ORIGINAL

No. 2013-1644 and
No. 2013-1766
(Consolidated)

In the Supreme Court of Ohio

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

PATRICIA HULSMEYER,

Appellee/Cross-Appellant,

v.

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

Appellants/Cross-Appellees.

JOINT BRIEF OF APPELLANTS/CROSS-APPELLEES BROOKDALE SENIOR LIVING, INC., HOSPICE OF SOUTHWEST OHIO, INC., AND JOSEPH KILLIAN

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I. Introduction

Appellee/Cross-Appellant Patricia Hulsmeyer's causes of action against Appellants/Cross-Appellees Hospice of Southwest Ohio, Joseph Killian (collectively "Hospice"), and Brookdale Senior Living for retaliation under R.C. 3721.24 fail because Hulsmeyer—a licensed health professional—never reported any suspected abuse or neglect to the Ohio Director of Health.

> No licensed health professional who knows or suspects that resident has been abused or neglected * * * shall fail to report that knowledge or suspicion *to the director of health.* (Emphasis added.)

R.C. 3721.22(A), Appx. 78.

The protection against retaliation afforded by R.C. 3721.24 is tied to this statutory provision. It provides:

> No person * * * shall retaliate against an employee or another individual used by the person * * * to perform any work or services who, in good faith, makes a report of suspected abuse or neglect, indicates an intention to make such a report; provides information during an investigation of suspected abuse [or] neglect * ** by the director of health; or participates in a hearing conducted under section 3721.23 of the Revised Code or in any administrative or judicial proceedings pertaining to the suspected abuse [or] neglect * * * .

R.C. 3721.24(A), Appx. 83.

Long-standing principles of statutory construction make clear that a court is prohibited from changing or adding to the words used by the General Assembly in enacting a statute. Yet the First District Court of Appeals did just when it construed the phrase "makes a report of suspected abuse or neglect of a resident" as used in R.C. 3721.24(A) to mean, "makes *any* report of suspected abuse or neglect of a resident *to anyone, including a*

family member." But the statute, by its plain terms, does not include the terms "any," nor does it include the phrase "to anyone, including a family member." In fact, as Hospice and Brookdale acknowledge, R.C. 3721.24(A), when read in isolation, is silent as to whom a report of suspected resident abuse or neglect is to be made.

But merely because it is silent as to whom any such report should be made does not mean that a court can *change* or *add* words to the statute to give it the meaning desired, nor does it mean that the statute should be read in isolation. On the contrary, R.C. 3721.24, read in pari materia with R.C. 3721.22, supports the interpretation that the term "report" refers to a report made to the Director of Health. Indeed, R.C. 3721.24, along with R.C. 3721.22 through 3721.26, were codified as entirely new statutes when the General Assembly enacted Am.Sub.H.B. No. 822 as part of a comprehensive statutory framework to protect against resident abuse and neglect.

That framework protects both the interests of the resident and the reporting individual by imposing mandatory obligations not only on a licensed health professional to report suspected abuse or neglect, but on the Director of Health to review and investigate those reports. Viewing this framework as a whole as related statutes enacted together should be, the General Assembly statutorily empowered the Director of Health with broad investigatory powers, including subpoena power. Once the Director receives a report of suspected abuse or neglect, he or she is required to investigate the report, conduct a hearing on the report, and issue findings based on the allegations in the report. And the Director is statutorily mandated to refer the matter to the attorney general, county prosecutor, or other law enforcement official if abuse or neglect is substantiated. Making a report to anyone other than the Director of Health would not further the goals that the

legislature intended when it enacted this statutory framework because no one besides the Director has this broad authority.

The First District, however, ignored this statutory framework. It read R.C. 3721.24 in isolation, without resort to R.C. 3721.22 or the other statutes enacted as part of Am.Sub.H.B. No. 822's statutory framework for reporting suspected abuse or neglect, and concluded that the term "report" used in R.C. 3721.24 was unambiguous and meant *any* report made to *anyone*. *See* 9/25/13 Op. at ¶ 23, 25, Appx. 18, 19.

This conclusion is wrong for two reasons. First, the First District's interpretation of "report" is only reached by changing words in the statute and adding words that are not there, a violation of fundamental rules of statutory construction. And second, even though Hospice and Brookdale argued below and continue to argue here that "report" as used in R.C. 3721.24 is ambiguous, even if it was not, related statutory provisions enacted together are read together in pari materia to determine the General Assembly's intent. Because R.C. 3721.24 is related to and enacted at the same time as R.C. 3721.22, both must be read together. Applying the in pari materia doctrine to related sections of the same law does not, and should not, turn on a threshold finding of ambiguity. Such a rigid application of this legal principle is contrary to Ohio statutory-construction jurisprudence, and minimizes the importance and usefulness of this maxim of construction. Indeed, this Court and courts around the state and country have long construed related statutes without a threshold finding of ambiguity.

The First District's decision should be reversed.

II. Statement of facts

A. Hospice employs Hulsmeyer as a registered nurse to provide hospice services to residents of Brookdale Senior Living.

Hulsmeyer is a registered nurse and thus a licensed health professional under R.C. 3721.21(L). 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 and where Hulsmeyer worked. Killian is Hospice's Chief Executive Officer. *See* 9/25/13 Op. at ¶ 1, 3, Appx. 9; 7/23/12 Entry, Appx. 61; *see also* R.C. 3721.21(L)(5), Appx. 76.

B. Hospice terminates Hulsmeyer's employment; Hulsmeyer sues.

Hulsmeyer claims that Hospice terminated her employment because she reported suspected neglect to the daughter of a Brookdale resident. *See* 9/25/13 Op. at ¶ 10, Appx. 12; 7/23/12 Entry, Appx. 61-62. In the five-count complaint against Hospice, Killian, and Brookdale that followed, Hulsmeyer asserted several claims, including claims for retaliation under R.C. 3721.24 against Hospice, Killian, and Brookdale—Counts I, II, and V of her complaint. She 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. *Id.*

C. Hospice and Brookdale each file motions to dismiss, in part, for failure to state a claim for retaliation under R.C. 3721.24; the trial court grants the motions on that issue.

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. *See* 9/25/13 Op. at ¶ 10, Appx. 12; 7/23/12 Entry, Appx. 61. 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 section of same law, must be read together with R.C. 3721.24.

The trial court—relying on the Eighth District Court of Appeals' 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 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. *See* 7/23/12 Entry, Appx. 63-65. The court dismissed Counts I and II against the Hospice defendants, and Count V against Brookdale. *Id.* at 65. 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. *Id.* at 66. The trial court, however, did not dismiss Hulsmeyer's tortious-interference claim (Count IV). *Id.* at 67. Hulsmeyer nonetheless subsequently dismissed that claim with prejudice and appealed to the First District Court of Appeals. *See* 9/25/13 Op. at ¶ 10, Appx. 12.

D. The First District reverses, in part, and affirms, in part.

Contrary to this Court's long-standing statutory construction jurisprudence, the First District did not read R.C. 3721.24 and 3721.22 in pari materia. Instead, it found that this maxim did not apply since the term "report" as used in R.C. 3721.24 was not ambiguous. *See* 9/25/13 Op. at ¶ 23, Appx. 18 ("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."); *see also id.*

at ¶ 2, Appx. 19 ("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."). In reaching this conclusion, the court relied on *State ex rel. Herman v. Klopfleisch*, 72 Ohio St.3d 581 (1995), and noted parenthetically that "the in pari materia doctrine may only be used in interpreting statutes where some doubt or ambiguity exists." *Id.* at ¶ 25, Appx. 19. It thereafter read R.C. 3721.24 in isolation and found the report of suspected abuse or neglect made to the resident's daughter sufficient to state a claim for retaliation and reversed that part of the trial court's judgment finding Hulsmeyer's retaliation claim under R.C. 3721.24 failed as a matter of law. *Id.* at ¶ 32, Appx. 21. It nonetheless affirmed the court's decision as to Hulsmeyer's claim against Hospice for wrongful discharge in violation of public policy, concluding that she had an adequate remedy for retaliation under R.C. 3721.24. *Id.* at ¶ 31, Appx. 21.

Recognizing that its judgment conflicted with that of the Eighth District in *Arsham-Brenner*, the First 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)?

9/25/13 Op. at ¶ 32, Appx. 15-16.

E. Hospice and Brookdale jointly seek further review by the Supreme Court of Ohio; Hulsmeyer cross-appeals.

Hospice and Brookdale thereafter jointly filed a Notice of Certified Conflict (Appx. 1) and this Court determined a conflict exists. *See* 3/19/14 J. Entry, *Hulsmeyer v. Hospice*, Case

No. 2013-1644. Hospice and Brookdale also sought discretionary review on jurisdictional grounds as well and Hulsmeyer cross-appealed. *Hulsmeyer v. Hospice*, Case No. 2013-1766. The Court accepted the appeal and cross-appeal, and consolidated the cases. *See* 3/19/14 J. Entry, *Hulsmeyer v. Hospice*, Case No. 2013-1766.

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.

A. R.C. 3721.24 and 3721.22 were enacted together as part of a comprehensive statutory framework for reporting suspected resident abuse and neglect.

Of paramount concern when construing statutory provisions is the General Assembly's legislative intent. *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, ¶ 16. And that intent is expressed in the terms used in the statute, not only according to their common usage, but when considered in context as well. *Id.*; *see also* R.C. 1.42. "[I]t is a cardinal rule of statutory construction that significance and effect should if possible be accorded every word, phrase, sentence and part of an act." *Wachendorf v. Shaver*, 149 Ohio St. 231, 237 (1948).

Here, the General Assembly codified R.C. 3721.22 and 3721.24 as entirely new sections when it enacted Am.Sub.H.B. No. 822 (effective December 13, 1990) and they were enacted together along with other related and entirely new sections—R.C. 3721.23, 3721.25, and 3721.26—as part of a comprehensive statutory framework for reporting suspected resident abuse and neglect, investigating those reports, and protecting those

whom make the reports. *See* Am.Sub.H.B. No. 822, Appx. 88, 100-102.[1] These newly codified and jointly enacted sections—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 (Appx. 78);
- **R.C. 3721.23** governs the procedure the Director of Health follows for receiving, reviewing, and investigating (including conducting a hearing on) a report of abuse or neglect, and requires reporting substantiated cases to the attorney general, county prosecutor, or other appropriate law enforcement official (Appx. 80);
- **R.C. 3721.24** prohibits retaliating against the person making a report of suspected abuse or neglect, including retaliatory discharge (Appx. 83);
- **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 (Appx. 85); and
- **R.C. 3721.26** gives the Director of Health rulemaking powers "to implement R.C. 3721.21 to R.C. 3721.25" (Appx. 87).

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. In fact, it imposes mandatory obligations on licensed health professionals to make such a report:

[1] This Act 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, Appx. 100.

> No licensed health professional who knows or suspects that a resident has been abused or neglected, or that a resident's property has been misappropriated, by any individual used by a long-term care facility or residential care facility to provide services to residents, shall fail to report that knowledge or suspicion to the director of health.

R.C. 3721.22(A), Appx. 78.[2]

Indeed, the Director of Health, and only the Director of Health, *receives* the report. R.C. 3721.23(A), Appx. 80. 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 and hearing according to rules adopted by the Director for these statutory provisions. *See* R.C. 3721.23(A) and 3721.26, Appx. 80, 87. 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), Appx. 81. The rulemaking provision—R.C. 3721.26—underscores the interrelatedness of R.C. 3721.22 and 3721.24. That section, on its face, authorizes the Director of Health to adopt rules "to implement sections 3721.21 to 3721.25." *See* R.C. 3721.26, Appx. 87.

It is within the midst of this statutory framework that R.C. 3721.24—the statutory provision protecting against retaliation—is placed. It provides:

> No person or government entity shall retaliate against an employee or another individual used by the person or government entity to perform any work or services who, in good faith, makes a report of suspected abuse or neglect of a resident or misappropriation of the property of a resident; indicates an intention to make such a report; provides

[2] Reports by any other person, including a resident, are merely permissive, but they are still made to the Director of Health. *See* R.C. 3721.22(B), Appx. 78.

> 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.

R.C. 3721.24(A), Appx. 83.

R.C. 3721.21 through 3721.26 evince a statutory framework that must be read together. Indeed, R.C. 3721.21 defines the terms used in R.C. 3721.22 through R.C. 3721.26 and each section references others within this statutory scheme. By doing so, the General Assembly made clear that it intended that these sections be read together.

B. R.C. 3721.24 is silent as to whom a report is to be made, which underscores that it is subject to more than one interpretation.

R.C. 3721.24, itself, is silent as to whom a report of suspected abuse or neglect is to be made. This silence makes "report" subject "to more than one interpretation" and therefore requiring further interpretation to effect the legislature's intent in enacting the statute.

This Court's decision in *Sheet Metal Workers' Internatl. Assn. Loc. Union No. 33 v. Gene's Refrig., Heating & Air Conditioning, Inc.*, 122 Ohio St.3d 248, 2009-Ohio-2747, supports this conclusion. In that case, an employee worked in an off-site fabrication shop of contractor Gene's Refrigeration, which had been awarded a contract for the construction of a local fire station. The employee claimed he was entitled to be paid the prevailing wage under the prevailing-wage law, R.C. 4115.05, for the project. Gene's Refrigeration, however,

argued that the prevailing-wage law applied only to work performed on the project site, not work performed off-site. *Id.* at ¶ 25-27.

Construing the statute, the Court noted the statute's silence as to where the employee must be working—i.e., either on the project site or off-site. And it was this silence alone that made the statute "subject to varying interpretations" requiring a construction "that carries out the intent of the General Assembly." *Id.* at ¶ 29. To do so, the court looked beyond the statute to the prevailing-wage "statutory scheme."

> R.C. 4115.05 does not specifically refer to persons whose work is conducted away from or off the project site. Other paragraphs within R.C. 411.05 and elsewhere in the prevailing-wage statutory scheme, however, provide insight into the scope of the law.

Id. at ¶ 34. The Court thereafter construed the prevailing-wage statutory framework, along with related administrative regulations, in pari materia to conclude that R.C. 4115.05 applies only to persons working at the project site. *Id.* at ¶ 43; *see also State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, ¶ 46 (construing related registration-requirement election statutes together in pari materia, and also along with related constitutional provision, where the statute was silent as to the date a citizen must been registered to be entitled to vote in a particular election).

The silence in R.C. 3721.24—i.e., not specifying to whom a report of abuse or neglect is to be made to be entitled to the protection against retaliation—is no different than the silence found in the statute at issue in *Sheet Metal Workers* or *Colvin*. Even Hulsmeyer's arguments in the First District confirms the varying interpretations that R.C. 3721.24's silence portends. At one point, Hulsmeyer argued that the report in R.C. 3721.24 could be made to anyone, but then limited that "to any appropriate agency." *Compare* Hulsmeyer Br.

at 7 with Br. at 10. Hospice and Brookdale pointed this out in briefing below, noting that Hulsmeyer's vacillating arguments as to the meaning of report underscored the term's ambiguity. Hospice Br. at 7; Brookdale Br. at 6.

R.C. 3721.24(A) then is not plain and unambiguous as Hulsmeyer argues or the First District held. Instead, both *add* words to R.C. 3721.24 that are not there and *change* words that are. By concluding that a report of suspected abuse or neglect need not be made the Director of Health as this statutory framework requires, the appellate court has effectively said that "a report of suspected abuse or neglect" means "*any* report of suspected abuse or neglect made to *anyone*," including a resident's daughter as Hulsmeyer—a licensed health professional with mandatory obligations under R.C. 3721.22(A)—alleges she did here. But changing "*a* report of suspected abuse or neglect" to "*any* report of suspected abuse or neglect" and then adding the phrase "made to anyone," or as Hulsmeyer also argued below "made to any appropriate entity," both changes and adds words to a validly enacted statute, which courts cannot do. *See Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, ¶ 40 ("In essence, relators' interpretation replaces the phrase, "to the extent"—a phrase that vests the apportionment board with discretion—with the conditional term "if." But this interpretation changes the meaning of Section 7(D), which we cannot do."); *State ex rel. Carna v. Teays Valley Loc. Sch. Dist. Bd. of Edn.*, 131 Ohio St.3d 478, 2012-Ohio-1484, ¶ 24 (noting that the appellate court "improperly included words in the statute that were not there" and thereafter cautioning against "judicial legislating" by adding words to a statute); *Pratte v. Stewart*, 125 Ohio St.3d 473, 2010-Ohio-1860, ¶ 49 ("Pratte is asking this court * * * to contravene established axioms of statutory construction by inserting words in the statute that were not used by the General Assembly."); *Wachendorf*, 149 Ohio St. at 237-38.

C. As related sections enacted together, R.C. 3721.24 and 3721.22 should be read together in pari materia.

This Court 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 irreconcilable.

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

And this Court has further made clear that statutes *enacted* or *amended* together at the same time are related statutes should be construed together.

> Where two sections of a statute relating to the same subject matter are amended in the same act, effective at the same time, they are in pari materia, and full effect must be given to the provisions of both sections if the same can be reconciled.

State ex rel. O'Neil v. Griffith, 136 Ohio St. 526 (1940), paragraph one of the syllabus; *see also Bd. of Park Commrs. of Cleveland Metro. Park Dist. v. Wyman*, 116 Ohio St. 441 (1927), paragraph two of the syllabus (appropriations statutes were "originally enacted in 1869 as parts of the same bill, and have been carried into re-enactments in substantially the same form ever since, and are *in pari materia* and will be so construed as to give force to each"); *Emerson v. Seville Elevator Co.*, 38 Ohio App.3d 55, 56-57 (9th Dist.1987) (reading R.C 926.01(D) as to the meaning of "depositor" with R.C. 925.18 in pari materia because they "relate to the same subject matter, were amended in the same Act *** and became effective at the same time").

As early as 1924 this Court recognized the usefulness of in pari materia as a maxim of construction with respect to statutes and laws enacted at the same time, and have applied it without the rigidity applied by the First District here. In *State ex rel. Crawford v. Indus. Comm. of Ohio*, for example, this Court was confronted with construing a former version of a workers' compensation statute that appeared clear and mandatory when read in isolation, and would have required continuing payments to the estate of the widow of an injured worker. Finding it unnecessary to "resort to a technical analysis of the language" of the statute, the Court stated in unequivocal terms that the statute "must be construed ***in pari materia***" with all other workers' compensation laws.

> They are all parts of the same law. They are all enacted pursuant to the same constitutional authority and must be harmonized by the Commission as not to create inequalities; so as not to create rights in favor of one class of persons wholly inconsistent with the rights of others.

State ex rel. Crawford v. Indus. Comm. of Ohio, 110 Ohio St. 271, 280 (1924).

So too is R.C. 3721.24. It is part of the same law that codified R.C. 3721.22 and R.C. 3721.23, 3721.25, and 3721.26. *See* Am.Sub.H.B. No. 822, Appx. 88, 100-102. To construe R.C. 3721.24 in isolation would create inequalities in investigating, and acting upon, reports of suspected abuse or neglect. No one other than the Director of Health is empowered with subpoena power to investigate a report of suspected abuse, and no one other than the Director can hold a hearing to further that investigation and report those findings to appropriate law enforcement officials if abuse or neglect is substantiated. The inequalities foretold in *Crawford* hold equal force today.

Other courts have recognized that R.C. 3721.22 and 3721.24 are related and should be read in pari materia. 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 Court of Appeals 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 R.C. 3721.24 and 3721.22 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, ¶ 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.

D. Construing related statutes together in pari materia does not require a threshold finding of ambiguity.

Ohio has codified many of its rules of statutory construction, including a rule of construction for ambiguous statutes. Written in permissive terms, R.C. 1.49 allows, but does not require or limit, a court to consider several matters, including: (1) the object sought to be attained; (2) the circumstances under which the statute was enacted; (3) the legislative history; (4) the common law or former statutory provisions, including laws upon the same or similar subjects; (5) the consequences of a particular construction; and (6) the administrative construction of the statute. R.C. 1.49(A)-(F), Appx. 69.

Nothing in this rule of construction prevents a court from applying the in pari materia maxim *only* upon a threshold finding of ambiguity as the First District so rigidly concluded. *See* 9/25/13 Op. at ¶ 25, Appx. 19. On the contrary, courts *may* consider laws on related subjects when a statute is ambiguous, but there is no legal basis for resorting to a rule of construction *only* when a statute is ambiguous.

This Court's decision in *State ex rel. Herman v. Klopfleisch*, 72 Ohio St.3d 581 (1995), supports this conclusion. The First District relied on this case as its authority that the in pari materia doctrine is only applied when there is "some doubt or ambiguity" in a statute. 9/13/13 Op. at ¶ 25, Appx. 19 (stating parenthetically that "the in pari materia doctrine

may only be used in interpreting statutes where some doubt or ambiguity exists"). But *Klopfleisch* does not say that. Instead, this Court merely said—and R.C. 1.49 confirms—that the "in pari materia doctrine *may* be used in interpreting statutes where some doubt or ambiguity exists." (Emphasis added.) *Id.* at 585. It did not say that it is ***only*** used when there is an ambiguity as the First District stated. In fact, the *Klopfleisch* court went on to say that "[a]ll statutes relating to the same general subject matter *must* be read in pari materia" and that they must be given "a reasonable construction so as to give proper force and effect to each and all of the statutes." *Id.*

And other courts, like the *Klopfleisch* court, have relied on the permissive nature of R.C. 1.49, all quite appropriately, and construed related statutes in pari materia when faced with an ambiguous statute. *See Blair v. Bd. of Trustees of Sugarcreek Twp.*, 132 Ohio St.3d 151, 2012-Ohio-2165, ¶ 17-18 (finding R.C. 505.49(B)(3) ambiguous and resorting to an in pari materia reading to clarify the ambiguity); *Cheap Escape Co., Inc. v. Haddox, L.L.C.*, 120 Ohio St.3d 493, 2008-Ohio-6323, ¶ 13 (finding it "appropriate" to review related statutes in pari materia to resolve ambiguity in R.C. 2901.18(A)).

That is not to say, however, that there is no authority for the First District's conclusion. Indeed, this Court in *State Farm Mut. Auto. Ins. Co. v. Webb*, 54 Ohio St.3d 61 (1990), stated in clear terms that 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." *Id.* at 63. No cases have been identified, however, relying on this precise language from *State Farm*. This Court has nonetheless, at times, criticized courts for reading related statutes in pari materia when the language of a statute is unambiguous. *See, e.g., State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶ 31.

But this Court, too, has long applied the in pari materia doctrine without a threshold finding of ambiguity. In *State ex rel. Crawford v. Indus. Comm. of Ohio*, this Court construed a former workers' compensation statute in pari materia with other workers' compensation statutes and the Ohio Constitution despite the "seemingly imperative language" of the statute at issue. *Crawford*, 110 Ohio St. 271, 285 (1924). In such a situation, the Court stated unequivocally that an otherwise unambiguous statute "must yield" to other related provisions to give effect to the legislature's intent. *Id.*

The Court relied on the in pari materia doctrine again in *Krueger v. Krueger*, 111 Ohio St. 369 (1924), without a threshold finding of ambiguity. In that case, it construed three related probate statutes in pari materia in resolving whether an after-born child not specifically provided for in the testator's will could maintain a partition action at the testator's death. The Court stated unequivocally that the statute entitling the after-born child to the same share of the estate was "not of doubtful meaning" (*id.* at 373), yet nonetheless construed this statute with other related statutes in ultimately concluding that the after-born child was entitled to maintain the action. *Id.* at 380.

This Court undertook the same analysis in *State ex rel. O'Neil v. Griffith*, 136 Ohio St. 526 (1940). At issue in that case was the construction of a statute involving the appointment of members to county boards of elections. Construing related statutes on the same subject matter amended at the same time together in pari materia, the court found the statutes "entirely reconcilable" and enforceable. *Id.* at 529; *see also id.* at paragraph one of the syllabus.

More recently, this Court again construed related statutes together in pari materia in *State v. Buehler*, 113 Ohio St.3d 114, 2007-Ohio-1246, even though it found nothing

ambiguous or conflicting about the statutes at issue. *Id.* at ¶ 31 ("We recognize that these statutes are not ambiguous and are not in conflict."); *see also id.* at paragraph one of the syllabus ("A careful, commonsense reading of R.C. 2953.74(C) in pari materia with R.C. 2953.72 and 2953.73 and the remainder of R.C. 2953.74 illustrates the intent of the General Assembly to authorize the trial court to exercise its discretion in how to proceed when ruling on an eligible inmate's application for DNA testing.").

Other decisions from this Court and other courts have analyzed related statutes similarly. In *State ex rel. Taxpayers for Westerville Schools v. Franklin Cty. Bd. of Elections*, 133 Ohio St.3d 153, 2012-Ohio-4267, for example, relator sought a writ of mandamus requiring the county board of elections to place a levy-decrease question on the ballot for the November 2012 election. At issue was the meaning of "rate of levy" as that term is used in R.C. 5705.261. The Court found nothing ambiguous about the "rate of levy" language in R.C. 5705.261 yet it nonetheless construed this statute in pari materia with R.C. 5705.192(B) and 319.301 to find that the relator was not entitled to the writ. *Id.* at ¶ 18-23, 26; *see also Sugarcreek Twp. v. Centerville*, 133 Ohio St.3d 467, 2012-Ohio-4649, ¶ 20, 23 (finding the language in R.C. 709.023(H) plain but nonetheless "bolstering" its interpretation of the statute by construing with R.C. 5709.40(F)); *Lawrence v. Youngstown*, 133 Ohio St.3d 174, 2012-Ohio-4247, ¶ 24 (construing R.C. 4123.90 in pari materia with the R.C. 4123.95 to find that the term "discharge" means notice of discharge, not the date of discharge); *State ex rel. Am. Subcontractors Assn., Inc. v. Ohio State Univ.*, 129 Ohio St.3d 111, 2011-Ohio-2881, ¶ 38-39 (construing R.C. 153.54(A) in pari materia with other provisions in R.C. Chapter 153 to find the term "bidding for a contract" as used in R.C. 153.54(A) is tied to an award to the "lowest responsive and responsible bidder"); *State ex rel. Lucas Cty.*

Republican Party Executive Commt. v. Brunner, 125 Ohio St.3d 427, 2010-Ohio-1873, ¶ 14-16 (construing R.C. 3501.07 in pari materia with R.C. 3517.05 and finding relator not entitled to writ of mandamus compelling Secretary of State to appoint him to local county board of elections); *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, ¶ 28-36 (construing R.C. 121.22, 149.43, and 507.04 in pari materia in determining whether a township officer has certain duties that would entitle relator to writ of mandamus that these duties be performed); *Suez Co. v. Young*, 118 Ohio App. 415, 418 (6th Dist.1963) (construing various sections of Workmen's Compensation Act "in pari materia * * * to arrive at an interpretation of the intention of the Legislature").

And yet still other decisions from this Court construe related statutes in pari materia when a statute is silent on a particular issue. In *State ex rel. Shisler v. Ohio Public Employees Retirement Sys.*, 122 Ohio St.3d 148, 2009-Ohio-2522, for example, relator sought a writ of mandamus compelling the Ohio Public Employees Retirement System (PERS) to accept her late husband's election for survivorship benefits that he executed before his death but was not received by PERS until after his death. Noting that the relevant statute—R.C. 145.46—was silent as to whether the election is invalidated if the retiree dies before it is received by PERS, the Court construed this statute in pari materia with related statutes to find that it was. Id. at ¶ 20.

Now it could be said that a statute's silence on a particular issue means the statute is ambiguous and subject to varying interpretations as this Court said in *Sheet Metal Contractors* and *Colvin* discussed in Section III(B). But the *Shisler* court did find that to be so. Instead, it said that R.C. 145.46 and related statutes "have unequivocal meanings" and

yet the Court still construed these related statutes together. *Shisler*, 122 Ohio St.3d 148, 2009-Ohio-2522, ¶ 25.

The same is true of the statute at issue in *Hughes v. Registrar, Ohio Bur. of Motor Vehicles*, 79 Ohio St.3d 305 (1997). At issue in that case was whether an Ohio-licensed driver convicted of a DUI in Kentucky would be entitled to occupational driving privileges during the suspension of his driving privileges as a result of the conviction. Had the driver been convicted in Ohio of the same offense, there was no question that R.C. 4507.16 would allow him occupational driving privileges. But Ohio residents convicted in another state were governed then by a different statute, R.C. 4507.169, which provided no such privileges. This Court noted that this statute "does not expressly grant that right." *Id.* at 306. There was nothing ambiguous about R.C. 4507.169 and it did not conflict with R.C. 4507.16; it was just silent on the issue of occupational driving privileges. This Court nonetheless construed these two related statutes in pari materia to find the driver entitled to petition for occupational driving privileges. *Id.* at 309.

These cases illustrate that the in pari materia doctrine is not a rigid, inflexible doctrine as the First District concluded. Certainly its use *may* be appropriate when a statute is ambiguous or doubtful, as contemplated by R.C. 1.49 and *Klopfleisch*. But it is also is adaptive and useful in construing related statutes enacted together as part of a particular statutory framework even when there is no ambiguity or conflict, especially in situations when a statute is silent on a particular issue.

And it should be used here when construing R.C. 3721.24. As shown, this statutory provision is silent as to whom a report of suspected abuse or neglect is to be made to be afforded the protection against retaliation the statute provides. But R.C. 3721.24 was

enacted at the same time as part of the same legislation enacting R.C. 3721.22, 3721.23, 3721.25, and 3721.26, as part of comprehensive statutory framework for reporting suspected resident abuse and neglect. And this framework makes clear that a report of suspected abuse or neglect is to be made to the Director of Health.

E. The in pari materia doctrine is well-established in other courts as well and likewise support its use here.

The United States Supreme Court has also recognized the well-established principle that statutes should be construed in pari materia where, as here, they concern the same subject matter and were enacted on the same date by the same legislative body. *See, e.g., Patton v. United States*, 281 U.S. 276, 278 (1930) ("The first ten amendments and the original Constitution were substantially contemporaneous, and should be construed *in pari materia*"); *Vane v. Newcombe*, 132 U.S. 220, 235 (1889) (recognizing the state of Indiana's policy of construing statutes in pari materia when there was any doubt as to their meaning and the statutes concerned the same subject matter and were passed around the same time); *Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972) ("A legislative body generally uses a particular word with a consistent meaning in a given context." The rule "is but a logical extension of the principle that individual sections of a single statute should be construed together"); *United States v. Stewart*, 311 U.S. 60, 64 (1940) ("That these two acts are in pari materia is plain. Both deal with precisely the same subject matter"); *Wells v. Supervisors*, 102 U.S. 625, 632 (1880) (when two provisions of a state statute governing bonds were "in pari materia and enacted at the same session of the legislature, they are to be taken as one law").[3]

[3] *See also* McCaffrey, *The Rule In Pari Materia As an Aid to Statutory Construction*, 3 Law & L.

Similarly, many other state supreme courts have also explicitly recognized that related statutes enacted contemporaneously should be read in pari materia. *See, e.g., Kam v. Noh*, 770 P.2d 414, 417 (Haw.1989); *Wyoming State Treasurer v. Casper*, 551 P.2d 687, 697 (Wyo.1976) ("Statutes which are passed at the same session of the legislature, relating to the same subject matter, are to be construed together in pari materia, especially if they were to take effect on the same day"); *Courtney v. State Dept. of Health of West Virginia*, 388 S.E.2d 491, 496 (W.Va.1989) ("The rule that statutes in pari materia should be construed together has the greatest probative force, in the case of statutes relating to the same subject matter passed at the same session of the legislature, especially if they were passed or approved or take effect on the same day"); *State v. Knapp*, 843 S.W.2d 345, 347 (Mo.1992) ("When the same or similar words are used in different places within the same legislative act and relate to the same or similar subject matter, then the statutes are in pari materia and should be construed to achieve a harmonious interpretation of the statute"); *Donaghue v. Bunkley*, 25 So.2d 61, 69 (Ala.1946) ("The rule [of in pari materia] applies with particular force to statutes which are enacted at the same time, or about the same time because of the fact that the situation presents the same men acting on the same subject, and the

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Notes 11, 11 (1949) ("The whole statute is to be viewed and compared in all its parts, in order to ascertain the meaning of any of its parts"); Colton, *The Use of Canons of Statutory Construction: A Case Study From Iowa Or When Does "Ghoti" Spell "Fish?"* 5 Seton Hall Legis. J. 149, 164 (1980-1982) (in discussing the purpose of statutory construction, noting that the court is not "permitted to write into the statute words which are not there. Rather, the court must look to what the legislature said not at what it should have or might have said."); Sinclair, *Only a Sith Thinks Like That: Llewellyn's "Dueling Canons," One to Seven*, 50 N.Y.L.Sch.L.Rev. 919, 974 (2005-2006) (noting the well-accepted principle of construing statutes together when they relate to the same subject matter or have a common purpose); Talmadge, *A New Approach to Statutory Interpretation in Washington*, 25 Seattle U.L.Rev. 179, 200 (2001) (noting that the principle of in pari materia has been called a "cardinal rule" in Washington).

presumption is that the acts were imbued with the same spirit and actuated by the same policy"); *Peoples Bridge Co. of Harrisburg v. Shroyer*, 50 A.2d 499 (Pa.1947) (construing two acts in pari materia where they were approved on the same day); *State v. Dumler*, 559 P.2d 798 (Kan.1977) (construing statutes in pari materia where they were enacted at the same time as part of a uniform act regulating highway traffic).

This principle is well illustrated in *Kam v. Noh*. In that case, the Hawaii Supreme Court, when reviewing the statutory duration of a restrictive covenant, considered the entire chapter in which the following provision was found: "all restrictions relating to the use of residential lots sold in fee simple shall expire within ten years after issuance of the deed." 770 P.2d at 417. At issue was the meaning of the phrase "relating to the use." The court considered the way the word "use" was employed throughout the chapter, because "laws in pari materia, or upon the same subject matter, shall be construed with reference to each other * * * In the absence of an express intention to the contrary, words or phrases used in two or more sections of a statute are presumed to be used in the same sense throughout." *Id.* Moreover, the court found that this rule "has the greatest probative force in the case of statutes relating to the same subject matter passed at the same session of the legislature, especially if they were enacted on the same day." *Id.; see also Knapp*, 843 S.W.2d 345 (using principles of in pari materia to conclude that the word "person" had the same meaning in two separate statutes).

F. Strong public policy interests support reading R.C. 3721.24 and 3721.22 together to effect the General Assembly's intent.

Failing to read R.C. 3721.24 and 3721.22 together in pari materia would jeopardize the entire statutory framework for reporting suspected resident abuse and neglect enacted

by Am.Sub.H.B. No. 822. That framework established a comprehensive framework for reporting, reviewing, and investigating reports of suspected abuse or neglect made to the Director of Health. Under the First District's isolated reading of R.C. 3721.24, an employee need not report suspected abuse to the Director of Health to be afforded the protection from retaliation the statute provides, and meant to be provided, to those making those reports to the Director. This inflexible and rigid construction of the statute ignores the mandate of R.C. 3721.22, which *requires* licensed health professionals to report suspected abuse to the Director of Health. It is against public policy to permit licensed healthcare professionals whistleblower protection under R.C. 3721.24 when those alleged whistleblowers did not even carry out their own explicit obligations under R.C. 3721.22.

There is no threat, as Hulsmeyer argued below, that reading R.C. 3721.22 and R.C. 3721.24 together would expose residents to a greater risk of abuse. Hulsmeyer confuses protection of *residents* with protection of *employee whistleblowers.* Importantly, a separate provision of the Revised Code—R.C. 3721.17—provides protection against retaliation for violating "any right set forth in sections 3721.10 to 3721.17" and provides a separate cause of action against the person or home committing the violation. *See* R.C. 3721.17(G), Appx. 71. Construing R.C. 3721.22 and 3721.24 together would have no effect on this provision, and specifically, does not leave residents without any protection.

Construing R.C. 3721.24 in pari materia with R.C. 3721.22 to require that the report referenced in R.C. 3721.24 be made to the Director of Health is also consistent with Ohio precedent mandating that whistleblower statutes be strictly construed. *See Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 152-153 (1997); *Contreras v. Ferro Corp.*, 73 Ohio St.3d 244, 246-48 (1995); *Abrams v. Am. Computer Tech.*, 168 Ohio App.3d 362, 2006-Ohio-4032, ¶ 40 (1st Dist.); *Grove v. Fresh Mark, Inc.*, 156 Ohio App.3d 620, 2004-Ohio-1728, ¶ 30 (7th Dist.). This Court has held that failure to strictly comply with the requirements of the Whistleblower Protection Act under R.C. 4112.52 precludes that employee from gaining protection under the Act.

By codifying R.C. 3721.22 at the same time as R.C. 3721.24 as part of Am.Sub.H.B. No. 822, the General Assembly included a similar limitation to whistleblowers seeking the protection of R.C. 3721.24: the requirement that licensed healthcare professionals first report suspected abuse or neglect to the Director of Health. Hulsmeyer's failure to do so precludes her from gaining protection under R.C. 3721.24.

These strong public policy considerations favor reading R.C. 3721.24 in pari materia with R.C. 3721.22. The General Assembly enacted them together at the same time as part of the same legislation. And in doing so, it determined that the Director of Health is the proper official to receive and investigate reports of suspected resident abuse, and further empowered the Director with the necessary authority and power to take action. At the same time, the General Assembly imposed mandatory duties on the Director to carry out these statutory responsibilities, including the obligation to refer responsible parties for prosecution when abuse or neglect is substantiated.

IV. Conclusion

The judgment of the trial court was correct. R.C. 3721.24 and 3721.22 are related statutory provisions 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. It is contrary to long-standing statutory-construction jurisprudence and has created confusion in the analysis required when related provisions are at issue.

Defendants-Appellants/Cross-Appellees Hospice of Southwest Ohio, Joseph Killian, and Brookdale Senior Living therefore respectfully request that this Court reverse, in part, the judgment of the First Appellate District and hold that R.C. 3721.24 and 3721.22 are related and should be read together, and, when read together, "report" as used in R.C. 3721.24 means a report made to the Director of Health.

Respectfully submitted,

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A copy of the foregoing was served on May 12, 2014 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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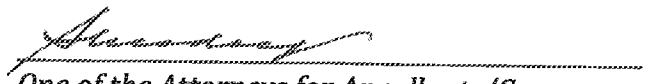

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APPENDIX

No. 13-1644

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 NOTICE OF CERTIFIED CONFLICT OF APPELLANTS HOSPICE OF SOUTHWEST OHIO, INC., JOSEPH KILLIAN, AND BROOKDALE SENIOR LIVING, INC.

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Joint Notice of Certified Conflict

Under S.Ct.Prac.R. 8.01(A), Appellants Hospice of Southwest Ohio, Inc., Joseph Killian, and Brookdale Senior Living, Inc., jointly give notice of a certified conflict to the Supreme Court of Ohio from the decision of the Hamilton County Court of Appeals, First Appellate District, entered in case number C-120822 on September 25, 2013, where the First District recognized that its judgment conflicted with the judgment of the Eighth Appellate District in *Arsham-Brenner v. Grande Point Health Care Community*, 8th Dist. No. 74835, 2000 WL 968790 (July 13, 2000), and thereafter certified the following issue under Article IV, Section 3(B)(4) of the Ohio Constitution 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)?

Hulsmeyer v. Hospice of Southwest Ohio, Inc., 1st Dist. No. C-120822, 2012-Ohio-4147, ¶ 32.

As required by S.Ct.Prac.R. 8.01(B), a copy of the First Appellate District's conflicting judgment in *Hulsmeyer* and its incorporated certification order is

attached as Exhibit A; a copy of the Eighth Appellate District's judgment in *Arsham-Brenner* is attached as Exhibit B.

Respectfully submitted,

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A copy of the foregoing was served on October 17, 2013 by United States mail per App.R. 13(C)(3) to:

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EXHIBIT A

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,

Dinsmore & Shohl, LLP, *Michael Hawkins and Faith Isenhath*, for Defendants-Appellees Hospice of Southwest Ohio, Inc., and Joseph Killian,

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. *Arsham-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.

EXHIBIT B

Not Reported in N.E.2d, 2000 WL 968790 (Ohio App. 8 Dist.)
(Cite as: 2000 WL 968790 (Ohio App. 8 Dist.))

Court of Appeals of Ohio, Eighth District, Cuyahoga County.
Nancy ARSHAM-BRENNER, Plaintiff-appellant
v.
GRANDE POINT HEALTH CARE COMMUNITY, et al., Defendants-appellees

No. 74835.
July 13, 2000.

Character of Proceeding: Civil appeal from Common Pleas Court Case No. CV-315506. Affirmed.

Kenneth D. Myers, Esq., Cleveland, for plaintiff-appellant.

Nicholas D. Satullo, Esq., Laura M. Sullivan, Esq., Reminger & Reminger, Cleveland, for defendants-appellees.

JOURNAL ENTRY AND OPINION

KARPINSKI, J.

*1 In this wrongful discharge case, plaintiff-appellant Nancy Arsham-Brenner (hereafter "appellant") asks that we overturn a summary judgment order rendered in favor of defendants-appellees Grande Pointe Health Care Community; Care Services, Inc.; Karen Fogel; and Warren L. Wolfson (hereafter collectively referred to as "appellees"). Appellant maintains that factual questions entitle her to trial on claims that her discharge was actionable under Ohio's "Whistleblower Statute" (R.C. 4113.52), was retaliatory in violation of R.C. 3721.24, and was independently actionable as being against Ohio public policy; and that she was defamed by the appellees. Our review convinces us that the appellees were entitled to judgment as a matter of law. Accordingly, the judgment is affirmed.

We learn from the record that appellee Grande Pointe Health Care Community is the name by which Richmond Nursing, Inc., does business .[FN1] Grande Pointe operates a licensed skilled residential and assisted living healthcare facility in Richmond Heights, Ohio, specializing in senior citizen care. Appellee Care Services, Inc., is a holding company that provides management and support services to Grande Pointe. At all relevant times, Grande Pointe's chief executive officer was appellee Warren Wolfson and its administrator was appellee Karen Fogel.

Fogel hired appellant Nancy Arsham-Brenner as Director of Nursing on

Not Reported in N.E.2d, 2000 WL 968790 (Ohio App. 8 Dist.)
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January 29, 1996, and was appellant's immediate supervisor for the duration of appellant's employment. Fogel terminated appellant's employment on April 3, 1996. Fogel averred that she terminated appellant's employment because of chronic absenteeism: appellant was absent approximately sixteen and one-half days in January and February 1996. Fogel also cited appellant's lack of team work as grounds for appellant's termination. Fogel noted that she had occasion to reprimand appellant on several occasions for appellant's work performance at Grande Pointe.

Appellant, for her part, offered a different perspective. She says she observed a variety of substandard office practices that she reported to her supervisor, including the fact that a non-nurse was supervising nursing personnel. Appellant reportedly discovered numerous other substandard practices which were not adequately addressed. She alleges that she spoke with representatives of the Ohio Department of Health about the conditions at Grande Pointe, although she kept no record of those contacts.

Appellee Wolfson averred that he was never informed by the Ohio Department of Health, or any other entity, that appellant had filed a complaint or report with any such entity regarding Grande Pointe. He added that he first learned that appellant had filed a complaint or report concerning Grande Pointe when this lawsuit was filed. Appellee Fogel similarly averred that she never learned from any source that appellant had filed a report or complaint concerning Grande Pointe until this lawsuit was filed.

*2 The appellees further offered evidence by affidavit from Michelle DeLong, the records custodian responsible for all complaints filed with the Ohio Department of Health that allege safety ordinance and/or regulatory violations against skilled nursing health-care facilities in Ohio. A search of the computer database on which records of complaints are stored disclosed "no complaint of any sort signed by Nancy Arsham-Brenner with the Ohio Department of Health alleging the violation of any safety ordinance and/or regulation on the part of Grande Pointe Health Care Community."

Appellant filed this action against the appellees on August 19, 1996. After a period allowed for discovery and motion practice, the trial court granted the appellees' motion for summary judgment on June 3, 1998. Appellant argues that the court erred in granting summary judgment as to certain claims.

Summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can reach only a conclusion that is

adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St.3d 367, 369-370; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327. To obtain a summary judgment under Civ.R. 56(C), the moving party bears the initial responsibility of informing the court of the basis for the motion and identifying those portions of the record which support the requested judgment. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 430. If the moving party discharges this initial burden, the party against whom the motion is made then bears a reciprocal burden of specificity to oppose the motion. *Id.* See, also, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112. We review the trial court's judgment *de novo* and use the same standard that the trial court applies under Civ.R. 56(C). See *Lee v. Sunnyside Honda* (1998), 128 Ohio App.3d 657, 660; *N. Coast Cable L.P. v. Hanneman* (1994), 98 Ohio App.3d 434, 440.

We additionally note that Civ.R. 56(C) is particular in identifying the documents that may be considered in summary judgment motion practice. They include "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action * * *." [FN2] In the case before us, both parties' filings below and here refer to deposition transcripts that were not filed and/or to exhibits that are not within the scope of that which Civ.R. 56(C) allows. Because summary judgment "must be awarded with caution," see *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2, we consider only those factual assertions supported in accordance with Civ.R. 56(C).

For this wrongful discharge case, appellant does not contend that her employment was based on contract, either express or implied. It follows that appellant's employment was at-will. As a general rule, at-will employment may be terminated by either employer or employee at any time for any or no reason. See *Fawcett v. G.C. Murphy & Co.* (1976), 46 Ohio St.2d 245. An employer may not, however, discharge an employee where the discharge violates "clear public policy" established by the Constitution and statutes of the United States, the Constitution and statutes of Ohio, administrative rules and regulations, and/or the common law. *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134; *Collins v. Rizkana* (1995), 73 Ohio St.3d 65; *Painter v. Graley* (1994), 70 Ohio St.3d 377; *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228.

*3 With these rules as our guide, we turn to appellant's first assignment of error, which reads:

I. THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT REGARDING APPELLANT'S CLAIM UNDER THE STATE WHISTLEBLOWER STATUTE, O.R.C. 4113.

This assignment of error is not well taken.

Appellant contends her discharge violated Ohio's whistleblower statute, R.C. 4113.52.[FN3] She asserts her claim under R.C. 4113.52(A)(1), which provides:

(a) If an employee becomes aware in the course of his employment of a violation of any state or federal statute or any ordinance or regulation of a political subdivision that his employer has authority to correct, and the employee reasonably believes that the violation either is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony, the employee orally shall notify his supervisor or other responsible officer of his employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation. If the employer does not correct the violation or make a reasonable and good faith effort to correct the violation within twenty-four hours after the oral notification or the receipt of the report, whichever is earlier, the employee may file a written report that provides sufficient detail to identify and describe the violation with the prosecuting authority of the county or municipal corporation where the violation occurred, with a peace officer, with the inspector general if the violation is within his jurisdiction, or with any other appropriate public official or agency that has regulatory authority over the employer and the industry, trade or business in which he is engaged.

(b) If an employee makes a report under division (A)(1)(a) of this section, the employer, within twenty-four hours after the oral notification was made or the report was received or by the close of business on the next regular business day following the day on which the oral notification was made or the report was received, whichever is later, shall notify the employee, in writing, of any effort of the employer to correct the alleged violation or hazard or of the absence of the alleged violation or hazard.

R.C. 4113.52(B) states, in relevant part:

Except as other provided in division (C) of this section, no employer shall take any disciplinary or retaliatory action against an employee for making any report authorized by division (A)(1) or (2) of this section, or as a result of the employee's having made any inquiry or taken any other action to ensure the accuracy of any information reported under either such division.

Under that section, disciplinary or retaliatory action includes removing the employee from employment. R.C. 4113.52(B)(1).

"In order for an employee to be afforded protection as a 'whistleblower,' such employee must strictly comply with the dictates

of R.C. 4113.52. Failure to do so prevents the employee from claiming the protections embodied in the statute." *Contreras v. Ferro Corp.* (1995), 73 Ohio St.3d 244, syllabus. In *Contreras*, the employee did not comply with R.C. 4113.52(A)(1)(a), because he did not orally notify his superior or other responsible officer of the corporation of the illegal inventory diversion, and because he did not provide his employer with a written report of the criminal activity until after he revealed his suspicions to outsiders, thereby denying his employer the opportunity to correct the illegal inventory diversion. Similarly, in *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, the employee did not comply with R.C. 4113.52(A)(1)(a) because he did not provide his employer with a written report describing the alleged OSHA violations before he reported the suspected violations to OSHA. *Kulch*, 78 Ohio St.3d at 140-142.[FN4] See also *Haney v. Chrylser Corp.* (1997), 121 Ohio App.3d 137 (employee did not comply with R.C. 4113.52(A)(1), because written report was not filed with appropriate supervisor or other responsible officer, lacked sufficient detail to identify and describe specific safety violation, and was unrelated to previous oral report); *Thatcher v. Goodwill Industries of Akron* (1997), 117 Ohio App.3d 525 (employee's "exit interview documents" failed to provide sufficient detail to identify and describe violation as required for written report).

*4 In the case at hand, appellees contend that appellant did not comply with R.C. 4113.52(A)(1) because (1) she did not give them a written report providing sufficient detail to identify and describe any violations, and (2) she did not file a written report with the Ohio Department of Health providing sufficient detail to identify and describe any violations. Appellant's response identified five subjects about which she registered complaints, but her response did not set forth facts that created material factual disputes.

In particular, appellant first says she complained to her supervisors that Grande Pointe residents' files lacked advance directives that state the residents' wishes if faced with a life-threatening illness. Appellant insisted that she handwrote several notes to Fogel about it, but she admits she kept no copies and therefore cannot show that her written report provided her employer with "sufficient detail to identify and describe the violation" as R.C. 4113.52(A)(1)(a) requires. She similarly claims to have written to the Ohio Department of Health about a lack of advance directives in residents' files, but she kept no copy of any such report and therefore cannot show that any such report to the Ohio Department of Health contained "sufficient detail to identify and describe the violation" as R.C. 4113.52(A)(1)(a) requires.

Appellant secondly states that she orally complained to her supervisor that patient and employee files were incomplete. Appellant did not file written reports with either her

employer or the Ohio Department of Health memorializing these complaints, so she did not comply with R.C. 4113.52(A)(1)(a) on this subject.

Appellant next says that she repeatedly complained to her supervisor that Grande Pointe lacked resident patient assessments and multi-data systems information and ultimately wrote to the Department of Health about this. Appellant did not file a written report with her employer on this matter. She also did not keep a copy of her correspondence to the Department of Health, so she again cannot show any report containing sufficient detail to identify and describe the violation as R.C. 4113.52(A)(1)(a) demands.

Appellant's fourth contention is that she complained that it was a violation of the Nurse Practices Act for a non-nurse to be supervising other nurses. There is no documentary evidence appellant filed a written report with her employer on this matter. She states that she sent a letter to the Department of Health on this subject but, again, retained no copy.

Appellant lastly says the letter she wrote to the Ohio Department of Health also reported that the facility lacked bed rail assessments. There is no documentary evidence that appellant made an oral or written report to her supervisor on this subject, and she, again, has no copy of her letter to the Department of Health.

Appellant does not dispute the testimony from the Department of Health records custodian stating that the Department of Health had no record of any "complaint of any sort signed by Nancy Arsham-Brenner with the Ohio Department of Health alleging the violation of any safety ordinance and/or regulation on the part of Grande Pointe Health Care Community." Appellant speculates that her correspondence to the Ohio Department of Health "could have been intercepted" through the Grande Pointe mailing system. Appellant offers no facts in support and, in any event, still cannot show that her correspondence contained "sufficient detail to identify and describe the violation" as R.C. 4113.52(A(1)(a) requires.

*5 Appellant's failure to comply strictly with the dictates of R.C. 4113.52 prevents her from claiming that statute's protection. See *Contreras v. Ferro Corp., supra; Kulch v. Structural Fibers, Inc., supra.* The appellees additionally contend that appellant could not recover under R.C. 4113.52 because of lack of causation. Specifically, the appellees' evidence showed that they were unaware that appellant made any R.C. 4113.52(A)(1) reports while she was employed at Grande Pointe. Appellant therefore could not show that the appellees took any disciplinary or retaliatory action against her because she made a R.C. 4113.52(A)(1) report or because she made any inquiry or took any other action to ensure the accuracy of any information

reported under that division, as R.C. 4113.52(B) requires. In *Thomas v. Mastership Corp.* (1995), 108 Ohio App.3d 91, we affirmed a summary judgment that denied a retaliatory discharge claim in part because the evidence showed the employer did not know about the Internal Revenue Service's adverse determination until after the employee was terminated.

In the case at bar, appellant concedes that she did not tell her supervisor about any communications with the Ohio Department of Health:

Q. Did you provide copies of these reports to Karen Fogel?

A. Oh, no, absolutely not.

Q. Why not?

A. Because I had been promised repeatedly by Karen Fogel that these problems were going to be resolved. And not only were they not resolved, but they were continuing and patients were at harm and being continually in the position of being harmed. And she had also been screaming and yelling at me inappropriately. So no, I most certainly did not give her a copy. I had no confidence that she would do anything different. I worked for her many weeks and she had done nothing.

(Arsham 12/22/97 Depo. at 17.) With no evidence to show appellees were aware of appellant's statements to the Department of Health prior to her termination, appellant's evidence does not establish any factual dispute to show that her statements to the Department of Health caused the appellees to retaliate against her.

Because the undisputed facts established that appellant did not comply strictly with R.C. 4113.52(A)(1)(a) and her discharge was not shown in any event to be in retaliation for any report or inquiry under that section, the trial court correctly granted the appellees' motion for summary judgment against appellant on her "whistleblower" statute claim. The first assignment of error is accordingly overruled.

Appellant's second assignment of error states:

II. THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT REGARDING APPELLANT'S CLAIM UNDER THE NURSING HOME ANTI-RETALIATION STATUTE, O.R.C. 3721.24.

This assignment of error is not well taken.

Appellant alternatively argues that her discharge violated the Ohio statute proscribing retaliation for reporting nursing home resident abuse or neglect. R.C.

3721.22(A) states:

*6 No licensed health professional who knows or suspects that a resident has been abused or neglected, or that a resident's property has been misappropriated, by any individual used by a long-term care facility or residential care facility to provide services to residents, shall fail to report that knowledge or suspicion to the director of health.

Under R.C. 3721.21(C),

"Abuse" means knowingly causing physical harm or recklessly causing serious physical harm to a resident by physical contact with the resident or by use of physical or chemical restraint, medication, or isolation as punishment, for staff convenience, excessively, as a substitute or treatment, or in amounts that preclude habilitation and treatment.

Under R.C. 3721.21(D),

"Neglect" means recklessly failing to provide a resident with any treatment, care, goods, or service necessary to maintain the health or safety of the resident when the failure results in serious physical harm to the resident.

Appellant contends her discharge was retaliatory in violation of R.C. 3721.24(A), which provides:

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

The appellees maintain that R.C. 3721.24(A) provided appellant with no right to relief here because she did not file any reports of suspected resident abuse or neglect with the Ohio Department of Health and because the appellees were unaware of any such complaint or report by appellant. For her part, appellant first contends that R.C. 3721.24(A) does not specify to whom the report of suspected resident abuse or neglect must be made, so that "reports" she made to

her employer are sufficient. We cannot agree.

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).

*7 Appellant alternatively argues that she did report her concerns to the Department of Health and assisted in the Department's investigations of the deaths of residents Helen Brown and Edward Guy. Appellant does not dispute that the Department's investigations of these matters arose from complaints made on December 14, 1995 and January 4, 1996, and thus pre-dated appellant's January 29, 1996 hiring. She alleges that Department of Health surveyors spoke with her about these matters on February 29, 1996 and on March 6, 1996. She insists that her statements to representatives from the Department of Health led to her discharge on April 3, 1996.

For their evidence offered in support of their motion for summary judgment, the appellees denied knowing that appellant had made any complaints or reports to the Department of Health while she was employed at Grande Pointe. Appellant did not submit any evidence to contest that fact. Because she did not dispute that the appellees lacked knowledge of her statements to the Department of Health, appellant could not show the appellees discharged her in retaliation for those statements. See *Thomas v. Mastership Corp., supra.*

Moreover, as legitimate non-retaliatory reasons for the termination of her employment, the appellees identified appellant's "chronic absenteeism and her lack of team work, which created division among the staff." Appellant did not submit any evidence to contest these facts.[FN5] She likewise presented no evidence to show that the stated reasons for her termination were mere pretext.

Appellant did not submit evidence establishing a triable factual question to show that her discharge was retaliatory in violation of R.C. 3721.24(A). The trial court correctly granted summary judgment on that claim. We therefore overrule appellant's second assignment of error.

Appellant's third assignment of error states:

III. THE TRIAL COURT ERRED IN

Not Reported in N.E.2d, 2000 WL 968790 (Ohio App. 8 Dist.)
(Cite as: 2000 WL 968790 (Ohio App. 8 Dist.))

GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT REGARDING APPELLANT'S CLAIM FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY.

Appellant argues that her discharge in violation of clear public policy permits her to maintain a common-law cause of action in tort. This assignment of error is not well taken.

When an at-will employee's discharge violates clear public policy, the employee's remedies are cumulative and she may pursue those remedies that the law itself provides for the violation or those that are available in a common-law cause of action in tort, but she is not entitled to double recovery. *Kulch v. Structural Fibers, Inc., supra; Greeley v. Miami Valley Maintenance Contrs., Inc., supra.* Conversely, when the employee's discharge is not actionable under the law that establishes the "clear public policy," the companion common-law claim for relief likewise fails as a matter of law. In *Kulch, supra,* the court held that because Kulch did not strictly comply with the requirements of R.C. 4113.52(A)(1)(a) in reporting his employer, he had "no foundation for a *Greeley* claim based on the public policy embodied in R.C. 4113.52 * * *." *Id.* 78 Ohio St.3d at 154. By contrast, Kulch's distinctly valid claim under R.C. 4113.52(A)(2) allowed him to seek the relief provided by R.C. 4113.52 and additionally furnished "a second and independent foundation for a *Greeley* claim premised upon the clear public policy embodied in R.C. 4113.52." *Id.*

***8** In the case at bar, however, we have already determined that appellant failed to establish grounds for relief under either R.C. 4113.52 or R.C. 3721.24. Appellant does not identify any other source of "clear public policy" to sustain her wrongful discharge claim. It follows that the absence of any foundation for relief under those statutes forecloses her from pursuing relief by a common-law tort claim. We must therefore overrule her third assignment of error.

Appellant's fourth assignment of error states:

IV. THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT ON APPELLANT'S DEFAMATION CLAIM.

This assignment of error is not well taken.

Appellant contends that she was defamed when appellee Fogel told her during an office meeting with other employees that "I'm not worth the salary that I'm already being paid." On another occasion, appellee Fogel yelled across a hallway, in front of staff members, residents and residents' family members, "You are nothing but trouble!" The appellees contend that these statements are not ac-

tionable because they were statements of opinion, not fact, and were necessarily not false. The appellees further contend that the statements were subject to a qualified privilege in any event. We conclude that the statements cited by appellant were not actionable here.

Defamation is a false publication causing injury to a person's reputation or exposing the person to public hatred, contempt, ridicule, shame or disgrace, or affecting the person adversely in the person's trade or business. See *Bryans v. English Nanny & Gov. School* (1996), 117 Ohio App.3d 303, 316. While false statements of fact may be actionable, statements of opinion are not, because of the First Amendment. See *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323. In *Vail v. The Plain Dealer Publishing Co.* (1995), the court's syllabus states:

When determining whether speech is protected opinion a court must consider the totality of the circumstances. Specifically, a court should consider: the specific language at issue, whether the statement is verifiable, the general context of the statement, and the broader context in which the statement appeared. [Citations omitted.]

In the instant case, we think it inescapable that the statements appellant attributes to appellee Fogel were protected statements of opinion. They cannot be shown to be demonstrably false. As the appellees correctly point out, "[t]he language used by [Fogel] is value-laden and represents a point of view that is obviously subjective." *Vail v. The Plain Dealer Publishing Co., supra,* 72 Ohio St.3d at 283.

Appellant does not dispute that Fogel's statements lack a plausible method of verification. When a statement lacks a plausible method of verification, a reasonable person will not believe that the statement has specific factual content. *Vail, supra,* 72 Ohio St.3d at 283. We conclude that the statements cited by appellant are not actionable as a matter of law. It is therefore unnecessary for us to consider the appellees' alternative contention that the statements are subject to a qualified privilege unless shown to have been made with actual malice. See *Hahn v. Kotten* (1975), 43 Ohio St.2d 237. The fourth assignment of error is overruled.

*9 The judgment is affirmed.

It is ordered that appellees recover of appellant their 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 directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the

Rules of Appellate Procedure.

TERRENCE O'DONNELL, P.J., and TIMOTHY E. McMONAGLE, J., concur.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

FN1. Richmond Nursing, Inc., was not named as a party-defendant, but its absence does not appear material.

FN2. At the time this case was pending below, Civ.R. 56(C) allowed transcripts of evidence "in the pending case." A 1999 amendment deleted that restriction.

FN3. Appellant's claim is governed by that version of R.C. 4113.52 amended by Am.Sub.H.B. 588, effective October 31, 1990. We note that R.C. 4113.52 was subsequently amended by Am.Sub.H.B. 350, which, by Section 6 of that act, applied only to civil actions based on tortious conduct commenced on or after the January 27, 1997 effective date of the act. While the Supreme Court of Ohio recently declared Am.Sub.H.B. 350 unconstitutional *in toto*, see *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, that act would not have applied here in any event because of Section 6.

FN4. While Kulch's failure to give his employer a written report was fatal to his claim under R.C. 4113.52(A)(1), his claim under R.C. 4113.52(A)(2) survived because that section did not require the employee to inform the employer, either orally or in writing, concerning violations of the type described in R.C. 4113.52(A)(2). See *Kulch*, 78 Ohio St.3d at 143-148. Appellant does not rely on R.C. 4113.52(A)(2) here and her claim does not appear to involve any of the matters within the scope of that section.

FN5. While appellant notes that there were no records reflecting that she had been disciplined or otherwise memorializing her supervisor's concerns about appellant's work performance, she offered no evidence to dispute appellees' evidence that she was absent "approximately sixteen

> and one-half days in January and February 1996."

Ohio App. 8 Dist.,2000.
Arsham-Brenner v. Grande Point Health Care Community
Not Reported in N.E.2d, 2000 WL 968790
(Ohio App. 8 Dist.)

END OF DOCUMENT

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 NOTICE OF APPEAL OF APPELLANTS BROOKDALE SENIOR LIVING, INC., HOSPICE OF SOUTHWEST OHIO, INC., AND JOSEPH KILLIAN

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Joint Notice of Appeal

Appellants Brookdale Senior Living, Inc., Hospice of Southwest Ohio, Inc., and Joseph Killian hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case No. C 120822 on September 25, 2013.

This case involves an issue of public and great general interest. Moreover, the First Appellate District certified its judgment as being in conflict with the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, within the text of its September 25 judgment and Appellants here filed a Joint Notice of Certified Conflict on October 18, 2013, which is docketed in this Court as Case No. 2013-1644.

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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ORIGINAL

IN THE SUPREME COURT OF OHIO

PATRICIA HULSMEYER APPELLEE/CROSS-APPELLANT, v. **HOSPICE OF SOUTHWEST OHIO, INC., et al.** APPELLANTS/CROSS-APPELLEES.	:	Case No. 2013-1766 On Appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals Case No.: C 120822 Certified Conflict Case No.: 2013-1644

NOTICE OF CROSS-APPEAL OF APPELLEE/CROSS-APPELLANT PATRICIA HULSMEYER

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Attorneys for Appellants/Cross-Appellees Hospice of Southwest Ohio, Inc. and Joseph Killian

Appellee/Cross-Appellant Patricia Hulsmeyer, by and through counsel, hereby gives notice of her cross appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case No. C 120822 on September 25, 2013.

This case is one of public or great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been duly served upon the following by electronic and regular U.S. mail this 19th day of November 2013 to:

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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

[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

[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.

Baldwin's Ohio Revised Code Annotated
General Provisions
Chapter 1. Definitions; Rules of Construction (Refs & Annos)
Statutory Provisions (Refs & Annos)

R.C. § 1.42

1.42 Common and technical usage

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

CREDIT(S)
(1971 H 607, eff. 1-3-72)

Notes of Decisions (117)

R.C. § 1.42, OH ST § 1.42
Current through Files 1 to 94 of the 130th GA (2013-2014).

End of Document

Baldwin's Ohio Revised Code Annotated
General Provisions
Chapter 1. Definitions; Rules of Construction (Refs & Annos)
Statutory Provisions (Refs & Annos)

R.C. § 1.49

1.49 Aids in construction of ambiguous statutes

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

(A) The object sought to be attained;

(B) The circumstances under which the statute was enacted;

(C) The legislative history;

(D) The common law or former statutory provisions, including laws upon the same or similar subjects;

(E) The consequences of a particular construction;

(F) The administrative construction of the statute.

CREDIT(S)
(1971 H 607, eff. 1-3-72)

Notes of Decisions (99)

R.C. § 1.49, OH ST § 1.49
Current through Files 1 to 94 of the 130th GA (2013-2014).

End of Document

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

R.C. § 3721.17

3721.17 Grievance procedure; procedures for review of complaints by Ohio commission on aging; penalties; other remedies; cause of action

Effective: September 29, 2013

(A) Any resident who believes that the resident's rights under sections 3721.10 to 3721.17 of the Revised Code have been violated may file a grievance under procedures adopted pursuant to division (A)(2) of section 3721.12 of the Revised Code.

When the grievance committee determines a violation of sections 3721.10 to 3721.17 of the Revised Code has occurred, it shall notify the administrator of the home. If the violation cannot be corrected within ten days, or if ten days have elapsed without correction of the violation, the grievance committee shall refer the matter to the department of health.

(B) Any person who believes that a resident's rights under sections 3721.10 to 3721.17 of the Revised Code have been violated may report or cause reports to be made of the information directly to the department of health. No person who files a report is liable for civil damages resulting from the report.

(C)(1) Within thirty days of receiving a complaint under this section, the department of health shall investigate any complaint referred to it by a home's grievance committee and any complaint from any source that alleges that the home provided substantially less than adequate care or treatment, or substantially unsafe conditions, or, within seven days of receiving a complaint, refer it to the attorney general, if the attorney general agrees to investigate within thirty days.

(2) Within thirty days of receiving a complaint under this section, the department of health may investigate any alleged violation of sections 3721.10 to 3721.17 of the Revised Code, or of rules, policies, or procedures adopted pursuant to those sections, not covered by division (C)(1) of this section, or it may, within seven days of receiving a complaint, refer the complaint to the grievance committee at the home where the alleged violation occurred, or to the attorney general if the attorney general agrees to investigate within thirty days.

(D) If, after an investigation, the department of health finds probable cause to believe that a violation of sections 3721.10 to 3721.17 of the Revised Code, or of rules, policies, or procedures adopted pursuant to those sections, has occurred at a home that is certified under the medicare or medicaid program, it shall cite one or more findings or deficiencies under sections 5165.60 to 5165.89 of the Revised Code. If the home is not so certified, the department shall hold an adjudicative hearing within thirty days under Chapter 119. of the Revised Code.

(E) Upon a finding at an adjudicative hearing under division (D) of this section that a violation of sections 3721.10 to 3721.17 of the Revised Code, or of rules, policies, or procedures adopted pursuant thereto, has occurred, the department of health shall make an order for compliance, set a reasonable time for compliance, and assess a fine pursuant to division (F) of this section. The fine shall be paid to the general revenue fund only if compliance with the order is not shown to have been made within the reasonable time set in the order. The department of health may issue an order prohibiting the continuation of any violation of sections 3721.10 to 3721.17 of the Revised Code.

Findings at the hearings conducted under this section may be appealed pursuant to Chapter 119. of the Revised Code, except that an appeal may be made to the court of common pleas of the county in which the home is located.

The department of health shall initiate proceedings in court to collect any fine assessed under this section that is unpaid thirty days after the violator's final appeal is exhausted.

(F) Any home found, pursuant to an adjudication hearing under division (D) of this section, to have violated sections 3721.10 to 3721.17 of the Revised Code, or rules, policies, or procedures adopted pursuant to those sections may be fined not less than one hundred nor more than five hundred dollars for a first offense. For each subsequent offense, the home may be fined not less than two hundred nor more than one thousand dollars.

A violation of sections 3721.10 to 3721.17 of the Revised Code is a separate offense for each day of the violation and for each resident who claims the violation.

(G) No home or employee of a home shall retaliate against any person who:

(1) Exercises any right set forth in sections 3721.10 to 3721.17 of the Revised Code, including, but not limited to, filing a complaint with the home's grievance committee or reporting an alleged violation to the department of health;

(2) Appears as a witness in any hearing conducted under this section or section 3721.162 of the Revised Code;

(3) Files a civil action alleging a violation of sections 3721.10 to 3721.17 of the Revised Code, or notifies a county prosecuting attorney or the attorney general of a possible violation of sections 3721.10 to 3721.17 of the Revised Code.

If, under the procedures outlined in this section, a home or its employee is found to have retaliated, the violator may be fined up to one thousand dollars.

(H) When legal action is indicated, any evidence of criminal activity found in an investigation under division (C) of this section shall be given to the prosecuting attorney in the county in which the home is located for investigation.

(I)(1)(a) Any resident whose rights under sections 3721.10 to 3721.17 of the Revised Code are violated has a cause of action against any person or home committing the violation.

(b) An action under division (I)(1)(a) of this section may be commenced by the resident or by the resident's legal guardian or other legally authorized representative on behalf of the resident or the resident's estate. If the resident or the resident's legal guardian or other legally authorized representative is unable to commence an action under that division on behalf of the resident, the following persons in the following order of priority have the right to and may commence an action under that division on behalf of the resident or the resident's estate:

(i) The resident's spouse;

(ii) The resident's parent or adult child;

(iii) The resident's guardian if the resident is a minor child;

(iv) The resident's brother or sister;

(v) The resident's niece, nephew, aunt, or uncle.

(c) Notwithstanding any law as to priority of persons entitled to commence an action, if more than one eligible person within the same level of priority seeks to commence an action on behalf of a resident or the resident's estate, the court shall determine, in the best interest of the resident or the resident's estate, the individual to commence the action. A court's determination under this division as to the person to commence an action on behalf of a resident or the resident's estate shall bar another person from commencing the action on behalf of the resident or the resident's estate.

(d) The result of an action commenced pursuant to division (I)(1)(a) of this section by a person authorized under division (I)(1)(b) of this section shall bind the resident or the resident's estate that is the subject of the action.

(e) A cause of action under division (I)(1)(a) of this section shall accrue, and the statute of limitations applicable to that cause of action shall begin to run, based upon the violation of a resident's rights under sections 3721.10 to 3721.17 of the Revised Code, regardless of the party commencing the action on behalf of the resident or the resident's estate as authorized under divisions (I)(1)(b) and (c) of this section.

(2)(a) The plaintiff in an action filed under division (I)(1) of this section may obtain injunctive relief against the violation of the resident's rights. The plaintiff also may recover compensatory damages based upon a showing, by a preponderance of the evidence, that the violation of the resident's rights resulted from a negligent act or omission of the person or home and that the violation was the proximate cause of the resident's injury, death, or loss to person or property.

(b) If compensatory damages are awarded for a violation of the resident's rights, section 2315.21 of the Revised Code shall apply to an award of punitive or exemplary damages for the violation.

(c) The court, in a case in which only injunctive relief is granted, may award to the prevailing party reasonable attorney's fees limited to the work reasonably performed.

(3) Division (I)(2)(b) of this section shall be considered to be purely remedial in operation and shall be applied in a remedial manner in any civil action in which this section is relevant, whether the action is pending in court or commenced on or after July 9, 1998.

(4) Within thirty days after the filing of a complaint in an action for damages brought against a home under division (I)(1)(a) of this section by or on behalf of a resident or former resident of the home, the plaintiff or plaintiff's counsel shall send written notice of the filing of the complaint to the department of medicaid if the department has a right of recovery under section 5160.37 of the Revised Code against the liability of the home for the cost of medicaid services arising out of injury, disease, or disability of the resident or former resident.

CREDIT(S)
(2013 H 59, eff. 9-29-13; 2002 H 412, eff. 11-7-02; 2001 H 94, eff. 9-5-01; 1998 H 354, eff. 7-9-98; 1990 H 822, eff. 12-13-90; 1984 H 660; 1978 H 600)

Notes of Decisions (30)

R.C. § 3721.17, OH ST § 3721.17
Current through Files 1 to 94 and Statewide Issue 1 of the 130th GA (2013-2014).

End of Document

Effective: September 10, 2012

Baldwin's Ohio Revised Code Annotated Currentness
Title XXXVII. Health--Safety--Morals
Chapter 3721. Rest Homes and Nursing Homes (Refs & Annos)
Reports of Abuse and Neglect
3721.21 Definitions

As used in sections 3721.21 to 3721.34 of the Revised Code:

(A) "Long-term care facility" means either of the following:

(1) A nursing home as defined in section 3721.01 of the Revised Code;

(2) A facility or part of a facility that is certified as a skilled nursing facility or a nursing facility under Title XVIII or XIX of the "Social Security Act."

(B) "Residential care facility" has the same meaning as in section 3721. 01 of the Revised Code.

(C) "Abuse" means knowingly causing physical harm or recklessly causing serious physical harm to a resident by physical contact with the resident or by use of physical or chemical restraint, medication, or isolation as punishment, for staff convenience, excessively, as a substitute for treatment, or in amounts that preclude habilitation and treatment.

(D) "Neglect" means recklessly failing to provide a resident with any treatment, care, goods, or service necessary to maintain the health or safety of the resident when the failure results in serious physical harm to the resident. "Neglect" does not include allowing a resident, at the resident's option, to receive only treatment by spiritual means through prayer in accordance with the tenets of a recognized religious denomination.

(E) "Misappropriation" means depriving, defrauding, or otherwise obtaining the real or personal

property of a resident by any means prohibited by the Revised Code, including violations of Chapter 2911. or 2913. of the Revised Code.

(F) "Resident" includes a resident, patient, former resident or patient, or deceased resident or patient of a long-term care facility or a residential care facility.

(G) "Physical restraint" has the same meaning as in section 3721.10 of the Revised Code.

(H) "Chemical restraint" has the same meaning as in section 3721.10 of the Revised Code.

(I) "Nursing and nursing-related services" means the personal care services and other services not constituting skilled nursing care that are specified in rules the director of health shall adopt in accordance with Chapter 119. of the Revised Code.

(J) "Personal care services" has the same meaning as in section 3721.01 of the Revised Code.

(K)(1) Except as provided in division (K)(2) of this section, "nurse aide" means an individual who provides nursing and nursing-related services to residents in a long-term care facility, either as a member of the staff of the facility for monetary compensation or as a volunteer without monetary compensation.

(2) "Nurse aide" does not include either of the following:

(a) A licensed health professional practicing within the scope of the professional's license;

(b) An individual providing nursing and nursing-related services in a religious nonmedical health care institution, if the individual has been trained in the principles of nonmedical care and is recognized by the institution as being competent in the administration of care within the religious tenets practiced by the residents of the institution.

(L) "Licensed health professional" means all of the following:

(1) An occupational therapist or occupational therapy assistant licensed under Chapter 4755. of the Revised Code;

(2) A physical therapist or physical therapy assistant licensed under Chapter 4755. of the Re-

vised Code;

(3) A physician authorized under Chapter 4731. of the Revised Code to practice medicine and surgery, osteopathic medicine and surgery, or podiatry;

(4) A physician assistant authorized under Chapter 4730. of the Revised Code to practice as a physician assistant;

(5) A registered nurse or licensed practical nurse licensed under Chapter 4723. of the Revised Code;

(6) A social worker or independent social worker licensed under Chapter 4757. of the Revised Code or a social work assistant registered under that chapter;

(7) A speech-language pathologist or audiologist licensed under Chapter 4753. of the Revised Code;

(8) A dentist or dental hygienist licensed under Chapter 4715. of the Revised Code;

(9) An optometrist licensed under Chapter 4725. of the Revised Code;

(10) A pharmacist licensed under Chapter 4729. of the Revised Code;

(11) A psychologist licensed under Chapter 4732. of the Revised Code;

(12) A chiropractor licensed under Chapter 4734. of the Revised Code;

(13) A nursing home administrator licensed or temporarily licensed under Chapter 4751. of the Revised Code;

(14) A professional counselor or professional clinical counselor licensed under Chapter 4757. of the Revised Code.

(M) "Religious nonmedical health care institution" means an institution that meets or exceeds the conditions to receive payment under the medicare program established under Title XVIII of the "Social Security Act" for inpatient hospital services or post-hospital extended care services

furnished to an individual in a religious nonmedical health care institution, as defined in section 1861(ss)(1) of the "Social Security Act," 79 Stat. 286 (1965), 42 U.S.C. 1395x(ss)(1), as amended.

(N) "Competency evaluation program" means a program through which the competency of a nurse aide to provide nursing and nursing-related services is evaluated.

(O) "Training and competency evaluation program" means a program of nurse aide training and evaluation of competency to provide nursing and nursing-related services.

CREDIT(S)

(2012 H 487, eff. 9-10-12; 2005 H 66, eff. 6-30-05; 2000 H 403, eff. 9-27-00; 1996 S 223, eff. 3-18-97; 1995 S 143, eff. 3-5-96; 1995 H 117, eff. 9-29-95; 1990 H 822, eff. 12-13-90)

UNCODIFIED LAW

2012 H 487, § 751.10: See Uncodified Law under Ch. 3721.

HISTORICAL AND STATUTORY NOTES

Ed. Note: 3721.21 is former 3721.27, amended and recodified by 1990 H 822, eff. 12-13-90; 1990 H 359; 1989 H 112.

Ed. Note: Former 3721.21 repealed by 1979 H 204, § 270, eff. 9-1-79; 1979 S 180; 1977 H 276, § 1, 2.

Ed. Note: Prior 3721.21 repealed by 1977 H 276, eff. 6-28-77; 1976 H 705.

R.C. § 3721.21, OH ST § 3721.21

Current through Files 1 to 76, and 78 of the 130th GA (2013-2014).

END OF DOCUMENT

C

Effective:[See Text Amendments]

Baldwin's Ohio Revised Code Annotated Currentness
Title XXXVII. Health--Safety--Morals
Chapter 3721. Rest Homes and Nursing Homes (Refs & Annos)
Reports of Abuse and Neglect
→→ 3721.22 Reports of abuse or neglect; immunity; failure to report; false allegations

(A) No licensed health professional who knows or suspects that a resident has been abused or neglected, or that a resident's property has been misappropriated, by any individual used by a long-term care facility or residential care facility to provide services to residents, shall fail to report that knowledge or suspicion to the director of health.

(B) Any person, including a resident, who knows or suspects that a resident has been abused or neglected, or that a resident's property has been misappropriated, by any individual used by a long-term care facility or residential care facility to provide services to residents, may report that knowledge or suspicion to the director of health.

(C) Any person who in good faith reports suspected abuse, neglect, or misappropriation to the director of health, provides information during an investigation of suspected abuse, neglect, or misappropriation conducted by the director, or participates in a hearing conducted under section 3721.23 of the Revised Code is not subject to criminal prosecution, liable in damages in a tort or other civil action, or subject to professional disciplinary action because of injury or loss to person or property allegedly arising from the making of the report, provision of information, or participation in the hearing.

(D) If the director has reason to believe that a violation of division (A) of this section has occurred, the director may report the suspected violation to the appropriate professional licensing authority and to the attorney general, county prosecutor, or other appropriate law enforcement official.

(E) No person shall knowingly make a false allegation of abuse or neglect of a resident or misappropriation of a resident's property, or knowingly swear or affirm the truth of a false allegation, when the allegation is made for the purpose of incriminating another.

CREDIT(S)

(1995 H 117, eff. 9-29-95; 1990 H 822, eff. 12-13-90)

HISTORICAL AND STATUTORY NOTES

Ed. Note: Former 3721.22 repealed by 1979 H 204, § 270, eff. 9-1-79; 1979 S 180; 1977 H 276, § 1, 2.

R.C. § 3721.22, OH ST § 3721.22

Current through Files 1 to 76, and 78 of the 130th GA (2013-2014).

END OF DOCUMENT

c

Effective: October 16, 2009

Baldwin's Ohio Revised Code Annotated Currentness
Title XXXVII. Health--Safety--Morals
Chapter 3721. Rest Homes and Nursing Homes (Refs & Annos)
Reports of Abuse and Neglect
→→ 3721.23 Investigation of allegations; findings; notice

(A) The director of health shall receive, review, and investigate allegations of abuse or neglect of a resident or misappropriation of the property of a resident by any individual used by a long-term care facility or residential care facility to provide services to residents.

(B) The director shall make findings regarding alleged abuse, neglect, or misappropriation of property after doing both of the following:

(1) Investigating the allegation and determining that there is a reasonable basis for it;

(2) Giving notice to the individual named in the allegation and affording the individual a reasonable opportunity for a hearing.

Notice to the person named in an allegation shall be given and the hearing shall be conducted pursuant to rules adopted by the director under section 3721.26 of the Revised Code. For purposes of conducting a hearing under this section, the director may issue subpoenas compelling attendance of witnesses or production of documents. The subpoenas shall be served in the same manner as subpoenas and subpoenas duces tecum issued for a trial of a civil action in a court of common pleas. If a person who is served a subpoena fails to attend a hearing or to produce documents, or refuses to be sworn or to answer any questions, the director may apply to the common pleas court of the county in which the person resides, or the county in which the long-term care facility or residential care facility is located, for a contempt order, as in the case of a failure of a person who is served a subpoena issued by the court to attend or to produce documents or a refusal of such person to testify.

(C)(1) If the director finds that an individual used by a long-term care facility or residential care facility has neglected or abused a resident or misappropriated property of a resident, the director shall notify the individual, the facility using the individual, and the attorney general, county prosecutor, or other appropriate law enforcement official. The director also shall do the following:

(a) If the individual is used by a long-term care facility as a nurse aide, the director shall, in accordance with section 3721.32 of the Revised Code, include in the nurse aide registry established under that section a statement detailing the findings pertaining to the individual.

(b) If the individual is a licensed health professional used by a long-term care facility or residential care facility to provide services to residents, the director shall notify the appropriate professional licensing authority established under Title XLVII of the Revised Code.

(c) If the individual is used by a long-term care facility and is neither a nurse aide nor a licensed health professional, or is used by a residential care facility and is not a licensed health professional, the director shall, in accordance with section 3721.32 of the Revised Code, include in the nurse aide registry a statement detailing the findings pertaining to the individual.

(2) A nurse aide or other individual about whom a statement is required by this division to be included in the nurse aide registry may provide the director with a statement disputing the director's findings and explaining the circumstances of the allegation. The statement shall be included in the nurse aide registry with the director's findings.

(D)(1) If the director finds that alleged neglect or abuse of a resident or misappropriation of property of a resident cannot be substantiated, the director shall notify the individual and expunge all files and records of the investigation and the hearing by doing all of the following:

(a) Removing and destroying the files and records, originals and copies, and deleting all index references;

(b) Reporting to the individual the nature and extent of any information about the individual transmitted to any other person or government entity by the director of health;

(c) Otherwise ensuring that any examination of files and records in question show no record

whatever with respect to the individual.

(2)(a) If, in accordance with division (C)(1)(a) or (c) of this section, the director includes in the nurse aide registry a statement of a finding of neglect, the individual found to have neglected a resident may, not earlier than one year after the date of the finding, petition the director to rescind the finding and remove the statement and any accompanying information from the nurse aide registry. The director shall consider the petition. If, in the judgment of the director, the neglect was a singular occurrence and the employment and personal history of the individual does not evidence abuse or any other incident of neglect of residents, the director shall notify the individual and remove the statement and any accompanying information from the nurse aide registry. The director shall expunge all files and records of the investigation and the hearing, except the petition for rescission of the finding of neglect and the director's notice that the rescission has been approved.

(b) A petition for rescission of a finding of neglect and the director's notice that the rescission has been approved are not public records for the purposes of section 149.43 of the Revised Code.

(3) When files and records have been expunged under division (D)(1) or (2) of this section, all rights and privileges are restored, and the individual, the director, and any other person or government entity may properly reply to an inquiry that no such record exists as to the matter expunged.

CREDIT(S)

(2009 H 1, eff. 10-16-09; 1995 H 117, eff. 9-29-95; 1990 H 822, eff. 12-13-90)

HISTORICAL AND STATUTORY NOTES

Ed. Note: Former 3721.23 repealed by 1979 H 204, § 270, eff. 9-1-79; 1979 S 180; 1977 H 276, § 1, 2.

R.C. § 3721.23, OH ST § 3721.23

Current through Files 1 to 76, and 78 of the 130th GA (2013-2014).

END OF DOCUMENT

Effective:[See Text Amendments]

Baldwin's Ohio Revised Code Annotated Currentness
Title XXXVII. Health--Safety--Morals
Chapter 3721. Rest Homes and Nursing Homes (Refs & Annos)
Reports of Abuse and Neglect
→→ 3721.24 Retaliation prohibited

(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.

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

(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.

CREDIT(S)

(1990 H 822, eff. 12-13-90)

HISTORICAL AND STATUTORY NOTES

Ed. Note: Former 3721.24 repealed by 1979 H 204, § 270, eff. 9-1-79; 1979 S 180; 1977 H 276, § 1, 2.

R.C. § 3721.24, OH ST § 3721.24

Current through Files 1 to 76, and 78 of the 130th GA (2013-2014).

END OF DOCUMENT

C

Effective:[See Text Amendments]

Baldwin's Ohio Revised Code Annotated Currentness
Title XXXVII. Health--Safety--Morals
Chapter 3721. Rest Homes and Nursing Homes (Refs & Annos)
Reports of Abuse and Neglect
→→ 3721.25 Confidentiality of information

(A)(1) Except as required by court order, as necessary for the administration or enforcement of any statute or rule relating to long-term care facilities or residential care facilities, or as provided in division (D) of this section, the director of health shall not disclose any of the following without the consent of the individual or the individual's legal representative:

(a) The name of an individual who reports suspected abuse or neglect of a resident or misappropriation of a resident's property to the director;

(b) The name of an individual who provides information during an investigation of suspected abuse, neglect, or misappropriation conducted by the director;

(c) Any information that would tend to disclose the identity of an individual described in division (A)(1)(a) or (b) of this section.

(2) An agency or individual to whom the director is required, by court order or for the administration or enforcement of a statute relating to long-term care facilities or residential care facilities, to release information described in division (A)(1) of this section shall not release the information without the permission of the individual who would be or would reasonably tend to be identified, or of the individual's legal representative, unless the agency or individual is required to release it by division (D) of this section, by court order, or for the administration or enforcement of a statute relating to long-term care facilities or residential care facilities.

(B) Except as provided in division (D) of this section, any record that identifies an individual

described in division (A)(1)(a) or (b) of this section, or that would tend to disclose the identity of such an individual, is not a public record for the purposes of section 149.43 of the Revised Code, and is not subject to inspection or copying under section 1347.08 of the Revised Code.

(C) Except as provided in division (B) of this section and division (D) of section 3721.23 of the Revised Code, the records of a hearing conducted under section 3721.23 of the Revised Code are public records for the purposes of section 149.43 of the Revised Code and are subject to inspection and copying under section 1347.08 of the Revised Code.

(D) If the director, or an agency or individual to whom the director is required by court order or for administration or enforcement of a statute relating to long-term care facilities or residential care facilities to release information described in division (A)(1) of this section, uses information in any administrative or judicial proceeding against a long-term care facility or residential care facility that reasonably would tend to identify an individual described in division (A)(1)(a) or (b) of this section, the director, agency, or individual shall disclose that information to the facility. However, the director, agency, or individual shall not disclose information that directly identifies an individual described in division (A)(1)(a) or (b) of this section, unless the individual is to testify in the proceedings.

CREDIT(S)

(1995 H 117, eff. 9-29-95; 1990 H 822, eff. 12-13-90)

HISTORICAL AND STATUTORY NOTES

Ed. Note: Former 3721.25 repealed by 1979 H 204, § 270, eff. 9-1-79; 1979 S 180; 1977 H 276, § 1, 2.

R.C. § 3721.25, OH ST § 3721.25

Current through Files 1 to 76, and 78 of the 130th GA (2013-2014).

END OF DOCUMENT

C

Effective:[See Text Amendments]

Baldwin's Ohio Revised Code Annotated Currentness
Title XXXVII. Health--Safety--Morals
Chapter 3721. Rest Homes and Nursing Homes (Refs & Annos)
Reports of Abuse and Neglect
→→ 3721.26 Rulemaking powers

The director of health shall adopt rules pursuant to Chapter 119. of the Revised Code to implement sections 3721.21 to 3721.25 of the Revised Code, including rules prescribing requirements for the notice and hearing required under section 3721.23 of the Revised Code. The notice and hearing required under section 3721.23 of the Revised Code are not subject to Chapter 119. of the Revised Code; however, the rules may provide for the notice to be provided and the hearing to be conducted in accordance with that chapter. Rules adopted under this section shall be no less stringent than the requirements, guidelines, and procedures established by the United States secretary of health and human services under sections 1819 and 1919 of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C.A. 301, as amended.

CREDIT(S)

(1990 H 822, eff. 12-13-90)

HISTORICAL AND STATUTORY NOTES

Ed. Note: Former 3721.26 recodified as 3721.41 by 1990 H 822, eff. 12-13-90; 1981 H 694.

R.C. § 3721.26, OH ST § 3721.26

Current through Files 1 to 76, and 78 of the 130th GA (2013-2014).

END OF DOCUMENT

SECTION 2. That existing sections 119.07, 119.092, 2317.02, 3721.22, 3721.23, 3729.12, 3729.121, 4723.341, 4731.22, and 5101.26 of the Revised Code are hereby repealed.

SECTION 3. The amendments to sections 2317.02 and 4731.22 of the Revised Code made in this act and the provisions of section 2305.33 of the Revised Code as enacted by this act shall apply only to civil actions, or professional discipline proceedings, that are commenced against a physician on or after the effective date of this act and that are based on or associated with a report by a physician of an employee's use of a drug of abuse, or of a condition of an employee other than one involving the use of a drug of abuse, to the employer of the employee. As used in this section, "civil action," "employee," "employer," and "physician" have the same meanings as in section 2305.33 of the Revised Code.

AMENDED SUBSTITUTE HOUSE BILL NO. 822

Act Effective Date:	12-13-90
Date Passed:	11-29-90
Date Approved by Governor:	12-13-90
Date Filed:	12-13-90
File Number:	283
Chief Sponsor:	SWEENEY

General and Permanent Nature: Per the Director of the Ohio Legislative Service Commission, this Act's section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

Emergency: Pursuant to O Const, Art II, § 1d, this Act was declared to be an emergency measure necessary for the preservation of the public peace, health, and safety. See Act section 9.

Future Repeal: This Act repeals certain provisions of law, the repeal of which takes effect on dates different from the effective date of the Act itself. See Act section(s) 3.

To amend sections 1347.08, 3701.023, 3702.51, 3721.04, 3721.07, 3721.08, 3721.10, 3721.12 to 3721.17, 3721.261, 3721.27, 3721.271, 3721.28, 3721.30 to 3721.33, 3721.99, 4723.061, 5111.01, 5111.02, 5111.06, 5111.20, 5111.21, 5111.22, 5111.222, 5111.23 to 5111.32, 5111.41, 5111.43, and 5111.99; to amend, for the purpose of adopting new section numbers as indicated in parentheses, sections 3721.26 (3721.41), 3721.261 (3721.42), 3721.27 (3721.21), 3721.271 (3721.35), 5111.33 (5111.11), 5111.34 (5111.12), 5111.41 (5111.75), 5111.42 (5111.76), 5111.43 (5111.77), 5111.44 (5111.78), 5111.45 (5111.79), 5111.46 (5111.80), and 5111.47 (5111.81); and to enact new sections 3721.26, 5111.41, 5111.42, 5111.43, 5111.44, 5111.45, 5111.46, and 5111.47 and sections 3721.022, 3721.031, 3721.22 to 3721.25, 3721.34, 5111.201, 5111.35 to 5111.40, and 5111.48 to 5111.62 of the Revised Code; and to amend Section 9 of Am. Sub. H.B. 257 of the 118th General Assembly to designate by statute the Department of Health as the state agency responsible for certain Medicare and Medicaid functions; to require the Department of Human Services to enforce certain requirements and impose various penalties, including fines, on nursing facilities; to establish procedures for imposition and appeals of the nursing facility penalties; to allow the Department of Health to use Maternal and Child Health Block Grant funds for liability insurance for health professionals; and to declare an emergency.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 1347.08, 3701.023, 3702.51, 3721.04, 3721.07, 3721.08, 3721.10, 3721.12, 3721.13, 3721.14, 3721.15, 3721.16, 3721.17, 3721.261, 3721.27, 3721.271, 3721.28, 3721.30, 3721.31, 3721.32, 3721.33, 3721.99, 4723.061, 5111.01, 5111.02, 5111.06, 5111.20, 5111.21, 5111.22, 5111.222, 5111.23, 5111.24, 5111.25, 5111.26, 5111.27, 5111.28, 5111.29, 5111.30, 5111.31, 5111.32, 5111.41, 5111.43, and 5111.99 be amended, sections 3721.26 (3721.41), 3721.261 (3721.42), 3721.27 (3721.21), 3721.271 (3721.35), 5111.33 (5111.11), 5111.34 (5111.12), 5111.41 (5111.75), 5111.42 (5111.76), 5111.43 (5111.77), 5111.44 (5111.78), 5111.45 (5111.79), 5111.46 (5111.80), and 5111.47 (5111.81) be amended for the purpose of adopting new section numbers as indicated in parentheses, and new sections 3721.26, 5111.41, 5111.42, 5111.43, 5111.44, 5111.45, 5111.46, and 5111.47 and sections 3721.022, 3721.031, 3721.22, 3721.23, 3721.24, 3721.25, 3721.34, 5111.201, 5111.35, 5111.36, 5111.37, 5111.38, 5111.39, 5111.40, 5111.48, 5111.49, 5111.50, 5111.51, 5111.52, 5111.53, 5111.54, 5111.55, 5111.56, 5111.57, 5111.58, 5111.59, 5111.60, 5111.61, and 5111.62 of the Revised Code be enacted to read as follows:

1347.08 Rights of subjects, or possible subjects, to inspection [EFF. 12-13-90]

(A) Every state or local agency that maintains a personal information system, upon the request and the proper identification of any person who is the subject of personal information in the system, shall:

(1) Inform the person of the existence of any personal information in the system of which he is the subject;

(2) Except as provided in divisions (C) and (E)(2) of this section, permit the person, his legal guardian, or an attorney who presents a signed written authorization made by the person, to inspect all personal information in the system of which he is the subject;

(3) Inform the person about the types of uses made of the personal information, including the identity of any users usually granted access to the system.

(B) Any person who wishes to exercise a right provided by this section may be accompanied by another individual of his choice.

(C)(1) A state or local agency, upon request, shall disclose medical, psychiatric, or psychological information to a person who is the subject of the information or to his legal guardian, unless a physician, psychiatrist, or psychologist determines for the agency that the disclosure of the information is likely to have an adverse effect on the person, in which case the information shall be released to a physician, psychiatrist, or psychologist who is designated by the person or by his legal guardian.

(2) Upon the signed written request of either a licensed attorney at law or a licensed physician designated by the inmate, together with the signed written request of an inmate of a penal or reformatory institution under the administration of the department of rehabilitation and correction, the department shall disclose medical information to the designated attorney or physician as provided in division (C) of section 5120.21 of the Revised Code.

(D) If an individual who is authorized to inspect personal information that is maintained in a personal information system requests the state or local agency that maintains the system to provide a copy of any personal information that he is authorized to inspect, the agency shall provide a copy of the personal information to the individual. Each state and local agency may establish reasonable fees for the service of copying, upon request, personal information that is maintained by the agency.

(E)(1) This section regulates access to personal information that is maintained in a personal information system by persons who are the subject of the information, but does not limit the authority of any person, including a person who is the subject of personal information maintained in a personal information system, to inspect or have copied, pursuant to section 149.43 of the Revised Code, a public record as defined in that section.

(2) This section does not provide a person who is the subject of personal information maintained in a personal information system, his legal guardian, or an attorney authorized by the person, with a right to inspect or have copied, or require an agency that maintains a personal information system to permit the inspection of or to copy, a confidential law enforcement investigatory record or trial preparation record, as defined in divisions (A)(2) and (4) of section 149.43 of the Revised Code.

(F) This section does not apply to papers ANY OF THE FOLLOWING:

(1) PAPERS, records, and books that pertain to an adoption and that are subject to inspection in accordance with section 3107.17 of the Revised Code, or to records

(2) RECORDS listed in division (A) of section 3107.42 of the Revised Code;

(3) RECORDS THAT IDENTIFY AN INDIVIDUAL DESCRIBED IN DIVISION (A)(1) OF SECTION 3721.031 OF THE REVISED CODE, OR THAT WOULD TEND TO IDENTIFY SUCH AN INDIVIDUAL;

(4) FILES AND RECORDS THAT HAVE BEEN EXPUNGED UNDER DIVISION (D)(1) OF SECTION 3721.23 OF THE REVISED CODE;

(5) RECORDS THAT IDENTIFY AN INDIVIDUAL DESCRIBED IN DIVISION (A)(1) OF SECTION 3721.25 OF THE REVISED CODE, OR THAT WOULD TEND TO IDENTIFY SUCH AN INDIVIDUAL;

(6) RECORDS THAT IDENTIFY AN INDIVIDUAL DESCRIBED IN DIVISION (A)(1) OF SECTION 5111.61 OF THE REVISED CODE, OR THAT WOULD TEND TO IDENTIFY SUCH AN INDIVIDUAL.

3701.023 Duties of department of health [Eff. 12-13-90]

~~The department of health shall:~~

(A) ~~Administer~~ THE DEPARTMENT OF HEALTH SHALL ADMINISTER funds received from the "Maternal and Child Health Block Grant," Title V of the "Social Security Act," 95 Stat. 818, (1981), 42 U.S.C.A. 701, as amended, for programs including the program for services to medically handicapped children. THE DEPARTMENT MAY MAKE GRANTS TO PERSONS AND OTHER ENTITIES FOR THE PROVISION OF SERVICES WITH THE FUNDS. THE DEPARTMENT MAY ALSO USE THE FUNDS TO PURCHASE LIABILITY INSURANCE COVERING THE PROVISION OF SERVICES UNDER THE PROGRAMS BY PHYSICIANS AND OTHER HEALTH PROFESSIONALS WHO PROVIDE THOSE SERVICES.

(B) ~~Review~~ THE DEPARTMENT SHALL REVIEW applications for eligibility for the program for medically handicapped children that are submitted to the department by physician providers approved in accordance with division (D) of this section, and shall determine whether or not the applicants meet the medical and financial eligibility requirements established by the public health council pursuant to division (A)(1) of section 3701.021 of the Revised Code, and by the department in the manual of operational procedures and guidelines for the program for services to medically handicapped children developed pursuant to division (B) of section 3701.021 of the Revised Code. Referrals of potentially eligible ELIGIBLE children for the program may be submitted to the department on behalf of the child by parents, guardians, public health nurses, or any other interested person. The department of health may designate a local health department or other agency to refer applicants to the department of health.

(C) ~~Authorize~~ THE DEPARTMENT SHALL AUTHORIZE a provider or providers to provide to any Ohio resident under twenty-one years of age, without charge and without restriction as to the economic status of the resident or his family, diagnostic services necessary to determine whether or not he suffers from a medically handicapping or potentially medically handicapping conditions;

(D) In accordance with standards set forth in rules adopted by the public health council pursuant to division (A)(2) of section 3701.021 of the Revised Code, THE DEPARTMENT SHALL review the applications of ~~professional personnel~~ HEALTH PROFESSIONALS, hospitals, medical equipment suppliers, and other individuals, groups, or agencies that ~~make application~~ APPLY to become providers. The department shall enter into a written agreement with each applicant who is determined to be eligible to be a provider in accordance with the provider agreement required by the medical assistance program established under section 5111.01 of the Revised Code.

(E) ~~Evaluate~~ THE DEPARTMENT SHALL EVALUATE applications from approved physician providers for authorization to provide treatment services and related goods to children determined to be eligible for the program FOR MEDICALLY HANDICAPPED CHILDREN pursuant to division (B) of this section. The department shall authorize necessary treatment services and related goods for each eligible child in accordance with an individual plan of treatment for the child.

(F) ~~Pay~~ THE DEPARTMENT SHALL PAY, from appropriations to the department, any necessary expenses, including but not limited to, expenses for diagnosis, treatment, supportive services, transportation, and necessaries and their upkeep, provided to medically handicapped children, provided that the provision of the goods or services is authorized by the department under division (C) or (E) of this section. Money appropriated to the department may also be expended for reasonable administrative costs incurred by the program. Payments made by the department pursuant to this division for inpatient hospital care, outpatient care, and all other medical assistance furnished by hospitals to eligible recipients shall be in accordance with methods established by rules of the public health council. Until such rules are adopted, the department shall make payments to hospitals in accordance with reasonable cost principles for reimbursement under the medicare program established under Title XVIII of the "Social Security Act," 79 Stat. 286 (1965), 42 U.S.C.A. 1395, as amended. Payments to providers for goods or services other than inpatient or outpatient hospital care shall be made in accordance with rules adopted by the public health council pursuant to division (A) of section 3701.021 of the Revised Code.

(G) ~~Pay~~ THE DEPARTMENT SHALL PAY for authorized goods or services, up to the amount determined under division (F) of this section for the authorized goods or services, only to the extent that payment for the authorized goods or services is not made through third-party benefits. The department shall pay for the goods or services only after all available third-party benefits, except for third-party benefits payable under the "Maternal and Child Health Block Grant," Title V of the "Social Security Act," 95 Stat. 818, (1981), 42 U.S.C.A. 701, as amended, are received and applied to the amount determined under division (F) of this section. Third-party payments for goods and services not authorized under division (C) or (E) of this section shall not be applied to payment amounts determined under division (F) of this section. Payment made by the department shall be considered payment in full of the amount determined under division (F) of this section. Medicaid payments for persons eligible for medical assistance under Title XIX of the "Social Security Act," 49 Stat. 620, (1935), 42 U.S.C.A. 301, as amended, shall be considered payment in full of the amount determined under division (F) of this section.

(H) ~~Require~~ THE DEPARTMENT SHALL REQUIRE a medically handicapped child who receives services from the program or his parents or guardians to apply for all third-party benefits for which they may be eligible and require the child, parents, or guardians to apply all third-party benefits received to the amount determined under division (F) of this section;

(I) ~~Determine, under~~ UNDER a procedure established by the rules of the public health council pursuant to division (A)(3) of section 3701.021 of the Revised Code, THE DEPARTMENT SHALL DETERMINE the amount each county shall provide annually for the program for medically handicapped children, based on a proportion of the county's total general property tax duplicate, not to exceed three-tenths of a mill, and charge the county, up to the amount so determined, for any part of expenses incurred under this section for treatment services on behalf of medically handicapped children having legal settlement in the county that is not paid from federal funds or paid through the medical assistance program established under section 5111.01 of the Revised Code. Prior to any increase in the millage charged to a county, the public health council shall hold a public hearing on the proposed increase and shall give notice of the hearing to each board of county commissioners that would be affected by the increase at least thirty days prior to the date set for the hearing. Any county commissioner may appear and give testimony at the hearing. Any increase in the millage any county is required to provide for the program for medically handicapped children shall be determined, and notice of the amount of the increase shall be provided to each affected board of county commissioners, no later than the first day of June of the fiscal year next preceding the fiscal year in which the increase will take effect.

All amounts collected by the department under this division shall be deposited in the state treasury to the credit of the medically handicapped children-county assessment fund, which is hereby created. The fund shall be used by the director of health to comply with sections 3701.021 to 3701.025 of the Revised Code.

(J) ~~Administer~~ THE DEPARTMENT SHALL ADMINISTER a program to provide services to Ohio residents who are twenty-one or more years of age who are suffering from cystic fibrosis and who meet the eligibility requirements established by the rules of the public health council pursuant to division (A)(4) of section 3701.021 of the Revised Code, subject to all provisions of this section other than division (I);

(K) ~~Provide~~ THE DEPARTMENT SHALL PROVIDE for appeals in accordance with Chapter 119. of the Revised Code for applications FOR THE PROGRAM for medically handicapped children under division (B) or (E) of this section that have been denied by the department or of amounts paid under division (F) of this section.

3702.51 Definitions [Eff. 12-13-90]

As used in sections 3702.51 to 3702.60 of the Revised Code:

(A) "Applicant" means any person that submits an application for a certificate of need under section 3702.54 of the Revised Code and who is designated in the application as the applicant.

(B) "Person" means any individual, corporation, business trust, estate, firm, partnership, association, joint stock company, insurance company, government unit, or other entity.

(C) "Certificate of need" means a written approval granted by the director of health to an applicant to authorize conducting a reviewable activity.

(D) "Health service area" means a geographic region designated by the director of health under section 3702.55 of the Revised Code.

(E) "Health service" means a clinically related service, such as a diagnostic, treatment, rehabilitative, or preventive service, and includes alcohol, drug abuse, and mental health services.

(F) "Health service agency" means an agency designated to serve a health service area in accordance with section 3702.55 of the Revised Code.

(G) "Health care facility" means:

(1) A hospital registered under section 3701.07 of the Revised Code;

(2) A nursing home licensed under section 3721.02 of the Revised Code, or by a political subdivision certified under section 3721.09 of the Revised Code;

(3) A county home or a county nursing home as defined in section 5155.31 of the Revised Code that is certified under Title XVIII or XIX of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C.A. 301, as amended.

(4) A freestanding dialysis center;

(5) A freestanding inpatient rehabilitation facility;

(6) A home health agency, as defined in section 3701.88 of the Revised Code, that utilizes medical equipment that has an acquisition cost of one million dollars or more in providing home health care;

(7) An ambulatory surgical facility;

(8) A freestanding emergency facility;

(9) An urgent care center that is operated by or on behalf of another health care facility;

(10) A freestanding inpatient hospice;

(11) A freestanding cardiac catheterization facility;

(12) A freestanding birthing center;

(13) A freestanding or mobile diagnostic imaging center;

(14) A freestanding radiation therapy center.

A health care facility does not include the offices of private physicians and dentists whether for individual or group practice, Christian Science sanitoriums operated or listed and certified by the First Church of Christ, Scientist, Boston, Massachusetts, residential facilities licensed under section 5123.19 of the Revised Code, or habilitation centers certified by the director of mental retardation and developmental disabilities under section 5111.041 of the Revised Code.

(H) "Medical equipment" means a single unit of medical equipment or a single system of components with related functions that is used to provide health services.

(I) "Third-party payer" means a medical care corporation or health care corporation licensed under Chapter 1737. or 1738. of the Revised Code, a health maintenance organization, an insurance company that issues sickness and accident insurance in conformity with Chapter 3923. of the Revised Code, a state-financed health insurance program under Chapter 3701., 4123., or 5101. of the Revised Code, or any self-insurance plan.

(J) "Government unit" means the state and any county, municipal corporation, township, or other political subdivision of the state, or any department, division, board, or other agency of the state or a political subdivision.

(K) "Health maintenance organization" means a public or private organization organized under the law of any state that is qualified under section 1310(d) of Title XIII of the "Public Health Service Act," 87 Stat. 931 (1973), 42 U.S.C. 300e—9 or that does all of the following:

(1) Provides or otherwise makes available to enrolled participants health care services including at least the following basic health care services: usual physician services, hospitalization, laboratory, x-ray, emergency and preventive services, and out-of-area coverage;

(2) Is compensated, except for copayments, for the provision of basic health care services listed in division (K)(1) of this section to enrolled participants by a payment that is paid on a periodic basis without regard to the date the health care services are provided and that is fixed without regard to the frequency, extent, or kind of health service actually provided;

(3) Provides physician services primarily either:

(a) Directly through physicians who are either employees or partners of the organization; or

(b) Through arrangements with individual physicians or one or more groups of physicians organized on a group practice or individual practice basis.

(L) "Existing health care facility" means a health care facility that is licensed or otherwise approved to practice in this state, in accordance with applicable law, is staffed and equipped to provide health care services, and actively provides health services or has not been actively providing health services for less than twelve consecutive months.

(M) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

(N) "Political subdivision" means a municipal corporation, township, county, school district, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches.

(O) Except as otherwise provided in section 3702.58 of the Revised Code, "affected person" means:

(1) An applicant for a certificate of need, including an applicant whose application was reviewed comparatively with the application in question;

(2) Any person who resides or regularly uses health care facilities within the geographic area served or to be served by the health care services that would be provided under the certificate;

(3) Any health care facility that is located in the health service area where the health care services would be provided under the certificate;

(4) Health care facilities that, before submission of the application in question, filed with the director of health written notice of an intention to provide similar services in the future;

(5) Third-party payers that reimburse health care facilities for services in the health service area where the health care services would be provided under the certificate;

(6) Any other person who testified at a public hearing held under division (B) of section 3702.53 of the Revised Code or who submitted written comments in the course of review of the application in question.

(P) "Osteopathic hospital" means a hospital registered under section 3701.07 of the Revised Code that advocates osteopathic principles and the practice and perpetuation of osteopathic medicine by doing any of the following:

(1) Maintaining a department or service of osteopathic medicine or a committee on the utilization of osteopathic principles and methods, under the supervision of an osteopathic physician;

(2) Maintaining an active medical staff, the majority of which is comprised of osteopathic physicians;

(3) Maintaining a medical staff executive committee that has osteopathic physicians as a majority of its members.

(Q) "Freestanding emergency facility" means any facility other than a hospital-based emergency department that accepts patients from ambulance delivery on a regular basis or otherwise holds itself out as accepting or treating life- or limb-threatening emergencies or employs the word "emergency" in its name or title.

(R) Except as otherwise provided in sections 3702.511, 3702.512, and 3702.513 of the Revised Code and divisions (S), (T), and (U) of this section, "reviewable activity" means any of the following:

(1) The obligation by or on behalf of a health care facility of a capital expenditure associated with the provision of a health service, other than to acquire an existing health care facility, in an amount of two million dollars or more. Whether an expenditure is a capital expenditure shall be determined in accordance with generally accepted accounting principles, except that the cost of any studies, surveys, designs, plans, working drawings, specifications or other activities, including staff effort, consulting, and other services essential to the project shall be considered part of the capital expenditure, and that the acquisition of a capital asset by lease, donation, or any other means for less than fair market value is a capital expenditure in the amount of the fair market value of the asset. For the purposes of this division, an obligation is considered to be incurred by or on behalf of a health care facility:

(a) When a contract enforceable under Ohio law is entered into by or on behalf of a health care facility for the construction, acquisition, lease, or financing of a capital asset;

(b) When the governing board of a health care facility, or another person on behalf of a health care facility, takes formal action to commit its own funds for a construction project undertaken by the health care facility as its own contractor;

(c) In the case of donated property, on the date on which the gift is completed under applicable Ohio law.

(2) The addition of a health service with an average annual operating cost of seven hundred fifty thousand dollars or more for the first three full years of operation that was not offered by or on behalf of a health care facility within the preceding twelve months. Operating costs shall be determined in accordance with generally accepted accounting principles.

(3) The addition of a megavoltage radiation therapy service operated by or on behalf of a health care facility and the addition by any person of any of the following health services, regardless of the amount of operating costs or capital expenditures:

(a) A heart, heart-lung, lung, liver, kidney, bowel, or pancreas transplantation service or a service for transplantation of any other organ unless transplantation of the organ is designated by public health council rule not to be a reviewable activity;

(b) A cardiac catheterization service or the addition of another cardiac catheterization laboratory to an existing service, when the service treats or will treat high-risk patients, including but not limited to those with significant ischemic syndromes, unstable or acute myocardial infarction, patients who need an intervention such as angioplasty or bypass surgery, patients who may require difficult or complex catheterization procedures such as transcepal assessment of valvular dysfunction, and patients with critical aortic stenosis or congestive heart failure. The director of health shall use the Guidelines for Coronary Angiography established by the American Heart Association and American College of Cardiology in determining the high-risk patients for the purposes of division (R)(3)(b) of this section. A cardiac catheterization service or the addition of another cardiac catheterization laboratory to an existing service that does not treat or will not treat high-risk patients is reviewable under division (R)(3)(b) of this section unless it is or will be located within a health care facility that includes at least two hundred and fifty beds registered under section 3701.07 of the Revised Code or had at least eight thousand five hundred admissions in the preceding calendar year.

(c) An open-heart surgery service;

(d) An extracorporeal shockwave lithotripsy service;

(e) Any new technology for which premarket approval has been granted by the United States food and drug administration and that is designated by rule of the public health council, after consideration of the recommendations of a new technology advisory council to be established by the director of health, as a reviewable activity because addition of the new technology will have an impact on the health care system similar to addition of the services listed in division (R)(3) of this section.

(4) The acquisition by any person of medical equipment with a cost of one million dollars or more. The cost of acquiring medical equipment includes the sum of the following:

(a) The greater of its fair market value or the cost of its lease or purchase;

(b) The cost of installation and any other activities essential to the acquisition of the equipment and its placement into service.

(5) The establishment, development, or construction of a new health care facility or a change from one category of health care facility to another;

(6) Any change in the health care services, bed capacity, or site, or any other failure to conduct the reviewable activity in substantial accordance with the approved application for which a certificate of need was granted, if the change is made within eighteen months after the implementation of the reviewable activity for which the certificate was granted;

(7) Any of the following changes in bed capacity of a health care facility:

(a) An increase in bed capacity;

(b) A recategorization of beds registered under section 3701.07 of the Revised Code, other than a recategorization of beds from an adult medical/surgical unit to an existing adult intensive/special care unit, or from a pediatric unit to an existing neonatal or pediatric intensive care unit, by a health care facility with an average occupancy rate of ninety-five per cent or greater for the preceding twelve months in the intensive care unit to which the beds are to be added, and where the recategorization amounts to no more than nine beds or ten per cent of the bed capacity of the unit from which the beds were removed, whichever is less, within a two-year period and associated with a capital expenditure of less than one million five hundred thousand dollars;

(c) A relocation of beds from one physical facility or site to another, excluding the relocation of beds within a health care facility, among buildings of a health care facility at the same site, or between two health care facilities within the same county that are under common ownership, if the relocation of beds is coupled with the relocation of no more than an equal number of beds from the second facility to the first facility and all of the following requirements are met.

(i) At least sixty days before the relocations occur, each facility participating in the relocation files with the director of health a notice of intent to relocate the beds;

(ii) Each relocation involves no more than twenty-five beds or, in the case of a relocation of beds categorized as obstetric and newborn care beds, no more than fifteen obstetric beds together with no more than nineteen newborn care beds;

(iii) After the relocations occur, the relocated beds are categorized as general medical/surgical, general pediatric, or level I or II obstetric or newborn care beds;

(iv) The relocation of the beds does not result in a recategorization of the beds by category of care provided, except that beds categorized as level III obstetric or newborn care beds may be recategorized to level I or II obstetric or newborn care beds;

(v) The number and ownership of the beds to be removed from each facility's complement of beds is determined by an agreement that is entered into between the two facilities and is recorded with the department of health;

(vi) The relocations and bed removals do not result in the termination of a health service offered by either facility on the day immediately preceding the day on which the notice of intent was filed under division (R)(7)(c)(i) of this section;

(vii) After the relocations and removals occur, neither facility has fewer than fifteen beds in any category of care provided from which beds are removed;

(viii) Both facilities operate the health services from which the beds are removed for at least one year after the relocations and removals are completed;

(ix) Any capital expenditure involved in either relocation, including any money paid by either facility to acquire the beds, is less than two million dollars.

(x) No facility may relocate more than twenty-five beds or, in the case of beds categorized as obstetric and newborn care beds, more than fifteen obstetric beds and nineteen newborn care beds, under division (R)(7)(c) of this section.

(xi) A relocation of beds that meets the requirements of division (R)(7)(c) of this section shall not be considered a reviewable activity, even if it meets the definition of reviewable activity established by division (R)(2), (6), (7), (8), or (9) of this section.

(d) A recategorization of hospital beds to skilled nursing beds, under rules adopted by the public health council within six months of the effective date of this amendment AUGUST 5, 1989, in accordance with the following requirements:

(i) No hospital recategorizing beds shall apply for a certificate of need for more than twenty skilled nursing beds pursuant to division (R)(7)(d) of this section.

(ii) No beds recategorized pursuant to this division shall be covered by a provider agreement under Title XIX of the "Social Security Act," ~~49 Stat. 620 (1935), 42 U.S.C. 301, as amended.~~"

(iii) No beds for which a certificate of need was granted pursuant to division (R)(7)(d) of this section shall be reviewed under or counted in any formula developed under public health council rules for the purpose of determining the number of long-term care beds that may be needed within the state.

(iv) No beds shall be approved pursuant to division (R)(7)(d) of this section unless the hospital certifies and demonstrates in the application that the beds will be dedicated to patients with a length of stay of no more than thirty days. In order to assist the director of health in monitoring any approved projects, the public health council shall specify appropriate reporting to the department of health on a quarterly basis. The patient may stay in the bed for more than thirty days if a hospital is able to demonstrate that it made a good faith effort to place a patient in an accessible skilled nursing care facility acceptable to the patient within the thirty-day period but was unable to do so.

(v) No beds shall be approved pursuant to division (R)(7)(d) of this section unless the hospital can satisfactorily demonstrate in the

application that it is routinely unable to place the patients planned for the beds in accessible skilled nursing facilities.

In developing rules to implement division (R)(7)(d) of this section, the public health council shall give special attention to the required documentation of the need for such units, including the efforts made by the hospital to place patients in suitable skilled nursing facilities, and special attention to the appropriate size of such units given the historical pattern of the applicant hospital's documented difficulty in placing such skilled nursing patients.

(vi) Every hospital which reconfigures beds pursuant to this division shall participate in the nursing home placement clearinghouse established in division (R)(7)(d)(vii) of this section, if an appropriate clearinghouse has been designated.

(vii) Nothing in division (R)(7)(d) of this section shall be construed to require a hospital to place a patient in any nursing home if the patient does not wish to be placed in the nursing home. Nothing in division (R)(7)(d) of this section shall be construed to limit the ability of a hospital to file a certificate of need application for the addition of long-term care beds which meet the definition of "bonne" as set forth in division (A) of section 3721.01 of the Revised Code. Nothing in division (R)(7)(d) of this section shall be construed to limit the ability of the department of health to grant certificates of need needed for hospitals to engage in demonstration projects authorized by the federal government for the purpose of enhancing long-term quality of care and cost containment. Nothing in division (R)(7)(d) of this section shall be construed to limit the ability of hospitals to develop swing bed programs in accordance with federal rules REGULATIONS.

No hospital that is granted a certificate of need under division (R)(7)(d) of this section and that complies with that division is subject to Chapter 3721. of the Revised Code, EXCEPT THAT IF THE PORTION OF THE HOSPITAL IN WHICH THE RECATEGORIZED BEDS ARE LOCATED IS CERTIFIED AS A SKILLED NURSING FACILITY UNDER TITLE XVIII OF THE "SOCIAL SECURITY ACT," THAT PORTION OF THE HOSPITAL IS SUBJECT TO SECTIONS 3721.10 TO 3721.17 AND SECTIONS 3721.21 TO 3721.34 OF THE REVISED CODE.

The public health council shall adopt rules authorizing the creation of one or more nursing home placement clearinghouses. Any public or private agency or facility may apply to the department of health to serve as a nursing home placement clearinghouse, and the rules shall provide the procedure for application and process for designation of clearinghouses. The department of health may approve one or more clearinghouses, but in no event shall there be more than one nursing home placement clearinghouse in each county.

The rules shall further provide that when a clearinghouse is designated by the department of health, any nursing home may list with a nursing home placement clearinghouse the services it provides and the types of patients it is approved for and equipped to serve. The clearinghouse shall make reasonable efforts to update its information at least every one hundred eighty days. If an appropriate clearinghouse has been designated, every hospital with skilled nursing beds approved pursuant to division (R)(7)(d) of this section shall, and every other hospital may, utilize the nursing home placement clearinghouse prior to admitting a patient to a skilled nursing bed within the hospital and prior to keeping a patient in a skilled nursing bed within a hospital in excess of thirty days.

The rules shall provide that the department of health shall publish at least annually to all hospitals a list of the designated nursing home placement clearinghouses.

(S) The expenditure of more than one hundred ten per cent of the maximum expenditure specified in a certificate of need;

(9) Any transfer of a certificate of need from the person to whom it was issued to another person before the project that constitutes a reviewable activity is completed, any agreement that contemplates the transfer of a certificate of need upon completion of the project, and any transfer of the controlling interest in a corporation that holds a certificate of need. However, the transfer of a certificate of need or agreement to transfer a certificate of need from the person to whom the certificate of need was issued to an affiliated or related person does not constitute a reviewable transfer of a certificate of need for the purposes of this division, unless the transfer results in a change in the individual or individuals who hold the ultimate controlling interest in the certificate of need.

(S) "Reviewable activity" does not include any of the following activities if a notice of intent relating to the activity is filed with the director of health at least sixty days before the activity is implemented:

(1) Acquisition of computer hardware or software;

(2) Acquisition of a telephone system;

(3) Construction or acquisition of parking facilities;

(4) Correction of cited deficiencies that are in violation of federal, state, or local fire, building, or safety laws and rules and that constitute an imminent threat to public health or safety;

(5) Acquisition of an existing health care facility that does not involve a change in the number of the beds, by service, or in the number or type of health services;

(6) Correction of cited deficiencies identified by accreditation surveys of the joint commission on accreditation of healthcare organizations or of the American osteopathic association;

(7) Acquisition of medical equipment to replace the same or similar equipment for which a certificate of need has been issued if the replaced equipment is removed from service;

(8) Mergers, consolidations, or other corporate reorganizations of health care facilities that do not involve a change in the number of beds, by service, or in the number or type of health services;

(9) Construction, repair, or renovation of bathroom facilities;

(10) Construction of laundry facilities, waste disposal facilities, dietary department projects, heating and air conditioning projects, administrative offices, and portions of medical office buildings used exclusively for physician services;

(11) Acquisition of medical equipment to conduct research required by the United States food and drug administration or clinical trials sponsored by the national institute of health. Use of medical equipment that was acquired without a certificate of need under division (S)(11) of this section and for which premarket approval has been granted by the United States food and drug administration to provide services for which patients or reimbursement entities will be charged shall be a reviewable activity.

(12) Removal of asbestos from a health care facility.

Only that portion of a project that meets the requirements of division (S) of this section is not a reviewable activity. In the case of division (S)(5) of this section, the notice required to be filed with the director of health shall not include the price of acquiring the facility, but the price shall be disclosed to the director in writing within ten days after the acquisition is completed.

(T)(1) "Reviewable activity" does not include the relocation of beds from a hospital to another hospital located in the same county, if the relocation of beds is coupled with the relocation of no more than an equal number of beds from the second hospital to the first hospital and all of the requirements of division (T)(2) of this section are met.

(2) The relocations described in division (T)(1) of this section shall meet all of the following requirements:

(a) At least sixty days before the relocations occur, each hospital participating in the relocation files with the director of health a notice of intent to relocate the beds;

(b) Each relocation involves no more than twenty-five registered beds or, in the case of a relocation of beds categorized as obstetric and newborn care beds, no more than fifteen obstetric beds together with no more than nineteen newborn care beds;

(c) After the relocations occur, the relocated beds are categorized, for the purposes of registration under section 3701.07 of the Revised Code, as general medical/surgical, general pediatric, or level I or II obstetric or newborn care beds;

(d) The relocation of the beds does not result in a recategorization of the beds by category of care provided, except that beds categorized as level III obstetric or newborn care beds may be recategorized to level I or II obstetric or newborn care beds;

(e) In addition to the beds that will be removed from each hospital's complement of registered beds because they have been relocated to the other hospital, the total number of registered beds in the two hospitals participating in the relocations is reduced by fifty per cent of the total number of beds involved in the two relocations. However, if one of the hospitals participating in the relocations had an average occupancy rate of ninety per cent or more for its registered beds during the most recent calendar year, the total number of additional beds to be reduced shall equal twenty-five per cent of the total number of beds involved in the two relocations. If the two hospitals participating in the relocations each had an average occupancy rate of ninety per cent or more for its registered beds during the most recent calendar year, the hospitals shall not be required to make additional reductions in their complements of registered beds.

(f) The number, registration category, and ownership of the beds to be removed from each hospital's complement of registered beds under division (T)(2)(e) of this section is determined by an agreement that is entered into between the two hospitals, is recorded with the department of health, and is binding on the two hospitals;

(g) The relocations and bed removals do not result in the termination of a health service offered by either hospital on the day immediately preceding the day on which the notice of intent was filed under division (T)(2)(a) of this section;

(b) For the purposes of registration under section 3701.07 of the Revised Code, each hospital files with the director of health an accurate statement of the number of beds in each registration category in the hospital within thirty days after completion of the relocations;

(c) After the relocations and removals occur, neither hospital has fewer than fifteen beds in any registration category from which beds are removed;

(d) Both hospitals operate the health services from which the beds are removed for at least one year after the relocations and removals are completed;

(e) Any capital expenditure involved in either relocation, including any money paid by either hospital to acquire the beds, is less than two million dollars.

(3) No hospital may relocate more than twenty-five beds or, in the case of beds categorized as obstetric and newborn care beds, more than fifteen obstetric beds and nineteen newborn care beds, under division (T) of this section.

(4) A relocation of beds that meets the requirements of division (T) of this section shall not be considered a reviewable activity, even if it meets the definition of reviewable activity established by division (R)(2), (6), (7), (8), or (9) of this section.

(U) "Reviewable activity" does not include an ambulatory surgical facility that is located in an existing structure owned directly and totally by one physician licensed under Chapter 4731. of the Revised Code, that on the effective date of this amendment AUGUST 5, 1989, was used primarily by patients of the physician who owns the structure, and for which the physician who owns the structure filed a request for an exception from reviewability under sections 3702.51 to 3702.60 of the Revised Code on or before June 30, 1989. The director of health, with the assistance of the Ohio state medical association, shall develop a definition of "ambulatory surgical facility" and recommend that the public health council adopt the definition as a rule.

(V) "Small rural hospital" means a hospital that is not located within a metropolitan statistical area, has fewer than one hundred beds, and to which fewer than four thousand persons were admitted during the most recent calendar year.

(W) "Children's hospital" means any of the following:

(1) A hospital registered under section 3701.07 of the Revised Code that provides general pediatric medical and surgical care, and in which at least seventy-five per cent of annual inpatient discharges for the preceding two calendar years were individuals less than eighteen years of age;

(2) A distinct portion of a hospital registered under section 3701.07 of the Revised Code that provides general pediatric medical and surgical care, has a total of at least one hundred fifty registered pediatric special care and pediatric acute care beds, and in which at least seventy-five per cent of annual inpatient discharges for the preceding two calendar years were individuals less than eighteen years of age;

(3) A distinct portion of a hospital, if the hospital is registered under section 3701.07 of the Revised Code as a children's hospital and the children's hospital meets all the requirements of division (W)(1) of this section.

(X) "Reviewable activity" does not include the relocation of obstetric beds to a hospital from another hospital within the same county if all of the following requirements are met:

(1) The hospital to which the beds would be relocated has not provided obstetric services within the preceding twelve months;

(2) The two hospitals participating in the relocations are located within a county that on the effective date of this amendment AUGUST 5, 1989, has a population of more than two hundred fifty thousand but less than three hundred thousand and is adjacent to a county that on the effective date of this amendment AUGUST 5, 1989, has a population of more than eight hundred thousand but less than one million;

(3) Before the relocation occurs, the hospital to which the beds would be relocated offers, to every hospital within the same county that is similar to the hospital making the offer in number of beds, ownership structure, and share of hospital revenues within the county, the opportunity to relocate obstetric beds to the hospital. If, within thirty days after the offer is made, the hospital within the county that is, of all the hospitals within the county that are similar to the hospital that made the offer in number of beds, ownership structure, and share of hospital revenues, the hospital that is geographically nearest to the hospital that made the offer, notifies that hospital that it is willing to commence arrangements to enter into an agreement to relocate obstetric beds to that hospital, the hospital that made the offer shall commence arrangements to enter into such an agreement with the notifying hospital or shall not enter into any such agreement. If, within thirty days after the offer is made, such geographically nearest hospital does not notify the hospital that made the offer that it is willing to enter into an agreement to relocate obstetric beds to that hospital, the hospital that made the offer may commence arrangements to enter into such an agreement with any hospital it is required to notify under division (X)(3) of this section.

(4) Any agreement entered into under division (X) of this section shall meet all of the following requirements:

(a) At least sixty days before the relocations occur, each hospital participating in the relocations files with the director of health a notice of intent to relocate the beds;

(b) Each relocation involves no more than twenty-five registered beds;

(c) In addition to the beds that will be removed from each hospital's complement of registered beds because they have been relocated to the other hospital, the total number of registered beds in the two hospitals participating in the relocations is reduced by fifty per cent of the total number of beds involved in the two relocations;

(d) The number and ownership of the beds to be removed from each hospital's complement of registered beds is determined by an agreement that is entered into between the two hospitals, is recorded with the department of health, and is binding upon the two hospitals;

(e) The relocations and bed removals do not result in the termination of a health service by either hospital on the day immediately preceding the day on which the notice of intent is filed under division (X)(4)(a) of this section;

(f) No hospital relocates more than twenty-five beds under division (W) of this section.

3721.011 Health department responsible for establishing and maintaining health standards [Eff. 12-13-90]

(A) AS USED IN THIS SECTION:

(1) "NURSING FACILITY" HAS THE SAME MEANING AS IN SECTION 5111.20 OF THE REVISED CODE.

(2) "DEFICIENCY" AND "SURVEY" HAVE THE SAME MEANINGS AS IN SECTION 5111.35 OF THE REVISED CODE.

(B) THE DEPARTMENT OF HEALTH IS HEREBY DESIGNATED THE STATE AGENCY RESPONSIBLE FOR ESTABLISHING AND MAINTAINING HEALTH STANDARDS AND SERVING AS THE STATE SURVEY AGENCY FOR THE PURPOSES OF TITLES XVIII AND XIX OF THE "SOCIAL SECURITY ACT," 49 STAT. 620 (1935), 42 U.S.C.A. 301, AS AMENDED. THE DEPARTMENT SHALL CARRY OUT THESE FUNCTIONS IN ACCORDANCE WITH THE REGULATIONS, GUIDELINES, AND PROCEDURES ISSUED UNDER TITLES XVIII AND XIX BY THE UNITED STATES SECRETARY OF HEALTH AND HUMAN SERVICES AND WITH SECTIONS 5111.35 TO 5111.62 OF THE REVISED CODE. THE DIRECTOR OF HEALTH SHALL ENTER INTO AGREEMENTS WITH REGARD TO THESE FUNCTIONS WITH THE DEPARTMENT OF HUMAN SERVICES AND THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES. THE DIRECTOR MAY ALSO ENTER INTO AGREEMENTS WITH THE DEPARTMENT OF HUMAN SERVICES UNDER WHICH THE DEPARTMENT OF HEALTH IS DESIGNATED TO PERFORM FUNCTIONS UNDER SECTIONS 5111.35 TO 5111.62 OF THE REVISED CODE.

THE DIRECTOR, IN ACCORDANCE WITH CHAPTER 119. OF THE REVISED CODE, SHALL ADOPT RULES NECESSARY TO IMPLEMENT THE SURVEY AND CERTIFICATION REQUIREMENTS FOR SKILLED NURSING FACILITIES AND NURSING FACILITIES ESTABLISHED BY THE UNITED STATES SECRETARY OF HEALTH AND HUMAN SERVICES UNDER TITLES XVIII AND XIX OF THE "SOCIAL SECURITY ACT," AND THE SURVEY REQUIREMENTS ESTABLISHED UNDER SECTIONS 5111.35 TO 5111.62 OF THE REVISED CODE. THE RULES SHALL INCLUDE AN INFORMAL PROCESS BY WHICH A FACILITY MAY OBTAIN A REVIEW OF DEFICIENCIES THAT HAVE BEEN CITED ON A STATEMENT OF DEFICIENCIES MADE BY THE DEPARTMENT OF HEALTH UNDER SECTION 5111.42 OF THE REVISED CODE. THE REVIEW SHALL BE CONDUCTED BY AN EMPLOYEE OF THE DEPARTMENT WHO DID NOT PARTICIPATE IN AND WAS NOT OTHERWISE INVOLVED IN ANY WAY WITH THE SURVEY. IF THE EMPLOYEE CON-

DUCTING THE REVIEW DETERMINES THAT ANY DEFICIENCY CITATION IS UNJUSTIFIED, THAT DETERMINATION SHALL BE REFLECTED CLEARLY IN ALL RECORDS RELATING TO THE SURVEY.

THE DIRECTOR NEED NOT ADOPT AS RULES ANY OF THE REGULATIONS, GUIDELINES, OR PROCEDURES ISSUED UNDER TITLES XVIII AND XIX OF THE "SOCIAL SECURITY ACT" BY THE UNITED STATES SECRETARY OF HEALTH AND HUMAN SERVICES.

3721.031 Investigation of complaints; confidentiality of information [EFF. 12-13-90]

(A) THE DIRECTOR OF HEALTH MAY INVESTIGATE ANY COMPLAINT HE RECEIVES CONCERNING A HOME.

(1) EXCEPT AS REQUIRED BY COURT ORDER, AS NECESSARY FOR THE ADMINISTRATION OR ENFORCEMENT OF ANY STATUTE RELATING TO HOMES, OR AS PROVIDED IN DIVISION (C) OF THIS SECTION, THE DIRECTOR AND ANY EMPLOYEE OF THE DEPARTMENT OF HEALTH SHALL NOT RELEASE ANY OF THE FOLLOWING INFORMATION WITHOUT THE PERMISSION OF THE INDIVIDUAL OR OF HIS LEGAL REPRESENTATIVE:

(a) THE IDENTITY OF ANY PATIENT OR RESIDENT;

(b) THE IDENTITY OF ANY INDIVIDUAL WHO SUBMITS A COMPLAINT ABOUT A HOME;

(c) THE IDENTITY OF ANY INDIVIDUAL WHO PROVIDES THE DIRECTOR WITH INFORMATION ABOUT A HOME AND HAS REQUESTED CONFIDENTIALITY;

(d) ANY INFORMATION THAT REASONABLY WOULD TEND TO DISCLOSE THE IDENTITY OF ANY INDIVIDUAL DESCRIBED IN DIVISION (A)(1)(a) TO (c) OF THIS SECTION.

(2) AN AGENCY OR INDIVIDUAL TO WHOM THE DIRECTOR IS REQUIRED, BY COURT ORDER OR FOR THE ADMINISTRATION OR ENFORCEMENT OF A STATUTE RELATING TO HOMES, TO RELEASE INFORMATION DESCRIBED IN DIVISION (A)(1) OF THIS SECTION SHALL NOT RELEASE THE INFORMATION WITHOUT THE PERMISSION OF THE INDIVIDUAL WHO WOULD BE OR WOULD REASONABLY TEND TO BE IDENTIFIED, OR OF HIS LEGAL REPRESENTATIVE, UNLESS THE AGENCY OR INDIVIDUAL IS REQUIRED TO RELEASE IT BY DIVISION (C) OF THIS SECTION, BY COURT ORDER, OR FOR THE ADMINISTRATION OR ENFORCEMENT OF A STATUTE RELATING TO HOMES.

(B) EXCEPT AS PROVIDED IN DIVISION (C) OF THIS SECTION, ANY RECORD THAT IDENTIFIES AN INDIVIDUAL DESCRIBED IN DIVISION (A)(1)(a) TO (c) OF THIS SECTION OR THAT REASONABLY WOULD TEND TO IDENTIFY SUCH AN INDIVIDUAL IS NOT A PUBLIC RECORD FOR THE PURPOSES OF SECTION 149.43 OF THE REVISED CODE, AND IS NOT SUBJECT TO INSPECTION AND COPYING UNDER SECTION 1347.08 OF THE REVISED CODE.

(C) IF THE DIRECTOR, OR AN AGENCY OR INDIVIDUAL TO WHOM THE DIRECTOR IS REQUIRED BY COURT ORDER OR FOR ADMINISTRATION OR ENFORCEMENT OF A STATUTE RELATING TO HOMES TO RELEASE INFORMATION DESCRIBED IN DIVISION (A)(1) OF THIS SECTION, USES INFORMATION IN ANY ADMINISTRATIVE OR JUDICIAL PROCEEDING AGAINST A HOME THAT REASONABLY WOULD TEND TO IDENTIFY AN INDIVIDUAL DESCRIBED IN DIVISION (A)(1)(a) TO (c) OF THIS SECTION, THE DIRECTOR, AGENCY, OR INDIVIDUAL SHALL DISCLOSE THAT INFORMATION TO THE HOME. HOWEVER, THE DIRECTOR, AGENCY, OR INDIVIDUAL SHALL NOT DISCLOSE INFORMATION THAT DIRECTLY IDENTIFIES AN INDIVIDUAL DESCRIBED IN DIVISIONS (A)(1)(a) TO (c) OF THIS SECTION, UNLESS THE INDIVIDUAL IS TO TESTIFY IN THE PROCEEDINGS.

(D) NO PERSON SHALL KNOWINGLY REGISTER A FALSE COMPLAINT ABOUT A HOME WITH THE DIRECTOR, OR KNOWINGLY SWEAR OR AFFIRM THE TRUTH OF A FALSE COMPLAINT, WHEN THE COMPLAINT IS MADE FOR THE PURPOSE OF INCRIMINATING ANOTHER.

3721.04 Rules; standards [EFF. 12-13-90]

(A) The public health council shall make and publish uniform rules governing the operation of homes, which shall have uniform application throughout the state, and which shall prescribe standards for such homes with respect to, but not limited to, the following matters:

(1) The minimum space requirements for occupants and equipping of the buildings in which such homes are housed so as to ensure healthful, safe, sanitary, and comfortable conditions for all residents, so long as they are not inconsistent with Chapters 3781. and 3791. of the Revised Code or with any rules adopted by the board of building standards and by the state fire marshal;

(2) The number and qualifications of personnel, including management and nursing staff, for each class of home, and the qualifications of nurse aides, as defined in section ~~3721.27~~ 3721.21 of the Revised Code, used by long-term care facilities, as defined in that section;

(3) The medical, rehabilitative, and recreational services to be provided by each class of home;

(4) Dietetic services, including but not limited to sanitation, nutritional adequacy, and palatability of food;

(5) The personal and social services to be provided by each class of home;

(6) The business and accounting practices to be followed and the type of patient and business records to be kept by such homes.

(B) The PUBLIC HEALTH council may make ADOPT whatever additional rules are necessary to carry out or enforce the provisions of sections 3721.01 to 3721.09 and 3721.99 of the Revised Code.

(C) In adopting rules under division (A)(2) of this section regarding the number and qualifications of personnel in rest homes, the public health council shall take into consideration the effect that the provision of personal care services and services under division (C) of section 3721.011 of the Revised Code may have on the number of personnel needed in rest homes. The rules prescribing qualifications of nurse aides shall be no less stringent than the requirements, guidelines, and procedures established by the United States secretary of health and human services under sections 1819 and 1919 of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C.A. 301, as amended.

3721.07 Conditions for issuance of license [EFF. 12-13-90]

Every person desiring to operate a home as ~~defined in section 3721.01 of the Revised Code~~ shall apply for such a license to the director of health. The director shall issue a license for the home, if after investigation of the applicant and inspection of the home, the following requirements or conditions are satisfied or complied with:

(A) The applicant has not been convicted of a felony or a crime involving moral turpitude;

(B) The applicant is not violating any of the rules made by the public health council or any order issued by the director of health;

(C) The buildings in which the home is housed have been approved by the state fire marshal or a township, municipal, or other legally constituted fire department approved by the marshal. In the approval of a home such agencies shall apply standards prescribed by the board of building standards, and by the state fire marshal, and by section 3721.071 of the Revised Code.

(D) The applicant, if it is an individual, or the principal participants, if it is an association or a corporation, is or are suitable financially and morally to operate a home ~~defined in section 3721.01 of the Revised Code~~;

(E) The applicant is equipped to furnish humane, kind, and adequate treatment and care;

(F) The home does not maintain or contain:

(1) Facilities for the performance of major surgical procedures;

(2) Facilities for providing therapeutic radiation;

(3) An emergency ward;

(4) A clinical laboratory unless it is under the supervision of a clinical pathologist who is a licensed physician in this state;

(5) Facilities for radiological examinations unless such examinations are performed only by a person licensed to practice medicine, surgery, or dentistry in this state.

(G) The home does not accept or treat outpatients, except upon the written orders of a physician licensed in this state, maternity cases, boarding children, and does not house transient guests housed for twenty-four hours or less;

(H) The home is in compliance with sections ~~3721.27~~ to 3721.28 AND 3721.29 of the Revised Code.

When the director issues a license, the license shall remain in effect until revoked by the director or voided at the request of the applicant; provided, there shall be an annual renewal fee payable during the month of January of each calendar year.

Any applicant who is denied a license may appeal in accordance with Chapter 119. of the Revised Code.

~~3721.88 Injunctive relief in court of common pleas [Eff. 12-13-90]~~

~~The~~ (A) AS USED IN THIS SECTION, "REAL AND PRESENT DANGER" MEANS IMMINENT DANGER OF SERIOUS PHYSICAL OR LIFE-THREATENING HARM TO ONE OR MORE OCCUPANTS OF A HOME.

~~(B) THE director of health shall~~ MAY petition the court of common pleas of the county in which the home is located for an order enjoining any person, ~~firm, partnership, association, or corporation,~~ from operating a home ~~as defined in section 3721.01 of the Revised Code~~ without a license ~~or from operating a home where, in the director's judgment, there is a real and present danger to the health or safety of any occupants of the home.~~ The court shall have jurisdiction to grant such injunctive relief upon a showing that the respondent named in the petition is operating a home without a license. THE COURT SHALL HAVE JURISDICTION TO GRANT SUCH INJUNCTIVE RELIEF AGAINST THE OPERATION OF A HOME WITHOUT A LICENSE REGARDLESS OF WHETHER THE HOME MEETS ESSENTIAL LICENSING REQUIREMENTS.

(C) UNLESS THE DEPARTMENT OF HUMAN SERVICES OR CONTRACTING AGENCY HAS TAKEN ACTION UNDER SECTION 5111.51 OF THE REVISED CODE TO APPOINT A TEMPORARY MANAGER OR SEEK INJUNCTIVE RELIEF, IF, IN THE JUDGMENT OF THE DIRECTOR OF HEALTH, REAL AND PRESENT DANGER EXISTS AT ANY HOME, THE DIRECTOR MAY PETITION THE COURT OF COMMON PLEAS OF THE COUNTY IN WHICH THE HOME IS LOCATED FOR SUCH INJUNCTIVE RELIEF AS IS NECESSARY TO CLOSE THE HOME, TRANSFER ONE OR MORE OCCUPANTS TO OTHER HOMES OR OTHER APPROPRIATE CARE SETTINGS, or OTHERWISE ELIMINATE THE REAL AND PRESENT DANGER. THE COURT SHALL HAVE THE JURISDICTION TO GRANT SUCH INJUNCTIVE RELIEF UPON A SHOWING THAT ~~there is a real and present danger to the health or safety of any occupants of the home.~~

(D)(1) IF THE DIRECTOR DETERMINES THAT REAL AND PRESENT DANGER EXISTS AT A HOME AND ELECTS NOT TO IMMEDIATELY SEEK INJUNCTIVE RELIEF UNDER DIVISION (C) OF THIS SECTION, HE MAY GIVE WRITTEN NOTICE TO THE HOME. THE NOTICE SHALL SPECIFY ALL OF THE FOLLOWING:

(a) THE NATURE OF THE CONDITIONS GIVING RISE TO THE REAL AND PRESENT DANGER;

(b) THE MEASURES THAT THE DIRECTOR DETERMINES THE HOME MUST TAKE TO RESPOND TO THE CONDITIONS;

(c) THE DATE ON WHICH THE DIRECTOR INTENDS TO SEEK INJUNCTIVE RELIEF UNDER DIVISION (C) OF THIS SECTION IF HE DETERMINES THAT REAL AND PRESENT DANGER EXISTS AT THE HOME.

(2) IF THE HOME NOTIFIES THE DIRECTOR, WITHIN THE TIME SPECIFIED PURSUANT TO DIVISION (D)(1)(c) OF THIS SECTION, THAT IT BELIEVES THE CONDITIONS GIVING RISE TO THE REAL AND PRESENT DANGER HAVE BEEN SUBSTANTIALLY CORRECTED, THE DIRECTOR SHALL CONDUCT AN INSPECTION TO DETERMINE WHETHER REAL AND PRESENT DANGER EXISTS. IF THE DIRECTOR DETERMINES ON THE BASIS OF THE INSPECTION THAT REAL AND PRESENT DANGER EXISTS, HE MAY PETITION UNDER DIVISION (C) OF THIS SECTION FOR INJUNCTIVE RELIEF.

(E)(1) IF IN THE JUDGMENT OF THE DIRECTOR OF HEALTH CONDITIONS EXIST AT A HOME THAT WILL GIVE RISE TO REAL AND PRESENT DANGER IF NOT CORRECTED, THE DIRECTOR SHALL GIVE WRITTEN NOTICE TO THAT EFFECT TO THE HOME. THE NOTICE SHALL SPECIFY ALL OF THE FOLLOWING:

(a) THE NATURE OF THE CONDITIONS GIVING RISE TO THE DIRECTOR'S JUDGMENT;

(b) THE MEASURES THAT THE DIRECTOR DETERMINES THE HOME MUST TAKE TO RESPOND TO THE CONDITIONS;

(c) THE DATE, WHICH SHALL BE NO LESS THAN TEN DAYS AFTER THE NOTICE IS DELIVERED, ON WHICH THE DIRECTOR INTENDS TO SEEK INJUNCTIVE RELIEF UNDER DIVISION (C) OF THIS SECTION IF THE CONDITIONS ARE NOT SUBSTANTIALLY CORRECTED AND HE DETERMINES THAT A REAL AND PRESENT DANGER EXISTS.

(2) IF THE HOME NOTIFIES THE DIRECTOR, WITHIN THE PERIOD OF TIME SPECIFIED PURSUANT TO DIVISION (E)(1)(c) OF THIS SECTION, THAT THE CONDITIONS GIVING RISE TO THE DIRECTOR'S DETERMINATION HAVE BEEN SUBSTANTIALLY CORRECTED, THE DIRECTOR SHALL CONDUCT AN INSPECTION. IF THE DIRECTOR DETERMINES ON THE BASIS OF THE INSPECTION THAT THE CONDITIONS HAVE NOT BEEN CORRECTED AND A REAL AND PRESENT DANGER EXISTS, HE MAY PETITION UNDER DIVISION (C) OF THIS SECTION FOR INJUNCTIVE RELIEF.

(F)(1) A COURT THAT GRANTS INJUNCTIVE RELIEF UNDER DIVISION (C) OF THIS SECTION MAY ALSO APPOINT A SPECIAL MASTER WHO, SUBJECT TO DIVISION (F)(2) OF THIS SECTION, SHALL HAVE SUCH POWERS AND AUTHORITY OVER THE HOME AND LENGTH OF APPOINTMENT AS THE COURT CONSIDERS NECESSARY. SUBJECT TO DIVISION (F)(2) OF THIS SECTION, THE SALARY OF A SPECIAL MASTER AND ANY COSTS INCURRED BY A SPECIAL MASTER SHALL BE THE OBLIGATION OF THE HOME.

(2) NO SPECIAL MASTER SHALL ENTER INTO ANY EMPLOYMENT CONTRACT ON BEHALF OF A HOME, OR PURCHASE WITH THE HOME'S FUNDS ANY CAPITAL GOODS TOTALING MORE THAN TEN THOUSAND DOLLARS, UNLESS THE SPECIAL MASTER HAS OBTAINED APPROVAL FOR THE CONTRACT OR PURCHASE FROM THE HOME'S OPERATOR OR THE COURT.

(G) IF THE DIRECTOR TAKES ACTION UNDER DIVISION (C), (D), OR (E) OF THIS SECTION, HE MAY ALSO APPOINT EMPLOYEES OF THE DEPARTMENT OF HEALTH TO CONDUCT ON-SITE MONITORING OF THE HOME. APPOINTMENT OF MONITORS IS NOT SUBJECT TO APPEAL UNDER CHAPTER 119. OR ANY OTHER SECTION OF THE REVISED CODE. NO EMPLOYEE OF A HOME FOR WHICH MONITORS ARE APPOINTED, NO PERSON EMPLOYED BY THE HOME WITHIN THE PREVIOUS TWO YEARS, AND NO PERSON WHO CURRENTLY HAS A CONSULTING CONTRACT WITH THE DEPARTMENT OR A HOME, SHALL BE APPOINTED UNDER THIS DIVISION. EVERY MONITOR SHALL HAVE THE PROFESSIONAL QUALIFICATIONS NECESSARY TO MONITOR CORRECTION OF THE CONDITIONS THAT GIVE RISE TO OR, IN THE DIRECTOR'S JUDGMENT, WILL GIVE RISE TO REAL AND PRESENT DANGER. THE NUMBER OF MONITORS PRESENT AT A HOME AT ANY GIVEN TIME SHALL NOT EXCEED ONE FOR EVERY FIFTY RESIDENTS, OR FRACTION THEREOF.

(H) ON FINDING THAT THE REAL AND PRESENT DANGER FOR WHICH INJUNCTIVE RELIEF WAS GRANTED UNDER DIVISION (C) OF THIS SECTION HAS BEEN ELIMINATED AND THAT THE HOME'S OPERATOR HAS DEMONSTRATED THE CAPACITY TO PREVENT THE REAL AND PRESENT DANGER FROM RECURRING, THE COURT SHALL TERMINATE ITS JURISDICTION OVER THE HOME AND RETURN CONTROL AND MANAGEMENT OF THE HOME TO THE OPERATOR. IF THE REAL AND PRESENT DANGER CANNOT BE ELIMINATED PRACTICABLY WITHIN A REASONABLE TIME FOLLOWING APPOINTMENT OF A SPECIAL MASTER, THE COURT MAY ORDER THE SPECIAL MASTER TO CLOSE THE HOME AND TRANSFER ALL RESIDENTS TO OTHER HOMES OR OTHER APPROPRIATE CARE SETTINGS.

(I) THE DIRECTOR OF HEALTH SHALL GIVE NOTICE UNDER DIVISIONS (D) AND (E) OF THIS SECTION TO BOTH OF THE FOLLOWING:

(1) THE HOME'S ADMINISTRATOR;

(2) IF THE HOME IS OPERATED BY AN ORGANIZATION DESCRIBED IN SUBSECTION 501(c)(3) AND TAX EXEMPT UNDER SUBSECTION 501(a) OF THE "INTERNAL REVENUE CODE OF 1986," 100 STAT. 2085, 26 U.S.C.A. 1, AS AMENDED, THE BOARD OF TRUSTEES OF THE ORGANIZATION; OR, IF THE HOME IS NOT OPERATED BY SUCH AN ORGANIZATION, THE OWNER OF THE HOME.

NOTICES SHALL BE DELIVERED BY CERTIFIED MAIL OR HAND DELIVERY. IF NOTICES ARE MAILED, THEY SHALL BE ADDRESSED TO THE PERSONS SPECIFIED IN DIVISIONS (I)(1) AND (2) OF THIS SECTION, AS INDICATED IN THE DEPARTMENT OF HEALTH'S RECORDS. IF THEY ARE HAND DELIVERED, THEY SHALL BE DELIVERED TO

PERSONS WHO WOULD REASONABLY APPEAR TO THE AVERAGE PRUDENT PERSON TO HAVE AUTHORITY TO ACCEPT THEM.

3721.10 Definitions [Eff. 12-13-90]

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

(A) "Home" means a ALL OF THE FOLLOWING:

(1) A home as defined in section 3721.01 of the Revised Code; and,

(2) ANY facility or part of a facility not defined as a home under such section 3721.01 OF THE REVISED CODE that is authorized to provide extended care services CERTIFIED AS A SKILLED NURSING FACILITY under Title XVIII of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C.A. 301, as amended, or AS a NURSING FACILITY AS DEFINED IN SECTION 5111.20 OF THE REVISED CODE;

(3) A county home or district home operated pursuant to Chapter 5155. of the Revised Code.

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

(C) "Administrator" with MEANS ALL OF THE FOLLOWING:

(1) WITH respect to a home as defined in section 3721.01 of the Revised Code means, a nursing home administrator as defined in section 4751.01 of the Revised Code; with

(2) WITH respect to a facility or part of a facility not defined as a home in section 3721.01 of the Revised Code that is authorized to provide extended care SKILLED NURSING FACILITY OR NURSING FACILITY services means, the administrator of the facility or part of a facility; and with

(3) WITH respect to a county home or district home means, the superintendent appointed under Chapter 5155. of the Revised Code.

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

(E) "Residents' rights advocate" means:

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

(2) An employee or representative of any private nonprofit corporation or association that qualifies for tax-exempt status under section 501(a) of the "Internal Revenue Code of 1954 1986," 68A 100 Stat. 3 2085, 26 U.S.C.A. 1, as amended, and that has registered with the department of health under division (B) of section 3701.07 of the Revised Code and whose purposes include educating and counseling residents, assisting residents in resolving problems and complaints concerning their care and treatment, and assisting them in securing adequate services to meet their needs;

(3) A member of the general assembly.

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

(G) "Chemical restraint" means any drug MEDICATION BEARING THE AMERICAN HOSPITAL FORMULARY SERVICE THERAPEUTIC CLASS 4.08, 28:16.08, 28:24.08, OR 28:24.92 that is listed in the schedules of controlled substances under section 3719.41 of the Revised Code as a substance having a depressant effect on ALTERS THE FUNCTIONING OF the central nervous system or chlorpromazine hydrochloride IN A MANNER THAT LIMITS PHYSICAL AND COGNITIVE FUNCTIONING TO THE DEGREE THAT THE RESIDENT CANNOT ATTAIN HIS HIGHEST PRACTICABLE PHYSICAL, MENTAL, AND PSYCHOSOCIAL WELL-BEING.

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

3721.12 Duties of administrator of a home [Eff. 12-13-90]

(A) The administrator of a home shall:

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

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

(3) Furnish TO EACH RESIDENT AND SPONSOR PRIOR TO OR AT THE TIME OF ADMISSION, AND TO EACH MEMBER OF THE HOME'S STAFF, at least one OF EACH OF THE FOLLOWING:

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

(b) A WRITTEN EXPLANATION OF THE PROVISIONS OF SECTION 3721.16 OF THE REVISED CODE;

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

(d) A COPY OF the home's rules; and

(e) A COPY OF the addresses and telephone numbers of the board of health of the health district of the county in which the home is located, the COUNTY department of human services of the county in which the home is located, the Ohio STATE departments of health and human services, the state and local offices of the department of aging, and any Ohio nursing home ombudsman programs, to:

(a) Each resident and sponsor prior to or at the time of admission;

(b) Each member of the home's staff.

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

(C) The administrator shall post ALL OF THE FOLLOWING prominently within the home:

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

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

(3) A notice that a copy of this chapter, rules of the department of health applicable to the home, and federal regulations adopted under Titles XVIII and XIX of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C.A. 301, as amended, and the materials required to be available in the home under section 3721.021 of the Revised Code, are available for inspection in the home at reasonable hours;

(4) A list of residents' rights advocates;

(5) IF THE HOME IS LICENSED UNDER SECTION 3721.02 OF THE REVISED CODE, A COPY OF THE MOST RECENT LICENSURE INSPECTION REPORT PREPARED FOR THE HOME UNDER THAT SECTION AND, IF THE HOME IS A NURSING FACILITY AS DEFINED IN SECTION 5111.20 OF THE REVISED CODE, A COPY OF THE MOST RECENT STATEMENT OF DEFICIENCIES ISSUED TO THE HOME UNDER SECTION 5111.62 OF THE REVISED CODE.

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

3721.13 Rights of residents of a home; sponsor; attempted waiver void [Eff. 12-13-90]

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

(1) The right to a safe and clean living environment pursuant to Titles XVIII and XIX of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C.A. 301, as amended, and applicable state laws and regulations prescribed by the public health council;

(2) The right TO BE FREE FROM PHYSICAL, VERBAL, MENTAL, AND EMOTIONAL ABUSE AND to be treated at all times with courtesy and, respect, and full recognition of dignity and individuality;

(3) Upon admission and thereafter, the right to adequate and appropriate medical treatment and nursing care and to other ANCILLARY services that comprise necessary and appropriate care consistent with the program for which the resident contracted;. THIS CARE SHALL BE PROVIDED without regard to considerations such as race, color, religion, national origin, age, or source of payment for care;

(4) The right to have all reasonable requests and inquiries responded to promptly;

(5) The right to have clothes and bed sheets changed as the need arises, to ensure the resident's comfort or sanitation;

(6) The right to obtain from the home, upon request, the name and any specialty of any physician or other person responsible for the resident's care or for the coordination of care;

(7) The right, upon request, to be assigned, within the capacity of the home to make the assignment, to the staff physician of the resident's choice, and the right, in accordance with the rules and written policies and procedures of the home, to select as the attending physician a physician who is not on the staff of the home. If the cost of a physician's services is to be met under a federally supported program, the physicians shall meet the federal laws and regulations governing such services.

(8) The right, in accordance with the rules of the home, TO PARTICIPATE IN DECISIONS THAT AFFECT THE RESIDENT'S LIFE, INCLUDING THE RIGHT to communicate with the physician AND EMPLOYEES OF THE HOME in planning the resident's treatment or care and to obtain from the attending physician complete and current information concerning medical condition, prognosis, and treatment plan, in terms the resident can reasonably be expected to understand; the right of access to all information in his medical record; and the right to give or withhold informed consent for treatment after the consequences of that choice have been carefully explained. When the attending physician finds that it is not medically advisable to give the information to the resident, the information shall be made available to the resident's attorney or to the sponsor on the resident's behalf, if the sponsor has a legal interest or is authorized by the resident to receive the information. The home is not liable for a violation of this division if the violation is found to be the result of an act or omission on the part of a physician selected by the resident who is not otherwise affiliated with the home.

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

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

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

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

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

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

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

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

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

(16) THE RIGHT OF ACCESS TO OPPORTUNITIES THAT ENABLE THE RESIDENT, AT HIS EXPENSE OR AT THE EXPENSE OF A THIRD-PARTY PAYER, TO ACHIEVE HIS FULLEST POTENTIAL, INCLUDING EDUCATIONAL, VOCATIONAL, SOCIAL, RECREATIONAL, AND HABILITATION PROGRAMS;

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

~~(17)~~(18) The right to use tobacco at his own expense under the home's safety rules and under applicable laws and rules of the state, unless not medically advisable as documented in his medical record by the attending physician or unless contradictory to written admission policies;

~~(18)~~(19) The right to retire and rise in accordance with his reasonable requests, if he does not disturb others or the posted meal schedules and upon the home's request remains in a supervised area, unless not medically advisable as documented by the attending physician;

~~(19)~~(20) The right to observe religious obligations and participate in religious activities; the right to maintain individual and cultural identity; and the right to meet with and participate in activities of social and community groups at the resident's or the group's initiative, unless not medically advisable as documented in his medical record by the attending physician;

~~(20)~~(21) The right upon reasonable request to private and unrestricted communications with his family, social worker, and any other person, unless not medically advisable as documented in his medical record by the attending physician, except that communications with public officials or with his attorney or physician shall not be restricted. Private and unrestricted communications shall include, but are not limited to, the right to:

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

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

(c) Private visits at any reasonable hour.

~~(21)~~(22) The right to assured privacy for visits by the spouse, or if both are residents of the same home, the right to share a room within the capacity of the home, unless not medically advisable as documented in his medical record by the attending physician;

~~(22)~~(23) The right upon reasonable request to have room doors closed and to have them not opened without knocking, except in the case of an emergency or unless not medically advisable as documented in his medical record by the attending physician;

~~(23)~~(24) The right to retain and use personal clothing and a reasonable amount of possessions, in a reasonably secure manner, unless to do so would infringe on the rights of other residents or would not be medically advisable as documented in his medical record by the attending physician;

~~(24)~~(25) The right to be fully informed, prior to or at the time of admission and during his stay, in writing, of the basic rate charged by the home, of services available in the home, and of any additional charges related to such services, including charges for services not covered under Titles XVIII and XIX of the "Social Security Act," ~~49 Stat. 620 (1935), 42 U.S.C. 301, as amended.~~" The basic rate shall not be changed unless thirty days notice is given to the resident or, if the resident is unable to understand this information, to his sponsor.

~~(25)~~(26) The right of the resident and person paying for the care to examine and receive a bill at least monthly for the resident's care from the home that itemizes charges not included in the basic rate;

~~(26)~~(27)(a) The right TO BE FREE FROM FINANCIAL EXPLOITATION;

(b) THE RIGHT to manage his personal financial affairs, or, ~~should the home accept written delegation of~~ IF HE HAS DELEGATED this responsibility IN WRITING TO THE HOME, to receive upon written request at least a quarterly accounting statement of financial transactions made on his behalf. The statement shall include:

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

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

~~(27)~~(28) The right of the resident to be allowed unrestricted access to his property on deposit at reasonable hours, unless

requests for access to property on deposit are so persistent, continuous, and unreasonable that they constitute a nuisance;

~~(28)~~(29) THE RIGHT TO RECEIVE REASONABLE NOTICE BEFORE HIS ROOM OR ROOMMATE IS CHANGED, INCLUDING AN EXPLANATION OF THE REASON FOR EITHER CHANGE.

(30) The right not to be transferred or discharged from the home except for medical reasons, for his welfare or another resident's, for nonpayment of charges due the home, if the home's license is revoked under section 3721.03 of the Revised Code THIS CHAPTER, if the home is being closed pursuant to SECTIONS 5111.35 TO 5111.62 OR section 5155.31 of the Revised Code, or if he is a recipient of medical assistance under section 5101.61 5111.01 of the Revised Code in a home whose certification PARTICIPATION IN THE MEDICAL ASSISTANCE PROGRAM is terminated or denied, OR IF HE IS A BENEFICIARY under Title XVIII or XIX of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C. 301, as amended IN A HOME WHOSE CERTIFICATION UNDER TITLE XVIII IS TERMINATED OR DENIED.

~~(29)~~(31) The right to voice grievances and recommend changes in policies and services to the home's staff, to employees of the department of health, or to other persons not associated with the operation of the home, of the resident's choice, free from restraint, interference, coercion, discrimination, or reprisal. This right includes access to a residents' rights advocate, and the right to be a member of, to be active in, and to associate with persons who are active in organizations of relatives and friends of nursing home residents and other organizations engaged in assisting residents.

~~(30)~~(32) The right to have any significant change in his health status reported to his sponsor. As soon as such a change is known to the home's staff, the home shall make a reasonable effort to notify the sponsor within twelve hours.

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

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

3721.14 Additional provisions for implementation of rights [Eff. 12-13-90]

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

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

(1) The resident's rights and the staff's responsibility in the implementation of the rights;

(2) The staff's obligation to provide all residents who have similar needs with comparable service.

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

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

(D) ADEQUATE INDOOR SPACE, WHICH NEED NOT BE DEDICATED TO THAT PURPOSE, FOR FAMILIES OF RESIDENTS TO MEET PRIVATELY WITH FAMILIES OF OTHER RESIDENTS;

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

(1) Employees of the Ohio department of health, Ohio department of mental health, Ohio department of mental retardation and developmental disabilities, Ohio department of aging, Ohio STATE department of human services, and county departments of human services;

(2) Prospective residents and their sponsors;

(3) A resident's sponsors;

(4) Residents' rights advocates;

(5) A resident's attorney;

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

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

3721.15 Authority for home to manage resident's financial affairs; accounting [Eff. 12-13-90]

(A) Authorization from a resident or a sponsor with a power of attorney for a home to manage the resident's financial affairs shall be in writing and shall be attested to by a witness who is not connected in any manner whatsoever with the home or its administrator. The home shall maintain accounts pursuant to division (A)~~(26)~~(27) of section 3721.13 of the Revised Code. Upon the resident's transfer, discharge, or death, the account shall be closed and a final accounting made. All remaining funds shall be returned to the resident or his sponsor, except in the case of death, when all remaining funds shall be given to the decedent's executor, administrator, or estate.

(B) A HOME THAT MANAGES A RESIDENT'S FINANCIAL AFFAIRS SHALL DEPOSIT THE RESIDENT'S FUNDS IN EXCESS OF FIFTY DOLLARS, AND MAY DEPOSIT THE RESIDENT'S FUNDS THAT ARE FIFTY DOLLARS OR LESS, IN AN INTEREST-BEARING ACCOUNT SEPARATE FROM ANY OF THE HOME'S OPERATING ACCOUNTS. INTEREST EARNED ON THE RESIDENT'S FUNDS SHALL BE CREDITED TO THE RESIDENT'S ACCOUNT. A RESIDENT'S FUNDS THAT ARE FIFTY DOLLARS OR LESS AND HAVE NOT BEEN DEPOSITED IN AN INTEREST-BEARING ACCOUNT MAY BE DEPOSITED IN A NONINTEREST-BEARING ACCOUNT OR PETTY CASH FUND.

(C) EACH RESIDENT WHOSE FINANCIAL AFFAIRS ARE MANAGED BY A HOME SHALL BE PROMPTLY NOTIFIED BY THE HOME WHEN THE TOTAL OF THE AMOUNT OF FUNDS IN THE RESIDENT'S ACCOUNTS AND THE PETTY CASH FUND PLUS HIS OTHER NONEXEMPT RESOURCES REACHES TWO HUNDRED DOLLARS LESS THAN THE MAXIMUM AMOUNT PERMITTED A RECIPIENT OF MEDICAL ASSISTANCE UNDER CHAPTER 5111. OF THE REVISED CODE. THE NOTICE SHALL INCLUDE AN EXPLANATION OF THE POTENTIAL EFFECT ON THE RESIDENT'S ELIGIBILITY FOR MEDICAL ASSISTANCE IF THE AMOUNT IN HIS ACCOUNTS AND THE PETTY CASH FUND, PLUS THE VALUE OF HIS OTHER NONEXEMPT RESOURCES, EXCEEDS THE MAXIMUM ASSETS A RECIPIENT OF MEDICAL ASSISTANCE MAY RETAIN.

(D) EACH HOME THAT MANAGES THE FINANCIAL AFFAIRS OF RESIDENTS SHALL PURCHASE A SURETY BOND OR OTHERWISE PROVIDE ASSURANCE SATISFACTORY TO THE DIRECTOR OF HEALTH, OR, IN THE CASE OF A HOME THAT PARTICIPATES IN THE MEDICAL ASSISTANCE PROGRAM ESTABLISHED UNDER SECTION 5111.01 OF THE REVISED CODE, TO THE DIRECTOR OF HUMAN SERVICES, TO ASSURE THE SECURITY OF ALL RESIDENTS' FUNDS MANAGED BY THE HOME.

3721.16 Notice of transfer or discharge; challenge [Eff. 12-13-90]

(A)(1) Except in emergencies AN EMERGENCY OR UNLESS AUTHORIZED BY STATUTE OR BY RULES OF THE DIRECTOR OF HEALTH, the administrator OF A HOME shall notify residents at least thirty days A RESIDENT IN WRITING, AND THE RESIDENT'S SPONSOR IN WRITING BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, in advance of any proposed transfer or discharge from the home and give them the. THE NOTICE SHALL BE PROVIDED AT LEAST THIRTY DAYS IN ADVANCE OF THE PROPOSED TRANSFER OR DISCHARGE, UNLESS EITHER OF THE FOLLOWING APPLIES:

(a) THE RESIDENT'S HEALTH HAS IMPROVED SUFFICIENTLY TO ALLOW A MORE IMMEDIATE DISCHARGE OR TRANSFER TO A LESS SKILLED LEVEL OF CARE;

(b) THE RESIDENT HAS RESIDED IN THE HOME LESS THAN THIRTY DAYS.

IN THE CASE OF A RESIDENT DESCRIBED IN DIVISION (A)(1)(a) OR (b) OF THIS SECTION, THE NOTICE SHALL BE PROVIDED AS MANY DAYS IN ADVANCE OF THE PROPOSED TRANSFER OR DISCHARGE AS IS PRACTICABLE.

(2) THE NOTICE REQUIRED UNDER DIVISION (A)(1) OF THIS SECTION SHALL INCLUDE ALL OF THE FOLLOWING:

(a) THE reasons for the decision, unless the PROPOSED transfer or discharge is otherwise authorized by law or by rules of the department of health;

(b) NOTICE OF THE RIGHT OF THE RESIDENT AND HIS SPONSOR TO AN IMPARTIAL HEARING AT THE HOME ON THE PROPOSED TRANSFER OR DISCHARGE, AND OF THE MANNER IN WHICH AND THE TIME WITHIN WHICH THE RESIDENT OR HIS SPONSOR MAY REQUEST A HEARING UNDER DIVISION (C) OF THIS SECTION;

(c) THE ADDRESS OF THE LEGAL SERVICES OFFICE OF THE DEPARTMENT OF HEALTH;

(d) THE NAME, ADDRESS, AND TELEPHONE NUMBER OF A REPRESENTATIVE OF THE STATE LONG-TERM CARE OMBUDSMAN PROGRAM AND, IF THE RESIDENT OR

PATIENT HAS A DEVELOPMENTAL DISABILITY OR MENTAL ILLNESS, THE NAME, ADDRESS, AND TELEPHONE NUMBER OF THE OHIO LEGAL RIGHTS SERVICE.

~~Transfer~~

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

~~Except in an emergency, the~~

~~(C)~~ A resident or his sponsor may challenge a transfer or discharge by requesting an impartial hearing at the home, unless the transfer or discharge is required because OF AN EMERGENCY OR ONE OF THE FOLLOWING REASONS:

~~(1)~~ The home's license has been revoked under section ~~3721.02 of the Revised Code~~ THIS CHAPTER;

~~(2)~~ The home is being closed pursuant to SECTIONS 5111.35 TO 5111.62 OR section 5155.31 of the Revised Code;

~~(3)~~ The resident is a recipient of medical assistance UNDER SECTION 5111.01 OF THE REVISED CODE and the home's ~~certification~~ PARTICIPATION IN THE MEDICAL ASSISTANCE PROGRAM has been terminated or denied;

~~(4)~~ THE RESIDENT IS A BENEFICIARY under Title XVIII or XIX of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C.A. 301, as amended AND THE HOME'S CERTIFICATION UNDER TITLE XVIII HAS BEEN TERMINATED OR DENIED. ~~The administrator shall notify the resident and his sponsor of the right to have an impartial hearing when he gives advance notice of the proposed action. The resident or sponsor may~~

A request FOR a hearing ~~within~~ UNDER THIS SECTION SHALL BE SENT IN WRITING TO THE LEGAL SERVICES OFFICE OF THE DEPARTMENT OF HEALTH NOT LATER THAN ten days after ~~notification~~ THE RESIDENT AND HIS SPONSOR RECEIVE NOTICE of the proposed action TRANSFER OR DISCHARGE. A hearing shall be held within ten days by the department of health. A representative of the department shall preside over the hearing and issue an order A RECOMMENDATION within five days as to any advisable action to the administrator, the resident, and any interested sponsor. The

IF A RESIDENT IS TRANSFERRED OR DISCHARGED PURSUANT TO THIS SECTION, THE HOME FROM WHICH THE RESIDENT IS BEING TRANSFERRED OR DISCHARGED SHALL PROVIDE THE RESIDENT WITH ADEQUATE PREPARATION PRIOR TO THE TRANSFER OR DISCHARGE TO ENSURE A SAFE AND ORDERLY TRANSFER OR DISCHARGE FROM THE HOME, AND THE home or alternative setting to which the resident is to be transferred OR DISCHARGED shall have accepted the resident for transfer OR DISCHARGE. An

~~(D)~~ AN impartial hearing on resident transfer or discharge is not subject to section 121.22 of the Revised Code.

~~(E)~~ AT THE TIME OF A TRANSFER OR DISCHARGE OF A RESIDENT WHO IS A RECIPIENT OF MEDICAL ASSISTANCE UNDER SECTION 5111.01 OF THE REVISED CODE FROM A HOME TO A HOSPITAL OR FOR THERAPEUTIC LEAVE, THE HOME SHALL PROVIDE NOTICE IN WRITING TO THE RESIDENT AND IN WRITING BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, TO THE RESIDENT'S SPONSOR, SPECIFYING THE NUMBER OF DAYS, IF ANY, DURING WHICH THE RESIDENT WILL BE PERMITTED UNDER THE MEDICAL ASSISTANCE PROGRAM TO RETURN AND RESUME RESIDENCE IN THE HOME AND SPECIFYING THE MEDICAL ASSISTANCE PROGRAM'S COVERAGE OF THE DAYS DURING WHICH THE RESIDENT IS ABSENT FROM THE HOME. AN INDIVIDUAL WHO IS ABSENT FROM A HOME FOR MORE THAN THE NUMBER OF DAYS SPECIFIED IN THE NOTICE AND CONTINUES TO REQUIRE THE SERVICES PROVIDED BY THE FACILITY SHALL BE GIVEN PRIORITY FOR THE FIRST AVAILABLE BED IN A SEMI-PRIVATE ROOM.

3721.17 Grievance procedures; procedures for review of complaints by Ohio commission on aging; penalties; other remedies [Eff. 12-13-90]

~~(A)~~ Any resident who believes that his rights under sections 3721.10 to 3721.17 of the Revised Code have been violated may file a grievance under procedures adopted pursuant to division ~~(A)~~(2) of section 3721.12 of the Revised Code.

When the grievance committee determines a violation of sections 3721.10 to 3721.17 of the Revised Code has occurred, it shall notify the administrator of the home. If the violation cannot be corrected within ten days, or if ten days have elapsed without correction of the violation, the grievance committee shall refer the matter to the department of aging HEALTH.

~~(B)~~ Any person who believes that a resident's rights under sections 3721.10 to 3721.17 of the Revised Code have been violated may report or cause reports to be made of the information directly to the department of aging HEALTH. No person who files a report is liable for civil damages resulting from the report.

~~(C)~~(1) Within thirty days of receiving a complaint under this section, the department of aging HEALTH shall investigate any complaint referred to it by a home's grievance committee and any complaint from any source that alleges that the home provided substantially less than adequate care or treatment, or substantially unsafe conditions, or, within seven days of receiving a complaint, refer it to the attorney general, if he agrees to investigate within thirty days.

(2) Within thirty days of receiving a complaint under this section, the department of aging HEALTH may investigate any alleged violation of sections 3721.10 to 3721.17 of the Revised Code, or of rules, policies, or procedures adopted pursuant to those sections, not covered by division ~~(C)~~(1) of this section, or it may, within seven days of receiving a complaint, refer the complaint to the grievance committee at the home where the alleged violation occurred, or to the attorney general if he agrees to investigate within thirty days.

~~(D)~~ If, after an investigation, the department of aging HEALTH finds probable cause to believe that a violation of sections 3721.10 to 3721.17 of the Revised Code, or of rules, policies, or procedures adopted pursuant to those sections, has occurred AT A HOME THAT IS CERTIFIED UNDER TITLE XVIII OR XIX OF THE "SOCIAL SECURITY ACT," 49 STAT. 620 (1935), 42 U.S.C.A. 301, AS AMENDED, it shall ~~refer the matter to the department of health.~~ The CITE ONE OR MORE FINDINGS OR DEFICIENCIES UNDER SECTIONS 5111.35 TO 5111.62 OF THE REVISED CODE. IF THE HOME IS NOT SO CERTIFIED, THE department of health shall hold an adjudicative hearing within thirty days under Chapter 119. of the Revised Code.

~~(E)~~ Upon a finding at an adjudicative hearing under division ~~(D)~~ of this section that a violation of sections 3721.10 to 3721.17 of the Revised Code, or of rules, policies, or procedures adopted pursuant thereto, has occurred, the department of health shall make an order for compliance, set a reasonable time for compliance, and assess a fine pursuant to division ~~(F)~~ of this section. The fine shall be paid to the general revenue fund only if compliance with the order is not shown to have been made within the reasonable time set in the order. The department of health may issue an order prohibiting the continuation of any violation of sections 3721.10 to 3721.17 of the Revised Code.

Findings at the hearings conducted under this section may be appealed pursuant to Chapter 119. of the Revised Code, except that an appeal may be made to the court of common pleas of the county in which the home is located.

The department of health shall initiate proceedings in court to collect any fine assessed under this section which is unpaid thirty days after the violator's final appeal is exhausted.

~~(F)~~ Any home found, PURSUANT TO AN ADJUDICATION HEARING UNDER DIVISION ~~(D)~~ OF THIS SECTION, to have violated sections 3721.10 to 3721.17 of the Revised Code, or rules, policies, or procedures adopted pursuant to those sections may be fined not less than one hundred nor more than five hundred dollars for a first offense. For each subsequent offense, the home may be fined not less than two hundred nor more than one thousand dollars.

A violation of sections 3721.10 to 3721.17 of the Revised Code is a separate offense for each day of the violation and for each resident who claims the violation.

~~(G)~~ No home or employee of a home shall retaliate against any person who:

(1) Exercises any right set forth in sections 3721.10 to 3721.17 of the Revised Code, including, but not limited to, filing a complaint with the home's grievance committee or reporting an alleged violation to the department of aging HEALTH;

(2) Appears as a witness in any hearing conducted under this section and section 3721.16 of the Revised Code;

(3) Files a civil action alleging a violation of sections 3721.10 to 3721.17 of the Revised Code, or notifies a county prosecuting attorney or the attorney general of a possible violation of sections 3721.10 to 3721.17 of the Revised Code.

If, under the procedures outlined in this section, a home or its employee is found to have retaliated, the violator may be fined up to one thousand dollars.

(H) When legal action is indicated, any evidence of criminal activity found in an investigation under division (C) of this section shall be given to the prosecuting attorney in the county in which the home is located for investigation.

(I) Any resident whose rights under sections 3721.10 to 3721.17 of the Revised Code are violated has a cause of action against any person or home committing the violation. The action may be commenced by the resident or by his sponsor on his behalf. The court may award actual and punitive damages for violation of the rights. The court may award to the prevailing party reasonable attorney's fees limited to the work reasonably performed.

3721.21 Definitions [Eff. 12-13-90]

Note: section transferred from former 3721.27.

As used in sections ~~3721.27~~ 3721.21 to ~~3721.33~~ 3721.34 of the Revised Code:

(A) "Long-term care facility" means either of the following:

(1) A nursing home as defined in section 3721.01 of the Revised Code, other than a nursing home or part of a nursing home certified as an intermediate care facility for the mentally retarded under Title XIX of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C.A. 301, as amended;

(2) A facility OR PART OF A FACILITY that is certified as a skilled nursing facility or a nursing facility under Title XVIII or XIX of the "Social Security Act."

(B) "ABUSE" MEANS KNOWINGLY CAUSING PHYSICAL HARM OR RECKLESSLY CAUSING SERIOUS PHYSICAL HARM TO A RESIDENT BY PHYSICAL CONTACT WITH THE RESIDENT OR BY USE OF PHYSICAL OR CHEMICAL RESTRAINT, MEDICATION, OR ISOLATION AS PUNISHMENT, FOR STAFF CONVENIENCE, EXCESSIVELY, AS A SUBSTITUTE FOR TREATMENT, OR IN AMOUNTS THAT PRECLUDE HABILITATION AND TREATMENT.

(C) "NEGLECT" MEANS RECKLESSLY FAILING TO PROVIDE A RESIDENT WITH ANY TREATMENT, CARE, GOODS, OR SERVICE NECESSARY TO MAINTAIN THE HEALTH OR SAFETY OF THE RESIDENT WHEN THE FAILURE RESULTS IN SERIOUS PHYSICAL HARM TO THE RESIDENT.

(D) "MISAPPROPRIATION" MEANS DEPRIVING, DEFRAUDING, OR OTHERWISE OBTAINING THE REAL OR PERSONAL PROPERTY OF A RESIDENT BY ANY MEANS PROHIBITED BY THE REVISED CODE, INCLUDING VIOLATIONS OF CHAPTER 2911. OR 2913. OF THE REVISED CODE.

(E) "RESIDENT" INCLUDES A RESIDENT, PATIENT, FORMER RESIDENT OR PATIENT, OR DECEASED RESIDENT OR PATIENT OF A LONG-TERM CARE FACILITY.

(F) "PHYSICAL RESTRAINT" HAS THE SAME MEANING AS IN SECTION 3721.10 OF THE REVISED CODE.

(G) "CHEMICAL RESTRAINT" HAS THE SAME MEANING AS IN SECTION 3721.10 OF THE REVISED CODE.

~~(B)~~(H) "Nursing and nursing-related services" means those services as defined by rule that shall be adopted by the public health council under Chapter 119. of the Revised Code.

~~(C)~~(I) "Nurse aide" means an individual who provides nursing and nursing-related services to patients or residents in a long-term care facility, other than a licensed health professional practicing within the scope of his license or an individual who provides nursing or nursing-related services as a volunteer without monetary compensation.

~~(D)~~(J) "Licensed health professional" means all of the following:

(1) An occupational therapist or occupational therapy assistant licensed under section ~~4755.07~~ CHAPTER 4755. of the Revised Code;

(2) A physical therapist or physical therapy assistant licensed under section ~~4755.44~~ CHAPTER 4755. of the Revised Code;

(3) A physician as defined in section 4730.01 of the Revised Code;

(4) A physician's assistant for whom a physician holds a valid certificate of registration issued under section 4730.04 of the Revised Code;

(5) A registered nurse or licensed practical nurse licensed under Chapter 4723. of the Revised Code;

(6) A social worker OR LICENSED INDEPENDENT SOCIAL WORKER licensed, or A SOCIAL WORK ASSISTANT certified, under section ~~4757.09~~ CHAPTER 4757. of the Revised Code;

(7) A speech pathologist or audiologist licensed under section ~~4753.07~~ CHAPTER 4753. of the Revised Code;

(8) ~~Any other individual~~ A DENTIST OR DENTAL HYGIENIST LICENSED UNDER CHAPTER 4715. OF THE REVISED CODE;

(9) AN OPTOMETRIST LICENSED UNDER CHAPTER 4725. OF THE REVISED CODE;

(10) A PHARMACIST LICENSED UNDER CHAPTER 4729. OF THE REVISED CODE;

(11) A PSYCHOLOGIST LICENSED UNDER CHAPTER 4732. OF THE REVISED CODE;

(12) A CHIROPRACTOR licensed under ~~Title XLVII~~ CHAPTER 4734. of the Revised Code ~~designated a health professional by rule adopted by the public health council~~;

(13) A NURSING HOME ADMINISTRATOR LICENSED OR TEMPORARILY LICENSED under Chapter ~~119.~~ 4751. of the Revised Code.

~~(E)~~(K) "Competency evaluation program" means a program through which the competency of a nurse aide to provide nursing and nursing-related services is evaluated.

~~(F)~~(L) "Training and competency evaluation program" means a program of nurse aide training and evaluation of competency to provide nursing and nursing-related services.

3721.22 Reports of abuse or neglect; immunity; failure to report; false allegations [Eff. 12-13-90]

(A) NO LICENSED HEALTH PROFESSIONAL WHO KNOWS OR SUSPECTS THAT A RESIDENT HAS BEEN ABUSED OR NEGLECTED, OR THAT A RESIDENT'S PROPERTY HAS BEEN MISAPPROPRIATED, BY ANY INDIVIDUAL USED BY A LONG-TERM CARE FACILITY TO PROVIDE SERVICES TO RESIDENTS, SHALL FAIL TO REPORT THAT KNOWLEDGE OR SUSPICION TO THE DIRECTOR OF HEALTH.

(B) ANY PERSON, INCLUDING A RESIDENT, WHO KNOWS OR SUSPECTS THAT A RESIDENT HAS BEEN ABUSED OR NEGLECTED, OR THAT A RESIDENT'S PROPERTY HAS BEEN MISAPPROPRIATED, BY ANY INDIVIDUAL USED BY A LONG-TERM CARE FACILITY TO PROVIDE SERVICES TO RESIDENTS, MAY REPORT THAT KNOWLEDGE OR SUSPICION TO THE DIRECTOR OF HEALTH.

(C) ANY PERSON WHO IN GOOD FAITH REPORTS SUSPECTED ABUSE, NEGLECT, OR MISAPPROPRIATION TO THE DIRECTOR OF HEALTH, PROVIDES INFORMATION DURING AN INVESTIGATION OF SUSPECTED ABUSE, NEGLECT, OR MISAPPROPRIATION CONDUCTED BY THE DIRECTOR, OR PARTICIPATES IN A HEARING CONDUCTED UNDER SECTION 3721.23 OF THE REVISED CODE IS NOT SUBJECT TO CRIMINAL PROSECUTION, LIABLE IN DAMAGES IN A TORT OR OTHER CIVIL ACTION, OR SUBJECT TO PROFESSIONAL DISCIPLINARY ACTION BECAUSE OF INJURY OR LOSS TO PERSON OR PROPERTY ALLEGEDLY ARISING FROM THE MAKING OF THE REPORT, PROVISION OF INFORMATION, OR PARTICIPATION IN THE HEARING.

(D) IF THE DIRECTOR HAS REASON TO BELIEVE THAT A VIOLATION OF DIVISION (A) OF THIS SECTION HAS OCCURRED, HE MAY REPORT THE SUSPECTED VIOLATION TO THE APPROPRIATE PROFESSIONAL LICENSING AUTHORITY AND TO THE ATTORNEY GENERAL, COUNTY PROSECUTOR, OR OTHER APPROPRIATE LAW ENFORCEMENT OFFICIAL.

(E) NO PERSON SHALL KNOWINGLY MAKE A FALSE ALLEGATION OF ABUSE OR NEGLECT OF A RESIDENT OR MISAPPROPRIATION OF A RESIDENT'S PROPERTY, OR KNOWINGLY SWEAR OR AFFIRM THE TRUTH OF A FALSE ALLEGATION, WHEN THE ALLEGATION IS MADE FOR THE PURPOSE OF INCRIMINATING ANOTHER.

3721.23 Investigation of allegations; findings; notice [Eff. 12-13-90]

(A) THE DIRECTOR OF HEALTH SHALL RECEIVE, REVIEW, AND INVESTIGATE ALLEGATIONS OF ABUSE OR NEGLECT OF A RESIDENT OR MISAPPROPRIATION OF THE PROPERTY OF A RESIDENT BY ANY INDIVIDUAL USED BY A LONG-TERM CARE FACILITY TO PROVIDE SERVICES TO RESIDENTS.

(B) THE DIRECTOR SHALL MAKE FINDINGS REGARDING ALLEGED ABUSE, NEGLECT, OR MISAPPROPRIATION OF PROPERTY AFTER DOING BOTH OF THE FOLLOWING:

(1) INVESTIGATING THE ALLEGATION AND DETERMINING THAT THERE IS A REASONABLE BASES FOR IT;

(2) GIVING NOTICE TO THE INDIVIDUAL NAMED IN THE ALLEGATION AND AFFORDING HIM A REASONABLE OPPORTUNITY FOR A HEARING.

NOTICE TO THE PERSON NAMED IN AN ALLEGATION SHALL BE GIVEN AND THE HEARING SHALL BE CONDUCTED PURSUANT TO RULES ADOPTED BY THE DIRECTOR UNDER SECTION 3721.26 OF THE REVISED CODE. FOR PURPOSES OF CONDUCTING A HEARING UNDER THIS SECTION, THE DIRECTOR MAY ISSUE SUBPOENAS COMPELLING ATTENDANCE OF WITNESSES OR PRODUCTION OF DOCUMENTS. THE SUBPOENAS SHALL BE SERVED IN THE SAME MANNER AS SUBPOENAS AND SUBPOENAS DUCES TECUM ISSUED FOR A TRIAL OF A CIVIL ACTION IN A COURT OF COMMON PLEAS. IF A PERSON WHO IS SERVED A SUBPOENA FAILS TO ATTEND A HEARING OR TO PRODUCE DOCUMENTS, OR REFUSES TO BE SWORN OR TO ANSWER ANY QUESTIONS PUT TO HIM, THE DIRECTOR MAY APPLY TO THE COMMON PLEAS COURT OF THE COUNTY IN WHICH THE PERSON RESIDES, OR THE COUNTY IN WHICH THE LONG-TERM CARE FACILITY IS LOCATED, FOR A CONTEMPT ORDER, AS IN THE CASE OF A FAILURE OF A PERSON WHO IS SERVED A SUBPOENA ISSUED BY THE COURT TO ATTEND OR TO PRODUCE DOCUMENTS OR A REFUSAL OF SUCH PERSON TO TESTIFY.

(C)(1) IF THE DIRECTOR FINDS THAT AN INDIVIDUAL USED BY A LONG-TERM CARE FACILITY AS A NURSE AIDE HAS NEGLECTED OR ABUSED A RESIDENT OR MISAPPROPRIATED PROPERTY OF A RESIDENT, HE SHALL NOTIFY THE INDIVIDUAL, THE LONG-TERM CARE FACILITY USING THE INDIVIDUAL AS A NURSE AIDE, AND THE ATTORNEY GENERAL, COUNTY PROSECUTOR, OR OTHER APPROPRIATE LAW ENFORCEMENT OFFICIAL, AND SHALL, IN ACCORDANCE WITH SECTION 3721.32 OF THE REVISED CODE, INCLUDE IN THE NURSE AIDE REGISTRY ESTABLISHED UNDER THAT SECTION A STATEMENT DETAILING HIS FINDINGS.

(2) IF THE DIRECTOR FINDS THAT AN INDIVIDUAL, OTHER THAN A NURSE AIDE, USED BY A LONG-TERM CARE FACILITY TO PROVIDE SERVICES TO RESIDENTS HAS NEGLECTED OR ABUSED A RESIDENT OR MISAPPROPRIATED PROPERTY OF A RESIDENT, HE SHALL NOTIFY THE INDIVIDUAL, THE FACILITY USING THE INDIVIDUAL TO PROVIDE SERVICES TO RESIDENTS, ANY APPROPRIATE PROFESSIONAL LICENSING AUTHORITY ESTABLISHED UNDER TITLE XLVII OF THE REVISED CODE, AND THE ATTORNEY GENERAL, COUNTY PROSECUTOR, OR OTHER APPROPRIATE LAW ENFORCEMENT OFFICIAL. IF THE INDIVIDUAL IS NOT LICENSED UNDER TITLE XLVII OF THE REVISED CODE, THE DIRECTOR SHALL, IN ACCORDANCE WITH SECTION 3721.32 OF THE REVISED CODE, ALSO INCLUDE A STATEMENT DETAILING HIS FINDINGS IN THE NURSE AIDE REGISTRY.

A NURSE AIDE OR OTHER INDIVIDUAL ABOUT WHOM A STATEMENT IS REQUIRED BY THIS DIVISION TO BE INCLUDED IN THE NURSE AIDE REGISTRY MAY PROVIDE THE DIRECTOR WITH A STATEMENT DISPUTING THE DIRECTOR'S FINDING AND EXPLAINING THE CIRCUMSTANCES OF THE ALLEGATION. THE STATEMENT SHALL BE INCLUDED IN THE NURSE AIDE REGISTRY WITH THE DIRECTOR'S FINDINGS.

(D)(1) IF THE DIRECTOR FINDS THAT ALLEGED NEGLECT OR ABUSE OF A RESIDENT OR MISAPPROPRIATION OF PROPERTY OF A RESIDENT CANNOT BE SUBSTANTIATED, HE SHALL NOTIFY THE INDIVIDUAL AND EXPUNGE ALL FILES AND RECORDS OF THE INVESTIGATION AND THE HEARING BY DOING ALL OF THE FOLLOWING:

(a) REMOVING AND DESTROYING THE FILES AND RECORDS, ORIGINALS AND COPIES, AND DELETING ALL INDEX REFERENCES;

(b) REPORTING TO THE INDIVIDUAL THE NATURE AND EXTENT OF ANY INFORMATION ABOUT HIM TRANSMITTED TO ANY OTHER PERSON OR GOVERNMENT ENTITY BY THE DIRECTOR OF HEALTH;

(c) OTHERWISE ENSURING THAT ANY EXAMINATION OF FILES AND RECORDS IN QUESTION SHOW NO RECORD WHATEVER WITH RESPECT TO THE INDIVIDUAL.

(2) WHEN FILES AND RECORDS HAVE BEEN EXPUNGED UNDER DIVISION (D)(1) OF THIS SECTION, ALL RIGHTS AND PRIVILEGES ARE RESTORED, AND THE INDIVIDUAL, THE DIRECTOR, AND ANY OTHER PERSON OR GOVERNMENT ENTITY MAY PROPERLY REPLY TO AN INQUIRY THAT NO SUCH RECORD EXISTS AS TO THE MATTER EXPUNGED.

3721.24 Retaliation prohibited [Eff. 12-13-90]

(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.

(B) NO PERSON OR GOVERNMENT ENTITY SHALL RETALIATE AGAINST A RESIDENT WHO REPORTS SUSPECTED ABUSE, NEGLECT, OR MISAPPROPRIATION; INDICATES AN INTENTION TO MAKE SUCH A REPORT; PROVIDES INFORMATION DURING AN INVESTIGATION OF ALLEGED ABUSE, NEGLECT, OR MISAPPROPRIATION CONDUCTED BY THE DIRECTOR; OR PARTICIPATES IN A HEARING UNDER SECTION 3721.23 OF THE REVISED CODE OR IN ANY OTHER ADMINISTRATIVE OR JUDICIAL PROCEEDING PERTAINING TO THE SUSPECTED ABUSE, NEGLECT, OR MISAPPROPRIATION; OR ON WHOSE BEHALF ANY OTHER PERSON OR GOVERNMENT ENTITY TAKES ANY OF THOSE ACTIONS. FOR PURPOSES OF THIS DIVISION, RETALIATORY ACTIONS INCLUDE ABUSE, VERBAL THREATS OR OTHER HARSH LANGUAGE, CHANGE OF ROOM ASSIGNMENT, WITHHOLDING OF SERVICES, FAILURE TO PROVIDE CARE IN A TIMELY MANNER, AND ANY OTHER ACTION INTENDED TO RETALIATE AGAINST THE RESIDENT.

(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.

3721.25 Confidentiality of information [Eff. 12-13-90]

(A)(1) EXCEPT AS REQUIRED BY COURT ORDER, AS NECESSARY FOR THE ADMINISTRATION OR ENFORCEMENT OF ANY STATUTE OR RULE RELATING TO LONG-TERM CARE FACILITIES, OR AS PROVIDED IN DIVISION (D) OF THIS SECTION, THE DIRECTOR OF HEALTH SHALL NOT DISCLOSE ANY OF THE FOLLOWING WITHOUT THE CONSENT OF THE INDIVIDUAL OR OF HIS LEGAL REPRESENTATIVE:

(a) THE NAME OF AN INDIVIDUAL WHO REPORTS SUSPECTED ABUSE OR NEGLECT OF A RESIDENT OR MISAPPROPRIATION OF A RESIDENT'S PROPERTY TO THE DIRECTOR;

(b) THE NAME OF AN INDIVIDUAL WHO PROVIDES INFORMATION DURING AN INVESTIGATION OF SUSPECTED ABUSE, NEGLECT, OR MISAPPROPRIATION CONDUCTED BY THE DIRECTOR;

(c) ANY INFORMATION THAT WOULD TEND TO DISCLOSE THE IDENTITY OF AN INDIVIDUAL DESCRIBED IN DIVISION (A)(1)(a) OR (b) OF THIS SECTION.

(2) AN AGENCY OR INDIVIDUAL TO WHOM THE DIRECTOR IS REQUIRED, BY COURT ORDER OR FOR THE ADMINISTRATION OR ENFORCEMENT OF A STATUTE RELATING TO LONG-TERM CARE FACILITIES, TO RELEASE INFORMATION DESCRIBED IN DIVISION (A)(1) OF THIS SECTION SHALL NOT RELEASE THE INFORMATION WITHOUT THE PERMISSION OF THE INDIVIDUAL WHO WOULD BE OR WOULD REASONABLY TEND TO BE IDENTIFIED, OR OF HIS LEGAL REPRESENTATIVE, UNLESS THE AGENCY OR INDIVIDUAL IS REQUIRED TO RELEASE IT BY DIVISION (D) OF THIS SECTION, BY COURT ORDER, OR FOR THE ADMINISTRATION OR ENFORCEMENT OF A STATUTE RELATING TO LONG-TERM CARE FACILITIES.

(B) EXCEPT AS PROVIDED IN DIVISION (D) OF THIS SECTION, ANY RECORD THAT IDENTIFIES AN INDIVIDUAL DESCRIBED IN DIVISION (A)(1)(a) OR (b) OF THIS SECTION, OR THAT WOULD TEND TO DISCLOSE THE IDENTITY OF SUCH AN INDIVIDUAL, IS NOT A PUBLIC RECORD FOR THE PURPOSES OF SECTION 149.43 OF THE REVISED CODE, AND IS NOT SUBJECT TO INSPECTION OR COPYING UNDER SECTION 1347.08 OF THE REVISED CODE.

(C) EXCEPT AS PROVIDED IN DIVISION (B) OF THIS SECTION AND DIVISION (D) OF SECTION 3721.23 OF THE REVISED CODE, THE RECORDS OF A HEARING CONDUCTED UNDER SECTION 3721.23 OF THE REVISED CODE ARE PUBLIC RECORDS FOR THE PURPOSES OF SECTION 149.43 OF THE REVISED CODE AND ARE SUBJECT TO INSPECTION AND COPYING UNDER SECTION 1347.08 OF THE REVISED CODE.

(D) IF THE DIRECTOR, OR AN AGENCY OR INDIVIDUAL TO WHOM THE DIRECTOR IS REQUIRED BY COURT ORDER OR FOR ADMINISTRATION OR ENFORCEMENT OF A STATUTE RELATING TO LONG-TERM CARE FACILITIES TO RELEASE INFORMATION DESCRIBED IN DIVISION (A)(1) OF THIS SECTION, USES INFORMATION IN ANY ADMINISTRATIVE OR JUDICIAL PROCEEDING AGAINST A LONG-TERM CARE FACILITY THAT REASONABLY WOULD TEND TO IDENTIFY AN INDIVIDUAL DESCRIBED IN DIVISION (A)(1)(a) OR (b) OF THIS SECTION, THE DIRECTOR, AGENCY, OR INDIVIDUAL SHALL DISCLOSE THAT INFORMATION TO THE FACILITY. HOWEVER, THE DIRECTOR, AGENCY, OR INDIVIDUAL SHALL NOT DISCLOSE INFORMATION THAT DIRECTLY IDENTIFIES AN INDIVIDUAL DESCRIBED IN DIVISION (A)(1)(a) OR (b) OF THIS SECTION, UNLESS THE INDIVIDUAL IS TO TESTIFY IN THE PROCEEDINGS.

3721.26 Rulemaking powers [Eff. 12-13-90]

THE DIRECTOR OF HEALTH SHALL ADOPT RULES PURSUANT TO CHAPTER 119. OF THE REVISED CODE TO IMPLEMENT SECTIONS 3721.21 TO 3721.25 OF THE REVISED CODE, INCLUDING RULES PRESCRIBING REQUIREMENTS FOR THE NOTICE AND HEARING REQUIRED UNDER SECTION 3721.23 OF THE REVISED CODE. THE NOTICE AND HEARING REQUIRED UNDER SECTION 3721.23 OF THE REVISED CODE ARE NOT SUBJECT TO CHAPTER 119. OF THE REVISED CODE; HOWEVER, THE RULES MAY PROVIDE FOR THE NOTICE TO BE PROVIDED AND THE HEARING TO BE CONDUCTED IN ACCORDANCE WITH THAT CHAPTER. RULES ADOPTED UNDER THIS SECTION SHALL BE NO LESS STRINGENT THAN THE REQUIREMENTS, GUIDELINES, AND PROCEDURES ESTABLISHED BY THE UNITED STATES SECRETARY OF HEALTH AND HUMAN SERVICES UNDER SECTIONS 1819 AND 1919 OF THE "SOCIAL SECURITY ACT," 49 STAT. 620 (1935), 42 U.S.C.A. 301, AS AMENDED.

3721.28 Competency requirements [Eff. 12-13-90]

(A)(1) Each nurse aide used by a long-term care facility on a full-time, temporary, per diem, or other basis on July 1, 1989, shall be provided by the facility a competency evaluation program approved by the director of health under division (A) of section 3721.31 of the Revised Code or conducted by him under division (D)(C) of that section. Each long-term care facility using a nurse aide on July 1, 1989, shall provide the nurse aide the preparation necessary to complete the competency evaluation program by January 1, 1990.

(2) Each nurse aide used by a long-term care facility on a full-time, temporary, per diem, or other basis on January 1, 1990, who either was not used by the facility on July 1, 1989, or was used by the facility on July 1, 1989, but had not successfully completed a competency evaluation program by January 1, 1990, shall be provided by the facility a competency evaluation program approved by the director under division (A) of section 3721.31 of the Revised Code or conducted by him under division (D)(C) of that section. Each long-term care facility using a nurse aide described in division (A)(2) of this section shall provide the nurse aide the preparation necessary to complete the competency evaluation program by October 1, 1990, and shall assist the nurse aide in registering for the program.

(B) Effective June 1, 1990, no long-term care facility shall use an individual as a nurse aide for more than four months unless the individual is competent to provide the services he is to provide, the facility has received from the nurse aide registry established under section 3721.32 of the Revised Code the information concerning the individual provided through the registry, and one of the following is the case:

(1) The individual was used by a facility as a nurse aide on a full-time, temporary, per diem, or other basis at any time during the period commencing July 1, 1989, and ending January 1, 1990, and successfully completed, not later than October 1, 1990, a competency evaluation program approved by the director under division (A) of section 3721.31 of the Revised Code or conducted by him under division (D)(C) of that section.

(2) The individual has successfully completed a training and competency evaluation program approved by the director under division (A) of section 3721.31 of the Revised Code or conducted by him under division (D)(C) of that section or has met the conditions specified in division (F)(4) or (5) of this section and, in addition, if the training and competency evaluation program or the training, instruction, or education the individual completed in meeting the conditions specified in division (F)(4) of this section was conducted by or in a long-term care facility, or if the director pursuant to division (F)(E) of section 3721.31 of the Revised Code so requires, the individual has successfully completed a competency evaluation program conducted by the director.

(3) Prior to July 1, 1989, if the long-term care facility is certified as a skilled nursing facility or a nursing facility under Title XVIII or XIX of the "Social Security Act," 49 Stat. 620, (1935), 42 U.S.C.A. 301, as amended, or prior to January 1, 1990, if the facility is not so certified, the individual completed a program that the director determines included a competency evaluation component no less stringent than the competency evaluation programs approved by him under division (A) of section 3721.31 of the Revised Code or conducted by him under division (D)(C) of that section, and was otherwise comparable to the training and competency evaluation programs being approved by the director under division (A) of that section.

(4) The individual successfully completed a training and competency evaluation program approved by another state that the director determines has program approval criteria that require a competency evaluation component no less stringent than the competency evaluation programs approved by him under division (A) of section 3721.31 of the Revised Code or conducted by him under division (D)(C) of that section, and THAT are otherwise no less stringent than the approval criteria established by rules adopted under section 3721.30 of the Revised Code.

(5) Prior to July 1, 1989, the individual was found competent to serve as a nurse aide after the completion of a course of nurse aide training of at least one hundred hours' duration.

(6) THE INDIVIDUAL IS ENROLLED IN A PRELICENSURE PROGRAM OF NURSING EDUCATION APPROVED BY THE BOARD OF NURSING OR BY AN AGENCY OF ANOTHER STATE THAT REGULATES NURSING EDUCATION, HAS PROVIDED THE LONG-TERM CARE FACILITY WITH A CERTIFICATE FROM THE PROGRAM INDICATING THAT THE INDIVIDUAL HAS SUCCESSFULLY COMPLETED THE COURSES THAT TEACH BASIC NURSING SKILLS INCLUDING INFECTION CONTROL, SAFETY AND EMERGENCY PROCEDURES, AND PERSONAL CARE, AND HAS SUCCESSFULLY COMPLETED A COMPETENCY EVALUATION PROGRAM CONDUCTED BY THE DIRECTOR UNDER DIVISION (C) OF SECTION 3721.31 OF THE REVISED CODE.

(C) Effective June 1, 1990, no long-term care facility shall continue for longer than four months to use as a nurse aide an individual who previously met the requirements of division (B) of this