

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BETTY LYND,

Plaintiff-Appellant,

v

ADAPT, INC., DOUG CARR, DON CROSS, and  
TOM KRAMER,

Defendants-Appellees.

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UNPUBLISHED

August 6, 1996

No. 178294

LC No. 90-050319

Before: Saad, P.J., and Marilyn Kelly and M. J. Matuzak,\* JJ.

PER CURIAM.

**I.**

**FACTS AND PROCEDURAL HISTORY**

Plaintiff, Betty Lynd, appeals on leave granted from an August 19, 1994, order of the Branch Circuit Court granting defendants' motion in limine excluding certain evidence and bifurcating for trial the issues of liability and damages. We reverse the trial court's decision concerning the exclusion of evidence, and affirm the decision to bifurcate the trial.

This appeal arises out of plaintiff's claim alleging a violation of the Whistleblower's Protection Act ("WPA"), MCL 15.361 *et seq.*; MSA 17.428(1) *et seq.* Defendant Adapt ("defendant" herein) is a nonprofit corporation licensed to operate two AISMR (Alternate Intermediate Services for the Mentally Retarded) facilities. The three individual defendants are employed by Adapt in the following capacities: Carr was plaintiff's immediate supervisor, Cross is a residential director, and Kramer is the executive director of Adapt.

In January 1987, plaintiff began a training program with Adapt to become a resident aide. Plaintiff worked as an "on call" substitute aide from February 1987 to May 1988. Plaintiff was then

appointed to a part-time position at Adapt's Gemini Home in Sturgis ("Gemini"). Plaintiff was given a full-time position in June 1989.

Plaintiff alleged that almost immediately upon beginning work at Gemini she witnessed what she believed were improper practices including turning off door buzzers, leaving clients unattended, and preparing false reports of resident program compliance. Plaintiff also alleged acts of physical and verbal abuse of residents.

Plaintiff prepared incident reports and discussed her concerns with Carr. Plaintiff alleged that in July 1989, upon discussing the matter with Cross, Carr's supervisor, plaintiff was removed from her full-time position and placed on the "sub list". In August 1989, plaintiff wrote a letter to the Adapt board of directors regarding her concerns and spoke with Kramer and another board member about the suspected abuse of residents. Plaintiff stated that she told Kramer that she would continue to report the alleged abuse to whomever she had to in order to remedy the situation. Plaintiff alleged that Kramer told her that because of her complaints she would not regain her full-time position. Plaintiff worked at Gemini on an "on-call" basis until December 1989, when she was moved to Adapt's Grant Street facility.

Plaintiff wrote to her state representative in October 1989 and asked for advice on whom to contact regarding the abuse she believed was occurring at Gemini. Plaintiff received no response.

Cross was aware that between February 26 and March 1, 1990, plaintiff contacted the Department of Social Services ("DSS") regarding her concerns about conditions at Gemini. On March 2, 1990, Cross discharged plaintiff from her substitute position at Adapt.

Plaintiff's formal complaint was filed with the DSS on March 28, 1990. DSS licensing consultant Jerry Lindsey conducted an investigation. He determined that some of plaintiff's allegations regarding lack of supervision and a patient's hair being pulled were substantiated, and that other allegations of physical abuse, such as a resident's dislocated or broken elbow, could not be substantiated.

On May 30, 1990, plaintiff filed a complaint alleging a violation of the WPA. On July 18, 1991, defendant filed a motion for summary disposition pursuant to MCR 2.1165(C)(8), which alleged that because plaintiff did not report any violations to a higher authority (the DSS) until after she was fired, the WPA was inapplicable. The trial court granted defendant's motion for summary disposition on September 4, 1991, and plaintiff appealed to this Court.

This Court reversed the trial court's grant of summary disposition and remanded the matter for trial. *Lynd v Adapt, Inc*, 200 Mich App 305; 503 NW2d 766 (1993). This Court noted that the mere fact that plaintiff's complaint with the DSS was filed after her termination did not preclude her action under the WPA:

The [WPA] prohibits the discharge of an employee because the employee reports or is "about to report" a violation of a law or rule. MCL 15.362; MSA 17.428(2). Thus, the fact that plaintiff reported the abuse alleged in this case to a "public body" after her discharge is not dispositive. A review of the evidence before the trial court reveals plaintiff made several attempts to remedy what she believed to be improper practices by reporting the alleged abuse to her supervisors and the organization's board of directors. She also contacted her state representative to learn whom she should contact to report the suspected abuse. We believe plaintiff presented sufficient evidence to withstand a motion for summary disposition with regard to the question whether she was discharged because she was "about to report" the suspected abuse, a clear violation of the act. Because a genuine issue of material fact existed, summary disposition was improperly granted. *Prysak R L Polk Co*, 193 Mich App 1; 483 NW2d 629 (1992). [*Lynd, supra* at 306.]

This Court also held that the trial court abused its discretion when it denied plaintiff's motion to amend her complaint to "more specifically allege she was discharged because she was about to report the alleged abuse." *Lynd, supra* at 306.

Upon remand, defendant filed a motion in limine requesting that the trial court exclude evidence "not reasonably connected with circumstances surrounding" plaintiff's report to the DSS, "both in time and in scope." Defendant argued that evidence regarding plaintiff's prior reports would be irrelevant and unduly prejudicial pursuant to MRE 401, 402, and 403, and suggested the applicability of the ninety-day statute of limitations contained in the WPA. MCL 15.363(1); MSA 17.428(3)(1). On June 10, 1994, plaintiff filed her response, arguing that although the ninety-day statute of limitations serves to bar certain actions, it is not an evidentiary rule.

A hearing on defendant's motion in limine was held on June 20, 1994. At the hearing, defendant noted that the key issue was whether there was a connection between plaintiff's termination and defendant's knowledge that she was about to report a violation to a regulatory body. Defendant insisted that evidence of plaintiff's prior reports to Cross, Carr, Kramer, and the board of directors was irrelevant and that its admission before a jury would result in unfair prejudice.

The trial judge stated his inclination to limit the admission of evidence to the ninety days prior to plaintiff's termination. In response, plaintiff argued that if she were so limited, she would be unable to present her theory to the jury; that is, that she had made a series of complaints and promised to continue reporting the matter until an investigation was made. Under the trial court's analysis, these prior reports would all be excluded from evidence because they took place prior to December 3, 1990, ninety days prior to plaintiff's termination.

The judge noted that this Court "determined that the history presented to the Court of Appeals by the Plaintiff suggested that there was a question of fact whether or not the Plaintiff was about to make a report about the suspected abuse, and as a consequent of that, was discharged." The judge

concluded that, under MRE 403, the ninety-day limitation would avoid confusion, waste of time and prejudice. The judge also stated that the trial would be bifurcated: the liability issue would be presented first and, if a violation of the WPA were found, then the issue of damages would be presented to the jury.

The trial court's written order was issued August 19, 1994. Plaintiff's application for leave to file this interlocutory appeal was granted by this Court on October 25, 1994. By the same order, this Court granted plaintiff's motion to stay the trial court proceedings. We now address the merits of plaintiff's appeal.

## II.

### ANALYSIS

#### EVIDENTIARY RULING

Plaintiff argues that the trial court erred in restricting evidence of plaintiff's prior attempts to report alleged abuses to events which occurred ninety days before plaintiff's termination. Plaintiff contends that the trial court was bound to allow the evidence by virtue of the earlier Court of Appeals decision. That is, plaintiff argues that this Court's earlier decision in this case constitutes the law of the case that evidence of these prior reports is "material" and "relevant." While we conclude below that the trial court's order limiting the introduction of evidence to the ninety-day period was an abuse of discretion, we disagree with plaintiff's argument that the trial court's decision violated the law of the case doctrine.

The doctrine of the law of the case serves to promote finality as to issues that have already been litigated between the parties and bars reconsideration of an issue by an equal or subordinate during subsequent proceedings in the same case. *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994). The primary purpose of the law of the case doctrine "is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Bennett v Bennett*, 197 Mich App 497, 499-500; 496 NW2d 353 (1992). The doctrine applies to questions specifically determined in the prior decision and to those questions necessarily determined to arrive at the prior decision. *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 546; 481 NW2d 762 (1992).

The first time this Court heard this matter on appeal it determined that the evidence of plaintiff's prior attempts to report alleged abuses was sufficient to withstand a motion for summary disposition on her Whistleblower's claim. This Court was not presented with nor did it rule upon the admissibility of such evidence should the matter go to trial. Therefore, the law of the case doctrine is inapplicable. *Poirier, supra* at 546.

Plaintiff also contends that the trial court's evidentiary order was an abuse of discretion: we agree and so reverse.

Because plaintiff's theory of liability asserts that she threatened to file a complaint about alleged abuses by her employer to higher authorities unless her complaints were investigated and abuses remedied, it appears relevant to her case that she had a history of making and persisting with such complaints. This is so because it bears upon (1) plaintiff's credibility about her determination to pursue the most recent matter to a conclusion and (2) defendants' state of mind -- whether defendant would have taken her seriously and, perhaps, terminated her due to her most recent threats to "blow the whistle."

To limit evidence of prior complaints to the time period of the statute of limitations (90 days), especially in a Whistleblower's case, appears totally unjustified, particularly where, as here, the entire time involved and the number of alleged incidents covers one year and several events.

It is only where the probative value of relevant evidence is substantially outweighed by the danger of unfair prejudice that the evidence will be excluded under MRE 403. "Unfair prejudice" does not mean merely "damaging." *Haberkorn v Chrysler Corp*, 210 Mich App 354, 362; 533 NW2d 373 (1995). Rather, "unfair prejudice" exists "when marginally relevant evidence might be given undue or preemptive weight by the jury or when it would be inequitable to allow use of such evidence." *Id.* This Court uses the following factors when determining the probative value and prejudicial effect of certain evidence:

[T]he time necessary to present the evidence and the potential for delay; whether the evidence is cumulative; how directly the evidence tends to prove the fact in support of which it is offered; how important the fact sought to be proved is; the potential for confusion; and whether the fact can be proved another way with fewer harmful collateral effects. [*Id.*, citing *People v Oliphant*, 399 Mich 472, 490; 250 NW2d 443 (1976).]

Here, the probative value of plaintiff's prior reports of alleged abuse is not substantially outweighed by unfair prejudice. This evidence would not unfairly prejudice defendant. Plaintiff alleged that she made a series of complaints in an attempt to remedy what she believed was abuse occurring at Gemini in 1989. The relationship of these prior reports to her demotion in 1989 is not actionable as plaintiff did not file her claim until May 1990. MCL 15.363(1); MSA 17.428(3)(1). However, the facts surrounding these prior reports may be relevant to plaintiff's complaint regarding her termination in March 1990, because they may have a bearing on defendant's motivation for plaintiff's termination.

With respect to the potential for delay, the presentation of such evidence should not take an inordinate amount of time. Plaintiff was employed by Adapt from February 1987 to March 1990, and plaintiff began making her complaints regarding alleged abuse at Gemini from January to October 1989, and again in February 1990. There is no indication in the record that presenting evidence of plaintiff's complaints over this one-year period would cause undue delay.

With respect to the cumulative nature of the evidence, plaintiff alleged that she made numerous complaints to Carr, Cross, Kramer, the Adapt board of directors, and finally to the DSS. The alleged past illegal acts include the turning off of door buzzers, leaving clients unattended, pulling a client's hair, dragging a resident by the arm, and calling a client "ugly." Some of this evidence, particularly with respect to plaintiff's reports to Cross, may be cumulative. However, in sum, the probative value of the challenged evidence is not substantially outweighed by the danger of unfair prejudice. *Haberkorn, supra* at 362.

## BIFURCATION RULING

Finally, plaintiff argues that it was unfair for the trial court to bifurcate the trial *sua sponte*. However, plaintiff cites no authority in support of her challenge to this portion of the trial court's ruling, and, therefore, she has abandoned this issue on appeal. *Samonek v Norvell Twp*, 208 Mich App 80, 86; 527 NW2d 24 (1994). Also, in light of our ruling on the evidentiary issue, the trial court may, indeed, address the bifurcation issue once again anew.

That portion of the trial court's order limiting the introduction of evidence to a ninety-day period prior to plaintiff's termination is reversed. That portion of the trial court's order providing for a bifurcated trial on the issues of liability and damages is affirmed. Jurisdiction over the case is returned to the Circuit Court.

/s/ Henry William Saad

/s/ Marilyn Kelly

/s/ Michael J. Matuzak