[Cite as *Guardo v. Univ. Hosp. Geauga Med. Ctr.*, 2015-Ohio-1492.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

MELISSA GUARDO,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2014-G-3178**
- vs -	:	
UNIVERSITY HOSPITALS, GEAUGA MEDICAL CENTER,	:	
Defendant-Appellee.	:	

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 12 M 000784.

Judgment: Affirmed.

Carly A. Ibold and *Casey P. O'Brien*, Petersen & Ibold, 401 South State Street, Building 1-A, Chardon, OH 44024 (For Plaintiff-Appellant).

Kerin L. Kaminski, Giffen & Kaminski, LLC, 1300 East Ninth Street, Suite 1600, Cleveland, OH 44114 (For Defendant-Appellee).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from a final order of the Geauga County Court of Common Pleas, granting summary judgment in favor of appellee, University Hospitals Geauga Medical Center, on all pending claims. The primary issue is whether appellee properly terminated appellant, Melissa Guardo, on the grounds that she wrongfully disclosed confidential information of a patient under her care. Appellant asserts that the trial court should have allowed her case to go forward because her discharge was inconsistent

with established public policy. For the following reasons, we affirm.

{¶2} Appellee originally hired appellant as a staff nurse in 1999. Although appellant remained with the hospital for thirteen years, she never executed an employment contract; thus, pursuant to HR-75 of appellee's written policies, she was considered an employee-at-will. Throughout her employment, appellant was obligated to take annual training on hospital policies, including compliance with the Health Insurance Portability and Accountability Act of 1999 ("HIPAA").

{¶3} On February 8, 2012, appellant was working as a staff nurse in appellee's emergency room. As of that date, she had been given three disciplinary warnings over the past twelve months. The last two warnings were characterized as "final" warnings, meaning that appellant could be discharged under hospital policy if she was again subject to disciplinary action.

{¶4} On the date in question, Dr. Samuel Rosenberg was performing tests on various patients in the hospital's radiology department. He was assisted in this work by a radiology technician, also a hospital employee. Since this technician is the person whose confidential medical information was later disclosed by appellant, he has been called "John Doe" by the parties throughout this litigation.

{¶5} After working together for approximately three hours, Dr. Rosenberg noted that John Doe suddenly appeared disoriented and was speaking differently. Fearful that John Doe was seriously ill, Dr. Rosenberg suggested that he go to the emergency room in the hospital. Although John Doe was escorted to the emergency room at that time, he never officially checked in, and did not receive any treatment. Instead, he had a cup of juice and returned to his desk in the radiology department to do paperwork.

{¶6} Only one hour later, John Doe's supervisor, Tamara Casper, noticed that he was slumping over his desk, that his speech was slurred, and that he was pale and sweaty. This time, Casper accompanied John Doe to the emergency room, where he was officially admitted as a patient. He was then placed in an examination room, and appellant was assigned to be his nurse.

{¶7} Immediately after his admittance, John Doe was subjected to two separate examinations, first by a physician assistant and then by Dr. Donald DeCarlo. As part of her examination, the physician assistant ordered a number of tests, including a test of John Doe's blood to determine the amount of alcohol in his system. The results of the blood test indicated that Doe's blood-alcohol level was .242, approximately three times higher than the legal limit for operating a motor vehicle.

{¶8} Upon learning of the results, the physician assistant told John Doe that he would not be discharged from the emergency room until another person came to drive him home. Since appellant was the assigned nurse, the assistant also informed her of the test results. In turn, pursuant to hospital procedure, appellant contacted the chief of hospital security to inform him of the situation. Given that John Doe's blood-alcohol level was so high, hospital security was required to dispatch an officer to watch him until he could obtain a ride home; however, in this instance, no officer was dispatched to the emergency room.

{¶9} While John Doe was still under appellant's care, Supervisor Casper came back to the emergency room to check on Doe's condition. During their conversation on the matter, appellant initially verified that Casper was Doe's supervisor in the radiology department. She then expressly informed Casper of the results of Doe's blood-alcohol

test. The latter part of the conversation was overheard by Dr. DeCarlo, Doe's attending physician.

{¶10} After her conversation with appellant ended, Supervisor Casper went to the hospital's human resources department and reported that she was told confidential patient information. Similarly, Dr. DeCarlo contacted the hospital's chief nursing officer and informed her of the nature of conversation he had overheard. In light of these two reports, the chief nursing officer immediately conducted an investigation into appellant's actions. At first, appellant denied that she had divulged the results of John Doe's blood-alcohol test to Casper; however, she later recanted. Upon concluding her investigation, the chief nursing officer found that appellant had violated the HIPAA laws by revealing the test results to someone who was not involved in John Doe's treatment. Accordingly, appellant's employment with appellee was terminated.

{¶11} After failing to prevail in an in-house appeal of her termination, appellant instituted the underlying civil action in August 2012. Initially, she named both appellee and the University Hospitals Health System as defendants. However, after submitting an amended complaint, appellant voluntarily dismissed the health system as a party. In her second complaint, she asserted five causes of action, including claims for wrongful discharge in violation of public policy and for punitive damages.

{¶12} After the parties engaged in prolonged discovery, appellee moved for summary judgment as to the entire amended complaint. In response, appellant only addressed the substance of three of her pending claims, thereby conceding her two claims for breach of contract and on claim of intentional infliction of emotional distress. Regarding the "wrongful discharge" claim, appellee primarily maintained that appellant

could not prevail on the merits because, during the course of discovery, she was unable to cite a specific public policy that supported her decision to disclose John Doe's confidential medical information. As to this point, appellant responded by citing multiple legal sources for the contention that her disclosure was justified as a means of protecting the safety of other patients and other hospital employees.

{¶13} In its January 3, 2014 decision, the trial court granted summary judgment in favor of appellee on all pending claims in the action. As to the "wrongful discharge" claim, the trial court based its ruling upon the following three conclusions: (1) appellant did not establish that a clear public policy supported the disclosure of the confidential medical information; (2) even if such a public policy did exist, appellant did not establish that her termination would jeopardize that public policy; and (3) she did not show that appellee lacked an overriding legitimate business concern justifying its determination to dismiss her as an employee.

{¶14} In appealing the summary judgment determination, appellant asserts two assignments of error for review:

{¶15} "[1.] The trial court committed prejudicial error in granting summary judgment in holding that the Appellant failed to demonstrate that she was wrongfully discharged based on public policy.

{¶16} "[2.] The trial court committed prejudicial error in granting summary judgment based upon its holding that the Appellant is not entitled punitive damages because she failed to demonstrate she has compensable harm stemming from a cognizable cause of action."

{¶17} Appellant's first assignment constitutes the crux of the instant appeal. She

contends that, in responding to appellee's summary judgment motion, she was able to cite multiple legal sources, including Ohio case law and federal statutory law, that were sufficient to show the existence of a public policy under which her decision to disclose John Doe's test results was justified. She further contends that this public policy will be jeopardized if other hospital employees in similar situations can be subject to discharge for revealing confidential information regarding whether fellow employees are working while intoxicated.

{¶18} The trial court's ruling on appellant's "wrongful discharge" claim was made in the context of a summary judgment exercise. "Summary judgment is proper when (1) the evidence shows 'that there is no genuine issue as to any material fact' to be litigated, (2) 'the 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.'" *Lamancusa v. Big Little Farms Inc.*, 11th Dist. Trumbull No. 2012-T-0054, 2013-Ohio-5815, ¶16, quoting Civ.R. 56(C).

{¶19} "A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard. *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, NA.* (1992), 84 Ohio App.3d 806, 809, * * *; *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411-412, * * *." *Strodtbeck v. Lake*

Hospital System, Inc., 11th Dist. Lake No. 2010-L-053, 2011-Ohio-2327, ¶15.

{¶20} Even though appellant's amended complaint in the underlying action had a claim for breach of contract, there is no dispute that she did not have an employment contract with appellee; thus, she was an employee-at-will. As a general proposition, an employment-at-will relationship can be terminated by either side for any reason at any time. *Id*. at ¶18. Nevertheless, Ohio law recognizes certain exceptions to the foregoing rule. One such exception is a claim for wrongful discharge where the termination of the at-will employment is in contravention of a sufficiently clear public policy. *Id*. at ¶19, quoting *Painter v. Graley*, 70 Ohio St.3d 377, 382 (1994).

{¶21} "The elements of a claim of wrongful discharge in violation of public policy are as follows:

{¶22} "'"1. That clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the *clarity* element)."'

{¶23} "'"2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the *jeopardy* element)."'

{¶24} "'"3. The plaintiff's dismissal was motivated by conduct related to the public policy (the *causation* element)."'

{¶25} "'"4. The employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element)."' (Emphasis sic.) *Painter*, 70 Ohio St.3d at 384, fn.8, * * *. See also *Leininger v. Pioneer Nat'l Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, * * *. ¶8-12.

{¶26} "The clarity and jeopardy elements of the *Painter* test are issues of law for

the court's determination; the causation and overriding-justification elements are questions for determination by the fact-finder. *Collins* [*v. Rizkana*, 73 Ohio St.3d 65, 70 (1995)]." *Dohme v. Eurand America, Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, ¶12-17.

{¶27} In this case, the trial court concluded that appellant could not satisfy the first element of a "wrongful discharge" claim; i.e., she could not show that her firing had violated an established public policy. In challenging this conclusion as part of her first assignment, appellant has not contested the fact that, by telling John Doe's supervisor that his blood-alcohol level was substantially elevated, she violated the general HIPAA prohibition against the disclosure of confidential patient information. Furthermore, she has not contested appellee contention that, under normal circumstances, a violation of the general HIPAA prohibition is an act in contravention of public policy. Accordingly, in order for appellant to demonstrate that her discharge was unlawful, she essentially must show that her actions were warranted under a separate public policy which trumps the enforcement of the general HIPAA rule.

{¶28} In maintaining that her actions were justified under existing public policy, appellant has asserted five arguments for review. First, she argues that prior Ohio case law supported her decision to advise John Doe's supervisor in the radiology department that he was intoxicated while working with Dr. Rosenberg earlier that day. Relying upon *Pytlinski v. Bocar Products, Inc.*, 94 Ohio St.3d 77, 2002-Ohio-66, appellant states that the protection of workplace safety constitutes a recognized public policy upon which a "wrongful discharge" claim can always be based.

{¶29} While the *Pytlinski* decision may have been broadly stated, the Supreme

Court of Ohio has subsequently limited its scope. In *Dohme*, 2011-Ohio-4609, at ¶21, the Supreme Court indicated that the "mere citation to the syllabus in *Pytlinski* is insufficient to meet the burden of articulating a clear public policy of workplace safety." In order to carry its burden on this point, the plaintiff-employee must be able to base the policy of workplace safety upon a specific citation from "the federal or state constitution, federal or state statutes, administrative rules and regulations, or common law." *Id*.

{¶30} Citing *Krickler v. City of Brooklyn*, 149 Ohio App.3d 97, 2002-Ohio-4278, ¶18, appellant submits that the Eighth Appellate District has recognized a clear public policy against workplace alcohol use, to the extent that such use poses a threat to the safety of other employees or third parties. However, the *Krickler* court did not base its holding upon a constitutional provision, statute, administrative provision, or a common law rule. Instead, the *Krickler* court relied solely upon *Pytlinski*, the Supreme Court precedent that was limited by *Dohme*. Thus, *Krickler* is not persuasive authority. For this reason, appellant's first argument lacks merit.

{¶31} Under her second argument, appellant claims that her action was justified under three exceptions to the general HIPAA prohibition. First, appellant references the "whistleblower" exception, as set forth in 45 CFR 164.502(j)(1):

{¶32} "A covered entity is not considered to have violated the requirements of this subpart if a member of its workforce * * * discloses protected health information, provided that:

{¶33} "(i) The workforce member * * * believes in good faith that the covered entity has engaged in conduct that is unlawful or otherwise violates professional or clinical standards, or that the care, services, or conditions that provided by the covered

entity potentially endangers one or more patients, workers, or the public; and

{¶34} "(ii) The disclosure is to:

{¶35} "(A) A health oversight agency or public health authority authorized by law to investigate or otherwise oversee the relevant conduct or conditions of the covered entity or to an appropriate health care accreditation organization of the purpose of reporting the allegation of failure to meet professional standards or misconduct by the covered entity; or

{¶36} "(B) An attorney retained by or on behalf of the workforce member * * * for the purpose of determining the legal options of the workforce member * * * with regard to the conduct described in paragraph (j)(1)(i) of this section."

{¶37} The foregoing HIPAA exception is clearly inapplicable to appellant's action in this case. First, appellee, as the covered entity, did not engage in any unprofessional or unlawful behavior; instead, it was a fellow employee, i.e., John Doe, who engaged in unprofessional behavior. Second, appellant's disclosure of the confidential information was not made to an appropriate entity or person.

{¶38} The second HIPAA exception cited by appellant is contained in 45 CFR 164.512(b)(1)(v), which permits a covered health care provider to disclose the patient's confidential medical information to the patient's employer for specific purposes, such as conducting a medical "surveillance" of a workplace. However, pursuant to subpart (D) of this provision, the patient must be afforded written notice of the disclosure prior to its occurrence. In this case, no such notice was given to John Doe prior to the disclosure of his blood-alcohol test results by appellant. Hence, this exception has no application.

{¶39} The final exception cited by appellant is set forth in 45 CRF 164.512(j)(i),

which allows disclosure of confidential patient information to prevent or lessen a serious and imminent threat to the health and safety of the public. Appellant submits that this exception applied because John Doe posed a threat to other patients in the hospital at that time.

{¶40} However, the undisputed evidence shows that, by the time appellant made the disclosure to the supervisor, John Doe was already a patient in the emergency room and was specifically told that he would not be released from the attending physician's care until someone came to give him a ride home. To this extent, Doe was no longer working and, thus, did not pose an imminent threat to anyone else in the hospital. In other words, this case does not involve a situation in which appellant became aware of John Doe's intoxicated state while he still could have contact with hospital patients. As a result, appellant has not established that her disclosure of the test results was covered under any exception to the general HIPAA rule.

{¶41} Under her third argument, appellant states that her actions were justified under her separate obligations as a licensed nurse. Citing Ohio Admin. Code 4723-4-06(H), she submits that she had a duty to take steps to provide a safe environment for all patients in the hospital. Yet, given the fact that Doe was not going to be permitted to leave the emergency room for the purpose of returning to work, he would not have any further contact with other patients. Therefore, appellant's duties as a nurse would not override her obligation under HIPAA to not disclose Doe's confidential information.

{¶42} Along the same line, appellant argues that her disclosure to the radiology supervisor is supported by clear public policy because, by treating patients while he was intoxicated, John Doe violated the ethical standards for his profession, as set forth in the

American Registry of Radiologic Technicians. To the extent that such standards can be a valid source of public policy under *Dohme*, a nurse's disclosure of a violation of the standards would generally support the enforcement of ethical behavior by technicians. But, again, this obligation to disclose would only apply when the technician is merely a fellow employee. Once the technician becomes the nurse's patient, the HIPAA rules governs the nurse's duties.

{¶43} Under her fourth argument, appellant contends that her disclosure of the test results was permissible because John Doe was guilty of a criminal act. She asserts that Doe committed the crime of disorderly conduct by engaging in conduct that created a risk of physical harm to the patients he assisted while working with Dr. Rosenberg.

{¶44} Again, by the time appellant revealed the blood-alcohol test results to the supervisor, John Doe was restricted to the emergency room and could not have further contact with patients in the radiology department. Moreover, appellant's act of informing the supervisor was not the same as informing the police of a possible crime. Thus, the undisputed facts of this case do not support the conclusion that she was attempting to report a prior crime or was trying to prevent future criminal behavior.

{¶45} Under her final argument, appellant submits that her termination was not warranted under public policy because her actions were consistent with the hospital's internal policy regarding intoxicated employees. In support, she cites appellee's HR-9, which allows a supervisor to seek a blood-alcohol test of an employee if there exists a reasonable suspicion of intoxication while working. Pursuant to the procedure, the test can only be taken if the employee executes a release, and the test results can only be divulge to specific persons within the corporate structure.

{¶46} In *Dohme*, 2011-Ohio-4609, the Supreme Court held that the existence of a public policy can only be derived from particular sources, such as federal and state constitutions, federal and state statutes, administrative rules and regulations, and the common law. Since a hospital's internal policy does not fall within any of the stated categories, it cannot be used to establish the existence of a public policy. Furthermore, since John Doe had already been admitted as a patient to the emergency room and the blood-alcohol test had already been performed before appellant made her statement to the supervisor, the disclosure of the test results was not made as a means of giving the supervisor a reasonable suspicion in order to invoke the procedure. In this regard, appellant admitted during her deposition that many of the express requirements of the "substance abuse" policy were not followed, such as the execution of a release by John Doe. Hence, appellant's actions were not done in compliance with HR-9.

{¶47} In light of the foregoing analysis, the undisputed facts demonstrate that appellant's disclosure of John Doe's confidential medical information was not made pursuant to a recognized exception to the general HIPAA rule. Thus, as there was no public policy upon which appellant could justify her actions, she is unable, as a matter of law, to satisfy the first element for a claim of wrongful discharge based upon a violation of a public policy. On this basis alone, appellee was entitled to summary judgment on that particular claim.

{¶48} Given the outcome of our analysis as to first element, it is not necessary to address whether appellant's summary judgment submission was sufficient to satisfy the "jeopardy" and "overriding justification" elements of her wrongful discharge claim. Appellant's first assignment of error is without merit.

{¶49} Under her second assignment, appellant asserts that the trial court erred in granting summary judgment on her separate claim for punitive damages. Under Ohio law, though, an award of punitive damages is impermissible when the plaintiff has failed to show that she is entitled to compensatory damages. *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, ¶13. In its final order, the trial court concluded that appellant was not entitled to proceed on any of her four claims for compensatory damages. Before this court, appellant has only contested the disposition of her claim for wrongful discharge. Given that the granting of summary judgment on that particular claim was warranted, the trial court's ruling on the punitive damages claim was likewise correct. Appellant's second assignment is also without merit.

{¶50} The judgment of the Geauga County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

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{¶51} Because I believe summary judgment is disfavored in this case, I respectfully dissent.

{¶52} "Summary judgment is a procedural tool that terminates litigation and thus should be entered with circumspection. *Davis v. Loopco Industries, Inc.*, 66 Ohio St.3d 64, 66 * * * (1993). Summary judgment is proper where (1) there is no genuine issue of material fact remaining to be litigated; (2) the movant 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, viewing the evidence in the non-moving party's favor, that conclusion favors the movant. *See, e.g*., Civ.R. 56(C).

{¶53} "When considering a motion for summary judgment, the trial court may not weigh the evidence or select among reasonable inferences. *Dupler v. Mansfield Journal Co.,* 64 Ohio St.2d 116, 121 * * * (1980). Rather, all doubts and questions must be resolved in the non-moving party's favor. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359 * * * (1992). Hence, a trial court is required to overrule a motion for summary judgment where conflicting evidence exists and alternative reasonable inferences can be drawn. *Pierson v. Norfork Southern Corp*., 11th Dist. No. 2002-A-0061, 2003-Ohio-6682, ¶36. In short, the central issue on summary judgment is, 'whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-252 * * * (1986). On appeal, we review a trial court's entry of summary judgment de novo. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105 * * * (1996)." *Meloy v. Circle K Store*, 11th Dist. Portage No. 2012-P-0158, 2013-Ohio-2837, ¶5-6. (Parallel citations omitted.)

{¶54} I would find the HIPAA exception set forth at 45 CFR 164.512(j)(i), allowing disclosure of confidential patient information to prevent of lessen an imminent threat to public health or safety, applicable. The majority concludes it is not, because John Doe was no longer working, nor having contact with hospital patients. I respectfully disagree with this reading of the facts. John Doe had already left the emergency room once, and returned to do paperwork in the radiology department. On

his second visit to the emergency room, it was determined that he was extremely intoxicated, and that he would not be allowed to leave the hospital absent a ride home.

{¶55} However, the record discloses that he left his room on at least one occasion, and went to the nurses' station. It reveals he was increasingly impatient and eager to leave, standing sometimes in his room's doorway. The record reveals that the hospital has only one security guard, who was, therefore, unable to stay in the emergency room to monitor John Doe. It reveals that, while orders had been made that he not be discharged until a ride materialized, no one particular individual had been assigned the task of keeping him from leaving. Given his state of intoxication, John Doe posed a potential threat to himself and others, particularly if he left and drove.

{¶56} I respectfully dissent.