury trial on May 20 – 24, 2019. Plaintiff brought both a wrongful death and survival action for the presumed death of Matthew Scheer. More specifically, Plaintiff submitted three causes of action to the jury for their consideration: (1) Defendant Dr. Patel was negligent in failing to administer certain medications to Matthew, (2) Defendant Dr. Ash-Bernal was negligent in failing to involuntarily commit Matthew and/or call Matthew's father at the time he decided to leave the hospital Against Medical Advice (AMA), and (3) Southern Myrtle was negligent with respect to their efforts to train Drs. Patel and/or Ash-Bernal in various HIPAA regulations. After over six (6) hours of deliberations, the jury found in favor of

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both Dr. Patel and Dr. Ash-Bernal on the claims of professional negligence; however, the jury also found for the Plaintiff solely against Defendant Southern Myrtle on the issue of negligent training.[1] The jury spoke loud and clear that Defendants Dr. Patel and Dr. Ash-Bernal, both employees of Southern Myrtle, were not negligent and accordingly allocated 0% of any fault to them. This motion seeks to revisit the jury's finding against Southern Myrtle only.

The only individual claim against Southern Myrtle, as stated in the Complaint, is for "failing to educate and otherwise train physicians and staff as to the ability, means, and mechanisms to detain a mentally ill patient against his/her will."[2] What Plaintiff argued at trial, over a timely objection, was that Southern Myrtle failed to properly train the Defendant doctors on the parameters of HIPAA, and because of this insufficient training, HIPAA prevented calling Matthew Scheer's father at the time he decided to leave the hospital AMA. This allegation was never pled, and the only evidence presented in regard to Southern Myrtle's training was conflicting expert testimony about a PowerPoint discussing the restrictions HIPAA places on disclosures of individual health care information, which Defendants objected to. All of Plaintiff's other claims against Southern Myrtle were premised on the doctrine of *respondeat superior*.

Upon receiving and publishing the verdicts of the jury on May 24th, the Honorable John C. Hayes, III stated that post-trial motions must be filed and served in ten (10) days. These motions are timely filed as ordered by Judge Hayes.

II. DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

At the close of Plaintiff's case, Defendants' counsel moved for a directed verdict on the issue of improper introduction of evidence with regards to Defendant Southern Myrtle's liability

[1] See Exhibit A, Verdict Form.

[2] See Exhibit B, Amended Complaint.

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for alleged failure to train its employee doctors, as this was not pled in the Complaint, and the only expert to opine as to corporate training standards was Plaintiff's hospitalist expert who is currently employed at CVS as a claims analyst. Further, defense counsel moved for directed verdict on the issue of no evidence that anything Southern Myrtle did or did not do with regard to training employees on HIPAA proximately caused Plaintiff's injuries. This motion was renewed at the close of the Defendants' case and was denied by the Court in both instances it was made.

LAW AND ARGUMENT

Rule 50(b), SCRCP, provides, in part, that "[a] party who had moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside to have judgment entered in accordance with his motion for a directed verdict." Rule 50(b), SCRCP. The party making a motion for judgment notwithstanding the verdict must have moved for directed verdict at the conclusion of all the evidence. *Bellew v. Liberty Life Ins. Co.*, 270 S.C. 301 (1978); *Government Employees Ins. Co. v. Mackey*, 260 S.C. 306 (1973); *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415 (Ct. App. 1995). The party is limited to moving on the same grounds as asserted in the motion for directed verdict. *Roland v. Palmetto Hills*, 308 S.C. 283 (Ct. App. 1992); *Glover v. N.C. Mutual Life Ins. Co.*, 295 S.C. 251 (Ct. App. 1988). In ruling on a motion for judgment notwithstanding the verdict, the trial court must view the evidence and inferences therefrom in the light most favorable to the nonmoving party and must deny the motions if either the evidence yields more than one reasonable inference, or its inferences are in doubt. The verdict will be upheld if there is any evidence to sustain the factual findings of the jury. *Shupe v. Settle*, 315 S.C. 510 (Ct. App. 1994); *Hilton Head Island Realty, Inc. v. Skull Creek Club*, 287 S.C. 530 (Ct. App. 1986).

Plaintiff, in his case-in-chief, offered no evidence from any expert who trains employees on HIPAA or institutes corporate standards for training on HIPAA, or any other privacy practices,

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to say that Defendant Southern Myrtle was negligent in their training. As noted in Defendants' directed verdict motion, this cause of action was not pled in Plaintiff's Complaint or Amended Complaint. The only testimony Plaintiff offered to support this contention was, after objection, from Dr. Robert Robinson, an internal medicine physician who previously worked as a hospitalist and now is employed by CVS pharmacy doing claim intake. Dr. Robinson does not have the education, training, or experience to testify as to how corporations should instruct or train employees on HIPAA, or its progeny. Dr. Robinson testified as an expert in the standard of care as applicable to an internal medicine physician. Dr. Robinson is not qualified to render opinions as to the standard of care applicable to corporations' proper training mechanisms. Moreover, Dr. Robinson did not offer any testimony that, more likely than not, had Defendant Southern Myrtle instituted different or better training of HIPAA, that Plaintiff would not have sustained injuries. For these reasons, this Court should grant Defendant Southern Myrtle Judgment Notwithstanding the Verdict.

III. DEFENDANT'S MOTION TO AMEND THE JUDGMENT.

Should this Court deny its JNOV motion, Defendant Southern Myrtle contends this Court should alter the jury's verdict and enter a verdict in its favor because Southern Myrtle cannot be held liable, as a matter of law, since the jury found its employees/agents not liable. Likewise, there is insufficient evidence to find any act or omission attributable to Southern Myrtle that proximately caused Matthew Scheer's death.

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A. Southern Myrtle is entitled to a Defense Verdict because it cannot be held liable since Dr. Patel and Dr. Ash-Bernal, as the alleged negligently trained employees, were not themselves negligent and did not contribute to Matthew Scheer's death.

Long ago, the Supreme Court of South Carolina addressed the issue of whether a corporation may be held liable when its employees are absolved of liability. The rule remains the same today and is most accurately phrased as follows:

> It has long been settled that, where principal and agent or master and servant are sued together for the same act of negligence or willful tort, and the principal's or master's liability rests solely upon such agent's or servant's conduct, a verdict against the master alone is illogical, and cannot stand. The reason for the rule is perfectly apparent, for, if the agent or servant is without blame in his conduct, the principal or master cannot be held blame-able because of that same conduct. Of course, a verdict against the master or principal alone is permissible and will be sustained where the evidence is such that the jury may reasonably conclude therefrom that the delicts were committed through the agency of some other servant not joined as a defendant.

Chapman-Storm Lumber Corp. v. Minnesota-S.C. Land & Timber Co., 183 S.C. 31, 190 S.E. 117, 118 (1937) (citations omitted); *see also Johnson v. Atl. Coast Line R. Co.*, 142 S.C. 125, 140 S.E. 443, 445 (1927)("it is an inconsistent declaration on the part of the court to say that, while the servant is without blame in his conduct, yet, because of that same conduct, the master is to be held blamable."). Thus, when a verdict is made only against the corporation and the employee is vindicated by the jury, judgment should be made in favor of all Defendants. *Id.*

In the present matter, Southern Myrtle was made a party because it employed Defendants Dr. Patel and Dr. Ash-Bernal. Southern Myrtle, as a corporation, does not treat patients. Its business is to employ physicians and place them within hospitals or other medical facilities within the state. Those physicians provide patient care on behalf of Southern Myrtle. In other words, Southern Myrtle can only act by and through its physicians and cannot be held liable for medical malpractice unless its physicians are found liable first. *See Chapman-Storm*, 183 S.C. at 31, 190

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S.E. at 118 ("[a] corporation, being a fictitious person, can never act except through servants."). Plaintiff's claims are wholly premised on alleged acts or omissions by Dr. Patel and Dr. Ash-Bernal, as agents of Southern Myrtle. Therefore, as a matter of law, the judgment against Southern Myrtle cannot stand since the jury unanimously found that Dr. Patel and Dr. Ash-Bernal were not negligent.

The only allegation pled as to Southern Myrtle, separate and apart from vicarious liability, is that it negligently educated/trained its physicians as to the ability to involuntarily commit a mentally ill patient. However, as noted above, such an argument was never presented at trial. Instead, Plaintiff briefly presented testimony about a PowerPoint from Southern Myrtle through his hospitalist expert, Dr. Robinson, regarding certain impermissible disclosures of protected health information under HIPAA. Dr. Robinson then testified, over objection, that the PowerPoint did not contain instances of permissible disclosures, which Plaintiff then attempted to use for the proposition that Southern Myrtle failed to properly educate Dr. Patel and/or Dr. Ash-Bernal on the parameters of HIPAA disclosure. This allegation was never pled. Nevertheless, a jury cannot reasonably conclude, based on the evidence presented, that any negligence arose from an employee at Southern Myrtle that was not joined as a Defendant. *See e.g., Brown v. Nat'l Oil Co.*, 233 S.C. 345, 347–48, 105 S.E.2d 81, 82 (1958) ("where a principal and agent or master and servant are jointly sued and the only evidence of negligence relates to acts committed by the agent or servant and the verdict of the jury exonerates the latter, a verdict against the principal or master alone cannot stand.").

No South Carolina case is directly on point as to exactly what a plaintiff must prove in a negligent training case where there is no tort committed by the trainee; however, two cases are instructive on this point and point towards South Carolina's requirement that a plaintiff in an action

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against an employer for negligent training must prove that the employee committed an actionable tort. *See Longshore v. Saber Sec. Services, Inc.*, 365 S.C. 554, 619 S.E.2d 5 (2005) (stating that there is support for the proposition that South Carolina law requires an employee to commit a tort for the employer to be liable for negligently training the employee based on *Sabb v. South Carolina State Univ.*, 350 S.C. 416, 431–33, 567 S.E.2d 231, 238–39 (2002) (Pleicones, J., dissenting). Such a position makes sense—if the "negligently trained" employee does not commit a tort, there can be no proximate cause against the employer for the training since the employee acted appropriately.

The only evidence of negligence presented during trial was that of the individual Defendants relating to the decisions they made and actions they took regarding Matthew Scheer's medical treatment. The only act/omission that could result from a failure to provide adequate HIPAA education/training was the physicians' decision not to call Matthew's father. As to this issue, the jury clearly found that the actions of Drs. Patel and Ash-Bernal were entirely appropriate when the jury gave both defendant doctors a defense verdict; the sole implicit finding being that Matthew Scheer's father did not need to be called based upon the standard of care applicable to hospitalists or by federal HIPAA law.

Therefore, as a matter of law, this Court should vacate the judgment against Southern Myrtle and enter a defense verdict for all Defendants.

B. There was no evidence presented to allow a jury to reasonably conclude that a failure to educate a physician on the parameters of HIPAA disclosure constitutes negligence and that such negligence proximately caused Matthew Scheer's death.

In medical malpractice cases, the plaintiff must show through expert testimony that, "in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence . . . [and] when it is the only evidence of proximate cause relied upon, it must provide

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a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection." *Daves v. Cleary*, 355 S.C. 216, 229–30, 584 S.E.2d 423, 430 (Ct. App. 2003) (citing *James v. Lister*, 331 S.C. 277, 286, 500 S.E.2d 198, 203 (Ct. App. 1998)). Stated differently, "proximate cause must be established beyond mere speculation or conjecture." *Welch v. Whitaker*, 282 S.C. 251, 258, 317 S.E.2d 758, 763 (Ct. App. 1984).

1. Plaintiff failed to present sufficient evidence of the breach of a duty to support a claim for negligently providing HIPAA training.

HIPAA mandates that personal health care information not be disclosed unless there is explicit permission from the patient. *See generally* 45 C.F.R 164.510. There is no legal duty established in the State of South Carolina that an employer has a legal duty to train physicians on HIPAA's permissive exclusions. This would be nonsensical as there is no obligation to permissively provide the information under the statute—all of the permissive disclosures allowed by HIPAA would require the exercise of professional judgment by the clinician. The exclusions to HIPAA's nondisclosure mandates are stringent and are required to be met prior to any permissive disclosure of the information.

Plaintiff provided no evidence to the court to establish a legal duty of a corporate entity to provide training to its physicians on HIPAA's permissive exceptions. Instead, Plaintiff's expert, Dr. Malone, merely stated that *he did not care about following HIPAA* and *he would disclose regardless of the law* and happily face a suit for improper disclosure. There certainly cannot be a legal duty upon an employer to mandate training on violating an important federal law that has criminal and civil penalties. The only thing the evidence revealed was that Southern Myrtle, through its corporate affiliates, took its responsibilities to ensure that providers were aware of their obligation to not disclose patient information in violation of HIPAA. Plaintiff merely presented a physician with no corporate experience and no knowledge of medical corporate HIPAA training,

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and who admittedly cares nothing about HIPAA compliance, to testify that he thinks the seventy (70) slide PowerPoint presentation taught on behalf of Southern Myrtle was inappropriately restrictive.

There was no evidence to establish a standard of care for medical companies. There was no evidence to reveal training or the nature of the training. There is no South Carolina legal precedent that there exists such a legal duty on an employer. Physicians are highly educated and licensed professionals who are obligated to follow state and federal law under their licensure. They are independently and personally liable for HIPAA violations—as a violation of HIPAA would be against the provider AND the employer. Employers only have the responsibility to train employees in limited circumstances and there is no legal precedent that would substantiate the requirement to train physicians on a permissive disclosure exception under HIPAA.

2. Plaintiff failed to present sufficient evidence that, even if a duty to train on HIPAA was breached, that such a breach by Southern Myrtle caused Matthew Scheer's death.

In this case, there was insufficient evidence presented to allow a jury to conclude, beyond mere speculation or conjecture, that any act or omission by Southern Myrtle proximately caused Matthew's death. In fact, there was no testimony stating to a reasonable degree of medical certainty that a failure to properly educate a physician on the permissible disclosures of protected health information proximately caused Matthew's death. Even assuming, *arguendo*, that Southern Myrtle negligently educated the physicians on HIPAA, it is wholly untenable and speculative to conclude, by way of a PowerPoint presentation, that such negligence proximately caused Matthew Scheer's death.

HIPAA mandates that a provider may not use or disclose protected health information unless the disclosure specifically falls under a limited, enumerated exception. *See* 45 C.F.R. §§

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164.502, 164.508. These exceptions, however, are (1) merely permissive disclosures and (2) governed by the medical, or treating, provider's judgment only. Plaintiff's arguments that Southern Myrtle's training on HIPAA, even if negligently done, proximately caused injury to Matthew Scheer fails for three reasons. Also, there are only two permissive disclosure exceptions at play in this case and neither applied.

a. Dr. Ash-Bernal knew of the permissive exceptions.

Dr. Ash-Bernal went to great length on the witness stand to demonstrate to the jury that she knew of HIPAA's permissive exceptions for disclosure of protected health information and chose not to use any such permissive exception. She testified that, in addition to the training she received from Southern Myrtle, she has received training from every hospital and corporation she has worked for. With just a cursory review of Dr. Ash-Bernal's *cv*[3] it is clear that her HIPAA knowledge and education is quite substantial. The jury, upon hearing this testimony, vindicated Dr. Ash-Bernal's decision-making process and her ultimate decision not to call Matthew Scheer's father. With such testimony, combined with the unanimous finding from the jury in her favor, Plaintiff's claim against Southern Myrtle fails South Carolina's "but for" proximate cause test. *See Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992) ("Proximate cause requires proof of both causation in fact, and legal cause. Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence.").

Because Dr. Ash-Bernal was fully cognizant of the permissive exceptions under HIPAA and chose not to implement them, even if the company had included permissive exceptions in its HIPAA training, the same result would have occurred. The jury has pronounced that result was

[3] See Exhibit C, Dr. Ash-Bernal *cv*.

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appropriate when they found Dr. Ash-Bernal was not negligent in her decision not to use the permissive exception and contact the father.

b. Dr. Ash-Bernal appropriately used her independent professional judgment to determine whether the patient has the capacity to uphold his right to patient confidentiality.

Dr. Ash-Bernal decided, using her independent professional judgment, that a permissive disclosure would be inappropriate under HIPAA. In order to meet the stringent exceptions to HIPAA's non-disclosure mandate and avoid committing a criminal offense, Dr. Ash-Bernal was mandated to determine whether the patient was incapacitated and also whether it would be in his best interests. The first exception argued at trial provides that if a patient with *an inability to object* to the disclosure because of *incapacity* or an emergency treatment circumstance, the provider may use or disclose some or all of the protected health information if the disclosure is (1) consistent with the individual's prior expressed wishes and (2) if disclosure is in the individual's best interest, *as determined by the health care provider, in the exercise of professional judgment.* 45 C.F.R. § 164.510 (emphasis added). This is a decision that is left solely within Dr. Ash-Bernal's determination based on the statute's specific language and her evaluation of the patient and surrounding circumstances. The testimony was clear that she felt that the patient was capable of exercising his right to protect his privacy and that it would be illegal for her to violate his rights. This is further demonstrated by the discharge against medical advice form signed by Dr. Ash-Bernal essentially certifying that Matthew had the requisite mental capacity to understand the risks of leaving the hospital against medical advice.[4] This determination, made with full understanding of the law, makes any training on permissive disclosures to family members irrelevant as she made the actual determination that the exclusion did not apply.

[4] See exhibit D, AMA form.

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Southern Myrtle is forbidden from training physicians to violate the statute and Dr. Ash-Bernal's testimony was that she analyzed the situation squarely within the statute. In accordance with S.C. Code Ann. § 40-47-10(I), South Carolina has promulgated Advisory Opinions on the issue of corporate medicine and has made it clear that the South Carolina Medical Board does not license or regulate corporations. No corporation or employer has a legal right to invade the practice of medicine by a licensed professional and only the physician has the legal right to form the medical opinion on the patient's capacity and whether it was in his best interests. As the jury agreed that Dr. Ash-Bernal did not violate any standard of care in her application of the HIPAA statute and its permissive disclosure rules, there can be no finding that training on these very rules would have resulted in a different outcome.

c. Dr. Ash-Bernal appropriately found in good faith that the patient was not a serious and imminent threat to the health and safety of a person or the public, or that the father would be reasonably able to prevent or lessen any such threat.

HIPAA expressly defers to the professional judgment of health care professionals when they make determinations about the nature and severity of the threat to health or safety. *See* 45 C.F.R. 164.512(j). Specifically, the second, permissive exception provides:

> The covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the covered entity, *in good faith, believes* the use or disclosure:
>
> > (A) Is *necessary* to prevent or lessen a serious and *imminent threat* to the health or safety of a person or the public; and
> >
> > (B) Is to a person or persons *reasonably able to prevent or lessen the threat*, including the target of the threat.

45 C.F.R. § 164.512 (emphasis added). If the provider does not determine imminent threat or an immediate danger, they are obligated under the statute to not disclose when the patient has objected. Dr. Ash-Bernal testified that she was aware of this requirement and determined in her

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professional judgment that the patient was not a serious or imminent threat to himself. She further testified that patients often change their mind on who should be told protected health information and that calling the dad in this circumstance may not have helped the situation. The jury analyzed Dr. Ash-Bernal's knowledge of HIPAA and her application of the same in their determination that Dr. Ash-Bernal was not negligent in her failure to call the father. In any event, the statute is clear that this is a determination that is only made by the *provider* using their professional judgment. There is absolutely no rational argument that a different result would occur if the company had trained this employee on a law that she was already well acquainted with and that reading the law one additional time would have changed her professional judgment on that day. Different training would have not changed any of the care provided as she was already very familiar with her responsibilities under the statute and testified that the permissive exceptions did not apply.

Clearly, the decision whether to call Matthew's father was solely that of the medical providers who were absolved of any negligence by the jury. Additionally, there was absolutely no evidence presented that could allow a jury to reasonably conclude that another employee of Southern Myrtle was present at the time Matthew desired to leave the hospital, had the requisite knowledge and training to evaluate Matthew, and was permitted to call Matthew's father. This Court should, accordingly, vacate the judgment against Southern Myrtle and enter a defense verdict in its favor. However, should the Court determine Plaintiff made out a sufficient case to justify a $3.5 million verdict against Southern Myrtle for failing to properly educate its physicians on HIPAA, Southern Myrtle moves for a new trial on this issue since it was not properly pled and not presented until the middle of trial.

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IV. SOUTHERN MYRTLE'S MOTION FOR NEW TRIAL.

In addition to Plaintiff's failure to plead the allegation that Southern Myrtle failed to properly educate/train its physicians on HIPAA, it maintains that several evidentiary errors warrant a new trial.

"The admission of evidence is within the [circuit] court's discretion." *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct.App.2000). "The [circuit] court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law." *Id.* "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). "[T]he admission of incompetent evidence having some probative value upon a material issue of fact in the case is ordinarily presumed to be prejudicial." *Mali v. Odom*, 295 S.C. 78, 84, 367 S.E.2d 166, 170 (Ct.App.1988).

Here, Southern Myrtle maintains that it was error to admit (A) Matthew Scheer's entire death certificate, (B) the HHS HIPAA letter, and (C) Dr. Robinson's testimony regarding Southern Myrtle. These evidentiary errors warrant a new trial for Southern Myrtle as they resulted in substantial prejudice due to a reasonable probability that the jury's verdict was influenced by such evidence.

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A. Death Certificate.

S.C. Reg. 61-19(C) governs the execution of a death certificate in the absence of a body. It states:

> [w]hen a death is presumed to have occurred within this State but the body cannot be located, a death certificate may be prepared by the State Registrar upon receipt of an order of a court of competent jurisdiction, which shall include the finding of facts required to complete the death record. Such a death record shall be marked 'presumptive' and shall show on its face the date of filing and shall identify the court and the date of the decree.

Here, the probate court issued an order on August 29, 2016, declaring that Matthew is presumed to have died on October 3, 2015.[5] According to S.C. Code Ann. § 62-1-507, "[a] certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie proof of the fact, place, date and time of death, and the identity of the decedent." At trial, the death certificate, over a timely objection, was admitted into evidence based upon the above statute and the public records exception to the hearsay rule. Concededly, it was not error to admit the death certificate as evidence of the death of Matthew Scheer. However, it was error to not redact the portion concluding the manner of death was suicide.[6] *See Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 764 S.E.2d 249 (Ct. App. 2014) ("Reports containing opinions, judgments, or conclusions are outside the scope of the public records exception to the hearsay rule."). In the absence of qualified testimony, the manner of death is a question of fact for the jury to decide. In other words, it constitutes an improper opinion, judgment, or conclusion.

Other courts have found that the manner of death on a death certificate constitutes inadmissible hearsay. In *Drain v. United Servs. Life Ins. Co.*, 85 N.C. App. 174, 184–86, 354

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[5] See Exhibit E, Probate Order.

[6] See Exhibit F, Death Certificate.

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S.E.2d 269, 276–77 (1987), the Court of Appeals of North Carolina upheld the trial court's exclusion of a statement within a death certificate listing suicide as the cause of death. Discussing a virtually identical statute to S.C. Code Ann. § 62-1-507, the North Carolina court ultimately concluded that statements within the death certificate not based on personal knowledge were not admissible. That court also stated, "the official status of a public record would lend this hearsay greater credibility and weight in the eyes of the jury." *Id. See also Welz v. Commercial Travelers Mut. Acc. Ass'n of Am.*, 266 A.D. 668, 668, 40 N.Y.S.2d 128, 129 (App. Div. 1943) (granting new trial and finding reversible error "[w]here it appeared that the death certificate . . . contained conclusory and hearsay statements that the insured's death had resulted from 'accident,' and that he was '[s]aid to have fallen on subway platform,' . . . [as] they contained an opinion on a matter within the province of the jury to determine."); *McKeown v. Pitcock*, 79 So. 3d 520, 524 (Miss. Ct. App. 2011) (upholding redaction of death certificate because of the lack of qualified testimony regarding the cause of death and where the coroner testified she was unable to make the determination as to the cause of death reflected on the death certificate).

B. HHS letter.

At trial, the Court admitted a 2013 letter prepared by the Director for the Office of Civil Rights, Leon Rodriguez, discussing the permissive exceptions to HIPAA's privacy rule.[7] The letter was published by the U.S. Department of Health and Human Services and directed to "Our Nation's Healthcare Providers." In short, there was absolutely no foundation laid and it constitutes inadmissible hearsay not subject to an exception or exclusion. *See Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) ("written affidavits and reports generally constitute inadmissible

[7] See Exhibit G, HHS Letter.

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hearsay, with some exceptions, although they may become admissible in whole or part when a proper foundation is laid by a witness's testimony.").

There was no evidence that the letter was kept in the ordinary course of business or that it relates to matters observed pursuant to a duty imposed by law, and it certainly is not a record of vital statistics. The letter is merely Rodriguez's interpretation of the law, which constitutes inadmissible hearsay as it contains his opinions and conclusions.

C. Dr. Robinson's HIPAA testimony.

Southern Myrtle contends that it was error to allow Dr. Robinson to offer testimony regarding the sufficiency of its HIPAA training. As noted above, Dr. Robinson does not have the education, training, or experience to testify as to how corporations should instruct or train employees on HIPAA, or its progeny.

Based on these evidentiary errors, Defendant Southern Myrtle is entitled to a new trial.

V. SOUTHERN MYRTLE'S MOTION TO ALTER OR AMEND JUDGMENT TO REFLECT THE CURRENT NON-ECONOMIC DAMAGES CAP.

S.C. Code Ann. § 15-32-220 places a limit on the amount of non-economic damages a plaintiff may recover in medical malpractice cases subject to a gross negligence exception.[8] In this case, the jury found Southern Myrtle acted in a grossly negligent, willful, wanton, or reckless manner by failing to adequately educate/train its physicians. However, there was absolutely no evidence to support such a finding.

Punitive damages are quasi-criminal in nature and are imposed to punish a wrongdoer and to deter like conduct. *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004). An award of punitive damages must be proven under a significant burden of proof:

[8] Prior to trial the parties agreed that there was no claim for economic damages.

clear and convincing evidence. *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 310, 594 S.E.2d 867, 873 (Ct. App. 2004); *Hundley v. Rite Aid of South Carolina, Inc.*, 339 S.C. 285, 311, 529 S.E.2d 45, 59 (Ct. App. 2000). Furthermore, the plaintiff must prove by clear and convincing evidence that the defendant's misconduct was willful, wanton, or in reckless disregard of the rights of others. *Id.* "[T]rial judges in this state have long been required, as a threshold matter, to assess the culpability of a defendant's conduct to determine whether punitive damages are available in a given case (i.e., whether the issue should be submitted to the jury)." *South Carolina Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149, 152, 478 S.E.2d 57, 58 (1996).

As mentioned above, there was absolutely no evidence submitted to support a finding that Southern Myrtle's conduct in negligently training/educating its physicians was willful, wanton, or in reckless disregard of the rights of others. On the contrary, the evidence supports a finding of at least slight care—Southern Myrtle took steps to educate its physicians by providing materials regarding the parameters of HIPAA. Thus, the issue of gross negligence and punitive damages should have never been submitted to the jury. *See Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 564–65, 619 S.E.2d 5, 11 (Ct. App. 2005) (reversing award of punitive damages upon a finding of no clear and convincing evidence that the defendant's conduct in negligent hiring, training, or supervising its employee who shot plaintiff was willful, wanton, or reckless.).

Southern Myrtle, accordingly, seeks to have the judgment altered or amended by removing the award of punitive damages and reducing the judgment to reflect the appropriate damages cap.

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CONCLUSION

For these and any such other reasons presented at or before the hearing on this matter, Defendants respectfully request this Court vacate the judgment against Southern Myrtle as a matter of law or, in the alternative, grant Southern Myrtle a new trial on the issue of negligent educating/training its doctors on the parameters of HIPAA.

Respectfully submitted,

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June 3, 2019
Mount Pleasant, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF HORRY David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer, Plaintiff, vs. Southern Myrtle Inpatient Services, LLC, Nirlep A. Patel, M.D., and Rachel Ash-Bernal, M.D., Defendants.	IN THE COURT OF COMMON PLEAS Civil Action No.: 2017-CP-26-1571 **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S POST TRIAL MOTIONS**

Plaintiff David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer (hereinafter "Plaintiff"), submits this Memorandum in Opposition to Defendant Southern Myrtle Inpatient Services, LLC's *Motion for Judgment Notwithstanding the Verdict or, in the Alternative, Motion to Alter or Amend Judgment or, in the Alternative, Motion for New Trial.* For the reasons stated herein, Defendant's Motion should be denied in its entirety, the Jury's verdict confirmed, and judgment entered against Defendant Southern Myrtle Inpatient Services, LLC (hereinafter "SMIS").

FACTUAL BACKGROUND AND POSTURE RELATED TO THE MOTIONS

From its very inception, this case has involved direct corporate liability claims against Defendant SMIS. Plaintiff filed his Complaint on March 23, 2017, wherein claims were made against SMIS and two other Defendants. The Complaint specifically alleged SMIS breached duties to train and educate its physicians, stating in Paragraph 25 that:

> The Defendants, individually, and by and through their agents and servants, deviated from the applicable standards of care, and were negligent, grossly negligent, and careless in the following particulars:
>
> a. allowing Matthew to leave GSRMC;
>
> b. failing to give Matthew antipsychotic medications;

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c. failing to contact Matthew's father to inform him that Matthew was attempting to leave GSRMC;

d. failing to educate and otherwise train physicians ***as to the applicable legal standards and mechanisms to detain a mentally ill patient against his/her will; and***

e. *in such other and further particulars as discovery or evidence at trial may reveal.*

On August 10, 2017, Plaintiff filed an Amended Complaint adding Dr. Rachel Ash-Bernal as a Defendant. In this Amended Complaint, Paragraph 50 alleges:

> The Defendants, individually, and by and through their agents and servants, deviated from the applicable standards of care, and were negligent, grossly negligent, careless and reckless, in the following particulars:
>
> a. failing to give Matthew antipsychotic medications;
>
> b. failing to ensure that Matthew received a psychiatric consultation in a timely manner;
>
> c. failing to contact Matthew's father to inform him that Matthew was desiring/attempting/planning to leave GSRMC;
>
> d. failing to involuntarily commit Matthew and otherwise allowing Matthew to leave GSRMC;
>
> *e. failing to educate and otherwise train physicians and staff* ***as to the ability, means, and mechanisms to detain a mentally ill patient against his/her will; and***
>
> *f. in such other and further particulars as discovery or evidence at trial may reveal.*

As demonstrated by the very words within the Plaintiff's pleadings, claims against SMIS relating to negligent training of its physicians has been a claim/issue since very inception of the case. In response to Plaintiff's claims, Defendants raised HIPAA privacy rules as a defense, contending that the privacy provisions prohibited SMIS's doctors from contacting David Scheer and advising him of Matthew's change in condition (his psychotic outburst at approximately 1:15 AM) and desire to leave the hospital. However, privacy laws do not prohibit the disclosure

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of health information when a provider has a good faith belief that a disclosure of patient information may lessen the threat of harm to a patient or the public. Thus, in response to Defendants having raised HIPAA as a basis for their actions, Plaintiff contended SMIS failed to properly train its physicians on both the legal standard for commitment of a mentally ill patient and on the permissible disclosures of health information when disclosure would serve to lessen the potential for harm to a patient or the public. During two years of litigation, extensive discovery was conducted as to what SMIS understood about these two issues, as well as the training the employer had provided to its doctors on these topics. See **Ex. 1**, Depo. of SMIS's 30(b)(6) Designee; **Ex. 2**, Depo of GSRMC 30(b)(6) Designees; **Ex. 3** Dr. Ash-Bernal Depo (pp. 61:25-66:8), **Ex. 4**, Dr. Patel Depo pp. 47-48, 66-67 **Ex. 5**, various written discovery requests exchanged during the litigation relating to physician training.

By way of example of the numerous ways and occasions when this issue as addressed during this litigation, the following was among the requests to admit that Plaintiff propounded on SMIS:

> 2. Describe any and all efforts that Southern Myrtle Inpatient Services, LLC, took, at any point in time between January 1, 1996 through December 31, 2016, to ensure that Dr. Nirlep Patel and/or Dr. Rachel Ash Bernal were educated on and familiar with the provisions contained within HIPAA.
>
> ANSWER: Defendants object to this request as it is overly broad and unduly burdensome. Defendants further object to this request as it creates a burden not grounded in law and is cumulative and duplicative.

See **Ex. 5**, Answers to Plaintiff's Third Interrogatories on Behalf of the Defendants, Nirlep A. Patel, M.D., Rachel Ash-Bernal, M.D., and Southern Myrtle Inpatient Services, LLC, served Aug. 20, 2018.

The case proceeded to trial in May of 2019, with all involved aware that Defendant SMIS's training of its physicians on these topics was very much in dispute in the litigation. At

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trial, Plaintiff submitted the testimony of Robert Robinson, M.D., who was duly qualified as an expert in hospital medicine (the same very type of medical services SMIS provides) and who testified that Defendant SMIS, as a medical provider, had a responsibility to ensure its employed physicians were trained and knowledgeable on the legal standards for permissible disclosures of information under HIPAA. *See* **Ex. 6**, Trial Testimony of R. Robinson pp. 2-4, 42, 43, 50, 51, 78-80. Dr. Robinson further testified that SMIS's training materials that he had reviewed (sought during discovery and provided by SMIS) were materially deficient in that they focused only on prohibited disclosures under HIPAA and failed to provide any information on the permissible disclosures to lessen the potential for harm to a patient. In other words, the training SMIS provided to its physicians improperly implied that there were no occasions where the disclosure of patient information was permitted (SMIS's written discovery responses also bore this out). Dr. Robinson was highly critical of Dr. Ash-Bernal's lack of knowledge regarding HIPAA permissible disclosures based on his review of her deposition testimony. *See* **Ex. 6** p. 42-43.

During his case, Plaintiff also published to the jury copious deposition testimony, obtained in a deposition of SMIS taken pursuant to Rule 30(b)(6), SCRP, on these very issues. A copy of this deposition is attached as **Ex. 1**. This testimony demonstrated that:

- SMIS has taken no action to research or train its physicians about their power to temporarily detain a patient to prevent injury to them self or others. (SMIS Rule 30(b)(6) Depo p. 14-15)
- SMIS does not get involved in the practice of medicine (p. 16)
- SMIS promulgated no policies or procedures applicable to Drs. Patel or Ash-Bernal (p. 48)
- SMIS expects its physicians to be knowledgeable on hospital privacy policies (p. 52)

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- SMIS has taken no action to ensure that its doctors are knowledgeable on hospital policies and procedures (p. 48)
- SMIS is not knowledgeable about HIPPA permissible disclosures (p. 52)
- SMIS has not sought to educate is physician on HIPPA permissible disclosures (p. 58)
- SMIS does not know or have any mechanism to confirm physician attendance at training seminars (p. 64)
- SMIS is not sure if it provided any training to Dr's Ash-Bernal and Patel (p. 66)
- SMIS provides some training online to its employees (p. 66)
- SMIS has online corporate training on HIPPA, but has never looked into whether Ash-Bernal or Patel have attended (p. 68)
- SMIS provided training from overarching corporate standpoint, but relies upon clinicians and hospital for specific training. (p. 69)
- SMIS cannot speak to whether Dr. Ash-Bernal has received training on dos and don't of HIPPA. (p. 72-73)

Moreover, during cross examination, Dr. Ash-Bernal was not even aware of her employer's (SMIS) name, clearly showing the Defendant SMIS had an outrageously miniscule degree of involvement with its own employees. Based upon Plaintiff's expert's testimony, SMIS' own 30(b)(6) testimony, and the testimony of Dr. Ash-Bernal, the Jury could reasonably conclude that SMIS failed to take appropriate action to educate and train its physicians on these important issues, and had no mechanism in place to determine if its physicians had been otherwise educated or trained on permissible disclosures under HIPAA.

A. DEFENDANT'S JNOV MOTION

"In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." Strange v. S.C. Dep't of Highways

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& Pub. Transp., 314 S.C. 427, 429–30, 445 S.E.2d 439, 440 (1994). If there is more than one reasonable inference that can be drawn from the evidence, a directed verdict should be denied and the case must be submitted to the jury. Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993); Mullinax v. J.M. Brown Amusement Co., 333 S.C. 89, 508 S.E.2d 848 (1998).

In deciding whether to grant or deny a directed verdict motion and JNOV, the trial court is concerned only with the existence or non-existence of evidence. Long v. Norris & Assocs., Ltd., 342 S.C. 561, 538 S.E.2d 5 (Ct.App.2000). **A directed verdict motion should be denied if, liberally construing the facts in the opposing party's favor, any evidence exists by which a verdict for the opposing party would be reasonably possible.** Sims v. Giles, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001). When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000); Erickson v. Jones Street Publishers, L.L.C., 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006).

A directed verdict is appropriate only in rare circumstances. *See* Linnen v. Commercial Cas. Co., 152 S.C. 450, 150 S.E. 127, 128 (1929) (stating that it is only "rare cases in which a directed verdict is proper"). In denying a motion for a directed verdict, the trial court can only be reversed by the appellate court when there is not a scintilla evidence to support the nonmoving party's case. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 477, 514 S.E.2d 126, 130 (1999). "[U]nder the scintilla rule which prevails in South Carolina, if there is a scintilla of evidence, which is any material evidence that if true would tend to establish the issue in the mind of a reasonable juror, the case should be submitted to the jury for its determination." Woodle v. Brown, 223 S.C. 204, 209-10, 74 S.E.2d 914, 917 (1953).

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A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 415 S.E.2d 393 (1992). The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision. Smalls v. South Carolina Dep't of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000); Hunter v. Staples, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999).

As detailed above, Plaintiff's direct corporate liability claims were plead, extensively addressed in discovery, and ample evidence was submitted at trial to support the jury verdict. Plaintiff's Complaint, first filed in March of 2017, included direct corporate liability claims against Defendant SMIS for its failure to properly train and educate its physicians on legal issues affecting patient care. Plaintiff's Amended Complaint included these allegations as well. For well over two years, these issues were litigated prior to trial. SMIS claims that these issues were not plead with exact specificity must fail.

Further, at trial, Plaintiff submitted the testimony of Robert Robinson, M.D., an internal medicine physician, who was duly qualified as an expert in hospital medicine and who testified that, for more ten years, he had personally supervised and trained hospital staff on permissible disclosures under HIPAA. Dr. Robinson opined, that based on his review of all the evidence, including the HIPAA training materials that SMIS provided to its physicians and the deposition testimony of Dr. Ash-Bernal, that SMIS's training was deficient because it only focused on HIPAA restrictions on disclosure and provided no guidance on permissible disclosures. Coupled with Dr. Ash-Bernal's demonstrable lack of familiarity with permissible disclosures under HIPAA from her deposition testimony (which was presented to the jury by video) during Plaintiff's case,[1] Dr. Robinson opined that SMIS's employee (Dr. Ash-Bernal) lacked crucial

[1] *See e.g.*, **Ex. 3**, Depo. of Dr. Ash-Bernal, p. 62-64 (demonstrating a lack of knowledge of

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knowledge about how HIPAA regulations would permit her to contact David Scheer and apprised him of Matthew's condition and intent to leave the hospital against medical advice. Further, SMIS's 30(b)(6)'s testimony was presented to the jury about these issues and demonstrated the company's lack of any meaningful efforts to train and supervise its physicians in any capacity. In sum, there was competent testimony supporting the Jury's finding of a legal obligation to train its employees, a negligently performed undertaking of that duty, and an overall breach of that duty.

Moreover, there was ample testimony submitted to support a finding of proximate cause. That is to say, and as discussed in greater detail in a subsequent section below, there was ample evidence that Defendant SMIS's failure to properly train and educate its physicians resulted in the failure of the company's employees to call Matthew's father and thereby prevent Matthew's death.

A negligent act or omission is a proximate cause of injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred. Vinson v. Hartley, 324 S.C. 389, 401, 477 S.E.2d 715, 721 (Ct. App. 1996). In other words, if the accident would have happened as a natural and probable consequence, even in the absence of the alleged breach, then a plaintiff has failed to demonstrate proximate cause. Where the injury complained of is not reasonably foreseeable, there is no liability. Crolley v. Hutchins, 300 S.C. 355, 387 S.E.2d 716 (Ct. App.1989). In order for conduct to amount to negligence for which compensation can be collected, the defendant must have foreseen, or by the exercise of ordinary care should have foreseen, the probability that his conduct would likely cause injury to another. Vinson, 324 S.C. at 401, 477 S.E.2d at 721. Hurd v. Williamsburg Cty.,

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HIPAA's permissible disclosures). Her conduct in the treatment of Matthew was equally demonstrative of this lack of knowledge.

353 S.C. 596, 612, 579 S.E.2d 136, 144 (Ct. App. 2003), aff'd, 363 S.C. 421, 611 S.E.2d 488 (2005).

Proximate cause is the efficient or direct cause of an injury. Small v. Pioneer Machinery, Inc., 329 S.C. 448, 464, 494 S.E.2d 835, 843 (Ct. App. 1997); Vinson, 324 S.C. at 401, 477 S.E.2d at 721. Proximate cause does not mean the sole cause. Small, 329 S.C. at 464, 494 S.E.2d at 843. A defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury. Id. The issue of proximate cause may be resolved by either direct or circumstantial evidence. Hurd at 613, 579 S.E.2d at 145. "Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." McNair v. Rainsford, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998). Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law. Hurd at 613–14, 579 S.E.2d at 145.

At trial, there was ample evidence to conclude that, had Dr. Ash-Bernal been properly trained and knowledgeable about permissible disclosures, she would have contacted David Scheer and thus prevented Matthew's death. *See* **Ex. 6**, Trial Testimony of R. Robinson p. 90. David Scheer testified that, had he been called about the change in his son's behavior and condition, he would have come to help his son, just as he had done in the days prior. Also, Dr. Malone (Plaintiff's psychiatry expert) testified that had Matthew received proper treatment and care, he would have likely been doing well to this day. Dr. Malone specifically opined that proper care and treatment would have involved contacting and involving family in Matthew's case to ensure he had social support to help care for his psychiatric condition. In sum, construing all evidence and inferences in Plaintiff's favor, there was ample evidence submitted for the Jury

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to conclude that SMIS's failure to train its physicians was a contributing/proximate cause of Plaintiff's death.

B. DEFENDANT'S MOTION TO ALTER/AMEND

Defendant SMIS contends that it cannot be held liable if its agents were not found liable by the jury.[2] This contention is wholly mistaken and directly contrary to current South Carolina law. In an effort to support this incorrect legal position, the defense harkens back nearly a century to cases with stale legal propositions.[3] Critically, Defendant's position is only true when a plaintiff's claims are based solely on the doctrine of *respondeat superior*. In this case, Plaintiff asserted both vicarious liability claims and direct corporate liability claims against Defendant SMIS.

Most recently, the South Carolina Supreme Court specifically confirmed, in Morrow v. Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015), that vicarious and direct corporate claims involving medical negligence are not dependent on one another, nor are they predicated upon a finding of negligence against the employee.

> The Morrows correctly assert that the theory of vicarious liability is different than the theory of direct corporate liability. *See* Martin C. McWilliams, Jr. & Hamilton E. Russell, III, *Hospital Liability for Torts of Independent Contractor Physicians,* 47 S.C. L. Rev. 431 (1996). Vicarious liability attaches to a parent company or employer as the result of negligence on behalf of its employees, such as through the doctrine of respondeat superior. *Id.* at 439. Conversely, ***direct corporate liability attaches due to a breach of a duty which runs directly between a parent company and a patient***, arising from negligence in actions such as leaving a hospital underfunded, understaffed, or ***undertrained so as to provide substandard care***. *Id.* at 462. Accordingly, ***the two theories of vicarious***

[2] Setting aside the legal incorrectness of this position, Plaintiff would note that if this were the case, the Defense submitted a verdict form that created this supposed legal conundrum. Stated alternatively, the defense submitted this Verdict Form knowing full well that there was a legal basis for a claim against SMIS independent of a finding of liability against Drs. Patel or Ash-Bernal.

[3] Defendant's Motion at p. 5 citing cases from 1927 and 1937.

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liability and corporate liability can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of the other.

Morrow, *supra* (emphasis added).

In addition to medical negligence, direct corporate liability for the failure to train and educate its employees has been recently confirmed in other fields as well. *See e.g.* James v. Kelly Trucking Co., 377 S.C. 628, 661 S.E.2d 329 (2008) (training of trucking company employees). In James, the South Carolina Supreme Court stated that "the employer's liability under such as theory does not rest on the negligence of another, but on the employer's own negligence. Stated differently, ***the employer's liability under this theory is not derivative, it is direct.***" Id. at 631 (emphasis added). In the case at bar, the Jury was charged on these direct corporate liability issues.[4]

Further, the Jury was free to conclude that Dr. Ash-Bernal exercised her best judgment in treating Matthew Scheer,[5] but that her best judgment was severely handicapped due to SMIS's failures to train relating to HIPAA's permissible disclosures for the patient's best interest and for public safety. At trial, there was ample evidence to conclude that, had Dr. Ash-Bernal been

[4] The Court charged the Jury as follows on that issue:

DIRECT CORPORATE LIABILITY:

IN ADDITION, PLAINTIFF HAS ALLEGED AND DEFENDANT SOUTHERN MYRTLE INPATIENT SERVICES, LLC, HAS DENIED THAT IT FAILED TO PROPERLY EDUCATE AND TRAIN DR.'S ASH BERNAL AND PATEL RELATING TO AS THE APPLICABLE STANDARDS TO DETAIN A MENTALLY ILL PATIENT AND AS TO THE PERMISSIBLE DISCLOSURES OF HEALTH INFORMATION. YOU MAY CONSIDER THOSE ALLEGED ACTIONS OR FAILURES OF THE CORPORATE DEFENDANT ALONG WITH THE OTHER ALLEGATIONS.

Importantly, at the time of trial, Defendant took no objection to this jury instruction given.

[5] The Jury was charged precisely as follows:

WHERE DOCTORS IN GOOD STANDING DISAGREE OR WHEN MEDICAL AUTHORITIES ARE DIVIDED WITH REGARD TO A SPECIFIC COURSE OF TREATMENT OR CARE, THEN THE DOCTOR IS BOUND *ONLY TO EXERCISE HIS OR HER BEST JUDGMENT* IN DETERMINING WHICH COURSE ON THE WHOLE IS BEST FOR THE PATIENT.

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properly trained and knowledgeable about permissible disclosures, she would have contacted David Scheer (Matthew's emergency contact who had left his number with his nurses earlier that evening) and prevented Matthew's death. *See* **Ex. 6**, Trial Testimony of R. Robinson p. 90. David Scheer testified he would have come to help his son, as he had done in the days prior. Also, Dr. Malone (Plaintiff's psychiatry expert) testified that had Matthew received proper treatment and care, he would have likely been doing well to this day. Dr. Malone specifically opined that proper care and treatment would have involved contacting and involving family in Matthew's case to ensure he had social support to care for his psychiatric condition. In sum, construing all evidence and inferences in Plaintiff's favor, there was ample evidence submitted for the jury to conclude that SMIS's failure to train its physicians was a contributing cause of Plaintiff's death.

In addition to Dr. Robinson's expert testimony regarding the obligation of a corporate medical provider to properly train staff on HIPAA permissible disclosures, the Jury was also provided information and testimony relating to Grand Strand Regional Medical Center's policies and procedures, including its Notice of Privacy Practices that was admitted into evidence. Notably, while Defendant SMIS expects its physicians to follow the HIPAA compliant hospital privacy policies, there was ample evidence submitted that Dr. Ash-Bernal was not familiar with those policies which permit disclosure to "A person or persons able to prevent or lessen a serious threat to health or safety". Further, the 30(b)(6) testimony of Defendant SMIS established that it expected physicians to be familiar with and follow GSRMC policy, but took **no** actions to train or ensure that its physicians were trained and knowledgeable on those policies. Given Dr. Ash-Bernal's lack of familiarity with those policies, the Jury could reasonably conclude that her

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employer had failed to properly train her on HIPAA or the related hospital privacy policy, and that this lack of training and knowledge contributed to Matthew's death.

Lastly, the evidence established that Defendant SMIS undertook to provide certain HIPPA training to its physicians but did not do so properly. "While there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken." Wright v. PRG Real Estate Mgmt., Inc., 426 S.C. 202, 826 S.E.2d 285, 290 (2019) (*citing* Vaughan v. Town of Lyman, 370 S.C. 436, 446, 635 S.E.2d 631, 637 (2006)). Here, the evidence established that Defendant SMIS undertook some effort to train its physicians about HIPAA, but focused solely on the restrictions and failed to provide any training on the permissible disclosures. Dr. Robinson testify that such a limited focus was materially deficient for SMIS's employed physicians. *See* **Ex. 6**, Trial Testimony of R. Robinson pp. 51, 78, 80. Essentially he testified that it was dangerous to scare physicians about HIPAA's restrictions and not to empower them with the knowledge of HIPAA's permissible disclosures that can reduce the risk of harm to the patient (and the public). It was soundly within the Jury's province to conclude it was this failure that was a contributing cause to Matthew's death.

C. DEFENDANT'S MOTION FOR A NEW TRIAL

Defendant SMIS seeks to blame the Jury's conclusions regarding its conduct on three evidentiary rulings relating to the admission of the death certificate, the HHS HIPAA letter, and Dr. Robinson's testimony regarding Defendant SMIS's training failures. The Trial Court's rulings on these evidentiary issues were well reasoned. Additionally, SMIS cannot demonstrate any particular prejudice resulting the admission of this evidence.

"The admission of evidence is within the [circuit] court's discretion." R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000).

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"The [circuit] court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law." Id. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fowler v. Nationwide Mut. Fire Ins. Co., 410 S.C. 403, 408, 764 S.E.2d 249, 251 (Ct. App. 2014).

1. "Suicide" on the Death Certificate

At trial, Defendant sought to have Matthew's entire death certificate excluded from evidence. Defendant SMIS now concedes that the admission of the death certificate into evidence was proper but now claims the failure to redact the manner of death listed as "suicide" was in error and prejudicial. Rule 803(9), SCRE (*emphasis added below*) creates an exception to the hearsay exclusionary rule for:

> *Records of Vital Statistics.* Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

This Court further relied upon LaCount v. Gen. Asbestos & Rubber Co.,, where the South Carolina Supreme Court held that "the death certificate, as we have said, was *prima facie* evidence of the facts therein stated. This [p]rima facie evidence is evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." 184 S.C. 232, 192 S.E. 262, 266 (1937) (internal citations omitted).

In this case, the manner of Matthew's death was not truly disputed. The defense put up no testimony or evidence to counter the eyewitness testimony of David Dougherty, who testified that he saw Matthew enter the Atlantic Ocean in the early morning hours of October 3, 2015 and never emerge, leaving his clothes on the beach (later identified by his mother), and to never be

heard from again from his family. Thus, it was not error to admit the entirety of the death certificate into evidence. Further, having submitted no evidence to dispute Mr. Dougherty's observations, the clothes on the beach, or the absence of any contact with Matthew since October 3, 2015, the defense did not suffer any prejudice due to the admission of this evidence.

2. HHS Letter

At trial, in accordance with Rule 803, SCRE, the Court properly admitted a letter from the United States Department of Health and Human Services, signed by the director of the department and addressed to "Our Nation's Healthcare Providers." Rule 803 provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> **(8) Public Records and Reports.** Records, reports, ***statements***, or data compilations, in any form, **of public offices or agencies**, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report.

The HHS Letter is precisely such a statement of a public office or agency, setting forth the activities of the office and or matters observed pursuant to a duty imposed by law. Further, the letter is self-authenticating under Rule 902, so no foundation need have been laid for its admission.[6]

The Defense claims that there was no evidence that this letter was kept in the ordinary course of business, but notably there is no such a requirement under Rule 803(8). Only the business records exception contained in Rule 803(6) requires evidence of a document being kept in the ordinary course of business. The Defense's argument conflates these evidentiary standards, and the Trial Court's admission under Rule 803(8) was proper. Further, the Defense cannot claim any prejudice due to the admission of this letter, as it is merely a summary of the

[6] Ironically, this letter was provided to Plaintiff's counsel by the Defense, since it was part of Defense expert Teresa Cuoco's research into this case.

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governing HIPAA laws recited in its own Motion (p. 11-12). There was no serious dispute over the language of the governing law at trial, simply a factual dispute as to its application in this case. Thus, Defendant SMIS cannot establish prejudice due to the admission of the HHS letter that correctly stated/summarized the regulatory provisions on permissible disclosures of patient information.

3. Dr. Robinson's Testimony Regarding SMIS's Training of Its Physicians

Dr. Robinson is an internal medicine physician who was duly qualified as an expert in hospital medicine by the Trial Court, and who testified that, for more than a decade, he supervised and trained hospital staff. *See* **Ex. 6**, Trial Testimony of R. Robinson pp. 2-4. Dr. Robinson opined, based on his review of all the evidence, including the deposition testimony of Dr. Ash-Bernal, and the HIPAA training materials that SMIS provided its physicians, that SMIS's training was deficient because it only focused on HIPAA's restrictions on disclosure and failed to provide any guidance to SMIS employees (including Dr. Ash-Bernal) on permissible disclosures. *See* **Ex. 6**, Trial Testimony of R. Robinson pp. 42, 43, 50, 51, 78-80.

To be competent to testify as an expert, "a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." O'Tuel v. Villani, 318 S.C. 24, 28, 455 S.E.2d 698, 701 (Ct.App.1995). A medical practitioner's experience teaching and interacting with persons in the applicable specialty are sufficient to support his qualification as an expert. Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252–53, 487 S.E.2d 596, 598 (1997). "[A]n expert is not limited to any class of persons acting professionally." Botehlo v. Bycura, 282 S.C. 578, 586, 320 S.E.2d 59, 64 (Ct. App. 1984). "Defects in an expert witness' education and experience go to the weight, rather than the

admissibility, of the expert's testimony." Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 253, 487 S.E.2d 596, 598 (1997).

In the present case, as determined by the Trial Court, Dr. Robinson's qualifications to opine as to the sufficiency of this training were established by his extensive education and training as an internal medicine physician and his experience in both working for companies who provide such training, and in personally conducting training to other medical providers. Any defect in his education and experience on this topic goes to the weight, not the admissibility, of his testimony. The admission of this expert testimony was proper, and it was squarely within the Jury's province to make a determination if his opinions about the propriety of the SMIS training were sufficient.

D. SMIS'S MOTION TO CONFORM JUDGMENT WITH DAMAGES CAPS

Defendant SMIS claims that there was no evidence to support a finding that it acted in a grossly negligent, willful, wanton, or reckless manner. To be clear, the Jury found not only gross negligence, but found by clear and convincing evidence that SMIS's conduct was willful, wanton, or reckless.[7] *See* Supplemental Verdict Form.

Defendant's motion conflates the legal standards for punitive damages and gross negligence. In order to avoid the application of the damages cap from S.C. Code § 15-32-220, all Plaintiff need to show is gross negligence. *See* S.C. Code § 15-32-220(e) ("[t]he limitations for noneconomic damages rendered against any health care provider or health care institution do

[7] Additionally, it should be mentioned there was no need for the jury to even find beyond simple negligence, as negligence relating to a failure to train employees sounds in "ordinary negligence" and does not trigger a claim of medical malpractice. *See* Dawkins v. Union Hosp. Dist., 408 S.C. 171, 758 S.E.2d 501 (2014). SMIS's negligence involves a failure to train its physicians, which is not a medical action but is administrative in its nature, and Dawkins specifically noted: "The statutory definition of medical malpractice found in S.C. Code Ann. § 15-79-110(6) does not impact medical providers' ordinary obligation to reasonably care for patients with respect to nonmedical, **administrative**, ministerial, or routine care. Thus, medical providers are still subject to claims sounding in ordinary negligence." Id. at 177-78, 758 S.E.2d at 504-05 (*emphasis added*).

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not apply if the jury or court determines that the defendant was grossly negligent"). Our court have defined gross negligence in a number of ways. In Anderson v. Ballenger, 166 S.C. 44, 55, 164 S.E. 313, 317 (1932), the Court described it as "the failure to exercise slight care." In subsequent cases, it has been defined as "the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." Richardson v. Hambright, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988). "Gross negligence is a relative term, and means the absence of care that is necessary under the circumstances." Hicks v. McCandlish, 221 S.C. 410, 415, 70S.E.2d 629 (1952).[8]

Ordinarily, the question of whether a defendant's conduct rises beyond negligence to gross negligence is one for the jury. *See* Hollins v. Richland Cty. Sch. Dist. One, 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1993) (holding that whether School District exercised "slight care" in sending a note home with eleven-year-old was a question for the jury). "In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury." Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 332, 566 S.E.2d 536, 545 (2002).

In the present case, the Jury concluded by clear and convincing evidence that SMIS's conduct was reckless, willful, and wanton. Ample evidence was submitted for the jury to conclude that SMIS was grossly negligent for its failure to train its employees.

---

[8] This Court properly charged the Jury as follows:

> GROSS NEGLIGENCE IS THE FAILURE TO EXERCISE EVEN THE SLIGHTEST CARE. GROSS NEGLIGENCE IS A RELATIVE TERM AND MEANS THE ABSENCE OF CARE THAT IS NECESSARY UNDER THE CIRCUMSTANCES.
>
> GROSS NEGLIGENCE CONNOTES THE FAILURE TO EXERCISE A SLIGHT DEGREE OF CARE. GROSS NEGLIGENCE INVOLVES AN INTENTIONAL, CONSCIOUS FAILURE TO DO SOMETHING WHICH ONE OUGHT TO DO OR THE DOING OF SOMETHING ONE OUGHT NOT TO DO. GROSS NEGLIGENCE MAY BE FOUND IF A DEFENDANT IS SO INDIFFERENT TO THE CONSEQUENCES OF HIS/HER CONDCUT AS NOT TO GIVE SLIGHT CARE TO WHAT HE/SHE IS DOING.

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In addition to the expert testimony of Dr. Robinson discussed previously, Plaintiff published the 30(b)(6) deposition testimony of Defendant SMIS on these issues to the Jury. This testimony demonstrated that:

- SMIS has taken no action to research or train its physicians about their power to temporarily detain a patient to prevent injury to them self or others. Ex. 1 (SMIS Rule 30(b)(6) Depo p. 14-15)
- SMIS has no involvement in the practice of medicine (p. 16)
- SMIS has no policies or procedures applicable to Drs. Patel or Ash-Bernal (p. 48)
- SMIS expects its physicians to be knowledgeable on hospital privacy policies (p. 52)
- SMIS has taken no action to ensure that its doctors are knowledgeable on hospital policies and procedures (p. 48)
- SMIS is not knowledgeable about permissible disclosures under HIPPA (p. 52)
- SMIS has not sought to educate is physician on HIPPA permissible disclosures (p. 58)
- SMIS does not know or have any mechanism to confirm physician attendance at training seminars (p. 64)
- SMIS is not certain if it provided any training to Drs. Ash-Bernal and Patel (p. 66)
- SMIS provides some training online to its employees (p. 66)
- SMIS has corporate training on HIPPA, but has never looked into whether Ash-Bernal or Patel have attended that training (p. 68)
- SMIS provided training from overarching corporate standpoint, but relies upon clinicians and hospital for specific training. (p. 69)
- SMIS cannot speak to whether Dr. Ash-Bernal has received training on dos and don't of HIPPA. (p. 72-73)

Moreover, during cross exam Dr. Ash-Bernal was not even aware of her employer's (SMIS) name.[9] Based upon its own 30(b)(6) testimony and that of Dr. Ash-Bernal, the Jury could

[9] A jury could reasonably infer that if an employee wasn't even aware of her employers name that the employer has not taken any real efforts to educate and train their employee or agent.

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reasonably conclude that SMIS took no action to educate and train its physicians on these issues, and had no mechanism in place to determine if their physicians had been otherwise educated and trained on HIPPA permissible disclosures. Put simply, there was ample evidence for the Jury's determination that SMIS failed to exercise slight care or the degree of care necessary under the circumstances. Thus, the Court should not interfere with the Jury's specific findings of gross negligence, and the Motion to reduce the damages award based upon the damages cap should be denied.

CONCLUSION

For these reasons, Plaintiff respectfully requests the Court to deny Defendant's post trial motion, to confirm the Jury's verdict, and to enter judgment against Defendant Southern Myrtle Inpatient Services, LLC.

Respectfully submitted,

s/ Francis M. Hinson, IV

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June 14, 2019
Columbia, South Carolina

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Exhibit 1

Exhibit 1 was Southern Myrtle Inpatient Services LLC's 30(b)(6) Deposition Transcript and is indexed separately at Page 1370

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Exhibit 2

Exhibit 2 was Grand Strand Regional Medical Center's 30(b)(6) Deposition Transcript and is Indexed separately at Page 1464

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Exhibit 3

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF HORRY

DAVID L. SCHEER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MATTHEW J. SCHEER,

Plaintiff,

vs. CASE NO.: 2017-CP-26-1571

SOUTHERN MYRTLE INPATIENT SERVICES, LLC, NIRLEP A. PATEL, M.D., RACHEL ASH-BERNAL, M.D., AND GRAND STRAND REGIONAL MEDICAL CENTER, LLC,

Defendants.

VIDEO
DEPOSITION OF: RACHEL ASH-BERNAL, M.D.

DATE: December 6, 2017

TIME: 10:30 AM

LOCATION: Grand Strand Business Center
1293 Professional Drive, Suite D
Myrtle Beach, South Carolina

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: TIA SHEAN, Professional Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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handwriting expert.

Q. Okay. Well, Doctor, I represent to you that's David Scheer's signature on page 42. Presuming that to be correct --

A. I don't know.

Q. Well, presuming that to be correct, Doctor, we've got a patient who presents to the hospital with his -- with his dad. His dad is listed as the person to notify and his dad is even signing the discharge summary paperwork -- did anything prevent you from calling Matthew's dad at approximately 1:15 AM on October 3, 2015?

A. Only if the patient declined me being able to call his parent or whoever he wanted.

Q. Why do you say that?

A. Well, he has a right to privacy of his medical care and if he declined, which is what the nurses stated, then I could not reveal his medical care or call his father if he did not want me to call his father.

Q. Are you --

A. I'd -- I'd make the distinction too -- I mean, being able to and wanting to are two different things, you know.

Q. Are you aware of HIPPA provisions that

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provide that when a patient is suffering from a mental incapacitation a healthcare provider may share the patient's information with family, friends, and others involved in the patient's care so long as the healthcare provider determines, based on his or her professional judgement, that doing so is in the best interest of the patient?

MR. MCKAY: Object to the form.

BY MR. HINSON:

Q. Are you aware of such provisions of the HIPPA laws?

A. Could you repeat the question?

Q. Sure. Are you aware of provisions in the HIPPA law that provides that where a patient suffering from mental incapacity a healthcare provider may share the patient's information with family, friends, or others involved in the patient's care so long as the healthcare provider determines, based on his or her professional judgement, that doing so is in the best interest of the patient?

A. I think if the patient declined contact -- having any of the staff contact his father that we had to respect his wishes.

Q. Even if it would be in the best interest of the patient?

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A. I -- I can't comment on what is in the best interest of the patient in that exact moment. What I can comment on is that the patient definitively stated he did not want his father called. I do not know why.

Q. Why can't you comment on what would be in the patient's best interest at that exact moment?

A. If he's able to describe his wishes to me, whether or not I agree with them, you know, I need to comply with that.

Q. Doctor, if a provision in HIPPA provided that if a patient objects to a provider sharing information with the patient's family member, the provider may share the information if doing so is consistent with the applicable laws and ethical conduct, and the provider has a good faith belief that the patient poses a threat to the safety of him/herself or others and that family member is reasonably able to lessen or prevent that threat.

MR. MCKAY: Object to the form.

BY MR. HINSON:

Q. Are you familiar with such provisions within HIPPA?

A. It's possible.

Q. Are you familiar, though, with them?

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A. I mean, it sounds like you're reading directly from the document. So it's possible.

Q. My question was if you were familiar with such a provision?

A. I think that when a patient states that he does not want -- he or she does not want certain people contacted they may share with me why they want that or not, but it's my duty to respect the patient.

Q. What if the patient is suffering from an acute psychotic episode, does that change the analysis?

A. If the patient was in eminent danger of self or endangering others, it's possible.

Q. How do you define eminent in that sentence?

A. Eminent, meaning right there or within a short period of time?

Q. How short? Minutes --

A. I don't know.

Q. -- hours, days, weeks.

A. I can't say. I mean...

Q. Are you familiar with the Notice of Privacy Practices used at Grand Strand Medical Center?

A. They were reviewed in my orientation possibly, yes.

Q. There is a portion of those privacy

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practices used at Grand Strand -- well, you would expect that patients admitted to the hospital sign-off that they've received some sort of copy of the privacy practices, correct? That's typical operating procedure?

A. That's not something that I would be directly involved with, but typically hospitals have their procedure for that.

Q. We're going to look at page 48, if you would.

A. Okay. Oops.

Q. Matthew Scheer, it appears on page 48, signed off acknowledgment of the Notice of Privacy Practices. Do you see that about one-third down the page?

A. Okay. I see number 15, Notice of Privacy Practices.

Q. Yes.

A. I acknowledge that I have received the hospital's Notice of Privacy Practices, that paragraph?

Q. Yes.

A. Yes.

Q. If the privacy practices at Grand Strand state: We may also use and disclose health information for the following types of entities, including but not limited to and then it goes on to list: A person or

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person's able to prevent or lessen a serious threat to health or safety.

A. Yes, I see that.

Q. Do you believe Matthew's father could've been in a position to prevent or lessen any danger to Matthew?

A. I don't know. I can't answer to a hypothetical like that.

Q. Do you believe Matthew was at risk of serious injury due to his psychiatric illness, correct?

MR. MCKAY: Object to form.

A. If during my clinical assessment of him I had thought that, I would've documented it.

Q. Well, Doctor, you wrote --

A. Can you tell me the page number you're looking at?

Q. Sure. Looking back at 68 your cross-cover note --

A. Uh-huh.

Q. -- you wrote: It was explained to him that he could die from -- then it lists infection, seizures, --

A. Mm-huh.

Q. -- were to result of his psychiatric illness. You wrote that note, correct?

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Exhibit 4

47

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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF HORRY

DAVID L. SCHEER, as Personal Representative of the estate Of MATTHEW J. SCHEER,

Plaintiff,

Vs. CASE NO. 2017-CP-26-1571

NIRLEP A. PATEL, M.D.; SOUTHERN MYRTLE INPATIENT SERVICES, LLC; RACHEL ASH-BERNAL, M.D., and GRAND REGIONAL MEDICAL CENTER, LLC,

Defendants.

VIDEO DEPOSITION OF:	NIRLEP A. PATEL, M.D.
DATE:	October 16, 2017
TIME:	10:29 AM
LOCATION:	A. William Roberts, Jr., & Associates 1293 Professional Drive, Suite D Myrtle Beach, South Carolina
TAKEN BY:	Counsel for the Plaintiff
REPORTED BY:	Jane L. McKillop, Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

Fast, Accurate & Friendly

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A I believe so.

Q So if my mother gets in a car wreck in Columbia --

A Uh-huh.

Q -- do I have to drive -- how do I find out if she is there? What do I do?

A I believe you would call the hospital. I am assuming in this hypothetical scenario someone told me -- someone told you that something happened. And I believe you would have to identify yourself or -- again I don't know exactly, but I am sure there is a policy or procedure in terms of how you are supposed to find out that information.

Q Do I have to drive around to every hospital?

MR. MCKAY: Object to form.

BY MR. HINSON:

Q Look from room to room?

A I honestly don't know.

Q People can designate someone to share their health care information with; correct?

A Correct.

Q Often times when someone goes to a doctor that's one of the -- and filling out paperwork that's part of -- part of what they fill out, who can -- who can access my information?

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You have to get permission to do that unless, you know, you feel like you said they are incapacitated, in a coma or on a ventilator or something like that or many other examples so . . .

Q What if a person --

A And of course that can be withdrawn at any time as I understand it so . . .

Q What if the person is experiencing psychosis and you believe it's in the best interest to contact the family member, does HIPAA still prevent that?

MR. MCKAY: Object to form.

THE WITNESS: I'm not sure. That would be up to, you know, whoever is there at the time to make that determination.

BY MR. HINSON:

Q Assume with me for a second that the federal code allows such a disclosure, meaning allows a physician to contact a family member about a patient's desire to leave the hospital, a patient experiencing acute psychosis.

A Presuming HIPPA doesn't exist?

Q Presuming HIPAA allows it.

A Okay.

Q Do you agree with me that would be a reasonable step that could be taken?

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MR. MCKAY: Object to form.

THE WITNESS: I mean I believe you asked that question when you were reading it; correct?

Like I said that's up to the people that are there, that are evaluating the patient. If they feel like that's a condition that exists then that's up to them to decide that.

BY MR. HINSON:

Q If you wanted to learn more about what HIPAA does or doesn't allow what would you do?

MR. MCKAY: Object to form.

THE WITNESS: I suppose there are a lot of resources that you could go to to look it up, both in the hospital or just simply searching for it.

BY MR. HINSON:

Q Do you ever have the occasion to go to continuing education events about the dos and do not's of HIPPA?

A We usually do, correct.

Q The hospital on occasion provides those --

A The hospital, employers, a variety of places, yes. There are usually updates and that sort of thing.

Q If David Scheer was allowed to have Matthew's

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Exhibit 5

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	Civil Action No. 2017-CP-26-1571
	)	
David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer,	)	ANSWERS TO PLAINTIFF'S THIRD INTERROGATORIES ON BEHALF OF THE DEFENDANTS, NIRLEP A. PATEL, M.D., RACHEL ASH BERNAL, M.D., AND SOUTHERN MYRTLE INPATIENT SERVICES, LLC
Plaintiff,	)	
v.	)	
Nirlep A. Patel, M.D., Rachel Ash Bernal, M.D., Southern Myrtle Inpatient Services, LLC, and Grand Strand Regional Medical Center,	)	
Defendants.	)	

TO: FRANCIS M. HINSON, IV, ESQUIRE, ATTORNEY FOR PLAINTIFF:

The Defendants, Nirlep A. Patel, M.D., Rachel Ash Bernal, M.D., and Southern Inpatient Services, LLC, pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, hereby answer Plaintiff's Third Interrogatories, as follows:

1. List and describe any and all training that Dr. Nirlep Patel and/or Dr. Rachel Ash Bernal, received on the provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) at any in the time period spanning January 1, 1996 through December 31, 2016.

ANSWER: **Dr. Ash Bernal and Dr. Patel receive training on HIPAA on an ongoing basis throughout their professional careers. To the best of their recollection, this includes:**

- **Hospital-based training at places of employment, both in person and on-line, to include new physician orientations and annual trainings;**
- **Hospital-based notice of privacy practices; and**
- **Training modules conducted on-line over the years by employers.**

2. Describe any and all efforts that Southern Myrtle Inpatient Services, LLC, took, at any point in time between January 1, 1996 through December 31, 2016, to ensure that Dr. Nirlep

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Patel and/or Dr. Rachel Ash Bernal were educated on and familiar with the provisions contained within HIPAA.

ANSWER: **Defendants object to this request as it is overly broad and unduly burdensome. Defendants further object to this request as it creates a burden not grounded in law and is cumulative and duplicative.**

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Attorneys for Defendants Nirlep A. Patel, M.D., Rach Ash Bernal, M.D. and Southern Myrtle Inpatient Services, LLC

Columbia, South Carolina
August 20, 2018.

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STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS
David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer, Plaintiff, vs. Southern Myrtle Inpatient Services, LLC, Nirlep A. Patel, M.D., Rachel Ash-Bernal, M.D., and Grand Strand Regional Medical Center, Defendants.	Civil Action No.: 2017-CP-26-1571 **PLAINTIFF'S NINTH REQUEST FOR PRODUCTION TO SOUTHERN MYRTLE INPATIENT SERVICES, LLC, NIRLEP A. PATEL, M.D., AND RACHEL ASH-BERNAL, M.D.**

TO: DEFENDANTS SOUTHERN MYRTLE INPATIENT SERVICES, LLC, NIRLEP A. PATEL, M.D., AND RACHEL ASH-BERNAL, M.D., AND THEIR ATTORNEYS, JULIUS W. MCKAY, II, ESQ, AND RACHEL G. PEAVY.:

The following Requests for Production are served upon you pursuant to Rule 34 of the South Carolina Rules of Civil Procedure. Plaintiff requests that Defendants produce and/or permit Plaintiff's representative to inspect and copy each of the following documents and things, including all those in the custody or under the control of any agent or representative of the Defendants. A written response to this request shall be served by you fully, in writing, under oath, and within the time prescribed by the South Carolina Rules of Civil Procedure, unless by agreement or Court order such time is extended.

****

INSTRUCTIONS AND DEFINITIONS

The *Instructions and Definitions* contained within *Plaintiff's First Set of Requests for Production to Defendants Nirlep A. Patel, M.D., and Southern Myrtle Inpatient Services, LLC,* are incorporated hereto and should be considered to apply as if repeated verbatim.

****

REQUESTS FOR PRODUCTION

1. Exhibit No. 3 to Dr. Theresa Cuoco's deposition states in part: "The scope of this permission is described in a letter to the nation's health care providers issued on January 15,

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2013, and below" (underlining contained in the original). Provide a copy of the aforementioned letter that is referenced in Dr. Cuoco's note.

2. With regard to the HIPAA training presentation referenced in the deposition of Southern Myrtle Inpatient Services LLC (taken on Dec. 5, 2018), provide a copy of all versions of this training presentation and other related training materials.

3. With the exception of communications that included attorneys, provide a copy of all written communications (including letters, emails, text messages, and messages sent via any form of instant messaging application) exchanged between Dr. Patel and Dr. Ash-Patel at any time between October 2, 2015 to present.

4. With the exception of communications that included attorneys, provide a copy of all communications (including letters, emails, text messages, and messages sent via any form of instant messaging application) dealing with Matthew Scheer or HIPAA that were exchanged between Dr. Patel and anyone working for or at Grand Strand Regional Medical Center at any time between October 2, 2015 to present.

5. With the exception of communications that included attorneys, provide a copy of all communications (including letters, emails, text messages, and messages sent via any form of instant messaging application) dealing with Matthew Scheer or HIPAA that were exchanged between Dr. Ash-Bernal and anyone working for or at Grand Strand Regional Medical Center at any time between October 2, 2015 to present.

Respectfully submitted,

Francis M. "Brink" Hinson, IV (SC Bar # 74917)
Kelley R. Leddy (SC Bar # 103257)
FINKEL LAW FIRM LLC

December 12 2018
Columbia, South Carolina

1201 Main Street, Suite 1800
Columbia, SC 29201
803-765-0935 (office)
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Attorneys for the Plaintiff

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STATE OF SOUTH CAROLINA COUNTY OF HORRY David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer, Plaintiff, vs. Southern Myrtle Inpatient Services, LLC, Nirlep A. Patel, M.D., Rachel Ash-Bernal, M.D., and Grand Strand Regional Medical Center, Defendants.	IN THE COURT OF COMMON PLEAS Civil Action No.: 2017-CP-26-1571 **PLAINTIFF'S FOURTH INTERROGATORIES TO DEFENDANTS SOUTHERN MYRTLE INPATIENT SERVICES, LLC, NIRLEP A. PATEL, M.D., AND RACHEL ASH-BERNAL, M.D.**

TO: DEFENDANTS SOUTHERN MYRTLE INPATIENT SERVICES, LLC, NIRLEP A. PATEL, M.D., AND RACHEL ASH-BERNAL, M.D., AND THEIR ATTORNEYS, JULIUS W. MCKAY, II, ESQ. AND RACHEL G. PEAVY, ESQ.:

The following Interrogatories are served upon you pursuant to the South Carolina Rules of Civil Procedure. They are to be answered by you fully, in writing, under oath, and within the time provided by the South Carolina Rules of Civil Procedure, unless by agreement or Court order such time is extended.

****

INSTRUCTIONS AND DEFINITIONS

The *Instructions and Definitions* contained within *Plaintiff's First Set of Interrogatories to Defendants Nirlep A. Patel, M.D., and Southern Myrtle Inpatient Services, LLC* are incorporated hereto and should be considered to apply as if repeated verbatim.

****

INTERROGATORIES

1. Describe the business relationship, identifying any contracts to govern the relationship, between Envision Healthcare Corporation and Southern Myrtle Inpatient Services, LLC.

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2. State how people and how many physicians are presently employed by Southern Myrtle Inpatient Services, LLC, as well as how many were employed by the company on October 3, 2015.

3. Identify any training sessions, seminars, classes, or other educational courses that Dr. Patel and/or Dr. Ash-Bernal have attended that in any way dealt with permissible disclosures under HIPAA. You may limit your response to sessions/seminars/classes/courses/etc. that occurred during the time period spanning from January 1, 2010 through the present. Include in your answer the location, date, and presenter of each training session, seminar, etc.

4. In *Responses to Plaintiff's Third Requests for Admission on Behalf of the Defendants Nirlep A. Patel, M.D., Rachel Ash Bernal, M.D., and Southern Myrtle Inpatient Services, LLC*, you answered Request to Admit No. 1 as follows:

> Request To Admit No. 1: Admit that on October 3, 2015, Grand Strand Regional Medical Center had a system in place by which a healthcare provider could get answers to questions that he/she might have regarding permissible disclosures under HIPAA.
>
> RESPONSE: Admitted upon information and belief, except these Defendants, after reasonable inquiry, lack information or knowledge sufficient to admit or deny whether such system was operated in such a manner that a live person employed by GSRMC for this purpose could be reached at any time, 24 hours per day/7 days per week, and any inference contained in this Request as to the immediate availability of such person is therefore denied.

In *Responses to Plaintiff's Fourth Requests for Admission on Behalf of the Defendants Nirlep A. Patel, M.D., Rachel Ash Bernal, M.D., and Southern Myrtle Inpatient Services, LLC*, you answered Request to Admit No. 2 as follows:

> Request To Admit No. 2: Admit that you are unaware whether, on October 3, 2015, GSRMC had systems in place that operated in such a manner that a live person employed by GSRMC could be reached, at any time of the day, to answer questions that a physician might have regarding permissible disclosures under HIPAA.

RESPONSE: These Defendants admit only that on October 3, 2015, GSRMC had systems in place by which a healthcare provider could get answers to questions that he/she might have regarding permissible disclosures under HIPAA but, after reasonable inquiry, lack information or knowledge sufficient to admit or deny whether such system was operated in such a manner that a live person employed by GSRMC for this person could be reached at any time, 24 hours per day/7 days per week.

Describe, in detail, the efforts at a "reasonable inquiry" that you made to truthfully and accurately respond to each of these two requests to admit.

Respectfully submitted,

Francis M. "Brink" Hinson, IV (SC Bar # 74917)
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Attorneys for the Plaintiff

August 21st 2018
Columbia, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS
David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer, Plaintiff, vs. Southern Myrtle Inpatient Services, LLC, Nirlep A. Patel, M.D., Rachel Ash-Bernal, M.D., and Grand Strand Regional Medical Center, Defendants.	Civil Action No.: 2016-CP-26-1571 **PLAINTIFF'S FOURTH REQUESTS FOR ADMISSION TO DEFENDANTS SOUTHERN MYRTLE INPATIENT SERVICES, LLC, NIRLEP A. PATEL, M.D., AND RACHEL ASH-BERNAL, M.D.**

TO: DEFENDANTS SOUTHERN MYRTLE INPATIENT SERVICES, LLC, NIRLEP A. PATEL, M.D., AND RACHEL ASH BERNAL, M.D. AND THEIR ATTORNEY, JULIUS W. MCKAY, II, ESQ.:

Pursuant to Rules 36 ad 37(c) of the South Carolina Rules of Civil Procedure, the Plaintiff hereby submits the following Requests for Admission to the above-named Defendant. The following Requests for Admission are served upon you pursuant to the South Carolina Rules of Civil Procedure. They are to be answered by you, in writing, under oath, and within the time provided by the South Carolina Rules of Civil Procedure, unless by agreement or Court order such time is extended.

****

INSTRUCTIONS AND DEFINITIONS

1. Pursuant to Rule 36(a), SCRCP, if an objection is made, the reasons therefor shall be stated.

2. Pursuant to Rule 36(a), SCRCP, if you can neither admit nor deny any of the requests for admission, your answer shall set forth, in detail, the reasons why your cannot truthfully admit or deny the matter.

3. Pursuant to Rule 36(a), any denial shall fairly meet the substance of the requested admission, and when good faith requires that you qualify your answer or deny only a part of the matter of which an admission is requested, you shall specify so much of it as is true and qualify or deny the remainder.

4. Pursuant to Rule 36(a), SCRCP, you may not give lack of information or knowledge as a reason for failure to admit or deny, unless you state that you have made reasonable inquiry and that the information known or readily obtainable by you is insufficient to enable you to admit or deny.

****

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REQUESTS FOR ADMISSION

1. Admit that on October 3, 2015, Southern Myrtle Inpatient Services, LLC, had issued/promulgated no policies and procedures of its own to guide Dr. Patel and Dr. Ash-Bernal in their rendering of patient care.

2. Admit that you are unaware whether, on October 3, 2015, GSRMC had systems in place that operated in such a manner that a live person employed by GSRMC could be reached, at any time of day, to answer questions that a physician might have regarding permissible disclosures under HIPAA.

Respectfully submitted,

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Attorneys for the Plaintiff

July 17th 2018
Columbia, South Carolina

ELECTRONICALLY FILED - 2019 Jun 14 1:41 PM - HORRY - COMMON PLEAS - CASE#2017CP2601571

STATE OF SOUTH CAROLINA COUNTY OF HORRY David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer, Plaintiff, v. Nirlep A. Patel, M.D., Southern Myrtle Inpatient Services, LLC, and Grand Strand Regional Medical Center, Defendants.	)	IN THE COURT OF COMMON PLEAS Civil Action No. 2017-CP-26-1571 **RESPONSES TO PLAINTIFF'S FIRST REQUESTS FOR ADMISSION ON BEHALF OF THE DEFENDANTS, NIRLEP A. PATEL, M.D., RACHEL ASH BERNAL, M.D., AND SOUTHERN MYRTLE INPATIENT SERVICES, LLC**

TO: FRANCIS M. HINSON, IV, ESQUIRE, ATTORNEY FOR PLAINTIFF:

The Defendants, Nirlep A. Patel, M.D., Rachel Ash Bernal, M.D., and Southern Inpatient Services, LLC, pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, hereby responds Plaintiff's First Requests for Admission, as follows:

1. Admit that, on October 2, 2015, Matthew Scheer signed paperwork allowing David Scheer to be provided with Matthew's healthcare information.

RESPONSE: **Denied. Defendants Ash Bernal, Patel and South Myrtle Inpatient Services were not involved in the admission process in terms of demographic information gathering, which is when this information would have been provided.**

2. Admit that, on or about April 8, 2016, Grand Strand Regional Medical Center or its agents provided David Scheer approximately 30 pages of Matthew Scheer's medical records from Grand Strand Regional Medical Center.

RESPONSE: **These Defendants can neither admit or deny the allegations in Paragraph 2 in that they did not provide medical record, or authorize it to be provided.**

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3. Admit that in order for David Scheer to be provided approximately 30 pages of Matthew Scheer's medical records on or about April 8, 2016, the provisions of HIPAA (Health Insurance Portability and Accountability Act of 1996) require that Matthew would have to first give permission for his health information to be provided to David Scheer.

RESPONSE: **See response to Request to Admit No. 2. Defendants cannot admit or deny what records were provided to David Scheer because Defendants Ash Bernal, Patel and Southern Myrtle Inpatient Services did not provide them, or request that they be provided.**

4. Admit that you or your agents violated the provisions of HIPAA (Health Insurance Portability and Accountability Act of 1996) by providing approximately 30 pages of Matthew Scheer's medical records to David Scheer on or about April 8, 2016.

RESPONSE: **Denied.**

5. Admit that, under the provisions of HIPAA (Health Insurance Portability and Accountability Act of 1996), where a patient is incapacitated due to mental infirmity/impairment, a health care provider is permitted to share the patient's health information with family, friends, or others involved in the patient's care or payment for care, so long as the healthcare provider determines, based on his/her professional judgment, that doing so is in the patient's best interests.

RESPONSE: **Denied as written.**

6. Admit that, under the provisions of HIPAA (Health Insurance Portability and Accountability Act of 1996), even though a patient does not suffer from mental infirmity/impairment and has objected to his healthcare information being shared with a family member, a healthcare provider may, in spite of the patient's objection, share the patient's health information with a family member of the patient, if the healthcare provider has a good faith belief that the patient poses a threat to his own health or safety, and the family member is reasonably able to prevent or lessen that threat.

RESPONSE: **Denied as written.**

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Columbia, South Carolina
January 19, 2018.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	Civil Action No. 2017-CP-26-1571
	)	
David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer,	)	AMENDED RESPONSES TO PLAINTIFF'S FOURTH REQUESTS FOR ADMISSION ON BEHALF OF THE DEFENDANTS, NIRLEP A. PATEL, M.D., RACHEL ASH BERNAL, M.D., AND SOUTHERN MYRTLE INPATIENT SERVICES, LLC
Plaintiff,	)	
v.	)	
Nirlep A. Patel, M.D., Rachel Ash Bernal, M.D., Southern Myrtle Inpatient Services, LLC,	)	
Defendants.	)	

TO: FRANCIS M. HINSON, IV, ESQUIRE, ATTORNEY FOR PLAINTIFF:

The Defendants, Nirlep A. Patel, M.D., Rachel Ash Bernal, M.D., and Southern Inpatient Services, LLC, pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, hereby respond to Plaintiff's Fourth Requests for Admission, as follows:

1. Admit that on October 3, 2015, Southern Myrtle Inpatient Services, LLC, had issued/promulgated no policies and procedures of its own to guide Dr. Patel and Dr. Ash Bernal in their rendering of patient care.

RESPONSE: **Admitted.**

2. Admit that you are unaware whether on October 3, 2015, GSRMC had systems in place that operated in such a manner that a live person employed by GSRMC could be reached, at any time of the day, to answer questions that a physician might have regarding permissible disclosures under HIPAA.

RESPONSE: **These Defendants admit only that on October 3, 2015, GSRMC had systems**

in place by which a healthcare provider could get answers to questions that he/she might have regarding permissible disclosures under HIPAA but, after reasonable inquiry, lack information or knowledge sufficient to admit or deny whether such system was operated in such a manner that a live person employed by GSRMC for this person could be reached at any time, 24 hours per day/7 days per week.

AMENDED RESPONSE:

Admitted.

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Columbia, South Carolina
September 18, 2018.

ELECTRONICALLY FILED - 2019 Jun 14 1:41 PM - HORRY - COMMON PLEAS - CASE#2017CP2601571

ELECTRONICALLY FILED - 2019 Jun 14 1:41 PM - HORRY - COMMON PLEAS - CASE#2017CP2601571

STATE OF SOUTH CAROLINA COUNTY OF HORRY David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer, Plaintiff, v. Nirlep A. Patel, M.D., Rachel Ash Bernal, M.D., Southern Myrtle Inpatient Services, LLC, and Grand Strand Regional Medical Center, Defendants.	IN THE COURT OF COMMON PLEAS Civil Action No. 2017-CP-26-1571 **RESPONSES TO PLAINTIFF'S THIRD REQUESTS FOR ADMISSION ON BEHALF OF THE DEFENDANTS, NIRLEP A. PATEL, M.D., RACHEL ASH BERNAL, M.D., AND SOUTHERN MYRTLE INPATIENT SERVICES, LLC**

TO: FRANCIS M. HINSON, IV, ESQUIRE, ATTORNEY FOR PLAINTIFF:

The Defendants, Nirlep A. Patel, M.D., Rachel Ash Bernal, M.D., and Southern Inpatient Services, LLC, pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, hereby respond Plaintiff's Third Requests for Admission, as follows:

1. Admit that on October 3, 2015, Grand Strand Regional Medical Center had a system in place by which a healthcare provider could get answers to questions that he/she might have regarding permissible disclosures under HIPAA.

RESPONSE: **Admitted upon information and belief, except these Defendants, after reasonable inquiry, lack information or knowledge sufficient to admit or deny whether such system was operated in such a manner that a live person employed by GSRMC for this purpose could be reached at any time, 24 hours per day/7 days per week, and any inference contained in this Request as to the immediate availability of such person is therefore denied.**

2. Admit that on October 3, 2015, Grand Strand Regional Medical Center did not have a system in place by which a healthcare provider could get answers to questions that he/she might have regarding permissible disclosures under HIPAA.

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RESPONSE: **Denied as written. Defendants aver to Response to Request No. 1.**

3. Admit that a threat of death or severe and permanent disability would be considered a serious threat to health or safety.

RESPONSE: **These Defendants admit only that, dependent upon the circumstances, a threat of death or severe and permanent disability could possibly be considered a serious threat to health or safety. Any remaining allegations are denied.**

4. Admit that a threat of dying from infection, seizures or as a result of psychiatric illness would be considered a serious threat to health or safety.

RESPONSE: **These Defendants admit only that some infections, seizures and psychiatric illness could be considered a serious threat to a person's health or safety, but further state that not all infections, seizures and psychiatric illness qualify as such. Further, there is no evidence that Mr. Scheer suffered an infection, or seizure, contemporaneous to his hospitalization. Any remaining allegations are denied.**

5. Admit that, pursuant to the provisions of HIPAA, a patient's protected health information may be released, without the patient's authorization, in situations where the disclosure would serve to avert a serious threat to health or safety.

RESPONSE: **Denied as written. Defendant further states that the terms "serious threat to health or safety" are undefined and vague. Further responding, Defendants would state that any such determination is a professional judgment call made by the provider based upon the totality of the circumstances presented.**

6. Admit that Grand Strand Regional Medical Center's NOTICE OF PRIVACY PRACTICES provides that: "As permitted by law, we may also use and disclose health information for the following types of entities, including but not limited to: [..] A person or persons able to prevent or lessen a serious threat to health or safety."

RESPONSE: **After reasonable inquiry, these Defendants lack information sufficient to admit or deny this Request. Further responding, these Defendants would rely upon the response of GSRMC to this Request, as GSRMC would have custody and control of its Notice of Privacy Practices and the terms contained therein.**

7. Admit that Matthew Scheer's medical records from Grand Strand Regional Medical Center state that Matthew was suffering from anorexia on October 2, 2015.

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RESPONSE: **These Defendants admit only that the hospital record refers to "....anorexia due to believing that all food he used is contaminated now....Patient reported not eating today or yesterday." Any remaining allegations are denied.**

8. Admit that Matthew Scheer's medical records from Grand Strand Regional Medical Center state that Matthew was having "auditory hallucinations," "visual hallucinations," and "tactile hallucinations" on October 2, 2015.

RESPONSE: **These Defendants admit only that the hospital admission record indicates a history from Matthew Scheer of "auditory hallucinations, visual hallucinations, pressured tangential speech, denies suicide and homicidal ideation and plan, paranoid thoughts that other are against him, tactile hallucinations, paranoid thoughts that his food is being poisoned." Any remaining allegations are denied.**

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Columbia, South Carolina
June 13, 2018.

ELECTRONICALLY FILED - 2019 Jun 14 1:41 PM - HORRY - COMMON PLEAS - CASE#2017CP2601571

STATE OF SOUTH CAROLINA COUNTY OF HORRY David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer, Plaintiff, v. Nirlep A. Patel, M.D., Southern Myrtle Inpatient Services, LLC, and Grand Strand Regional Medical Center, Defendants.	IN THE COURT OF COMMON PLEAS Civil Action No. 2017-CP-26-1571 **RESPONSES TO PLAINTIFF'S SECOND REQUESTS FOR ADMISSION ON BEHALF OF THE DEFENDANTS, NIRLEP A. PATEL, M.D., RACHEL ASH BERNAL, M.D., AND SOUTHERN MYRTLE INPATIENT SERVICES, LLC**

TO: FRANCIS M. HINSON, IV, ESQUIRE, ATTORNEY FOR PLAINTIFF:

The Defendants, Nirlep A. Patel, M.D., Rachel Ash Bernal, M.D., and Southern Inpatient Services, LLC, pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, hereby responds Plaintiff's Second Requests for Admission, as follows:

1. Admit that, although all psychiatric illnesses are not emergencies, a psychiatric illness can rise to the level of being a medical emergency.

RESPONSE: **Admit, depending on patient's symptoms and clinical findings.**

2. Admit that when a physician is determining if, due to mental illness, a patient is likely to cause serious harm to himself or others if not immediately hospitalized, the physician should not only consider whether the patient may be homicidal and/or suicidal but should also consider whether the patient may be unable to protect him due to delusional thinking and impaired judgment.

RESPONSE: **Denied as stated. The physician makes a determination as to whether a patient is a danger to himself or to others and takes the appropriate measures.**

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3. Admit that significant food deprivation can cause serious harm to a person.

RESPONSE: **Defendant is unable to admit or deny, in that the word "significant" is vague and ambiguous. Defendant does admit that long term food deprivation can cause harm to an individual. There is no evidence of long term malnutrition or food deprivation in evidence.**

4. Admit that a seizure can cause serious harm to a person.

RESPONSE: **Defendant admits that some seizures can cause serious harm to a person, but not all seizures. Further, there is no evidence Mr. Scheer suffered a seizure contemporaneous to his hospitalization.**

5. Admit that if a patient with a seizure disorder, who has been prescribed an anti-seizure medication, refuses to take his anti-seizure medication, the patient puts himself at an increased risk of suffering a seizure.

RESPONSE: **Defendant is unable to admit or deny this in that it would depend on the patient, and whether the patient experiences active seizures if deprived of anti-seizure medication.**

6. Admit that Matthew Scheer was exhibiting delusional thinking on October 2-3, 2015.

RESPONSE: **Denied. These Defendants did not observe delusional thinking in Mr. Scheer, as set forth in the medical record in that this was not observed by Dr. Patel or Dr. Ash Bernal, and was only by history. Moreover, the patient was able to have a rational conversation with Dr. Patel and Dr. Ash Bernal, was able to comprehend his actions, and made a conscious decision to leave the hospital against medical advice.**

7. Admit that the 44th president of the United States of America, Barack Hussein Obama, was not Lucifer.

RESPONSE: **Defendants are unable to admit or deny this statement.**

8. Admit that the nurses and staff at Grand Strand Regional Medical Center are not devil worshippers.

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Exhibit 6

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY) 2017-CP-26-1571

David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer,

Plaintiff,

versus

Southern Myrtle Inpatient Services, LLC, Nirlep A. Patel, M.D., and Rachel Ash-Bernal, M.D.,

Defendants.

B E F O R E:

Honorable John C. Hayes, III
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Francis M. Hinson, IV, Esquire
William R. Padget, Esquire
Attorneys for Plaintiff

Jack G. Gresh, Esquire
Lauren V. Spears, Esquire
Attorneys for Defendants

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

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(On the record, May 21, 2019.)

MR. HINSON: Your Honor, the Plaintiff calls Dr. Robert Robinson.

THE COURT: All right.

Whereupon, Robert Robinson is called to the stand, duly sworn by the clerk and testified as follows:

THE COURT: You may proceed.

MR. ROBINSON: Robert, R-O-B-E-R-T, Robinson, R-O-B-I-N-S-O-N.

DIRECT EXAMINATION

BY MR. HINSON:

Q Good morning, Dr. Robinson.

A Good morning.

Q Would you please tell the jury a little bit about your education?

A Sure. I graduated medical school from the, from the University of Illinois at Chicago. Upon completion of my medical school training I went on to do internal medicine residency, again at the University of Illinois at Chicago. Residency, for those who are not familiar, is basically more specialized training in your area of expertise or the, the focus that you intend to practice in. So I completed that in 2005, upon which I entered a career as a hospitalist physician in Gastonia, North Carolina. I was employed as a hospitalist at Gaston Memorial Hospital from 2005 through 2013, at which

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time I transitioned to a different hospital system, continued working as a hospitalist, but more specifically a nocturnist, meaning I worked night shifts, night shifts specifically or exclusively from 2013 to 2015 with Novant Health Matthews Medical Center. I then transitioned in 2015 to Carolinas Medical Center where, again, I worked as a nocturnist, again, exclusively working the night shift in the hospital there.

Q Can you tell us a little bit -- you mentioned earlier you, you did a residency. What -- how long does a residency last?

A So it varies based on the specialty, but for internal medicine residency is three years.

Q And did you obtain any board certifications?

A Yes. I did. I obtained my board certification in internal medicine by the American Board of Internal Medicine.

Q And are you a member of any societies or organizations?

A Yes. I am. I'm a member of the American Medical Association, the National Medical Association and the Society for Hospital Medicine.

Q And Dr. Robinson, have you done any training -- done any educating or training other people in the healthcare profession during your time?

A Certainly. So I've trained both nurse practitioners, as well as physician assistants when they've been onboarding with our hospitalist group and also trained hospitalists who have

been new to whatever hospitalist group I was working at at the time.

Q And do you hold a license to practice medicine?

A Yes. I do. I hold license -- licenses to practice medicine both in the State of North Carolina as well as the State of Illinois.

MR. HINSON: Your Honor, at this time I would move to qualify Dr. Robert Robinson as an expert in internal medicine, and more specifically, in the practice of hospital medicine.

THE COURT: All right. Any voir dire?

MR. GRESH: No, Your Honor.

THE COURT: All right. I find he's qualified. Members of the jury panel, Dr. Robinson's testifying as what we call an expert. Generally, individuals can only come in and testify to something they've seen, heard. I think I talked to you a little about it yesterday, but individuals who have certain training, knowledge or experience in a particular area can come into court and testify, give their opinion. These opinions are allowed into evidence to assist you in reaching your decision. They're not binding on you, and you judge an expert witness with the same degree that you judge any other witness, and I'll tell you more about that when I charge you on the law, but I wanted to go ahead and, again, explain to you what an expert witness is.

BY MR. HINSON:

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reasonable decisions for him or herself.

Q Did -- does the record indicates that Matthew Scheer was able to make reasoned decisions for himself?

A No. It does not.

Q What tools or options were available to Dr. Ash-Bernal at approximately 1:30 in the morning on October 3rd in her treatment of Matthew Scheer? What, what options should she -- could she and should she have taken?

A Sure. So the options that were available to her and that should've been taken were to do a more thorough assessment of Matthew and his mental state. Again, it, it was very clear by the documentation that he was psychotic, and so before releasing him from the hospital a, a thorough evaluation of his mental state should have been assessed. She certainly had within her abilities the option to make outreach to Matthew's dad, David Scheer, to let him know of the circumstances and, you know, hopefully get him to come and, and lessen the threat that we just read about of that serious or imminent danger, and then, lastly, she had the option to involuntarily commit him at that point because now he is combative, he is aggressive, he is agitated, unlike earlier in his hospitalization, and so that option was available to Dr. Ash-Bernal as well.

Q Did you read Dr. Ash-Bernal's deposition in this case?

A Yes. I did.

Q Did it demonstrate that she had an adequate understanding of the concepts of permissible patient disclosures for safety purposes?

A No. It did not.

Q Did you review any training PowerPoints that she had been provided by her or through her employer, Southern Myrtle Inpatient Services?

A Yes. I did.

Q Did you have any opinions on those?

MR. GRESH: Objection, Your Honor. May we approach?

(Whereupon, a bench conference is held in the presence, but out of the hearing of the jury.)

THE COURT: Why don't we take a short break? This is probably a good time to take a break anyway, and I'll be looking at some legal matters. Doctor, you can step down and have a -- use the restroom or have you a cup of water or whatever. Just don't discuss the case with anybody.

A Yes, sir. Thank you.

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: All right. All right. We've got --

MR. HINSON: Your Honor, we're actually looking for a copy of the complaint. Oddly enough, that seems to be the one thing that I can't put my hands on at the moment. Jack, do you have a copy?

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court here that the clerk will order lunch for the jury. It will come around 1:00 o'clock, and so that means we'll take about an hour break. I know you all have got to go eat yourselves, but rather than take an hour and 15 or an hour and a half we'll probably try to keep it to an hour if you all can work out some way to get fed during that time.

MR. HINSON: Certainly, Your Honor.

THE COURT: And also, so you know that 1:00 o'clock is sort of the time I'm shooting for to take a lunch break. All right. Bring in the jury.

(Whereupon, the following takes place in the presence of the jury.)

THE COURT: Doctor, you can come back up and take the stand, please. You're still under oath, of course.

All right. You may, you may continue.

MR. HINSON: Thank you, Your Honor.

BY MR. HINSON:

Q Dr. Robinson, before the break I was asking you about the PowerPoint presentation that Dr. Ash-Bernal's employer, Southern Myrtle Inpatient Services, had presented to employees. Have you reviewed that PowerPoint?

A Yes. I have.

Q Do you have opinions as to the adequacy of that PowerPoint?

A Yes. I do.

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MR. GRESH: This is all over objection. Right?

THE COURT: Yeah.

MR. GRESH: Thank you.

THE COURT: Objection overruled.

Q And what are your opinions, Doctor?

A My opinions are that while the PowerPoint does speak to the conditions or circumstances where a provider cannot communicate information about a patient's health to anyone, it does not include the very important side of that coin as to when a prescriber or provider can share health information with a family member or, or other individual.

Q And Doctor, you've worked for a number of corporations in healthcare?

A Yes. I have.

Q And in your experience working for these different medical corporations, does the corporation have a duty to make sure that its physicians are properly trained on permissible disclosures for patient safety?

MR. GRESH: Your Honor, outside the scope of his expertise.

THE COURT: Yeah. I sustain the objection on that.

Q Dr. Robinson, in your experience working for these different corporations, has the corporation taken to -- made an effort to educate you and other doctors on permissible disclosures for patient safety?

A Yes. They have.
Q Dr. Robinson, I want to go back now to Plaintiff's Exhibit One, and if I could, turn you to page 68. Dr. Robinson, what are we looking there on page 68 of Plaintiff's Exhibit One?
A We're looking at a note entered by Dr. Rachel Ash-Bernal.
Q And what time, let me go up here, what time did she make this note?
A It appears this note was made on October 3rd, 2015 at 1:29 a.m.
Q All right. And then down at the bottom it says it's signed at 1:40. Just generally what does, what does that mean, the making it at one time versus signing it as another?
A Sure. So typically the time the note was made is when it was started. So when a physician or other healthcare provider goes into the chart, initiates a new document, in this case a note, it timestamps it as to when it was started as compared to the signature time which is when it's been completed and verified by that healthcare provider as, as a complete document.
Q So it was typed at -- even before 1:30 and signed at 1:40?
A Correct.
Q Doctor, can you read that, that cross-cover note to the jury?

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Q And you didn't go to law school; right?
A No. I didn't.
Q No. I did and I still didn't learn about HIPAA in law school, but what I do know is that you as a medical doctor would undergo yearly continuing medical education classes; right?
A That's correct. Yes.
Q One of the things that you would undergo is from your employer a -- it's in like a PowerPoint electronically and you get to kind of click through it and say, "Yeah, I, I recognize what you're trying to tell me about HIPAA"; true?
A That's correct.
Q And I thought I heard you say on direct that Southern Myrtle Inpatient Services, the, the employer of Dr. Ash-Bernal and Patel -- there's actually two PowerPoints that they sent on, on HIPAA. They may be squished into one, but there was actually two of them, but I thought you to say that that was a -- they did a negligent PowerPointing; right, negligently did a PowerPoint for the providers; is that -- was your opinion earlier today?
A My opinion was that they excluded key elements of the HIPAA law in such a way that it did not allow for the providers who are undergoing that training to appreciate and understand when they can disclose a patient's information to family members or whomever may need that information.

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Q And I just wanted to be clear that as a physician, as a hospitalist, a nocturnist or somebody working at CVS you don't only get your education from your employer; correct?
A No. We don't solely get our education from our employer as it relates to our medical care or any knowledge for that matter, but it is the responsibility of the employer to ensure that we do receive adequate education in the HIPAA law and that they provide that and follow up and ensure that we have completed said education in HIPAA.
Q And you haven't seen anything in Dr. Ash-Bernal's or Dr. Patel's employment file where they were -- didn't have enough continuing education hours; correct?
A No. I did not see that.
Q All right. And not only would they get the type of education from Southern Myrtle, their employer, they would also get it from Grand Strand; correct?
A Well, I would think it would be given to them by way of Grand Strand as an agent, so to speak.
Q Okay. And they would get it for whenever they, they go to other continuing medical education classes; correct?
A If they specifically went to classes to understand HIPAA law. It's not that it's just given at every continuing medical education seminar, conference that we go to. You would have to specifically go for that intent or purpose.
Q And, and that's fair, because all the ones that I've

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taught at, I don't know anything about medicine. Right. So they'll have a big conference on brain-damaged children or something like that and there'll be lots of different medical topics. Then they'll call in a lawyer for an hour to get up there and say here's what HIPAA is and what HIPAA's done. You've been to conferences that are like that; correct?

A I, I've been to numerous conferences. Yes.

Q And the idea is that we're going to teach a physician about HIPAA, it's multifactorial, lots of different people have insight and input into the education and training that physicians like yourself, like Dr. Ash-Bernal get in HIPAA; right?

A I'm sorry. Can you repeat the question?

Q Yeah. The -- it's not a singular source. It comes from lots of different types and sources whether it's employers or hospitals you work at, continuing medical education classes, you're always absorbing it from lots of different sources; fair?

A Yes. That's fair, but again, I'll go back to my statement that it's still the responsibility of the employer to make sure that the physicians employed have an understanding of the concepts of HIPAA that would affect them in their day-to-day practice.

Q Okay. And not to belabor the point, but if the patient is there and they're competent they get to decide. One of the

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other exceptions is, of course, if the physician determines in their judgment that the patient is in imminent harm to themselves or others HIPAA would also allow the physician under those limited circumstances to go against the patient's wishes; correct?

A That is correct. Yes.

Q And we know that Dr. Ash-Bernal concluded, she's there and talked to the patient, she concluded that he was not in imminent danger to himself or to others that evening; correct? She notes he's there on voluntary papers and she can't restrain him?

A Well, she doesn't document specifically that he's not a risk of harm to himself or others. The only thing specifically documented is that he was not suicidal or homicidal, and I think we've discussed how the lack of having suicidal or homicidal intent does not mean that a person or an individual is not at risk to themselves or others, particularly when you're dealing with someone who's dealing with psychosis.

Q Do you know that South Carolina as a matter of law defines what it means to be a serious harm to yourself or others?

A I have reviewed some South Carolina law. Yes.

Q Then can we agree what the legislature in Columbia has decided is that you are not an imminent danger to yourself or

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Q And so when Dr. Ash-Bernal is talking to the nursing staff and they say, "Hey, we've asked about calling the father and the patient says no," at that point that conversation has already occurred prior to Dr. Ash-Bernal walking in to talk to Matthew Scheer; correct?

A That's correct, but that's where I think understanding HIPAA and understanding what rights Dr. Ash-Bernal had as a clinician, as well as understanding the psychosis that Matthew was suffering from should have led to her making that phone call, despite whatever conversation the nurse had, to ensure that Matthew was entrusted to the care of someone responsible, or better scenario, to ensure that he's kept in the hospital after his dad is able to intervene and, and de-escalate the scenario.

Q And when you go to talk to a patient who wants to leave AMA, one of your charges, one of the things you are obligated to do as a physician is make a judgment call about whether that patient has capacity; correct?

A Yes. That is correct.

Q And you're there, you ask open-ended questions looking for the truth; right?

A Yes.

Q And you'll try to engage a -- excuse me, engage a patient in the conversation, understand, "Why are you here? You know that. You know why you want to leave. There's dangers to

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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	CIVIL ACTION NO.: 2017-CP-26-1571
David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer, Plaintiff, v. Southern Myrtle Inpatient Services, LLC, Nirlep A. Patel, M.D., and Rachel Ash-Bernal, M.D., Defendants.	**DEFENDANT SOUTHERN MYRTLE INPATIENT SERVICES, LLC'S REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S POST-TRIAL MOTIONS**

Defendant, Southern Myrtle Inpatient Services, LLC ("Southern Myrtle"), by and through its undersigned counsel, hereby submits this Reply to Plaintiff's Memorandum in Opposition to Defendant's Post-Trial Motions.

INTRODUCTION

This matter centers around an alleged failure to involuntarily commit the Decedent, Matthew Scheer. Plaintiff's Complaint makes several claims in this regard. As to Southern Myrtle, Plaintiff's only claim is for a failure to educate its physicians on the mechanisms to detain, or involuntarily commit, a mentally ill patient. At trial, however, Plaintiff's sole criticism of Southern Myrtle was that it negligently educated its physicians on the parameters of HIPAA. The jury ultimately returned a verdict against Southern Myrtle but awarded defense verdicts to its physician employees.

The heart of Southern Myrtle's argument boils down to three points: (1) Plaintiff failed to establish the standard of care for Southern Myrtle; (2) Plaintiff did not establish Southern Myrtle

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was the proximate cause of Matthew Scheer's death; and (3) corporate liability cannot be imposed on Southern Myrtle for failing to educate/train its physicians.

I. Plaintiff failed to establish a standard of care for Southern Myrtle.

In a medical malpractice action, the plaintiff must use expert testimony to establish both the standard of care and the defendant's failure to conform to that standard. *Pederson v. Gould,* 288 S.C. 141, 341 S.E.2d 633 (1986).

Plaintiff argues the verdict should stand because "there was competent testimony supporting the Jury's finding of [Southern Myrtle's] legal obligation to train its employees, a negligently performed undertaking of that duty, and an overall breach of that duty." Plaintiff relies on the testimony from his expert Dr. Robert Robinson to establish this point. Although Plaintiff is correct in that Dr. Robinson was qualified as an expert in hospital medicine, he was not and is not qualified to render a standard of care opinion for Southern Myrtle. In fact, this Court agreed with Southern Myrtle's position when this very objection was raised at trial.

> Q. Do you have opinions as to the adequacy of that PowerPoint?
>
> A. Yes. I do.
>
> Mr. Gresh: This is all over objection. Right?
>
> The Court: Yeah.
>
> Mr. Gresh: Thank you.
>
> The Court: Objection overruled.
>
> Q. And what are you opinions, Doctor?
>
> A. My opinions are that while the PowerPoint does speak to the conditions or circumstances where a provider cannot communicate information about a patient's health to anyone, it does not include the very important side of that coin as to when a prescriber or provider can share health information with a family member or, or other individual.

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Q. And Doctor, you've worked for a number of corporations in healthcare?

A. Yes. I have.

Q. And In your experience working for these different medical corporations, does the corporation have a duty to make sure that its physicians are properly trained on permissible disclosures for patient safety?

Mr. Gresh: Your Honor, outside the scope of his expertise.

The Court: Yeah. I sustain the objection on that.

Robertson Trial Tr. 50:23–51:21 (emphasis added).

There was no other testimony regarding the applicable standard of care for Southern Myrtle. For this reason and this reason alone, Southern Myrtle is entitled to Judgment Notwithstanding the Verdict.

II. Southern Myrtle did not proximately cause Matthew Scheer's death.

Plaintiff cites to testimony from his experts Dr. Robinson and Dr. Malone and from himself to support the argument that sufficient evidence existed to find Southern Myrtle's failure to educate proximately caused Matthew Scheer's death. This amounts to nothing more than speculation and conjecture. You cannot possibly say that the outcome would have been any different had Southern Myrtle included HIPAA's privacy rule exceptions within its PowerPoint and/or communicated those exceptions to its physicians in some other way. Especially since Dr. Ash-Bernal testified that she was aware of the exceptions.

In an analogous case, a plaintiff alleged a surgeon failed "to make sure that he communicated to the pathologist his thoughts for treatment, so that the pathologist was aware of the treatment plan of the surgeon." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247–48, 626 S.E.2d 1, 3–4 (2006). The court granted summary judgment due to the plaintiff's failure to

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establish proximate cause beyond mere speculation and conjecture. *Id.* In so holding, the court stated that the plaintiff's expert incorrectly relies on the assumption that the pathologist would have diagnosed plaintiff's tumor differently had the surgeon communicated his thoughts for treatment before the plaintiff's tumor was tested. *Id.* The majority went on to criticize the dissent's argument that had the pathologist been aware of the surgeon's intended treatment, then the pathologist *might* have qualified or sought to confirm his preliminary diagnosis. *Id.* (emphasis in original). It stated:

> The dissent's argument disregards the necessity that a surgeon be able to rely upon inter-operative diagnoses to determine a patient's proper treatment. Moreover, the position argued by the dissent would set the precedent that a speculative hypothetical may serve as the standard of care in an action for medical malpractice. In South Carolina, medical malpractice actions require a greater showing than generic allegations and conjecture.

Id.

In this case, Plaintiff cites to Dr. Robinson's testimony for the proposition that "there was ample evidence to conclude that, had Dr. Ash-Bernal been properly trained and knowledgeable about permissible disclosures, she would have contacted David Scheer and thus prevented Matthew's death." This is exactly the scenario our Supreme Court desires to avoid. Dr. Robinson's testimony is premised on the assumption that had Southern Myrtle sought to educate Dr. Ash-Bernal on the exceptions to HIPAA's privacy rule the result might have been different. As our Supreme Court noted, this is not the standard in South Carolina.

III. Direct Corporate Liability.

Plaintiff argues Southern Myrtle's contention that it cannot be held liable for a failure to educate/train because its employees were not found liable is contrary to South Carolina law. This is simply not true. To be clear, Southern Myrtle is not arguing that a corporation can never be held liable in the absence of a finding of liability on behalf of the employee/agent. Southern Myrtle

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understands the distinction between direct corporate liability claims and vicarious liability claims and that there are circumstances where one can exist without the other. Southern Myrtle's argument is specific to a negligent training cause of action under the facts of this case and is twofold—(1) a corporation like Southern Myrtle cannot be held liable for negligently training its physicians on the parameters of HIPPA when the physicians who were allegedly negligently trained were found to have complied with the standard of care, and (2) notwithstanding any deficient training, Southern Myrtle did not owe Matthew Scheer a duty to provide such training.

A. Liability for negligent training.

As noted in Southern Myrtle's Post-Trial Motions, there is no legal precedent in South Carolina that prescribes what a plaintiff must prove in a negligent training case where there is no tort committed by the trainee. However, the Court of Appeals has suggested that a plaintiff may have to prove an actionable tort by the employee in order to maintain a negligent hiring, supervision, and training action against the employer. *See Longshore v. Saber Security Servs., Inc.*, 365 S.C. 554, 619 S.E.2d 5 (Ct.App.2005) (citing *Sabb v. S.C. State Univ.*, 350 S.C. 416, 431–32, 567 S.E.2d 231, 239 (2002)); *see also Hays v. Patton–Tully Transp. Co.*, 844 F.Supp. 1221 (W.D.Tenn.1993) (negligent supervision claim will lie only where supported by viable claim of tortious conduct by offending employee); *Mulhern v. City of Scottsdale,* 165 Ariz. 395, 799 P.2d 15 (Ct.App.1990) (in order for employer to be liable for negligent hiring, retention, or supervision, the employee must have committed an actionable tort); *Schoff v. Combined Ins. Co. of America,* 604 N.W.2d 43 (Iowa 1999) (the torts of negligent hiring, supervision, or training must include as an element an underlying tort or wrongful act committed by the employee); *Hogan v. Forsyth Country Club Co.,* 79 N.C.App. 483, 340 S.E.2d 116 (1986) (before employer can be held liable for negligently hiring or retaining an employee, plaintiff must prove that the offending

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employee committed a tortious act resulting in injury to plaintiff); *Gonzales v. Willis,* 995 S.W.2d 729 (Tex.Ct.App.1999) (plaintiff-employee's negligent hiring, retention, and supervision claims against employer failed where plaintiff-employee failed to show actions of offending employee amounted to an actionable tort); *Haverly v. Kaytec, Inc.,* 169 Vt. 350, 738 A.2d 86 (1999) (the tort of negligent supervision must include as an element an underlying tort or wrongful act committed by the employee). Such an approach makes sense. If the "negligently trained" employee does not commit a tort, how could there be a finding of proximate cause against the employer since the employee acted appropriately?

Not to mention, the only act/omission that could result from a failure to provide adequate HIPAA education/training was the physicians' decision not to call Matthew's father. As to this issue, the jury clearly found that the actions of Drs. Patel and Ash-Bernal were entirely appropriate when the jury gave both defendant doctors a defense verdict; the sole implicit finding being that Matthew Scheer's father did not need to be called based upon the standard of care applicable to hospitalists or by federal HIPAA law. In fact, Plaintiff's memorandum as well as the evidence presented at trial illustrates that the decision to call a patient's parent falls under the standard of care for a physician—"Dr. Malone specifically opined that proper care and treatment would have involved contacting and involving family in Matthew's case to ensure he had social support to help care for his psychiatric condition." The jury found Drs. Ash-Bernal and Patel met the standard for the "proper care and treatment". As a result, there can be no liability imposed on Southern Myrtle based on a failure to properly educate/train its physicians.

To hold otherwise would produce absurd results. For example, every time a law firm puts on a CLE for its attorneys it would be required to present a comprehensive and detailed presentation on the topic being covered or it could be subject to liability in the event its attorney

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commits malpractice despite that attorney's obligation to pursue additional continuing education. Plaintiff's position essentially shifts a professionals' obligation to obtain continuing education to the entity that employs him or her.

A similar principle has been applied by the Supreme Court of the United States when it held that a county prosecutor's office was not liable for failing to train its young attorneys about their *Brady* disclosure obligation. *See Connick v. Thompson*, 563 U.S. 51, 54, 131 S. Ct. 1350, 1355, 179 L. Ed. 2d 417 (2011). Although that case centered around a narrow, constitutional question the Court's line of reasoning supports the argument Southern Myrtle made at trial and in its Post-Trial Motions. In holding the prosecutor's office could not be held liable for failing to train its attorneys, the Court stated:

> Attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment. They receive training before entering the profession, must usually satisfy continuing-education requirements, often train on the job with more experienced attorneys, and must satisfy licensing standards and ongoing ethical obligations. Prosecutors not only are equipped but are ethically bound to know what *Brady* entails and to perform legal research when they are uncertain.

Connick, 563 U.S. at 51, 131 S. Ct. at 1354–55. The same is true for physicians. They, like attorneys, have an independent duty to educate and train themselves. Whether Drs. Ash-Bernal and Patel possessed the appropriate level of knowledge regarding the parameters of HIPAA goes directly to the standard of care for a physician, not a corporation. It therefore follows that Southern Myrtle cannot be held liable for failing to educate/train its doctors on matters that fall within a physician's independent duties and obligations.

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B. Southern Myrtle does not owe Mathew Scheer a duty to provide HIPAA training to its physicians.

Plaintiff cites to *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 536, 773 S.E.2d 144, 145 (2015), for the proposition that the Supreme Court of South Carolina always allows vicarious and direct corporate claims to coexist in medical malpractice actions. However, the plaintiff in that case alleged a defendant/corporation that controlled a long-term care facility was "directly responsible for [plaintiff's] injuries by way of . . . underfunding [the nursing home], which led to issues with staffing, training, and nutrition."

That case is distinguishable for a number of reasons. First, it did not involve the lone allegation of failure to educate on a narrow subject within the purview of the standard of care for a physician. The biggest distinction, however, is that it involved a nursing home that exercised control over patient care and owned a facility that housed patients in need of constant medical treatment. The cases and legal text cited by the *Morrow* court involved a discussion of hospital liability and whether such liability could be extended to other healthcare organizations. In fact, those cases support Southern Myrtle's position as the common inquiry was whether the corporation was a comprehensive health care provider with the responsibility for arranging and coordinating the total health care of its patients, and whether it was involved in daily decisions affecting its patients' medical care. *See Scampone v. Highland Park Care Ctr., LLC*, 618 Pa. 363, 397–99, 57 A.3d 582, 602–04 (2012) (deciding nursing home is subject to direct corporate liability); *Sutherland v. Monongahela Valley Hosp.*, 2004 PA Super 245, ¶ 22, 856 A.2d 55, 61–62 (2004) (holding that a physician's practice group, unlike a corporate hospital, did not have a duty to the plaintiff); *Montgomery Health Care Facility, Inc. v. Ballard,* 565 So.2d 221, 225–26 (Ala.1990) (finding parent corporation of nursing home could be held liable for patient's death where corporation controlled day-to-day operations of home).

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Southern Myrtle clearly does not fit the mold of a "comprehensive healthcare provider". As demonstrated by the testimony Plaintiff cites, Southern Myrtle has "no involvement in the practice of medicine." It is a company that is contracted by a hospital to supply physicians who render care within the hospital. Southern Myrtle is no more than a staffing agency. It was not responsible for arranging or coordinating Matthew Scheer's care and was not involved in any decision affecting his care. Therefore, Southern Myrtle did not owe Matthew Scheer a duty to train its physicians on the parameters of HIPAA.

CONCLUSION

For the reasons set forth in Southern Myrtle's Post-Trial Motions and this Reply, Southern Myrtle respectfully request this Court grant Southern Myrtle Judgment Notwithstanding the Verdict or, in the alternative, vacate the judgment against it as a matter of law or, in the alternative, grant Southern Myrtle a new trial on the issue of negligently educating/training its doctors on the parameters of HIPAA.

Respectfully submitted,

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STATE OF SOUTH CAROLINA COUNTY OF HORRY David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer, Plaintiff, vs. Southern Myrtle Inpatient Services, LLC, Nirlep A. Patel, M.D., and Rachel Ash-Bernal, M.D., Defendants.	)	IN THE COURT OF COMMON PLEAS Civil Action No.: 2017-CP-26-1571 **PLAINTIFF'S SURREPLY IN OPPOSITION TO DEFENDANT'S POST TRIAL MOTIONS**

Plaintiff David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer (hereinafter "Plaintiff"), submits this Surreply to address several arguments raised by Defendant Southern Myrtle Inpatient Services, LLC ("SMIS") in its Reply in support of the *Motion for Judgment Notwithstanding the Verdict or, in the Alternative, Motion to Alter or Amend Judgment or, in the Alternative, Motion for New Trial.*

I. No expert testimony is required to establish a legal duty for ordinary negligence for failure to train.

Defendant SMIS incorrectly seeks to characterize all of the claims made against the corporation as medical malpractice claims. Such a characterization conveniently ignores the fact that the Trial Court charged the Jury on both medical malpractice claims against the physician Defendants and on ordinary negligence claims against the corporate Defendant (SMIS). While standard of care testimony is often required to make claims of medical malpractice,[1] our courts are clear that ordinary negligence claims do not carry the same burden.

[1] It should be noted that our case law and S.C. Code § 15-36-100(C)(2) provide that expert testimony is not needed to establish medical malpractice when the claims pertain to "negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant." *See eg.*, Green v. Lilliewood, 272 S.C. 186, 249 S.E.2d 910 (1978) (holding that a tubal ligation procedure that

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Negligence relating to a failure to properly train employees sounds in "ordinary negligence" and does not trigger a claim of medical malpractice with the need for expert testimony. Dawkins v. Union Hosp. Dist., 408 S.C. 171, 758 S.E.2d 501 (2014); *see also* Morrow v. Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015) (holding that direct corporate liability attaches due to a breach of a duty that runs directly between a parent company and the company's patients and arises from negligence in actions such as leaving a hospital "underfunded, understaffed, or undertrained so as to provide substandard care"). The Dawkins court specifically noted: "The statutory definition of medical malpractice found in S.C. Code Ann. § 15-79-110(6) does not impact medical providers' ordinary obligation to reasonably care for patients with respect to nonmedical, ***administrative***, ***ministerial***, or routine care. Thus, medical providers are still subject to claims sounding in ordinary negligence." Id. at 177-78, 758 S.E.2d at 504-05 (*emphasis added*). In this case, SMIS's negligence involves a failure to properly train its staff, which is not a medical action but is administrative and/or ministerial in its nature.

Further, the existence of such a duty in negligence is not established by expert testimony but by the trial court. In ordinary negligence actions "[t]he court must determine, as a matter of law, whether the law recognizes a particular duty." *See* Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 135-36, 638 S.E.2d 650, 656 (2006) (holding that a facility has duty to supervise and care for a patient with special needs admitted to facility); Shaw v. Psychemedics Corp., 426

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rendered intrauterine device and other birth control devices useless constituted a matter of common knowledge); Thomas v. Dootson, 377 S.C. 293, 659 S.E.2d 253 (Ct. App. 2008) (recognizing expert testimony was not required for a claim arising from a surgical drill that burned skin on contact because issues would fall within the common knowledge or experience of laymen); Hickman v. Sexton Dental Clinic, P.A., 295 S.C. 164, 367 S.E.2d 453 (Ct. App. 1988) (where a patient testified that an unsupervised dental assistant rammed a sharp object into her mouth, even without the support of expert testimony, the evidence presented was sufficient for the jury to infer a breach of duty to the patient).

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S.C. 194, 197, 826 S.E.2d 281, 282 (2019) (holding that a drug testing lab has duty to an employee who gave sample to be tested).

In the present case, in denying the motion for directed verdict, the Trial Court properly reasoned that SMIS had a duty to train is physicians on permissible disclosures under HIPAA.[2] Particularly such a finding was proper where SMIS undertook to train its staff on the restrictions HIPAA imposes but failed to provide its staff with training regarding permissible disclosures of patient information. Because the substance of this training involves corporate legal compliance issues common to all healthcare industry workers (from physicians and nurses to receptionists and clerical staff), it is particularly appropriate for the Court to conclude that a duty existed for SMIS to provide its staff with complete and accurate training on HIPAA's permissible disclosures. Thus, Defendant's argument that expert standard of care testimony relating to the ordinary negligence claim against the corporate entity misses the mark.

Moreover, if the Court finds that such testimony is required, there was ample expert testimony to support the finding of a legal duty for SMIS to train its staff on HIPAA permissible disclosures. Plaintiff's expert, Dr. Robert Robinson, testified to this exact point during his cross examination:

[*see following page*]

[2] Even if SMIS did not have a duty to ensure that its employees were properly trained, an issue which Plaintiff patently denies, once SMIS undertook to train its physicians on HIPAA, it had an obligation to do so properly. Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) *citing* Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991) ("If an act is voluntarily undertaken, however, the actor assumes the duty to use due care."). In the present case, there was ample evidence that SMIS undertook to train its physicians on HIPAA but then did so in a negligent manner by training them only as to the situations when patient information cannot be disclosed and scared them into thinking there were no occasions when patient information should be disclosed for patient safety.

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Q: And I just wanted to be clear that as a physician, as a hospitalist, a nocturnist or somebody working at CVS, you don't only get your education from your employer; correct?

A: No. We don't solely get our education from our employer as it relates to our medical care or any knowledge for that matter, ***but it is the responsibility of the employer to ensure that we do receive adequate education in the HIPPA law and that they provide that and follow up and ensure that we have completed said education in HIPPA.***

[....]

Q: The—it's not a singular source. It comes from lots of different types and sources whether its employers or hospitals you work at, continuing medical education classes, you're always absorbing it from lots of different sources; fair?

A: Yes, that's fair, but again, I'll go back to my statement that ***it's still the responsibility of the employer to make sure that the physicians employed have an understanding of the concepts of HIPPA that would affect them in their day-to-day practice.***

Ex. 6, Transcript Robinson Trial Testimony p. 79-80 (emphasis added).

In sum, as determined by the Trial Court and as charged to the Jury on Plaintiff's ordinary negligence claim, SMIS had a duty to ensure its physicians and all staff were adequately and appropriately trained on HIPAA's permissible disclosures. Moreover, to the extent that expert testimony was required, Plaintiff's expert testified during cross exam (without objection) as to this precise obligation of the corporate defendant. [3]

II. Corporate liability for failure to train.

In seeking to avoid the Jury's verdict for failure to properly train its employees, Defendant SMIS cites to a host of cases from other jurisdictions, but the Defendant ignores the South Carolina

[3] With regard to the proximate cause arguments made by SMIS in its Reply, Plaintiff has already addressed those arguments at length in his prior Memorandum in Opposition to Defendant's Post Trial Motions, p. 8-10.

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Supreme Court's holding in Morrow, *supra* at 538, that corporate liability is not dependent upon a finding against the employee. In Morrow, the Court flatly rejected the medical provider entities' argument that any verdict against them must first be predicated on a finding of an actionable tort by an employee. Similarly, this Court's charge to the Jury was entirely proper on that issue and there was ample evidence to support the Jury's finding against Defendant SMIS alone.

III. It is the Trial Court's duty to reconcile the verdict when there is a logical basis to do so, or in the alternative, the Court must order a new trial absolute on all claims against all Defendants.

Plaintiff maintains that the verdict is reconcilable because the Jury has a logical basis for a finding of liability against SMIS on the direct corporate liability claim. See *Plaintiff's Memorandum in Opposition to Post Trial Motions*. Defendant tip-toes around its argument that the verdict against SMIS and not against either of the defendant physicians is irreconcilable and demands a new trial only as to the direct corporate liability claim of SMIS and not as to the defendant physicians. This is not how a new trial would be handled, and even the cases cited by SMIS require a far different result.

If a verdict appears factually irreconcilable, "the proper and most consistent approach of treating such verdicts is to require, upon request, the trial court to re-submit the matter to the jury." Longshore v. Saber Sec. Servs., Inc., 365 S.C. 554, 562–63, 619 S.E.2d 5, 10 (Ct. App. 2005). "If the jury cannot reach a consistent verdict, the trial court may then order a new trial *nisi* or a new trial absolute. However, the law imposes no duty upon the trial judge to reject an inconsistent verdict in the absence of an objection by either party." Id. In the present case, no party moved to resubmit these issues to the jury, while they were still empaneled, and the defense cannot now argue that any such irregularity exists, unless they demand a new trial ***for all parties as to all claims***. As Defendant did not move for the Jury to reconcile the verdict (because there was no

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need to do so) at the time when the Jury was still empaneled, its current argument is tardy and thus inappropriate.

Where neither party timely moves the trial court to resubmit the matter to the jury, the trial court has no duty or authority to do so, and neither the parties to the litigation nor the court should be required to guess what the jury sought to accomplish. Id. In those situations, verdicts which are irreconcilably inconsistent should not stand, and a new trial should be granted, because the parties and the judge "should not be required to guess as to what the jury sought to render." Prego v. Hobart, 287 S.C. 116, 118, 336 S.E.2d 725, 726 (Ct.App.1985). "However, it is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found." Daves v. Cleary, 355 S.C. 216, 231, 584 S.E.2d 423, 430 (Ct. App. 2003); Longshore v. Saber Sec. Servs., Inc., 365 S.C. 554, 562-63, 619 S.E.2d 5, 10 (Ct. App. 2005).

In the present case, the Jury's logic is apparent. Here, in light of the various claims submitted, the Jury was free to conclude that Dr. Ash-Bernal exercised her best judgment in treating Matthew Scheer, but that her best judgment was severely handicapped due to SMIS's failures to properly train her relating to HIPAA's permissible disclosures. There was ample evidence to conclude that, had Dr. Ash-Bernal been properly trained and appropriately knowledgeable about permissible disclosures, she would have contacted David Scheer (Matthew's emergency contact who had left his number with his nurses earlier that evening) and prevented Matthew's death. David Scheer testified that, had he been called about Matthew's change in behavior, he would have come to help his son, just as he had done in the days prior. Also, Dr. Timothy Malone (Plaintiff's expert in psychiatry) testified that had Matthew received proper treatment and care, he would have likely been doing well to this day. Dr. Malone specifically opined that proper care and treatment would have involved contacting and involving Matthew's

family to ensure that Matthew had social support to care for his psychiatric condition. In sum, construing all evidence and inferences in Plaintiff's favor, there was ample evidence submitted for the jury to conclude that SMIS's failure to train its physicians was a contributing cause of Plaintiff's death. With such evidence submitted to the Jury, it is role of the trial court to sustain the Jury's logical findings.

CONCLUSION

Plaintiff respectfully requests the Court to deny Defendant's post trial motion, to confirm the Jury's verdict, and to enter judgment against Defendant Southern Myrtle Inpatient Services, LLC. In the alternative, in the event the Court believes such a verdict is irreconcilable, a new trial absolute must be granted as to all claims and against all Defendants.

Respectfully submitted,

s/ *Francis M. Hinson, IV*

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS	
COUNTY OF HORRY)	2017-CP-26-1571	
David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer,	)	
Plaintiff,	)	
versus	)	May 20-24, 2019
Southern Myrtle Inpatient Services, LLC, Nirlep A. Patel, M.D., and Rachel Ash-Bernal, M.D.,	)	VOLUME I
Defendants.	)	

B E F O R E:

Honorable John C. Hayes, III
Horry County Courthouse
Conway, South Carolina

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Circuit Court Reporter

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(On the record, May 20, 2019. The following takes place outside the presence of the jury venire.)

THE COURT: In going back and forth I apparently have left my copies of your request for voir dire downstairs. So before you leave if you'll hand me up another copy so I can look at it over lunch.

All right. What have we got? And I don't know why this chair is very low. So I feel like I'm down in a hole. You can barely see my head probably, but all right. What have we got to do?

MR. PADGET: Your Honor, Bill, Bill Padget for the Plaintiffs. If I may make a quick suggestion, we've just had a very brief opportunity. Each side has a number of different motions in limine and I think some fairly minor objections related to some proposed voir dire questions. If you could give us maybe five or six minutes I think we can narrow that, that list down substantially because I think there are some agreements.

THE COURT: All right. Well, I'm certainly not opposed to that. So I'll give you about ten, ten minutes to just -- a few minutes before 12, about 10 after 12.

MR. GRESH: Perfect.

MR. PADGET: Very well, Your Honor.

MR. HINSON: Thank you, Your Honor.

MR. PADGET: Thank you.

OFF THE RECORD

(On the record. The following takes place outside the presence of the jury venire.)

THE COURT: All right. What have we got first?

MR. HINSON: Your Honor, Your Honor, the voir dire I would suggest might be a good place to start. I think we've come to an agreement on the voir dire. What we did, Your Honor, was we took the, the Defense and the Plaintiff's and we struck through some that we thought were redundant, and between the two of them together I think it makes a, a complete list we both have agreement on.

THE COURT: Okay.

MR. HINSON: Yeah.

MR. PADGET: Judge, if I may approach. Got Defendants' which is, Judge, it's not marked up. So it's being read in whole, at least we're in agreement if you're okay with it, Your Honor, and then this is Plaintiff's voir dire. I've struck those questions which are duplicative or we have agreed not to ask.

THE COURT: All right. But so I'm still charging all of this?

MR. PADGET: That's correct, Your Honor.

THE COURT: But isn't this -- some of these the same people?

MR. GRESH: It's only going to be one time.

MR. PADGET: It's only going to be one time.

THE COURT: Oh, I charge them off of these?

MR. PADGET: That's right.

THE COURT: You struck them off of that.

MR. PADGET: That's correct.

THE COURT: I got you. Okay. I've got you. All right. Real quick, that leaves on Plaintiff's number three, five, can you all follow with me or do I have the only copy?

MR. HINSON: I, I think you got our last copy, Your Honor, but that's, that's --

MR. PADGET: That's the one that's marked up, Judge.

THE COURT: You know, these are not struck, three and five, six, seven, nine, 10, 11, 12, 13, 14, 15, 16, 17, 19 and 20. All right. And Defendants' --

MR. GRESH: Sorry, Your Honor. There was, there was further agreement on 17 I thought or maybe we need to talk about 17.

MR. PADGET: It's marked up.

MR. HINSON: Yeah.

THE COURT: Seventeen, I think's marked out. Did I, did I say 17?

MR. HINSON: Your Honor, 17 we agreed for it to be read but to stop after the phrase --

THE COURT: I see.

MR. HINSON: -- ever been employed by an insurance

company leave out --

THE COURT: Where it says regards to sympathy, yeah.

MR. HINSON: -- the rest.

THE COURT: I got you. Yeah. He's got it.

All right. Defendants' One, Two, Three, Four, Five, Six, all the way, looks like none of them are stricken.

MR. GRESH: Your Honor, under number one there was a couple of witnesses that were inadvertently included that we've agreed that could be stricken.

THE COURT: Okay.

MR. GRESH: The last one is Ed Piotrowski.

THE COURT: Okay.

MR. GRESH: And then on that second page at the top is a gentleman, Kevin Defoney, and if you can, you can -- the jury's not going to hear Kevin Defoney, should be on the top of page two. It may already be stricken out on your copy, Your Honor.

THE COURT: I see it. No. It isn't. It isn't.

MR. GRESH: Thank you.

MR. HINSON: Yep. And nothing more need to be struck. It was some of the parts of the Plaintiff's had been kind of redundant if the Defendants' got read, so.

THE COURT: Okay. All right. What do we have as far as pretrial?

MR. HINSON: Your Honor, Plaintiffs have what we've

entitled an omnibus motion and we were able to confer with -- let's see here -- with Defendant. May, may I approach, Your Honor?

THE COURT: Yes. Yes, sir.

MR. HINSON: Let's make sure we go through it. I think you got the marked up copy.

MR. GRESH: Okay.

MR. HINSON: Your Honor, we, we had --

(Clerk and Court confer.)

THE COURT: All right. The first one's prohibit comments about where the expert lives.

MR. HINSON: Yes, sir. I think we had agreement actually all the way through until number -- what was it, Gresh?

MR. PADGET: Thirteen, wasn't it?

MR. HINSON: Thirteen, Your Honor.

THE COURT: All right. Thirteen is --

MR. HINSON: Your Honor, 13 is a motion in limine regarding equally available witnesses, and Plaintiff is excluding any reference or suggestion, "Well, you didn't hear from so and so. Plaintiff didn't call X, Y, Z."

THE COURT: Well, I, I think the law is pretty clear you can't have any inference -- adverse inference from the fact that somebody didn't call a witness because it's -- if it's somebody that's subject to subpoena unless there's, unless there's some element of a witness being hidden or, or, or the

access to the witness being denied for some reason, but I'll be glad to hear from Mr. Duncan [sic].

MR. GRESH: Yeah, Your Honor, just briefly on that point, the way I envision this might occur during trial would be in a closing argument. If the Plaintiff bears the burden of proof and a key factual witness that would be necessary to substantiate the Plaintiff's claim was not called then I believe the Defendant in that situation can say, "And who would know the answer to that question? So and so, and they didn't call them." Right.

THE COURT: Well, you --

MR. GRESH: A necessary element and they didn't call that witness to substantiate a necessary element to their claim, to make comment on that that they could have called them and they didn't call them to prove their case. I think it's otherwise --

THE COURT: Well, I, I know that's a little different from what, what I was addressing, which still I, I don't think you can claim any adverse -- what happens in, in essence is for the Judge before I can make a decision as to whether that witness could add some factual to it is have that witness come in and testify under oath so I can determine whether or not your comments that they should have called this person, I, I don't know how we can go behind the absence of a witness and determine that they should have been called. So I, I'm going

to sustain the objection on that.

MR. GRESH: Thank you, Your Honor.

MR. HINSON: Thank you, Your Honor. So numbers one through 12 were -- we came to agreement on, and Your Honor, you, as I understood, just granted number 13 and number 14 we're also in agreement on.

THE COURT: Okay. All right. Well, that was easy enough. All right. Defense has some?

MR. HINSON: Your Honor, Defense had a -- well, Plaintiff has a few more motions in limine that we just kind of had as separate. These -- most of these were kind of short, and I -- and as I -- we anticipated we would have an agreement on, and then we have some separate issues that were briefed separately, Your Honor, and I actually will for the first one, I think, turn over to Mr. Padget.

THE COURT: All right.

MR. HINSON: Well, yeah, Your Honor, that's -- if, if, if you would allow -- the Defense had kind of an omnibus motion in limine as well, and we had some -- we agreed with, with much of it. So if you'd like, we could go ahead and just put that on the record what we've already come to agreement on.

THE COURT: All right. I don't have a copy of that yet.

(Mr. Hinson and Mr. Gresh confer.)

THE COURT: All right. All right. One, exclude death certificate as evidence of the cause of death.

MR. GRESH: Your Honor, this, this motion arises out of the circumstances surrounding the issuance of a death certificate following the disappearance of Matthew Scheer. It should have been marked a presumptive death certificate. The copy I'm looking at today does say the word presumptive on the death certificate, but the death certificate itself goes on to say that the manner of death was suicide. The reason we're going to be here for two weeks maybe in front of Your Honor is to talk about exactly that question, how did it come to be that Matthew Scheer is not with us today in trial, did he disappear, did he die, if he did die, how did it come to be that he did die. There is no evidence from anybody that's going to talk about this was an intentional suicide. The only evidence that's going to be before Your Honor or before the jury is going to be one eyewitness who saw a man matching Matthew's description go into the ocean and never resurface. I think for the probate court to find based on evidence -- excuse me, affidavits of the Scheer family and of the eyewitness and then infer from there that the manner of death was suicide goes beyond what was necessary to issue a presumptive death certificate. This is presumptive. I think if this was a final death certificate that had an inquiry, coroner's inquiry or something, we could have a manner of death, but in a case like this where there's no testimony from anybody and everything that was heard by the probate court,

they're supposed to comply with the rules of evidence, but all they did was elicit affidavits. I think this speaks too far, and so what I have suggested or requested in this case is to allow the presumptive death certificate to come into the jury but to exclude or obliterate the term suicide or the, the colon before the manner of death and allow that to be a conclusion that the jury is able to draw once they've heard all of the evidence and testimony.

THE COURT: Well, generally, under the Business Records Act the matters of opinion are not admissible.

MR. HINSON: What, Your Honor, under Rule 803(9) records of vital statistics, which include deaths, are admissible, and --

THE COURT: But I agree with that.

MR. HINSON: And Your Honor, there's a case I -- it is 184 S.C. 232, and it says that a death certificate and the manner of death on the death certificate is prima facie evidence of the manner of death, and that's LaCount versus General Asbestos and Rubber Company, and it holds squarely that it is evidence -- that the death certificate itself is prima facie evidence of the manner of death. Now, I'm not saying -- I, I would very much like to argue that Mr. Gresh doesn't even get to rebut what the death certificate says, but, but I think he can under the, the case I just cited, but our case law says it's prima facie evidence as to the manner

of death. We had to come to the probate court and prove this by clear and convincing evidence under the statute and the probate court has ruled already, two and a half years ago, that there was clear and convincing evidence as to the manner in which Mr. Matthew Scheer died.

THE COURT: Why don't you hand up that case and let me look at it.

MR. GRESH: And, and Your Honor, just to follow up on that, I think that's exactly the problem. I didn't have an opportunity to present evidence in the probate court. This is a presumptive death certificate. Right? This is, this is -- all they're supposed to do is make an order to DHEC saying issue a presumptive death certificate. What they did is went further and said, "Yeah. This is a death certificate and he died by suicide." The only opportunity I have to challenge that is before Your Honor in this court. I was not a party, nor was I invited to the party at the probate court, and so I think to hand it up and now it be evidence that can't be overturned on a presumptive death certificate I do think is in error.

MR. HINSON: Well, Your Honor, the Department of Vital Records is required under the statute to include the manner of death. That is part of the statute. The Department of Vital Records has to do that. In every case where there's a death certificate the Defendant, when there's a wrongful death, the

Defendant did not have any involvement in declaring how the decedent died. A person gets killed in a motor vehicle accident, the coroner comes and the Department of Vital Statistics issues a death certificate and that's what happens in every case, and I -- there's -- almost no situation you can conceive of where the Defendant would come and argue to the Department of Vital Statistics that that's not what should go on the death certificate, and, and so anyway, again, under the law, under that case, Your Honor, I didn't know that I was going to come here having to argue this. I'll be happy to get a copy of that case that I just cited.

THE COURT: All right.

MR. HINSON: And if you would just give us -- I'd ask a little indulgence. I can email it to you or, or --

THE COURT: Okay.

MR. HINSON: -- whatever you'd have us do.

THE COURT: You can just get a, get a copy for me after lunch.

MR. HINSON: Yes, Your Honor.

MR. GRESH: Your Honor, the -- there's been agreement on Defendants' Motion number two and number three. Motion number four filed by the Defendants, Your Honor, is exclusion of the police report and a portion of one witness's testimony. I think it's pretty black letter law that a police report is hearsay unless the officer comes in to say what's on the

police report. The officer's not going to testify in this case. There's no officers listed on the pretrial things that the jury is going to hear about. Duane Doherty is the witness. He's going to come in and testify to things he personally observed, and I think that's all fine, but to somehow say that Duane can then say, "Here's what the officer told me," or just read into evidence what's in the police report that Mr. Doherty himself did not author I think is improper. If we could get in police reports we wouldn't -- I mean, all of our car wreck trials would be 30 minutes. Right? We'd just put it up into, into evidence. So I think this -- that's improper to bring in the police reports for, for those reasons.

THE COURT: All right.

MR. HINSON: Your Honor, I have a -- we did anticipate this motion in limine. I have a, I have a memo on this topic if I could approach.

THE COURT: You, you can hand it and I'll take a look at it, too.

MR. HINSON: All right.

THE COURT: I mean, my -- at first blush I agree with the -- but I'll take a look at it -- with the police report --

MR. HINSON: Well, Your Honor --

THE COURT: -- but go ahead.

MR. HINSON: Yes, sir. Your Honor, the, the gravamen of,

of Plaintiff's argument is that, again, there's an exception under 803(8) for public records and reports, and 803(8) says, [as read], "Records and reports, statements or data compilations, in any form, by public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to the duty imposed by law," and so that's what we're talking about here with this police report. Now, 803(8) does have exceptions for police reports when you're trying to use them in a criminal matter, and it says, [as read], "However, in criminal matters observed by police officers and other law enforcement personnel." So it's not allowed in in a criminal matter. I, I agree with that, and if we were here talking about the actual drowning and arguing that someone drowned him on -- like put him under the water, I agree that it couldn't come in because 803(8) goes on to say, [as read], "It's inadmissible as evidence of negligence," and that's not what it's being entered into for, Your Honor. In this, in this case the police report reflects that a witness saw a young man fitting Matthew's description strip off his clothes and go running into the Atlantic Ocean.

THE COURT: Well, that wouldn't be a matter observed by the officer.

MR. HINSON: Well, Your Honor, that's, that's, that's correct, but then the police report goes on to say that the officers came to the beach and combed the beach and looked

for, looked for him and that would be something observed by the officers. That is their activity. That would be an activity of the agent -- of the agency and its officers.

THE COURT: That, that's negative testimony though. I, I'm not going to allow that.

MR. HINSON: Thank you, Your Honor.

THE COURT: What's next?

MR. GRESH: Your Honor, number -- Defense motion number five is -- it's entitled exclusion of speculative damages testimony. I recognize that grief, sorrow, etcetera, is not subject to being calculated, and I'm not trying to exclude that type of testimony. Instead what we have, and we may even have agreement on it now that we talk about it, is that Matthew Scheer was a, a bar-back and made essentially minimum wage, and you know, what he was going to do with his life, was he going to become a bartender or a manager or an NFL player or an astronaut is speculative, and so I think we can talk about who Matthew was, the things he enjoyed doing, grief, sorrow, those types of things, but to then to extrapolate and just wildly guess as to what could have been or would have been has no place in this court. We can prove it and talk about it but you can't just wildly speculate and wildly guess as to damages testimony.

THE COURT: You have a response to that? Speculation is just speculation.

MR. HINSON: Your Honor, I, I don't think we're going to speculate in this courtroom about what Matthew -- that he was going to be a doctor, that he was going to be a lawyer, that he was going to be any one particular thing, but I think, you know, Plaintiff should be allowed to say, "Matthew has lost his life and he never got a, a chance to, to fulfill his career. He never got a chance" --

THE COURT: Well, what, what was -- how you going to prove his career? His career was a bar-back.

MR. HINSON: Whatever it may be. I mean, whatever it would have made -- may have turned into. He did want -- his, his parents can testify that Matthew's ambition was to work in the food and beverage industry. His father has had a very successful career in the food and beverage industry. Debbie's going to testify that, that Matthew just revered his dad and wanted to be like his dad and that was his goal was to be like his dad, and I think we should at least be able to testify that or at least submit testimony that was Matthew's goal, that that was his dream and his ambition, not that he would have done it, but that that was what his ambition was.

THE COURT: Well, how, how does that come into play as far as, as damages to the family? I mean, they're the Plaintiffs, and the damage is to them and, and they haven't lost anything. It's, you know, in the future. I, I mean, you kind of follow that to its logical conclusion then there'd

have to be testimony that he was going to be in beverage industry and give all his money he made to his family.

MR. HINSON: We're not talking about lost wages, Your Honor. I don't, I don't think we're talking about lost wages. We're not saying he was going to make some amount of money and this amount of money was to go to his parents. We're just saying that the parents lost the opportunity -- part of their grief and suffering is they'll never get to see their child succeed.

THE COURT: Well, I, I agree that they can testify to that.

MR. HINSON: Okay. We're, we're not, we're not offering any testimony about he would have made X, Y, Z, he would have made a lot of money. That is not our --

THE COURT: Well, no, I mean, not, not wages, but as far as exactly -- they can testify that they never got to experience any more time than they did, but I can't -- I don't believe they can testify that based on the fact that, that his, you know, that his chosen career was going to be X, Y and Z because, you know, that's, that's, I mean --

MR. HINSON: We're not offering that, Your Honor. I, I think we may actually have agreement, Judge.

MR. GRESH: I think we, we did. We agreed prior to trial. It's all coming back to me now, Judge. We did agree prior to trial that they were not going to elicit evidence of

-- I, I divided everything it into pain and suffering or economic loss.

THE COURT: Okay.

MR. GRESH: And there are going to be an economic component to this. What I was trying to also get out is to prevent any testimony that would let the jury infer that there must be some economic loss, that bar-backs make, I don't know, $50,000 a year, and that they would be able to somehow extrapolate and speculate as to that. I think we're in agreement that that's not going to be a line of testimony. There are not going to be a -- an economic loss component to, to this.

MR. HINSON: Well, there will be no economic loss component to that testimony, Your Honor.

THE COURT: I see Oliver Wood's listed. He's not going to testify?

MR. HINSON: He's, he's not coming to testify.

THE COURT: Okay.

MR. GRESH: Yeah.

MR. HINSON: I think that's actually his witness, Your Honor.

MR. GRESH: I got Oliver on this one.

THE COURT: I just --

MR. HINSON: So I, I won't speak for you, Mr. Gresh. I'm sorry.

THE COURT: His name just jumped out when I was looking at the list. I didn't remember whose list it was.

MR. GRESH: The, the second part to this, which more of what my motion was written on, the testimony before this Court is going to be as, as Mr. Hinson has said, that a witness observed a man matching Matthew Scheer's description run into the ocean, I believe he says he came up one time, went back down, then the witness goes down five flights of stairs, over a causeway to a beach and never saw Matthew come up, and that based on this we presume that he is, is dead. What I'm trying to exclude now is allowing the jury to speculate, to, "Oh, my, Matthew must have drowned, must have been painful, must have endured so much in the water," when it's just as likely Matthew hit his head and didn't have any conscious pain and suffering. There's no evidence on either side, and so to allow a jury to say, "This must be what" --

THE COURT: Well, a wrongful death, is his conscious pain and suffering an element of their wrongful death?

MR. HINSON: If I might --

MR. GRESH: I think it has survival claim, I thought, and I -- that's really what this goes to is there's no evidence of any conscious pain and suffering.

THE COURT: Yeah.

MR. GRESH: Your Honor, Judge Edgar Dickson ruled on this matter, and I can -- back in -- well, it doesn't have a date.

I'm sorry, back in August of 2018.

THE COURT: In this case.

MR. HINSON: In this case.

THE COURT: Well, would I, would I --

MR. HINSON: There was a motion for partial summary judgment seeking to dismiss Plaintiff's survival action saying that there was no evidence that Matthew Scheer suffered any pain and suffering when he died, and actually I think we argued this very same courtroom and Judge Dickson has issued an order. I have a copy of it right here, and he agrees that there's at least circumstantial evidence that we can show that Matthew had conscious pain and suffering and that should be allowed at this trial.

MR. GRESH: Which is why we moved to have that issue revisited, and it's all speculation. All somebody is going to say is he walked into the ocean.

THE COURT: Well, I'm, I'm not going to revisit it. That can be appealed at the end of the trial if --

MR. GRESH: Yeah.

THE COURT: -- but I'm not going to try to revisit. I'm not an appellate court. I can't visit Judge Dickson's order.

MR. GRESH: I know. The, the issue to revisit that has been on the books for a year and a half.

THE COURT: Well, I mean --

MR. GRESH: We just didn't have -- it just never came up

before now.

THE COURT: Well, any Rule 59(e) motion if it's just -- it's in the nature of that would had to be before Judge Dickson.

MR. GRESH: Yeah. And it's, and it's still pending. That motion is still pending.

THE COURT: Well, I, I -- it's still the law of the case then until, until Judge Dickson -- plus, if he's got it under advisement I couldn't rule anyway.

MR. HINSON: Thank you, Your Honor.

MR. GRESH: And I guess, mine, mine goes further than this. This is a motion for summary judgment. All right. So I was arguing here as a matter of law the answer is zero, and a year and a half ago, they've had a year and a half to come up with evidence from somebody. I want to see what evidence is elicited from this witness stand that goes to the issue of was there conscious pain and suffering, and it is all speculative. With all due respect, Your Honor, that issue is before Your Honor, and to, to not allow speculative testimony I think is squarely within our purview, but we can address that, I guess, as the witnesses are called.

THE COURT: Okay. All right. Exclusion of interpretation of HIPAA.

MR. GRESH: Number -- did we agree to that one?

MR. HINSON: I don't think so.

MR. GRESH: Oh, then we need to talk about that.

One of the issues in this case, Your Honor, just to kind of sets the facts for you a little bit in a non-argutive fashion when Matthew Scheer comes to Grand Strand he's worked up. His father and his mother have concerns about his mental well-being. He goes to Grand Strand Hospital. He's worked up aggressively by an ER doc looking for a medical issue that might explain the mental well-being. She finds no medical issues that would explain this, but says, "Hey, you should go seek psychiatric treatment from Lighthouse," the local psychiatric facility.

Matthew and his father go to Lighthouse. They do not have an opportunity to see a psychiatrist there. Instead when they get there they're turned around and said, "No, no, no, you need to go back to Grand Strand and get medically cleared." Okay. So the guy comes back to Grand Strand to get medically cleared and that's where Matthew Scheer is treated by the Defendant physicians is on this second opportunity.

One of the questions in this case is going to be from the Plaintiffs is that at around 1:30 or so in the morning Matthew wants to leave the hospital and is -- tells one of the nurses or the nurse and the physician, "Don't call my dad." So one of the issues in this case is going to be can or should the Defendant doctor, Dr. Rachel Ash-Bernal have called Matthew Scheer's father when Matthew, a 26-year old kid, wanted to

leave the hospital. The answer to that question is in HIPAA, right, and it's a, it's a federal law. We're all presumed to know the law, but if Your Honor has looked at HIPAA it's over 7,000 pages long.

The issue in this case is not what does HIPAA say. The issue in this case is what would a reasonably prudent hospitalist believe that HIPAA said under these same or similar circumstances. They're not lawyers. They're not, you know, privacy officers from big Chicago companies. These are folks with boots on the ground. They get one-hour of HIPAA training every year as part of their continuing medical education, and so for us to have finite bullet points, the one bullet point out of 7,000 pages I think is irrelevant. Well, it's irrelevant because the issue is would a physician have known that bullet point or is it like every one of Plaintiff's experts and Defendants' experts, they had to look this thing up before their depositions, and I think if you've got to look it up before your deposition, then you didn't look it up when you were taking care of the patient the night before, and that's really the issue in this case, what would a reasonably prudent hospitalist do under the same or similar circumstances, not what somebody would do sitting in an ivory tower in preparation for their deposition when they've got all the answers on the computer.

THE COURT: Yes, Mr. --

MR. PADGET: Good morning, Your Honor. Afternoon now. In this case, first of all let's talk with specifics about what the note in the, in, in the hospital, the nurse's note actually said. It didn't say, "Don't call my father." It didn't say that. It says, "The nurses inquire, 'Do you want to speak with your father'," and, and according to the note he answered no. Now, that's a, that's a very different situation factually than, "I'm instructing you not to call my father." So that, that's one factual difference that we want the Court to be mindful of as we talk about this, but when it, when it comes to HIPAA I, I don't think anybody's going to come here and say -- no witness is going to get on the stand and say, "This is what the law is." Your Honor, gives the law in the case, and obviously we'll be asking for an instruction related to the particular provisions of HIPAA and a few other provisions of the South Carolina Code related to incapacitated patients in this case.

The question though and what is permitted by the case law is is experts are entitled and the, the courts have confirmed and I, I can send you a cite on this as well if necessary, but it's a Professor Freeman opinion that came out a few years ago. Experts can't give the law, no doubt about that, and we're not asking any of our experts to get on the stand and say, "This is what the law is," but they can, they can give testimony as to the application of those laws to the facts of

this case if it relates to their particular expertise, and in this case, of course, the expertise is practicing internal medicine at a hospital like Grand Strand. Our experts have talked about it and their experts are going to talk about it.

As far as what HIPAA permits in this situation, there's, there's three exceptions to HIPAA's privacy rule that, that we contend are at issue in this, really one of them more so than the other two, one if the patient is indicating that they're a danger to themselves, if they are -- have indicated they're suicidal then that's, that's something where that information can be revealed. It's plain in HIPAA. The second part is if they've indicated they're a danger to someone else. They're homicidal in some way, and the last exception, really the key one here is if essentially, and I, I, I should have the reg in front of me, it is numerous, but the regulation essentially says that if the person is, is so incapacitated that they can't be -- they can't protect themselves then you can reveal that information to a family member or someone else who's in a reasonable position to mitigate the harm to that person. Actually we do have it, Judge. I did pretty good.

The quote from it is, Judge, [as read], "Where a patient is not present or is incapacitated, the healthcare provider may share the patient's information with the family, friends or others involved in the patient's care or payment for care as long as the healthcare provider determines, based on

professional judgment, that doing so is in the best interest of the patient," and so, the point we're getting to is HIPAA's certainly at issue in this case. There's a lot of laws, privacy laws and incapacity laws that are at issue, and the application of those laws by the experts is what both sides are going to be talking about a good bit in the testimony.

MR. GRESH: Your Honor, I wrote this motion at the same time I wrote a motion to exclude their HIPAA expert. They've agreed to get rid of their HIPAA expert. If they're going to call internal medicine docs to talk about that then I'm fine with it. I'll --

THE COURT: Okay. All right.

MR. GRESH: -- withdraw that.

THE COURT: All right. All right.

MR. GRESH: Which I believe --

THE COURT: Then one -- number eight is one of my favorite topics.

MR. GRESH: Yeah. I believe that was -- it's the last one that we couldn't agree to, Your Honor.

THE COURT: I don't think many people agree on what the Dead Man's Statute says, but --

MR. GRESH: There's, there's, there's lots of cases going all over the place when you look up a Dead Man's Statute, but the latest in the trend that, that we have seen is that a witness with an interest in the litigation cannot come in and

speak about what a now deceased person told them. We -- if they were allowed to do that obviously I would have no right to cross examine that person because that person is now deceased, and so as it would apply to this case there's a lot of testimony from the parents of the now deceased and what communications they had with Matthew Scheer, what Matthew Scheer told them. They have an interest in the litigation as they are the beneficiaries to the estate, and I can't cross them on, "Well, that's not exactly what Matthew said," because he's deceased, and I think the Dead Man's Statute is right on point, in that limited circumstance, that type of testimony can't be elicited.

MR. HINSON: Your Honor, if, if Mr. Jack's -- Mr. Gresh's position were, were correct then any time there was a wrongful death, a wrongful death case the widower couldn't take the stand and say, "My wife told me this. My late wife told me that. As she was on her deathbed, she, she told me she loved me." There would be no testimony like that ever in a wrongful death case if his interpretation of the, the Dead Man's Statute was accurate.

This case, Your Honor, is about Matthew Scheer, a 26-year-old man who had a sudden onset psychosis. He had been at work a few days earlier, and all of a sudden out of the blue he's hearing voices, seeing things, and the -- quite frankly, the crazy things he told his parents are the reason his

parents brought him to the hospital seeking medical care, and that's very important in this case, and Matthew's condition, his psychiatric illness, it was seen by the physicians. It was seen by the emergency room staff, and David and Debbie should be permitted to come to this trial and talk about the things that Matthew said that led to him coming to the ER. That's, that's the basis for why he's even seeking medical treatment.

MR. GRESH: But to do that would introduce evidence that they didn't know. They couldn't possibly have known, and when Matthew Scheer's in the hospital he's interviewed by ten different folks. So there's going to be plenty of evidence for this jury to hear about, "Why are you here," the basis for the psychosis, all of those things will come out, but then to allow the parents to say, "Not only did he tell me everything that he also told the providers, he also said, 'I intend to kill myself on Saturday.'" Right? If they were to come and say something like that that totally changes the analysis in this case, that I can't now cross them on because they have an interest in the case, it's in their best interest to take the stand and say something that is different than is in the medical records. This case is about what the folks with the medical records did with that information and is that reasonable or unreasonable. We can't let the Plaintiffs or anybody with an interest in the litigation come in and change the rules by talking about conversations with presumed dead

people. That's why we had the statute.

THE COURT: All right. Well, I'll have to take a look at this one.

MR. HINSON: I think -- yeah. Yeah. Yeah. Your Honor, we don't think the Dead Man's Statute has application in a, in a wrongful death case such as this, and if Mr. Gresh would like to cross the --

THE COURT: Well, why would it not have an application? It's a statute, I mean.

MR. HINSON: Well --

THE COURT: It's under Rule -- Section 19 if I remember correct. That's evidence, but maybe I'm wrong on that.

MR. HINSON: Your Honor, I -- this, this is another issue that kind of caught us off-guard. If you could give us a little time to research it, but --

THE COURT: Okay.

MR. HINSON: -- Your Honor, I mean, I think Mr. Gresh and, and very briefly, is welcome, of course, to cross examine, he can cross examine Mr. and Mrs. Scheer and point out to the jury that they have an interest in this litigation and they have -- I mean, no different than he could anytime a Plaintiff brings a case, and he can point out their bias and why they may want to say things different, but they should absolutely be allowed to talk about the circumstances that led to them bringing their son to the emergency department.

THE COURT: All right. Well, let me take that under advisement, but it seems -- well, it doesn't seem to leave much of a loophole. It says no person shall be examined in regard to any transaction or communication between such witness and a person who at the time is deceased at the time of the proceeding. I mean, that doesn't leave much.

MR. HINSON: Your Honor, again, without the benefit of, of much time to research this issue, I'm looking at Hanahan v. Simpson, 2 -- excuse me, 326 S.C. 140 and it -- it's disappeared, Bill -- [as read], "Testimony related to interested witness's observation of testor which formed basis of their opinions of his capacity," talking about mental capacity, "was properly admitted into will contest under mental capacity exception to the Dead Man's Statute. So there's a mental capacity exception to the Dead Man's Statute and I think that would -- is -- I mean, that's just one exception we found in this case.

THE COURT: What's -- they said observations or communications?

MR. HINSON: [As read], "Testimony related to interested witness's observations of testor which formed basis of their opinions of his capacity were properly admitted in will contest under mental capacity exception." All this goes to his mental --

THE COURT: Well, that's, that's observations, though,

not communications. I mean, we got a --

MR. HINSON: Well --

THE COURT: -- case about capacity where a man lived in a tree house or something like that and somebody could certainly testify to observing that, but they couldn't -- I don't think they could testify -- I, I'm -- I see a difference between communications and observations.

MR. HINSON: Your Honor, again, if I -- just would beg some indulgence to research this.

THE COURT: Okay.

MR. HINSON: Because this is, this is a very large portion of this case.

THE COURT: All right. Anything else before we break for lunch?

MR. HINSON: Yes, Your Honor. We have one more motion in limine.

MR. PADGET: Judge, there's a -- we've been provided today, and I will say I believe for the very first time with some, some photographs and some extractions that a potential expert, a gentleman named Clark Walton, who's a -- actually, excuse me, a lawyer from North Carolina who has some forensic training, that he extracted off a cell phone that we, we believe was Matthew's cell phone and that he, he took some extractions off of it. We took his deposition. He didn't -- he couldn't tell us a lot about what he knew or didn't know at

his deposition, and he didn't bring a copy of his file or his extractions with him to that deposition, and we asked him, "Could you provide it to us later," and he said, "Sure," that kind of thing at the deposition, and we have not to this -- until just literally a few minutes ago, have not been provided with any information that he pulled off that cell phone. There's -- I think there's a, a number of things, but primarily there is a photograph, and I, I think perhaps if we deal with this photograph first it might shortcut some of these arguments about Mr. Walton's testimony and the propriety of it, whether or it's not been properly disclosed in discovery and everything else, but, Jack, do you mind -- do you have a copy of the photograph?

MR. GRESH: I do.

MR. HINSON: Jack, can we -- for the purpose of the, of the motion I think we should look at all the photographs that are at issue in this, and I think they all -- we want to move to keep all of them out so.

MR. PADGET: Sure.

MR. GRESH: Okay.

THE COURT: All right. They're going to have to be marked somehow so we can have a record. You want to mark them as one and --

MR. PADGET: Your Honor, we're, we're --

THE COURT: You want to mark that as Court's Exhibit?

MR. PADGET: That's, that's what I was going to do.

THE COURT: She -- I don't mark them, the court reporter.

(Court's Exhibit Number One [Photographs of Matthew Scheer] appropriately marked.)

MR. PADGET: And Your Honor, this is, again, a photograph that the Defense, Defense's forensic witness says to have pulled off Matthew's cell phone at some point in time. We don't know when the photograph was taken, at least I don't believe we know when the photograph was taken. We don't know when it was taken, under what circumstances it was taken, that kind of thing. It's just a photograph. There's nobody to testify to it. Obviously, Matthew's not here to testify to it about what it means and those kinds of things. We believe the Defense is offering this or at least we've been told that it's for the purposes of establishing that he may have some other goals in his life other than some typical goals and that he believes -- the Defense contends this may be some evidence in support of the fact that he may have gone missing as opposed to drowned after going in the ocean as observed by Mr. Doherty as will be testified. I, I'm not sure, number one, we believe this is Rule 403. This is -- this, this type of evidence is way more prejudicial than it is probative --

THE COURT: Yeah. And I'm looking at the picture and it appears it's got him in female garb.

MR. PADGET: Correct, Your Honor. There's, there's,

there's --

THE COURT: What's that relevant to, Mr. Gresh?

MR. GRESH: Your Honor, there's a couple of things. The -- just to kind of, kind of go back to how this picture came about, the cell phone was given to Plaintiff's cell phone forensics guy who downloaded all of the data. So they've got all the data. They gave the data to my forensics guy who looked at it and said that picture in particular was a picture that was on the cell phone that was deleted in January after Matthew presumed to be drowned by Mr. Scheer. Right? That's the testimony that I believe is going to come from this witness stand, that he intentionally deleted evidence so as not to, in his words, inflame the mother who just lost her son, and I understand that, but when you are already contemplating litigation, you take the cell phone to a store and have it wiped and it doesn't wipe this, and you go back and delete it and you don't tell me about it in discovery, you don't put it in an interrogatory when I ask all pictures, are there any pictures, you hide it, it goes to spoliation of evidence claim, and the jury should be able to infer, "Wait a minute, why would they delete it," and if they believe Mr. Scheer and his argument that, "Okay. I understand that this is something that is so different than his mom believed her son to be, that's a good enough explanation," then they don't have to do anything with it, but the evidence in this case is

going to be when Matthew went into the water, if that's what the jury believes, and I'm not sure they get there, but if they do believe that Matthew went into the water, the only other evidence they're going to have is his boss saying, "Matthew told me a couple of days before this that he was quitting and getting his life together, moving away," okay. Now, I've got him telling his dad that, that he wanted to go essentially live off the land, so to speak. I've got another piece of information, another thing the jury should be able to consider that would allow them to say, "Wait a minute, maybe he didn't walk into the ocean to kill himself."

THE COURT: Well, how does this relate to that?

MR. GRESH: Maybe he walked in there to start a new life and came up out of the water and said, "I am -- I'm now reborn and I went," and maybe now he's living somewhere else.

THE COURT: Well, that, that, I mean --

MR. GRESH: This, this whole case is speculation that Mathew drowned or had any kind of harm occurred to him in the water. This is one thing that, that the jury should be able to infer, "Wait a minute, you guys knew about this. You intentionally deleted it. Why?" Because it was further proof that maybe Matthew is still alive. Maybe he's just now -- maybe he didn't want to live under the strong --

THE COURT: Well, but you, you --

MR. GRESH: -- rigors of a Catholic household anymore.

THE COURT: -- you have it now. I mean, spoliation of evidence usually means, in my recollection, that the evidence is gone.

MR. GRESH: Yeah. But I had to, I had to pay 50 grand or something for a forensics guy to go digging back through it, and they didn't even tell me they deleted it, but I, I had to go find the fact that they deleted it. Not only did they delete that picture, all of his texts, his telephone calls. All of the other pictures I can't, I can't recreate. I can only recreate, you know, a dozen or so of the photographs, but what was in Matthew's state of mind, what his plan was, was his plan to fake a death, was his plan to, "I'm going to go live as a woman," was his plan to go live off the land like a lot of my family does. All of that was intentionally deleted by the Plaintiffs, and this is one thing that I can prove, the testimony was at Clark's deposition, "This picture was taken on a particular date and intentionally deleted by the dad on some other date," and I think that that comes in. If, if Mr. -- excuse me, I apologize, Mr. Scheer testifies on the stand that he deleted a picture or pictures because he didn't want his mom to see them, then I will not show that picture then. I will not call my witness, but if he gets up there, and I don't believe he's going to, I believe he is an honest man as long as the day is. If he gets up there and says, "I did it, and I deleted it, and here's the reasons why I did it," then

I'm not going to show the picture, but I think if he doesn't then I have to be able to cross him on, "Is this the picture."

THE COURT: I agree you could use it for cross. I, I don't think there's any -- I don't see why he couldn't use it for cross if --

MR. PADGET: Well, Your Honor, I guess I'll back up, we're talking about the, the, the potential admission of, of the photograph, and as it relates to the admission of the photograph we think this is classic 403 for, for obvious reasons in the photograph. It doesn't go to any claim or defense in the case because at -- there's --

THE COURT: Where would it have some impeachment value?

MR. PADGET: Impeachment value as to whether or not my clients deleted information off the phone?

THE COURT: Yeah.

MR. PADGET: Well, the, the issue there is, Your Honor, and first of all, none of -- I would submit and I've got an entire memo about Mr. Walton. It's way too long. It's 20 pages long with lots of exhibits if the Court wants to see it, but the, the, the major point about it is Mr. Walton has not -- he can't say who deleted what. He's, he's testified to that in his deposition. He doesn't know that. He doesn't -- he cannot establish the chain of custody for the cell phone. So under some -- under the Jamison case in '09 and a few other cases that have come out since, if you -- you can't testify as

to a forensic analysis without chain of custody. It's, it's black letter law, and, and Mr. Walton does not say -- he does not say at any point in time that anybody -- that Mr. Scheer or the family intentionally deleted anything. He doesn't even know. He just says, "There's some data missing." That's what he opines to. He also agrees and what, what actually happened in this circumstance is the phone, like many, is passcode protected, and you may remember when the, the guy shot up the, the, the place out in L.A. the U.S. Government and the CIA could not get into a password protected cell phone, and this was a password protected cell phone. Mr. Scheer took it to Verizon. They did a factory reset. When you do a factory reset you lose data and the data is lost. This was not an intentional destruction of anything.

Now, it's -- the only -- the questioning then related to this particular photograph I, I'm not sure how -- if Mr. Scheer deleted that photograph at any point in time off his phone, how does that relate to any claim or defense in the case?

THE COURT: Well, I'm inclined to agree that that's one thing I can look at, but if you get to the point where it becomes an issue, we certainly could have a proffer outside the jury to look at whether or not there's any basis to allow it or to disallow it.

MR. PADGET: Well, certainly we would, we would agree,

Your Honor, that it, it would certainly -- any proffer would need to be outside the jury. I, I think primarily we were focused on with this the admission of that particular photograph into evidence. Now, whether or not --

THE COURT: Well, that -- that's why, I mean, it would be a, be a proffer because I think if -- it's got to be -- for the Defendant to get to it, based on what I'm hearing, Defendants got to make a showing that Mr. Scheer deleted it.

MR. PADGET: That, well, that -- we agree with that, Your Honor, and that -- also that that deletion --

THE COURT: And I don't know --

MR. PADGET: -- bears on some claim or defense in the case to be put in front of the jury. I mean, for example, if his testimony is, "I, I deleted this photograph because I didn't want my wife to see this photograph of our son after his death," how does that go to any particular claim or defense in the case? I -- I'm not sure it does, and so that, you know, the act of the deletion itself still has to be relevant evidence that's not otherwise prejudicial to get in, and, and that's, that's the connection that we think is missing here is what's -- how is that, that particular testimony where there's no other testimony that it was an intentional deletion in furtherance of some conspiracy for Matthew to disappear and never be found again, despite what's going to be some great evidence to the contrary that we intend

to put up, that act of the deletion still is not relevant to any claim or defense and is certainly probative and for all those reasons, Your Honor, we'd ask that, that the Court keep it out and we not go down this rabbit hole about what's on the phone or not on the phone in this case.

MR. GRESH: One of the challenges that I have in linking that picture up to a lot of other things is they deleted the rest of it. Right? They left me one little nugget that I had to pay a guy to assemble all of the pixels, right, to find this picture when he's going to say, "I deleted this. I did it on purpose, but I had a really good reason why I did it." That's okay. That testimony can come in, but if he says he didn't delete it, then I should be able to come in and say, "Yes, you did," and I can prove it, I can prove on the date, he says it was always in his custody other than the, the Verizon thing. Verizon has a date. I know when Verizon wiped the phone. This is after that date. This is Mr. Scheer, and I think he admits to all this. We're, we're having a debate that I don't think we're really going to have when the evidence comes out. This is going to be one thing a jury should be able to consider is spoliation, why would they do that, what's the inference that they can draw.

THE COURT: Well, spoliation though means that as I understand it and I can repeat myself that there's something that's missing, not that, not that there's something that was

withheld at or, or some, some nefarious, allegedly nefarious reason for doing it.

MR. GRESH: Yeah. And I, and I think the fact that they tried -- we shouldn't let a spoliator off the hook because they're bad at spoliating evidence. Right? He tried to. He tried to delete this picture and I found it. The fact that he did delete other pictures that I can't find, he did delete all the calls and the texts and the contact lists that I can't put back together. This is just one thing that it leads to there has to be a reason why. Why would somebody do this? He's going to offer an explanation, and if the jury takes that explanation then they won't draw any inferences, but if a juror says, "No. That's not what a reasonably prudent person would do under these circumstances," then they have to be entitled to draw an inference as to why, "What are they hiding here?"

THE COURT: Well, I --

MR. PADGET: Judge, real quick on a couple of points. One, there's zero evidence in the record, zero evidence in the record that Mr. Scheer or anybody else intentionally deleted all of this information. There's, there's -- and there's no evidence of actually him deleting this singular picture, although we -- because there's no question that's ever been asked about that, and in speaking with Mr. Scheer he said, "I do think I remember at some point not sharing that singular,

one particular piece of information," but there is zero evidence that he deleted all these calls or emails or anything else. In fact, the only evidence will be is that he took the phone to Verizon and they did a hard reset, which makes complete sense for anybody who has a cell phone and doesn't have a passcode.

Next, the spoliation is, as Your Honor indicates, is a doctrine when you don't have the evidence. Here we do have the evidence and whether or not the, the Court charges the jury with a spoliation charge, that's your determination, Your Honor. It's not for the jury to determine whether or not something was spoliated. That doesn't go to the jury. Your Honor makes a determination whether or not something's spoliated, and if so, then gives a charge on spoliation.

THE COURT: Well, he -- I think he's arguing spoliation for the admission, not for a charge. Is that correct?

MR. GRESH: I think it's, I think it's both. He's going to -- I have to lay the predicate that information was intentionally deleted and then once that has been factually proven then I would ask Your Honor for a charge to the jury that they can infer from that deletion that whatever was deleted was harmful to the Plaintiff's case as I think how, how the law goes.

MR. PADGET: Judge, this -- by the way, this deletion was six months before anybody ever consulted a lawyer, and, and

over a year before a lawsuit was filed. This was not after anybody had been put on notice of preserving evidence or anything like that. This was a father looking through what was left of his cell phone after a hard reset and finding a singular photograph. This was --

THE COURT: Well, I'm not -- I'm not sure spoliation has to be done for any legal connected reason.

MR. PADGET: Well, usually it has to be -- I think litigation has to be contemplated in order for the duty to preserve any of the evidence to arise.

THE COURT: You're, you're, you're probably right.

MR. PADGET: Which is why we send these letters, you know, and eventually we get a claim --

THE COURT: Yeah.

MR. PADGET: -- and we send a nasty letter to the other side saying preserve everything and they do the same. None of that -- at this stage this was four months, five months after Matthew's death and disappearance. There wasn't any contemplation of the suit at that time, and there had not been any lawyers contacted. So for all those reasons, Your Honor, we don't think this is a spoliation situation and there's certainly no reason for that evidence, for that photograph to ever be seen by this jury.

THE COURT: All right. Well, let, let me think about it. All right. Anything else before we break for lunch?

MR. HINSON: Yes, Your Honor. I've let Mr. Padget argue this one. Yeah. I'll argue mine. Your Honor, we, we have a motion for contempt. If I may approach.

THE COURT: Yeah. Is that in limine motion? I mean, is that something we need to take up right now?

MR. HINSON: No. Your Honor, it's a motion for contempt, but we can -- this can be held later.

THE COURT: Yeah.

MR. HINSON: It has to do with --

THE COURT: If we don't have to do it right now.

MR. HINSON: Okay.

THE COURT: I mean, it's just getting toward lunchtime and I'm not a pig, but it's getting -- and then we got a jury coming back at two. So I mean, we're, obviously, we're not going to be ready by two.

MR. HINSON: This certainly can be dealt with later, Your Honor.

THE COURT: Yeah. That's what I would think.

MR. HINSON: Yes, sir.

THE COURT: All right. Well, let's break till 2:15 and that will give us an hour and the jury should be ready at that point. All right. Have a good lunch.

MR. HINSON: Thank you, Your Honor.

MR. GRESH: Thank you, Your Honor.

OFF THE RECORD

(On the record. The following takes place outside the presence of the jury venire.)

THE COURT: All right. Anything else before we get the jury up?

MR. GRESH: Nothing, Your Honor.

THE COURT: Again, the strikes are four and four and then one and one on the alternates and we'll draw two alternates since this case looks like it'll take the full week or more. All right. Send us up a jury. Counsel I believe what I should tell the jury as far as the facts simply have to ask them if they know anything about the case? Plaintiff alleges --

MR. HINSON: Matthew Scheer, a 26-year-old who had come to the hospital for treatment of psychosis was improperly released from the hospital at approximately 1:30 in the morning. Plaintiff alleges that he drowned in the Atlantic Ocean shortly thereafter. Defendants have denied the allegations and --

MR. GRESH: And I, I don't -- wouldn't ask the Court tell them he was treated for psychosis. That's one of the things we're arguing about.

THE COURT: Yeah. Just, I think just that this involves the -- Plaintiffs allege that, that the, that Matthew Scheer, after being treated by the Defendants, took his own life by drowning.

MR. HINSON: Well, actually, I mean, I hate to, to

nitpick, Your Honor, but it's part of our assertion that he never received any treatment while he was there. Plaintiffs believe --

THE COURT: Well, after being --

MR. HINSON: Admitted to the hospital and subsequently released.

THE COURT: How about that?

MR. GRESH: He left AMA. He -- I don't want them to think we just let him go.

THE COURT: Well, all, all I just -- I just got to have enough so --

MR. GRESH: Yeah.

THE COURT: Just --

MR. PADGET: A med-mal case involving the discharge of a patient from the hospital.

MR. GRESH: Yeah.

MR. HINSON: That would be fine.

THE COURT: Well --

MR. HINSON: A med-mal case involving the discharge of a patient from the hospital.

THE COURT: And the patient's name is Matthew Scheer.

MR. HINSON: Matthew Scheer.

THE COURT: All right.

MR. HINSON: Yes. Yes.

THE COURT: Involving the discharge from a hospital?

MR. GRESH: Yep. Well, that's technically he's not discharged. He left.

THE COURT: All right. Medical-mal --

MR. GRESH: I think it is a -- it's a difference. I'm not sure if it's -- I mean, I just don't want the Court to comment early on that he had been --

THE COURT: Yeah. I don't want to -- yeah. That's, that's why -- what's the date of his -- the alleged death? What's the date? What's the date?

MR. GRESH: October 3rd, 2015.

THE COURT: How about on October 3rd, 2015, Matthew Scheer took his own life after being a patient at -- I mean, this is what, what the allegations are --

MR. HINSON: That would be fine with the Plaintiff, Your Honor.

THE COURT: I'm just saying they allege it.

MR. GRESH: Yeah.

THE COURT: And I can say which, which Defendants deny.

MR. GRESH: Okay. Your Honor, I think I left a folder in the break. Can I run right quick?

THE COURT: Okay.

(Whereupon, the following takes place in the presence of the jury venire.)

THE COURT: Got them? All right. We'll have the sheriff check on Sheila, Shannon Doctor or Doster [sic]. I can't

read. It's crossed out.

THE COURT: Members of the jury panel, we're going to draw the jury in the first case for trial this week. It's David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer versus Southern Myrtle Inpatient Services, LLC, Nirlep Patel and Rachel Ash-Bernal, M.D.'s. The allegation of the Plaintiffs, that is David Scheer, is that on October 3rd, 2015, Matthew Scheer took his own life after being a patient of the Defendants and this is disputed by the Defendants. I've got certain questions I need to ask you, but first I want to counsel for the Plaintiff to introduce themselves and tell you who they have seated with them, and then I'm going to ask the Defendants to do the same.

MR. HINSON: My name is Brink Hinson. I'm an attorney in Columbia, South Carolina. This is my law partner, Bill Padget. These are my clients, David Scheer and Debbie Scheer.

THE COURT: All right. Counsel.

MR. GRESH: Good afternoon. I'm Jack Gresh. I have seated here with me today Lauren Spears, my law partner, with the firm Hall Booth Smith in Mount Pleasant, South Carolina. This is Dr. Rachel Ash-Bernal and Dr. Nirlep Patel.

THE COURT: All right. First, do any of you on the jury panel know anything about this case, heard about it from any source whatsoever or formed any opinion about the matter at issue here, which is -- I've already related to you? If so,

please stand.

(No response.)

THE COURT: No one stands.

Do any of you know any -- let me ask it like this, have any of you been represented by any of the attorneys to whom you've just been introduced? If so, please stand.

(No response.)

THE COURT: No one stands.

Are you related by blood or marriage to the late Matthew J. Scheer, David L. Scheer, Nirlep A. Patel or Rachel Ash-Bernal? Any of you related by blood or marriage to any of those individuals? If so, please stand.

(No response.)

THE COURT: No one stands.

The -- I'm, I'm going to go over a list of possible witnesses that will testify. I don't think all these witnesses will testify. It's a long list. If you're related by blood or marriage or know any of these individuals please stand when I call their name: Debra Scheer, Erik Scheer, Jim Cinelli, Duane Doherty, Gregory Phaebus, Dr. Robert Robinson, Dr. Kenneth M. Scissors, Scissors it looks like, Scissors, Dr. Timothy Malone, Jeremy Gilbert, Kimberly Reich, Shane Caldwell, Dr. Adedapo Oduwole, Mike Groce, Courtney Greer, David Masonoff, Tushara Rhodes, Gina Trahey, Dr. Theresa Cuoco, Dr. Timothy Osbon, Dr. Oscar Lovelace, Dr. James

Ballenger, Dr. Oliver Wood or Dr. Clark -- Clark Walton -- no, he's not a doctor. I'm sorry, just Clark Walton. Any of you related by blood or marriage to any of those individuals?

(No response.)

THE COURT: No one stands.

Do any of you have any interest in Southern Myrtle Inpatient Services, LLC? Do you own any stock in it? Do you own -- do you contract with it in any way? Do you deliver paper to it or deliver soft drinks or something like that or water to it, any connection whatsoever with Southern Myrtle Inpatient Services? If so, please stand.

(No response.)

THE COURT: No one stands.

Have any of you had any interactions, business, social or otherwise with Mr. -- with David Scheer, Dr. Patel, Dr. Ash-Bernal or any person affiliated with Southern Myrtle Inpatient Services? If so, please stand.

(No response.)

THE COURT: No one stands.

Are any of you an attorney or a paralegal?

(No response.)

THE COURT: No one stands.

Are any of you affiliated with Grand Strand Regional Medical Center, again, own any stock in it, work for it or deliver -- have any contractual relationship with it? If so,

please stand.

Yes, sir, your name and number?

JUROR NUMBER 392: Yes, sir. My name's Steve Williams, Juror Number 392. My business, Black Mule Print, does some printing for Grand Strand Regional Medical Center.

THE COURT: In spite of that would you be able to be fair and impartial to the Plaintiff and the Defendant in this case?

JUROR NUMBER 392: Yes, sir.

THE COURT: All right. You can be seated. Thank you.

Yes, sir, your name and number?

JUROR NUMBER 333: Ellis Smith, 333. My wife works at Grand Strand.

THE COURT: All right. What does she do there?

JUROR NUMBER 333: Respiratory therapy.

THE COURT: Would that fact affect your ability to be fair and impartial in the trial of this case?

JUROR NUMBER 333: No, sir.

THE COURT: Would you be able to base your verdict on the law and the evidence as developed in the trial?

JUROR NUMBER 333: Yes, sir.

THE COURT: All right. Thank you. You can remain with us.

Have any of you ever testified as an expert witness in a lawsuit?

(No response.)

THE COURT: No one stands.

Have any of you ever been a Plaintiff or a Defendant in a lawsuit, and I'm not talking about family court, that's -- or, or probate court, but in a circuit court, have any of you been a Plaintiff or a Defendant, anything like a wreck case, a slip and fall or medical case like this? If so, please stand.

(No response.)

THE COURT: No one stands.

Do any of you -- this is personal and they've asked me to ask this -- do any of you suffer from epilepsy or have a family member that has epilepsy? If so, please stand.

(No response.)

THE COURT: That's fortunate no, no one stands.

Do any of you have a close family, a friend or an immediate family member with epilepsy? If so, please stand.

All right. Yes, sir, your name and number?

JUROR NUMBER 72: Tom Cochrane, 72. My mother has epilepsy.

THE COURT: Would that fact affect your ability to be fair and impartial in the trial of this case?

JUROR NUMBER 72: No, sir.

THE COURT: All right. Thank you. I appreciate you standing.

The next is very personal, but I have to ask it, but I'm not going to ask you to explain it. All I'm going to ask you

to do is stand if this relates to you.

Have any of you been diagnosed with a mental illness? If so, please stand.

(No response.)

THE COURT: Again, that's very sensitive. No one stands.

Do any of you have a family member or immediate friend who has received medical treatment or been diagnosed with a mental illness? If so, please stand.

All right. Your name and number?

JUROR NUMBER 140: Cynthia Grant, 140.

THE COURT: And what's the relationship, without going into detail?

JUROR NUMBER 140: Daughter.

THE COURT: Would that affect your ability to be fair and --

JUROR NUMBER 140: No, sir.

THE COURT: Okay. Thank you. Yes, ma'am, first, first lady.

JUROR NUMBER 371: Crystal Vereen, Number 371. My sister is diagnosed schizophrenic.

THE COURT: Do -- would that affect your ability to be fair and impartial in this trial?

JUROR NUMBER 371: No.

THE COURT: Okay. You can be seated. Thank you. Yes, ma'am.

JUROR NUMBER 344: Stacey Stewart, 344, my father suffered from depression and anxiety.

THE COURT: Would that affect your ability to be fair and impartial in this trial?

JUROR NUMBER 344: No.

THE COURT: All right. Thank you. Oh, I'm sorry.

JUROR NUMBER 338: 338. My mother had depression years ago.

THE COURT: Would, would that affect your ability to be fair and impartial in this trial?

JUROR NUMBER 338: No, sir.

THE COURT: All right. Thank you. You can be seated.

I'm not going to ask 14 because I've asked 11 and that takes care of 14.

Do any of you have a close friend or immediate family member who has been hospitalized as a result of mental illness? That would include those of you who have already stood.

(No response.)

THE COURT: No one stands.

JUROR NUMBER 338: My mother was hospitalized years ago.

THE COURT: All right. Stand up. Your name and number, name?

JUROR NUMBER 338: Yvonne Snider, 338.

THE COURT: And would that affect your ability to be fair

and impartial in this trial?

JUROR NUMBER 338: No, sir.

THE COURT: All right. You can be seated.

Another question is very sensitive, but I have to, have to ask it. Do you any of you or -- well, have any of you had a close friend or immediate family member who has died as a result of suicide? If so, please stand.

All right. Again, I'm just going to ask your name and number. I'm not going to ask you to go into details. We'll start back in the far corner. Your name and number?

JUROR NUMBER 51: My name is Randy Buckland, Number 51.

THE COURT: All right. Man in the green shirt?

JUROR NUMBER 51: It was a friend that had committed suicide.

THE COURT: All right. I, I -- you don't, you don't need to go into the particulars, just the fact that you're standing tells me all I need to know.

Man with the green shirt, your name and number?

JUROR NUMBER 366: Eugene Town, 366.

THE COURT: Lady in the gold sweater?

JUROR NUMBER 215: Kristin Levy, 215.

THE COURT: Man with the purple shirt.

JUROR NUMBER 274: David Peterson, 274.

THE COURT: All right. Yes, ma'am.

JUROR NUMBER 338: Yvonne Snider, 338.

THE COURT: All right. Yes, sir.

JUROR NUMBER 112: 112, Nushan Fashjian.

THE COURT: Yes, ma'am.

JUROR NUMBER 203: Sue Kopil, 203.

THE COURT: All right. Any of you standing, if the fact that you have that occurrence in your family or a friend, if that would prevent you from being fair and impartial in this trial please raise your right hand.

All right. Yes, sir, your name and number again?

JUROR NUMBER 274: David Peterson, 274.

THE COURT: All right. You'll be excused. Don't leave. Just have a seat. He's the only one that raised his hand. Please be seated.

Do any of you -- have any of you had an immediate family member who has been involuntary committed to a hospital for mental illness, if so -- mental health issues? If so, please stand.

(No response.)

THE COURT: No one stands.

Oh, yes, ma'am, your name and number again. We have to --

JUROR NUMBER 338: Yvonne Snider, 338.

THE COURT: All right. Yes, ma'am.

JUROR NUMBER 371: Crystal Vereen, 371.

THE COURT: Yes, ma'am.

JUROR NUMBER 140: Cynthia Grant, 140.

THE COURT: All right. Would any of you because of this be -- stay, stay up, please, ma'am -- would, would any of you be unable to be fair and impartial in this trial as a result of why you're standing? If so, raise your right hand.

(No response.)

THE COURT: None of them do. Thank you. You may be seated.

Have any of you had any experience with a medical provider, doctor, healthcare, hospital, anything like that that would negatively affect your feelings and cause you to be unfair to the medical Defendants in this case? If so, please stand.

(No response.)

THE COURT: No one stands.

Have any of you ever filed a claim against a doctor for any reason whatsoever? If so, please stand.

(No response.)

THE COURT: No one stands.

I'm not going to ask 20. I'm not going to ask 21. I'm going to tell them that or 22. 23, has any juror ever been involved with a case of a missing person? If so, please stand.

(No response.)

THE COURT: No one stands.

I think that covers 24 and 25 on the Defendants'.

I asked if any of you had any relationship with Grand Strand Regional or Southern Myrtle. Have any of you in the past had any relationship with either of those -- you or a member of your immediate family had any relationship or previously been employed by Southern Myrtle Inpatient or Grand Strand? If so, please stand.

Yes, ma'am, your name and number?

JUROR NUMBER 344: Stacey Stewart, 344. I was an operating room tech at Grand Strand Regional Medical Center.

THE COURT: Would that affect your ability to be fair and impartial in this trial?

JUROR NUMBER 344: No, sir.

THE COURT: Thank you. You can be seated.

Have any of you or a close friend -- oh, I'm sorry. Yes, sir, your name and number?

JUROR NUMBER 191: 191, Greg Johnson. My wife worked at Grand Strand as an RN.

THE COURT: Would that affect your ability to be fair and impartial in the trial of this case?

JUROR NUMBER 191: No, sir.

THE COURT: All right. Thank you. You can be seated.

Have any of you or a member of your family had -- well, not any of you obviously, have any of your family members or close friends died as a result of drowning? If so, please

stand.

All right. We'll start over here. Your name and number?

JUROR NUMBER 380: 380, Tim Ward, and one of my best friends passed away from drowning.

THE COURT: Would that affect your ability to be fair and impartial in this trial?

JUROR NUMBER 380: No, sir.

THE COURT: Yes, sir. Your name and number?

JUROR NUMBER 372: Quincy Vereen, 372, one of my best friends when I was 15 died.

THE COURT: Would that affect your ability to be fair and impartial in this trial?

JUROR NUMBER 372: No, sir.

THE COURT: All right. Thank you. Would any of you be unable to reach a verdict awarding monetary damages as compensation for someone's estate if you found that person's -- was -- death was caused wrongfully by another? If so, please stand.

(No response.)

THE COURT: No one stands.

Is there anything you've heard or believe that would prevent you from rendering a verdict against a medical provider? If so, please stand.

JUROR: Against what, sir?

THE COURT: A medical provider like a hospital or doctor,

chiropractor, anything like that.

(No response.)

THE COURT: No one stands.

I'm not going to ask 12 or 13.

Is there anything in your background or in your experience that would -- that -- anything you've seen or heard that would make you unable to render a verdict for punitive damages if you thought the evidence supported it? If so, please stand.

(No response.)

THE COURT: No one stands.

No. You've already been excused.

JUROR: No. Over there, sir.

THE COURT: Oh, I'm sorry. Yes, ma'am. Your name and number again?

JUROR NUMBER 371: Crystal Vereen, 371. I don't, I don't know. I mean, I, I've suffered a loss of a child as well. It's not to suicide, but I would -- I, I, I can't really say how I would --

THE COURT: Do you think you --

JUROR NUMBER 371: I know it's not a criminal case. I, I don't --

THE COURT: Do you believe you could not be fair and impartial?

JUROR NUMBER 371: I would try to be, but honestly I

can't say I would.

THE COURT: All right. Well, I'll excuse you then.

JUROR NUMBER 371: Okay.

THE COURT: Just have a seat. Thank you. I appreciate your honesty.

Have any of your or a member of your immediate family been employed by an insurance company? If so, please stand.

(No response.)

THE COURT: No one stands.

JUROR NUMBER 91: I'm an insurance agent.

THE COURT: All right. Well, you're employed. All right. Stand, stand up again. Stand up again. Your name and number?

JUROR NUMBER 91: 91, Tracy Dilligard.

THE COURT: Would that affect your ability to be fair and impartial in this trial?

JUROR NUMBER 91: No.

THE COURT: All right. Thank you.

JUROR NUMBER 395: 395, I had sold insurance like ten years ago.

THE COURT: Would that affect your ability to be fair and impartial?

JUROR NUMBER 395: No. Not at all.

THE COURT: All right. Thank you.

All right. I'm not going to ask any of the other ones.

Anything that I haven't gone over that's already been submitted? Anything else from Plaintiff?

MR. HINSON: No, Your Honor.

THE COURT: Defense?

MR. GRESH: Nothing, Your Honor.

THE COURT: Finally, do any of you know of any reason whatsoever why you could not or should not serve as a fair and impartial juror in the trial of this case? If so, please stand.

(No response.)

THE COURT: No one stands.

Now, the way we draw jurors in this case is a list is prepared and from that list each side has a right out of the first 20 individuals to strike four, excuse four, which leaves 12 jurors. Plaintiff has four strikes. Defense has four strikes. In this case we'll draw two alternates. As to the first and second alternate each side has one strike as to the alternate, leaving us with 12 jurors and two alternates, for a total of 14. This'll take a few minutes because we have -- cannot prepare the list until we've gone over the questions I've gone over and received the answers I've received. So we'll prepare that list, give it to the attorneys and I will give them some time to go over the list with their clients. They can leave the room and, and find a suitable place to meet and go over it. We're not going to take a break, but we'll be

at ease. All right. Could I have a list? Do I have a list?

THE CLERK: Okay.

THE COURT: Is this my list?

THE CLERK: Yes, sir.

THE COURT: Okay. Thank you.

THE CLERK: You're welcome.

Start with the numbers one through 20.

MR. GRESH: Your Honor, can we have a couple of minutes to confer with --

THE COURT: Yeah. Let -- let's -- I said I'm ready to strike. I, I back up. Take about five or 10 minutes, and again, you can leave the room if you wish. I, I apologize. That's my error.

MR. HINSON: Thank you, Your Honor.

OFF THE RECORD

(On the record. The following takes place in the presence of the jury.)

THE COURT: All right. Plaintiff strikes first using the numbers on the far left.

MR. HINSON: Plaintiff strikes Juror Number 17.

THE CLERK: Plaintiff strikes Juror Number 17.

MR. GRESH: Defendants strike Juror 18.

THE CLERK: Defendants strike Number 18.

MR. HINSON: Plaintiff strikes Juror Number 10.

THE CLERK: Plaintiff strikes Number 10.

MR. GRESH: Defendant strikes Juror Number Four.
THE CLERK: Defendant strikes Juror Number Four.
MR. HINSON: Plaintiff strikes Juror Number 12.
THE CLERK: Plaintiff strikes Number 12.
MR. GRESH: Defendant strikes Juror Number 20.
THE CLERK: Defendant strikes Juror Number 20.
MR. HINSON: Plaintiff strikes Juror Number Seven.
THE CLERK: Plaintiff strikes Juror Number Seven.
MR. GRESH: Defendant strikes Juror Number Nine.
THE CLERK: The Defendant strikes Juror Number Nine.
Okay. For your first alternate Number 21 through 23.
MR. HINSON: Plaintiff strikes Juror Number 23.
THE CLERK: Plaintiff strikes Number 23.
MR. GRESH: Defendant strikes Juror 22.
THE CLERK: Defendants strike Juror Number 22.
For your second alternate, Number 24 through 26.
MR. HINSON: Juror -- Plaintiff strikes Juror Number 26.
THE CLERK: Plaintiff strikes Juror Number 26.
MR. GRESH: Defendant strikes Juror 25.
THE CLERK: Defendant strikes Number 25.
All right. May we review your strikes?
Plaintiff strikes Juror Number Seven, Number 10, Number 12, Number 17, Number 23 and Number 26. Is that correct?
MR. HINSON: That's correct.
THE CLERK: And the Defendant strikes Number Four, Number

Nine, Number 18, Number 20, Number 22 and Number 25. Is that correct?

MR. GRESH: That's correct.

THE CLERK: Okay. As I call your name if you'll come have a seat in the juror box, please.

Number 352, Rodney Suggs; Number 175, Nathan Hoffner; Number 10, Elvis Avila; Number 278, Henry, is it Pigate.

JUROR NUMBER 278: Pigate.

THE CLERK: Pigate; Number 305, Austin Royal; Number 112, Nushan Fashjian; Number 90, Kimberly Dill; Number 91, Tracy Dilligard; Number 98, Ginger Dunn; Number 78, Angelia Cox; Number 135, Joy Stevenson; Number 30, Thomas Bissett; Number 88, Sarah Dew; and Number 15, Norman Barnhill.

THE COURT: All right. I think -- anything from the Plaintiffs regarding the striking of the panel?

MR. HINSON: Nothing further from Plaintiff.

THE COURT: Defense?

MR. GRESH: Nothing.

(Remaining jury panel excused by Court with call-in instructions.)

THE COURT: Now, Madam Clerk, would you swear in the jury?

(Jury sworn by the clerk.)

THE COURT: Members of the jury panel, I'm going to chat with you just for a minute and then turn the case over to the

attorneys. They will have the right to come before you in just a few minutes and make what are known as opening statements. These statements are not testimony. These attorneys are not witnesses. The testimony will come from the witnesses who testify from the witness stand and from any exhibits that are introduced. So what the attorneys tell you is simply they're telling you what they believe the evidence will show in this trial and why you should ultimately reach a verdict for that particular party.

Now, during the -- during this -- the trial of this case, I'm going to instruct you not to discuss the case among yourselves or try to make up your own mind until I instruct you to jointly deliberate and return a unanimous verdict. Prior to that time, you don't have all the tools you need to make a fair and reasoned decision. Don't discuss the case among yourselves in the jury room. Don't discuss the case until I instruct you to jointly deliberate and return a unanimous verdict. Do not let anyone discuss this case with you outside the courtroom. If anyone does try to discuss this case with you tell them you cannot as you're serving as a juror, and report back to me if anyone does try to talk to you about this case. Do not let yourself be exposed to any news coverage. I don't know that there would be any. Don't listen, watch or let anything catch your eye or ear that could remotely deal with this trial. Your verdict must be based on

the law and the evidence that you hear in this trial.

You are the sole judges of the facts in this case. I cannot dispute any factual finding you make. That is solely your prerogative. I cannot comment or make findings of fact. That is your job. I am the judge of the law. You cannot differ with me on what I say the law is. You have to follow the law as I charge it, even if you think I charge error or even if you think the law should be different. Your oath requires you to take exception, apply the law as I charge it.

While you're out and about during the trial of this case do not use any electronic devices to obtain any information about this case. Don't get on Facebook or go to Google to find out anything about any of the terms that are used in the trial or anything about the parties that are used in the trial, about me, about courtroom procedure. Again, you have to base your verdict solely on the law and the evidence developed in the trial, and it would be improper for you to try to obtain information from any source outside the courtroom, and I include in that, don't go on Facebook and say, "Hey, I'm on a jury," because while that sounds innocuous, someone may Facebook you back or whatever is done on those things or tweet you back with something that might not be healthy for your service as a juror in this case.

In this case, you'll hear testimony from what people that are called experts. That is people who have certain expertise

in a certain area. Generally only witnesses can only testify as to something they've observed with one of their five senses. However, where an individual has certain training, experience and knowledge, that person can take facts from those facts reach an opinion. The opinion of experts are allowed into evidence solely to assist you. They're not binding on you. You can take exception as a whole or in part a witness's testimony.

You are the sole judges of the fact -- of the credibility, that is the believability of all the witnesses who testify in this case. It is solely up to you to examine the evidence and give to it the effect you believe the evidence should have, that is up to you to determine who to believe in this case.

Now, I'm going to ask you to listen to counsel. Keep in mind that they're not giving you testimony. They're just giving you their overview of the trial. Counsel. Opening, opening statement.

MR. HINSON: Your Honor, we're going to need a little bit of time to set up a projector. I've got a short PowerPoint I want to include.

THE COURT: All right.

MR. HINSON: Beg the Court's -- 15-minutes indulgence, please.

THE COURT: All right. Let, let our jury go to the jury

room and get familiar with the jury room while we take a break. This will probably be our afternoon break then and we'll try to go -- I try to run no later than five or 5:30. If we're in the middle of a witness we might go a little later than that, but I don't like to keep jurors here much later than that because you got other lives outside the courtroom. So let you go to the jury room right now while we take a break.

(Whereupon, the following takes place outside the presence of jury.)

THE COURT: All right. We'll be at ease.

MR. HINSON: Thank you, Your Honor.

THE COURT: I'll give you -- you think 10 minutes is -- well, I'll give you 15.

MR. HINSON: It, it's some technology involved in it.

THE COURT: Okay.

MR. HINSON: Fifteen, Your Honor. Thank you.

THE COURT: All right. 3:15.

OFF THE RECORD

(On the record. The following takes place outside the presence of the jury.)

THE COURT: Thank you. Take your seats. You ready?

MR. HINSON: Yes, Your Honor.

THE COURT: All right. Bring in the jury.

(Whereupon, the following takes place in the presence of

the jury.)

THE COURT: Members of the jury panel, before we hear the attorneys, I, I should have told you earlier, if you need a break, just raise your hand and with no questions asked we'll take a break. I don't want anybody to be uncomfortable sitting on the jury panel. It's hard to pay attention when you're uncomfortable, and I tell you I'll take a break when I need one. So I'm going to give you the same prerogative, and I extend that to the attorneys, too. If anyone needs a break raise your hand and we'll take a break. Counsel.

MR. HINSON: May it please the Court?

Ladies and gentlemen of the jury, this case is about two physicians who through their haste and hurry cost a young man his life and left a huge gaping hole in the hearts of a wonderful family. This case involves safety rules. Physicians should protect patients who do not have the mental capacity to protect themselves. This rule has already applied to everyone in this room. When we were children we didn't have the ability to understand and appreciate what was best for us, and a young child who's sick, who needs a shot, no matter how sick the child is, how badly he needs the medicine, only knows that that needle is going to hurt. That's all he can appreciate. The doctor, knowing the child needs the shot, will ask the nurse to come hold the child down so the child can get the healthcare that he needs, and the doctor does

that, not because he wants to hurt his patient, but because he cares, and this rule may apply to each one of us again in our lives. I saw it with my own grandmother a few years ago. She went to the nursing home, and after some time she developed some dementia. The doctor would call up my momma say, "Ms. Hinson, your momma, Ms. Janie, isn't taking her medicine. We need you to come help us with this because if you can't we're going to have to resort to some other measures." My mom and the physicians would make sure my grandmother did what was best for her, even though she didn't understand what was best for her, and there's a third category of patient that this applies to, those with mental handicaps. Some have the mental handicap at birth. Some have some sort of traumatic brain injury whether from a car wreck or whatever it may be, and others have developed some sort of mental illness, some sort of true psychological illness, and for those people with psychological illness, much like the child or the older, older person, they can't understand what's right and what's wrong, and some of them have disconnection from reality. They don't understand what's real and what's not, and psychosis is a term that you're going to hear a lot in this case. It's a mental disorder characterized by a disconnection from reality. People with psychosis, they see things that really aren't there. Sometimes they see things and they realize they aren't there, but sometimes they truly believe that what they're

seeing is real. Sometimes they hear voices talking to them. They don't realize that that voice really isn't speaking to them and others feel things or touch things that they really aren't touching, and people who are hearing voices, people who are seeing things can't make decisions for themselves and they need help from their doctors.

The second safety rule, physicians should communicate with each other or, excuse me, with their patients and with other doctors. Of all the technology that we have, MRI machines costing millions and millions of dollars, wonder drugs with a billion dollars worth of research, the most important tool is something doctors have had since there were doctors and that's communication, the most important tool they have still. They should use with their patient and with each other. "You say -- it says in the chart you're having pain. Tell me about this pain. It says in the chart that you had a cough. How long have you had it? Is it, is it getting worse," and the doctor has to talk to his patient to learn these things because the chart just may say has cough, but much more information is needed than that, and doctors have to communicate with one another.

A physician refers the patient to another physician, somebody with a higher level of specialty, call up the other doctor, "I'm sending over a patient to you. This is what I've, what I've determined, but you've got more specialty in

this topic," or doctors go on vacation. They go off shift. "I'm going on, I'm going on vacation next week. Let me tell you about a patient that I have that you may see." Doctors have to communicate. It's important for patient safety, and over the course of the next few days you will hear how these Defendants through their hurry and haste broke these simple and fundamental safety rules and caused a young man suffering from psychosis to die a horrible death drowning in the ocean.

This is a case about doctors choosing between two paths. One, it takes a little more work. The evidence will show one, one takes a little more work, but it keeps the patient safe, and the second path, it's easier, no doubt about it, but it puts the patient and others in danger.

At the end of this trial you're going to be asked to determine what is the right way and what is the wrong way to treat a patient with mental illness.

Our case takes place at Grand Strand Regional Medical Center, probably familiar with it. It's one of the bigger hospitals in the area, one of the bigger hospitals in the State, in fact. It's got 369 patient beds, does $2.7 billion worth of revenue a year.

MR. GRESH: Your Honor.

MR. HINSON: It has a level one trauma.

THE COURT: Don't, don't go into that at this point.

MR. HINSON: It has doctors and nurses working day and

night and a team of security guards available 24-7, and our case takes place primarily on Saturday, October 3rd, 2015, and it takes place at about a little bit before 1:30 in the morning, and at 1:30 in the morning, other than the ER, typically things are pretty quiet in a hospital. Most patients are sleeping. Nurses are charting. Doctors are charting. Other than the ER things are pretty quiet except for outside the ER on October 3rd, 2015, things are not quiet. There's a hurricane coming. It's a hurricane. It's already starting to rain. It's already starting to blow. It's Hurricane Joaquin that's coming. This is the thousand year flood. This is a storm that would do catastrophic damage all up and down the east coast, $200 million worth of damage. It's going to drop more rain on the Palmetto State than any other storm in a thousand years, and Hurricane Joaquin is ramping up outside.

It's about 1:30 in the morning. Dr. Ash-Bernal gets a call, gets paged that there's a patient on the second floor who's acting up, getting aggressive, yelling and screaming. She gets called to see to this patient. He's throwing a fit, and when she arrives security's already there. Security's standing in the doorway. The patient she sees has come to the hospital for psychosis. You'll see in the evidence patient's there for acute psychosis, meaning it came on suddenly. He doesn't have a history of psychosis, no mental illness in the

past, no family history of psychosis. This is something new for him, and you'll see in the evidence that earlier medical providers had found this patient to be having visual hallucinations, tactile hallucinations, meaning he's feeling things that aren't there. He's having a flight of ideas, can't keep his thoughts straight, pressured tangential speech, which kinds of goes similar to the thoughts, he's talking about all kinds of different things. He has paranoid thoughts that others are plotting against him, and the records reflect that he believes that all the food in the world has been poisoned. He thinks all the food has been poisoned by the devil. This is a man who is not in his right mind. The medical records reflect it, and as you'll see in the nursing notes he wasn't in his right mind at 1:30 in the morning, and the evidence will show that Ash-Bernal briefly walks up, takes just a bit to review the patient's chart. The patient is acting up and throwing a fit and says, "Do you want to stay or do you want to leave?" Not surprisingly, the patient who's come to the hospital for acute psychosis says, "I want to go. I want out of here."

Now, earlier he had been asked, and you'll see this in the evidence, earlier he had been asked, "Do you want us to call your father for you to speak with," and he had said no, he didn't want to speak with his father, but nobody says, "Let's call his, let's call his dad and get, get his dad down

here."

Dr. Ash-Bernal, who's looked over the patient's chart, the patient also has epilepsy, which is a, a mental disorder that has -- it causes, causes seizures, doesn't cause mental illness, per se. It causes seizures. This patient, the record reflects, hasn't been taking his anti-seizure medication, hasn't been taking the medicine he needs to prevent him from having a seizure because he thinks everything is poisoned and he also has heard a voice telling him that he's been cured. The patient is severely dehydrated and the patient's blood work is a little off. His elevated -- his white blood cell count is elevated, which means he might have an infection, also could be caused by anxiety and his bilirubin level, which is an enzyme that your livers make, his bilirubin level is raised. The man hadn't eaten in days because he thought all the food in the world had been poisoned. So he hadn't been eating, and Ash-Bernal comes to the patient says, "You could die from your psychosis. You could die from your seizures. You could die from an infection. You've got an elevated blood count, blood cell count. You understand those risks?" He doesn't even respond. He never even says yes. He's just ranting and ranting about religion. She, she calls it in the chart, you'll see this in evidence, "He interrupted his religious rant and seemed to think about my question." He never answers, and Dr. Ash-

Bernal goes and gets the form for discharging the patient against medical advice. You'll see this in the evidence. It's called an AMA form, against medical advice, and on this form she writes the patient is at risk of death, seizures and infection, seizures, psychosis and infection, "you may die," and what he has refused is treatment for these things. She writes that the psychotic patient was refusing treatment for his psychosis, and on this same form, it's a two-page form. It's front and back. It would be like this. On this same form, she signs her name certifying that the patient has the mental capacity to understand the risks and benefits of refusing treatment. She signs her name that a psychotic patient, who just moments earlier was screaming and hollering in his room, a patient who had approached the nurse's station shirtless, ripped off his armbands, was yelling at the nurses, "We cannot control him and neither can Obama," is accusing the nurses of being devil worshipers, saying, "You're all with the devil," she signs her name that he has the mental capacity to understand the risks of leaving the hospital.

The patient signs his name. He does. She instructs security to take him out. The patient has no car keys. The patient has no cell phone. The patient has no wallet. The patient has no means to get transportation, and there's a hurricane that's beginning outside, and it's 1:30 in the

morning, and the evidence is going to show you that this patient calmed down, no doubt about it. He had this outburst and he calmed down, and the evidence is going to show you that at all other points other than at 1:30 in the morning while psychotic, although he was hearing voices and feeling things and seeing things, he had still been calm and cooperative, but simply because you're calm and cooperative doesn't mean that you're safe if you're seeing things, and simply because you're calm and cooperative doesn't mean that you have the mental capacity to understand the risks you're accepting. Calm and cooperative people can calm and cooperatively walk out into traffic and cause terrible accidents if they think that they're safe doing so, and the security guard takes this patient -- back up for one second.

At no point does Ash-Bernal say, "Let's call his dad." This patient is Matthew Scheer, who you will not hear from in this trial because he not with us anymore, and the record will show that his dad, David, who was a phone call away, who was a short drive away, his name and phone number appeared in the medical record. It was at Dr. Ash-Bernal's fingertips, that David Scheer was the person to notify, the emergency contact, and Dr. Ash-Bernal doesn't call him.

You're going to hear in this case an excuse about that, this belief that, that federal HIPAA laws, privacy laws wouldn't let her call him. First of all, you'll see in the

record that never appears anywhere. You'll see in the record, it's completely devoid of any mention, "I really wanted to call his dad, but I don't think HIPAA would let me." That never appears in the record ever. It only came up after this lawsuit, and you're also going to hear evidence of how that's untrue, that she could have called him, the dad. First of all, he never, never revoked this consent. You will find nothing in the record where he ever said that David Scheer was not the person to notify. He didn't have the capacity to do it, and he didn't do it anyway or try to do it. He only said, "I don't want to talk to my dad," which is a much different statement.

The evidence will show that even if Dr. Ash-Bernal wasn't sure about the rules of HIPAA, even if she wasn't -- didn't -- wasn't exactly sure, the answers to those questions were a phone call away because the hospital has a chain of command which is available 24-7 and it goes all the way up to the CEO of the hospital. If you have a question about some sort of legal issue, a doctor can get on the phone and find out the answer any time of day. She didn't do that. The evidence is going to show didn't even think about it, and with regard to this calling the dad, the evidence is going to show she had another option, pick up the phone, "Mr. Scheer, not real sure about privacy laws. So I'm just going to say come down to the hospital. I can't tell you any more than that, I don't think.

Just come on down to the hospital." That's all she had to do, but she didn't. She chose not to.

Mr. Matthew Scheer is shown to the door by the security guard. The evidence is going to show 1:30 in the morning Matthew just takes off in a light jog, doesn't have a car, doesn't have anywhere to go, doesn't have a way to call an uber or a taxi, and the evidence will not show was what was actually in Matthew's mind. We'll never know, but we do know where he went.

Around 2:00 o'clock, approximately 30 minutes later on 68 Avenue North, 6800 Block, a young man perfectly fitting Matthew's description is seen. We don't know, of course, what path he took, could be one shown here, it could be -- no evidence is going to show you exactly where he walked, but it's about two miles. It's the distance than an otherwise healthy, fit, 26-year old man can run in 30 minutes with no problem, and you're going to hear in this case from a witness called Duane Doherty. Duane has no dog in this fight. He's an independent third-party. You're going to hear from Mr. Doherty. He and his wife are sitting on their balcony kind of watching the storm come in, drizzling rain, and he's going to tell you, "I was actually right where the moon was over the ocean. There wasn't a cloud right there. The clouds were kind of more over him. It was drizzling rain." They were sitting on the balcony, and they heard somebody yelling and

screaming, and you're going to hear how they heard this big commotion, and they looked down, they saw this young man, and they knew something was wrong. They didn't know what, of course. They knew something was wrong by the way he was acting.

This young man, they watched him strip off all of his clothes. Didn't have on much, just a T-shirt, flip-flops and a shirt, strip off all his clothes till he's buck-naked, and he runs screaming into the ocean. Mr. Doherty is going to tell you, hey, just couldn't believe what he was watching, and suddenly, big swells, of course, in the ocean because there's a hurricane coming. They watch a big wave knock this young man down, and he doesn't resurface, and he calls 911, and he runs down to the beach and he tries to find this, this young man, but he never does. The police come and they all look and they look and they look and they search, but Matthew's body is never recovered.

Matthew is never heard from again. They search the beach. His medical -- excuse me, his bank accounts are never touched. His, his phone is actually -- his phone records reflect there's never, never a phone call, there's never any activity on his debit cards, none of his friends ever hear from him, none of them, and after some months the State of South Carolina will issue a death certificate for Matthew Scheer, and I recognize it's called a presumptive death. They

never found the body, but it's been since October of 2015 and no one has heard from Matthew when he went out into the ocean in a terrible storm, and a horrible storm would come in the next few days.

So how did we get here? How did this happen? Well, as I mentioned earlier -- well, let me back up for just a second. The evidence is going to show that one reason we're here is because Southern Myrtle Inpatient Services, that's another Defendant in this case, the evidence is going to show that Southern Myrtle Inpatient Services that's the business, company that Defendant Ash-Bernal works for, it never undertook in any way to train its doctors on the does and -- the, the allowable disclosures under HIPAA. It never trained her on that at all. That's one reason we're here.

I want to back up in time just a little bit to October 1st, the day before Matthew had been a normal 26-year-old young man. The evidence is going to show you he grew up in New Jersey, firstborn son of David and -- David and Debbie Scheer. He was a normal kid. He had epilepsy, had it since he was, since he was born, actually. It had always been well-controlled, took medication. He had had a few seizures in his life, but otherwise it was a well-controlled problem. It was well-controlled for him.

He wrestled on the high school wrestling team, had friends. He had a younger brother Erik, normal, normal life.

A few years before this Erik [sic] moves down to Myrtle Beach. He's going to get involved in the food and beverage industry, but then one day, you'll hear from Debbie, she'll take the stand and Debbie is going to tell you about this, one day her son had this very disturbing post on Facebook that was totally out of character for him, for him. You're not going to see that post because Matthew's Facebook page has been taken down when he was -- when, when, when he died, and there's no, there's no way to resurrect his Facebook page, but Debbie's going to describe for you what it was like, and it was dark, and it was about the end of the world and dead babies, and it was not Matthew Scheer. It was not anybody, kind of post anybody in their sane mind, and Dave and Debbie realize that something has gone wrong. He's not who he was just a day before.

Dave and Debbie decide to divide and conquer. Debbie's going to stay -- they're from New Jersey. Debbie's going to stay up there, try to find a good place to get Matthew, a good doctor, a good facility to try to figure out where he should go, and Dave is going to come down and pick Matthew up and bring him back home, and Dave drives through the night to get to his son, and when he arrives, he finds his son at his condo completely naked on the couch, ranting and raving, calm at times, but ranting and raving, having given away everything in the world he owns. He's got nothing, practically nothing,

doesn't want to eat, thinks all the food's been poisoned by the devil.

Dave quickly realizes he can't bring his son home right now. You're going to hear from Dave in this trial. He's going to tell you how he was worried if he put Matthew in the car he didn't know what would happen. Matthew grab the steering wheel, jump out at some point, that he thought that what was best for his son to get him seen by a doctor.

So Dave takes his son to Grand Strand. They are going to diagnose him with what we have already seen, psychosis, visual, auditory, tactile hallucinations, seeing, hearing feeling things that aren't there. They're going to do some, some lab work and some, some head images. They -- the, the head images don't show anything wrong with his head, nothing physically wrong with his head. The labs don't show him to be on any drugs or anything like that, there's no illicit drug use, but they do show him to be severely dehydrated, and his bilirubin and his white blood cell count to be off because he hasn't eaten and he's very paranoid, and the evidence will show you that the ER doctor sends Matthew to a facility called Lighthouse, which is a mental health facility here in Conway. Dave, ever vigilant looking out for his son, takes his son to Lighthouse and gets him there, they say, "Oh, we can't admit you actually not because, not because of psychosis. You have psychosis, but we're worried about this blood work, this white

blood cell count and, and this dehydration and this bilirubin, and we can't treat you here because we're just a mental health facility and we can't treat these things. Go back to the hospital for right now and, and we'll treat you there. We'll get you treated for psychosis and your other underlying metabolic problem, the white blood cell counts." So that -- David takes Matthew back to Grand Strand.

The evidence is going to show that, that Dave may have misunderstood there. They may have told Dave take him to Conway, but Dave's not from here. He heard take him to the hospital, and Dave takes him back to Grand Strand instead of Conway, and they arrive back in Grand Strand, and by this point it's about four in the afternoon, and Matthew gets admitted. He's admitted to the hospital as a patient for acute psychosis, and there his attending physician is Defendant Patel, and Defendant Patel sees Matthew, notes similar things, tangential thinking, and he orders Matthew a psych consult. He doesn't ever talk to a psychiatrist. All he does is enter it in the computer. There's a hurricane coming. People are preparing for the hurricane, things are happening, doesn't ever pick up the phone and say to the psychiatrist, "When do you think you can come? I've got a severely psychotic patient here. When do you think you can come? Is there anything you'd have me do in the meantime? Any kind of antipsychotic medication maybe I should give? The

ER record certainly reflects that he's having visual hallucinations, would you like me to give him something for that?" Because there are drugs that can be, that can be given for that, and the evidence is going to show you there's drugs that can be given to help with this, and it acts quickly. All, all Dr. Patel does is enter it in the computer, and Dr. Patel writes in his note that he's going to order Ativan PRN. Now, Ativan's a drug for agitation, and Matthew's calm, calm and cooperative. He's seeing things, but he's calm and cooperative, and PRN means if needed. It's a Latin phrase. I have no idea what it, what it actually -- I would butcher it if I tried to say it in Latin, but PRN, PRN means if needed the nurses can give Ativan for agitation.

He doesn't enter the order. All he does is write in his note, "I'm going to do this," but he doesn't communicate that to the nurses, and so later on when Matthew starts to get agitated they're hamstrung because the order is never entered, and then Dr. Patel goes off shift, and he never does a signout to the next Doctor who's Dr. Ash-Bernal, and a signout is as simple as this. It's communicating what's going on to the next person on shift. Security guards do it. Police officers do it, and doctors do it, too. They should do it. It goes something like this, "Well, in room three we still have Miss Jones. She's been here for about a week. No real change in her condition, still just kind of watching her making sure she

stays, gets plenty of fluids, and room four, got Mr. Thompson. He was in a car wreck today. I'm worried he may have a lacerated kidney. Watch his hemoglobin, and if his hemoglobin starts, starts to drop let's consider -- you need to consider consulting surgery. He tells me his, his, his pain is actually growing worse in his abdomen. So we really need to watch him like a hawk." These are things that are best communicated with the spoken word. You can write stuff in the chart, but there's nothing better than just talking face to face, and it should have been clear, "And we got a new guy here, too, Mr. Matthew Scheer. He's been calm and cooperative. He's got his dad with him. His dad seems to be good social support, looks like he's got a good, good social support at home. I've ordered him some Ativan if he gets agitated, and I think he needs a psych consult. I've put it in, need to make sure he sees him soon." That conversation never happens.

In this trial, besides Mr. Doherty, there's another perfectly unbiased witness that you're going to hear from in this case, and that's Greg Phaebus. Greg Phaebus is the security guard, and so, of course, we know what happens. Dr. Patel doesn't say anything to Dr. Ash-Bernal, and then 1:30 in the morning comes and Matthew acts out. Mr. Phaebus is a security guard. He's going to tell us that Dr. Ash-Bernal never asked any questions to her patient other than, "Do you want to stay or do you want to go," no other questions. She

doesn't take the time to say, "Matthew, looking at your chart, and it says that you haven't eaten in, in several days. Can you tell me why? Do you still think all the food in the world is poisoned? Matthew, I'm looking over your chart here and it says you think you're cured of your epilepsy. Before I let you leave, Matthew, let's talk about why you think you're cured of epilepsy because there's no cure for epilepsy. Matthew, I -- it's now already in, I've -- talking with the nurses and they said you were accusing them of being devil worshipers. Why did you say that? Do you believe that, Matthew? Why did you say that?" None of those questions are asked of Matthew, none. The only question, "Do you want to stay or do you want to go?" Mr. Phaebus is going to tell you, again, that Matthew calmed down, which we won't dispute that, but calm does not equal safe. At 1:30 in the morning with a hurricane coming, a patient who's hearing voices, a patient who's paranoid thinking everyone is out to get him doesn't have the capacity to sign this form.

In this case you're going to hear from Dr. Robert Robinson. Dr. Robinson is a hospitalist. He does -- he's a nocturnist meaning he works in hospitals at night typically, works other shifts, but he's generally a night-time hospital guy, and Dr. Robinson, he works for Carolinas Healthcare System in Charlotte. He's going to come talk to us. He got his medical degree from the University of Illinois School of

Medicine, and he is a member of the Society of Hospital Medicine. This is hospitalists who see patients in hospitals like these two Defendants here, and Dr. Robinson is going to talk to us about all the things we've mentioned, about all the things about how you should do a signout and how you should talk to the next doctor, and he's also going to talk to us about disclosures for patient safety, and he's going to tell you that doctors have to understand when they can disclose healthcare information. You don't have to be able to cite the exact part of the law or go exactly to the page and the book where it says it, but you got to have a general understanding for patient safety, and you've got to understand that the privacy rule recognizes circumstances arise where health information may need to be --

MR. GRESH: Your Honor, may we approach?

(Whereupon, a bench conference is held in the presence but out of the hearing the jury.)

MR. HINSON: Dr. Robinson is going to tell you that in situations such as this you absolutely -- what hospitalists do is pick up the phone and make a phone call to the emergency contact.

You're also going to hear from Dr. Kenneth Scissors. Dr. Kenneth Scissors is also a hospitalist. You're going to see him by video. He was not able to come and be here live. So we took his, took his testimony by a videographer some weeks

ago so we could play it for you. Dr. Scissors went to the Washington University School of Medicine. He did his training at Greenville Hospital System here in South Carolina, and he is a member of the American Board of Internal Medicine, the same as our Defendants here, same board -- boarded by the same organization, and he, too, is going to talk to you about a lot of the same things. He's going to talk to you about this form particularly and how it's nonsensical, how it's a hypocrisy to say that, "I explained to the patient who has psychosis that they were a risk of death and they understand the risk," and you're going to hear from Dr. Tim Malone. Dr. Tim Malone is a psychiatrist here in South Carolina. He's in Columbia. Did his medical degree at the University of South Carolina School of Medicine. He works at Palmetto Health. It's now called Prisma as of a few weeks ago, and he's a member of the American Psychiatric Association. He's going to talk to us about Matthew's condition, and he's going to tell us how Matthew could have been treated successfully, how the vast majority of people like Matthew who have no history of mental illness, who present for the first time with mental illness in their mid-20s, can be treated, can be made healthy and can live healthy normal lives.

So we're here in civil court. This is not a criminal trial, and this is not some sort of licensure hearing, this isn't the Board of, of Labor, License and Regulation.

Nobody's going to jail. Nobody's losing their license. No matter what you decide nobody's going to jail and nobody's losing their license. This is the court for people who have been hurt by somebody else's mistake. This is the court that people come to when their lives have been forever changed because somebody was hurried and rushed and didn't take the time. So that's the evidence we're going to show you in this case, and at the end I'm going to ask you for a substantial verdict for the Scheer family. I'm going to ask you for a verdict that gives justice to Matthew Scheer. I'm going to ask you for a verdict that does justice to Dave and Debbie, two parents that would have had -- would have their son with them today if two doctors had taken the time.

MR. GRESH: Your Honor, argumentative.

THE COURT: Yeah.

MR. HINSON: I'm, I'm done, Your Honor.

THE COURT: All right.

MR. HINSON: Your Honor, excuse me, ladies and gentlemen of the jury, my name is Brink Hinson. I've had a very brief introduction earlier. This is my law partner Bill Padget. We live in Columbia, South Carolina. I'm originally from Bennettsville. Bill's from Camden. This is Dave and Debbie Scheer. We thank you for your time and your service on this jury. You're going to hear that a lot. You're going to hear it from Mr. Gresh. You're going to hear it from, from the

Judge, and we all mean it very sincerely. We do. You all are so important to this process. We know you've taken time away from your families and your job, and we do not take it for granted, and we thank you for your attention. Thank you, Your Honor.

THE COURT: All right. Let's take, before we hear from Mr. Gresh, let's take a short refresher break. If you'll go to the jury room we'll take just long enough to get refreshed. We'll be at ease for 10 or so minutes.

OFF THE RECORD

(On the record. The following takes place outside the presence of the jury.)

THE COURT: Thank you. Take your seats. Ready?

MR. GRESH: Yeah. Your Honor, just for housekeeping measures, Ms. Spears is going to give the opening. In talking with Plaintiffs their first witness, I thought, was going to be Dr. Ash-Bernal by video. That's like two hours long. I assume we're not going to start that about 4:30.

THE COURT: No. No. We're -- I doubt we'll -- I mean, it'll be --

MR. GRESH: Fifteen, 20-minute opening. So probably'll put us right at 4:30, 4:35.

THE COURT: Well, yeah, about 4:45. I, I think that -- I'll -- I know we got a long way to go, but.

MR. PADGET: We do, and Your Honor, I'm sorry to

interject. If, if, if we want, we don't obviously have to, but if we want we could -- counsel and Your Honor could use that time. We've got a few deposition designations and objections that we've got to deal with that we could --

THE COURT: Okay.

MR. PADGET: -- do to get those ready for tomorrow.

THE COURT: All right. Okay. Bring in the jury.

(Whereupon, the following takes place in the presence of the jury.)

THE COURT: All right. Counsel.

MS. SPEARS: Thank you, Your Honor. May it please the Court?

Good afternoon. My name is Lauren Spears. Along with Jack Gresh, we represent Dr. Patel, Dr. Ash-Bernal and Southern Myrtle Inpatient Services. First of all, we want to thank you for your time and your service. You all have been very patient with us today. So we'll try to be efficient with your time this week. I know it is precious.

I'd like to start by introducing these folks to you. Dr. Nirlep Patel has a bachelor of science in biomedical engineering from Duke University. He's sitting right over here, master's in medical science from Boston University, a doctor of medicine from St. George University and he's been an internal medicine doctor at Grand Strand for over 10 years. Dr. Patel was working the day shift as a hospitalist on

October 2nd, 2015.

Dr. Rachel Ash-Bernal has a BS in biology and a BA in Spanish literature from Penn State, a doctor of medicine from the Medical College of Pennsylvania. She did an internship at Johns Hopkins, a fellowship at Columbia Presbyterian. She has over 19 years of experience as a physician. Dr. Ash-Bernal was working as a nocturnist or a nighttime hospitalist on October 2nd and 3rd, 2015.

Ladies and gentlemen, this case is about law and medicine. This case is about the fundamental right to freedom, a right to privacy and not depriving Matthew Scheer's rights when he made the competent decision to leave Grand Strand Regional Medical Center on October 3rd, 2015.

You've heard some of the facts, but I'm going to run through them again. In October 2015 Matthew Scheer was living here in Myrtle Beach. He'd been here since 2013. He was employed. He had good friends. His parents had a condo here. His aunt and uncle were in the area. They often had dinner with him, probably once a month. Matthew did have a history of seizures but it was well maintained on his medication, Keppra.

On October 1st or around there about Matthew's mom, Ms. Scheer, sees a Facebook post that Matthew has put up on Facebook that she says is unusual. She doesn't like it. The post is taken down. She's worried. She talks to Matthew's

dad who makes the decision to come here to South Carolina to talk to Matthew. Matthew tells David that he has stopped taking his seizure medication, Keppra. Matthew tells David about a lot of things, including some religious ideas that he's had. Matthew gives no indication when David is here talking to him that he has any intention in harming himself or harming others.

On October 2nd, 2015, David Scheer takes Matthew to Grand Strand Regional Medical Center to seek medical help. They arrived in the emergency department around 10 a.m. Matthew is evaluated by Dr. Amanda Battisti, who is an emergency medicine physician at Grand Strand. Dr. Battisti knows Matthew to be having paranoia and hallucinations, but he denies homicidal or suicidal thoughts. Dr. Battisti obtains lab work. She gets a head CT and her impression is acute psychosis.

Dr. Battisti does not order any antipsychotic medication for Matthew at this point. Dr. Battisti does not order or consider involuntary commitment for Matthew at this point based on his acute psychosis. Dr. Battisti works up the medical reasons behind his psych problem and clears Matthew for outpatient psych. Dr. Battisti then refers Matthew over to Lighthouse Care Center for mental health treatment. Matthew understood and agreed with Dr. Battisti's plan as noted in the medical record.

David then takes Matthew to Lighthouse Care Center. This

is, again, on October 2nd, 2015. The lab work from Grand Strand indicated that Matthew had a high white blood cell count and a high bilirubin level. Matthew was seen by a social worker, Amanda Morganroth, at Lighthouse Care Center. Amanda discusses Matthew with Dr. Oduwole who is a psychiatrist at Lighthouse Care Center. Dr. Oduwole is concerned about Matthew's abnormal lab values and wants these issues resolved before treating the acute psychosis. Dr. Oduwole does not order any antipsychotic medication at this point. Dr. Oduwole does not order or indicate the need for involuntary commitment of Matthew at this point. Dr. Oduwole instead gives instructions to David to take Matthew back to the hospital to clear his medical issues. Dr. Oduwole actually tells David to take Matthew to Conway Medical Center, but David takes him back to Grand Strand Medical Center. Grand Strand, the afternoon of October 2nd, 2015, David and Matthew arrive back around 1 p.m. Again, they're in the emergency department. Dr. Battisti evaluates Matthew. Dr. Battisti then calls the psychiatrist, Dr. Oduwole, to discuss why Matthew's back at Grand Strand when she had just sent him to Lighthouse some hours earlier. Dr. Battisti, the ER physician, Dr. Oduwole, the psychiatrist, have physician to physician communication about the plan for Matthew Scheer. The decision is made to admit Matthew to Grand Strand to address his abnormal lab values, again, high white blood cell

count, high bilirubin levels. Dr. Battisti, again, does not order any antipsychotic medication for Matthew Scheer. Dr. Battisti, again, does not order involuntary commitment for Matthew Scheer.

Dr. Battisti then calls Dr. Patel to discuss the plan for Matthew Scheer. Dr. Battisti and Dr. Patel have physician to physician communication and agree on the plan for Matthew Scheer for admission to the hospital. Via consult, they discuss the need for a psychiatric consult. Dr. Patel admits Matthew to the hospital around five or 5:30 on the evening of October 2nd. Dr. Patel evaluates Matthew, speaks with Matthew and works up Matthew's medical issues. Again, the reason Dr. Oduwole wanted Matthew to come back to Grand Strand is to address these medical issues that Matthew has, before addressing his acute psychosis.

Dr. Patel orders an ultrasound of the abdomen to try to determine why Matthew has high bilirubin levels. He orders a repeat of the lab work for the following morning to try to address whether those white -- high white blood cell count numbers come down. Dr. Patel orders psych consult with Dr. Oduwole to occur that evening.

In Dr. Patel's note, he notes that Matthew is calm and cooperative. Dr. Patel notes that Matthew denies suicidal or homicidal thoughts or ideations. Dr. Patel does note Ativan PRN. As Mr. Hinson said, that's a fancy Latin word for as

needed. At the time Dr. Patel evaluated Matthew Scheer there's no indication that he was agitated and needed Ativan.

As mentioned, Dr. Patel was the day shift hospitalist on October 2nd, 2015. As a day shift hospitalist his shift ends at 7:00 o'clock p.m. Dr. Patel writes up his entire note about everything he has done for Matthew, includes a history, physical, assessment, plan, everything that has occurred with Matthew up until this point. Dr. Patel writes his note and then he goes home for the day.

Dr. Ash-Bernal is a nighttime hospitalist. She comes on shift and sees patients at the hospital at nighttime. From the hours of 7:00 o'clock p.m. till around 1 a.m. on October 2nd and 3rd, Nurse Bethany Bell is rounding on Matthew every hour. There's nothing in the record to reflect that Matthew was agitated, yelling or in any way acting out or being a disturbance to other patients each hour that Nurse Bethany Bell was rounding on him.

Approximately 1:13 a.m. Nurse Jacqueline Freeman notes Matthew is yelling at the nursing staff. At that time Nurse Freeman appropriately gets Dr. Ash-Bernal involved. 1:31 it is noted that Matthew is yelling at nurse staff that he is there voluntarily and that they cannot keep him. Nurse Bethany Bell offers to call David Scheer for Matthew and Matthew refused. Matthew is an adult. Matthew is 26 years old, and he refused to have his father called.

Around 1:20 in the morning Dr. Ash-Bernal, after getting a call from the nurses, goes to the computer and pulls up Matthew's chart to review everything that is in the chart about Matthew Scheer. She reads all the notes, any lab work, any imaging and then she goes to Matthew's room to evaluate him. Matthew advises, as he did the nurses, that he wants to leave the hospital. He doesn't want to be there anymore. Dr. Ash-Bernal sits down and discusses with Matthew the risk of leaving the hospital against medical advice. Her habit, Dr. Ash-Bernal asks Matthew direct questions to appreciate does he understand these risks of leaving the hospital against medical advice. Matthew answers all of her questions appropriately. He gives direct answers to direct questions and still wants to leave the hospital.

At that point in time, assisting -- he is insisting on leaving AMA. Dr. Ash-Bernal determines he is competent and he can go because he does not want to be there anymore. Matthew competently reads and reviews the AMA form that Mr. Hinson showed you and signs it that he wants to leave the hospital. A security guard is called to escort Matthew out of the hospital. Gregory Phaebus, whose picture you saw earlier, comes to escort Matthew out of the hospital. As he lets him go Matthew shakes Mr. Phaebus's hand and says, "Thank you very much." Matthew takes a light jog out the door and sets off in the full moonlight October 3rd, 2015.

Approximately 15, 20 minutes later, Mr. Doherty, Duane Doherty, whose picture you saw earlier, is sitting on the porch of his fifth floor hotel room and sees an unidentified male run out onto the beach, take off his clothes and run into the ocean. Mr. Doherty looks to see if he comes back out and doesn't see him. So Mr. Doherty leaves his room, goes downstairs and goes outside to see if he can see this person. He does not see anyone. So he calls the police. The police search the area. No body or no swimmer are seen. No body is ever recovered.

Ladies and gentlemen, those are the facts. The evidence you will hear this week shows that Matthew Scheer wanted to leave Grand Strand Regional Medical Center on the early morning of October 3rd, 2015. Dr. Ash-Bernal came to talk to Matthew about the risk of leaving in the middle of the night from the hospital. Dr. Ash-Bernal came to talk to Matthew to encourage him not to leave, that he should stay. Dr. Ash-Bernal reviewed the against medical advice form with Matthew before both Dr. Ash-Bernal and Matthew Scheer sign this form. Matthew made the competent decision to leave the hospital against medical advice. Matthew then calmly left the hospital.

What the evidence does not show is that Matthew was an imminent threat to himself, that Matthew was an imminent threat to others, Matthew had suicidal thoughts or that

Matthew had homicidal thoughts. The evidence will show that people have a right to decide their own healthcare, even if that may not be the right choice all the time. A person can only be involuntarily committed if they are found to be serious harm or threat to themself or others. The likelihood of serious harm means because of mental illness there is a substantial risk of physical harm to a person manifested by evidence of suicidal thoughts or evidence of homicidal thoughts or other violent behavior. The evidence will show that just because a person is experiencing acute psychosis you cannot lock them up.

You're also going to hear a lot this week about HIPAA. HIPAA is the Health Information [sic] Portability and Accountability Act. It protects private health information from being disclosed when a patient does not want their information disclosed. HIPAA is the law in place to protect a person's privacy.

Ladies and gentlemen, the evidence this week will show that more than 10 healthcare providers were involved with Matthew Scheer's care on October 2nd and 3rd, 2015. None of these providers ordered antipsychotic medication for Matthew Scheer. All of them appreciated the fact that Matthew Scheer was experiencing acute psychosis. None of them ordered Matthew to be involuntarily committed. None of them determined Matthew to be a danger to himself or others.

It is agreed Matthew had mental health and medical issues that needed to be treated as an outpatient. None of these issues required him to be held against his will at the hospital. All of the providers involved with Matthew's decision to leave the hospital against medical advice agreed with the process. You're going to hear from Plaintiff's experts and we're going to hear from some Defense experts as well. Expert testimony will reveal that it was reasonable for Dr. Patel, just like Dr. Battisti, just like Dr. Oduwole, to not order antipsychotic medication for Matthew Scheer. It was reasonable for Dr. Ash-Bernal to not wrongfully imprison Matthew Scheer at Grand Strand when he made the competent decision that he wanted to leave. Dr. Ash-Bernal and Dr. Patel evaluated this patient. Dr. Ash-Bernal talked to this patient. Each of them took their time with this patient coming up with their assessment and plan. Dr. Ash-Bernal encouraged Matthew Scheer not to leave the hospital. It was then that Matthew decided competently that he was ready to go. Nothing these doctors did caused Matthew Scheer's disappearance.

Ladies and gentlemen, I know it's been kind of a long day. We very much appreciate your time, your open ears and your open minds this week. It is our pleasure and we thank you very much.

THE COURT: All right. Members of the jury panel, due to

the time we're not going to start in with the first witness for the day. We're going to start back at 9:30 in the morning. Keep in mind, don't go on any social media or twitter or Facebook or anything concerning this case. Don't let yourself be exposed to any news coverage if there is any and don't try to make up your mind yet. You're far away from having the opportunity to do that, and don't discuss the case among yourselves until I tell you to do that. So have a pleasant evening and we'll try to start as early -- as, as promptly as we can at 9:30. So please be back by then. Thank you, and the bailiff will tell you how to best get in and out while you're serving as a juror.

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: All right. You say there's some issues we could deal with?

MR. PADGET: Yes, Your Honor, if I, if I could, I believe my, my notebooks with the designations are just right next door.

THE COURT: Okay.

MR. PADGET: If I could just step out and grab them.

THE COURT: Sure.

MR. GRESH: We appreciate Your Honor's indulgence. We were able to narrow it down, I believe, to four objections total over two depositions. So I appreciate the time.

THE COURT: Okay.

MR. PADGET: Judge, I've got a copy for you of the deposition.

THE COURT: That'd be fine.

MR. PADGET: This is the original. Any objection, Jack, to me going ahead and unsealing it?

THE COURT: Go ahead and unseal it. All right.

MR. PADGET: Judge, the only issue --

THE COURT: This is Dr., Dr. Ash-Bernal. Okay. Go ahead.

MR. PADGET: Judge, the only issue I think that remains is on -- begins on page 90 on line three, and there's a series of questions there that Mr. Hinson asked Dr. Ash-Bernal about whether or not good doctors make mistakes or can make mistakes in judgment, and there's some disagreement about terminology and so forth there for a page or two. Eventually, using, I guess, some Latin reasoning that doctors are people, too, that there is a concession to that answer that, that good doctors can make poor decisions sometimes, and the reason we asked that is because a lot of the defense so far, at least through discovery and depositions and so forth of the experts, have focused on, you know, what's the basis of the opinion, and a few of the experts have said, well, good doctors, you know, Dr. Ash-Bernal by reputation is a very good doctor. Therefore, she didn't breach the standard of care kind of

thing, which we don't think amounts to things, but we want to be able to distinguish the, the, the type of case where, you know, a good doctor can make a mistake in judgment that's legally actionable versus and also the nature of the conduct there's some questions with regard to whether or not physicians should behave in a reckless manner, and ultimately there is a concession that, that doctors and people should not be reckless, and we believe that all relates, basically, to Dr. Ash-Bernal's understanding of the standard of care in this case.

THE COURT: All right. How far? I'm seeing it goes over to 91. How far does it goes?

MR. PADGET: Sure. It stops -- this, the objection stops page 92 at line 12.

THE COURT: And the doctors are people, too. All right. Objection?

MR. GRESH: Yes, Your Honor, just for context, this is hopefully the end of a two-plus hour long deposition of Dr. Ash-Bernal. What you've got here is a series of questions that are irrelevant, you know, whether people are doctors and whatnot. Nobody is going take the witness stand from a Defense perspective and say that the Defense complied with the standard of care because Dr. Ash-Bernal is a good doctor. Right? I wouldn't survive, I wouldn't survive a directed verdict.

THE COURT: All right. So, so this question from Mr. Hinson is really directed statements that their own witnesses have made?

MR. PADGET: That's correct, Your Honor. Dr. Lovelace in particular has said that was part of the foundation and basis of his opinion is that Dr. Ash-Bernal is a good doctor, and therefore, she, you know, her conduct complied with the standard of care that day, and we'd like to punch some holes in that position.

MR. GRESH: But getting at it this way, to, to have this round and around soliloquy about whether people are doctors and people make mistakes but doctors don't, is over and over it's irrelevant and it's more prejudicial than it is probative. She's going to take the stand. You know, if they want to, I mean, I don't even know how it ever gets in even when she takes the stand, but to me all this does is just try and impugn her. They're just boxing in, in Latin terms this is, you know, doctors are people and reckless conduct. It's just the whole thing doesn't help aid the jury.

THE COURT: Yeah. I, I agree. I'm going to delete that from page 90, line three through 12 on 92.

MR. PADGET: All right. We've got that one noted, Judge, and I think that's all of the un -- the contested portions of that deposition.

THE COURT: All right.

MR. PADGET: So we've got 95 pages or so.

(Attorneys confer.)

MR. GRESH: I'm sorry, Your Honor. One more thing.

MR. PADGET: Go ahead. Let's be clear.

(Attorneys confer.)

MR. GRESH: Thank you, Your Honor.

MR. HINSON: Your Honor, if I may approach, this is the deposition of Mr. Gregory Phaebus who was the security guard who escorted Mr. Scheer out of the hospital.

THE COURT: Okay.

MR. PADGET: Judge, I'd direct you to page 49, line 16.

THE COURT: All right.

MR. PADGET: And the objection goes through page 50, line 14, and this is where the security guard, Mr. Phaebus, indicated he just had a very short amount of time with Matthew and did not have time to observe and did not have any knowledge of, really, whether or not he was in his right mind or not.

THE COURT: All right. Who's taking this one?

MR. PADGET: This one at this time was -- the questions were being asked by Defense counsel.

MR. HINSON: I think -- no, I think I was asking that, Your Honor. The questions were being asked by --

MR. PADGET: No. I'm sorry. I read, I read her name in the objection, but the question was being asked by Mr. Hinson.

MR. HINSON: This is a deposition that's been noticed by Defense counsel of the security guard. We traveled up to, to Maryland to take his deposition, and this is my cross-examination of him.

THE COURT: Well, he never answers the question.

MR. PADGET: Well, ultimately, he says he doesn't have knowledge one way or the other there to the --

THE COURT: Well, that's, that's a true or false. That's pretty much saying, "I ain't answering the question."

MR. PADGET: That's true for that, Your Honor. Earlier, though, it is important him -- his describing, though, that he had a very short period of time to observe Matthew as he escorted him out of the hospital.

THE COURT: Well, that starts at line 24, and, I mean, 20, and goes over -- no, wait a minute. Oh, yeah, yeah, line 20 on page 49, [as read], "Due to my short amount of time I had with him I would have had no time to observe even a basic knowledge of it." The problem -- well, not the problem but the question has to do with the auditory and visual hallucination, and the question is, "Did that sound like a young man who was in his right state of mind to you?"

MR. HINSON: Well, Your Honor, the --

THE COURT: He's just, he's just a layman.

MR. HINSON: Your Honor, the relevance of it is is that the security guard is there with Mr. Scheer at the time Dr.

Ash-Bernal walks up, and then the security guard escorts Matthew out of the hospital. So the security guard is there with Mr. Scheer longer than anybody else and he's saying this whole chain of events was so short there wasn't even time to notice whether or not this young man was in his right mind.

THE COURT: Well, I don't have --

MR. HINSON: And it goes to show -- I'm sorry, Your Honor.

THE COURT: I don't have any problem with this being with him only a short amount of time, but with the -- that doesn't -- is not responsive to the question, but it goes on and says, again, it's a, it's a non-answer other than that he was with him a short amount of time because then he says he didn't have enough time to get any knowledge of it, whatever it is. I don't, I don't find any objection to his testifying that he was due to -- that, that, that he was there for a short amount of time although does it -- did he testify to that earlier because this says, "Due to my short amount of time"?

MR. PADGET: That's the first. There's a -- I think another time here in a minute -- moment, Your Honor, where he talks about that briefly. So what -- if we ended at page 50, line one and don't go on to the next question, I mean, I understand the nature of the concern about his medical knowledge and the answers.

MR. GRESH: But it's not just that. It's, it's a

question and a, a nonresponsive answer that was appropriately objected to in a discovery deposition. If you want to get that -- he says it later. You don't -- he doesn't -- the Plaintiffs don't need this to prove that the guy was there a short amount of time. That comes later, I, I promise you, but you can't ask a witness if he's in his right state of mind, which is irrelevant, it's outside the, the scope of a security guard to have anything that talks like that, and then he has a non sequitur answer not responsive to the thing. That testimony comes in later, but to allow it to come in at this point, too, was what the objection was. I think they're going to get the -- the jury is still going to hear later about how long the conversation was, but they don't need this. This was appropriately objected to. That is nonresponsive, and you can't have a security guard talking about whether there's somebody in their right mind or not.

THE COURT: Yeah.

MR. HINSON: Your Honor, laypeople can give an opinion of their -- I mean, you could certainly have -- we could have someone take the stand and say the man was acting crazy. He didn't --

THE COURT: Well, he says he -- he says he doesn't know.

MR. HINSON: But he says he doesn't --

THE COURT: The question is, the question is, [as read], "Does that sound like a young man who is in right state of

mind?" He says, [as read], "I'd have had no time even to observe."

MR. HINSON: And, and that's the point, Your Honor, is that this interaction at 1:30 in the morning was so short that a doctor couldn't have taken the time to make an adequate assessment of her patient and that's what makes it very relevant and important to this case.

THE COURT: Well, I don't mind, again, if somehow if you rework it or I know we can't rework testimony because it's testimony, it's under oath, I have no objection or not I don't object, but I, I find no problem with him testifying that he was with him a short amount of time. It's in the context that he does it that, that bothers me in this particular situation.

MR. HINSON: But he, he gives no opinion, ultimately, Your Honor, one way or another about the -- about Mr. Scheer's mental capacity, and so, his answer --

THE COURT: Well --

MR. HINSON: -- his answer is still relevant to the --

THE COURT: But he says he has no knowledge of it and then he goes on and says that the, you know, the, the doctors or somebody said he or the question was if it was determined earlier that he was having audio and visual hallucinations would that sound like a young man that was in his right mind to you, and then he says, "I mean, I guess whatever -- whoever looked at his medical records they would have knowledge to

know that." These, these are sort of non-answers. So I'm, I'm going to rule out 16 on page 49 through 14 I believe it goes on 50.

MR. HINSON: Understand, Your Honor. Thank you. Through what -- through where is it again?

MR. PADGET: Through -- where, where did it end, Your Honor?

MR. GRESH: Fifty, line 14, I believe.

THE COURT: After -- well, starting -- start back up with 15 on page 50.

MR. PADGET: Okay. Jack, we're agreeable to the objection that begins on 52 and ends --

THE COURT: I'm sorry, what page?

MR. PADGET: Your Honor, I was just indicating on the record that we are agreeable there was, there was a next objection that they had lodged for page 52 to the top of page 53 and that is from lines three on page 52 through page -- line eight on page 53 and we're, we're agreeable not to play that portion.

THE COURT: All right.

MR. PADGET: The next objection, Your Honor, and I believe this is what Mr. Gresh was referring to is on page 64 --

THE COURT: Okay.

MR. PADGET: -- and down at the bottom beginning on line

17 on page 64 Mr. Hinson is asking in cross, [as read], "You never saw any sort of exam or evaluation taking place by the doctor to determine if he was having a belief that all the food in the world had been poisoned," and the answer was no, "Never saw any sort of exam or evaluation from the doctor to determine if he was having extreme paranoia?" There's an objection. He answers no, and then the question is, "The doctor simply showed up and said, 'If you don't want to stay we can't keep you,' and the next thing you know is you're escorting Matthew out of the hospital," and the answer is, "That's pretty much what it all boils down to." So, Your Honor, these are just his factual report of what he saw that evening and the lack of exam that he saw during his time there on the floor with Dr. Ash-Bernal and Matthew.

MR. GRESH: This is a witness that they're calling during their case to testify and they're just leading him through this entire thing. Second, is how do we -- a security guard does not know what an examination would be on any of these things. It sounds terrible, but he doesn't have a point of reference to say, "I am familiar with how a hospitalist would examine a patient with psychosis, and I am familiar that she didn't do that." Right? But now we're letting a security guard testify essentially as to whether there was or wasn't an exam, but Dr. Ash-Bernal is going to take the stand and say, "Here's what my examination was," and they're going to have

experts that say what it was or what it should've been, but not through a security guard.

THE COURT: Well, somewhere in the -- is, is somewhere in the testimony, not to what I've heard just in opening statements, he wasn't there the whole time.

MR. GRESH: Yeah. And so you, you have an incomplete lapse of maybe there was one then or not. In fact, he doesn't know it's just --

MR. PADGET: Judge, it's a witness testifying about what he saw.

THE COURT: Yeah, but --

MR. PADGET: I mean, it's the most fundamental testimony that I, that I could be aware of. "Did you see a doctor do an exam?" "No. I didn't." "Did I see a doctor do this?" "No", and ultimately concedes. Now, let me point out about this. This was a de bene esse deposition noticed by the Defense. We came to that de bene esse deposition for use at trial, cross-examine this witness, and when we cross this witness he said, you know, and this is obviously a point of contention in this case, the extent and the quality of that exam that was performed by Dr. Ash-Bernal, and he says during this, during other parts of it, too, he says, "I arrived. The doctor came in and I observed what happened." Now, he concedes he wasn't there before. So that's clear, and he concedes that he wasn't there the whole time, but he says, "While I was there and Dr.

Ash-Bernal came in, I never saw any sort of exam for the issues that Matthew was having," and if she gets up on -- if Dr. Ash-Bernal gets up on the stand and says, "I did X, Y and Z," we're certainly entitled to put up the testimony of a witness who was there who said, "I never saw her do X, Y and Z."

THE COURT: I'll allow it in. I'm looking at line 13 on page 62. He, he quantifies it or qualifies it by say, [as read], "See, I don't know what she did prior to me getting there or did prior to getting to the room. She didn't do an evaluation the time I was there to her meeting him at the time he was discharged." So, I, I think he -- that's, that's admissible.

MR. HINSON: Thank you, Your Honor.

(Attorneys confer.)

MR. PADGET: Your Honor, that's all for those, and that's all we anticipate playing tomorrow as far as prior deposition testimony.

THE COURT: Okay. All right. So we'll stop till 9:30. Have a pleasant evening.

MR. GRESH:: Thank you, Your Honor.

MR. PADGET: Thank you, Your Honor.

MR. HINSON: Thank you, Your Honor.

MS. SPEARS: Thank you, Your Honor.

(Adjourned for the day.)

(On the record, May 21, 2019. The following takes place outside the presence of the jury.)

THE COURT: The Plaintiff ready?

MR. HINSON: Yes, Your Honor.

THE COURT: The Defense ready?

MR. GRESH: We are.

THE COURT: All right. I'll give you time to put your jacket on before we get the jury in.

MR. HINSON: Thank you, Your Honor.

THE COURT: All right. Anything before we do get the jury in?

MR. HINSON: Your Honor, we had six different exhibits that the parties stipulated to.

THE COURT: Looks like seven, six with Plaintiff and one Defendant?

MR. HINSON: Yes, Your Honor.

THE COURT: All right. Our thorough court reporter's already -- somebody's -- all right. Let's bring in the jury.

MR. HINSON: Yes, sir.

(The following takes place in the presence of the jury.)

THE COURT: All right. Members of the jury panel, I've made, made Mr. Fashjian, is that the way you pronounce it?

JUROR NUMBER 112: Yes, sir.

THE COURT: He's going to be the foreman of the jury. You can have a seat. You will be the liaison between the jury

and myself and preside over the jury's deliberation, and ultimately sign the unanimous verdict of the jury. So I appreciate your serving in that capacity. Counsel.

MR. HINSON: Your Honor, the Plaintiff calls Dr. Robert Robinson.

THE COURT: All right.

Whereupon, Robert Robinson is called to the stand, duly sworn by the clerk and testified as follows:

THE CLERK: If you'll say and spell your first and last name.

THE COURT: You may proceed.

MR. ROBINSON: Robert, R-O-B-E-R-T, Robinson, R-O-B-I-N-S-O-N.

DIRECT EXAMINATION

BY MR. HINSON:

Q Good morning, Dr. Robinson.

A Good morning.

Q Would you please tell the jury a little bit about your education?

A Sure. I graduated medical school from the, from the University of Illinois at Chicago. Upon completion of my medical school training I went on to do internal medicine residency, again at the University of Illinois at Chicago. Residency, for those who are not familiar, is basically more specialized training in your area of expertise or the, the

focus that you intend to practice in. So I completed that in 2005, upon which I entered a career as a hospitalist physician in Gastonia, North Carolina. I was employed as a hospitalist at Gaston Memorial Hospital from 2005 through 2013, at which time I transitioned to a different hospital system, continued working as a hospitalist, but more specifically a nocturnist, meaning I worked night shifts, night shifts specifically or exclusively from 2013 to 2015 with Novant Health Matthews Medical Center. I then transitioned in 2015 to Carolinas Medical Center where, again, I worked as a nocturnist, again, exclusively working the night shift in the hospital there.

Q Can you tell us a little bit -- you mentioned earlier you, you did a residency. What -- how long does a residency last?

A So it varies based on the specialty, but for internal medicine residency is three years.

Q And did you obtain any board certifications?

A Yes. I did. I obtained my board certification in internal medicine by the American Board of Internal Medicine.

Q And are you a member of any societies or organizations?

A Yes. I am. I'm a member of the American Medical Association, the National Medical Association and the Society for Hospital Medicine.

Q And Dr. Robinson, have you done any training -- done any educating or training other people in the healthcare

profession during your time?

A Certainly. So I've trained both nurse practitioners, as well as physician assistants when they've been onboarding with our hospitalist group and also trained hospitalists who have been new to whatever hospitalist group I was working at at the time.

Q And do you hold a license to practice medicine?

A Yes. I do. I hold license -- licenses to practice medicine both in the State of North Carolina as well as the State of Illinois.

MR. HINSON: Your Honor, at this time I would move to qualify Dr. Robert Robinson as an expert in internal medicine, and more specifically, in the practice of hospital medicine.

THE COURT: All right. Any voir dire?

MR. GRESH: No, Your Honor.

THE COURT: All right. I find he's qualified. Members of the jury panel, Dr. Robinson's testifying as what we call an expert. Generally, individuals can only come in and testify to something they've seen, heard. I think I talked to you a little about it yesterday, but individuals who have certain training, knowledge or experience in a particular area can come into court and testify, give their opinion. These opinions are allowed into evidence to assist you in reaching your decision. They're not binding on you, and you judge an expert witness with the same degree that you judge any other

witness, and I'll tell you more about that when I charge you on the law, but I wanted to go ahead and, again, explain to you what an expert witness is.

BY MR. HINSON:

Q All right. Dr. Robinson, as you testify today will you agree to only give opinions that you hold to a reasonable degree of medical certainty?

A Yes. I do.

Q Dr. Robinson, I want to jump back just for a second at your training and your -- well, more specifically, your work career. Carolinas Hospital, is that -- you mentioned that one?

A I, I did. Yes.

Q Where is that located?

A So Carolinas Medical Center is in Charlotte, North Carolina.

Q Okay. And in your career have you ever worked as a hospitalist in a hospital that was of similar size and capabilities as Grand Strand Regional?

A Yes. I have. In fact, Gaston Memorial Hospital is a 370 bed trauma center. My understanding per my review is that Grand Strand Medical Center is a 369 bed trauma center.

Q Dr. Robinson, are hospitalists, such as yourself, are they trained on the permissible disclosures of patient information in situations for patient safety?

A Yes. We certainly are.
Q And why is that important?
A Well, that's important both to know when those disclosures can and cannot be made, and they're equally important to know both sides of that coin.
Q And Dr. Robinson, you're not a psychiatrist; correct?
A That's correct. I'm not a psychiatrist.
Q But as a physician practicing internal medicine as a hospitalist have you had training in the field of psychiatry? Did your education include that?
A Yes. It did. Specifically in medical school training we're required to do rotations in psychiatry whereby we learn the basic fundamentals, so to speak, of, of the practice of psychiatric medicine, and then as well as in residency we also had that requirement, and we're oftentimes involved in the care of individuals who are being treated for, managed for forms of mental illness.
Q In your career have you had the occasion to, to be the attending physician for someone who had been or patients who have been admitted for psychiatric concerns?
A Yes. I have. Yes.
Q Dr. Robinson, what have you been asked to do in this case?
A I've been asked to provide my opinions based on review of the medical records in the care of Mr. Matthew Scheer and to

determine if the care met what is considered a reasonable standard of care and that's what I've been asked to do in this case.

Q And Dr. Robinson, I want to give you plenty of opportunity to discuss how you reached your conclusions, but did you come to any conclusions with regard to Dr. Ash-Bernal?

A Yes. I did.

Q And what was that conclusion?

A My conclusion is that, unfortunately, the care fell beneath the standard of care.

Q Okay. Dr. Robinson, have you reviewed the records from Grand Strand Regional Medical Center with regard to Matthew Scheer?

A Yes. I have.

Q And Dr. Robinson, I want to provide you a copy of Plaintiff's Exhibit One, Madam Court Reporter. Can we provide that? Dr. Robinson, could you please tell us what are you looking there is, what is Plaintiff's Exhibit One?

A These are what appear to be printouts from Mr. Matthew Scheer's hospitalization at Grand Strand Medical Center, haven't had a chance to peruse all of it, but this looks like what I've reviewed and in reviewing the records of Mr. Scheer.

Q Take a second if you need to. Are those the records that you've reviewed in this case?

A They are. Yes.

Q Dr. Robinson, tell us how Matthew presented -- just generally, how did Matthew present to Grand Strand Regional Medical Center?

A So on October 2nd, 2015, Matthew presented to Grand Strand Regional Medical Center accompanied by his father for evaluation of symptoms of psychosis which were manifesting with both auditory, meaning hearing things, hallucinations, visual hallucinations and seeing things, and what we call tactile hallucinations in that he was feeling things, all of these things not being rooted in reality. So he was hearing things that weren't there, seeing things that weren't there, feelings things that weren't there and expressing concerns that his food was being poisoned, that the devil was after him, and this was obviously concerning to his father, David Scheer, which is why he was brought to the hospital by and accompanied with his father.

Q Dr. Robinson, if I could turn your attention to page 12 in Plaintiff's Exhibit One, what was the chief complaint recorded as -- for Matthew at the time he arrived at the hospital?

THE COURT: Now, is that in by -- in without objection; right?

MR. GRESH: It is, Your Honor.

Q What was the -- Mr. -- Matthew Scheer's chief -- what was the chief complaint?

A The complaint as documented was paranoia and hallucinations.
Q And what did those -- Dr. Robinson, you mentioned food earlier. What was recorded in the record as Matthew's belief as far as food?
A In the additional HPI notes, HPI meaning history of present illness, it's documented that he believed that all food he used to eat is contaminated now.
Q What is an auditory -- was there a record that he had an auditory hallucination?
A Yes. There was.
Q Okay. What does that mean, an auditory hallucination?
A So auditory hallucination refers to hearing things that aren't actually present. They're not, again, rooted in reality. So one might hear a sound that no one else hears because the sound isn't actually being produced.
Q Would hearing voices be included in that?
A Yes. It could be. Yes.
Q What did the records say about Matthew with regard to suicide or homicide?
A It says that he denied suicidal ideation or suicidal thoughts. Likewise, it said that he denied homicidal ideation or homicidal thoughts.
Q If a patient with psychosis with delusions, auditory hallucinations, visual hallucinations, tactile hallucinations

denies having suicidal thoughts or homicidal thoughts, does that mean the patient's safe?

A Absolutely not.

Q What types of things -- what are the dangers of a patient with homicidal -- excuse me. What are the dangers of a patient with delusional thinking?

A Well, there, there are many. Certainly their delusional thinking might cause them to believe that they can do things that they can't. So, for example, they might think that they can fly and in turn jump off of a building. They might think that they're invincible and in turn walk out into traffic posing a harm or danger to not only themselves but to drivers on the road. They might as was the case with Matthew perceive that everyone is out to get them and in turn become aggressive towards individuals randomly because of their perceived thoughts and their hallucinations and their, their false beliefs.

Q Dr. Robinson, what was Matthew's demeanor recorded as being?

A At which point, I'm sorry?

Q I'm sorry. At the time he was in the ER in the -- on the morning of October 2nd, what was his demeanor?

A I believe he was --

Q Was he agitated or calm or angry? What was his demeanor at that point?

A Yes. I believe he was calm at the time that he presented.
Q Was there any reason at that point, Dr. Robinson, to put Matthew under some sort of involuntary hold?
A Not at this point in time. No. He was there agreeable and cooperative at that time.
Q If a person in this mental state with auditory hallucinations, visual hallucinations, believes that all the food in the world is poisoned isn't calm and cooperative and agreeable to stay, would there be a reason to put him on a hold then?
A I'm sorry. Can you repeat the question?
Q If a patient in the ER who's having visual hallucinations, auditory hallucinations and these beliefs that people are plotting against him, that all the food in the world is poisoned, if they're not calm and cooperative and willing to stay, at that point would there be a reason to put him on an involuntary hold?
A Yes. I believe there would be under those circumstances.
Q Dr. Robinson, did the ER staff run any labs, imaging, things like that on Matthew?
A Yes. They did. They did laboratory work and imaging studies. Yes.
Q What did the -- did the, did the imaging studies show anything significant?

A No. There was nothing significant found on the imaging studies.
Q And what about the lab studies, the labs that were run?
A The labs revealed that he had an elevated white blood cell count, and a white blood cell count can be a marker of a number of things, one of which is infection. It can certainly be a marker of inflammation in general. It can also be a marker of stress or anxiety as that can cause your white blood cell count to rise, and, and, notably, also, it could be elevated due to dehydration or what we call hemoconcentration meaning that because the person is dehydrated it elevates their blood counts falsely, so to speak.
Q Did the record, medical records show Matthew to have dehydration?
A Yes. It did.
Q What do you attribute this dehydration to?
A Well, in putting together the, the history of Matthew's symptoms I attribute it to his psychosis and his belief that the food that he'd previously consumed was now being poisoned and now his avoiding eating and drinking as a result of his beliefs and his psychosis.
Q Doctor, will you turn to page 12 in the medical record, and I'm looking under the part that says gastrointestinal. What did the ER staff determine was going on with Matthew with regard to his digestive system?

A So it's documented that he has anorexia, which is commonly misinterpreted as the extreme of, of that, that term, but what that, in essence, means is that he was not eating and, and then parentheses it says due to hallucinations.
Q And what do you interpret that to mean, due to hallucinations?
A I interpret that to mean that the provider recognized that he was not eating because of his belief that he had already stated that all the food that he was previously consuming was now contaminated and poisoned.
Q Was there any history reported of Matthew having a family history of mental illness or Matthew himself having a history of mental illness?
A No. There was not.
Q Was there any indication in the labs that were run that Matthew had used any sort of illicit drugs in his -- was there any sort of drugs in his system?
A No. There were not.
Q Did Matthew have any chronic seizure disorders?
A Yes. Matthew did have a, a history of a seizure disorder for which he was prescribed medication, and my recollection is that this was a seizure disorder that had been diagnosed in childhood.
Q And what -- what's the name of that seizure disorder that Matthew had?

A Epilepsy.
Q And what medication was it reported that he had typically been taking for epilepsy?
A So Matthew had been taking Keppra, which is an anti-seizure medication, but it was noted in the medical record that he had stopped taking it several days prior, and again, it was felt that this was part of his -- well, it was recognized that he stated that he had been cured of epilepsy.
Q Is there a cure for epilepsy?
A There is not.
Q If a person has epilepsy, has a seizure disorder, and doesn't take his or her medication what would be the risks of that?
A Well, the risk could be that that individual could have seizures, and seizures can, in fact, be fatal if not managed correctly or appropriately.
Q Was Matthew at risk of having a seizure as a result of his psychosis and as a result of not taking his medicine?
A Yes. He was.
Q Dr. Robinson, what was the disposition, what, what else happened in that morning trip to the ER on October 2nd, 2015?
A So the plan and disposition was for Matthew to be transferred to an inpatient psychiatric unit known as Lighthouse, and he was discharged to the care of his father, Mr. David Scheer, to be transported over to Lighthouse for

admission.
Q Dr. Robinson, would you turn to page 41 in Exhibit One, please? What is the timeframe Matthew was instructed, Matthew and his Dad are instructed to go to Lighthouse? I'm looking under follow-up there at the bottom of page 41.
A Oh, okay. Yes. I'm with you there. It says follow-up when and it says immediately.
Q And then at the bottom it says follow-up notes?
A Go directly to Lighthouse.
Q Does that indicate to you any degree of what the ER staff thought that this -- whether this was a -- something that needed immediate treatment or was it -- what did that indicate?
A Yes. It indicates to me that they felt that there was an urgent need for him to go there without pause, without any hesitation, that he needed to go to the Lighthouse psychiatric facility.
Q Doctor, will you turn to page 42 of the medical record? First, let me turn your attention, Doctor, I'm sorry, will you go to page eight first? Whose initials are there on that page when Matthew is checking in?
A It's my understanding that those are Matthew's initials, MJS, Matthew Scheer.
Q Yet, when Matthew checked out and went to Lighthouse, what does the record reflect, who was required to sign for him

there?
A It's my understanding that the signature on the left is that of his father, David Scheer.
Q Does that have any significance to you? Does that -- well, what does that -- what do you glean from that?
A Well, what I take from that is that the emergency department staff did not feel that Matthew was able to sign himself out on the discharge paperwork for reasons related to his psychosis and that they felt that his father needed to be the one to take responsibility for the actions and the plan of his being transferred to Lighthouse place upon discharge.
Q So Matthew is discharged in the care of his father and sent to Lighthouse?
A Correct.
Q Was that appropriate?
A Yes. I do believe that was appropriate at the time.
Q Was Matthew suicidal or homicidal?
A Not per the records, no.
Q But how was his mental state at this point?
A He was psychotic.
Q Was there any reason at that point for anybody to put him on a temporary hold?
A No. At that time he was still compliant and willing to undergo treatment.
Q Dr. Robinson, if you could go -- see Plaintiff's Exhibit

Two, and let's go ahead and do Two and Three at the same time, please? Thank you. Dr. Robinson, what, what are you looking there in Exhibit Two?

A So Exhibit Two is titled inquiry call, inquiry call update and it has Lighthouse Behavioral Health at the top, so documentation from Lighthouse Behavioral Health Facility.

Q Are these records from Lighthouse?

A Yes. They are.

Q And Dr. Robinson, if you would turn to page three of Exhibit Two. I know it's a little bit hard to read. What did healthcare providers at Grand Strand find about Matthew's -- did they find him to have delusions?

A Yes. They document that he walked in, and I'll read verbatim, [as read], "Patient walked in here and was very delusional and confused. He had very disorganized thinking. When asked a direct question, he answered but went right back into his thinking," I believe is what that says.

Q Was Matthew's condition at Lighthouse similar to his psychotic condition at Grand Strand earlier that morning?

A Yes. Per the records, his condition was similar to what he -- to how he presented at Grand Strand earlier that, that day.

Q Was he able to -- the records indicate he was able to be admitted into Lighthouse?

A I'm sorry. Repeat the question.

Q Do the records indicate Matthew was ever admitted to Lighthouse, like as a patient actually?
A No. They do not.
Q What do the records indicate that Matthew -- why, why was he not able to be admitted?
A So the records reflect that the providers at Lighthouse did not feel that he was medically stable for admission to the behavioral health facility.
Q And tell us why he was not -- they -- he was not medically able to be admitted. Well, what about his medical record would keep him from being able to be admitted?
A I believe there is documentation. I don't see it here but -- oh, yes, it is. There it is, because of his abnormal lab values that we spoke of earlier, so his elevated white blood cell count, and what I failed to mention earlier was his bilirubin, which was also an indicator that he was severely dehydrated or some other medical process was going on, and for those reasons, they didn't feel equipped to manage his medical issues at the behavioral health facility.
Q Doctor, what page are you looking at? What's the Bates stamp number on the --
A Three.
Q -- bottom right-hand corner?
A Three.
Q Three. Does a -- in your experience, does a facility,

mental health facilities, do they have the ability -- do they always have the ability to take care of a medical -- a patient who has medical needs?

A No. They don't.

Q And why not?

A Oftentimes they don't have equipment such as IV lines, certain medications, in part because some of that equipment poses a risk to the individuals who are in those facilities and also the clinicians who are, are working there, whether it be psychiatrists and/or psychologists may not be well-versed in the treatment of the non-psychiatric medical issues that the individuals have.

Q What could such, such a thing as an IV line, the, the tubing, what -- how would IV tubing be a danger at a mental health facility?

A Sure. So an individual could use it to potentially strangle themselves or to hang themselves. Certainly there are, are sharps that are needed to start the IV, the needles that are needed. They could use those to injure themselves or others. Similarly, with the IV tubing, they could use that to injure someone else, not just themselves, but someone working in the -- those, those facilities, and so for those reasons it's not uncommon that behavioral health facilities don't have that type of equipment.

Q Dr. Robinson, you mentioned a minute ago the term

bilirubin, and generally speaking and, and for us non-doctors in the room, what is, what is bilirubin?

A So bilirubin is a chemical or enzyme produced in the liver, but also produced by way of breakdown of red blood cells.

Q And Matthew, mentioned a minute ago he had elevated bilirubin. What could that be attributed to or related to?

A I think in large part it was related to, again, his dehydration and malnutrition from his failure to eat because of his beliefs that the food that he was eating was poisoned.

Q Is this causing Matthew harm?

A Certainly it is. Yes.

Q Dr. Robinson, what was -- what ultimately happened at, at Lighthouse? What, what was he -- what was Matthew and Matthew's dad, what were they instructed to do?

A They were instructed to return to the hospital for medical clearance or medical reevaluation because of the abnormal lab values.

Q Would you look at Plaintiff's Exhibit Three, Dr. Robinson? What are we looking at there in Plaintiff's Exhibit Three?

A So this is a document, again, medical record from Lighthouse Place or Lighthouse Behavioral Care Center, and it's a transfer document indicating that they were recommending that he, again, go to a medical facility for

evaluation.
Q And what time of day is this transfer?
A 1500 or 3 p.m.
Q And is there a -- looking about midway through the page, is there a preliminary diagnosis for Matthew?
A Yes. The primary diagnosis listed is psychosis.
Q And a little bit above that how is his psychosis presenting? Is it, is it present at that moment?
A Yes. It says he is actively psychotic with delusions and disorganized thoughts.
Q Is there any record that Matthew is ever agitated, angry, in any way being aggressive towards anybody at the time he's at Lighthouse?
A No. There is not.
Q Okay. Is there ever any record that he's homicidal or suicidal?
A No. There's not.
Q Was it appropriate for Lighthouse to send Matthew back to a hospital with his father?
A Yes. It was.
Q Was there any reason at that point for anybody to have put an involuntary hold on Matthew?
A No. There was not.
Q And why not?
A Again, at this point in time he's still agreeable. He's

still willing to undergo treatment.
Q Is Matthew someone at this point who would be safe to be on his own?
A No. He's not.
Q Dr. Robinson, what's next in the medical record? Chronologically what happens next with Matthew and his dad?
A In terms of the records here or --
Q Well, let's, let's -- that -- they're transferred from Lighthouse; correct?
A Correct.
Q And where does Matthew go next? Where does his dad take him?
A He ends up re-presenting to Grand Strand Regional Medical Center.
Q And at Grand Strand what do the staff there find?
A My recollection of the medical record is that the same emergency room provider saw him and notes that his condition is unchanged from when they had seen him earlier that day. So he's still having delusions. He's still psychotic.
Q Doctor, if you would, turn to page -- pages 57 and 58 in Plaintiff's Exhibit One.
A Bates numbers 57 and 58?
Q Yes, sir. It's --
A Okay.
Q -- the ones in the bottom right corner. I know it's

confusing. We've got a, a Bates number that's the exhibit -- the number of pages in the, in the medical record and then we have a record number below it that's the -- well, it's the hospital's Bates number.

A Right.

Q So we have kind of two numbers, but the Bates number 57 and 58 if you would. At, at all times we've been talking about so far who's with Matthew?

A His father.

Q Is that important?

A I certainly believe it's important.

Q Why is that important?

A Well, it's important because at all times he's in the care of someone who is -- who has and is taking responsibility for him because due to his psychosis he cannot be entrusted into his own care.

Q I'm looking, Dr. Robinson, on page 58 under reports, kind of under social history.

A Okay. I'm there. Yep.

Q What does it say about his social history?

A It says good social support, local resident.

Q So what do you interpret that to mean?

A I interpret that to mean that the providers felt that he had a good network of support to assist him as it relates to his healthcare.

Q Speaking of parents, his father?
A Specifically speaking of his father, given that that's who he presented with.
Q Doctor, looking still on page 58, is Matthew similar to as he was before, as he, as he had presented earlier in the day at Grand Strand?
A Yes. He is. It's still documented in the psychiatric assessment that he has paranoid thoughts that, that others are against him. Again, it's documented that he's having tactile hallucinations, paranoid thoughts that his food is being poisoned.
Q And Dr. Robinson, it's noted that he's -- there's no acute distress. He's still not agitated or angry?
A Correct.
Q And he denies -- well, he's there with his dad. He's not agitated or angry. Is there a need to put an involuntary hold on him?
A No. There's not.
Q Is this a man who's safe?
A He's not safe. No.
Q Is safe to be let out?
A Safe to be released from the hospital?
Q For release.
A No. He's not.
Q And he, again, denies suicidal, homicidal ideations or

plans?
A Correct.
Q Does that mean he won't -- does that mean he's not going to -- he doesn't pose a risk of hurting himself or others?
A No. That does not mean that he doesn't pose a risk. The, the lack of suicidal or homicidal or communicating suicidal or homicidal intent does not mean that he may not still pose a harm or risk to himself or others.
Q Do people who have plans to hurt themselves or hurt others always admit it?
A No. They don't.
Q Can you simply ask a patient, "Do you plan on hurting yourself or others," or is there more involved in trying to determine that?
A Certainly, there's more involved. Specifically, if you have someone who is presenting with psychosis it's a duty and a responsibility of any physician in that clinical scenario to probe further than just asking a yes, no question, "Do you have plans to hurt yourself or plans to kill yourself or others?"
Q Dr. Robinson, you've read the testimony of Mr. David Scheer?
A Yes. I have.
Q Do you understand that at some point that evening he departed the hospital?

A Yes.
Q And at the time David left, what was Matthew's demeanor as you understand it?
A My understanding is that he was still calm, that he had -- was being admitted to the hospital but that he was still calm, not showing any agitation or combativeness or aggression.
Q And at the time Matthew was at the hospital what treatment and care had been ordered for him? I want to differentiate what was ordered for him and what was actually provided. What was ordered for Matthew?
A I'm sorry. Can you repeat the question?
Q Sure. Well, did they order -- was a psychiatric consult ordered for Matthew?
A Yes. It was.
Q Did Matthew ever receive a psychiatric consult?
A No. He did not.
Q Were there ever -- was there -- was Keppra ordered for Matthew?
A Yes. I believe Keppra was ordered. However, he refused the medication.
Q And when he refused the medication, is there anything in the medical record that anybody worked to convince him to take it?
A No. I did not see that there is anything suggesting that

anyone tried to convince him to take the medication that he needed to have taken.

Q If you had a patient in your hospital -- well, if there's a patient in a hospital with psychosis and a seizure disorder and they refuse to take their anti-seizure medication, what should a hospitalist do?

A I think that a hospitalist --

MR. GRESH: Objection, Your Honor. Lack of foundation. The hospitalist know, say that first?

Q Assuming the hospitalist knows --

MR. GRESH: Yeah.

Q -- the hospitalist is made aware that, that his patient, his or her patient hasn't taken anti-seizure medication, what's the hospitalist do?

A I think it's incumbent on the hospitalist to speak with the patient at length, try to get an understanding as to why he or she does not want to take the medication, make every effort to convince them as to the need to take the medication for their health benefits and reasons. I think that's, again, the duty of any hospitalist faced with that scenario.

Q Have you in your practice, Dr. Robinson, have -- ever had the occasion to treat a patient who has psychosis who was refusing treatment?

A Yes. I have.

Q And on occasions when that has happened what have you

done?
A I've taken the time, and in most cases a great deal of time to sit and speak with the patient to let them know the importance of receiving the therapy that it, that it is that we're intending to provide, take the time to understand why they're refusing that treatment and as best I could and have done to convince them to undergo the treatments that's necessary for whatever condition they're in for.
Q And when you've had the occasion to do that, has it usually been successful in ultimately getting the patient to do the recommended medicine or course of therapy?
A More often than not it's been successful. Yes.
Q Do you have any examples of times where you've had to do that?
A Yes. I have a specific example where a young lady was acutely psychotic, needed an MRI procedure because she had a potentially life-threatening but certainly movement threatening infection in her spinal cord, and I had to take, again, a great length of time to convince her to undergo the MRI procedure to confirm that she had a sack of puss around her spinal cord so that we could then get that treated by the appropriate individuals.
Q So when the, when the patient initially refused, did you simply just tell the patient, "Well, you could be paralyzed," sign here? What did you do?

A No. Again, I, I took as much time as I could to really communicate to this young lady the importance of getting the procedure so that she could then get the necessary treatment. That, that's what I did.

Q Is that required under the standard of care?

A Yes. I believe it is.

Q Dr. Robinson, in your experience as a nocturnist -- again, what's a nocturnist?

A So a nocturnist is a hospitalist who works night hours only. So we're kind of the, the vampires of the hospital, so to speak. We're up late nights.

Q Typically, on an inpatient floor at midnight, 1:30 in the morning is it busy, is it quiet? What's it like?

A It varies, but I would say generally speaking, it, it's relatively quiet in those hours.

Q What are people -- healthcare providers usually doing at around one, 1:30 in the morning?

A So usually rounding on patients, following up on records and charts, making sure the procedures that were ordered that we're expecting results on have been completed, reviewing the charting and the like. That's what's most often occurring at that time.

Q In the course of a day for a hospitalist is it most chaotic, least chaotic, how does, how does 1:30, midnight fall in?

A Again, I would say it varies, but it's not -- I wouldn't say that it's a peak hour where there's a lot of activity. I'd say it's closer to the lower level of activity.
Q Dr. Robinson, what do the records -- what happened at around 1:15, 1:30 in the morning at Grand Strand with regard to Matthew Scheer?
A So the records reflect that Matthew was seen pacing near the nursing station without his shirt on. He approached the nursing station, ripped off his hospital ID bracelet and in a very, as it was described, aggressive tone and loud voice began shouting that all the staff were devil worshipers, that neither the staff nor Obama, who was president at the time, could control him and demanding that he be released from the hospital.
Q Dr. Robinson, would you please turn to page 100 in the medical record. Actually, can we get Defendant's One? I think it's a little better, Doctor, easier to read, Defendant's One. Doctor, I think on your, your, on your version of the medical record there that's Plaintiff's One, it's page 100 I'm looking here?
A Uh-huh.
Q 116 I think is just a little easier to read. Could you read that portion of the record that was -- that occurred at 1:30 in the morning or, excuse me, 1:13 in the morning?
A Yes. So it reads, [as read], "Patient approached nursing

station and was pacing shirtless. Patient ripped off armbands and threw on the floor. Patient started yelling stating that we could not control him nor could Obama. Patient accusing staff of being devil worshipers. On-call MD, Ash-Bernal called to see patient."

Q At this time did the nurses have any ability when this happened at 1:13 in the morning, was it within the nurses' power to give Matthew any sort of antipsychotic or anti-agitation drugs?

A No. It was not.

Q And why, why not?

A No medications of that type had been ordered for Matthew.

Q What does PRN mean, Doctor?

A So PRN means as needed. So oftentimes we write orders preemptively or with a plan that something may occur, and so we'll put a medication on order on an as-needed basis so that the nurses have it at their disposal, so to speak, should they need to use it.

Q If an antipsychotic drug or anti-agitation drug had been ordered for Matthew, could the nurses then have given that to Matthew at about 1:13 in the morning?

A Yes. They could have.

MR. GRESH: Objection, Your Honor, outside his scope. He's a hospitalist, not comment on the nursing standard of care.

Q You manage nurses as a physician; correct?
A I do.
Q And you give orders to nurses; correct?
A Correct.
Q And if you gave a nurse -- provided them an order that they could give a drug PRN, the nurse, you would expect them to give the drug to be given PRN?
MR. GRESH: Objection. Leading.
THE COURT: Rephrase your question.
Q If you had entered an order -- if a physician entered an order PRN for Haldol, an anti- -- excuse me, an anti-anxiety drug or an antipsychotic drug and a patient started acting as you previously read, would you expect -- what would you expect the nurse to do?
A Well, the nurse would have the ability, first and foremost, to use that drug because I'd already ordered it, and so my expectation would be that the nurse would either administer that drug or call me to ask if they could administer the drug, but most importantly, they would have it available to them to administer should they need to.
Q And what does the record reflect happened after Matthew had this outburst at 1:13? Was someone called?
A Yes. It indicates that the on-call physician, Dr. Ash-Bernal was called to see Matthew.
Q So the call to Dr. Ash-Bernal per the record occurred

about 1:13?
A Correct.
Q But would she have been there at that time per the record?
A I, I can't see one way or the other if she was there at that time, but the record suggests that she was called, and so I would -- my interpretation is that she was not physically there.
Q And what's the next record in the nursing note?
A The next record is of, again, the same date, 10-3-15 at 1:31.
Q Is that the occurrence time or the recorded time, the 1:31?
A I'm sorry. Restate your question.
Q Sure. I'm, I'm looking -- it may be easier to see in my version of the, of the document.
MR. HINSON: May I approach, approach the witness, Your Honor.
THE COURT: Yes.
BY MR. HINSON:
Q Sure. What's the occurred time?
A Oh, okay. I'm sorry. The occurred time is 1:31.
Q All right. Dr. Robinson, what do the records reflect happened with regard to Matthew and his behavior and his care at 1:31 in the morning?

A Again, it says he's -- [as read], "The patient is pacing in hallways. Approached nursing unit saying that we cannot control him. Patient escorted back to room. Patient very verbal with staff, becoming aggressive with staff, stating that we are all with the devil." At this time it's noted that security is at the bedside. "Patient verbalizing that he is here voluntarily and that we cannot keep him here. Staff tried to calm patient and reinforce that we are here to help him. Staff offered to call patient's father for him to speak to. Patient refused. Dr. Ash-Bernal in to see patient. Patient stated he wants to leave. AMA paper signed by Dr. Ash-Bernal. Patient and this RN," so all three signed, "and patient was escorted off the unit by security."

Q Dr. Robinson, in your review of the records and what transpired in this time period between approximately 1:13 and 1:31 was the standard of care met in the way Dr. Ash-Bernal handled the situation?

A No. I do not, I do not. No.

Q Tell us why the standard -- how and why the standard of care wasn't met? What should have occurred? What, what didn't occur? What should have occurred?

A Well, what should have occurred is that there should have been a thorough psychiatric evaluation undertaken knowing that Matthew was there for psychosis. The physician caring for Matthew at that time had the duty, had the responsibility to

assess his mental state, and even going beyond that, recognize that due to his presenting psychosis he was in no state to make a decision to leave the hospital against medical advice, and so I, I think first and foremost the standard of care requires that, that thorough evaluation of his mental state be done. If unsuccessful in convincing Matthew to stay, it was incumbent on the provider to contact the next of kin being Mr. David Scheer who was identified in the records as the emergency contact person to let them know of the incident and, and what was occurring at that time.

Q Dr. Robinson, I'm looking on page 51 of Exhibit One. Who was the person to notify or the emergency contact for Matthew?

A Mr. David Scheer.

Q Was this information -- would it have been available to Dr. Ash-Bernal at approximately 1:30 in the morning?

A Yes. It would have.

Q Did you see anything in the record that would indicate that Matthew ever revoked or made effort to revoke the ability for his dad to be contacted?

A No. I did not.

Q Did you see anything in the medical record that would indicate that Dr. Ash-Bernal wanted to call David Scheer but thought that she couldn't? Did she ever -- was there anything in the record that ever talks about being hamstrung by HIPAA?

A No. There's not.

Q Is there anything in the record that would indicate that she ever thought about calling Matthew's, Matthew's dad?
A No. There's -- no. There's not.
Q The note you read earlier said, [as read], "Staff offered to call patient's father for him to speak to." Did you see anything in the record that said staff was going to call the father?
A I'm sorry. Restate that.
Q Differentiating, Doctor, between, "Do you want to talk to your dad," or "We're going to talk to your dad." Was there anything in the record that said Dr. Ash-Bernal tried to call Matthew's dad?
A No. There's not.
Q Even if Matthew's dad -- excuse me. Even if Matthew had revoked or tried to revoke David Scheer as being his person to notify or emergency contact, did Matthew have the mental capacity to make that, that revocation?
A No. He did not.
Q Are there, well, as a hospitalist, are you and other hospitalist to be required -- are you required to be knowledgeable about the do's and don'ts of HIPAA?
A Yes. We are.
Q Generally speaking, Doctor, what is HIPAA?
A So HIPAA really refers to patient privacy in a very general sense and the maintaining of the privacy of an

individual's medical history and records.

MR. HINSON: The Court's indulgence for one second, please.

BY MR. HINSON:

Q Dr. Robinson, when patients come to the hospital are they given a notice of privacy practices?

A Yes. They are.

Q Generally speaking, what is, what is -- that's -- is that at any -- at every hospital?

A Yes. It's been in every hospital I've worked at.

Q Have you looked -- let's look at Exhibit Five, please. This is a photocopy of what I'm holding in my hand.

A Thank you.

Q Doctor, would you identify what we're looking at as Exhibit Five?

A Yes. It's Grand Strand Medical Center notice of privacy practices.

Q And on the -- let me grab this board if I could. Doctor, I want to -- essentially the inside page of this, you can look at your version and look at the blowup I have here. It says, [as read], "As permitted by law we may also use and disclose health information -- disclose health information for the following types of entities, including, but not limited to," and it lists a bunch of entities and a bunch of different reasons. What is the last one given, Doctor?

A The last one given, it says, [as read], "A person or persons able to prevent or lessen a serious threat to health or safety."
Q Is this a concept -- well, generally speaking, what does that, what does that mean? Can you tell us what's that, what that's -- what is your understanding of that as a hospitalist, as a physician?
A So my understanding of that statement is that there may be situations and will be situations where we as healthcare providers, as healthcare organizations can disclose a patient's medical information to someone or some persons who have the ability to prevent harm to the patient, him or herself when that patient cannot make that decision for him or herself.
Q What's the purpose of having that in there? Why, why does -- why is that there?
A Again, it's important to know when you can disclose information just as it's important to know when you cannot, and so there are certain situations or populations of patients for whom there has to be someone else to make their decisions be it children, the elderly who have dementia or as in this case those who have mental illness or psychosis.
Q In your review of the record in this case and the testimony, was David Scheer a person in a position to prevent or lessen a serious threat to health or safety?

A Yes. He was.
Q Dr. Robinson, have you reviewed any data, publications that were promulgated and published by the Department of Health and Human Services?
A Yes. I have.
(Mr. Gresh and Mr. Hinson confer.)
MR. HINSON: May I approach, Your Honor?
THE COURT: Yes.
BY MR. HINSON:
Q Dr. Robinson, please identify the document that I just handed you.
A Yes. It's a, a document authored by the Department of Health and Human Services, Office of the Secretary, the Director, and it's titled, "Message to Our Nation's Healthcare Providers," and it's a document further clarifying the intent of the HIPAA regulations.
MR. GRESH: Can we approach, Your Honor?
THE COURT: Yes. Can I see it?
(Whereupon, a bench conference is held in the presence, but out of the hearing of the jury.)
THE COURT: You object to it coming in?
MR. GRESH: Yes, Your Honor.
THE COURT: Over objection I'll allow it in.
MR. GRESH: Thank you.
MR. HINSON: Thank you, Your Honor. Mark this as Exhibit

Seven.

(Plaintiff's Exhibit Number Seven [DHHS Letter] admitted into evidence and appropriately marked.)

A My copy? Okay.

Q No. He is behind it.

A Sure.

Q Dr. Robinson, what we've marked as Exhibit Seven, what's the date of this document?

A It's dated January 15th, 2013.

Q And again, who's it being written to?

A To our Nation's healthcare providers.

Q And who, who is, who is sending, who is promulgating this document?

A The Department of Health and Human Services.

Q Dr. Robinson, who's -- who was the author of it?

A The author is Leon Rodriguez, Director.

Q What is -- okay.

A Yes.

Q Would you read, will you read for us the first two sentences there of the second paragraph?

A Of the second paragraph. Okay. [As read], "The HIPAA privacy rule protects the privacy of patients' health information but is balanced to ensure that appropriate use and disclosures of the information still may be made, still may be made when necessary to treat a patient to protect the Nation's

public health and for other critical purposes such as when a provider seeks to warn or report that persons may be at risk of harm because of a patient. When a healthcare provider believes in good faith that such a warning is necessary to prevent or lessen a serious and imminent threat to the health or safety of the patient or others, the privacy rule allows the provider, consistent with applicable law and standards of ethical conduct, to alert those persons whom the provider believes are reasonably able to prevent or lessen the threat."

Q Is the physician -- does the standard of care require a physician to understand this concept?

A Yes. It does.

Q Why is that important?

A Again, it speaks to our need to understand when we can communicate information related to a patient's health and who we can communicate that information to.

Q If a physician -- well, does the standard of care require the physician to know the exact statute and the exact place to find that information?

A No. It's just an understanding of the concept that's needed.

Q Is this limited to situations of suicide and homicide?

A No. It's not.

Q What other kind of situations would it include?

A Well, as we spoke to, it, it, it extends itself to

situations where someone is mentally incapacitated and unable to make a reasonable decision about their own care, and so we discussed the example of a child. We discussed the example of an elderly demented patient and we also discussed the example of an individual who has psychosis and is unable to make reasonable decisions for him or herself.

Q Did -- does the record indicate that Matthew Scheer was able to make reasoned decisions for himself?

A No. It does not.

Q What tools or options were available to Dr. Ash-Bernal at approximately 1:30 in the morning on October 3rd in her treatment of Matthew Scheer? What, what options should she -- could she and should she have taken?

A Sure. So the options that were available to her and that should've been taken were to do a more thorough assessment of Matthew and his mental state. Again, it, it was very clear by the documentation that he was psychotic, and so before releasing him from the hospital a, a thorough evaluation of his mental state should have been assessed. She certainly had within her abilities the option to make outreach to Matthew's dad, David Scheer, to let him know of the circumstances and, you know, hopefully get him to come and, and lessen the threat that we just read about of that serious or imminent danger, and then, lastly, she had the option to involuntarily commit him at that point because now he is combative, he is

aggressive, he is agitated, unlike earlier in his hospitalization, and so that option was available to Dr. Ash-Bernal as well.

Q Did you read Dr. Ash-Bernal's deposition in this case?

A Yes. I did.

Q Did it demonstrate that she had an adequate understanding of the concepts of permissible patient disclosures for safety purposes?

A No. It did not.

Q Did you review any training PowerPoints that she had been provided by her or through her employer, Southern Myrtle Inpatient Services?

A Yes. I did.

Q Did you have any opinions on those?

MR. GRESH: Objection, Your Honor. May we approach?

(Whereupon, a bench conference is held in the presence, but out of the hearing of the jury.)

THE COURT: Why don't we take a short break? This is probably a good time to take a break anyway, and I'll be looking at some legal matters. Doctor, you can step down and have a -- use the restroom or have you a cup of water or whatever. Just don't discuss the case with anybody.

A Yes, sir. Thank you.

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: All right. All right. We've got --

MR. HINSON: Your Honor, we're actually looking for a copy of the complaint. Oddly enough, that seems to be the one thing that I can't put my hands on at the moment. Jack, do you have a copy?

MR. GRESH: Got it right here.

MR. HINSON: I mean, it says in paragraph 50, Your Honor, it says, [as read], "The Defendants, individually, and through their agents and servants, deviated from the applicable standards of care, were negligent, grossly negligent, careless, reckless, in the following manners:," and letter E is, [as read], "Failing to educate and otherwise train physicians and staff as to the ability, means and mechanisms to detain a mentally ill patient against his or her will."

MR. GRESH: And I agree. If the allegation is Ash-Bernal doesn't know what to do because Southern Myrtle didn't tell her, that's fine, but what he's trying to get from this witness is HIPAA. That's something totally different than the ability to detain. Right. That's what they've pled, and now they're going to say the company has corporate responsibility to train their physicians on the do's and don'ts. He's a hospitalist. I agreed to let him in on a hospitalist expert. He's not a -- he's never ran a corporation that employs a bunch of hospitalists. He says a PowerPoint is bad because it only has do's and not don'ts, and this is going to be a basis

for negligence against a corporation when it's not pled. This is all brand-new information.

MR. HINSON: Your Honor --

MR. GRESH: It's not in his deposition.

MR. HINSON: Your Honor, I think that's wonderful cross-examine, that he's not -- he doesn't run a corporation, but he trains other, other healthcare providers, and he's, he's testifying as to what a physician should be taught, and a physician should be taught not only the don'ts but also the do's, and that's, that's the crux of this case.

MR. GRESH: No. No. It's, it's not. And there's -- all he does and he'll, he'll tell us when he gets back up on the stand he does a yearly, you know, roundtable when he used to be a nocturnist. Right. It's the same kind of PowerPoint that is here. If he's got new opinions don't tell them to me at 11:00 o'clock on a Tuesday. Call me and say, "Hey, look, that PowerPoint that you turned over, my expert's going to take the stand and is going to say that PowerPoint is insufficient as a matter of law and this is now a corporate negligence claim."

THE COURT: Have you provided them with the PowerPoint?

MR. GRESH: I gave him the PowerPoint.

MR. HINSON: We only got the PowerPoint like a week and a -- two weeks ago at most, Jack.

MR. GRESH: But it's not --

MR. HINSON: You've sat on that PowerPoint for three years and now you're blaming me for not -- him not testifying that when he was deposed two years ago or a year and a half ago.

MR. GRESH: It's --

MR. HINSON: You didn't -- we just got the PowerPoint in discovery about two weeks ago, Your Honor.

MR. GRESH: And it's --

THE COURT: All right. The core issue is whether or not this witness can testify as to whether or not the, the training by an -- by a corporate owner of a facility whether or not that entity is negligent or not in its instructions or training of its medical providers. Is that sort of where we are?

MR. HINSON: It is, Your Honor. I, I think I would, would respectfully couch it as is this adequate training for a physician, is this the training that the physician should receive.

MR. GRESH: And that doesn't get us there. Okay. He may say that's -- this isn't enough, but if he takes the stand and he's honest what he's going to also tell you is hospitals do training, "I did CME's through other things." What has to be the law here is that Dr. Ash-Bernal didn't have the training through whatever mean and mechanism. This is but one piece of information, and to hold a corporation liable for doing its

part when it knows it's not the only piece of the puzzle, that's kind of the whole problem with this. You get this from -- it's like us going to a CLE. My -- no, my firm puts on CLE's for lawyers and says, "Hey, here's some things to do," but Lord knows, I don't get all my education just from my law firm, and if I screw up and somebody tries to hold my law firm accountable because I don't know what I'm doing because they haven't told me, when I also go to CLE's all over the country and speak at them, to me that's different. This is but one piece of the puzzle, and it's going to be the only piece that somehow hooks in a corporation for corporate negligence, again, that wasn't pled.

MR. HINSON: Your Honor, that's a wonderful cross-exam that Mr., Mr. Gresh just, just demonstrated. My point is only that this, that this particular piece of training wasn't adequate, that this one, and the doctor may have gotten other training from other sources, but the training that was provided by her employer, that training itself was inadequate. Now, she may have gotten training from lots of other places and that can come out.

THE COURT: Well, did -- it's in her deposition did she testify that she had, had been trained by Grand Strand?

MR. HINSON: She testified she couldn't remember any specifics about her training, that she couldn't remember.

She'd, she'd been training was all she testified to. "I've been to training," and she was asked, "Can you tell us exactly what training you received," and she says, "I -- I've been to training."

THE COURT: Well, unless she had been trained on this or not trained on it, I don't think it's relevant. I mean, the fact that they provided -- if you're trying to, trying to find negligence on Dr. Ash-Bernal or trying to find negligence on behalf of her employer based on their inadequate training, I think you've got to show that, that she had training in that area.

MR. HINSON: And that's what I'm trying to show, Your Honor. I'm trying to show that the training that they set forth to give her that that training module was missing some important things it should include. So if there's five things that any training module should include and they only included four of them, that's what this area of testimony focuses on, that it's important to train physicians on patient privacy, and the corporation undertook to do that, but when they did they left off a key element to patient privacy, and that's what he's going to testify to, that, that this key element, the training that was offered by her employer, she may have received training other places, and that's, and I'm sure that that will come out in, in Mr. Gresh's testimony, but the training that the employer did seek to give missed some

important points.

THE COURT: All right. Mr. Gresh, any further follow-up?

MR. GRESH: It has to be relevant. Okay. You have to prove that she got it, that she based her opinion on it and it alone and that her -- basing her opinion on that caused harm to David Scheer. You're 0 for three. Okay? There's no proof that she actually got this. There's no proof that this is the only source of information that she had that would have done it, and that, that the training she had would have said you can't do what you did. Okay. But it's, it's -- they're 0 for three. There's no link here. There's no foundation.

THE COURT: All right. Final.

MR. HINSON: Your Honor, she testified in her deposition as to, as to particular lack of knowledge on the topic of permissible disclosures. Her corporation, the one she works for, put together a PowerPoint presentation for its employees about HIPAA, and it's missing that same piece of information that the evidence is going to show that she herself has a lack of knowledge on. It's -- it is absolutely relevant, Your Honor.

THE COURT: All right. I overrule the objection. I'll allow it in over objection. Let's take a break, take about 10 minutes. The jury's had time to refresh, but let's take about till about quarter after.

MR. GRESH: Thank you, Your Honor.

MR. HINSON: Thank you, Your Honor.

OFF THE RECORD

(On the record. The following takes place outside the presence of the jury.)

THE COURT: For planning purposes I did not realize -- well, did not know because it's been a while since I've held court here that the clerk will order lunch for the jury. It will come around 1:00 o'clock, and so that means we'll take about an hour break. I know you all have got to go eat yourselves, but rather than take an hour and 15 or an hour and a half we'll probably try to keep it to an hour if you all can work out some way to get fed during that time.

MR. HINSON: Certainly, Your Honor.

THE COURT: And also, so you know that 1:00 o'clock is sort of the time I'm shooting for to take a lunch break. All right. Bring in the jury.

(Whereupon, the following takes place in the presence of the jury.)

THE COURT: Doctor, you can come back up and take the stand, please. You're still under oath, of course.

All right. You may, you may continue.

MR. HINSON: Thank you, Your Honor.

BY MR. HINSON:

Q Dr. Robinson, before the break I was asking you about the PowerPoint presentation that Dr. Ash-Bernal's employer,

Southern Myrtle Inpatient Services, had presented to employees. Have you reviewed that PowerPoint?

A Yes. I have.

Q Do you have opinions as to the adequacy of that PowerPoint?

A Yes. I do.

MR. GRESH: This is all over objection. Right?

THE COURT: Yeah.

MR. GRESH: Thank you.

THE COURT: Objection overruled.

Q And what are your opinions, Doctor?

A My opinions are that while the PowerPoint does speak to the conditions or circumstances where a provider cannot communicate information about a patient's health to anyone, it does not include the very important side of that coin as to when a prescriber or provider can share health information with a family member or, or other individual.

Q And Doctor, you've worked for a number of corporations in healthcare?

A Yes. I have.

Q And in your experience working for these different medical corporations, does the corporation have a duty to make sure that its physicians are properly trained on permissible disclosures for patient safety?

MR. GRESH: Your Honor, outside the scope of his

expertise.

THE COURT: Yeah. I sustain the objection on that.

Q Dr. Robinson, in your experience working for these different corporations, has the corporation taken to -- made an effort to educate you and other doctors on permissible disclosures for patient safety?

A Yes. They have.

Q Dr. Robinson, I want to go back now to Plaintiff's Exhibit One, and if I could, turn you to page 68. Dr. Robinson, what are we looking there on page 68 of Plaintiff's Exhibit One?

A We're looking at a note entered by Dr. Rachel Ash-Bernal.

Q And what time, let me go up here, what time did she make this note?

A It appears this note was made on October 3rd, 2015, at 1:29 a.m.

Q All right. And then down at the bottom it says it's signed at 1:40. Just generally what does, what does that mean, the making it at one time versus signing it as another?

A Sure. So typically the time the note was made is when it was started. So when a physician or other healthcare provider goes into the chart, initiates a new document, in this case a note, it timestamps it as to when it was started as compared to the signature time which is when it's been completed and verified by that healthcare provider as, as a complete

document.
Q So it was typed at -- even before 1:30 and signed at 1:40?
A Correct.
Q Doctor, can you read that, that cross cover note to the jury?
A Yes. It says, [as read], "Patient refused IV PO Keppra," PO meaning by mouth. "I was called to patient room by nursing staff since patient was yelling at nursing staff stating they were all devil worshipers and Obama is Satan. Patient is a voluntary psychiatric admission, and when asked if he wanted to leave the hospital against medical advice or stay in-house for treatment he state, 'I want to leave right now.' Patient has -- was yelling in his room, disrupting the other patients' rest time. Patient indicated he understood that it was recommended he remain in the hospital for further evaluation of his psychiatric issues, but he refused to stay. Patient seemed able to weigh the information (he interrupted his religious rant to think about the question), and it was explained to him that he could die from infection, seizures or as a result of his psychiatric illness and he insisted on leaving. Patient may not be restrained in the hospital since he is a voluntary admission. Patient vitals stable. AMA papers signed. Patient left the hospital."
Q Dr. Robinson, when it says here, "Patient may not be

restrained in the hospital since he was a voluntary admission," he was a voluntary admission; correct?

A He was. Yes.

Q At this point in time could Matthew have been restrained?

A Yes. He could have.

Q Should he have been restrained?

A Yes. He should have.

Q Dr. Robinson, where it says, "Patient seemed able to weigh the information," and in parentheses, "He interrupted his religious rant to think about the question", is that a proper way to get consent for a patient -- from a patient?

A I don't -- no. It's not.

Q Do you see anything at all in Dr. Ash-Bernal's note or anywhere in the medical record that she did an adequate evaluation of Matthew Scheer's mental capacity before she let him leave the hospital?

A No. It's not reflected in the record.

Q Dr. Robinson, have you looked over any informed -- any policies from Grand Strand, any policies and procedures?

A Yes. I have.

MR. HINSON: Would you please give the witness Exhibit Six?

BY MR. HINSON:

Q Generally speaking, Dr. Robinson, what is Exhibit Six?

A Exhibit, Exhibit Six is the informed consent policy from

Grand Strand Health.

Q And this would apply to this -- to any situation with a doctor and a patient in Grand Strand; is that your understanding?

A That is my understanding. Yes.

Q And what does it mean to be unable to consent or what does it mean to be able to consent, however you want to describe it?

A So to be able to consent you need to understand the treatment and plan, and most importantly, the condition for which your planned treatment is, is occurring. The inability to consent means that you don't have that understanding. You can't comprehend for whatever reason the implications of your disease process and the potential benefits of therapies.

Q And how does, how does Grand Strand define the ability to consent?

A So they define it as one who can appreciate the nature and implications of his or her condition and proposed healthcare, one who's able to make a reasonable decision concerning the proposed healthcare or communicate that decision in a clear and unambiguous manner.

Q Dr. Robinson, from your review of the records, could Matthew Scheer in his mental state appreciate the nature and implications of his condition?

A No. He could not.

Q Have you -- if you would, turn to page 85 of Plaintiff's Exhibit One.
A Okay.
Q 85 and 86, Doctor. Are you there?
A Yes. I am.
Q All right. What, what form are we looking at there?
A So what we're looking at is the refusal or it's, it's titled the Grand Strand Regional Medical Center Informed Refusal for or for Partial Refusal of Care and AMA or Against Medical Advice form.
Q And what, what are the risks that Matthew per this -- well, who filled out this form?
A This form was filled out by Dr. Ash-Bernal.
Q Did she sign it?
A She did on the second page.
Q And what time did she time it?
A She timed it 10-3-2015 at 1:27 a.m.
Q Okay. So a couple of minutes before that cross cover note we mentioned?
A Correct.
Q And what is she -- in this form, what is she telling, what is she saying, "I told the patient they needed treatment for"?
A She has documented at the bottom that the treatment was for seizures, psychosis and infection.

Q So she's telling the patient that he's refusing care for these things and that the refusal puts him at risk of what?
A Death, seizures, and then it says treatment of psychosis.
Q Does that make sense to you? Is this a sensible form to fill out the way it was done?
A No.
Q Tell us why not.
A Well, his refusal doesn't put him at risk for a treatment of psychosis. His refusal puts him at risk to the effects of the psychosis which include potentially death and harm to himself.
Q Does Matthew Scheer, from your review of this case, did he have the mental capacity to accept these risks?
A No. He did not.
Q At the time Matthew leaves the -- well, what time did Matthew leave the hospital approximately?
A Approximately 1:35 to 1:40 is the timeframe.
Q All right. And he's -- how is he brought out of the hospital?
A He's escorted by security.
Q At the time he leaves the hospital has he received any treatment for psychosis?
A No. He has not.
Q At the time he leaves the hospital has he received any treatment for his seizure disorder?

A No. He has not.
Q At the time he leaves the hospital has he received any treatment for his white blood cell count and dehydration?
A No. He has not.
Q Is there anything he's at risk of?
A Yes.
Q What is he at risk of?
A So he's at risk for seizures due to his refusal of treatment of his seizure disorder. He's at risk of potentially infection because we still don't have an understanding as to why his white blood cell count was elevated. He's at risk of kidney injury and/or failure because of his dehydration, and again, he's at risk of the consequences of his untreated psychosis, which include harm to himself and ultimately death.
Q When, when is he at risk of having a seizure?
A The minute --
MR. GRESH: Objection to form. Speculation, Your Honor.
THE COURT: I sustain the objection.
MR. HINSON: Okay.
BY MR. HINSON:
Q People with untreated seizure disorder, is there a timeframe, it's -- would -- a seizure -- is Matthew at risk of having a seizure at any moment?
A Yes. He is.

Q Can seizures be, be fatal?
A Yes. They can. Seizures can be deadly, fatal.
Q Dr. Robinson, if a physician doesn't know the answer to a question about medicine or the law is there something set up in a hospital with which a physician can get those answers?
A Yes. There is. It's called the chain of command.
Q Generally speaking, what is the chain of command?
A So it's an administrative ladder of sorts whereby if you have questions related to policies and laws and, and medicine you go up rung by rung until you find the answer to that question.
Q So a physician had a question -- well, is the chain of command available only during business hours?
A No. It's available 24 seven.
Q Is that at specific hospitals?
A No. That's -- it's been my experience that that's at all hospitals.
Q So if a physician had a question about HIPAA and needed an answer at 1:30 in the morning, could a physician get that answer?
A Yes. They could.
Q Dr. Robinson, from a physiological standpoint what do we understand, what does medicine understand the process of drowning to be like?
A Well, we understand that drowning encompasses a lack of

oxygen delivery to the brain and other tissues as water and/or whatever substance is filling the lungs, that there's associated panic and anxiety with that, that there's spasm of the airway, tightening of the airway and that it is a painful process.

Q Thank you, Dr. Robinson. No further questions at this time.

THE COURT: All right. Cross?

MR. GRESH: Thank you, Your Honor. Thank you.

CROSS EXAMINATION

BY MR. GRESH:

Q Dr. Robinson, before we really kind of get into this, Brink's going to move the TV for us. There's two different copies of the medical records. There is a Defendant's One and Plaintiff's One, and just, just so you're aware the hospital produced two sets and they're essentially the same thing. Right. One or two of the nursing notes prints out different in form but not in substance between those two. Do you understand that?

A I do understand what you're saying. Yes.

Q Okay. There's no -- there's nothing nefarious between the two different sets. Whichever one you need to look at at anytime feel free to do so. Okay?

A Is this the other set here?

Q This is Defendant's One, and the only reason it's even an

exhibit, I believe, the nursing notes that Mr. Hinson was asking you about, some of them print up and down instead of left and right.

A Sure.

Q I mean, it really is, is that easy.

A Okay.

Q So whichever one with which you are more comfortable, if you'll please use that if, if you to need at any time. First, let me start with, you are here as an expert witness as a hospitalist who provided care and treatment as a nocturnist. Have I got that right?

A That is correct. Yes.

Q And I understand from your deposition that you last practiced as a nocturnist a couple of years ago; is that fair?

A In October, November of 2017 is when I stopped practicing as a hospitalist nocturnist.

Q And when you were a nocturnist you were on a cancer floor; is that -- I don't mean to -- just tell me what kind of floor it was that you were at?

A Sure. So I was a, a nocturnist. Well, let's, let's parse it out. So in the years of 2013 to 2015 I was a nocturnist on a general medical service. So we saw all patients. Between 2015 and 2017, October 2015 specifically and November 2017 I was a nocturnist on a bone marrow transplant unit, but again, those patients have the same

medical issues as do others. It's just that it's superimposed on a background of cancer. So they still have other issues, infections, psychosis and the like. It's not exclusive that they only have a cancer diagnosis.

Q And are you still working at CVS now?

A Yes. I am. CVS Caremark, yes.

Q At CVS Caremark you -- I tried to understand from reading your deposition. My understanding is you review claims that are submitted that are -- may or may not be paid for whether a prescription is related to care provided. Is that, in essence, that your job?

A That -- that's a good summary. Yes.

Q Okay. But you're no longer practicing in the hospital seeing patients as either a daytime hospitalist or a nighttime nocturnist; correct?

A That is correct.

Q All right. You, you've been doing this type of work in a medical, legal sense since about 2009 or about 10 years or so at this point; right?

A That's correct. Yes.

Q And I know you do cases for Plaintiffs and Defendants and this type of thing and you've reviewed about 125, 100 cases, somewhere in that range?

A I think that was at the time of my deposition. The number has likely gone up since then, but I would say it's

still in the realm of 150 at the most over 10 years.
Q And the -- His Honor has already explained, the jury is going to hear from Dr. Ash-Bernal and Dr. Patel who were actually there providing care and treatment to Matthew Scheer. Am I correct that the basis of your information is what's contained in the chart plus the deposition testimony that the other folks have elicited?
A That is correct. My opinions are formulated based on the medical records primarily and then the deposition testimony of the involved providers and other witnesses to the events.
Q Okay. And in preparation for doing the testimony today, you would have looked back through the deposition testimony of all the folks that were deposed during the pendency of this litigation?
A The vast majority of those that were relevant. Yes.
Q And you would have looked at Mr. Scheer's deposition, David Scheer's deposition; right?
A That's correct. Yes.
Q And you saw that on the, the day in question, October 2, that Matthew Scheer and David Scheer had breakfast that day; did you see that?
A I don't recall that specifically, but if that's contained within the deposition I have no reason to dispute that.
Q Okay. When David and Matthew, I believe, as it goes, after they finish up breakfast and Matthew, I think, showers,

and they go to the hospital, they're initially greeted by Dr. Battisti, the ER physician; isn't that right?

A Dr. Battisti, yes, was involved in the initial evaluation.

Q And there is also a physician's assistant. I think you mentioned them in your direct. What's a physician's assistant?

A So a physician's assistant is someone who's trained very much like physicians in the medical information and, and knowledge to practice medicine. They just didn't go through medical school. They go through physician assistant school, and so, in essence, they work collaboratively, but in some instances can work independently, which is with a physician supervision. So but they're what we refer to as physician extenders. They can do a lot of the things that we as physicians can do, but they do require that they have the oversight of a, a physician to ensure that their care is being -- is, is appropriate.

Q And a physician extender or a PA as, as the case is here, can also order medications; right?

A They can. Yes.

Q And when Matthew Scheer is in the emergency department the first time in the morning of October 2, he's also seen by emergency room nursing staff; fair?

A That's fair. Yes.

Q And when -- we can take our time, but when we look through the medical records from the emergency department visit in the morning, there are several references by the physician, by the physician's assistant and by the nursing staff that they talk to Matthew Scheer and that he denied homicidal or suicidal intentions or plans; correct?
A Yes. It's documented that he denied suicidal or homicidal intentions or plans. That's correct.
Q Okay. Now, everybody makes note that Matthew has maybe a potential psychosis going on; correct?
A Well, I think that it was explicitly stated that they felt that he had psychosis, not potential.
Q All right. And the physician's assistant who can order medications, the physician who can order medication, the nurse, although she can't order medications, could ask the physician to order medications, there were no medications ordered in the emergency department for Matthew Scheer to address the psychosis; correct?
A That's correct, but I'll point out that that's because he was being sent to a behavioral health facility where he was to undergo treatment.
Q Okay. Now, first off, let me apologize. I hate to bounce around, and I'm going second. So a lot of the questions I was going to ask you Mr. Hinson already did. So if I bounce around and you need me to kind of rephrase

something, let me know, but one of the things that we had talked about on the direct exam for Mr. Hinson was this idea of the Keppra or the, the medication that is administered to patients with epilepsy that reduces the risk of them having a seizure, fair?

A Yes. That's correct.

Q And when we look through the entirety of Defendant's One or Plaintiff's One, all the medical records from Grand Strand, or the medical records from Lighthouse, there is no evidence that Matthew Scheer had a seizure; correct?

A There's no evidence that he had a seizure in the way of what we recognize as tonic-clonic seizures or convulsive seizures. Correct.

Q Okay. And when, you know, Dr. Patel ordered the Keppra to be restarted for Matthew, the nursing staff tried to give it to Matthew at about 9:00 o'clock; is that right, about 9:00 o'clock that evening and Matthew refused PO and IV Keppra; correct?

A He did refuse. I, I don't recall the specifics as to the time. I can certainly, if you'd direct me to a particular page where that was documented, but he did refuse the, the Keppra in both the IV and the oral formulation.

Q And, and whenever the time was. I think it was at bedtime or somewhere after the evening shift. Whenever it was that Matthew refused that, the nursing staff didn't call up

Dr. Patel or Dr. Ash-Bernal and tell them that the patient had refused Keppra; correct?

A I did not see documentation that they communicated that. Correct.

Q And in fact you know because you read the deposition of Bethany Bell; right, the nurse?

A Correct. I did.

Q She's the nurse that's on shift during the second visit to Grand Strand from 7 p.m. all the way up until Matthew leaves AMA. She's that, that nurse; right?

A She is. Yes.

Q And when she was deposed didn't she say, "Yeah, Matthew declined the Keppra, and I didn't tell the physicians about it." That's essentially what she said; right?

A Again, I don't recall those details, but if, if that's recorded in her deposition I have no reason to dispute that.

Q Okay. Going to the, the Lighthouse records, at the time of your deposition you didn't have the Lighthouse records; did you?

A Correct.

Q Went around and around looking for those, but long story short, they did produce some records that we looked at earlier that are the kind of the call logs, which I believe is Plaintiff's Exhibit Two and then there is a memorandum of transport form. I believe it's Plaintiff's Exhibit Three, and

you've got those there in front of you?
A I do. Yes.
Q When he goes to Lighthouse there is concern for the white blood cell count and the bilirubin levels and Dr. Oduwole he's the psychiatrist at Lighthouse, essentially makes the decision in conjunction with the social worker at Lighthouse that because of Matthew Scheer's medical problems he ought to go back to Grand Strand and get those cleared and then come back; right?
A Yes. He advises that he go to a hospital to get his medical evaluation for the abnormal lab values that we discussed. Yes.
Q And the way it's recorded there is that the medical folks at Lighthouse called Conway and gave them a special heads up about Matthew Scheer coming over there for medical clearance; right?
A Yes. That's correct. That's documented.
Q In fact, they tell Conway, "Hey, pay special attention to Matthew Scheer because of his white blood cell count and his bilirubin levels"; right?
A Yes. I do see that. Correct.
Q Where it's pay special attention to the white blood cell count and the bilirubin levels?
A Correct.
Q If a psychiatrist or a social worker was really concerned

about somebody being an imminent danger to himself or to others they wouldn't let somebody go in a private vehicle; right?

A I disagree.

Q You think that imminently dangerous folks are just allowed to drive themselves or ride around in private vehicles?

A Well, I think the point is, is noted that he wasn't driving himself. Again, he was being driven by his father, David Scheer, and David Scheer had the ability to take responsibility for Matt under these circumstances.

Q And if Lighthouse, the folks who are on this planet, thank God they are, they're on this planet to take care of people with psychiatric issues, if they had thought that David -- excuse me, Matthew Scheer was in imminent danger to himself or others wouldn't they have said, "Hey, pay special attention to Matthew Scheer. He's a potential danger to himself or to others?" Wouldn't they have given that kind of heads up?

A No. Because, again, he's being sent for a medical evaluation with the understanding that the psychiatrist is going to come and evaluate him in consultation, and so Dr. Oduwole, as you mentioned, was aware of Matthew and the need for the psychiatric evaluation. He was being sent back to the hospital for medical evaluation, and so they needed to identify with the medical providers why it was that he was

being sent back for the medical evaluation. They had a handle on what it was that they intended to do from a psychiatric standpoint.

Q And you've read the deposition of the Lighthouse corporate representative?

A I believe so. Yes.

Q What that Lighthouse corporate representative said is that even though there may not have been a formal evaluation of Matthew when he got there because he had the medical problems, if that social worker who talked to Matthew thought that Matthew was in imminent harm to himself or to others that she would have put other processes in place; correct?

A Again, I don't recall those specific details, but if that's documented, I don't have a reason to discount or dispute that.

Q But that instead the plan was to go get medical clearance and that Dr. Oduwole, the psychiatrist, would come follow the patient; true?

A Yes. That's correct.

Q Okay. And there's no mention in the Lighthouse records that Matthew Scheer was in imminent harm to, excuse me, there was no indication in the records from Lighthouse that Matthew Scheer was in imminent danger to himself or to others at least in their opinion; correct, you didn't see that in the Lighthouse records?

A I, I did not but, again, this documentation was not made by a clinician. It was made by a social worker who doesn't have the, the same purview, the same perspective of, of a psychiatrist.

Q So Matthew Scheer -- I think Conway Hospital and Lighthouse do you know they're essentially in the same parking lot. You understand that?

A I understood that they're very close in proximity.

Q I, I heard somebody say you can basically hit a seven iron from Lighthouse to Conway. That's essentially how close they are. They're right there; right?

A I, I have no reason to dispute that but, yes.

Q Anyway, we come back to Grand Strand which is where Matthew Scheer had been seen earlier that day; right?

A Correct.

Q And again, we're seen by Dr. Battisti, the same ER doc who has seen him four or five hours earlier?

A That's correct.

Q There's -- Dr. Battisti does her evaluation, again, of Matthew Scheer; correct?

A Correct.

Q Again, does not order any type of antipsychotic or anti-agitation medicine for Matthew Scheer; correct?

A Correct, but Dr. Battisti is an emergency room physician, and again, at the time that he presented while he was still

having hallucinations while he was still identified as being psychotic or suffering from psychosis, he was not combative, he was not agitated, so there was no reason to administer or order those medications, and again, her being an emergency room provider, they don't implement orders for when the patient is in the hospital. That's the responsibility of the hospitalist.

Q You're not trying to imply that if an ER doctor thought somebody was in the throes of an acute psychotic event that they wouldn't prescribe Ativan or some other antipsychotic if they thought it was necessary; right?

A What I'm, what I'm saying, not implying, what I'm saying explicitly is they would only treat the immediate issue at hand. They would not put orders in place that would then carry on to the patient's inpatient hospitalization. So if they felt the need for a medication at that moment in time they would do that, but again, Matthew at that point in time was cooperative. He was willing to undergo and seek treatment. So there was no need to employ those therapies at that time.

Q But Dr. Battisti in her evaluation is the only person that found that Matthew Scheer was complaining of tactile hallucinations and auditory hallucinations and visual hallucinations; correct? Nobody else mentions those?

A I'll need to look back at the admission history and

physical and nursing notes to confirm your claim that she's the only person who identified those because my recollection is that there is documentation in the H and P or the history and physical that he was still experiencing those symptoms.

Q Isn't it, and I don't mean to cut you off, but isn't it Dr. Patel who notes in his H and P the patient denies hallucinations?

A That's what I'm looking for actually is his H and P to confirm what it is that you're stating. Do we have a Bates number on his H and P by chance?

Q I believe if you're looking at the Plaintiff's, you're looking at the Plaintiff's One?

A I am. Yes.

Q Yes. You are. All right. Turn your attention --

MR. GRESH: Your Honor, if I could approach?

BY MR. GRESH:

Q Turn your attention to Grand Strand 0065.

A 65, okay.

Q And about midway down that paragraph it says the patient denies hallucinations but his father described a psychiatric episode where he ran into the woods.

A Yes. I do see that.

Q So kind of going back to where we were, he's there with Dr. Battisti, and she's noting the visual hallucinations, auditory hallucinations, tactile hallucinations, and despite

all of those current findings, still doesn't order any type of antipsychotic meds; correct?

A That is correct. She does not.

Q All right. So let's kind of talk a little bit about the nocturnist. As a nocturnist or somebody who is employed to provide medical care and treatment to the patient overnight, one of their primary responsibilities is to admit folks from the emergency department; correct?

A That is one of the responsibilities. Yes.

Q And they also would round on other patients throughout the night if that was necessary; correct?

A That's correct. Yes.

Q And oftentimes what happens for a nocturnist is they may not see all the patients in the hospital if an issue doesn't arise; true?

A Yes. That's true.

Q So talk to us a little bit about your experience involuntarily committing a patient. You've done that in the past; correct?

A Yes. I have.

Q How many times do you estimate that you have, that you have taken a patient's liberties from them and said, "I'm going to involuntarily put you in a psychiatric facility for an undetermined amount of time"? How many times have you done that?

A Well, what I'd first like to state is that the way I view it I've taken the patient's best interest at heart rather than having taken their liberties from them to ensure that they're in a safe environment where they can get the appropriate and necessary medical attention for their psychiatric illness, and over the course of my career I've done that somewhere on the order of maybe three to five times.

Q That's a rare event. Can we agree to that? It's a rare event for a hospitalist or a nocturnist, no matter when you're on shift to involuntarily commit somebody to the hospital; correct?

A That is correct. It -- it's, it's not -- it's relatively rare, but I think that's in large part because if you take the steps leading up to that and appropriately have a conversation with the patient it oftentimes doesn't result in the need to involuntarily commit them assuming you can, again, rationalize and get to a point where they'll willingly comply and, and, and get the medical attention that they need.

Q And in some of those, at least one of those instances where you've had to involuntarily commit a patient to the hospital, you've gone down to the emergency department and you've been the second signature for an emergency room physician to involuntarily commit that patient; correct?

A I'm sorry. Restate your question.

Q Yeah. Sure. In some of the instances or at least one

instance that you recall during your deposition that you had to involuntarily commit a patient, you went down to the emergency department and were the second signature for somebody to be involuntarily committed; correct?

A In one instance, sure. That's not necessarily the only way that an involuntary commitment can occur.

Q Now, and some -- and I think the reason that emergency room physicians might need two signatures because they don't actually admit patients to the hospital. You guys actually admit them; correct?

A Correct.

Q So in that situation if you're going down to the -- excuse me, going down to the emergency department to admit somebody involuntarily you might need two signatures; is that, is that fair?

A That's fair.

Q All right. Looking at the -- one of the things that was an exhibit was a letter that the Health and Human Services sent out. Which one was that form?

A It's Exhibit Seven.

Q Defendant's Exhibit -- excuse me, Plaintiff's Exhibit Seven, and that's the one that's addressed to all healthcare providers; is that correct?

A That's correct. Yes.

Q Did you get a copy of that?

A As, as a -- as an actual hard copy, no, but I'm sure that I was made aware of it by my employer at the time.
Q Isn't it true that Mr. Hinson brought that to your deposition so you could be aware of it there?
A As it relates to in the deposition, yes, but as it relates to my caring for patients, no.
Q Okay. And what that, that form, that, that letter says is it tries to summarize 7000 pages of HIPAA law into a page and a half; right?
A Well, specifically it's giving some clarification as to how the, the law can be better interpreted by clinicians.
Q And it starts out that unless it's otherwise allowed by law you can do these kinds of things; right?
A I'm sorry. Repeat that.
Q Yeah. Part of it talks about, you know, if it's otherwise allowed by law that here's some things that you as the provider can do with patient privacy information; right?
A As it relates to the otherwise allowed by law I'm not sure what you're referencing specifically.
Q Okay. All right. If the patient is in the hospital, if they're there in front of you and they're competent, the patient gets to decide who gets their healthcare information; correct?
A Yes. The big qualifier being if they're competent.
Q And, and I know you disagree that Matthew Scheer was

competent at the time, right, you've testified as to that, but let's just be clear, that if a physician in their judgment in talking to the patient makes the determination that the patient is competent, then the patient's wishes about who gets their healthcare information is controlled by the patient; true?

A That is true. Yes.

Q And you didn't go to law school; right?

A No. I didn't.

Q No. I did and I still didn't learn about HIPAA in law school, but what I do know is that you as a medical doctor would undergo yearly continuing medical education classes; right?

A That's correct. Yes.

Q One of the things that you would undergo is from your employer a -- it's in like a PowerPoint electronically and you get to kind of click through it and say, "Yeah, I, I recognize what you're trying to tell me about HIPAA"; true?

A That's correct.

Q And I thought I heard you say on direct that Southern Myrtle Inpatient Services, the, the employer of Dr. Ash-Bernal and Patel -- there's actually two PowerPoints that they sent on, on HIPAA. They may be squished into one, but there was actually two of them, but I thought you to say that that was a -- they did a negligent PowerPointing; right, negligently did

a PowerPoint for the providers; is that -- was your opinion earlier today?

A My opinion was that they excluded key elements of the HIPAA law in such a way that it did not allow for the providers who are undergoing that training to appreciate and understand when they can disclose a patient's information to family members or whomever may need that information.

Q And I just wanted to be clear that as a physician, as a hospitalist, a nocturnist or somebody working at CVS you don't only get your education from your employer; correct?

A No. We don't solely get our education from our employer as it relates to our medical care or any knowledge for that matter, but it is the responsibility of the employer to ensure that we do receive adequate education in the HIPAA law and that they provide that and follow up and ensure that we have completed said education in HIPAA.

Q And you haven't seen anything in Dr. Ash-Bernal's or Dr. Patel's employment file where they were -- didn't have enough continuing education hours; correct?

A No. I did not see that.

Q All right. And not only would they get the type of education from Southern Myrtle, their employer, they would also get it from Grand Strand; correct?

A Well, I would think it would be given to them by way of Grand Strand as an agent, so to speak.

Q Okay. And they would get it for whenever they, they go to other continuing medical education classes; correct?
A If they specifically went to classes to understand HIPAA law. It's not that it's just given at every continuing medical education seminar, conference that we go to. You would have to specifically go for that intent or purpose.
Q And, and that's fair, because all the ones that I've taught at, I don't know anything about medicine. Right. So they'll have a big conference on brain-damaged children or something like that and there'll be lots of different medical topics. Then they'll call in a lawyer for an hour to get up there and say here's what HIPAA is and what HIPAA's done. You've been to conferences that are like that; correct?
A I, I've been to numerous conferences. Yes.
Q And the idea is that we're going to teach a physician about HIPAA, it's multifactorial, lots of different people have insight and input into the education and training that physicians like yourself, like Dr. Ash-Bernal get in HIPAA; right?
A I'm sorry. Can you repeat the question?
Q Yeah. The -- it's not a singular source. It comes from lots of different types and sources whether it's employers or hospitals you work at, continuing medical education classes, you're always absorbing it from lots of different sources; fair?

A Yes. That's fair, but again, I'll go back to my statement that it's still the responsibility of the employer to make sure that the physicians employed have an understanding of the concepts of HIPAA that would affect them in their day-to-day practice.

Q Okay. And not to belabor the point, but if the patient is there and they're competent they get to decide. One of the other exceptions is, of course, if the physician determines in their judgment that the patient is in imminent harm to themselves or others HIPAA would also allow the physician under those limited circumstances to go against the patient's wishes; correct?

A That is correct. Yes.

Q And we know that Dr. Ash-Bernal concluded, she's there and talked to the patient, she concluded that he was not in imminent danger to himself or to others that evening; correct? She notes he's there on voluntary papers and she can't restrain him?

A Well, she doesn't document specifically that he's not a risk of harm to himself or others. The only thing specifically documented is that he was not suicidal or homicidal, and I think we've discussed how the lack of having suicidal or homicidal intent does not mean that a person or an individual is not at risk to themselves or others, particularly when you're dealing with someone who's dealing

with psychosis.
Q Do you know that South Carolina as a matter of law defines what it means to be a serious harm to yourself or others?
A I have reviewed some South Carolina law. Yes.
Q Then can we agree what the legislature in Columbia has decided is that you are not an imminent danger to yourself or to others unless you manifest a plan to kill or hurt somebody; correct?
A I, I did not see that in my review of the law, and if you could direct me to that specifically I would appreciate it.
Q Did you also see or not see the South Carolina law that talks about an imminent harm to yourself you have to manifest a plan to commit suicide or manifest a plan to harm yourself? You saw that?
A Again, the same response or answer applies.
Q Before a physician, a South Carolina physician like Dr. Ash-Bernal can take away the patient's rights, they have to comply with the law of South Carolina that says we are a free society, if we're going to --
MR. HINSON: Objection, Your Honor, misstating the law.
(Whereupon, a bench conference is held in the presence, but out of the hearing of the jury.)
THE COURT: I, I, I overrule the objection. I'll give him some leeway. It's cross.

Q We are a free society; correct?
A We are. Yes.
Q And we can make terrible decisions for ourselves; can't we?
A We can. Yes.
Q When I don't take my blood pressure in the morning, my blood pressure pills in the morning I am putting myself at risk but that's my right; isn't it?
A That is assuming you're of sound mind.
Q And when I get on a motorcycle without a helmet on I'm putting my life in danger; right?
A You are. Yes.
Q So what we say in this great state is we say, you know what, you are free to do that unless, unless you manifest a plan with evidence to kill yourself or kill somebody else, and if you do that, then I got folks like Dr. Ash-Bernal or I got folks like Dr. Robinson --

MR. HINSON: Objection, Your Honor.

Q -- who are going to commit me involuntarily.

THE COURT: It's cross. I'll allow him some leeway.

Q They can involuntarily commit you if that's how you manifest your plan; correct?
A Well, again, I think the law also speaks to or, or factors in whether or not the individual is of sound mind, if they are rational, if they can make those decisions for

themselves.
Q So it's your opinion that South Carolina law says manifest an intent to kill yourself, manifest an intent to kill or hurt somebody else or be delusional; is that how you read the law?
A Or be mentally incompetent.
Q Or have psychosis?
A Which would equate to being mentally incompetent.
Q Or talk too, too religiously to folks?
A I think this, you know, goes well beyond talking too religiously.
Q But you haven't actually looked at what South Carolina law requires; correct?
A I have. I've not committed it to memory, but I have looked at what South Carolina law requires.
Q You also talked a little bit about this idea of the chain of command?
A Yes. I did.
Q And what I understood you to say is the chain of command is a process by which if somebody has a question or a concern about what's going on in the hospital that they just don't sit on that, they take it to somebody up above them and maybe somebody up above that person, all the way up the chain of command; fair?
A That's correct. Yes.

Q And the reason you brought it up on direct, I thought, was that if Dr. Ash-Bernal had concerns about what she's allowed to do with HIPAA information or not that she could go up that chain of command; right?
A Yes. That's correct.
Q But did you see, did you see the corporate representative from Grand Strand who sits on the top of that chain of command what that person said would've happened if Dr. Ash-Bernal had called her and said, "In this limited circumstance should I tell the father or no"? Did you see that testimony?
A I did see that testimony, and quite honestly, I don't think it would've gotten to that level because I think the question would've been answered much sooner than having to get to that level.
Q Because what that person said is got to defer to the judgment of a clinician who's there with the patient; right?
A That -- I have no reason to dispute that testimony.
Q When you as a hospitalist have a patient who goes to the nursing station, is that the right word?
A Nursing station, nursing unit.
Q Nursing station.
A Uh-huh.
Q Goes to the nursing station and says, "I want to leave. I know my rights. I know I'm here voluntarily and you can't control me," you would expect those nurses to come get you if

you're the doctor on call; right?
A Yes, and yes, I would expect them to notify me.
Q And what the nurses, and they did the right thing, right, Nurse Freeman and Nurse Bell saw Dr. Ash-Bernal walking on the unit and came to get her; right?
A I do recall that testimony. Yes.
Q And that's what they should do; right? You want a physician involved. When a patient says, "I want to leave," you want a physician to come there and evaluate that patient; right?
A Yes. That's correct.
Q And if you're the physician that's going to come into that situation you say, "Wow, let me talk to my nursing staff, get -- understand from them what the problem is and then I'm going to go look at the patient's chart." You'd want to do that before you went and talked to the patient; right?
A Absolutely. Yes.
Q You're trying to learn from the chart what this patient had been complaining of and thinking about; right, to get a little understanding of the patient; true?
A Yes. That's correct.
Q Then what you would do in compliance with the standard of care is you go in and talk to the patient; right?
A Yes.
Q It's not in a hurry. It's not fast. You take whatever

time you need to look through the chart, take whatever time you need to talk to the nursing staff and take whatever time you need to talk to the patient; fair?

A That, that's fair. Yes.

Q And what we know in this case is that's exactly what Dr. Rachel Ash-Bernal did; right? You heard from the nursing staff. She reviewed the patient's chart online and she went in to talk to Matthew Scheer; correct?

A I don't recall seeing any documentation or evidence that she reviewed the medical record.

Q Did you look at her deposition testimony?

A I did review her deposition testimony. Yes.

Q Because oftentimes a physicians may not write, "I reviewed the patient's chart before I went in to talk to the patient"; right?

A They may not but it would be -- certainly be within the standard -- expected that they document that they know why the patient is there and what discussion subsequently ensued with the patient.

Q And there's no magical rule that says a physician complying with the standard of care must spend "X" minutes with a patient before the patient is able to leave AMA; correct?

A That's correct. There is no specific amount of time. However, that being said, in the case of a person who's been

admitted, again, for psychosis or with known psychosis who is now saying that they want to leave the hospital after having a psychotic episode within minutes of your having been called, it's been my experience and it would be my expectation that it would take more than two to four minutes for that conversation to occur to determine if that person was capable of making those decisions for themselves.

Q And the two to four minutes, lots of folks in their depositions talked about how long this encounter was; correct?

A Yes. They did.

Q Some folks say 10 to 15 minutes, some folks say two to four minutes, but the point is there really isn't a -- nobody documents this entire thing took 15 minutes; right? Nobody documents specific time?

A Well, the documentation is time stamped and the encounter started at 1:13 and the discharge occurred by 1:29 or 1:30.

Q Fifteen minutes or so?

A Total, and to your point, you say that in that time Dr. Ash-Bernal was called, she reviewed the record and went to see the patient and he was out the door. So for all that to occur in a 15-minute timeframe, including the signature or the signing of the AMA form, I don't think allows for much time for a thorough evaluation of someone's mental state.

Q And you reviewed the deposition of the nursing staff who was there with Dr. Ash-Bernal; correct?

A Yes. I did.
Q We talked about the chain of command a second ago in relation to HIPAA, but wouldn't the chain of command allow a nurse, and they're healthcare providers, too; aren't they?
A They are. Yes.
Q And I know they're not doctors, but they go to school for a long time and they formulate their own judgment; don't they?
A Yes. They do.
Q And if a nurse or a charge nurse, because they're both involved, if they thought, "I can't let this guy go," and Dr. Ash-Bernal said, "I don't think I can keep him," they would be allowed under the chain of command to go above Dr. Ash-Bernal's head and get somebody else involved; right?
A They would have that, that right to do so. It's not uncommon that nurses may feel somewhat odd about doing that.
Q Whether they feel odd or not really isn't the issue. If they really thought the doctor was making a grievous error, they would go up the chain of command; right? You would expect them to do that?
A I would expect it, but again, it's, it's certainly been my experience that that's not always how it's handled.
Q And in this case there's absolutely no indication that Nurse Bell or Nurse Freeman said, "No, don't do this. I see it differently than you, Doctor. Let me go up the chain of command"? No evidence of that; right?

A Aside from Nurse Bell saying that she offered to call Matthew's father, there is no other evidence that they had any intent or plan of going up the chain of command.

Q Yeah. And the conversation with the nurse and Matthew Scheer about calling the father, that all happened before Dr. Ash-Bernal got there; right?

A Per the records, yes.

Q And so when Dr. Ash-Bernal is talking to the nursing staff and they say, "Hey, we've asked about calling the father and the patient says no," at that point that conversation has already occurred prior to Dr. Ash-Bernal walking in to talk to Matthew Scheer; correct?

A That's correct, but that's where I think understanding HIPAA and understanding what rights Dr. Ash-Bernal had as a clinician, as well as understanding the psychosis that Matthew was suffering from should have led to her making that phone call, despite whatever conversation the nurse had, to ensure that Matthew was entrusted to the care of someone responsible, or better scenario, to ensure that he's kept in the hospital after his dad is able to intervene and, and de-escalate the scenario.

Q And when you go talk to a patient who wants to leave AMA, one of your charges, one of the things you are obligated to do as a physician is make a judgment call about whether that patient has capacity; correct?

A Yes. That is correct.
Q And you're there, you ask open-ended questions looking for the truth; right?
A Yes.
Q And you'll try to engage a -- excuse me, engage a patient in the conversation, understand, "Why are you here? You know that. You know why you want to leave. There's dangers to leaving," all of that would be discussed; correct?
A Yes. It should be discussed. Correct.
Q And what you're trying to do is answer for yourself, "Does he have capacity to do that," and well, first off, you'd be saying, you know, "Does he have capacity to leave," and you're going to make a determination, yes, he does or no, he doesn't, but even if the patient has capacity to leave, you as the physician can say, "No, sir. I know you think you want to leave, but you have manifested a homicidal plan or a suicidal plan, and you're one of the three people in 10 years I've got to lock up." Right? You can do that?
A You can. Yes.
Q So you're talking to or Ash-Bernal is talking to the patient, she's asking him all kinds of open questions, trying to figure it out, then she circles -- that's better -- then she certifies, the signature of the physician certifies that the patient or individual acting on the patient's behalf has the mental capacity to understand the risks and benefits of

partial refusal of care or leaving against medical advice and the patient or patient's caregiver has had an opportunity to ask questions about the benefits or risks of the refusal of care and leaving against medical advice; right? That's what she certifies that she has done?

A That is what she's signing her name to, correct.

Q So the person who's talked to the nursing staff, the person who has reviewed the chart, the person who has talked to Matthew, the person who's Hopkins, Johns Hopkins trained and certified comes to the decision that the patient has the mental capacity to fill out that form; correct?

A Again, that's what she's signed to, yes.

Q And then we know from her cross cover note, which is what it would be called if a nocturnist is seeing a patient, right, cross cover note?

A Sure.

Q That she writes in there he's voluntary. That means he came here voluntarily; right?

A That's correct.

Q There's also a term on papers, and just so everybody's on the same page what that means is somebody has already certified you are a danger, you are homicidal, you are suicidal, you are a danger to yourself or others and you're no longer free, you're being taken to a hospital for mandatory treatment, it doesn't matter what you say; right? That's what

on papers mean?
A That's correct.
Q But to be clear Matthew wasn't. Nobody who had seen Matthew Scheer on October 2 had come to the conclusion, "No, sir, Matthew, I need to do this to you no matter what you say." Right? Nobody had made that determination?
A Well, no, they had not, but again, he had been there cooperatively and willing to undergo treatment to that point.
Q And when Dr. Ash-Bernal, who's actually there, who actually talks to the patient, by the time he comes back into his room voluntarily; right?
A Well, he was escorted back. Yes.
Q But you, but you read the depositions of the nursing staff. They didn't have to like drag him back to the room. He came back to the room voluntarily?
A Correct.
Q Put his shirt back on; right?
A That's correct.
Q That's a good social norm; right, that men understand when they're talking to folks in a hospital they probably should put their shirt back on; right?
A Yes. But contrarily, the fact that he presented to the nursing station without a shirt and ripping his armbands off speaks to the ongoing psychosis that he was experiencing.
Q And his desire to leave the hospital, he knew his rights,

"I'm here voluntarily and I want to leave"; right?
A That's what he communicated. Yes.
Q And when Dr. Ash-Bernal is talking to him he is talking religiously, I don't know -- nobody knows what all he's saying in the religious context, that when she asks him a question he doesn't just keep ranting, he doesn't just keep talking. He stops. He considers the question and answers that question. That's what she documents; right?
A Yes. She documents that he interrupted his religious rant, I think were her words verbatim, which, again, speaks to his ongoing psychosis.
Q But if you're the person who's actually there, actually talking to the patient, the fact that they can put aside their religious discussions and have a discussion with you about the risks and the benefits and the alternatives to leaving against medical advice, that would reassure you that the patient understands; correct?
A I disagree.
Q You think that'd be a bad thing the fact that a patient would stop their religious discussion and have a conversation with you like that?
A I'm sorry. What was --
Q Is that a bad thing that a patient would just, would stop talking religiously and instead start talking coherently with you? Is that a bad thing?

A It's not a bad thing, but the inconsistencies are still concerning, and so we're talking a span of minutes, and so for, for Matt to interrupt his rant for seconds to a couple of minutes does not, you know, magically mean that he's now competent and his psychosis has resolved.

Q Okay. And Dr. Ash-Bernal in her deposition that I think we're going to hear later today testified under oath that she tried to get Matthew Scheer to stay; correct?

A Yes.

Q The nursing staff who were there in the room with her tried to get Matthew Scheer to stay; correct?

A Per their testimony, yes.

Q If Matthew Scheer had the mental capacity to make the decision to leave, he had that right; correct?

A Yes. If he had the capacity to make that decision, which I think is the issue at hand.

Q And if he had the mental capacity to refuse medication or care he had every right to do that; correct?

A Again, if he had the capacity, which I think it certainly does not appear by way of the record that any reasonable clinician would have found him to have capacity based on his behavior and his presenting illness.

Q You agree that if he had the mental capacity to make a decision to leave the hospital that he had the right to leave the hospital of his own free will; correct?

A Again, the qualifier being if he had the mental capacity to make that decision.
Q And Dr. Ash-Bernal, who was there with the patient, reviewed the chart, talked to the nurses, talked to Matthew, tried to get him to stay, certified in her opinion, in her judgment he did?
A That is what she signed to.
MR. GRESH: One second, Your Honor. Thank you, Your Honor.
THE COURT: All right. Redirect.
MR. HINSON: Briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. HINSON:
Q Dr. Robinson, you were asked about your testimony as, as an expert witness. How does that break down between testimony for a patient Plaintiff and testimony for a Defendant doctor?
A Sure. So I'd say 95 percent of my testimonies to date have been for the Defense, meaning siding with the physician, probably more upwards of 97 percent and very few have been on behalf of the Plaintiff.
Q You're usually testifying on the other side?
A That's right.
Q And at the time of the events in question in this case, October 2015, you were in active practice?
A That's correct. Yes.

Q Working as a nocturnist?
A That's correct.
Q Mr. Gresh asked you about all these other -- well, that Matthew was allowed to be discharged from the ER in the a.m. of October 2nd without a hold and that he was allowed to leave Lighthouse without a hold, and then you've testified that if, if necessary, a hold should have been put at 1:30 in the morning on October 3rd. Tell us what's different about 1:30 in the morning on October 3rd than those other times?
A So at all the other times that Matthew was seen by healthcare providers he was cooperative, he was willing to undergo treatment. 1:30 in the morning or so is the first time we see of him being agitated, aggressive as defined by the nursing staff and, again, now manifesting his hallucinations and associated behavior, and so that's the biggest difference is his behavior and his aggression and combativeness.
Q Had he ever been combative prior to 1:30?
A No. He had not.
Q Mr. Gresh asked you about and who was with him when he left at 1:30 in the morning?
A No one. He was escorted by security to the doors, but no one left with him.
Q And who was with Matthew at all the other times?
A His father.

Q If you would in Plaintiff's Exhibit One, I'm referring to page 65, the Bates stamp 65, which is Dr. Patel's history and physical, his H and P I think is the term you used, and Mr. Gresh asked you earlier, I think he said nobody other than the ER doctor found him to be having hallucinations and visions. What does it say about midway through that page, it says --

A So starting at the second sentence he had been on Keppra for six years, recently stopped taking it but has been having what the father describes, who is accompanying the patient and providing most of the history, as an acute psychotic episode, tangential thinking. He has been having visions.

Q All right. And so Dr. Patel per the note found the patient was having visions?

MR. GRESH: Leading, Your Honor.

Q What did Dr. Patel find as far as hallucinations?

A So he found that the patient denied hallucinations but the reports of the patient's father was that he was having visions.

Q Do people having hallucinations always realize that they're hallucinations?

A They don't.

Q So if a patient who's believed to have psychosis denies hallucinations, is that the end of the inquiry by the physician?

A No. It should not be.

Q Turn to page 12 in the record, if you would, the Plaintiff's Exhibit One. Was there a -- I'm sorry. Turn to page 11. Who's the author of that document, this is the H and P from the ER?

A Looks like it's Amanda Battisti.

Q Well, and who else?

A Or Michael Beliew, Beliew.

Q And the, the PA, Michael Beliew or Beliew -- I'm not sure how his last name is pronounced -- what does he find if you look on page 12?

A So under, let's see here.

Q Just generally what does, what does this PA find as well?

A So again.

Q About Matt's condition?

A Finds that he's, one, presenting with paranoia and hallucinations, including insomnia or lack of sleep and anorexia, not eating, and again the father, Mr. David Scheer, reported that Matthew had an extended complex vision lasting a couple of hours on the preceding night and the patient reports hearing voices and believes someone is plotting against him by poisoning him.

Q So we've got a patient that sometimes acknowledges hallucinations and is that different other times?

A It does. Yes.

Q Does that have any significance?

A It speaks as to his inconsistency, and again, likely is related to his psychosis.

Q Mr. Gresh asked you on cross about depositions and what other people had recalled about how long Dr. Ash-Bernal's encounter, her conversation with Matthew lasted. Have you read the deposition of the security guard?

A I have. Yes.

Q How long did the security guard say that encounter lasted?

A My recollection is that he said somewhere between two to four minutes is how long the encounter lasted.

Q Did anything prevent, anything, regardless of capacity, did anything prevent Dr. Ash-Bernal from picking up the telephone calling David [sic] Scheer's dad and say, "I'd like you to get down here?"

A No.

Q Does that involve the disclosure of any health information to say, "Just come on down to the hospital?"

A No. It does not.

Q Does that in any way restrict a patient's freedoms to simply say to the emergency contact, "Come on down to the hospital"?

A No. It does not.

Q Mr. Gresh asked you about South Carolina law. The reasons to put a temporary hold -- first of all, if someone

puts a hold on a patient that's not indefinite; is it?
A No. It's not.
Q How long does it last? What's -- how -- typically, what would be the, the default?
A I'm sorry?
Q How -- if someone orders an emergency or a temporary involuntary hold how long would that last?
A I'm not sure I know the answer to that specifically.
Q A couple of days?
A Generally, I --
MR. GRESH: Objection, Your Honor.
THE COURT: He said he couldn't answer it.
Q A temporary hold can be put on a patient who's homicidal; correct?
A Correct.
Q A temporary hold can be put on a patient who's suicidal?
A Correct.
Q Is there a third category of patient where a temporary hold can be put?
A Those who, again, are mentally incapacitated.
Q So it's not just about suicide and homicide?
A Correct.
Q Have you looked at South Carolina's law on the definition of unable to consent, of what it means to consent?
A Yes. I have.

Q Did it appear similar to what we looked at earlier with the consent policy from Grand Strand?

MR. GRESH: Objection. Leading.

THE COURT: Rephrase your question.

Q How did it compare with the policy from Grand Strand?

A It was identical.

Q And if you would, let's look again at Exhibit Six. What does that say -- what does, what does the ability to consent mean? You have to have the ability to do what?

A To appreciate the nature and implications of his or her condition and proposed healthcare, make a reasonable decision concerning the proposed healthcare or communicate that decision in a clear and unambiguous manner.

Q Does a patient who believes all the food in the world is poisoned, is hearing voices and seeing things have the ability to appreciate the nature and implications of their condition?

A No. They do not.

Q Can someone be an imminent threat to themselves or others without being suicidal or homicidal?

A Absolutely.

Q Did Matthew have the mental capacity to make the decision to sign himself out of the hospital and leave at 1:30 in the morning?

A No. He did not.

Q Thank you, Dr. Robinson.

MR. GRESH: Nothing, Your Honor.

THE COURT: All right. You can step down and be excused. We appreciate your time, Doctor.

A Yes, sir.

THE COURT: All right. We've got lunch coming at one? Is lunch coming at one? All right. Lunch is already here. So we'll break for lunch for about an hour. That'll take us till about 1:30 -- no, let's go to one -- well, let's, let's have lunch from now till quarter till two. That'll be almost -- that'll be a little over an hour. Is that enough time to eat? Okay. So we'll break for lunch till a quarter till two.

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: All right. Anything before we break for lunch?

MR. HINSON: Nothing from the Plaintiff, Your Honor.

MR. GRESH: Nothing from the Defense.

THE COURT: What does, what does the afternoon look like?

MR. HINSON: We have a video deposition taken from the Defendant, Dr. Ash-Bernal, and Mr. David Scheer, Mr. -- Matthew's father, who we'll put live as a witness.

THE COURT: Okay. And then if that -- if you finish up before five you can have something else you can fit in or --

MR. HINSON: We have -- yes, sir. Before Mr. Scheer we have the deposition de bene esse taken of the security guard.

We're going to play that as well.

THE COURT: Okay.

MR. HINSON: And before, Your Honor, we, we put Mr. Scheer on the stand I think we need to address the, the Dead Man's Statute issue, and we, we worked up a memo on it, Your Honor, and I --

THE COURT: Yeah. I'll look at that over lunch. I was been -- I've been looking at it. Where is it? Not that I haven't been paying attention but I had -- I got it up here somewhere.

MR. HINSON: All right. Well, Your Honor, we had put some time into a brief last night.

THE COURT: Yeah. Let me, let me have it. I'll look at it over lunch.

MR. HINSON: All right. That'd be great. Thank you, Your Honor.

THE COURT: You -- you all provided a copy to the Defense?

MR. HINSON: We certainly will, Your Honor. Apparently we seemed to misplaced it on this table. Bear with us one second. We'll be happy to, to locate it. Found it, Your Honor.

THE COURT: Oh, good. All right. Thank you. All right. We'll be at ease.

MR. GRESH: Thank you, Your Honor.

OFF THE RECORD

(On the record. The following takes place outside the presence of the jury.)

MR. GRESH: Your Honor, just by way of housekeeping, looks like we got a video plus or minus right at two hour mark, I believe. Then there's another video plus or minus one hour mark, and so just as I was looking at the clock I know we have some things we probably need to go over before David Scheer, who I thought to be the last witness of the day. I'll leave it, of course, to Your Honor's discretion but it looks like we might have, you know, we might end about 20 or 30 minutes early and then address maybe those issues before David testifies, if that --

THE COURT: Yeah. That sounds like the way to do it.

MR. HINSON: Okay.

THE COURT: Because if, if you've got a two-hour deposition we'll certainly take a short break between that and the next one.

MR. GRESH: That's fair.

THE COURT: All right.

MR. HINSON: Sounds good. Thank you, Your Honor.

THE COURT: Okay. Does the Defendant have anything else to hand up on the Dead Man's Statute issue?

MR. GRESH: Nothing, Your Honor.

THE COURT: All right. I'm trying to find -- I tried to

clean up this morning, trying to find what I did -- oh, here it is. I found it. I found what I was looking for.

MR. GRESH: Thank you.

THE COURT: All right. Bring in the jury.

MR. PADGET: Judge, can I test this real quick again? I moved it around. It'll just take five, ten seconds here. I just didn't want to interrupt you with a bunch of noise.

THE COURT: Okay.

MR. HINSON: And Your Honor, I would just have a question. Will you be instructing the jury on how -- considering, address the video depositions they're going to hear?

THE COURT: Yeah.

MR. HINSON: Okay. Thank you.

MR. PADGET: All right. Judge, I just have to play it past the part where the hospital's counsel introduces himself.

THE COURT: Okay.

MR. PADGET: And then after that we're good. We just didn't want to interject that into this trial.

THE COURT: All right.

MR. PADGET: We're ready, Your Honor.

THE COURT: All right. We can bring in the jury.

(Whereupon, the following takes place in the presence of the jury.)

THE COURT: Members of the jury panel, the next witness

is being presented by way of video deposition. This testimony is to be received by you and considered by you just as though the witness came and testified in that witness chair. For matters of convenience we allow under certain circumstances a witness to be deposed and videoed and that testimony be used in court just as though that witness were here seated. He's under oath. Previously he -- anyway, the witness is under oath and you're to treat the testimony from this video deposition just as though the witness was sitting here in the witness chair testifying. Thank you.

MR. PADGET: Your Honor, at this time we'd like to play the video deposition of the Defendant, Rachel Ash-Bernal.

THE COURT: All right. Well, it is a she. I'm sorry. I thought --

(Video Deposition of Rachel Ash-Bernal played in open court.)

THE COURT: This is a good time to take a break?

MR. PADGET: That's what I was going to suggest, Your Honor.

THE COURT: All right. Let you go to the jury room.

(Whereupon, the following takes place outside the presence of the jury.)

OFF THE RECORD

(On the record. The following takes place outside the presence of the jury.)

THE COURT: Ready?

MR. HINSON: Yes, Your Honor.

MR. PADGET: Yes, Your Honor.

THE COURT: All right. Bring in the jury.

(Whereupon, the following takes place in the presence of the jury.)

THE COURT: All right.

(Video Deposition of Rachel Ash-Bernal played in open court.)

MR. PADGET: Judge, you mind if we take five minutes? I think I can get this thing rebooted.

THE COURT: All right.

MR. HINSON: My apologies, Your Honor.

THE COURT: Let me let you go to the jury room just for a real quick in and out and just get refreshed while you're in there.

(Jury exits courtroom.)

OFF THE RECORD

(On the record. The following takes place outside the presence of the jury.)

MR. PADGET: Now I've just got to get it back to the section where it was --

THE COURT: Okay.

MR. PADGET: -- before. We're close.

MR. HINSON: Your Honor, Your Honor, we appreciate your

patience. Thank you.

(Whereupon, the following takes place in the presence of the jury.)

THE COURT: All right. You may go ahead.

MR. PADGET: Thank you, Your Honor.

(Video Deposition of Rachel Ash-Bernal played in open court.)

MR. PADGET: Your Honor, we just have to skip over to the next clip here, just take a quick second.

(Video Deposition of Rachel Ash-Bernal played in open court.)

MR. PADGET: Your Honor, at this time we would -- we need to just switch out the discs and we're going to publish this -- by video deposition the deposition of Gregory Phaebus the security guard.

THE COURT: Okay. How long is that?

MR. PADGET: I think about 45 minutes.

THE COURT: Okay. All right.

MR. PADGET: It may take me about five minutes, maybe a little less to set it up.

THE COURT: All right. Well, can the jury sit in here instead of going back and forth?

MR. PADGET: That's fine with me, Your Honor.

MR. HINSON: To make the best use of our time, Your Honor, while Mr. Padget is setting up the next video,

Plaintiffs would move into evidence as Plaintiffs' Exhibit Eight the application for involuntary emergency hospitalization for mental illness, which was one of the exhibits used in the deposition we just watched.

MR. GRESH: And that goes in without objection.

THE COURT: In without objection.

MR. HINSON: Thank you, Your Honor.

(Plaintiff's Exhibit Number Eight [Application for Involuntary Emergency Hospitalization for Mental Illness] admitted into evidence and appropriately marked.)

MR. PADGET: Your Honor, we're ready to proceed. There are, there are six clips I think in total. I think it's about 45 minutes or so.

THE COURT: Okay. Go ahead.

MR. PADGET: Very well. Thank you, Your Honor.

(Video Deposition of Gregory Phaebus played in open court.)

MR. PADGET: Judge, I'm estimating -- just for planning purposes, Your Honor, I'm estimating we have about 20 more minutes of this, 25 minutes possibly.

THE COURT: Well, do you all want to take a break before we do that? Okay. I don't see any interest in a break. So let's just go ahead. That'll take us to 5:30, so.

MR. PADGET: Well, Judge, give me -- if, if you would could you give me two or three minutes? I'll get this

rebooted. Get this particular clip working again and then I'll have the rest ready to go.

THE COURT: Does the jury want to step out a minute or stay here. All right. Everybody wants to stay here. I'm going to step out a minute while you're doing that though.

(Video Deposition of Gregory Phaebus played in open court.)

THE COURT: All right. We'll stop till -- try to start back -- we'll start back at 9:30 in the morning. So be here a little earlier. I think they'll have something for you to nibble on before we get back started, but we'll start back at 9:30.

(Whereupon, the following takes place outside the presence of the jury.)

THE COURT: All right. We'll start back at 9:30. The first thing we'll do is the Dead Man's Statute, I believe.

MR. HINSON: Thank you, Your Honor. Sounds great.

THE COURT: All right. Have a pleasant evening. We'll see you a little before, around 9:30 in the morning.

MR. GRESH: Thank you, Your Honor.

MR. HINSON: Thank you, Your Honor.

(Adjourned for day.)

(On the record, May 22, 2019. The following takes place outside the presence of the jury.)

THE COURT: I think the first order of business is to see where we are as far as scheduling, and I mean, I've got to tell the jury something about whether it looks like we're going into next week or what, what we're looking like.

MR. HINSON: Plaintiffs anticipate resting tomorrow, Your Honor, or at least, excuse me, concluding our part of the case.

MR. GRESH: Yeah. I don't think the Defense case can be put up on a Friday. I just don't think we can get through the whole thing on Friday and charge and close and all of that.

THE COURT: Okay.

MR. GRESH: I think we're going to have to spill over into --

THE COURT: All right.

MR. GRESH: -- that next Tuesday.

THE COURT: Okay.

MR. GRESH: But to me, Your Honor, a lot of that depends on when on Thursday the Plaintiff rests. If the Plaintiff rests before lunchtime, then it would be my goal to be finished at lunchtime Friday, which I think would allow us time to close, charge, deliberate. If --

THE COURT: All right. Why don't -- okay. Go ahead.

MR. GRESH: But if they -- if there's a -- the real

missing nugget here is there's a four-hour video deposition, and I think if that's played then we're guaranteed to be here on Tuesday because I just don't see how we can get through, I got two clients and two experts. I just don't know how we can get through that in a half a day. If that's not played, then looks like I'm going to get the case maybe Thursday afternoon, and then I think we would be done Friday afternoon.

MR. HINSON: What -- Jack, what four hour?

MR. PADGET: He's talking about Scissors.

MR. GRESH: Scissors.

MR. HINSON: Scissors.

MR. PADGET: Three.

MR. HINSON: I think at most it's two, absolute most.

MR. GRESH: All right. I asked you this. I thought it was a four-hour. It doesn't -- whatever it is, Your Honor, that, that length of time is a third of a day or two thirds of a day, it's two or four hours.

THE COURT: Well, I guess, I don't know that they'd want to come in on Saturday. I guess one of the questions I could pose to them is if you think you could finish Saturday I could give them the option of coming in Saturday. It's Memorial Day weekend. I know people have a lot of plans.

MR. GRESH: Well, and respectfully, Your Honor, I've got my expert lined up to come Tuesday morning. I did not anticipate that the Court might have trial on, on Saturday.

THE COURT: Well, I really don't want to. Why don't I go ahead and tell the jury that it -- well, what happens if we -- you finish -- if they finish tomorrow at lunchtime? You said you might could finish on Friday, but your expert isn't unavailable till Tuesday.

MR. GRESH: I've, I've got him Friday and Tuesday.

THE COURT: All right. Well, why don't I tell the jury that there's -- that we're working to get the case done by this week, but there's a possibility that we may end up having to come back next Tuesday.

MR. GRESH: I think that's fair.

THE COURT: And that I'll know more about that tomorrow.

MR. HINSON: Sounds great, Your Honor.

THE COURT: All right. Thank you. You may have a seat. Before we get the jury in, I don't know that I, I -- I'm ready to rule on two issues. One is the Dead Man's Statute and the other is the use of the death certificate.

I've, I've read your briefs. I don't need any further argument. On the Dead Man's Statute I find it doesn't apply to Mr. Scheer's testimony. The Dead Man's Statute, from everything I can deduce from it, would not apply to a case where the facts are as they are in this case, that is the case as I see, including -- I didn't read them all, and I didn't read the two that the Defense referenced in their motion, Hanahan and Long, although I did look at them to see what kind

of cases they were and Hanahan is a will contest and Conroy is a DJ involving an estate. I -- we always focus on the -- whether or not somebody has an interest in the outcome, and I think we overlook the fact that it's got to be -- it appears to me to only apply to matters dealing with estates and trusts. So I find that the Dead Man's Statute does not preclude Mr. Scheer's testimony.

I find that the 1937 case involving -- the asbestos case involving a death certificate is very clear that a death certificate is prima facie evidence of the fact therein stated and is admissible. I quite frankly think that's a bad decision, particularly under the facts of the case, but I'm not Judge Stabler. So I didn't have anything to do with it. So that's my ruling on those two issues.

All right. Ready for the jury?

MR. GRESH: I believe the Plaintiffs are also going to call David Scheer this morning. That was the witness who the Defense --

MR. HINSON: Jack, I, I think we're going to start with Mr. Duane Doherty and then go to Mr. -- Dr. Malone, so I think will be our order. I see Doctor, I see Dr. Malone's in the courtroom. So I'm going to try to get him up and back to, back to Columbia.

MR. GRESH: And I appreciate it. There was one other issue I just really wanted to have a ruling on because I've

got an expert that has to come if the cell phone stuff is going to come in. The way I see this happening is when David Scheer is on the stand, which is going to be either before or right after lunchtime today, if he testifies on either direct or cross examination that the cell phone, he took it from Matthew at the hospital and he had it in his possession and at some point he intentionally deleted a picture or pictures and took it to Verizon and had them wipe it, then I think that's as far as it goes. If he doesn't, if he, if he lies now and says, "No, I didn't do that," then I think I have to call a forensics guy to say, "That's just not true. Here's something," and there's a motion to exclude the expert. So I'm, I'm incurring costs and then there's the red picture that my expert can say, "This was on the phone, this was intentionally deleted, not by Verizon but by somebody else after Verizon opened it," and in talking with counsel I know that to be Mr. Scheer. He said that to me, and he said it here in open court as well, and so respectfully, Your Honor, I would request let's just kind of put a bow on that, however it works out.

THE COURT: Okay. All right. Anything else before we get the jury in?

MR. PADGET: Well, Your Honor, if we're going to argue that point I'm prepared to argue it. If we're going to deal with that at --

THE COURT: Let's deal with it later. Let's go ahead and get the jury start working.

MR. HINSON: Your Honor, can I just go get our first witness? I think he was out in the hall before we did that.

THE COURT: Yeah.

MR. PADGET: Get our clients.

MR. HINSON: And our clients. Thank you, Your Honor.

THE COURT: All right. Bring in the jury.

MR. HINSON: There are photographs we've marked as Exhibit Nine by -- that have been admitted by stipulation.

THE COURT: They're in by --

MR. HINSON: Agreement.

MR. GRESH: By agreement.

THE COURT: Nine through what?

MR. HINSON: Nine A through G.

THE COURT: All right. In without objection. Bring them on in.

(Plaintiff's Exhibits Numbers 9A through 9G [Photographs] admitted into evidence and appropriately marked.)

(Whereupon, the following takes place in the presence of the jury.)

THE COURT: Members of the jury, good morning. Discussed with the attorneys before you came in where we are scheduling wise, and there's a possibility we can finish the case this

week, but it's a real possibility we may have to come back Tuesday. Monday, of course, is Memorial Day. So we won't work that day, and I don't want to work on Saturday because it is Memorial Day weekend and I'm sure people, well, I'm not sure, but I would be surprised if -- I wouldn't be surprised if some people have plans for the weekend. So keep in mind that we may have to come back Tuesday to finish the case up. Call your first -- call your next witness.

MR. HINSON: Thank you, Your Honor. The Plaintiff calls Duane Doherty.

Whereupon, Duane Doherty is called to the stand, duly sworn by the clerk and testified as follows:

THE CLERK: If you will say and spell your first and last name for the Court. Okay?

MR. DOHERTY: My first name is Duane, D-U-A-N-E, last name Doherty, D-O-H-E-R-T-Y.

DIRECT EXAMINATION

BY MR. HINSON:

Q Good morning, Mr. Doherty.

A Good morning.

Q Would you please tell us where you live?

A I live at 104 Summit Drive in Rich Creek, Virginia.

Q And do you have the occasion to come to Horry County?

A Beg your pardon?

Q Do you come to Horry County on occasion?

A Yes.
Q And what do you typically come to Horry County for?
A We have a timeshare down at Myrtle Beach.
Q And do you recall where you were in the early evening hours of October 3rd, 2015?
A I do.
Q And where were you, Mr. Doherty?
A We had just come out from going to a country, country club where we had dinner and everything with my wife, my brother-in-law, my sister. We came home about 1:00 o'clock in the morning.
Q And Mr. Doherty, you say you came home. Where did you come to? What -- where -- what, what's the address?
A Yeah. We reside at 6800 North Ocean Boulevard, the Beach House and Racquet Club.
Q And when you came home what did, did you and your wife do after that?
A We weren't quite tired. We usually go out on the balcony and watch the ocean and, and see some waves and everything else and just listen to the weather and everything, and it was raining that night. I know that. We weren't really tired. So we just sat outside.
Q Do you remember generally what the weather was like that weekend?
A Yeah. The weather was really rough. It was raining. It

-- the ocean was pretty, pretty disturbed.
Q And that evening as you're sitting on the balcony with your wife, did -- was there anything unusual that occurred that you observed?
A Yeah. On the left side of the, the hotel that bordered the hotel next door there's about a 10-foot wide span between the two hotels. There was a young gentleman that came up -- because we got home at like 1:00 o'clock in the morning. This took place anywhere between 1:30, 2:30 in the morning. A young gentleman came up on the tree belt side, and he pursued to the palm tree where there was a lounge chair. He sat down at the, the lounge chair for, for a short period of time, and then shortly after that, he got up. He proceeded to the causeway that goes from the back of the hotel to the beach area, and he stood on the causeway for a little while, and he was -- made some fist movements, and he was yelling and screaming, but you couldn't really understand what he was saying, you know.
Q Mr. Doherty, is there anything that I could provide you that might help refresh your memory and, and help you remember these events?
A Yeah. If I could see a police report to, you know, what transpired that evening. Yes.
MR. HINSON: May I approach the witness, Your Honor?
THE COURT: What, what is that?

MR. HINSON: It's the police report that Mr. Doherty filed that night. I'm not looking to put into evidence.

THE COURT: Okay. All right. You may approach.

MR. GRESH: Not putting it?

MR. HINSON: I'm not putting it in.

THE COURT: No. It's just refreshing his recollection.

MR. GRESH: I understand.

BY MR. HINSON:

Q Mr. Doherty, could you identify what document I've provided you?

A Yeah. This is the, the incident of the investigation of the police report.

Q And, and jump back to what you, what you saw that -- in the early morning hours of October 3rd. So this young man, you see him on the beach. What happened next? What did you observe?

A As he was walking towards a palm tree, you know, once he sat on the lounge chair and everything he was carrying something in his hand, and then after a short period of time as he went to the causeway he stood there, you know, making fist movements and yelling and screaming. Then he went to the beach area and then he totally disrobed. Okay.

Q When you say making fist movements, did you kind of gesture and tell us what you mean by that?

A He was, you know, going like this and shaking his fist.

Q Was he, was he making noise? Was he talking? Was there something auditory that you could hear?
A Yeah. He was talking. He was muddling something but I couldn't understand it.
Q Okay. And what did you observe? You said you observed him disrobe?
A Yeah. He totally disrobed. He, you know, he just took off his shorts and he, he was stark naked after that. His, his butt was white as a snowflake and then he went out and he continued to jump into the water and I stayed focused, and as you stay focused if you look at something, you know, such a wide open area, your eyes will drift off to the right and drift off to the left. So if you take your hands and you make a focus like this and stay in focus to one area, you're, you're acting as a pair of binoculars, and, and that's what I did, you know, and I told my wife the same thing, and I just had a gut feeling, and I told her to call 911, and I continued to the beach area and I told her to do the same thing as I did. So it didn't take me no more than a minute to go down to the beach area to where the gentleman was, and I still stayed focused on that area.
Q And did you observe him in the waves?
A Beg your pardon?
Q Did you observe him in the waves? Did you see the gentleman in the waves?

A I seen him when he went actually into the water and everything else, and I seen him go in, and when he went down, I never seen the gentleman come back up.
Q And when you say he went down, describe what you mean by that.
A He, actually, you know, went in under the water, and I stayed focused on that one area even till the police officer, the RO got there. She was the first responder that came to the beach and there were several police officers that came to the beach with flashlights. We did a land search looking for the gentleman to resurface or something, but with the rip current and, you know, two to three foot swells and the waves and everything else and the undertow, you could be here at point A and just a few seconds you could be 150 yards down the beach area with the rip current.
Q And Mr. Doherty, did you participate in the search up and down the beach that night?
A Yes. We did.
Q And did you ever see any sign that this young man had, had come out of the water?
A No, none whatsoever to my recollection. No. We, we stayed there for about 20 minutes.
Q And did the police continue to stay?
A Yeah. The police still continued to go up and down the beach area for a land search, and there was no, no, no person

to be found.
Q And Mr. Doherty, I'd ask the court, court reporter to hand you what we've marked as Exhibit 9a, show you a photograph. Does the gentleman on the left side of that photograph, does that appear to be the same gentleman that you saw go into?
A It is. Yes.
Q It appears to be the same gentleman you saw go into the ocean?
A Yes, sir.
Q Had you ever met this gentleman before?
A No, sir.
Q Mr. Doherty, since that time was there an occasion that you heard from this parents?
A Quite, quite, quite some time ago I got a, I got a call from his parents thanking me.
Q And what, what did they thank you for?
A For witnessing the incident so there wouldn't be any further search, you know, to give them some kind of closure to what happened to their son.
Q Have you ever met the Scheers until this morning?
A No, sir, neither one of the parents, no.
Q Thank you, Mr. Doherty. Approximately what time did, did you and your wife contact the police?
A Like I say, we got home about one -- I don't wear a

watch. So I'm still pretty good even without wearing --
Q If you, if you need to look at the police report to refresh your recollection of the time of just approximately what time.
A Yeah. It was, it was, like I said, you know, between the hours of 1:30 and 2:30 and that's -- it's what's on the police report.
Q Okay. And it says on the police report --
MR. GRESH: No. No.
THE COURT: Yeah. You don't --
MR. HINSON: That's fine.
THE COURT: -- you're only using it to refresh his recollection.
MR. HINSON: That's right.
BY MR. HINSON:
Q All right. So, I'm sorry. Approximately what time was it that you -- that the -- that you observed all this?
A It was between 1:30 and 2:30 in the morning.
Q Okay. Between 1:30 and 2:30. Okay. Thank you, Mr. Doherty. Nothing further at this time.
THE COURT: Cross?
MR. GRESH: Yes, Your Honor.

CROSS EXAMINATION

BY MR. GRESH:
Q Good morning, Mr. Doherty. I'm Jack Gresh. I wasn't at

your deposition. I was the guy on the telephone.
A Oh, okay.
Q Couldn't make it over there that day. As I understand it, just to put your testimony in a little bit of context, you were out that evening with your wife and some friends listening to some country music? Is that --
A Yes, sir.
Q And you, you came home about one, 1:30 in the morning, weren't quite ready to go to bed yet, so went out on the back balcony?
A Right.
Q And in your deposition you describe the, the big full moon that was out there that really just kind of illuminated everything; correct?
A It was a full moon that, that morning. Yes.
Q And you're, you're there. You see something that's concerning to you. You call 911, and you go down on to the beach; right?
A Yes. I did.
Q And you're on the fifth floor balcony?
A Yes.
Q So we go down -- if you go -- five flights of stairs or do we wait for the elevator?
A I went down five flights of stairs. I can move pretty fast.
Q So five flights of stairs, then we go through the lobby,

out to the causeway, over the causeway, and then out to the beach area?

A I didn't go through the lobby. I went through -- right at the bottom of the stairs there's a little left hand that takes you right to the beach.

Q Okay. And you did all of that and you get down there, you put back on the -- to keep the moonlight out so you can stay focused on that one spot and you didn't see Matthew; right?

A I didn't see him, but I also told my wife to stay focused like I did and when I got there I yelled to her and asked her if she had --

MR. GRESH: Hearsay, Your Honor.

THE COURT: Don't go into what she told -- what she said.

BY MR. GRESH:

Q So I think I was asking you, you had your focus on that one particular point --

A Yes.

Q -- in the water, and then however long it takes you to go down five flights of stairs, out the exit, over the causeway, to the beach, you put back on the binoculars and you don't see anybody in the water; correct?

A Correct.

Q But you're a surfer; right, or used to be a surfer?

A I used to do surfing.
Q Used.
A Yes.
Q Yeah. And you were talking to us in your deposition about these undercurrents, and I think you talked a little about them in direct that, you know, in a place like this where the Hurricane Joaquin had already come through, it's still got two or three foot swells out there?
A Oh, yeah.
Q That you can, you can go down into the water and disappear 150 yards down the beach real fast; right?
A He could. Yes.
Q Okay. When this person that you saw went to the water, and they're standing there in the surf, they just kind of dove into the water; didn't they?
A He just went out there and jumped into the water.
Q Yeah. Yeah. That's all I have. Thank you very much for your time.
THE COURT: All right.

REDIRECT EXAMINATION

BY MR. HINSON:
Q Mr. Doherty, you mentioned that the, the man on the beach who you identified in that photograph you watched him disrobe?
A Yes.
Q Completely naked?

A Yes.
Q All right. Did the -- were the clothes that he had taken off, did, did you and the police locate them?
MR. GRESH: Beyond the scope of cross.
THE COURT: Yeah. That -- he didn't go into that in cross. I sustain the objection.
MR. HINSON: Your Honor, if I, if I could I'd be happy to let him have a --
THE COURT: No.
MR. HINSON: -- a brief re-cross on this.
THE COURT: No. No.
MR. HINSON: All right. Your Honor, may I approach?
THE COURT: Yeah.
(Whereupon, a bench conference is held in the presence but out of the hearing of the jury.)
BY MR. HINSON:
Q Mr. Doherty, was it your understanding that while you were making this quick trip to the beach that your, that your wife was continuing to look?
A Yes.
Q And was it your understanding that she ever saw anybody come out?
MR. GRESH: That calls for hearsay.
THE COURT: Yeah. I sustain the objection. He can't say whether she looked or not.