

[Cite as *Sygula v. Regency Hosp. of Cleveland E.*, 2016-Ohio-2843.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103436

LAURA SYGULA

PLAINTIFF-APPELLANT

vs.

**REGENCY HOSPITAL OF
CLEVELAND EAST, ET AL.**

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-817358

BEFORE: Laster Mays, J., E.T. Gallagher, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: May 5, 2016

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ANITA LASTER MAYS, J.:

{¶1} Plaintiff-appellant, Laura Sygula (“Sygula”), appeals from the trial court’s decision in favor of defendants-appellees, Regency Hospital of Cleveland East (“Regency”), Krista McFadden (“McFadden”), and Karen Obendorf Keller (“Keller”). After a thorough review of the record, we affirm the trial court’s decision to grant summary judgment in favor of the appellees.

{¶2} On November 14, 2012, charge nurse Andrea Kimble (“Kimble”) reported to McFadden, the director of nursing at Regency, that she had discovered a discrepancy involving a missing narcotic. Kimble told McFadden that she investigated to see which nurse requested the narcotic that was never given to the patient for whom it was requested. Kimble noticed that the request came from an agency nurse named Daiedra White (“White”) under a temporary account, but the spelling of her name was incorrect, which seemed strange to Kimble. Kimble confronted White, who told her that she never requested the narcotic and was working in another department during the time of the request.

{¶3} Kimble and McFadden contacted Omnicell, the company that manufactures the pill dispenser, to notify them of a glitch in their system. Omnicell, Kimble, and McFadden discovered that a charge nurse can create a temporary account, using anyone’s name, to dispense pills. Omnicell created this function because temporary nurses are not

given accounts to request medication from the pill dispenser. A charge nurse has to create a temporary account for the temporary nurses under the charge nurse's account using their fingerprints.

{¶4} This process is as follows: Full-time nurses are already entered into the Omnicell system, but temporary agency nurses are entered in the system by charge nurses and their accounts are only valid for one shift. In order for a charge nurse to create a temporary account, the charge nurse must input their user identification, which consists of their three initials, the last four digits of their social security number, and their password, which they created. The charge nurse must then submit their fingerprint to complete the login. After the discrepancy was discovered, McFadden requested a report from Omnicell that would list the names of the charge nurses that created the temporary accounts for the temporary agency nurses.

{¶5} Omnicell generated the report that McFadden requested, and McFadden noticed that beginning on September 14, 2012, temporary accounts were being created by the user LLS7349 to receive Vicodin and Percocet, but neither drug had been given to the patients for whom they were requested. McFadden also noticed that new, full-time employees had temporary accounts created for them by that same user. Approximately 88 doses of Vicodin and Percocet had been requested by LLS7349 for various patients who never received them. The user name LLS7349 belonged to Sygula. Upon this discovery, McFadden contacted Keller, the director of pharmacy, who continued the investigation.

{¶6} McFadden and Keller consulted with Scott Williams (“Williams”), the local CEO, as well as other members of Regency’s management and legal team. One of the members, Kurt Streepy, the vice president of pharmacy, informed Keller and McFadden that the State of Ohio Board of Pharmacy (“State Board”) requires them to immediately report any potential drug diversion at a hospital. Keller reported it, and was instructed to also report the matter to the local police.

{¶7} On November 16, 2012, McFadden contacted the Warrensville Heights Police Department (“WHPD”) and spoke to Officer John Videc (“Videc”), who instructed her to complete a police report. That same day, McFadden contacted Sygula, requested that she submit to a drug test, and suspended her pending an investigation. McFadden also contacted the Ohio Board of Nursing (“Board of Nursing”) to inform them of the incident.

{¶8} On November 20, 2012, Sygula met with Williams, McFadden, Keller, and WHPD Detective Dennis Fossett (“Fossett”). They presented the records to Sygula showing her all the temporary accounts that she was suspected of creating. She denied creating them and taking the drugs. In that meeting, Sygula remembered that she did create several temporary accounts, but would routinely leave the room after she input her login credentials, leaving the temporary agency nurses to request whatever pills they choose. This practice violated hospital policy, and Sygula’s employment was terminated December 6, 2012, for failure to adhere to Regency’s medication administration policy.

{¶9} Regency did not press charges against Sygula, however, after Fossett concluded his investigation, he presented the evidence to the Cuyahoga County Prosecutor's office, who decided to indict Sygula. Sygula was indicted for theft; a fourth-degree felony in violation of R.C. 2913.02(A)(3); illegal processing of drug documents, a fourth-degree felony in violation of R.C. 2925.23(A); illegal processing of drug documents, a fifth-degree felony in violation of R.C. 2925.23(A); five counts of identify fraud, a fifth-degree felony in violation of R.C. 2913.49(B)(2); two counts of drug possession, a fifth-degree felony in violation of R.C. 2925.11(A); and one count of drug possession, a first degree misdemeanor in violation of R.C. 2925.11(A).

{¶10} During the investigation, Sygula testified that she had created many temporary accounts for respiratory therapist Rebecca D'Amico ("D'Amico"). D'Amico claimed that her login information was not working properly and needed Sygula to login for her. However, Sygula could not identify the dates when she created these accounts, and had no knowledge of whether or not D'Amico was involved in the theft of the missing pills. On July 1, 2013, the Cuyahoga County Prosecutor dismissed the charges against Sygula without prejudice.

{¶11} Sygula sued Regency, McFadden, and Keller for maliciously reporting her to the police and the board of nursing. On summary judgment, the trial court dismissed all causes of actions in favor of the appellees. As a result, Sygula filed this timely appeal and assigns the following errors for our review.

- I. The trial court erred in ruling appellant did not present evidence as to each element of defamation, including evidence of malice where a qualified immunity is raised.
- II. The trial court erred in ruling appellant did not present evidence as to each element of negligent infliction of emotional distress where appellant provided evidence of malice.
- III. The trial court erred in ruling appellant did not present evidence to support her claim of negligent reporting.
- IV. The trial court erred in holding appellant did not establish a prima facie case of malicious prosecution.
- V. The trial court erred in holding Ohio does not require retention of fingerprints used as positive identification to withdraw dangerous drugs, and therefore dismissing appellant's claim for wrongful termination against public policy.
- VI. The trial court erred in dismissing counts 6, 7, and 8 alleging negligent hiring, negligent supervision, and negligent retention.

I. Summary Judgment

A. Standard of Review

{¶12} “This court reviews the lower court’s granting of summary judgment de novo.” *Baiko v. Mays*, 140 Ohio App.3d 1, 7, 746 N.E.2d 618 (8th Dist.2000), citing *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987); *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.*, 121 Ohio App.3d 188, 699 N.E.2d 534 (8th Dist.1997); *Dragmen v. Swagelok Co.*, 8th Dist. Cuyahoga No. 101584, 2014-Ohio-5345, ¶ 15. “An appellate court affords no deference to the trial court’s ruling and conducts an independent review of the record to determine whether summary judgment is appropriate.” *K.S. v. Pla-Mor Roller Rink*, 8th Dist. Cuyahoga No. 103139, 2016-Ohio-815, ¶7. “The reviewing court evaluates the record * * * in a light most favorable to the nonmoving party. * * * [T]he motion must be overruled if reasonable minds could find for the party opposing the motion.” *Saunders v. McFaul*, 71 Ohio App.3d 46, 50, 593 N.E.2d 24 (8th Dist.1990).

{¶13} “Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party.” *Pla-Mor Roller Rink* at ¶ 8.

{¶14} “The party moving for summary judgment has the initial burden to show that no genuine issue of material fact exists.” *Id.* at ¶ 9. In *Dresher v. Burt*, 75 Ohio St.3d

280, 662 N.E.2d 264 (1996), the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991). Under *Dresher*, “the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim.” *Id.* at 296. “The movant cannot simply rely on conclusory assertions that the nonmovant has no evidence — the movant must specifically point to evidence contained within the pleadings, depositions, answers to interrogatories, written admissions, affidavits, etc., which affirmatively demonstrate that the nonmovant has no evidence to support his claims.” *Id.* at 293.

{¶15} “The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings.” *Id.* The nonmoving party must set forth “specific facts” by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. *Id.*; see *Citibank, N.A. v. Katz*, 8th Dist. Cuyahoga No. 98753, 2013-Ohio-1041, ¶ 15. “If the nonmoving party establishes the existence of a genuine issue of material fact, then the trial court should deny the motion for summary judgment.” *Pla-Mor Roller Rink*, 8th Dist. Cuyahoga No. 103139, 2016-Ohio-815, ¶ 11.

B. Defamation

{¶16} In Sygula’s first assignment of error, she argues that the trial court erred in ruling that she did not present evidence as to each element of defamation, including evidence of malice where a qualified immunity is raised. “Defamation is a false

publication that injures a person's reputation, exposes him to public hatred, contempt, ridicule, shame or disgrace; or affects him adversely in his trade or business.” *Kanjuka v. Metrohealth Med. Ctr.*, 151 Ohio App.3d 183, 2002-Ohio-6803, 783 N.E.2d 920, ¶15 (8th Dist.). “The essential elements of a defamation action are a false statement, that the false statement was defamatory, that the false defamatory statement was published, the plaintiff was injured and the defendant acted with the required degree of fault.” *Id.* “There are two forms of defamation: libel or slander. Generally, slander refers to spoken defamatory words and libel refers to written defamatory words.” *Id.*

{¶17} “Defamation may be per se or per quod.” *Id.* at ¶ 16.

Defamation per se means that the defamation is accomplished by the very words spoken. Defamation per quod means that a statement with an apparently innocent meaning becomes defamatory through interpretation or innuendo. In order for a statement to be defamatory per se, it must consist of words which import an indictable criminal offense involving moral turpitude or infamous punishment, imputes some loathsome or contagious disease which excludes one from society or tends to injure one in his trade or occupation. With defamation per se, damages and actual malice are presumed. With defamation per quod, the plaintiff must plead and prove special damages resulting from the defamatory statements.

Id. at ¶ 16.

{¶18} “An allegation that one has acted unprofessionally constitutes defamation per se.” *Id.* at ¶ 17. Sygula claims McFadden and Keller defamed her by making reports to the WHPD and Drug Enforcement Administration (“DEA”) that she stole narcotics from the hospital. “To prevail on a defamation claim, a plaintiff must prove five elements: 1) a false statement; 2) about the plaintiff; 3) published to a third party; 4) with the required degree of fault by the defendant publisher; and 5) defamatory per se or

defamatory per quod, causing special harm to the plaintiff.” *Garofolo v. Fairview Park*, 8th Dist. Cuyahoga Nos. 92283 and 93021, 2009-Ohio-6456, ¶ 17. However, “there is a qualified-privilege defense to a claim of defamation in certain instances.” *Id.* at ¶ 19.

A qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty of a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest. The essential elements thereof are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.

Id.

{¶19} According to the United States Department of Justice, Drug Enforcement Administration, Office of Diversion Control’s Pharmacist Manual, should there be:

[A] theft or significant loss of any controlled substance occur at a pharmacy, the following procedures must be implemented within one business day of the discovery of the theft or loss. The theft of controlled substances from a registrant is a criminal act and a source of diversion that requires notification to DEA. A pharmacy must notify in writing the local DEA Diversion Field Office within one business day of discovery of a theft or significant loss of a controlled substance. Although not specifically required by federal law or regulations, the registrant should also notify local law enforcement and state regulatory agencies. Prompt notification to enforcement agencies will allow them to investigate the incident and prosecute those responsible for the diversion. If there is a question as to whether a theft has occurred or a loss is significant, a registrant should err on the side of caution and report it to DEA and local law enforcement authorities. DEA must be notified directly. This requirement is not satisfied by reporting the theft or significant loss in any other manner. For example, a corporation which owns or operates multiple registered sites and wishes to channel all notifications through corporate management or any other internal department responsible for security, must still provide notice directly to DEA in writing within one business day upon discovery and keep a copy of that notice for its records. The notice must be signed by an authorized individual of the registrant.

United States Department of Justice Drug Enforcement Administration, Office of Diversion Control, *Pharmacist Manual*, http://www.deadiversion.usdoj.gov/pubs/manuals/pharm2/pharm_manual.htm#5 (accessed Mar. 10, 2016).

{¶20} Keller, McFadden, and Regency had a duty to report the loss of narcotics to the local police department, the DEA, and state regulatory agencies as required by law, and did so in accordance with the statute. Therefore, they all had qualified privilege.

{¶21} Sygula also claims that the appellees defamed her by making similar reports to the Board of Nursing. However, according to R.C. 4723.34,

A person or governmental entity that employs, or contracts directly or through another person or governmental entity for the provision of services by, registered nurses, licensed practical nurses, dialysis technicians, medication aides, or certified community health workers and that knows or has reason to believe that a current or former employee or person providing services under a contract who holds a license or certificate issued under this chapter engaged in conduct that would be grounds for disciplinary action by the board of nursing under this chapter or rules adopted under it shall report to the board of nursing the name of such current or former employee or person providing services under a contract. The report shall be made on the person's or governmental entity's behalf by an individual licensed by the board who the person or governmental entity has designated to make such reports.

Again, in accordance with the Ohio Revised Code, the appellees had a duty to report Sygula because they had reason to believe that she had engaged in misconduct. McFadden and Keller did not randomly accuse Sygula of stealing drugs. They had the report from Omnicell that Sygula's login credentials were used over the course of a three-month period to dispense narcotics that were never given to the patients for whom they were intended. There were over 85 narcotic pills missing. By law, they had to

report this conduct to the proper authorities. Therefore, the appellees had a qualified privilege and did not defame Sygula by reporting her to the police department, the DEA, or the Board of Nursing.

{¶22} In Sygula’s defamation claim, she argues that the appellees defamed her to fellow workers. “Generally, a communication made in good faith on a matter of common interest between an employer and an employee, or between two employees concerning a third employee, is protected by qualified privilege.” *Kanjuka*, 151 Ohio App.3d 183, 2002-Ohio-6803, 783 N.E.2d 920 at ¶ 42. “The elements necessary to establish the privilege are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.” *Id.* “Once a defendant demonstrates the existence of the qualified privilege, a plaintiff can prevail only upon a showing of actual malice.” *Id.* “Actual malice in defamation cases may be demonstrated only by clear and convincing evidence that the defendant published the statement at issue with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* The appellees have demonstrated that they have a qualified privilege. Therefore, Sygula can only prevail on her defamation claim and action if it can be shown the appellees statements to fellow workers were made with actual malice. There is no evidence that the appellees discussed Sygula’s suspension or termination with any other employees.

{¶23} During the deposition of one of Sygula’s coworkers and fellow charge nurse, Kimberly Laster (“Laster”), Laster stated that she did not have any conversations

about Sygula's suspension or termination with McFadden, Keller, or anyone from Regency's administration. In fact, Laster testified that Sygula told her about the suspension. There is no evidence that appellees defamed Sygula. Therefore, appellant's first assignment of error is overruled.

C. Infliction of Emotional Distress

{¶24} In Sygula's second assignment of error, she contends that the trial court erred in ruling that she did not present evidence as to each element of negligent infliction of emotional distress.

In order to recover on an action for intentional infliction of serious emotional stress four elements must be proved: 1) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff; 2) that the actor's conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community; 3) that the actor's actions were the proximate cause of plaintiff's psychic injury; and 4) that the mental anguish suffered by plaintiff is serious and of a nature that no reasonable man could be expected to endure it. It is not necessary that bodily injury or any physical impact be shown.

Pyle v. Pyle, 11 Ohio App.3d 31, 34, 463 N.E.2d 98 (8th Dist.1983). "The resulting emotional distress from the behavior must be so serious that, a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances." *McNeil v. Case W. Res. Univ.*, 105 Ohio App.3d 588, 593, 664 N.E.2d 973 (8th Dist.1995). "In the context of an employer intentional tort, a plaintiff must then show defendants engaged in a course of conduct with

knowledge that plaintiff's injuries were certain or substantially certain to occur, and despite that knowledge, still proceeded with that course of conduct.” *Id.*

{¶25} Sygula first contends that appellees' reports to the authorities regarding the theft of the narcotics caused her emotional distress. Additionally, she argues that the appellees did not specify the statutes obligating them to report the theft of the drugs and that these mandatory reports were not made in good faith. In this opinion, we have provided the statutes that obligated the appellees to report the theft of the drugs. The appellees had substantial evidence from the Omnicell reports that Sygula logins were used in the dispensing of the narcotics and reporting which was mandatory.

{¶26} As previously stated, they did not just maliciously collude together to falsely accuse Sygula of theft. When the narcotic discrepancy was reported to McFadden, she investigated which nurse's login credentials, including the username, personal password, and fingerprint, were used to dispense the narcotics that were never given to the “intended” patients. Sygula's credentials were used. McFadden and the other appellees were required by law to report that information. There is no evidence in the record that the appellees intended to cause Sygula emotional distress. Their conduct was not extreme or outrageous, but rather lawful. Therefore, Sygula's second assignment of error is overruled.

D. Negligent Identification

{¶27} In Sygula's third assignment of error, she argues that the trial court erred in ruling that she did not present evidence to support her claim of negligent identification.

“The elements for the tort of negligent identification, or mis-identification, exist for persons who are negligently improperly identified as being responsible for committing a violation of law and who suffer injury as a result of the wrongful identification.” *Barilla v. Patella*, 144 Ohio App.3d 524, 534, 760 N.E.2d 898 (8th Dist.2001). “As with any cause of action sounding in negligence, there must be a showing of a duty, a breach of that duty, proximate cause, and injury before the person improperly identified for committing a crime can establish a valid claim.” *Id.*

{¶28} Sygula argues that the police and Regency purposefully misidentified her as a criminal suspect in the theft of the narcotics when they knew that she did not take the drugs. There is no evidence in the record that the appellees or police knew that Sygula did not take the drugs. The record supports that there were narcotics, dispensed to patients who did not receive them, from temporary agency nurses, that did not work in the designated unit on the designated evening, and all logins were created by Sygula. Appellant’s third assignment of error is overruled.

E. Malicious Prosecution

{¶29} In Sygula’s fourth assignment of error, she contends that the trial court erred in holding that she did not establish a prima facie case of malicious prosecution. “Claims for malicious prosecution are not favored at law because they act as a restraint upon the right to resort to the courts for lawful redress.” *Froehlich v. Ohio Dept. of Mental Health*, 114 Ohio St.3d 286, 2007-Ohio-4161, 871 N.E.2d 1159, ¶ 9. “Public policy supports this position in order that criminal investigations are not discouraged and that those who cooperate with law enforcement are protected.” *Id.* “The tort of malicious prosecution in a criminal setting requires proof of three essential elements: (1) malice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of the prosecution in favor of the accused.” *Id.* at ¶ 10. “Malice has been defined as the willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through conduct which is unlawful or unjustified.” *Habeeb v. Ohio House of Representatives*, 10th Dist. Franklin No. 07AP-895, 2008-Ohio-2651, ¶ 12. “Bad faith has been defined as a design to mislead or deceive another, not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive.” *Id.*

“Reckless” has been defined as being when one does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Id.

{¶30} Sygula has not given any evidence that the prosecution acted maliciously in pursuing this case. The prosecution did not intentionally harm Sygula. They did not mislead or deceive and were not reckless in their prosecution. The prosecutor had evidence that Sygula, through her login credentials, was or may have been involved with the theft of narcotics, and decided to pursue an action against her in accordance with that evidence. Therefore, Sygula's fourth assignment of error is overruled.

F. Wrongful Termination

{¶31} In Sygula's fifth assignment of error, she argues that the trial court erred in dismissing her claim for wrongful termination against public policy.

The elements of the tort of wrongful discharge in violation of public policy are: (1) that 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).

Leininger v. Pioneer Natl. Latex, 115 Ohio St.3d 311, 2007-Ohio-4921, 875 N.E.2d 36, ¶10, 12.

{¶32} "To satisfy the clarity element of a claim of wrongful discharge in violation of public policy, a terminated employee must articulate a clear public policy by citation to specific provisions in the federal or state constitution, federal or state statutes, administrative rules and regulations, or common law." *Rebello v. Lender Processing*,

Servs., 2015-Ohio-1380, 30 N.E.3d 999, ¶ 29 (8th Dist.). “A public policy sufficient to overcome the presumption in favor of employment at will is not limited to instances in which the statute expressly forbids termination, but may be discerned from legislation generally, or from other sources of law.” *Id.* “The wrongful-discharge tort is not limited to situations where the discharge violates a statute.” *Id.* “Case law demonstrates that the cited policy need not prohibit discharge per se.” *Id.*

{¶33} Sygula did not cite to a specific provision in the federal or state statutes, administrative rules and regulations, or common law where there existed a public policy citation. In her brief, Sygula argues that Ohio Adm.Code 4729-17-04 requires the appellees to maintain a record of the fingerprint scans performed by the Omnicell machines. Additionally, she argues that appellees’ failure to maintain a record of the actual fingerprints violated this code section, and, hence, her termination was in violation of public policy. We disagree. Sygula is incorrect on the law. The code section never mentions fingerprint records.

{¶34} The records shows that Sygula was terminated because she violated hospital policy. In her own testimony, Sygula admitted that she did not follow Regency’s medication administration policy. Sygula stated that sometimes when she would set up temporary user accounts for temporary nurses, she would leave the room before completing the process. This allowed the temporary user to type whatever name they wanted and receive whatever drug they requested. Because Sygula would leave the room, she did not accurately monitor the information submitted to the Omnicell machine.

For this reason, she was terminated. Additionally, Sygula was terminated before the Cuyahoga County Prosecutor's Office indicted her. Sygula has not provided any evidence that she was wrongfully terminated by Regency, and her fifth assignment of error is overruled.

G. Negligent Hiring, Supervision, and Retention

{¶35} In Sygula's sixth assignment of error, she contends that the trial court erred in dismissing counts 6, 7, and 8, alleging negligent hiring, negligent supervision, and negligent retention. "The tort of negligent hiring is recognized in Ohio." *Evans v. Ohio State Univ.*, 112 Ohio App.3d 724, 739, 680 N.E.2d 161 (10th Dist.1996). "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless in the employment of improper persons or instrumentalities in work involving risk of harm to others." *Id.*

The elements necessary for a plaintiff to prove an action for negligent hiring or retention are (1) the existence of an employment relationship; (2) the employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing the plaintiff's injuries, and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries.

Id.

The elements of negligent retention are: (1) an employment relationship; (2) incompetence of the employee; (3) actual or constructive knowledge of the incompetence by the employer; (4) an act or omission by the employee which caused the plaintiff's injuries; and (5) negligent retention of the employee by the employer, which action is the proximate cause of the plaintiff's injuries.

Mills v. Deehr, 8th Dist. Cuyahoga No. 82799, 2004-Ohio-2410, ¶ 13.

The elements of negligent supervision are: (1) an employment relationship; (2) incompetence of the employee; (3) actual or constructive knowledge of the incompetence by the employer; (4) an act or omission by the employee which caused the plaintiff's injuries; and (5) negligent retention of the employee by the employer, which action is the proximate cause of the plaintiff's injuries.

Crable v. Nestle USA, Inc., 8th Dist. Cuyahoga No. 86746, 2006-Ohio-2887, ¶ 39.

{¶36} Sygula argues that Regency negligently hired, supervised, and retained D'Amico after D'Amico plead guilty to felony narcotic theft at her former job. Sygula argues that the evidence points to D'Amico stealing the missing drugs. D'Amico was never a suspect in this case. Nor was there any evidence, other than Sygula's testimony, that D'Amico stole drugs. In fact, Sygula argues that no drugs were ever stolen. She can not have it both ways. Additionally, Sygula has not shown that she was harmed by D'Amico or Regency for hiring D'Amico. As a result, the trial court was correct in dismissing her claims for negligent hiring, supervision, and retention. Therefore, Sygula's sixth assignment of error is overruled.

{¶37} The judgment of the trial court is affirmed.

It is ordered that the appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court to carry out this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANITA LASTER MAYS, JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS;
EILEEN T. GALLAGHER, P.J., CONCURS IN JUDGMENT ONLY