WISCONSIN COURT OF APPEALS
DISTRICT II
Appeal No. 2021AP000570

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**KAREN WIDENSKI,**

Plaintiff-Appellant-Cross-Respondent,

vs.

**PRO HEALTH CARE,**

Defendants-Respondent-Cross-Appellant.

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# BRIEF OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT

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Appeal from the Order Granting Motion for Directed Verdict and
Order on Motions in Limine Issued by Circuit Court of Waukesha County
The Honorable Michael Bohren, Presiding
Circuit Court Case No. 2017-CV-1943

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## ISSUES PRESENTED FOR REVIEW

I. Whether there was sufficient evidence for a reasonable jury to find in favor of Karen Widenski?

Trial Court Answered: NO

II. Whether an advisory jury verdict to include emotional distress and punitive damages should have been ordered if the jury determined Widenski was wrongfully discharged?

Trial Court Answered: NO

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Appellant and Cross-Respondent ("Widenski") presents an issue requesting a change in current law to allow for emotional distress and punitive damages in wrongful discharge cases. Widenski's claim is supported by case law adopted in other jurisdictions that have wrongful discharge claims. The current law prohibits the recovery of emotional distress and/or punitive damages in wrongful discharge cases. Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561, 575, 355 N.W.2d 834, 841 (1983). As such, Widenski requests that the court allow for oral argument on this issue as § 809.22, Wis. Stats. does not prohibit oral argument under these circumstances. Moreover, Widenski requests that a decision be published because an opinion on this issue will have significant value as precedent allowing for publication under § 809.23, Wis. Stats.

## STATEMENT OF THE CASE

### I. Nature of the Case

Widenski filed this wrongful discharge case based upon her termination from ProHealth Care, Inc., on August 15, 2017. (R.1). More specifically, Widenski alleged in a second amended complaint she was wrongfully terminated for reporting and attempting to resolve by investigation the fraudulent activity she discovered with Remote Progress Notes previously submitted by Diabetes Mellitus Nurse Practitioners ("DMNPs") at ProHealth who recorded false information in medical records by indicating they were seeing patients they did not actually see, all of which may be considered a violation of § 943.39, Wis. Stats., and may have been used to submit fraudulent claims for patient health insurance payments in violation of § 943.395(1)(a) and (b), Wis. Stats. (R.61).

### II. Procedural Background

Widenski amended her wrongful discharge complaint twice (R.5) and brought a motion to compel discovery that resulted in a Stipulated Protective Order. (R.17; 27). Widenski then brought a second motion to compel discovery (R.37; 40) and ProHealth Care, Inc. ("ProHealth") opposed the motion to compel and moved for summary judgment. (R.43; 52). ProHealth's motion for summary judgment was denied. (R.99). In denying ProHealth's motion for summary judgment, the trial court held that § 943.39 Wis. Stats., clearly states that if someone knows that a record or document is false, and it's publicly recorded and used, that person can be held criminally responsible for it. (R.230:19). The trial

court went on to add that Widenski asserted it was a part of her responsibility to monitor DMNPs and since those items were placed into EPIC, it was her responsibility to double check and make sure those items were not billed. (Id). As such, Widenski investigated and it appeared ProHealth agreed with her in the beginning but decided to back off and when Widenski continued to push forward, she was terminated. (R.230:20). Based on this, the trial court was satisfied Widenski established issues of fact for a jury to determine if she was terminated for continuing with her investigation on this fundamental public policy. (R.230:21).

ProHealth then brought a motion for reconsideration, on the argument that § 943.39(1), Wis. Stats., did not create an affirmative duty for Widenski to act. (R.231:3-4). ProHealth's motion for reconsideration was denied. (R.115; 231). In denying the motion for reconsideration, the trial court determined that Widenski as a manager had a duty under Wisconsin law to supervise DMNPs and could be criminally prosecuted for acquiescing in the acts of another employee who falsified records. (R.231:14-15). As such, the trial court found Widenski had a duty to rectify the issues involved so that she was not held criminally responsible. (Id).

In advance of the trial, Widenski filed a motion to include emotional distress and punitive damages on the special verdict for advisory ruling by the jury on her wrongful discharge claim. (R.119). The trial court denied Widenski's request for an advisory ruling by the jury on emotional distress and/or punitive

damages as Wisconsin law does not provide for such damages and felt the court of appeals should determine if there is an opening for those damages. (R.232:16-17).

In addition, ProHealth filed multiple motions in limine which in part sought to prohibit Widenski from making any claim or in describing herself as a whistleblower; prohibiting Widenski from introducing any evidence of emotional distress, punitive damages or compensatory damages other than back and front pay, together with any claim for loss of interest earnings on her 401(k) plan; to preclude testimony from named witnesses identifying any nurse as committing fraud or acting illegally; to prohibit Widenski from raising other alleged or potential lawsuits and discipline; to prohibit any testimony identifying actions by ProHealth or its employees as constituting fraud or being illegal; prohibiting Widenski from identifying that the DMNP program having been closed down two years earlier; to prohibit Widenski from testifying or to solicit testimony from other witnesses regarding the use of remote notes being prohibited two years earlier in 2015; and to prohibit Widenski from testifying or soliciting testimony to any event preceding her employment as Chronic Care Director which started on May 1, 2017. (R. 122-125).

The trial court in ruling on ProHealth's motions in limine ordered that Widenski was prohibited from describing herself as a whistleblower but was not precluded from identifying the actions she undertook; Widenski was prohibited from introducing evidence of emotional distress and/or punitive damages or compensatory damages other than back or front pay but allowed to include in her

wage loss the claim for loss of interest earnings on her 401(k); Widenski was allowed to use named witnesses to identify general standards and practices nurses are to follow without specifically identifying any such nurse as committing fraud or acting illegally; that no witness was allowed to identify ProHealth's or its employees' actions as constituting fraud or being illegal, but could testify to the underlying facts; Widenski was prohibited from raising other alleged or potential lawsuits of discipline; Widenski was prohibited from identifying that the DMNP program had been closed down two years earlier; and Widenski was prohibited from testifying or soliciting testimony regarding the use of remote notes being prohibited two years earlier and from testifying or soliciting testimony to any event preceding her employment as Chronic Care Director on May 1, 2017 with the understanding Widenski was free to testify to all policies and practices in place from May 1, 2017 through August 2017. (R.145; App. 29-31).

The matter was then tried and at the close of Widenski's case, ProHealth brought a motion for a directed verdict. (R.158-159). More specifically, ProHealth argued there was no evidence of any remote note being billed, no evidence of intent under both § 943.39 and § 943.395, Wis. Stats. on the basis DMNP Hendrickson testified her recording of time spent with patients on remote notes were mistakes and not intentional acts. (R.237:217-221; App. 2-6). The trial court granted ProHealth's motion for a directed verdict. (R.199; 237:231-240; App. 17-25, 28). In reaching this decision, the trial court ruled that pursuant to § 943.39(1) and § 943.395 Wis. Stats., a false record needs to be "intentionally" created and

not created by just a mistake, and the evidence showed the remote notes created by the DMNPs were mistakes and not intentional acts. (R.237:235-237; App. 20-23). In addition, the trial court ruled that the DMNPs established that they would have needed to take an extra step for these remote notes to be billed which they had not taken. (R.237:236; App. 21-22). Further, the trial court added that there was no evidence setting forth any motive to falsify. (R.237:237; App. 22). As such, the trial court concluded that the evidence showed the remote notes were incorrect, but there was no evidence they were intentionally false. (R.237:239; App. 24-25). From this, judgment was entered dismissing Widenski's wrongful discharge case. (R.213). Widenski now appeals. (R.202).

## III. Statement of Facts

Widenski started at ProHealth on May 1, 2017 as its Director for Chronic Care. (R.235:143-145). In this position, Widenski was responsible for the department's operations, efficiency, budget, and meeting regulatory functions. (R. 235:144). As Director, Widenski answered to Vice President Maria Hill who oversaw inpatient care managers and the Chronic Care Clinic. (R.235:157; 236:11). Hill hired Widenski. (R.236:14). It was Widenski's understanding that Hill hired her because she liked her diverse background, clinical operational experience and because she did not trust the data at ProHealth. (R.235:157-158).

At the time Widenski was brought on, ProHealth was undergoing a redesign to create a one-stop shop for chronic care issues including diabetes, heart failure, telehealth, wound care, COPD, and chronic kidney disease. (R.235:159-

160). This redesign required that Widenski learn the existing practices and make the necessary changes. (R.235:160-161). To do this, a team was put together that included: Hill, Widenski, Joy Jurek, Mindi Fulmer, Leslie Cody, Linda from the COPD clinic, Ann Cooley from Human Resources and Tana from the process improvement team. (R.235:162-163). In this respect, Jurek was employed in the Chronic Care Clinic the longest, had been the manager of the Diabetic Clinic at one time and was now the manager of the Heart Care Clinic. (R.235:163 & 165). Widenski got along very well with Jurek. (R.235:163; R.173:18-19).

Fulmer was the interim manager of the Diabetic Clinic supervising DMNPs when Widenski started on May 1st but was moved to lead Telehealth by Hill who hired Leslie Cody to manage the Chronic Care Clinic effective on May 30th. (R.235:165-166). In this respect, Widenski also got along with Fulmer very well. (R.235:165; R.237:133). As for Cody, she started on May 30th as the manager of the Chronic Care Clinic and was responsible for the day-to-day operations of the clinic including supervision of DMNPs. (R.235:166; R.236:123).

On May 30th Fulmer emailed Hill and Widenski to request a meeting with the DMNPs to discuss the July schedule because they were going to be short staffed as two full-time DMNPs were leaving. (R.235:170; R.237:118-119; R.183). As a result, a meeting was held between Hill, Widenski, Fulmer and the remaining three DMNPs on June 1st wherein a shortage of DMNPs and staffing concerns were discussed as DMNPs indicated they were seeing 20 to 25 inpatients per day. (R.235:170-171). Widenski being concerned as to how patient care was

going to be delivered and with the DMNP workloads tried to gather data to look at how many patients DMNPs were seeing. (R.235:171-172). As a result, Widenski obtained information for the period of October 1, 2016 through May 31, 2017 detailing the number of patients DMNPs were seeing and found there were two to three DMNPs working each day with each seeing 4 to 9 patients per day. (R.235:172-174; R.196). In taking this step, Widenski could not validate that DMNPs were seeing 20 to 25 patients per day as it appeared they were only seeing 13 to 15 patients. (R.235:175-176). From there, Widenski then looked at billing information which showed that for the month in June 2017, 666 patients were billed and that DMNPs conducted 96 consults for the month. (R.235:179-180; R.197). This too concerned Widenski as the numbers again did not make sense with what the DMNPs had indicated to her. (R.235:180). In addition, Widenski tried to get human resources to hire new DMNPs before the July 7th shortage began but was told no new hires could take place until the two current DMNPs ended their employment. (R.235:183; R.166).

Then on Sunday July 9, 2017, the remaining full time DMNP Rebecca Hendrickson sent Leslie Cody an email whereby her and the two-remaining part-time DMNPs Allison Fahey and Brittany Knuth wanted to know how the shortage of DMNPs was going to be addressed as they did not want to work beyond their scheduled hours without pay because they were moved from hourly to salary before this shortage occurred and also had an interim plan to present. (R.235:184-186; R. 179:1). On the morning of July 10th, Cody forwarded the Hendrickson

email to Widenski who forwarded the email to Hill who indicated to Widenski and Cody that the inpatient coverage for diabetic patients was a priority and that the DMNPs could see 15 inpatients per day. (R.235:186-187; R.185). In fact, prior to this, Hill and Hendrickson had met with the hospitalist and chief medical officer to discuss the DMNP shortage wherein Hill presented information on the DMNP workload and asked if a hospitalist could alleviate some of the DMNP workload, but nothing was agreed to which caused confusion. (R.235:189-190; R.184). As a result, on July 10th, Widenski and Cody met with the three remaining DMNPs to discuss Hendrickson's July 10th email, but the meeting was filled with contention and interruptions by DMNP Fahey. Every time Widenski asked Hendrickson to explain what happened from July 7th up to July 10th Fahey answered for Hendrickson, and as such, Widenski ended the meeting indicating they would reschedule. (R.235:191-194; R.177:2-3). Later that day, Widenski spoke to Hendrickson who confirmed the weekend was okay. (R.236:163).

Nonetheless, on July 10th, the DMNPs reached out to Dr. Crelin, the Medical Director of the Diabetic Clinic who emailed Widenski and Cody indicating that with the shortage of DMNPs the remaining DMNPs were seeing too many patients and saw no reason hospitalists couldn't be involved. (R. 235:196; R.186:2). Widenski forwarded Dr. Crelin's email to Hill who indicated she would contact Dr. Crelin. (R.235:197).

In addition, Widenski who was not only concerned with the shortage of DMNPs but by the fact she could not validate the number of patients DMNPs

claimed they were seeing, asked Mindi Fulmer to go into the EPIC system to look at Hendrickson's documented volume of work for July 7th through July 10th. (R. 235:197-198; R.236:164). In accessing this EPIC documentation, it was discovered Hendrickson had only documented 5 consults during this time with all other patients being documented "remote". (R.236:164-165). More specifically, it was observed that on Saturday July 8th there were 7 to 9 patients documented with "remote" with 10 to 11 patients on Sunday July 9th also being documented "remote". (Id.) In this respect, the word "remote" meant that Hendrickson had not actually seen the patient. (R.235:199). Yet, these "remote" documents contained criteria at the bottom for billing that stated total time spent with patient educating them with greater than 15 minutes. (R.236:165-167). When Widenski saw this, she told Fulmer "You can't educate a patient if you haven't seen them." (R.236:166). As an example, on July 10th, Hendrickson issued a "remote" note at 8:06 a.m. indicating she saw and educated the patient for greater than 15 minutes and then at 8:08 a.m. entered another "remote" note indicating she saw another patient and educated that patient for greater than 15 minutes. (R.236:166-167; R.180:7; R.182:4). In this respect, even though Widenski was only provided two remote notes from July 10th in discovery, there were multiple remote notes discovered by Fulmer on July 10, 2017, as DMNP Hendrickson documented 10 remote notes for Sunday July 9th alone. (R.236:171-172).

This finding created issues because EPIC is the electronic health record system used by ProHealth whereby care providers document the care provided to

patients. (R.235:111-113 & 123-124). All nurses know it is inappropriate to place a record into EPIC that indicates you saw a patient when you didn't. (R.235:124-125). Moreover, all care providers understand that placing a false document into EPIC creates a legal issue as medical records are legal documents that must be accurate. (R.235:126-128). More specifically, each care provider is responsible to make sure the documents they place into EPIC are accurate, and Widenski having the overall management of the department upon learning something was inputted into EPIC that was not accurate was required to report that to her direct leader Hill and was then responsible to make sure the false information was amended and/or fixed. (R.235:113 & 116). Just as important, false information in a medical record could affect the care of the patient down the line. (R.235:114-116).

Widenski having been a clinical legal consultant was also fully aware that the remote notes placed into EPIC were legal medical records and if they contained false information, she herself was responsible to get them corrected because she was also responsible for what the DMNPs documented into EPIC. (R.236:169-170 & 172). Widenski further knew this legal obligation existed even if the remote note was created in error because once she knew the false information was entered into EPIC, even by error, it needed to be corrected. (R.236:172-173). Further, the filing of these remote notes by DMNPs was a concern for Widenski as not only did Hendrickson state she provided a service that she did not, but instead of completing her primary role to serve and educate the patient, completed remote notes for most of that weekend. (R.236:168-169).

Additionally, Widenski was concerned the remote notes contained patient identifiers and "total time spent with patient" could be billed for services not provided. (R.236:173-175; R.177:2; R.180:7).

Widenski was required by law to investigate why this occurred and develop a plan of action to ensure it didn't happen again. (R.236:170-171; R.235:113). As such, Widenski contacted Hill during the evening of July 10th about the remote notes Hendrickson documented. (R.236:170-171; R.177:1). Then during the late morning of July 11th, Widenski together with Cody met with Hendrickson to understand what happened with documenting remote notes as Widenski had never seen a remote note before and wanted Hendrickson to explain it to her. (R.236:178-179; R.177:2). Widenski started this meeting by informing Hendrickson she was trying to understand the workflow and asked her how her weekend was to which Hendrickson responded it was fine. (R.236:179). Widenski then said she was looking at Hendrickson's remote notes and wanted to know why she used a remote note to which Hendrickson responded she was in the hospital and saw patients. (R.236:182; R.177:2). Widenski then told Hendrickson she didn't see patients and showed her the remote note to which Hendrickson responded that she wasn't in but was in the professional building. (Id.) Widenski then asked Hendrickson why she didn't see patients if she was in the hospital as she could have developed that relationship and educated the patient to which Hendrickson then admitted she wasn't there and hadn't come in. (R.236:183; R.177:2-3). Widenski then informed Hendrickson of the volume of patients in the

hospital that were not seen although documented by remote notes as being seen. (R.236:184). Widenski then asked Hendrickson to amend those remote notes to reflect the actual care provided. (Id.) In fact, Hendrickson amended the July 10th notes on July 11th whereby "Total time spent with patient greater than 15 minutes; greater than 50% of time was spent explaining treatment plan, counseling, and coordinating care" was removed. (R.236:184-185; R.180; R.182). In addition to getting Hendrickson to amend these two remote notes, Widenski then contacted billing and compliance regarding her concerns about remote notes possibly being billed as Hendrickson was unable to confirm whether she dropped charges on her remote notes. (R.236:177; R.237:112). In doing so, Widenski learned that the actual minutes of 15, 30 or 90 was something entered by DMNPs through a CBT code and the phrase, "greater than 50% of the time spent explaining treatment plan, counseling and coordinating care" had the possibility of a billing code automatically attached to it because it indicates a service was provided. (R.236:175-177). Further, Widenski learned from Cody that Kim from Health Information Management ("HIM") told her before the meeting they had with Hendrickson that this was not only a legal medical record issue, but potentially an issue for billing as anything below the phrase "thank you for the opportunity" near the bottom of the remote note was not viewable. (R.236:135, 158-159 & 179-181; R.180:7-9). As such, the additional documentation on the patient's care was not viewable in billing, and once Widenski found that out, she assigned Cody to investigate the billing issue. (R.236:180-182). Moreover, Widenski made the

decision that an audit of EPIC needed to be conducted to make sure all remote notes in the system were reviewed to make sure no false information existed. (R. 236:185-186). In addition, Widenski needed to understand where the DMNPs were documenting from so she could conduct a thorough investigation to ensure remote notes were accurate and not billed. (R.236:186-187; R.177:3). Further, it would be incorrect to say they saw a patient if they were documenting from their home. (R.236:137-138). In fact, Widenski requested this information from Hendrickson in an email she also shared with Hill to keep Hill apprised of the investigation she was conducting to take the required corrective action. (R.236:187; R.177:3).

After the meeting with Widenski, Cody and Hendrickson concluded on July 11th, Fulmer spoke to Hendrickson and asked her how things were going to which Hendrickson responded, "Not good. And you know, they're looking at going through our clinical documentation now." (R.236:187-188; R.237:130-132). Fulmer relayed Hendrickson's comments to Widenski who felt that if Hendrickson was concerned, she should also be concerned. (R.236:188). As a result, Hill knew that Widenski was leading the charge to investigate this situation and to create a standard practice. (R.236:33-35).

Widenski also made several calls to EPIC leaders to see how remote notes worked and every single person told her remote notes did not exist. (R. 236:193). Widenski then developed a plan to understand where the DMNPs were documenting from and to audit EPIC to ensure all remote notes were amended if

needed and that none were billed. (R.236:186-187). As a part of the investigation Cody identified each of the DMNP's workstation IDs at Widenski's direction so that it could be determined whether the remote notes were inputted from their homes. (R.236:35-36 & 193-194; R.188:3). After the information was supplied by Cody to human resources on July 26th Widenski, after receiving Hill's authorization, supplied the DMNP workstation IDs to ProHealth's Security Engineer and requested a search be conducted from October 2016 to present to see where the DMNPs were entering their documentation into EPIC regarding their care of the patient. (R.236:194-196; R.188:2-3).

At around this same time in mid-July, ProHealth announced in its newsletter that they were excited to have Widenski as its Director of the Chronic Care Clinic as she was working on the redesign of that area. (R.236:189-190). Additionally, having started on May 1st, Widenski was due for her 90-day evaluation at the end of July which was cancelled multiple times. (R.236:190). Yet, by the end of July, Widenski was informed by Ildiko Huppertz a Vice President in Human Resources that she was being sent to participate in a leadership assessment test with Talent Plus because they felt Widenski would do well on the test and become part of the fall 2017 leadership and training program. (R.236:190-191). In fact, Widenski attended the Talent Plus leadership assessment during the first week of August and was notified by Talent Plus on August 8th or 9th that they would tell ProHealth, "if they hadn't hired you, they better or someone else will." (R.236:191-193; R.175:3). Further, Talent Plus determined

that Widenski lead with talent in positivity and worked well with others and with teams. (R.237:9 & 14; R.175:4). In comparison, as of July 26th, Hill was in conversation with Widenski to place Cody on a performance improvement plan who Hill had concerns about getting her work done and was recently hostile in a meeting with Widenski. (R.236:47-52; R.237:19-21). In general, it was typical at ProHealth to put employees on a performance improvement plan to provide notice their professional behavior or performance needed to be improved as identified. (R.236:52-53). Further, DMNP Allison Fahey had a history of being argumentative and was also placed on a performance improvement plan to improve her behavior at this time. (R.237:203-204).

Then on July 28th, Widenski notified Hill by email that she was scheduled for EPIC training to understand Registry which was set for August 3rd. (R.237:21; R.189). Up to this point, Widenski still did not have EPIC access, but once completing this training would get that access. (R.237:22). At around this same time, Widenski called the Wisconsin Inspector General who confirmed with her that it would be fraud for DMNPs to place false information into EPIC and any bill issued from a medical record placed into EPIC indicating a service was provided to a patient which was not would also be fraud. (R.237:22-23).

After the July 28th email was sent, Hill took direct management of the DMNPs by removing Widenski and Cody as their manager. (R.237:24-25). In addition, even when Widenski completed her EPIC training, Hill denied her EPIC access. (R.237:25-26). This action occurred even though Hill never put Widenski

on notice of any issue regarding her employment but thanked her for moving the program forward and developing a plan for each department. (R.237:25-27; R.190). Further, Hill continued to involve Widenski in meetings and had her provide a workstream redesign presentation while also working with ProHealth's legal department to develop a contract as a part of the redesign. (R.237:28-30; R.191-193). As of August 8th, Hill notified Widenski she was trying to schedule Widenski's 90-day evaluation and asked her to set up the chronic kidney disease program included in the Chronic Care Clinic. (R.237:31-32; R.193). Again, there was no indication provided to Widenski of any issues with her work. (R.237:31).

Then on August 14th, Widenski received an email from the security engineer attaching a report detailing where the DMNPs accessed EPIC. (R.237:32-33; R.194). Widenski informed Hill of this report, and Hill told Widenski to give the report to Cody even though Cody was not managing the DMNPs at that time. (R.237:33-34). Moreover, Cody did not know what to do with this information. (R.237:34-35). Later that same day, Hill asked Widenski to be part of a patient outreach contact center meeting that was scheduled for August 21st. (R.237:35-36; R.195). It was then during the evening of August 14th that Hill met with Ildiko Huppertz and Ken Price from Human Resources to discuss Widenski but couldn't recall any details of that discussion. (R.236:56-57).

Then on August 15th, when Widenski came into work, she was informed she needed to meet with Hill for her one-to-one 90-day review. (R.237:36). As such, Widenski went to Hill's office where Ildiko Huppertz was present with Hill.

(R.237:36-37). As soon as Widenski sat down, Huppertz told Widenski, "I'm sorry, but you're not a cultural fit." (R.237:37). Widenski who was surprised asked if they received her leadership assessment and Huppertz indicated they had and added Widenski was quite talented and knew she wouldn't have an issue getting a job somewhere else. (Id.) From there, Huppertz and Widenski went to her office where Widenski told Huppertz, "I'm the one who found all the fraud" to which Huppertz said, "I know, I'm sorry, I'm just the messenger." (R.237:37-38). In this respect, ProHealth's "Just Culture Commitment" required Hill to communicate standards to provide opportunities for Widenski to improve behaviors or performance. (R.236:62-63; R.173:4 & 14-15). Further, no item listed on the performance documentation form were actions taken by Widenski that could result in an immediate termination. (R.236:64-65; R.173:16). Yet, Widenski's first notice of any issues with her performance was when she was terminated. (R.236:65).

After Widenski was terminated, Hendrickson was shown two remote notes at her deposition entered by her into EPIC on July 7, 2017 indicating at 8:25 a.m. she saw a patient for 15 minutes with greater than 50% of the time spent explaining treatment plan, counseling and coordinating care while at 8:26 a.m. she completed a remote consult note cosigned by Dr. Crelin identifying that she saw a patient for 30 minutes with greater than 50% of the time spent explaining treatment plan, counseling and coordinating care. (R.237:166-170 & 173-176; R.164:2; R.180:2). Hendrickson admitted she did not see either of these patients.

(R.237:170 & 173). Yet these remote notes remained in EPIC unchanged up through Hendrickson's deposition on March 9, 2018 and she did not recall correcting either remote note thereafter as no one asked her to correct it and believed they remained in EPIC unchanged as of the date of her testimony at trial. (R.237:176). Likewise, at her deposition DMNP Fahey was shown a remote consult note cosigned by Dr. Crelin that she completed on July 21, 2017 at 8:37 a.m. indicating "Diabetes education concerning blood sugar goals and insulin adjustments was given. Discussed general issues about diabetes pathophysiology and management." (R.237:206-207; R.181:1). Fahey also admitted that the remote note was inaccurate and had not gone into EPIC to correct the document as no one told her to. (R.237:207-208).

## ARGUMENT

### I. Standard of Review

The circuit court's granting of a motion for a directed verdict at the close of plaintiff's case on the basis there was not sufficient evidence to take the case to a jury is reviewed under the clearly wrong standard. Olfe v. Gordon, 93 Wis.2d 173, 185-86, 286 N.W.2d 573, 579 (1980). In this respect, the trial court's decision will only be disturbed when the mind is clearly convinced the conclusion of the trial judge is wrong. Id.

Regarding the trial court's interpretation of § 943.39(1) and § 943.395, Wis. Stats., this Court is to interpret these statutes independently of the trial

court's analysis. State ex. rel. Zignego v. Wisconsin Elections Commission, 2020 WI App 17, ¶32, 391 Wis.2d 441, 460, 941 N.W.2d 284, 293.

Under current Wisconsin law, emotional distress and punitive damages are not available in wrongful discharge cases. Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561, 575, 335 N.W.2d 834, 841 (1983). As such, plaintiff motioned the trial court to include these damages as an advisory ruling on the special verdict which the trial court denied as plaintiff will be requesting a change in law. (R.119; R.232:16-17). In this respect, this Court will independently review whether a jury instruction is appropriate under the specific facts of the case. Schwigel v. Kohlmann, 2005 WI App 44, ¶9, 280 Wis.2d 193, 201-02, 694 N.W.2d 467, 472.

## II. There was Sufficient Evidence for a Jury to Conclude Widenski was Terminated for Undertaking Obligations Imposed on her by Law.

The trial court first concluded that both § 943.39(1) and § 943.395, Wis. Stats., required any manager who had knowledge of an intentionally false record to get that record corrected. (R.237:233-235; App. 18-21). The trial court then added, the evidence showed the remote notes were mistakes, not intentional acts, and that neither DMNP took the extra step needed to bill for services not provided. (R.237:226 & 236; App. 12; 21-22). Further, the trial court added that there was no evidence in the record setting forth a motive to falsify the records. (R.237:237; App. 22). As such, the trial court granted ProHealth's request for a directed verdict after the plaintiff's case concluded by summarizing that the remote notes were

incorrect, but there was no evidence they were intentionally false. (R.237:239; App. 24-25).

The trial court's determination is to be analyzed under the "clearly wrong" standard. Olfe, 93 Wis.2d at 185-186. "Clearly wrong" means that if there is any credible evidence upon which a jury could arrive at a verdict, the action of the trial court to disregard such a determination is clearly wrong and must be set aside. Weiss v. United Fire and Casualty Co., 197 Wis.2d 365, 389-90, 541 N.W.2d 753, 761-62 (1995); see also, Delvaux v. Kewaunee, G.B. & W. RY. Co., 167 Wis. 586, 167 N.W. 438, 442 (1918). This is so even if there is contradictory evidence upon which some may find stronger or more convincing. Weiss, 197 Wis.2d at 389-90. Further, it is the jury's duty to assess the evidence and determine what is credible, not the trial court.

The record in this case will demonstrate there was a substantial amount of credible evidence for a jury to find Widenski had a duty by law to correct false medical records placed into EPIC whether intentionally created or by mistake; that DMNP Hendrickson intentionally created the false remote notes placed into EPIC; and that DMNP Hendrickson had a motive to create false medical records by placing remote notes into EPIC.

### A. Once Widenski as Director/Manager Knew of the False Entry or Omission of a Document Belonging to the Corporation that was Circulated and Possibly Presented to be Billed, she was Required to get it Corrected.

The trial court's decision first focused on § 943.39(1) and § 943.395, Wis. Stats., requiring that before a director/manager had an obligation to correct an inaccurate document created by a subordinate, the document had to first be falsely created by an intentional act. (R.237:232-239; App. 18-25). In doing so, the trial court concluded that even if the director/manager learns of a false document being circulated and possibly presented for billing, they have no obligation to take any step to correct the situation unless the document was first created by an intentional act to falsify. This conclusion not only fails to set forth Widenski's legal obligations, but also misses several pieces of evidence that showed the remote notes were created by intentional acts and not mere mistakes.

The evidence identified Widenski's legal obligations as the director responsible for the Chronic Care Clinic's operations and regulatory functions. (R.235:143-145). The evidence also showed Widenski as director supervised the manager who directly supervised the Chronic Care Clinic and the DMNPs that worked in the Chronic Care Clinic. (R.235:166; R.236:123). Further, the evidence showed that Widenski who was concerned about the DMNP shortage, the volume of patients DMNPs claimed they saw, and how DMNPs were going to service patients, had the former interim DMNP manager who had EPIC access sit down with her to review the DMNP documentation for July 7th through July 10th to see how the first few days of being short DMNPs went. (R.235:197-198; R.236:164). In doing so, it was discovered that DMNP Hendrickson only saw 5 patients with all other patients being documented as "remote". (Id.) The problem with this was

"remote" meant you did not see the patient, but DMNP Hendrickson's remote notes indicated she had seen the patient for greater than 15 minutes and spent greater than 50% of that time explaining treatment plan, counseling, and coordinating care. (R.236:166-167; R.180:7; R.182:4). In addition, the entry of time spent servicing the patient and the phrase "greater than 50% of the time spent explaining treatment plan, counseling and coordinating care" had the possibility of a billing code being attached to it and could be billed. (R.236:175-177). Moreover, these remote notes were documents placed into EPIC which was the electronic health record system used by ProHealth whereby care providers accessed documents for patient care. (R.235:111-113 & 123-124). Further, all nurses knew it was inappropriate to place a false document into EPIC which created legal issues as medical records are legal documents. (R.235:124-128). In fact, Widenski was fully aware that having been a clinical legal consult she was responsible for getting the DMNP documentation that was placed into EPIC corrected. (R.236:169-170 & 172). Further, Widenski knew this legal obligation existed even if the DMNPs placed these remote notes into EPIC in error. (R.236:172-173). Not only could these false notes affect patient care down the line, but they might be billed for services never provided. (R.235:114-116; 236:173-175). Additionally, while conducting the investigation to correct remote notes that may be in EPIC, Widenski called the Wisconsin Inspector General who confirmed with her that if DMNPs placed false information into EPIC that would be fraud and any bill issued from those false records would also be fraud.

(R.237:22-23). In other words, the evidence presented showed that once Widenski knew false documents were created and placed into EPIC she was responsible as a director to get those records corrected whether they were intentionally created by the DMNPs or just created in error/mistake.

Moreover, a review of § 943.39, Wis. Stats., makes it a Class H felony for whoever with intent to injure or defraud to:

> (1) Being a director…of any corporation…falsifies any record, … or other document belonging to that corporation … by alteration, false entry or omission, or makes, circulates or publishes any written statement regarding the corporation … which he or she knows is false.

As for § 943.395(1)(b), Wis. Stats., it is unlawful for whoever, knowing it to be false or fraudulent to do any of the following:

> Prepares, makes or subscribes to a false or fraudulent … proof of loss or other document or writing, with knowledge that the same may be presented or used in support of a claim for payment under a policy of insurance.

As the trial court reviewed the above statutes, it determined that both statutes required "falsified" records meaning there had to be "intent" to falsify through a deceptive maneuver not just created through mistake. (R.237:235; App. 20-21). In making this determination, the trial court's emphasis on the actions of the DMNPs ignored the evidence presented and misinterpreted Widenski's legal obligations as a director having learned of a false record detailing services not actually provided to the patient which could be presented in support of a claim for payment under a policy of insurance. Moreover, it ignored the evidence in the

record whereby a jury could determine that DMNP Hendrickson intentionally created these false remote notes.

The interpretation of a statute begins with the plain meaning of the language within the statute. State ex. rel. Zignego, 2020 WI App. 17, ¶ 34, 391 Wis.2d at 461, 941 N.W.2d at 294. If the meaning is plain, the review ordinarily stops there. Id. In looking at the plain language of this statute, any director who falsifies any record of the corporation by omission which they know to be false is guilty of violating § 943.39(1), Wis. Stats. For Widenski as director, this meant that once she knew of a false document in EPIC which was accessed throughout the corporation for future care of the patient and could be used to bill for services not provided, her act to ignore getting the document corrected would be an illegal act of omission. To find the plain language to mean anything other than this misses the clear intent of the statute to deter fraud. In fact, the evidence presented clearly supported the requirement to get false medical records corrected.

Moreover, any person who allows a false record to be presented for a possible payment by insurance is guilty of a crime. § 943.395, Wis. Stats. In other words, based on the plain language of the involved statutes, directors are required to correct false records of the corporation once they discover a false record or by their omission to act, they are falsifying the corporation's records, and allowing false records to be submitted for potential payment by insurance. Again, it is clear the letter and spirit of these statutes is to deter fraud, and a failure for a director to correct a false record that reports a patient's care and treatment as

well as used to bill for services needs to be corrected for the continuing care of the patient and to prevent a payment for services that was not provided. A failure for a director to correct such a document when discovered is an omission whereby the director is falsifying a corporate record. Once a director discovers a false document whether created intentionally false or not but knowing the record is false and that there may be more such false records, commits an intentional act of omission to look the other way and ignore correcting it. As such, the trial court's determination by merely considering the DMNPs' intentions misses the duties set forth for the director. Moreover, it ignored the credible evidence set forth to establish Widenski's legally required duties to correct false medical records once discovered to be false and upon learning there may be other false medical records, she was required to investigate to make sure other such false documents were corrected, and to further put a policy in place to ensure they were not created going forward.

### B. In the Alternative, Evidence Existed that DMNP Hendrickson Intentionally Created False Medical Records.

Moreover, the trial court's determination that the record was devoid of evidence for a jury to reach the conclusion that DMNP Hendrickson acted intentionally in creating the remote notes misses the evidence in this record. To begin with, the evidence showed there was going to be a shortage of two full-time DMNPs as of July 7th. (R.235:170-171; R.237:118-119; R.183). The record further showed the remaining DMNPs were not happy about working beyond their

scheduled hours of work without pay as they were moved from hourly to salary. (R.235:184-186; R.179:1). In fact, during that first weekend of being short, the three DMNPs per an email from Hendrickson requested a meeting to present an alternative plan to have hospitalist conduct some of their work despite the fact this plan had already been presented and rejected. (R.235:186-187 & 189-190; R.184; R.185). Further, the evidence shows that when Widenski tried to verify how the first weekend went in a morning meeting of July 10th, the meeting was filled with interruptions and had to be rescheduled. (R.235:191-194; R.177:2-3). As a result, in Widenski's efforts to discover how many patients the DMNPs saw that weekend, she discovered remote notes whereby DMNP Hendrickson indicated she saw patients but had not actually seen them. (R.235:197-198; R.236:164-167). From there, Widenski met with DMNP Hendrickson who at first indicated she was in the hospital and saw the patients identified through remote notes. (R.236:182; R.177:2). Yet, when Widenski told DMNP Hendrickson she knew she didn't see the patients, Hendrickson said she wasn't in, but was in the professional building. (Id). Then when Widenski asked Hendrickson why she didn't see the patients if she was in the hospital, Hendrickson finally admitted she hadn't come in. (R.236:183; R.237:170; R.177:2-3). In short, a jury could conclude the shortage of DMNPs would cause extra unpaid work for Hendrickson and Hendrickson purposely completed these remote notes indicating she saw these patients without having to go in and see them, but to make management believe she had done her job. In short, this is evidence of a motive for the DMNPs to intentionally falsify

their notes to indicate they saw patients even though they did not and would not go to work without extra pay for doing so. A fact further supported by the actions of the DMNPs on July 10th having gone to Dr. Crelin who then notified Widenski and Cody that hospitalists should be assigned to help relieve the volume of patients assigned to DMNPs. (R.235:195-196; R.186:2).

This is further supported by the evidence that Hendrickson claimed at trial that her completion of the remote notes were just mistakes, but she documented different minutes on them. For instance, Hendrickson claimed her use of the phrase "Total time spent with patient greater than 15 Minutes. Greater than 50% of time was spent explaining treatment plan, counseling, and coordinating care" was a template she forgot to remove from the document. (R.237:170). However, a review of a remote note completed by Hendrickson of July 7th at 8:26 a.m. showed she had indicated she saw that patient for 30 minutes. (R.237:173; R.164:2). In other words, if this were a template she forgot to remove, all remote notes would have been for 15 minutes, but that was not the case because Hendrickson had to type in the number of minutes, she saw the patient. (R.237:182; R.177:2). In other words, the minutes listed had to be typed in and Hendrickson's act to record minutes on these remote notes were intentional acts.

Additionally, Hendrickson claimed at trial that even though there was a code that went with the phrase, "Greater than 50% of time was spent explaining treatment plan, counseling, and coordinating care," she would have had to go to another place on the chart to enter the code and she did not. (R.237:167).

However, contrary to this testimony, the evidence shows that when Widenski asked Hendrickson on July 11, 2017 if she billed these remote notes, Hendrickson was unable to confirm whether she dropped charges on these remote notes or not. (R.236:177; R.237:112). In other words, Hendrickson's testimony at trial was not consistent with her actions as viewed by others when the events occurred and showed an intentional act in creating false medical notes.

Moreover, the evidence showed that when Fulmer approached Hendrickson to see how she was doing after her meeting with Widenski to discuss the remote notes of July 7th through 10th, Hendrickson told Fulmer, "Not good. And you know, they're looking at going through our clinical documentation now." (R.236:187-188; R.237:130-132). As such, a jury had plenty of evidence to determine that Hendrickson intentionally created these remote notes to identify she treated patients she didn't see and was extremely worried what might be found. Again, Hendrickson's testimony at trial was not consistent with what she said to others at the time the events were unfolding. Further, there was extensive evidence in this record upon which a jury could have concluded the remote notes were intentionally created in a false manner by DMNP Hendrickson.

### C. Evidence Exists to Show ProHealth's Motive to Terminate Widenski was due to her Investigation into the Fraudulent Remote Notes.

Likewise, ProHealth's position that remote notes are never billed also raised issues of fact for a jury determination. In this respect, there was credible

evidence presented that when Widenski instructed Cody to go to billing to have them conduct an audit to make sure remote notes were not billed, Cody never saw any documentation that an audit occurred, but merely took the word of Erica Magenheim and Kim Bischel an audit was performed. (R.236:136, 145-146 & 161-162). In fact, there is no documentation in this record identifying that any such audit had been done. Additionally, Cody's testimony that the audit of billing was completed within a couple of weeks of July 11th, and that she let Widenski and the team know is contradicted by credible evidence. (R.236:153-155). More specifically, Widenski testified that she assigned Cody to investigate billing and that Cody never got back to her. (R.237:81). Further, credible evidence shows that on July 26th, Cody at Widenski's direction sent the DMNP workstation IDs to ProHealth's Security Engineer for a search to identify where the DMNPs were entering their documentation into EPIC regarding their care of patients. (R.236:194-196; R.188:2-3). From there, the evidence shows that Hill knowing that Widenski was getting EPIC training denied her EPIC access, removed her from managing the DMNPs and in a meeting told Widenski she didn't care about billing but to focus on ramping up coverage for inpatients. (R.237:24-26 & 83-84). Further, credible evidence shows that when the Security Engineer provided this report to Widenski on August 14th, Hill told Widenski to provide the report to Cody who was not supervising the DMNPs at that time, did not know what to do with the information, and testified she had nothing to do with any effort to ensure that all remote notes by DMNPs were reviewed. (R.236:145; R.237:32-35; R.194).

In fact, Hill met with Huppertz and Price of human resources on the evening of August 14th and couldn't remember exactly what was discussed, but Widenski was terminated first thing in the morning on August 15th. (R.236:56-57; R.237:36-37). Moreover, credible evidence was presented that false remote notes were still in ProHealth's EPIC system as of the trial. (R.237:166-170, 173-176; R.237:206-208; R.164:2; R.180:2; R.181:1). From this a jury could conclude that ProHealth decided it was better to claim remote notes don't get billed and could not cause harm to any patient rather than to correct the false medical records and billing payments received for services not provided. In other words, there was a good amount of credible evidence for a jury to find that ProHealth terminated Widenski for undertaking her legal obligation to get these notes corrected.

For all the reasons stated herein, the trial court's determination to grant ProHealth's motion for a directed verdict must be reversed. As set forth herein, there was a substantial amount of credible evidence for a jury to find Widenski had a duty by law to correct false medical records placed into EPIC even those created by mistake and that DMNP Hendrickson was motivated to intentionally create the false remote notes she placed into EPIC.

## III. Widenski's Request to Include Emotional Distress and Punitive Damages on the Jury Verdict Should Have Been Granted as Wisconsin Law Regarding Damages to a Successful Plaintiff in a Wrongful Discharge Case Needs to be Changed.

The current law in Wisconsin does not provide for the recovery of emotional distress damages and/or punitive damages in wrongful discharge cases.

Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561, 575, 355 N.W.2d 834, 841 (1983).

The plaintiff argues it is time for Wisconsin law to include emotional distress and punitive damages in wrongful discharge cases. As such, Widenski, motioned the trial court pursuant to § 805.02, Wis. Stats., to allow the jury, if it finds a wrongful discharge did occur, to consider evidence on plaintiff's past and future wage losses, emotional distress, and punitive damages by entering an advisory decision on the emotional distress and punitive damages which the Court could consider in setting plaintiff's damages.

Such a ruling would prevent the necessity of a re-trial on damages in the event the plaintiff is successful in getting the law changed to allow for emotional distress and punitive damages. Widenski's position is that Wisconsin law needs to be updated and changed. Currently, Wisconsin law makes it very clear that "an employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law." Hausman v. St. Croix Care Center, 214 Wis.2d 655, 664, 571 N.W.2d 393, 396 (1997). In taking this position, our Court has made it clear that when Wisconsin law imposes an affirmative obligation upon the plaintiff whereby the plaintiff's failure to act could subject the plaintiff to criminal prosecution, and the defendant terminates plaintiff for undertaking such an affirmative obligation, the plaintiff has a public policy exception for a wrongful discharge claim. Id., at 667-68.

In similar public policy wrongful discharge cases, other states recognize that wrongful termination in violation of public policy is an intentional tort thereby applying damages to prevailing plaintiffs. Tameny v. Atlantic Richfield Co., 27 Cal.3d 167, 176-177, 610 P.2d 1330 (1980); Cagle v. Burns and Roe, Inc., 106 Wash.2d 911, 914-15, 726 P.2d 434 (1986); Nees v. Hocks, 272 Ore. 210, 536 P.2d 512 (1975); Harless v. First National Bank In Fairmont, 162 W.Va. 116, 124 at fn. 5, 246 S.E.2d 270 (1978); Springer v. Weeks & Leo Co., 429 N.W.2d 558, 560-61 (Iowa 1988).

In particular, the Iowa court has stated that:

> … when an employee is discharged in violation of public policy, the employer commits a wrong both in contract and in tort. '[W]here a duty recognized by the law of torts exists between the plaintiff and defendant distinct from a duty imposed by the contract. … a tort action [will] lie for conduct in breach of the contract.' Preferred Mktg. Assocs. Co. v. Hawkeye Nat'l Life Ins., 452 N.W.2d 389, 397 (Iowa 1990). Employers have a duty to refrain from acting in contravention of established public policies, and the tort of retaliatory discharge ensures that employees are not impermissibly sanctioned for exercising guaranteed rights. …
>
> Ackerman v. State, 913 N.W.2d 610, 618 (Iowa 2018).

The Ackerman case was the Iowa court expanding the retaliatory discharge in violation of public policy from employment at-will situations to contract employees. Id. In doing so, the Iowa court recognized that "[t]he duty giving rise to the tort remedy is not derived from the covenants of contract, but rather from the employer's obligation to conduct its affairs in conformity with fundamental public policy." Id.; *citing* Smith v. Bates Tech Coll., 139 Wash.2d 793, 991 P.2d

1135, 1141 (2000) (*en banc*). As such, the employee has the right to bring a claim for tortious conduct that harms not only the employee, but also the state's clear public policy. Ackerman, 913 N.W.2d at 618.

As the Iowa court further stated, the rationale behind this is that an employee discharged for refusing to violate a public policy requirement may have their private contract interests satisfied with breach of contract damages, but this alone fails to vindicate the violated public interest or to provide a deterrent against future violations. Ackerman, 913 N.W.2d at 618-19; *citing* Keveney v. Missouri Military Academy, 304 S.W.3d 98, 103 (Mo. 2010) (*en banc*).

Similarly, the Utah court noted, an employer who fires an employee in contravention of an established public policy setting forth vital state interests "should be liable for the more expansive penalties of tort, a potentially harsher liability commensurate with the greater wrong against society." Ackerman, 913 N.W.2d at 619; *citing* Retherford v. AT & T Communications of the Mountain States, Inc., 844 P.2d 949, 960 (Utah 1992).

Moreover, the Illinois court in accepting tort recovery for wrongfully terminated at-will and contracted employees has concluded:

> As a result, it is now recognized that a proper balance must be maintained among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out.
>
> Palmateer v. International Harvester Co., 85 Ill.2d 124, 129, 421 N.E.2d 876, 878 (1981).

From this perspective, Wisconsin law needs to be changed to include tort recovery damages for persons wrongfully terminated contrary to the well-defined public policy of this State. As it currently stands in Wisconsin, plaintiffs are not being fully compensated as victims of intentional torts, and employers are not being punished or deterred from undermining public policy as declared by our state legislature. There simply is no future deterrent for employers of this state to terminate an employee for following the stated public policy of this state. The only way to correct that and assure the public policy of our state is followed by employers in dealing with its employees is to provide tort damage recovery to employees to include emotional distress and punitive damages for punishment of intentional acts. As such, plaintiff respectfully requests that the trial court be required to instruct the jury to consider Widenski's emotional distress and punitive damages in the event the jury finds a wrongful discharge.

## CONCLUSION

Based upon all the reasons stated above, Widenski respectfully requests the trial court's decision to dismiss her case on a directed verdict be reversed; the case be remanded for retrial with directions to allow for an advisory ruling on emotional distress and punitive damages in anticipation of Wisconsin's wrongful discharge law being changed to allow for such damages.

Dated this 15th day of November, 2021.

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## FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in § 809.19(8)(b), (bm) and (c) for a brief. The length of this brief is 9,094 words.

Dated this 15th day of November, 2021.

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