

No. 2013-1766

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO
APPEALS CASE No. C 120822

PATRICIA HULSMEYER,

Plaintiff-Appellee,

v.

HOSPICE OF SOUTHWEST OHIO, INC., et al.,

Defendants-Appellants.

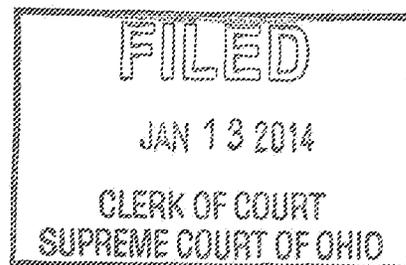
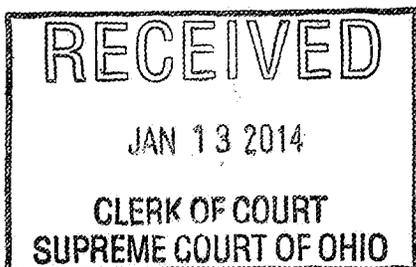
**APPELLANT/CROSS-APPELLEE HOSPICE OF SOUTHWEST OHIO, INC.'S
MEMORANDUM IN RESPONSE TO APPELLEE/CROSS-APPELLANT PATRICIA
HULSMEYER'S MEMORANDUM IN SUPPORT OF JURISDICTION**

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I. Appellant/Cross-Appellee's Response to Appellee/Cross-Appellant's Statement of why this case presents an issue of public or great general interest

Appellee/Cross-Appellant Patricia Hulsmeyer's (hereinafter "Hulsmeyer") appeal does not present an issue of first impression, does not offer any conflict between appellate districts, and merely proposes an issue that has already been resolved by well-settled law. Hulsmeyer argues that if this Court reverses the First District regarding her retaliation claim to determine that she was required to report suspected abuse to the Director of Health and Hulsmeyer does not have a claim under R.C. 3721.24, she should then be permitted to proceed with a claim for wrongful discharge in violation of public policy. This premise ignores applicable law and does not demonstrate that this issue is of public or great general interest for appeal.

The law in Ohio has established that there cannot be a separate wrongful discharge claim because the public policy of protecting resident abuse and reporting violations of resident abuse is embodied and adequately protected in R.C. 3721.24 and the public policy would therefore not be jeopardized without the separate wrongful discharge tort. In *Dolan v. St. Mary's Mem. Home*, 153 Ohio App.3d 441, 2003-Ohio-3383, at ¶ 16 (1st Dist.), the First District ruled there is no public policy claim outside of R.C. 3721.24 and held, "[t]he public policy embodied in R.C. Chapter 3721 of protecting the rights of nursing-home residents and of others who report violations of those rights would not be jeopardized in the absence of a common-law wrongful discharge tort."

On Appeal for the instant matter, the First District correctly followed its decision in *Dolan* and this Court's decision in *Wiles v. Medina Auto Parts*, 96 Ohio.3d 241, 2002-Ohio-3994, 773 N.E.2d 526 and found that "because the remedies provided by R.C. 3721.24 were

sufficient to vindicate the 'public policy embodied in R.C. Chapter 3721 of protecting the rights of nursing-home residents and of others who would report violations of those rights,' the public policy expressed in Chapter 3721 would not be jeopardized by the lack of a common-law public-policy claim."

The issue pending before this Court regarding Hulsmeyer's retaliation claim under R.C. 3721.24 does not impact the outcome of her wrongful discharge claim. Even if this Court determines that Hulsmeyer cannot maintain a retaliation claim under 3721.24, her wrongful discharge claim still fails based on routine application of well-settled law. Accordingly, Hulsmeyer's argument that she should have a common law cause of action if she does not have a claim under R.C. 3721.24 does not present an issue worthy of appeal.

II. Counterstatement of the case and facts¹

Hulsmeyer, a Registered Nurse, previously worked for Hospice as a Team Manager, overseeing the care of Hospice's patients and monitoring the work of other nurses and aides. (T.d. 2 at ¶ 6). Hospice provides hospice care to residents of long-term care facilities and residential care facilities. (T.d. 2 at ¶¶ 2, 3). Appellant Killian is the Chief Executive Officer of Hospice. (T.d. 2 at ¶¶ 2, 3).

Hulsmeyer alleges that Hospice terminated her employment after she reported suspected abuse to a patient's family. (T.d. 2 at ¶¶ 31-24). It is undisputed that Hulsmeyer did not report any suspected abuse to the Ohio Director of Health. Hulsmeyer alleges she was subject to retaliation in violation of R.C. 3721.24 by Hospice, Killian, and Appellant

¹ Hospice also relies on the facts as previously set forth in its joint memorandum in support of jurisdiction and for the purposes of this memorandum, will focus on the facts related specifically to the cross-appeal.

Brookdale for making a report of suspected abuse and/or neglect of a resident. (T.d. 2 at ¶¶ 28-45).

Pertinent to the instant Response, Hulsmeyer alleges Hospice terminated her in violation of public policy, relying on a public policy protecting reports of suspected abuse, and brought a wrongful discharge against public policy claim against Hospice. (T.d. 2 at ¶ 47). Hospice moved to dismiss Hulsmeyer's wrongful discharge claim under 12(B)(6) for failure to state a claim. The trial court granted Hospice's motion and dismissed Hulsmeyer's wrongful discharge claim because R.C. 3721.24 provided a statutory remedy that adequately protected society's interest and there is no separate common-law claim.

On appeal, the First District Court of Appeals correctly upheld the trial court's decision to dismiss Hulsmeyer's wrongful discharge claim against Hospice. The First District properly determined that Hulsmeyer has a sufficient remedy under R.C. 3721.24 and the public policy expressed in Chapter 3721 would not be jeopardized by the lack of a separate common-law public-policy claim. Hulsmeyer is now seeking to appeal the First District's decision upholding the trial court's dismissal of her wrongful discharge claim.

III. Argument

Counterproposition of Law

Hulsmeyer cannot recover in a wrongful-discharge tort when the public policy is based on reporting suspected abuse because R.C. 3721.24 provides an adequate remedy and the public policy is not jeopardized in the absence of a separate common law claim.

Even if this Court rules that Hulsmeyer does not have a retaliation claim under 3721.24, she still does not have a wrongful discharge claim against Hospice because there is no separate public policy outside of R.C. 3721.24 under well-established law.

In order to establish a public policy wrongful discharge claim, Hulsmeyer must prove that (1) a clear public policy exists; (2) dismissing employees under circumstances like hers would jeopardize the public policy; (3) causation; and (4) Hospice lacked an overriding legitimate business justification for the dismissal. *Collins v. Rizkana*, (1995), 73 Ohio St.3d 65, 69-70, 1995 Ohio 135, 652 N.E.2d 653; *Chapman v. Adia Services, Inc.* (1997), 116 Ohio App.3d 534, 541-542, 688 N.E.2d 604. Hulsmeyer cannot establish the jeopardy element because R.C. 3721.24 provides the appropriate remedy and a common-law tort outside of the statute is unnecessary as a matter of law.

On Appeal for the instant matter, the First District correctly followed its decision in *Dolan* and this Court's decision in *Wiles v. Medina Auto Parts*, 96 Ohio.3d 241, 2002-Ohio-3994, 773 N.E.2d 526 and found that "because the remedies provided by R.C. 3721.24 were sufficient to vindicate the 'public policy embodied in R.C. Chapter 3721 of protecting the rights of nursing-home residents and of others who would report violations of those rights,' the public policy expressed in Chapter 3721 would not be jeopardized by the lack of a common-law public-policy claim."

In her cross-appeal, Hulsmeyer even concedes that the remedy afforded to her by 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. (Cross-Appeal, 11). Regardless of the outcome on Hulsmeyer's retaliation claim on appeal, her wrongful discharge claim fails because there cannot be a separate public policy claim as society's interests are adequately protected under R.C. 3721.24.

Furthermore, if this Court finds that Hulsmeyer, a licensed health professional, was required to report suspected abuse to the Director of Health to gain protection under R.C.

3721.24, her wrongful discharge claim fails for the additional reason that she did not comply with the requirements of R.C. 3721. Ohio law is clear that when an employee's discharge is not actionable under the law that establishes the "clear public policy," the related common-law claim for relief likewise fails as a matter of law. *Arsham-Brenner v. Grande Point Health Care Community*, 8th Dist No. 74835, 2000 Ohio App. LEXIS 3164, *24, 25 (July 13, 2000) citing *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 152-153, 677 N.E.2d 308 (syllabus ¶ 3).

In *Kulch v. Structural Fibers, Inc.*, this Court held, "[a]n at-will employee who is discharged or disciplined in violation of the public policy embodied in R.C. § 4113.52 may maintain a common-law cause of action against the employer . . . so long as the employee had fully complied with the statute and was subsequently discharged or disciplined." *Id.* Likewise, and directly relevant to Hulsmeyer, in *Arsham-Brenner*, the Eighth District Court of Appeals determined that because the plaintiff had not established grounds for relief under R.C. 3721.24, she could not *also* sustain her wrongful discharge claim. *Arsham-Brenner*, 2000 Ohio App. LEXIS at *25. Hulsmeyer does not have a common law wrongful discharge claim because her remedy lies in R.C. 3721.24 **and** because she failed to comply with the requirements of the statute.

Even if the Court determines R.C. 3721.24 requires a report of suspected abuse to the Director of Health, Hulsmeyer's wrongful discharge claim fails for the additional reason that she did not follow the requirements of the statute.² Accordingly, Hulsmeyer's

² As set forth in Hospice's joint memorandum in support of jurisdiction, R.C. 3721.22 and R.C. 3721.24 should be read together, and when read together, Hulsmeyer failed to meet the requirements of the statute to qualify for protection because she did not report suspected abuse to the Director of Health.

wrongful discharge claim is not worthy of this Court's review because the issue is well-settled in the law.

IV. Conclusion

The law is established that Hulsmeyer cannot assert a separate wrongful discharge claim because the public policy of protecting resident abuse and reporting violations of resident abuse is embodied in R.C. 3721.24 and the public policy would not be jeopardized without the separate wrongful discharge tort. Based on the foregoing, the First District's correct decision to uphold dismissal of Hulsmeyer's wrongful discharge claim does not impact this Court's decision on Defendant-Appellant's jurisdictional appeal and the certified conflict. Accordingly, Appellant/Cross-Appellee Hospice of Southwest Ohio, Inc. respectfully requests that this Court decline jurisdiction because Appellee/Cross-Appellant Hulsmeyer failed to raise any issue worthy of the Court's review.

Respectfully submitted,



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A copy of the foregoing was served on January 10, 2014 pursuant to App.R. 13(C)(3)

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