IN THE SUPREME COURT OF MISSOURI

No. SC90249

DANIEL J. MARGIOTTA,
Plaintiff/Appellant,

vs.

CHRISTIAN HOSPITAL NORTHEAST NORTHWEST D/B/A
CHRISTIAN HOSPITAL AND BJC HEALTH SYSTEM,
Defendants/Respondents

SUBSTITUTE REPLY BRIEF OF PLAINTIFF/APPELLANT DANIEL J. MARGIOTTA

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I. Respondents changed the factual basis of their motion, adding assertions not included in their Statement of Uncontroverted Material Facts

Respondents, in their Statement of Facts as well as their Argument, include factual assertions they did not make in the numbered paragraphs of their Statement of Uncontroverted Material Facts ("SUMF"), thereby changing the factual basis for their motion. Because Margiotta's only opportunity to controvert Respondents' assertions was at the circuit court under Rule 74.04, Margiotta had no need or procedural opportunity to controvert these new assertions. Therefore, the Court should not consider Respondents' new factual basis for its motion in its review.

Examples of Respondents' new assertions follow.

A. Respondents now state: "While Margiotta testified at his deposition that he did not yell at Dr. Joyce, he did not present any evidence to refute Lundak's testimony that Dr. Joyce had so reported to Lundak" and "Lundak put a note documenting [Dr. Joyce's July 2005] report into Margiotta's file." RSB,[1] 2. Respondents' description of the July 2005 incident in their SUMF did not include either assertion. LF, 67; SUMF, ¶4.

B. Respondents now provide a detailed scenario describing their decision to discharge Margiotta, none of which was part of Respondents' SUMF. RSB, 4 (first full

[1] "RSB" refers to Respondents' Substitute Brief, followed by the page number; "Brief," as the term is used *infra* refers to Margiotta's opening brief.

paragraph). For example, Respondents now describe a "second altercation involving Margiotta," citing LF, 230, p. 88. Respondents neither referred to a second altercation nor cited to page 230 of the Legal File in their SUMF. Page 230 is part of the Legal File only because Margiotta cited to the contents in his Statement of Additional Material Facts, in reference to a different topic. LF, 202, ¶80.

C. Respondents now make assertions about a number of witnesses' observations which they did not make in their SUMF. *Compare,* LF, 68 (SUMF, ¶ 11) *with* RSB, 6 (Rigsby); LF, 69 (SUMF, ¶ 12) *with* RSB, 7 (Sorden); LF, 69 (SUMF ¶ 14) *with* RSB, 7 (Harper). Since Respondents did not cite to these portions of the witnesses' statements in their SUMF, Margiotta had no notice of need nor opportunity to controvert the assertions.

D. Respondents state, "c. Margiotta is Reprimanded for Rudeness to a Patient (RSB, 3)," but made no such assertion in their SUMF.

II. Respondents rely on inadmissible or immaterial evidence

Respondents cite to assertions which, while part of their SUMF, were based on inadmissible evidence or evidence which was inadmissible for the purposes Respondents now claim. Such evidence should be disregarded. *Scott v. Ranch Roy-L, Inc.*, 182 S.W.3d 627, 634-35 (Mo. App. 2005).

Under the heading "c. Margiotta is Reprimanded for Rudeness to a Patient," Respondents claim that on December 7, 2005, a nurse documented a patient complaint against Margiotta. RSB, 3. Respondents described the December 7 incident in SUMF, ¶8, citing

William Lundak's Affidavit (LF, 77, ¶10), in which Lundak referred to Exhibit G (LF, 92). Exhibit G is a redacted document which appears to be a report that a patient complained about the conduct of an unnamed CT scan tech. While Exhibit G indicates Chris Mahurin entered the complaint, there is no evidence the patient complained to Mahurin, as Respondents stated in ¶8. Additionally, Margiotta's name does not appear on the typewritten portion of Exhibit G; the only other person named is "Jodi Lundak," whose name appears as follows:

Complaint About:

- Christian Hospital Northeast|Lundak, Jodi:

Respondents cite no evidence establishing how and when William Lundak obtained Exhibit G or why William Lundak might have believed Exhibit G related to Margiotta, as Respondents claim. Since Respondents claim the decision-makers' beliefs about Margiotta's conduct is material to the case (RSB, 30-31), as opposed to controverted assertions about what actually happened, the absence of evidence showing Lundak obtained Exhibit G before deciding to fire Margiotta makes Exhibit G and the matters asserted therein immaterial.[2] Indeed, Respondents' failure to assert the decision-

[2]Respondents repeatedly shift their explanation for firing Margiotta and the basis for their motion from claims about what Margiotta did to claims about the decision-makers' *belief*. When Respondents claimed in their SUMF that Margiotta engaged in a bad act (*e.g.*, the July 2005 incident; LF, 67, ¶ 4), Margiotta controverted that claim (LF,

makers knew about Exhibit G before discharging Margiotta allows a jury to infer the decision-makers were unaware of that alleged incident until, if ever, after the termination. A jury could therefore infer Respondents' inclusion of Exhibit G is a *post hoc* padding of the record to conceal their true, improper motive for discharging Margiotta. *See, Kim v. Nash Finch Co.*, 123 F.3d 1046, 1061-62 (8th Cir. 1997)(Title VII case).

Reply to Response to Margiotta's Point 1

I. Respondents do not identify in headings which of their points respond to the points Margiotta raised in his brief

Respondents' Brief headings fail to identify the points relied on from Margiotta's brief

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192, ¶4), so Respondents now claim only their belief about Margiotta's conduct matters. RSB, 22. Later, without citing to the record, Respondents assert Margiotta actually yelled at the doctor. RSB, 34. With regard to the alleged December 7 report of a patient being left on a CT scan table, Respondents claimed in their SUMF only that they had a report, not that Margiotta actually left the patient on the table. LF, 68, ¶8. In their Brief, however, Respondents claim Margiotta left the patient on the table, then argue Margiotta failed to dispute he engaged in such conduct. RSB, 22. This shift continues throughout the Brief, including at page 21, where Respondents claim it is undisputed that the people who decided to terminate Margiotta believed he engaged in misconduct on December 8, 2005 even though Respondents did not assert in their SUMF that the decision-makers believed Margiotta engaged in such misconduct.

to which each of their arguments responds, as required by Rule 84.04(f). While Respondents state in an introduction that their Points I and II respond to Margiotta's Points 1, 3, and 5, Respondents do not specify which part(s) of Points I and II respond to Margiotta's Point 1, 3, or 5. RSB, 20. At another part of their Brief, Respondents state their Point I-C is their response to Margiotta's Point 1 (RSB, 33 n. 4), but there is no Point I-C. By disregarding Rule 84.04(f), Respondents leave themselves room to argue Margiotta failed to reply to some argument they claim to have made. Margiotta will nonetheless attempt to reply to what appear to be Respondents' responses to his points.

II. Respondents do not respond to the argument they failed to establish their *prima facie* right to judgment if their motion was based on an element which is not part of Margiotta's claim

Respondents moved for summary judgment arguing Margiotta was required to, but could not, prove his protests were the exclusive cause of his discharge. LF, 63. In Point 1, Margiotta asserted Respondents did not establish their *prima facie* entitlement to summary judgment because Respondents did not seek summary judgment on the motive element applicable to the public policy discharge tort (as Margiotta urges the Court to adopt), *i.e.*, that Margiotta's protests were a contributing factor in Respondents' decision to discharge him. Respondents do not appear to address this argument; instead, they attempt to change the legal basis for their motion, arguing they are entitled to summary judgment under the "any causal role" standard. RSB, 21, Point 1 heading.

III. "Exclusive causation" should not be the motive element of the public policy discharge tort

In Point 1, Margiotta urged the Court to reject "exclusive causation" as the motive element of the public policy tort and adopt, instead, the "contributing factor" element used in retaliation cases under the Missouri Human Rights Act ("MHRA"). Respondents argue Margiotta waived this argument because Margiotta did not file a legal memorandum at the circuit court. Since Rule 74.04 places the burden of establishing the uncontested right to on the moving party, *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. banc 1993), and does not require the non-moving party to file a legal memorandum in the circuit court, lack of a legal memorandum by the non-moving party should not be considered a waiver, on appeal, of the argument that the moving party failed to establish its *prima facie* right to judgment as a matter of law. Nonetheless, Respondents brief the issue, so Margiotta will respond.

A. Respondents do not address the argument that, given a choice, a public policy claim is more like an MHRA retaliation case than a Workers Compensation retaliation case

When Margiotta wrote his opening brief, though this Court had not yet held "contributing factor" was the motive element for MHRA retaliation cases, but the Court of Appeals had, in *Korando v. Mallinckrodt, Inc.*, 239 S.W.3d 647, 650-51 (Mo. App. 2007). Since Margiotta made his original argument, this Court held "contributing factor" is the

motive element for MHRA retaliation cases. *Hill v. Ford Motor Co.*, 227 S.W.3d 659, 665 (Mo. banc 2009). In Point 1, Margiotta argued if the motive element of a public policy claim is to be based on an analogy to a retaliation statute and there are different motive elements in caselaw interpreting two retaliation statutes, the better analogy is to the MHRA because the employee's conduct in a public policy claim is more like the type of conduct protected by the MHRA's retaliation section.[3] Brief, pp. 18-22. Respondents neither address nor dispute that a public policy claim is more like MHRA retaliation than Workers Compensation retaliation.

B. Ignoring *Hill* , Respondents argue "contributing factor" works as the motive element only in discrimination cases

Respondents argue that while "contributing factor" is acceptable for measuring unlawful motive in discrimination cases, it is inappropriate for public policy claims because public policy claims are fundamentally different from MHRA *discrimination* claims. Ignoring *Korando* and *Hill*, Respondents claim retaliation plaintiffs, unlike discrimination plaintiffs, are able to "set up" their employers for a claim and so the more onerous motive element is necessary. Respondents cite no evidence from the record or

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[3]The motive element of this intentional tort, of course, does not have to be based on analogy to retaliation statutes. Instead, as suggested in *Brenneke v. Department of Missouri, Veterans of Foreign Wars of United States of America*, 984 S.W.2d 134, 139-40 (Mo. App. 1998), the common law "because of" element could be applied.

any other source supporting their assertion that employees are more or less likely to "set up" their employers if exclusive causation is the motive element in a public policy claim or how the more onerous burden would weed out only the claims where employees "set up" their employers. The only evidence before the Court is in this case, in which Respondents repeatedly claim Margiotta made his complaints *before* he was disciplined. RSB, 26-28.

In his Brief, Margiotta cited to common law and statutory interpretations from other jurisdictions where there is no "exclusive causation" requirement. Respondents argue none of those cases considers the "special nature of whistle-blower retaliatory discharge cases or their ready susceptibility to abuse." RSB, 43. The absence of such analysis by so many courts strongly suggests the absence of a need for such analysis, *i.e.*, the courts in the other jurisdictions had no evidence and saw no reason to believe public policy cases are so susceptible to abuse that employers must enjoy special protection from liability with the exclusive causation requirement. *See e.g., Shaw v. Titan Corp.*, 498 S.E.2d 696 (Va. 1998)(distinguishing common law cause of action from statute).

Respondents express a concern that even if unlawful motive accounted for only 1% of the reason they fired Margiotta, Margiotta could still collect 100% of his damages. It is doubtful jurors would so precisely quantify Respondents' motive for discharging Margiotta absent an instruction to do so. Jurors would consider whether it was more likely true than not true that Margiotta's protests contributed to Respondents' decision to fire him. MAI 3.01. If, under the instructions, the jury finds Respondents discharged

Margiotta because of his protected conduct, Respondents would be in no position to complain about the damages the jury awards based on that finding.

Respondents' argument about percentages of unlawful motive highlights the extraordinary burden on the plaintiff in an "exclusive causation" case where the plaintiff must prove no other factor, even an unlawful one which might not be actionable for some other reason (*e.g.,* a time-barred race discrimination claim), entered the employer's mind. *See*, Respondents' Summary Judgment Brief (LF, 145)("If the termination was caused, even in small part, by something other than the alleged reporting, Plaintiff's claim fails as a matter of law."). In reality, it is probably rare that such important decisions are made for one reason alone. Here, for example, Respondents claim multiple reasons led them to discharge Margiotta. RSB, 22. Exonerating an employer from liability for discharging an employee because he protested concerns about patient safety, as long as the employer considered some other factor as well (*e.g.*, tardiness seven months earlier), gives the employer's decision an undeserved and unnecessary amount of deference.

Reply to Response to Margiotta's Point 2

In Point 2, Margiotta asserted Respondents' motion should have been denied because Respondents did not follow Rule 74.04(c)(1) in their Statement of Uncontroverted Material Facts. Respondents argue the standard of review is abuse of discretion but recognize "the purpose of Rule 74.04(c)(1) is 'to apprise the opposing party, the trial court, and the appellate court of the specific basis upon which the movant claims it is

entitled to summary judgment,'" quoting *Mathes v. Nolan*, 904 S.W.2d 353, 355 (Mo. App. 1995). RSB, 47. *See also*, *McAnich v.Robinson*, 942 S.W.2d 452, 455 (Mo. App. 1997). If an appellate court must decide for itself whether the SUMF is clear, the appellate court must be engaging in its own review of compliance.

Respondents argue Rule 74.04 does not require each sentence to be in a different paragraph. Margiotta agrees there might be instances, in which a drafter uses a couple of sentences to convey one fact. Here, however, Respondents spilled out entire stories in single paragraphs. *E.g.*, SUMF, ¶1 (LF, 66); SUMF, ¶2 (LF, 66) and response (LF, 190-92); SUMF, ¶4 (LF, 67); SUMF, ¶5 (LF, 67); SUMF, ¶11 (LF, 68); SUMF, ¶18 (LF, 70); and, LF, 251 (Motion to Strike).

Respondents argue Point 2 is frivolous because Margiotta responded to their motion. Margiotta had to respond - whether the circuit court thought Margiotta responded successfully is another matter. Because the circuit court did not specify which facts it found to be controverted, the extent to which Respondents' violation impacted the summary judgment ruling cannot be determined. LF, 311. A good indicator that Respondents' SUMF was not sufficient to state the factual basis of their motion is a comparison between the SUMF and the factual assertions Respondents make in their Brief. As described above, in the Reply to Respondents' Statement of Facts and, *infra*, in the Reply to Response to Margiotta's Points 3 and 5, even Respondents would not ask this Court to rely only on the assertions they made in the numbered paragraphs of their SUMF to sustain their motion. If the facts contained in the SUMF were not sufficiently clear for

this Court, they were not clear enough for any court.

Reply to Response to Margiotta's Point 3

I. Since Margiotta controverted assertions Respondents claimed were "material," summary judgment should have been denied

In Point 3, Margiotta argued since he controverted facts Respondents asserted were material to their motion, summary judgment should have been denied. Margiotta could not find a topic heading which appeared to be responsive to this fundamental summary judgment issue.

II. A jury could reasonably conclude Respondents' motive was unlawful

A. Respondents misstate the holding in *Lomax*

Margiotta asserted even if exclusive causation is an element of Margiotta's claim, there are contested issues of fact material to Respondents' motive. In response, Respondents provide their view of the facts which, unsurprisingly, points to a conclusion in Respondents' favor. Summary judgment, however, should be denied where there is conflicting evidence as to the real reason for an employee's discharge. *Kummer v. Royal Gate Dodge, Inc.*, 983 S.W.2d 568, 572 (Mo. App.1998); *Olinger v. General Heating & Cooling Co.*, 896 S.W.2d 43, 47 (Mo. App. 1994).

As support for his argument regarding inferences the jury could draw from credibility issues, Margiotta cited *Lomax v. DaimlerChrysler Corp.*, 243 S.W.3d 474, 483 (Mo. App. 2007), an MHRA case in which the Court of Appeals held where there are credibility

issues relating to the employer's proffered reason for discharging the plaintiff, summary judgment should be denied. Respondents claim the inference described in *Lomax* applies only where there are "significant discrepancies in the testimony of the decision-maker about the reasons for an adverse employment action . . ." RSB, 30.

In *Lomax*, there were no inconsistencies in the decision-maker's testimony about his reasons for firing the plaintiff. *See e.g.*, *Lomax*, 482-83. The Court of Appeals held that proof the explanation is unworthy of credence is a form of circumstantial evidence which is probative of intentional discrimination. *Id.*, quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S.133, 147 (2000). The Court of Appeals also stated, "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination." *Id.*, quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993)(emphasis in original). Thus, the holding in *Lomax* is not, as Respondents assert, confined to instances in which the plaintiff can point to differences in the decision-maker's testimony.

B. Respondents' interpretation of the evidence is based on inferences drawn in their favor from assertions they did not make in their SUMF along with inadmissible or immaterial evidence

1. Respondents' assertions about the decision-makers' beliefs were not part of their SUMF

In arguing Margiotta did not produce evidence he was fired because of his protests,

Respondents refer to factual assertions they did not include in their SUMF and, therefore, which Margiotta had no opportunity to controvert.

Respondents now argue, "It is undisputed that the people who decided to terminate Margiotta's employment believed that, on December 8, 2005, he lost his temper and started yelling at a patient (RSB, 21)," when they included no such assertion in their SUMF. While Respondents asserted the decision-makers based their decision to discharge Margiotta on information available to them at the time (LF, 70; SUMF, ¶16), the information available to the decision-makers included what Margiotta told them (LF, 202-3, ¶¶84-86, citing LF, 211-12 and 303) and, with regard to Lundak, Margiotta's protests over patient safety issues. LF, 197, ¶28, citing LF 223, 225; LF 197, ¶31, citing LF, 225; LF, 197, ¶¶33, 34 citing LF, 227. The Court would have to draw impermissible inferences in Respondents' favor to conclude from the SUMF that the decision-makers believed Margiotta lost his temper on December 8 and started yelling at a patient, and that the decision-makers considered neither Margiotta's statements about the incident (LF, 202, ¶¶84-86) nor Margiotta's protests about unsafe practices in reaching their decision. *United Missouri Bank, N.A. v. City of Grandview*, 105 S.W.3d 890, 898 (Mo. App. 2003).

2. Respondents' reference to other alleged misconduct is based on new factual assertions or controverted or inadmissible evidence

Respondents describe the December 8 incident as the culmination of "numerous other incidents" they list in three bullet-points. RSB, 22.

In the first bullet point, Respondents claim in July 2005, Margiotta yelled at a doctor (identified in SUMF, ¶4 as Dr. Joyce), who refused to work with Margiotta again. RSB, 22. Respondents admit the incident is controverted, but argue they were entitled to take the physician's word about the incident at face value. Respondents, however, did not state in their SUMF what any individual believed about the physician's complaint. Considering Margiotta repeatedly worked with Dr. Joyce after July 2005 (LF, 199, ¶49, citing LF, 208), a jury could reasonably infer Respondents did not get such word from the physician, particularly where Respondents offer conflicting information about which physician was involved in the alleged incident. Respondents state Dr. Joyce was a woman (RSB, 2, 32); Lundak identified Dr. Joyce as a man (LF, 76, ¶6); and, Respondents claim in a different part of their Brief that a doctor with a different name, Dr. Floyd, was involved in the July 2005 incident. RSB, 28.

In the third bullet-point, Respondents claim that on December 7, 2005, Margiotta refused to help a patient off the CT scan table and yelled at the patient. RSB, 22. Respondents did not include in their SUMF an assertion that Margiotta refused to help a patient or yelled at a patient. The only assertion describing anything related to a December 7 incident was SUMF, ¶8, where Respondents stated a nurse, Chris Mahurin, received a patient complaint about Margiotta. LF, 68. This particular paragraph is discussed at length at pp. 2-3, *supra*, and is inadmissible and immaterial for the purposes Respondents now assert.

C. Respondents' motive is for the jury to decide

1. Timing and causation

Respondents argue the lapse of time between Margiotta's complaints and his discharge is too long to infer causation. Margiotta made reports through late November 2005. LF, 195 (response to SUMF, ¶ 16), citing LF, 126 (report that patient had been dropped).[4] *See also*, LF 70, ¶ 20 (report about pregnant woman being x-rayed, made between July and September 2005). Whether a jury could infer causation based on this lapse of time, or even a larger lapse of time, "is a matter of evidence" *Petersimes v. Crane Co.*, 835 S.W.2d 514, 517 (Mo. App. 1992)(seven month lapse).

In his Brief, Margiotta noted that because Respondents claim a May 2005 incident

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[4]Respondents claim Margiotta's complaint about a coworker dropping a patient "does not count" because Margiotta was not the whistle-blower, ignoring evidence that Margiotta discussed the dropped patient with Tim Cuff, who was Margiotta's supervisor. LF, 71, SUMF, ¶ 20(5); LF, 66, SUMF, ¶1. A jury could reasonably infer from the content and tone of Margiotta's statement, just after Margiotta and Cuff heard another employee dropped a patient, that Cuff understood Margiotta was pointing out yet another example of the unsafe practice of using only one employee to move patients from stretcher to table.

caused them to discharge Margiotta, Respondents must concede an event which does not immediately precede an act can be causally related to the act. Brief, pp. 29-30; LF, 67, ¶ 3. In response, Respondents shorten the time lapse between the antecedent event to which Margiotta referred in his Brief and their conduct, and then refer to an incident which is not part of the record, *i.e.*, that in July 2005, Margiotta yelled at "Dr. Floyd." RSB, 28. Respondents, in any event, argue there is a difference between a positive averment of fact, like Lundak's testimony (presumably some uncited testimony from Lundak about a July 2005 incident with Dr. Floyd) and an inference. Thus, Respondents claim incorrectly that in deciding summary judgment more weight is given to certain types of evidence. Summary judgment tests for "the existence, not the extent" of the disputes. *ITT*, 378. If affidavits are given more weight than reasonable inferences in deciding summary judgment, then non-moving parties are not being given the benefit of all reasonable inferences.

Respondents argue no inference of causation can be drawn between an employee's protected conduct and the employer's challenged conduct unless the two are very close in time. Margiotta never argued temporal proximity alone proves causation; Respondents make the argument and then attack it. Nonetheless, if, as Respondents argue, it is unreasonable to infer a causal link between Margiotta's complaints and his discharge because the events are too remote in time, then it is also reasonable for a jury to infer, where Respondents claim they decided to discharge Margiotta based on conduct separated from their decision by a similar amount of time, that Respondents are not credible.

Where, as here, Respondents cite Margiotta's conduct from May 2005 (LF, 67; SUMF, ¶ 3) and July 2005 (RSB, 28; SUMF, ¶4, LF, 67) as material facts, a jury can reasonably infer Respondents are not credible.

Respondents erroneously argue *everything* that led to Margiotta's discharge happened after Margiotta protested patient safety issues and therefore Margiotta's complaints could not have led to his discharge. Respondents cited as material facts incidents of misconduct which they claim occurred or were reported to them in May (LF 67, ¶3); July (LF, 67, ¶4); September (LF, 67, ¶5; LF 68, ¶7); and December (LF 67, ¶¶8, 9). Since Margiotta's complaints continued as late as November 2005 (LF, 195, response to SUMF, ¶16, citing LF 126), the factual premise for Respondents' argument is wrong.

Respondents argue the causal link between Margiotta's protests and his discharge was broken by Margiotta's intervening conduct. Whether intervening events were the cause of Margiotta's discharge is a question of fact. *Petersimes,* 517. The jury might not believe the "intervening" events occurred or that the events were the reason Respondents discharged Margiotta.

Ultimately, Respondents ask this Court to draw a dispositive inference that the managers discharged Margiotta because of what they learned in employee interviews and other events earlier in Margiotta's career. A jury, however, would not have to infer the causal connection Respondents advance based on the summary judgment record, as limited by the factual assertions Respondents made in their SUMF. Therefore, summary judgment should have been denied.

2. Margiotta had a factual basis for his claim

Respondents argue Margiotta admitted he had no basis for his conclusion he was discharged because of his protests about patient care, citing Margiotta's deposition testimony where Respondents' counsel asked Margiotta to state the basis for his belief he was discharged because of his protests about patient care. RSB, 24.[5] Respondents appear to be arguing that unless Margiotta recited at his deposition the evidence which he could use to controvert an as yet unfiled Rule 74.04 SUMF, they are entitled to summary judgment. There is no rule confining the non-moving party, in responding to summary judgment, to evidence the plaintiff is able to articulate at the time of his deposition.

In any event, Margiotta did testify to a basis for his belief which would allow him to survive summary judgment. Margiotta testified the basis for his claim that Respondents discharged him because of his protests concerning patient safety was that he protested safety issues, Respondents' stated reasons for discharging him were unfounded, and Respondents did not care about the truth. RSB, 24-25.While speaking in layman's terms, Margiotta understood and articulated the concept behind *Lomax* and the U.S. Supreme Court cases on which *Lomax* relies. When an employee knows he protested patient care issues, and his employer articulates a false reason for discharging him and is not even

[5]Respondents also mention an unsworn statement Margiotta made to a healthcare provider (RSB, 25) which is inconsistent with the deposition testimony Respondents cited. LF, 72, SUMF ¶24.

interested in the truth, an inference can be drawn in the employee's favor that the employer's motive was unlawful. *Lomax*, 482-83. It is unclear what more Respondents claim Margiotta should have said when he was asked to testify to the "the basis" for his claim he was discharged because he protested patient care issues, in a case based on circumstantial evidence.

Reply to Response to Margiotta's Point 4

In Point 4, Margiotta asserted the trial court erred in refusing to allow him sufficient time to use the transcript from the Moutria deposition as part of the summary judgment record. Respondents argue the trial court did not abuse its discretion because Margiotta's counsel's affidavit did not specify what information from the deposition would add to the record and that the affidavit should have included a summary of Moutria's testimony. Rule 74.04(f) does not require a summary. More specificity would have required the transcript, the lack of which was the reason Margiotta requested more time.

Respondents argue that since Respondents had Moutria's statement when they decided to fire Margiotta, whatever Moutria testified to in a deposition about the events of December 8, 2005 was immaterial because only the decision-makers' beliefs about December 8 are material to this case. In their SUMF, Respondents asserted the actual conduct on December 8, 2005 was material. *See*, LF 66-67, ¶2, second-sixth sentences; LF 68-69, ¶¶ 9-15. Since Respondents based their motion on what they claim actually happened on December 8, Moutria's testimony about what happened on December 8 (as

well as how he was treated after and because of the events) was material. LF, 351, pp. 139-41; LF, 357, pp. 163-64.

Respondents argue any claim they tried to hide Moutria is "ludicrous" because Margiotta did not tell Respondents he wanted depose Moutria until March 13, 2008. Respondents cite no authority that required Margiotta to seek Moutria's deposition at some unstated earlier time. To the contrary, Rule 56.01(d) allows a party to conduct discovery in any sequence. On March 13, 2008, trial was two months away, there was no dispositive motion pending, and Husch & Eppenberger was the exclusive agent Respondents designated for contact with Moutria. Respondents abandoned that role only after filing their summary judgment motion. LF, 248, ¶¶5, 6; LF, 65.

Respondents' month-long delay in renouncing their role as the exclusive contact point for Moutria, coupled with the then two-week old summary judgment motion, left Margiotta little time to get an Illinois subpoena issued and secure personal service. Since Margiotta had to allow time for service on Moutria, he set the deposition for May 7, 2008 (LF 249, ¶¶7, 8), so on May 2, 2008, Respondents countered by setting the summary judgment hearing for May 9, 2008, virtually insuring Margiotta would be unable to use whatever Moutria might say to dispute Respondents' SUMF or even file a detailed motion for continuance, including transcript excerpts. LF, 188-89. Respondents, having been Moutria's employer, of course, knew what information Moutria had while they were delaying its discovery.

Respondents' decision to control access to witnesses for most of the pretrial period and

to announce, two weeks after they filed their summary judgment motion, Margiotta had to find Moutria in Illinois, is gamesmanship the courts should strongly discourage, not reward. The circuit court could have nullified this obstruction of Margiotta's trial preparation by continuing the hearing for a day; the refusal to do so was an abuse of discretion.

Reply to Response to Margiotta's Point 5

In Point 5, Margiotta asserted it was error to grant summary judgment based on Respondents' argument that Margiotta's reports were not covered by the public policy tort. Respondents argue Margiotta's conduct falls outside the public policy tort because the tort is a narrow exception to the employer's right to discipline employees[6] and

[6]Throughout this portion of their Brief, Respondents justify narrowly defining the tort with unsupported claims about Margiotta's conduct. *E.g.*, without citing to the record, Respondents state: "It is absolutely unacceptable for such an employee to leave patients half on and half off a CT scan table." RSB, 34. Respondents did not assert Margiotta left an employee on scan table in their SUMF. In SUMF, ¶ 8 (LF, 68), based on inadmissible evidence, Respondents claimed only that someone made such a report. As discussed above at pp. 3-4, the report is hearsay, did not tie Margiotta to the hearsay complaint, and Respondents did not assert the decision-makers knew about the report when they discharged Margiotta. Other examples of such unsupported claims about Margiotta's conduct, with no record citations, appear throughout Respondents' argument for narrowly

requires proof of a clear and specific mandate of public policy.

I. Margiotta's reports of safety violations are protected under the public policy tort as developed by the Courts of Appeal

Because this Court has not expressly recognized the existence of the public policy tort, but implied the tort exists, *Gilliland v. Missouri Athletic Club,* 273 S.W.3d 516, 521 (Mo. banc 2009) citing, *Bell v. Dynamite Foods,* 969 S.W.2d 847, 853 (Mo. App. 1998), the tort's contours, even its name, have not been delineated at this level. With more cases coming before the Courts of Appeal, the scope of the "protected conduct" element has been refined. Early on, in *Luethans v. Washington University*, 894 S.W.2d 169, 171 n.2 (Mo. banc 1995), this Court described the developing tort, as set forth in *Lay v. St. Louis Helicopter Airways, Inc.*, 869 S.W.2d 173, 176 (Mo. App. 1993), as protecting employees who report violations of the law, without addressing violations of public policy. Now, the Courts of Appeal generally describe the protected conduct element as including reports of public policy violations. *Bell,* 853; *Dunn v. Enterprise Rent-a-Car Co.,* 170 S.W.3d 1, 6 (Mo. App. 2005). As to where "public policy" is to be found, the Court of Appeals recently explained:

> The source of public policy is found in the letter and purpose of a constitutional, statutory, or regulatory provision or scheme, in the judicial decisions of state and federal courts, in the constant practice of government officials,

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defining the "protected activity" element.

and, in certain instances, in professional codes of ethics. *Drury v. Missouri Youth Soccer Ass'n, Inc.*, 259 S.W.3d 558, 566 (Mo. App. 2008).

The state regulations Margiotta described in his Petition (LF, 9) and Brief were promulgated under the Hospital Licensing Law, which expressly states the purpose of the law is: "to provide for the development, establishment, and enforcement of standards for the care and treatment of individuals in hospitals . . . which . . .will promote *safe and adequate treatment of such individuals in hospitals*." RSMo 197.030 (emphasis supplied). The Missouri Department of Health and Senior Services promulgated the regulation pursuant to its authority "to further the accomplishment of the purposes of this law in promoting safe and adequate treatment of individuals in hospitals in the interest of public health, safety and welfare. RSMo 197.080. Hospitals are required to follow such safety regulations in order to operate. RSMo 197.070.

Margiotta reported improper, unsafe patient care, which violated the public policy found in the letter and purpose of the safety regulations. The Court of Appeals, in this case, summarized the public policy involved, stating the regulations, "have significant public policy implications because patients have relinquished control over their safety and care to the hospital and its employees. Patients are at a heightened level of vulnerability." *Margiotta v. Christian Hospital Northeast Northwest*, No. ED91466, slip op. at 7 (Mo. App. 6/30/09)(transfer granted).

II. Public policy can be found in the purpose of statutory and regulatory schemes, not just highly specific regulations

Respondents argue against a "protected conduct" element in which the public policy is found in the purpose of statutes and regulations, claiming public policy is found only in regulations proscribing the specific acts about which the plaintiff complained. For Margiotta's conduct to be protected, for example, there would have to be a regulation prohibiting CT scan techs from x-raying pregnant women or mandating specific methods for transferring patients from stretcher to CT scan table.

A similar argument was made by the defendant in *Kirk v. Mercy Hosp. Tri-County*, 851 S.W.2d 617 (Mo. App. 1993), where the Court of Appeals held the nurse engaged in protected activity when she tried to get a doctor to give a patient antibiotics. Kirk was entitled to pursue her claim "without reliance on any direct violation of 'law or regulation' by the Hospital." *Id.*, 621. The Court of Appeals disagreed with the hospital's claim the source of the public policy was too vague, holding the definition of "public policy" as it then existed under *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. App. 1985) was "in itself vague until applied to the facts of each case."

Respondents argue *Kirk* is inapposite because the plaintiff risked losing her license if she did not protest, suggesting public policy is violated only when an employer fires an employee protesting pursuant to a legal obligation. The key in *Kirk* was not the existence of a regulation requiring the nurse to protest, but rather that the public policy behind the regulation, which was "for the benefit of the public who might suffer from the conse-

quences of unsafe or incompetent nursing care." Similarly, here, the hospital regulations requiring safe practices exist for the benefit of the public who might suffer the consequences of unsafe patient handling practices.

Under an analogous common law protection, the Supreme Court of Wisconsin held a nurse who protested floating to different departments of a hospital was protected by public policy gleaned from a statute defining "negligence" and a regulation giving the Board of Nursing the power to revoke a license based on nurses' negligence. To have a claim, the nurse did not have to identify a statute prohibiting the hospital from floating the nurse to different departments; examining the public policy behind the statute, the court found the public policy was, "patients should be protected from negligent nurses." *Winkelman v. Beloit Memorial Hospital*, 483 N.W.2d 211, 216 (Wisc. 1992).

Respondents argue the plaintiff must protest violation of a highly-specific regulation because "safety" is an inherently subjective concept which would lead to cases in which the terminated employee claims his method is the only "safe" way and "the employer retorts that its method is just fine." RSB, 39. In this case, Respondents did not assert their method of doing things was "just fine;" they did not claim the regulations were so vague that they did not understand their legal obligation to provide medical treatment in a safe manner; and, they did not claim not to have realized the conduct about which Margiotta complained fell short of meeting their obligation. Instead, Respondents argue in general that unless public policy is narrowly defined to include only violations of highly specific laws and regulations, lawyers will be able to pursue claims under regulations, which

Respondents do not cite, enjoining employers to "be safe" or "do good." Such hypothetical regulations enjoining any employer to "be safe" or "do good" are not before this Court. What is before this Court is a statutory and regulatory scheme mandating those who assume the responsibility for "patients who have relinquished control over their safety and care to the hospital and employees," to care for those patients in a safe manner. Margiotta reported conduct which violated that public policy.

In support of their argument, Respondents cite several cases, all of which are inapposite.

One of the cases, *Lay v. St. Louis Helicopter Airways, Inc.*, *supra*, involves an employee who claimed he was fired for refusing to perform unlawful acts, whereas Margiotta has a whistle-blower type of claim. The Court of Appeals held discharging a pilot because he refused to take what he believed to be dangerous flights did not violate public policy, noting the FAA regulation the plaintiff cited said nothing about pilots' safety obligations. Although the helicopter pilot Code of Ethics provided pilots were to exercise their best judgment to insure maximum safety, neither the regulation nor the Code prohibited firing an employee whose judgment calls were contrary to the employer's. *Id.*, 177. Since *Lay*, the Courts of Appeal have held that the law the plaintiff cites as the source of public policy does not have to prohibit discharge. *See e.g.*, *Adolphsen v. Hallmark Cards, Inc.*, 907 S.W.2d 333, 336 (Mo. App. 1995); *Kirk*, 851 S.W.2d at 620. The *Lay* court also held the plaintiff had no claim since he was not directed to commit a crime. *Lay*, 177. Again, since *Lay*, the courts have not required the

plaintiff to prove that he was directed to and refused to commit a crime - only that he reasonably believed he was being directed to do something unlawful. *Dunn*, 6.

In both of the cases Respondents cite involving whistleblower claims, *Adolphsen*, *supra*, and *Porter v. Reardon Machine Co.*, 962 S.W.2d 932 (Mo. App. 1998), the plaintiffs failed to specify either the source of the public policy (*Adolphsen*) or the conduct in which he engaged (*Porter*) which entitled him to protection. In contrast, Margiotta alleged he repeatedly reported unsafe practices for handling and monitoring patients in violation of public policy and Respondents discharged him for making those reports. LF 8-9, ¶¶4, 5; *see also*, LF 197-99, 203, ¶¶28-34, 37-45, 90.

IV. The crossroads between the public and the employer's interests

Respondents argue the public policy tort lies at the crossroads of the interest (the public's interest, presumably) in having employees refuse to commit crimes or to inform on those who do versus the employer's ability to discipline employees. RSB, 34. If that is truly the crossroads, one would assume even Respondents would not quarrel that the public's interest in protecting employees who refuse to commit or report crimes out-weighs the employer's interest in disciplining those employees for such conduct.

The true "crossroads" is the public's interest in stopping violations of the law and public policy as expressed in the sources described in *Drury*, 566, versus the hospital's desire, as here, to bury its head in the sand and ignore such violations. If the public policy is important enough, as patient safety is, then the public's interest should outweigh the

employer's freedom to fire the employee because of his protests.

Respondents incorrectly argue inroads on their freedom to fire employees makes Missouri a less attractive place for employers to do business, which is not the public policy the state should favor in these economic times. Instead, what would make Missouri a less attractive place for employers to do business and people to live is increasing healthcare costs by allowing hospitals to feign ignorance of reports that their employees are treating patients in an unsafe manner by disposing of the messenger. The laws already exist – hospitals that want to treat patients in Missouri understand and accept the requirement to treat patients in a safe manner.

In their cost-benefit analysis, Respondents ignore the main party whom the public policy tort protects: the public. The cost to an employer who commits the tort, compensating a lone whistle-blower, pales in comparison to the public's benefit from having a judicial mechanism in place to protect the public from such things as dangerously manufactured eyeglasses, as in *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. App. 1985); substandard medical treatment, as in *Kirk*; or, as here, unsafe patient care.

Conclusion

For the reasons stated herein as well as those in his opening brief, Margiotta asks this Court to reverse the judgment of the circuit court and remand the case for trial.

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Certificates of Compliance

The undersigned certifies this brief contains the information required by Rule 55.03, the original was signed by the attorney, and it complies with the word limits of Rule 84.06(b) in that it contains 7,525 words, exclusive of portions exempted from the wordcount, as set forth in the wordcount of the Wordperfect processing system used to prepare this brief. The undersigned certifies the accompanying CD has been scanned for viruses and is virus-free.

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Certificate of Service

The undersigned certifies that one copy of the foregoing and a CD containing same were served upon the following counsel of record by U.S. Mail, postage prepaid on the 6th day of October, 2009: Mark G. Arnold, JoAnn T. Sandifer, and Michael P. Nolan, Husch Blackwell Sanders, 190 Carondelet Plaza, Suite 600, St. Louis, Missouri 63105.

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Appendix