ORIGINAL

No. 13-1766

In the Supreme Court of Ohio

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

PATRICIA HULSMEYER,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

JOINT MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS BROOKDALE SENIOR LIVING, INC., HOSPICE OF SOUTHWEST OHIO, INC., AND JOSEPH KILLIAN

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APPENDIX

I. Explanation of why this is a case of public or great general interest

The appeal presents an issue of first impression that has caused a direct conflict between appellate districts: to whom must a report of suspected resident abuse or neglect be made to be entitled to the protection against retaliation under R.C. 3721.24? The First Appellate District, after finding no ambiguity in the term "report" as used in R.C. 3721.24, read the statute in isolation and concluded that the report can be made essentially to anyone, including a resident's daughter. According to the First District, it did not need to construe R.C. 3721.24 in pari materia with R.C. 3721.22—which requires reports of suspected resident abuse or neglect to be made to the Director of Health—because it found no ambiguity in the term "report" as used in R.C. 3721.24. It concluded then that the protection against retaliation under R.C. 3721.24 is not limited to claims where the reporting person made a report to the Director of Health and therefore Plaintiff-Appellee Patricia Hulsmeyer stated a valid claim for retaliation when she alleged she reported suspected neglect to a resident's daughter.

The Eighth Appellate District in *Arsham-Brenner v. Grande Point Health Care Community*, 8th Dist. No. 74835, 2000 WL 968790 (July 13, 2000), came to the opposite conclusion. That appellate court read R.C. 3721.24 and 3721.22 together in pari materia because they are related statutes. It made no threshold finding regarding whether the term "report" was ambiguous before it did so as did the First District in this case. And when read together without regard to any ambiguity, it found that a claim for retaliation under R.C. 3721.24 is only actionable if the reporting person made a report of suspected abuse or neglect to the Director of Health; a report made to anyone else was insufficient. *See Arsham-Brenner*, 8th Dist. No. 74835, 2000 WL 968790 at *6.

The Eighth District did not undertake an ambiguity analysis before applying the in pari materia doctrine because it did not have to; indeed, this Court had consistently applied the doctrine without any such threshold finding of ambiguity when analyzing statutes in a variety of statutory issues before it. *See, e.g., Cater v. Cleveland*, 83 Ohio St.3d 24 (1998) (construing related statutes R.C. 2744.01(C)(2)(u) and former R.C. 2744.02(B)(3) and (4) together without reference to, or making a finding of, ambiguity); *Johnson's Markets, Inc. v. New Carlisle Dept. of Health*, 58 Ohio St.3d 28 (1991) (construing R.C. 3709.20, 3709.22, 913.41, and 913.42 together in pari materia without a threshold finding of ambiguity).

And it has done so more recently in *Chesapeake Exploration, L.L.C. v. Oil & Gas Comm.*, 135 Ohio St.3d 204, 2013-Ohio-224 (construing R.C. 1509.36 and 1509.06 together in pari materia without a threshold finding of ambiguity), *State ex rel. Shisler v. Ohio Pub. Emp. Retirement Sys.*, 122 Ohio St.3d 148, 2009-Ohio-2522, (applying in pari materia doctrine even though statutes at issue were not ambiguous), and *Carnes v. Kemp*, 104 Ohio St.3d 629, 2004-Ohio-7107, ¶ 16 (construing R.C. 3111.05 and 3111.13(C) together in pari materia without reference to, or finding of, ambiguity), to name a few. Appellate courts too have construed related statutes together even without a finding of ambiguity. *See, e.g., Ohio Podiatric Med. Assn. v. Taylor*, 2012-Ohio-2732, 972 N.E.2d 1065, ¶ 29 (10th Dist.) (construing R.C. 3923.23 in pari materia with R.C. 1751.51 even though the court determined that R.C. 3923.23 was unambiguous).

The First District's reasoning—that there must be a threshold finding of ambiguity before applying the in pari materia doctrine—is not, however, entirely without foundation. Indeed, it relied upon this Court's decision in *State ex rel. Hermann v. Klopfleisch*, 72 Ohio St.3d 581 (1995) (*see* 9/25/13 Op. at ¶ 25, Appx. 14), which stated that the in pari materia

doctrine "*may be used* where some doubt and ambiguity exists." (Emphasis added.) *Klopfleisch*, 72 Ohio St.3d at 585 (applying in pari materia doctrine after finding use of term "affiliated" in R.C. 733.08 ambiguous). Although the First District relied on this permissive language to find that a threshold finding was *required*, other decisions from this Court have been similarly restrictive. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Webb*, 54 Ohio St.3d 61, 63 (1990) ("The rule of statutory construction of *in pari materia* is applicable only when the terms of a statute are ambiguous or its significance is doubtful."); *but see Cheap Escape Co., Inc. v. Haddox, LLC*, 120 Ohio St.3d 493, 2008-Ohio-6323, ¶ 13 (noting only that "it is *appropriate* to review statutes in pari materia" to resolve an ambiguity between R.C. 1901.18 and 1901.02). Relying on this line of Supreme Court cases, some appellate courts have required a threshold finding of ambiguity before applying the in pari materia doctrine. *See, e.g., Columbiana v. J & J Car Wash, Inc.*, 7th Dist. No. 04 CO 20, 2005-Ohio-1336, ¶ 37.

Accepting jurisdiction in this case then would not only resolve a conflict between the Eighth and First appellate districts on to whom a "report" of suspected abuse or neglect must be made for a claim for retaliation under R.C. 3721.24 to be actionable, but would give the Court the opportunity to clarify its statutory-construction jurisprudence. Because all levels of courts across Ohio apply and construe Ohio statutes on a daily basis, the Court can provide clear direction on the proper use of the in pari materia doctrine by bringing order to that analysis.

Although Defendants-Appellants Hospice of Southwest Ohio, Joseph Killian ((collectively "Hospice" where appropriate), and Brookdale Senior Living also argued that the term "report" is ambiguous, applying the in pari materia doctrine to related statutes should not turn on whether ambiguity exists. Such a rigid application minimizes the

importance and usefulness of the doctrine. This Court has long construed related statutes without a threshold finding of ambiguity. It can make that rule unequivocally clear here.

II. Statement of the case and facts

Hulsmeyer is a registered nurse. She formerly worked for Hospice, which provides hospice care to residents of long-term and residential care facilities. Brookdale is one such facility where Hospice provided services. Killian is Hospice's Chief Executive Officer.

Hulsmeyer claims that Hospice terminated her employment because she reported suspected neglect to the daughter of a Brookdale resident. In the five-count complaint against Hospice, Killian, and Brookdale that followed, Hulsmeyer asserted several claims. Relevant to this appeal are the claims for retaliation under R.C. 3721.24 she asserted against the Hospice and Killian and Brookdale—Counts I, II, and V of her complaint.[1]

Because Hulsmeyer did not allege (nor could she) that she made the report of suspected abuse or neglect to the Director of Health, Hospice and Brookdale each filed pre-answer motions to dismiss under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted. Each argued that the retaliation claims failed as a matter of law because Hulsmeyer did not make a report of suspected abuse or neglect to the Director of Health as required by R.C. 3721.22, which, as a related statute, must be read together with R.C. 3721.24.

The trial court—relying on the Eighth Appellate District's decision in *Arsham-Brenner v. Grande Point Health Care Community*, 8th Dist. No. 74835, 2000 WL 968790, and *Davis v. Marriott Internatl., Inc.*, No. 04-4156, 2005 Fed.App. 0812N, 2005 WL 2445945 (6th

[1] Hulsmeyer also asserted a claim for wrongful discharge in violation of public policy against Hospice (Count III) and a claim for tortious interference with a business relationship against Brookdale (Count IV); neither is at issue in this appeal.

Cir. Oct. 4, 2005)—agreed that R.C. 3721.22 and 3721.24 should be read together and, when read together, Hulsmeyer's retaliation claims failed as a matter of law because Hulsmeyer failed to make a report to the Director of Health as required by R.C. 3721.22. The court dismissed Counts I and II against the Hospice defendants, and Count V against Brookdale.[2] *See* 9/25/13 Op. at ¶ 10, Appx. 7; *see also* 7/23/12 J. Entry, Appx. 20-22.

The First District reversed and remanded. Contrary to this Court's long-standing statutory construction jurisprudence, it did not read R.C. 3721.24 and 3721.22 in pari materia because it reasoned that this rule of construction did not apply since the term "report" as used in R.C. 3721.24 was not ambiguous. *See* 9/25/13 Op. at ¶ 25, Appx. 14 ("Because the statute is unambiguous and does not limit reports of suspected abuse or neglect to only those reports made or intended to be made to the Director of Health, we need not look to R.C. 3721.22 and 3721.23 for assistance in interpreting the statute."). It thereafter found the report of suspected abuse or neglect made to the resident's daughter sufficient to state a claim for retaliation.

Recognizing that its judgment conflicts with that of the Eighth District in *Arsham-Brenner*, the First Appellate District certified the following issue to this Court:

> 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)?

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[2] The trial court also dismissed Hulsmeyer's wrongful-discharge claim against Hospice, Count III, because R.C. 3721.24 provided a statutory remedy that adequately protected society's interest. Although the trial court did not dismiss her tortious-interference claim (Count IV), Hulsmeyer subsequently dismissed that claim with prejudice.

9/25/13 Op. at ¶ 32, Appx. 16-17. Hospice and Brookdale thereafter filed a Joint Notice of Certified Conflict, which remains pending before this Court. *See Hulsmeyer v. Hospice*, Case No. 2013-1644.

Because the First Appellate District's decision not only creates a conflict among the appellate districts but further splinters this Court's statutory construction jurisprudence, Hospice and Brookdale are now before the Court seeking discretionary review.

III. Argument

Proposition of Law

> R.C. 3721.24 and 3721.22 are related statutes that should be read together and, when read together, a claim for retaliation under R.C. 3721.24 requires a person reporting suspected abuse or neglect to make that report to the Director of Health.

The Supreme Court of Ohio has made clear that *related* statutes must be construed together and read in pari materia:

> In interpreting a statute, a court's principal concern is the legislative intent in enacting the statute. In order to determine that intent, a court must first look at the words of the statute itself. We are also mindful that "'all statutes which relate to the same subject matter must be read in pari materia.'" In construing such statutes together, full application must be given to both statutes unless they are irreconciliable. (Citations omitted.)

Carnes v. Kemp, 104 Ohio St.3d 629, 2004-Ohio-7107, ¶ 16.

Although this Court has, at times, applied the doctrine of in pari materia when there the terms of a statute are ambiguous, a finding of ambiguity in the first instance is not necessarily required for related statutes to be construed together. *Compare Chesapeake Exploration, L.L.C. v. Oil & Gas Comm.*, 135 Ohio St.3d 204, 2013-Ohio-224 (construing R.C. 1509.36 and 1509.06 together in pari materia without a threshold finding of ambiguity),

State ex rel. Shisler v. Ohio Pub. Emp. Retirement Sys., 122 Ohio St.3d 148, 2009-Ohio-2522, (applying in pari materia doctrine even though statutes at issue were not ambiguous), and *Carnes v. Kemp*, 104 Ohio St.3d 629, 2004-Ohio-7107, ¶ 16 (construing R.C. 3111.05 and 3111.13(C) together in pari materia without reference to, or finding of, ambiguity) *with State ex rel. Hermann v. Klopfleisch*, 72 Ohio St.3d 581, 585 (1995) (applying in pari materia doctrine after finding use of term "affiliated" in R.C. 733.08 ambiguous), and *State Farm Mut. Auto. Ins. Co. v. Webb*, 54 Ohio St.3d 61, 63 (1990) ("The rule of statutory construction of *in pari materia* is applicable only when the terms of a statute are ambiguous or its significance is doubtful.").

But under *Carnes*, *Shisler*, and *Cheseapeake Exploration* to name a few, "all statutes which relate to the same subject matter must be read in pari materia," giving full effect to both "unless they are irreconciliable." R.C. 3721.22 and 3721.24 should be read together in pari materia because they relate to the same subject matter—reporting resident abuse and neglect—and are not irreconciliable. Indeed, R.C. 3721.22 and 3721.24 were enacted as entirely new sections as part of Am.Sub.H.B. No. 822 (effective December 13, 1990) and that they were enacted together along with other related and entirely new statutes—R.C. 3721.23, 3721.25, and 3721.26. *See* Am.Sub.H.B. No. 822.[3] As noted by the Fifth Circuit Court of Appeals in *Mattox v. Fed. Trade Comm.*, the doctrine of "in pari materia finds its greatest force 'when the statutes are enacted by the same legislative body at the time.'" 752 F.2d 116, 122 (7th Cir.1985), quoting *Erlenbaugh v. United States*, 409 U.S. 239, 244, 93 S.Ct. 477, 34 L.Ed.2d 446 (1972).

[3] This legislation also amended R.C. 3721.21—the definitions statute—to include new terms needed to give effect to R.C. 3721.22 through 3721.26. *See* Am.Sub.H.B. No. 822.

These newly codified and jointly enacted statutes—R.C. 3721.22 through 3721.26—are written consecutively in the Revised Code. Summarized, they are:

- **R.C. 3721.22** governs reports of resident abuse and subsection (A) in particular requires a licensed health professional to report suspected abuse or neglect to the Director of Health;
- **R.C. 3721.23** governs the procedure the Director of Health follows for receiving, reviewing, and investigating a report of abuse or neglect, including reporting substantiated cases to the attorney general, county prosecutor, or other appropriate law enforcement official;
- **R.C. 3721.24** prohibits retaliating against the person making a report of suspected abuse or neglect, including retaliatory discharge;
- **R.C. 3721.25** protects from disclosure the identity of the person making a report of suspected abuse or neglect at any time after the report was made; and
- **R.C. 3721.26** gives the Director of Health rulemaking powers "to implement R.C. 3721.21 to R.C. 3721.25."

As a whole, these entirely new sections enacted together evince a statutory framework that provides a mechanism for reporting and investigating suspected resident abuse and neglect. As part of that framework, the General Assembly made clear that reports of suspected abuse or neglect are to be made to the Director of Health. R.C. 3721.22. Indeed, the Director of Health, and only the Director of Health, *receives* the report. R.C. 3721.23(A). The Director thereafter reviews the report and, with the broad investigative powers (including subpoena power) authorized under R.C. 3721.23(B)(2), conducts an investigation according to rules adopted by the Director for these statutes. *See* R.C. 3721.23(A) and 3721.26. And if abuse or neglect is substantiated after that review, the Director has mandatory obligations to report the abuse or neglect to the attorney general, county prosecutor, or other appropriate law enforcement official. *See* R.C. 3721.23(C). The rulemaking statute—R.C. 3721.26—underscores the interrelatedness of R.C. 3721.22 and

3721.24. That statute, on its face, authorizes the Director of Health to adopt rules "to implement sections 3721.21 to 3721.25." *See* R.C. 3721.26.

Courts too have recognized that R.C. 3721.22 and 3721.24 are related statutes that are to be read together. In *Arsham-Brenner v. Grande Point Health Care Community*, 8th Dist. No. 74835, 2000 WL 968790 (July 13, 2000), for example, the plaintiff sued her employer for retaliatory discharge under R.C. 3721.24. Although she made no report of suspected abuse to the Director of Health, she argued that "reports" to her employer satisfied the statute because the statute is silent as to whom the report is to be made. *Id.* at *6. The court disagreed.

> Under R.C. 3721.22(A), a licensed health professional is obliged to report suspected abuse or neglect "to the director of health." Sections B and C describe voluntary reporting to the "director of health." The intervening statute, R.C. 3721.23, refers to the duties of the director of health to investigate allegations. *Reading these statutes together*, we believe that R.C. 3721.24 forbids retaliation for reports, whether obligatory or voluntary, made only to the director of health pursuant to R.C. 3721.22. Any reports to others, such as to appellant's employer, of suspected resident abuse or neglect do not qualify for protection under R.C. 3721.24(A). (Emphasis added.)

Id. at *6.

Relying on *Arsham*, the Sixth Circuit in *Davis v. Marriott Internatl., Inc.*, No. 04-4156, 2005 Fed.App. 0812N, 2005 WL 2445945 (6th Cir. Oct. 4, 2005), likewise construed R.C. 3721.22 and 3721.24 together. In that case, the plaintiff argued that a report made to her supervisors satisfied R.C. 3721.24 even if she did not report suspected abuse to the Director of Health. *Id.* at *2. The Sixth Circuit disagreed, read both statutes together, and held that her complaint failed to state a claim for retaliatory discharge under R.C. 3721.24 because she did not allege that she made or intended to make a report to the Director of

Health. *Id.* at *3; *see also Dolan v. St. Mary's Mem. Home*, 153 Ohio App.3d 441, 2003-Ohio-3383, at ¶ 16 (1st Dist.) (reading R.C. 3721.22 and 3721.24 together in the context of analyzing whether the plaintiff had a claim for wrongful discharge in violation of public policy and noting that R.C. 3721.22 requires a licensed health profession to report suspected resident abuse to the Director of Health).

Arsham and *Davis*, and even *Dolan* by inference, recognized that R.C. 3721.22 and 3721.24 are related statutes that must be read together. And when read together, "report" as used in R.C. 3721.24 means a report made to the Director of Health. The First District's contrary conclusion based on reading R.C. 3721.24 in isolation, which was in turn premised on splintered in pari materia jurisprudence, requires this Court's intervention and clarification.

But even if a threshold finding of ambiguity is required, the term "report" as used in R.C. 3721.24 is just as unclear as the term "affiliated" was in *Klopfleisch*. By not specifically stating to whom a report must be made—just as by not specifying as to when a resigning official is "affiliated" with a particular party—the First District, like Hulsmeyer herself, *adds* words to R.C. 3721.24 that are not there. Indeed, by concluding that a report of suspected abuse or neglect need not be made the Director of Health as the jointly enacted statutes in this statutory framework require, the appellate court has effectively said that the report can be made to anyone, including a resident's daughter as Hulsmeyer alleges she did here. But effectively adding "anyone" to the statute, or as Hulsmeyer argued below "to any appropriate entity," adds words to a validly enacted statute, which courts cannot do. *See Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, ¶ 40.

At bottom, the judgment of the trial court was correct. R.C. 3721.24 and 3721.22 are related statutes that should be read together. And when read together, the report referenced in R.C. 3721.24 means a report made to the Director of Health. Because Hulsmeyer made no such report, her claim for retaliation under R.C. 3721.24 fails as a matter of law. The First District's judgment to the contrary should be reversed.

IV. Conclusion

The First District's judgment has created a conflict between appellate districts and further muddied the Court's statutory-construction jurisprudence.

Defendants-Appellants Hospice of Southwest Ohio, Joseph Killian, and Brookdale Senior Living respectfully request that this Court accept jurisdiction to resolve this conflict and clarify its statutory-construction analysis.

Respectfully submitted,

(per consent)
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PROOF OF SERVICE

A copy of the foregoing was served on November 12, 2013 per S.Ct.Prac.R. 3.11 (B) by mailing it by United States mail and electronically by e-mail to:

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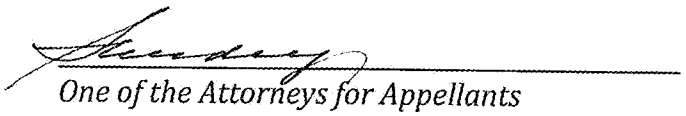

One of the Attorneys for Appellants

APPENDIX

ENTERED
SEP 25 2013

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

PATRICIA HULSMEYER,	:	APPEAL NO. C-120822 TRIAL NO. A-1201578
Plaintiff-Appellant,	:	
vs.	:	*JUDGMENT ENTRY.*
HOSPICE OF SOUTHWEST OHIO, INC.,	:	
JOSEPH KILLIAN,	:	D103685847
and	:	
BROOKDALE SENIOR LIVING, INC.,	:	
Defendants-Appellees.	:	

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed in part, reversed in part, and cause remanded for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To the clerk:

Enter upon the journal of the court on September 25, 2013 per order of the court.

By: _____
Presiding Judge

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

PATRICIA HULSMEYER,	:	APPEAL NO. C-120822 TRIAL NO. A-1201578
Plaintiff-Appellant,	:	
vs.	:	*OPINION.*
HOSPICE OF SOUTHWEST OHIO, INC.,	:	
JOSEPH KILLIAN,	:	
and	:	
BROOKDALE SENIOR LIVING, INC.,	:	
Defendants-Appellees.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: September 25, 2013

Robert A. Klingler Co. L.P.A., *Robert A. Klingler* and *Brian J. Butler*, for Plaintiff-Appellant,

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Tucker Ellis & West LLP, *Victoria Vance* and *Susan M. Audey* for Defendant-Appellee Brookdale Senior Living Inc.,

Michael Kirkman and *Ohio Disability Rights Law and Policy Center, Inc.*, for Amicus Curiae Disability Rights Ohio,

AARP Foundation Litigation, Kelly Bagby, Kimberly Bernard and *Alison Falb,* for Amicus Curiae AARP.

Please note: this case has been removed from the accelerated calendar.

Per Curiam.

{¶1} Plaintiff-appellant Patricia Hulsmeyer appeals the trial court's judgment dismissing her claims for retaliation under R.C. 3721.24 and for wrongful discharge in violation of public policy against defendants-appellees, her former employer, Hospice of Southwest Ohio, Inc. ("Hospice"), its CEO, Joseph Killian, and Brookdale Senior Living, Inc. ("Brookdale"), a corporation that operated a long term and residential care facility where Hospice provided services.

{¶2} Because Hulsmeyer need not 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, we reverse that part of the trial court's judgment dismissing her retaliation claim under R.C. 3721.24 against Hospice, Killian, and Brookdale. We, affirm however, the dismissal of her claim against Hospice for wrongful discharge in violation of public policy because R.C. 3721.24 provides Hulsmeyer with an adequate remedy.

Hulsmeyer's Complaint

{¶3} Hulsmeyer is a registered nurse. She formerly served as a team manager for Hospice. Her duties included overseeing the care of Hospice's patients who resided at one of Brookdale's facilities in Cincinnati, and supervising other Hospice nurses who provided care to those residents. On October 19, 2011, during a patient care meeting of Hospice employees in which Hulsmeyer participated, a Hospice nurse indicated that one of Hospice's patients at Brookdale had suffered some bruising, which she feared was the result of abuse or neglect at the hands of Brookdale staff. A second Hospice employee, an aide, had taken photographs of the injuries at the patient's request, which she showed to those in attendance. Three Hospice employees, who were present at the meeting, informed Hulsmeyer that she was obligated to call Brookdale and the patient's family immediately to report the suspected abuse or neglect.

{¶4} Hulsmeyer immediately called the Director of Nursing at Brookdale, Cynthia Spaunagle, to report her suspicions of abuse or neglect. Spaunagle said that she would take all appropriate measures, including contacting the patient's daughter after ordering an examination of the injuries. Hulsmeyer then reported the suspected abuse to her own supervisor, Hospice's Chief Clinical Officer, Isha Abdullah, but Abdullah did not appear to take the report seriously. Finally, Hulsmeyer called the patient's daughter, who was also the patient's power of attorney, reported the suspected abuse, and informed her that Spaunagle would be contacting her. The following day Hulsmeyer submitted a written report to Abdullah concerning the suspected abuse or neglect of the patient.

{¶5} On October 24, 2011, the patient's daughter contacted Hulsmeyer and left a voice message stating that Spaunagle had not yet contacted her. Later that same day, the patient's daughter contacted Hulsmeyer and informed her that she had called Ida Hecht, the Executive Director of Brookdale, seeking information about her mother's injuries. Hecht had not heard about the injuries or Hulsmeyer's suspicions of abuse or neglect, but she told the patient's daughter that she would look into the matter. On November 4, 2011, a meeting was held at Brookdale to discuss the patient's care. Numerous Brookdale and Hospice employees were present, including Hulsmeyer, as well as the patient's son and daughter.

{¶6} 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. During Hulsmeyer's leave of absence, Jackie Lippert, Regional Health and Wellness Director for Brookdale, contacted Hospice and demanded to know who had informed the patient's daughter of the suspected abuse or neglect. During the telephone call, Ms.

Lippert stated, "We got rid of our problem [Spaunagle], what are you going to do?" Brookdale had terminated Spaunagle.

{¶7} On November 28, 2011, Hulsmeyer's first day back at work following her leave of absence, Abdullah asked Hulsmeyer to join her in her office. Betty Barnett, Hospice's COO and Director of Human Resources, was also in Abdullah's office. They explained to Hulsmeyer that they all had to call Lippert. Lippert was irate. She stated that the patient's daughter had told her that she would not recommend Brookdale to anyone. She accused Hulsmeyer of making Brookdale "look bad" and "stirring up problems." 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.

{¶8} Two days later, Barnett called Hulsmeyer into her office and informed her that she would be terminated. Taken aback by the termination, Hulsmeyer attempted to meet with Killian, but Barnett informed Hulsmeyer that Killian had instructed Barnett to "cut ties" with Hulsmeyer and that he "[didn't] want to be associated with her" because he "[didn't] have time."

{¶9} On November 30, 2011, in a letter signed by Killian and Abdullah, Hospice informed Hulsmeyer that she was terminated. In the letter, Hospice stated that Hulsmeyer had not timely notified Hospice's "Management" about the suspected abuse, criticized her for notifying the patient's daughter about the suspected abuse, and claimed Hospice's "upper management" had not learned about the suspected abuse until Lippert had contacted Abdullah, sometime after November 11, 2011. The termination letter also specifically identified the fact that Hulsmeyer had contacted the patient's daughter as justification for her termination.

{¶10} On February 28, 2012, Hulsmeyer filed suit against Brookdale, Hospice, and Killian. She alleged that Brookdale, Hospice, and Killian had wrongfully terminated her employment in violation of R.C. 3721.24 for reporting suspected abuse and neglect of a nursing home resident. She also asserted a claim against Hospice for wrongful discharge in violation of public policy and a claim against Brookdale for tortious interference with a business relationship. Hospice, Killian, and Brookdale moved pursuant to Civ.R. 12(B)(6) to dismiss all of Hulsmeyer's claims against them. The trial court dismissed all of Hulsmeyer's claims without prejudice except her claim for tortious interference with a business relationship against Brookdale. After conducting limited discovery, Hulsmeyer dismissed with prejudice her remaining claim against Brookdale to pursue this appeal.

Jurisdiction

{¶11} Brookdale argues that this court lacks jurisdiction over Hulsmeyer's appeal. It asserts that Hulsmeyer is not appealing from a final appealable order because the trial court dismissed her public policy and retaliation claims without prejudice. *See* Civ.R. 41(B)(3); *see also Natl. City Commercial Capital Corp. v. AAAA at Your Serv., Inc.*, 114 Ohio St.3d 82, 2007-Ohio-2942, 868 N.E.2d 663, ¶ 8. An order granting a motion to dismiss for failure to state a claim, however, even if expressly dismissed without prejudice, may be final and appealable if the plaintiff cannot plead the claims any differently to state a claim for relief. *See George v. State*, 10th Dist. Franklin Nos. 10AP-4 and 10AP-97, 2010-Ohio-5262, ¶ 13, citing *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147, ¶ 17. Here, the trial court's dismissal of Hulsmeyer's public policy and retaliation claims was based upon its conclusion that they failed as a matter of law.

{¶12} The trial court held that Hulsmeyer could not state a claim for retaliation because R.C. 3721.24 protects a nursing home employee from retaliation only for reporting or intending to report suspected abuse or neglect of a resident to the Ohio Director of Health and that Hulsmeyer had failed to allege that she had reported or intended to report the suspected abuse and neglect to the Ohio Director of Health. It further held that Ohio public policy would not be jeopardized if nursing home employees are terminated for reporting abuse or neglect because R.C. 3721.24 affords them an adequate remedy.

{¶13} Notwithstanding the trial court's notation that it was dismissing the claims without prejudice, no further allegations or statements of facts consistent with the pleadings could cure the defect to these claims. Unless Hulsmeyer were to have disavowed her prior statement that she had not made a report to the Ohio Director of Health, which would have been inconsistent with the allegations in her present complaint, the trial court's conclusion with respect to her retaliation claim would have been unalterable. Similarly, even if Hulsmeyer were to change the facts of her complaint, her public policy claim would still fail as a matter of law based upon the trial court's conclusion that she could not satisfy the jeopardy element of the claim because R.C. 3721.24 had provided her with an adequate remedy. Because there would be no possible factual scenario under which she could state a claim for retaliation in violation of R.C. 3721.24 and for wrongful discharge in violation of public policy, the trial court's dismissal of her claims was in fact an adjudication of the merits of those claims. *See State ex rel. Arcadia Acres v. Ohio Dept. of Job & Family Servs.*, 123 Ohio St.3d 54, 2009-Ohio-4176, 914 N.E.2d 170, ¶ 15. We, therefore, conclude that we have jurisdiction to entertain her appeal.

Standard of Review

{¶14} In two assignments of error, Hulsmeyer argues that the trial court erred in dismissing her retaliation and public policy claims for failure to state a claim under Civ.R. 12(B)(6). We review dismissals by the trial court under Civ.R. 12(B)(6) under a de novo standard of review. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. In determining the appropriateness of a dismissal, we, like the trial court, are constrained to take the allegations in the complaint as true, drawing all reasonable inferences in the plaintiff's favor, and then to decide if the plaintiff has stated any basis for relief. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). A dismissal should be granted only if the plaintiff can plead no set of facts that would entitle it to relief. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus.

Retaliation Claim under R.C. 3721.24

{¶15} In her first assignment of error, Hulsmeyer argues the trial court erred in dismissing her claim for retaliation under R.C. 3721.24.

{¶16} The trial court held that R.C. 3721.24 only protects employees from retaliation who report or intend to report abuse or neglect to the Ohio Director of Health. Because Hulsmeyer had not alleged that she had reported or intended to report the suspected abuse to the Director of Health, she could not state a claim for relief under R.C. 3721.24. In reaching this conclusion, the trial court relied upon the Eighth Appellate District's decision in *Arsham-Brenner v. Grande Point Health Care Comm.*, 8th Dist. Cuyahoga No. 74835, 2000 Ohio App. LEXIS 3164 (July 13, 2000), and an unreported opinion from the Sixth Circuit, *Davis v. Marriott Internatl., Inc.*, 6th Cir. No. 04-4156, 2005 U.S. App. LEXIS 21789 (Oct. 4, 2005), which had followed *Arsham-Brenner*.

{¶17} In *Arsham-Brenner*, the Eighth District held that the protections of R.C. 3721.24 apply only when an employer learns that an individual has reported abuse or neglect to the Ohio Director of Health, and thereafter retaliates against that individual for making such a report to the agency. *Arshem-Brenner* at *21. The court reached this conclusion by reading R.C. 3721.24 together with R.C. 3721.22 and 3721.23. The court noted that "[u]nder R.C. 3721.22(A), a licensed health professional is obligated to report suspected abuse or neglect 'to the director of health.' Sections B and C describe voluntary reporting to the 'director of health.' The intervening statute, R.C. 3721.23, refers to the duties of the director of health to investigate allegations." The court noted that by "[r]eading these statutes together, we believe that R.C. 3721.24 forbids retaliation for reports, whether obligatory or voluntary, made only to the director of health pursuant to R.C. 3721.22. Any reports to others, such as to appellant's employer, of suspected resident abuse or neglect, do not qualify for protection under R.C. 3721.24(A)." *Id.*

{¶18} Similarly, in *Davis v. Marriott Internatl., Inc.*, the Sixth Circuit rejected an employee's claim that a report of suspected abuse to her supervisors satisfied R.C. 3721.24. It stated that the Eighth District's interpretation of the statute in *Arsham-Brenner* was far from unreasonable, given that the Ohio Supreme Court had held that " 'all statutes which relate to the same general subject matter must be read in pari materia' " and that it "ha[d] previously construed whistleblower statutes narrowly." *Davis* at *8, quoting *Carnes v. Kemp*, 104 Ohio St.3d 629, 2004-Ohio-7107, 821 N.E.2d 180, ¶ 16, and citing *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 677 N.E.2d 308 (1997). As a result, the Sixth Circuit followed *Arsham-Brenner*, read the statutes together, and held that the employee's complaint had failed to state

a claim for retaliatory discharge under R.C. 3721.24 because she had not alleged that she had made or intended to make a report to the director of health. *Davis* at *9.

{¶19} Hulsmeyer argues that the trial court, as well as the *Arsham-Brenner* and *Davis* courts, erred by reading R.C. 3721.24 in pari materia with R.C. 3721.22 and 3721.23. She argues that under the rules of statutory construction, a court must first look to the language of the statute, itself, and because R.C. 3721.24 is unambiguous, there is no need to look to R.C. 3721.22 or 3721.23 to interpret R.C. 3721.24. Hospice, Killian, and Brookdale, argue, on the other hand, that this court should follow the interpretation of R.C. 3721.24 set forth in *Arsham-Brenner* and *Davis*. They argue that because R.C. 3721.22 and 3721.24 relate to the same subject matter—reporting resident abuse and neglect—that they must be construed together and be read in pari materia.

{¶20} The interpretation of a statute is a matter of law that an appellate court reviews under a de novo standard of review. *Akron Centre Plaza, L.L.C. v. Summit Cty. Bd. of Revision*, 128 Ohio St.3d 145, 2010-Ohio-5035, 942 N.E.2d 1054, ¶ 10. The Ohio Supreme Court has held that in interpreting a statute, a court must first look to the language of the statute itself. *See Spencer v. Freight Handlers, Inc.*, 131 Ohio St.3d 316, 2012-Ohio-880, 964 N.E.2d 1030, ¶ 16. Words used in a statute must be read in context and accorded their normal, usual, and customary meaning. R.C. 1.42. If the words in a statute are "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." *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶ 12 quoting *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph two of the syllabus. "An unambiguous statute is to be

applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus.

{¶21} "It is only where the words of a statute are ambiguous, are based upon an uncertain meaning, or, if there is an apparent conflict of some provisions, that a court has the right to interpret a statute." *Brooks v. Ohio State Univ.*, 111 Ohio App.3d 342, 349, 676 N.E.2d 162 (10th Dist.1996). A statute is ambiguous where its language is susceptible of more than one reasonable interpretation. *In re Baby Boy Brooks*, 136 Ohio App.3d 824, 829, 737 N.E.2d 1062 (10th Dist.2000). " 'When a statute is subject to more than one interpretation, courts seek to interpret the statutory provision in a manner that most readily furthers the legislative purpose as reflected in the wording used in the legislation.' " *AT&T Communications of Ohio, Inc. v. Lynch*, 132 Ohio St.3d 92, 2012-Ohio-1975, 969 N.E.2d 1166, ¶ 18, quoting *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St.3d 508, 513, 668 N.E.2d 498, (1996). In interpreting an ambiguous statute, a court may inquire into the legislative intent behind the statute, its legislative history, public policy, laws on the same or similar subjects, the consequences of a particular interpretation, or any other factor identified in R.C. 1.49. *See Toledo Edison*, 76 Ohio St.3d at 513-514, 668 N.E.2d 498. Furthermore, when interpreting a statute, courts must avoid unreasonable or absurd results. *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, 838 N.E.2d 658, ¶ 28.

{¶22} R.C. 3721.24 provides in pertinent part:

> (A) 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. For purposes of this division, 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.

{¶23} After reading the statute, we agree with Hulsmeyer that the plain language of R.C. 3721.24(A) forbids retaliation "against an employee or another individual used by the person or government entity to perform any work or services who, in good faith, makes or indicates an intention to make a report of suspected abuse or neglect of a resident * * *." 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.

{¶24} 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. *See State v. Taniguchi*, 74 Ohio St.3d 154, 156, 656 N.E.2d 1286 (1995) (holding that "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 guise of interpreting the statute."); *see also Wachendorf v. Shaver*, 149 Ohio St. 231, 236-37, 78 N.E.2d 370 (1948).

{¶25} Because the statute is unambiguous and does not limit reports of suspected abuse or neglect to only those reports made or intended to be made to the Director of Health, we need not look to R.C. 3721.22 and 3721.23 for assistance in interpreting the statute. *See State ex rel. Hermann v. Klopfleisch*, 72 Ohio St.3d 581, 585, 651 N.E.2d 995 (1995) (the in pari materia rule may only be used in interpreting statutes where some doubt or ambiguity exists). Because Hulsmeyer need not 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, the trial court erred in dismissing her retaliation claim under R.C. 3721.24 against Hospice, Killian, and Brookdale on this basis.

{¶26} Brookdale additionally argues that Hulsmeyer's retaliation claim fails as a matter of law because Hulsmeyer has failed to allege that she was "used by" Brookdale to perform any work or services. R.C. 3721.24 provides a cause of action for an "employee or another individual used by the person or government entity to perform any work or services" who is terminated for reporting suspected abuse and neglect. After reviewing the allegations in her complaint, however, we find that Hulsmeyer has alleged sufficient facts to withstand Brookdale's motion to dismiss. Hulsmeyer alleged that Brookdale used Hospice nurses in conjunction with its own staff to provide patient care at its long-term care facility in several ways.

{¶27} First, she alleged that she was used by Brookdale to oversee the care for certain residents and to monitor the care of other nurses providing care for those residents. She further alleged that she also attended a meeting at Brookdale's facility to consult with Brookdale's staff and the patient's family to ensure the patient was receiving proper care. These facts were sufficient to withstand Brookdale's motion to dismiss.

{¶28} Because R.C. 3721.24 does not limit reports of suspected abuse and neglect to only those reports made to the Ohio Director of Health, and because Hulsmeyer has pleaded sufficient facts to state a claim against Hospice, Killian, and Brookdale, we sustain her first assignment of error.

Public Policy Claim

{¶29} In her second assignment of error, Hulsmeyer argues that the trial court erred in dismissing her claim for wrongful discharge in violation of public policy against Hospice on the basis that she had an adequate remedy available pursuant to R.C. 3721.24 and thus, could not meet the jeopardy element of her claim.

{¶30} In order to state a claim for wrongful discharge in violation of public policy, a plaintiff must show:

> (1) That a clear public policy existed and was manifested in a state or federal constitution, statute 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 overriding legitimate

business justification for the dismissal (the overriding justification element).

Collins v. Rizkana, 73 Ohio St.3d 65, 69-70, 652 N.E.2d 653 (1995). The first two elements—the clarity element and the jeopardy element—are questions of law to be determined by the court, while the third and fourth elements—the causation element and the overriding business justification element—are questions of fact for the trier of fact. *Id.*

{¶31} In *Dolan v. St. Mary's Home*, 153 Ohio App.3d 441, 2003-Ohio-3383, 794 N.E.2d 716 (1st Dist.) this court followed the Ohio Supreme Court's decision in *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 241, 2002-Ohio-3994, 773 N.E.2d 526. We held 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. *Id.* at ¶ 17. 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. We, therefore, overrule her second assignment of error.

Conclusion

{¶32} In conclusion, we affirm the portion of the trial court's judgment dismissing Hulsmeyer's public policy claim, but we reverse that portion of its judgment dismissing Hulsmeyer's claim for retaliation under R.C. 3721.24. We, therefore, remand this cause for further proceedings consistent with this opinion and the law. We recognize that our resolution of Hulsmeyer's first assignment of error conflicts with the Eighth District Court of Appeals in *Arsham-Brenner v. Grande*

Point Health Care, 8th Dist. Cuyahoga No. 74835, 2000 Ohio App. LEXIS 3164 (July 31, 2000). We, therefore, certify to the Supreme Court of Ohio, pursuant to Section 3(B)(4), Article IV, Ohio Constitution, the following issue 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)?"

Judgment affirmed in part, reversed in part, and cause remanded.

HENDON, P.J., CUNNINGHAM and **FISCHER, JJ.**, concur.

Please note:

The court has recorded its own entry this date.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PATRICIA HULSMEYER, PLAINTIFF -VS- HOSPICE OF SOUTHWEST OHIO, INC., ET AL., DEFENDANTS.	CASE NO. A1201578 JUDGE JEROME METZ, JR. ENTRY GRANTING DEFENDANT HOSPICE OF SOUTHWEST OHIO AND JOSEPH KILLIAN'S MOTION TO DISMISS AND GRANTING IN PART AND DENYING IN PART DEFENDANT BROOKDALE SENIOR LIVING, INC.'S MOTION TO DISMISS

This matter came before the Court on Defendants' motion to dismiss. The Court has reviewed the briefs, the complaint, and has heard the arguments of counsel in chambers. For the reasons that follow, the Court hereby grants the motion of Defendants Hospice of Southwest Ohio and Joseph Killian and grants in part and denies in part the motion of defendant Brookdale Senior Living.

I. PLAINTIFF'S COMPLAINT

Plaintiff Patricia Hulsmeyer alleges that she is a registered nurse and former employee of Defendant Hospice of Southwest Ohio, Inc.[1] Ms. Huslmeyer alleges that she was wrongfully terminated from her position as Team Manager for reporting suspected abuse of one of Brookdale's patients to her employer, Hospice, and to the patient's family.[2]

[1] Complaint, ¶ 1.

[2] *Id.* at ¶ 21-27.

Plaintiff's Complaint has five counts. Counts I and II are for retaliation in violation of R.C. 3721.24 against Defendants Hospice and Killian respectively. Count III is for wrongful discharge in violation of public policy against Hospice. Count IV is for tortious interference with a business relationship against Defendant Brookdale and Count V is for retaliation in violation of R.C. 3721.24 against Brookdale.

II. MOTION TO DISMISS

A motion to dismiss is a procedural mechanism that tests the sufficiency of a complaint.[3] When deciding a motion to dismiss under Civ. R. 12(B)(6), courts are confined to the allegations in the complaint and cannot consider outside materials.[4] In order for the Court "to grant a motion to dismiss for failure to state a claim, it must appear 'beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief.'"[5] When a motion to dismiss is filed, "all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party."[6]

a. RETALIATION IN VIOLATION OF R.C. 3721.24

Plaintiff brings a claim for retaliation in violation of R.C. 3721.24 against all Defendants. R.C. 3721.24 provides

> (A) 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

[3] *State ex rel. Hanson v. Guernsey County Bd. of Comm'rs* (1992), 65 Ohio St. 3d 545, 548.

[4] *Id.*

[5] *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60, 565 N.E.2d 584, 589 (*quoting O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St. 2d 242, 245, 71 O.O.2d 223, 224, 327 N.E.2d 753, 755).

[6] *Byrd*, 57 Ohio St.3d at 60, 565 N.E.2d at 589.

> 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. For purposes of this division, 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.
>
> ...
>
> (C) Any person has a cause of action against a person or government entity for harm resulting from violation of division (A) or (B) of this section. If it finds that a violation has occurred, the court may award damages and order injunctive relief. The court may award court costs and reasonable attorney's fees to the prevailing party.

Ms. Hulsmeyer argues that she is protected under the statute for her conduct in reporting suspected abuse to her employer and the patient's family and alleges that she has stated a cause of action under R.C. 3721.24 and therefore, the motion to dismiss should be denied.

To establish a prima facie case under R.C. 3721.24, an employee must show "(1) that the employee engaged in a protected activity; (2) that the employee was the subject of adverse employment action; and (3) that a causal link existed between the protected activity and the adverse action."[7] But, R.C. 3721.24 only applies to those who report suspected abuse of nursing-home residents to the Ohio Director of Health.[8]

> Under R.C. 3721.22(A), a licensed health professional is obliged to report suspected abuse or neglect "to the director of health." Sections B and C describe voluntary reporting to the "director of health." The intervening

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[7] *Dolan v. St. Mary's Memorial Home*, 153 Ohio App.3d 441, ¶ 19 (1st Dist.).

[8] *See id.* at ¶ 16. *Arsham-Brenner v. Grande Point Health Care Community*, 2000 Ohio App. LEXIS 3164, *21 (8th Dist).

> statute, R.C. 3721.23, refers to the duties of the director of health to investigate allegations. Reading these statutes together, we believe that R.C. 3721.24 forbids retaliation for reports, whether obligatory or voluntary, made only to the director of health pursuant to R.C. 3721.22. Any reports to others, such as to appellant's employer, of suspected resident abuse or neglect do not qualify for protection under R.C. 3721.24(A).[9]

Plaintiff argues that the Court should not apply *Arsham-Brenner* to this case because it is unreported, not binding, and has no precedential value. However, in *Davis v. Marriot International Inc.*[10]., the 6th Circuit U. S. Court of Appeals analyzed *Arsham-Brenner* while applying Ohio law to a case similar to this one. The 6th Circuit, in applying the *Arsham-Brenner* case said

> In [*Arsham-Brenner*], much as in this [case], the director of nursing for a health care organization reported below-standard care to her employers and did not report anything to the Ohio Department of Health. In rejecting the resulting retaliation claim, the *Arsham-Brenner* court noted that § 3721.22(A) obliges licensed health professionals to report instances of abuse to the Director of Health, subsections B and C of that provision establish voluntary reporting for others to the Director of Health and § 3721.23 describes the duties of the Director of Health to investigate these allegations. In this context, the court reasoned, the next statute, § 3721.24, must be read as requiring an individual to report abuse to the Director of Health to obtain protection from discharge.
>
> This is far from an unreasonable interpretation of the statute. The Ohio Supreme Court recently observed that it was "mindful that all statutes which relate to the same general subject matter must be read *in pari material*" ... , and has previously construed whistleblower statutes narrowly, ... As this court is sitting in diversity and as we have no evidence, much less persuasive evidence, that the Ohio Supreme Court would construe this statute differently, we are obliged to hold that § 3721.24(A) requires the plaintiff to report instances of abuse in nursing homes to the Ohio Director of Health. Because Davis's motion to amend does not state that she reported (or intended to report) the alleged abuse to

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[9] *Arsham-Brenner*, 2000 Ohio App. LEXIS 3164 at * 21.

[10] 2005 U.S. App. LEXIS 21789, *6 (6th Cir.).

> public authorities, the motion was futile and accordingly was properly dismissed.[11]

Furthermore, the First District Court of Appeals read the statutes together when analyzing a similar case to determine if a Plaintiff had met her burden to on a summary judgment motion. In *Dolan v. St. Mary's Memorial Home*[12], the Court said

> R.C. 3721.22(A) requires a licensed health professional to report suspected abuse of nursing-home residents to the Ohio Director of Health. R.C. 3721.24(A) provides that "no person or government entity shall retaliate against an employee * * * who, in good faith, makes a report of suspected neglect or abuse of a resident * * *." R.C. 3721.24(C) provides that "any person has a cause of action against any person or government entity for harm resulting from violation of division (A) * * *." If a court finds that a violation has occurred, it may order injunctive relief and award damages, court costs and reasonable attorney fees.[13]

Therefore, based on the cases above, the Court finds that in order to have a cause of action for retaliation under R.C. 3721.24, a Plaintiff must allege that she reported or intended to report the suspected abuse to the Ohio Director of Health. Plaintiff does not allege in her Complaint that she reported or intended to report the suspected abuse to the Ohio Director of Health. Therefore, the claims of Plaintiff for retaliation under R.C. 3721.24 against Defendants Hospice, Killian, and Brookdale, which are Counts I, II, and V, are hereby dismissed for failure to state a claim upon which relief can be granted.

b. WRONGFUL DISCHARGE IN VIOLATION OF OHIO PUBLIC POLICY

In Count III of Plaintiff's Complaint, she alleges wrongful discharge in violation of public policy against Defendant Hospice. This claim also cannot stand.

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[11] *Id.* at *7-8.

[12] 153 Ohio App.3d 441 (1st Dist.).

[13] *Id.* at ¶ 16.

> 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 would not be jeopardized in the absence of a common-law wrongful-discharge tort. Consequently, [Plaintiff] may not recover in a wrongful-discharge action when the public policy is based on the reporting of abuse in a nursing home. Her remedy lies in an action for retaliatory discharge pursuant to R.C. 3721.24.[14]

Since a statutory remedy exists that adequately protects society's interest, the remedy lies in an action under the statute and not in an action for wrongful discharge in violation of Ohio public policy. Therefore, the claim must be dismissed for failure to state a claim upon which relief can be granted. Count III of Plaintiff's complaint is therefore dismissed.

c. TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIP

Count IV of Plaintiff's complaint alleges tortious interference with business relationship against Defendant Brookdale. "Generally, a claim for tortious interference with a business or economic relationship requires proof that 'one who, without a privilege to do so, induces or otherwise purposely causes a third party not to enter into, or continue, a business relationship with another, is liable to the other for the harm caused thereby.'"[15]

Brookdale argues that this claim must be dismissed because Brookdale has a business relationship with Hospice and was privileged to speak with Hospice about Ms. Hulsmeyer's conduct and so was protecting a legitimate business interest. However, the Court is confined to the allegations in the Complaint when ruling on a motion to dismiss. Plaintiff alleges sufficient facts in her Complaint to support a claim for tortious interference with a business relationship.

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[14] *Id.* at ¶ 17.

[15] *Bauer v. Commercial Aluminum Cookware*, 140 Ohio App.3d 193, 197 (6th Dist. 2000) (quoting *Brahim v. Ohio College of Podiatric Medicine* (1994), 99 Ohio App. 3d 479, 489, 651 N.E.2d 30.)

Plaintiff alleges

> 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. Brookdale was a third party to the business relationship between Ms. Hulsmeyer and Hospice. ... Brookdale had no privilege to interfere with the business relationship.[16]

Assuming all of those facts as true, as the Court must for a motion to dismiss, Plaintiff has alleged sufficient facts to support a claim for tortious interference with a business relationship. Therefore, Defendant Brookdale's motion to dismiss the tortious interference claim is hereby denied.

III. CONCLUSION

As detailed above, the motion of Defendants Hospice of Southwest Ohio and Joseph Killian to dismiss is hereby granted. The motion of Defendant Brookdale to dismiss is granted in part and denied in part. Counts I, II, III, and V of Plaintiff's Complaint are dismissed without prejudice for failure to state a claim pursuant to Civ. R. 12(B)(6). Count IV of Plaintiff's Complaint remains active.

ENTERED

JUL 23 2012

SO ORDERED.

JEROME J. METZ, JR. JUDGE

JEROME J. METZ, JR., JUDGE

cc: counsel of record

[16] Plaintiff's Complaint, 56-59.