STATE OF MICHIGAN

COURT OF APPEALS

ELIZABETH DAWE,

Plaintiff-Appellee/Cross-Appellant,

and

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff,

v

DR. REUVAN BAR-LEVAV & ASSOCIATES, P.C., the ESTATE of DR. REUVAN BAR-LEVAV, M.D., and DR. LEORA BAR-LEVAV, M.D.,

Defendants-Appellants/Cross-Appellees.

FOR PUBLICATION
July 10, 2008
9:05 a.m.

No. 269147
Oakland Circuit Court
LC No. 2001-036687-NH

Before: Smolenski, P.J., Whitbeck, C.J., and Kelly, J.

WHITBECK, C.J.

In this medical malpractice action, defendants Dr. Reuvan Bar-Levav & Associates, the Estate of Dr. Reuvan Bar-Levav (Dr. Reuvan), and Dr. Leora Bar-Levav (Dr. Leora) appeal as of right the jury verdict in favor of Elizabeth Dawe on various grounds. On cross-appeal, Dawe appeals the trial court's calculation of prejudgment interest on the jury's award. We reverse, vacate, and remand.

I. Basic Facts

This medical malpractice action arises out of a shooting incident at defendants' psychiatric office where Dawe received treatment. On June 11, 1999, Joseph Brooks, who was a former patient of Dr. Reuvan,[1] came to the office, pulled a handgun, and shot and killed Dr.

[1] Defendants discharged Brooks from their care on March 19, 1999.

Reuvan. Brooks then proceeded into the back office area and fired into Dawe's group therapy room. Brooks killed one patient and wounded others, including Dawe. After firing dozens of rounds into the room, Brooks committed suicide.

Dawe sued defendants, alleging that Brooks made threatening statements to defendants in which he indicated that he "fantasized about murdering" and that he demonstrated his ability to carry out threats by showing up at defendants' office with a handgun. Dawe further alleged that a "'manuscript'" that Brooks delivered to defendants in June 1999 "could be reasonably construed as a threat of violence against other members who participated in his group therapy sessions, including [Dawe]." Accordingly, Dawe alleged that defendants were liable under two theories: statutory liability for failure to warn under MCL 330.1946, and common law medical malpractice. With respect to her common law medical malpractice claim, Dawe alleged that defendants' breached their applicable standard of care, which included "informing the police, warning patients or others, and taking reasonable precautions for the protection of patients when a doctor or health care provider has information which could reasonably be construed as a threat of violence against a patient or others[,]" when defendants failed to warn Dawe and the police of Brooks' "'threats'" or take reasonable steps to protect Dawe. Dawe also filed an Affidavit of Meritorious Claim in support of her complaint.[2]

Defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that there was no evidence the Brooks expressed a threat to defendants about Dawe specifically and, therefore, defendants owed no duty to warn or protect Dawe under MCL 330.1946. Defendants also noted that Dawe was not alleging malpractice with regard to her individual care, rather her only allegation was a failure to fulfill the duty to warn, which was derived solely from the statute.

In response, Dawe argued that it was significant that she was defendants' patient rather than merely a "third person" to which the statute applied. Dawe argued that her special physician/patient relationship with defendants also required them to treat her within the applicable standard of care stated in her complaint. In other words, Dawe argued that defendants owed both statutory and common-law duties. Dawe further argued that she had presented a genuine issue of material fact that defendants violated that standard of care. In support of her motion, Dawe submitted the affidavit of Dr. Mark Fettman, Dawe's psychiatric expert, who attested that a psychiatrist has a duty to take reasonable precautions for the protection of patients. According to Dr. Fettman, included within this duty is the requirement that the psychiatrist assess a patient to determine if the patient is a suitable candidate for group therapy before placing the patient into a group. Dr. Fettman averred that once a patient has been placed in group therapy, the psychiatrist has a further duty to continually assess the patient to ensure that the patient remains suitable for group therapy. Dr. Fettman attested that defendants violated the applicable standard of care by placing Brooks in a group session with Dawe and other patients.

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[2] See MCL 600.2912d.

The trial court ruled that summary disposition was not appropriate because Dawe had stated a prima facie case and there were genuine issues of material fact regarding whether defendants violated MCL 330.1946 or the applicable standard of care. Accordingly, the trial court denied defendants' motion.

At trial, Dawe argued that defendants breached their duty to warn and that defendants breached their duty to provide Dawe with a safe clinical environment for her treatment. Specifically, Dawe contended that defendants breached the standard of care by placing Brooks in Dawe's group therapy sessions when they knew or should have known that Brooks was a danger to the other group members.

After the close of Dawe's proofs, defendants moved for a partial directed verdict on Dawe's claim of failure to warn under MCL 330.1946, arguing that Dawe failed to establish that Brooks communicated to defendants a threat of violence specifically against Dawe. Defendants also argued that Dawe failed to present expert testimony concerning the standard of care applicable under the statute; that is, defendants noted that Dr. Fettman's testimony went solely to defendants' alleged duties when placing Dawe in group therapy, not to defendants' duty to warn. In response, Dawe again argued that it was significant that she was defendants' patient, now apparently arguing that MCL 330.1946 did not even apply in cases where the victim was a patient.[3] Nevertheless, the trial court denied the motion on the ground that Dawe had stated a prima facie case sufficient to survive a directed verdict.

After the six-day trial in September 2005, the jury returned a verdict in favor of Dawe. Defendants moved for a judgment notwithstanding the verdict (JNOV) and for a new trial, raising several of the same issues now raised on appeal; however, the trial court denied the motions. Defendants now appeal.

II. Preemption Of A Psychiatrist's Common Law Duty To Protect

Defendants argue that the only duty that a psychiatrist has to protect others from a patient is the duty imposed by MCL 330.1946, and that the Legislature abrogated all other common law duties to protect third persons when it enacted MCL 330.1946. We agree.

A. The Statute

MCL 330.1946(1) provides as follows:

> If a patient communicates to a mental health professional who is treating the patient a threat of physical violence against a reasonably identifiable third person

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[3] Dawe's counsel specifically stated as follows: "[T]his statute that [defendants are] referring to is talking—it's in establishing a duty by someone that isn't normally a patient. That doesn't exist here because Elizabeth Dawe was [a patient]. . . . This other statute is talking about if Elizabeth Dawe wasn't a patient[.]"

> and the recipient[4] has the apparent intent and ability to carry out that threat in the foreseeable future, the mental health professional has a duty to take action as prescribed in [MCL 330.1946(2)]. Except as provided in this section, a mental health professional does not have a duty to warn a third person of a threat as described in this subsection or to protect the third person.

MCL 330.1946(2) provides:

> A mental health professional has discharged the duty created under subsection (1) if the mental health professional, subsequent to the threat, does 1 or more of the following in a timely manner:
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> (a) Hospitalizes the patient or initiates proceedings to hospitalize the patient under chapter 4 or 4a.
>
> (b) Makes a reasonable attempt to communicate the threat to the third person and communicates the threat to the local police department or county sheriff for the area where the third person resides or for the area where the patient resides, or to the state police.
>
> (c) If the mental health professional has reason to believe that the third person who is threatened is a minor or is incompetent by other than age, takes the steps set forth in subdivision (b) and communicates the threat to the department of social services in the county where the minor resides and to the third person's custodial parent, noncustodial parent, or legal guardian, whoever is appropriate in the best interests of the third person.

In other words, a mental health professional does not have a duty to take the actions described under MCL 330.1946(2), unless four criteria are met: (1) a mental health professional is presently treating a patient, (2) that patient communicates a threat of physical violence to the mental health professional, (3) that threat of physical violence is directed against a readily identifiable third person, and (4) the patient has the apparent intent and ability to carry out the threat in the foreseeable future.

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[4] 1995 PA 290 amended MCL 330.1946 to change the third use of the word "patient" in subsection one to "recipient." All other references to "patient" in the statute were left unaltered. The term recipient is defined to mean "an individual who receives mental health services from the department, a community mental health services program, or a facility or from a provider that is under contract with the department or a community mental health services program." MCL 330.1100c(12). Although not all patients of mental health professionals will qualify as recipients, see *Saur v Probes*, 190 Mich App 636, 641; 476 NW2d 496 (1991) (construing former MCL 330.1700, which defined recipient in a substantially similar way to present MCL 330.1100c[12]), for this issue, it is not necessary to examine how the use of the term "recipient" might affect the duty imposed by this statute.

B. Principles Of Common Law Preemption

"The common law, which has been adopted as part of our jurisprudence, remains in force until amended or repealed."[5] "Whether a statutory scheme preempts, changes, or amends the common law is a question of legislative intent."[6] But "legislative amendment of the common law is not lightly presumed."[7] When the Legislature exercises its authority to modify the common law, "it should speak in no uncertain terms."[8]

C. Principles of Statutory Interpretation

When interpreting a statute,

> [t]his Court's primary task . . . is to discern and give effect to the intent of the Legislature. "The words of a statute provide 'the most reliable evidence of [the Legislature's] intent . . . .'" In discerning legislative intent, a court must "give effect to every word, phrase, and clause in a statute. . . . The Court must consider "both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." "If the language of a statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written."[9]

The Legislature is presumed to have intended the meaning it plainly expressed.[10]

D. Relevant Case Law Interpreting MCL 330.1946

To establish a prima facie case of negligence, the plaintiff must prove as a matter of law that the defendant owed a duty to the plaintiff to avoid negligent conduct.[11] Generally, under the common law, "there is no duty that obligates one person to aid or protect another."[12] However, under the common law, "[w]here there is a duty to protect an individual from a harm by a third

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[5] *Wold Architects and Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006), citing Const 1963, art 3, § 7.

[6] *Id*.

[7] *Id*.

[8] *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006).

[9] *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004) (internal citations omitted).

[10] *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007).

[11] *Swan*, *supra* at 195.

[12] *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988).

person, that duty to exercise reasonable care arises from a 'special relationship' either between the defendant and the victim, or the defendant and the third party who caused the injury."[13]

In *Davis v Lhim*,[14] the Court adopted the reasoning of *Tarasoff v Regents of Univ of California*,[15] and held that the special relationship between a psychiatrist and his patient gives rise to "a duty of reasonable care to a person who is foreseeably endangered by [the psychiatrist's] patient." The Michigan Supreme Court later reversed *Lhim* on the ground that the psychiatrist in *Lhim* was protected by governmental immunity, and, based on that holding, the Court found it unnecessary to address "whether a duty to warn should be imposed upon mental health professionals to protect third persons from dangers posed by patients."[16]

Shortly thereafter, the Michigan Legislature enacted MCL 330.1946, thereby codifying mental health professionals' duty to warn third parties of danger from their patients.[17] As recognized by this Court, the legislative history of the statute indicates that the Legislature enacted the statute to "limit the liability of mental health practitioners."[18]

Since its enactment, only two published cases have interpreted the statute. However, the issue now before this Court—whether a common-law duty to warn or protect has survived the statute's limitation on a psychiatrist's liability to protect others—has not been resolved.

In 1996, this Court released its first opinion addressing the statute. In *Jenks v Brown*, the plaintiff's ex-wife told her psychiatrist that she intended to kidnap her and the plaintiff's son.[19] The plaintiff then sued the psychiatrist, alleging that he breached MCL 330.1946 by failing to warn the plaintiff of his ex-wife's threat. This Court affirmed the trial court's grant of summary disposition in the psychiatrist's favor, holding that the psychiatrist had no duty to the plaintiff because the threat was directed at the child, not the plaintiff. This Court explained,

> In prior years, the common-law duty to warn had been extended in some cases to unnamed third parties and even to property. In response to these developments, the duty to warn statute limited a mental health practitioner's duty to that as provided in the statute. Furthermore, in order for any duty to arise, a patient must communicate "a threat of physical violence against a reasonably identifiable third person." It is apparent from the language of the statute and its legislative history

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[13] *Murdock v Higgins*, 454 Mich 46, 54; 559 NW2d 639 (1997).

[14] *Davis v Lhim*, 124 Mich App 291, 301; 335 NW2d 481 (1983), rev'd on other grounds sub nom *Canon v Thumudo*, 430 Mich 326; 422 NW2d 688 (1988).

[15] *Tarasoff v Regents of Univ of California*, 17 Cal 3d 425; 551 P2d 334 (1976).

[16] *Canon*, *supra* at 355.

[17] See 1989 PA 123.

[18] *Jenks*, *supra* at 418, citing House Legislative Analysis, HB 4237, July 11, 1989.

[19] *Id*. at 417.

> that it is intended to protect only those readily identifiable individuals against whom a threat of physical violence is made.[20]

The plaintiff also sought to amend his complaint to add a common-law theory of negligence.[21] This Court found any such amendment futile on the ground that there was no special relationship between the plaintiff and the psychiatrist that would give rise to a duty to protect the plaintiff.[22] In so ruling, this Court acknowledged but declined to address the issue "whether a claim brought against a mental health practitioner under a common-law theory of failure to warn is superseded by MCL 330.1946[.]"[23]

Two years later, this Court again published an opinion interpreting the statute. In *Swan v Wedgwood Christian Youth and Family Services, Inc*, a teenage boy (LaPalm) killed his mother's boyfriend after being released from defendant's residential facility where LaPalm had received psychiatric treatment.[24] The plaintiff, as personal representative of the decedent's estate, sued the defendant, alleging that it negligently treated LaPalm, thereby proximately causing the decedent's death.[25] Relying on *Jenks*, this Court affirmed the trial court's grant of summary disposition in the defendant's favor on the ground that MCL 330.1946 served "as a bar to the plaintiff's suit because, pursuant to the statute, it owed no duty to decedent."[26] More specifically, this Court explained that the defendant owed no duty to warn or protect the decedent under the terms of the statute because LaPalm never communicated a threat against the decedent.[27] This Court stated, "Under the statute, the *only* duty owed is a duty to warn in those situations where a patient communicates a threat and the object of the threat is reasonably identifiable."[28]

The *Swan* Court also rejected the plaintiff's argument that the statute did not apply because his claim against the defendant alleged negligence rather than a failure to warn. This Court explained,

> Plaintiff notes correctly that the type of claims it asserts are often brought together with a failure to warn claim, but they are separate questions. However, plaintiff's argument fails because to the extent that he alleges a breach of duties on the part of defendant, those duties were owed to LaPalm and not to the

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[20] *Id*. at 418-419 (citations omitted).

[21] *Id*. at 420.

[22] *Id*. at 421.

[23] *Id*. at 421 n 1.

[24] *Swan*, *supra* at 191-193.

[25] *Id*. at 193-194.

[26] *Id*. at 197-199.

[27] *Id*. at 198-199.

[28] *Id*. at 198 (emphasis added).

> decedent, as the circuit court correctly noted. Moreover, plaintiff's argument ignores the last sentence of MCL 330.1946(1); . . . , which provides, "Except as provided in this section, a mental health professional does not have a duty to warn a third person of a threat as described in this subsection *or to protect the third person*." (Emphasis added.) We believe that this language is unambiguous and clearly limits the duty a mental health professional owes to third persons to the duty to warn identifiable third persons "as provided in this section. . . ." Plaintiff cannot claim the benefit of any alleged breach of duty to LaPalm, and the statute plainly provides that defendant did not owe a duty to the decedent.[29]

This Court also acknowledged but rejected the plaintiff's position to the extent that it could be interpreted as arguing that defendant owed a common-law, rather than a statutory, duty to the decedent.[30] More specifically, this Court concluded that even under the common law the defendant had no duty to warn or protect the decedent because no foreseeable danger to decedent, or any other third person, was made known during LaPalm's treatment.[31] In so ruling, this Court again declined to "decide whether a common-law duty survived the enactment of the statute[.]"[32]

Thus, this case presents this Court with an opportunity to resolve a recurring issue of contention regarding a plaintiff's ability to sue a psychiatrist (or other mental health professional) outside the limitation imposed by the statute.

E. The Psychiatrist's Common Law Duty To Protect "*Third Persons"* From Patients

We conclude that a plain reading of MCL 330.1946 indicates that the statute was intended to modify the common law duty to warn or protect third persons from a patient that arises out of the special relationship between a psychiatrist and that patient. The second sentence in subsection (1) clearly states that a mental health professional has no duty to "warn" or "protect" a "third person," *except as provided under MCL 330.1946*. Thus, the Legislature has clearly stated its intent to preempt a mental health professional's common law duty to warn or protect third persons. Indeed, Dawe concedes this interpretation. However, because Dawe alleges ambiguity in the phrase "third person," this conclusion does not end our inquiry.

F. The Psychiatrist's Common Law Duty To Protect *Patients* From Other Patients

Dawe argues that MCL 330.1946 addresses only the duty that arises from the relationship between a psychiatrist and a dangerous patient while specifically preserving other duties and, therefore, does not abrogate or modify the common law duty to treat other patients within the

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[29] *Id*. at 199 (citations omitted).

[30] *Id*. at 199-200.

[31] *Id*. at 200-201.

[32] *Id*. at 200.

applicable professional standard of care, which includes a duty to provide a safe clinical environment for patients. We disagree.

As mentioned, Dawe concedes that "MCL 330.1946 explicitly governs the issue of" a mental health professional's duty when a patient communicates a threat of violence against a reasonably identifiable third person, and therefore concedes that it is clear that the Legislature intended to modify a mental health professional's common law duty to warn or protect those *third persons*. But she contends that it is not at all clear that the Legislature intended to modify or abrogate every common law duty that a mental health professional may have to protect the mental health professional's *other patients*.

In support of her position, Dawe finds it significant that under subsection (5), the Legislature expressly stated, "This section [MCL 330.1946] does not affect a duty a mental health professional may have under any other section of law." Dawe interprets this to mean that the Legislature clearly contemplated that some duties will remain despite the language of MCL 330.1946(1), which purports to eliminate all duties to "warn" or "protect" "third persons." In other words, Dawe would have us conclude that MCL 330.1946(1) only addresses a mental health professional's duty to warn or protect *third persons* from a patient arising from the mental health professional's relationship *with that patient* who may pose a danger to the *third person*, but that the statute does not modify any common law duties that the mental health professional may have to protect *another patient* based on the mental health professional's relationship with *that patient* (e.g., a psychiatrist's duty to render professional care).

Thus, the issue essentially boils down to whether the term "third person" in MCL 330.1946(1) includes the psychiatrist's other patients.

The second sentence of MCL 330.1946(1) expressly states: "Except as provided in this section, a mental health professional does not have a duty to warn a third person of a threat as described in this subsection or *to protect the third person*." (Emphasis added). The phrase "third person" is defined as "the grammatical person used in an utterance in referring to *anyone* or anything other than the speaker or the ones being addressed."[33] Reading the phrase in context and employing a common usage of the phrase "third persons" leads to the inevitable conclusion that the phrase encompasses all other persons who are neither the dangerous patient nor the mental health professional. And we can only conclude this to mean that the Legislature intended use of the term "third persons," to include those third persons who might also happen to be the psychiatrist's patient. Therefore, we conclude that the statute applies both to "third persons" who are members of the public at large, as well as to "third persons" who are also the psychiatrist's patient. To read "third persons" as not including other patients employs a strained reading of the language and contravenes the dictate that we may not speculate regarding the intent of the Legislature beyond the language expressed in the statute.[34]

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[33] *Random House Webster's College Dictionary* (1997), p 1338 (emphasis added).

[34] *Lash v Traverse City*, 479 Mich 180, 194; 735 NW2d 628 (2007).

Thus, we believe that the statute was specifically intended to expressly limit a mental health practitioner's duty to that "*as provided in this section*," thereby limiting a mental health practitioner's *only* duty to protect to *only* those readily identifiable persons against whom a threat of physical violence is made.[35] In other words, we believe that it is clear that the Legislature intended to modify or abrogate any other conceivable duty that a mental health professional may have to protect others, which would include a duty to take reasonable steps to ensure that the patient is treated in a safe clinical environment. The duty a mental health professional owes to protect third persons does not vary depending on the cause of action, nor upon the identity or category of the "third person."

Further, we disagree that subsection (5) of the statute, in which the Legislature stated, "This section does not affect a duty a mental health professional may have under any other section of law[,]" supports a conclusion that the Legislature contemplated that some common-law duties would remain despite the language of MCL 330.1946(1). To the contrary, reading the plain language of the statute indicates that the Legislature merely contemplated that a psychiatrist's other *statutory* duties remain viable—for example, the duty to report suspected abuse under the Child Protection Law.[36] More specifically, subsection (5) begins with the words "[t]his *section*," clearly referring to the statute, MCL 330.1946, as "[t]his section." Subsection (5) then concludes with the words "under *any other section* of law[.]" The Legislature's decision to utilize the word "section" again here clearly indicates that it was again referring to statutory law, rather than common law.

G. Conclusion

In sum, we conclude that no common law duty to protect survived the Legislature's enactment of MCL 330.1946. We conclude that MCL 330.1946 preempts the field on the issue of a medical health professional's duty to warn or protect others, including the psychiatrist's other patients. We therefore conclude that Dawe's claim that defendants breached their duty to provide Dawe with a safe clinical environment for her treatment is without merit. Consequently, we conclude that the trial court erred when it refused to grant defendants' requests for relief premised on the theory that they had no common law duty to protect Dawe beyond that imposed by MCL 330.1946.

H. Unfair Result

We acknowledge that the evidence presented at trial was compelling proof that defendants knew or should have known that Brooks posed a danger to the other patients in his therapy group and, therefore, should not have been placed in group therapy. Therefore, it is an

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[35] See *Swan*, *supra* at 198 ("Under the statute, the *only* duty owed is a duty to warn in those situations where a patient communicates a threat and the object of the threat is reasonably identifiable."); *Jenks*, *supra* at 418-419 ("It is apparent from the language of the statute and its legislative history that it is intended to protect only those readily identifiable individuals against whom a threat of physical violence is made.").

[36] MCL 722.623.

unfair result to shield defendants from liability in this case. Common sense and the general tenets of the common law duty to protect arising out a special relationship would seem to justify holding defendants accountable here. However, we are bound to interpret plain statutory language as written. The plain language of the statute dictates the result we reach today, and any arguments that the statute is unwise or results in bad policy must be addressed to the Legislature.[37]

III. Statutory Duty To Warn Or Protect Under MCL 330.1946

Applying the language of the statute, defendants argue that Dawe failed to present evidence that Brooks communicated to defendants a threat of physical violence against Dawe. Therefore, defendants argue that the trial court erred when it declined to grant defendants' motions for summary disposition,[38] directed verdict, and JNOV on Dawe's claim under MCL 330.1946.

In interpreting MCL 330.1946, this Court has clarified that "[i]t is apparent from the language of the statute and its legislative history that it is intended to protect only those readily identifiable individuals against whom a threat of physical violence is made."[39] Accordingly, communication of a threat of physical violence directed against the victim is essential to liability under the statute.[40]

Applying the statutory criteria to this case, we conclude that Dawe failed to present evidence from which a reasonable jury could conclude that Brooks communicated a threat of physical violence against Dawe to defendants. The only relevant testimony was that of James Stanislaw, a certified social worker employed by defendants, who served as the group therapist for the group that included Brooks and Dawe. And, although Stanislaw's testimony, even taken in the light most favorable to Dawe,[41] established that Brooks probably indicated that he wanted to hurt *someone* at the practice, his testimony did not establish that Brooks made a threat of physical violence *against Dawe*, either individually or as a member of the therapy group. Therefore, we conclude that Dawe failed to present evidence from which a reasonable jury could conclude that Brooks communicated a threat of physical violence against Dawe, as a readily identifiable third person, to defendants. Thus, Dawe failed to establish a claim as a matter of law

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[37] See *Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 613; 575 NW2d 751 (1998); *Richter*, *supra*.

[38] Because defendants do not substantively address their motion for summary disposition, we limit our analysis to whether the trial court should have granted defendants' motion for a directed verdict.

[39] *Swan v Wedgwood Christian Youth and Family Services, Inc*, 230 Mich App 190, 198; 583 NW2d 719 (1998), citing *Jenks v Brown*, 219 Mich App 415, 419; 557 NW2d 114 (1996).

[40] See *Lagow ex rel Welch v Segue, Inc*, unpublished opinion per curiam of the Court of Appeals, issued August 17, 2001 (Docket No. 219624).

[41] See *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005).

under MCL 330.1946. Consequently, the trial court should have granted defendants' motion for directed verdict on this claim.

Given the resolution of this issue, we decline to address defendants' argument that the statutory claim should have been dismissed because Dawe failed to present expert testimony concerning the standard of care applicable under MCL 330.1946. Further, we find it unnecessary to address whether the trial court erred in failing to grant defendants motion for JNOV.

IV. Conclusion

The trial court erred by failing to grant defendants a directed verdict. Therefore, we vacate the lower court judgment against defendants, reverse the trial court's denial of defendants' motion for a directed verdict, and remand for entry of an order dismissing Dawe's claims against defendants. Given our disposition, we decline to address the parties' remaining arguments related to errors related to the trial and judgment.

Reversed, vacated, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly