

STATE OF MICHIGAN
IN THE SUPREME COURT

ROBERTO LANDIN,

Plaintiff-Appellee,

v.

HEALTHSOURCE SAGINAW, INC.,

Defendant-Appellant

Supreme Court No. _____ *Saginaw*

Trial Court No. 08-002400-NZ-3 *J. B. W.*

Court of Appeals No. 309258

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**DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL TO THE
MICHIGAN SUPREME COURT**

APPL

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OPINION AND ORDER APPEALED FROM AND RELIEF SOUGHT

Defendant/Appellant Healthsource Saginaw (“Healthsource”) seeks leave to appeal from the Michigan Court of Appeals’ June 3, 2014 Published Opinion and Order (the “Published Opinion”) (Appx 1)¹ affirming the Saginaw County Trial Court’s Opinion and Order denying Healthsource’s Motion for Summary Disposition pursuant to MCR 2.116(C)(10). Healthsource also seeks leave to appeal from those portions of the Published Opinion that affirm the trial court’s denial of Healthsource’s Emergency Motion for Summary Disposition, evidentiary rulings and denial of Healthsource’s motion for JNOV, new trial and/or remittitur.

The Saginaw County Trial Court entered its Opinion and Order denying Healthsource’s Motion for Summary Disposition as to Plaintiff’s public policy wrongful discharge claim on September 14, 2010 (Appx 2). In its ruling, the Saginaw County Trial Court failed to identify any objective legislative source for Plaintiff’s public policy wrongful discharge claim. On October 13, 2011, the Saginaw County Trial Court issued an Order that identified, for the first time, the purported legislative source of Plaintiff’s public policy claim: the Public Health Code (Appx 3). Healthsource filed an immediate Emergency Motion for Summary Disposition, which the Saginaw County Trial Court denied on October 14, 2011 (Appx 4).² But the Court of Appeals nevertheless affirmed the Saginaw County Trial Court, finding that it reached the right result for the wrong reason, even though it acknowledged that the Saginaw County Trial Court made its own “judgment call” and never applied controlling Michigan Supreme Court precedent.

¹ Saginaw County Trial Court Opinions and the Court of Appeals Opinion being appealed from are cited as “Appx _____” and are attached to this Application. All other cited exhibits, transcripts and unpublished case law were attached at Appellant’s Court of Appeals Brief or are otherwise part of the Record On Appeal. (MCR 7.302(A), 7.309 and 7.311).

² After trial, a judgment was entered against Healthsource on November 9, 2011 and a post-trial Motion for Judgment Notwithstanding the Verdict, Or, Alternatively, For New Trial or Remittitur was Denied by the Saginaw County Trial Court. (Appx 5, 6).

Healthsource asks this Honorable Court to reverse the decisions of the Court of Appeals and the Saginaw County Trial Court, grant either of Healthsource's Motions for Summary Disposition, or grant Healthsource's Motion for JNOV and determine that, under *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002) and *Suchodolski v Michigan Consol Gas Co*, 412 Mich 692; 292 NW2d 880 (1982), Plaintiff has no valid public policy wrongful discharge claim. Alternatively, Healthsource requests the reversal of evidentiary rulings detailed below, made by the Court of Appeals and the Saginaw County Trial Court and a new trial with corrected evidentiary rulings, and a corrected ruling on Healthsource's Motion to limit Plaintiff's damages due to after-acquired evidence of misconduct.

STATEMENT OF QUESTIONS PRESENTED

- I. WHETHER WHEN THE MICHIGAN SUPREME COURT HAS HELD IN *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002) THAT THE LEGISLATURE IS THE CREATOR OF PUBLIC POLICY, A LOWER COURT CAN EFFECTIVELY OVERTURN THAT HOLDING, USURP THE ROLE OF THE LEGISLATURE AND CREATE A PUBLIC POLICY WRONGFUL DISCHARGE CLAIM WHERE NONE EXISTS?

Court of Appeals Would Answer: Yes
Trial Court Would Answer: Yes
Plaintiff/Appellee Would Answer: Yes
Defendant/Appellant Would Answer: No

- II. WHETHER THE COURT OF APPEALS' JUNE 3, 2014 OPINION CONFLICTS WITH THE MICHIGAN SUPREME COURT'S DECISIONS IN *Suchodolski v Michigan Consol Gas Co*, 412 Mich 692; 316 NW2d 710 (1982) AND *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993) BECAUSE IT MIS-APPLIES THE PUBLIC POLICY EXCEPTION TO THE AT-WILL EMPLOYMENT DOCTRINE?

Court of Appeals Would Answer: No
Trial Court Would Answer: No
Plaintiff/Appellee Would Answer: No
Defendant/Appellant Would Answer: Yes

- III. WHETHER THE COURT OF APPEALS' JUNE 3, 2014 OPINION IS CLEARLY ERRONEOUS AND HAS CAUSED MATERIAL INJUSTICE TO HEALTHSOURCE BECAUSE IT ERRONEOUSLY CONCLUDED THAT THE MICHIGAN PUBLIC HEALTH CODE CAN SERVE AS THE BASIS OF A PUBLIC POLICY WRONGFUL DISCHARGE CLAIM WHERE THE CODE ALREADY PRESCRIBES A STATUTORY REMEDY FOR SUCH DISCHARGES, AND WHERE PLAINTIFF NEVER ACTED IN ACCORDANCE WITH THE PUBLIC HEALTH CODE?

Court of Appeals Would Answer: No
Trial Court Would Answer: No
Plaintiff/Appellee Would Answer: No
Defendant/Appellant Would Answer: Yes

- IV. WHETHER THE COURT OF APPEALS' JUNE 3, 2014 OPINION CONFLICTS WITH THE MICHIGAN SUPREME COURT'S DECISIONS CLARIFYING AND LIMITING THE SCOPE OF *Toussaint v Blue Cross*, 408 Mich 579; 292 NW2d 880 (1980) BECAUSE THE OPINION ERODES THE AT-WILL EMPLOYMENT DOCTRINE?

Court of Appeals Would Answer: No
Trial Court Would Answer: No

Plaintiff/Appellee Would Answer: No
Defendant/Appellant Would Answer: Yes

- V. WHETHER THE COURT OF APPEALS' JUNE 3, 2014 OPINION IS CLEARLY ERRONEOUS AND HAS CAUSED MATERIAL INJUSTICE TO HEALTHSOURCE BECAUSE IT INCORRECTLY HELD THAT PLAINTIFF'S ALLEGED PROTECTED ACTIVITY WAS A SIGNIFICANT FACTOR IN HIS DISCHARGE?

Court of Appeals Would Answer: No
Trial Court Would Answer: No
Plaintiff/Appellee Would Answer: No
Defendant/Appellant Would Answer: Yes

- VI. WHETHER THE COURT OF APPEALS' JUNE 3, 2014 OPINION IS CLEARLY ERRONEOUS AND HAS CAUSED MATERIAL INJUSTICE TO HEALTHSOURCE BECAUSE IT INCORRECTLY AFFIRMED THE PROHIBITION AT TRIAL OF EVIDENCE THAT CAST DOUBT ON PLAINTIFF'S WRONGFUL DISCHARGE CLAIM, AFFIRMED THE INTRODUCTION OF EVIDENCE AT TRIAL THAT WAS IRRELEVANT TO THE *PRIMA FACIE* ELEMENTS OF PLAINTIFF'S CLAIM, IMPROPERLY AFFIRMED DENIAL OF HEALTHSOURCE'S MOTION TO LIMIT PLAINTIFF'S DAMAGES DUE TO AFTER-ACQUIRED EVIDENCE OF MISCONDUCT AND IMPROPERLY DENIED HEALTHSOURCE'S MOTIONS FOR JNOV AND NEW TRIAL?

Court of Appeals Would Answer: No
Trial Court Would Answer: No
Plaintiff/Appellee Would Answer: No
Defendant/Appellant Would Answer: Yes

I. INTRODUCTION

This case concerns the fundamental jurisprudential question of whether Michigan courts are permitted to create public policy wrongful discharge claims that they believe serve the public good, in the absence of a Legislative act or statute providing a basis for such claims, and where the creation of those claims undermines established Michigan Supreme Court precedent and the doctrine of employment at-will in Michigan.

The Court of Appeals' Published Opinion at issue does exactly this. It essentially guts prior Supreme Court precedent which has definitively confirmed that only the Legislature can create public policy, and is in derogation of controlling authority holding that public policy wrongful discharge claims are valid under only very limited and rare circumstances that are not present here. This alone requires peremptory reversal of the Court of Appeals' Published Opinion. But there is more. Allowing the Court of Appeals' Published Opinion to stand will embolden other courts to follow a similar path, open the floodgates to public policy wrongful discharge claims being asserted every time a discharged employee believes his or her termination is unfair, and will have the effect of nullifying the at-will employment doctrine in Michigan, which the Michigan Supreme Court has carefully sought to preserve in its post-1980 decisions.

In *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002), the Supreme Court reined in the ability of lower courts to create or identify public policies that individual judges thought were worthy of furtherance, or from general considerations of supposed public interests. There, the Michigan Supreme Court ruled that only the Legislature may create Michigan's public policy, that public policy "must be more than a different nomenclature for describing the personal preferences of individual judges," and that the judiciary's focus must be on policies that have, in fact, been adopted through legal processes and are reflected in the state and federal constitutions, statutes and common law. This Court further emphasized in *Terrien* that Michigan public policy

is *not* merely the equivalent of the personal preferences of one particular judge or a majority of an appellate court, that such a policy must be clearly rooted in the law and that there is no other proper means of ascertaining Michigan public policy.

The Michigan Supreme Court also set forth the applicable standard for public policy wrongful discharge claims in *Suchodolski v Mich Consol Gas Co*, 412 Mich 692; 316 NW2d 710 (1982). At the outset, *Suchodolski* merely reiterated that the common law is that all employment is at-will unless there is a just cause contract between the employee and employer that affirmatively changes at-will status. In other words, *Suchodolski* did not create at-will employment, it merely recognized that at-will employment is the default position under the common law unless the parties modified that position by contract. Next, *Suchodolski* recognized that the Legislature can limit the power of employers to carry out at-will terminations, and that employers who violate legislatively created public policy, such as discharging employees in violation of civil rights statutes, can be sued for wrongful discharge. It is into this regime that *Terrien* injects the further clarification that only the Legislature has the authority to say what conduct violates public policy.

The Court of Appeals' Published Opinion moves the state of the law back into the world created by *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980), which allowed virtually every termination to be challenged in a lawsuit, and which has been de-fanged by the Michigan Supreme Court over the past twenty five years. As with *Toussaint*, the Court of Appeals' Published Opinion means that every terminated employee, armed with a clever lawyer who is good at deriving ad hoc public policy that might catch the eye of a lower court judge, could obtain a successful wrongful discharge jury verdict. Such a legal regime has the potential to be an economic body blow to Michigan's always fragile business climate, just as *Toussaint* was thirty four years ago. If, as a state, we are going to adopt this

approach, then, as in *Henry v The Dow Chemical Co*, 473 Mich 63; 701 NW2d 684 (2005), where the Supreme Court was invited to create an equally-destabilizing medical monitoring doctrine, the Supreme Court ought to direct this Plaintiff to take his theory to the Legislature. The Legislature has the ability to determine just what the costs of this new approach will be to jobs and growth, and to determine if it is worth doing notwithstanding the costs. Courts are poorly-suited to such evaluations, as *Toussaint* made clear. In short, if the people of the State of Michigan want to visit these consequences on their job providers, so be it, but it is wise for this Court to recognize, as in *Henry*, that it is best done not in a court but after a full and fair debate in the Legislature.

Here, the Court of Appeals' Published Opinion erroneously held that Plaintiff, a Licensed Practical Nurse who claimed he was terminated for internally reporting the alleged negligent actions of a coworker, could assert a wrongful discharge public policy claim. The Court of Appeals concluded that the Michigan Public Health Code provided a statutory basis for Plaintiff's public policy claim, notwithstanding that the Court of Appeals acknowledged that the Public Health Code already provided a remedy for discharged employees (the Whistleblowers' Protection Act), and that Plaintiff did not even act in accordance with the conduct the Public Health Code ostensibly protects. Although the Court of Appeals cited to and recognized the relevant standards in *Terrian* and *Suchodolski*, it failed to apply them. Instead, it erroneously engaged in the weighing of public policy considerations, arguing that protecting healthcare employees who report alleged coworker malpractice "is of at least equal if not of greater" significance than benefitting and protecting victims of work-related injuries. In so doing, the Court of Appeals engaged in precisely the type of identifying priorities, weighing of the relevant considerations and choosing between competing alternatives that courts are not permitted to do. *Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999).

The Court of Appeals' Published Opinion at issue here is at logger-heads with *Terrien* and *Suchodolski*, and by virtue of its mistaken rationale and ruling, along with its status as a published opinion, it places those decisions and at-will employment at risk of being undone. *Terrien* cut down drastically on the potential creators of public policy, whose declarations of what public policy is would trump the common law. It is this narrowing that the Court of Appeals' Published Opinion attacks by expanding the number of potential public policy "creators" to include judges. The Opinion so hollows out *Terrien* that the bar is likely to conclude that *Terrien* has effectively been overruled, and it may act as a signal that lower courts can challenge or chip away at superior precedent. By awarding Plaintiff a public policy claim where he already had a statutory one provided by the Legislature, and where no such wrongful discharge claim existed at common law, the Court of Appeals also ignored, issued a ruling contrary to and *de facto* overruled *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993), *Pompey v General Motors Corp*, 385 Mich 537, 552-53; 189 NW2d 243 (1971) and their progeny.

The Published Opinion at issue here can readily be cited by future litigants as support for public policy claims where none should exist, or have ever existed. If left unchecked, the Court of Appeals' Published Opinion will serve as the entry point for a legal system where at-will employment – and not public policy claims – becomes the exception, not the rule.

The Court of Appeals' Published Opinion requires immediate review and correction to avoid "unforeseen and undesirable consequences" associated with its startling departure from "bedrock legal rules" and established Supreme Court precedent. *See Young, A Judicial Traditionalist Confronts The Common Law*, 8 Texas Rev. L. & Pol. 299, 305-310 (2004).

II. STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

A. STATEMENT OF PROCEEDINGS BELOW

1. The Saginaw County Trial Court Denies Healthsource's April 26, 2010 Motion For Summary Disposition Pursuant To MCR 2.116(C)(10)

On April 26, 2010, Healthsource filed a Summary Disposition Motion pursuant to MCR 2.116(C)(10). Healthsource cited controlling case law outlining the *prima facie* elements of a public policy discharge claim pursuant to *Suchodolski v Mich Consol Gas Co*, 412 Mich 692; 316 NW2d 710 (1982), and argued that the undisputed facts and law demonstrated that: (1) Plaintiff had not stated under which *Suchodolski* exception his claim fell; (2) Plaintiff could not establish he was discharged in violation of an explicit legislative statement prohibiting termination of employees acting pursuant to the statute; (3) Plaintiff could not establish he was terminated for failure or refusal to violate the law; (4) Plaintiff could not establish he was discharged for exercising a right conferred by a well-established legislative enactment; (5) controlling case law holds that there is no public policy claim based upon the reporting of suspected coworker misconduct to a supervisor; (6) none of the well-established legislative enactments identified by Plaintiff, including the Public Health Code, could serve as a basis for a public policy discharge action under controlling law; (7) Plaintiff could not establish that his internal complaint was the significant factor in his termination; and (8) Plaintiff's claim that another employee was treated differently could not establish a *prima facie* public policy claim. (6/7/10, pp. 1-10, 17-20).

The Saginaw County Trial Court denied Healthsource's motion, incorrectly concluding that no Michigan Court has determined whether an internal report of coworker misconduct creates a public policy cause of action. (Appx 2, p. 19a-20a). To reach this conclusion, the Saginaw County Trial Court decided to make its own "judgment call," did not apply Michigan

law, bypassed several on-point federal court decisions indicating that Plaintiff had no claim, and instead relied solely on inapposite out-of-state cases, including the dissenting opinion of a Supreme Judicial Court of Massachusetts decision where the majority affirmed the dismissal of a public policy claim identical to Plaintiff's. *Id.* pp. 20a-23a. Having done so, the Saginaw County Trial Court, contrary to *Suchodolski*, held that an internal report of suspected misconduct can form the basis of a public policy claim. Demonstrating that it was engaged in the creation of public policy, which is the sole province of the Legislature, the Trial Court stated:

To hold that Landin has no claim against the Defendant, is in essence, to hold that no good deed shall go unpunished. That cannot be the law. *Id.* p. 23a.

The Saginaw County Trial Court never applied *Suchodolski*, did not determine under which at-will employment exception Plaintiff's public policy claim allegedly fell, and did not state which statute provided Plaintiff with an actionable public policy claim. The Saginaw County Trial Court also concluded that Plaintiff had presented evidence that the internal report was the significant factor his discharge. *Id.* p. 18a.³

2. The Saginaw County Trial Court's Ruling – Issued Five Days Before Trial – That The Michigan Public Health Code Provided A Statutory Basis For Plaintiff's Public Policy Claim

During the submission of proposed jury instructions prior to trial, Healthsource argued that neither Plaintiff, nor the Saginaw County Trial Court, had ever identified the statutory basis of Plaintiff's public policy discharge claim and that, consequently, that basis must be an element of Plaintiff's burden of proof at trial. (10/10/11, pp. 43-44). Healthsource's proposed initial instructions also included that Plaintiff had to prove that his internal report was a significant factor in his discharge and that Healthsource's stated reason for the discharge was false. *Id.* pp.

³ Healthsource filed an application for leave to appeal this order (Court of Appeals No. 300522), which was denied 2-1. (Ex 40).

41-42. Defendant also submitted non-standard jury instructions outlining the scope of public policy discharge claims, including instructions pointing the Trial Court for a second time to controlling law holding that neither internal reports of co-worker misconduct nor the Public Health Code could serve as the basis of a public policy claim. (10/10/11, pp. 40-43).

Plaintiff submitted a non-standard instruction regarding his public policy discharge claim. (10/10/11, p. 41). Plaintiff argued that the Jury should be instructed that the elements of his claim should be based on the Public Health Code and the Jury must only find that the internal report was one of the reasons for his discharge, not a significant factor. *Id.* pp. 43-44. Defendant reminded the Trial Court for the third time that the exclusive remedy under the Public Health Code's anti-retaliation provision is the Whistleblowers' Protection Act. *Id.* pp. 41-42.

Five days before trial – for the first time – the Saginaw County Trial Court ruled that “as a question of law properly to be decided by it, Michigan law recognizes a cause of action for wrongful termination in violation of public policy exhibited by [the Public Health Code] MCL § 333.20176a(1)(a).” (Appx 3). The Saginaw County Trial Court did not identify any authority supporting its finding. The Saginaw County Trial Court also instructed the jury that Plaintiff had to show he “made a good faith report to his employer, Healthsource, that he believed that a co-worker acted in a negligent or incompetent manner, and posed a danger to Healthsource patients.” (*Id.*; see also 10/18/11, pp. 59-62).

3. The Trial Court's Denial Of Healthsource's October 13, 2011 Emergency Motion For Summary Disposition

In response to the Court's erroneous ruling five days before trial that the Public Health Code supported a public policy discharge claim, Healthsource filed an Emergency Motion for Summary Disposition, pointing out to the Trial Court – for the fourth time – that binding precedent stated that the Whistleblowers' Protection Act was the exclusive remedy under the

Public Health Code. The Court denied Defendant's Motion because there was "no adequate time prior to trial for counsel" to respond to the motion and "the Court will not entertain a summary disposition motion at the eleventh hour." (Ex 8).⁴

4. The Saginaw County Trial Court's Rulings On Motions In Limine

a. The Saginaw County Trial Court Denies Healthsource's Motions In Limine To Exclude Irrelevant Issues And Grants Plaintiff's Motion To Preclude Evidence Absolving Plaintiff's Coworker Of Professional Misconduct

Healthsource filed a motion in limine to exclude a number of irrelevant issues at trial. Much of the evidence Healthsource anticipated Plaintiff would introduce at trial concerned malpractice, discrimination and disparate treatment, none of which Plaintiff alleged in his Complaint. Healthsource requested exclusion of evidence that Gayle Johnson's (Plaintiff's coworker) actions or inactions actually led to the death of a patient and that Johnson was a poorly-performing employee. Citing controlling law, Healthsource argued that the truth of a retaliation plaintiff's underlying complaint was irrelevant to whether the complaint was the significant factor in his discharge. (10/10/11, pp. 22-24). Such evidence would only prejudice Healthsource and confuse and mislead the jury. *Id.* pp. 9-10, 22-24. Healthsource also sought to preclude Plaintiff from arguing that his former supervisor, Amber Boyk, destroyed evidence or committed perjury, because the accusation lacked foundation and its probative value was far outweighed by its prejudicial effect. *Id.* pp. 22-27.

Plaintiff also filed a motion to preclude Healthsource from referring to internal reports absolving Gayle Johnson of professional misconduct. (10/10/11, pp. 8-9). Plaintiff thus agreed that whether Johnson actually caused a patient's death was irrelevant to Plaintiff's retaliation

⁴ Healthsource filed an Emergency Application for Leave to Appeal and Motion for Immediate Consideration of Order Denying Summary Disposition (Court of Appeals No. 306570), which was denied. (Ex 43).

claim. Healthsource requested that the Trial Court grant both motions, prohibiting either party from submitting evidence as to the truth of Plaintiff's underlying complaint. *Id.* pp. 9-10.

The Saginaw County Trial Court ultimately denied Healthsource's motion and granted Plaintiff's. (Appx 7, 8, pp. 45a-46a, Ex 6, pp. 2-3). The Saginaw County Trial Court's rulings permitted Plaintiff to present evidence suggesting that Johnson killed a patient and was a bad nurse while Healthsource was barred from presenting evidence to rebut those claims. The Trial Court also stated, without authority, that evidence concerning Gayle Johnson was also relevant to the extent that Plaintiff argues that disparate treatment is evidence of unlawful retaliation. *Id.* p. 46a. Finally, the Saginaw County Trial Court permitted Plaintiff to claim – in the absence of evidence – that Plaintiff's supervisor, Amber Boyk, lied or destroyed evidence. *Id.*

b. The Saginaw County Trial Court Denies Healthsource's Motion To Exclude Evidence Related To Non-similarly Situated Employees

Healthsource filed a motion in limine to exclude evidence of the performance histories of non-similarly situated employees. None of the alleged similar employees, including Gayle Johnson, had engaged in the same misconduct Plaintiff did: falsifying medical records. *Id.* pp. 12-13, 17-19, 30-31. The Court's opinion denying the motion did not cite any authority in support of its ruling. (Appx 8, Ex 6).

5. The Court Of Appeals' June 3, 2014 Published Opinion Affirming The Saginaw County Circuit Court's Rulings In All Respects

The Court of Appeals fully recognized that the Saginaw County Trial Court denied Healthsource's Summary Disposition Motion pursuant to MCR 2.116(C)(10) without identifying any specific law or public policy that would support Plaintiff's cause of action. It noted, however, that the Saginaw County Trial Court, in a subsequent Order, stated that it was holding, as a matter of law, that Michigan law recognizes a cause of action for wrongful termination in violation of public policy exhibited in a section of the Michigan Public Health Code. (Appx 1).

The Court of Appeals' Published Opinion acknowledged that Michigan law generally presumes that employment relationships are terminable at the will of either party, recited the applicable standards for public policy wrongful discharge claims in *Suchodolski v Michigan Consol Gas Co*, 412 Mich 692; 316 NW2d 710 (1982), correctly identified the three narrow exceptions to the presumption of at-will employment under which a public policy claim must fit and observed that the Michigan Supreme Court has never expanded upon those three narrow exceptions. *Id.*, pp. 2a-3a. The Court of Appeals' Published Opinion also referenced the Michigan Supreme Court's decision in *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002). *Id.*, p. 3a.

Having correctly set forth this jurisprudential framework, the Court of Appeals then neglected to apply it. Compounding this error, the Court of Appeals took an extraordinarily forgiving view of the Saginaw County Trial Court's decisions to: make its own "judgment call," ignore controlling Michigan law, fail to articulate whether Plaintiff's claim fell under any exception under *Suchodolski*, and rely on non-Michigan cases to justify its decision denying Healthsource's Motion for Summary Disposition. Notwithstanding this, the Court of Appeals presumed that the Saginaw County Trial Court found that Plaintiff's wrongful discharge public policy claim fell under exception 1 (an explicit legislative statement prohibited the discharge of employees who act in accordance with a statutory right or duty) or exception 3 (the reason for the discharge was the employee's exercise of a right conferred by a well-established legislative enactment). Ultimately, the Court of Appeals' Published Opinion concluded that denial of Healthsource's Motion was appropriate because the Michigan Public Health Code provided a statutory basis for Plaintiff's public policy claim. *Id.*, p. 4a.

In reaching this conclusion, the Court of Appeals cited to MCL 333.20176(a), a portion of the Michigan Public Health Code, as the basis for Plaintiff's claim. That section states that a

health facility or agency shall not discharge or otherwise discriminate against an employee if the employee reports or intends to report, verbally or in writing, the malpractice of a health professional. The Court of Appeals reasoned that employees asserting public policy wrongful discharge claims under exception 1 may do so pursuant to the Public Health Code, MCL 333.20176(a), just as they may do so under the Michigan Whistleblowers' Protection Act and the Michigan Elliott-Larsen Civil Rights Act. *Id*, p. 5a.

The Court of Appeals' decision ignores the fact that each of those statutes, including MCL 333.20176(a), already incorporates a remedy granting aggrieved employees a private right of action under the Whistleblowers' Protection Act, and that under controlling Supreme Court precedent, there is no other remedy.

Although the Court of Appeals acknowledged that the only situation to which *Suchodolski* exception 3 has been applied is the termination of an employee in retaliation for filing a worker's compensation claim, it engaged in a weighing of policy considerations and concluded that protecting employees who internally report coworker malpractice is a public policy worth developing and promoting:

The workers' compensation statutes and MCL 333.20176(a) share the same underlying purpose-- to promote the welfare of the people in Michigan as it concerns health and safety. While the workers' compensation statutes were admittedly enacted specifically in the context of protecting employees who are injured in the workplace, **it could be argued that** reporting malpractice in the context of a medical workplace would have even more of a direct impact on the health and welfare of our citizens and that the right to report alleged malpractice in one's workplace without fear of repercussion **is of at least equal if not of greater significance** than benefitting and protecting victims of work-related injuries. (emphasis added).

Id, p. 6a (emphasis added). The Court of Appeals also rejected Healthsource's argument that the Legislature specifically incorporated the Whistleblowers' Protection Act as the exclusive remedy

for violations of MCL 333.20176(a), concluding that it did not apply because “plaintiff did not originate a report or complaint of a violation of the Public Health Code....” *Id.*, p. 7a. In other words, the Court of Appeals concluded that although Plaintiff never reported a violation of the Public Health Code, the Code could nevertheless serve as the basis for his public policy wrongful discharge claim.

The Court of Appeals also concluded that the Saginaw County Trial Court correctly determined that a question of fact existed as to whether there was a causal connection between Plaintiff’s termination and his internal complaint, it affirmed all of the Saginaw County Trial Court’s evidentiary rulings on the parties’ Motions in Limine, and the denial of Healthsource’s after-acquired evidence motion and it concluded that Healthsource’s Motions for JNOV and a new trial were properly denied. *Id.* at 7a, 11a-13a.

The Court of Appeals in this case has issued a published opinion that cannot coexist with established Michigan Supreme Court precedent announced in *Terrien* and *Suchodolski* because it usurps the Legislature’s authority to create public policy, throws settled at-will employment law into a state of upheaval and will invite terminated employees who believe they’ve been treated unfairly to initiate lawsuits, so long as they can identify a single statute that bears only a tangential relationship to the alleged reason for their terminations, even where they did not act in accordance with that statute. In short, if it is allowed to stand, the Court of Appeals’ Published Opinion will *de facto* result in the overturning of carefully considered prior Michigan Supreme Court precedent.

B. UNDERLYING FACTS

1. Healthsource Saginaw

Healthsource is a not-for-profit municipal health organization that provides medical care for about 300 patients at its extended, behavioral medicine and medical rehabilitation centers.

(10/19/11, pp. 76-77; 10/21/11, pp. 20-22).⁵ Healthsource hired Plaintiff as a Licensed Practical Nurse (LPN) in March 2001. (10/19/11, pp. 74-75). LPNs care for people who are sick or injured under the direction of physicians and registered nurses. (10/19/11, p. 77). They administer prescription medication and provide basic bedside care. (Ex 15). Amber Boyk, who had been working for Healthsource since 1999, supervised Plaintiff. (10/21/11, p. 17-19).

2. Healthsource's Medication Administration Policy

Healthsource maintains detailed procedures for medication administration in its nursing manual that are created by a nursing executive committee. (10/26/11, p. 10). The medication policy requires someone who administers medication to “d. Be sure medicine has been swallowed before leaving [the] room.” (Ex 16, p. 2, Section 4(d)). The Policy also requires nurses to certify on a chart that the medication was given, who administered the medication and when the patient took it. *Id.* p. 3. The Policy cautions “Never sign for or initial medication ahead of time in the medication notebook.” (*Id.* p. 5; see also 10/21/11, pp. 44-46).

Signing a Medication Administration Record before watching the patient swallow medication is falsification because the signature is an affirmative statement that the medication has been given to the patient. (10/21/11, pp. 46-48; 10/26/11, pp. 11-14). This practice is dangerous because nurses can be distracted by events occurring on the floor and forget if the medication was given. *Id.* Further, subsequent nurses who review the chart and see that medication has been signed out will presume the medication has been given to the patient.⁶ *Id.* Intent is not a factor in falsification. (10/26/11, p. 48). Healthsource's Disciplinary Policy

⁵ All references to exhibits are to those exhibits attached to Defendant-Appellant's June 11, 2012 Brief in Support of Its Claim of Appeal by Right.

⁶ In contrast, failing to sign out medication – even though it was properly administered – is not falsification because there was no false certification and the subsequent nurse will follow up if the medication record is not filled out. (10/21/11 pp. 48-49; 10/26/11, pp. 16-17).

confirms that falsification of medical records may result in immediate termination. (Ex 17, p. 1; 10/26/11, p. 14).⁷ The Policy also dictates that when a nurse is alerted to a medication variance, s/he must report that problem by filling out a variance/concern worksheet and reporting to the manager in charge. (10/21/11, pp. 42-44, Ex 18). Plaintiff admits that he received these policies, knew what they required, and knew that falsification could lead to termination. (10/19/11, pp. 104, 123-124, 181-183, 192-196).⁸ Failure on Healthsource's part to follow these policies could result in citation from the State, prohibiting Healthsource from taking new admissions or disqualifying it from Medicare reimbursement programs. (10/26/11, p. 15-17).

3. Plaintiff's Serious And Continuing Performance Problems

Plaintiff's performance issues began nearly two years before his termination and continued to that date:

- **November 1, 2004:** Plaintiff was suspended for insubordination when he refused to work rounds on the second shift. (Ex 20; 10/19/11, pp. 120-122, 184-185).
- **February 2, 2005:** Plaintiff was coached and counseled by supervisor Amber Boyk for an inappropriate interaction with a patient's family member. Boyk also emphasized the importance of assessment and medical documentation; as well as the need for Plaintiff to maintain professionalism with his coworkers. (10/19/11, pp. 118-119).
- **April 22, 2005:** Plaintiff was disciplined for failing to properly handle a patient's request for medication. As a result, Healthsource had to call in a pharmacist to dispense the medication after hours. (Ex 21, 10/19/11, pp. 185-186).
- **July 6, 2005:** Plaintiff was counseled for failing to report a bruise of unknown origin on

⁷ Like any employer, Healthsource reserves the right to change its disciplinary policies, enforce measures of discipline in its discretion and provide notice of those changes to its employees. (10/21/11, pp. 50-51). Discipline is not administered arbitrarily. (10/20/11, p. 82).

⁸ Despite this testimony, Plaintiff alleges he routinely signed medication out before administering it while in the Psychiatric Unit. (10/19/11, pp. 130-131). According to Nurse Executive Sue Graham, this practice is not permitted and, if it had happened and she had become aware of it, it would have been swiftly stopped. (10/26/11, p. 28). In any event, in July 2004 Plaintiff was moved off the psychiatric unit onto Unit 5A, where he admits that his supervisor, Amber Boyk, never gave him permission to continue falsifying medical records as he allegedly did in the Psychiatric Unit. (10/19/11, pp. 165-166; Ex 19).

a patient's lip in violation of the policy requirement to report patient injuries. (Ex 22; 10/19/11, pp. 119, 186-187).

- **August 12, 2005:** Plaintiff was counseled for incurring his 5th unscheduled absence. (Ex 23; 10/19/11 pp. 118, 186).
- **January 27, 2006:** Plaintiff received written counseling for violating the Sexual Harassment Policy. (Ex 24; 10/19/11, p. 190; 10/21/11, p. 53).

Plaintiff agrees he could have been terminated for these incidents. (10/19/11, p. 182-185, 190-191). He also admits to routinely violating the medication administration policy by initialing the Medication Administration Record before entering the patient's room 25-30% of the time. (10/19/11 at 209-211; *supra*, note 6).

4. Plaintiff's Suspension For Falsifying Medical Records And Failing To Provide Two Patients With Respiratory And Anti-Seizure Medication

On March 1, 2006, a patient's family member complained that Plaintiff failed to provide a scheduled respiratory medication. (Ex 25; 10/19/11, pp. 197-199; 10/25/11, pp. 51-52). The complaint was made to the nurse following Plaintiff's shift, Gayle Johnson, who advised the family member that she would have to inform a supervisor. (10/19/11, p. 134; 10/21/11, p. 186; 10/25/11, pp. 51-52).⁹ The patient's Medication Administration Record stated that Plaintiff had signed out the medication.

On March 2, 2006, just one day later, Plaintiff again falsified medical records when he failed to give anti-seizure and Parkinson's medications to a patient but falsely documented that he had done so. (10/19/11, pp. 137, 198-199). The patient's family member complained to the incoming nurse, Gayle Johnson, who checked the Medication Administration Record, noting that Landin's initials indicated the medication had been given. (10/25/11, pp. 52-54; 10/21/11, pp.

⁹ Patients complain all the time and it is natural for patients who are unhappy with the care they are receiving to complain to the nurse on the next shift; Gayle Johnson followed Plaintiff's shift. (10/21/11, pp. 63-64; 10/25/11, p. 50; 10/26/11, p. 26).

187-188). Johnson then called the supervisor, Mary Reynolds, who opened the medication cart and discovered pills in the cart that had not been administered. (10/25/11, pp. 52-54).

During an interview regarding the March 1 and March 2 incidents, Plaintiff admitted he falsely certified he had administered the medication. (Ex 25; 10/19/11, pp. 134, 197-199; 10/21/11, p. 52). Plaintiff blamed the March 1st incident on the patient (10/19/11, pp. 133-135) and the March 2nd incident on a nurse who promised to give the medication after Plaintiff hurriedly left work for school (10/19/11, pp. 138-139). Notwithstanding his excuses, Plaintiff admits his behavior violates policy and could have led to immediate termination. (Ex 17; 10/19/11, pp. 198, 200-201; 10/21/11, p. 53; 10/25/11 pp. 83-84; 10/26/11, pp. 14, 48). Plaintiff also admits that Healthsource gave him another chance, suspending him for five days, and warning him that any further instances of poor performance could result in discipline, up to and including discharge. (Ex 25; 10/19/11, pp. 200-201; 10/21/11, p. 53; 10/25/11, pp. 83-84).

5. Plaintiff's Discharge For A Third Instance Of Medical Record Falsification

Within two months of his five-day suspension for medical record falsification and failure to administer medication, Plaintiff engaged in the very same conduct again. On April 23, 2006, Plaintiff was caring for a patient named "Scott," who had recently suffered a seizure. (Exs 26 and 27). Plaintiff admits he signed the Medication Administration Record, attesting that he watched Scott swallow his anti-seizure medication. (10/19/11, pp. 127-128). Later, Scott complained to the next incoming nurse, Gayle Johnson, that he had not received his medication. (10/25/11, p. 54; Ex 26 and 27). Scott also complained to his physician, Dr. Ali, who asked Johnson why Scott was not given his medication. (10/25/11, pp. 55-56; Ex 26-27). Johnson checked the Medication Administration Record, confirming that the record indicated Plaintiff had signed out Scott's medication. (10/19/11, p. 203; 10/25/11, pp. 35, 56). Johnson then

notified a supervisor, Mary Reynolds, and opened the medication cart, noticing it contained the anti-seizure pills that should have been given to patient Scott. (10/25/11, p. 56). Johnson called a second supervisor to look at the pills. *Id.* Dr. Ali examined the circumstances and instructed Nurse Johnson to give Scott his anti-seizure medication. (10/25/11, pp. 56-57; Ex 26-27).

Amber Boyk, Plaintiff's supervisor, investigated the circumstances surrounding patient Scott's complaint, concluding that: (1) Plaintiff had initialed the Medication Administration Record, indicating that he had given patient Scott the anti-seizure medication; (2) Scott's medication was found in the medication cart; (3) Scott confirmed in an interview that he did not receive his anti-seizure medication from Plaintiff; (4) the attending physician, Dr. Ali, interviewed the patient, who stated that Plaintiff did not give him his medication; and (5) Boyk interviewed the patient, who reiterated that Plaintiff did not give him his medication. (Ex 26, 27, and 28; 10/21/11, pp. 53-61; 10/25/11, pp. 80-81).¹⁰

Despite his two admitted instances of falsification, Plaintiff again blamed the patient, stating that Scott could not be trusted because he is disabled. (10/19/11, pp. 145, 210-211). When asked how he expected Healthsource to believe him when he just admitted to falsifying records twice in the previous month, Plaintiff responded, "Oh, I see what you're getting at ... I guess I can understand your reasoning." (10/19/11, p. 208). Plaintiff also blamed Gayle Johnson, alleging that she placed the pills in the cup herself and reported it to get back at Plaintiff for a report Plaintiff made about her two months earlier. (10/19/11, pp. 148-149).

¹⁰ Additional evidence establishes that Healthsource's investigation reached a reasonable conclusion: (1) Scott had never before (or after) complained about not receiving his medication (10/21/11, p. 59); (2) there was no evidence suggesting that Scott suffered from adverse effects typically associated with receiving a double-dose of anti-seizure medications (10/21/11, pp. 57-58); and (3) Plaintiff conceded that, on prior occasions, he had falsified patient Scott's medical records by initialing the medication administration record before actually providing medication to Scott. (10/19/11, pp. 210-211). Patient Scott's medical records contain no diagnosis of memory problems. (10/21/11, pp. 59-61).

Plaintiff's only evidence for this conspiracy theory was his gut feeling. (10/19/11, pp. 205-208).

After consulting with Human Resources ("HR"), Boyk terminated Plaintiff on April 28, 2006 for his falsification of patient medical records. (Ex 29; 10/21/11, pp. 25, 61-62; 10/25/11, pp. 80-82; 10/26/11, pp. 20-21). Boyk's reasons for terminating Plaintiff are reflected in a contemporaneous written document which states:

[t]his is to inform you that upon conclusion of the investigation, we have found that you did not adhere to the facility's Nursing Policy...specifically the procedure on documentation of treatment... This is a Healthsource Saginaw Group I work rule violation, specifically #1, '*Falsification, alteration, or deliberate omission of information on the application for employment, application for leave of absence, medical records, or any other HSS record.*' (Ex 29).

6. The Michigan Bureau Of Health Professions Found That Plaintiff Falsified Medicine Administration Records

On September 15, 2006, the Michigan Bureau of Health Professions issued an administrative complaint against Plaintiff. (Ex 30).¹¹ The Bureau alleged that Plaintiff falsely stated that he had provided patients with medication, and held a hearing on April 24, 2007. The ALJ found that Plaintiff admitted he deliberately falsified patient medical records on March 1 and March 2, 2006. (Ex 32, pp. 5-7). The ALJ also concluded that Plaintiff's conduct violated the Public Health Code. *Id.* at p. 8. (See also 10/19/11, pp. 216-219).

7. Plaintiff's False Allegations Regarding Coworker Gayle Johnson

On February 25, 2006, Landin publicly accused a fellow nurse, Gayle Johnson, of causing a patient's death. The 73-year-old patient, "Jack," passed away on February 25 at 5:45 a.m. He had a history of obesity, was a heavy smoker, and had a tumor of the central nervous system, heart disease, diabetes, and gangrene. (Ex 33; 10/19/11, pp. 84-85).

¹¹ Under the Public Health Code, Healthsource Saginaw must report employee terminations to the Michigan Bureau of Health Professions. See MCLA § 333.16222. Pursuant to this duty, Healthsource Saginaw reported Plaintiff's termination to the Bureau. (Ex 31, 10/26/11, pp. 19-20, 26-27).

On February 24, Gayle Johnson measured Jack's blood sugar and noticed that it read 515, prompting her to call a supervisor who, in turn, directed Johnson to call the on-call physician assistant. (10/21/11, pp. 112-113, 126; Ex 34, 35). Everyone, including Plaintiff, admits that Johnson did the right thing by calling the on-call physician assistant, Allen Lindsey. (10/19/11, p. 100; 10/21/11, pp. 33-34; 10/19/11 pp. 211-215). PA Lindsey asked Johnson what Jack's sliding scale was, what his current blood sugar read and ordered Johnson to give Jack 15 units of insulin. (10/21/11, pp. 118-119 Ex 34). Throughout the night, the nurse assistant and Johnson checked on Jack. (10/21/11, p. 172 Ex 34). At one point, the nurse assistant found Jack on the floor in a pool of vomit and stool and notified Johnson who, in turn, notified her supervisor. (10/21, pp. 109-110, 116, 142-143; Ex 34). Jack was found dead a few hours later. Plaintiff filed a "Variance/Concern" report accusing Johnson of killing Jack. (Ex 36; 10/21/11, pp. 182-184).¹²

When Boyk received the document, she called Plaintiff to discuss his concerns and to inquire about whether the patient's family had any concerns so that Healthsource could respond. (10/21/11, pp. 28-29; 10/25/11, pp. 77-78). Katie Adams, the Director of Human Resources, and Boyk were present. Neither Adams nor Boyk thinks there is anything wrong with submitting a variance/concern report. (10/21/11 p.129; 10/25/11, p. 79).¹³ Neither Adams nor Boyk had any issue with the fact that Plaintiff had spoken to patient Jack's widow. (10/21/11 p.129; 10/25/11, p. 77-79). Adams was not aware that Plaintiff filed a written report. (10/25/11, p. 93).

Boyk immediately investigated the allegations. As Plaintiff's concerns were clinical,

¹² Despite claiming he believed Johnson was dangerous, Plaintiff simply slid the report under his supervisor Amber Boyk's door, knowing that Johnson would work two full shifts before Boyk would even see the report. (10/19/11, pp. 112, 211-214; 10/21/11, pp. 28-29).

¹³ Boyk testified that she receives several variance/concern reports per week, and that she thinks it is a great idea for employees to bring issues forward so they can be addressed. (10/21/11, pp. 25-27). In fact, nurses are required to file such reports if there are irregularities in patient care. (10/25/11, p. 77). Variance/concern report forms are freely available and employees or patients are never disciplined or treated differently because they file such reports. (10/25/11, pp. 75-76).

Human Resources did not lead the investigation.¹⁴ (10/25/11, p. 79). Boyk checked Jack's chart, spoke with Johnson and other staff, interviewed Plaintiff, and ultimately determined that Johnson had acted appropriately in following PA Lindsey's orders. (10/21/11, pp. 29-31; Ex 37, 38). Boyk also considered statements from other nurse managers such as Dale Pattelle. (10/21/11, pp. 30-33, Exs 35, 38 and 39). In sum, Boyk concluded that Johnson had followed orders given to her by Lindsey, no evidence demonstrated that Johnson had not received the order, and the possibility of malpractice litigation simply was not a factor in Boyk's determination. (10/20/11, pp. 106-108, 120-121; 10/21/11, pp. 37-41; Ex 37, 38).¹⁵

Plaintiff believes his report caused a chain reaction, with Gayle Johnson and Amber Boyk plotting to set him up for termination. (10/19/11, pp. 152-153). Plaintiff admits that his only evidence to support this theory is speculation. (10/19/11, pp. 205-208).¹⁶ Boyk confirmed that she never considered Plaintiff's variance/concern report when she terminated Plaintiff; and the record demonstrates that neither Adams nor Johnson even knew that Plaintiff had filed a written report alleging that Johnson had killed Jack. (10/21/11, p. 62-63, 166; 10/25/11, pp. 81-82).

8. Plaintiff's Unsupported Allegations Regarding Amber Boyk

Amber Boyk is a manager who is never overly aggressive, avoids disciplining subordinates and would never retaliate against an employee. (10/25/11, pp. 84-85; 10/26/11, pp. 30-31). On February 26, 2006, nurse Dale Pattelle informed Boyk that Johnson had done

¹⁴ Human Resources' role is to provide recommendations to management to ensure consistent application of policies and to ensure that the ultimate discipline is based on the facts, rather than emotion. (10/25/11, pp. 73-74). HR does not make clinical findings, but takes the clinical decisions of professionals at face value. *Id.*

¹⁵ Healthsource Saginaw's Death Review Committee concluded that nothing untoward caused Jack's death. The Court precluded this evidence at trial. (Appx 8, p. 46a)

¹⁶ Despite his admittedly poor disciplinary record, Plaintiff's report and testimony demonstrates that he thought he was a better clinician than everyone he worked with – including Gayle Johnson, other fellow nurses and all of his supervisors, whom he believed were incompetent and unfair supervisors. (10/19/11, pp. 88-89, 169-175).

nothing wrong with Jack, stating that Plaintiff was openly hostile: “Once again, Landin is jumping to statements over what is deemed appropriate and certainly not his to make openly ... for him to qualify another nurse, in public, is totally bogus. Further, it seems to be related to his having been ‘written’ up for not passing a group of medications to [Scott].” (Ex 33). Boyk’s investigatory notes regarding the Jack incident, also written in February 2006, state “found pills in med cart [Scott] on it (cup).” (Ex 38). Plaintiff claims, based solely on speculation, that Boyk fabricated these documents. (10/20/11, p. 135). Boyk dismissed this accusation, however, testifying that: (1) she did not alter Pattelle’s email; (2) the incident mentioned in Pattelle’s email concerned a similar incident where Plaintiff was accused of not properly passing medication to Scott in February 2006; (3) Boyk investigated that incident at the same time she investigated the incident regarding Jack, which is why they are both referenced in her February 2006 notes; and (4) the reference to “Scott” in her February notes had nothing to do with the April 2006 incident for which Plaintiff was ultimately terminated. (10/21/11 pp. 19-20; 10/20/11, pp. 135-136).

III. ARGUMENT

A. STANDARD OF REVIEW

“This Court reviews the grant or denial of summary disposition *de novo* to determine if the moving party is entitled to judgment as a matter of law.” *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). To make this determination for a motion brought under MCR 2.116(C)(10), this Court must view the substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion. *Id* at 120. Summary disposition will be affirmed only when no genuine issue regarding any material fact exists and the moving party is entitled to judgment as a matter of law. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which

reasonable minds might differ.” *Id.* Plaintiff cannot rely on the hope that the trier of fact will disbelieve the movant’s denial of a disputed fact or show that there is some metaphysical doubt as to the material facts, but must present affirmative evidence to defeat a properly supported motion for summary disposition. *McCart v Thompson, Inc*, 437 Mich 109, 115 n 4; 469 NW2d 284 (1991). Failure to rebut evidence from the moving party that no genuine issue of material fact exists requires the trial court to grant summary disposition. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 725-726; 691 NW2d 1 (2005).

B. SUMMARY OF ARGUMENT

The fundamental jurisprudential question presented in this Application is whether Michigan courts are permitted to create public policy wrongful discharge claims that they believe serve the public interest, in a manner that undermines established Supreme Court precedent, erodes at-will employment and where the Legislature has never provided a basis for such claims.

At the outset, Michigan common law is that all employment is at-will unless there is a just cause contract between the employer and employee that changes at-will status. In *Suchodolski v Mich Consol Gas Co*, 412 Mich 692; 316 NW2d 710 (1982), the Michigan Supreme Court merely reiterated this fact. It also concluded that the Legislature can limit the power of employers to carry out at-will terminations, and that employers who violate legislatively created public policy can be sued for wrongful discharge. *Suchodolski* set forth three narrow exceptions where public policy wrongful discharge claims can exist: (1) where explicit Legislative statements prohibit discharge of employees who act in accordance with a statutory right or duty; (2) where the employer discharges an employee for failure or refusal to violate the law; or (3) where the employee is discharged because he exercises a right conferred by a well-established legislative enactment. In *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993), the Supreme Court effectively eliminated the first exception by holding

that the remedies provided by statute for violation of a right having no common-law counterpart are exclusive, and there is no other remedy. It is into this regime that *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002), injects the further clarification that only the Legislature has the authority to say what conduct violates public policy.

In *Terrien*, the Supreme Court reined in the ability of lower courts to create or identify public policies that individual judges thought were worthy of furtherance. *Terrien* held that only the Legislature may create Michigan's public policy, and that the judiciary's focus must be on policies that have, in fact, been adopted through legal processes and are reflected in the state and federal constitutions, statutes and common law. This Court further emphasized in *Terrian* that Michigan public policy is *not* merely the equivalent of the personal preferences of one particular judge or a majority of an appellate court, that such a policy must be clearly rooted in the law and that there is no other proper means of ascertaining Michigan public policy.

Although the Court of Appeals cited to *Suchodolski*, *Dudewicz* and *Terrien* in its Published Opinion, it reached a result directly contrary to them when it concluded that the Michigan Public Health Code, which already proscribes retaliatory discharge, was the statutory basis for Plaintiff's public policy wrongful discharge claim, even though it found Plaintiff did not act pursuant to that statute. Other decisions that have examined the Public Health Code, or similar public policy claims based on internal reports of alleged wrongdoing, have concluded that no public policy wrongful discharge claim exists. To justify a contrary result, the Court of Appeals engaged in the very balancing of priorities and policy-weighting that *Terrien* does not permit courts to engage in. By its decision, the Court of Appeals has *de facto* overruled *Terrien*.

If allowed to stand, the Court of Appeals' Published Opinion will move the state of the law back into the world created by *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980), which allowed virtually every termination to be challenged in a

lawsuit, and which has been corrected by the Michigan Supreme Court. The Court of Appeals' Published Opinion means that every terminated employee, armed with a clever lawyer who is good at deriving ad hoc public policy that might catch the eye of a lower court judge, could obtain a successful wrongful discharge jury verdict. The Legislature can determine just what the costs of this new approach will be to jobs and growth, and to determine if it is worth doing notwithstanding such costs. Pursuant to *Toussaint*, Courts are poorly-suited to such evaluation.

The Court of Appeals' Published Opinion at issue here places *Terrien*, *Suchodolski* and the at-will employment doctrine at risk of being undone. *Terrien* cut down drastically on the potential creators of public policy, whose declarations of what public policy is would trump the common law. It is this narrowing that the Court of Appeals' Published Opinion attacks by expanding the number of potential public policy "creators" to include judges. The Opinion so hollows out *Terrien* that the bar is likely to conclude that *Terrien* has effectively been overruled, and it may act as a signal that lower courts can challenge or chip away at superior precedent.

The Court of Appeals' Published Opinion requires immediate review and correction. Allowing the Published Opinion to stand will embolden other courts to follow a similar path, open the floodgates to public policy wrongful discharge claims being asserted every time a discharged employee believes his or her termination is unfair, and will have the effect of nullifying the at-will employment doctrine in Michigan, which the Michigan Supreme Court has carefully sought to preserve in its post-1980 decisions.

C. LEAVE SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' JUNE 3, 2014 PUBLISHED OPINION CONFLICTS WITH AND FAILS TO APPLY SUPREME COURT PRECEDENT, THEREBY EFFECTIVELY "OVERRULING" THAT PRECEDENT

1. Only The Legislature Can Create Public Policy

To strictly curb a flood of decisions wherein courts stepped into the province of the

Legislature and engaged in the creation of public policy, the Michigan Supreme Court issued a significant and far-reaching decision in *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002). At issue was whether covenants against the operation of day care centers in residential settings were unenforceable as against Michigan public policy. The Supreme Court took great pains to provide clarification and guidelines as to how a court should ascertain the public policy of the state. It held that the adjudication of public policy claims is not simply a means to implement social policies based upon the preferences of judges:

In defining “public policy,” it is clear to us that this term must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of subjective views of individual judges ... As a general rule, making social policy is a job for the Legislature, not the courts ... public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. *Id.* at 66-68.

The Supreme Court also found that the “responsibility for drawing lines in a society as complex as ours – of identifying priorities, weighing the relevant considerations and choosing between competing alternatives – is the Legislature’s, not the judiciary’s.” *Id.* at 67, *citing Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999).

2. Standards Applicable To A Public Policy Discharge Claim

The Michigan Supreme Court set forth the applicable standard for public policy wrongful discharge claims in *Suchodolski v Mich Consol Gas Co*, 412 Mich 692; 316 NW2d 710 (1982). At the outset, *Suchodolski* merely reiterated that the common law is that all employment is at-will unless there is a just cause contract between the employee and employer that affirmatively changes at-will status. In other words, *Suchodolski* did not create at-will employment, it merely recognized that at-will employment is the default position under the common law unless the parties modified that position by contract. Next, *Suchodolski* recognized that the Legislature can

limit the power of employers to carry out at-will terminations, and that employers who violate legislatively created public policy, such as discharging employees in violation of civil rights statutes, can be sued for wrongful discharge. *Suchodolski*, 412 Mich at 695.

Given the very significant statutory protections against unlawful terminations already given to Michigan employees, such as the Elliott-Larsen Civil Rights Act and Whistleblowers' Protection Act, the public policy exception to at-will employment is necessarily very limited. This narrow exception arises under three limited circumstances: (1) where explicit legislative statements prohibit discharge of employees who act in accordance with a statutory right or duty; (2) where the employer discharges an employee because the employee fails or refuses to violate the law; or (3) where the employee is discharged because he exercises "a right conferred by a well-established legislative enactment." *Suchodolski*, 412 Mich at 695-696; *Edelberg v Leco Corp*, 236 Mich App 177, 183; 599 NW2d 785 (1999) (declining to expand *Suchodolski*). The Michigan Supreme Court has never expanded these three limited exceptions, and has never authorized lower courts to expand or create new exceptions to the at-will employment doctrine.

In fact, in *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993), *overruled in part on other grounds* 478 Mich 589 (2007), the Michigan Supreme Court pared back the first *Suchodolski* exception. The Supreme Court held that, as a general rule, the remedies provided by statute for violation of a right having no common-law counterpart are exclusive, and there is no other remedy. *Dudewicz*, 443 Mich at 78, *citing Pompey v General Motors Corp*, 385 Mich 537, 552-53; 189 NW2d 243 (1971). Given this, *Dudewicz* held that the existence of a specific statutory prohibition against retaliatory discharge (*e.g.*, the Whistleblowers' Protection Act) is determinative of the viability of a public policy claim. It further observed that in cases in which Michigan courts have sustained a public policy claim, the statutes involved did not specifically prohibit retaliatory discharge, but where the statutes

involved did so, Michigan courts have consistently denied a public policy claim. *Id* at 79-80. Thus, where a statute prohibits retaliatory discharge and confers upon a victim of retaliation the right to sue, that person may not also assert a public policy claim. Michigan Courts have held that *Dudewicz* essentially limited or eliminated the first *Suchodolski* exception.¹⁷ *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481; 516 NW2d 102 (Mich App 1994); *Garavaglia v Centra, Inc*, 211 Mich App 625, 630; 536 NW2d 805 (Mich App 1995).

The first and third *Suchodolski* prongs require a plaintiff to identify a specific legislative enactment supporting his claim. *Vagts*, 204 Mich App at 483-487. The third *Suchodolski* prong also requires a plaintiff to establish, among other things, that he exercised a right conferred by a well-established legislative enactment. *Turner v Munk*, 2006 WL 3373090 (No 270532) (Mich App, Nov 21, 2006)(Ex B). The statute identifying a public policy under either prong must provide direct employment rights, *i.e.*, it must prevent discharge for protected activity. *Suchodolski*, 412 Mich at 696; *Psaila v Shiloh*, 258 Mich App 388, 392; 671 NW2d 563 (2003); *Zub v Wayne County Comm'n*, 1997 WL 33344618 (No 192641) (Mich App, Sept 9, 1997) (Ex C); *Grant v Dean Witter Reynolds, Inc*, 952 F Supp 512, 515 (ED Mich 1996); *Edelberg*, 236 Mich App at 181; *Friend v Village of North Branch*, 2005 WL 599705 (No 251415) (Mich App, Mar 15, 2005)(Ex D); *Regan v Lakeland Regional Health System*, 2001 WL 879008, *1 (No 223491) (Mich App, Aug 3, 2001)(Ex E).

3. The Court Of Appeals Recognized The Applicability Of *Suchodolski* But Failed To Correctly Apply It

As set forth more fully below, the Court of Appeals' Published Opinion requires reversal

¹⁷ Consistent with this, Plaintiff conceded below that a viable public policy wrongful discharge claim cannot be made under the first *Suchodolski* exception. (Ex 45, pp. 16-17). As for the second exception, Plaintiff admits he was never asked to violate the law, and was not terminated for refusing to violate the law. (06/07/10, pp. 4-5).

because it did not identify any statute that actually conferred a public policy right of action on Plaintiff, as required by *Suchodolski*.¹⁸

a. The Court Of Appeals Improperly Concluded That Plaintiff Established A Claim Under The First *Suchodolski* Exception

As noted above, *Suchodolski*'s first exception is met where explicit legislative statements prohibit the discharge of employees who act in accordance with a statutory right or duty. Notwithstanding that Plaintiff never advanced a claim under the first *Suchodolski* exception and admitted he had no such claim, and that the Saginaw County Trial Court never held that Plaintiff had met the first *Suchodolski* exception, the Court of Appeals nevertheless concluded that Plaintiff had done so. (See Ex 44, p. 17)(wherein Plaintiff states "[i]n the instant case, however, there is no applicable statutory prohibition"); (Appx 1, p. 5a).

In reaching this conclusion, the Court of Appeals committed a serious error by ignoring, and issuing a ruling contrary to *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993), *overruled in part on other grounds* 478 Mich 589 (2007) and *Pompey v General Motors Corp*, 385 Mich 537, 552-53; 189 NW2d 243 (1971). *Dudewicz* unambiguously held that where a statute already proscribes retaliatory discharge, that statute is an employee's exclusive remedy and no public policy claim may be found based on that statute. *Dudewicz*, 443 Mich at 79-80. *Pompey* similarly held that remedies provided by statute for violation of a right having no common-law counterpart are exclusive, and there is no other remedy permitted.¹⁹

¹⁸ Plaintiff's Complaint does not identify the specific *Suchodolski* exception under which his public policy claim allegedly fell. (Ex 45, ¶ 40). Nor did Plaintiff identify the appropriate *Suchodolski* prong in his response to Defendant's Motion for Summary Disposition. (Ex 44). In and of itself, this required dismissal of Plaintiff's public policy claim. *Riopelle v Walls*, 1999 WL 33440910 (No 205368) (Mich App, June 29, 1999) (Ex F); *Kunkler v Global Futures & Forex Ltd*, 2004 WL 2169071 (No 245561) (Mich App, Sept 28, 2004) (Ex G).

¹⁹ Michigan common law has never provided individuals who believe they've been terminated in retaliation for complaints with the right to file a private action. That right was created by the Michigan Whistleblowers' Protection Act.

The Court of Appeals held that the Michigan Public Health Code, at MCL 333.20176(a), contained a specific prohibition against the discharge of employees who report violations of the Code. (Appx 1, p. 5a)(“As to exception (1), MCL 333.20176a contains an explicit legislative statement prohibiting discharge or discipline of an employee for specific conduct”). The Court of Appeals also acknowledged that the Michigan Public Health Code specifically incorporated the Whistleblowers’ Protection Act as a remedy for those who experience retaliatory discharge for making complaints. (Appx 1, p. 6a). Given these findings, the Court of Appeals was bound by *stare decisis* to apply controlling prior Supreme Court precedent and conclude that Plaintiff had no viable public policy wrongful discharge claim under the first *Suchodolski* exception. *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000)(*stare decisis* promotes the evenhanded, predictable, and consistent development of legal principles, and contributes to the integrity of the judicial process); *Petersen v Magna Corp*, 484 Mich 300, 314-15; 773 NW2d 564 (2009). Instead, the Court of Appeals ignored controlling precedent and engaged in serious and reversible error by concluding that Plaintiff could state a public policy claim under that exception. (Appx 1, p. 5a).

But the Court of Appeals went even further. In its Published Opinion, it also erroneously concluded that the first *Suchodolski* exception applied to the Whistleblowers’ Protection Act and Elliott-Larsen Civil Rights Act. (Appx 1, p. 5a). In other words, the Court of Appeals ostensibly authorized employees who believe they’ve been terminated based upon their race, but who cannot establish a *prima facie* claim under the Elliott-Larsen Civil Rights Act, to bring public policy wrongful discharge claims based upon the very same circumstances giving rise to their statutory claims. Because the Court of Appeals’ decision is published, it can readily be cited by future litigants as support for public policy claims where none should exist, or have ever existed. This would mark a significant encroachment on at-will employment and the effective overruling

of years of established Michigan Supreme Court precedent. The only method of preventing this from occurring is Supreme Court review, or peremptory reversal.

b. The Court Of Appeals Improperly Concluded That Plaintiff Established A Claim Under The Third *Suchodolski* Exception

To come within the third *Suchodolski* exception, an individual must establish that they were terminated for exercising a right conferred by a well-established legislative enactment, and that statute must be one directed at conferring employment rights. *Suchodolski*, 412 Mich at 696; *Psaila v Shiloh*, 258 Mich App 388, 392; 671 NW2d 563 (2003); *Edelberg v Leco Corp*, 236 Mich App 177, 181; 599 NW2d 785 (1999).

The Court of Appeals relied upon tortured reasoning and illogical arguments to arrive at its conclusion that Plaintiff properly stated a public policy claim under the third *Suchodolski* exception. First, it concluded that MCL 333.20176(a) prohibited a health facility from discharging employees who complain about a violation of the Health Code. (Appx 1, p. 5a). Second, it acknowledged – as it must – that the Public Health Code already incorporated the Whistleblowers’ Protection Act to guard health facility employees who report or complain about violations of the Health Code, and that if Plaintiff had exercised his rights under the Public Health Code, he would have no viable public policy claim. *Id*, p. 6a. Third, the Court of Appeals concluded that Plaintiff never reported a violation of the Public Health Code, and was therefore permitted to proceed with a public policy wrongful termination claim. *Id*, p. 7a) (“However, plaintiff did not originate a report or complaint of a violation of the Public Health

Code; he accused a co-worker of malpractice”).²⁰

In other words, the Court of Appeals concluded that although Plaintiff never reported a violation of the Public Health Code, the Code could nevertheless serve as the basis for his public policy wrongful discharge claim. This non-sequitur argument does not justify the Court of Appeals’ conclusion. Moreover, in enacting section 20176a, the Michigan Legislature intended to protect workers who make *public* reports of violations of the Public Health Code to “proper authorities” – not internal reports like the one Plaintiff made here. *Parent v Mount Clemens Gen Hosp*, 2003 WL 21871745, *3, n 1 (Mich App, Aug 7, 2003)(Ex A).²¹ Aside from this, the Court of Appeals failed to acknowledge that the Public Health Code does not govern medical malpractice – those standards are set forth by the Legislature at MCL 600.2912, *et seq.*, and that statute unquestionably does not confer employment rights, and therefore cannot be the basis for a public policy wrongful discharge claim. Given this, the Court of Appeals should have concluded that dismissal of Plaintiff’s claim was required.

The Court of Appeals’ Published Opinion turns *Suchodolski* on its head, and effectively grants Plaintiff, and potentially hundreds and thousands of other litigants who come after him, the right to bring public policy wrongful termination claims without fitting the very narrow

²⁰ Even assuming for the sake of argument that *Suchodolski* authorizes a public policy claim under these circumstances (it does not), the Court of Appeals failed to consider that Plaintiff never demonstrated that his coworker engaged in malpractice. In a January 23, 2014 unpublished decision, the Court of Appeals refused to recognize a public policy cause of action based upon medical malpractice, characterizing that claim as “a new public policy-based claim premised on medical malpractice standards.” *McIntire v Michigan Inst of Urology*, 2014 WL 265519 (Mich App Jan 23, 2014). The *McIntire* panel explained that the standard of care in the medical profession is “not based on any objective legal source, but must be established through expert testimony on a case by case basis.” *Id* at *6, *citing Gonzalez v St John Hosp & Medical Ctr (On Reconsideration)*, 275 Mich App 290, 294; 379 NW2d 392 (2007). Although *McIntire* examined a claim under the second *Suchodolski* exception, its reasoning is nonetheless applicable here because it goes to the heart of what is, and what is not, objective public policy as created by the Legislature.

²¹ Legislative Analysis of House Bill 4960, for what it is worth, states that the bill would “protect health facility or agency employees who report violations of the bill from civil and criminal liability under the Whistleblower’s Protection Act (Public Act 469 of 1980).” (Ex 47).

parameters for such claims set forth by the Supreme Court. Review by the Supreme Court is required to correct the decision at issue here, where the Court of Appeals straddled the line between two very different statutes to craft a public policy wrongful discharge claim where none previously existed, and, crucially, the Legislature had never created one.

4. The Court Of Appeals Failed To Apply, And Thereby *De Facto* Overruled, *Terrien v Zwit* And Other Supreme Court Precedent

Courts are not free to ignore controlling Michigan law and instead pick and choose from other decisions that support their rulings. *See Petersen v Magna Corp*, 484 Mich 300, 314-15; 773 NW2d 564 (2009)(prior precedent may not be overturned or ignored based upon a mere belief that a case was wrongly decided). By declaring a new public policy claim where none previously existed under Michigan law, the Court of Appeals' Published Opinion effectively overturned *Terrien v Zwit* and many years of decisions following in *Terrien's* path.²² *Terrien* provided lower courts with a firm and unambiguous ruling that "as a general rule, making social policy is a job for the Legislature, not the courts" and "public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Terrien v Zwit*, 467 Mich 56, 66-68; 648 NW2d 602 (2002).

Just three years after *Terrien*, the Michigan Supreme created a prudential doctrine cautioning judges not to venture into certain areas that are better left to the Legislature as they are more in the nature of political questions. *Henry v The Dow Chemical Co*, 473 Mich 63; 701 NW2d 684 (2005). There, appellants asked the Supreme Court to modify Michigan negligence

²² *See, e.g., Smitter v Thornapple Twp*, 494 Mich 121; 833 NW2d 878 (2013)(public policy is not determined by what a majority of the Supreme Court believes is desirable at the time); *Woodman ex rel Woodman v Kera LLC*, 486 Mich 228, 247; 785 NW2d 1 (2010)(the reality of the limitations on our judicial institutions is a significant liability in courts' ability to make informed decisions when asked to create public policy by changing the common law); *Wells Fargo Bank, NA v Cherryland Mall Limited Partnership*, 295 Mich App 99; 812 NW2d 799 (Mich App 2011)(the Legislature makes public policy, not the courts).

law to permit the assertion of negligence claims where plaintiffs sought medical monitoring to screen for possible future, rather than present, injury. *Henry*, 473 Mich at 78. Plaintiffs alleged that Dow Chemical's plant on the banks of the Tittabawassee River discharged harmful chemicals into the soil, that those chemicals were known to cause health problems such as cancer, that they owned property in the vicinity and were therefore exposed to the chemicals, and that the court should implement a court-supervised medical monitoring program to screen them for future negative health consequences. *Id* at 69-70. The Supreme Court characterized plaintiffs' request as a proposal for a "transformation in tort law that will require the courts of this state-in this case and the thousands that would inevitably follow-to make decisions that are more characteristic of those made in the legislative, executive and administrative processes." *Id* at 80.

Noting the potential undesirable externalities that such a course of action would create, the Supreme Court refused to grant plaintiffs' request "[b]ecause such a balancing process would necessarily require extensive fact-finding and the weighing of important, and sometimes conflicting, policy concerns" a task which is not suitable to resolution by the judicial branch. *Id* at 83-84. The Court held "there is a stronger prudential principle at work here: the judiciary's obligation to exercise caution and defer to the Legislature when called upon to make a new and potentially societally disclosating change to the common law." *Id* at 89; *see also* Young, *A Judicial Traditionalist Confronts The Common Law*, 8 Texas Rev. L. & Pol., 299, 307 (2004)(noting that common-law jurisprudence has been guided by an attempt to "avoid capricious departures from bedrock legal rules as such tectonic shifts might produce unforeseen and undesirable consequences"). Also underpinning the Supreme Court's decision was its analysis that "the Legislature has already created a body of law that provides plaintiffs with a remedy" and acknowledgment that creating a separate remedy would place the Court in

competition with the Legislature and without the benefit of Legislative resources. *Id* at 92.²³ *Henry* also practically noted that, if it had held otherwise, it would have given *carte blanche* to “any moderately creative lawyer to identify an emission from any business enterprise anywhere, speculate about the adverse health consequences of such an emission, and thereby seek to impose on such business the obligation to pay the medical costs...” *Id* at 100.

In other words, *Henry* concluded the Legislature has the ability to determine whether new legal systems impose costs, and if the system is worth undertaking despite those costs. Courts are poorly-suited to such evaluations.

Although the Court of Appeals was required to follow the holdings and principles outlined in *Terrien* and similar decisions, and the prudential warning of *Henry*, it instead did exactly what those decisions state it could not do: it engaged in a comparison of competing interests in the process of fashioning a new public policy. That the Court of Appeals did so is transparently evident where it stated:

The workers’ compensation statutes and MCL 333.20176(a) share the same underlying purpose-- to promote the welfare of the people in Michigan as it concerns health and safety. While the workers’ compensation statutes were admittedly enacted specifically in the context of protecting employees who are injured in the workplace, **it could be argued that** reporting malpractice in the context of a medical workplace would have even more of a direct impact on the health and welfare of our citizens and that the right to report alleged malpractice in one’s workplace without fear of repercussion **is of at least equal if not of greater significance** than benefitting and protecting victims of work-related injuries. (emphasis added).

(Appx 1, p. 6a)(emphasis added). Where the Plaintiff has no viable public policy claim under

²³ Although the dissent in *Henry* claimed that the majority’s Opinion left injured plaintiffs without a remedy, the majority cogently and correctly held that, assuming plaintiffs can show the four elements of a traditional negligence claim, plaintiffs could obtain full compensation for their injuries. *Id* at 98-99. This holding puts to rest any claim here that Plaintiff Landin lacked a statutory remedy because he did not plead or satisfy the standard for a *prima facie* Whistleblowers’ Protection Act claim.

Suchodolski, the Court of Appeals' decision to draw lines, identify priorities, weigh relevant considerations and choose between competing alternatives, which is the sole province of the Legislature, must be addressed and corrected by the Supreme Court. *Terrien*, 467 Mich at 67; *Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999). Given that the Court of Appeals' Opinion is published, Plaintiff in this case will assuredly not be the last person to rely on it, and any moderately creative lawyer could use that Opinion to identify some statute to support an analogous public policy claim that does not exist at common law and has never been authorized by the Legislature or Supreme Court. This situation could repeat hundreds, or even thousands, of time in the future, creating a chaotic and dislocating effect on Michigan law and the at-will employment doctrine.

As things currently stand, *Terrien* and *Van* have effectively been hollowed out by the Court of Appeals' Opinion. For these reasons, reversal of the Court of Appeals' Opinion is required.

5. The Public Health Code Cannot Serve As The Basis Of A Public Policy Claim

Shortly after the decision in *Terrien*, the Court of Appeals had an opportunity to address the exact question presented here – whether a public policy termination claim could be based on the Public Health Code. It properly concluded that no public policy claim can be based on MCL 333.20176a because the exclusive remedy provided by the Public Health Code is the Whistleblowers' Protection Act. *Parent v Mount Clemens Gen Hosp*, 2003 WL 21871745, *3 (Mich App Aug 7, 2003)(unpublished)(Ex A).

In *Parent*, a medical technician claimed she was discharged in violation of public policy because she refused to perform a procedure that she believed violated the medical standard of care. Like Plaintiff in this case, Parent made no report to the Department of Public Health prior

to discharge, and premised her public policy claim on MCL 333.20176a. The Court of Appeals found that the Public Health Code provided both a specific protection against retaliation and a specific remedial provision to grant relief. *Parent*, 2003 WL 21871745, at *2-3 (quoting *Dudewicz*, 443 Mich at 78-80)(“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”). On this basis, *Parent* held that because the Legislature adopted the Whistleblowers’ Protection Act as the exclusive remedy for retaliatory discharge grounded on the Public Health Code, no public policy claim exists. *Id.* *Parent* also observed that the Legislature incorporated the Whistleblowers’ Protection Act as the exclusive remedy to encourage health care worker to make reports to public authorities. *Id.*

Although *Parent* carries no precedential weight, the first axiom of a sound judicial system is similar outcomes for indistinguishable cases, whether published or not. Any other result visits unpredictability and irrational analysis on the citizenry. *Parent*’s logic is sound, fully consistent with controlling Supreme Court precedent and arrives at the same conclusion that the Court of Appeals was bound to reach, but did not, in this case. Given the foregoing, the Court of Appeals’ Opinion must be reviewed or preemptorily reversed.²⁴

6. Analogous State And Federal Court Decisions Hold That Under Michigan Law, No Public Policy Claim Based On Internal Reports Of Misconduct Exists

The Court of Appeals also erred by failing to consider that, as a matter of law, an internal report of misconduct is insufficient to form the basis of a public policy claim. The Michigan Supreme Court and Court of Appeals have affirmed the dismissal of a public policy claim where

²⁴ Plaintiff never filed a complaint or report with the Department of Public Health regarding his coworker, nurse Gayle Johnson; therefore, he did not engage in protected activity as defined by the very statute the Court identifies as the basis of Plaintiff’s public policy claim.

a plaintiff alleged he was terminated for internally reporting suspected misconduct. *Suchodolski*, 412 Mich at 694-95; see also *Gilmore v Big Brother/Big Sisters of Flint, Inc*, 2009 WL 1441568, *1-3 (No 284704)(Mich App, May 21, 2009)(affirming dismissal of public policy claim where plaintiff claimed she was terminated because she confronted her employer about its hire of a convicted felon in violation of company policy, and her supervisor's payment of a personal cell phone bill with company funds) (Ex I).

The Sixth Circuit and Eastern District of Michigan have reached the same conclusion. See *Cushman-Lagerstrom v Citizens Ins Co*, 72 Fed Appx 322, 328 (6th Cir 2003) (Ex J) (holding that, under Michigan law, “[n]o public policy cause of action exists for a retaliatory discharge of an employee who reported alleged violations of law to a superior.”); *Scott v Total Renal Care, Inc*, 194 Fed Appx 292 (6th Cir 2006)(Ex K); *Harder v Sunrise Senior Living, Inc*, 2009 WL 5171843, *1-3 (No 09-11094) (ED Mich, Dec 22, 2009) (Ex L).

In *Harder*, the plaintiff claimed that she was terminated from her job because she internally reported that a coworker nurse unlawfully dispensed Vicodin to a patient, and that Sunrise was concerned that plaintiff would also report that dispensation to the State of Michigan. *Harder*, 2009 WL 5171843 at *1. The Eastern District of Michigan concluded that a public policy claim under Michigan law cannot be based on internally reporting alleged unlawful conduct to a supervisor, and that even if plaintiff was terminated for doing so, “there is no authority that holds that such a termination is a violation of the public policy doctrine.” *Id* at *3, citing *Scott*, 194 Fed Appx 292.

These decisions are fully consistent with Michigan Supreme Court precedent and, unlike the Court of Appeals here, recognize that Michigan courts are not permitted to expand the public policy doctrine beyond the three exceptions identified by the Michigan Supreme Court.

D. IF ALLOWED TO STAND, THE COURT OF APPEALS' OPINION WILL ERODE THE AT-WILL EMPLOYMENT DOCTRINE IN MICHIGAN

In 1980, the Supreme Court decided *Toussaint v Blue Cross & Blue Shield*, 408 Mich 579; 292 NW2d 880 (1980), a case in which two employees claimed they were terminated in violation of agreements promising them just cause employment. Both employees claimed that their employers verbally promised them job security as long as they were doing their jobs. *Toussaint*, 408 Mich at 597. Among other things, the Supreme Court held that employment contracts promising just cause employment are enforceable, and that a provision promising just cause employment may be incorporated into an employment contract by virtue of oral agreement or as the result of an employee's legitimate expectations based upon policy statements. *Id* at 598-99. In effect, *Toussaint* subjected virtually every at-will termination to judicial scrutiny, so long as the claimant could identify some small statement regarding their employment status.

In the wake of *Toussaint*, wrongful discharge and just cause employment cases rapidly multiplied. Employees who could point to a scrap of a handbook, or a vague oral statement, could now claim entitlement to just cause employment and judicial review of their terminations. This naturally worked to limit the application of at-will employment in Michigan. Just over a decade later, the Michigan Supreme Court limited the application of *Toussaint* when it decided *Rowe v Montgomery Ward*, 437 Mich 627; 473 NW2d 268 (1991)(holding that claims of just cause employment founded on oral representations are only cognizable where the evidence demonstrates both employer and employee clearly intended to be bound) and *Rood v General Dynamics Corp*, 444 Mich 107; 507 NW2d 591 (1993)(concluding that to overcome the presumption of at-will employment in Michigan, an employee must submit evidence of a contractual agreement for a specific employment term, or a provision stating that the employee may only be discharged for just cause).

The Supreme Court's restoration of the at-will employment doctrine in Michigan, twenty five years in the making, is irreconcilable with, and has been firmly placed at risk by, the Court of Appeals' Published Opinion here. When fully appreciated, the Court of Appeals' Published Opinion carries with it the potential to reset Michigan law back to the immediate post-*Toussaint* world, when almost any employee had the opportunity to seek judicial review of his or her termination decision, and the term "at will employee" meant little in practice. The Court of Appeals' Published Opinion, however, is potentially more dangerous than *Toussaint* ever was. Unlike with *Toussaint* claimants, those advancing public policy claims do not need to submit evidence of verbal statements or policy handbooks expressing an intent to promise employment for a definite term. Under the principles and conclusions announced in the Court of Appeals' Published Opinion, the bar is much lower: discharged employees can lay out their story in a judicial complaint and creative lawyers or sympathetic courts need only identify some statute bearing a tangential relationship to the Complaint to permit a jury to review the employee's termination. In short, nearly all terminations will be subject to judicial review and at-will employment – rather than public policy claims – will become the exception, not the general rule.

If, as a state, we are going to adopt this approach, then, as in *Henry v The Dow Chemical Co*, 473 Mich 63; 701 NW2d 684 (2005), where the Supreme Court was invited to create an equally-destabilizing medical monitoring doctrine, the Supreme Court ought to direct this Plaintiff to take his theory to the Legislature. The Legislature can and should determine just what the costs of this new approach will be to jobs and growth, and if it is worth doing notwithstanding the costs. Courts are poorly-suited to such evaluations. In short, if the people of the State of Michigan want to visit these consequences on their job providers, so be it, but it is wise for this Court to recognize, as in *Henry*, that it is best done not in a court but after a full and fair debate in the Legislature. Given the tremendous risks and associated social costs at issue

here, leave to appeal should be granted.

E. THE COURT OF APPEALS ERRED BY AFFIRMING THAT A GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO THE REASON MOTIVATING PLAINTIFF'S DISCHARGE

In its opinion denying Healthsource's Motion for Summary Disposition, the Trial Court erroneously concluded that there is "evidence in the record" to show causation, without ever identifying what evidence supported that conclusion. The Court of Appeals improperly affirmed that decision. To prove causation, Plaintiff must meet the high burden of showing that his activity was a "significant factor" in his termination, not just that there was a potential causal link between the two. *Turner v Munk*, 2006 WL 3373090 (Ex B); *West v General Motors Corporation*, 469 Mich 177, 665 NW2d 468 (2003). Temporal proximity alone or speculation does not establish causation. *Griffin v Lake County*, 2011 WL 3760907 (No 282921) (Mich App, Aug 25, 2011) (Ex P); *West*, supra; *Owen v Unadilla Township*, 1999 WL 33451605, *2-3 (No 206769) (Mich App, April 9, 1999) (Ex Q) (dismissing public policy claim where only evidence of causation was opinion and suspicion).

Assuming Plaintiff meets his *prima facie* burden, Healthsource may provide a legitimate business reason for the discharge, at which time Plaintiff must demonstrate that Healthsource's reason was pretextual. *Hazle v Ford Motor Co*, 464 Mich 456, 465-66; 628 NW2d 515 (2001); *Bricker v Ausable Valley Community Health Services*, 2009 WL 211883 (No 281736) (Mich App, Jan 29, 2009) (Ex R). To establish pretext, Plaintiff must show that (1) Defendant's articulated reasons have no basis in fact; (2) if they have a basis in fact, they were not the actual factors motivating the decision; or (3) if they were factors, they were insufficient to justify the decision. *Feick v County of Monroe*, 229 Mich App 335, 343; 582 NW2d 207 (1998).²⁵

²⁵ Falsification of medical records is a legitimate basis for discharge from employment. *Dumas v Providence Hosp*, 2009 WL 4981152 at *4 (No 286806) (Mich App, Dec 22, 2009) (Ex S).

Plaintiff cannot demonstrate causation or pretext simply by questioning, or second guessing, Healthsource's business judgment. *Hazle*, 464 Mich at 476. Furthermore, courts and juries are not to sit as super-personnel departments re-examining an employer's business decisions or "second-guessing" otherwise legitimate decisions. *Hazle*, 464 Mich at 475-476; *Campbell v Human Services Dep't*, 286 Mich App 230; 780 NW2d 586 (2009). Even if a decision-maker is completely mistaken, so long as the decision-maker based her decision on her evaluation, her business judgment is not to be second-guessed. *DeMarco v Holy Cross High School*, 4 F3d 166, 170-171 (2d Cir 1993); *Bender v Hecht*, 455 F3d 612, 627 (6th Cir, 2006).²⁶

Under these controlling standards, Plaintiff's evidence in response to motions for summary disposition or at trial did not establish that his internal report was a significant factor in his termination or that Healthsource's reason for his termination is pretextual. The undisputed record evidence establishes that Amber Boyk based her decision to terminate Plaintiff, made in consultation with HR, on the results of an investigation showing that Plaintiff – who had an admitted and recent history of falsifying patient medical records – had done so again. Further, Plaintiff admitted that the only support he has for this theory is his speculation. (10/19/11 pp. 205-208). Plaintiff, in fact, concedes that he understands why someone would conclude that he falsified patient medical records – shattering his pretext claim. Boyk had no reason to believe that Johnson, who accurately reported two patient complaints, would fabricate a third.²⁷

²⁶ Plaintiff cannot establish a *prima facie* case by claiming that an allegedly similarly situated nurse was treated differently. This boils down to the assertion of a disparate treatment discrimination claim, which Plaintiff has never alleged in this lawsuit and, therefore, cannot provide a basis for relief. See *Makohon v DaimlerChrysler Corp*, 2003 WL 22339225, *4 (No 240112) (Mich App Oct 14, 2003) (Ex T) (public policy claimant's assertion that he was "treated differently" from similarly situated women was without merit "because plaintiff's complaint did not state a claim of discrimination, this issue is not before this Court").

²⁷ The record evidence establishes that Healthsource Saginaw has terminated other nurses who engaged in the same misconduct as Plaintiff and reported those nurses to the State of Michigan

Given the foregoing, the Court of Appeals committed reversible error when it concluded that Plaintiff established a genuine issue of material fact on the issue of causation.²⁸

F. THE COURT OF APPEALS ERRED BY FAILING TO CORRECT SIGNIFICANT AND ERRONEOUS EVIDENTIARY RULINGS THAT SEVERELY PREJUDICED HEALTHSOURCE, CONFUSED THE JURY AND CREATED A MINI-TRIAL ON IRRELEVANT ISSUES

The Trial Court's evidentiary rulings severely prejudiced Healthsource and confused the Jury as to the relevant issues. Acknowledging the confusion engendered by its rulings, the Trial Court stated, "I am going to be interested to see you explain this all to the jury ... I just think for a jury it's going to be confusing." (10/10/11, pp. 42-43). Based on the following erroneous rulings, the Court of Appeals should have concluded that no reasonable jury would have found for Plaintiff based on the relevant evidence, or, alternatively, a new trial should be ordered where a jury can review only the relevant evidence.

1. Standard Of Review

The Michigan Supreme Court has stated that while decisions to admit evidence are reviewed using an abuse of discretion standard, preliminary legal questions are reviewed *de novo*. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). Introduction of evidence is governed by the basic principle set forth in MRE 402: "All relevant evidence is admissible.... Evidence which is not relevant is not admissible." The "trial court has the responsibility to control the introduction

as it is required to. (10/26/11, pp. 27-29).

²⁸ In response to summary disposition, Plaintiff stated that the evidence at trial would show that Amber Boyk lied or otherwise fabricated evidence to set up Plaintiff's termination. A promise to provide evidence, however, cannot be used to deny a Motion for Summary Disposition. *Maiden v Rozwood*, 461 Mich App 109, 121; 597 NW2d 817 (1999).

of evidence and the arguments of counsel and to limit them to relevant and material matters.” *Tobin v Providence Hosp*, 244 Mich App 626; 624 NW2d 548 (2001). Relevant evidence is defined as, “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. Otherwise, the information is irrelevant and is not admissible. MRE 402. Evidence is not probative when it relates to conduct that is not logically related to the actions alleged in the case. *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289; 624 NW2d 212 (2001). Finally, even if probative to an issue in the case, evidence should be excluded pursuant to MRE 403 if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.

2. The Court Of Appeals Erred By Endorsing The Admission Of Irrelevant Evidence Regarding The Truth Of Plaintiff’s Underlying Complaint

Plaintiff’s “evidence” regarding whether Gayle Johnson actually caused a patient’s death fell into three categories: (1) testimony from Plaintiff and Johnson regarding patient Jack’s care; (2) testimony from witnesses regarding their analysis of Jack’s medical records; and (3) argument by Plaintiff’s counsel that Johnson should have been terminated. The Trial Court ruled that the evidence was relevant because Plaintiff could argue disparate treatment to prove his public policy claim, and the Court of Appeals affirmed this ruling. (Appx 8; Ex 6).

a. The Evidence Is Barred By MRE 401 And 402

The three categories of evidence identified above are barred under MRE 402 because the factual merit of Plaintiff’s complaint regarding Gayle Johnson is of no consequence to the only relevant question: whether Plaintiff was terminated from Healthsource for exercising “a right conferred by a well-established statute.” *See Fitzgerald v Wayne State University*, 2009 WL 2952686 (No 284136) (Mich App, Sept 15, 2009) (Ex X) (internal report was not logically

relevant to the sole issue presented in the retaliation claim; the evidence posed a high risk that the jury would consider the evidence for the improper purpose of determining whether the defendant discriminated against the plaintiff and was thus barred). No less is required here. Evidence purporting to establish the truth of the underlying facts in Plaintiff's internal complaint, as well as evidence and argument suggesting she performed poorly, or caused a patient's death, should have been excluded from trial as a matter of law. Even if Plaintiff actually demonstrated that Johnson should have been terminated and that her actions resulted in patient Jack's death, that does not mean that he met his burden of proof for a public policy wrongful discharge claim.

b. The Evidence Is Barred By MRE 403

Alternatively, this evidence should have been excluded under MRE 403 because the evidence's probative value is substantially outweighed by the risk of unfair prejudice, and because it created a trial within a trial. Submitting this evidence to the Jury prevented it from separating the relevant issue of whether Plaintiff was terminated for filing the complaint concerning Johnson, from the irrelevant issue of whether Johnson actually caused patient Jack's death. This caused the jury to find in Plaintiff's favor notwithstanding the lack of any evidence linking his termination to his complaint. *Fitzgerald*, 2009 WL 2952686 at *2; *Fisher*, 390 Fed Appx at 470-71. In essence, the Jury was misled into believing that if the evidence showed that Johnson contributed to a patient's death, then Healthsource must have violated public policy and Plaintiff had proven his claim. However, Plaintiff's burden of proof is far different. Based on the foregoing, the Jury should not have been permitted to review this evidence.

3. The Court Of Appeals Erred By Affirming The Trial Court's Improper Prohibition Of Testimony At Trial Absolving Gayle Johnson Of Wrongdoing

While Plaintiff was allowed to introduce evidence of the alleged professional misconduct of Gayle Johnson and the death of patient "Jack," the Court compounded its error by precluding

Healthsource from introducing key rebuttal evidence and testimony at trial. (Appx 8, Ex 6). This evidence included: (1) Healthsource's internal death review committee's report regarding the death of patient Jack, and testimony concerning that report (*Id.*); (2) the Bureau of Health Professions report absolving Amber Boyk and Healthsource from any wrongdoing (10/19/11, pp. 53-66); and (3) the fact that Jack's widow did not file any legal action against Healthsource, despite Plaintiff's providing her with Jack's medical records and advising her that Healthsource caused her husband's death (*Id.*).

The Court of Appeals' decision to affirm the lower court's ruling is erroneous as a matter of law, inconsistent with notions of fairness, as the ruling irrevocably prejudiced Healthsource by prohibiting it from showing the Jury evidence that demonstrated that Johnson did not cause a patient's death. (Appx 1). The effect of the Court's two rulings was to turn Plaintiff's simple public policy discharge case into a complicated medical malpractice case – while barring Healthsource from rebutting Plaintiff's evidence.

4. The Court Of Appeals Erred By Determining That Evidence Regarding Johnson's Performance History Was Relevant At Trial

Throughout trial, Plaintiff compared himself with his coworker, Gayle Johnson. The record is clear that Johnson, unlike Plaintiff, *never* falsified a medical record. Nonetheless, Plaintiff introduced the following inadmissible evidence regarding Johnson: prior performance reviews, academic performance, her transfer from a skilled nursing unit to an unskilled one, her suspension in November, 2005, complaints from other nurses regarding Johnson and disciplinary notices. (e.g., 10/19/11, pp. 100-104; 10/20/11, pp. 56-59, 90-98, 120-123; 10/21/11, pp. 149-179; 10/25/11, pp. 22-25). Plaintiff argued that the Jury should compare his wrongdoing to Johnson's performance to determine whether he was subjected to disparate treatment because of his allegation that Johnson gave inadequate care to Jack. (e.g., 10/10/11, pp. 8-9; Appx 8; Ex 6).

Such an argument boils down to the assertion of a disparate treatment discrimination claim, a claim that Plaintiff has never alleged in this lawsuit. Whether Plaintiff was treated fairly or unfairly or whether Gayle Johnson should have been fired is irrelevant to Plaintiff's claim for wrongful discharge in violation of public policy. Nor is Johnson's performance an element of Plaintiff's claim or Defendant's defenses. *Turner, supra. Makohon v DaimlerChrysler Corp*, 2003 WL 22339225, *4 (Mich App Oct 14, 2003)(claimant's assertion that he was "treated differently" than similarly-situated women was without merit "because plaintiff's complaint did not state a claim of discrimination, this issue is not before this Court"). The evidence should have been barred at trial and the Court of Appeals' failure to correct this error warrants review.

Even if relevant, the "disparate treatment" evidence at issue should have been excluded under settled principles of law. In *Town v Michigan Bell Telephone Co*, 455 Mich 688, 568 NW2d 64 (1997), the Michigan Supreme Court held that a plaintiff seeking to establish disparate treatment must compare himself to another employee who is shown to be "nearly identical" in "all relevant aspects" to the plaintiff. *Id.* at 700 n 23; *MDCR ex rel Burnside v Fashion Bug*, 473 Mich 863; 702 NW2d 154 (2005). Evidence regarding the discipline given to other Healthsource employees is irrelevant unless Plaintiff can demonstrate that those employees were similarly situated, i.e., engaged in the same misconduct. *Fashion Bug, supra; Venable v General Motors Corp*, 253 Mich App 473, 484; 656 NW2d 188 (2003) (plaintiff was not similarly situated to employees who engaged in different misconduct); *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 369-70; 597 NW2d 250 (1999). Thus, Plaintiff should not have been permitted to submit evidence of Johnson's alleged performance problems where it was undisputed that she

never engaged in falsification of medical records, as did Plaintiff.²⁹ (10/20/11, pp. 90-91; 10/21/11, pp. 49, 64-65; 10/25/11, pp. 46-48, 99).³⁰

5. The Court Of Appeals Erred By Concluding That The Trial Court Properly Permitted Plaintiff To Allege At Trial, Without Evidence, That Amber Boyk Destroyed Or Falsified Evidence

The uncontroverted testimony of Amber Boyk in the face of allegations of fabrication of evidence and lying demonstrates that (1) she did not alter Pattelle's email; (2) the incident mentioned in Pattelle's email concerned a similar incident where Plaintiff was accused of not properly passing medication to patient Scott in February 2006; (3) Boyk investigated that incident at the same time she investigated the incident relating to patient Jack, which is why they are both referenced in her February 2006 notes; and (4) the reference to the incident in her February notes had nothing to do with the April 2006 incident for which Plaintiff was ultimately terminated. (10/21/11 pp. 19-20; 10/20/11, pp. 135-136). Plaintiff's only "evidence" to support his theory was his speculation. Allowing this testimony prejudiced Healthsource and gave the Jury yet another reason to want to punish it, rather than focusing the Jury on the relevant inquiry: whether Plaintiff's internal report caused his discharge. (*Supra*, note 29).

6. The Court Of Appeals Erred In Affirming The Trial Court's Ruling That After-Acquired Evidence Issues Should Be Decided By The Jury

On February 27, 2009, Plaintiff produced to Defendant copies of confidential patient

²⁹ Courts routinely exclude evidence regarding non-similarly situated employees in discrimination cases. *Schrand v Federal Pacific Elec Co*, 851 F3d 152, 156 (6th Cir, 1988) (discharge of employees who were not similarly situated to the plaintiff was not relevant to the issues presented by the plaintiff's age discrimination claims); *Gorski v Myrian Genetics*, 2007 WL 2021843 (No 06-11631) (ED Mich, July 12, 2007)(Ex Z). The fundamental principle in these cases is that an employer is entitled to treat different employees differently when they engage in different misconduct, or even similar misconduct under different circumstances.

³⁰ Plaintiff argued to the Jury that his discharge violated Michigan public policy because he was disciplined more severely than other employees who engaged in conduct other than falsification of medical records. The underlying premise of Plaintiff's argument is the notion that Plaintiff is *entitled* to be treated the same as these other employees. But as demonstrated above, Plaintiff was *not* so entitled because he was not similarly situated to these employees as a matter of law.

medical records that he had copied and taken from Healthsource's premises. See *supra*; 10/20/11, pp. 11-14. Healthsource was not aware of Plaintiff's misconduct until Plaintiff produced these documents in discovery. Plaintiff admitted that he copied and removed confidential medical records from Healthsource's property while he was employed, thereby violating Healthsource's disciplinary policy. *Id.* Had Healthsource been aware of these actions during Plaintiff's employment, it would have terminated Plaintiff. (10/21/11, pp. 66-67). Under the after-acquired evidence doctrine, as presented in Healthsource's Motion to limit Plaintiff's damages, the Trial Court was bound to prohibit Plaintiff from recovering damages beyond the date he would have been terminated, *i.e.* February 7, 2009. *McKennon v Nashville Banner Publishing*, 513 US 352, 361-62 (1995)(after-acquired evidence of employee wrongdoing must work to limit the relief available to a discharged employee); *Wright v Restaurant Concept Management, Inc*, 210 Mich App 105; 532 NW2d 889 (1995); *Horn v Dept of Corrections*, 216 Mich App 58; 548 NW2d 660 (1996); *Smith v Union Township* 227 Mich App 358; 575 NW2d 290 (1998). The Trial Court mistakenly ruled that despite the absence of evidence showing that Plaintiff would not have been terminated for his misconduct, the after-acquired evidence issue would be submitted to the Jury. (Appx 9). The Court of Appeals affirmed this decision, concluding that a question of fact existed even though Healthsource presented sworn testimony demonstrating that Plaintiff would have been terminated, and Plaintiff submitted no contrary testimony. Based on the foregoing authority, this was a question of law to be decided by the Trial Court, which should have ruled in Healthsource's favor. (Appx 1, pp. 10a-11a).

G. LEAVE SHOULD BE GRANTED TO REVERSE THE COURT OF APPEALS' DECISION AFFIRMING THE DENIAL OF HEALTHSOURCE'S MOTIONS FOR JNOV AND NEW TRIAL

For all the reason set forth at pages 21 – 48, above, the Trial Court should have granted Healthsource's Motion for JNOV or, alternatively, ordered a new trial where only the relevant

evidence would be produced to the Jury. MCR 2.611(A)(1)(a)(c)(d), (e), (g), and (h) and 2.612(C)(1)(f). (Appx 6)

IV. CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, Defendant-Appellant Healthsource Saginaw most respectfully requests that this Court grant this Application for Leave to Appeal and grant peremptory relief that: (1) reverses the Published Opinion of the Court of Appeals and the Saginaw County Trial Court, grants either of Healthsource's Motions for Summary Disposition, or grants Healthsource's Motion for JNOV and determines that, under *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002) and *Suchodolski v Michigan Consol Gas Co*, 412 Mich 692; 292 NW2d 880 (1982), Plaintiff has no valid public policy wrongful discharge claim; (2) in the alternative, reverses the Published Opinion of the Court of Appeals and the Saginaw County Trial Court and orders a new trial with corrected evidentiary rulings and a corrected ruling on Healthsource's Motion to limit Plaintiff's damages due to after-acquired evidence of misconduct.

Respectfully submitted,

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