

**IN THE SUPREME COURT OF OHIO**

|                     |   |                                    |           |
|---------------------|---|------------------------------------|-----------|
| MARY McGOWAN, M.D., | : | Case No.                           | 2015-1756 |
|                     | : |                                    |           |
|                     | : |                                    |           |
| Appellant,          | : | On Appeal from the Hamilton County |           |
|                     | : | Court of Appeals, First Appellate  |           |
| vs.                 | : | District                           |           |
|                     | : |                                    |           |
| MEDPACE, INC.,      | : |                                    |           |
|                     | : |                                    |           |
|                     | : |                                    |           |
| Appellee.           | : |                                    |           |

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**REPLY BRIEF OF APPELLANT MARY McGOWAN, M.D.**

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## I. INTRODUCTION.

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The personal attacks and misstatement of the record which are replete throughout the Merit Brief of Appellee Medpace, Inc. reflect the reality that their position is at odds with the legal precedent of this Court, the appellate courts of Ohio outside the First District, and the seminal treatise upon which those precedents are based.<sup>1</sup> Such personal attacks have come to characterize our political discourse; they have no place between litigants in the highest court in this state. Moreover, those personal attacks are entirely irrelevant to any issue before this Court.

The issues before this Court are straightforward: (1) whether *Greeley v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990), and its progeny require the source of a sufficiently clear public policy to impose an affirmative duty on an employee to report a violation; expressly prohibit the employer from retaliating against an employee who reports a violation; or protect the public's health and safety in order to satisfy the clarity element; and (2) whether R.C. 2913.47 and HIPAA manifest sufficiently clear public policies to satisfy the clarity element of a *Greeley* claim. For the reasons articulated below, and in her brief-in-chief, Dr. McGowan respectfully submits that the answer to (1) is "no", and the answer to (2) is "yes".

But this case is also about the unfairness and injustice of a complaining employee such as Dr. McGowan who happens to work for a company located in the geography of the First Appellate District, being deprived of the rights and protections afforded every employee who happens to work for a company in Ohio **outside** the geography of the First Appellate District. Such fortuitous happenstance should not dictate the fate of an employee such as Dr. McGowan who raises good faith concerns about patient safety, violations of Ohio insurance statutes, and patient privacy under HIPAA.

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<sup>1</sup>Medpace pillories Dr. McGowan in its Introduction and Statement of Facts, despite admitting that "this appeal does not depend on the resolution of disputed facts." (Medpace Merit Brief, p.1).

## II. STATEMENT OF FACTS.

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### A. Medpace Continues To Misrepresent The Nature Of Dr. McGowan's Concern With The "Pill-Splitting" Prescription Practices Of Dr. Stein And The CTC/MARC Staff.

As was true at trial and in the Court of Appeals, Medpace continues to misstate the nature of Dr. McGowan's concern over Dr. Stein's prescription practices involving "pill-splitting." In its Merit Brief, Medpace claims that "pill-splitting" is a practice commonly utilized by physicians and endorsed by insurance companies for cost savings to patients. (Medpace Merit Brief at p. 5). But pill-splitting *per se* was never the focus of Dr. McGowan's concern, and Medpace knows it, since she has consistently made that clear from the first time she brought it up with Medpace management in the early summer of 2011. (T.p. 361:4-361:15).

Dr. McGowan was being asked by MARC/CTC staff members, and by patients, to write or refill prescriptions for twice a patient's daily dose but orally instruct the patient to split the pill, which would allow the patient to receive twice the total amount of medicine for a single copay. (T.p. 334:12-336:19, 377:20-379:13). In this way, although the patient chart would reflect the correct prescription, the prescription going to the pharmacy and claims going to Medicaid and the insurance company would **not** reflect the correct prescription. (*Id.*) Dr. McGowan clearly testified at trial that this misleading prescription writing practice was one Stein had followed (T.p. 334:3-335:14), and which involved both MARC and CTC, thus clearly implicating Medpace itself. (T.p. 377:20-379:13, 458:7-463:21).

Dr. McGowan testified at length on direct examination and on cross examination that pill splitting was permissible only if it was accurately reflected in the patient's chart and that the insurance company was aware of it. (T.p. 334:10-336:11, 477:6-481:19).

Medpace also attempts to dismiss Dr. McGowan's concerns as merely "her opinion." (Medpace Merit Brief at p. 5). This again misstates the record evidence. The record evidence

confirms that improperly documented pill splitting is considered by numerous sources -- including the Executive Director of the Ohio Pharmacy Board -- to be insurance fraud. Dr. McGowan testified, without objection, to her healthcare attorney's opinion confirming that conclusion. (T.p. 337:19-338:14, 470:2-472:13). Dr. McGowan testified to the Executive Director of the Ohio Pharmacy Board sharing that opinion. (T.p. 361:4-25, 364:4-17, 365:6-366:23). And Dr. McGowan testified at length, again without objection, to a recent medical publication confirming that opinion:

Q. Alright. Now could you look at the next exhibit in this book, exhibit 6, Plaintiff's exhibit 6?

A. Yes.

Q. And, actually, is this the publication that talks about the issue of pill splitting?

A. It is.

Q. Now, if I could direct your opinion to Page 6-2.

A. Right.

Q. This was the article you said had been published by someone you were familiar with; is that correct?

A. Joe Saseen was on the National Lipid Association Board with me. He is a PharmD, a Pharmacist with a doctorate degree from the University of Colorado.

Q. Could you read the second -- the first full paragraph that starts with "be aware."

A. Be aware that recommending tablet splitting to insured patients solely to spare them a copay, instructing a patient to take a half tablet to make a 30-day prescription cover 60 days, is considered insurance fraud.

(T.p. 593:8-594:8, McGowan Ex. 6). In short, despite Medpace's assertion to the contrary, Dr. McGowan's clearly articulated concern over the prescription practices of Dr. Stein and the CTC/MARC staff she inherited from him were echoed by medical publications, the Executive Director of the Ohio Pharmacy Board, and McGowan's own healthcare attorney.

**B. Medpace Misstates The Record Evidence In Regard To Dr. Stein’s Charting Practices Which Dr. McGowan Challenged.**

In addition to the prescription writing and patient safety issues discussed above, upon her arrival at Medpace, Dr. McGowan also witnessed violations of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), including exposure of patient’s records to the public as the charts were left open on a table outside patient’s rooms (T.p. 341:4-342:19), and combining CTC and MARC charts (which violated HIPAA because information about patients’ personal lives irrelevant to MARC studies was nonetheless included in MARC files). (T.p. 330:2-332:17).

In its Merit Brief, Medpace misstates the record evidence by asserting that “[t]he uncontroverted evidence at trial disproved her accusations.” (Medpace Merit Brief at p. 6). In support of this statement, Medpace cites to the testimony of its witness, staff member Dessy Dimova, that combining patient charts is necessary when a pharmaceutical company evaluates new drugs in a study subject, and that Dr. McGowan “admitted at trial” that Medpace had signed consent forms from patients expressly authorizing the combination of their charts. (*Id.*)

Both statements misstate the record evidence. In fact, on cross-examination at trial by Medpace’s counsel, Dr. McGowan disagreed strongly with Ms. Dimova’s view and explained why the consent forms Medpace relies upon were not adequate for these purposes. Dr. McGowan explained that in drug trials such as those conducted at MARC, it was the responsibility of the principal investigator such as Dr. McGowan to monitor the pharmaceutical company reviewers, “so it is important to restrict what the reviewer can see. They should not be able to see that protected private information.” (T.p. 498:4-7).

**C. Medpace Misstates The Record Evidence Regarding The Circumstances Leading Up To The July 27, 2011 Meeting Between Dr. McGowan and Medpace Senior Management.**

In its Merit Brief, Medpace misstates the record evidence regarding the circumstances leading up to the July 27, 2011 meeting between Dr. McGowan and Medpace senior management (CEO Dr.

Troendle, General Counsel Nolen, and Human Resources Director Tiffany Khodadad). Medpace states that McGowan “disingenuously suggests that on July 26 she asked to meet with Medpace’s senior management” to address Dr. Stein’s unlawful prescription practices and his retaliation. (Medpace Merit Brief at p.8, n.8). Without any citation to the record, Medpace goes on to state: “[I]n fact, Medpace already had called the meeting to address McGowan’s accusations and behavior four days earlier.” (*Id.*) As noted, Medpace does not provide any record citation for that statement. It did not do so because no record citation exists for that statement. No record citation exists for that statement because the statement is false. The record evidence establishes that Dr. McGowan called Medpace’s General Counsel Kay Nolen on Monday, July 25 and asked to set up a meeting with CEO Dr. Troendle to address Dr. Stein’s unlawful prescription practices and his retaliation. (T.p. 354:11-23, 465:6-10). Nolen told Dr. McGowan that Dr. Troendle was traveling. (*Id.*) Dr. McGowan followed up her telephone conversation with Nolen in an email on Tuesday, July 26, on which she copied Dr. Troendle. (T.p. 353:18-354:10; McGowan Ex. 27). In that email, Dr. McGowan states:

I hope you have managed to get in touch with Dr. Troendle as this issue needs to be resolved quickly. As you know, I have given up a great deal to move here to Cincinnati. I gave up my practice of 20 years, disrupted my life and the lives of my husband and children and I find myself in an untenable position. I am sure you are really busy but at this point I feel like this needs to be a high priority.

(McGowan Ex. 27). Thus, the record clearly establishes that Dr. McGowan initiated the meeting with Medpace senior management in her call to Medpace General Counsel Nolen on July 25 and, when she had heard nothing back, followed up with an email on July 26 urging Ms. Nolen to schedule the requested meeting. All of this was consistent with Dr. McGowan’s obligations under the Medpace Employee Handbook requiring Dr. McGowan to report her concern about Dr. Stein’s prescription and charting practices. (T.p. 350:11-353:17; McGowan Ex. 5 at 5-7). That same section of the Medpace Employee Handbook specifically prohibits retaliation for reporting such unethical or unlawful activities. (*Id.*)

**D. Medpace Misstates The Record Evidence When It Denies That Dr. McGowan Is A Nationally-Recognized Expert in Cholesterol Treatment.**

In its Merit Brief, Medpace states that “the record contains no such testimony or other evidence” establishing Dr. McGowan as “one of the most highly-regarded experts in the treatment of cholesterol disorders in the country.” (Medpace Merit Brief at p.4, n.2). Medpace is wrong.

At trial, two letters signed by Medpace’s co-founder, Chief Science Officer, and board member, Evan Stein, were introduced into the record. (T.p. 316:1-317:2; McGowan Ex. 12, 12A). The letters are identical, save for the fact that one is on the letterhead of the Cholesterol Treatment Center (“CTC”), and the other one is on letterhead that combines the CTC and the Metabolic and Atherosclerosis Research Center (“MARC”). (*Id.*) CTC was Dr. Stein’s ostensibly private practice; MARC was a unit of Medpace. In these letters, Dr. Stein writes:

**Dr. McGowan is one of the few recognized experts in lipid metabolism in the country** and has been the Medical Director of the Cholesterol Treatment Center at Concord Hospital in Concord, New Hampshire for nearly 20 years and Assistant Professor of Medicine at the University of Massachusetts Medical Center. Mary is a Diplomate of the American Board of Clinical Lipidology. Dr. Mary McGowan is president of the Northeast Cholesterol Foundation and has served on both the NH Expert Panel on pediatric obesity and the State of New Hampshire Commission for the Prevention of Childhood Obesity. Mary also serves on the Board of Directors of the National Lipid Association and Northeast Lipid Association.

Dr. McGowan brings decades of experience with all forms of lipids disorders, especially Familial Hypercholesterolemia (“FH”) a fairly common and severe disorder and where, in our center, we currently treat over 1,000 patients, including many children.

Mary P. McGowan, M.D. received her medical degree from the University of Massachusetts Medical Center, completed her residency in Internal Medicine at the University of Massachusetts Medical Center and completed a fellowship focused on clinical and research aspects of lipid metabolism, at the Johns Hopkins Hospital in Baltimore, Maryland.<sup>2</sup>

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<sup>2</sup>In fact, Medpace’s co-founder and CEO, Dr. August Troendle, testified that Dr. McGowan so impressed Dr. Stein that Dr. Troendle was not aware of anyone else even being interviewed for the position that Dr. McGowan was hired for, and Dr. McGowan was the only candidate Dr. Troendle even interviewed. (T.p. 954:13-955:2).

(McGowan Ex. 12, 12a). Why Medpace would refuse to acknowledge undisputed record evidence provided by its own co-founder, CSO, and board member is a question only Medpace can answer.

**E. Medpace Misstates The Record Evidence In Denying the Overlap Between And Among CTC, MARC, And The Clinical Pharmacology Unit Of Medpace.**

CTC was ostensibly Dr. Stein's private practice. In its brief, Medpace misstates Dr. McGowan's trial testimony. It claimed that "[a]t trial McGowan conceded that CTC had no affiliation with Medpace," citing to trial transcript 305:9-19. In fact, Dr. McGowan was testifying about the overlap between CTC and Medpace, noting that "everybody that worked for CTC got a Medpace check, they didn't get a CTC check" (T.p. 305:1-2), and that CTC was located on the Medpace campus. (T.p. 305:4-9). (Medpace Merit Brief at p. 3). The testimony Medpace cites in its brief does not support the proposition for which Medpace cites it, but rather states in full:

A. [by Dr. McGowan] No, same building. Same building, same receptionist area, same clinic area, same people drawing blood, same people checking, same everything, but I still wondered. And so Matt then started wondering and he shipped it over to [Medpace GC] Kay Nolen.

Q. Okay, so somehow, somehow, you and Matt worked together eventually it was figured out that [CTC] was a private company?

A. Right. It went to Kay Nolen, and she didn't know it, but she figured it out.

(T.p. 305:9-19). Medpace CEO Dr. Troendle confirmed the overlap among Medpace's Clinical Pharmacology Unit ("CPU"), Medpace's MARC Unit, and Stein's ostensibly private practice, CTC. Dr. Troendle confirmed that Medpace owned the CPU. (T.p. 928:5-7). Medpace hired Dr. McGowan to be Executive Director over the CPU. (T.p. 928:8-11). Dr. Troendle testified that MARC was started by Dr. Stein but bought by Medpace in 2007. (T.p. 928:12-21).

Dr. Troendle also admitted that Dr. Stein's ostensibly private practice, CTC, did not pay rent despite being housed in the Medpace facility. (T.p. 928:22-929:4). Dr. Troendle also confirmed the testimony of several Medpace employees or former employees who had testified that they performed both CTC and MARC duties in the Medpace facility. (T.p. 929:16-21).

The overlap among Stein’s ostensibly private practice CTC, and the Medpace CPU and MARC Units is also apparent in Dr. McGowan’s offer letter from Medpace, which was introduced at trial as Plaintiff’s Exhibit 11. One element of that offer letter made clear that: “as a full-time employee of Medpace, you will be expected to devote all of your professional time and effort exclusively to Medpace and closely related activities which are to its benefit such as the specialty lipid clinic ....” The offer letter continued in the same bullet point: “Activities in the lipid clinic will be considered as part of your duties at Medpace as the patient population is important to the success of the clinical trials at MARC and the CPU.” (McGowan Ex. 11). Dr. McGowan understood that the reference in her offer letter to the “lipid clinic” was a reference to the CTC, Dr. Stein’s ostensibly private practice. (T.p. 301:18-302:20, 449:30-21).

It is difficult to understand why Medpace attempts to make so much of the supposed separation between CTC and Medpace, since it effectively concedes the lack of separation in its brief. At page 2, Medpace states: “Stein operated MARC, and served as its Director, primarily for the benefit of his private practice patients; that is, so he could enroll certain at-risk patients in clinical trials that might improve their condition. In fact, all the individuals who participated in MARC studies were Stein’s own private practice patients.” (Medpace Merit Brief, at p.2).

In short, the record establishes that the idea of CTC as Stein’s private practice was largely a fiction. It was housed on the Medpace campus in the same building as other Medpace units. It shared patients and employees with other Medpace units, its employees received Medpace checks, not CTC checks, and it was run by Dr. McGowan, who also ran the CPU and MARC for Medpace.

### III. ARGUMENT.

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**Proposition of Law I: Under this Court’s Jurisprudence, a *Greeley* Claim Does Not Derive Solely from Statutes or Other Sources That Impose an Affirmative Duty on an Employee to Report a Violation, Prohibit an Employer from Retaliating Against an Employee Who Reports a Violation, or Protect Public Health and Safety.**

- A. **Because The First District’s Decision Only Addressed The Clarity Element Of A *Greeley* Claim, And Did Not Address The Jeopardy Element Of Such A Claim, Medpace’s Arguments Related To McGowan’s Alleged Failure to Sufficiently Articulate A Jeopardy Element Here Must Be Disregarded.**

Medpace devotes a significant portion of its Merit Brief to arguing that Dr. McGowan failed to satisfy the jeopardy element of a *Greeley* claim.<sup>3</sup> All of these arguments and cases should be ignored, however, because the First District never reached the jeopardy element issue. Rather, the First District’s opinion focuses entirely and exclusively upon whether Dr. McGowan satisfied the clarity element of a *Greeley* claim:

Because McGowan failed to establish that she was discharged in violation of a clear public policy that imposed an affirmative duty on an employee to report a violation, that prohibited an employer from retaliating against an employee who had reported a violation, or that protected the public’s health and safety, she has failed to satisfy the **clarity element** of her wrongful-discharge claim. Consequently, reasonable minds could only reach one conclusion on the evidence admitted -- that McGowan could not succeed on her claim for wrongful-discharge in violation of public policy. We hold that the trial court erred by failing to grant Medpace a directed verdict on this claim.

(Appx. to McGowan Merit Brief, 17). (Emphasis added).

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<sup>3</sup>See, e.g., Medpace Merit Brief at 16 (“[t]o satisfy the jeopardy element, ... .”); pages 22-24 (relying upon cases – *McDonnell v. Cardiothoracic & Vascular Surgical Associates, Inc.* S.D. Ohio, No. C2-03-0079, 2004 U.S. Dist. LEXIS 29439 at \*28-30 (Aug. 3, 2004), *Hill v. Mr. Money Fin. Co. & First Citizens Bank Corp.*, 309 F.App’x 950, 965 (6th Cir. 2009), *Pytlinski v. Brocar Prods.*, 94 Ohio St.3d 77, 2002-Ohio-66, 760 N.E. 2d 385 (2002) -- addressing the failure of the jeopardy element as fatal to a *Greeley* claim); page 27 (“McGowan cannot satisfy the . . . jeopardy element with respect to alleged HIPAA violations”); and page 31-32 (“McGowan also cannot establish the jeopardy requirement because the public interest is otherwise adequately protected.”)

Because the First District did not reach the jeopardy element issue in its opinion, that issue was not a basis for Dr. McGowan’s appeal and is not an issue before this Court. *Shover v. Cordis Corp.*, 61 Ohio St.3d 213, 218, 574 N.E.2d 457 (1991) (“[I]t is axiomatic, however, that issues not presented for consideration below will not be considered by this Court on appeal.”) (Citations omitted) (Overruled on other grounds).

**B. *Hale and Dean Create New Criteria For The Clarity Element Under A Greeley Claim, Inconsistent With The Prior Guidance Of This Court And With The Interest Of Ohio Public Policy.***

Medpace is wrong when it argues that *Hale*<sup>4</sup> and *Dean*<sup>5</sup> do not create new criteria for the clarity element under a *Greeley* claim. (Medpace Merit Brief at 17). Medpace is also wrong when it argues that *Hale* and *Dean* (and, by extension, the First District’s opinion in this case) apply the *Greeley* criteria in a manner that is consistent with the prior guidance of this Court and with the interest of Ohio public policy. (*Id.*) Its only support for this argument is two federal court decisions, *Crowley v. St. Rita’s Med. Ctr.*, 931 F.2d 824 (N.D. Ohio 2013), and *Hale v. Mercy Health Partners*, 20 F.Supp 3d 620 (S.D. Ohio 2014). (Medpace Merit Brief at 17-18). These cases are unpersuasive, however, since federal courts have to rely on state appellate court decisions if they cannot find Ohio Supreme Court precedent. *Holbrook v. Louisiana-Pacific Corp.*, 533 Fed. Appx. 493, 497 (6th Cir. 2013). Medpace argues just the opposite; that somehow these federal court cases are a basis to affirm the First District’s *Dean* standard statewide. Medpace is wrong.

Medpace is also wrong in challenging Dr. McGowan’s argument that this Court already has rejected the approach adopted by *Hale* and *Dean* that a source of public policy must “parallel” the reporting and retaliation provisions of the Ohio whistleblower statute. (Medpace Merit Brief at 19).

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<sup>4</sup>*Hale v. Volunteers of Am.*, 158 Ohio App.3d 415, 2004-Ohio-4508, 816 N.E. 2d 259 (1<sup>st</sup> Dist.)

<sup>5</sup>*Dean v. Consol. Equities Realty #3, LLC*, 182 Ohio App.3d 725, 2009-Ohio-2480, 914 N.E. 2d 1109 (1st Dist.)

Medpace claims that the case McGowan cites, *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 1997-Ohio-19, 677 N.E.2d 308 (1997), “does not even address the parallelism approach.” In fact, *Kulch* specifically reaffirmed the analysis set forth in *Painter v. Graley*, 70 Ohio St.3d 377, 1994-Ohio-334, 639 N.E.2d 51 (1994) and quoted at length from the *Painter* opinion that adopts the seminal law review article which rejected parallelism, H. Perritt, *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U.Cin.L.Rev. 397, 398-399 (1989). *Kulch*, 78 Ohio St.3d at 151. *Kulch* applied Perritt’s analysis of the clarity element which “mandates consideration of the question whether clear public policy is manifested in a state or federal constitution, statute or administrative regulation, or in the common law,” **not** whether the source of the clear public policy contains employee reporting requirements, employer anti-retaliation provisions, or public health and safety standards. *Kulch*, 78 Ohio St.3d at 150-52. (Emphasis added).

These are exactly the prerequisites which the First District imposes on the clarity element analysis under *Greeley*. It is exactly those prerequisites that preclude any public policy claims based on the Ohio or United States Constitutions, since neither require employees to report violations nor contain anti-retaliation provisions. But this Court has consistently made it clear since the *Painter* decision over two decades ago that the Constitutions of Ohio and the United States are appropriate sources of public policy sufficient to support a *Greeley* claim. *Painter*, 70 Ohio St.3d at paragraph 3 of the syllabus.

**C. Medpace’s Attempt To Distinguish the Numerous Other Cases Cited By Dr. McGowan, Analyzing the Clarity Element Of A *Greeley* Claim, Is Unavailing.**

Medpace attempts to distinguish the numerous cases Dr. McGowan cites in favor of her position.<sup>6</sup> In so doing, however, Medpace either misunderstands or ignores the fundamental point

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<sup>6</sup>*Sabo v. Schott*, 70 Ohio St.3d 527, 639 N.E.2d 783 (1994); *Dohme v. Urand Am. Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, 956 N.E.2d 825; *Zajc v. Hycomp*, 172 Ohio App.3d 117, 2007-Ohio-2637, 873 N.E.2d 337, ¶¶ 25-26 (8th Dist.); *Alexander v. Cleveland Clinic Found.*,

of these cases. These cases uniformly hold that the clarity element of a claim for wrongful-discharge in violation of public policy is met when a plaintiff articulates a clear public policy based on citation to specific provisions in the federal or state constitution, federal or state statutes, administrative rules and regulations, or common law. They do not require that the source of the public policy be employment-related or regulate public health and safety. The First District’s decision in this case undermines this uniformity, conflicts with this Court’s public policy wrongful-discharge jurisprudence and such jurisprudence of other appellate courts throughout this state, and contravenes what lies at the heart of this Court’s *Greeley* jurisprudence; namely, that the right of employers to terminate employment for any cause does not include the discharge of an employee where the discharge contravenes public policy, regardless of whether the source of the public policy is employment-related or regulates public health and safety. See *Greeley*, 49 Ohio St.3d at paragraph 2 of the syllabus.

**Proposition of Law II: The Public Policies Manifested By R.C. 2913.47 And HIPAA Are Sufficiently Clear To Satisfy The Clarity Element of A *Greeley* Claim Under The Facts Of This Case.**

In arguing against Dr. McGowan’s position that the public policies manifested by R.C. 2913.47 and HIPAA are sufficiently clear to satisfy the clarity element of a *Greeley* claim under the facts of this case, Medpace asserts that R.C. 2913.47 does not apply to Medpace in this case, and Dr. Stein’s actions should not be “imputed” to Medpace. (Medpace Merit Brief at 22-26). In so doing, Medpace misrepresents the record evidence and misstates the law.

Medpace misstates the record evidence when it alleges that Dr. McGowan cited for the first

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8th Dist. Cuyahoga No. 95727, 2012-Ohio-1737, ¶ 36; *McJennett v. Lake Waynoka Property Owners*, 12th Dist. Brown Co. No. CA2013-05-006, 2013-Ohio-5767; *McKnight v. Goodwill Industries of Akron, Inc.*, 9th Dist. Lorain No. 99CA007504, 2000 WL 1257810, \*6 (Sept. 6, 2000); *Bailey v. Priyanka Inc.*, 9th Dist. Summit No. 20437, 2001-Ohio-1410; *Armstrong v. Trans-Service Logistics, Inc.*, 5th Dist. Coshocton No. 04CA015, 2005-Ohio-2723; *Avery v. Joint Township Dist. Mem. Hosp.*, 286 Fed. Appx. 256, 262 (6th Cir. 2008).

time at trial R.C. 2913.47 in support of her “personal opinion” that Dr. Stein’s prescription writing practices constitute insurance fraud. (Medpace Merit Brief at 22-23). In fact, the record evidence is clear that Dr. McGowan raised the insurance fraud issue (and HIPAA violations) **in her very first meeting** with Medpace senior management on July 27, 2011. As Dr. McGowan testified:

**“Well, the purpose of the [July 27] meeting was to discuss the HIPAA violations,<sup>7</sup> the insurance issues, and now my complete removal from the CTC and MARC. So I thought that -- I thought that I was being retaliated against. That I raised some issues that were of great concern, and actually in my mind should have been a concern to Medpace. Medpace is a big company.”**

(T.p. 350:4-11). (Emphasis added). Dr. McGowan has been clear and consistent in her position since July 2011 that her concerns were focused on ensuring that the patient chart and prescription matched, thus avoiding both insurance fraud and patient safety issues, and that the charting practices which led to HIPAA violations had to end. (T.p. 334:3-345:14, 467:24-470:23, 593:8-594:8).

The record evidence also establishes that Dr. McGowan asked Medpace’s General Counsel Nolen in the July 27 meeting for help identifying the proper authority in Ohio to confirm that Dr. Stein’s prescription practices constituted insurance fraud. (T.p. 361:16-21, 985:22-986:2). Nolen told Dr. McGowan she could confirm that with the Ohio Board of Pharmacy. (T.p. 361:16-21, 985:22-986:2). Dr. McGowan promptly followed up on Nolen’s suggestion and spoke with Dr. Whittington and three lawyers at the Ohio Board of Pharmacy who confirmed that Dr. McGowan’s concerns were valid. (T.p. 363:25-366:23, 1021:15-1022:22).<sup>8</sup>

Dr. McGowan also specifically raised R.C. 2913.47 in her August 17, 2011 meeting with Medpace CEO Troendle, wherein she repeated her concern that Dr. Stein’s prescription practices jeopardized patient safety and constituted insurance fraud. (T.p. 474:16-475:1). Dr. McGowan’s

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<sup>7</sup>This testimony also entirely refutes Medpace’s argument that Dr. McGowan did not raise her HIPAA concerns in the July 27, 2011 meeting. (Medpace Merit Brief at 30).

<sup>8</sup>Dr. McGowan’s contemporaneous notes of her conversation with Dr. Whittington includes the notation “2913.47.” (T.p. 366:19-25 and McGowan Ex. 34).

contemporaneous notes of that meeting confirm her testimony:

I reminded him that during our meeting I asked Kay Nolen where we would go to find out if what Evan did was healthcare fraud -- she had said the Ohio Board of Pharmacy. I then said that I had contacted the Ohio Board of Pharmacy and spoke with Jim Whittington, M.D. who said what Evan was doing was insurance fraud -- I also commented that during our phone conversation Dr. Whittington consulted with a few lawyers in his office who concurred that Evan was committing insurance fraud. To this August responded "if the IRS tells you something is illegal are you going to believe it?" I said yes, I would. I also told him that I had also contacted a healthcare lawyer Kate Hannah, who agreed that Evan's practice of prescribing a higher dose than a patient required and thus what would appear to be a 90-day supply was really 180-day supply was indeed insurance fraud.

(T.p. 410:6:13, 581:7-585:18 and McGowan Ex. 44-2).

Medpace also attempts to build its argument that R.C. 2913.47 does not apply to Medpace by falsely claiming that Medpace personnel "do not write prescriptions in their capacity as Medpace employees," a supposed fact that "McGowan does not dispute." (Medpace Merit Brief at 23). Again, Medpace misrepresents the record evidence and is simply wrong. First, as detailed above, the record evidence clearly establishes that there was a significant overlap between and among CTC, MARC and the CPU, including the fact that the employees of Dr. Stein's ostensibly private practice, CTC, received a Medpace paycheck, not a CTC paycheck, that CTC was located on the Medpace campus in the Medpace building, and utilized the same receptionist area, the same clinic area and the same people drawing blood. (T.p. 305:1-19). Although CTC was housed in the Medpace building, it did not pay rent. (T.p. 928:22-929:4). Medpace employees performed both CTC and MARC duties in the Medpace facility. (T.p. 929:16-21). Medpace's own witness, Lindsey Bussell, confirmed both the overlap of MARC and CTC employees and the fact that MARC personnel have authority to call in the prescription that the doctor has written. (T.p. 1286:20-1287:8, 1287:25-1288:9).

In addition, and most damning of all to Medpace's argument here, the record evidence is clear and un rebutted that Medpace employee Dr. Cheryl Webb wrote prescriptions in exactly the

same way as Dr. Stein had written prescriptions, in exactly the same way that Dr. McGowan had confirmed constituted insurance fraud, and in exactly the same way that Dr. McGowan raised concerns about with Medpace senior management immediately before she was fired. (T.p. 407:20-25 and McGowan Ex. 41, 461:25-462:12).

Dr. McGowan's complaints to Medpace senior management that the written prescriptions did not match the medication dosage and instructions given to the patients as reflected in the patient charts (T.p. 336:20-341:3, 477:18-22, 481:1-19, 484:16-485:10, 486:7-19), constituted complaints about "false or deceptive statements" in violation of R.C. 2913.47 (B).<sup>9</sup>

Thus, contrary to Medpace's assertion (Medpace Merit Brief at 24), Dr. McGowan clearly articulated to Medpace's senior management in July and August 2011 that she was concerned Dr. Stein's prescription writing practices -- followed by Dr. Webb and other Medpace employees -- constituted insurance fraud under R.C. 2913.47, and that Dr. Stein's charting practices -- again followed by Medpace employees -- in combining MARC and CTC patient charts, and leaving patient charts open on carts in the hallway, violated federal law safeguarding patient health and privacy rights under HIPAA.

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<sup>9</sup>(B) No person with purpose to defraud or knowing that the person is facilitating a fraud, shall do either the following:

- (1) Present to, or cause to be presented to, an insurer any written or oral statement that is part of, or in support of, an application for insurance, a claim for payment pursuant to a policy, knowing that the statement, or any part of the statement, is false or deceptive;
- (2) Assist, aid, abet, solicit, procure, or conspire with another to prepare or make any written or oral statement that is intended to be presented to an insurer as part of, or in support of, an application for insurance, a claim for payment pursuant to a policy, or a claim for any other benefit pursuant to a policy, knowing that the statement, or any part of the statement, is false or deceptive.

#### IV. CONCLUSION

Medpace warns throughout its Merit Brief that if this Court does not affirm the First District's opinion in this case, the result will be "a vast expansion of the limited exceptions to Ohio's long-standing employment at-will doctrine" (Medpace Merit Brief at 1), and the "destruction" of that doctrine. (Medpace Merit Brief at 14). The fallacy in that argument, however, is established by the fact the uniform application of the clarity element of a *Greeley* claim which Dr. McGowan argues for here and which is the law throughout Ohio outside of the geography of the First District, has not led to the erosion of the employment at-will doctrine that Medpace fears.

By rejecting the First District's application of its *Dean* criteria in this case, this Court will bring consistency throughout Ohio appellate courts in the application of clarity element analysis to *Greeley* claims. As a result, an employee's protection for good faith reporting of violations of the Ohio insurance fraud statute and HIPAA will not depend upon the fortuitous circumstance of that employee's geographic location.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served via regular U.S. Mail on this 1<sup>st</sup> day  
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