[Cite as *Strodtbeck v. Lake Hosp. Sys., Inc.*, 2011-Ohio-2327.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, ohio

ERNEST STRODTBECK,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
- vs -	:	**CASE NO. 2010-L-053**
LAKE HOSPITAL SYSTEM, INC.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 09 CV 001250.

Judgment: Affirmed.

Richard N. Selby, II, Dworken & Bernstein Co., L.P.A., 60 South Park Place, Painesville, OH 44077 (For Plaintiff-Appellant).

Richard T. Prasse and *Amie L. LaBahn*, Hahn, Loeser, Parks, L.L.P., 200 Public Square, #2800, Cleveland, OH 44114 (For Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, Ernest Strodtbeck, appeals the Judgment Entry of the Lake County Court of Common Pleas, in which the trial court granted defendant-appellee, Lake Hospital System, Inc.'s (LHS) Motion for Summary Judgment. For the following reasons, we affirm the decision of the trial court.

{¶2} On April 20, 2009, Strodtbeck filed a Complaint against LHS, asserting a claim of wrongful discharge in violation of public policy. According to his Complaint and

deposition, he asserts that the following events occurred, leading to his discharge as a Lake West Hospital employee.

{¶3} Strodtbeck was an Emergency Department Tech II at Lake West Hospital. His job duties included acting as a paramedic and monitoring patients that had been restrained and other psychiatric patients in the Emergency Department. On May 3, 2008, Strodtbeck was observing a patient who had been placed in restraints due to intoxication and violent behavior. The patient requested that Strodtbeck remove a catheter. Upon attempting to remove the catheter, Strodtbeck observed that several inches of tape had been used to attach the catheter's tubing to the patient's upper thigh. Strodtbeck stated that he believed this amount of tape was "disturbing" and that he never used tape to hold a catheter into place. Strodtbeck felt this patient had been mistreated and wanted to bring this incident to the attention of hospital management. Strodtbeck testified that he asked Charge Nurse, Debra Hoplight, for permission to take a picture of the patient's leg and the tape. Strodtbeck stated that Hoplight told him to "just go ahead and deal with it," which he interpreted as permission to take a picture. Subsequently, Strodtbeck asked the patient for permission and took a picture, with his personal cell phone, of the patient's upper thigh.

{¶4} A few days later, Strodtbeck showed the picture to Debra Seaborn, the nurse manager in the Lake West Emergency Department. In meetings with Seaborn and Nancy Foster, a human resources employee, Strodtbeck testified that they expressed concern that Strodtbeck "brought the possibility of liability against the hospital on the patient's part."

{¶5} On May 9, 2008, Strodtbeck was terminated by LHS. Strodtbeck asserts that although he was told that he was fired for unauthorized use of his cell phone, he believes that this reason "was a pretext" for LHS's displeasure of Strodtbeck bringing the mistreatment to the patient's attention and documenting the mistreatment.

{¶6} In LHS's Answer to the Complaint, filed on May 26, 2009, LHS asserted that Strodtbeck was terminated for his violation of LHS's cell phone policy and for violating a patient's privacy rights. LHS denied Strodtbeck's assertion that he was fired for alerting the patient to potential misconduct that may have occurred by using an excessive amount of tape to secure the catheter.

{¶7} Seaborn testified in her deposition that it was inappropriate and against hospital policy for Strodtbeck to take pictures on his cell phone while working. She also testified that the hospital disciplines employees who are caught using their cell phones.

{¶8} Hoplight testified that any pictures taken of patients are to be taken with a Polaroid camera located in the Emergency Department, not with a cell phone. She also testified that a patient must sign a consent form for a picture to be taken.

{¶9} LHS filed a Motion for Summary Judgment on February 16, 2010, asserting that Strodtbeck failed to identify in his Complaint what public policy was violated by Strodtbeck's discharge. LHS argued that for a wrongful termination claim to succeed, Strodtbeck must have indicated a specific public policy at issue, supported by the law.

{¶10} On March 5, 2010, Strodtbeck filed a Motion in Opposition to Defendant's Motion for Summary Judgment, asserting that Ohio courts have held that Ohio law

prevents employers from terminating employees who take potentially adverse actions against the employer.

{¶11} On April 20, 2010, the trial court issued an Order Granting LHS's Motion for Summary Judgment. The court found that Strodtbeck "[did] not meet his burden of showing with specificity what constitutional, statutory, regulatory, or common law rule actually manifests a clear public policy against his termination." The trial court held that Strodtbeck's claim for wrongful discharge in violation of public policy "must fail because he has not established the required clarity element of that claim." The court granted the Motion for Summary Judgment and dismissed Strodtbeck's Complaint.

{¶12} Strodtbeck timely appeals and asserts the following assignment of error:

{¶13} "The trial court erred in granting Defendant Lake Hospital System's Motion for Summary Judgment."

{¶14} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" to be litigated, (2) "[t]he moving party is entitled to judgment as a matter of law," and (3) "it appears from the evidence *** that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence *** construed most strongly in the party's favor."

{¶15} A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 1996-Ohio-336. An appellate court must independently review the record to determine if summary judgment was appropriate. Therefore, an appellate

court affords no deference to the trial court's decision while making its own judgment. *Schwartz v. Bank One, Portsmouth, N.A.* (1992), 84 Ohio App.3d 806, 809; *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411-412.

{¶16} Strodtbeck argues that the trial court erred in granting LHS's Motion for Summary Judgment because there is existing case law suggesting that employees should not be terminated for taking actions that could place their employers in legal jeopardy.

{¶17} LHS asserts that there is no genuine issue of material fact surrounding whether Strodtbeck provided proper support for his wrongful discharge claim. LHS asserts that Strodtbeck failed to establish a necessary element of its wrongful discharge claim and dismissal by the trial court was appropriate.

{¶18} "It is well settled that under the at-will employment doctrine, absent facts and circumstances which indicate that the employment is for a specific duration or term, either side may terminate the employment relationship for any reason, not contrary to law." *Gargas v. Streetsboro*, 11th Dist. No. 2000-P-0095, 2001-Ohio-4334, 2001 Ohio App. LEXIS 4125, at *19, citing *Burdine v. Avery Dennison Corp.*, 11th Dist. No. 98-L-269, 2000 Ohio App. LEXIS 2350, at *25 (citation omitted).

{¶19} However, certain exceptions to the at-will employment doctrine exist. "[A] discharged employee has a private cause of action sounding in tort for wrongful discharge where his or her discharge is in contravention of a 'sufficiently clear public policy.'" *Painter v. Graley*, 70 Ohio St.3d 377, 382, 1994-Ohio-334, citing *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228, 233. "To establish a claim *** pursuant to the common law tort of wrongful discharge, a plaintiff must

demonstrate *** '[t]hat 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*)[;] *** [t]hat dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (*the jeopardy element*) [;] *** [t]he plaintiff's dismissal was motivated by conduct related to the public policy (*the causation element*)[;] ***[t]he employer lacked overriding legitimate business justification for the dismissal (*the justification element*).'" *Goss v. Kmart Corp.*, 11th Dist. No. 2006-T-0117, 2007-Ohio-3200, at ¶30, quoting *Springer v. Fitton Ctr. for Creative Arts*, 12th Dist. No. CA2004-06-128, 2005-Ohio-3624, at ¶¶16-20 (emphasis sic) (citation omitted). The clarity and jeopardy elements "are questions of law to be determined by the court." *Collins v. Rizkana*, 73 Ohio St.3d 65, 70, 1995-Ohio-135. The causation and overriding-justification elements are questions of fact to be determined by the trier of fact. Id.

{¶20} "The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt,* the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party

has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St. 3d 112." *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶40. In a case where the point of contention calls for a legal conclusion, such as in this case where the moving party asserts there is no identifiable public policy, the moving party will be unable to prove the negative existence of such a policy. Therefore, the burden shifts to the party bringing the wrongful discharge claim and that party has the "burden of producing specific facts demonstrating that a clear public policy exists and that discharge under such circumstances violates that public policy." *Gargas*, 2001 Ohio App. LEXIS 4125, at *22. This is true even at the summary judgment stage. See *Croskey v. Universal Health Servs., Inc.*, 5th Dist. No. 09 CA 37, 2009-Ohio-5951, at ¶39; *Gargas*, 2001 Ohio App. LEXIS 4125, at *22. Establishing the clarity element requires the plaintiff to "indicate the specific public policy at issue." *Croskey*, 2009-Ohio-5951, at ¶39; *Poland Twp. Bd. of Trustees v. Swesey*, 7th Dist. No. 02 CA 185, 2003-Ohio-6726, at ¶10.

{¶21} We first note that the facts regarding the reasons surrounding Strodtbeck's termination are disputed by both parties. The trial court found that, even if there were material disputes over the facts related to this issue, Strodtbeck's failure to assert

a public policy violated by LHS precluded his ability to continue with an action for wrongful discharge. Therefore, even if Strodtbeck's assertion that he was fired because he alerted the patient to the fact that he may have been mistreated was supported by evidence, LHS would still be entitled to summary judgment. Failure to assert a public policy being violated precludes the success of an action for wrongful discharge in violation of public policy.

{¶22} Strodtbeck cites several cases that he asserts provide a public policy that was violated by LHS. First, he argues that in *Moskowitz v. Progressive Ins. Co.*, 128 Ohio Misc.2d 10, 2004-Ohio-3100, the court found that Ohio courts have prevented employers from terminating employees who take potentially adverse actions against their employer. Strodtbeck cites *Moskowitz* for the proposition that an employer cannot terminate an employee for consulting with an attorney. 2004-Ohio-3100, at ¶11.

{¶23} The public policy in *Moskowitz* is that an employee may not be fired for consulting a lawyer or filing a lawsuit against his employer. The justification for this policy is protecting an employee's right to seek advice from an attorney and ability to have ready access to legal information. See *Moskowitz*, 2004-Ohio-3100, at ¶11. No such right was denied to Strodtbeck, therefore, this public policy does not apply.

{¶24} Strodtbeck also asserts that *Iberis v. Mahoning Valley Sanitary Dist.*, 11th Dist. No. 2000-T-0036, 2001-Ohio-8809, 2001 Ohio App. LEXIS 5837, provides an applicable public policy because it holds that an employee may not be fired for participating in a criminal investigation into corrupt practices by an employer.

{¶25} However, this policy is not applicable to the current case. Strodtbeck was not involved in any criminal investigation nor did he attempt to institute such an

investigation. In *Iberis*, the court noted that "Ohio has a clear public policy in favor of reporting crimes." 2001 Ohio App. LEXIS 5837, at *14. There is no evidence that criminal behavior occurred on the behalf of LHS. This public policy is inapplicable to the circumstances in this case.

{¶26} Similarly, Strodtbeck cites *Sabo v. Schott*, 70 Ohio St.3d 527, 1994-Ohio-249, for the proposition that an employer cannot fire an employee for testifying unfavorably against the employer.

{¶27} Again, this policy and its purpose do not apply to the facts surrounding Strodtbeck's termination. Strodtbeck was not terminated because he attempted to testify against LHS.

{¶28} Strodtbeck also asserts that *Dolan v. St. Mary's Mem. Home*, 153 Ohio App.3d 441, 2003-Ohio-3383, is applicable because it recognizes a public policy against terminating employees who report abuse that occurs in nursing homes.

{¶29} The public policy in *Dolan* is targeted toward protecting nursing home residents and arises from the existence of the nursing home patient's bill of rights, embodied in R.C. 3721. This policy deals specifically with nursing home patients who are abused and have other rights violated. Although Strodtbeck claims that he felt the catheter may have been taped inappropriately, there is no indication that there was an abuse situation in the current case, and the case did not involve nursing home patients.

{¶30} Moreover, even if this public policy were applicable to this case, the courts have found that a wrongful discharge claim is improper in nursing home abuse cases governed by R.C. 3721 because a statutory remedy exists that adequately protects society's interests. *Dolan*, 2003-Ohio-3383, at ¶17; *Wiles v. Medina Auto Parts*, 96

Ohio St.3d 240, 2002-Ohio-3994, at ¶15 ("there is no need to recognize a common-law action for wrongful discharge if there already exists a statutory remedy that adequately protects society's interests").

{¶31} Based on the foregoing analysis, Strodtbeck failed to assert a specific and clear public policy preventing an employer from discharging an employee for alerting a patient to potential mistakes a hospital may have made when providing treatment. Each public policy cited by Strodtbeck does not specifically apply to the facts of this case. Therefore, Strodtbeck failed to meet the clarity element such that he could maintain a wrongful discharge claim.

{¶32} For the foregoing reasons, the Judgment Entry of the Lake County Court of Common Pleas, granting LHS's Motion for Summary Judgment, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, J., concurs,

TIMOTHY P. CANNON, P.J., concurs with a Concurring Opinion.

TIMOTHY P. CANNON, P.J., concurring.

{¶33} I respectfully concur in the opinion of the majority.

{¶34} This case was disposed of by summary judgment. Strodtbeck, as the non-moving party, has no burden to do anything until such time as the movant, Lake Hospital System, Inc., produces sufficient evidentiary material to establish its right to

summary judgment as to each element of Strodtbeck's claims. At that point, as the majority points out, a "burden shifting" takes place.

{¶35} The trial court and the majority have both indicated that the party bringing a wrongful discharge claim "has the burden" to produce specific facts demonstrating that a clear public policy exists and that discharge under such circumstances violates public policy. Because there is nothing in the record indicating the movant met its initial burden of production, it appears the trial court and the majority have placed the initial burden on Strodtbeck. Since this appears to be at odds with the general rule, I write separately for the purpose of attempting to explain why placement of the burden on Strodtbeck is appropriate under the facts of this case.

{¶36} While the general rule is that the movant has the burden to establish it is entitled to summary judgment, such should not be the case with regard to a point of contention that calls for a legal conclusion. For example, in a case such as this, the movant asserts that, based on the evidentiary materials it has submitted, no identifiable public policy has been violated. This is a legal assertion based on the facts as presented. Once this legal assertion is made, it is incumbent upon the opposing party to demonstrate the presence of an identifiable public policy that has been violated. To hold otherwise would be to require the movant to somehow prove the negative existence of a policy. In this case, we have ruled that the party opposing summary judgment never sufficiently identified the public policy that would require protection, even though there was no "burden shifting" on this point. That is because this is a *legal conclusion*. We did not impose upon Strodtbeck an initial burden with regard to establishment of a *factual* point of contention.

{¶37} The majority cites several cases as authority that Strodtbeck failed to meet "his burden." For example, in *Gargas v. Streetsboro*, 2001-Ohio-4334, it was determined that the obligation to establish a reciprocal burden had been triggered. In *Croskey v. Universal Health Servs.*, 2009-Ohio-5951, the Fifth District Court of Appeals stated that summary judgment was proper because "[i]t was Appellant's burden to indicate the specific public policy at issue and to establish how that clear public policy was violated by her termination," which is similar to what the majority says herein. However, *Croskey* cited as authority for this proposition *Poland Twp. Bd. of Trustees v. Swesey*, 7th Dist. No. 02 CA 185, 2003-Ohio-6726, which is inapplicable to the issue here since that case was an appeal of the verdict after a jury trial.

{¶38} For the foregoing reasons, I concur with the majority's opinion and disposition that affirms the decision of the trial court.