

ORIGINAL

IN THE SUPREME COURT OF OHIO

PATRICIA HULSMEYER

Case Nos. 2013-1644
2013-1766

APPELLEE/CROSS-APPELLANT,

v.

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

HOSPICE OF SOUTHWEST OHIO, INC.

Court of Appeals Case No.: C 120822

AND

JOSEPH KILLIAN

AND

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

APPELLANTS/CROSS-APPELLEES.

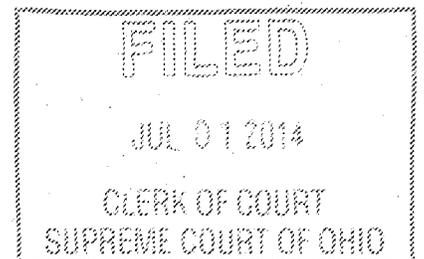
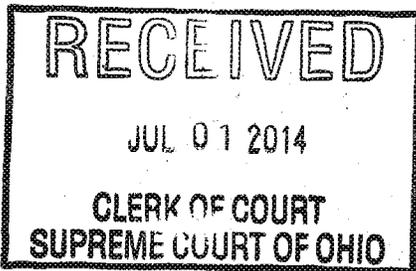
MERIT BRIEF OF APPELLEE/CROSS-APPELLANT PATRICIA HULSMEYER

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I. STATEMENT OF FACTS

A. Appellants Retaliated Against Hulsmeyer For Reporting Suspicions Of Abuse To The Daughter Of A Resident At Brookdale

Hulsmeyer is a registered nurse and formerly served as a Team Manager for Hospice. (*Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 2013-Ohio-4147, 998 N.E.2d 517, ¶ 3 (1st Dist.), (“Opinion”), attached to Joint Br. of Appellants at Appx. 45). Killian is the CEO of Hospice. (*Id.* at Appx. 47, ¶ 1). 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. (*Id.* at Appx. 47, ¶ 3).

On October 19, 2011, during a patient care meeting of Hospice employees attended by Hulsmeyer, a Hospice nurse indicated that one of Hospice’s patients at Brookdale (“Patient”) had suffered some bruising, which she feared was the result of abuse or neglect at the hands of Brookdale staff. (*Id.*) An aide had taken photographs of the injuries at Patient’s request, which she showed to those in attendance. (Complaint at Supp. 4, ¶ 9, attached to Br. of Appellee Hulsmeyer at Supp. 1). Three Hospice employees present at the meeting, including a nurse, Hospice’s staff physician, and a licensed social worker, all informed Hulsmeyer that she was obligated to immediately call Brookdale and Patient’s family to report the suspected abuse or neglect. (*Id.* at Supp. 4, ¶ 10).

Hulsmeyer immediately called the Director of Nursing at Brookdale, Cynthia Spaunagle, to report her suspicions of abuse or neglect. (Opinion at Appx. 48, ¶ 4). Spaunagle said that she would take all appropriate measures, including contacting Patient’s daughter. (*Id.*) Hulsmeyer then reported the suspected abuse to her own supervisor, Hospice’s Chief Clinical Officer, Isha Abdullah, and told her that the staff physician, nurse, and social worker had counselled her to contact Brookdale and Patient’s family. (Complaint at Supp. 4-5, ¶ 12). Abdullah dismissively

stated, "Oh, more stuff with [Patient]." (*Id.*) Hulsmeyer then called Patient's daughter, who was also her power of attorney, informed her of the bruising and that she suspected abuse or neglect by Brookdale's staff, and informed her that Spaunagle would be contacting her. (*Id.* at Supp. 5, ¶ 13). After her telephone conversation with Daughter, Hulsmeyer returned to Abdullah's office and showed her the photograph of Patient's skin. Abdullah remarked, "Oh, my gosh, who would leave a Foley bag on like that!" (*Id.* at Supp. 5, ¶ 14). On the following day, Hulsmeyer submitted a written report to Abdullah detailing the suspected abuse or neglect. (*Id.* at Supp. 5, ¶ 15).

On October 21, 2011, at Daughter's request, an aide took additional photographs of the bruising on Patient. (*Id.* at Supp. 5, ¶ 16). Meanwhile, Spaunagle did not contact Patient's daughter as promised. (Opinion at Appx. 48, ¶ 5). On October 24, 2011, Patient's daughter contacted Ida Hecht, the Executive Director of Brookdale, seeking information about her mother's injuries. (*Id.*) Hecht had not heard about the injuries or about Hulsmeyer's suspicions of abuse or neglect, and stated that she would look into the matter. (*Id.*) On November 4, 2011, a meeting was held at Brookdale to discuss Patient's care, and numerous Brookdale and Hospice employees were present, including Hulsmeyer, as well as Patient's son and daughter. (*Id.*)

On November 11, 2011, Hulsmeyer began a planned leave of absence to undergo a medical procedure and was not to return to work until November 28, 2011. (*Id.* at Appx. 48, ¶ 6). While Hulsmeyer was on leave, Jackie Lippert, Brookdale's Regional Health and Wellness Director, contacted Hospice and demanded to know who had informed Patient's daughter of the suspected abuse or neglect. (*Id.*) During the telephone call, Lippert stated, "We got rid of our problem [Spaunagle], what are you going to do?" Brookdale had terminated Spaunagle. (*Id.* at Appx. 48-49, ¶ 6).

On November 28, 2011, Hulsmeier's first day back at work following her leave, Abdullah asked Hulsmeier to join her in her office. (*Id.* at Appx. 49, ¶ 7). Betty Barnett, Hospice's COO and Director of Human Resources, was also in Abdullah's office. They explained to Hulsmeier that they all had to call Lippert. Lippert was irate. She stated that Patient's daughter had told her that she would not recommend Brookdale to anyone. Lippert accused Hulsmeier of making Brookdale "look bad" and "stirring up problems." She said she could not believe that the others in the room (Abdullah and Barnett) thought Hulsmeier had done the right thing. (Complaint at Supp. 6-7, ¶ 21-22). After Barnett asked what should have been done differently, Lippert snapped, "The family should not have been called and the photographs should not have been taken." Finally, Lippert threatened that Brookdale would cease recommending Hospice to its residents. (*Id.* at Supp. 6-7, ¶ 22).

Two days later, Barnett called Hulsmeier into her office and informed her that she would be terminated. (Opinion at Appx. 49, ¶ 8). Taken aback by the termination, Hulsmeier attempted to meet with Killian, but Barnett told her that Killian had instructed Barnett to "cut ties" with Hulsmeier and that he "[didn't] want to be associated with her" because he "[didn't] have time." (*Id.*).

On November 30, 2011, in a letter signed by Killian and Abdullah, Hospice informed Hulsmeier that she was terminated. (*Id.* at Appx. 49, ¶ 9). In the letter, Hospice claimed that Hulsmeier did not timely notify "Management" about the suspected abuse, criticized her for notifying Patient's daughter, and claimed Hospice's "upper management" had not learned about the suspected abuse until Lippert contacted Abdullah, sometime after November 11, 2011 (*Id.*), despite all of Hulsmeier's initial reports and conversations with Abdullah and Barnett. The

termination letter specifically identified the fact that Hulsmeyer had contacted Patient's daughter as a justification for her termination. (*Id.*).

B. Hulsmeyer Filed Claims In Hamilton County Court of Common Pleas

Hulsmeyer filed claims against Brookdale, Hospice of Southwest Ohio, Inc., and Joseph Killian, alleging that Brookdale, Hospice, and Killian terminated her in violation of R.C. 3721.24 for reporting suspected abuse and neglect of a nursing home resident. (*Id.* at Appx. 50, ¶ 10). She also asserted a claim against Hospice for wrongful discharge in violation of Ohio public policy, and a claim against Brookdale for tortious interference with a business relationship. (*Id.*).

C. Appellants Each Filed Motions To Dismiss All Claims

Hospice, Killian, and Brookdale filed motions to dismiss. (Opinion at Appx. 50, ¶ 10). The trial court dismissed all claims except the claim for tortious interference with a business relationship against Brookdale. (*Id.*). After conducting limited discovery, Hulsmeyer dismissed that remaining claim with prejudice in order to pursue her appeal. (*Id.*).

D. First District Court Of Appeals Reversed The Trial Court's Order Granting Appellants' Motion To Dismiss Hulsmeyer's Claims Under R.C. 3721.24

The First District determined that R.C. 3721.24 unambiguously protected Hulsmeyer from retaliation. Specifically, the court held:

The statute provides protection for any 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.

Had the legislature meant to limit the protection afforded to only reports of suspected abuse or neglect made to the Director of Health, it could have easily done so by either directly inserting the words "to the Director of Health" after the word "report," by referencing R.C. 3721.22 in conjunction with report, or by referring to the report made as one specified under R.C. Chapter 3721. The legislature, however, did not employ these words and we may not add them to the statute.

(*Id.* at Appx. 56-57, ¶¶ 23-24). The court concluded that, because R.C. 3721.24 is not ambiguous, there was no cause to read it in pari materia with other sections of R.C. 3721. (*Id.* at Appx. 57, ¶ 25). Finally, the court rejected Brookdale's argument that it was not subject to liability under R.C. 3721.24 because Hulsmeyer was not "used by" Brookdale to perform work or services. (*Id.* at Appx. 57, ¶ 26). Brookdale did not present that issue to this Court.

The First District affirmed the trial court's order dismissing Appellee's public policy claim because Hulsmeyer has a statutory claim. "Because Hulsmeyer has a remedy by way of a claim for retaliation under R.C. 3721.24, the trial court properly dismissed her claim for wrongful discharge in violation of public policy." (*Id.* at Appx. 59, ¶ 31). The court did not address the question of whether Appellee could sustain a public policy claim if she did not have a remedy under R.C. 3721.24.

Recognizing that its decision conflicted with an earlier unreported decision from the Eighth District Court of Appeals, *Arsham-Brenner v. Grande Point Health Care*, 8th Dist No. 74835, 2000 WL 968790 (July 13, 2000), the First District certified the following issue to this Court for review and final determination:

Must an employee or another individual used by the person or government entity to perform any work or services make a report or indicate an intention to report suspected abuse or neglect of a nursing home resident to the Ohio Director of Health to state a claim for retaliation under R.C. 3721.24(A)?

(Opinion at Appx. 59-60, ¶ 32).

E. Supreme Court Of Ohio Accepts Appeal of Appellants And Cross-Appeal Of Appellee Hulsmeyer

Appellants filed a Notice of Certified Conflict and also sought discretionary review of the First District's decision concerning R.C. 3721.24. (Joint Notice of Certified Conflict of Appellants; Joint Notice of Appeal of Appellants, attached to Joint Br. of Appellants at Appx. 1, 37). Appellee Hulsmeyer sought discretionary review of the First District's decision affirming

dismissal of her claim based on Ohio public policy, contingent on a finding from this Court that R.C. 3721.24 does not protect Hulsmeyer from retaliation. (Notice of Cross-Appeal of Appellee, attached to Joint Brief of Appellants at Appx. 41; Mem. In Resp. to Appellants' Mem. In Supp. of Jurisdiction and in Supp. of Jurisdiction of Cross-Appeal of Appellee Hulsmeyer at 11-12). This Court accepted the appeal and the cross appeal on February 19, 2014. (02/19/14 Case Announcements, 2014-Ohio-566).

II. ARGUMENT IN RESPONSE TO APPELLANTS' PROPOSITION OF LAW AND QUESTION OF LAW CERTIFIED BY FIRST DISTRICT COURT OF APPEALS

Proposition Of Law

An employee or another individual used by the person or government entity to perform any work or services, who in good faith makes a report of suspected abuse or neglect of a nursing home resident to a resident's sponsor, is protected from retaliation by the provisions of R.C. 3721.24.

Certified Question Of Law

Must an employee or another individual used by the person or government entity to perform any work or services make a report or indicate an intention to report suspected abuse or neglect of a nursing home resident to the Ohio Director of Health to state a claim for retaliation under R.C. 3721.24(A)?

A. The Doctrine Of In Pari Materia Is Not To Be Employed Where, As Here, The Statute Is Not Ambiguous

Appellants ask this Court to add words to a clear and unambiguous statute to permit retaliation against Hulsmeyer and other persons who report suspected abuse or neglect of nursing home residents to the resident's family. They ask the Court to disregard well-settled rules of statutory interpretation by applying the doctrine of in pari materia to the exclusion of all other rules of construction. Appellants' request should not be granted.

This Court has consistently held that statutes must be applied, not interpreted, when expressed in clear and unambiguous terms.

[T]he intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction.

Tomasik v. Tomasik, 111 Ohio St.3d 481, 2006-Ohio-6109, 857 N.E.2d 127, ¶ 14, quoting *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶ 12.

Appellants imply that this Court's decision in *Bartchy v. State Bd. Of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, 897 N.E. 2d 1096 supports reading a statute in pari materia in the first instance, without an initial determination that the statute is ambiguous. However, in that case this Court looked to other sources to interpret the statute at issue only after making a threshold finding of ambiguity. "We determine that R.C. 3311.06(I) is not a specific, straightforward, and unambiguous as CPSD contends." *Id.* at ¶ 23. This Court has consistently refused to look to other sources to divine a statute's meaning when the words of the statute make the meaning clear.

B. R.C. 3721.24 Is Not Ambiguous And Was Correctly Interpreted By The First District Court Of Appeals

R.C. 3721.24(A) states in pertinent part:

No person or government entity shall retaliate against an employee or another individual used by the person or government entity to perform any work or services 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.

Appellants argue that R.C. 3721.24 is ambiguous because the legislature used the term "report" without identifying to whom the report must be made. This, Appellants contend,

renders the statute subject to more than one interpretation. Appellants rely primarily on this Court's decision in *Sheet Metal Workers' Internatl. Assn. Loc. Union No. 33 v. Gene's Refrig., Heating & Air Conditioning, Inc.*, 122 Ohio St.3d 248, 2009-Ohio-2747, 910 N.E.2d 444 in support of this argument. In *Sheet Metal Workers*, the Court considered whether R.C. 4115.05 required a contractor to pay the prevailing wages to laborers working away from a project site. *Id.* at ¶ 25. The Court determined that, because the statute did not reference where the work must be performed, it was ambiguous and must be construed in a way that carried out the intent of the legislature. *Id.* at ¶ 29. The Court looked to other statutes in the same chapter and numerous other sources, including industry custom and practice, in order to determine that intent.

R.C. 3721.24 does not present the ambiguity this Court found in R.C. 4115.05, and there is no need to resort to other sources to divine the intent of the legislature. R.C. 3721.24 protects an employee or other individual who, in good faith: (1) makes a report of suspected abuse or neglect of a resident or misappropriation of the property of a resident; (2) indicates an intention to make such a report; (3) provides information during an investigation of suspected abuse, neglect, or misappropriation conducted by the director of health; or (4) 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 first two protected activities—making a report, and indicating an intent to make a report—are undeniably written broadly. Neither specifies that the good faith report must be made to the director of health, nor do they indicate to whom an intent to make a report must be conveyed. There is no reason to conclude that the broad language was unintended.

A statute is not ambiguous merely because it uses broad, general language. This Court previously explained:

The only mode in which the will of a legislature is spoken is the statute itself. Hence, in the construction of statutes, it is the legislative intent manifested in the statute that is of importance, and such intent must be determined primarily from the language of the statute, which affords the best means of the exposition of the intent. . . . As variously expressed, the statute may not be restricted, constricted, qualified, narrowed or abridged. Hence, general words are to have a general operation, where the manifest intention of the Legislature affords no ground for qualifying or restraining them. Under this rule, where the statute is expressed in general language, it is to be applied to all cases coming within its terms. The Legislature will be presumed to have intended to make no limitations to a statute in which it has included by general language many subjects, persons or entities, without limitation. . . . These rules of construction are subject to some exceptions; nevertheless, if the act or acts in question are couched in plain and unambiguous language, courts are not justified in adding words to such statutes, neither may the courts delete words from a statute, but must construe intent of the lawmakers as expressed in the law itself.

Wachendorf v. Shaver, 149 Ohio St. 231, 236-237, 78 N.E.2d 370 (1948).

In *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, 919 N.E.2d 190, this Court held that the Third District Court of Appeals had improperly examined unambiguous statutory language in *pari materia* with other subsections of the same statute to determine whether destruction of a private cellular telephone constituted disruption of a public service within the meaning of R.C. 2909.04. *Id.* ¶ 31. Because the meaning of “property” and “telecommunications device” clearly encompassed cellular telephones, the Third District erred by reviewing legislative history and adjacent statutory subsections to conclude that destruction of a private cellular phone did not violate the statute. *Id.* ¶¶ 31, 32.

Similarly, there is no need here to look to R.C. 3721.22 or to any other sections to ascertain the meaning of R.C. 3721.24. It is clear that the legislature intended to express broadly the statute’s protection for employees who make reports of abuse and neglect. Under this Court’s jurisprudence, the legislature must be presumed to have used the general language advisedly.

Contrary to Appellants' assertion, Hulsmeyer did not argue to the First District that R.C. 3721.24 extends to *any* report made to "anyone," and then contradictorily suggest that protected activity is limited to reports to "any appropriate agency." (Joint Br. of Appellants in Ohio Sup. Ct. at 11). Appellants grossly misrepresent Hulsmeyer's argument, and even changed her word "entity" to "agency," in an effort to create ambiguity in her own interpretation where none exists. Hulsmeyer has consistently maintained that making a good faith report of suspected abuse or neglect to a resident's sponsor, to a superior in management, to law enforcement, to a facility's director of nursing, or to any other "appropriate entity" is protected activity under R.C. 3721.24. (Br. of Pl.-Appellant Hulsmeyer in 1st. Dist. Ct. App. at 7). That interpretation is wholly consistent with the concept of a good faith report of abuse or neglect in R.C. 3721.24.

Words in statutes are to be construed according to the rules of grammar and common usage. R.C. 1.42. Black's Law Dictionary defines "report" as "a formal oral or written presentation of facts or a recommendation for action." Black's Law Dictionary (9th Ed. 2009). R.C. 3721.24 limits its protections to employees who make a report in "good faith." Black's Law Dictionary defines "good faith" as "a state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage." Black's Law Dictionary (9th Ed. 2009).

Based on the common usage of the terms "report" and "good faith," the plain language of R.C. 3721.24 limits its protections to an employee who makes an honest report of suspected abuse or neglect consistent with her duty or obligation to protect the health and welfare of nursing home residents. Thus, reports of suspected abuse or neglect to a nursing home's director of nursing, to law enforcement, to a resident's sponsor, or to the director of health are all good

faith reports because they are all made in faithfulness to the duty or obligation to protect the well-being of the resident. Telling a “nosy neighbor” about suspected abuse or neglect—the only scenario Appellants have come up with to support their argument to unduly narrow the statute’s protection—would not be a good faith report because it would have nothing to do with the employee’s obligation to protect the resident’s health.

Hulsmeyer made a good faith report of suspected abuse or neglect to Patient’s daughter. She was fired for making that report. There is nothing in R.C. 3721.24 to exclude that report from the statute’s protection from retaliation. *Cf. State v. Robinson*, 124 Ohio St. 3d 76, 2009-Ohio-5937, 919 N.E.2d 190, ¶30 (“Division (A)(3) of R.C. 2909.04 does not contain any reference to the words ‘public emergency systems’ or ‘utilities.’ Thus, the Third District’s interpretation that the statute does not apply to the destruction of a single private telephone or cellular telephone is not a sound reading of the plain language.”)

As the First District noted, “[h]ad the legislature meant to limit the protection afforded to only reports of suspected abuse or neglect made to the Director of Health, it could have easily done so by either directly inserting the words ‘to the Director of Health’ after the word ‘report,’ by referencing R.C. 3721.22 in conjunction with report, or by referring to the report made as one specified under R.C. Chapter 3721.”¹ (*Hulsmeyer*, 2013-Ohio-4147, 998 N.E.2d 517, ¶ 24). Appellants ask this Court to presume that the legislature’s failure to include one of these qualifiers was a drafting error that this Court should correct by borrowing the qualifier “to the Director of Health” from R.C. 3721.22. However, “[a] court should give effect to the words actually employed in a statute, and should not delete words used, or insert words not used, in the

¹ As discussed below, had the legislature limited the protections to a report under R.C. Chapter 3721, as the First District noted it could have done, Hulsmeyer’s conduct still would have been protected. One of the many reports contemplated by R.C. Chapter 3721 is a report to a resident’s adult child when there is a change in the resident’s health status.

guise of interpreting the statute.” *State v. Taniguchi*, 74 Ohio St.3d 154, 156, 656 N.E.2d 1286 (1995).

The fact that R.C. 3721.24 does not specify to whom a report must be made does not render the statute ambiguous. It must be presumed that the legislature chose to employ the general language intentionally—and it did so with good reason. Protecting vulnerable nursing home residents from abuse and neglect is of paramount importance. Nursing home residents are best protected—indeed, can *only* be protected—if employees are able to make good faith reports of abuse or neglect to management, to law enforcement, to sponsors, or to other persons or entities in a position to assist the resident, without the fear of facing retaliation for doing so. Under Appellants’ interpretation of the statute, any employee could be disciplined or terminated, as Hulsmeier was, for making any of these good faith reports. The chilling effect of such a policy on an employee’s willingness to report abuse or neglect is obvious. The legislature wisely chose not to so limit the protections of R.C. 3721.24.

C. Even If R.C. 3721.24 Is Ambiguous, The Decision Of The First District Court Of Appeals Is Correct

Assuming, arguendo, that R.C. 3721.24 is ambiguous, then the Court should construe the language of the entire statutory scheme governing nursing homes, the related regulations, and any other statutes and regulations relating to the same subject matter, in order to discover and carry out the legislature’s intent. *Sheet Metal Workers*, 122 Ohio St.3d 248, 2009-Ohio-2747, 910 N.E.2d 444, at ¶ 38. The Court must also consider the consequences of a particular construction when determining the intent of the legislature. *Id.* at ¶ 29. “The General Assembly is presumed not to intend any ridiculous or absurd results from the operation of a statute which it enacts, and, if reasonably possible to do so, statutes must be construed so as to prevent such

results.” *State ex rel. Haines v. Rhodes*, 168 Ohio St. 165, 165, 151 N.E.2d 716 (1958), paragraph two of the syllabus.

Appellants’ interpretation of R.C. 3721.24(A) would result in the absurdity of employers being free to terminate with impunity employees who make good faith reports of abuse or neglect to their supervisors, to sponsors, or to law enforcement. In the context of Chapter 3721, whose sole purpose is the protection of the vulnerable residents of long term care and residential care facilities, such a result would be ridiculous. Every citizen of Ohio who is such a resident, or whose parent, grandparent, or other relative is such a resident, knows that such a result would be not only ridiculous, but outrageous. The legislature did not enact the provisions of Chapter 3721 with the intention of permitting employers to discourage the reporting of abuse or neglect by retaliating against employees who in good faith tell their supervisors, a resident’s sponsors, or law enforcement agencies about such abuse or neglect. Appellants’ constricted statutory construction is shockingly devoid of any recognition or appreciation of the purpose behind Chapter 3721—the protection of Ohio’s most vulnerable citizens when they are in the custody and care of long term and residential care facilities.

Appellants reach their absurd construction of R.C. 3721.24 by reading only R.C. 3721.22 through R.C. 3721.26 in *pari materia*, to the exclusion of the remainder of Chapter 3721. Based on this narrow analysis, Appellants argue that the First District “ignored this statutory framework” and that its construction “would jeopardize the entire statutory framework for reporting suspected resident abuse and neglect” (Joint Br. of Appellants in Ohio Sup. Ct. at 3, 24). As discussed below, a reading of the entire chapter and related regulations supports Hulsmeyer’s interpretation of R.C. 3721.24. But even Appellants’ inappropriately limited application of the *in pari materia* doctrine does not support their interpretation of 3721.24.

Appellants argue that the legislature could not have intended to afford protection from retaliation to “whistleblowers who did not even carry out their own explicit obligation under R.C. 3721.22.” (Joint Br. of Appellants in Ohio Sup. Ct. at 25). The fact is that Hulsmeier *did* comply with the mandate of her employer, Hospice, whose policy *required* her to report suspected abuse or neglect to the CEO or its designee, who would then “report[] to the appropriate state and local bodies within 5 working days”² Hulsmeier was never disciplined by any licensing agency, or by her employer Hospice, for not personally reporting to the director of health. But regardless of whether Hulsmeier complied with R.C. 3721.22, it is clear that the legislature intended to provide different protections to different persons in different circumstances, including protection from retaliation for persons like Hulsmeier.

R.C. 3721.22(C) provides protection from criminal prosecution, civil liability, and professional disciplinary action to “any person”—a licensed health care professional or anyone else—who in good faith reports suspected abuse or neglect “to the director of health.”

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 prosecution, liable in damages in a tort or other civil action, or subject to professional disciplinary action because of injury or loss to person or property allegedly arising from the making of the report, provision of information, or participation in the hearing.

R.C. 3721.22(C).

R.C. 3721.24(A), on the other hand, provides protection from retaliation to “an employee or another individual used by the person or government entity to perform any work or services who, in good faith, makes a report of suspected abuse or neglect of a resident.” These two sections cover distinct classes of individuals and provide them with different protections:

² Hospice Policy Manual, attached to Merit Brief of Appellee Hulsmeier at Supp. 15.

3721.22(C) protects “any person,” while 3721.24(A) protects only “an employee or another individual used . . . to perform any work or services.” R.C. 3721.22(C) provides protection from prosecution and civil liability, while 3721.24 provides protection from retaliation. The legislature chose to limit the immunity from prosecution and civil liability under R.C. 3721.22 to persons who report to the director of health. It did not so limit the protection from retaliation under 3721.24.

Contrary to Appellants’ contention, there is nothing inherently inconsistent in affording protection from criminal and civil liability to ‘any person’ who reports suspected abuse or neglect to the director of health, and affording protection from retaliation to employees who report suspected abuse or neglect to a sponsor, a supervisor, or law enforcement. A licensed health care professional who reports abuse or neglect to a sponsor, but not to the director of health, would not be protected from criminal prosecution or civil liability under R.C. 7321.22(C), and could even be subject to professional discipline and criminal prosecution for failing to report to the director of health under R.C. 3721.22(D). But she would, under R.C. 3721.24(A), be protected from retaliation by her employer for making the report. Indeed, under Appellants’ reading of the statute, Hulsmeyer could have legitimately been terminated for reporting suspected abuse or neglect to Patient’s sponsor even if she had also reported it to the director of health, because the former report would not have been protected.

An employer may of course legally discipline or terminate a licensed health professional for failing to fulfill her professional responsibilities, including any reporting requirements.³ But an employer may not retaliate against any employee—including a licensed health care

³ Hulsmeyer was not terminated for failing to report to the director of health, which is not surprising since Hospice required that such reports be made to the CEO or its designee, who would then report to the state agency. Hulsmeyer was terminated for reporting to Patient’s sponsor.

professional—for making a good faith report of suspected abuse or neglect to her supervisor, a sponsor, law enforcement, or any other person or entity in a position to remedy the abuse or neglect. Any other interpretation of 3721.24(A) would thwart the overriding statutory purpose to protect residents of long term and residential care facilities.

Division (B) of R.C. 3721.24 lends strong support to this interpretation of division (A). The protections afforded by R.C. 3721.24(B) are similarly not restricted to reports to the director of health. That statute provides:

No person or government entity shall retaliate against a resident who reports suspected abuse, neglect, or misappropriation; indicates an intention to make such a report; provides information during an investigation of alleged abuse, neglect, or misappropriation conducted by the director; or participates in a hearing under section 3721.23 of the Revised Code or in any other administrative or judicial proceeding pertaining to the suspected abuse, neglect, or misappropriation; or on whose behalf any other person or government entity takes any of those actions. For purposes of this division, retaliatory actions include abuse, verbal threats or other harsh language, change of room assignment, withholding of services, failure to provide care in a timely manner, and any other action intended to retaliate against the resident.

R.C. 3721.24(B).

Under Appellants' and the Eighth District's interpretation, a resident who complained to a family member, to management, or to law enforcement about abuse or neglect would not be protected from retaliation by this provision, a result that underscores the absurdity of that interpretation. There is no reason to presume that the General Assembly in drafting this provision expected nursing home residents to report abuse or neglect to the director of health, and not to anyone else, or expected that residents would even know who the director was or how to make contact with the director. A resident who is suffering from abuse or neglect is most likely to report it to a family member, to a manager or supervisor at the facility, or perhaps in an extreme case, to law enforcement. None of these reports would be protected under Appellants' construction—a result that is absurdly at odds with the antiretaliation intent of the statute.

Divisions (A) and (B) of R.C. 3721.24 are identical in that they protect persons who make reports of suspected abuse or neglect, with no specification that the report be made to the director of health. In that respect, these divisions are distinctly different from R.C. 3721.22, which provides immunity to persons only for reports made to the director of health. Just as it would make no sense to limit the protection of residents under R.C. 3721.24(B) to those who report abuse or neglect to the director of health, so it would make no sense to apply that restriction under R.C. 3721.24(A) to employees and others who provide work or services who report abuse or neglect. An employee or other person who provides work or services—whether it be a nurse, an aide, a food service worker, a custodian, receptionist, or a contractor—would in all likelihood report any suspected abuse or neglect to someone in the vicinity, whether it be family, a supervisor, or even the police. It is unlikely that many of these employees and contractors would report directly to the director of health, or would even know who that is. The legislature obviously understood this when it failed to require that reports under R.C. 3721.24 be made to the director of health.

Expanding the analysis beyond R.C. 3721.22 through R.C. 3721.26 to the entire statutory scheme provides further support for Hulsmeyer's position. R.C. Chapter 3721 and the related portions of the administrative code contain several requirements that reports of abuse or neglect be made to persons or entities other than the director of health, particularly to a resident's sponsor. For example, R.C. 3721.13(A)(32) provides that a resident has the right to have "any significant change in the resident's health status reported to the resident's sponsor. As soon as such a change is known to the home's staff, the home shall make a reasonable effort to notify the

sponsor within twelve hours.”⁴ Ohio Adm. Code 3701-17-12 similarly provides that a hospice care program must immediately notify a resident’s sponsor and treating physician if there is an accident involving the resident which results in an injury potentially requiring physician intervention or a significant change in the resident’s physical, mental, or psycho-social status.⁵ Ohio Adm. Code 3701-17-62 also requires a residential care facility, in the event of a significant adverse change in a resident’s health status, to take immediate steps to ensure the resident receives any necessary intervention and to notify the resident’s sponsor.

The unexplained bruises Patient exhibited in this case certainly constituted a significant change in Patient’s health status, and the report to Patient’s daughter was mandatory under Ohio law. These provisions of the Revised Code and the Administrative Code must be considered when determining the intent of the legislature in enacting R.C. 3721.24. *Sheet Metal Workers*, 122 Ohio St.3d 248, 2009-Ohio-2747, 910 N.E.2d 444, at ¶ 38. It is completely unreasonable to presume, as Appellants do, that the legislature intended to exclude these mandatory reports to a resident’s sponsor and physician from the reports protected by R.C. 3721.24(A). Appellants have offered no argument for ignoring these additional sections of Chapter 3721 when interpreting the scope of R.C. 3721.24.

Other sections of R.C. Chapter 3721 provide additional edification. Under the trial court’s interpretation of R.C. 3721.24(A), an employee is protected from retaliation only if the employer learns that the employee made a report to the director of health and retaliates against the employee for making that report. R.C. 3721.25 mandates that such reports to the director of

⁴ A sponsor is “an adult relative, friend, or guardian of a resident who has an interest or responsibility in the resident’s welfare.” R.C. 3721.10(D). Patient’s daughter, to whom Hulsmeier reported the suspected abuse, was a sponsor.

⁵ Ohio Adm. Code 3701-17-12 was revised effective April 1, 2012. The version of the regulation in effect at the time of Hulsmeier’s report to the patient’s daughter and at the time the complaint was filed is attached to Merit Brief of Appellee Hulsmeier at Supp. 19.

health must be maintained confidentially. Because of this confidentiality, it is unlikely that an employer would ever learn the identity of an employee who made a report of abuse or neglect to the director of health. If an employer does not know who made the report to the director of health, it cannot retaliate. Under the trial court's interpretation of R.C. 3721.24, the statute would apply only if the employer somehow obtained this confidential information. Such a narrow scope would render the statute effectively meaningless. When read in pari materia with the entire chapter and the relevant regulations, it is clear that the protections of R.C. 3721.24 cannot be limited to reports made to the director of health.

The Eighth District's and Appellants' interpretation of R.C. 3721.24 leaves a substantial gap in the protection of residents by permitting retaliation against nurses and other employees who make good faith reports of suspected abuse or neglect. Protection of residents requires more than the reporting of suspected abuse or neglect to the director of health. The director of health cannot take immediate remedial action, even in the best of circumstances. To promptly address suspected abuse or neglect, a nurse or other person may need to report the abuse or neglect to supervisors, to physicians, to family members, and in some cases, to law enforcement. Under the Eighth District's and Appellants' interpretation, Ohio's nurses and other employees will not be protected from retaliation for making such a report. Even such a report made concurrently with a report to the director of health would not be protected, because it is only a report to the director of health that is protected under this construction. Under Appellants' construction, reports to other persons or entities such as supervisors, sponsors, and law enforcement, are *never* protected, even though they are, in many cases, mandated under R.C. Chapter 3721 and the related regulations. Such an interpretation is both ridiculous and absurd.

This Court examines the consequences of a particular construction when determining the intent of the legislature, *Sheet Metal Workers*, 122 Ohio St.3d 248, 2009-Ohio-2747, 910 N.E.2d 444, at ¶ 29, and it endeavors to construe statutes so as to avoid absurd results. *State ex rel. Haines v. Rhodes*, 168 Ohio St. 165, 151 N.E.2d 716 (1958), paragraph two of the syllabus. It would be a truly absurd result if a nurse or other employee who witnesses or suspects abuse or neglect can be retaliated against for alerting a superior, or for notifying the sponsor, as required by Ohio law. The interpretation of R.C. 2721.24(A) reached by the trial court and by the Eighth District is at odds with the statute's plain language, and cannot be what the legislature intended.

III. ARGUMENT IN SUPPORT OF APPELLEE/CROSS-APPELLANT'S PROPOSITION OF LAW

Appellee/Cross-Appellant'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.

To state a cause of action for wrongful discharge in violation of Ohio public policy, a plaintiff must show: (1) that a clear public policy existed and was manifested in a state or federal constitution, state or administrative regulation, or in the common law (the clarity element); (2) that dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element); (3) the plaintiff's dismissal was motivated by conduct related to the public policy (the causation element); and (4) the employer lacked an overriding legitimate business justification for the dismissal (the overriding justification element). *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, 773 N.E. 2d 526, ¶¶ 7-10. The first two elements pose questions of law to be decided by the Court, whereas the last two elements pose questions of fact for the trier of fact to resolve. *Id.* at ¶ 11.

A. Ohio Has A Clear Public Policy In Favor Of Reporting Suspected Abuse And Neglect To A Nursing Home Resident's Sponsor

The First District Court of Appeals has previously determined that R.C. 3721.10 through R.C. 3721.17, commonly referred to as the nursing home patients' bill of rights, sets forth "a clear public policy that encourages the reporting of patient abuse and the protection of those who participate in the reporting of such abuse." *Dolan v. St. Mary's Memorial Home*, 153 Ohio App.3d 441, 2003-Ohio-3383, 794 N.E.2d 716, ¶ 10. Among the rights protected is "[t]he right to have any significant change in the resident's health status reported to the resident's sponsor. As soon as such a change is known to the home's staff, the home shall make a reasonable effort to notify the sponsor within twelve hours." R.C. 3721.13(A)(32). Ohio Adm. Code 3701-17-12 extends that requirement to hospice care organizations. Ohio Adm. Code 3701-17-12 also requires the report to be immediately made to the resident's physician.

A separate source of public policy in favor of reporting suspected abuse or neglect of nursing home patients is R.C. 3721.24. If R.C. 3721.24 by its terms does not unambiguously protect employees for reporting suspected abuse or neglect other than to the director of health, it certainly demonstrates a legislative intent to protect individuals from retaliation for addressing suspected abuse or neglect of nursing home residents.

This Court's decision in *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, 950 N.E.2d 938, is directly on point. In *Sutton*, the Court concluded that, although the terms of R.C. 4123.90 protect from retaliation only individuals who have already begun to pursue a worker's compensation claim, the statute demonstrates a clear public policy in favor of "enabl[ing] employees to freely exercise their rights without fear of retribution from their employers." *Id.* at ¶ 22. The Court concluded that the General Assembly "did not intend to leave a gap in protection during which time employers are permitted to retaliate against

employees who might pursue workers' compensation benefits. The alternative interpretation—that the legislature intentionally left the gap—is at odds with the basic purpose of the antiretaliation provision . . . [and would] render any purported protection under the antiretaliation provision wholly illusory.” *Id.*

The Cross-Appellees' and the Eighth District's interpretation of R.C. 3721.24 is similarly at odds with the statute's purpose by leaving a gaping hole in the antiretaliation provision's protection of persons who report suspected abuse or neglect of nursing home patients—a hole that the legislature could not have meant to leave. There is no reason to presume that the legislature intended to permit senior care organizations to retaliate with impunity against individuals who fulfill their obligations to report suspected abuse or neglect to a resident's sponsor, to law enforcement, or to a superior, or that the legislature intended to encourage reports of suspected abuse or neglect *only* to the director of health, while family members, law enforcement, and even the organization's management remain in the dark about the incident.

Abuse and neglect must be addressed immediately, lest it continue or escalate. The Ohio Department of Health's Abuse, Neglect, Misappropriation (ANM) Investigation Guide, a resource the Ohio Department of Health publishes, calls for individuals who suspect abuse or neglect to “immediately” report allegations or suspicions of abuse, neglect, or misappropriation to numerous sources.⁷ These include a physician, the resident's sponsor, the home's administrator, and the state survey agency. In fact, the ANM Investigation Guide calls for a sponsor to be notified within 12 hours, whereas reports to the facility's administrator and to the state survey agency are to be made within 24 hours. This shows how seriously the Department

⁷ Abuse, Neglect, Misappropriation (ANM) Investigation Guide, attached to Merit Brief of Appellee Hulsmeyer at Supp. 21. The document can be viewed at <http://www.odh.ohio.gov/~media/ODH/ASSETS/Files/lrc/nursing%20homes%20-%20facilities/anmguideonly.ashx>.

of Health takes reports to a resident's sponsor. Administrative rules and regulations are a source of public policy. *Painter v. Graley*, 70 Ohio St.3d 377, 384, 639 N.E.2d 51 (1994). This guide published by the Ohio Department of Health qualifies as another source of a public policy encouraging reports of abuse and neglect.

At its heart, the public policy at stake is the protection of nursing home residents by enabling residents and employees to make good faith reports of abuse or neglect without fear of retribution. As the First District acknowledged in *Dolan*, the nursing home patients' bill of rights clearly conveys this policy. That bill of rights establishes a grievance procedure, giving residents or their representatives the right to pursue a grievance with the facility and ultimately a civil action if their rights are violated. R.C. 3721.17. But the bill or rights is largely impotent if an employer can retaliate against employees who take steps to ensure that those rights are not violated.

Cross-Appellees have never contested that Ohio has a public policy in favor of reporting suspected abuse or neglect to a resident's sponsor. Instead, they have focused solely on the jeopardy element, arguing that their construction of R.C. 3721.24 adequately protects society's interests. There is no doubt that the clarity element of Hulsmeier's claim for wrongful discharge in violation of public policy is met.

B. If R.C. 3721.24 Protects Individuals From Retaliation Only For Reporting Suspected Abuse Or Neglect To The Director Of Health, Ohio's Clear Public Policy Is In Jeopardy

If R.C. 3721.24 protects individuals from retaliation only for reports to the director of health, then the Court must determine whether a retaliatory dismissal of a person who reported suspected abuse and neglect and a change in health condition of a nursing home resident to that resident's sponsor jeopardizes Ohio's public policy in favor of reporting abuse and neglect. "In cases where the right and remedy are part of the same statute that is the sole source of public

policy opposing the discharge, the test for determining the jeopardy element is whether the remedy provisions adequately protect society's interest by discouraging wrongful conduct." *Sutton*, 129 Ohio St.3d 153, 2011-Ohio-2723, 950 N.E.2d 938, at ¶ 25. "In cases of multiple-source public policy, the statute containing the right and remedy will not foreclose recognition of the tort on the basis of some other source of public policy, unless it was the legislature's intent in enacting the statute to preempt common-law remedies." *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, 875 N.E. 2d 36, ¶ 24, quoting *Collins v. Rizkana*, 73 Ohio St.3d 65, 73 (1995).

There are multiple sources for the policy favoring reporting abuse of neglect of residents. The First District Court of Appeals has found that R.C. 3721.10 through 3721.17, the nursing home patients' bill of rights, sets forth a clear public policy favoring reporting of abuse or neglect and protecting those who report it. *Dolan*, 153 Ohio App.3d 441, 2003-Ohio-3383, 794 N.E.2d 716, at ¶ 10. R.C. 3721.24 is another source. R.C. 3721.13(A)(32), Ohio Adm. Code 3701-17-12, Ohio Adm. Code 3701-17-62, and the Department of Health's ANM Investigation Guide are still other sources. Therefore, the jeopardy element should be analyzed using the multiple source standard set forth in *Leininger*.

There can be no reasonable dispute that Ohio's public policy encouraging reports to protect Ohio's nursing home residents is in jeopardy if there is no protection for individuals who make reports to persons or entities other than the director of health. The Ohio legislature and the Department of Health have already spoken on how important these reports are to the protection of Ohio's nursing home residents. If a nurse's or other employee's livelihood can be threatened for making such a report, those reports often will simply not be made, and Ohio's nursing home

residents will suffer. As discussed in the preceding section, this is the same type of “gap” this Court agreed a public policy claim is meant to fill in *Sutton*:

By its express terms, R.C. 4123.90 does not apply to Sutton or others who experience retaliatory employment action after being injured but before they file, institute, or pursue a workers’ compensation claim. Consequently, a claim for retaliatory discharge in those circumstances is not cognizable under the statute. It is precisely this reason that Sutton’s statutory claim failed. Therefore, R.C. 4123.90 plainly does nothing to discourage the wrongful conduct that Sutton alleges. Accordingly, we hold that R.C. 4123.90 does not provide adequate remedies and thus the jeopardy element is satisfied.

Sutton, 129 Ohio St.3d 153, 2011-Ohio-2723, 950 N.E.2d 938 at ¶ 27.

Here, if the Court determines that R.C. 3721.24 does not apply to employees who, like Hulsmeyer, make reports of abuse or neglect to a resident’s sponsor, then the statute does nothing to discourage the wrongful conduct that Hulsmeyer alleges. The statute therefore does not provide an adequate remedy.

There is certainly no indication that the legislature intended, by enacting R.C. 3721.24, to preempt common law remedies. *Leininger*, 115 Ohio St.3d 311, 2007-Ohio-4921, 875 N.E. 2d 36, at ¶ 24. Therefore, the fact that R.C. 3721.24 does not protect individuals from retaliation for reports other than to the director of health does not foreclose recognition of a tort for wrongful discharge in violation of public policy. Accordingly, the jeopardy element of Hulsmeyer’s claim for wrongful discharge in violation of public policy is satisfied.

As this Court has repeatedly held, most recently in *Sutton v. Tomco*, where the legislature has left a gap in a statute that jeopardizes a clear public policy of this state, it is the role of this Court to fill that gap by providing a common-law tort remedy to employees who otherwise would not be protected. Most Ohioans would be shocked were they to learn that the law does not protect Ohio’s strong public policy in favor of reporting abuse or neglect of nursing home residents by forbidding retaliation against employees who make such reports to sponsors,

supervisors, law enforcement, and other appropriate entities. This Court should insure that the protection of employees from retaliation is consistent with this important public policy.

IV. CONCLUSION

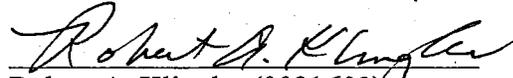
R.C. 3721.24 unambiguously protects from retaliation employees and residents who make reports of suspected abuse or neglect to sponsors, supervisors, law enforcement, and other appropriate entities. To the extent that there is any ambiguity, reading R.C. 3721.24 together with the rest of Chapter 3721 and the relevant regulations substantiates this interpretation of the section.

If and to the extent that R.C. 3721.24 does not protect employees and residents who report suspected abuse or neglect to persons other than the director of health, then Ohio's clear public policy in favor of reporting abuse or neglect of nursing home residents is jeopardized, and the Court should recognize a common-law tort claim for wrongful discharge in violation of public policy when an employee or resident suffers retaliation for reporting suspected abuse or neglect to a sponsor, management, law enforcement, or other appropriate entity.

Appellee/Cross-Appellant Patricia Hulsmeyer therefore respectfully requests that the Court affirm the decision of the First District Court of Appeals.

Alternatively, if this Court reverses that part of the First District's opinion finding that Hulsmeyer has a statutory claim for retaliation under R.C. 3721.24, then Appellee/Cross-Appellant respectfully requests this Court reverse that part of the First District's opinion finding that she has no common-law claim for wrongful discharge in violation of public policy.

Respectfully submitted,



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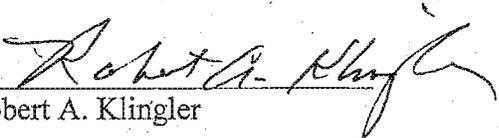
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CERTIFICATE OF SERVICE

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Appendix

Baldwin's Ohio Administrative Code Annotated
3701 Health Department (Refs & Annos)
Public Health Council (Refs & Annos)
Chapter 3701-17. Nursing Homes and Rest Homes (Refs & Annos)

OAC 3701-17-12

3701-17-12 Notification and reporting of changes in health status, illness, injury and death of a resident

Currentness

The nursing home administrator or the administrator's designee shall:

(A) Immediately inform the resident, consult with resident's physician or other licensed health professional acting within the applicable scope of practice, or the medical director, if the attending physician or other licensed health professional acting within the applicable scope of practice is not available, and notify the resident's sponsor or authorized representative, with the resident's permission, and other proper authority, in accordance with state and local laws and regulations when there is:

- (1) An accident involving the resident which results in injury and has the potential for requiring physician intervention;
- (2) A significant change in the resident's physical, mental, or psycho-social status such as a deterioration in health, mental, or psycho-social status in either life-threatening conditions or clinical complications;
- (3) A need to alter treatment significantly such as a need to discontinue an existing form of treatment due to adverse consequences, or to commence a new form of treatment.

The notification shall include a description of the circumstances and cause, if known, of the illness, injury or death. A notation of the change in health status and any intervention taken shall be documented in the medical record. If the resident is a patient of a hospice care program, the notifications required by this paragraph shall be the responsibility of the hospice care program unless otherwise indicated in the coordinated plan of care required under paragraph (H) of rule 3701-17-14 of the Administrative Code.

(B) Report the death of a resident within twenty-four hours to the appropriate third-party payer; or, if the office is closed, as soon thereafter as it is open.

(C) Report any incident of fire, damage due to fire and any incidence of illness, injury or death due to fire or smoke inhalation of a resident within twenty-four hours to the office of the state fire marshal and to the director.

(D) Report the diseases required to be reported under Chapter 3701-3 of the Administrative Code in the manner specified by that chapter.

Credits

HISTORY: 2011-12 OMR pam. # 9 (A), eff. 4-1-12; 2005-06 OMR pam. #11 (RRD); 2001-02 OMR 668 (A), eff. 10-20-01; 1992-93 OMR 682 (A), eff. 12-21-92; prior HE-17-12.

RC 119.032 rule review date(s): 12-1-16; 10-27-11; 5-1-11; 10-1-06; 5-19-06; 9-1-00

Rules are complete and appendices are current through May 11, 2014

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Baldwin's Ohio Administrative Code Annotated
3701 Health Department (Refs & Annos)
Public Health Council (Refs & Annos)
Chapter 3701-17. Nursing Homes and Rest Homes (Refs & Annos)

OAC 3701-17-62

3701-17-62 Changes in residents' health status; incidents; infection control

Currentness

(A) In the event of a significant adverse change in residents' health status, the residential care facility shall do all of the following:

- (1) Take immediate and proper steps to see that the resident receives necessary intervention including, if needed, medical attention or transfer to an appropriate medical facility;
- (2) Make a notation of the change in health status and any intervention taken in the resident's record;
- (3) Provide pertinent resident information to the person providing the intervention as soon as possible; and
- (4) Notify the sponsor unless the resident refuses or requests otherwise.

(B) As used in this paragraph, "incident" means any accident or episode involving a resident, staff member, or other individual in a residential care facility which presents a risk to the health, safety, or well-being of a resident. In the event of an incident, the facility shall do both of the following:

- (1) Take immediate and proper steps to see that the resident or residents involved receive necessary intervention including, if needed, medical attention or transfer to an appropriate medical facility; and
- (2) Investigate the incident and document the incident and the investigation. The facility shall maintain an incident log separate from the resident record which shall be accessible to the director and shall contain the time, place, and date of the occurrence; a general description of the incident; and the care provided or action taken. The facility shall maintain a notation about the incident in the resident's record.

(C) Each residential care facility shall establish and implement appropriate written policies and procedures to control the development and transmission of infections and diseases which, at minimum, shall provide for the following:

- (1) Individuals working in the facility shall wash their hands vigorously for ten to fifteen seconds before beginning work and upon completing work, before and after eating, after using the bathroom, after covering their mouth when sneezing and coughing, before and after providing personal care services or skilled nursing care, when there has been contact with body substances, after contact with contaminated materials, before handling food, and at other appropriate times;

(2) If the residential care facility provides any laundering services, the facility shall keep clean and soiled linen separate. Soiled laundry shall be handled as little as possible. Laundry that is wet or soiled with body substances shall be placed in moisture-resistant bags which are secured or tied to prevent spillage. Laundry staff shall wear moisture-resistant gloves, suitable for sorting and handling soiled laundry, and a moisture-resistant gown or sleeved plastic apron if soiling of staff members' clothing is likely. The facility shall use laundry cycles according to the washer and detergent manufacturers' recommendations. Protective clothing shall be removed before handling clean laundry;

(3) Individuals providing personal care services or skilled nursing care that may result in exposure to body substances, shall wear disposable vinyl or latex gloves as a protective barrier and shall remove and dispose of the used gloves and wash hands before contact with another resident. If exposed to body substances, the individual who has been exposed shall wash his or her hands and other exposed skin surfaces immediately and thoroughly with soap and water. The facility shall provide follow-up consistent with the guidelines issued by the U.S. centers for disease control and prevention for the prevention of transmission of human immunodeficiency virus and hepatitis B virus to health-care and public-safety workers in effect at the time. Individuals providing personal care services or skilled nursing care shall wash their hands before and after providing the services or care even if they used gloves;

(4) Place disposable articles, other than sharp items, contaminated with body substances in a container impervious to moisture and manage them in a fashion consistent with Chapter 3734. of the Revised Code. Reusable items contaminated with body substances shall be bagged, then sent for decontamination;

(5) Wear a moisture-resistant gown or other appropriate protective clothing if soiling of clothing with body substances is likely;

(6) Wear a mask and protective eye wear if splashing of body substances is likely or if a procedure that may create an aerosol is being performed;

(7) Ensure that all hypodermic needles, syringes, lancets, razor blades and similar sharp wastes are disposed of by placing them in rigid, tightly closed puncture-resistant containers before they are transported off the premises of the facility, in a manner consistent with Chapter 3734. of the Revised Code. The residential care facility shall provide instructions to residents who use sharps on the proper techniques for disposing of them.

For the purposes of this paragraph, "body substance" means blood, semen, vaginal secretions, feces, urine, wound drainage, emesis, and any other body fluids that have visible blood in them.

Credits

HISTORY: 2012-13 OMR pam. # 6 (A), eff. 1-1-13; 2011-12 OMR pam. # 4 (RRD); 2006-07 OMR pam. #5 (RRD); 2001-02 OMR 1028 (A), eff. 12-1-01; 1996-97 OMR 359 (A), eff. 9-29-96; 1992-93 OMR 698 (E), eff. 12-21-92.

RC 119.032 rule review date(s): 9-15-17; 10-1-16; 9-25-12; 11-1-11; 10-11-11; 12-1-06; 11-6-06; 8-31-01

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Baldwin's Ohio Revised Code Annotated
Title XXXVII. Health--Safety--Morals
Chapter 3721. Rest Homes and Nursing Homes (Refs & Annos)
Patients' Rights

R.C. § 3721.10

3721.10 Definitions

Effective: September 29, 2013
Currentness

As used in sections 3721.10 to 3721.18 of the Revised Code:

(A) "Home" means all of the following:

- (1) A home as defined in section 3721.01 of the Revised Code;
- (2) Any facility or part of a facility not defined as a home under section 3721.01 of the Revised Code that is a skilled nursing facility or nursing facility, both as defined in section 5165.01 of the Revised Code;
- (3) A county home or district home operated pursuant to Chapter 5155. of the Revised Code.

(B) "Resident" means a resident or a patient of a home.

(C) "Administrator" means all of the following:

- (1) With respect to a home as defined in section 3721.01 of the Revised Code, a nursing home administrator as defined in section 4751.01 of the Revised Code;
- (2) With respect to a facility or part of a facility not defined as a home in section 3721.01 of the Revised Code that is authorized to provide skilled nursing facility or nursing facility services, the administrator of the facility or part of a facility;
- (3) With respect to a county home or district home, the superintendent appointed under Chapter 5155. of the Revised Code.

(D) "Sponsor" means an adult relative, friend, or guardian of a resident who has an interest or responsibility in the resident's welfare.

(E) "Residents' rights advocate" means:

(1) An employee or representative of any state or local government entity that has a responsibility regarding residents and that has registered with the department of health under division (B) of section 3701.07 of the Revised Code;

(2) An employee or representative of any private nonprofit corporation or association that qualifies for tax-exempt status under section 501(a) of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 1, as amended, and that has registered with the department of health under division (B) of section 3701.07 of the Revised Code and whose purposes include educating and counseling residents, assisting residents in resolving problems and complaints concerning their care and treatment, and assisting them in securing adequate services to meet their needs;

(3) A member of the general assembly.

(F) "Physical restraint" means, but is not limited to, any article, device, or garment that interferes with the free movement of the resident and that the resident is unable to remove easily, a geriatric chair, or a locked room door.

(G) "Chemical restraint" means any medication bearing the American hospital formulary service therapeutic class 4:00, 28:16:08, 28:24:08, or 28:24:92 that alters the functioning of the central nervous system in a manner that limits physical and cognitive functioning to the degree that the resident cannot attain the resident's highest practicable physical, mental, and psychosocial well-being.

(H) "Ancillary service" means, but is not limited to, podiatry, dental, hearing, vision, physical therapy, occupational therapy, speech therapy, and psychological and social services.

(I) "Facility" means a facility, or part of a facility, certified as a nursing facility or skilled nursing facility, both as defined in section 5165.01 of the Revised Code. "Facility" does not include an intermediate care facility for individuals with intellectual disabilities, as defined in section 5124.01 of the Revised Code.

CREDIT(S)

(2013 H 59, eff. 9-29-13; 2001 H 94, eff. 9-5-01; 1990 H 822, eff. 12-13-90; 1978 H 600)

Notes of Decisions (12)

R.C. § 3721.10, OH ST § 3721.10

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R.C. § 3721.11

3721.11 Rules

Currentness

(A) The director of the department of health shall adopt rules under Chapter 119. of the Revised Code to govern procedures for the implementation of sections 3721.10 to 3721.17 of the Revised Code.

(B) The director may adopt, amend, and repeal substantive rules under Chapter 119. of the Revised Code defining with reasonable specificity acts that violate division (A) of section 3721.13 of the Revised Code.

CREDIT(S)

(1978 H 600, eff. 1-9-79)

R.C. § 3721.11, OH ST § 3721.11

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R.C. § 3721.12

3721.12 Duties of administrator of home

Effective: September 29, 2013
Currentness

(A) The administrator of a home shall:

(1) With the advice of residents, their sponsors, or both, establish and review at least annually, written policies regarding the applicability and implementation of residents' rights under sections 3721.10 to 3721.17 of the Revised Code, the responsibilities of residents regarding the rights, and the home's grievance procedure established under division (A)(2) of this section. The administrator is responsible for the development of, and adherence to, procedures implementing the policies.

(2) Establish a grievance committee for review of complaints by residents. The grievance committee shall be comprised of the home's staff and residents, sponsors, or outside representatives in a ratio of not more than one staff member to every two residents, sponsors, or outside representatives.

(3) Furnish to each resident and sponsor prior to or at the time of admission, and to each member of the home's staff, at least one of each of the following:

(a) A copy of the rights established under sections 3721.10 to 3721.17 of the Revised Code;

(b) A written explanation of the provisions of sections 3721.16 to 3721.162 of the Revised Code;

(c) A copy of the home's policies and procedures established under this section;

(d) A copy of the home's rules;

(e) A copy of the addresses and telephone numbers of the board of health of the health district of the county in which the home is located, the county department of job and family services of the county in which the home is located, the state departments of health and medicaid, the state and local offices of the department of aging, and any Ohio nursing home ombudsman program.

(B) Written acknowledgment of the receipt of copies of the materials listed in this section shall be made part of the resident's record and the staff member's personnel record.

(C) The administrator shall post all of the following prominently within the home:

(1) A copy of the rights of residents as listed in division (A) of section 3721.13 of the Revised Code;

(2) A copy of the home's rules and its policies and procedures regarding the rights and responsibilities of residents;

(3) A notice that a copy of this chapter, rules of the department of health applicable to the home, and federal regulations adopted under the medicare and medicaid programs, and the materials required to be available in the home under section 3721.021 of the Revised Code, are available for inspection in the home at reasonable hours;

(4) A list of residents' rights advocates;

(5) A notice that the following are available in a place readily accessible to residents:

(a) If the home is licensed under section 3721.02 of the Revised Code, a copy of the most recent licensure inspection report prepared for the home under that section;

(b) If the home is a facility, a copy of the most recent statement of deficiencies issued to the home under section 5165.68 of the Revised Code.

(D) The administrator of a home may, with the advice of residents, their sponsors, or both, establish written policies regarding the applicability and administration of any additional residents' rights beyond those set forth in sections 3721.10 to 3721.17 of the Revised Code, and the responsibilities of residents regarding the rights. Policies established under this division shall be reviewed, and procedures developed and adhered to as in division (A)(1) of this section.

CREDIT(S)

(2013 H 59, eff. 9-29-13; 2001 H 94, eff. 9-5-01; 1999 H 471, eff. 7-1-00; 1993 H 152, eff. 7-1-93; 1990 H 822; 1986 H 428; 1984 H 660; 1978 H 600)

Notes of Decisions (1)

R.C. § 3721.12, OH ST § 3721.12

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R.C. § 3721.13

3721.13 Rights of residents of a home; sponsor; transfer or discharge; attempted waiver void

Effective: September 29, 2013
Currentness

(A) The rights of residents of a home shall include, but are not limited to, the following:

- (1) The right to a safe and clean living environment pursuant to the medicare and medicaid programs and applicable state laws and rules adopted by the director of health;
- (2) The right to be free from physical, verbal, mental, and emotional abuse and to be treated at all times with courtesy, respect, and full recognition of dignity and individuality;
- (3) Upon admission and thereafter, the right to adequate and appropriate medical treatment and nursing care and to other ancillary services that comprise necessary and appropriate care consistent with the program for which the resident contracted. This care shall be provided without regard to considerations such as race, color, religion, national origin, age, or source of payment for care.
- (4) The right to have all reasonable requests and inquiries responded to promptly;
- (5) The right to have clothes and bed sheets changed as the need arises, to ensure the resident's comfort or sanitation;
- (6) The right to obtain from the home, upon request, the name and any specialty of any physician or other person responsible for the resident's care or for the coordination of care;
- (7) The right, upon request, to be assigned, within the capacity of the home to make the assignment, to the staff physician of the resident's choice, and the right, in accordance with the rules and written policies and procedures of the home, to select as the attending physician a physician who is not on the staff of the home. If the cost of a physician's services is to be met under a federally supported program, the physician shall meet the federal laws and regulations governing such services.
- (8) The 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 and to obtain from the attending physician complete and current information concerning medical condition, prognosis, and treatment plan, in terms the resident can reasonably be expected to understand; the right of access to all information in the resident's medical record; and the right to give or withhold informed consent for treatment after the consequences of that choice have been carefully explained. When the attending

physician finds that it is not medically advisable to give the information to the resident, the information shall be made available to the resident's sponsor on the resident's behalf, if the sponsor has a legal interest or is authorized by the resident to receive the information. The home is not liable for a violation of this division if the violation is found to be the result of an act or omission on the part of a physician selected by the resident who is not otherwise affiliated with the home.

(9) The right to withhold payment for physician visitation if the physician did not visit the resident;

(10) The right to confidential treatment of personal and medical records, and the right to approve or refuse the release of these records to any individual outside the home, except in case of transfer to another home, hospital, or health care system, as required by law or rule, or as required by a third-party payment contract;

(11) The right to privacy during medical examination or treatment and in the care of personal or bodily needs;

(12) The right to refuse, without jeopardizing access to appropriate medical care, to serve as a medical research subject;

(13) The right to be free from physical or chemical restraints or prolonged isolation except to the minimum extent necessary to protect the resident from injury to self, others, or to property and except as authorized in writing by the attending physician for a specified and limited period of time and documented in the resident's medical record. Prior to authorizing the use of a physical or chemical restraint on any resident, the attending physician shall make a personal examination of the resident and an individualized determination of the need to use the restraint on that resident.

Physical or chemical restraints or isolation may be used in an emergency situation without authorization of the attending physician only to protect the resident from injury to self or others. Use of the physical or chemical restraints or isolation shall not be continued for more than twelve hours after the onset of the emergency without personal examination and authorization by the attending physician. The attending physician or a staff physician may authorize continued use of physical or chemical restraints for a period not to exceed thirty days, and at the end of this period and any subsequent period may extend the authorization for an additional period of not more than thirty days. The use of physical or chemical restraints shall not be continued without a personal examination of the resident and the written authorization of the attending physician stating the reasons for continuing the restraint.

If physical or chemical restraints are used under this division, the home shall ensure that the restrained resident receives a proper diet. In no event shall physical or chemical restraints or isolation be used for punishment, incentive, or convenience.

(14) The right to the pharmacist of the resident's choice and the right to receive pharmaceutical supplies and services at reasonable prices not exceeding applicable and normally accepted prices for comparably packaged pharmaceutical supplies and services within the community;

(15) The right to exercise all civil rights, unless the resident has been adjudicated incompetent pursuant to Chapter 2111. of the Revised Code and has not been restored to legal capacity, as well as the right to the cooperation of the home's administrator in making arrangements for the exercise of the right to vote;

(16) The right of access to opportunities that enable the resident, at the resident's own expense or at the expense of a third-party payer, to achieve the resident's fullest potential, including educational, vocational, social, recreational, and habilitation programs;

(17) The right to consume a reasonable amount of alcoholic beverages at the resident's own expense, unless not medically advisable as documented in the resident's medical record by the attending physician or unless contradictory to written admission policies;

(18) The right to use tobacco at the resident's own expense under the home's safety rules and under applicable laws and rules of the state, unless not medically advisable as documented in the resident's medical record by the attending physician or unless contradictory to written admission policies;

(19) The right to retire and rise in accordance with the resident's reasonable requests, if the resident does not disturb others or the posted meal schedules and upon the home's request remains in a supervised area, unless not medically advisable as documented by the attending physician;

(20) The right to observe religious obligations and participate in religious activities; the right to maintain individual and cultural identity; and the right to meet with and participate in activities of social and community groups at the resident's or the group's initiative;

(21) The right upon reasonable request to private and unrestricted communications with the resident's family, social worker, and any other person, unless not medically advisable as documented in the resident's medical record by the attending physician, except that communications with public officials or with the resident's attorney or physician shall not be restricted. Private and unrestricted communications shall include, but are not limited to, the right to:

(a) Receive, send, and mail sealed, unopened correspondence;

(b) Reasonable access to a telephone for private communications;

(c) Private visits at any reasonable hour.

(22) The right to assured privacy for visits by the spouse, or if both are residents of the same home, the right to share a room within the capacity of the home, unless not medically advisable as documented in the resident's medical record by the attending physician;

(23) The right upon reasonable request to have room doors closed and to have them not opened without knocking, except in the case of an emergency or unless not medically advisable as documented in the resident's medical record by the attending physician;

(24) The right to retain and use personal clothing and a reasonable amount of possessions, in a reasonably secure manner, unless to do so would infringe on the rights of other residents or would not be medically advisable as documented in the resident's medical record by the attending physician;

(25) The right to be fully informed, prior to or at the time of admission and during the resident's stay, in writing, of the basic rate charged by the home, of services available in the home, and of any additional charges related to such services, including charges for services not covered under the medicare or medicaid program. The basic rate shall not be changed unless thirty days' notice is given to the resident or, if the resident is unable to understand this information, to the resident's sponsor.

(26) The right of the resident and person paying for the care to examine and receive a bill at least monthly for the resident's care from the home that itemizes charges not included in the basic rates;

(27)(a) The right to be free from financial exploitation;

(b) The right to manage the resident's own personal financial affairs, or, if the resident has delegated this responsibility in writing to the home, to receive upon written request at least a quarterly accounting statement of financial transactions made on the resident's behalf. The statement shall include:

(i) A complete record of all funds, personal property, or possessions of a resident from any source whatsoever, that have been deposited for safekeeping with the home for use by the resident or the resident's sponsor;

(ii) A listing of all deposits and withdrawals transacted, which shall be substantiated by receipts which shall be available for inspection and copying by the resident or sponsor.

(28) The right of the resident to be allowed unrestricted access to the resident's property on deposit at reasonable hours, unless requests for access to property on deposit are so persistent, continuous, and unreasonable that they constitute a nuisance;

(29) The right to receive reasonable notice before the resident's room or roommate is changed, including an explanation of the reason for either change.

(30) The right not to be transferred or discharged from the home unless the transfer is necessary because of one of the following:

(a) The welfare and needs of the resident cannot be met in the home.

(b) The resident's health has improved sufficiently so that the resident no longer needs the services provided by the home.

(c) The safety of individuals in the home is endangered.

(d) The health of individuals in the home would otherwise be endangered.

(e) The resident has failed, after reasonable and appropriate notice, to pay or to have the medicare or medicaid program pay on the resident's behalf, for the care provided by the home. A resident shall not be considered to have failed to have the resident's care paid for if the resident has applied for medicaid, unless both of the following are the case:

(i) The resident's application, or a substantially similar previous application, has been denied.

(ii) If the resident appealed the denial, the denial was upheld.

(f) The home's license has been revoked, the home is being closed pursuant to section 3721.08, sections 5165.60 to 5165.89, or section 5155.31 of the Revised Code, or the home otherwise ceases to operate.

(g) The resident is a recipient of medicaid, and the home's participation in the medicaid program is involuntarily terminated or denied.

(h) The resident is a beneficiary under the medicare program, and the home's participation in the medicare program is involuntarily terminated or denied.

(31) The 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. This right includes access to a residents' rights advocate, and the right to be a member of, to be active in, and to associate with persons who are active in organizations of relatives and friends of nursing home residents and other organizations engaged in assisting residents.

(32) The right to have any significant change in the resident's health status reported to the resident's sponsor. As soon as such a change is known to the home's staff, the home shall make a reasonable effort to notify the sponsor within twelve hours.

(B) A sponsor may act on a resident's behalf to assure that the home does not deny the residents' rights under sections 3721.10 to 3721.17 of the Revised Code.

(C) Any attempted waiver of the rights listed in division (A) of this section is void.

CREDIT(S)

(2013 H 59, eff. 9-29-13; 2012 H 487, eff. 9-10-12; 2001 H 94, eff. 9-5-01; 1990 H 822, eff. 12-13-90; 1978 H 600)

Notes of Decisions (42)

R.C. § 3721.13, OH ST § 3721.13

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R.C. § 3721.14

3721.14 Additional provisions for implementation of rights

Effective: September 29, 2013

Currentness

To assist in the implementation of the rights granted in division (A) of section 3721.13 of the Revised Code, each home shall provide:

(A) Appropriate staff training to implement each resident's rights under division (A) of section 3721.13 of the Revised Code, including, but not limited to, explaining:

- (1) The resident's rights and the staff's responsibility in the implementation of the rights;
- (2) The staff's obligation to provide all residents who have similar needs with comparable service.

(B) Arrangements for a resident's needed ancillary services;

(C) Protected areas outside the home for residents to enjoy outdoor activity, within the capacity of the facility, consistent with applicable laws and rules;

(D) Adequate indoor space, which need not be dedicated to that purpose, for families of residents to meet privately with families of other residents;

(E) Access to the following persons to enter the home during reasonable hours, except where such access would interfere with resident care or the privacy of residents:

(1) Employees of the department of health, department of mental health and addiction services, department of developmental disabilities, department of aging, department of job and family services, and county departments of job and family services;

(2) Prospective residents and their sponsors;

(3) A resident's sponsors;

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(4) Residents' rights advocates;

(5) A resident's attorney;

(6) A minister, priest, rabbi, or other person ministering to a resident's religious needs.

(F) In writing, a description of the home's grievance procedures.

CREDIT(S)

(2013 H 59, eff. 9-29-13; 2009 S 79, eff. 10-6-09; 1999 H 471, eff. 7-1-00; 1990 H 822, eff. 12-13-90; 1986 H 428; 1984 H 660; 1978 H 600)

Notes of Decisions (6)

R.C. § 3721.14, OH ST § 3721.14

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R.C. § 3721.15

3721.15 Authority for home to manage resident's financial affairs; accounting

Effective: September 29, 2013
Currentness

(A) Authorization from a resident or a sponsor with a power of attorney for a home to manage the resident's financial affairs shall be in writing and shall be attested to by a witness who is not connected in any manner whatsoever with the home or its administrator. The home shall maintain accounts pursuant to division (A)(27) of section 3721.13 of the Revised Code. Upon the resident's transfer, discharge, or death, the account shall be closed and a final accounting made. All remaining funds shall be returned to the resident or resident's sponsor, except in the case of death, when all remaining funds shall be transferred or used in accordance with section 5162.22 of the Revised Code.

(B) A home that manages a resident's financial affairs shall deposit the resident's funds in excess of one thousand dollars, and may deposit the resident's funds that are one thousand dollars or less, in an interest-bearing account separate from any of the home's operating accounts. Interest earned on the resident's funds shall be credited to the resident's account. A resident's funds that are one thousand dollars or less and have not been deposited in an interest-bearing account may be deposited in a noninterest-bearing account or petty cash fund.

(C) Each resident whose financial affairs are managed by a home shall be promptly notified by the home when the total of the amount of funds in the resident's accounts and the petty cash fund plus other nonexempt resources reaches two hundred dollars less than the maximum amount permitted a recipient of medicaid. The notice shall include an explanation of the potential effect on the resident's eligibility for medicaid if the amount in the resident's accounts and the petty cash fund, plus the value of other nonexempt resources, exceeds the maximum assets a medicaid recipient may retain.

(D) Each home that manages the financial affairs of residents shall purchase a surety bond or otherwise provide assurance satisfactory to the director of health, or, in the case of a home that participates in the medicaid program, to the medicaid director, to assure the security of all residents' funds managed by the home.

CREDIT(S)

(2013 H 59, eff. 9-29-13; 2005 H 66, eff. 6-30-05; 2001 H 94, eff. 9-5-01; 1999 H 471, eff. 7-1-00; 1995 H 167, eff. 11-15-95; 1995 H 117, eff. 9-29-95; 1990 H 822, eff. 12-13-90; 1978 H 600)

R.C. § 3721.15, OH ST § 3721.15

Current through Files 1 to 113 and Statewide Issue 1 of the 130th GA (2013-2014).

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R.C. § 3721.16

3721.16 Notice of proposed transfer or discharge; challenge

Effective: September 29, 2013

Currentness

For each resident of a home, notice of a proposed transfer or discharge shall be in accordance with this section.

(A)(1) The administrator of a home shall notify a resident in writing, and the resident's sponsor in writing by certified mail, return receipt requested, in advance of any proposed transfer or discharge from the home. The administrator shall send a copy of the notice to the state department of health. The notice shall be provided at least thirty days in advance of the proposed transfer or discharge, unless any of the following applies:

- (a) The resident's health has improved sufficiently to allow a more immediate discharge or transfer to a less skilled level of care;
- (b) The resident has resided in the home less than thirty days;
- (c) An emergency arises in which the safety of individuals in the home is endangered;
- (d) An emergency arises in which the health of individuals in the home would otherwise be endangered;
- (e) An emergency arises in which the resident's urgent medical needs necessitate a more immediate transfer or discharge.

In any of the circumstances described in divisions (A)(1)(a) to (e) of this section, the notice shall be provided as many days in advance of the proposed transfer or discharge as is practicable.

(2) The notice required under division (A)(1) of this section shall include all of the following:

- (a) The reasons for the proposed transfer or discharge;
- (b) The proposed date the resident is to be transferred or discharged;
- (c) Subject to division (A)(3) of this section, a proposed location to which the resident may relocate and a notice that the resident and resident's sponsor may choose another location to which the resident will relocate;

(d) Notice of the right of the resident and the resident's sponsor to an impartial hearing at the home on the proposed transfer or discharge, and of the manner in which and the time within which the resident or sponsor may request a hearing pursuant to section 3721.161 of the Revised Code;

(e) A statement that the resident will not be transferred or discharged before the date specified in the notice unless the home and the resident or, if the resident is not competent to make a decision, the home and the resident's sponsor, agree to an earlier date;

(f) The address of the legal services office of the department of health;

(g) The name, address, and telephone number of a representative of the state long-term care ombudsman program and, if the resident or patient has a developmental disability or mental illness, the name, address, and telephone number of the Ohio protection and advocacy system.

(3) The proposed location to which a resident may relocate as specified pursuant to division (A)(2)(c) of this section in the proposed transfer or discharge notice shall be capable of meeting the resident's health-care and safety needs. The proposed location for relocation need not have accepted the resident at the time the notice is issued to the resident and resident's sponsor.

(B) No home shall transfer or discharge a resident before the date specified in the notice required by division (A) of this section unless the home and the resident or, if the resident is not competent to make a decision, the home and the resident's sponsor, agree to an earlier date.

(C) Transfer or discharge actions shall be documented in the resident's medical record by the home if there is a medical basis for the action.

(D) A resident or resident's sponsor may challenge a transfer or discharge by requesting an impartial hearing pursuant to section 3721.161 of the Revised Code, unless the transfer or discharge is required because of one of the following reasons:

(1) The home's license has been revoked under this chapter;

(2) The home is being closed pursuant to section 3721.08, sections 5165.60 to 5165.89, or section 5155.31 of the Revised Code;

(3) The resident is a recipient of medicaid and the home's participation in the medicaid program has been involuntarily terminated or denied by the federal government;

(4) The resident is a beneficiary under the medicare program and the home's certification under the medicare program has been involuntarily terminated or denied by the federal government.

(E) If a resident is transferred or discharged pursuant to this section, the home from which the resident is being transferred or discharged shall provide the resident with adequate preparation prior to the transfer or discharge to ensure a safe and orderly

3721.16 Notice of proposed transfer or discharge; challenge, OH ST § 3721.16

transfer or discharge from the home, and the home or alternative setting to which the resident is to be transferred or discharged shall have accepted the resident for transfer or discharge.

(F) At the time of a transfer or discharge of a resident who is a recipient of medicaid from a home to a hospital or for therapeutic leave, the home shall provide notice in writing to the resident and in writing by certified mail, return receipt requested, to the resident's sponsor, specifying the number of days, if any, during which the resident will be permitted under the medicaid program to return and resume residence in the home and specifying the medicaid program's coverage of the days during which the resident is absent from the home. An individual who is absent from a home for more than the number of days specified in the notice and continues to require the services provided by the facility shall be given priority for the first available bed in a semi-private room.

CREDIT(S)

(2013 H 59, eff. 9-29-13; 2011 H 153, § 120.20, eff. 10-1-12; 2011 H 153, § 101.01, eff. 9-29-11; 2001 H 94, eff. 9-5-01; 1990 H 822, eff. 12-13-90; 1978 H 600)

R.C. § 3721.16, OH ST § 3721.16

Current through Files 1 to 113 and Statewide Issue 1 of the 130th GA (2013-2014).

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Baldwin's Ohio Revised Code Annotated
Title XXXVII. Health--Safety--Morals
Chapter 3721. Rest Homes and Nursing Homes (Refs & Annos)
Patients' Rights

R.C. § 3721.161

3721.161 Notice of proposed transfer or discharge; hearing

Currentness

(A) Not later than thirty days after the date a resident or the resident's sponsor receives notice of a proposed transfer or discharge, whichever is later, the resident or resident's sponsor may challenge the proposed transfer or discharge by submitting a written request for a hearing to the state department of health. On receiving the request, the department shall conduct a hearing in accordance with section 3721.162 of the Revised Code to determine whether the proposed transfer or discharge complies with division (A)(30) of section 3721.13 of the Revised Code.

(B) Except in the circumstances described in divisions (A)(1)(a) to (e) of section 3721.16 of the Revised Code, if a resident or resident's sponsor submits a written hearing request not later than ten days after the resident or the resident's sponsor received notice of the proposed transfer or discharge, whichever is later, the home shall not transfer or discharge the resident unless the department determines after the hearing that the transfer or discharge complies with division (A)(30) of section 3721.13 of the Revised Code or the department's determination to the contrary is reversed on appeal.

(C) If a resident or resident's sponsor does not request a hearing pursuant to division (A) of this section, the home may transfer or discharge the resident on the date specified in the notice required by division (A) of section 3721.16 of the Revised Code or thereafter, unless the home and the resident or, if the resident is not competent to make a decision, the home and the resident's sponsor, agree to an earlier date.

(D) If the resident or resident's sponsor requests a hearing in writing pursuant to division (A) of this section and the home transfers or discharges the resident before the department issues a hearing decision, the home shall readmit the resident in the first available bed if the department determines after the hearing that the transfer or discharge does not comply with division (A)(30) of section 3721.13 of the Revised Code or the department's determination to the contrary is reversed on appeal.

CREDIT(S)

(2001 H 94, eff. 9-5-01)

R.C. § 3721.161, OH ST § 3721.161

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Baldwin's Ohio Revised Code Annotated
Title XXXVII. Health--Safety--Morals
Chapter 3721. Rest Homes and Nursing Homes (Refs & Annos)
Patients' Rights

R.C. § 3721.162

3721.162 Hearings

Currentness

(A) On receiving a request pursuant to section 3721.161 of the Revised Code, the department of health shall conduct hearings under this section in accordance with 42 C.F.R. 431, subpart E, to determine whether the proposed transfer or discharge complies with division (A)(30) of section 3721.13 of the Revised Code.

(B) The department shall employ or contract with an attorney to serve as hearing officer. The hearing officer shall conduct a hearing in the home not later than ten days after the date the department receives a request pursuant to section 3721.161 of the Revised Code, unless the resident and the home or, if the resident is not competent to make a decision, the resident's sponsor and the home, agree otherwise. The hearing shall be recorded on audiotape, but neither the recording nor a transcript of the recording shall be part of the official record of the hearing. A hearing conducted under this section is not subject to section 121.22 of the Revised Code.

(C) Unless the parties otherwise agree, the hearing officer shall issue a decision within five days of the date the hearing concludes. In all cases, a decision shall be issued not later than thirty days after the department receives a request pursuant to section 3721.161 of the Revised Code. The hearing officer's decision shall be served on the resident or resident's sponsor and the home by certified mail. The hearing officer's decision shall be considered the final decision of the department.

(D) A resident, resident's sponsor, or home may appeal the decision of the department to the court of common pleas pursuant to section 119.12 of the Revised Code. The appeal shall be governed by section 119.12 of the Revised Code, except for all of the following:

(1) The resident, resident's sponsor, or home shall file the appeal in the court of common pleas of the county in which the home is located.

(2) The resident or resident's sponsor may apply to the court for designation as an indigent and, if the court grants the application, the resident or resident's sponsor shall not be required to furnish the costs of the appeal.

(3) The appeal shall be filed with the department and the court within thirty days after the hearing officer's decision is served. The appealing party shall serve the opposing party a copy of the notice of appeal by hand-delivery or certified mail, return receipt requested. If the home is the appealing party, it shall provide a copy of the notice of appeal to both the resident and the resident's sponsor or attorney, if known.

(4) The department shall not file a transcript of the hearing with the court unless the court orders it to do so. The court shall issue such an order only if it finds that the parties are unable to stipulate to the facts of the case and that the transcript is essential to the determination of the appeal. If the court orders the department to file the transcript, the department shall do so not later than thirty days after the day the court issues the order.

(E) The court shall not require an appellant to pay a bond as a condition of issuing a stay pending its decision.

(F) The resident, resident's sponsor, home, or department may commence a civil action in the court of common pleas of the county in which the home is located to enforce the decision of the department or the court. If the court finds that the resident or home has not complied with the decision, it shall enjoin the violation and order other appropriate relief, including attorney's fees.

CREDIT(S)

(2001 H 94, eff. 9-5-01)

Notes of Decisions (1)

R.C. § 3721.162, OH ST § 3721.162

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Supplement

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**TRACY WINKLER
HAMILTON COUNTY CLERK OF COURTS**

COMMON PLEAS DIVISION

**ELECTRONICALLY FILED
February 28, 2012 02:08 PM**

**TRACY WINKLER
Clerk of Courts
Hamilton County, Ohio
CONFIRMATION 126611**

PATRICIA HULSMEYER

A 1201578

vs.

**HOSPICE OF SOUTHWEST
OHIO INC**

**FILING TYPE: INITIAL FILING(OUT OF COUNTY) WITH JURY
DEMAND**

PAGES FILED: 13

EFB200

Supp.1

Robert A. Klingler (0031603)
ATTORNEY FOR PLAINTIFF

**COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**

PATRICIA HULSMEYER
1908 Brixton Court
Loveland, OH 45140

Case No. _____

Judge _____

PLAINTIFF,

v.

HOSPICE OF SOUTHWEST OHIO, INC.
7625 Camargo Road
Madera, OH 45243

SERVE: Michael Doddy
7625 Camargo Road
Madera, OH 45243

**COMPLAINT WITH JURY
DEMAND ENDORSED HEREON**

AND

JOSEPH KILLIAN
7625 Camargo Road
Madera, OH 45243

AND

BROOKDALE SENIOR LIVING, INC.
d/b/a BROOKDALE PLACE AT
KENWOOD
9090 Montgomery Road
Cincinnati, OH 45242

SERVE: CT Corporation System
1300 East Ninth Street
Cleveland, OH 44114

DEFENDANTS.

For her Complaint against Defendants Hospice of Southwest Ohio, Inc., Joseph Killian,
and Brookdale Senior Living, Inc., Plaintiff Patricia Hulsmeyer states as follows:

Supp.2

PARTIES AND VENUE

1. Ms. Hulsmeyer is an individual residing in Loveland, Ohio. She is a registered nurse and a former employee of Defendant Hospice of Southwest Ohio, Inc.

2. Defendant Hospice of Southwest Ohio, Inc. ("Hospice") is an Ohio for profit corporation with its principal place of business in Hamilton County, Ohio. Hospice provides hospice care to residents of long-term care facilities and residential care facilities as those terms are defined in R.C. § 3721.21.

3. Defendant Joseph Killian is an individual residing in Warren County, Ohio. Mr. Killian is the Chief Executive Officer of Hospice.

4. Defendant Brookdale Senior Living, Inc. ("Brookdale") is a Delaware for profit corporation conducting business in Hamilton County, Ohio. Brookdale operates a long-term care facility and residential care facility as those terms are defined in R.C. § 3721.21.

5. Venue is appropriate in this Court pursuant to Rule 3(B)(3) of the Ohio Rules of Civil Procedure because Defendants conducted the activity that gave rise to the claims in Hamilton County, Ohio.

FACTUAL ALLEGATIONS

6. Ms. Hulsmeyer was an employee of Hospice for nearly two years. At the time of her termination, Ms. Hulsmeyer held the position of Team Manager. Ms. Hulsmeyer was responsible for overseeing the care of Hospice's patients and monitoring the work of various other nurses and aides employed by Hospice.

7. Hospice provides hospice care to residents at various long-term care and residential care facilities in the Greater Cincinnati area. When a resident is placed on hospice care, Hospice is retained to provide nursing and other services to the residents, even though they

remain in the long-term care or residential care facility in which they reside. The long-term care or residential care facility's staff also continues to provide the residents care.

8. Brookdale operates Brookdale Place at Kenwood. Hospice provided hospice services to residents at that location.

9. On October 19, 2011, Ms. Hulsmeyer attended a team meeting at Hospice's facility to discuss various patients. During that meeting, a nurse, Roxanne Schneider, indicated that one of Hospice's patients at Brookdale ("Patient") had suffered some bruising. She further indicated that she felt the bruising was inconsistent with previous falls and she suspected abuse and/or neglect at the hands of Brookdale staff. Subsequently, an aide present at the meeting, Rachel Brown, indicated that she had taken a photograph of additional marks on Patient's skin, at Patient's request, with her mobile telephone. Ms. Brown then forwarded the photograph to Ms. Hulsmeyer's mobile telephone as well as to other staff. All present concluded that the likely cause of the marks in the photograph was an excessively-tightened bag from a Foley catheter.

10. After the revelation of suspected abuse and/or neglect, while still in the meeting, John Back, a nurse, Brian Keegan, M.D., Hospice's staff physician, and Ann Schuur, LSW, all informed Ms. Hulsmeyer that she was obligated to call both Brookdale and Patient's family immediately to report the suspected abuse or neglect.

11. During the meeting, Ms. Hulsmeyer called Brookdale and spoke to Cindy Spaunagle, the Director of Nursing at Brookdale. Ms. Hulsmeyer relayed her suspicions of abuse and/or neglect to Ms. Spaunagle, who said that she would perform a full-body examination of Patient and take appropriate measures. Ms. Spaunagle also indicated that she would contact Patient's daughter after the examination.

12. After contacting Brookdale, Ms. Hulsmeyer immediately went to the office of her supervisor, Isha Abdullah, the Chief Clinical Officer of Hospice. Ms. Hulsmeyer informed Ms.

Abdullah about the suspected abuse or neglect and that Mr. Back, Dr. Keegan, and Ms. Schuur had counseled her to contact Brookdale and Patient's family. Ms. Abdullah dismissively stated, "Oh, more stuff with [Patient]."

13. Ms. Hulsmeyer then left Ms. Abdullah's office and placed a call to Patient's daughter ("Daughter"). Ms. Hulsmeyer informed Daughter about the bruising and that she suspected abuse or neglect by Brookdale's staff. Ms. Hulsmeyer also recounted her conversation with Ms. Spaunagle and told Daughter that Ms. Spaunagle would be calling her.

14. After her telephone conversation with Daughter, Ms. Hulsmeyer returned to Ms. Abdullah's office and showed her the picture of the marks on Patient's skin. Ms. Abdullah exclaimed, "Oh, my gosh, who would leave a Foley bag on like that!"

15. The next day, during the daily morning meeting with Ms. Abdullah, Ms. Hulsmeyer submitted a written report concerning the suspected abuse and/or neglect of Patient.

16. On October 21, 2011, at Daughter's request, aide Rachel Brown took additional photographs of the bruising on Patient. When Ms. Brown returned to Hospice's facility, she showed the pictures to Ms. Hulsmeyer and Betty Barnett, Hospice's Chief Operating Officer and Director of Human Resources.

17. On Monday, October 24, 2011, Ms. Hulsmeyer received a voicemail message from Daughter stating that Ms. Spaunagle had not yet contacted her. Daughter then called Ms. Hulsmeyer later in the day and informed Ms. Hulsmeyer that she had contacted Ida Hecht, the Executive Director of Brookdale, because she had not heard from Ms. Spaunagle. Ms. Hecht told Daughter that she had not heard about the suspected abuse or neglect, and that she was "very disturbed" about that breakdown in communication.

18. On November 4, 2011, a meeting was held at Brookdale to discuss Patient's care. In attendance were Ms. Hulsmeyer, Ms. Spaunagle, Ms. Hecht, Roxanne Schneider, Daughter,

Patient's son, Ann Schuur, and Jane Keller, a nurse employed by Hospice. During the meeting, the attendees first discussed billing matters. Once that was concluded, they passed around Rachel Brown's phone containing a picture of Patient's bruising.

19. On November 11, 2011, Ms. Hulsmeyer began a leave of absence to undergo a medical procedure. She was set to return on November 28, 2011.

20. During Ms. Hulsmeyer's leave of absence, Jackie Lippert, a Regional Health and Wellness Director for Brookdale, contacted Ms. Abdullah and Ms. Barnett. Ms. Lippert was angry and demanded that Ms. Abdullah and Ms. Barnett tell her who informed Daughter about Patient's bruising. Toward the end of the telephone call, Ms. Lippert stated, "We got rid of our problem [Ms. Spaunagle], what are you going to do?" Brookdale terminated Ms. Spaunagle.

21. On November 28, 2011, Ms. Hulsmeyer's first day back at work since her leave of absence, Ms. Abdullah asked Ms. Hulsmeyer to join her in her office shortly after Ms. Hulsmeyer arrived at Hospice. Ms. Barnett, Hospice's COO and Director of Human Resources, was also in Ms. Abdullah's office. They explained to Ms. Hulsmeyer that they all had to call Ms. Lippert.

22. They placed a call to Ms. Lippert. Ms. Abdullah explained to Ms. Hulsmeyer that Ms. Lippert wanted to know why Ms. Hulsmeyer had informed Daughter about the suspected abuse and/or neglect, and why the photographs were taken and shown to Patient's family. Ms. Lippert was irate. She stated that Daughter had told her that she would not recommend Brookdale to anyone. She accused Ms. Hulsmeyer of making Brookdale "look bad" and "stirring up problems." Ms. Lippert then stated that she could not believe that the others in the room (Ms. Abdullah and Ms. Barnett) thought Ms. Hulsmeyer had done the right thing. Ms. Barnett asked what should have been done differently. Ms. Lippert snapped, "The family should not have been called and the photographs should not have been taken." Finally, Ms. Lippert

threatened that Brookdale would cease recommending Hospice to its residents. Hospice derives a substantial amount of business from Brookdale, at both its Brookdale Place at Kenwood location and other Brookdale facilities in the Greater Cincinnati area.

23. On November 30, 2011, Ms. Hulsmeyer went to Ms. Abdullah's office to discuss another concern regarding Patient that had arisen on the overnight shift. While there, Ms. Abdullah raised the issue of photographs being taken of Patient, allegedly without consent. Ms. Hulsmeyer repeated that she did not authorize the aide to take the photographs, and that she did not know about the photographs until the meeting on October 19, 2011, when she first learned about the suspected abuse or neglect, nor did she know about the additional photographs taken by the aides on October 21, 2011, until they were shown to her at the Hospice facility.

24. At approximately 1:15 p.m. on November 30, 2011, Ms. Barnett called Ms. Hulsmeyer in her office and informed her that she was going to be terminated. Ms. Hulsmeyer attempted to meet with Defendant Joe Killian in his office, but Ms. Barnett intercepted her. Ms. Barnett told Ms. Hulsmeyer that she had already spoken with Mr. Killian and that he had instructed her to "cut ties" with Ms. Hulsmeyer. He further stated, "I don't want to be associated with her. I don't have time."

25. Hospice presented Ms. Hulsmeyer with a termination letter on November 30, 2011. In the letter, Hospice falsely claimed that Ms. Hulsmeyer did not timely notify Hospice's "Management" about the suspected abuse or neglect. The letter also criticized Ms. Hulsmeyer for notifying Daughter that "[Ms. Hulsmeyer] suspected neglect." Finally, the letter falsely claims that the first time Hospice's "upper management" learned about the suspected abuse and/or neglect of Patient was when Ms. Lippert contacted Ms. Abdullah.

26. Defendant Killian and Ms. Abdullah signed the termination letter.

27. Hospice's stated justification for terminating Ms. Hulsmeyer is demonstrably false and is pretext for illegal retaliation against Ms. Hulsmeyer for reporting suspected abuse or neglect to Daughter.

Count I
(Retaliation In Violation Of R.C. § 3721.24 Against Hospice)

28. Ms. Hulsmeyer repeats the allegations contained in paragraphs 1 through 27 of the Complaint as if fully restated herein.

29. Ohio law provides: "No person or government entity shall retaliate against an employee or another individual used by the person or government entity to perform any work or services who, in good faith, makes a report of suspected abuse or neglect of a resident"

30. To establish a prima facie case of retaliation, Ms. Hulsmeyer must show that she engaged in protected activity, that she was the subject of adverse employment action, and that a causal link existed between the protected activity and the adverse action.

31. Ms. Hulsmeyer engaged in protected activity when she reported the marks and bruising on Patient to Daughter, which she suspected to be abuse and/or neglect.

32. Ms. Hulsmeyer suffered an adverse action when Hospice terminated her on November 30, 2011.

33. A causal link existed between the protected activity and the adverse action as demonstrated by Hospice's termination letter, the temporal proximity between the report of suspected abuse and/or neglect and Ms. Hulsmeyer's termination, Brookdale's threat to cease recommending Hospice, and all other facts pled above.

34. Hospice retaliated against Ms. Hulsmeyer for making a report of suspected abuse and/or neglect of a resident by terminating her employment.

35. As a result of Hospice's unlawful actions, Ms. Hulsmeyer has suffered loss of employment, loss of past and future income, emotional pain and suffering, inconvenience, and loss of enjoyment of life.

36. Hospice acted with malice and a conscious disregard for the rights of others that had a great probability of causing substantial harm.

Count II
(Retaliation In Violation Of R.C. § 3721.24 Against Killian)

37. Ms. Hulsmeyer repeats the allegations contained in paragraphs 1 through 36 of the Complaint as if fully restated herein.

38. Ohio law provides: "No person or government entity shall retaliate against an employee or another individual used by the person or government entity to perform any work or services who, in good faith, makes a report of suspected abuse or neglect of a resident"

39. To establish a prima facie case of retaliation, Ms. Hulsmeyer must show that she engaged in protected activity, that she was the subject of adverse employment action, and that a causal link existed between the protected activity and the adverse action.

40. Ms. Hulsmeyer engaged in protected activity when she reported the marks and bruising on Patient to Daughter, which she suspected to be abuse and/or neglect.

41. Ms. Hulsmeyer suffered an adverse action when Killian terminated her on November 30, 2011.

42. A causal link existed between the protected activity and the adverse action as demonstrated by Killian's termination letter, the temporal proximity between the report of suspected abuse and/or neglect and Ms. Hulsmeyer's termination, Brookdale's threat to cease recommending Hospice, and all other facts pled above.

43. Killian retaliated against Ms. Hulsmeyer for making a report of suspected abuse and/or neglect of a resident by terminating her employment.

44. As a result of Killian's unlawful actions, Ms. Hulsmeyer has suffered loss of employment, loss of past and future income, emotional pain and suffering, inconvenience, and loss of enjoyment of life.

45. Killian acted with malice and a conscious disregard for the rights of others that had a great probability of causing substantial harm.

Count III
(Wrongful Discharge In Violation Of Ohio Public Policy Against Hospice)

46. Ms. Hulsmeyer repeats the allegations contained in paragraphs 1 through 45 of the Complaint as if fully restated herein.

47. Ohio has a clear public policy against the abuse and neglect of residents in long-term care or residential care facilities.

48. Hospice's termination of Ms. Hulsmeyer for her report to Daughter of suspected abuse and/or neglect of Patient, as set forth above, jeopardized Ohio public policy to the extent that her report was not protected under R.C. § 3721.24.

49. Ms. Hulsmeyer's termination was motivated by her report to Daughter of suspected abuse and/or neglect of Patient.

50. Hospice lacked an overriding legitimate business justification for dismissing Ms. Hulsmeyer.

51. As a result of Hospice's unlawful actions, Ms. Hulsmeyer has suffered loss of employment, loss of past and future income, emotional pain and suffering, inconvenience, and loss of enjoyment of life.

52. Hospice acted with malice and a conscious disregard for the rights of others that had a great probability of causing substantial harm.

Count IV
(Tortious Interference With Business Relationship Against Brookdale)

53. Ms. Hulsmeyer repeats the allegations contained in paragraphs 1 through 52 of the Complaint as if fully restated herein.

54. Ms. Hulsmeyer had a business relationship with Hospice. She served as the Managing Nurse, for which she received compensation.

55. Brookdale knew of the business relationship.

56. Brookdale intentionally and improperly interfered with the business relationship between Ms. Hulsmeyer and Hospice, resulting in her termination. Brookdale was angry that Ms. Hulsmeyer reported suspected abuse and/or neglect to Daughter, insisted that Hospice terminate Ms. Hulsmeyer as a result, and threatened to terminate its business relationship with Hospice to force Hospice to terminate Ms. Hulsmeyer. Brookdale was motivated by a desire to protect its reputation over serving and protecting its elderly residents, which is contrary to the interests of society and Brookdale's residents.

57. Brookdale was a third party to the business relationship between Ms. Hulsmeyer and Hospice.

58. Brookdale was motivated by a desire to interfere with the business relationship between Ms. Hulsmeyer and Hospice.

59. Brookdale had no privilege to interfere with the business relationship.

60. Ms. Hulsmeyer suffered damages as a direct result of Brookdale's interference with her business relationship with Hospice, including loss of employment, loss of past and future income, emotional pain and suffering, inconvenience, and loss of enjoyment of life.

61. Brookdale acted with malice and a conscious disregard for the rights of others that had a great probability of causing substantial harm.

Count V
(Retaliation In Violation Of R.C. § 3721.24 Against Brookdale)

62. Ms. Hulsmeyer repeats the allegations contained in paragraphs 1 through 61 of the Complaint as if fully restated herein.

63. Ohio law provides: "No person or government entity shall retaliate against an employee or another individual used by the person or government entity to perform any work or services who, in good faith, makes a report of suspected abuse or neglect of a resident . . . retaliatory actions include discharging, demoting, or transferring the employee or other person, preparing a negative work performance evaluation of the employee or other person, reducing the benefits, pay, or work privileges of the employee or other person, and any other action intended to retaliate against the employee or other person. "

64. To establish a prima facie case of retaliation, Ms. Hulsmeyer must show that she engaged in protected activity, that she was the subject of adverse employment action, and that a causal link existed between the protected activity and the adverse action.

65. Ms. Hulsmeyer engaged in protected activity when she reported the marks and bruising on Patient to Daughter, which she suspected to be abuse and/or neglect.

66. Ms. Hulsmeyer suffered an adverse action when Hospice and Defendant Killian terminated her on November 30, 2011.

67. A causal link existed between the protected activity and the adverse action as demonstrated by Hospice's termination letter, the temporal proximity between the report of suspected abuse and/or neglect and Ms. Hulsmeyer's termination, Brookdale's threat to cease recommending Hospice, and all other facts pled above.

68. Brookdale engaged in a retaliatory action pursuant to R.C. § 3721.24 by inducing Hospice and Killian to terminate Ms. Hulsmeyer, as alleged above. Such action was intended to retaliate against Ms. Hulsmeyer for reporting suspected abuse and/or neglect to Daughter.

69. As a result of Brookdale's unlawful actions, Ms. Hulsmeyer has suffered loss of employment, loss of past and future income, emotional pain and suffering, inconvenience, and loss of enjoyment of life.

70. Brookdale acted with malice and a conscious disregard for the rights of others that had a great probability of causing substantial harm.

WHEREFORE, Plaintiff Patricia Hulsmeyer demands judgment against Defendants Hospice, Killian, and Brookdale as follows:

1. An award of back pay and benefits in the amount Ms. Hulsmeyer would have earned from the date of her wrongful discharge until the date of judgment, with prejudgment interest, in an amount in excess of \$25,000;
2. Reinstatement to her position as Managing Nurse, or if reinstatement is not feasible, an award of front pay equal to the amount she would have earned from the date of judgment forward, in an amount in excess of \$25,000;
3. An award of compensatory damages against Defendants for all emotional distress and other damages Ms. Hulsmeyer has suffered as a result of Defendants' wrongful actions, in an amount in excess of \$25,000;
4. An award of punitive damages in an amount in excess of \$25,000;
5. An award of attorney fees, including litigation expenses and the costs of this action; and
6. All other relief to which she may be entitled.

Jury Demand

Plaintiff, by and through counsel, demands a trial by jury on all matters so triable.

Respectfully submitted,

/s/ Robert A. Klingler
Robert A. Klingler (0031603)
Brian J. Butler (0082675)
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Attorneys For Plaintiff

"EXHIBIT B"

Patient Rights

Policy #322

Reporting of Abuse, Neglect and Misappropriation

Regulation(s)/Standards: 418.52(b) OH 3704-19-08 (A)(2)	Effective Date: October 2011 Revision Date(s):
------------------------------------------------------------	---------------------------------------------------

PURPOSE: To provide guidance for reporting alleged violations of abuse, neglect, mistreatment and misappropriation.

POLICY: All alleged violations involving mistreatment, neglect, or verbal, mental, sexual, and physical abuse, including injuries of unknown source, and misappropriation of patient property by anyone furnishing services on behalf of Hospice, must be reported immediately by Hospice employees and contracted staff to CEO/designee. Alleged violations will be investigated and verified violations will be reported to appropriate state and local bodies within 5 working days of becoming aware of the incident. All suspected abuse, neglect or exploitation of patients and suspected abuse or neglect of children will be reported immediately to CEO/designee.

Hospice intends to ensure that all suspected cases of physical abuse, neglect and exploitation are reported. It also provides information about patient abuse, disciplinary action in cases of suspected patient abuse by Hospice staff, and its related reporting system.

Hospice has a zero tolerance for and prohibits patient abuse, neglect, and exploitation in the workplace or in any Hospice-related activity. Hospice provides procedures for employees, volunteers, family members, board members, patients, victims of abuse, neglect, and exploitation, or others to report the offences and disciplinary penalties for those who commit such acts. No employee, volunteer, patient or third party, no matter his or her title or position, has the authority to commit or allow patient abuse, neglect, and exploitation. Upon completion of the investigation, disciplinary action up to and including termination of employment and criminal prosecution may ensue.

DEFINITIONS:

"Abuse" means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.

"Verbal abuse" includes the use of oral, written or gestured language that willfully includes disparaging and derogatory terms to patients or their families, or within their hearing distance, regardless of their age, ability to comprehend, or disability.

"Mental abuse" includes, but is not limited to, humiliation, harassment, and threats of punishment or deprivation.

"Sexual abuse" includes, but is not limited to, sexual harassment, sexual coercion, or sexual assault.

"Physical abuse" includes, but is not limited to, hitting, slapping, pinching and kicking. It also includes controlling behavior through corporal punishment.

"Neglect" means failure to provide goods and services necessary to avoid physical harm or mental anguish.

Reporting of Abuse, Neglect and Misappropriation

"Misappropriation of patient property" means the deliberate misplacement, exploitation, or wrongful, temporary or permanent use of a patient's belongings or money without the patient's consent.

"Injuries of unknown source" - An injury should be classified as an "injury of unknown source" when both of the following conditions are met:

- The source of the injury was not observed by any person or the source of the injury could not be explained by the patient; and
- The injury is suspicious because of the extent of the injury or the location of the injury (e.g., the injury is located in an area not generally vulnerable to trauma) or the number of injuries observed at one particular point in time or the incidence of injuries over time.

"Immediately" means as soon as possible, but not to exceed 24 hours after discovery of the incident, in the absence of a shorter State time frame requirement.

PROCEDURE:

- 1) Hospice employees and contracted staff will be educated as to their responsibilities in reporting alleged violations immediately to CEO/designee. Reporting staff will document alleged violation.
- 2) CEO/designee will immediately investigate all alleged violations involving anyone furnishing services on behalf of the hospice.
- 3) CEO/designee will immediately take action to prevent further potential violations while the alleged violation is being verified. Action taken will be documented.
- 4) Investigations will include, but is not limited to interviewing employees, contracted staff, patients and other caregivers and reviewing of documentation.
- 5) Corrective action will be taken in accordance with state law if the alleged violation is verified by the hospice administration or an outside body having jurisdiction, such as the State survey agency or local law enforcement agency.
- 6) Documentation of the investigation and corrective action taken will be completed immediately.
- 7) CEO/designee will report verified violations to State and local bodies having jurisdiction (including to the State survey and certification agency) within 5 working days of becoming aware of the violation.
- 8) All suspected abuse, neglect or exploitation of patients and suspected abuse or neglect of children will be reported immediately to CEO/designee who will report to appropriate authorities.

"EXHIBIT C"

COMPLIANCE

It is the policy of HSWO to comply with all Federal, State of Ohio and local laws, regulations and rules regarding health care issues. As such, HSWO will not tolerate non-compliance with these regulations by any employee. Any employee found to be in violation of these regulations will be subject to disciplinary action up to and including termination. Any employee who discovers any non-compliance at HSWO is required to report it to HSWO's Compliance Officer for immediate action.

HIPAA COMPLIANCE

As a part of the HSWO's overall Compliance program, we are committed to protecting the confidentiality and security of health information and standardizing electronic data interchange by complying with the standards created pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). In compliance with HIPAA, HSWO employees shall:

- Strictly safeguard all protected health information and will never disclose such information without the appropriate patient authorization or as otherwise allowed by law.
- * • Ensure all the patient rights and other requirements provided under the HIPAA privacy standards are followed.
- * • Comply with all HIPAA and HSWO related policies and procedures:
 - Attend all required training on HSWO HIPAA related policies and procedures as required by HIPAA.
 - Never disclose any type of patient information on social media accounts such as: Facebook, MySpace, YouTube or Twitter.

**There are additional HIPAA policies and procedure that are not included in this handbook.*

"EXHIBIT B"

ACKNOWLEDGEMENT

I acknowledge that I have received a copy of the Hospice of Southwest Ohio Employee Handbook, I have read the handbook and understand all of the responsibilities as they are enumerated in the handbook and I agree to meet those expectations during my employment with Hospice of Southwest Ohio.

I understand that Hospice of Southwest Ohio may revise or change this document at any time during my employment when it feels that such change is warranted.

I further understand that this document does not constitute an employment contract and that it does not imply a guarantee of continued employment. I understand that I may be terminated at any time and that I may terminate my employment at any time.


Employee Signature

6/23/10
Date

Patricia Hulsmeyer
Employee Name (Print)

Baldwin's Ohio Administrative Code Annotated
3701 Health Department (Refs & Annos)
Public Health Council (Refs & Annos)
Chapter 3701-17. Nursing Homes and Rest Homes (Refs & Annos)

OAC 3701-17-12

3701-17-12 Notification and reporting of changes in health status, illness, injury and death of a resident

Currentness

The nursing home administrator or the administrator's designee shall:

(A) Immediately inform the resident, consult with the resident's physician or the medical director, if the attending physician is not available, and notify the resident's sponsor or authorized representative, unless the resident objects, and other proper authority, in accordance with state and local laws and regulations when there is:

- (1) An accident involving the resident which results in injury and has the potential for requiring physician intervention;
- (2) A significant change in the resident's physical, mental, or psycho-social status such as a deterioration in health, mental, or psycho-social status in either life-threatening conditions or clinical complications;
- (3) A need to alter treatment significantly such as a need to discontinue an existing form of treatment due to adverse consequences, or to commence a new form of treatment.

The notification shall include a description of the circumstances and cause, if known, of the illness, injury or death. A notation of the change in health status and any intervention taken shall be documented in the medical record. If the resident is a patient of a hospice care program, the notifications required by this paragraph shall be the responsibility of the hospice care program unless otherwise indicated in the coordinated plan of care required under paragraph (G) of rule 3701-17-14 of the Administrative Code.

(B) Report the death of a resident within twenty-four hours to the appropriate third-party payer; or, if the office is closed, as soon thereafter as it is open.

(C) Report any incident of fire, damage due to fire and any incidence of illness, injury or death due to fire or smoke inhalation of a resident within twenty-four hours to the office of the state fire marshal and to the director.

(D) Report the diseases required to be reported under Chapter 3701-3 of the Administrative Code in the manner specified by that chapter.

Credits

HISTORY: 2005-06 OMR pam. #11 (RRD); 2001-02 OMR 668 (A), eff. 10-20-01; 1992-93 OMR 682 (A), eff. 12-21-92; prior HB-17-12

RC 119.032 rule review date(s): 5-1-11; 10-1-06; 5-19-06; 9-1-00

Rules are complete through February 29, 2012; Appendices are current to February 28, 2010

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3701-17-12, OHADC 3701-17-12

End of Document

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Abuse, Neglect, Misappropriation (ANM) Investigation Guide

ALLEGATION OR SUSPICION OF ABUSE, NEGLECT OR MISAPPROPRIATION OF RESIDENT PROPERTY
 INJURY OF UNKNOWN SOURCE (as determined by IUS Investigation Guide)

- IMMEDIATELY**
- Secure resident safety
 - Assess the resident, provide medical and/or psychosocial treatment as necessary
 - Examine the resident's injury and/or psychosocial changes and document the description in the medical record
 - Identify alleged perpetrator (staff, family or visitor); remove from contact with all residents and staff pending outcome of investigation
 - If identified alleged perpetrator is a resident, take measures to prevent recurrence
 - Document date and time injury was discovered in the medical record
 - Notify physician if the injury (physical and/or psychosocial) has the potential to require physician intervention
 - Notify the resident's sponsor (no later than 12 hours) if there is a significant change in health status
 - Immediately (no later than 24 hours) notify the administrator
 - Administrator or designee notifies appropriate entities (local law enforcement and/or other state agencies as required)
 - Immediately (no later than 24 hours) complete the first three sections of form HEA 1652; notify the state survey agency of all allegations (Fax 614-728-9169)
 - Document date and time of all notifications per facility policy



- INVESTIGATE**
- Interview and/or obtain statement from person reporting allegation or suspicion
 - Interview and/or obtain statement from victim
 - Interview and/or obtain statement from alleged perpetrator
 - Interview and/or obtain statements from potential witnesses as determined by the scope of the investigation
 - Review materials and complete investigation (refer to abuse investigation protocol and facility policy)



- NO LATER THAN FIVE WORKING DAYS POST INCIDENT**
- Report the results of all investigations to the administrator
 - Report the results of all investigations to the Ohio Department of Health on form HEA 1652 (Fax 614-728-9169)
 - Initiate corrective measures (if applicable) to prevent recurrence

3/10/05