STATE OF MICHIGAN

COURT OF APPEALS

NORMAN LAGOW, as Personal Representative of the ESTATE OF TAMERA L. WELCH, Deceased,

Plaintiff-Appellant/Cross-Appellee,

v

SEGUE, INC., and JUDITH A. ZAREND,

Defendants-Appellees.

and

LIFEWAYS and LARRY DOUGLAS,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
August 17, 2001

No. 219624
Jackson Circuit Court
LC No. 96-078109-NO

NORMAN LAGOW, as Personal Representative of the ESTATE OF TAMERA L. WELCH, Deceased,

Plaintiff-Appellant/Cross-Appellee,

v

LIFEWAYS and LARRY DOUGLAS,

Defendants-Appellees-Cross-Appellants,

and

SEGUE, INC., AND JUDITH A. ZAREND,

Defendants-Appellees.

No. 220214
Jackson Circuit Court
LC No. 96-016494-CM

Before: Holbrook, Jr., P.J., and Hood and Griffin, JJ.

PER CURIAM.

These consolidated appeals arise out of the murder of plaintiff's decedent, Tamara Welch. In Docket No. 219624, plaintiff Norman Lagow, personal representative of the estate of Tamara Welch, appeals as of right from the September 29, 1998, order of the circuit court granting summary disposition in favor of defendants Lifeways, Segue, Inc.,[1] Larry Douglas, and Judith Zarend[2] pursuant to MCR 2.116(C)(10), based on the absence of any duty owed by defendants to the decedent in this wrongful death action. Although they prevailed in the underlying action, defendants Lifeways and Douglas, in Docket No. 220214, cross appeal and challenge an earlier order entered by the circuit court on May 12, 1998, denying their motion for summary disposition pleading governmental immunity pursuant to MCL 691.1407(2). This Court consolidated the respective appeals, and we affirm.

I

On the night of December 11, 1994, Tamara Welch (decedent) was murdered. An individual by the name of Mark Chesley was arrested and charged with the crime, having led police to the body. However, Chesley was subsequently determined to be incompetent to stand trial; thus, no conviction was ever obtained for the murder. Defendants Lifeways and Segue, Inc. (Segue), had provided mental health services to both decedent and Chesley before decedent's death.

Decedent, who suffered from schizophrenia, was placed in defendant Segue's care for several months in 1992 pursuant to an involuntary treatment order issued by the Jackson Probate Court. After the involuntary treatment order expired in November 1993, decedent requested to live independently in her own apartment, outside of Segue's adult foster care system. As her mental condition improved, her psychiatrist approved the move to independent living in January 1994. The evidence indicates that when decedent moved into her own apartment in 1994 she was mentally stable and functioning very well. Her father, plaintiff herein, admitted at his deposition that during this period decedent was functioning "like a normal person," i.e., "taking care of herself" and "becoming very responsible." Decedent even worked on a part-time basis and walked to and from work in the city of Jackson without assistance from any of the defendants. Decedent received social security benefits, which went to Segue as the payee; Segue in turn paid her rent from the proceeds. Decedent helped to cut her costs by sharing rent with one or more roommates. Those roommates changed over time, but included, at various times, her

[1] Segue, Inc., is a nonprofit corporation that provides services to the mentally ill pursuant to a contract with defendant Lifeways (formerly known as Jackson-Hillsdale Community Mental Health Board at the time of the incidents giving rise to the suit), a local government agency responsible for providing mental health services in its area.

[2] At the time of the events giving rise to the present appeal, Douglas was a licensed social worker employed by Lifeways, and Zarend was the executive director of defendant Segue, Inc.

alleged assailant, Mark Chesley, and two boyfriends. Since their presence allegedly violated the specific terms of her lease and jeopardized her social security payments, Segue advised decedent in writing to have the men move out. However, she did not comply with the request.

Decedent was interviewed weekly by Segue employees during her stay in her apartment, to monitor her continued compliance with her psychotropic medication requirements. The record indicates that she never once mentioned any physical difficulties that she may have been having with any of her roommates. Some of the roommates were reported to have been somewhat of a nuisance to her because of their predilection for staying up late and watching television at all hours; however, decedent never made any complaints about physical threats or assaults by her roommates, including Mark Chesley.

Mark Chesley, who suffered from paranoid schizophrenia, was involuntarily committed to the Ypsilanti Regional Psychiatric Hospital by the Jackson Probate Court for sixty days in early 1992. The probate court later involuntarily transferred Mark Chesley into the Segue program for a thirty-day period, ending in July of 1992. After Chesley was released by the court, he voluntarily agreed to continue in the Segue program and continue taking his psychotropic medications for at least a short period. In fact, his girlfriend at the time, who happened to be a Segue employee, made taking his medication a condition precedent of Chesley's cohabitation with her. Over the next two-year period, Chesley continued to take his medication on a regular basis; however, he used Segue's outpatient psychiatric program services less and less.

Chesley was a patient of Segue until February 1994, when he asked for termination of the contract treatment by Segue and a transfer of services to Lifeways. Lifeways agreed to have Chesley transferred to their mental health program, and consequently, Segue had no further direct programmatic contact with Chesley. Chesley participated in the Lifeways program without incident for only two months. In June 1994, Chesley announced he was moving to Seattle, Washington, with his girlfriend, who told the Lifeways psychiatrist that she would assist him in obtaining mental health services there through the Veteran's Administration. Chesley was thereafter discharged from Lifeways' program pursuant to state statute. See MCL 330.1478.

Chesley never made it to Washington. He and his girlfriend separated, and Chesley moved in with decedent. Unbeknownst to defendants, Chesley ran out of his psychotropic medications in mid-October, 1994. His former girlfriend called Lifeways on October 31, 1994, to report that Chesley had run out of his medications two weeks before, and to demand additional medications. Because he was not making threats to harm himself or others, Lifeways indicated that Chesley would have to come to their facility voluntarily to receive assistance. He never arrived. On December 13, 1994, decedent was found murdered in her apartment, after an incoherent Chesley lead police to the body. Chesley was determined to be mentally incompetent to stand trial and was involuntarily confined to a psychiatric facility.

Plaintiff initially filed two separate negligence actions, one in the Court of Claims against defendant Lifeways, the other in Jackson Circuit Court against the remaining defendants. The two actions were consolidated in Jackson Circuit Court by stipulation and order, removed to

federal court, and eventually remanded to state court.[3] Defendants' initial motions for summary disposition, based on alleged immunity provided by law, were denied by the trial court. However, defendants filed renewed motions for summary disposition following the release of this Court's decision in *Swan v Wedgwood Christian Youth & Family Services, Inc*, 230 Mich App 190; 583 NW2d 719 (1998). Defendants asserted that *Swan*, in which this Court held that pursuant to a state statute, a mental health provider has no duty to warn a third party of the risk of danger from one of its patients unless the patient made a direct threat against the third party with an apparent ability to carry out the threat, was dispositive of the present case. The trial court agreed and, holding that defendants owed no duty to decedent under the circumstances, entered an order granting summary disposition in favor of defendants. Plaintiff now appeals.

II

On appeal, plaintiff contends that the trial court erred in granting summary disposition in favor of defendants. Plaintiff argues that defendant Segue and its executive director, defendant Zarend, had a special relationship with decedent, in that they were providing for her care and therefore had a duty to protect her from foreseeable harm. Plaintiff maintains it was foreseeable that if Chesley and decedent lived together, Chesley would harm decedent, given that Segue knew decedent was mentally ill and had little insight into her illness, and Chesley was violent and aggressive and was not taking his medicine. Plaintiff further asserts that defendant Lifeways, as a public mental health agency, violated its constitutional and statutory duties to provide appropriate treatment to mentally disabled persons by placing decedent in the least restrictive treatment environment which was inadequate for her treatment needs, and by allowing Chesley to be at large in the community, where he could pose a danger to her.

On appeal, this Court reviews de novo a trial court's decision regarding a summary disposition motion. *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 324; 559 NW2d 86 (1996). Because it is evident that the trial court looked beyond the pleadings in ruling on the motion, we will review the propriety of the court's action pursuant to MCR 2.116(C)(10), which tests the factual basis of a claim. As explained by our Supreme Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996):

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

---

[3] Plaintiff also filed a separate suit against Chesley, which was consolidated with the other actions but ultimately voluntarily dismissed. Suits filed by plaintiff against other defendants were likewise voluntarily dismissed.

See also *Maiden v Rozwood*, 461 Mich 109, 119-121; 597 NW2d 817 (1999).

Duty is an essential element of any negligence action. To establish a prima facie case of negligence, the plaintiff must prove that: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the defendant's breach of duty was a proximate cause of the plaintiff's damages; and (4) the plaintiff suffered damages. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 203; 544 NW2d 727 (1996). Duty is any obligation that the defendant has to the plaintiff to avoid negligent conduct. *Id*. In negligence actions, the existence of a duty is a question of law for the court. *Id.*

In *Swan*, *supra*, a young man, sixteen years of age, was released from a secure residential program for emotionally disturbed adolescents run by the defendant mental health facility, for an unsupervised home visit. The teenager became self-destructive and when his mother's live-in boyfriend attempted to calm him, he killed the boyfriend. The plaintiff, as personal representative of the estate of the decedent, brought an action against the mental health facility, alleging that it committed a breach of its duty to use reasonable care in the admission, treatment, and supervision of the teenager, by sending him home on an unsupervised visit, failing to ensure that the youth had an adequate amount of his prescription medication and would take it during the visit, and failing to take appropriate measures in response to a phone call from the teenager's mother during the visit regarding his behavior. The plaintiff claimed that the killing of the decedent was proximately caused by the defendant's negligence. The trial court granted summary disposition in favor of the defendant, finding that although the defendant owed a duty of reasonable care to the disturbed teenager, it owed no duty to unknown third parties such as the decedent. This Court affirmed, finding that MCL 330.1946 narrowly limits the duty a mental health professional owes to third parties. MCL 330.1946, a "duty to warn" statute,[4] provides in pertinent part:

---

[4] The *Swan* Court, *supra* at 195-196, explained the rationale underlying the statute as follows:

> In the landmark case on a psychiatrist's duty to third persons, *Tarasoff v Regents of Univ of California*, 17 Cal 3d 425; 131 Cal Rptr 14; 551 P2d 334 (1976), the California Supreme Court held that a psychiatrist owes a duty to use reasonable care to protect persons endangered by his patient. The holding in *Tarasoff* was based upon the common-law rule of negligence that a person owes a duty to protect individuals from third persons when there is a special relationship with either the dangerous person or the potential victim.
>
> In *Davis v Lhim*, 124 Mich App 291, 301; 335 NW2d 481 (1983), this Court adopted the *Tarasoff* reasoning and held that a psychiatrist owes a duty of reasonable care to a person who is foreseeably endangered by his patient. However, the Supreme Court reversed this decision on other grounds in *Canon v Thumudo*, 430 Mich 326; 422 NW2d 688 (1988), and the Court found that on the basis of its holding it did not need to decide whether a duty to warn should be imposed upon mental health professionals. In 1989, the Michigan Legislature
>
> (continued…)

(1) 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 and the recipient 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 subsection (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.*

(2) 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:

(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.

* * *

(5) This section does not affect a duty a mental health professional may have under any other section of law. [Emphasis added.]

The *Swan* Court rejected the plaintiff's argument that the statute did not apply to the facts before it and held that the statute served as a bar to the plaintiff's suit:

According to plaintiff, the statute by its own terms applies only in those situations where a psychiatric patient has communicated a threat to a mental health professional against a reasonably identifiable third person. We disagree. MCL 330.1946; MSA 14.800(946) limits the duty a mental health professional owes to third persons such as plaintiff's decedent. 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. . . . In the present case, plaintiff concedes that LaPalm had communicated no threat against the decedent or any other third party. The decedent had participated in two visits with LaPalm in the preceding month that had gone well. Moreover, there is no evidence that LaPalm ever threatened or assaulted the decedent before the assault on August 23, 1992. Therefore, defendant owed no duty to warn or protect the decedent under the terms of the statute.

(…continued)

sought to codify the holding set forth in *Tarasoff* in a "duty to warn" statute, MCL 330.1946; MSA 14.800(946) . . .

> Plaintiff further argues that the statute does not apply in the present case because plaintiff's claim is not based upon a failure to warn but upon defendant's negligence in treating LaPalm. . . . 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 decedent, as the circuit court correctly noted. Moreover, plaintiff's argument ignores the last sentence of MCL 330.1946(1); MSA 14.800(946)(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. [*Id*. at 198-199 (emphasis in original).]

The *Swan* Court further ruled that to the extent the plaintiff's position could be interpreted as arguing that the defendant owed a common-law duty to the decedent, rather than a statutory duty,

> we disagree with plaintiff's argument. An individual generally has no duty to protect another who is endangered by a third person's conduct. *Jenks* [*v Brown*, 219 Mich App 415; 557 NW2d 114 (1996)], *supra* at 420-421. A duty of reasonable care may arise where one stands in a special relationship with either the victim or the person causing the injury. *Id*. at 421. "Special relationships" recognized under Michigan law include psychiatrist-patient and doctor-patient. *Marcelletti v Bathani*, 198 Mich App 655, 664; 500 NW2d 124 (1993). Michigan courts have established in this context a duty of reasonable care toward only those third parties who are " 'readily identifiable as foreseeably endangered.'" *Jenks*, *supra* at 421, quoting *Marcelletti*, *supra* at 665.
>
> In *Jenks*, the Court discussed the possibility of a mental health professional owing a common-law duty to third persons in the context of a trial court's refusal to allow the plaintiff leave to add a common-law theory of negligence to his complaint against the defendant. The panel did not decide whether a common-law duty flowing from psychiatrists to third persons had survived the enactment of MCL 330.1946; MSA 14.800(946). However, the panel determined that the proposed amendment was futile because the patient had not communicated any threat of violence against the plaintiff. *Jenks*, *supra* at 421. In the present case, we also do not need to decide whether a common-law duty survived the enactment of the statute because no foreseeable danger to plaintiff's decedent was made known during defendant's treatment of LaPalm. Nor did LaPalm communicate any threat of violence against the decedent or any other persons, except himself. Under these circumstances, defendant had no common-law duty to warn or protect the decedent. See *id*. [Id. at 200-201.]

See also *Buczkowski v McKay*, 441 Mich 96, 100-109; 490 NW2d 330 (1992); *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988).

As the trial court correctly recognized, this Court's decision in *Swan* is dispositive of the present matter. The *Swan* Court expressly and unequivocally held that pursuant to MCL 330.1946, mental health professionals have no duty to warn or protect third persons, like decedent herein, unless the psychiatric patient communicates a threat against a reasonably identifiable third person. Thus, verbal communication of a threat of physical violence directed toward the victim is absolutely essential to liability under the statute.

Consequently, *Swan* bars plaintiff's analogous claim against defendants in the instant case. Although there is conflicting evidence regarding the severity of Chesley's condition and the potential danger Chesley posed to the public at large, the record is devoid of any evidence that Chesley ever communicated a specific threat against decedent to any of the defendants. Accordingly, defendants had no legally cognizable duty to protect or warn decedent under the terms of the statute, and the trial court therefore did not err in granting summary disposition in favor of defendants.

Moreover, to the extent plaintiff argues a special relationship existed between defendants and decedent by virtue of her status as defendants' psychiatric patient, thereby allegedly giving rise to a common-law duty to protect decedent from foreseeable harm, we find plaintiff's argument to be without merit.

As a general rule, there is no legal duty that obligates one person to aid or protect another. *Krass v Tri-County Security, Inc*, 233 Mich App 661, 668-669; 593 NW2d 578 (1999). Moreover, it is well settled that there is no duty to protect another from the criminal acts of a third party in the absence of a special relationship between the defendant and the plaintiff or the defendant and third party. *Id.*; *Phillips v Deihm*, 213 Mich App 389, 397; 541 NW2d 566 (1995); *Bell & Hudson PC v Buhl Realty Co*, 185 Mich App 714, 717; 462 NW2d 851 (1990); *Papadimas v Mykonos Lounge*, 176 Mich App 40, 46-47; 439 NW2d 280 (1989). The underlying rationale for this rule is the fact that "[c]riminal activity, by its deviant nature, is normally unforeseeable." *Id.* at 46-47. See *MacDonald v PKT, Inc*, ___ Mich ___; ___ NW2d ___ (2001) (Docket Nos. 114039; 115322, issued 6/26/01). A cognizable "special relationship" requires one party's loss of control over self-protection and the other party's concomitant assumption of the obligation to protect the other. As explained by our Supreme Court in *Williams, supra* at 499:

> The rationale behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety.

See also *Buczkowski, supra* at 103-104; *Marcelletti v Bathani*, 198 Mich App 655, 664-665; 500 NW2d 124 (1993); *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 8-9; 492 NW2d 472 (1992); *Bell & Hudson, PC, supra* 717-718.

In *Hinkelman v Borgess Medical Center*, 157 Mich App 314; 403 NW2d 547 (1987),[5] a psychiatric patient who was being treated on a voluntary basis at the defendant medical center shot and killed his former girlfriend. In a wrongful death action filed against the medical center, the plaintiff administrator of the decedent's estate alleged that the defendant was negligent in failing to warn others of the patient's dangerous propensities and in allowing the patient to leave the hospital. This Court rejected the plaintiff's argument, stating:

> First, plaintiff has failed to allege any facts that would establish the requisite special relationship between defendant and Daniel Travis [psychiatric patient]. As was noted by the trial court, Travis was not a hospital patient for any appreciable length of time. Rather, on two occasions he voluntarily admitted himself and stayed for only a few hours. The hospital was not afforded sufficient time to begin to evaluate and treat Travis. On the facts presented, there was no special relationship established that would impose a duty on the hospital.
>
> * * *
>
> Plaintiff also asserts that the defendant had a duty to keep Travis hospitalized, either under an unspecified common law duty or pursuant to the Mental Health Code. . . .
>
> Critical to our analysis is the fact that Travis was a voluntary patient. Mental institutions are not prisons, nor places where people are confined to oblivion. . . . Rather, the voluntary patient carries the key to the hospital's exit in his hand. . . . Indeed, MCL 330.1412; MSA 14.800(412) provides that informal voluntary patients shall be allowed to terminate hospitalization.
>
> The duty of a psychiatric treatment facility to protect third persons is premised upon the facility's special relationship to the patient. However, in order to take charge of a person in such a manner as will create a duty to control his conduct, the facility must possess the ability to control that person's conduct. . . . Thus, while mental hospitals charged with control and treatment of dangerous patients have been held responsible for patient conduct, the duty has been imposed based upon the control vested by involuntary commitment. . . . In contrast, where a patient's hospitalization was voluntary, no duty has been imposed due to the facility's inability to compel patient confinement. . . .
>
> In the instant case, defendant Borgess Medical Center had little, if any, ability to control Travis. As a voluntary patient, Travis' hospitalization or freedom was subject to his own volition. Under the circumstances, the hospital cannot now be charged with the consequences of Travis' decision to leave. [*Id*. at 322, 324-325 (citations omitted).]

---

[5] Although *Hinkelman* was decided prior to the passage of MCL 330.1946, its reasoning is nonetheless relevant to the present case.

See also *Paul v Plymouth General Hosp*, 160 Mich App 537, 541-542; 408 NW2d 492 (1987).

The reasoning of this Court in *Hinkelman* applies to the present case and nullifies the argument that defendants had a "special relationship" *with either decedent or Chesley* at the time of decedent's murder in December 1994. Mark Chesley was refusing all treatment at the time of the incident and was not part of any active community mental health treatment program being provided by any of these defendants. In fact, Chesley had been discharged from the defendants' outpatient program some ten months before decedent's murder, as a result of his decision to refuse to accept services being offered by these defendants and his preference to pursue mental health services elsewhere. Decedent was voluntarily receiving outpatient community mental health services at the time of her death. As the *Hinkelman* Court noted, in this capacity she was treated under the mental health code as a legally competent adult with the inherent right to make her own decisions absent a direct court order to the contrary. While defendants advised her not to have men, including Chesley, as her roommates, since their presence allegedly violated the specific terms of her lease and would require a cut in her housing allowance, the decision was decedent's to make. It is undisputed that she chose to ignore this advice.

We, therefore, conclude that under the circumstances, where defendants lacked the requisite control over either patient – Chesley or decedent – in light of their status as voluntary patients, a "special relationship" giving rise to a duty to protect decedent from the unforeseeable criminal acts of Chesley did not exist. In sum, the trial court did not err in granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). In light of our conclusion in this regard, we need not address the issues raised in the cross appeal of defendants Lifeways and Douglas.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Harold Hood
/s/ Richard Allen Griffin