

IN THE SUPREME COURT OF OHIO

PATRICIA HULSMEYER

APPELLEE/CROSS-APPELLANT,

v.

HOSPICE OF SOUTHWEST OHIO, INC.

AND

JOSEPH KILLIAN

AND

BROOKDALE SENIOR LIVING, INC.
d/b/a BROOKDALE PLACE AT
KENWOOD

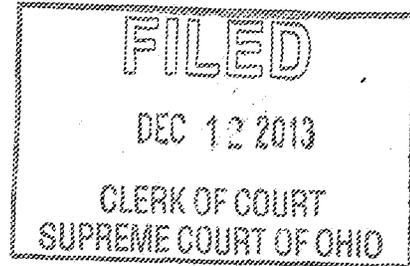
APPELLANTS/CROSS-APPELLEES,

: Case No. 2013-1766

: On Appeal from the Hamilton County
: Court of Appeals, First Appellate District

: Court of Appeals Case No.: C 120822

: Certified Conflict Case No.: 2013-1644



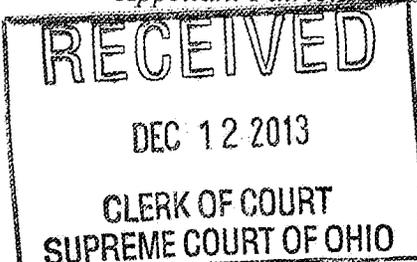
**MEMORANDUM IN RESPONSE TO APPELLANTS/CROSS-APPELLEES'
MEMORANDUM IN SUPPORT OF JURISDICTION AND IN SUPPORT OF
JURISDICTION OF CROSS-APPEAL OF APPELLEE/CROSS-APPELLANT
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A. Appellee’s Response to Appellants’ Proposition Of Law.....7

Under the plain language of R.C. § 3721.24, the making of a report or the intention to make a report of suspected abuse or neglect of a resident is protected activity. R.C. § 3721.24 is unambiguous and its protection should not be limited by R.C. § 3721.22 to persons who make or intend to make such reports only to the Director of Health.

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If R.C. § 3721.24 protects only employees or other persons who make reports of suspected abuse or neglect of a resident to the Director of Health, then persons who make such reports to an employer, to a family member of the resident, to law enforcement, or to other appropriate persons or entities must be permitted to assert claims for retaliation in violation of public policy.

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I. Appellee's Response To Appellants' Explanation Of Why This Case Is Of Public Or Great General Interest

Appellants argue that there is a conflict between the Eighth and First Appellate Districts about to whom a report of abuse or neglect must be made for a retaliation claim under R.C. § 3721.24 to be actionable. However, the only case that conflicts with the First District's decision, *Arsham-Brenner v. Grande Point Health Care Community*, 8th Dist. No. 74835, 2000 WL 968790 (July 13, 2000), is unpublished and was decided in 2000.

Unpublished appellate court opinions prior to 2002 have no precedential value in Ohio. Former S.Ct.R.Rep.Op. 2(G)(1), in effect when *Arsham* was decided, states:

Unofficially published opinions and unpublished opinions of the Courts of Appeals may be cited by any court or person subject to the following restrictions, limitations, and exceptions: (1) An unofficially published or unpublished opinion shall not be considered controlling authority in the judicial district in which it was decided except between the parties thereto when relevant under the doctrines of the law of the case, res judicata or collateral estoppel or in a criminal proceeding involving the same defendant[.]

The court in *Watson v. Neff*, 4th Dist. Jackson No. 08CA12, 2009-Ohio-2062, ¶ 16 relied on this rule in declining to apply an unreported 1992 opinion, stating, "Because *Joseph* was decided before May 1, 2002 . . . and because the Ohio Official Reports did not publish *Joseph*, it is not controlling authority in this case." Therefore, there is no controlling authority that conflicts with the First District's decision in this case.

This is a case of simple statutory construction. The Court of Appeals correctly held that the word "report" in R.C. 3721.24 does not include the qualifier "to the Director of Health." This unremarkable conclusion is not one that requires examination by this Court. Because there is no reported or controlling authority in Ohio to the contrary, this case is not one of public or great general interest. The decision of the Court of Appeals should stand.

II. Appellee's Explanation Of Why This Case Is Of Public Or Great General Interest

This appeal presents an issue of public or great general interest because of the significant public policy implications rendered by the appellate court's decision.

Ohio has a clear public policy in favor of reporting and preventing abuse and neglect and of notifying sponsors of nursing home residents of changes in medical care or condition. The First District Court of Appeals correctly found that R.C. § 3721.24 provides protection for any reports of suspected abuse and neglect that are made or intended to be made, not just those made or intended to be made to the Director of Health. The Court then concluded that because Hulsmeier was already protected by R.C. § 3721.24, she could not prevail on a claim of wrongful discharge in violation of public policy. If this Court reverses the appellate court's decision, and finds that Hulsmeier does not have a claim under R.C. § 3721.24 because she made a report to a family member and not to the Director of Health, Ohio's public policy would be in jeopardy, and could only be protected if Hulsmeier can proceed with a claim for wrongful discharge in violation of public policy.

A wrongful discharge cause of action is necessary to protect public policy in situations where employees like Hulsmeier report suspected abuse or neglect to nursing home management, to family members in accordance with R.C. § 3721.13(A)(32), OAC § 3701-17-12(A) and the Ohio Department of Health's Abuse, Neglect, Misappropriation (ANM) Investigation Guide, to law enforcement, or to anyone else necessary to protect residents.

If R.C. § 3721.24 provides only the limited protection that Appellants/Cross-Appellees argue it does, then Ohio's public policy that encourages individuals to report abuse and neglect, encourages protection of those who make such reports, and obligates hospice programs to inform a resident's sponsor of changes in condition, is at serious risk. If the statute explicitly protects only persons who make reports to the Director of Health, then Ohio's public policy can be

protected only if a wrongful discharge public policy claim can be pursued by employees or others who report abuse or suspected abuse to anyone who might take steps to protect the resident.

III. Statement Of The Case And Facts

This case involves the wrongful termination of a registered nurse who reported the suspected abuse and neglect of a nursing home resident. Hulsmeyer is a registered nurse and formerly served as a Team Manager for Hospice. Hulsmeyer's duties included overseeing the care of Hospice's patients who resided at one of Brookdale's facilities in Cincinnati, and supervising other nurses who provided care to those residents. (T.d. 2 at ¶¶ 6-9).

Upon learning of the suspected abuse or neglect of one of Hospice's patients at Brookdale, Hulsmeyer immediately called the Director of Nursing at Brookdale, Cynthia Spaunagle, to report her suspicions of abuse or neglect. (T.d. 2 at ¶ 11). Spaunagle said that she would contact the patient's daughter. (T.d. 2 at ¶ 11). Next, Hulsmeyer reported the suspected abuse to her own supervisor, Hospice's Chief Clinical Officer, Isha Abdullah, but Abdullah did not appear to take the report seriously. (T.d. 2 at ¶ 12). Hulsmeyer then called the patient's daughter, who was also the patient's power of attorney, reported the suspected abuse, and informed her that Spaunagle would be contacting her. The next day Hulsmeyer submitted a written report to Abdullah detailing the suspected abuse or neglect. (T.d. 2 at ¶ 15). Soon thereafter, in a letter signed by Hospice's CEO, Killian, and Abdullah, Hospice informed Hulsmeyer that she was terminated. (T.d. 2 at ¶¶ 25-26).

Hulsmeyer filed suit, claiming retaliation in violation of R.C. § 3721.24, wrongful discharge in violation of Ohio public policy, and tortious interference with a business relationship. The trial court dismissed Hulsmeyer's R.C. § 3721.24 and public policy claims. The appellate court reversed the dismissal of the R.C. § 3721.24 claim, concluding that

Hulsmeyer did not need to report the suspected abuse to the Ohio Director of Health to state a claim for retaliation under R.C. § 3721.24. Hulsmeyer also appealed the trial court's determination that in the absence of protection under R.C. § 3721.24, Ohio public policy is not jeopardized when nursing home employees are terminated for reporting abuse or neglect to the employer, a family member of the resident, law enforcement, or other appropriate entity. The appellate court held that because R.C. § 3721.24 sufficiently protects Hulsmeyer, she could not prevail on her public policy claim.

Appellants filed a notice of appeal and Memorandum in Support of Jurisdiction on November 12, 2013. Hulsmeyer filed a notice of cross-appeal on November 20, 2013.

IV. Arguments On Propositions Of Law

A. Appellee's Response To Appellants' Proposition Of Law:

Under the plain language of R.C. § 3721.24, the making of a report or the intention to make a report of suspected abuse or neglect of a resident is protected activity. R.C. § 3721.24 is unambiguous and its protection should not be limited by R.C. § 3721.22 to persons who make or intend to make such reports only to the Director of Health.

Appellants assert that a threshold finding of ambiguity is not necessary to apply the doctrine of *in pari materia* to R.C. § 3721.24. Only one unpublished and non-controlling opinion, *Arsham-Brenner v. Grande Point Health Care Community*, 8th Dist. No. 74835, 2000 WL 968790 (July 13, 2000), contradicts the First District's opinion that R.C. § 3721.24 is unambiguous and need not be interpreted by looking to other statutes for assistance.

Appellants cite to five Ohio Supreme Court cases for the proposition that the *in pari materia* doctrine can be applied without any threshold finding of ambiguity. Though the Court in these cases may not explicitly use the word "ambiguous" or a derivation thereof, a threshold finding of ambiguity is implicit in every single one.

The Court repeatedly stresses the importance of the statutes' plain language in these cases; it is clear that the statutes in these cases are only read in *pari materia* because further clarification is necessary, e.g., when a different, definitional statute specifically defines an unclear term in the substantive statute or when the case involves an issue that is not contemplated by the statute and must be clarified by other statutes. Not one of the cases cited by Appellants pulls a term from a substantive, non-definitional statute and inserts it into a separate substantive statute, thereby changing its meaning, as Appellants propose should be done with R.C. § 3721.22 and R.C. § 3721.24.

For example, the two statutes at issue in *Chesapeake Exploration, L.L.C. v Oil & Gas Comm.*, 135 Ohio St.3d 204, 2013-Ohio-224—R.C. § 1509.36 and § 1509.06(F)—were read in *pari materia* because one of them clearly and unambiguously made the other inapplicable to the case. The issue was whether the issuance of a drilling permit by the Division chief was appealable to the Commission. Revised Code § 1509.36 states: “Any person adversely affected by an order of the chief . . . may appeal.” Revised Code § 1509.06(F) states: “The issuance of a permit shall not be considered an order of the chief.” Clearly, then, the issuance of the permit was not an “order of the chief” and was therefore not subject to R.C. § 1509.36. The Court stressed the importance of the plain language of the statutes: “R.C. 1509.06(F) *manifestly* divests the commission of appellate jurisdiction over the chief’s decisions to issue permits for oil and gas wells”; “[B]y the plain language of these provisions, the chief’s issuance of a permit for an oil and gas well does not constitute an order of the chief and cannot be appealed to the commission.” *Id.* at ¶ 15 (emphasis added).

Revised Code § 3721.22, by contrast, is not a definition or restriction of R.C. § 3721.24. To the contrary, R.C. § 3721.22 is a completely distinct and separate statute that requires certain

behavior of licensed health professionals—specifically, that they report abuse or suspected abuse to the Director of Health. But R.C. § 3721.24 is not limited to licensed health professionals, does not *require* reports, and forbids retaliation against *all* individuals who report abuse or neglect. Both statutes are substantive in nature, serve separate purposes, and should not be read together unless ambiguity requires it.

Likewise, the statutes in *Carnes v. Kemp*, 104 Ohio St.3d 629, 2004-Ohio-7107 necessarily flow from one another and *must* be read together, unlike R.C. § 3721.22 and § 3721.24. Revised Code § 3111.05 sets forth the statute of limitations for determining parentage actions, and R.C. § 3111.13(C) gives the trial court authority to order support once a determination of parentage is made. Logic dictates that R.C. § 3111.13(C) is wholly inapplicable if the statute of limitations in R.C. § 3111.05 is not first met. It is also important to note that the *Carnes* court, like the *Chesapeake* court, specifically looked to the “plain language of the pertinent statutes” before construing them together, which shows that a threshold finding of ambiguity is a persistent concern in all statutory construction. *Id.* at ¶ 17.

A finding of ambiguity was also implicit in *State ex rel. Shisler v. Ohio Pub. Emp. Retirement Sys.*, 122 Ohio St.3d 148, 2009-Ohio-2522. At issue was the effective date of a retirant’s application for a change in a pension-payment plan. The statute at issue, R.C. 145.46(E)(1)(a)(2), provides: “The plan elected under this division shall become effective on the date of receipt by the board of an application” *Id.* at ¶ 17. The applicant died the day after he mailed his application for a change in the plan to the board, before the board had received it. The Court found that the application was ineffective because, pursuant to other sections of Chapter 145, pension benefits are payable *at death*. When the retirant died, his old plan was in effect, and his benefits became payable at that time, under the old plan. Because the application

was received after death, it was ineffective. This result was mandated by the direct contradiction between the retirant's interpretation of the statute, and those portions of the statute that made benefits payable upon death. They could not both be right. Like the statutes in *Chesapeake Exploration*, supra, one statutory provision was in direct contradiction to one party's interpretation of another provision. A threshold finding of ambiguity in R.C. § 145.46(E)(1)(a)(2) was implicit in the Court's decision.

The statutes in *Cater v. Cleveland*, 83 Ohio St.3d 24, 29 (1998)—R.C. § 2744.01(C)(2)(u) and R.C. § 2744.02(B)—are similar to those in *Chesapeake* in that R.C. § 2744.01(C)(2)(u) is non-substantive and serves only to define the term “governmental function.” Therefore, it is necessarily referred to when analyzing R.C. § 2744.02(B), which imposes liability upon political subdivisions for buildings used in connection with governmental functions. *Id.*

The ambiguity underlying the issue in *Johnson's Markets, Inc. v. New Carlisle Dept. of Health*, 58 Ohio St.3d 28, 31, 35 (1991)—whether the legislature intended to vest the regulatory control of food in the Department of Agriculture or in the boards of city health districts—dictated the necessity of construing together various statutes pertaining to food manufacture, sales, and handling. Only upon reviewing all the applicable statutes was the Court able to conclude that the legislature intended to grant some regulatory authority in city health districts.

Appellants are mistaken in asserting that two distinct, substantive statutes can be read in *pari materia* without a threshold finding of ambiguity. Consistent with the Ohio rule, the United States Supreme Court made clear in *Erlenbaugh v. U.S.*, 409 U.S. 239, 243-45, 93 S.Ct. 477, 34 L.Ed.2d 446 (1972) that statutes that play different roles in achieving broad, common goals should not be construed in *pari materia* unless ambiguities or doubts exist. The petitioners in the

case challenged the legality of their convictions under 18 U.S.C. § 1952 by arguing that their allegedly illegal actions fell within an exception contained in 18 U.S.C. § 1953; therefore, under an in pari materia reading that construed the two statutes as one law, their § 1952 prosecution was improper. *Id.* at 243. In affirming their convictions, the Court noted:

[P]etitioners would have us resort to the exception contained in § 1953(b)(3) not simply to resolve any ‘ambiguities (or) doubts’ in the language in § 1952 but to introduce an exception to the coverage of the latter where none is now apparent. This might be a sensible construction of the two statutes if they were intended to serve the same function, but plainly they were not. *Id.* at 244-45.

Similarly, R.C. § 3721.22 and R.C. § 3721.24 serve two different functions and should not be construed to introduce terms into one another, especially without a threshold finding of ambiguity. R.C. § 3721.22 is necessarily specific about reporting abuse to the Director of Health because it is a directive statute requiring certain behavior of licensed health professionals. Without this specificity, licensed health professionals would be in doubt about their compliance with the statute’s requirements. R.C. § 3721.24, as a protective statute, is purposely broad in its grant of whistleblower protection to *any* employee who reports abuse.

B. Appellee’s Proposition Of Law:

If R.C. § 3721.24 protects only employees or other persons who make reports of suspected abuse or neglect of a resident to the Director of Health, then persons who make such reports to an employer, to a family member of the resident, to law enforcement, or to other appropriate persons or entities must be permitted to assert claims for retaliation in violation of public policy.

Hulsmeyer agrees with the First District Court of Appeals that R.C. § 3721.24 protects all reports of suspected abuse and neglect that are made or intended to be made, not just those reports that are made or intended to be made to the Director of Health. Hulsmeyer also concedes that the remedy afforded her by the appellate court’s reading of R.C. § 3721.24 is sufficient to vindicate the public policy of protecting the rights of nursing home residents and of others who would report violations of those rights.

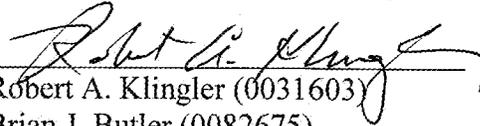
However, should this Court conclude that Hulsmeyer has no retaliation claim under R.C. § 3721.24 because she did not make her report to the Director of Health, then she asks the Court to reverse the First District's decision on her public policy claim and hold that Hulsmeyer has a claim for wrongful discharge in violation of public policy that may proceed to trial.

Ohio has a clear public policy in favor of reporting and preventing abuse and neglect and of notifying sponsors of nursing home residents of changes in medical care or condition. This public policy would be in jeopardy if Hulsmeyer is prevented from asserting a retaliation claim under R.C. § 3721.24, and is also left without a claim for wrongful discharge in violation of public policy. Employers would be free to retaliate against employees who report abuse to their managers, to family, to sponsors, and even to law enforcement. The chilling effect the threat of such retaliation would have on employees' willingness to report abuse is obvious, as is the resulting harm to Ohio's policy of protecting our most vulnerable citizens.

V. Conclusion

For the foregoing reasons, Appellee/Cross-Appellant Hulsmeyer respectfully requests that this Court decline jurisdiction over Appellants/Cross-Appellees' appeal. If this Court accepts jurisdiction, Hulsmeyer respectfully requests in the alternative that it also accept jurisdiction over her cross-appeal.

Respectfully submitted,



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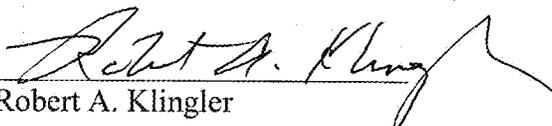
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been duly served upon the following by
electronic and regular U.S. mail this 11th day of December, 2013 to:

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