STATE OF MICHIGAN

COURT OF APPEALS

JANINE IRWIN,

Plaintiff-Appellant,

v

CIENA HEALTH CARE MANAGEMENT, INC. d/b/a GOLDEN OAKS MEDICAL CARE FACILITY,

Defendant,

and

NORTHERN OAK MANAGEMENT COMPANY, L.L.C.,

Defendant-Appellee.

UNPUBLISHED
October 3, 2013

Nos. 305878; 306013
Oakland Circuit Court
LC No. 2008-093145-CD

Before: MURRAY, P.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendant, Northern Oak Management Company, L.L.C. (Northern Oak).[1] We affirm.

This Court reviews de novo a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10). *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). The trial court "must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the opposing party." *Id*; MCR 2.116(G)(3). The motion is properly granted under MCR 2.116(C)(10) "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *MEEMIC*, 292 Mich App at 280. A genuine issue of material fact exists when "reasonable

[1] Ciena Health Care Management, Inc. has been dismissed from this case and is not part of this appeal. See *Irwin v Ciena Health Care Mgmt, Inc*, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2010 (Docket No. 294239).

minds could differ . . . after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

First, plaintiff asks this Court to recognize a cause of action for the wrongful termination of a health care professional for refusing to provide care that potentially places a patient's health in substantial jeopardy on the basis of public policy. We decline to do so.

Unless a contract provides otherwise, employment is generally terminable at will by either the employer or the employee, at any time, for any or no reason. *McNeil v Charlevoix Co*, 484 Mich 69, 79; 772 NW2d 18 (2009). But an employer cannot terminate an employee in violation of public policy. *Id.* Our Supreme Court has recognized three situations when public policy will preclude an employer from terminating an employee at will:

> (1) the employee is discharged in violation of an explicit legislative statement prohibiting discharge of employees who act in accordance with a statutory right or duty;
>
> (2) the employee is discharged for the failure or refusal to violate the law in the course of employment; or
>
> (3) the employee is discharged for exercising a right conferred by a well-established legislative enactment. [*McNeil*, 484 Mich at 79, citing *Suchodolski v Michigan Consol Gas Co*, 412 Mich 692, 695-696; 316 NW2d 710 (1982).]

This Court has held regarding the second exception that it "could be possible for a public policy to be based on principles derived from authoritative sources other than statutes." *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 485-486; 516 NW2d 102 (1994). For example, the "law" for purposes of this exception "may include those principles promulgated in constitutional provisions, common law, and regulations as well as statutes." *Id.* at 485.

While the three exceptions listed above are not exclusive, "the proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges." *Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002)(emphasis in original). Thus, the public policy cited in a wrongful termination claim must be based on an objective legal source. See *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 576-577; 753 NW2d 265 (2008). The Michigan Supreme Court has rejected the proposition that the "code of ethics of a private association" could establish public policy. *Suchodolski*, 412 Mich at 696. In *Suchodolski*, the plaintiff asserted that the Code of Ethics of the Institute of Internal Auditors was a reflection of a public policy against terminating employees who report the poor internal management of their employer. The Supreme Court rejected this argument because the internal auditors' code of ethics regulated corporate management and was not a clearly mandated public policy that might support an action for retaliatory discharge. *Id.*

In this case, plaintiff asks this Court to recognize a public policy based on medical malpractice standards. "In a medical malpractice case, the plaintiff bears the burden of proving: (1) the applicable standard of care; (2) breach of that standard by the defendant; (3) an injury, and (4) proximate causation between the alleged breach and the injury." *Gonzalez v St John*

Hosp & Medical Ctr (On Reconsideration), 275 Mich App 290, 294; 739 NW2d 392 (2007). The plaintiff must use expert testimony to establish the applicable standard of care and then prove that the defendant breached that standard. *Id.* at 294-295.

First, the cause of action plaintiff proposes does not fall within any of the three categories our Supreme Court has recognized. See *McNeil*, 484 Mich at 79. The concept of the standard of care is defined as "the skill and care ordinarily possessed and exercised by practitioners of the same profession in the same or similar communities." *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 22; 651 NW2d 356 (2002). The applicable standard of care is not based on an objective legal source; it must be established through expert testimony on a case-by-case basis. *Gonzalez*, 275 Mich App at 294-295. The fact-finder can choose to accept or reject that testimony. See *Surman v Surman*, 277 Mich App 287, 309-310; 745 NW2d 802 (2007). Thus, the determination of the standard of care owed a patient is a fact-driven, subjective inquiry. Even if standards are outlined in the American Medical Association Code of Medical Ethics or the American Nurses Association Code of Ethics, our Supreme Court has specifically rejected the premise that a private organization's code of ethics be the source for a public policy based wrongful termination claim. *Suchodolski*, 412 Mich at 696.

Second, prudence counsels that "a significant departure from Michigan law" such as the recognition of a new cause of action "should only come from our Supreme Court, not an intermediate court." *Teel v Meredith*, 284 Mich App 660, 666; 774 NW2d 527 (2009). Because this Court's function is to correct errors, we must confine ourselves to that function. Any new public policy basis for a wrongful termination claim must emanate from our Legislature or possibly our Supreme Court. *Id.* at 663-666.

Third, the law of the case doctrine precludes recognizing plaintiff's proposed public policy claim. Under the law of the case doctrine, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case when the facts have not materially changed. *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010). In our prior decision in this case, we rejected the argument that the standard of care owed a patient is a sufficient public policy basis for a wrongful termination claim. *Irwin v Ciena Health Care Mgmt, Inc*, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2010 (Docket No. 294239), at 2 n 2. Thus, the law of the case doctrine prohibits our deciding this question of law differently in this subsequent appeal. See *Shade*, 291 Mich App at 21.

Plaintiff also argues that the trial court erred in granting summary disposition in favor of Northern Oak. We disagree.

Our Supreme Court has recognized a cause of action for wrongful termination in violation of public policy when the plaintiff is terminated "for the failure or refusal to violate the law in the course of employment." *McNeil*, 484 Mich at 79, citing *Suchodolski*, 412 Mich at 695-696. At the time of plaintiff's discharge, the Public Health Code stated that "prescribing shall be limited to a prescriber." See *Irwin*, unpub op at 2, citing MCL 333.17708(3).[2] This

[2] The quoted language was eliminated by 2012 PA 209, effective June 27, 2012.

Court held in our prior opinion that a licensed practical nurse was not included in the Code's then existing definition of "prescriber." See *Irwin*, unpub op at 2-3, citing MCL 333.17708(2). Because the facts remain materially unchanged, our previous decision also governs this issue, *Shade*, 291 Mich App at 21. We concluded "that plaintiff did state a valid wrongful termination public policy claim when she alleged her employment was terminated because she refused to violate the law during the course of her employment." *Irwin*, unpub op at 3.

Viewing the evidence in the light most favorable to plaintiff, we conclude no genuine issue of material fact exists as to whether plaintiff was terminated because she refused to violate MCL 333.17708 by prescribing, or administering without a physician's order, the patient's medication. Plaintiff testified that she was distributing medications the morning of June 15, 2008, when she noticed an entry for discontinuing insulin on one patient's medication administration record. Plaintiff testified that she searched the patient's chart and several other areas in the Golden Oaks facility for a physician's order verifying that the medication should, in fact, be discontinued. She was unable to find such an order. Moreover, plaintiff also spoke to the patient to determine if she had recently seen a doctor who knew why her order for insulin had been marked discontinued.

Both plaintiff and plaintiff's supervisor, Yahel Dawson, testified that the patient's file did not have a doctor's order for the administration of insulin for May or June. There was, however, an order from April that was never discontinued by physician order. Carol Viverette, the acting director of nursing, and Mary Bold, Ciena's corporate compliance officer, both said that a doctor's order to administer insulin remains effective until there is a subsequent written order to discontinue it. Both plaintiff and Dawson, however, testified that a physician reviews each patient's chart every month and renews the medication orders. Viverette testified that any time a doctor writes a medication order, the order is in the patient's chart. If this were the policy, a physician's order for insulin should have been in the patient's chart for June. In sum, there may be a factual dispute regarding whether there were orders entered in May and June renewing the order for insulin, but those are not material facts. The material fact is there existed an order for insulin, entered in April, which was never discontinued. That material fact is undisputed.

Also, although there may be factual questions with respect to why plaintiff was terminated, the issue is moot. Viverette testified that she and Harry Slater, the Golden Oaks Administrator, made the decision to terminate plaintiff. Viverette testified that plaintiff's refusal to obey Dawson's order to administer the insulin was one factor in the decision to terminate plaintiff, but it was not "the straw that broke the camel's back." Slater testified that plaintiff was terminated because she refused to comply with Dawson's order and because she returned to Golden Oaks on the night of June 15, 2008, and made copies of a patient's medical record. The form terminating plaintiff has the following boxes checked: insubordination, failure to obey others, defective and improper work, and carelessness. The insubordination and failure to obey others would appear to relate directly to plaintiff's refusal to follow Dawson's order. To establish wrongful termination in violation of public policy, plaintiff does not have to show that her refusal to commit an illegal act was the sole reason for her termination. See *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 454-455; 750 NW2d 615 (2008). Plaintiff only needs to prove that her refusal to commit an illegal act was one of the motives or reasons for her termination. See *Id*. But, as we have already discussed, there is no question that the April order

for insulin remained in effect, so Dawson's ordering plaintiff to administer the insulin was proper. Consequently, plaintiff cannot establish that she refused to commit an illegal act.

We affirm. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ William C. Whitbeck