

STATE OF MICHIGAN
IN THE SUPREME COURT

ROBERTO LANDIN,

Plaintiff-Appellee,

v.

HEALTHSOURCE SAGINAW, INC.,

Defendant-Appellant

Supreme Court No. _____

Trial Court No. 08-002400-NZ-3

Court of Appeals No. 309258

149663-1
reply

**DEFENDANT-APPELLANT'S REPLY IN SUPPORT OF ITS APPLICATION
FOR LEAVE TO APPEAL TO THE MICHIGAN SUPREME COURT**

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A. Plaintiff/Appellee's Reliance on Irrelevant Facts Should Be Disregard

Rather than respond to the well-supported legal arguments in Defendant/Appellant Healthsource Saginaw, Inc.'s ("Healthsource") Application for Leave to Appeal, the vast majority of Plaintiff/Appellee Roberto Landin's ("Plaintiff") Response merely proffers the same blizzard of irrelevancies that, to date, have distracted one jury and four judges from the only relevant facts, simple as they are, and thus created an injustice. Candidly, Healthsource needs this Honorable Court's help to right this wrong.

Plaintiff argued, and the well-intentioned but distracted trial judge bought, that a Michigan employer's right to discharge any employee "at will" vanishes if the employer was acting in retribution for the employer whistleblowing about other employee misconduct (negligent homicide, no less!). What can be confusing here is that there is a kernel of almost merit to Plaintiff's argument because Section 333.20180(1) of Michigan's Public Health Code ("PHC"), MCL 333.1101 *et seq.*, does, indeed, provide whistleblower protection under Michigan's Whistleblower Protection Act ("WPA"), MCL 15.361 *et seq.* to those, who like Plaintiff, make a report or complaint of a violation of the PHC. Yet, and importantly, Plaintiff never used it. Instead – possibly because he had missed the WPA's limitations period – he plead whistleblower protection type facts, couching them as an actionable violation of Michigan's public policy. This claim, independent from any WPA claim, according to Plaintiff, trumps an employer's broad rights to discharge an employee "at will."

On its face, Plaintiff's contention that he is entitled to WPA-like protections, without actually complying with the WPA – is without merit because it effectively affords an employee-plaintiff the right to amend the PHC. Notably, the Trial Court seemed inclined to find Healthsource's argument meritorious, but overcame its reservations by safe harboring in the notion that Plaintiff was trying to do "good deeds" and Michigan courts must protect such people. That is it. On such a half-baked analysis, the Trial Court denied Healthsource's dispositive motions and the lawsuit continued. But, it got worse.

Allowed to parade the irrelevancies surrounding his discharge – including the breathtaking accusation that a coworker nurse negligently killed a patient – Plaintiff argued that he discovered this foul deed, sent up the alarm and was, in retribution, let go. Indeed, he did it with gusto, as he once again does in his Response. (*See, e.g.*, Plaintiff's Response, pp. 11 – 28). Faced with this "shiny object" approach and fearing jury prejudice, Healthsource sought to introduce proofs that Plaintiff's theory lacked any merit whatsoever. Those proofs would have included that the state authorities investigated Plaintiff's negligent homicide claims and concluded that there was *no patient killing*. Once understood, the authorities' findings must lead to the conclusion that Plaintiff's entire construct as to how and why he was discharged was without support. The jury, however, was to hear no such evidence because the Trial Court denied Healthsource's requests to present such proofs.

Not surprisingly, the jury got swept along by Plaintiff's unrebutted fantasy. Surprisingly, so did the Court of Appeals. That should not be the end of the story. There has been an injustice. Healthsource deserves this Court's help.

In response to all this, Plaintiff essentially argues the same as below, except that he now adds a uniquely ugly argument. That argument is effectively that this Court should not grant leave, because even if there is an injustice, there is nothing actually written in the published Court of Appeals decision that acknowledges the hollowing out of this Court's precedents in *Terrian v Z Witt*, 467 Mich 56; 648 NW2d 602 (2002); *Van v Zahorik*, 460 Mich 320; 597 NW2d 15 (1999); *Suchodolski v Michigan Consol Gas Co*, 412 Mich 692; 292 NW2d 880 (1982), *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993); and *Pompey v General Motors Corp*, 385 Mich 537; 189 NW2d 243 (1971) – let alone breathing life into the previously deceased *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 64 (1997) – and thus, no Court of Appeals precedent at war with this Court's precedents has been created. Stated differently, Plaintiff encourages this Court to think of this case as rendering a sort of *ad hoc* justice, off the books into the bargain, on which it should deny leave and just move on to the next file. The mere making of this argument, however, implicitly acknowledges that this is the antithesis of equal justice under law. This is not how Michigan courts having knowingly operated in the past and it is not how this Court should operate now. Healthsource respectfully requests that this Honorable Court take up this matter now that it is aware of its profound unfairness and impropriety.

B. Plaintiff Misinterprets This Court's Decision In *Dudewicz*

In response to Healthsource's argument that the first prong of *Suchodolski* was effectively eliminated by the Michigan Supreme Court in *Dudewicz*,¹ Plaintiff claims that Healthsource is "incorrect as to the facts of this case" because in that case, the plaintiff had a viable claim under the WPA, whereas in the instant matter, Plaintiff did not have a viable WPA claim because he did not engage in conduct protected by that statute. (Pl's Resp at 31-32). Plaintiff, like the Court of Appeals, misinterprets *Dudewicz*'s holding.

In *Dudewicz*, the court explained that in determining the availability of a public policy claim, the key factor is not whether the plaintiff can make out a *viable* case under a given statute; but rather, whether the given statute provides an *available remedy* for the statutorily prohibited conduct. *See Dudewicz*, 443 Mich at 79 (holding that the central issue in determining whether a public policy claim is available is the "existence of the specific prohibition against retaliatory discharge" in the statute). As *Dudewicz* noted, cases in which Michigan courts have sustained a public policy claim do not involve statutes that specifically proscribe retaliatory discharge. *Id.* at 79-80. Where, however, the statutes involved prohibited such discharges, Michigan courts have consistently denied a public policy claim. *Id.*

Based on this reasoning, this Court in *Dudewicz* held that:

¹ Plaintiff incorrectly states that *Dudewicz* has been overruled by *Brown v Mayor of Detroit*, 487 Mich 589; 734 NW2d 514 (2007). (Pl's Resp at 3). Although it is true that this Court in *Brown* disapproved of certain dicta in *Dudewicz* and overruled other cases relying on that dicta, the Court did not overrule the holding of *Dudewicz* which is at issue in this case. *See, e.g., Segue v Wayne County*, 2014 WL 2154976 (Mich App, May 22, 2014) (unpublished).

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

Id. at 80. Said more simply, the presence of *available* relief in a statute precludes relying on that statute for a public policy wrongful discharge claim.

Here, getting it absolutely backwards, Plaintiff claims that the rule in *Dudewicz* does not preclude his public policy claim because he was “not protected under the WPA because he did not made [*sic*] a report, or threatened [*sic*] to make a report that would trigger the provisions of the WPA.” (Pl’s Resp at 32). He also argues that if he had filed his claim pursuant to the WPA, it would have been “immediately dismissed,” because he made an internal report, not a report (or threatened report) to a “public body.” (Pl’s Resp at 35). Plaintiff’s arguments miss the mark. Again, the issue under *Dudewicz* is not whether Plaintiff had a *viable* WPA claim, but rather, whether he had an *available* statutory remedy for his alleged retaliatory discharge for reporting the alleged malpractice (a violation of the PHC) to Healthsource, his employer.²

Both the Trial Court and Court of Appeals concluded that Plaintiff’s public policy claim was sustainable in light of MCL 333.20176a of the PHC, MCL 333.1101 *et seq.* (Appx 3; Appx 1, p. 5a). Section 333.20176a expressly prohibits an employer from

² Plaintiff even tries to leverage a public policy claim based on the “Code of Ethics for Nurses with Interpretive Statements.” (Pl’s Resp at 33-34). This is exactly what *Terrian* outlawed as these are privately created standards and cannot, because of that, be the basis for a public policy claim. Indeed, even before *Terrian*’s bright line rule, the *Suchodolski* court concluded that a private association code of ethics cannot establish the public policy for a public policy wrongful discharge claim. *Suchodolski*, 412 Mich at 696-97.

discharging an employee in retaliation for the employee reporting malpractice of a health professional. Pursuant to MCL 333.20180(1) of the PHC, the Legislature has granted employees protection from retaliatory discharge by incorporating the WPA as a remedy when they make a “report or complaint including . . . a violation of this article.” Contrary to the Court of Appeals’ decision, that is precisely what Plaintiff did when he reported the alleged malpractice of his coworker. Therefore, the rule from *Dudewicz, supra*, applies to this case. Because the Legislature has adopted an exclusive remedy for a retaliatory discharge grounded on policy based on the PHC, the Court of Appeals committed reversible error in imposing cumulative remedies in this situation. *See Parent v Mount Clemens General Hosp, Inc*, 2003 WL 21871745, *3 (Mich App, Aug 7, 2003) (unpublished) (Def’s Initial Brief Ex. A).³

C. Healthsource Did Not “Waive” Its Argument Regarding *Toussaint* Because The Issue Was Precipitated By The Court of Appeals’ Decision

Citing the decision in *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008), Plaintiff also contends that Healthsource somehow “waived” its arguments regarding *Toussaint*, because it never raised them below in the Court of Appeals. (Pl’s Resp at 37-38). Plaintiff’s argument is not supported by *Walters* and is otherwise illogical.

In *Walters*, the trial court granted the defendant’s motion to dismiss the plaintiff’s complaint based on the statute of limitations. On appeal, the plaintiff argued for the first

³ Indeed, as the court in *Parent* noted, the Legislature incorporated the WPA as a remedy for a retaliatory discharge under the PHC so that health care workers will report suspected abuses to the proper authorities to protect the general public. *Parent*, 2003 WL 21871745 at *3, n1.

time that the tolling provisions of the relevant statute required reversal. *Walters*, 481 Mich at 381. The Court of Appeals affirmed the trial court, albeit on different grounds and declined to address plaintiff's tolling argument holding that it was unpreserved for appellate review. *Id.* Affirming the Court of Appeals, this Court similarly held that plaintiff waived the tolling provision argument by failing to raise it in the trial court. *Id.* at 390-91.

Supporting its decision, this Court noted that the "principal rationale" for the waiver rule is "based in the nature of the adversarial process and judicial efficiency." *Walters*, 481 Mich at 388. Requiring litigants to raise and frame their argument in the trial allows their opponents to "respond to them factually" and "avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful." *Id.*

No such facts are present here. Healthsource did not raise its argument regarding *Toussaint* in the Trial Court (or Court of Appeals) because it did not have any reason to do so prior to the Court of Appeals' June 3, 2014 decision. It was that decision that precipitated this argument.

Plaintiff's failure to respond to the merits of Healthsource's *Toussaint* argument, on the other hand, is telling. As Healthsource argued in its Application for Leave, allowing the Court of Appeals' decision to stand in this case will, like *Toussaint*, erode the "at-will" employment doctrine in Michigan, which the Michigan Supreme Court spent the better part of twenty-five years repairing. This is so because every at-will employee who does not have a *viable* statutory wrongful discharge claim – as opposed to

an *available* statutory remedy – will claim that the statute provides him/her with a public policy wrongful discharge case. In other words, if a whistleblower lacks a viable WPA claim because he filed it untimely, he will be able to rely on the WPA as the public policy supporting his wrongful discharge tort cause of action. Such an outcome would subject virtually every at-will termination to judicial scrutiny.

D. Plaintiff's Contention That Plaintiff And His Coworker Were "Similarly Situated" Is Not Supported By Apposite Law

According to Plaintiff, to demonstrate that he and his coworker were "similarly situated," all he needed to show was that "the comparable must have the same supervisor, must have been subject to the same standards, and have engaged in acts of comparable seriousness." (Pl's Resp at 40) (citing *Wright v Murray Guard, Inc*, 455 F3d 702 (CA 6, 2006)). Not only is this an incomplete statement of the law, but it is not the standard applied by Michigan Courts in determining whether an alleged comparator is "similarly situated."

With respect to the latter, in *Town v Michigan Bell Telephone Co*, 455 Mich 688, 700 n 23; 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. *See also MDCR ex rel Burnside v Fashion Bug*, 473 Mich 863; 702 NW2d 154 (2005). Evidence regarding the discipline given to other employees is irrelevant unless the 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).

As for the former, in *Wright*, the Sixth Circuit explained that to make the “similarly situated” determination, a court may look to certain factors such as whether the alleged comparator “engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct of the employer’s treatment of them for it.” *Wright*, 455 F3d at 710 (quoting *Mitchell v Toledo Hosp*, 964 F2d 577, 583 (CA 6, 1992)). Applying that standard, the *Wright* court concluded that the alleged comparator was not “similarly situated” to the plaintiff for the purposes of discipline because they engaged in different conduct, and the differences in their conduct was relevant. *Id.* Whereas the comparator allegedly failed to follow a procedure by allowing an unauthorized person into the facility and allegedly spreading a rumor about the plaintiff, the plaintiff allegedly sexually harassed at least one of his subordinates. *Id.*

Just as in *Wright*, Plaintiff’s alleged comparator, his coworker, was not “similarly situated” to Plaintiff for the purpose of Plaintiff’s challenged discharge because they engaged in vastly different conduct and the differences in the conduct was materially relevant. As set forth in its Application for Leave, Plaintiff engaged in falsification of medical records on multiple occasions and it is undisputed that his coworker never engaged in such serious misconduct. (Def’s Initial Brief, 46-47).

E. CONCLUSION

For the reasons set forth above and in Healthsource's Application for Leave, Healthsource respectfully requests that this Honorable Court 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* and *Suchodolski*, Plaintiff has no valid public policy wrongful discharge claim.

Alternatively, Healthsource requests the reversal of evidentiary rulings made by the by the Trial Court, as detailed in its Application for Leave, 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.

Respectfully submitted,
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