STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF SAMUEL CORRADO, by LESLEY MEYERS, Personal Representative,

Plaintiff-Appellee,

v

KAREN RIECK, RADI GERBI, R.N., JESSICA JOHNSON, L.P.N., BEAUMONT NURSING HOME SERVICES, INC., and PINEHURST EAST, INC.,

Defendants,

and

SHELBY NURSING CENTER JOINT VENTURE, doing business as SHELBY NURSING CENTER,

Defendant-Appellant.

UNPUBLISHED
April 23, 2020

No. 346920
Macomb Circuit Court
LC No. 2016-003128-NH

Before: RIORDAN, P.J., and FORT HOOD and SWARTZLE, JJ.

PER CURIAM.

Defendant-appellant, Shelby Nursing Center Joint Venture, doing business as Shelby Nursing Center (defendant),[1] appeals by leave granted[2] an order denying its motion for summary disposition of claims arising from a nurse's alleged noncompliance with a standing order regarding

[1] Defendants Karen Rieck, Radi Gerbi, R.N., Jessica Johnson, L.P.N., Beaumont Nursing Home Services, Inc., and Pinehurst East, Inc., were dismissed by stipulated order and are not participating in this appeal.

[2] *Corrado Estate v Rieck*, unpublished order of the Court of Appeals, entered April 24, 2019 (Docket No. 346920).

patient care. We agree that any such claim sounds in medical malpractice and that the standing order could not be relied on as evidence of the standard of care. Accordingly, we reverse the trial court's order denying defendant's motion for summary disposition and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Plaintiff's decedent, Samuel Corrado, was admitted to defendant's nursing home for rehabilitation after having a percutaneous endoscopic gastrostomy (PEG) tube surgically placed to help combat rapid weight loss attributed to progressive dysphagia (difficulty swallowing). On the afternoon of June 2, 2014, Corrado vomited at least twice. He went into severe respiratory distress and passed away from acute aspiration shortly after being transferred to a hospital. At issue in this appeal is plaintiff's contention that Radi Gerbi, R.N., a member of defendant's staff, was negligent in failing to comply with defendant's standing order regarding patients who experience nausea or vomiting. Among other things, the standing order directs nurses to "immediately" report to a physician if a patient experiences more than one episode of emesis (vomiting) within 24 hours. Gerbi testified that he tried, without success, to contact a doctor approximately 20 to 30 minutes after Corrado's second episode of emesis.

Plaintiff brought an ordinary negligence claim, and later moved to amend the complaint to specifically add Gerbi's noncompliance with the standing order to that claim. While that motion was pending, defendant moved for summary disposition of all claims arising from Gerbi's noncompliance with the standing order, arguing that any such claim sounded in medical malpractice and that the standard of care could not be established or bolstered by way of the standing order. The trial court disagreed, concluding that Gerbi's noncompliance with the standing order was a matter of ordinary negligence because the standing order unambiguously created a mandatory requirement concerning physician notification, which "does not involve any medical judgment." This appeal followed.[3]

II. STANDARD OF REVIEW

This Court reviews rulings on summary disposition motions de novo. *Jones v Botsford Continuing Care Corp*, 310 Mich App 192, 199; 871 NW2d 15 (2015). The standard of review for dispositive motions brought under MCR 2.116(C)(10) is well settled:

[3] We note that plaintiff's original complaint set forth claims of medical malpractice and ordinary negligence arising from a variety of other actions and inactions on the part of defendant's staff. The trial court granted summary disposition with respect to claims involving defendant's administrators and claims grounded in compliance with federal and state regulations. Those rulings are not challenged on appeal. At the time the trial court entered the order from which this appeal was taken, it had yet to rule on defendant's earlier motion for summary disposition as to the claims of ordinary negligence presented in plaintiff's original complaint. Thus, those claims remain pending and are beyond the scope of this appeal. Plaintiff's additional medical malpractice theories that were not the subject of dispositive motions likewise remain pending and are not at issue in this appeal.

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Trueblood Estate v P&G Apartments, LLC*, 327 Mich App 275, 284; 933 NW2d 732 (2019), quoting *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).]

"A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, would leave open an issue upon which reasonable minds might differ." *Pugno v Blue Harvest Farms LLC*, 326 Mich App 1, 12; 930 NW2d 393 (2018) (quotation marks and citation omitted).

III. ANALYSIS

Defendant argues on appeal that the trial court erred by holding that plaintiff's proposed claim regarding the standing order sounded in ordinary negligence. We agree.

Courts are not bound by the procedural labels a party attaches to its claim and, instead, must look to the substance of the claim to determine its nature. *David v Sternberg*, 272 Mich App 377, 381; 726 NW2d 89 (2006). In determining whether a claim sounds in ordinary negligence or medical malpractice, this Court considers two questions: "(1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience." *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004). The claim falls within the realm of medical malpractice when both of these inquiries are answered in the affirmative. *Id*. Because the parties do not dispute that the care provided by defendant's staff before Corrado's death arose in the context of a professional relationship, the nature of plaintiff's proposed claim rests on whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. This inquiry focuses on whether the reasonableness of the defendant's actions can be evaluated on the basis of common knowledge and experience. *Id*. at 423. If so, the claim does not involve medical judgment and, therefore, sounds in ordinary negligence. *Id*. Conversely, if a factfinder cannot assess the reasonableness of the defendant's actions without the benefit of expert testimony concerning the applicable standard of care, the question involves medical judgment and presents a claim for medical malpractice. *Id*.

In *Bryant*, our Supreme Court applied this standard to claims that arose when the plaintiff's decedent died from positional asphyxia after her neck became wedged between a bedside rail and the mattress, *id*. at 417, and found that most, but not all, of the plaintiff's claims sounded in medical malpractice, *id*. at 426-431. The Court reasoned that claims alleging that the defendant failed to properly train its staff to assess the risk of potential asphyxia and failed to recognize the risk posed by the decedent's bedding involved medical judgment because both theories required specialized knowledge regarding the risks of the particular equipment provided to the decedent. *Id*. at 427-430. The plaintiff's final claim alleged that the defendant failed to take steps to protect the decedent after she was discovered entangled in a similar position the day before. *Id*. at 430.

Notably, after the decedent was repositioned following the first incident, the defendant's staff reported to supervisors that the decedent was at risk of asphyxiation, clearly demonstrating that the defendant was aware of the danger. *Id*. The Court observed that the plaintiff's claim did not involve the propriety of affirmative steps taken by the defendant, but rather the defendant's complete failure to respond to a recognized risk. *Id*. The Court offered a hypothetical scenario to help elucidate the distinction:

> Suppose, for example, that two CENAs [certified evaluated nursing assistants] employed by defendant discovered that a resident had slid underwater while taking a bath. Realizing that the resident might drown, the CENAs lift him above the water. They recognize that the resident's medical condition is such that he is likely to slide underwater again and, accordingly, they notify a supervising nurse of the problem. The nurse, then, does nothing at all to rectify the problem, and the resident drowns while taking a bath the next day.
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> If a party alleges in a lawsuit that the nursing home was negligent in allowing the decedent to take a bath under conditions known to be hazardous, the *Dorris* [*v Detroit Osteopathic Hosp Corp*, 460 Mich 26; 594 NW2d 455 (1999),] standard would dictate that the claim sounds in ordinary negligence. No expert testimony is necessary to show that the defendant acted negligently by failing to take any corrective action after learning of the problem. A fact-finder relying only on common knowledge and experience can readily determine whether the defendant's response was sufficient. [*Id*. at 431.]

The *Byrant* Court then concluded that the plaintiff's failure-to-protect theory likewise involved ordinary negligence because "[p]rofessional judgment might be implicated if plaintiff alleged that defendant responded inadequately, but, given the substance of plaintiff's allegation in this case, the fact-finder need only determine whether *any* corrective action to reduce the risk of recurrence was taken after defendant's agents noticed that [the decedent] was in peril." *Id*.

The task of ascertaining the gravamen of plaintiff's claim in this case is complicated by the fact that plaintiff has not yet filed an amended complaint articulating the claim at issue. In its motion seeking leave to amend, plaintiff asked to "add as part of its claim for ordinary negligence the fact that Nurse Gerbi failed to comply with [the] standing order to contact the physician on call." On appeal, defendant characterizes plaintiff's proposed claim as alleging "failure to properly treat and monitor a patient, with known swallowing and aspiration risks, after repeat episodes of vomiting resulting in respiratory distress and death." Defendant contends that while the standing order provided guidance for Gerbi's response to Corrado's condition, Gerbi still had to exercise professional judgment in implementing and carrying out the order. Plaintiff, on the other hand, emphasizes that it takes no issue with the formulation or content of the standing order and contends that it would assert liability on the basis of Gerbi's failure to comply with the standing order. Plaintiff reasons that it took no medical judgment for Gerbi to recognize that the conditions outlined in the standing order existed—a patient had vomited twice in less than 24 hours—thereby triggering the requirements of the standing order. Moreover, because the standing order dictated that Gerbi must immediately contact a doctor after such an occurrence, a factfinder could evaluate the reasonableness of Gerbi's response without expert testimony explaining what actions should

have been taken. According to plaintiff, the standing order removed judgment of any sort, let alone *medical* judgment, from the equation.

Even accepting plaintiff's more narrow articulation of the proposed claim, we conclude that the proposed claim sounds in medical malpractice. The hypothetical and actual claims of ordinary negligence discussed in *Bryant* could be evaluated on the basis of common knowledge and experience because the average factfinder would be able to appreciate that *something* should have been done to reduce a clear risk of harm, even if determining *what* response was reasonable required some degree of specialized knowledge. *Id*. at 430-431. Plaintiff's position is distinguishable from this type of failure-to-protect theory because plaintiff does not simply allege that Gerbi was negligent in failing to do *anything* after Corrado vomited the second time. Rather, plaintiff alleges that Gerbi was negligent because he failed to take a specific action in response to the circumstances. A lay factfinder would not know that a physician should be immediately informed when a patient vomits twice in a matter of hours and could not rely solely on common knowledge and experience to determine whether it was reasonable for Gerbi to wait at least 20 minutes before attempting to consult a doctor about Corrado's status. Plaintiff would have the factfinder rely on the standing order to assess the reasonableness of Gerbi's actions, but the very fact that information outside the realm of common knowledge and experience (i.e., the standing order) would be required to determine liability supports the conclusion that plaintiff's proposed claim sounds in medical malpractice. Accordingly, the trial court erred by holding that plaintiff's proposed claim was one of ordinary negligence.

Defendant also contends that it was entitled to summary disposition with respect to all claims relying on the standing order, including claims sounding in medical malpractice, because the standing order did not establish the standard of care. We agree.

Medical malpractice occurs when a medical professional, "employed to treat a case professionally, [fails] to fulfill the duty to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or similar locality, in light of the present state of medical science." *Id*. at 424 (quotation marks and citation omitted). With respect to nurses in particular, he or she must likewise exercise the "skill and care ordinarily possessed and exercised by practitioners of the profession in the same or similar localities." *Cox v Bd of Hosp Managers*, 467 Mich 1, 21-22; 651 NW2d 356 (2002). Unless negligence is so obvious that it is within the common knowledge and experience of an ordinary layperson, the plaintiff must present expert testimony to establish the applicable standard of care. *Elher v Misra*, 499 Mich 11, 21-22; 878 NW2d 790 (2016). Consistent with this requirement, the defendant's internal rules and regulations cannot be used to establish the standard of care. *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761, 765-766; 431 NW2d 90 (1988).[4] See also *Zdrojewski v Murphy*, 254 Mich App 50, 62; 657 NW2d 721 (2002), citing *Gallagher*, 171 Mich App at 764-765 ("Defendants are

[4] Opinions of this Court issued before November 1, 1990, are not precedentially binding under MCR 7.215(J)(1) but may be considered for their persuasive value. *Jackson v Dir of Dep't of Corrections*, ___ Mich App ___, ___ n 4; ___ NW2d ___ (2019) (Docket No. 342882); slip op at 4 n 4.

correct in their assertion that internal policies of an institution, including a hospital, cannot be used to establish a legal duty in a negligence claim.").

The parties vehemently dispute whether the standing order at issue was a mandatory order that defendant's nurses had to follow without discretion or a general guideline that the nurses could turn to in conjunction with their own professional judgment. The parties' focus on this distinction is misplaced. The standard of care is governed by the standards within "the same or similar localities." *Cox*, 467 Mich at 21-22. Regardless of the mandatory or discretionary nature of the standing order, it is beyond dispute that the order was not applicable outside the confines of defendant's nursing home. Because there is no evidence that other nurses exercising the skill and care ordinarily possessed within the same or similar localities would be bound by defendant's standing order, it cannot be used to establish the standard of care. *Id*.

Moreover, the standing order cannot be used as evidence in conjunction with expert testimony to establish the standard of care. In *Jilek v Stockson*, 289 Mich App 291, 306; 796 NW2d 267 (2010) (*Jilek I*), rev'd 490 Mich 961 (2011), the majority the notion that all internal guidelines had to be excluded from medical malpractice cases under the precedent established in *Gallagher*, 171 Mich App 761. The majority recognized that a healthcare provider's internal rules could not "fix" or "establish" the standard of care, but opined that there was no reason to impose a wholesale bar on the use of internal policies and guidelines in medical malpractice actions. *Jilek I*, 289 Mich App at 308-309, 314. The majority favorably cited *Gallagher*'s statement that " 'a hospital's rules could be admissible as reflecting the community's standard where they were adopted by the relevant medical staff and where there is a causal relationship between the violation of the rule and the injury,' " and observed that the plaintiff was not trying to *establish* the standard of care on the basis of internal policies. *Id*. at 306-307, quoting *Gallagher*, 171 Mich App at 767. Rather, the plaintiff only asserted that the policies were "relevant to the jury's determination, in light of the expert testimony, of what the standard was." *Jilek I*, 289 Mich App at 307. The majority concluded that the admissibility of internal policies was ultimately a matter of relevancy and that certain internal policies could be relevant, depending on the manner in which the parties' experts viewed them. *Id*. at 310-312.

Judge BANDSTRA dissented, stating:

> The trial court also concluded that all of plaintiff's nine proposed documentary exhibits relating to guidelines and policies for the care of persons allegedly like the deceased were to be excluded from consideration by the jury. The majority finds fault with the trial court with respect to only three of those documents, and it does so only after concluding that it is either "not bound to follow" the only Michigan precedent directly on point, *Gallagher v Detroit–Macomb Hosp Ass'n*, 171 Mich App 761; 431 NW2d 90 (1988), or that the holding of *Gallagher* should be ignored while dictum within that precedent should be followed. I disagree with the majority and conclude that binding precedent that applied and reiterated the *Gallagher* holding cannot be distinguished away. See *Buczkowski v McKay*, 441 Mich 96; 490 NW2d 330 (1992), and *Zdrojewski v Murphy*, 254 Mich App 50; 657 NW2d 721 (2002). But, apart from all of that, even if I were to agree with the majority's conclusion that the three documents were

> improperly excluded, I would not conclude that it would have made any difference in the outcome of the trial. [*Id*. at 316-317 (BANDSTRA, J., dissenting).]

The Supreme Court later reversed the *Jilek I* majority's decision regarding this issue for the reasons articulated by Judge BANDSTRA. *Jilek v Stockson*, 490 Mich 961, 962 (2011) (*Jilek II*). In doing so, the Supreme Court gave Judge BANDSTRA's dissent the effect of binding precedent. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369-370; 817 NW2d 504 (2012) ("By referring to the Court of Appeals dissent, this Court adopted the applicable facts and reasons supplied by the dissenting judge as if they were its own."); *Sanders v McLaren-Macomb*, 323 Mich App 254, 276 n 10; 916 NW2d 305 (2018) ("An order of the Michigan Supreme Court is binding precedent if it includes an understandable rationale supporting its decision."). Consequently, defendant was entitled to summary disposition with respect to a medical malpractice claim arising from Gerbi's failure to comply with the standing order because the standing order could not be used to establish, or as evidence of, the standard of care.[5]

Lastly, defendant argues that it was entitled to summary disposition regarding claims arising from compliance with the standing order because the order would be inadmissible at trial. We agree.

In ruling on a motion for summary disposition, a trial court should only consider substantively admissible evidences. MCR 2.116(G)(6); *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 373; 775 NW2d 618 (2009). As it did before the trial court, defendant contends that the standing order was inadmissible under *Gallagher*, 171 Mich App at 767-768, and a general public policy in favor of encouraging healthcare facilities to establish internal policies that promote exceptional patient care. Plaintiff argues that defendant's reliance on *Gallagher* is misplaced for several reasons and that the admissibility of the standing order is governed exclusively by the Michigan Rules of Evidence.

Plaintiff correctly observes that our Supreme Court has held that certain evidentiary rules derived from caselaw predating the adoption of the Michigan Rules of Evidence were superseded by the codified rules. See, e.g., *Waknin v Chamberlain*, 467 Mich 329, 332-333; 653 NW2d 176 (2002) (concerning admissibility of criminal conviction in civil proceedings); *People v Kreiner*, 415 Mich 372, 377; 329 NW2d 716 (1982) (regarding tender-years exception to hearsay rule). Although *Gallagher* cites several older cases, *Gallagher* itself was decided in 1988, well after the Michigan Rules of Evidence were adopted in 1978. Furthermore, while *Gallagher* does not

[5] This conclusion should not be construed as suggesting that plaintiff could not establish that the conduct that purportedly violated the standing order, i.e., Gerbi's 20- to 30-minute delay in attempting to notify a physician about Corrado's condition, was a violation of the standard of care. To do so, however, plaintiff would have to establish through expert testimony that the delay breached the standard of care because other nurses exercising the skill and care ordinarily possessed by nurses in the same or similar localities would have immediately contacted a physician under the circumstances, and not because immediate notification was required by defendant's standing order.

discuss the issue in terms of the codified rules, its analysis appears entirely consistent with the Michigan Rules of Evidence.

The *Gallagher* Court found no error in the exclusion of the defendant's nursing manual or internal rules because the standard of care in a medical malpractice action must be established through expert testimony. *Gallagher*, 171 Mich App at 764-768. The Court explained,

> Plaintiff sought to introduce internal rules concerning restraint of patients, charting of observations and monitoring changes in behavior. But the question at trial was whether [the patient] had received adequate nursing care or, in other words, whether the nurses had exercised appropriate medical judgment. The rules plaintiff sought to use were not standards for exercising judgment but were more in the nature of the hospital's administrative guidelines. As such, they were not indicative of community standards nor do they appear to be causally connected to the injury.
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> . . . [T]he ultimate question is what responsibility has the hospital assumed regarding the care of the patient. In Michigan, we look to the standard practiced in the community rather than internal rules and regulations to determine that responsibility in a malpractice action. [*Id*. at 767-768.]

This explanation, while devoid of reference to evidentiary rules, seems to be premised in what is arguably the most elementary rule of evidence—relevance. MRE 402 establishes the basic notion that relevant evidence is admissible, while irrelevant evidence is not. *Rock v Crocker*, 499 Mich 247, 256; 884 NW2d 227 (2016). Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The essence of *Gallagher*'s rationale is that evidence having no bearing on the applicable standard of care should not be admitted at trial because it would not tend to make the ultimate fact in question (the defendant's liability) more or less probable.

The same holds true in this case. As explained earlier, plaintiff's proposed claim regarding compliance with the standing order sounds in medical malpractice. Thus, plaintiff was obligated to prove four elements: "(1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Cox v Hartman*, 322 Mich App 292, 299; 911 NW2d 219 (2017). The standing order purports to define what actions a nurse should or must take when a patient experiences nausea with or without vomiting. The standard of care applicable to nurses, however, is the "skill and care ordinarily possessed and exercised by practitioners of the profession in the same or similar localities," *Cox*, 467 Mich at 21-22, and a healthcare provider's internal policies cannot be relied on in establishing that standard, *Zdrojewski*, 254 Mich App at 62; *Gallagher*, 171 Mich App at 765-766. See also *Jilek II*, 490 Mich at 962 (adopting *Jilek I* dissent); *Jilek I*, 289 Mich App at 316 (BANDSTRA, J., dissenting) (disagreeing with majority's conclusion that internal policies can be used, in conjunction with expert testimony, to determine standard of care). At most, the standing order dictates only what nurses employed by defendant are required to do. The standing order is therefore irrelevant because it does not make it more or less probable that the standard of care required immediate physician notification after a second episode of emesis. Because the standing

order is not relevant to the standard of care or any other required element, it was inadmissible under MRE 402. The trial court erred by basing its ruling on defendant's motion for summary disposition on substantively inadmissible evidence.[6] *Barnard Mfg Co, Inc*, 285 Mich App at 373.

Plaintiff disagrees and cites the *Gallagher* Court's recognition that "a violation of a regulation promulgated pursuant to statutory authority is admissible in a medical malpractice action[.]" *Gallagher*, 171 Mich App at 766. As plaintiff explains in its appellate brief, *Gallagher* discussed two cases supporting this proposition: *Davis v Detroit*, 149 Mich App 249; 386 NW2d 169 (1986), and *Young v Ann Arbor*, 119 Mich App 512; 326 NW2d 547 (1982), vacated in part by *Young v Ann Arbor (On Rehearing)*, 125 Mich App 459; 336 NW2d 24 (1983). Plaintiff's position is unpersuasive. Both *Davis* and *Young* involved rules established by the Department of Corrections that applied to all local penal institutions throughout the state and, in both instances, compliance was mandated by statute. *Davis*, 149 Mich App at 256-261; *Young*, 119 Mich App at 516-517. The precedent from those cases was not controlling in *Gallagher* because the defendant's internal policies were not mandated by law. *Gallagher*, 171 Mich App at 767.

Although compliance with regulations has sometimes been considered in a medical malpractice context, those cases have uniformly involved regulations that applied throughout the same or similar localities. For instance, in *Lockwood v Mobile Medical Response, Inc*, 293 Mich App 17, 25; 809 NW2d 403 (2011), the plaintiff alleged that the defendant failed to comply with guidelines promulgated by the Saginaw Valley Medical Control Authority, which was authorized by statute to create protocols for emergency medical services in two counties. In *Kakligian v Henry Ford Hosp*, 48 Mich App 325, 330-332; 210 NW2d 463 (1973) (opinion by BRENNAN, J.), it was alleged that the defendant hospital violated Mich Admin Code, R 325.1027(1)(b), a state-wide administrative rule, by failing to have a written policy concerning consultations. The rule at issue in *Zdrojewski*, 254 Mich App at 56, 62-63, was created by a nonprofit organization that set standards for and accredited healthcare organizations. In each of these cases, the relevant regulation or rule was created by an external agency or organization and applied to healthcare providers beyond the specific defendant involved in the case.

Plaintiff contends that the standing order was evidence of negligence because it was promulgated pursuant to federal and state regulations requiring nursing homes to establish, maintain, and implement written policies regarding patient care. Assuming, without deciding, that plaintiff correctly characterizes the requirements of the applicable regulations, the regulation that would be relevant to the issue of negligence is the regulation requiring patient care policies. The standing order is simply not a "regulation promulgated pursuant to statutory authority," nor is the specific content of the order mandated by law. *Gallagher*, 171 Mich App at 766. Even if the standing order was created to comply with applicable regulations, it is evident that it only governed the activities within defendant's nursing home and was not representative of a community standard of care.

[6] Given this conclusion, it is unnecessary for us to address defendant's alternative public policy argument.

For the foregoing reasons, we reverse the trial court's order denying defendant's motion for summary disposition and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Karen M. Fort Hood
/s/ Brock A. Swartzle