STATE OF MICHIGAN

COURT OF APPEALS

PHILIP J. TAYLOR, D.O., Plaintiff-Appellant,	UNPUBLISHED December 10, 2015
v	No. 323155 Kent Circuit Court
SPECTRUM HEALTH PRIMARY CARE PARTNERS, d/b/a SPECTRUM HEALTH MEDICAL GROUP, Defendant-Appellee.	LC No. 13-000360-CL

Before: OWENS, P.J., and MURPHY and HOEKSTRA, JJ.

PER CURIAM.

Plaintiff Philip Taylor, D.O., appeals as of right the trial court's order granting defendant Spectrum Health Medical Group's motion for summary disposition. Because the parties' employment contract forecloses the possibility of judicial review of defendant's determination that plaintiff engaged in unethical behavior warranting summary termination, the trial court properly granted summary disposition and we affirm.

Plaintiff is a licensed medical practitioner specializing in obstetric and gynecological medicine. In 2011, plaintiff and defendant entered into a contract whereby defendant employed plaintiff as a physician in its department of obstetrics, gynecology, and women's health. In the fall of 2012, defendant began an investigation regarding plaintiff's conduct. Specifically, there had been reports that plaintiff engaged in angry outbursts at work and, most relevant to this case, defendant alleged that plaintiff acted unethically in handling a patient's deceased fetus. In particular, defendant preserved a fetus in a jar of formalin that was turned over to him for disposal by one of his patients, who had suffered a miscarriage. Thereafter, he took the fetus home to show his daughters, who were interested in attending medical school, and also displayed it on other occasions.

On January 9, 2013, defendant summarily terminated plaintiff's employment because of his handling of the fetus, which defendant determined was unethical behavior. In terminating plaintiff in this manner, defendant relied on a "summary termination" provision in the employment contract which permitted defendant to terminate plaintiff for "a serious, intentional violation of the standards of patient care" or "unethical behavior" as determined by defendant's board of directors. This summary termination provision states:

> Summary Termination. If your employment by [defendant] is terminated by its Board of Directors [the "Board"] for a serious, intentional violation of the standards of patient care *(i.e.*, serious quality and/or safety breaches), or unethical behavior, you will automatically be deemed to have voluntarily resigned or otherwise terminated your clinical privileges or medical staff membership at any Spectrum-owned hospital facility. Termination under these circumstances will be taken only after thorough investigation and review of facts by [the Board] which includes the President of [defendant] and CEO of Spectrum. Any termination described immediately above will be referred to in this Agreement as a "Summary Termination," and will trigger automatic resignation of Medical Staff privileges. . . .
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> Any termination of this Agreement and your employment by [defendant], whether Without Cause, For Cause, or Summary Termination, will be made by [the Board] following a thorough review and determination by the Professional Standards committee [PSC] in consultation with your Department Chief.

Following his termination, plaintiff sued defendant for breach of contract,[1] arguing that his behavior was not "unethical" and that his summary termination was thus a violation of the employment contract. Defendant then moved for summary disposition, which the trial court granted based on the conclusion that judicial review of the summary termination decision was prohibited by the employment contract which reserved to defendant the sole authority to determine whether plaintiff engaged in unethical behavior justifying summary termination. Plaintiff now appeals as of right.

On appeal, plaintiff contends that the trial court erred by granting summary disposition to defendant because the employment contract at issue did not provide defendant with sole discretion to determine whether plaintiff's conduct was "unethical" and that, in the absence of express language to this effect, defendant's finding of unethical behavior remains subject to judicial review. In support of this argument, plaintiff notes that there is an arbitration provision in the agreement which, in contrast to the summary termination provision, affords the arbitrator the authority to make a "final and binding" decision regarding employment disputes arising under the contract. Because the arbitration provision allows for resolution of disputes under the agreement and it states that plaintiff is not waiving "substantive rights," plaintiff asserts that this provision demonstrates that the Board's decision regarding what constitutes "unethical" behavior is subject to review by an arbitrator.[2] Alternatively, plaintiff maintains that there is, at a

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[1] Plaintiff also brought counts of conversion, tortious interference with a business relationship, civil conspiracy, and breach of contract on the ground that defendant failed to properly notify his patients of his termination. These claims were either voluntarily dismissed or dismissed pursuant to a grant of summary disposition. Plaintiff does not seek review of these claims on appeal, which is instead limited solely to the breach of contract claim concerning summary termination.

[2] The parties agreed to waive the arbitration provision; thus, plaintiff maintains that judicial review of the dispute in this case is appropriate.

minimum, some ambiguity in the contract which must be resolved by the trier of fact. Lastly, plaintiff also argues that defendant waived any claim that judicial review of its decision was foreclosed because defendant did not plead this issue as an affirmative defense in its first responsive pleading.

We review de novo a trial court's decision on a motion for summary disposition. *Tienda v Integon Nat'l Ins Co*, 300 Mich App 605, 611; 834 NW2d 908 (2013). "Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

"[C]ontracts are enforced according to their terms[,]" which "is a corollary of the parties' liberty to contract." *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). This Court examines the language in a contract according to "its ordinary and plain meaning if such would be apparent to the reader of the instrument." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). Where a term is not defined in a contract, "it is accorded its commonly understood meaning." *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 534-535; 676 NW2d 616 (2004). "If the language of the contract is unambiguous, we construe and enforce the contract as written." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003).

Employment contracts are interpreted according to the same rules of construction that apply to other contracts. *Bruno v Detroit Inst of Tech*, 36 Mich App 61, 64; 193 NW2d 322 (1971). Generally, employment relationships of indefinite duration are presumed to be terminable at the will of either party. *Lytle v Malady*, 458 Mich 153, 163; 579 NW2d 906 (1998). "However, the presumption of employment at will can be rebutted so that contractual obligations and limitations are imposed on an employer's right to terminate employment." *Id.* "[A]n employer's express agreement to terminate only for cause . . . can give rise to rights enforceable in contract." *Toussaint v Blue Cross & Blue Shield of Mich*, 408 Mich 579, 610; 292 NW2d 880 (1980). Consequently, "where an employer has agreed to discharge an employee for cause only, its declaration that the employee was discharged for unsatisfactory work is subject to judicial review." *Id.* at 621.

However, in *Thomas v John Deere Corp*, 205 Mich App 91, 94-95; 517 NW2d 265 (1994), this Court outlined an exception to the judicial review of wrongful termination cases involving a "just cause" provision. Specifically, where the employment contract provides the employer with sole discretion to determine whether cause exists justifying the employee's termination, then courts may not review the employer's determination that cause existed. *Id.* In other words, it is a "fundamental proposition that parties to an employment contract are free to bind themselves to whatever termination provisions they wish." *Id.* at 93-94. See also *Meagher v Wayne State Univ*, 222 Mich App 700, 721; 565 NW2d 401 (1997).

> In some employment contracts, employers choose to retain unfettered discretion to terminate an employee's employment when doing so would not violate the law. In other employment contracts, employers agree to limit their discretion to terminate an employee's employment in some way. Employers and employees are free to bind themselves as they wish, and "at-will" and "just-cause"

> termination provisions are merely extremes that lie on opposite ends of the continuum of possibilities. [*Thomas*, 205 Mich App at 94.]

Rather than "at-will" or reviewable "just-cause" termination provisions, parties may choose something that "lies between the two extremes" by agreeing to a provision that grants the employer sole discretion to determine whether just cause exists. *Id.* at 94-95. "This decision-making approach protects defendant's employees from some risks that truly at-will employees face, such as being fired rashly in a fit of pique, and being fired only because of a personality conflict with an immediate supervisor that does not affect job performance." *Id.* at 95 n 1. For example, in *Thomas*, the plaintiff could be terminated only for good and just cause, and the decision whether good and just cause existed would be made by plaintiff's supervisor, his supervisor's superior, and a personnel representative. *Id.* at 95. Because the defendant had sole authority to determine the existence of good and just cause, the *Thomas* Court determined that judicial review of the termination decision was prohibited, explaining:

> Thus, despite [the] defendant's alleged agreement to terminate [the] plaintiff only for cause, as long as the determination that just cause existed was made by the designated personnel, it is not possible for [the] plaintiff to state a claim that [the] defendant breached [the] plaintiff's employment contract by terminating his employment. Because [the] defendant had reserved for itself the authority to determine whether there was good and just cause, and because [the] defendant had, in the manner provided by the alleged employment contract, determined that there was good and just cause for terminating [the] plaintiff's employment, terminating [the] plaintiff's employment was not a breach of that contract. We are not saying that there was just cause to terminate [the] plaintiff's employment. We are only saying that the particular employment contract alleged by [the] plaintiff does not give courts the authority to second-guess [the] defendant's determination. [*Id.*]

In this case, the present facts fall squarely within the rule created by *Thomas* and thus, because defendant reserved for itself sole discretion to determine what constituted "unethical behavior" justifying summary termination, judicial review of this issue is foreclosed and the trial court properly granted defendant's motion for summary disposition. In particular, plaintiff's employment contract allows for termination in three circumstances: (1) without cause subject to providing 180 days written notice prior to the date of termination, (2) "for cause" as defined in the agreement, and (3) "summary termination" for "a serious, intentional violation of the standards of patient care" or "unethical behavior," which will result in automatic termination of clinical privileges. It was under this "summary termination" provision that plaintiff was terminated for "unethical behavior."

Similar to the situation described in *Thomas*, in this case, "summary termination" could only occur in specific circumstances, namely, where there had been a finding of "unethical behavior" or "a serious, intentional violation of the standards of patient care." With regard to how the summary termination decision should be made and by whom, there were clear procedures outlined in the contract that defendant had to follow before summary termination could occur, and the decision that grounds for summary termination existed had to be made by designated individuals. Cf. *Thomas*, 205 Mich App at 95. Specifically, under the summary

termination clause, termination "will be taken only *after thorough investigation and review of facts by* [the Board] which includes the President of [defendant] and CEO of Spectrum." The contract also specifies that the summary termination decision "*will be made by the Board of Directors* of [defendant] following a thorough review and determination by the Professional Standards committee [PSC] in consultation with your Department Chief." By expressly identifying the Board as the entity empowered to determine the occurrence of "unethical behavior," the contract excludes the possibility that anyone else has the authority to determine whether unethical behavior occurred. See *Grinnell Bros v Brown*, 205 Mich 134, 137; 171 NW 399 (1919) ("The expression of one thing [in a contract] is the exclusion of another, and a thing expressed puts an end to tacit implication."). See also *Miller v Allstate Ins Co*, 481 Mich 601, 611; 751 NW2d 463 (2008). Taken together, these provisions plainly demonstrate that the Board—and no other person or entity—had the sole authority to review the facts and to determine whether plaintiff engaged in "unethical behavior."[3]

Plaintiff contests this conclusion on appeal by highlighting the availability of dispute resolution procedures as set forth in the contract, which allow the parties to seek "final and binding" arbitration for "[a]ny dispute which may arise under the Agreement, or which relates to [plaintiff's] employment in any way." Contrary to plaintiff's argument, we conclude that the possibility of arbitration, as an alternative to judicial proceedings, does not alter the parties' intent as expressed in the summary termination clause of the contract. That is, as discussed, defendant reserved for itself sole discretion to determine the existence of "unethical behavior" justifying summary termination. Provided that defendant follows the procedures outlined in the contract, plaintiff has no basis on which to "dispute" this determination and thus the possibility of review by an arbitrator, like the possibility of judicial review, is foreclosed. Cf. *Thomas*, 205 Mich App at 95. See also *Krist v Krist*, 246 Mich App 59, 62; 631 NW2d 53 (2001) ("Since arbitrators derive their authority from the parties' contract and arbitration agreement, they are bound to act within those terms."). Consequently, the Board's summary termination decision does not give rise to a "dispute" and plaintiff cannot seek review of this decision by an arbitrator.[4]

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[3] Contrary to plaintiff's claim of ambiguity, we find the language at issue to be plain and unambiguous. That is, the summary termination provision does not "irreconcilably conflict" with another provision in the agreement, nor are its terms "equally susceptible to more than a single meaning." See *Coates*, 276 Mich App at 503 (quotations and citation omitted). Because the language is plain and unambiguous, there is no question of fact and the language must be enforced as written. See *id.* at 503-504.

[4] That is not to say that the arbitration provision is without effect. There are any number of "disputes" that might arise under the agreement, which would entitle plaintiff to seek binding arbitration. For example, as it relates to summary termination, plaintiff could dispute his termination if there were some question regarding whether defendant complied with the procedures required by the contract. But, there is no such dispute in this case.

In sum, because the sole discretion to make the summary termination decision rested with the Board, provided that the decision was in fact made by the Board in the manner required by the agreement, it follows that plaintiff may not state a claim for breach of contract and review of the Board's decision is prohibited. See *Thomas*, 205 Mich App at 95. Regarding defendant's compliance with the procedures set forth in the agreement, there is no question in this case that defendant adhered to the procedural requirements in the contract when it summarily terminated plaintiff's employment.[5] Consequently, given that the Board had sole authority to decide whether plaintiff's behavior was "unethical" and that no question of fact remains with regard to whether defendant adhered to the summary termination procedures established by the contract, judicial review of the Board's decision is prohibited and the trial court properly granted summary disposition to defendant on plaintiff's breach of contract claim.[6] See *id.*

Finally, there is no merit to plaintiff's argument that defendant had to raise, as an affirmative defense, the assertion that the employment contract prohibited judicial review of defendant's summary termination decision. An affirmative defense, which must be stated in a party's responsive pleading, "is a defense that does not controvert the plaintiff's establishing a prima facie case, but that otherwise denies relief to the plaintiff." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993); MCR 2.111(F)(3). To establish a prima facie case for breach of contract, "[a] party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co v Ahrens Const,*

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[5] At the hearing on defendant's motion for summary disposition, plaintiff's counsel conceded that, in terms of the process for summary termination, defendant "went through the process" and defendant "didn't breach that part of the contract." Aside from this concession, the record confirms that the decision to summarily terminate plaintiff for unethical behavior was made by the Board after an investigation involving numerous interviews, including certain interviews conducted at plaintiff's request. Plaintiff also submitted comments to the PSC for consideration. After its investigation, the PSC recommended termination of plaintiff's employment. The Board considered the PSC's recommendation, the information obtained during the investigation, and opinions of experts in the field of medical ethics. Only after following these procedures did the Board summarily terminate plaintiff's employment based on its finding of unethical behavior.

[6] Having concluded that judicial review of defendant's summary termination decision is foreclosed, we find it unnecessary to reach the parties' additional arguments on appeal. In particular, defendant contends that summary disposition was also appropriate because, by failing to obtain the parents' specific consent, plaintiff's treatment of the fetus violated MCL 333.2848(2) and should thus be considered unethical as a matter of law. Plaintiff also attempts to litigate the question of whether his behavior was unethical, and he specifically argues that the trial court abused its discretion by excluding testimony from two proposed experts on the question of medical ethics. As we have already explained, the terms of the employment contract prevent courts from second-guessing defendant's summary termination decision, meaning that we will refrain from considering the ethics of plaintiff's conduct and we need not decide whether the trial court abused its discretion by excluding plaintiff's experts. See *Thomas*, 205 Mich App at 95.

Inc, 495 Mich 161, 178; 848 NW2d 95 (2014). Given the elements necessary to establish a prima facie breach of contract claim, it is apparent that defendant's defense is not an affirmative defense. That is, by asserting that only the Board has authority to determine whether plaintiff's conduct constituted unethical behavior, defendant fundamentally argues that plaintiff cannot establish a breach of contract claim because he cannot show that defendant breached the agreement. Because defendant's argument relates to an element of plaintiff's prima facie case, this defense is not an affirmative defense. See *Stanke*, 200 Mich App at 312. Indeed, in *Thomas* this Court recognized that an employee in plaintiff's position has failed to "state a claim" for breach of contract when the employer has reserved the right to determine whether there was just cause for termination. *Thomas*, 205 Mich App at 95. The defense of "failure to state a claim" need not be asserted in a party's responsive pleading. See MCR 2.111(F)(2); *Campbell v St John Hosp*, 434 Mich 608, 616 n 6; 455 NW2d 695 (1990). In short, defendant was not required to raise this defense in a responsive pleading.

Affirmed. Having prevailed in full, defendant may tax costs pursuant to MCR 7.219.

/s/ Donald S. Owens
/s/ William B. Murphy
/s/ Joel P. Hoekstra