

STATE OF MICHIGAN  
IN THE SUPREME COURT

ROBERTO LANDIN,

Plaintiff/Appellee,

Supreme Court No.: \_\_\_\_\_  
Lower Court File No. 08-002400-NZ-3  
Court of Appeals No.: 309258

vs.

HEALTHSOURCE SAGINAW, INC.

Defendant/Appellant.

\_\_\_\_\_  
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**PLAINTIFF/APPELLEE'S RESPONSE TO DEFENDANT/APPELLANT'S**  
**APPLICATION FOR LEAVE TO APPEAL TO THE**  
**MICHIGAN SUPREME COURT**

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## COUNTER STATEMENT OF ORDER APPEALED FROM

The Court of Appeals, contrary to the representations of the Appellant Healthsource, correctly explained that the Trial Court, in denying the Defendant's Motion for Summary Disposition, held that "Michigan law recognized a cause of wrongful termination in violation of the public policy exhibited by MCL 333.20176(a)." [*Landin v. Healthsource*, Slip Opinion p. 4]. The unanimous panel of the Court of Appeals, in a decision written by Judge Servitto, further explained that the public policy legislatively set forth in MCL 333.20176(a), fulfilled two prongs of the public policy doctrine enunciated in this Court's Opinion in *Suchodolski v. Michigan Consolidated Gas*, 412 Mich 692 (1982)].

The Court of Appeals explained that in enacting the Public Health Code, the purpose of the legislature was to "safeguard the public health and protect the public from incompetence, deception and fraud." [*Landin supra p. 5 citing Michigan Ass', of Psychotherapy Clinics v. Blue Cross Blue Shield of Michigan*, 118 Mich App. 505, 522; 325 NW2d 471 (1982)].

The Court of Appeals correctly explained that two of the applicable public policy exceptions of the at-will employment doctrine, articulated in *Suchodolski, supra* apply to this case as described by the trial court. [*Landin Slip p. 4*]. Those exceptions are (1) that it contains an explicit legislative prohibiting discharge...or other adverse treatment of employees who act in accordance with a statutory right or duty and (3) where the reason for the discharge was the employees exercise of a right conferred by a well-established legislative enactment.

The Court of Appeals correctly explained that both prongs 1 and 3 of *Suchodolski* were present in this case. Specifically, "MCL 333.20176(a) contains an explicit legislative statement prohibiting discharge or discipline of an employee for specified conduct. It could also be argued that the specified conduct was of acting in accordance with a statutory right or duty." [*Landin*

Slip p. 5]. In relation to the third exception articulated in *Suchodolski* the Court of Appeals declared,

“In enacting MCL 333.20176(a), the Legislature clearly expressed a desire to further that policy by prohibiting retaliation against an employee who reports malpractice. And, the right to report alleged acts of negligence (malpractice) is consistent with and implicit in the purposes of the Public Health Code and its statutory regulations governing health care professionals.

For the same reason, exception (3) in *Suchodolski*, (citations omitted) (where the reason for the discharge was the employee’s exercise of a right conferred by well-established legislative enactment) could also apply to MCL 333.20176(a).” [*Landin* Slip pp. 5-6].

Plaintiff Landin asks this Court to deny Leave to Appeal, and affirm the common sense notion that public policy, as expressly stated by specific legislative mandates in this state, prohibits the retaliatory discharge of a nurse who reports that a co-worker is “dangerous” and her negligence caused and/or precipitated the death of an unsuspecting patient.

## STATEMENT OF QUESTIONS PRESENTED

### I.

WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT AND JURIES' FINDINGS THAT THE MICHIGAN PUBLIC HEALTH CODE WAS ENACTED BY THE LEGISLATURE TO SAFEGUARD THE PUBLIC FROM INCOMPETENCE, DECEPTION AND FRAUD AND THAT MICHIGAN PUBLIC POLICY WAS VIOLATED WHERE THE DEFENDANT HEALTHSOURCE TERMINATED ROBERTO LANDIN IN RETALIATION FOR REPORTING THAT A CO-WORKER WAS "INCOMPETENT", "DANGEROUS" AND HAD PRECIPITATED THE DEATH OF A PATIENT?

**Plaintiff-Appellee says "YES"**

**Defendant-Appellant says "NO"**

**Court of Appeals says "YES"**

### II.

WHETHER THE COURT OF APPEALS CORRECTLY FOUND THAT LANDIN HAD PROVEN A PRIMA FACIE CASE OF RETALIATION WHERE HE DEMONSTRATED THAT HE MADE A REPORT OF MALPRACTICE REGARDING A CO-WORKER, THAT HEALTHSOURCE KNEW OF THE REPORT AND THEREAFTER LANDIN WAS TREATED IN A DISPARATE MANNER AND ULTIMATELY TERMINATED AS A DIRECT RESULT OF HIS REPORT OF MALPRACTICE?

**Plaintiff-Appellee says "YES"**

**Defendant-Appellant says "NO"**

**Court of Appeals says "YES"**

### III.

WHETHER THE COURT OF APPEALS DECISION IN THIS CASE WILL HAVE ANY EFFECT ON THE AT-WILL EMPLOYMENT DOCTRINE, WHERE THE COURT OF APPEALS DID NOT EXPAND THIS COURT'S THREE EXCEPTIONS TO THE AT-WILL EMPLOYMENT DOCTRINE FOUND IN SUCHODOLSKI V. MICHIGAN CONSOLIDATED GAS AND ITS PROGENY?

**Plaintiff-Appellee says "NO"**

**Defendant-Appellant says "YES"**

**Court of Appeals says "NO"**

IV.

WHETHER THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EVIDENTIARY RULINGS AND WHERE THE COURT HELD THAT THERE WAS NO EVIDENCE THAT A SUBSTANTIAL RIGHT OF HEALTHSOURCE WAS AFFECTED?

**Plaintiff-Appellee says "YES"**

**Defendant-Appellant says "NO"**

**Court of Appeals says "YES"**

**I. OVERVIEW:**

This is an appeal from a jury's well-founded conclusion, as unanimously affirmed by the Michigan Court of Appeals, that Plaintiff-Appellee, Roberto Landin [hereinafter Landin], was the victim of a retaliatory termination in violation of Michigan Public Policy. [See, *Suchodolski v. Michigan Consolidated Gas*, 412 Mich 692; 316 NW2d 710 (1982)]. The legislative foundation for the public policy that was violated in this case is found in MCL 333.20176(a). It provides that an employer may not change the terms or conditions of employment because an employee of a health care facility reported the malpractice of a health professional. It provides,

**"Sec. 20176a. (1) A health facility or agency shall not discharge or discipline, threaten to discharge or discipline, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee or an individual acting on behalf of the employee does either or both of the following:**

**(a) In good faith reports or intends to report, verbally or in writing, the malpractice of a health professional or a violation of this article, article 7, or article 15 or a rule promulgated under this article, article 7, or article 15.... [Emphasis Added].**

The Defendant-Appellant, Healthsource's (Hereinafter Healthsource) makes a spurious claim that the trial judge, or the Court of Appeals, "created public policy" in the "absence of a Legislative act or statute". [See, Healthsource Application p. 1]. Rather, Healthsource suffers from a severe case of myopia, not seeing, the Legislative enactment that is front and center in the Court of Appeals unanimous decision.

Indeed, in the entire introductory section of the Healthsource's Application for Leave to Appeal, Healthsource never apprises this Court of the ubiquitous presence of MCL 333.20176(a). As the Court of Appeals explained:

"It is well established that the purpose of the statutes regulating health care professions including those set forth in the Public Health Code (under which MCL 333.20176a falls) is to safeguard the public health and protect the public from incompetence, deception, and fraud". *Landin v. Healthsource Saginaw, No. 309258 (June 3, 2014) p. 5 citing*

*Michigan Association of Psychotherapy Clinics v. Blue Cross Blue Shield of Michigan*, 118 Mich App 505, 522; 325 NW2d 471 (1982).

The Court of Appeals followed the letter, and spirit, of this Court's prior statements on public policy in *Suchodolski supra*, and *Terrien v. Zwit*, 467 Mich 56; 648 NW2d 602 (2002).<sup>1</sup> The public policy enforced by the trial court and the Court of Appeals was not, "the equivalent of personal preferences of one particular judge or a majority of an appellate court" [See *Healthsource's Brief* p. 2]. Instead, the Opinion of the Court of Appeals adhered faithfully to this Court's Opinion in *Suchodolski* and its progeny by references to the public policy that is enunciated through legislative enactment established by MCL 333.20176(a).

Plaintiff-Appellee, Roberto Landin, is a licensed practical nurse (LPN) that was terminated shortly after he reported that a co-worker's negligence had killed and/or precipitated the death of a Healthsource patient. After years as an LPN on a psychiatric floor, Mr. Landin worked on an extended care floor. He cared for a brittle diabetic, "Jack", for almost two-years. When Landin reported to work on the morning of February 25, 2006, he was advised by LPN Gayle Johnson<sup>2</sup> that, while under her care, "Jack" had passed away. [See *Infra*]

Mr. Landin reviewed the chart and believed that Johnson's negligence had killed or had precipitated the death of "Jack". Landin immediately wrote a report to his supervisor, Amber

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<sup>1</sup> The Court of Appeals specifically stated it was following the edicts put forth by this Court in *Suchodolski* and *Terrien supra*, and explained that, consistent with those cases, public policy is a "job for the legislature not the courts" and further directed that "public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. [See *Landin v. Healthsource supra*, Slip Opinion, p. 3]. In relying on MCL 333.201176a(1)(a) the Court of Appeals relied on an explicit legislative statement prohibiting the discharge and adverse employment action and recognized that the reason Landin was terminated was Landin's exercise of a right conferred by well-established legislative enactment. [See *Suchodolski @ 695 cited by Landin supra* slip opinion p. 2].

<sup>2</sup> Ms. Johnson got married and her married name is Conic. As she was referred to as Johnson throughout all depositions and discovery she will be referred to as Johnson throughout.

Boyk, explaining that Ms. Johnson was “dangerous” and presented a threat to the well being of the patients of Healthsource. Mr. Landin declared, in part, as follows:

“Amber I am concerned that a resident (Jack\_\_) has died [due] to the neglect of a nurse (Gayle)...The resident was...exhibiting the signs and symptoms of Hypoglycemia @ 1:30 in the morning. Why was not the Blood Sugar checked? Again the above noted nurse documented “will continue to monitor”, so why didn’t she look in on the resident sooner than four hours and fifteen minutes later? I believe that Jack ----- received a larger dose of insulin than he needed, [he was very unstable] he was not properly or safely followed up [his sugar was level not monitored post injection]. That I believe that his death could have been avoided and that his fall out of bed at 01:30 was symptomatic to his physical reaction to the drop of his blood sugar...I believe that the above nurse is dangerous” [Exhibit 50, Variance Concern Report dated 2/25/06].<sup>3</sup>

Within a week of reporting that Gayle Johnson was “dangerous”, and precipitated the death of “Jack”, Ms. Johnson, and the supervisor, Amber Boyk, documented two technical and minor infractions by Mr. Landin that the Defendant erroneously refers to as “falsifying” a medical record.<sup>4</sup> Approximately six (6) weeks later Johnson fabricated a third event where the evidence of record demonstrates that Landin gave a head injured/epileptic, Scott B. his medications. There is also no doubt Boyk subsequently created documents, including a document allegedly written by a deceased nurse, Dale Pettelle, to allegedly confirm the event.

**A. HEALTHSOURCE SUPERVISOR, AMBER BOYK MANUFACTURED AND/OR FORGED DOCUMENTS IN AN ATTEMPT TO DISCREDIT LANDIN AND JUSTIFY HIS TERMINATION.**

Rarely in real life does one find events that mirror the hideous actions found in prime time television. However, there is no doubt that Landin’s Supervisor, Amber Boyk, created/forged documents after the fact so as to help justify Landin’s discharge.

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<sup>3</sup> All Trial Exhibits are attached under the “A” Tab and correspond to the trial exhibit number. Therefore, The Variance Report authored by Mr. Landin is attached as 50 under the A Tab.

<sup>4</sup> Defendant’s Discipline Policy #115, admitted as Exhibit 42, defines in very ambiguous terms a series of actions that constitute Group I or Group II violations. Despite repeatedly referring to the Plaintiff’s actions as “falsifying” documents the evidence of record did not support that claim. See, Trial Exhibit 42, attached at A-42.

Healthsource, through defense counsel, meticulously went through every “write-up” and every “documented” evidence of any wrongdoing that Landin was involved in while at Healthsource. Those “write-ups” start on November 1, 2004 and end on January 26, 2006. Those write-ups are chronicled in Defendant’s Brief in Support of its Application at pages 14-15. One can see that there is no “write-up” or any other “documented” discipline concerning the Plaintiff and the failure to pass medications to Scott B. <sup>5</sup> The lack of a write-up involving Scott B., in conjunction with exhibits 60, 57, & 54, proves that Boyk was the only person, who could have fabricated these documents as the deceased nurse, Dale Pettelle, could not tell the future.

The document that Boyk says she obtained from Pettelle on February 26, 2006, Exhibit 57, could not have happened as the document states because the document makes reference to events that had not yet occurred. That is, the document on February 26, 2006 makes reference to an event that did not occur until April 23<sup>rd</sup> 2006.

**B. THE INTERACTION OF THREE OTHER DOCUMENTS, EXHIBITS 60, 57 AND 54 DEMONSTRATE BEYOND ANY REASONABLE DOUBT THAT AMBER BOYK CREATED/FORGED DOCUMENTS FOR THE SOLE PURPOSE OF DISCREDITING AND JUSTIFYING THE DISCHARGE OF LANDIN.**

Landin proved that that Amber Boyk had intentionally retaliated against him after he wrote the Variance and Concern Report regarding Gayle Johnson. The foundation of that retaliation is found in Exhibit 60. Boyk’s scheme was exposed by yet one more glaring error by Gayle Johnson.

Exhibit 60 is the Variance and Concern Report written by Johnson for the erroneous claim that Landin did not give Scott B. his medications on April 23, 2006.<sup>6</sup> Unfortunately for

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<sup>5</sup> Plaintiff had agreed to keep the complete names of patients confidential. The Defendant, via witnesses, identified the names of patients. Indeed, Amber Boyk identified the full name of this patient (Scott B.). [Vol III p. 45]. Nevertheless, Plaintiff will attach these documents under confidential labeling and refer to the patient(s) by their first name and last initial.

<sup>6</sup> The evidence of record clearly demonstrated and Mr. Landin testified that he gave Scott the medications and that the medication log demonstrated that the medications were given. The actual

Boyk/Healthsource, Johnson erroneously dated the document 4/23/04. Later it was corrected to reflect the actual date 4/23/06. [See Exhibit 60 wherein 4/23/04 is corrected to (06)].<sup>7</sup> In reviewing the file, while discovery was ongoing, Boyk used this erroneously dated 2004 document to create a document from a dead nurse, Dale Pettelle, that would help support her decision to terminate Landin.

The first document created by Boyk is Exhibit 57. This Exhibit claims to be a letter/document allegedly sent from Pettelle (deceased) to Boyk on 2/26/06. That is, of course, the day after the Plaintiff wrote up Johnson for precipitating and/or causing the death of "Jack".

At the time Boyk created the document, after discovery was ongoing and many years later, she knew that Pettelle had subsequently passed away, and would not be available to cross-examine. Boyk had access to the personnel file and merely placed the document in the file. [See *infra*]. One knows that Pettelle could not have possibly drafted the document because the document makes reference to events that had not yet occurred. Exhibit 57, in relevant part, stated as follows:

"Once again, Landin is jumping to statements over what is deemed appropriate and certainly NOT his to make openly (even if they may or could be accurate). In this case, there is much that would persuade a study that the medical problems in general was enough to have led to this gentlemen's death. For him to qualify another nurse, in public, is totally bogus. **Further it seems to relate to his having been written up for not passing a group of medications to [Scott B].**<sup>8</sup>

Ms. Boyk then wrote on Ms. Pettelle's behalf that

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documents demonstrating how Boyk created the documents are attached as written and marked confidential under seal and placed under Tab B. That is, there were some references to Plaintiff's attorney blacking out names at trial. The original un-blackened documents show that there was only one Scott B and to demonstrate that the Plaintiff did not in anyway alter the documents but merely agreed to protect the privacy of Scott and other patients. [Attachment B containing original documents that were entered as Exhibits 54, 57, & 60]. Defendant's agents referred to Scott's last name during the trial on many occasions. Documents supplied under tab B to Trial Court should continue to be kept confidential.

<sup>7</sup> Boyk admitted that Johnson did not write the correct date, did not know for sure who wrote the (06), but did know that April 23, 2006 was the correct date. [Vol III p. 132].

<sup>8</sup> The original document clearly identifies the patient by his last name, B\_\_\_\_\_T, rather than Scott. The documents as admitted are under Tab A. [Also submitted under Tab B is the original that fully cites Scott's last name and was submitted below under seal. Confidentiality should be continued.

“The behavior, whenever Landin has been documented on for not doing something like a treatment, passing meds, and is reported by another nurse, he then begins harassing or writing them up, et al. This instance is a bit much nonetheless. [Exhibit 57].

Dale Pettelle could not have written this document to Amber Boyk as it was written. On 2/26/06 the event with Scott B. had not yet occurred. There was no other “write-up” involving Scott B. as of 2/26/06. [See listing of the write-ups set forth by the Defendant, pp. 14-15 Brief]. Rather, the occurrence date with Scott was April 23, 2006. [Exhibit 60]. There was no other incident where Landin was cited for not passing meds, nor was there another incident where Landin made a claim against another nurse. Ms. Boyk tried to lie her way out of it by saying that she must have been investigating a claim at that time. [See Vol III pp. 132-36].

That answer must fail for two reasons. First, there was no event in, or before, February 2006. Second, Boyk had no answer when confronted with the language of the document that said that Landin was retaliating for “being written up” for not passing meds to Scott B. The only write up for Mr. Landin regarding Scott B. was what he was terminated for on April 23, 2006 some two months after the date that this document was allegedly written. [Id.; Also See Exhibit 60; 4-23-06]. Exhibit 57 also makes clear that the allegation against Landin is where he has been “documented” for not doing something. There is no other documentation regarding Scott B.

The final piece of the puzzle that showed, conclusively, that Boyk created these documents for the purpose of retaliating against Landin, is Boyk’s own corresponding note that was intended to augment Pettelle’s email/memo. It is believed that Boyk, at or near the same time that she created Exhibit 57, also created Exhibit 54. Exhibit 54 is Boyk’s note allegedly starting on February 27, 2006, at the top of the page, and ending on February 28, 2006 on the bottom of the page. Again, just days after Landin reported Gayle Johnson’s continuing incompetence.

In the middle of the page it claims that Boyk spoke to Dale (Pettelle) and that there was a discussion regarding pills found in the medication cart and Scott B’s name was on the cup. There is

no record of that happening in February 2006. That event did not occur until April 23, 2006.

Moreover, as admitted by the Defendant, Landin had no other prior write-ups regarding Scott.

The only explanation for the mistakes is that Boyk wrote both documents and relied on the erroneous date that Johnson put on Exhibit 60. After years of delay, in discovery, Boyk believed that there had been a write up in 2004 regarding Scott. The only event was on April 23, 2006.

In a half-hearted attempt to diffuse this damning evidence, after having an entire day to review all of the evidence, Ms. Boyk could only testify that she would not know how to alter an email. Ms. Boyk's explanation for Exhibit 54 was even less enlightening. She admitted that the notes were hers. She admitted that the notes were started on February 27<sup>th</sup> and ended on February 28<sup>th</sup> 2006. [Id]. Incredibly, she denied that the reference to Scott B on Exhibit 54 had anything to do with the April, 2006 event. Of course she could not cite to any other discipline involving Scott B. Finally, at the end of the trial the Defendant's counsel had no explanation for the lack of another write up or any other evidence regarding Scott B not getting his medications from Landin. Healthsource had no explanation for a corroborating mistake in Boyk's notes. How does an event that occurred on April 23, 2006, get in log notes that start on Feb. 27, 2006 and end on the 28<sup>th</sup>?

In his closing argument the only thing Defendant's counsel can argue is the following:

"But I am here, because I don't believe she altered that document. And she told you that she did not alter the document. She looked everybody in the eye and said I didn't do that..." [T. Vol. VI. P. 119].<sup>9</sup>

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<sup>9</sup> Healthsource engages in "revisionist" history wherein it attempts to create some doubt as to Boyk's creation of the documents. Healthsource notes, "the incident mentioned in Pettelle's email concerned a similar incident where the Plaintiff was accused of not properly passing medication to Scott in February 2006". [Appellant's Brief p. 21]. Other than the self-serving claim there is no evidence to support that. The Pettelle document, Exhibit 57, makes specific reference to a "write up" and "documented" evidence. Where is it?. Moreover, if there was another event prior to Landin's report of Johnson's malpractice, and it was serious enough to terminate him in April 2006, why is it not a big deal before he reported Johnson? Other than Boyk's self serving statements, a day after she could not give a rationale explanation on cross-examination, there is no evidence that there ever was another event with Landin and Scott B. Landin also believes it was more than coincidental that all of the evaluations that Ms. Boyk did regarding him and Gayle Johnson, for the last years, all mysteriously disappeared. *See Infra.*

As Plaintiff's counsel explained to the jury one must view this as a test in school. If a person cheats, and copies all of the right answers, it is much harder to prove than if a person copies all wrong answers. That is, if two people are next to each other and copy the exact wrong answers, none of which make sense, that is overwhelming evidence that one is copying from the other.

In this case Boyk copied her notes in Exhibit 54 from an email that she created in exhibit 57, from Dale Pettelle, a nurse who she knew was deceased. The mistake was made because of the original error of Johnson dating the event with Scott as 4/23/04 instead of 4/23/06. There is no evidence of any event with Scott B. and Mr. Landin occurring before 4/23/06. The only way that the same mistake could have been made is if Boyk created both documents.

The jury correctly found that the Public Policy of the State was breached. Judge Boes correctly denied Defendant's Motion for Summary Judgment and JNOV. The Court of Appeals, in a unanimous 3-0 Opinion, soundly rejected Healthsource's claims. Not only did Healthsource wrongfully retaliate against the Plaintiff, violating the public policy of that as enunciated in MCLA 333.20176(a), but Amber Boyk set out on a mission to create/forged documents that would help cover-up her wrongdoing. The Court of Appeals correctly affirmed the decision of the Trial Court and the Jury. The Court should not grant Application for Leave to Appeal.

## **II. COUNTER-STATEMENT OF FACTS**

Roberto Landin is a married father of three children. [Vol II. 10/19/11 p. 66]. He is a graduate of Saginaw Practical Nursing School [SPNS].<sup>10</sup> After getting his degree from SPNS, Landin spent the next twenty-five (25) years seamlessly moving from one nursing job to another. He never had difficulty getting a job and he was never fired.<sup>11</sup>

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<sup>10</sup> Nursing certificates admitted as Exhibit 13.

<sup>11</sup> A timeline is attached under Tab C. This is not an exhibit but is accurate as to the events and may be helpful in viewing all of the events in context.

His first job as a nurse was at Midland Hospital. In 1985 Mr. Landin left Midland Hospital and joined the Navy. He received extensive medical training in the navy and was decorated. [Vol II. pp. 67-69].<sup>12</sup> After the military Landin worked at several hospitals, always voluntarily leaving for better pay or better conditions. In 2001, while he was working full-time at St. Luke's Hospital (1996-2003), Landin started working as an on-call LPN at Healthsource. [See Vol. II pp. 74-75]. To further his aspirations Landin started working at Healthsource full-time in 2004. [Id @ p 76].

Healthsource Saginaw included a long-term care facility similar to a nursing home. Mr. Landin viewed his role as a nurse and patient advocate. [Vol II. p. 77]. Trial Exhibit 9 is the job description for an LPN. The policy at Healthsource, since Landin began, was that nurses were to be reviewed every year. Those evaluations were to be performed by the immediate supervisor. [Id. p. 78]. Mr. Landin's reviews from 2001-2003 reviews were produced and demonstrated that Landin was a good to excellent nurse. [See Exhibits 96-104 pp. 16-18]<sup>13</sup>.

In 2004, Landin's supervisor was Nurse Manager Amber Boyk. [Vol II p. 78]. She gave him good reviews. [Id @ pp 78-79]. When he obtained his file after this lawsuit was filed the Boyk

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<sup>12</sup> He initially became a corpsman. [Exhibit 16] Because he finished in the top 10% of his class he was sent to Field Medical Service School where he was trained to treat catastrophic injuries associated with military operations. [Vol II. p 70]. Mr. Landin garnered numerous awards. He received an award for "Super Squad Recognition" [Exhibit 14]. [Id]. He also finished combat medical training and received recognition for that service. [See Exhibits 15 & 17 Vol II. pp. 71-72]. Mr. Landin was stationed in live battle zones and did suffer the loss of vision in the right eye while in the service. [Id @ pp. 72-73]. Mr. Landin was honorably discharged with "a greater love of home, a greater sense of honor [and] courage". [Id p. 73].

<sup>13</sup> Mr. Landin was repeatedly described as being neat, punctual, hardworking and an advocate for patients. [Exhibit 96]. In Exhibit 97 he graded out at 100% on 10 different sections of evaluation. In Exhibit 98 he was deemed of sufficient expertise to train other nurses in no less than (11) eleven categories and was at least competent and/or able to act independently in all other venues of nursing. [Exhibit 98]. A nurse who got along well and was excellent regarding patient confidentiality. He regularly graded out at the top of the scales and was thought to be "team player and a good advocate for residents and family". [Exhibits 98-104]. In one of the last reviews produced, it was noted that "Roberto is a very hard worker. He cares about the quality of care with his patients and gets along well with most of his peers. His medical background is an asset to our program..." Exhibit 102.

reviews were missing. [Vol. II p 79]. Comparable co-worker Gayle Johnson's reviews that would have also been performed by Boyk were also missing. [See Exhibit 36].<sup>14</sup>

Prior to working in the long-term floor Landin worked for almost four-years in the psych unit at Healthsource. [Vol II. pp. 82-83]. On the psych unit medications were passed differently than on other floors. For most floors, the nurse takes the medication cart to the patient's room, confirms the patient, takes the meds to the patient, watches the patient take the medication and then comes back and signs that the medication was given. [T. Vol II pp. 123-124].<sup>15</sup> However, on the psych floor a

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<sup>14</sup> Exhibit 36 provides that Healthsource "will provide an annual review of each employee's job performance based upon a position description". Mr. Landin testified that Boyk gave him good evaluations. [T. Vol. II p.p. 78-79]. Boyk testified that as Nurse Manager she did perform all aspects of her job to the best of her abilities and that part of her job was to do annual evaluations. [T. Vol. III p. 47-48]. She did not deny that she did the evaluations but merely claimed that she could not remember. [T. Vol. III pp. 49-50]. Ms. Boyk also admitted that she had unfettered access to the employee personnel files. [Vol III p. 49]. Sue Graham, the Nurse Executive at HSS, testified that Boyk, as the Nurse Manager, was supposed to perform evaluations yearly. She further explained that Boyk could walk any document over and place it into the personnel file or, implicitly, remove a document from the file. [T. Vol VI p. 32] The Human Resource Director at the time, Katie Adams, confirmed that Amber Boyk would have had access to the personnel files and could have added or removed documents at will. Adams could not explain the disappearance of Landin or Gayle Johnson's most recent evaluations by Boyk. [T. Vol V. pp. 86- 87]. Landin's evaluations from 2000-03 were in his file. [See Exhibits 96-104]. In addition, Gayle Johnson testified at her deposition, and was impeached at trial, that she did have an evaluation by Amber Boyk and could not explain why it was not in her file. [Vol. IV p. 123]. Based on all of the other evidence, there is strong reason to believe that Boyk destroyed the relevant evaluations of Landin and Johnson.

<sup>15</sup> Landin explained that some medications come in blister packs and others come in bulk bottles. Some medications were brought by family members in bulk bottles to save money. [T. Vol II pp. 123-124]. Each resident has its own drawer in the medication cart. The nurse has access to all of the drawers. Scott B. was a patient who was at the facility for only about 6-7 months. Scott had a history of seizures and had a closed head injury when he was a younger man. According to Mr. Landin, Scott had a closed head injury and appeared mentally retarded as a result of the head injury. In addition, Scott had short-term memory loss and was in his forties at the time of trial. Scott's mother brought certain medications in bulk that got to the medication cart through her delivery of the drugs to the pharmacy. [Id pp. 124-126]. Scott's medication administration record, that was supplied by the Defendant in response to Production of Document Requests, was admitted as Exhibit 11. This document covers the month of April 2006. If one looks down the column for April 23, 2006, the date that the Plaintiff allegedly did not give medications, one can see that Mr. Landin did give Scott his medications as he testified

nurse is not allowed to take the cart into the ward. If one took the cart into the psych ward the nurse would “be wearing the cart on your head”. The residents were combative and would strike the nurses with the cart. [Vol. II p. 129]. Landin explained that in his almost four years in the psych ward it was common to gather the medications, sign them out, take them into the psych ward, watch the person take the meds and then return to the cart for the next patient. [Id pp. 129-130]. It was common to sign one’s initials in the psych ward before the patient took the medication. In almost four (4) years of administering the medications in that manner Landin was never written up for, or accused of “falsifying” a document. [Vol II. p. 130]. Mr. Landin explained:

“It just holds true. It’s a good policy. Often you get sidetracked. Once you get in the back you never know what’s going to happen, but stool and feces, people get combative so its easy where you could be sidetracked for a lengthy time, 15, 20 minutes and hour. But what happens is if I don’t sign it, someone else looks at it. If he looks at the mark and says this wasn’t given, and someone could get double-dosed”. [Vol. II 130-131].<sup>16</sup>

In February 2006, Landin had been treating a patient, Jack, for about 18 months. Landin knew the medical history of each patient. [Vol II pp. 83-84]. Landin was aware that Jack was a brittle diabetic. Brittle meaning that his blood sugars were subject to wide swings [Id @ 84]. Jack also had many other serious problems including an inability to independently walk [Vol II. p. 85].

**A. LANDIN REPORTED TO HIS SUPERVISOR, AMBER BOYK, THAT LPN JOHNSON’S NEGLIGENCE CAUSED OR PRECIPITATED THE DEATH OF A HEALTHSOURCE PATIENT.**

On February 25, 2006, Mr. Landin arrived at work before 7:00 a.m. The LPN working nights, Gayle Johnson, told Landin that Jack had fallen during the night and hit his head and passed away.<sup>17</sup> Mr. Landin had worked with Ms. Johnson as a nurse, and previously when Johnson was a CENA and unit secretary. Landin knew that Johnson was transferred to his unit, 5a, because she was

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and as are initialed in Exhibit 11. Landin’s initials are seen at 0900 and 1800 hours. [T. Vol II pp. 127-128].

<sup>16</sup> In almost four (4) years of administering medications in this manner on the psychiatric ward Mr. Landin was never written up.

<sup>17</sup> Gayle Johnson was a comparable worker to the Plaintiff. They both were LPNs and they both reported to Boyk. [Vol. II p. 87]. They worked the same floor but different shifts.

banished from the skilled floor. [Vol. II p. 90].<sup>18</sup> He believed that Johnson was not a good nurse, was not competent, thorough, or reliable. [Vol II. pp. 88-89].

After being told Jack was dead, Mr. Landin questioned Johnson regarding Jack's treatment. Johnson's demeanor changed and she became hostile. Landin saw Johnson documenting information in the nursing record long after Jack's death. [Vol II. pp. 95-96].<sup>19</sup>

Landin later reviewed the Medication Administrative Record (MAR) admitted as Exhibit 46. The MAR shows there was a sliding scale to determine the amount of insulin Jack was to receive based on his blood sugars [Vol II. pp. 96-97]. This MAR demonstrated that on February 24, 2006 at 9:00 p.m., Jack was given 15 units of insulin for a blood sugar of 515. [Vol II p. 98].<sup>20</sup> That was more than double the dose of insulin Jack had been given at 9:00 p.m. any night in February 2006.<sup>21</sup>

Mr. Landin explained the procedures that should have been done after a 515 blood sugar. He would have repeated the test to rule out a false positive. Critically, after administering that amount of insulin, he would have checked on Jack hourly. [Vol II. p. 99-100].

Mr. Landin also explained that the nursing notes compiled by Johnson for Jack on the

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<sup>18</sup> Exhibit 82 is the "Coaching" that Ms. Johnson received. It appears that Ms. Johnson was transferred from the skilled floor, after numerous other nurses complained that she was not doing her dressing changes. As numerous people testified, the failure to perform dressing changes on these severely ill diabetic patients could easily have severe ramifications including amputation or death. Despite failing to perform 12 out of 16 changes, each one independently a Group 1 violation (See Exhibit 42), and subject to termination, Ms. Johnson merely got a coaching. Johnson had already been suspended for a different group 1 violation for three days in November 2005. [Exhibit 80]. On March 10, 2006, just a couple of weeks after Johnson was alleged to have killed Jack she failed to give a patient his medicine. Exactly what she erroneously claimed Landin had done. The fact was Landin gave Scott his medicine, *see infra*. Nevertheless, after getting suspended in November 2005, after failing to do 12/16 dressing changes, [each a group 1 violation] after failing to properly follow up on Jack possibly resulting in his death, and after failing to give medicines a couple of weeks later, on March 10, 2006, Johnson is coached for failing to give medications and not telling the truth about it [Ex. 83].

<sup>19</sup> Mr. Landin testified that Johnson did not take criticism well and reacted with anger. [Vol II p. 91]. Landin heard Johnson swear at him and others. When he complained to Boyk she got out of the area to avoid a confrontation with Ms. Johnson. [Vol II pp. 92-93, *also* Affidavit Tab H].

<sup>20</sup> Exhibit 48 is Jack's MAR and shows that his blood sugar was 515 @ 2100 hours on 2/24/06.

<sup>21</sup> *See* Ex. 46, Insulin, 2100 hours, next highest dosage of insulin for the month is 7 units.

morning of his death, Exhibit 47, were devoid of any actions by Ms. Johnson. The nursing notes should reflect all actions of the nurse. Written orders are to be provided whenever available. Verbal orders are to be avoided and documented if necessary. [Vol II p. 100].

The nursing notes did not say when or if anyone was called when Jack's blood sugars were 515. It did not document what Johnson told the PA, Alan Lindsay, or what he told her.<sup>22</sup> The log was devoid of any check by Johnson on Jack from 9:00 pm on the 24<sup>th</sup> until Jack was found by a CENA on his hands and knees in a pool of vomit and diarrhea at 1:30 am on the morning of the 25<sup>th</sup>. [See Exhibit 47; Vol II. pp. 104-105]. Ms. Johnson initialed it as 1:40 am in the nursing note.<sup>23</sup> Johnson also failed to check Jack's head and/or his neurological signs for a closed head injury since he had to have fallen out of bed [Vol II. 106].<sup>24</sup> It was cited that Johnson did not check Jack's blood sugars. Low blood sugar is life threatening. [Vol II. pp. 106-107]. Assuming that his blood sugar would have fallen because of the 15 units of insulin Jack could have been saved with foods containing sugar. [Id p. 107]. He also could have been given an IV. Johnson took none of these

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<sup>22</sup> These are all violations of Healthsource policies. Exhibit 39, Physician Orders, states that "verbal orders are to be taken by a nurse only in an emergency situation and require a verification read back of the complete order by the nurse receiving the order". It also violates another policy, Exhibit 40, "Communication-Physician Orders and Critical Test Results".

<sup>23</sup> See Ex. 47 2/25/06 line 7. Landin testified that regular acting insulin takes two hours to reach peak efficacy. That is, the blood sugars would have dropped within two hours of the administration of the insulin. Landin went through a plethora of precautions of what he would have done had he been treating Jack. If the blood sugars were truly 515 then he would have checked on the patient hourly after the administration of the drug. [Vol II pp. 101-102]. Not surprisingly, Johnson did not know peak efficacy times for insulin. [Vol IV. P. 119].

<sup>24</sup> Ms. Johnson admitted that LaShawnda Curry found Jack and that Curry called Johnson. She also admitted repeatedly how deficient her nursing notes were. Specifically, that there was no notation of calling PA Lindsay. It did not show when or if Jack was given the insulin. It did not document what she told Lindsay and what he told her. She did not document what follow up orders were given. She testified that she found no vomit with Jack when called by Curry but had to admit on cross-examination that there was vomit present. [Vol IVpp. 110-112]. She further admitted that she was supposed to know the history of her long term care patients. That was "very important". [Vol II. P. 114]. Ms. Johnson, a person who had now been a nurse since 2004, did not even know what it meant to be a "brittle" diabetic. To her, "they were all" the same. [Vol. IV p. 115]. She admitted that she did not know the term in 2006. [Also see Vol IV p. 118 generally].

rudimentary actions according to her own nursing notes. Johnson failed to do a fall protocol, neurological protocol, or a head injury protocol. [Id. p. 108; See Exhibits A 37-45 for a litany of rudimentary policies of the Defendant that Johnson failed to follow].

Mr. Landin concluded that Jack's death was caused or precipitated by the negligence of Johnson. He wrote his supervisor, Amber Boyk, a Variance and Concern Report (V&CR) that documented his concerns. [Vol II p. 109].<sup>25</sup> Mr. Landin testified that he wrote the (V&CR) in good faith, and that he believed that Gayle Johnson was dangerous. His testified as follows:

- Q At the time you wrote this, Mr. Landin, did you write this in good faith?  
A Yes.  
Q Did you believe that the death of Jack could have been avoided if other remedial measures would have been taken?  
A Absolutely.  
Q Did you believe that Gayle Johnson was dangerous at that point?  
A Yes.  
Q As on this occasion, had you ever, in 23 plus years, ever written a report where you said a coworker had negligently contributed or precipitated, unintentionally, of course, to the death of a patient?  
A No, sir, never have.  
Q Why did you decide to write it on this event on that night?  
A I didn't want another patient to suffer. I didn't want another patient that - - that this could happen to.  
Q Did you believe that Gayle Johnson was competent at that point to be a nurse on that floor?  
A She is not competent, sir. [Vol II. pp. 111-112].

Mr. Landin explained that he wrote the (V&CR) and slipped it under Boyk's door. He did not give a copy to Johnson or anyone else. [Vol II p. 112]. He did not give it to a state agency nor did he threaten to give it to a state agency.<sup>26</sup> Prior to this time neither he nor Gayle Johnson had

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<sup>25</sup> The Variance and Concern Report directed to Boyk, is admitted as Exhibit 50.

<sup>26</sup> Because Mr. Landin did not report the suspected malpractice to a state agency, nor did he threaten to report it to a state agency/public body, he did not meet the requirements of having a claim pursuant to the WPA. See, MCLA 15.362 *et.seq.* Rather, he merely reported malpractice to his supervisor and as a result he has a valid public policy claim, consistent with MCL 333.20176(a), as correctly concluded by the Court of Appeals. [See, *Landin supra*, Slip Opinion, pp. 6-7].

written each other up. Prior to this time Gayle Johnson had never written up anyone. [Id. p 112-113, Vol IV p. 161], *also see* Affidavit of Landin, attached as C].

Immediately after Landin submitted the (V&CR) on Johnson their relationship became strained. Johnson immediately retaliated and wrote Exhibit 51. She informed the supervisor, Boyk, that Landin was talking to the widow of Jack. [Trial Exhibit 51, Tab A]. Thereafter, Landin was immediately called down to Human Resources (HR). He met with Katie Adams, head of HR, and Amber Boyk, Landin's direct supervisor.<sup>27</sup> Both women wanted to know what he was telling Jack's widow. Both wanted to know whether he had told the widow, Bev, whether he believed Gayle Johnson was responsible for the death of Jack. They asked if she planned on suing the hospital. [Id. p. 116]. Adams and Boyk called Plaintiff down at least two (2) and possibly three (3) times to interrogate him regarding his conversations with the Jack's widow [Vol. II p. 116-117]. These were the only times that Landin had been called to HR during the duration of his employment. [Id].

**B. AMBER BOYK /GAYLE JOHNSON RETALIATE AGAINST LANDIN.**

Remember that Mr. Landin had worked on the psych ward for many years and testified that on that ward, it was imprudent and/or unsafe to deliver the medications, as the policy read. In a number of years he had never been written up.

**1. The Trilogy of Horrors Created by Amber Boyk and Gayle Johnson within One Week of the Plaintiff's Variance and Concern Report Regarding Gayle Johnson's Incompetence and the Danger she Posed to the Residents and Patients of Healthsource.**

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<sup>27</sup> Adams, as Head of Human Resources, was the person who was freely submitting patient records in MESC Hearings to avoid paying unemployment benefits at the same time that the Defendant was demanding the return of medical records that the Defendant freely produced in an attempt to discredit Mr. Landin. Adams submitted those documents while the Defendant's Motion to Compel was pending. Plaintiff submitted an extensive brief in response and used the same response, in part, in answer to the Defendant's Motion *in Limine* [See Documents submitted Tab D]. It can be seen that any document taken by the Plaintiff was voluntarily produced by the Defendant. The only person other than the Defendant who was provided the documentation was the widow of Jack. [See Answer and Documents under "D"].

Within days of the Plaintiff reporting the dangers that Johnson posed, as well as talking to the widow of Jack, he was written up at the request, or as the result of a suggestion, of Gayle Johnson and was written up on three different occasions within a matter of a couple months.

a. **The First Event March 1, 2006 Less Than One Week After Landin's Variance and Concern Report.**

There was a woman patient by the name of "Jean", a long-time resident, who was ambulatory and smoked. "Jean" often left her room. She came back to get narcotics. Mr. Landin admitted that he did not give Jean her medications on that day. He did that because, based on long time treatment of her, he knew that Jean hoarded breathing medications in her drawer. He did not believe he was falsifying anything. [Vol II p. 133]. Jean told him not to worry about it. Jean and/or her husband had never had a complaint about Landin. [Id. 134]. [Jean's records supplied by the Defendant].

The more telling significance of the Complaint, however, is how it occurred. Mr. Landin explained that within one week of reporting Johnson, Gayle Johnson asked Jean and her husband to file a complaint against him because Johnson felt if she reported the incident it would only be looked on as retaliation. [See Vol II. 134; Johnson Vol IV pp. 190-191; Ex. 66].

Exhibit 66 documents that Johnson had Jean and her husband file a complaint.<sup>28</sup> The document also suggested that Mr. Landin said mean and nasty things to Jean. That was not true despite the fact that Jean often said nasty things to Mr. Landin because she wanted more narcotics and that he could not give them to her. [Vol II pp. 134-135]. The jury saw the relative demeanor of Mr. Landin, a no non-sense ex-military man, who answered, "yes sir" or " no sir". In the military Landin was trained to never say anything "nasty" to a patient: [Id 135].

b. **March 2, 2006, Five Days After the Death of Jack, Gayle Johnson/Amber Boyk, Reports Landin Again.**

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<sup>28</sup> The actual typed up document in Exhibit 66 is the report of Irene Lowe based exclusively on the self-serving lies of Gayle Johnson. The only truthful thing in the document is that Johnson solicited the report and it is retaliatory.

On March 2, 2006 Gayle Johnson filled out a reporting Occurrence Worksheet on a patient named "Marjorie". [See Exhibit 70]. Marjorie, a long-time patient of the Plaintiff, was not in her room when Mr. Landin came to give her medications. Marjorie had left her room to be with her daughter. It was a Wednesday night and Mr. Landin had school. He asked another nurse, Sue Erskine, a good friend of Gayle Johnson, to provide Marjorie her medications. Ms. Erskine promised that she would give the medications [Vol II pp. 137-138]. The next day it was stated that Ms. Erskine did not give Marjorie her medications and Mr. Landin was written up. [Id. p. 138]. Erskine refused to talk to Landin after he filed his V&CR against Johnson. Erskine was not written up. Who filed the Complaint against Landin? Gayle Johnson and supervisor Amber Boyk. [Vol II. p. 139; Exhibit 70 both pages]. As a result of the two reports solicited by Johnson/Boyk Landin received a five (5) day suspension in a letter dated March 10, 2006. [Id @ 140 See Exhibit 20 and the Defendant's way of classifying the offense as a falsification of a record (Group I violation) versus what the Defendant would classify Gayle Johnson's similar offenses (Group II violation)] [See Exhibit 42 Falsification (Which as admitted by Healthsource personnel presumably meant intentional conduct) versus a Group II violation of a violation of an established administrative policy or rule].<sup>29</sup>

c. **After Landin Made the Variance and Concern Report to Amber Boyk he was Treated as a Pariah.**

Mr. Landin explained that after he authored the V&CR, Ex. 50, and gave it to Amber Boyk he was treated as a pariah. [Vol II p. 140 (sp) see piranha rather than pariah]. He explained that people would no longer socialize with him. People would not ask him to go out. People ignored him. People who were his friends no longer wanted anything to do with him. [Vol. II T. 140].

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<sup>29</sup> On the same day that Landin is suspended for the aforementioned offenses, Gayle Johnson despite having a plethora of complaints, including the fact that it was alleged that she killed or precipitated the death of Jack, failed to do 12/16 dressing changes, also received a five day suspension in November of 2005, received a group II offense for failing to give a medication and not telling the truth about it because, in the eyes of Amber Boyk, "there was no harmful intent" [See Exhibit 83].

d. **The Third Complaint Against Landin Alleged that he did not give a Patient “Scott” B. some Epileptic Medications that Resulted in his Termination was Totally Contrived and Untrue.**

On April 28, 2006 Mr. Landin was given a termination letter. [Ex. 24, 59]. He was terminated, allegedly, for his failure to provide a resident, “Scott” B., his scheduled medications on April 23, 2006. Mr. Landin acknowledged being responsible for Scott at 900 and 1800 hours on April 23, 2006. In reviewing the chart, one can glean that the Plaintiff’s initials are squarely provided indicating that he gave the medication. [Vol II p. 143]. He testified that he gave Scott his medications that day. He further explained that when Scott had previously had seizures he was not the nurse on call. Scott never had a seizure while on Landin’s shift. [Id @ p. 144].

Mr. Landin also explained that in the past he had problems with Scott because he had short-term memory loss. [Vol II p. 145]. Ms. Boyk admitted that the patient’s MAR demonstrated that Landin did give the patient the medication. [Exhibit 26 Scott’s MAR].

The allegation, however, was that the patient, who was mentally retarded, told Gayle Johnson that he did not get his medication and then had his medications actually found in the medication cart.<sup>30</sup> Guess who found the medications? None other than Gayle Johnson. Boyk was asked, “Did that concern you?” and she responded “No”. Notwithstanding her prior testimony that Gayle Johnson was “very angry at Mr. Landin”. [Vol III p. 138].<sup>31</sup>

C. **PLAINTIFF PROVED THAT AMBER BOYK INTENTIONALLY CREATED DOCUMENTS TO HARM MR. LANDIN THAT LEAD TO HIS**

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<sup>30</sup> Scott was mentally retarded as demonstrated by his prior history. He had been hit in the head by a rock thrown by his brother when he was in his mid-teens. He developed epilepsy and a history of mental retardation. He was a person who had short-term memory loss. As Mr. Landin explained, “so you could talk to him and a half hour later, he forgot that he ever talked to you”. [Vol. II p. 125]

<sup>31</sup> The testimony of record demonstrated that Scott’s mother brought in bulk medications. [Vol II. P. 124-126]. Gayle Johnson followed Landin and had access to the bulk medication and could have easily put these medications in a cup and claimed that she found them. [Vol. II pp. 147-149]. The Healthsource documents demonstrate, contrary to the claims of Johnson, that Landin did give Scott his bulk medication. [See Exhibit 11 initials of RL on 4/23/06]. As Landin so astutely noted at the time, he told Boyk, “...I had [given] the medication, but I said you know what, **I am getting set up here, I’m being set up**. That was my rebuttal to Amber”. [Vol II p. 149].

**TERMINATION AND ACTIONS BY HEALTHSOURCE TO IMPAIR HIS LICENSE ALL BECAUSE HE WROTE THE VARIANCE AND CONCERN REPORT REGARDING GAYLE JOHNSON'S NEGLIGENCE.**

Landin has explained in the introduction, in some detail, how Boyk set out on a mission to discredit, retaliate and terminate Landin. Counsel for the Appellee Landin has spent countless hours going through the documents. Suffice it to say, while counsel understands the interaction between the documents take some time to get familiar with, there is no doubt if the reader of the brief takes the time, that he/she will fully understand that the only explanation for the documents found in Exhibits 54 & 57 is that Boyk made them up.

The seminal, **and only**, event with Scott B. occurred only on one occasion April 23, 2006. This is an event that was allegedly worthy of termination. There is no history of even so much as a verbal warning regarding any alleged similar event.

That date was originally incorrectly documented by Gayle Johnson as April 23, 2004. Everyone admits that was an error. [Amber Boyk admits that Johnson "did not even write the date down correctly". Boyk knew that the correct date is April 23, 2006, and the event is the final event before Landin is terminated. [See Vol. III p. 131-132].

The deceased nurse Pettelle, could not have written about this event in her message to Boyk on February 26, 2006, the day after Landin's report to Boyk about Johnson. [Exhibit 57]. The reason being that on February 26, 2006 the event that allegedly occurred with Scott B had not yet occurred for another two months.

A careful review of Exhibits 57 & 54, with the foundation that an error had been made on Exhibit 60, dating the event 4/23/04 as opposed to the actual date 4/23/06, is critical. Exhibit 57 purports to be an email or letter from Pettelle to Boyk that clearly refers to events that occur two months after this email/message is sent. The document created by Boyk, in the name of Pettelle, makes specific reference to Landin retaliating against Johnson for being "written" up for not passing

a group of medications to Mr. B. [Scott]. [Exhibit 57]. Pettelle allegedly puts the word “written” up in quotes. There is, of course, only one time that Landin was written up for not giving Scott B. his medications. That is on 4/23/06 two months after Pettelle allegedly wrote the document that we now know was written by Boyk.

One knows that Boyk had to have manufactured the documents is by reference to her own acknowledged notes, Exhibit 54. Exhibit 54 is a note that is alleged to be made by Boyk starting on February 27<sup>th</sup> 2006 and ending on February 28<sup>th</sup> 2006. Sandwiched in the middle of that document is reference to finding “pills in the medicine cart [Scott] [B.] on it (cup). That is the event that the Plaintiff was allegedly fired for and that event did not occur for another two months, or April 23, 2006. Boyk made an error using the erroneous date on Exhibit 60. She then created both of these documents to support the decision to terminate Landin. Healthsource meticulously went through every verbal warning and/or “write-up” of Landin. There is no other “write-up” concerning Scott B. There is no other “documented” event where Landin made a report on another nurse. There is no doubt that Boyk fabricated Exhibits 54 & 57.

**D. EVIDENCE OF DISPARATE TREATMENT AND RETALIATORY ANIMUS BY HEALTHSOURCE.**

It is difficult to describe the disparity in care provided by the Plaintiff Roberto Landin, and Gayle Johnson.<sup>32</sup> During the oral argument at the Defendant’s Motion for Judgment Notwithstanding the Verdict, Judge Boes noted, “I did not think that Gayle Johnson came across as knowledgeable or

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<sup>32</sup> Defendant for the first time argues that the Plaintiff could not claim disparate treatment because that was not part of Landin’s claim. To the contrary, the claim of disparate treatment in the violation of public policy was specifically alleged in the Complaint. Paragraph 39 provided as follows: ¶ 39 “That the Defendant’s decision to initially discipline the Plaintiff and treat him in a manner **disparate** from the other LPNs, and ultimately the decision to terminate the Plaintiff upon the pretext that he did not provide a patient medication, was in retaliation for the Plaintiff’s report of misconduct by Nurse Gayle that proximately led to the death of a patient, Jack” [Emphasis added]. *Also see* ¶40 Complaint.

competent. **In fact, she seemed to have a startling, if not appalling, lack of knowledge.**" [Hearing February 27, 2012 p. 21]. [Emphasis Added].

1. **Gayle Johnson's Errors Prior to February 2006.**

On October 25, 2005 Johnson got a written counseling for her fifth unscheduled absence [Ex. 84].<sup>33</sup> On November 30, 2005, Johnson was given a Group I suspension. [Trial Exhibit 80].<sup>34</sup> Shortly thereafter Johnson was issued a V & CR written by Deb Wilson confirming that Johnson failed to do dressing changes, failed to treat necrotic sores on a severely diabetic patient on "numerous" occasions. [Exhibit 81]. Wilson stated Johnson "continues to ignore the importance of changing the dressings twice a day" [Exhibit 81 (emphasis added)]. This also did not detract from Boyk's opinion that Johnson was a "good nurse". [Vol III pp. 58-59].

On January 31, 2006, Dale Pettelle, the RN in charge of Nurse Supervision, did actually author a coaching on Johnson before Pettelle's untimely demise in October 2008. [Vol. III pp. 61-63; Trial Exhibit 82]. Ms. Pettelle noted that Johnson's peers reported that she was remiss in completing her tasks dealing with dressing changes on "brittle" diabetics. The document confirmed that Johnson failed to do 12 out of 16 dressing changes because "she had a large load and could not get to it". [See Exhibit 82]. Worse, not only did Johnson fail to perform the procedures, she failed to arrange for another nurse to do it. Nurse Pettelle noted that as a result it could lead to a patient "going septic or even expire from septicemia or amputation et al". [Ex. 82]. In a prophetic statement Dale Pettelle coached as follows:

...Also explained that her continuing to complete tasks (sic) because her "load is too heavy or she is tired" ultimately can lead to problems with her PIR, licensure, survey results, and progressive disciplinary responses. She will be transferring to a single nurse unit by 06

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<sup>33</sup> Boyk stated that attendance was part of being a "good" nurse. Nevertheless, Johnson was written up for attendance issues every year from 2005-2009. [Vol III pp. 66-67; Exhibits 84-87].

<sup>34</sup> Interestingly, there is no explanation for the three-day suspension on Exhibit 80. Boyk could not remember. But it did not detract from her opinion that Johnson was a "**good**" nurse. [Vol. III p. 57]. [Emphasis added].

February and oversight is not as frequent, but the need to maintain appropriate response to patient needs is just as prescient and prioritizing is just as critical” [Exhibit 82]<sup>35</sup>

Boyk stated that this event did not detract from her opinion that Johnson was a “good” nurse. Exhibit 82 from Pettelle was only a “coaching” the least severe of all discipline. [Vol. III. P. 60]. Boyk admitted that each failure to perform one of the aforementioned dressing changes in Exhibit 82 constituted the highest level of misconduct pursuant to the Discipline Policy, Exhibit 42. A group I violation is supposed to, at a minimum, result in a three-day suspension. [Vol III p. 63].<sup>36</sup> Boyk confirmed that these failures constituted a Group I violation. [Id. p. 64]. The Nurse Executive Susan Graham also confirmed that. [Vol. VI p. 43]. Boyk said that she knew Johnson would have to improve her prioritization but that when she was moved in February 2006 she went from a nurse who had some problems to a “good” nurse. [Vol. III p. 65].

2. **LPN Johnson Commits No Less than Twenty (20) Group I Violations in Relation to the Treatment of Healthsource Resident, Jack, who is Killed by the Negligence of Johnson and she does not even Receive a Write up.**

Exhibit 38 detailed Healthsource’s Administration of Medications Policy. Exhibit 39 is Physician Orders. The policies, together, mandate that verbal orders are to be avoided and given only in emergencies. [Vol. III p. 69]. Written orders are much safer. [Vol. II p. 100; Vol. III p. 70]. When taking a verbal order it must be an emergency in the eyes of the nurse and the doctor and the nurse must write down exactly what the doctor orders and what the nurse tells the doctor. [Vol II p.

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<sup>35</sup> The warning was ever so prescient as Johnson’s inability to prioritize was probably the cause and/or precipitating factor of Jack’s death just as reported by Landin. Nevertheless, it was Johnson’s opinion that the Pettelle and others moved her because the “nurses was picking on me like I never did anything right. I didn’t have no support of a nurse that actually worked with me. They was always—and it stopped and they wasn’t a mentor, so she felt that it would benefit me working on a single unit. [Vol IV p. 180]emphasis added].

<sup>36</sup> Pursuant to Exhibit 42 Work Rules a Group I violation includes: 1. (13) “Failure to fulfill job responsibilities to the extent that such failure has the potential for or does cause injury to a person or substantial damage to equipment or to HHS. Failure to fulfill job responsibilities will include neglect of any patient, resident or client. Neglect is failure to provide ... services necessary to avoid physical harm, mental anguish or mental illness”. According to Ex 42 Group 1 (13) Johnson could have been fired or suspended for each failure to change dressings as required. Each failure constituted neglect.

100-101; Vol III pp. 70-71, 73-74]. Johnson clearly violated both of these Healthsource edicts.<sup>37</sup> Johnson admitted that she failed to properly chart her nursing notes that she gave Jack 15 units of insulin on the night of February 24, 2006. She also acknowledged that she was required to write down what she told P.A. Lindsay and what he told her. [Vol. IV p. 111, 118-119; 142]. She failed to write what time she gave the insulin. [Id p. 112]. Johnson admitted that there is no record of her checking on Jack in the 4-½ hours between the time he was given insulin and the time he was found on the floor in a pool of vomit and diarrhea. [Vol IV p. 142].

Incredibly Johnson admitted that when Jack was found in vomit and diarrhea she had the CENA clean him up but she did not take his vitals.<sup>38</sup> She left that to the CENA once she cleaned him up. She never had his blood sugars tested after the time he was found on the floor. [Id. p. 144]. Johnson was not aware that a person with very high blood sugars could then swing very low after the administration of 15 units of insulin and was not sure if finding someone on the ground with vomit and diarrhea was consistent with low blood sugars. [Vol IV pp. 145-146].

Johnson agreed with Boyk and Landin that with long-term patients it was very important to know the resident's history. [Vol IV. P. 114]. Even after two years of employment as a LPN Johnson did not know what a "brittle" diabetic meant. [Id p. 115].<sup>39</sup> Incredibly she did not know the workings of insulin nor did she know when the insulin reached max effect. [Vol. IV 119, 144].

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<sup>37</sup> Indeed, at the time Johnson did not even understand that verbal orders were to be avoided. [Vol IV p. 136]. When asked what concerns Johnson had her answer was that Jack's sugars were "out of whack". When asked, as a result of "out of whack" sugars what medical concerns she had and her answer was that she had no concerns. [Vol IV pp. 137-138]. She did not remember what PA Lindsay asked her and did not know what she told him. [Id pp. 139-140].

<sup>38</sup> In her deposition that she was repeatedly impeached, Johnson did not know what was more important, cleaning up Jack or taking his blood sugars where he was a brittle diabetic who had a blood sugar of 515, was given 15 units of insulin, and then was found dazed and confused in a pool of vomit and diarrhea. [Vol IV p. 148-149]. Johnson explained that she got sidetracked taking care of other patients and never got back to Jack to take his blood sugars. [Id p. 149, 156].

<sup>39</sup> This is all the more frightening because Johnson was written up by Pettelle, a month before Jack's death, because she failed to take care of those "brittle" diabetics necrotic sores. [See Exhibit 82].

Exhibit 40 provided the protocols for fall prevention. Johnson knew that Jack fell out of bed as he was found on the floor and not ambulatory. In such a circumstance a nurse is to write a fall report/neurological report. [Vol. III p. 83]. Johnson failed to author a fall report on Jack. [Vol IV p. 146]. She likewise failed to do a neurological or head injury report.

When Jack was found on the ground Johnson should have called the PA who ordered the insulin. She did not make that call. [Vol IV p. 116]. In addition because there was a fall she was suppose to put an episodic charting notation on his file. Johnson failed to do that because “she didn’t get a chance to”. [Id p. 172; See Policy Exhibit 45; See Boyk Vol III p. 86].

On the prior evening Johnson did not take a second blood sugar reading when Jack’s blood sugars read 515.<sup>40</sup> She acknowledged that there are false readings. [Id p. 124]. She agreed that a 515 sugar should have gone in the nurse progress notes and that she failed to do it. [Vol IV p. 129].

Johnson admitted that between the time she gave the 15 units of insulin and the time he was found on the floor at 1:30 am that she never checked on him. She never checked on him because she had 34 other residents and she was “too busy”. [Vol IV pp. 172-174]. She also acknowledged that when the CENA found Jack on the floor at 1:30 a.m. in a pool of vomit and diarrhea, she did not take his blood sugars. [Vol IV p. 144] She admitted that low blood sugars are dangerous and life threatening. If a blood sugar is below 60 they are to give the person orange juice. If it is below 40 one can die. [Vol iv p. 127]

3. **Roberto Landin’s Minor Infractions Compared to Johnson and Disparate Treatment.**
  - a. **Defendant Meticulously Admitted Each Infraction The Plaintiff Ever Committed Before He Authored the Variance and Concern Report Regarding the Death of the Healthsource Patient, Jack.**

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<sup>40</sup> She also admitted that being a “new” nurse, having only passed her exams two years before, she did not understand a sliding scale and in three months she had not taken the time to learn Jack’s history. [Vol IV p. 132-133].

Defendant meticulously admitted every instance wherein the Plaintiff did anything wrong or was alleged to do anything wrong, whether he did it or not, and whether it occurred at Healthsource or other facilities. [Vol II p. 168]. Whenever there was any documentation the Defendant admitted the exhibit. The sum and substance of the Defendant's allegations were as follows for the years 2001-February 25, 2006

1. That over his many years at Healthsource Landin did not blindly follow his supervisors when he believed that their judgment was incorrect and questioned a few supervisors over the course of his employment who he believed had exhibited poor judgment, i.e. having less trained nurses do CPR etc... that is he questioned their judgment when he thought that they were incorrect; [Id pp. 171-175];
2. That on November 1, 2004 when he questioned a supervisor he was given a write-up and a one-day suspension for insubordination; [Vol II p. 184];
3. In 2005 he had 5 unscheduled absences just as Gayle Johnson did; [Id p. 186];
4. In July 2005, rather than writing a report about a patient's bruised lip he gave the information to a nurse who was replacing him [Vol II. 187];
5. And he was written up for laughing at a co-workers joke; [Id p. 188].<sup>41</sup>

b. **Plaintiff's Write-ups After He Authored the Variance and Concern Report Alleging that Gayle Johnson Caused or Precipitated the Death of Patient Jack.**

Plaintiff has already detailed the three write-ups the Plaintiff received starting days after the Variance & Concern Report to about six weeks for the concocted write-up that he did not give seizure medications to Scott B.

The most important aspect of this evidence is what is not there. This Court can scour this record with a fine toothcomb and it will only find one write-up for the Plaintiff regarding the alleged failure to pass medications to Scott B. There is no other "write-up" of the Plaintiff that was allegedly described by deceased nurse Dale Pettelle on February 26, 2006, the day after the Plaintiff wrote the

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<sup>41</sup> Plaintiff urges the Court to review Defendant's listing of alleged infractions. Defendant's brief pp. 14-15. What is missing? Prior to February 26, 2006 there is no "write-up" regarding Plaintiff's failure to pass medications to Scott B. No write up and no verbal warning. Proving what the Plaintiff has said and proved all along. That is, Amber Boyk must have created documents Exhibits 54 and 57, after the fact, because of a reliance on a wrong date written on Exhibit 60 by Gayle Johnson.

Variance & Concern Report. Therefore, Pettelle could not have written on February 26, 2006 what did not occur until April 23, 2006. [See and compare Exhibit 57 and 60].<sup>42</sup>

4. **Amber Boyk's Stated Opinion that Johnson was a "Good" Nurse and that Landin was a "Poor" Nurse was Demonstrated to be Based on Retaliatory Animus.**

Amber Boyk was the Nurse Manager in 2006 and Landin and Johnson both reported to her. Boyk was responsible for their evaluations and any discipline. [Vol III. pp. 46-47]. Boyk admitted that she was responsible for the hire of Gayle Johnson as an LPN. [Vol III p. 87].

Boyk testified at trial that Johnson was a "fair" employee and Landin was a poor employee. She was impeached with deposition testimony wherein she graded Johnson as a "good" employee. [Vol III pp. 50-52].<sup>43</sup>

Trial Exhibit 42 was admitted by Boyk to be an ambiguous document that allowed the Defendant to alter or modify its rules to fit whatever purpose Healthsource desired. [Vol. III p. 68]. The policy allowed Healthsource to do whatever it wanted, even if it was for an unlawful reason. [See Vol. III pp. 68-69]. Specifically Ms. Boyk was asked as follows:

"Q. ...The policy allows them, for whatever their motives or wants are, they can change the policy to fit whatever they want to do; fair to say?

"A. Per the policy, yes.

"Q. There is no mandatory—you could, as an extreme, you could absolutely go out and kill somebody, and that policy doesn't demand that they fire you, true?

"A. Not with the wording of the policy.

"Q. Right. And there is no limit under the policy how many Group I violations you could get. We know that she [Gayle Johnson] got 12 and she didn't get written up, fair to say?

"A. Yes. [Vol. III p. 69].

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<sup>42</sup> Please remember Exhibit 60 was initially dated April 23, 2004, but was later corrected to read (06). No one disputes Exhibit 60 refers to an event that the Defendant alleged occurred on 4/23/06. Likewise, Boyk could not have had a conversation with Pettelle on February 27, 2006 about Landin retaliating for being written up about not passing medications to Scott B. as the event had not occurred until two months later. [Compare Exhibits 54, 57, 60]. Again, Boyk's errors in creating these documents all emanated from the wrong date initially being placed on Exhibit 60 by Johnson.

<sup>43</sup> Not only was evidence of Johnson admissible to prove that Landin had a good faith belief that she was negligent, it was also admissible to impeach Boyk.

Boyk admits the rules are written in such a way that allows them to retaliate, or get rid of those employees that they don't want, and keep anyone that they do want regardless of qualifications. [See, Vol. III pp. 81-82].

- a. **Weeks Before Landin is Terminated Johnson Does the Same Thing that Landin was Alleged to do, and Despite her Prior Record of Failing to Give 12/16 Dressing Changes, and an Accusation that she had just Caused or Precipitated the Death of Jack, Johnson is Given A Group II Violation Because there was No Evidence of Malicious Intent**

A prime example of how ambiguous the Healthsource Policy on Discipline was, and how it was used in a disparate manner against Landin, is demonstrated in Exhibit 83. Ms. Boyk admitted that medication errors at Healthsource are common. [Vol. III. P. 89]. On March 6, 2006, Gayle Johnson, the same day Boyk is writing up Landin, was accused of falsely telling a supervisor that she administered drugs but upon review of the resident's MAR it was discovered that she did not document the treatment. Exhibit 83 chronicles a written warning for an offense that Boyk admitted was the same as what the Plaintiff was accused of doing. The relevant colloquy was as follows:

"Q. Now whether the medication error is signing your initials when you didn't give the medication or not signing after, you were suppose to write them up, (sic) is that true?

"A. Yes, education or write-up or depending on where in the policy or where in the discipline they are at?

"Q. Yeah. Previously you said you looked at them as the same, correct?

"A. Correct.<sup>44</sup> [Vol III p. 89].

Boyk testified that she talked to Johnson and investigated Jack's death. That was contrary to Johnson's testimony at her deposition that was used to impeach her at trial. The relevant colloquy was as follows:

Q. I asked you on line 19 at page 30: Were you called in to any meetings to discuss the circumstances of ... Jack's death? And your answer was?

"A. This answer right here is no.

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<sup>44</sup> Boyk went on to say that the nurse's intent was not important because she would not know it. Later, however, in Exhibit 83 she coaches Johnson because she has no bad intent. Boyk, however, terminates Landin where he stated that he signed his initials and gave the medications to Scott B. [Vol III. Pp. 89-91]. The record showed that Landin gave the medication but he was still fired. [See Medication Record Scott B, Exhibit 11].

"Q. Your answer was no. Correct?

"A. Right.

"Q. Then I asked you: Human resources or risk management never called you in for any meeting regarding the death of Jack? And your answer was?

"A. No. [Vol. IV p. 120].<sup>45</sup>

Incredibly, despite a career of errors in one night, Johnson did not have her statement taken by HR, Risk Management or any other entity in Healthsource. She was never written up or given any discipline. [Id. p. 122, 169, 172]. Johnson denied ever talking to Boyk regarding any of the charges that Landin made against her. [Id p. 175].

Boyk's statement that Johnson was a "good" nurse and was better than Landin, a "poor" nurse, was totally discredited. Even Gayle Johnson acknowledged that Landin was more knowledgeable than she was and a better nurse. The colloquy was as follows:

Q. Now you would agree that in 2006 and even in 2009, you believed that Mr. Landin was a more knowledgeable nurse than you were?

A. Well, he was a gooder (sic) nurse for years. Yes I would say he was knowledgeable.

Q. And he was more knowledgeable regarding the specifics of Jack, because he had treated him for a year or more?

"A. Yes

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"Q. Well you just said a second ago it was your understanding Mr. Landin was a very knowledgeable, experienced nurse that had worked with...Jack a long time, true?

"A. True.

[Vol IV. P. 162].<sup>46</sup>

#### ARGUMENT I

### THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT AND JURIES' FINDINGS THAT THE MICHIGAN PUBLIC HEALTH CODE WAS

<sup>45</sup> Obviously, the investigation that the Defendant wanted to put in absolving Johnson of wrongdoing was not quite the investigation one would typically envision in a death case. Usually, to exonerate wrongdoing, the investigative body would have to at least interview the person who is alleged to have negligently caused the death. The lack of a single person from Healthsource even interviewing Johnson is the culmination of what this counsel would characterize as the worst cover-up, or attempt to cover-up wrongdoing that he has seen in over thirty-two (32) years of practice.

<sup>46</sup> After denying before that she was "angry", Johnson admitted that "**you'd be angry, too**" if **someone accused you of killing somebody**. She knew that Landin thought her work was "**substandard**". After after denying **she was angry** Johnson stated that **she was angry for being called dumb and substandard**. [Vol IV p. 166]. [Emphasis added]. The most appropriate word describing Ms. Johnson was the word used by Mr. Landin, "**dangerous**". [See Exhibit 50].

**ENACTED BY THE LEGISLATURE TO SAFEGUARD THE PUBLIC FROM INCOMPETENCE, DECEPTION AND FRAUD AND THAT MICHIGAN PUBLIC POLICY WAS VIOLATED WHERE THE DEFENDANT HEALTHSOURCE TERMINATED ROBERTO LANDIN IN RETALIATION FOR REPORTING THAT A CO-WORKER WAS "INCOMPETENT", "DANGEROUS" AND HAD PRECIPITATED THE DEATH OF A PATIENT.**

**A. STANDARD OF REVIEW**

Plaintiff agrees with the Defendant that this Court reviews the Trial Court's proper denial of the Defendant's motion for summary disposition *de novo*. Also, questions of law regarding public policy are also questions of law that are reviewed *de novo*. *Kelly v. Builders Square Inc.*, 465 Mich 29, 34, 632 NW2d 912 (2001).

**B. THE LEGISLATURE ENACTED THE PUBLIC HEALTH CODE TO PROTECT THE PUBLIC FROM INCOMPETENCE, DECEPTION AND FRAUD.**

It is a doctrine of longstanding, as the Court of Appeals in this case explained, that "the purpose of the statutes regulating health care professionals, including those set forth in the Public Health Code (under which MCL 333.20176a falls) is to safeguard the public health and protect the public from incompetence, deception, and fraud. *Landin v. Healthsource*, Slip Opinion p. 5, citing *Michigan Ass'n of Psychotherapy Clinics v. Blue Cross & Blue Shield of Michigan*, 118 Mich App 505, 522; 325 NW2d 471 (1982). The Court of Appeals further opined that it was the expressed desire of the legislature to prohibit retaliation against an employee who reported malpractice, "[a]nd the right to report alleged acts of negligence (malpractice) is consistent with and implicit in the purposes of the Public Health Code and its statutory regulations governing health care professionals". [*Landin supra*, p. 5].

**C. DEFENDANT'S TERMINATION OF THE PLAINTIFF FOR WRITING A STATEMENT THAT A CO-WORKER WAS INCOMPETENT, DANGEROUS, AND HER NEGLIGENCE KILLED OR PRECIPITATED THE DEATH OF A HEALTHSOURCE PATIENT VIOLATED MICHIGAN PUBLIC POLICY.**

1. **Public Policy Law in Michigan.**

In *Suchodolski v Michigan Consol. Gas Co.* 412 Mich 692, 316 NW 2d 710 (Mich 1982), this Court recognized three public policy exceptions to Michigan's general rule of employment at will. According to *Suchodolski*, an employer is not free to discharge an employee (1) when such discharge runs contrary to "explicit legislative statements prohibiting the discharge . . . of employees who act in accordance with a statutory right or duty" (2) "where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment" or (3) "when the reason for a discharge was the employee's exercise of a right conferred by a well established legislative enactment." *Id.* at 695-96, 316 NW 2d at 711-12.

Defendant argues that there can be no public policy claim without a specific statement in the policy that protects employment rights. [Defendant's Brief p. 27 citing *Psaila v. Shiloh*, 258 Mich App 388, 392; 671 NW2d 563 (2003)].<sup>47</sup> The Defendant further argues that the statute identifying a

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<sup>47</sup> *Psaila* is not analogous to this case as it involved a claim under the Sales Commission Act. Defendant also provides string cites of other inapplicable unpublished opinions. *See, Zub v. Wayne County Commission* 1997 WL 33344618 (1997) [Claim was that discharge was in violation of ERISA to prevent attainment of a pension]; *Friend v. Village of North Branch* 2005 WL 599705 (police officer sought public policy claim regarding home building regulation). Nothing in the statute applied to individuals. To the extent that the discharge was in retaliation for the report or the threat to report to a state agency the claim was a Whistleblower's action. Defendant cited *Regan v. Lakeland Regional Health System*, 2001 WL 879008 that involved a plaintiff's attempt to sensitize her employer to Medicare fraud. The Plaintiff's failure to report precludes her reliance on either the federal legislation or Michigan's Whistleblower's Protection Act. Defendant's reliance on *Scott v Total Renal Care*, 194 Fed Appx 292 (2006) is also irrelevant to this case. In *Scott*, the Plaintiff made a claim under the Whistleblower Protection Act. The Court held because the Plaintiff had a claim under the WPA, "...that Scott's public policy based claim could not proceed because the WPA is the exclusive cause of action governing employer retaliation" where employees made a report to a state agency. The Plaintiff, herein, made no such report, nor did he threaten to report. His public policy matter can proceed as Landin had no recourse under the WPA. [See *Infra*].

Defendant's reliance on *Turner v. Munk*, 2006 WL 3373090, is also misplaced. In *Turner*, the Plaintiff was an office manager who, apparently, was helping herself to the property of the Defendant's practice. The Plaintiff claimed that her request for overtime, some seven months before her termination, was the basis of the retaliatory termination. The Court found, that the Defendant provided a legitimate reason for the Plaintiff's termination, theft, which the Plaintiff failed to rebut. In this case there is temporal causality as well as disparate treatment from the way Mr. Landin was treated and that of Gayle Johnson. Landin has extensive evidence to rebut the Defendant's pretext

public policy under either prong of *Suchodolski* must prevent discharge for protected activity. [Defendant's Brief p. 27]. That is exactly the Statute that the Plaintiff provided to the courts below.

Michigan Compiled Law 333.20176(a) clearly sets forth the State's public policy regarding the prohibition of retaliatory termination for the reporting of malpractice. The Statute makes clear that it is against the law to discharge for reporting, in good faith, that a co-worker committed malpractice. The Statute, however, provides no remedy provision that applies to this case. (No claim under the Whistleblower Protection Act herein). The Statute does, however, set forth explicit legislative statements prohibiting discharge of employees who act in accordance with the statutory right and provides a right conferred by a well-established legislative enactment thereby fulfilling at least 2 of the three prongs enumerated in *Suchodolski supra*, [See prongs 1&3].

Defendant suggests that the first prong of *Suchodolski* was "effectively eliminated" by this Court's holding in *Dudewicz v. Norris-Schmid, Inc.*, 443 Mich 68, 503 NW2d 645 (1993) overruled on other grounds 478 Mich 589 (2007). That is incorrect as to the facts of this case. In *Dudewicz*, the plaintiff was an individual who had reported a co-worker's assault and battery to the local prosecutor. When *Dudewicz* came to work the next day he was told by management to drop the charges. When he refused, he was terminated. In that factual situation, the public policy claim was pre-empted by the Whistleblower Protection Act (WPA) because the plaintiff had a viable claim under the WPA.

This Court declared:

A public policy claim is sustainable, then, only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue. As a result, **because the WPA provides relief to Dudewicz for reporting his fellow employee's illegal activity, his public policy claim is not sustainable.**

*Dudewicz, supra* @ p. 80. [Emphasis added].

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for unlawful conduct. Defendant makes the same error in *Grant v. Dean Witter Reynolds*, 952 F Supp 512 [ED MI 1996]. Plaintiffs claimed that Dean Witter violated the Michigan Partnership Act by discharging them for suing under the MPA. The Court noted, however, that the **sections of the MPA** relied upon by plaintiffs as a source of public policy (M.C.L. §§ 449.20–21) are only general provisions explaining the duties of partners and are not directed at conferring rights on employees.

In this case, however, Landin was not protected under the WPA because he did not make a report, or threatened to make a report that would trigger the provisions of the WPA. Therefore, as Landin had no other statutory protection, and because there was a clear legislative policy protecting his conduct, he has established a public policy claim under *Suchodolski, supra*.

Indeed, this is a quintessential claim under the first prong of *Suchodolski*. That is, there is an “express legislative statement prohibiting the discharge...of an employee who act(s) in accordance with a statutory right or duty”. 412 Mich at 695-696. As the Court of Appeals correctly explained,

“[i]f plaintiff was simply reporting a violation of an article under the Public Health Code, defendant’s argument would succeed, given that the remedies provided by the WPA are exclusive and not cumulative. (citations omitted). However, plaintiff did not originate a report or complaint of a violation of the Public Health Code: he accused a co-worker of malpractice...There is no requirement that in order to establish a claim of malpractice, one must necessarily allege a violation of the Public Health Code. The Trial Court did not err in denying defendant’s motion or summary disposition based on the WPA. [*Landin supra* slip Opinion p. 7]||Also see *infra* as to why Landin had no claim under the WPA].<sup>48</sup>

Defendant asserts that this Court reined in the public policy exception in *Terrien v. supra*, and that Michigan public policy is not merely the equivalent of the personal preferences of one judge. [Appellant’s brief p. 23]. The Court explained that:

In identifying the boundaries of public policy, we believe that the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted \*67 by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law.<sup>10</sup> See *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 357, 51 S.Ct. 476, 75 L.Ed. 1112 (1931). The public policy of Michigan is *not* merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law. There is no other proper means of ascertaining what constitutes our public policy. *Terrien supra* @ pp. 66-67.

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<sup>48</sup> Landin also is protected by the third prong of *Suchodolski*. That is, the “reasons for a discharge was the employee’s exercise of a right conferred by a well-established legislative enactment. See *Suchodolski supra* at 695-696 and *see infra*.

The facts and the underlying public policy in *Terrien*, however, were much different than this case. In *Terrien* the Court found that there was no evidence of a legislative public policy prohibiting a covenant precluding the operation of family day care homes. The Court declared:

This Court has found no “definite indications in the law” of Michigan to justify the invalidation of a covenant precluding the operation of “family day care homes.” Indeed, nothing has been cited, nor does our research yield anything, in our constitutions, statutes, or common law that supports defendants’ view that a covenant prohibiting “family day care homes” is contrary to the public policy of Michigan.

Defendants contend that “family day care homes” are a “favored use” of property, and a restriction against such a use, therefore, violates public policy. Amorphous as that claim may be, even if it is true that “family day care homes” may be permitted or even encouraged by law, it does not follow that such use is a favored one. Additionally, that “family day care homes” are *permitted* by law does not indicate that private covenants barring such business activity are contrary to public policy. What is missing from defendants’ argument is some “definitive indication” that to exclude “family day care homes” from an area by contract is incompatible with the law.... *Terrien supra* @ pp. 69-70 [Footnotes omitted][Emphasis added].

Contrary to the situation in *Terrien*, in this case there is a clear legislative mandate that prohibits the retaliatory termination of nurses who report malpractice/negligence. [See MCL 333.20176(a)]. Defendant is in the anomalous position of arguing that despite the clear language of MCL 333.20176(a) that the State of Michigan does not have a definitive public policy that prohibits the retaliatory termination of health professionals for reporting malpractice/negligence.

2. **The Legislative Enactment Referred to in the Instant Case, MCLA 333.20176(a), is Consistent with Recognized Codes of Professional Conduct that Best Serve the Interests of the Public.**

It has long been recognized that a nurse as a professional employee may confront circumstances where the nurse’s professional obligations to his/her profession conflict with the responsibilities of an employee to obey an employer’s directive. See, Frank J. Cavico and Nancy M. Cavico, Employment At Will, Public Policy, and the Nursing Profession, 8 *Quinnipiac Health L. J.* 161, 162 (2005) [Hereinafter *Cavico & Cavico*].

The foundation of a profession is its code of ethics. The paramount code of ethics for the nursing profession is the Code of Ethics for Nurses with Interpretive Statements promulgated by the American Nurses Association (ANA). [*Cavico & Cavico*, pp. 216-217 citing ANA Code of Ethics].

“Of particular note is the ethical duty set forth in the ANA’s Code obligating the nurse to be an advocate for patients. The ANA Code of Ethics provides that ‘[t]he nurse promotes, advocates for, and strives to protect the health, safety, and rights of the patient...In addition, pertaining to the nurse’s advocacy obligations, there is a “whistleblowing” section called “Acting on questionable practice,” which describes in detail and in a highly legalistic manner the nurse’s ethical duty to report, “incompetent, unethical illegal or impaired practice by any member of the health care team or health care system” [Id @ p. 218 citing various sections of the ANA Code of Ethics].

Mr. Landin testified that as a nurse his chief obligation was to act as an advocate for his patients. [Vol. II p. 77]. Landin’s professional duty to report malpractice is subsumed and protected within the meaning of MCLA 333.20176(a). Sister jurisdictions that have considered the question have ruled in conformity with the Court of Appeals and trial court’s decisions below.<sup>49</sup>

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<sup>49</sup>In *Hausman & Wright v. St. Croix Care*, 214 Wis 2d 655, 571 NW2d 393 (1997) the Wisconsin Supreme Court reversed a grant of summary disposition and held that employer who discharged an employee for her fulfillment of her obligation to prevent abuse and/or neglect in a nursing home creates wrongful termination liability. The Court noted, “A wrongful discharge is actionable when the termination clearly contravenes the public welfare and gravely violates paramount requirements of public interest. [citations omitted]. Accordingly, ‘an employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law. [Id. 214 Wis 2d 655, 663-664].

In *Wendeln v. The Beatrice Manor Inc.*, 271 Neb 373; 712 N.W. 2d 226 (2006) the Nebraska Supreme Court recognized a public policy claim for retaliatory discharge where an employee was discharged for making a report to the Nebraska Dept. of Health & Human Services. The Defendant, Beatrice, argued that there is no clear legislative enactment declaring an important public policy for wrongful discharge. [Id @ 385]. The Court found that the purpose of the APSA would be circumvented if employees mandated by the APSA to report suspected patient abuse could be threatened with discharge for making such a report...Thus, we determine that a public policy exception to the employment-at-will doctrine applies to allow a cause of action for retaliatory discharge when an employee is fired for making a report of abuse as mandated by the APSA. [Id @ pp. 387-388].

The Kansas Supreme Court reached the same result in *Palmer v. Brown*, 242 Kan. 893; 752 P.2d 685 (1988). In *Palmer* the plaintiff was allegedly terminated for reporting improper Medicaid billing practices. The Court concluded: “Public policy requires that citizens in a democracy be protected from reprisals for performing their civil duty of reporting infractions of rules, regulations, or the law pertaining to public health, safety, and the general welfare. ...[w]e have no hesitation in

**D. DEFENDANT’S CLAIM THAT THE PUBLIC HEALTH CODE CANNOT BE THE SOURCE OF A PUBLIC POLICY CLAIM IGNORES THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE ACT AND FAILS TO RECOGNIZE THAT THE PLAINTIFF WAS NOT PROTECTED BY THE MICHIGAN WHISTLEBLOWER PROTECTION ACT (WPA).**

Healthsource argues that the Pubic Health Code only provides protection under the WPA. [Defendant’s Brief p. 26-29]. There is no such limitation, however, in MCLA 333.20176(a). The sole support for Defendant’s claim is the holding of an unpublished split decision in *Parent v. Mount Clemens Gen Hosp*, 2003 WL 21871745 (August 7, 2003). [See Healthsource brief p. 31].

The two-one decision in *Parent* gives many scenarios why the plaintiff therein lost. *Parent* concluded that even if the WPA did not preempt the Plaintiff’s claim, that *Parent* had not proved her public policy claim. Therefore, the *Parent* ruling that the WPA is the exclusive remedy is *dicta*.

Judge White in the dissent, correctly explained that *Parent* **could not** have been protected by the WPA and, therefore, the WPA could not preempt the public policy claim. Judge White wrote:

**“The WPA only applies where the employee reports the alleged violation to a public body. Such conduct was not involved here. The WPA provides no remedy and therefore is not the exclusive remedy.”** [Judge White, *Id.* at p. 4]. [Emphasis added].

Had Landin filed this claim pursuant to the WPA, the Defendant would have had it immediately dismissed. Landin made an internal report. Landin never reported, nor did he threaten to report, any wrongdoing to a “public body”. [Vol II p. 112]. Therefore, Mr. Landin had no remedy under the WPA. Where there is no other remedy, and there is a clearly stated public policy, Mr. Landin has a viable public policy claim pursuant to *Suchodolski, supra* and its progeny<sup>50</sup>. Likewise,

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holding termination of an employee in retaliation for the good faith [report] ...is an actionable tort. [752 P2D 685, @ 689-690]

<sup>50</sup> A policy claim is sustainable under the first prong of *Suchodolski* only where there is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue. *Garavaglia v Centra Inc*, 211 Mich App 625, 536 NW 2d 805 (1995) citing *Dudewicz v Norris Schmid, Inc.*, *supra* at 80. Landin had no claim under the WPA as he did not report or threaten to report Johnson’s errors to a “public body”. [See Affidavit Tab H].

this is consistent with this Court's holding in *Dudewicz supra*. As noted above, *Dudewicz* only held that where a person had a claim under the WPA, that the public policy claim was pre-empted.

Indeed, Defendant admitted that Landin did not have a claim under the WPA, wherein it stated that Plaintiff admitted away a WPA claim by affirming he did not file a charge with a public body nor did he intend to. [Defendant's Brief Court of Appeals p. 9 *citing* Affidavit of Roberto Landin. (Affidavit Tab H)].<sup>51</sup>

Under the policy language of MCLA 333.20176(a) there is no requirement that the report be made to a state agency or public body. The pronouncement, rather, has these three requirements. The employee must 1) make a good faith report that one has committed malpractice; 2) make the report verbally or in writing; and 3) then suffer an adverse employment action as a result of the report. Mr. Landin proved that he met those three prerequisites to have a public policy claim.<sup>52</sup>

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<sup>51</sup> Defendant cites *Parent* in its brief for the proposition that, "a public policy claim is sustainable, then, only where there is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue". [Defendant's Brief on Appeal p. 36 *citing Parent*]. In this case there is no other applicable statutory prohibition because the WPA did not apply as the Plaintiff did not report or threaten to report the actions to a "public body" as required under the WPA. Therefore, according to *Suchodolski* and its progeny, and this Court's holding in *Dudewicz supra*, Mr. Landin has a viable public policy claim as there is not a separate viable statutory prohibition against discharge.

<sup>52</sup> Healthsource's claims that other courts have denied public policy claims based on internal reports. Those internal reports, however, had no legislative statements prohibiting discharge (*Suchodolski* exception 1) nor was the termination in response to an employee's exercise of a well established legislative enactment (*Suchodolski* exception 3). All of the string cites are not analogous. There is no stated legislative enactment that provides the foundation for a public policy claim complaining about the hiring of a convicted felon. [See *Healthsource's Brief* p. 37 *citing Gilmore v. Big Brothers/Sisters of Flint, Inc* 209 WL 1441568]. *Harder v. Sunshine Senior Living* [2009 WL 5171843] is also distinguishable. In *Harder* plaintiff asserted that her claim for wrongful termination was based on the second prong identified by the *Suchodolski* court, a termination for failure or refusal to violate the law. The Court noted, however, that "Harder's claim that she was fired to prevent her from reporting the nurse's dispensing of the drug to the state of Michigan, however, fails to state a claim for wrongful termination for failure or refusal to violate the law. The complaint alleges that Sunrise terminated Harder to prevent her from reporting the improper dispensing of drugs by Sunrise's nurse, and alleges that Harder's supervisor's failure to report the improper dispensing of drugs was a violation of state law. Harder's complaint does not allege facts showing that Harder *herself* refused or failed to violate any specified law and therefore it fails to state a claim for wrongful termination under this prong of the public policy exception" *Harder supra*. Finally, Healthsource's reliance on *Cushman-Lagerstrom v. Citizens Ins Co*, 72 Fed Appx 328 (6<sup>th</sup> Cir 2003), is easily distinguishable. In *Cushman* the Plaintiff was claiming that she reported an internal report that suggested that she

E. THE CLAIMS THAT THE FLOODGATES OF LITIGATION WILL BE OPENED AND THAT THE AT-WILL DOCTRINE ERODED, ARE ERRONEOUS AND NEW CLAIMS RAISED IN THIS APPLICATION.

Defendant states that the at-will employment doctrine will be eroded as the result of this case. [Def. Brief p. 38]. First, this case does not erode the at-will doctrine as it is consistent with this Court's prior holdings in *Suchodolski* and *Terrien supra*. *Suchodolski* was decided three decades ago. *Landin* squarely falls in the exceptions enunciated in *Suchodolski*. Consequently, there is no change in the at-will doctrine and, therefore, no concomitant rise in litigation.

In addition, this is a new argument that was not raised in the Court of Appeals. *Toussaint v. Blue Cross & Blue Shield*, 408 Mich 579; 292 NW2d 880 (1980) and its progeny, none of which are relevant to this case, were never raised in Healthsource's brief below. It is well established that a defendant's failure to allege a claim **below** results in **waiver** of his **argument** regarding the claim on appeal. See *Walters v. Nadell*, 481 Mich. 377, 387; 751 NW2d 431 (2008). This argument is

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would be violating the law. The Court held otherwise. The Sixth Circuit explained: "We are not persuaded that Plaintiff has established any violation of law or any proposed actions that would have violated the law. Rather, it appears that Plaintiff merely raised an issue as to whether any of Allmerica's actions would violate the terms in Citizens' July 25, 1997 letter to the MIB. Her concerns were passed on to upper management officials, who in turn determined that no violations had occurred or were occurring. Plaintiff has produced no evidence to the contrary. [*Cushmon supra*]. Regarding the internal aspect of the report the Sixth Circuit held, "First of all, this factual scenario is not listed among the three public policy exceptions to the "at-will employee" rule. See *Edelberg*, 599 N.W.2d at 786-87. Second, Plaintiff has not identified, and we have not located, any controlling or persuasive Michigan case law that has extended the public policy exception \*329 to discharges in retaliation for reporting violations of law to superiors. [*Cushmon supra* 328-329]. *Cushmon supra* supports *Landin* because the factual scenario herein does fall within two of the three exceptions enunciated under this Court's holding in *Suchodolski*. Second, *Cushmon supra* is consistent with the Court of Appeals in this case because under the clear policy of MCL 333.20176(a) an employer shall not discharge an employee who reports in writing the malpractice of a health care professional. *Cushmon* also cites two other cases, *Wiskotoni v. Mich National Bank*, 716 F2d 378 (6<sup>th</sup> Cir 1983); and *Pratt v. Brown*, 855 F2d 1225, (6<sup>th</sup> Cir 1988). These cases require that the Plaintiff demonstrate the "location of some legislative enactment to ground a finding that a discharge is in breach of public policy. [See *Cushmon* p. 328].

a red herring. The Court of Appeals decision is dead center in applying this Court's holdings in *Suchodolski* and *Terrien supra*. This case does not expand this Court's prior holdings.<sup>53</sup>

## ARGUMENT II

**THE COURT OF APPEALS CORRECTLY FOUND THAT LANDIN HAD PROVEN A PRIMA FACIE CASE OF RETALIATION WHERE HE DEMONSTRATED THAT HE MADE A REPORT OF MALPRACTICE REGARDING A CO-WORKER, THAT HEALTHSOURCE KNEW OF THE REPORT AND THEREAFTER LANDIN WAS TREATED IN A DISPARATE MANNER AND ULTIMATELY TERMINATED AS A DIRECT RESULT OF HIS REPORT OF MALPRACTICE.**

### **A. PLAINTIFF PROVED A PRIMA FACIE CLAIM OF RETALIATION.**

The Court of Appeals correctly stated the law wherein the panel stated: “[t]o establish a prima facie case of unlawful retaliation plaintiff must show” (1) that he engaged in protected activity; (2) the employer knew of the activity; (3) the employer took action that was adverse to the Plaintiff and (4) there was a causal connection between the protected activity and the adverse action. *See, Landin supra* p. 7 citing, *DeFlaviis v. Lord & Taylor, Inc.*, 223 Mich.App. 432, 436 (1997).<sup>54</sup>

Healthsource, being oblivious to the facts of the case, asserts that neither the court of appeals nor the trial court “ever identified what evidence supported that conclusion”. [Appellant’s brief p. 40]. To the contrary the Court of Appeals expressly stated the following:

Plaintiff presented evidence that he had regularly violated the medication policy while in

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<sup>53</sup> Defendant’s other new argument is that the Plaintiff did not prove malpractice. [See Healthsource brief p. 31 fn 29.] Not surprisingly, the case cited by Healthsource has nothing to do with this case. *See, McIntire v. Michigan Institute of Urology*, 2014 WL 265519 (January 23, 2014). The only portion of *Suchodolski* that was argued was the second prong, the refusal to violate the law which the plaintiff could not prove. Under MCL 333.20176(a) Landin only needed to show that he “in good faith” reported what he believed to be malpractice of Gayle Johnson. The evidence overwhelmingly demonstrated that Landin had ample reason to believe in good faith that Gayle Johnson was “dangerous”, breached the standard of care in countless ways, and indeed caused and/or precipitated the death of Healthsource patient Jack.

<sup>54</sup> In *Kocenda v Detroit Edison Co.*, 139 Mich App 721, 363 NW 2d 20 (1984) this Court held that to prevail in a retaliation case under the Elliott Larsen Civil Rights Act one need only show a causal link between the protected activity and the adverse treatment by the employer. In this case the jury was instructed, and the Verdict Form reflected, that the Jury had to find that Mr. Landin’s report to Boyk was “**a significant**” factor in the decision to terminate. [Verdict Form attached under Tab G].

another department in defendant's employ without consequence. Plaintiff presented further evidence that the co-worker about whom he had filed a report was the individual who initiated the complaints regarding his failure to comply with the medication policy and initiated the complaints only after she was aware of his accusations against her. Plaintiff presented evidence that the complaints were made within a short time after plaintiff filed his report; that the co-worker had never filed a complaint against another employee; that defendant called him to human resources when it was discovered that he was speaking to the deceased patient's widow and questioned plaintiff about whether the widow was considering legal action against defendant, and that the co-worker had violated defendant's policies on several occasions that could also subject her to termination under defendant's discipline policy, yet was not fired. *Landin Slip* pp. 7-8.

Defendant provides no analysis why the Court of Appeals is wrong.

1. **The First Three Elements of a Prima Facie Case are Not Seriously in Dispute.**

Mr. Landin made a report to his supervisor Amber Boyk that LPN Johnson was dangerous and caused or precipitated the death of "Jack". That is a report of negligence/malpractice consistent with MCL 333.20176(a). This constituted protected conduct.

2. **Landin Proved that his Report of Johnson's Negligence/Malpractice to Amber Boyk was the Reason that he was Terminated.**

To prove a causal connection, a plaintiff must "introduce evidence sufficient to raise the inference that his protected activity was the likely reason for the adverse action." *Dixon v. Gonzales*, 481 F.3d 324, 333 (6th Cir.2007) It has been held that "[a]lthough temporal proximity itself is insufficient to find a causal connection, a temporal connection coupled with other indicia of retaliatory conduct may be sufficient to support a finding of a causal connection." *Randolph v. Ohio Dep't of Youth Servs.*, 453 F.3d 724, 737 (6th Cir.2006).

a. ***Plaintiff Proved a Compelling Temporal Connection.***

In this case the retaliation could not have been more simultaneous. As soon as the Plaintiff reported Johnson's incompetence to Boyk he was retaliated against. Johnson wrote a report against Landin the next day. (Exhibit 51). Within a week Boyk sanctioned him twice for incidences reported by Johnson. [Exhibits 20, 66 and 70]. Moreover, what he was sanctioned for was conduct

that he in some cases had been doing for years without repercussion. Finally, within a two-month period documents were fabricated by Boyk, and was Landin was charged with failing to give medicine to Scott B. that the record demonstrated that he gave. [See, Exhibits 24, 26, 54, 57, 60].

**b. Plaintiff Provided a Mountain of Other “Indicia” of Retaliatory Conduct in the Form of Disparate Treatment between Plaintiff and Gayle Johnson.**

In the absence of direct evidence of discriminatory treatment, proof of discriminatory motive can be inferred from the mere fact of differences in treatment. *Hollins v. Atlantic Co.*, 188 F.3d 652 (6<sup>th</sup> Cir. 1999). In order to satisfy the requirements of the *prima facie* case of **disparate treatment** the plaintiff must produce evidence that: (1) he is a member of a protected class, and (2) for the same or similar conduct he was treated differently from similarly situated non-minority employees. See *Lytle v. Malady* 458 Mich 153, 579 NW2d 906 (1998). It is well established that evidence of like or different treatment of fellow employees is relevant in aiding the jury in determining whether an employer was likely to have acted with unlawful motives. *Meury v. Connie Kalitta Services*, 1999 WL 357774 (6<sup>th</sup> Cir. 1999). [See tab D].

**3. Landin and Johnson were Similarly Situated Employees.**

Plaintiff had to only show that he and Johnson were similarly situated in all relevant respects. In discipline cases, this means that the comparable must have the same supervisor, must have been subject to the same standards, and have engaged in acts of comparable seriousness. *Wright v. Murray Guard, Inc.* 455 F3d 702 (6<sup>th</sup> Cir 2006).<sup>55</sup> Landin and Johnson were comparable in all respects. They were both LPNs, worked the same floor, reported to the same supervisor, and were both subject to the same rules.

**4. Landin Proved he was Treated in a Disparate Manner and Retaliated Against Contrary to the Policy Enunciated in MCLA 333.20176(a) Because he Reported the Malpractice of Johnson.**

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<sup>55</sup> See Plaintiff’s Complaint, paragraphs 38-40, wherein he alleged that he was treated in a disparate manner from other LPNs (Gayle Johnson).

Plaintiff demonstrated that LPN Gayle Johnson committed 13 Group I violations prior to her being removed from the skilled nursing unit at the end of January, 2006. Johnson then committed in excess of twenty (20) Group I violations in what Landin believed caused, and/or precipitated the death of Jack. Johnson was, as Landin wrote, "dangerous".

In comparison the Plaintiff had few writes up since 2001. Critically, there is only one (1) write up involving the failure to pass medication to Scott B. thereby confirming that Boyk created the document that was allegedly written by Dale Pettelle. Possibly even more telling than the fact that Johnson was not disciplined, coached, talked to, or reprimanded in any way for Jack's death is the evidence that showed how she was disparately treated on March 10, 2006.

Exhibit 83 is a coaching that Johnson got on March 10, 2006, just two weeks after it was alleged that her negligence killed a Healthsource Patient. On that day Ms. Johnson lied to the Nursing Administrator and stated that she gave a medication to a resident who had complained that they did not receive the medication. After review, it was discovered that Johnson did not, in fact, document that the medication was given. Pursuant to Exhibit 42, this could have been classified as a Group I violation, falsification of a document, but, instead, she was merely given a Group II violation and a coaching, because "there was no evidence of malicious intent". [Exhibit 83].

In contrast, the Defendant never suggested that Landin had any malicious intent. Nevertheless, he was written up twice for conduct that was common. That is, signing his initials before he actually gave the medications to the residents (psych unit). The final write-up occurred despite Landin's insistence, as was corroborated by the MAR of Scott, that he had been given Scott B. his medications. A write-up that was put in motion by an allegation of Gayle Johnson and sanctioned by Amber Boyk. The only write up of Landin involving Scott, and one that occurred on April 23, 2006, two months after Boyk created Exhibits 57 & 54.

The jury did not accept the Defendant's self-serving argument that Mr. Landin falsified a medical record and that made him unique compared to Ms. Johnson. [See Work Rules Exhibit 42]. First, as Sue Graham, Defendant's Nurse Executive testified, the requirement to meet "falsification" of a medical record requires intentional wrongdoing. [Vol VI p. 46]. There is no evidence that Mr. Landin intentionally falsified anything. As the Sixth Circuit noted in affirming a jury verdict:

The district judge clearly instructed the jury that they could not find Defendant liable unless they found a causal connection between Chandler's leave and her termination. Proximity in time can raise a prima facie case of retaliatory discharge. See *Skrjanc*, 272 F3d at 314. But proximity alone may not survive summary judgment, see *Id* at 317, nor does it necessarily imply causation. But where, as here, the jury weighed additional evidence, including the credibility of Defendant's proffered reason for termination, the demeanor of witnesses on the stand, and the evidence of Plaintiff's prior work habits, we are loath to substitute our judgment for that of the jury. *Chandler v Specialty Tires of America*, 283 F3d 818, 826 (6th Cir 2002)

The Sixth Circuit reversed a Motion for Summary Judgment in *Johnson v University of Cincinnati*. The Court, regarding meeting the causality prong of a retaliation case, held as follows:

In order to meet the final step of his prima facie case, Plaintiff must establish a causal link between his filing of the EEOC claim and his termination. A causal link may be shown through knowledge combined with closeness in time that creates an inference of causation. In order to make such a showing, the Plaintiff must produce sufficient evidence for a reviewing court to infer that the employer would not have taken the adverse action had the Plaintiff not filed a discrimination action. [citations omitted]. Although temporal proximity alone does not support an inference of retaliatory discrimination in the absence of other evidence, closeness in time between the filing with the EEOC and the adverse employment action is relevant and may evince the employer's intent. [citations omitted].

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For example, Plaintiff has shown that his first two performance evaluations had been strong prior to his filing of the EEOC charge...Furthermore, the same day that Dr. Steger informed the Cabinet of Plaintiff's filing of EEOC complaint and that they may have to defend against it, Plaintiff requested a performance evaluation from Dr. Steger and only in response to this request did Dr. Steger then scrutinize Plaintiff's performance and provide him with a negative evaluation. On January 16, 1996, Plaintiff responded to Dr. Steger's evaluation by sending Dr. Steger an evaluation accusing him of, among other things, retaliating against Plaintiff for filing an EEOC claim. The next day, Dr. Steger terminated Plaintiff from his duties at the University. Considering this evidence in the light most favorable to Plaintiff, a reasonable jury could find that Plaintiff was retaliated against for filing his complaint and charge with the EEOC.

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We therefore reverse the district courts' grant of summary judgment to the University and Dr. Steger in his official capacity on Plaintiff's claim brought under the participation clause of Title VII. *Johnson v University of Cincinnati*, 215 F3d 561, 582-583 (6th Cir 2000).

Where Healthsource should have embraced the information that they received from Landin, they sought to ignore it and cover-up Johnson's negligence. The disparity in treatment of Landin vs. Johnson is palpable. Johnson made repeated life endangering errors yet Boyk did nothing to her. After the death of "Jack", Boyk went out of her way to protect Johnson and attack Landin protecting herself and her decision to hire Johnson. The disparate treatment confirms the jury's conclusion that Boyk terminated Landin to retaliate and justifies the trial court's denial of all post trial motions as well as the Court of Appeals unanimous affirmance.<sup>56</sup>

### ARGUMENT III

#### THE COURT OF APPEALS DECISION WILL HAVE NO EFFECT ON THE AT-WILL EMPLOYMENT DOCTRINE, WHERE THE COURT DID NOT EXPAND THIS COURT'S THREE EXCEPTIONS TO THE AT-WILL EMPLOYMENT DOCTRINE FOUND IN SUCHODOLSKI SUPRA, AND ITS PROGENY

It is well settled that issues that are not raised below, cannot be raised for the first time on appeal. Healthsource has never raised the issue that the appropriate application of this Court's holdings in *Suchodolski*, and/or *Terrien, supra*, erode the employment at will doctrine in Michigan. Therefore, that argument should be waived.

That said, the argument is absurd. The very nature of *Suchodolski* and its progeny make very clear that some bases for termination are so contrary to public policy that they are *per se*

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<sup>56</sup> Defendant for the first time raises the issue that Plaintiff did not allege disparate treatment and, therefore, cannot assert this claim. [Appellant's Application p. 41 fn26]. The claim was not previously raised and is, therefore, waived. More important, however, is that like so many allegations of Defendant, the claim is not accurate. Plaintiff's Complaint, ¶39 alleged as follows:

"That the Defendant's decision to initially discipline the Plaintiff and treat him in a manner **disparate** from the other LPNs, and ultimately the decision to terminate the Plaintiff upon the pretext that he did not provide a patient medication, was in retaliation for the Plaintiff's report of misconduct by Nurse Gail that proximately led to the death of a patient, Jack." [Paragraph 39 Complaint; emphasis added]. [Also see ¶40].

illegal. In carving out this exception to the at-will employment doctrine, the public policy exception is, by necessity, an exception to the at-will doctrine.

To the extent that a plaintiff demonstrates one of the three *Suchodolski* exceptions, then it is a termination in violation of public policy irrespective of the at-will doctrine. To the extent that the termination fits in the *Suchodolski* exceptions, there has been no diminution of the at-will doctrine. In this case, Landin fulfills exceptions 1 and 3 under *Suchodolski*.

Healthsource, has the temerity to suggest that the “social costs” suggest that Application for Leave to should be granted. [Appellant’s brief pp. 39-40]. Landin suggests that the real social costs, the death of Jack, and other unwitting patients who assume that Ms. Johnson is a competent nurse, is the real social cost. Healthsource was not concerned with the social costs when it ignored Landin’s report regarding Johnson. Rather, Healthsource chose to circle the wagons, protect the ineptitude of Johnson, and shoot the messenger, Landin.

#### **ARGUMENT IV**

**THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EVIDENTIARY RULINGS AND WHERE THE COURT HELD THAT THERE WAS NO EVIDENCE THAT A SUBSTANTIAL RIGHT OF HEALTHSOURCE WAS AFFECTED.**

##### **A. STANDARD OF REVIEW**

A trial court’s evidentiary rulings are reviewed for an abuse of discretion. *People v. Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). Any error in the admission or exclusion of evidence does not require reversal unless a substantial right of the party is affected or unless failure to do so would be inconsistent with substantial justice. *Landin Slip* p. 11.

##### **B. CONTRARY TO THE ASSERTION OF HEALTHSOURCE, LANDIN DID ALLEGE DISPARATE TREATMENT AND EVIDENCE OF JOHNSON’S INEPTITUDE AND LACK OF DISCIPLINE WAS ALL RELEVANT.**

Healthsource mischaracterizes the issue when it states that the factual merit of Plaintiff's complaint regarding Gayle Johnson is of no consequence because the only relevant question is whether Landin was terminated for exercising a right conferred by a well-established statute. [Appellant's Brief p.43]. Part of Healthsource's confusion may have been caused by its failure to recognize that one way to demonstrate retaliation, is to demonstrate that Landin was treated disparately from Johnson, because he engaged in protected activity. [See Healthsource's' repeated claims that Plaintiff has not alleged disparate treatment. Contrary to that claim Plaintiff absolutely alleged that he was treated disparately as a result of his protected activity. [See ¶¶ 38-40 of Landin's Complaint]. That disparate treatment was demonstrated by showing how no action, or little action was taken against Johnson for terrible and life threatening infractions while Landin was terminated, essentially, for a non-existent infraction and the performance of his duties as he had done them for many years. [medications on the psych floor].

Healthsource is correct on one score. Gayle Johnson in all probability killed Jack. Despite its repeated claims that Landin, "falsified" documents there own witnesses admitted that the interpretation of the different rules suggested that "falsification" meant an intent to deceive. There is no evidence that Landin ever intended to deceive. There is no evidence Landin ever harmed a patient. The same cannot be said for Johnson.

In contrast, Gayle Johnson, within the week that Landin was written up for lying and falsifying a medical record re Marjorie (Exhibit 70, 71), "falsified" a document that she gave a medication when she did not. Johnson was only given a written warning because, despite the fact that she knowingly lied, she had no bad intent. [See Exhibit 83].

The ineptitude of Johnson was palpable. The errors incredible. The fact that she was not only not terminated, but ultimately promoted, is clearly relevant to demonstrate that Landin was

retaliated against for engaging in protected conduct. Stated another way, if Johnson was maintained despite all of the egregious errors that she committed, including the possible precipitation of a patient's death, then why was Landin not treated in the same manner?

All evidence, by its nature, is prejudicial. MRE 403 allows evidence to be excluded only if the probative value is "substantially outweighed" by its danger of unfair prejudice. [MRE 403]. The ineptitude of Johnson is probative of the disparate manner in which Landin was treated. That probative value was critical to the case. All of her prior records were also relevant to show how disparately she was treated from Landin. There is no "unfair" prejudice in this case. Johnson was removed from assignments, and ultimately precipitated the death of Jack. Landin's claim was that she was dangerous. The evidence supported that. It is that type of incompetence that the Public Health Code seeks to protect the public from.

As the Court of Appeals acknowledged:

Defendant contends that evidence concerning plaintiff's co-worker's actions, testimony from witnesses regarding the deceased patient's medical records, and argument by plaintiff's counsel regarding whether plaintiff's co-worker should have been terminated are irrelevant and thus inadmissible because they have no bearing on whether plaintiff was terminated for exercising a right in violation of public policy. However, under the statute relied upon by the trial court to find that plaintiff had a viable public policy cause of action, plaintiff would be protected if he were reporting the malpractice of a health care professional. Thus, whether that health care professional engaged in what could be deemed malpractice would be relevant. Thus, the co-worker's actions/inactions, other witnesses reviews of the deceased patient's medical records and what type of care they thought he received under the co-worker's care and what type of care they thought he should have received, as well as whether argument by counsel, if supported by the evidence, that the co-worker should have been terminated, was relevant under MRE 401 and thus admissible under MRE 402.

Similarly, evidence of the co-worker's performance history would be relevant. This evidence would not only be relevant to support plaintiff's claim of malpractice and his report that he was concerned she was a danger, but also to establish that the stated cause for his termination was pretext. Where plaintiff was able to show that his co-worker violated defendant's medication policy and violated other policies that listed termination as a possible punishment on several occasions without, in fact, being terminated was relevant to his claim of pretext when he was allegedly terminated for the same actions. *Landin supra* Slip Opinion p. 12

C. THE TRIAL COURT CORRECTLY EXCLUDED AN INTERNAL HEALTHSOURCE REPORT THAT ALLEGEDLY ABSOLVED JOHNSON OF WRONGDOING WHERE JOHNSON ADMITTED THAT SHE WAS NEVER INTERVIEWED REGARDING THE CIRCUMSTANCES INVOLVING JACK'S DEATH AND WHERE THE FACTS ARE THE FACTS AND LANDIN ONLY HAD TO REPORT MALPRACTICE IN "GOOD FAITH".

The Court of Appeals correctly excluded self-serving evidence that absolved Healthsource after the fact. This is especially true in light of Johnson's testimony that no one from Healthsource ever even interviewed her regarding Jack's death. [Vol. There was no investigation as to Johnson's conduct. How in the world can that then absolve her conduct???

The Court of Appeals correctly concluded as follows:

An internal report generated by defendant that plaintiff's co-worker engaged in no wrongdoing would be of limited value given that the report was generated as a result of plaintiff's report which, he claims, led to his termination. And, even if we were to find that this document should have been admitted, given the remaining evidence presented to the jury, it cannot be said that this singular document affected defendant's substantial rights. The fact that the deceased patient's widow did not sue defendant is of no consequence to the ultimate issue as framed by the trial court-whether plaintiff was terminated for reporting the malpractice of a health employee in violation of public policy. The lack of a lawsuit does not equate with a lack of malpractice.

*Landin Slip Opinion p. 12.*

Moreover Landin only had to make a "good faith report" as to the malpractice. Therefore, what happened subsequently has no bearing on what precipitated Landin's action. No amount of absolution can condone the twenty (20) plus acts that Johnson failed to perform as they related to patient Jack, and his untimely death.

D. THE COURT OF APPEALS CORRECTLY AFFIRMED THE ARGUMENT THAT BOYK CREATED DOCUMENTS AND, MAY HAVE DESTROYED DOCUMENTS AS WELL, WHERE THE EVIDENCE SUPPORTED THE CLAIMS.

Interestingly the Defendant states that the "uncontroverted testimony of Amber Boyk in the face of the allegations of fabrication of evidence and lying demonstrates that (1) she did not

alter Pettelle's email; 2) the incident mentioned in Pettelle's email concerned a similar incident of where Plaintiff was accused of not properly passing medication to Scott in February 2006. [Defendant's brief p. 47].

That is the spin Healthsource needs to give the evidence of record. Criminals deny that they committed crimes. Boyk was no different. The only "uncontroverted" evidence is that there is no history, of any event with Landin and Scott B. in, or before, Feb. 2006.

At trial, Boyk was the proverbial person caught with her hand in the cookie jar. She could not explain how the documentation occurred. She could not explain where the other evidence of Landin being "written up" was [Exhibit 57]. She could not explain where the "other documentation was". On appeal, an investigation referred to. The transcript, and the evidence of record, however, do not bear it out. There was extensive evidence to demonstrate that Boyk created those documents, Exhibit 57, & 54, based on the erroneous date in Exhibit 60.

Finally, the Court of Appeals correctly decided that the overwhelming evidence that Boyk had created and falsified documents, as well as possibly destroyed the personnel files of Landin and Johnson, was justified and did not under any circumstance affect the defendant's substantial rights. The Court of Appeals correctly explained as follows:

Finally, the trial court did not err in admitting testimony that plaintiff's supervisor allegedly falsified documents. Testimony was presented that the supervisor had received an e-mail from a now-deceased nurse concerning a prior incident with plaintiff. The date that the e-mail was received was a matter of contention, as were notations made on the e-mail. The questions concerning the e-mail dates and its authentication were brought out during examination of the supervisor, who gave her explanation concerning the date and her notations. Issues of witness credibility are for the jury to decide. *People v. Lemmon*, 456 Mich. 625, 642; 576 NW2d 129 (1998).

**E. THE COURT OF APPEALS CORRECTLY RULED THAT MEDICAL RECORDS THAT THE AGENTS OF THE DEFENDANT HEALTHSOURCE REPEATEDLY AND FREELY SUBMITTED IN THIS LITIGATION AND OTHERS, AND SOUGHT RETURN OF ALMOST A YEAR AFTER THE FACT, WAS PROPERLY DENIED AND THAT**

**DEFENDANT'S SELF SERVING STATEMENT THAT PLAINTIFF WOULD HAVE BEEN TERMINATED AS "AFTER ACQUIRED EVIDENCE", WHEN OTHER MEMBERS OF THE DEFENDANT'S STAFF WERE NOT TERMINATED, WAS PROPERLY LEFT FOR JURY CONSIDERATION.**

The after acquired is an affirmative defense. A defendant must prove its affirmative defense by a preponderance of the evidence. See *Detroit News, Inc v. City of Detroit*, 185 Mich.App 296, 300; 460 NW2d 312 (1990) ("An **affirmative defense** cannot succeed unless the matters upon which it rests are proved. The **burden** of producing evidence and establishing these facts rests upon the defendant."). The issue in a termination case, however, is a factual determination to be **made by the jury**. As has been noted:

"Alleged misconduct known to the employer before the employee's discharge may qualify as after acquired evidence that the jury may consider in determining the employee's recovery for the violation. The jury is in the best position to determine whether the employer would have discharged the employee immediately on learning of the alleged repeated misconduct, even though it did not respond on learning of the initial misconduct..." 2 Emp. Discrim Coord. Analysis of Federal Law §53.13 [updated April 2010 citing *Ricky v. Mapco., Inc* 50 F3d 874 (10<sup>th</sup> Cir 1995).

Other than self-serving statements of the Defendant, there was no proof submitted that would suggest that Landin would have been terminated. The Court of Appeals correctly found:

"In this matter, defendant submitted that it would have terminated the plaintiff had it known that he copied and removed the deceased patient's (and apparently a few other patients medical records). However, aside from the defendant's self-serving statement, there is no evidence that it would have done so." [Landin Slip p. 11].

In *Thrumman v. Yellow Freight Systems Inc*, 90 F3d 1160 (6<sup>th</sup> Cir 1996) the Court made clear that where the Defendant did not prove it would have refused to hire, the after acquired evidence rule did not apply. [Id @ 1168]. Likewise, in this case the Defendant's own work rules, Exhibit 42, provided that an "incidental breach of confidentiality" was a Group II violation. [Ex. 42 p.3 #12]. There is no credible proof that the Plaintiff would have been terminated.

Every document "copied" by Landin was freely produced by the Defendant and, only

after one-year did the Defendant request those documents back after it appeared that those records hurt, rather than helped, the Defendant.

Ironically, at the same time that the Defendant was claiming that the Plaintiff would have been terminated, the Defendant's Human Resource Manager, Katie Adams, freely admitted records of countless patients in an attempt to deny another employee unemployment benefits. Ms. Adams was not terminated as she testified that she voluntarily left her job at Healthsource. [Vol V p. 105]. The Defendant failed to demonstrate that any person was terminated for producing documents of Jack, Marjorie, Jean or Scott that were all voluntarily produced by the Defendant.<sup>57</sup>

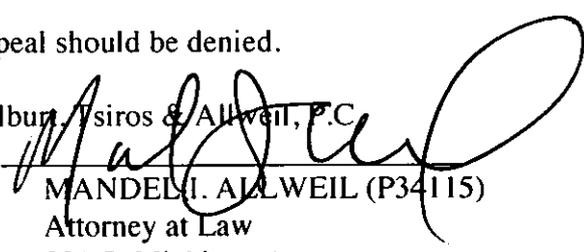
Amber Boyk admitted that while "Divulging confidential and/or protected health information from patient medical records or any other source about a patient, resident, client, their families, or an employee of HSS" was a Group I violation it did not mandate termination. [Vol IV p. 69]. As noted above, an incidental breach of confidentiality is only a Group II violation and one would only get a written warning. [Id] [See Exhibit 42 p. 3 ¶12]. Landin only provided the documents to his attorney and the widow of the decedent, Jack. Defendant never carried its burden of proof. The Court of Appeals, correctly affirmed that the issue of after acquired evidence was a factual one to be determined by the jury. All of the Defendant's Motions for New Trial /JNOV were correctly denied.

### CONCLUSION

Defendant's Application for Leave to Appeal should be denied.

Dated: August 20, 2014

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<sup>57</sup> See, MESC case of *Denese Mitchell v. Healthsource*, [May 6, 2010, No. 0809011] [The Hearing is within the Plaintiff's Tab E, Plaintiff's Response to Defendant's Motion *in Limine*.