

ORIGINAL

IN THE SUPREME COURT OF OHIO

PATRICIA HULSMEYER

APPELLEE/CROSS-APPELLANT,

v.

HOSPICE OF SOUTHWEST OHIO, INC.

AND

JOSEPH KILLIAN

AND

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

APPELLANTS/CROSS-APPELLEES.

Case Nos. 2013-1644
2013-1766

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

Court of Appeals Case No.: C 120822

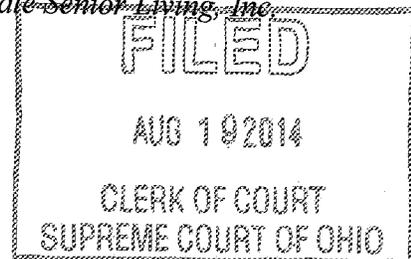
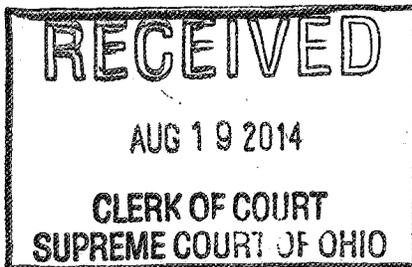
REPLY BRIEF OF APPELLEE/CROSS-APPELLANT PATRICIA HULSMEYER IN
SUPPORT OF CROSS-APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

I. INTRODUCTION.....1

II. REPLY ARGUMENT IN SUPPORT OF CROSS-APPEAL.....1

III. CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

Page

Arsham-Brenner v. Grande Point Health Care Community, 8th Dist. Cuyahoga No. 74835, 2000 WL 968790 (July 13, 2000).....9

Dolan v. St. Mary's Mem. Home, 153 Ohio App.3d 441, 2003-Ohio-3383, 794 N.E.2d 716 (1st.Dist.).....2, 3

Hulsmeyer v. Hospice of Southwest Ohio, Inc., 2013-Ohio-4147, 998 N.E.2d 517 (1st Dist.).....3

Leininger v. Pioneer Natl. Latex, 115 Ohio St.3d 311, 2007-Ohio-4921, 875 N.E. 2d 365

Sutton v. Tomco Machining, Inc., 129 Ohio St.3d 153, 2011-Ohio-2723, 950 N.E.2d 9386, 7

Wiles v. Medina Auto Parts, 96 Ohio St.3d 240, 2002-Ohio-3994, 773 N.E. 2d 5264, 5

Statutes

Ohio Adm. Code 3701-17-12.....9, 10

R.C. 3721.10 through 3721.17.....9

R.C. 3721.13(A)(32).....9, 10

R.C. 3721.24.....9, 10

R.C. 4113.52.....6, 7, 8

I. INTRODUCTION

If R.C. 3721.24 protects persons from retaliation only for reporting suspected abuse or neglect to the Director of Health, then Ohio's clear public policy in favor of protecting residents of Ohio's nursing homes is not adequately protected. Cross-Appellees dismiss the so-called "parade of horrors" Hulsmeier and the amici presented in their briefs as resting on mere "conjecture," but they do not explain how reports made only to the Director of Health are sufficient to adequately protect Ohio's seniors. It is not merely "conjecture" to conclude that Ohio's seniors will lose an essential protection if the nurses and others tasked with protecting them cannot freely report suspected abuse or neglect and significant changes in their medical conditions to their family members and others with responsibilities in their care.

Ohio has a clear public policy favoring the reporting of changes in the medical condition of nursing home residents to those charged with their care, including reports of suspected abuse or neglect, and notification to residents' sponsors of significant changes in a resident's condition. Cross-Appellees do not dispute this clear public policy. Rather, they argue only that R.C. 3721.24 occupies the field, and that Ohio law does not protect any reports other than to the Director of Health. Cross-Appellees' position leaves a huge gap in the protection of Ohio's most vulnerable citizens by dissuading those persons most able to observe it from reporting substandard treatment of nursing home residents to their families. This position is anathema to Ohio public policy.

II. REPLY ARGUMENT IN SUPPORT OF CROSS-APPEAL

Cross-Appellees do not dispute that Ohio has a clear public policy in favor of reporting suspected abuse and neglect to a nursing home resident's sponsor. Instead, they argue only that "the public policy of protecting resident abuse [sic] and reporting violations of resident abuse [sic] is embodied and adequately protected in R.C. 3721.24." Joint Combined Third Brief of

Appellants/Cross-Appellees at 17. But they don't explain how the public policy is adequately protected if employees like Hulsmeyer can be fired for reporting suspected abuse or neglect to a resident's sponsor.

Cross-Appellees mischaracterize and misapply this Court's and other precedent in their effort to convince the Court that a common law tort claim is precluded here. Their most blatant mischaracterizations are of the First District's decision in *Dolan v. St. Mary's Mem. Home*, 153 Ohio App.3d 441, 2003-Ohio-3383, 794 N.E. 2d 716, (1st Dist.), which they claim actually supports *their* position. They leave the impression that Dolan was terminated for contacting a family member in violation of company policy, "much like Hulsmeyer in the present case," and that the First District held she had no public policy claim as a result of that termination. Third Brief at 18. But in fact, Dolan claimed she was discharged for reporting to the Director of Health, and the First District found that report to be protected under R.C. 3721.24. "Dolan presented evidence showing that she had reported Sister Rachel's patient abuse to Pro Seniors and ultimately to the Department of Health. Sister Rachel knew about Dolan's involvement with the investigation following the meeting Dolan suffered an adverse employment action shortly after that meeting." *Dolan*, 153 Ohio App.3d at ¶ 21. Dolan's employer claimed that the reason for her termination was not her report to the Department of Health, but was instead her refusal to promise that she would never again contact a patient's family without first contacting Sister Rachel. Dolan claimed that this reason was pretextual, and that the real reason for her termination was her report to the Department of Health. *Id.* at ¶ 22. On these facts, the First District held that Dolan had stated and adequately supported a statutory claim for retaliation under R.C. 3721.24, and that no common law wrongful discharge claim was necessary to protect employees who made reports to the Director of Health. *Id.* at ¶¶ 17, 18.

Contrary to Cross-Appellees' contention, the First District in *Dolan* did not address the question of whether reports of abuse or neglect to family members are protected by either the statute or by common law. Because Dolan claimed that her reports to the family and her refusal to promise not to do it again were not the real reasons for her termination, the court did not consider whether that conduct was protected. The *Dolan* case cannot be read to mean either that reports to family members are not protected by R.C. 3721.24, or, as Cross-Appellees contend, that reports to family members are not protected by common law in the absence of statutory protection.

Cross-Appellees misleadingly claim that the First District's decision below somehow supports their position in holding that, "because the remedies provided by R.C. 3721.24 were sufficient to vindicate the 'public policy embodied in R.C. Chapter 3721 of protecting the rights of nursing-home residents and of others who would report violations of those rights,' the public policy expressed in R.C. Chapter 3721 would not be jeopardized by the lack of a common-law public policy claim." Third Br. at 18, quoting *Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 2013-Ohio-4147, 998 N.E.2d 517, ¶ 31 (1st Dist.) (quoting *Dolan* at ¶ 17). But Cross-Appellees ignore the fact that the First District's rejection of a public policy claim in both *Dolan* and *Hulsmeyer* was based on its finding that both plaintiffs had a statutory claim under R.C. 3721.24, as shown in the very next sentence of the *Hulsmeyer* opinion: "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." *Hulsmeyer* at ¶ 31. Had the court found that Hulsmeyer was *not* protected by the statute, its public policy analysis would undoubtedly have been decidedly different.

Cross-Appellees also mischaracterize the applicability of *Wiles v. Medina Auto Parts*, 96 Ohio St.3d. 240, 2002-Ohio-3994, 773 N.E. 2d 526. In *Wiles*, the plaintiff brought a common law claim for wrongful discharge based on the public policy embodied in the federal Family and Medical Leave Act (FMLA). There was no dispute as to whether the plaintiff or his employer were covered by the FMLA, and he could have asserted a claim for retaliatory discharge under that statute. Instead, he asserted only a common law claim for wrongful discharge, arguing that the FMLA did not provide an adequate remedy to protect the public policy embodied in it because it did not provide for punitive damages or emotional distress damages. *Id.* at ¶ 19.

In rejecting plaintiff's position, this Court noted, "In addition to providing substantive rights for employees and prohibitions applicable to employers, the FMLA also contains a comprehensive remedial scheme designed to compensate an employee for his or her employer's violation of the Act." *Id.* at ¶ 16. The Court enumerated the many remedies provided by the FMLA and concluded that they were adequate, even in the absence of punitive or emotional distress damages, "to vindicate the policy Congress created in the very same statutory scheme." *Id.* at ¶ 21.

Here, Hulsmeier is not quibbling over the adequacy of the damages provided by R.C. 3721.24. Instead, the question is whether that statute gives her the substantive right to make the report she made without being retaliated against. Unlike the plaintiff in *Wiles*, who had an adequate statutory remedy if he had simply filed an FMLA retaliation claim, Hulsmeier has *no* remedy whatsoever if this Court holds that her report to Patient's sponsor is not protected by R.C. 3721.24. Cross-Appellees repeatedly obfuscate this issue by claiming that Hulsmeier had an adequate remedy if she had only *chosen* to report to the Director of Health rather than to Patient's sponsor: "Hulsmeier had an adequate remedy available to her by complying with R.C.

3721.24.” Third Br. at 21. But her report to the sponsor was not a choice of remedies; her report was made in good faith furtherance of her duties as a Hospice nurse, and the question is whether R.C. 3721.24 protects from retaliation employees who make such reports. If it does not, then a common law claim is required to avoid discouraging such reports and jeopardizing Ohio’s policy of encouraging such reports. The question is not whether Hulsmeyer could have chosen *not* to report to Patient’s sponsor; the question is whether the report she *did* make is protected from retaliation. The Plaintiff in *Wiles* was protected by the FMLA, which provides adequate remedies to discourage retaliation against employees who exercise their FMLA rights. Here, if the Court finds that Hulsmeyer has no statutory claim under R.C. 3721.24, then she has *no* protection, and *no* remedy, absent a common law wrongful discharge claim.

Cross-Appellees also incorrectly claim that their position is supported by *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, 875 N.E. 2d 36. The plaintiff in that case claimed she could bring a common law claim based on the anti-age discrimination policy in R.C. 4112.02, having missed the statute of limitations for filing the statutory claim. Again, this Court found that the Ohio statutory scheme to prohibit age discrimination in employment provided adequate remedies to protect the policies it contains, despite the fact that they included relatively short limitations periods. *Id.* at ¶¶ 27, 32. As in *Wiles*, the plaintiff in *Leininger* was undisputedly covered by the statute. She had simply filed her claim too late to take advantage of the statute’s protections. Here, Hulsmeyer was not late in filing a claim which otherwise belonged to her; nor, as in *Wiles*, did she choose not to file a claim pursuant to the statute that protects her. To the contrary, she properly filed her claim under R.C. 3721.24, but she has no statutory claim if this Court holds that she has none. The question is whether Ohio’s policy for encouraging reports of suspected abuse or neglect and changes in health conditions to residents’

sponsors is adequately protected if Hulsmeyer can be terminated for making the report she made to Patient's sponsor.

Cross-Appellees' attempt to distinguish this case from *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, 950 N.E. 2d 938, is particularly unconvincing. They claim that, unlike the plaintiff in *Sutton*, "Hulsmeyer had an adequate remedy available to her by complying with R.C. 3721.24." Yet, they argue that Hulsmeyer has no remedy under R.C. 3721.24 because only reports to the Director of Health are protected, not reports to a resident's sponsor. They claim that Hulsmeyer could have protected herself simply by reporting to the Director.¹ But, as discussed above, that begs the question. The question is not whether Hulsmeyer could have chosen not to make the report to Patient's sponsor, any more than the question in *Sutton* was whether the plaintiff could have chosen not to report his injury to his employer; the question is, having made the report she made, is she protected?

Cross-Appellees also claim that Hulsmeyer could have complied with and asserted a claim under R.C. 4113.52, Ohio's general whistleblower statute. Third Br. at 21. This argument fails for two obvious reasons. First, R.C. 4113.52 requires that the employee reasonably believe the violation is a criminal offense likely to cause imminent risk of physical harm, a felony, or an improper solicitation for contribution. Those were not the facts here—Hulsmeyer was reporting previously suffered bruising that she and others suspected resulted from an overly-tightened Foley catheter bag. There was no suspected criminal activity. Second, Hulsmeyer was

¹ Appellants appear to argue that a report to the Director would have immunized Hulsmeyer from retaliation for her report to Patient's sponsor. Third Br. at 10. That is not true. If the statute does not protect reports to sponsors, then Hulsmeyer could have been terminated for that report, regardless of whether she also reported to the Director. The issue would simply have been which report motivated the termination—the one to the Director (protected) or the one to the sponsor (unprotected).

terminated for reporting to the resident's family, not for reporting to her employer or to a prosecuting authority, which are the only reports protected under R.C. 4113.52.

But again, that is beside the point, which is whether Hulsmeyer's good faith report to Patient's sponsor is protected. If it is not protected by R.C. 3721.24, then a substantial gap indeed exists that this Court should fill by providing a common law remedy. Just as the General Assembly was deemed in *Sutton* not to have intended the result compelled by the statutory language, so to, the General Assembly could not have intended that employers be free to retaliate against employees who make good faith reports of suspected abuse or neglect of nursing home residents to sponsors. As this Court explained, "The alternative interpretation—that the legislature intentionally left the gap—is at odds with the basic purpose of the antiretaliation provision" *Sutton* at ¶ 22. Similarly here, an intention by the General Assembly to permit at-will retaliation against employees like Hulsmeyer would be at odds with the basic purpose of the entire applicable statutory scheme.

Cross-Appellees avoid addressing this issue, for obvious reasons. What possible rationale could explain an intention by the General Assembly to permit employers to terminate employees for carrying out their obligation to keep sponsors of nursing home residents informed of significant health issues, including suspected abuse or neglect? Cross-Appellees do not even attempt to posit such a rationale. They simply repeat the mantra of a "comprehensive statutory framework" that, they claim, limits protection from retaliation to reports made to the Director. But if the statute does in fact so limit its protection, then that limitation is at odds with the purposes of Chapter 3721.

Cross-Appellees go on to argue that whistleblower protection is limited under Ohio law, and that several courts, including this Court, have held that an individual must strictly comply

with the statutory requirements to be protected. Third Br. at 22. But all of the cases cited by Cross-Appellees for that proposition dealt with “whistleblower” claims under R.C. 4113.52. Hulsmeyer does not assert a claim under R.C. 4113.52, for the reasons stated above, so all of the cases cited by Cross-Appellees are inapposite.

Incidentally, Hulsmeyer *did* comply with the dictates of R.C. 4113.52 when she reported the suspected abuse and neglect to her employer, although she is not asserting a claim under that statute. She reported her suspicions to her supervisor, Isha Abdullah, orally, and then submitted them in writing to Abdullah the following day.²

Moreover, Hulsmeyer also precisely followed Hospice’s reporting policy, which requires its employees to report suspicions of abuse or neglect *not* to the Director of Health, but rather to Hospice’s CEO or his designee. It provides that the CEO or his designee will report “verified violations” to the required state agency.⁴ Hulsmeyer followed company policy, and now Cross-Appellees are cynically claiming that her compliance deprives her of any protection because she did not report directly to the Director of Health. Third Br. at 22.

Cross-Appellees confusingly mix issues by arguing that, “Hulsmeyer does not have a common law wrongful-discharge claim because her remedy lies in R.C. 3721.24 and because she failed to comply with the requirements of the statute.” Third Br. at 22. But if, as Cross-Appellees claim, her report to Patient’s sponsor is not protected by the statute, then the question remains whether protection of the report she made is necessary to vindicate Ohio’s public policy in favor of protecting nursing home residents. If it is, then her failure to report to the Director of Health makes no difference.

² Complaint, attached to Merit Brief of Hulsmeyer at Supp. 4-5.

⁴ Hospice Policy Manual, attached to Merit Brief of Hulsmeyer at Supp. 15.

Furthermore, Hulsmeyer does not rely solely on R.C. 3721.24 as a source of public policy supporting her common law claim, and therefore her failure to strictly comply with that statute's requirements, as Cross-Appellees interpret them, is not fatal to her common law claim. As set forth in Hulsmeyer's merit brief, she also relies on the nursing home patients' bill of rights in R.C. 3721.10 through R.C. 3721.17. She relies on R.C. 3721.13(A)(32), which gives residents "[t]he right to have any significant change in the resident's health status reported to the resident's sponsor." She relies on Ohio Adm. Code 3701-17-12, which requires hospice organizations to notify a resident's sponsor of any significant change in the resident's health status. She relies on the Ohio Department of Health's Abuse, Neglect, Misappropriation (ANM) Investigation Guide,⁵ which calls for suspicions of abuse or neglect to be reported to a resident's sponsor within 12 hours. These sources all indicate a clear public policy in favor of protecting employees who report suspected abuse or neglect to a resident's sponsor.

Finally, Appellants also suggest that the Eighth District's decision in *Arsham-Brenner v. Grande Point Health Care Community*, 8th Dist. Cuyahoga No. 74835, 2000 WL 968790 (July 13, 2000) (unreported), supports the conclusion that no public policy claim is available to Hulsmeyer. The *Arsham-Brenner* decision is devoid of any meaningful analysis of the public policy claim, and it differs factually because the discharged employee identified only R.C. 4113.52 and R.C. 3721.24 as sources of public policy. The court had already determined that the discharged employee had no claim under R.C. 4113.52 because she did not comply with the reporting procedure contained in the statute. The court also determined that she had no claim under R.C. 3721.24 because reports to her supervisors were not protected activity, and because

⁵ 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/ltc/nursing%20homes%20-%20facilities/anmguideonly.ashx>.

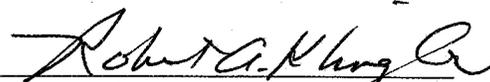
she presented no evidence that the employer was aware of any participation in the Department of Health's investigation. Thus, neither of those statutes could support a public policy claim, and the discharged employee identified no other sources of public policy.

Hulsmeyer has identified several sources of public policy in addition to R.C. 3721.24. Even if R.C. 3721.24 protects only reports to the Director of Health, the public policies embodied in R.C. 3721.13(A)(32) and Ohio Adm. Code 3701-17-12 are independent sources of a public policy that would be jeopardized if Hulsmeyer is unable to pursue a common law claim.

III. CONCLUSION

For all of the foregoing reasons, Cross-Appellant Patricia Hulsmeyer respectfully requests that if this Court determines she does not have a statutory claim for retaliation pursuant to R.C. 3721.24, that it hold that she and persons like her, who make good faith reports of abuse or neglect of residents to sponsors, be permitted to assert claims for wrongful discharge in violation of public policy.

Respectfully submitted,



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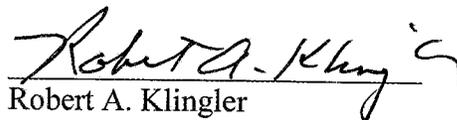
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