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IN THE
COURT OF APPEALS OF INDIANA

Benjamin Coplan, M.D., Laxeshkumar Patel, M.D., John Schiltz, M.D., Christine Tran, M.D., Community Health Network, Inc., d/b/a Community Hospital Howard Regional Health Hospital and Community Howard Behavioral Health, Community Physicians of Indiana, Inc., d/b/a Community Physician Network, Community Howard Regional Health, Inc., Timothy

November 12, 2021

Court of Appeals Case No.
21A-CT-406

Appeal from the
Marion Superior Court

The Honorable
Heather Welch, Judge

Trial Court Cause No.
49D01-1812-CT-049633

Held, P.A., and Medical Associates LLP,
Appellants-Defendants,

v.

Betty Miller, Individually and as Personal Representative of the Estate of John Allen Miller,
Appellee-Plaintiff

Vaidik, Judge.

Case Summary

[1] In January 2017, after a month of erratic behavior and trips to the emergency room for mental-health issues, Zachary Miller killed his grandfather, John Miller. John's widow later sued many of the healthcare providers. Several defendants moved for summary judgment under Indiana Code section 34-30-16-1, which provides that a "mental health service provider" does not have a duty to take action to protect others from a patient's violent behavior unless the patient (1) "has communicated to the provider of mental health services an actual threat of physical violence or other means of harm against a reasonably identifiable victim or victims" or (2) "evidences conduct or makes statements indicating an imminent danger that the patient will use physical violence or use other means to cause serious personal injury or death to others." The trial court denied the motions, and the providers appeal.

[2] Regarding the first prong of Section 34-30-16-1, we agree with the providers that Zachary did not communicate to them an "actual threat" against John. As for the "imminent danger" prong, the providers contend that because the phrases "evidences conduct" and "makes statements" are written in the present tense, each of Zachary's hospital visits must be evaluated separately, and only what Zachary did and said "in the presence of" or "to" the providers during each specific visit can be considered in determining whether he posed an imminent danger of harm to others. We disagree and hold that the imminent-danger prong allows consideration of all Zachary's conduct and statements during the month leading up to his attack on John. And because the providers do not dispute that the totality of Zachary's conduct and statements over that period could lead a reasonable trier of fact to find an imminent danger existed, the providers are not entitled to summary judgment. Therefore, we affirm the trial court's denial of their motions.

Facts and Procedural History

[3] This appeal concerns events that took place during the one-month period between December 9, 2016, and January 10, 2017. On the afternoon of December 9, Zachary's mother took him to the emergency room at Community Howard Regional Health in Kokomo after he threatened to strangle her "until her eyes popped out." Appellee's App. Vol. II p. 33. He presented with suicidal ideation, agitation, and depression, and the degree of symptoms was noted as "severe." *Id.* A behavioral-health consult was ordered, during which Zachary

reported having suicidal, homicidal, and violent thoughts earlier in the day. He also reported throwing a "tantrum" that involved "screaming, yelling, cussing," hitting a tree, and throwing his phone at a wall. *Id.* at 100. His mother reported he "believed the TV was talking to him" and he had been "following her around today, making her nervous." *Id.* at 99. Zachary was diagnosed with major depression but was discharged home with instructions to follow up with behavioral health.

[4] On December 11, Zachary returned to the Community Howard emergency room reporting suicidal thoughts, stating "he would cut his throat with a knife." *Id.* at 39. He reported he had not followed up with behavioral health as instructed on December 9. He stated that "he is here to stay, thinks he needs to stay[.]" *Id.* Another behavioral-health consult was ordered, during which Zachary reported having "bad thoughts" and wanting to "hurt bad guys," like if he saw somebody "punch a woman in the face." *Id.* at 121. Again, Zachary was diagnosed with major depression but was discharged home with instructions to follow up with behavioral health.

[5] On December 16, Zachary's grandfather, John Miller, reported to Kokomo police that Zachary had kicked him, threatened to kill him, and stated "the Illuminati" had said to choke and kill him. *Id.* at 105. Police detained Zachary and brought him to the Community Howard emergency room. He presented with a "psychiatric problem" and "delusional thoughts" and was "angry," "agitated," and a "homicide risk." *Id.* at 49. Zachary's mother reported he was paranoid about the Illuminati, he "believes that the TV speaks to him," and he

had been talking about harming his family and himself. *Id.* at 105. After a behavioral-health consult, the decision was made to have Zachary admitted for psychiatric care. During an assessment on December 18, Zachary acted "guarded" and was "hostile," "uncooperative," "lethargic," "paranoid," "suspicious," "disheveled," and "irritable." *Id.* at 67. Zachary was discharged on December 19. In a "Final Report" from that day, it was noted Zachary had stated, "I'm not sure how much to tell you guys because I don[']t want it to cause me to have to stay here longer." *Id.* at 70. Zachary acknowledged he had "threatened and pushed" John and stated he was trying to scare John because he felt John was withholding information about his time in Vietnam. *Id.* He reported hearing "an angel on one shoulder and a devil on the other shoulder" and seeing a "shadowy slender man" walking by his window the previous night. *Id.* At a follow-up appointment on December 20, Zachary stated, "I go back [and] forth in my own head on what is right and what is wrong," "I just don't trust anyone really," and "I think everybody is out to get me." *Id.* at 76, 78.

[6] On January 1, Zachary was again brought to the Community Howard emergency room by Kokomo police. He had threatened to kill his mother, kicked John a second time, and killed the family dog. A behavioral-health consult was ordered, and a "Mental Status Exam" indicated "Mood: Angry, Irritable," "Judgment: Poor," and "Impulse Control: Poor." *Id.* at 113. After a few hours, Zachary was discharged and instructed to follow up with behavioral health.

[7] On January 8, Zachary went to the Community Howard emergency room acting "anxious," "paranoid," and "agitated" and asking to be admitted. *Id.* at 86. He was seen by physician assistant Timothy Held ("PA Held"), who was working under the supervision of Dr. Sara Koerwitz. A behavioral-health consult was ordered, and Zachary said he needed to be admitted due to "external stressors." *Id.* at 92. He stated, "I hear my own thoughts. I can't shut my brain off. Everytime something good happens in my life I get the need to f*** myself every time." *Id.* He added, "I keep fighting my brain, but I need something to keep me from thinking so much." *Id.* It was determined that inpatient treatment was not medically necessary, and Dr. Koerwitz and PA Held ordered Zachary discharged with instructions to follow up with his primary care provider.

[8] Zachary was discharged at 10:42 p.m. Within hours, he went to John's home and brutally attacked him. He hit John's head with a fist and a frying pan, stomped on his head, choked him, and cut his wrist with a steak knife. John died on January 10.[1]

[9] Two years later, John's widow Betty sued several Community Health physicians and entities ("Community Defendants"),[2] as well as Medical

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[1] Zachary was charged with murder but eventually pled guilty but mentally ill to voluntary manslaughter. *See* Cause No. 34D04-1701-F1-3.

[2] The Community Defendants are: Dr. Laxeshkumar Patel; Dr. John Schiltz; Dr. Benjamin Coplan; Dr. Christine Tran; Community Health Network, Inc., d/b/a Community Howard Regional Health Hospital

Associates LLP (which staffed the emergency room at Community Howard Regional Health) and PA Held, a Medical Associates employee[3] (collectively, "the Defendants").[4] She claims that "the Defendants should have taken action to have Zachary Miller admitted to the hospital, involuntarily committed, and provided adequate warnings to potential victims of his violent nature upon his presentations in December 2016 and January 2017." Community Defendants' App. Vol. II p. 53.[5]

[10] The Defendants moved for summary judgment under Indiana Code sections 34-30-16-1, which provides:

> A mental health service provider is immune from civil liability to persons other than the patient for failing to:
>
> (1) predict; or
>
> (2) warn or take precautions to protect from;

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and Community Howard Behavioral Health; Community Physicians of Indiana, Inc., d/b/a Community Physician Network; and Community Howard Regional Health, Inc.

[3] Betty also sued several Medical Associates physicians—Dr. Erik Fossum, Dr. Bradford Hale, Dr. James Blickendorf, Dr. Robert McAllister, and Dr. Sara Koerwitz—but later dismissed her claims against them in exchange for a stipulation by Medical Associates LLP that it would be vicariously liable for any negligence by those physicians.

[4] Betty named several other defendants who are no longer parties to the case and are not involved in this appeal: Dr. Joseph Hill; St. Joseph Hospital & Health Center, Inc.; St. Vincent Health, Inc.; and Ascension Health, Inc.

[5] Betty did not bring her claim under the Indiana Medical Malpractice Act (Ind. Code art. 34-18), and none of the appellants argue she was required to do so. *Cf. Cutchin v. Beard*, 171 N.E.3d 991, 993 (Ind. 2021) (holding that "the Indiana Medical Malpractice Act applies when a plaintiff alleges that a qualified health-care provider treated someone else negligently and that the negligent treatment injured the plaintiff").

> a patient's violent behavior **unless the patient has communicated to the provider of mental health services an actual threat of physical violence or other means of harm against a reasonably identifiable victim or victims, or evidences conduct or makes statements indicating an imminent danger that the patient will use physical violence or use other means to cause serious personal injury or death to others.**

(Emphasis added). Indiana Code section 34-30-16-2 reiterates the limited nature of this duty and identifies the actions that can be taken to satisfy the duty when it arises:

> The duty to warn of or to take reasonable precautions to provide protection from violent behavior or other serious harm arises only under the limited circumstances specified in section 1 of this chapter. The duty is discharged by a mental health service provider who takes one (1) or more of the following actions:
>
> > (1) Makes reasonable attempts to communicate the threat to the victim or victims.
> >
> > (2) Makes reasonable efforts to notify a police department or other law enforcement agency having jurisdiction in the patient's or victim's place of residence.
> >
> > (3) Seeks civil commitment of the patient under IC 12-26.
> >
> > (4) Takes steps reasonably available to the provider to prevent the patient from using physical violence or other means of harm to others until the appropriate law enforcement agency can be summoned and takes custody of the patient.

> (5) Reports the threat of physical violence or other means of harm, within a reasonable period of time after receiving knowledge of the threat, to a physician or psychologist who is designated by the employer of a mental health service provider as an individual who has the responsibility to warn under this chapter.

The Defendants did not claim they took any of the five actions under Section 34-30-16-2. Rather, they argued they were not required to take any of those actions because Zachary's statements and conduct during the month before the attack were insufficient to trigger the duty under Section 34-30-16-1. Concluding that issues of fact preclude summary judgment under the statute, the trial court denied the motions.

[11] The Defendants then sought and received permission to bring this interlocutory appeal.

Discussion and Decision

[12] The Defendants contend the trial court erred by denying their motions for summary judgment. We review such motions de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). That is, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C).

[13] The parties' arguments present several issues of statutory interpretation. We review such issues de novo. *KS&E Sports v. Runnels*, 72 N.E.3d 892, 898 (Ind. 2017). When interpreting a statute, "our primary goal is to determine and give effect to the intent of the legislature." *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390, 394 (Ind. 2018). We examine the statute's language to give effect to the plain and ordinary meaning of statutory terms. *Id.* In doing so, we presume the legislature intended for the statutory language be applied logically and consistently with the underlying policy and goals of the statute. *Id.*

[14] We begin by addressing the arguments of the Community Defendants and Medical Associates LLP and then turn to PA Held's arguments.[6]

I. Community Defendants and Medical Associates LLP

[15] The Community Defendants and Medical Associates LLP make two arguments on appeal. First, they contend Zachary neither (1) communicated to them an actual threat against John nor (2) evidenced conduct or made statements indicating an imminent danger that he was going to seriously harm anyone, as required by Section 34-30-16-1. Second, they assert that even if Zachary did one or both of those things, his family was already aware of the danger he posed, and the providers were not required to "re-warn" them.

[6] Medical Associates LLP and PA Held filed a joint opening brief and a joint reply brief, with PA Held's name listed first. We refer to the briefs as Held's Br. and Held's Reply Br.

A. Indiana Code Section 34-30-16-1

[16] As set forth above, Section 34-30-16-1 establishes that a "mental health service provider" has no duty to "predict" or "warn or take precautions to protect from" a patient's violent behavior unless the patient (1) "has communicated to the provider of mental health services an actual threat of physical violence or other means of harm against a reasonably identifiable victim or victims" or (2) "evidences conduct or makes statements indicating an imminent danger that the patient will use physical violence or use other means to cause serious personal injury or death to others." The Community Defendants and Medical Associates LLP contend that neither the "actual threat" prong nor the "imminent danger" prong was satisfied in this case.

[17] Regarding the actual-threat prong, we agree. There is no evidence Zachary ever communicated an actual threat against John to any of the defendants. Betty points out that Zachary, while speaking to various providers, **acknowledged making earlier threats** against John. But acknowledging an earlier threat – "Yes, doctor, last night (or last month, or last year) I threatened to kill John" – is not the same as communicating a threat – "Doctor, I'm going to kill John." The actual-threat prong requires the latter, and no such communication occurred here.

[18] As for the imminent-danger prong, the Community Defendants and Medical Associates LLP do not dispute that if Zachary's conduct and statements between December 9 and January 8 are considered as a whole—including

repeated hospital visits for mental-health issues, threats against his mother and John, multiple assaults on John, and killing the family dog—a trier of fact could reasonably conclude he posed an imminent danger of serious harm. Rather, they contend Zachary's conduct and statements during those thirty days should not be considered as a whole. Specifically, they argue that because the phrases "evidences conduct" and "makes statements" are written in the present tense, the imminent-danger prong is concerned only with conduct evidenced and statements made "in the presence of" or "to" a provider, during a particular visit, and "historical" or "prior" conduct and statements must be disregarded. Community Defendants' Br. pp. 13, 14, 18, 21, 22; Held's Br. pp. 29-33. They ask that we separately analyze each of Zachary's visits to the hospital and determine whether the things he did and said during each visit, standing alone, indicated an imminent danger that he would seriously harm others. *See* Held's Reply Br. p. 5 (arguing that "each ER visit must necessarily be reviewed and analyzed independently and the providers' conduct during each such ER visit must necessarily be reviewed and analyzed independently").

[19] There are two problems with this interpretation of the statute. First, the imminent-danger prong, unlike the actual-threat prong, does not include a phrase like "to the provider" (e.g., "evidences conduct or makes statements **to the provider** indicating an imminent danger . . ."). Second, the proposed reading of the statute would mean that a patient could be acting violently and making clear, specific threats hours or minutes before meeting with a provider, and the provider could not consider those facts in determining whether the

patient poses an imminent danger to others. Likewise, here, Zachary's conduct and statements at the hospital on January 8 would have to be viewed in a vacuum, ignoring all the disturbing things he said and did over the previous thirty days. That cannot be what the legislature intended, which explains why it did not include language like "to the provider" in the imminent-danger prong.

[20] Because the imminent-danger prong allows consideration of a patient's "historical" or "prior" conduct and statements known to a provider, and because the Community Defendants and Medical Associates LLP do not dispute that the totality of Zachary's conduct and statements between December 9 and January 8 could support a finding of imminent danger, they are not entitled to summary judgment under the imminent-danger prong.

B. Duty to "Re-warn"

[21] The Community Defendants and Medical Associates LLP also argue that even if one of the prongs under Section 34-30-16-1 was satisfied, Zachary's family was already aware of the danger, and the statute shouldn't be read to require the providers to take action to protect the family or, as the providers put it, "re-warn" them. Again, we disagree. Nothing in Section 34-30-16-1 indicates that the duty to warn or take precautions is owed only to those potential victims who are completely unaware of the danger posed. This argument would require us to read into the statute language like "unless the potential victims are otherwise aware of the threat." A court cannot engraft new words onto a statute. *Kitchell v. Franklin*, 997 N.E.2d 1020, 1026 (Ind. 2013). And in construing a statute, "it is just as important to recognize what [the] statute does

not say as it is to recognize what it does say." *Davis v. Edgewater Sys. For Balanced Living, Inc.*, 42 N.E.3d 524, 528 (Ind. Ct. App. 2015).

[22] Furthermore, requiring a provider to take protective measures even when a potential victim is aware of some danger makes practical sense. Being warned by a trained professional may very well cause a potential victim to take extra precautions to avoid violence. As the trial court put it, a mental health service provider is required to take action "because of their expertise in treating patients," and "individuals may not take any threats made direct[ly] to them by their loved one seriously." Community Defendants' App. Vol. III p. 48.

* * * *

[23] For these reasons, we affirm the trial court's denial of the Community Defendants' and Medical Associates LLP's motions for summary judgment.

II. PA Held

[24] PA Held also moved for summary judgment under Section 34-30-16-1. In response, Betty argued PA Held is not a "mental health service provider" and therefore is not "entitled to the protections of I.C. § 34-30-16-1." Held's App. Vol. II p. 243. The trial court ruled that PA Held is a mental health service provider but that, as with the other defendants, issues of fact preclude summary judgment.

[25] On appeal, PA Held renews his claim for summary judgment under Section 34-30-16-1. Likewise, Betty renews her argument that PA Held is not a mental

health service provider and "may not invoke I.C. § 34-30-16 *et seq.* as a liability shield." Appellee's Br. p. 36. PA Held contends this issue "is not properly before the Court of Appeals" because the trial court certified "four (4) very precise issues for Interlocutory Appeal," and whether he is a mental health service provider was not one of them. Held's Reply Br. pp. 17-18. He is incorrect. Our Supreme Court has held that trial courts certify orders, not issues, for interlocutory appeal under Appellate Rule 14(B) and that any issues the trial court had before it when entering the certified order are available on appeal. *Curtis v. State*, 948 N.E.2d 1143, 1147 (Ind. 2011); *Harbour v. Arelco, Inc.*, 678 N.E.2d 381, 386 (Ind. 1997). Therefore, the question of whether PA Held is a mental health service provider is properly before us.

[26] And the answer to that question is clear: no physician assistant, including PA Held, is a mental health service provider for purposes of Section 34-30-16-1. That term is defined in Indiana Code section 34-6-2-80, which provides:

> "Mental health service provider", for purposes of IC 34-30-16, means any of the following:
>
> (1) A physician licensed under IC 25-22.5.
>
> (2) A hospital licensed under IC 16-21.
>
> (3) A private institution licensed under IC 12-25.
>
> (4) A psychologist licensed under IC 25-33.

(5) A school psychologist licensed by the Indiana state board of education.

(6) A postsecondary educational institution counseling center under the direction of a licensed psychologist, physician, or mental health professional.

(7) A registered nurse or licensed practical nurse licensed under IC 25-23.

(8) A clinical social worker licensed under IC 25-23.6-5-2.

(9) A partnership, a limited liability company, a corporation, or a professional corporation (as defined in IC 23-1.5-1-10) whose partners, members, or shareholders are mental health service providers described in subdivisions (1) through (6).

(10) A community mental health center (as defined in IC 12-7-2-38).

(11) A program for the treatment, care, or rehabilitation of alcohol abusers or drug abusers that is:

(A) certified under IC 12-23-1-6; or

(B) created and funded under IC 12-23-14 or IC 33-23-16.

(12) A state institution (as defined in IC 12-7-2-184).

(13) A managed care provider (as defined in IC 12-7-2-127(b)).

That list does not include physician assistants, even though the legislature has dedicated an entire article in the Indiana Code—Article 25-27.5—to the licensing and regulation of physician assistants, and even though physician assistants are included, along with physicians and nurses, in the definition of "Health care provider" in the Medical Malpractice Act, *see* Ind. Code § 34-18-2-14(1). The trial court acknowledged this fact but concluded that "the Indiana legislature's intent was that physician[] assistants do fall under the definition of 'mental health service provider' even though they are not specifically listed." Held's App. Vol. II p. 56. But even if the legislature's "intent" is to have a physician assistant treated as a mental health service provider, that intent is not reflected in the plain language of the statute defining that term. We leave it to the legislature to add physician assistants to the list if it sees fit. For the time being, PA Held is not a mental health service provider, so he cannot be entitled to summary judgment under Section 34-30-16-1.

[27] That said, the fact that Section 34-30-16-1 does not apply to PA Held also means he could not have owed the duty established by that statute. The question, then, is whether he owed a duty under the common law. The parties do not identify any established duty that would apply to PA Held. When a duty has not already been declared or otherwise articulated, a court deciding whether a duty exists can balance the three factors set out by our Supreme Court in *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991): "(1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns." *See Doe #1 v. Ind. Dep't of Child Servs.*, 81 N.E.3d

199, 206-07 (Ind. 2017); *id.* at 207-08 (David, J., concurring). Betty discusses these three factors in her brief and contends they support a finding that PA Held owed a duty in this case. In his reply brief, PA Held offers no response to Betty's argument and makes no mention of the three factors. Therefore, he is not entitled to summary judgment on the issue of duty under *Webb v. Jarvis*.

[28] PA Held's only common-law argument is that he did not owe a duty under *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384 (Ind. 2015), and its progeny, including *Cavanaugh's Sports Bar & Eatery, Ltd. v. Porterfield*, 140 N.E.3d 837 (Ind. 2020), and *Jones v. Wilson*, 81 N.E.3d 688 (Ind. Ct. App. 2017). Those, however, were premises-liability cases that concerned the well-established duty of landowners to take reasonable precautions to protect their invitees from foreseeable criminal attacks. That duty is not at issue in this case, so *Goodwin*, *Cavanaugh's*, and *Jones* do not entitle PA Held to summary judgment.[7]

[29] Affirmed.

May, J., and Crone, J., concur.

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[7] While *Goodwin* involved an established duty, making a full *Webb* analysis unnecessary, the opinion modified how the *Webb* foreseeability factor should be applied. *Goodwin*, 62 N.E.3d at 390-91. However, it also confirmed that the three-factor *Webb* test (as modified) remains applicable in cases, like this one, where no duty has yet been established. *Id.* at 387; *see also Doe #1*, 81 N.E.3d at 206-07; *id.* at 207-08 (David, J., concurring).