

ORIGINAL

IN THE SUPREME COURT OF OHIO

PATRICIA HULSMEYER,	:	
	:	CASE NO. 2013-1644
Plaintiff-Appellee,	:	& 2013-1766
	:	
vs.	:	On Appeal from the Hamilton
	:	County Court of Appeals,
HOSPICE OF SOUTHWEST OHIO, Inc., et al.	:	First Appellate District
	:	
Defendants-Appellants.	:	Case No. C 120822

BRIEF OF AMICUS CURIAE
OHIO EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF
APPELLEE/CROSS-APPELLANT PATRICIA HULSMEYER

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TABLE OF CONTENTS

Table of Contents		i
Table of Authorities		iii
I. STATEMENT OF INTEREST		1
II. INTRODUCTION AND SUMMARY OF ARGUMENT		2
III. STATEMENT OF FACTS AND THE CASE		5
IV. LAW AND ARGUMENT.....		5

Proposition of Law I: The termination of a nurse in retaliation for reporting abuse or neglect of a nursing home resident to the nurse’s supervisors and the resident’s family violates the plain language of Revised Code Section 3721.24, which bars retaliation for making a report of abuse or neglect, or for even indicating an intention to make such a report.

A.	The Plain Language of Section 3721.24 Rejects the Defendants’ Claimed License to Fire Nurses for Attempting to Protect the Health and Safety of Nursing Home Residents	5
B.	Reading Section 3721.24 “In Pari Materia” with Adjacent Statutory Provisions Is Unnecessary, and It Actually Undermines the Defendants’ Claim that the General Assembly Intended to Protect Only One Particular Kind of Report of Abuse and Neglect	8
1.	<i>The Canons of Construction, Including “In Pari Materia,” Must Not Be Employed in Interpreting Unambiguous Statutes</i>	9
2.	<i>Reading Section 3721.24 “In Pari Materia” with Sections 3721.22 and 3721.23 Demonstrates the General Assembly’s Intent to Protect a Broader Range of Activity in Section 3721.24 than in the Adjacent Provisions</i>	12

Proposition of Law II: The termination of a nurse in retaliation for reporting abuse or neglect of a nursing home resident to the nurse’s supervisors and the resident’s family violates the strong and obvious public policies embodied in Chapter 3721 in favor of protecting the health and safety of nursing home residents and guaranteeing the rights of residents and their families to immediate notification regarding any problems with their care.

C.	Permitting nurses to be terminated with impunity for notifying others of potential abuse or neglect would jeopardize Ohio’s clear public policies in favor of protecting nursing home residents and keeping residents and their families informed regarding their care.	17
1.	<i>The Clear Right of Residents and Their Families to Information Regarding the Resident’s Care Would Be Jeopardized if Nursing Homes Could Punish Nurses for Informing Residents’ Families of Critical Incidents</i>	18
2.	<i>Section 3721.24 Expresses a Clear Public Policy in Favor of Protecting Nursing Home Residents from Abuse, Neglect, and Misappropriation</i>	20
V.	CONCLUSION	22
	Certificate of Service	23

TABLE OF AUTHORITIES

Cases

<i>Collins v. Rizkana</i> (1995), 73 Ohio St.3d 65, 652 N.E.2d 653	18
<i>In re Election of Member of Rock Hill Local Sch. Dist. Bd. of Educ.</i> (1996), 76 Ohio St. 3d 601, 608, 669 N.E.2d 1116	13-14
<i>Krueger v. Krueger</i> (1924), 111 Ohio St. 369, 145 N.E. 753	10-11
<i>Maggiore v. Kovach</i> , 101 Ohio St. 3d 184, 2004-Ohio-722, 803 N.E.2d 790	13
<i>State ex rel. Apcompower, Inc. v. Industrial Commission</i> , 108 Ohio St. 3d 196, 2006-Ohio-659, 842 N.E.2d 498	13
<i>State ex rel. Carna v. Teays Valley Local School District Board of Education</i> , 131 Ohio St. 3d 478, 2012-Ohio-1484, 967 N.E.2d 193	6-8, 13
<i>State ex rel. Crawford v. Industrial Commission</i> (1924), 110 Ohio St. 271, 143 N.E. 574	10
<i>State ex rel. O'Neil v. Griffith</i> (1940), 136 Ohio St. 526, 27 N.E.2d 142	11
<i>State Farm Mut. Auto. Ins. Co. v. Webb</i> (1990), 54 Ohio St. 3d 61	9
<i>State v. Buehler</i> , 113 Ohio St. 3d 114, 2007-Ohio-1246, 863 N.E.2d 124	11-12
<i>State v. Robinson</i> , 124 Ohio St.3d 76, 2009-Ohio-5937	9
<i>Sutton v. Tomco Machining, Inc.</i> , 129 Ohio St. 3d 153, 2011-Ohio-2723, 950 N.E.2d 938	4, 20-21
<i>Wiles v. Medina Auto Parts</i> , 96 Ohio St.3d 241, 2002-Ohio-3994, 773 N.E.2d 526	19-20

Statutes

Ohio Constitution, Article 2, Section 26 10

Ohio General Code Section 1465-82 10

Ohio Revised Code Section 1923.04 13

Ohio Revised Code Section 3509.05 14

Ohio Revised Code Section 3721.13 3, 17, 19-20

Ohio Revised Code Section 3721.17 19

Ohio Revised Code Section 3721.22 3, 12,14-16, 20

Ohio Revised Code Section 3721.23 2, 3, 5, 12, 14-16

Ohio Revised Code Section 3721.24 *passim*

Ohio Revised Code Section 3721.25 8

Ohio Revised Code Section 4123.90 21

I. STATEMENT OF INTEREST

The Ohio Employment Lawyers Association (OELA) is the state-wide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment and civil rights disputes. OELA is the only state-wide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. NELA and OELA strive to protect the rights of their members' clients, and regularly support precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics, and judicial integrity.

As an organization focused on protecting the interests of workers who are subjected to workplace discrimination and retaliation, OELA has an abiding interest in ensuring that employees are not subjected to terminations when they engage in protected activity, such as the good-faith reporting of illegal, unsafe, or fraudulent activity. Such terminations suppress reports of wrongful activity and endanger the public—particularly in situations where, as here, the protected activity involves the protection of vulnerable nursing home residents from abuse and neglect. OELA files this amicus brief to cast light on these issues and to call attention to the impact the decision in this case could have on the safety of nursing home residents.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

“We got rid of our problem, what are you going to do?” According to the Defendants, there was nothing improper about this conversation between nursing home and hospice managers, or about the ensuing, openly retaliatory termination of a nurse for reporting the possible abuse of a nursing home resident to her supervisors and the resident’s family. They argue these actions were permissible despite clear statutory language prohibiting retaliation against any employee “who, in good faith, makes a report of suspected abuse or neglect of a resident or misappropriation of the property of a resident; indicates an intention to make such a report; provides information during an investigation of suspected abuse, neglect, or misappropriation conducted by the director of health; or participates in a hearing conducted under section 3721.23 of the Revised Code or in any other administrative or judicial proceedings pertaining to the suspected abuse, neglect, or misappropriation.” R.C. 3721.24(A).

The Defendants reach this untenable conclusion by adding the words “to the director of health” to the end of the first clause of this statutory provision—words the General Assembly deliberately chose not to add, despite using them in other provisions (and elsewhere in the same provision) enacted at the same time, as part of the same statutory scheme. Ironically, the Defendants attempt to justify this insertion of words, which would mean the antiretaliation protections of Section 3721.24 apply only to reports made specifically to the director of health, by citing the canon of construction called “*in pari materia*,” which requires the Court to construe ambiguous statutory language by reference to related, adjacent statutes.

This vain effort to add words to an unambiguous statute must fail—not only because the canon of *in pari materia* is not applied to clear, unambiguous language like the term “makes a report of suspected abuse or neglect,” but also because using the canon would simply make the

General Assembly's intent to protect the Plaintiff's conduct here even clearer. Section 3721.22, the key provision the Defendants rely upon, provides a perfect example of the General Assembly using the exact limiting language, "report to the director of health," that is *not* found in Section 3721.24. This difference is the clearest possible indicator that the General Assembly knew very well how to apply such a limitation, but chose not to do so in Section 3721.24.

Though the Defendants fail to recognize it, such a contrast makes sense: Section 3721.22 provides narrow immunity from civil and criminal liability for individuals who participate in the specific proceedings arising from a report to the director of health, just as those who testify in court hearings receive limited immunity from suit for truthful testimony. Section 3721.24 has a distinct, broader purpose. In recognition of the exposure of at-will employees to retaliatory employment actions (and nursing home residents, to retaliatory abuse), it broadly protects those who make good-faith efforts of any kind to report misconduct—and, unlike Section 3721.22, it extends protection to those who even indicate their intent to make a report, as well as those who participate in other proceedings, outside the jurisdiction of the Department of Health.

The effects of adopting the Defendants' narrow interpretation of the statute would be devastating to the rights of nursing home residents, who are among Ohio's most vulnerable citizens. The General Assembly enacted a statutory scheme that zealously protects these citizens' rights, including through a "bill of rights" (R.C. 3721.13), a regulatory enforcement scheme (R.C. 3721.22 and 3721.23), and a whistleblower protection statute (R.C. 3721.24). Without these provisions, residents and their families will have no assurances that what happens within the walls of a nursing home, no matter how egregious or harmful, will ever come to light. Those who are victimized by nursing home abuse are often essentially voiceless. It is their caregivers and family members who must be responsible for protecting them.

Ms. Hulsmeyer, by notifying her supervisors and a resident's family of potential abuse, unquestionably did the right thing. Yet the Defendants request that the Court apply an obsessive focus on *how* she did the right thing. It makes little difference to a nursing home resident whether a nurse is punished or fired for making a report to the resident's family or for making the same report to the director of health—either action will be just as effective in deterring that nurse and the resident's other protectors from bringing suspected abuse or neglect to light.

Amicus curiae OELA requests that this Court apply the plain language of the statute to protect those who make reports of abuse or neglect, without limiting that protection by relying on language the General Assembly did not use and could not conceivably have intended to use.

In the alternative, the Court should recognize a wrongful discharge claim based on the clear public policies embodied throughout Chapter 3721 of the Revised Code, including the policies guaranteeing residents and their families the right to prompt and open communication from their caregivers. These policies are independent of the antiretaliation provisions of Section 3721.24, as they cover reports to family members of not just abuse or neglect, but any important change in the resident's condition. The General Assembly even underscored the importance of this policy by requiring such a change to be reported to the resident's family within twelve hours. Such policies would be rendered ineffective if employers could simply terminate employees, and deter their co-workers, when they convey vital information of any kind to residents' families.

If the Court construes Section 3721.24 as the Defendants ask, limiting its scope to formal reports to the director of health, the Court should correct this unintended gap in the statutory bar against retaliation by recognizing a wrongful discharge claim based on the policies embodied in Section 3721.24 and other provisions protecting nursing home residents from abuse and neglect.

Sutton v. Tomco Machining, Inc., 129 Ohio St. 3d 153, 2011-Ohio-2723, 950 N.E.2d 938.

III. STATEMENT OF FACTS AND THE CASE

Amicus curiae OELA adopts the Appellee's Statement of Facts and the Case.

IV. LAW AND ARGUMENT

PROPOSITION OF LAW I: The termination of a nurse in retaliation for reporting abuse or neglect of a nursing home resident to the nurse's supervisors and the resident's family violates the plain language of Revised Code Section 3721.24, which bars retaliation for making a report of abuse or neglect, or for even indicating an intention to make such a report.

A. The Plain Language of Section 3721.24 Rejects the Defendants' Claimed License to Fire Nurses for Attempting to Protect the Health and Safety of Nursing Home Residents.

Although its implications for the health and safety of some of Ohio's most vulnerable citizens are grave, this case should begin and end with a very clear-cut question of statutory interpretation. Section 3721.24(A) provides, in relevant part, that "No person or government entity shall retaliate against an employee *** who, in good faith, makes a report of suspected abuse or neglect of a resident or misappropriation of the property of a resident; indicates an intention to make such a report; provides information during an investigation of suspected abuse, neglect, or misappropriation conducted by the director of health; or participates in a hearing conducted under section 3721.23 of the Revised Code or in any other administrative or judicial proceedings pertaining to the suspected abuse, neglect, or misappropriation."

The simple question here is whether the statute limits "a report of suspected abuse or neglect of a resident" to only a very specific type of report to the Director of Ohio's Department of Health, or covers all good-faith reports, including reports to a supervisor or to a resident's responsible family members. The answer is just as simple: the statute does not specify that the report must be made to the director of health, or to anyone else in particular, so there is no reason to apply anything except the ordinary meaning of the term "report."

The Defendants assert a right to terminate a nurse or other employee for making a good-faith report of abuse or neglect, so long as the report is made to anyone other than the director of health. According to their reasoning, the word “report” in Section 3721.24 should be read as “report [to the director of health],” despite the General Assembly’s decision not to use those additional words, or any similar words, in the statutory text. Such a reading disregards this Court’s repeated warnings against “construing” an unambiguous statute by adding words. In fact, as discussed below, it even ignores the implications of the very rules of construction that would apply if the statute were not as clearly worded as it is.

This Court recently summarized this principle of statutory construction, in *State ex rel. Carna v. Teays Valley Local School District Board of Education*:

Venerable principles of statutory construction require that in construing statutes, we must give effect to every word and clause in the statute. We must read words and phrases in context and construe them in accordance with rules of grammar and common usage, and we may not restrict, constrict, qualify, narrow, enlarge, or abridge the General Assembly’s wording. Instead, we must accord significance and effect to every word, phrase, sentence, and part of the statute, and abstain from inserting words where words were not placed by the General Assembly. No part of the statute should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative. Statutes must be construed, if possible, to operate sensibly and not to accomplish foolish results. When we conclude that a statute’s language is clear and unambiguous, we apply the statute as written, giving effect to its plain meaning.

131 Ohio St. 3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶¶ 18-20 (quotations omitted). In other words, the General Assembly means what it says and says what it means. In *Carna*, the respondent school board sought to restrict an administrator’s right to request a meeting to discuss the reasons for non-renewing her contract, arguing that the request needed to be made within a particular time frame. The Court unanimously rejected that argument for the same reason it

should reject the Defendants' argument here: the statute governing meeting requests contained no language limiting the time or manner of a valid request, just as Section 3721.24(A) contains no language limiting the recipient of a report of abuse or neglect.¹

There is a second, equally compelling reason reports other than those to the director of health are plainly covered by the language of Section 3721.24(A): it includes not just an employee who actually makes a report of abuse or neglect, but also one who merely "indicates an intention to make such a report." Thus, if a nurse prepares a written report of an incident (without listing the intended recipients), the statute bars an employer from firing that nurse upon discovering the draft report, even if it has not yet been filed. And if a nurse witnesses an incident of abuse along with other employees, and tells the others the incident "needs to be reported," the employer cannot fire the nurse for such a statement, even if the nurse informs only her co-workers who are already aware of the incident, and does not say who should receive the report.

In either of these scenarios, the employer will not necessarily know whether the nurse intends to make a report to the director of health, to a supervisor, to a resident's family member, or to some other person or agency. All the employer will know is that the nurse suspects abuse, has discussed it with others, and does not intend to let it slide. But under the Defendants' interpretation of this clause (which contains the same wording as the clause addressing actual reports), a court would need to determine whether the nurse's "indicated intention" was to make a report specifically to the director of health (in which case the nurse would be protected) or was merely a general statement of an intent to call the incident to others' attention (in which case the nurse could be fired with impunity). Such an absurd result, requiring a nurse to use "magic

¹ The answer is actually much clearer here. In *Carna*, one might have expected the General Assembly to require a meeting request to be made in a particular time frame, while here, there is no conceivable reason for giving nursing homes a license to terminate nurses for making good-faith reports of abuse or neglect to anyone, at any time, or in any form.

words” even when simply “indicat[ing] an intention to make a report,” is inconsistent with the General Assembly’s plain, broad, protective language and its obvious intent to protect those who report abuse. See *Carna*, 2012-Ohio-1484, at ¶ 19 (“Statutes must be construed, if possible, to operate sensibly and not to accomplish foolish results.” (quotations omitted)).

Notably, formal reports to the director of health are kept strictly confidential. See R.C. 3721.25(A)(1)(a) (stating that, with a few narrow exceptions, “the director of health shall not disclose *** [t]he name of an individual who reports suspected abuse or neglect of a resident or misappropriation of a resident’s property to the director”). This means that as a practical matter, the strongest “indication” to an employer that a nurse intends to file a formal Department of Health complaint will be for a nurse to *also* report it to a supervisor, a resident, or a resident’s family member. Here, the Defendants likely interpreted the Plaintiff’s urgent reporting through her chain of supervision and to the resident’s family as an indicator that she would also alert state regulators (or that she may already have done so). Section 3721.24 makes it illegal to terminate an employee on that basis even if the employee does not actually make a report. This means even the Defendants’ narrow definition of “report” supports the Plaintiff’s claim for relief.

B. Reading Section 3721.24 “In Pari Materia” with Adjacent Statutory Provisions Is Unnecessary, and It Actually Undermines the Defendants’ Claim that the General Assembly Intended to Protect Only One Particular Kind of Report of Abuse and Neglect.

The Defendants’ efforts to add words to Section 3721.24 hinges on their advocacy of the canon of construction known as “*in pari materia*,” by which unclear statutory language is interpreted by reference to its broader context. But citing this doctrine accomplishes nothing in this case. *In pari materia* is not a magical incantation—it cannot make new, more restrictive words appear in a statute out of thin air. It is a canon of statutory construction, to be employed, along with other, equally important principles of construction, only when it becomes necessary

in light of unclear or conflicting statutory language. Because the language of Section 3721.24 is unambiguous and self-implementing, there is no need for this Court to rely on *in pari materia* or any other canon of statutory construction here. The Defendants improperly employ it, misapply it, and, without explanation, disregard equally applicable canons of construction, all of which lead to the conclusion that the Plaintiff's actions are protected under the statute. In fact, even if *in pari materia* could assist in interpreting Section 3721.24, the status of the Plaintiff's actions as protected activity is even clearer in light of the adjacent statutory provisions.

1. *The Canons of Construction, Including "In Pari Materia," Must Not Be Employed in Interpreting Unambiguous Statutes.*

As the Defendants concede, this Court has very clearly prohibited the use of canons of construction, including *in pari materia*, to interpret otherwise unambiguous statutory language. See Defendants' Merit Brief, pp. 17-18 (citing *State Farm Mut. Auto. Ins. Co. v. Webb* (1990), 54 Ohio St. 3d 61, 63, and *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶ 31, for the principle that *in pari materia* is not properly employed to interpret unambiguous provisions). But the Defendants ask the Court to ignore its own principles of statutory interpretation by applying this canon of construction even after concluding that the language of Section 3721.24 is unambiguous. The Defendants justify this requested departure from the Court's rule by citing a series of cases where, they argue, the Court has merely paid lip service to its own principles, then nevertheless applied the canons of construction to unambiguous language. A closer examination of the cases cited reveals that the Court has done nothing of the kind, and this Court should disregard the Defendants' dubious spin on its prior jurisprudence.

There is no question that the doctrine of *in pari materia* is discussed or alluded to in several cases despite the Court's conclusion that statutory language in question was

unambiguous. But none of the cases the Defendants cite support the use of *in pari materia* in the way they advocate: to contradict the plain language of a self-executing statutory provision.

For instance, in *State ex rel. Crawford v. Industrial Commission* (1924), 110 Ohio St. 271, 143 N.E. 574, the Defendants claim the Court used *in pari materia* to construe language that would otherwise have appeared unambiguous. This is not accurate. In *Crawford*, the Court construed a statute that the relator argued was “mandatory” and provided for continuing payments to the estate of a widow who was the beneficiary of her spouse’s workers’ compensation payments. The Court employed *in pari materia* because corresponding statutory provisions, and provisions of the Ohio Constitution, made it clear that such continuing payments to a person other than the widow of the worker were not intended by the General Assembly. *Id.*, 110 Ohio St. 285. But contrary to the Defendants’ claim, the *Crawford* Court never said it agreed with the relator that Section 1465-82 of the General Code unambiguously provided for continuing payments. Rather, the Court did identify ambiguity in the statute, stating, “If we were disposed to resort to a technical analysis of the language of that section we think it would be possible to show that the language is not mandatory.” *Id.* at 279-80. The reason the Court refused to engage in that analysis was that a contrary conclusion would have conflicted with Article 2, Section 26 of the Ohio Constitution. *Id.*

The Defendants make the same inaccurate claim regarding *Krueger v. Krueger* (1924), 111 Ohio St. 369, 145 N.E. 753, in which the Court held that an after-born child could bring an action in partition as to any real property in a testator’s estate. In *Krueger*, though, the Court *did* determine that the statute was unambiguous, and that it unambiguously provided for exactly the result the Court reached. 111 Ohio St. at 373 (stating that the statutory language “is not of doubtful meaning,” and that “[w]e follow what seems to be the plain provision of the statute, that

such after-born child shall be put in the position it would have occupied had there been no will.”). The Court’s subsequent examination of the adjacent statutory provisions, which did not alter its holding, was simply its effort to explain why it was rejecting the losing party’s argument that holding in favor of the after-born child would render these other provisions meaningless.

In *State ex rel. O’Neil v. Griffith* (1940), 136 Ohio St. 526, 27 N.E.2d 142, another case cited by the Defendants as a supposed counter-example to the prohibition against using *in pari materia* to construe unambiguous statutory language, the Court, once again, obeyed this prohibition. The dispute in that case revolved around whether a new statute, which provided for the resolution of controversies over which of two competing county executive committees was the “rightful” committee, implicitly repealed an existing statute providing procedures for appointments by the Secretary of State when two competing committees made recommendations for a spot on the county board of elections. The Court noted that the new statutory language was added at the same time as the General Assembly slightly amended the existing statute, and thus, that the legislature must not have intended to repeal the existing statute. The Court held that the statutes served slightly different purposes, that both could be applied, and that the relator was entitled to the appointment pursuant to the existing statutory language (which was unambiguous). This arcane question of county organizational structure sheds no light at all on the question of whether to apply *in pari materia* here. Of course the Court would need to examine two adjacent statutes in resolving questions, like those in *O’Neil*, regarding which of the two statutes should apply and whether one of the statutes implicitly repealed the other.

State v. Buehler, 113 Ohio St. 3d 114, 2007-Ohio-1246, 863 N.E.2d 124, provides a more recent, but equally unhelpful example for the Defendants. In *Buehler*, the Court employed *in pari materia* to resolve a question of whether an inmate was entitled to a DNA evidence report

from the prosecutor irrespective of a trial court's determination that DNA evidence would not have affected the outcome of the inmate's trial. The Defendants emphasize that the *Buehler* Court employed *in pari materia* while stating that "these statutes are not ambiguous and are not in conflict"—but in fact, the Court once again found the statutes unambiguous and non-conflicting only *because* it construed them the way it did. *Id.* at ¶ 31 (emphasizing that the Court's holding would not create ambiguity or conflict). Had it adopted the interpretation advocated by *Buehler*, the statute requiring a report from the prosecutor would arguably have conflicted with the statute cutting off the application process upon the trial court's determination that DNA evidence was unnecessary. In the majority's view, reading the statutes together, and sequentially, was necessary in order to avoid confusion, ambiguity, and conflict.

None of these cases stands for the proposition that an otherwise unambiguous, self-executing statute should be read *in pari materia* with adjacent, non-conflicting provisions in order to create ambiguity or conflict. In every case cited by the Defendants, the Court either confirmed the unambiguous meaning of the statutory text or employed *in pari materia* only as a means of avoiding serious conflicts or ambiguities that could have resulted from viewing the text in isolation. No such conflict or ambiguity appears here, and, as discussed below, giving effect to the General Assembly's plain language is the only way to construe Section 3721.24 without overhauling the statute's structure and purpose.

2. *Reading Section 3721.24 "In Pari Materia" with Sections 3721.22 and 3721.23 Demonstrates the General Assembly's Intent to Protect a Broader Range of Activity in Section 3271.24 than in the Adjacent Provisions.*

Although it is not necessary to read anything but the plain language of Section 3721.24 to understand its meaning, it is odd that the Defendants would seek to compare it to the adjacent

provisions, because doing so just makes it clearer that the General Assembly did not intend Section 3721.24 to protect only those who make reports specifically to the director of health.

In pari materia is one of many canons and principles of statutory construction; this Court has never stated that it trumps all other such principles. In fact, it has stated that it yields to the more important principle that courts should rely, first, on the plain language of an unambiguous provision. When the Court does employ the doctrine of *in pari materia*, it does not blind itself to every other principle of construction.

In particular, this Court frequently acknowledges that the General Assembly's use of limiting language in one part of a statute demonstrates that the legislature "knew how" to employ it when it wanted to—meaning that in other provisions where it did not use the same language, it intended a different result. See, e.g., *Carna, supra*, 2012-Ohio-1484, at ¶ 23 ("Had the General Assembly intended for the request for a meeting to be dependent on any temporal specificity, it would have included that specificity in the statute itself, as it did in other sections of this statute."); *State ex rel. Apcompower, Inc. v. Indus. Comm'n*, 108 Ohio St. 3d 196, 2006-Ohio-659, 842 N.E.2d 498, at ¶ 18 ("The commission also argues that the General Assembly, when it wishes to permanently bar compensation for a given period, knows how to clearly express that intent. A review of compensation statutes supports this assertion."); *Maggiore v. Kovach*, 101 Ohio St. 3d 184, 2004-Ohio-722, 803 N.E.2d 790, at ¶ 27 ("[T]he second paragraph of R.C. 1923.04(A) *** provides that such notice 'shall contain the following language' and sets forth the required language in quotation marks. The first paragraph of R.C. 1923.04(A), by contrast, contains no similar indicia ***. This distinction indicates that the General Assembly knows how to require landlords to include specific language in such notices but decided not to do so ***."); *In re Election of Member of Rock Hill Local Sch. Dist. Bd. of Educ.* (1996), 76 Ohio St. 3d 601,

608, 669 N.E.2d 1116 (“The term ‘personally’ in R.C. 3509.05 is used only in connection with the phrase ‘personally deliver.’ Had the General Assembly intended to impose an obligation on an absentee voter to personally mail his or her ballot and identification envelope to the board of elections, it certainly knew how to do so, i.e., the term ‘personally’ could easily have been inserted in R.C. 3509.05 immediately before the term ‘mail.’ Given that the General Assembly expressed no such intention, we presume that R.C. 3509.05 imposes no obligation on an absentee voter to personally place his or her ballot and identification envelope in the mailbox.”).

This principle comes powerfully into play in examining Section 3721.24 and its adjacent provisions. Section 3721.22 provides for mandatory reporting “to the director of health” of all suspicions of abuse, neglect, or misappropriation of a nursing home resident’s property by certain licensed health professionals, and for permissive reporting of such suspicions by others. It also provides that those who make such reports in good faith or participate in departmental investigations and hearings are immune from civil or criminal liability for doing so. The language establishing this immunity is similar, but not at all identical, to that of Section 3721.24.

Section 3721.22(C) provides, “Any person who in good faith reports suspected abuse, neglect, or misappropriation *to the director of health*, provides information during an investigation of suspected abuse, neglect, or misappropriation conducted by the director, or participates in a hearing conducted *under section 3721.23 of the Revised Code* is not subject [to criminal or civil liability].” (Emphasis added). In contrast, Section 3721.24(A) provides protection against retaliation for anyone “who, in good faith, makes a report of suspected abuse or neglect of a resident or misappropriation of the property of a resident; *indicates an intention to make such a report*; provides information during an investigation of suspected abuse, neglect, or misappropriation conducted by the director of health; or participates in a hearing conducted

under section 3721.23 of the Revised Code or in any other administrative or judicial proceedings pertaining to the suspected abuse, neglect, or misappropriation.” (Emphasis added).

The boldfaced language above highlights the General Assembly’s clear effort to make the retaliation protections in Section 3721.24 broader than the immunities in Section 3721.22. The most obvious difference is in the first clause. Section 3721.22 protects only those who make reports “to the director of health,” while Section 3721.24 contains no such limiting language. The Defendants have noted, repeatedly, that these two provisions were drafted and enacted together. If the General Assembly had wanted to protect only those employees who reported abuse to the director of health, it knew how to do so. Its refusal to include such a limitation, when it did so explicitly in a provision enacted at the same time, is a clear indicator of its intent to extend retaliation protection to all reports of abuse, neglect, and misappropriation.

In fact, this conclusion is essential even without reference to Section 3721.22, since the General Assembly used the same limiting language within Section 3721.24(A) itself. Like Section 3721.22(C), Section 3721.24(A) protects a person who “provides information during an investigation of suspected abuse, neglect, or misappropriation,” but only when that investigation is “conducted ***by the director of health.***” Again, the General Assembly demonstrated its ability to limit the statute’s protections to a particular type of investigation, but chose not to use the same language in order to protect only a particular type of report.

The distinctions do not end there, and the other differences in the statute help clarify the separate, broader purpose of Section 3721.24. Section 3721.22(C) does not contain the language in Section 3721.24(A) that protects those who “indicate[] an intention” to make a report. And while Section 3721.22(C) provides immunity only for those who participate in hearings conducted under Section 3721.23, Section 3721.24(A) explicitly extends retaliation protection to

anyone who participates in any kind of hearing or judicial proceeding, including, but not limited to, those conducted under Section 3721.23.

Taking all of these differences into account, it is clear the General Assembly enacted Section 3721.22 to establish fairly narrow legal protections for those who participate in the specific, sometimes mandatory, proceedings initiated by a report to the director of health. The provision thus extends the ordinary qualified privileges and immunities one expects when making a good-faith report of a crime to the police, or testifying truthfully in court.

In contrast, Section 3721.24(A) provides broader, employment-based protections for employees who raise concerns about the mistreatment of residents, or even plan to raise such concerns. This distinction makes sense, given the special vulnerability of employees and nursing home residents to retaliation from those who seek to suppress these concerns. The practical differences are clear. If Ms. Hulsmeyer had been sued by her employer or a co-worker for defamation, based on an alleged inaccuracy in her reports to her supervisors or her resident's family, she could fight such a lawsuit in court, using the ordinary defenses and privileges afforded to her by the common law. But as an at-will employee, in the absence of the protections of Section 3721.24, she would have no recourse if she was fired for reporting abuse. The same is true of a resident who reports abuse to a staff member. A lawsuit against the resident can be contested in court, but a resident subjected to the types of insidious retaliation discussed in 3721.24(B), such as punitive transfers, denials of care, or verbal abuse, needs the cause of action the General Assembly provided in order to achieve an effective remedy. The General Assembly understood this and structured the anti-retaliation protections accordingly—as is shown most clearly by engaging in precisely the *in pari materia* analysis advocated by the Defendants.

PROPOSITION OF LAW II: The termination of a nurse in retaliation for reporting abuse or neglect of a nursing home resident to the nurse's supervisors and the resident's family violates the strong and obvious public policies embodied in Chapter 3721 in favor of protecting the health and safety of nursing home residents and guaranteeing the rights of residents and their families to immediate notification regarding any problems with their care.

C. Permitting nurses to be terminated with impunity for notifying others of potential abuse or neglect would jeopardize Ohio's clear public policies in favor of protecting nursing home residents and keeping residents and their families informed regarding their care.

The First District Court of Appeals concluded, based upon *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 241, 2002-Ohio-3994, 773 N.E.2d 526, that the Plaintiff could not state a claim of wrongful discharge in violation of public policy because she had a viable claim under Section 3721.24 for a retaliatory termination. In the event this Court disagrees with the Plaintiff and *amici* that Section 3721.24 covers internal reports and reports to family members, the Court should recognize the Plaintiff's wrongful discharge claim, based on two independent sources of clear public policy in Chapter 3721.

First, this Court should recognize that the Defendants' conduct jeopardizes the public policies expressed in Revised Code Section 3721.13 and elsewhere, supporting the rights of nursing home residents and their families to be kept informed of issues with their care and provided access to effective grievance procedures. An employee terminated for informing a resident's family of any care issues (including, but not limited to, abuse or neglect) must have a claim for relief, especially if this Court concludes that the language of Section 3721.24 is not clear enough to support the Plaintiff's statutory retaliation claim.

Second, the Court should recognize a wrongful discharge claim in light of the clear public policy the General Assembly stated in Section 3721.24 itself, in favor of protecting the health and safety of nursing home residents.

1. *The Clear Right of Residents and Their Families to Information Regarding the Resident's Care Would Be Jeopardized if Nursing Homes Could Punish Nurses for Informing Residents' Families of Critical Incidents.*

Section 3721.13 of the Revised Code provides a "bill of rights" for nursing home residents and their families. Among the rights afforded by that statute are "[t]he right to have any significant change in the resident's health status reported to the resident's sponsor" within twelve hours of the change, R.C. 3721.13(A)(32), "[t]he right to participate in decisions that affect the resident's life, including the right to communicate with the physician and employees of the home in planning the resident's treatment or care," R.C. 3721.13(A)(8), and "[t]he right to voice grievances and recommend changes in policies and services to the home's staff, to employees of the department of health, or to other persons not associated with the operation of the home, of the resident's choice, free from restraint, interference, coercion, discrimination, or reprisal." R.C. 3721.13(A)(31). All of these rights would be jeopardized if nursing homes and other service providers were permitted to terminate employees for reporting abuse, neglect, or any other care issue to a resident or a resident's responsible family members. See, e.g., *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 69-70, 652 N.E.2d 653 (stating elements of public policy wrongful discharge claim, including a clear public policy, expressed in a statute or other source of law, that would be jeopardized by dismissing employees under the circumstances at issue).

The General Assembly has made it very clear in Section 3721.13 (and elsewhere, throughout the remedial statutory scheme it established in Chapter 3721 to protect the rights of nursing home residents and those who seek to protect them) that residents are best protected when information flows freely between nursing homes, medical personnel, residents, residents' families, advocacy groups, and regulators. The more important the information, the more quickly the information must be shared. Permitting nurses and other employees involved in a

resident's care to be terminated for sharing pertinent information about a resident's care, in good faith, with a resident, family member, or co-worker, would do untold damage. Residents cannot communicate effectively with their families, physicians, or advocates, file grievances effectively, or make informed decisions about their care, if information is concealed from them.

Notably, the goal of preventing nursing homes and other care providers from interfering with the flow of such information is independent of the goal of Section 3721.24, which is limited to issues of abuse, neglect, or misappropriation of property. While the policies overlap in many cases, not every report to a family member must touch on abuse, neglect, or theft in order to implicate this public policy. A nurse fired for telling a family member that a resident fell from his or her bed may never have suspected neglect or abuse (perhaps it was unavoidable or due to the resident's own negligence, for instance)—but the family would still be entitled to know under Ohio law, and permitting that nurse to be fired for conveying this information would jeopardize the General Assembly's clear public policy in favor of providing that information. And, while Chapter 3721 provides remedies for residents who are retaliated against for exercising their rights under Section 3721.13, e.g., R.C. 3721.17(I), it does not provide a cause of action for employees who act in defense of those rights. *Cf. Wiles*, 2002-Ohio-3994, at ¶ 15 (holding that the jeopardy element is defeated under circumstances where the sole source of the claimed public policy provides adequate remedies for enforcing the policy).

The Plaintiff's circumstances plainly fit within the scope of these public policies. Whether or not her actions constituted a good-faith "report" of suspected abuse or neglect under Section 3721.24, they certainly constituted an effort to inform the family of a change in the resident's condition, facilitating the rights of the resident and the family to participate in the resident's health decisions and potentially, to participate in the home's grievance procedures.

2. *Section 3721.24 Expresses a Clear Public Policy in Favor of Protecting Nursing Home Residents from Abuse, Neglect, and Misappropriation.*

Of course, in both Section 3721.13 and Sections 3721.22 through 24, the General Assembly also highlighted a clear public policy in favor of protecting nursing home residents from abuse, neglect, and misappropriation of property. *E.g.*, R.C. 3721.13(A)(1)-(5) (providing rights to be provided with a clean, safe environment, free of abuse, and with adequate and prompt medical care). Per the plain language of Section 3721.24, employees who act in defense of this policy by reporting suspected abuse or neglect *are* adequately protected, which, under this Court's precedents, including *Wiles, supra*, means there may be no need to recognize a wrongful discharge claim under the common law.

If, on the other hand, this Court construes the protections of Section 3721.24 to mean that only an employee “who, in good faith, makes a [formal] report of suspected abuse or neglect of a resident or misappropriation of the property of a resident [to the director of health],” as the Defendants advocate, there would be no statutory protection for those who use less formal means to advance the rights of residents to be free from abuse. In that case, it would be necessary to recognize a wrongful discharge claim, as one could only conclude that, despite the General Assembly's clear goal of protecting both those who are abused or neglected and those who report such abuse or neglect, “a gap exists in the language of the statute” and Hulsmeyer's “firing occurred in that gap,” that “the General Assembly did not intend to leave a gap in protection,” and that “[t]he alternative interpretation—that the legislature intentionally left the gap—is at odds with the basic purpose of the antiretaliation provision.” *Sutton v. Tomco Machining, Inc.*, 129 Ohio St. 3d 153, 2011-Ohio-2723, 950 N.E.2d 938, at ¶¶ 14, 22.

In *Sutton*, this Court faced a scenario in which an employee reported a compensable workplace injury, and was immediately terminated for doing so, without having an opportunity

to file an actual workers' compensation claim. The antiretaliation statute, Section 4123.90 of the Revised Code, did not explicitly prohibit retaliation except upon the filing of an actual claim. Concluding that permitting such a termination would lead to a "footrace" between employers and employees, and would jeopardize the policy against retaliation embodied in the statute, this Court filled the evident gap in the statute using the tool specifically created for that purpose: a common-law wrongful discharge claim. *Id.* at ¶ 22.

Construing Section 3721.24 as the Defendants advocate would leave a similar gap.² As discussed below, reports of abuse or neglect to the director of health are confidential, unlike workers' compensation complaints. Internal reports to supervisors and reports to family members are far more likely to come to the immediate attention of employers and far more likely to result in the termination of the reporting employee by an unscrupulous employer. If the Defendants' interpretation were adopted, an employee who reported an incident internally, and also, unbeknownst to the nursing home, made a confidential report to the director of health, could be fired without violating the statute. An employee could not claim the firing was motivated by a report to the director of health that the employer knew nothing about. Under those circumstances, that employee, who did his or her utmost to advance the policies enacted by the General Assembly, could prevail only upon recognition of a wrongful discharge claim.

The same is true here. As described in the pleadings, Ms. Hulsmeyer's actions furthered the goals of the General Assembly. She was fired by unscrupulous care providers whose interest was not to protect a vulnerable resident, but to protect themselves from the unwanted scrutiny of

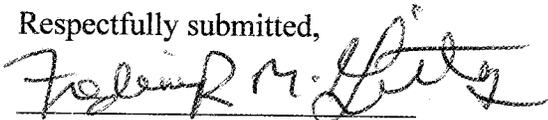
² In fact, the gap here is larger, at least in temporal terms. The claim recognized in *Sutton* covered only those circumstances in which an employee was fired before having a reasonable opportunity to file an actual workers' compensation claim. The claim here could not be similarly limited in time, given that the employer may never know whether or not the employee made a confidential report to the director of health, but would still be able to undermine the purpose of the statute by firing an employee who made an internal report or a report to a family member.

regulators, the resident's family, or both. Though the General Assembly's actual words appear easily broad enough to provide protection under such circumstances, if this Court disagrees, it should fill that enforcement gap by recognizing a wrongful discharge claim.

V. Conclusion

For the reasons stated above, *amicus curiae* OELA urges this Court to affirm the decision of the First District Court of Appeals permitting the Plaintiff to move forward with her claim under Section 3721.24 of the Revised Code. In the alternative, this Court should reverse the lower court's dismissal of the Plaintiff's wrongful discharge claim in violation of the public policies expressed in Section 3721.24 and elsewhere throughout Chapter 3721.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July 2014, a copy of the Brief of Amicus Curiae the Ohio Employment Lawyers Association in Support of Appellee/Cross-Appellant Patricia Hulsmeyer was served by postage-paid U.S. Mail upon the following:

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