

JOHN SLOAN, Plaintiff, v. CAPE REGIONAL MEDICAL CENTER, INC, CAPE REGIONAL HEALTH SYSTEM, INC., ED MOYLETT, JOANNE CARROCINO, MARK GILL, BYRON HUNTER, ABC CORPORATIONS 1-5 (fictitious names describing presently unidentified business entities) and JOHN DOES 1-5 (fictitious names describing presently unidentified individuals), Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003581-23T1 On Appeal From: Superior Court of New Jersey Law Division – Cape May County Docket No. CPM-L-462-20 Sat Below: Hon. James H. Pickering, J.S.C
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**BRIEF OF PLAINTIFF/APPELLANT
JOHN SLOAN**

McOMBER McOMBER & LUBER, P.C.
50 Lake Center Drive, Suite 400
Marlton, New Jersey 08053
(856) 985-9800 Phone
Attorneys for Plaintiff/Appellant John Sloan

Matthew A. Luber, Esq. – NJ ID #037892010
mal@njlegal.com
Meghan A. Pazmino, Esq. – NJ ID #306642019
map@njlegal.com
Jefferey D. Ragone, Esq. – NJ ID #276772018
jdr@njlegal.com

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I. PRELIMINARY STATEMENT

This is a narrow, but significant appeal. Plaintiff/Appellant John Sloan was previously employed by Cape Regional Medical Center, Inc. and Cape Regional Health System, Inc. as the Director of Plant Operations. Plaintiff alleges he was wrongfully terminated in violation of the New Jersey Conscientious Employee Protection Act (“CEPA”) because he repeatedly reported to the Individual Defendants, Chief Executive Officer Joanne Carrocino, Human Resources Director and Safety Officer Byron Hunter, and Vice President of Human Resources Ed Moylett, that the hospital was violating federal and state law and was not in compliance with certain safety codes and regulations.

The Trial Court correctly recognized that Plaintiff met his burden on all *prima facie* elements for his CEPA claim – including that the retaliation was so egregious as to potentially warrant punitive damages – and that numerous issues of fact existed regarding Plaintiff’s retaliatory termination. The *sole* issue on appeal is whether Plaintiff *sufficiently identified* at least one law, rule, regulation, or public policy in support of his CEPA claim. The Trial Court ruled he did not and granted summary judgment on that basis alone. This is reversible error for three reasons.

First, Plaintiff did not generally identify a source of law. Respectfully, the Trial Court disregarded record evidence, specific citations, admissions by Defendants, and various exhibits identifying the specific laws, statutes, and

regulations that Plaintiff identified throughout the litigation and which he reasonably believed Defendants violated. In fact, Plaintiff identified several regulations/codes *before this lawsuit was even filed*, he referenced and discussed them in the complaint, he identified and produced copies in discovery (*so did Defendants*), they were examined during depositions, and they were analyzed in detail in the respective summary judgment briefing. Plaintiff unequivocally met his burden.

Second, even if Plaintiff was not precise enough (though he was), CEPA does not require exacting specificity. The Court erred when it imposed a higher standard (an impossible standard) than every other CEPA case to address the issue. The Trial Court's holding, if upheld, would effectively overrule legions of cases discussing the "identification" issue, none of which stand for the proposition that a CEPA plaintiff must identify a law, rule, or regulation with exacting specificity (though Plaintiff did here). The opposite is true. Chiofalo v. State, 238 N.J. 527, 542-45 (2019) (CEPA's "salutary public policy is not furthered by any implied requirement 'to make lawyers out of conscientious employees' ... its design is 'to prevent retaliation against those employees who object to employer conduct that they reasonably believe to be unlawful.' . . . We reiterate . . . that *we do not expect whistleblower employees to be lawyers on the spot*; once engaged in the legal process, and with the assistance of counsel *or* careful examination by the court, however, the legal underpinnings for claimed behavior that is perceived as

[unlawful] should be able to be teased out sufficiently for identification purposes.”)
(citation omitted) (emphasis added).

Third, as a corollary, the Trial Court exclusively relied upon an incorrect interpretation of Hitesman v. Bridgeway, 218 N.J. 8 (2014). In Hitesman, the defendants’ summary judgment motion on the identification of “patient care” laws under CEPA subsection (c)(1) and (c)(3) (a claim not brought here) was *denied*. Further, on appeal, the “[t]he inquiry [wa]s not whether factual assertions and legal arguments could have been made by the trial court or counsel to support the plaintiff’s claim, but whether the plaintiff has presented *sufficient evidence at trial* that ‘together with the legitimate inferences therefrom, could sustain a judgment in plaintiff’s favor.’” Id. at 39–40 (citations omitted). The Trial Court here erroneously determined that Hitesman requires something more than what Plaintiff presented. It does not. Thus, this matter should be remanded for trial.

II. PROCEDURAL HISTORY (Pa1, Pa29, Pa1111, Pa1155-1306, Pa1480-81, Pa1482-99)¹

On December 21, 2020, Plaintiff filed his action. (Pa1, Pa29) After discovery, Defendants filed a Summary Judgment motion and oral argument was heard before the Honorable James H. Pickering, J.S.C. on January 19, 2024. (1T) On May 17, 2024, Judge Pickering granted Defendants’ Motion and issued a written opinion.

¹ Pa – Plaintiff’s Appendix; “1T” – January 19, 2024 Transcript of Oral Argument on Defendants’ Motion for Summary Judgment; “2T” – July 12, 2024 Transcript of Oral Argument on Plaintiff’s Motion to Reconsider.

(Pa1111) On June 6, 2024, Plaintiff filed a Motion for Reconsideration. (Pa1155-1306) On July 12, 2024, Judge Pickering conducted oral argument and denied Plaintiff's Motion. (2T) (Pa1480-81) This appeal follows. (Pa1482-99)

III. FACTUAL BACKGROUND

A. Plaintiff Commences Employment with Defendants. (Pa29, Pa30-31, Pa116, Pa119, Pa132-33, Pa136, Pa279, Pa282, Pa890-95, Pa904, Pa914-23)

Plaintiff was employed by Corporate Defendants as Director of Plant Operations. (Pa29 ¶ 1.) Corporate Defendants employed Moylett, as the Director of Human Resources and Safety Officer, Carrocino as the Chief Executive Officer (Plaintiff's *direct* supervisor), Gill as Chief Financial Officer, and Hunter as the Vice President of Human Resources. (Pa30 ¶¶ 4-7); (Pa31 ¶13)

Plaintiff commenced employment on or about February 5, 2018. (Pa31 ¶13²) Plaintiff was responsible for, among other things, ensuring Cape's maintenance, repair and safety needs were in compliance with all regulations and state codes, including, but not limited to life safety codes ("LSC"), fire codes and Joint Commission regulations. (Pa132 at 77:9-15); (Pa133 at 78:7-12); (Pa136 at 93:24-94:12). Plaintiff was a model employee, never received any oral warnings, written warnings or performance notices, and has over 30 years of experience working in

² Plaintiff left his prior employment of nine years to join Defendants. (Pa116 at 10:18-24); (Pa31 at ¶ 13). Carrocino (who interviewed Plaintiff) knew Plaintiff would be leaving another job and uprooting his family to take this position. (Pa279 at 55:2-4). She admitted Plaintiff was qualified for the role, as did Hunter. (Pa279 Id. at 54:10-13).

healthcare facilities. (Pa119 Id. at 24:4-5; 24:19-31); (Pa890-95); Ex. G at (Pa904-23³); (Pa282 at 67:7-69:4). It was only *after* Plaintiff reported safety concerns/non-compliance that Defendants fabricated reasons to cover-up his unlawful termination.

B. Plaintiff Complains of Cape’s Regulatory Non-Compliance, Safety Issues (Pa120, Pa133, Pa147, Pa182, Pa183, Pa185, Pa187, Pa188, Pa189, Pa191, Pa192, Pa193, Pa194, Pa195, Pa196, Pa200, Pa202, Pa204, Pa523, Pa865)

Shortly after Plaintiff commenced employment, Plaintiff realized that Defendants were putting the health and safety of employees at risk. For example, Cape’s nursing and security staff knowingly held violent (unstable/unfit) patients in the Behavioral Health Unit (“BHU”) longer than legally permissible. (Pa182 at 60:12-61:3). Despite countless complaints to management, particularly to Moylett, no one took action to remediate the unsafe environment. (Pa183 at 62:22-63:20).

Cape also disregarded regulatory requirements of the Centers for Medicare and Medicaid Services (“CMS”) temperature controls.⁴ (Pa189 at 89:10-22). For example, Cape’s main operating rooms and same day surgery operating rooms were being used while the temperature and humidity levels were outside of the permissible range and non-compliant with CMS Regulations and State Operations Manual

³ Plaintiff’s 2018 and 2019 reviews were satisfactory. Carrocino applauded Plaintiff for his list of major accomplishments in both reviews. (Pa904, Pa914-23).

⁴ Hospitals adhere to CMS Regulations. CMS is part of the U.S. Department of Health and Human Services department regulating for the health and safety of all individuals. CMS regulations and policies require Defendants to adhere certain patient and facility standards, including those relating to temperature and humidity levels. See <https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/Downloads/R99SOMA.pdf>; <https://www.cms.gov/files/document/appendix-u-state-operations-manual>.

Regulations. (Pa185 at 73:14-20). CMS regulations required that humidity levels be maintained between 20 and 60 percent. (Pa187 at 79:24-80:2).

More specifically, when the relative humidity is above the maximum percentage, operating instruments and supplies are compromised and could severely affect the quality and cleanliness of patient care as operating outside of the temperature range increases infection rates and mold growth. (Pa191 at 96:7-15). The out-of-range temperature and humidity levels were problematic and presented ongoing safety issues. (Pa188 at 82:5-8). Plaintiff observed the out-of-range levels “a lot.” (Pa187 at 81:4-5). The levels were out of permissible range as often as 3-4 times per week. (Pa193 at 102:25-103:1). Plaintiff knew that this violated CMS regulations and Plaintiff printed the regulations out and put them in a binder.⁵ (Pa187 at 78:20-79:12). Plaintiff emailed the printouts to Carrocino, among others. Id. at (Pa187-88 at 76:7-78:3); (Pa187-88 at 81:10-82:8); (Pa188 at 82:17-22); (Pa188 at 83:11-15). Plaintiff’s complaints were not addressed and instead the levels were continuously lowered in the operating rooms because the employees were too “hot.” (Pa189 at 88:3-9); (Pa188 at 85:16-19); (Pa193 at 102:7-24).

Plaintiff raised these concerns throughout his employment to multiple

⁵ Plaintiff kept a binder of the life safety codes, fire codes, and state codes in his office. (Pa133 at 78:3-18). Plaintiff kept a binder for each code that required compliance. (Pa133 Id. at 81:4-20. Plaintiff’s binder with the printed-out documents containing the out-of-range levels, were left at Cape upon his termination and was never returned to him. (Pa187 at 80:3-18). Defendants did not produce the binder as part of this litigation. (Pa865).

individuals on more than 20 occasions, the last time being shortly before his termination. (Pa189 at 89:10-90:2); (Pa191 at 96:1-3); (Pa192 at 99:16-17). Plaintiff reported these concerns to Carrocino approximately once a month. (Pa193 at 104:6-12) (Pa194 at 107: 25-108:2). Rather than remediate his concerns, Plaintiff was directed to disregard the levels and maintain the temperatures the physicians wanted. (Pa195 Id. at 110:12-19). Other employees even threatened to “report” Plaintiff to Carrocino if he did not drop the matter. (Pa196 at 114:9-15).

Plaintiff’s concerns for patient safety only escalated in March 2020 when the Coronavirus global health pandemic hit New Jersey. Plaintiff, as the Director of Plant Operations, implemented procedures to prepare Defendants for the inevitable influx of Covid-19 patients. (Pa147 at 137:11-16). However, even in the wake of the Covid-19 pandemic, Defendants did not (i) implement proper safety procedures, (ii) upkeep with hospital maintenance or regulatory compliance, (Pa523), (iii) follow social distancing guidelines, (Pa202 at 138:22-139:5), or (iv) follow personal protective equipment (“PPE”) guidelines. (Pa202 Id. at 140:22-141:11). For example, Defendants permitted and directed employees to wear homemade cloth masks instead of the medical grade masks, face shields and N-95 masks when treating patients despite the PPE not being rated for airborne safety of employees. (Pa120 at 26:2-6); (Pa200 at 131:19-132:1). Plaintiff believed this conduct violated

CDC guidelines but his complaints went unaddressed. (Pa204 at 146:16-147:6-11).⁶

C. The Covid-19 Furloughs (Pa16-17, Pa127, Pa143, Pa144, Pa145, Pa173, Pa204, Pa206, Pa207, Pa208, Pa211, Pa217-18, Pa232, Pa247, Pa280, Pa292, Pa299, Pa308, Pa358, Pa848-63, Pa864, Pa866, Pa869, Pa873, Pa876, Pa880-81, Pa926-28, Pa929-31, Pa932-34, Pa935-37, Pa938-40, Pa945-47, Pa949-51, Pa952-54, Pa958-60, Pa964-66, Pa967-69, Pa974-76, Pa1001-04, Pa1005-08, Pa1009-11)

On March 23, 2020, all non-direct patient care departments of Cape were directed to *furlough* employees “the goal being at least 50%.” (Pa880-81). Plaintiff was immediately concerned with the safety implications of reduced staff during the height of the pandemic. (Pa207 at 158:15-24). Plaintiff expressed to Moylett, *inter alia*, “*there was no physical way that we could maintain that inspection process*” with the 50% furlough. (Pa144 at 122:22-123:12); (Pa143 at 120:10-15). Moylett did not substantively respond to Plaintiff’s concerns – he laughed. *Ibid.* Although Moylett agreed with Plaintiff’s safety concerns, and while he too was responsible for the safety of the hospital, nothing was done to address Plaintiff’s concerns. (Pa144 at 125:10-16).

After reporting his concerns to Moylett, Plaintiff feared he would tell Carrocino that he was complaining, subjecting him to retaliation. (Pa145 at 126:12-21); (Pa143 at 121:6-8). Nonetheless, Plaintiff informed Carrocino that he would not

⁶ Plaintiff also reported – to no avail – that Cape failed to clean dirty masks and that employees failed to social distance and wear proper PPE. (Pa173 at 22:8-21); (Pa173 at 24:4-25), (Pa204 at 147:22-149:8), (Pa206 at 154:7-17). (Pa873) (Pa876).

be able to maintain hospital equipment and implement all safety precautions and procedures with only 50% of the staff. (Pa207 at 159:7-8); (Pa207 159:20-160:4). Carrocino directed Plaintiff to do so anyway. Id. at 160:11-14; (Pa247 at 107:24-108:8). Accordingly, on April 2, 2020, Plaintiff furloughed six (6) out of twelve (12) hospital maintenance staff. (Pa16-17 ¶ 84). During this time, Plaintiff also reported to Carrocino and Moylett, “We will also need to discuss [Mr. White]. He is becoming very openly negative in front of the staff about the furloughs.” (Pa948). Neither Carrocino nor Moylett elevated Plaintiff’s complaints to human resources or noted them in a personnel file. (Pa358 at 31:19-32:5). As a result, Hunter (HR) was never apprised of Plaintiff’s complaints. Ibid.

As Plaintiff anticipated, from April 2020 until the beginning of June 2020, Plaintiff’s department was unable to manage all of the requests and safety compliance obligations. (Pa207-08 at 161:25-162:5). Before the furloughs the work order completion rate ranged from 83.66%-98.61% but after the furloughs, it steadily dropped reaching a low of 17.05% in June 2020. (Pa864, Pa866, Pa869). Plaintiff again complained to Carrocino, explaining his department was unable to maintain hospital equipment without jeopardizing patient safety (Pa208 at 162:6-12).

Plaintiff also reported his concerns with being non-compliant to Carrocino in his weekly reports which he supplied her ahead of their weekly meetings.⁷ (Pa127 at

⁷ Plaintiff met on a weekly basis with Carrocino to “discuss any issues or concerns that he had.” (Pa280 at 61:7-15).

55:13-22). In the reports, Plaintiff reported many concerns, including “Department Issues” that “all preventative maintenance on building equipment is on hold until furlough is over” and the number of uncompleted work orders was problematic. (Pa949-51); (Pa952-54); (Pa958-60); (Pa964-66); (Pa967-69); (Pa974-76); (Pa848-63). Relatedly, Plaintiff reported that “All critical Life Safety Code testing & Inspections are on hold until after the furlough.” Ibid. Shockingly, Carrocino denied Plaintiff ever informed her that all preventative maintenance on the building equipment was on hold until the furlough was over—despite it being contained in the reports he sent directly to her. (Pa299 at 137:12-16). Further, Plaintiff reported to Carrocino that his department was only responding to “critical work requests” because that is all it could do after furloughing half of his staff. (Pa211 at 174:12-2); (Pa951). Carrocino concedes same. (Pa299 at 110:18-111:1); (Pa308 at 173:7-16).

Plaintiff also specifically reported to Carrocino in his weekly reports that inspections at certain intervals/times of the year for preventative maintenance were not getting done in accordance with the compliance code, particularly the National Fire Protection Agency (“NFPA”). Id. at 165:2-11; 167:14-19. Specifically:

- Emergency lighting testing and inspections; exit light inspections and fire extinguisher inspections required by the NFPA; emergency shower inspections & flow testing; medical gas alarms inspections were open work orders and a “failure risk[s].” (Pa848-63). The emergency lights and exit signs were out at 9&11 Village Drive which was determined deficient by

Carrocino told Plaintiff if he did not have any issues or concerns, they did not have to meet; however, they “almost always met” because Plaintiff almost always had issues or concerns. Id. at 62:2-7.

the Middle Township fire inspector. (Pa1001-04).

- Life safety issue of failing sprinkler lines. (Pa926-28); (Pa929-31); (Pa932-34); (Pa935-37); (Pa938-40); (Pa945-47); (Pa949-51); (Pa952-54); (Pa958-60); (Pa964-66); (Pa967-69); (Pa974-76); (Pa848-59); (Pa1001-04); (Pa1005-1008); (Pa1009-11).

Plaintiff noted in his complaints Cape was non-compliant, out of code, and illegal. (Pa217-18 at 201:10-202:1). Plaintiff also informed Carrocino and Moylett that he believed the inability to manage the requests, safety compliance obligations, maintenance (and others) was a violation of law. *Id.* at 162:13-18; 173:16-20. Yet, instead of taking any action to investigate or remediate them, Carrocino brushed them under the rug. (Pa232 at 49:8-49:23). Carrocino admits she did not typically read Plaintiff's weekly reports—the same reports where he depicted the serious safety concerns. (Pa292 at 107:18-23)(“Q. ...When you get a report is it typical for you to read the report? A. No.”).

D. Defendants Fumble the Opportunity to Remediate Plaintiff's Complaints, Which Remained Uninvestigated/Unaddressed (Pa141-42, Pa142-43, Pa147, Pa149, Pa212, Pa213, Pa214, Pa228, Pa230, Pa417, Pa418, Pa878-79, Pa1039, Pa1042, Pa1043)

Despite complaining in accordance with hospital procedure, Carrocino failed to respond. (Pa142-43 at 117:15-118:9), (Pa147 at 135:3-9). Egregiously, *Carrocino admitted she did not take Plaintiff's complaints seriously because she personally found him to be “spiteful,” “arrogant,” “whiney,” a “primadonna” and “jump[s] to conclusions.”* (Pa141-42 at 113:24-116:13); (Pa149 at 144:5-8).

On April 21, 2020, Plaintiff advised Moylett that Cape needed to submit a

waiver for their Non-Compliance with the LSC. (Pa1039). The LSC includes a set of fire protection requirements designed to provide a reasonable degree of fire safety. (Pa213 at 182:7-12). The LSC covers construction, protection, and operational features designed to provide safety from fire, smoke, and panic. Id. at 181:17-24. The waiver—which was made available during this critical, peak period of the COVID-19 pandemic—would have absolved the hospital of certain compliance requirements so long as it was submitted. (Pa228 at 32:16-25).

Plaintiff provided Moylett the appropriate waiver documents and requested a meeting to discuss them. (Pa1042). Ultimately, Plaintiff, Moylett and White had a meeting to discuss the waiver. (Pa417 at 62:17-22). The waiver required a completion of documents where “you needed to check off or put dates down the last time something was inspected, the last time someone came in to inspect it, what was there, and anticipate a date of when you think you could have it inspected again. That type of thing.” (Pa417 at 65:2-8). However, Plaintiff was not comfortable signing the documents relating to this process—a process certifying compliance—and he expressed that to Moylett in that meeting. (Pa418 at 66:10-12). Plaintiff told Moylett that he and White could complete it but that only frustrated Moylett. (Pa418 at 67:16-19; 67:22-68:3). Moylett did not submit the waiver by the deadline and as of October 1, 2020 the waiver was still not submitted. (Pa1043); (Pa214 at 188:20-

25). *As a result, Cape was in violation of the LSC.* (Pa213 at 184:9-15).

Shortly thereafter, on April 30, 2020, a Cape Maternity Nurse Manager advised Plaintiff of a COVID-19 positive patient in room 2108. (Pa878-79). Plaintiff immediately advised that 2108 is not a negative pressure room – COVID-19 positive patients had to be kept in negative pressure room to prevent virus droplets from spreading. *Ibid.* Plaintiff also informed Carrocino and Dr. McCoy of the danger. (Pa230 at 40:24-44:7). However, contrary to all COVID-19 protocols, Cape unilaterally decided and directed their employees that COVID-19 positive patients could be kept in standard rooms so long as the door was shut. (Pa878-79). After months of advising Defendants of the array of unsafe working conditions Cape, Plaintiff was advised by White that Cape’s departments were filing complaints about Plaintiff’s department not fulfilling work requests. (Pa212 at 180:15-181:4). This was baffling to Plaintiff as Defendants knew that it was Plaintiff who had been complaining about being understaffed for months. *Supra* §II(A)-(D).

E. Plaintiff Submits Another Internal Complaint of Safety Issues and Regulatory Non-Compliance to Leadership; Carrocino Immediately Retaliates and Seeks to Terminate Plaintiff (Pa188, Pa189, Pa191, Pa193, Pa232, Pa235, Pa236, Pa298, Pa299-300, Pa301, Pa302, Pa305, Pa343, Pa344, Pa345, Pa882-83, Pa995-96, Pa997, Pa998-1000)

Plaintiff’s department remained understaffed, leaving them unable to complete the required preventative maintenance to be compliant. (Pa235 at 60:20-61:5). Plaintiff emailed Cape’s departmental leadership explaining that requests

were not being ignored. (Pa995-96). Plaintiff's email reported that Cape was "two months behind for inspections, testing, maintenance and repairs of critical equipment for the operations to all of the buildings," causing Cape to be in violation of various laws, rules, and regulations related to safety and inspection codes and compliance. (Pa995-96). Plaintiff's email also explained the process moving forward and that they would be triaging the requests based on department staffing and urgency. Ibid.

Immediately after Plaintiff sent the email, Carrocino called Plaintiff, busted into his office and, in a clear act of retaliation, screamed at him and called him stupid for sending the email. (Pa232 at 48:24-49:2; see also (Pa302 146:1-4) (Carrocino testifying she did storm into Plaintiff's office and had a raised voice); (Pa302 at 147:19-148:11) ("***Q. Did you call him stupid? A. Yes, I did.***"). Despite the valid safety and compliance concerns, Carrocino believed the email was "***a perfect example of Plaintiff not being a team leader and sitting in his office on his little high horse sending out directives.***" (Pa299 at 137:22-138:3; 134:13-16). Carrocino also admitted she was "outraged" by this email and "very annoyed with [Plaintiff]" for sending it. (Pa298 at 132:3-5; 133:21-22); (Pa301 at 145:19-23).

Carrocino immediately directed Plaintiff to rescind the email. (Pa298 at 133:2-6). Carrocino viewed Plaintiff's report to leadership as "whining" rather than a concern for safety. (Pa299-300 at 137:22-138:3). Carrocino admits her issue with Plaintiff's email was not that ***it may be true*** but that he put it in writing and exposed

“too much information.” (Pa300 at 138:10-18; 140:7-14). Carrocino viewed the complaint as an example of Plaintiff’s arrogance and him being a “primadonna.”

Q. Okay. He writes: As furloughs continue in the plant operations department we will triage all online work requests daily based on department staffing and urgency of request. Is there something wrong with that?

A. *This is him whining.* You know ... everybody was short staffed, everybody was doing whatever it takes, so you don’t have to put it in writing as a leader in this organization. Stop whining and just suck it up, like everybody else was doing.

Q. Okay. So the issue here is that he’s whining, and he should suck it up and just stop complaining, in essence, right?

A. *Well, there’s no need to put this in writing, you know.*

Q. So the problem you had with it, that may be true, but there’s no need to put that in writing to the leadership team?

A. To whine and complain. . . .

Q. You really thought he was a whiney person?

A. *Absolutely. He is a primadonna, arrogant.* . . .

Q. Okay. You would describe -- I think it’s fair to say you were pretty -- you had a lot of contempt for John writing this email, did you not?

A. *I was very annoyed with John.*

(Pa299-300 at 137:22-138:18); (Pa301 at 144:5-8; 145:19-23) (emphasis added).

Carrocino simply did not take Plaintiff’s email seriously, nor did she think Plaintiff’s departments’ role in the pandemic, to keep the hospital compliant and safe, was important. (Pa301 at 144:9-145:10) (emphasis added) (Carrocino testified: “*So how trying is it for poor John, who worked a suit and tie...And it’s hard to*

feel sorry for him. And to say thank you for supporting our department, we're supporting the patients, we don't care about his well, strike that. Not that we don't care about his department....He was punching the time clock.”) Carrocino directed Plaintiff to rescind the email but because he did not know how, Carrocino entered Plaintiff's office and did it herself. (Pa302 at 146:1-4; 148:22-25); (Pa997).

Carrocino's reaction confirmed what Plaintiff believed all along – that she knew the lack of maintenance staff presented safety/compliance issues for hospital. (Pa300 at 138:10-18; 140:7-14). Carrocino did not want Plaintiff to create a written record so she could conceal the issues. (Pa300 at 138:10-14). Unequivocally, Carrocino retaliated against Plaintiff for sending an email to management about Cape's ongoing violations of laws, rules, and regulations related to safety and inspection codes and compliance. (Pa995-96) From that point forward, Carrocino only escalated her retaliatory campaign against Plaintiff, beginning with her informing Hunter that Plaintiff's conduct was “inappropriate...and just a continued example of him not getting it.” (Pa302 at 149:5-13). The “it” being not to express the safety concerns perturbing Cape. Ibid. Gill also spoke to Carrocino after receiving Plaintiff's email and admits that he did not think this email should have gone out to the entire leadership team because the “substance and tone” of the email was “sending the wrong message” despite it being concerning. (Pa343 at 53:22-24); (Pa344 at 55:8-18); (Pa344 at 56:19-23); (Pa345 at 58:2-11) (emphasis added).

Despite the valid safety concerns, Carrocino wanted to instantly fire Plaintiff:

Q. Suffice to say, you were very upset with John throughout this entire process, correct? Was that a yes?

A. Yes.

Q. *You wanted to fire him at that point, or you had thought about firing him at that point?*

A. *Yes.* But we were in the middle of a pandemic, and it would be impossible to replace that position in the height of the pandemic. No one wanted to work in healthcare.

(Pa305 at 161:8-20) (emphasis added).

Carrocino's retaliation continued not even an hour later when she began firing off emails criticizing Plaintiff, questioning his actions, and accusing him of not following her directions. (Pa1000) (6/5/2020 at 9:02 AM, Carrocino expressing disappointment with Plaintiff's complaints within his weekly report⁸ despite Plaintiff reporting such complaints (and more) for the previous 10 weekly reports dating back to 4/10/2020, which generated no response by Carrocino); (Pa1000) (6/5/2020 at 9:29 AM, accusing Plaintiff of not following her directions); (Pa999) (6/5/2020 at 10:00 AM, directing Plaintiff to put together another furlough plan); (Pa998) (6/5/2020 at 5:22 PM, painting Plaintiff as insubordinate employee).

Carrocino's retaliation continued in August 2020 when Plaintiff informed

⁸ Plaintiff reported, *inter alia*, "We currently have over 1,400 preventative maintenance work orders that are two months behind for inspections, testing, maintenance and repairs of critical equipment for the operations of the building." (Pa995-96).

Defendants that his department was unable to assemble equipment without overtime. (Pa236 at 63:21-64:6; 64:21-25). Carrocino aggressively responded by belittling Plaintiff for putting his concerns in writing. (Pa236 at 65:4-10); (Pa882-83). She was obviously making an effort to avoid any written trace of Plaintiff's complaints and safety issues, which created liability for Defendants. *Id.*; (Pa300 at 138:10-14).

In September 2020, Plaintiff complained yet again – this time to the Physician Director and Infection Control Person – that Cape operating rooms were not set to the requisite temperature and humidity levels. (Pa191 at 94:16-20); (Pa189 at 88:3-9); (Pa188 at 85:16-19); (Pa193 at 102:7-24). Although it would have been easy for Defendants to pinpoint the problem and remediate, Plaintiff's complaints were again ignored. *Id.* Plaintiff reported this up until his termination. *Id.* (Pa191 at 96:1-3); (Pa192 at 101:17-20). Defendants were clearly making an effort to push Plaintiff out of employment or in the alternative, nitpicking his performance to lay the foundation for his unlawful termination. (Pa998-1000); (Pa882). Indeed, Carrocino admitted she wanted to terminate Plaintiff after his June 2020 email. (Pa300 at 141:13-20).

F. Defendants Manufacture a Pretextual Reason to Terminate Plaintiff (Pa155, Pa157, Pa158, Pa160-61, Pa162, Pa163-64, Pa165, Pa176, Pa177-78, Pa180-81, Pa198, Pa230, Pa260, Pa386, Pa388, Pa425, Pa455, Pa459, Pa477, Pa486, Pa902-3, Pa1012-13, Pa1027-28, Pa1031, Pa1032, Pa1034-38, Pa1046)

As Plaintiff feared, shortly after his last complaint, on October 5, 2020, Plaintiff was suddenly brought into a conference room with Moylett and Hunter

(Pa158 at 180:21-181:7). They informed Plaintiff that he was being investigated for an error with regard to COVID-19 protocol that occurred in *April of 2020—nearly six months earlier*. Defendants told Plaintiff that the “return vents” were not covered in the ICU, which was placing people at risk. At this meeting, Plaintiff did not tell Moylett and Hunter that the ICU does not have returns, just exhaust. (Pa163 at 200:18-22). Plaintiff also did not tell them that he would have to go into the ICU to check and see if return vents were in the rooms. (Pa163 at 201:8-12). Plaintiff explained, however, it did not matter if the vents were not closed because the return fan was turned off and the electrical switch was locked and tagged out so the fan was not pulling air out of the rooms. (Pa163-64 at 201:25-202:6). Plaintiff does not recall if he told Moylett and Hunter if the ICU return vents were covered. (Pa162 at 196:1-6). Curiously, by this point, no one had brought the alleged uncovered return vent issue to Plaintiff’s attention. (Pa455 at 60:18-23) (“Q. But you never reported directly to Mr. Sloan that you had issues with the return vents, right, you never said that to him? A. I did not tell John, as I stated previously. I did not tell him the return vents were not closed.”); (Pa486 at 88:10-12) (“Q. Do you know if anybody told John the vents were not covered before you told Sam? A. Not to my knowledge”); (Pa164 at 205:17-22) (“Q. Sam did not tell you that there were return vents in ICU rooms one through six that had not been covered and they needed to be covered as they had been in Two East and fast track? A. No, I did not have that conversation

with him.”); (Pa1032) (Moylett: “Returns uncovered?” Mr. Raymond: “No I did not tell John that”)⁹; *Id.* at (Pa897) (“SW never told JS that the issue was unsealed returns because JS shuts him down and didn’t want to get in a confrontation with JS”); (Pa386 at 142:6-10) (Hunter admits there was never an allegation of an employee telling Plaintiff the vents were uncovered that he needed to address.).

Plaintiff had gone into each room in Two East (a section of the hospital) and the maintenance department went into ICU rooms 1-6 to make sure the rooms were sealed up properly. (Pa155 at 168:1-12); (Pa161 at 191:23-192:4). Plaintiff was directed not to go into the ICU because of the scarcity of the PPE and because they had patients on respirators in them. (Pa161 at 191:6-17; 193:16-18); (Pa155 at 168:23-169:2). In the event a nurse observed something wrong with a room or had an “emergency” they would contact Plaintiff to test the area. (Pa155 at 169:2-12). Plaintiff informed the head nurse, Ms. Simoncini to notify him multiple times, when any of the rooms were empty but because the census was high, every room was occupied. (Pa162 at 196:22-197:19); (Pa176 at 36:15-17); (Pa177 at 40:3-7).

Moreover, irrespective of the vents being purportedly uncovered, COVID-laden air was not escaping putting anyone at risk because the return fans were turned

⁹ Notably, Mr. Raymond’s testimony is inconsistent with Defendants’ responses to Plaintiff’s interrogatories. Contrary to Defendants’ responses to Plaintiff’s Interrogatory No. 2, Mr. Raymond never complained about Plaintiff. Compare (Pa1046) (“Hunter and Moylett met with Eric Raymond, Specialist Mechanic – HVAC, to discuss Raymond’s concerns about the Plaintiff”) *with* (Pa477 at 52:8-11) (“Q. Did you ever make any complaints about John Sloan? A. Well, I would – no. I haven’t made any complaints about him.”) Likewise, Mr. Moylett’s notes from their meeting state Mr. Raymond did not tell Plaintiff the returns were uncovered. (Pa1031).

off in the ICU from March through Plaintiff's termination. (Pa177-78 at 41:12-42:5); (Pa198 at 122:7-10). Importantly, Plaintiff's plans for the ICU were sent to all necessary parties including Carrocino and Moylett in March 2020, yet no objections were made. (Pa1034-38). Plaintiff discussed the isolation rooms, including ICU rooms 1-6 with Carrocino specifically stating the air exchanges and where the air was exhausted. (Pa1012-13). Plaintiff also had a meeting with White and Raymond wherein they discussed how the ICU rooms could be exhausted and looked at the plans prior to the work in the ICU. (Pa157 at 174:4-13); (Pa162 at 192:25-193:15¹⁰).

Plaintiff had a second meeting with Hunter and Moylett on or about October 8, 2020 and again expressed he was not told the vents were purportedly uncovered. (Pa902-3). Plaintiff also reported "one of his staff has had it in for him it's documented." *Id.* at Pa902. Hunter "assumed he was making reference to Sam White." (Pa388 at 152:12-18). Hunter did not know what Plaintiff meant but did not inquire further. (Pa388 at 152:22-24). The meeting ended with Defendants ordering Plaintiff to turn over his badge - he was now suspended. (Pa180 at 53:19-22); (Pa425 at 97:7-8). Defendants advised Plaintiff he was being investigated and would be contacted on October 13th - he never was. (Pa180-81 at 53:19-22; 54:8-12).

G. The Investigation Was Severely Flawed, Incomplete, and Designed to Cover-up Retaliation (Pa165, Pa322, Pa370, Pa377, Pa379,

¹⁰ Defendants also accused Plaintiff of failing to purchase "HEPA filters" to be installed in the ventilation system, which was blatantly untrue. (Pa260 at 159:18-24). Plaintiff's participation in setting up the ICU included helping the maintenance team who was working where the HEPA units were at the time. (Pa160-61 at 189:19-190:13).

Pa383, Pa423, Pa431, Pa453, Pa459, Pa478, Pa484, Pa486, Pa488, Pa899-901, Pa1027-28)

While Plaintiff was suspended, Moylett and Hunter conducted an investigation. (Pa319 at 214:23-215:3). The purported investigation was a complete sham designed to mask Defendants' true motivations – to punish Plaintiff for raising legitimate safety/compliance issues in the workplace and to effectuate Carrocino's desire to terminate Plaintiff. The evidence was not independently verified by anyone other than White (an employee with a motive to see Plaintiff fired). (Pa322 at 229:13-15¹¹) (“Q. Did Byron go into the room, himself, to take a look? A. No.”); (Pa377 at 109:3-10) (“Q. Did you ever go into the ICU rooms to look at the vents? A. I did not. Q. Do you know if [Carrocino] did? A. I do not know.”) Moylett testified that he went into one of the rooms (although he cannot remember which one) with White, however, White testified they did not go into the rooms but merely looked through the door window. (Pa453 at 53:11-14); (Pa423 at 89:15-19). Mr. Raymond also never physically went into the rooms to verify if they were open nor was Mr. Raymond shown the photos taken by White in his meetings with Hunter and Moylett. (Pa488 at 96:11-14); (Pa486 at 87:19-21); (Id. at 100:8-10).

Further, there is nothing identifiable with the particular rooms and there is no

¹¹ Carrocino testified that Hunter and Moylett told her they went down to look at the vents themselves. (Pa319 at 214:20-25). Yet, Hunter says he never did. This is just one of many inconsistencies in Defendants' proffered non-retaliatory reason for termination.

way to discern if the vents were ever sealed at all or unsealed for the purpose of the photos. (Pa899-901); (Pa383 at 133:17-22) (“Q. Looking at the pictures, can you tell whether or not these particular rooms or particular vents were sealed at any point in time? A. *No, I can’t tell if they were sealed at any point in time.*”); (Pa431 at 118:1-7) (“Q. If we look at from these pictures, could you tell if White did not write on these pictures or put the indication as to which room it is, you couldn’t tell which actual room it was. Right? You have to rely upon White’s notations here? A. Yes.”) Defendants admit they did not test the contaminated air. (Pa370 at 79:12-15), (Pa379 at 115:13-16). In fact, the vents at issue were not “fixed” for “*at least a year or more.*” (Pa478 at 56:19-57:12); (Pa484 at 80:12-16) (emphasis added).¹²

H. Plaintiff is Unlawfully Terminated in Violation of CEPA (Pa24, Pa116, Pa154, Pa180, Pa181, Pa270, Pa323, Pa325, Pa445, Pa884-88, Pa924-25)

Contrary to Defendants’ assertion, Defendants did not contact Plaintiff on October 13, 2020. (Pa180 at 53:19-22; 54:8-12). Accordingly, Plaintiff emailed Hunter who ultimately scheduled a meeting for October 16, 2020. (Pa924-25). Defendants acted suspicious and even told Plaintiff to use a different entrance to avoid other employees from seeing him. (Pa24 ¶ 127). When he arrived, Moylett and

¹² Importantly, this is contrary to Mr. White’s testimony that he sealed the vents “that day or the next day” after taking the pictures. (Pa459 at 74:22-23). Because the vents were not fixed until more than a year later, the photos of the purportedly sealed vents taken by Mr. White could not have possibly been of the ICU rooms where they were purportedly uncovered and causing concern. (Pa1027-28). This is unsurprising though as Mr. White was motivated to lie about Plaintiff to get Plaintiff’s job. (Pa165 at 206:5-8).

Carrocino were in the room with him, joined virtually by Hunter. (Pa181 at 54:24-55:6). Hunter told Plaintiff he had two options: (i) voluntarily resign effective immediately, or (ii) termination. (Pa323 at 233:13-23). Carrocino explained:

I said that as a result of the – as a result of the investigation, the investigation is complete, and we determined that the situation seriously jeopardized the health and welfare, health and safety of our staff, patients, doctors, everyone. And due to his gross incompetence and failure to consult with subject matter experts, that we are terminating his employment.

Id. at 226:3-12.

Carrocino admitted that Cape had “shortcomings” and were not completely complaint at the time of Plaintiff’s termination. (Pa323 at 230:9-15) (“**Q.** What was he going to expose? **A.** All of our shortcomings, you know, *things that we may not be in compliance with.*”). Carrocino also admitted that she brushed off Plaintiff’s complaints because she thought he was only making them to make others look bad. Id. at 200:5-14 (“**Q.** It sounds like every time that John *brings up a safety concern or a problem or a complaint or a code violation* that [] you believe he’s doing it in order to make somebody else look bad...was that always the case? **A.** Well – *Yeah.*”)

Plaintiff refused to resign and, in an effort to silence Plaintiff and avoid litigation, Defendants’ offered Plaintiff two (2) months of severance pay in exchange for his release of all claims against Defendants. (Pa884-88). Offering severance was not routine for Cape and Carrocino could not remember the last time they offered severance to an employee. (Pa325 at 239:6-13). On October 23 Moylett sent Plaintiff

a text regarding his “resignation,” which Defendants attempted to force upon him in an attempt to dupe Plaintiff into signing the agreement as a means to preserve his professional reputation. (Pa884); (Pa323-24 at 233:24-235:5).

Defendants falsely informed the other department directors that Plaintiff had resigned when, in reality, he was terminated. (Pa885); (Pa325 at 238:16-23). Plaintiff left his previous, steady employment to join Cape and was left without any income or medical coverage during a global pandemic as a result of Defendants’ clearly retaliatory actions. (Pa116 at 10:18-24); (Pa154 at 164:6-11); (Pa116 at 11:11-13). Plaintiff would not have been subjected to such egregious and unlawful retaliation but for his complaints regarding Defendants’ complete disregard for employee and patient safety. Unsurprisingly, Carrocino promoted White to fill Plaintiff’s position after Plaintiff was terminated (Pa270 at 19:10-23; 21:16-21), despite previously admitting White was not qualified for it. (Pa445 at 18:5-19:9).

I. Plaintiff Is the Only Employee Terminated for the Alleged Unsealed Vents (Pa130, Pa284, Pa295, Pa312, Pa416, Pa422-23, Pa456, Pa480-81)

White and Mr. Raymond did not inform anyone of the alleged unsealed return vents for approximately six months despite knowing they were allegedly open. (Pa480 at 62:7-11) White and Mr. Raymond (“HVAC guy” responsible for air handling throughout the hospital) were not terminated. (Pa130 at 66:6-11; 69:6-13). Mr. Raymond, who reported the issue to White, expected White to take immediate

action. (Pa481 at 66:7-10) (“Q. Did you expect White to do anything about it, any change you say? A. I would think so. He’s the manager. He was the supervisor back then.”). White had an obligation to report safety issues. (Pa456 at 63:20-23).

White and Raymond suffered no discipline as a result of failing to report the alleged unsealed vents. (Pa423 at 86:11-16). Moylett thought “how [they] handled it was appropriate.” (Pa423 at 86:11-22). Moylett merely accepted White’s explanation that he was “concerned and worried about how John would handle that if he reported it.” (Pa422-23 at 85:22-86:10). Carrocino described Plaintiff as “arrogant” “spiteful” “not trustworthy” not a “good leader” and someone with “memory issues.” (Pa294 at 117:17-21); (Pa313 at 191:6-17). Carrocino also believed Plaintiff lied about “many things” “all the time,” (Pa294 at 117:25-118:7), though she could not provide a single example, (Pa295 at 120:24-25); (Pa296 at 122:10-16). Neither could Gill. (Pa340 at 38:17-20) Not a single document exists expressing any issue or concern with Plaintiff’s honesty or performance; rather, Carrocino’s performance reviews of Plaintiff for 2018 provide him “commendable” ratings for exactly what Plaintiff was doing that got him terminated—ensuring compliance with federal, state and local safety standards. (Pa284 at 74:4-75:5; 76:12-17; 76:20-77.1). She further concedes that Plaintiff was good at policies and procedures and liked the “detail work”. (Pa312 at 187:25-188:10). Carrocino terminated Plaintiff, on the recommendations of Moylett and Hunter, because his

complaints were creating a liability for the hospital, and she knew those safety issues would ultimately be her responsibility. (Pa416 at 59:1-6); (Pa338 at 33:1-8).¹³

IV. ARGUMENT

A. This Court Must Review this Matter *DE NOVO* (Raised Below)

This Court reviews the Trial Court’s decision *de novo*. “A trial court’s interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.” Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). This Court must determine if “the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.” Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). “[S]ummary judgment is rarely appropriate” in retaliation cases because the “paramount question of why an employer took an adverse employment action against a plaintiff ‘is clearly a factual question.’” Marzano v. Comput. Sci. Corp., Inc., 91 F.3d 497, 509 (3d Cir. 1996).

B. CEPA Generally (Raised Below)

“CEPA is remedial legislation entitled to liberal construction, with the

¹³ Likewise, while Carrocino did not think Plaintiff was a hard worker and thought working his 8 hours paled in comparison to White who purportedly worked whenever the hospital needed him, in reality, Plaintiff worked more than White. (Pa309 at 176:5-23). Plaintiff worked 6:30am-3:00pm and White only worked 7am – 3pm. (Pa262 at 166:1-24); (Pa450 at 40:12-14). Gill too considered Plaintiff as one of the employees who was busting his tail during the pandemic. (Pa344 at 55:19-23). Despite Carrocino’s obvious distaste for Plaintiff, she could not truthfully say Plaintiff was a poor performing employee. Carrocino’s performance reviews for Plaintiff for 2019 are satisfactory, with mainly scores of 3, 3.5 and 4’s. (Pa288 at 91:24-92:3). Carrocino’s 2019 evaluation of Plaintiff is devoid of any notations of verbal warnings or unsatisfactory performance notices. (Pa289 at 94:8-95:7).

purpose of protecting whistleblowers from retaliation by employers and discouraging employers from engaging in illegal or unethical activities.” Lippman v. Ethicon, Inc., 222 N.J. 378, 387 (2015); Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405 (1994); Kolb v. Burns, 320 N.J. Super. 467, 477 (App. Div. 1999) (“construed liberally to achieve its important social goal”). CEPA’s purpose, as pronounced by the Supreme Court, “is to protect and encourage employees to report illegal or unethical workplace activities and to discourage . . . employers from engaging in such conduct.” Id. at 443. “New Jersey’s CEPA statute has been described as the most far reaching ‘whistleblowing statute’ in the nation.” Hernandez, 354 N.J. Super. at 467.

C. The Record Support’s Each Prima Facie Element. (Pa6, Pa194, Pa208, Pa209-10, Pa228, Pa305, Pa705-06, Pa1019, Pa1020-21, Pa1038, Pa1111, Pa1500)

To maintain a cause of action under CEPA, a plaintiff must establish: (1) he reasonably believed that his or her employer’s conduct was violating either a law, rule or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he performed a “whistle-blowing” activity; (3) an adverse employment action was taken against him; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action. Dzwonar v. McDevitt, 177 N.J. 451, 464 (2003). CEPA’s goal “is ‘not to make lawyers out of conscientious employees but rather to prevent retaliation against those employees who object to

employer conduct that they reasonably believe to be unlawful or indisputably dangerous to the public health, safety, or welfare.” Id.

As discussed more fully below, when examining the record in its entirety,¹⁴ the evidence shows Plaintiff has set forth a *prima facie* case of retaliation. As an initial matter, Plaintiff identified at least 10 laws, rules, and regulations by name he believed were violated. Defendant too extensively identified and referenced the laws Plaintiff was alleging violations of. New Jersey courts have held far less specific identifications (if any at all) to be sufficient for *prima facie* CEPA purposes. See Hernandez, 354 N.J. Super. 467, 474 (The plaintiff in Hernandez complained of “health hazard conditions and maintenance lack of service in the building” regarding clogged toilets and unlit exit signs. The Court held that giving Plaintiff all favorable inferences, there was credible evidence to support the jury’s conclusion that “plaintiff made his superiors aware of the problems even if he did not always articulate the exact violation.”); see also Mehlman, 153 N.J. at 172–73 (The Court determined the jury was able to make the public policy determination without a specific statute or governmental regulation that expressly prohibited the complained of conduct based on the evidence and representations by counsel).

¹⁴ The Court failed to review the entire record as required by R. 4:46-2(c). For one, the Court conceded that it did not review hyperlinks relied on by Plaintiff due to an “error.” (Pa705-06). The hyperlinks contained substantive pertinent information. Plaintiff and Defendant were able to access the links without issue. Second, the Court initially limited its review of the record to two interrogatories when evaluating the sources of law, rule, and regulations relied upon by Plaintiff. Although, on reconsideration, the Court clarified it did not rely on that “firstly” and not “too much.” (2T at 27:7-10). Nonetheless, the Court did not have or review the entire record at the time and as such, reversal is warranted.

With respect to the first element of Plaintiff's *prima facie* case, there can be no real debate that Plaintiff reasonably believed that Defendants' conduct violated laws, rules, and regulations, which is why he was reporting his concerns. (Pa228 at 32:16-25) (The Section 1135 Waiver of the Social Security Act needed to be submitted to be absolved of non-compliance); (Pa6 ¶ 25), (Pa1500), (Pa194 at 107:4-108:11) (Reporting out-of-range temperature and humidity levels as violations of CMS and State Regulations); (Pa210 at 173:5-20) (Reporting violations of the NFPA and Life Safety Code); and (Pa1019–22) Reporting violations of the National Electric Code Sections 501.10(b)(1) and 501.15(A)(4)).

Second, Plaintiff engaged in whistleblowing activity orally and in writing on at least four occasions. Specifically, (i) Plaintiff reported the “electric in the sewage ejector put was non-complaint with the National Electric Code Sections 501.10(b)(1) and 501.15(A)(4),” (Pa1020-21); (ii) Plaintiff reported the hospital was non-compliant with the Life Safety Code (“LSC”) and NFPA—specifically, preventative maintenance, exit sign and fire extinguisher inspections were not being completed, (Pa208 at 165:2-11); (Pa209-10 at 167:14-172:11); (Pa210 at 173:5-20) (iii) Plaintiff reported the hospital's failure to submit a Section 1135 of the Social Security Act Waiver during Covid-19, (Pa1038); and (iv) the temperature and humidity levels in the operating rooms were outside the parameters set forth in the CMS and State Regulations. (Pa1500), (Pa194 at 107:4-108:11).

Third, Plaintiff suffered adverse employment action when Defendants suspended and terminated Plaintiff's employment. N.J.S.A. 34:19-2(e) (CEPA defines unlawful "retaliatory action" as "the *discharge, suspension* or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." (emphasis added).

Fourth, the causal connection between Plaintiff's whistleblowing activity and suspension and termination is supported by direct evidence—Carrocino's admission that immediately after Plaintiff reported the hospital's non-compliance to leadership, she wanted to *fire him then*. (Pa305 at 161:8-20) ("Q. You wanted to fire him at that point or you had thought about firing him at that point? A. Yes. . . .").

The Trial Court too, found (i) Plaintiff set forth evidence of a *prima facie* case of retaliation; (ii) at least one genuine issue of material fact existed; and (iii) sufficient evidence exists to support a finding of pretext to warrant the issuance of punitive damages. (Pa1111 at 34; 36; 39-41).

D. The Trial Court Erred in Holding Plaintiff Did Not "Specifically" Identify Laws, Rules or Regulations He Reasonably Believed Defendants Violated. (Pa719, Pa720, Pa1020-22, Pa1111)

To be clear, the only issue on appeal is whether Plaintiff sufficiently identified at least one law, rule, or regulation he believed Defendants violated. The answer is straightforward and can be found in black and white in Plaintiff's briefing and

exhibits before the Trial Court, and even in the Trial Court’s written opinion—Plaintiff specifically identified at least ten different laws, rules, and regulations.

To satisfy the first prong of a prima facie CEPA case, “either ‘the court *or* the plaintiff’ must identify the statute, regulation, rule, or public policy that closely relates to the complained-of conduct.” Chiofalo v. State, 238 N.J. 527, 541, 542 (2019) (quoting Dzwonar, 177 N.J. at 456):

Importantly, Dzwonar notes that a plaintiff need not “allege facts that, if true, actually would violate that statute, rule, or public policy.” 177 N.J. at 463. A plaintiff is required only to “set forth facts that would support an objectively reasonable belief that a violation has occurred.” Id. . . . at 464. The statute’s salutary public policy is not furthered by any implied requirement “to make lawyers out of conscientious employees”; rather, and more accurately, its design is “to prevent retaliation against those employees who object to employer conduct that they reasonably believe to be unlawful.” Ibid. (quoting Mehlman v. Mobil Oil Corp., 153 N.J. 163, 193–94 (1998)).

The Trial Court erred in holding that Plaintiff’s “ten laws that were referenced in the plaintiff’s opposition brief” did not satisfy the identification requirement of CEPA because Plaintiff made only “general reference[s]” and not specific citations, to laws, rules, regulations or, public policies he reasonably believed were violated. (Pa1111). At oral argument, the Trial Court explained, “I think it’s consistent with the law [Hitesman] and I think that the law sensibly requires that there be a citation to a law plaintiff alleges was violated.” “2T at 35:9-12. This is error, first, because Plaintiff *did* provide citations within the complaints he submitted, and second,

because CEPA and its progeny does not require such a level of legal specificity from employees who disclose or object to activities, practices, or policies by the employer which Plaintiff reasonably believes is violative of laws, rules, or regulations promulgated pursuant to law. N.J.S.A. 34:19-3(a), (c); see also Chiofalo, 238 N.J. at 542, 544-45 (CEPA’s “salutary public policy is not furthered by any implied requirement ‘to make lawyers out of conscientious employees’; rather, and more accurately, its design is ‘to prevent retaliation against those employees who object to employer conduct that they reasonably believe to be unlawful.’ . . . We reiterate . . . that *we do not expect whistleblower employees to be lawyers on the spot*; once engaged in the legal process, and with the assistance of counsel or careful examination by the court, however, the legal underpinnings for claimed behavior that is perceived as [unlawful] should be able to be teased out sufficiently for identification purposes.”) (citation omitted) (emphasis added).

In this case, Plaintiff identified at least four¹⁵ laws, rules, and regulations he believed Defendants violated, and while not required, at least two of those laws included pinpoint citations by Plaintiff down to the subsection of the law. Specifically, Plaintiff cited the CMS regulations, Section 1135 of the Social Security

¹⁵ Plaintiff identified 10 laws, rules, regulations and public policies he reasonably believed Defendants violated in opposition to Defendants summary judgment motion. (Pa719) ((i) New Jersey Governor’s Executive Orders during the COVID-19 Pandemic; (ii) Center for Disease Control (“CDC”) Regulations; (iii) National Fire Protection Association Codes; (iv) Life Safety Code; (v) Center for Medicare & Medicaid Service (“CMS”) Code Requirements; (vi) State Operations Manual Regulations; (vii) National Electric Code; (viii) Healthcare Facilities Code Requirements; (vii) Joint Commission Regulations; and (viii) public policies, regulations, and law protecting employees and patients from healthy and safety issues in healthcare organizations).

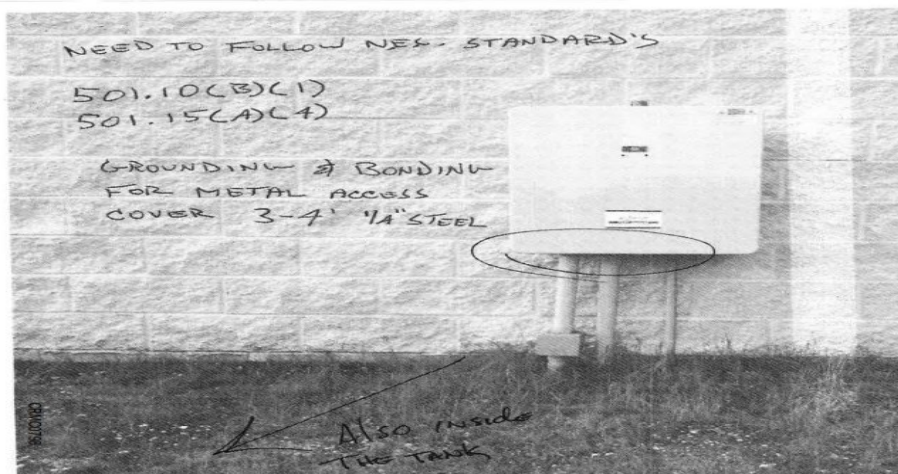
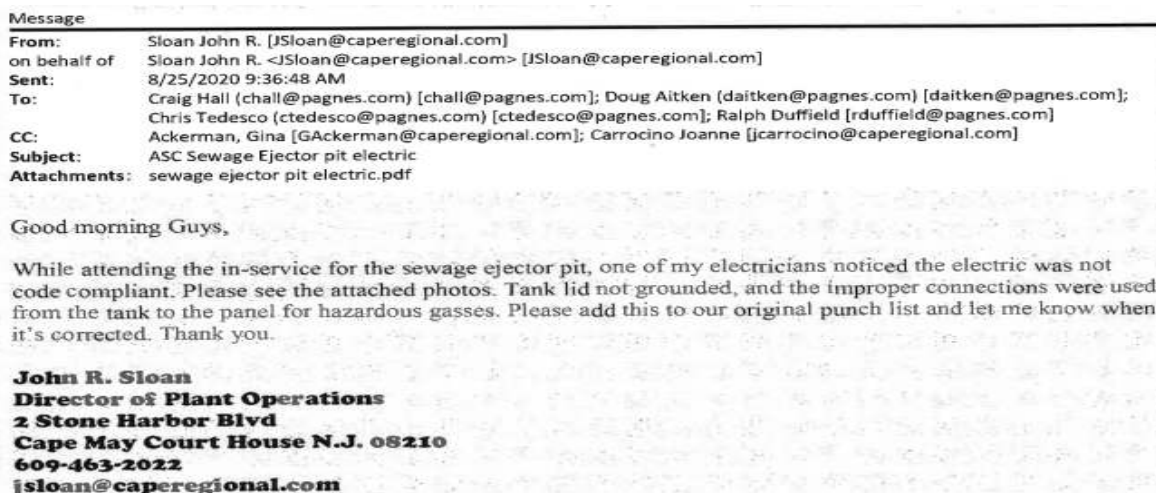
Act. Additionally, Plaintiff cited to the National Electric Code sections “501.10(b)(1)” and “501.15(A)(4).” (Pa1020-22); (Pa720). Plaintiff highlighted these specific NEC citations to the Trial Court. However, the Court overlooked same and erroneously held that “that specific section is not cited in the brief” 2T at 26:10-11, which is erroneous. See (Pa720) (“Electric in the sewage ejector pit was non-complaint with the National Electric Code sections 501.10(b)(1) and 501.15(A)(4). Id. at CRMC 797-799.”). Plaintiff respectfully submits that this erroneous oversight by the Court, alone, warrants reversal, because the Court explicitly determined that Plaintiff met the remaining elements and requirements within his CEPA claim.

1. The National Electric Code (Pa316, Pa396, Pa433, Pa434, Pa720, Pa1020-22, Pa1173-74)

The most glaring error by the Trial Court was the failure to appreciate the identification and significance of probative, competent evidence highlighted by Plaintiff wherein he notes a violation of law (National Electric Code “NEC” sections 501.10(b)(1) and 501.15(A)(4)). (Pa720). In real time, Plaintiff provided evidence of the violation and cited to the applicable/relevant code before this lawsuit was even filed. This is reversible error because Plaintiff did identify the NEC throughout discovery and in the underlying Motion. Page 41 of Plaintiff’s opposition brief specifically states, “Electric in the sewage ejector pit was non-compliant with the National Electric Code sections 501.10(b)(1) and 501.15(A)(4). Id. at CRMC 797-

799". (Pa720). Exhibit G also included the specific email and pictures with the written citations on them, supporting Plaintiff's allegation. Id.

Prior to being fired and initiating this lawsuit, Plaintiff reported in writing in an August 2020 email to Carrocino – "Need to follow NEC Standards" and "Electric in the sewage ejector pit was non-compliant with the National Electric Code sections 501.10(b)(1) and 501.15(A)(4)." (Pa720); (Pa1020-22). Plaintiff further explained the violations, stating, the "tank lid not grounded and the improper connections were used from the tank to the panel for hazardous gasses." (Pa1020-22)



(Pa1020-21).

On multiple fronts, Plaintiff's email and accompanying annotated photograph demonstrate Plaintiff's reasonable belief that "the electronic was not code compliant," *ibid.*, specifically Section 501.10(B)(1) of the National Electrical Code, which states, "In Class I, Division 2 locations, all wiring methods permitted in 501.10(A) and the following methods shall be permitted: Rigid metal conduit (RMC) and intermediate metal conduit (IMC) with listed threadless fittings")." Relatedly, Section 501.15(A)(4) of the National Electrical Code states:

A conduit seal shall be required in each conduit run leaving a Division 1 location. The sealing fitting shall be permitted to be installed on either side of the boundary *within 3.05 m (10ft) of the boundary*, and it shall be designed and installed to minimize the amount of gas or vapor within the portion of the conduit installed in the Division 1 location that can be communicated beyond the seal. The Conduit run between the conduit seal and the point at which the conduit leaves the Division 1 location shall contain no union, coupling, box, or other fitting except for a listed explosionproof reducer installed at the conduit seal. When the seal is located on the Division 2 side of the boundary, the Division 1 wiring method shall extend into the Division 2 area to the seal.

Id. Here, by disclosing and objecting to his supervisors that the "[t]ank lid [is] not grounded, and the improper connections were used from the tank to the panel for hazardous gases," *and* by providing the regulatory standard Plaintiff reasonably believed was being violated, Plaintiff clearly "identif[ied] the authority that provides a standard against which the conduct of the defendant may be measured." Hitesman,

218 N.J. at 32-33 (citing N.J.S.A. 34:19-3(c)(3)); see also id. at 34-35 (citing Mehlman, Abbamont, and Maimone, at determining that “[i]n each case, the law, regulation, or other authority held to support a CEPA claim . . . identified acceptable and unacceptable practices in the defendant employer’s business”). Thus, Plaintiff’s email establishes both his reasonable belief that Corporate Defendant was in violation of regulations that provide a standard against which Corporate Defendant can be held against, and that he disclosed and objected to his supervisors about his reasonable belief. On this basis, the Trial Court erred in determining—particularly as a matter of law¹⁶—that Plaintiff failed to satisfy the first prong of his CEPA claim.

Plaintiff’s email and accompanying photograph was produced *by Defendants* in discovery October 2022. Plaintiff even sought testimony regarding this particular safety issue at the depositions of Carrocino, Hunter, and Moylett. (Pa316 at 203:15-204:11) (“Q. . . . Do you remember anything about John bringing up what could be a code violation with respect to electric and the installation by the...by the

¹⁶ New Jersey’s Model Jury Charge for CEPA cases underscores that whether Plaintiff maintained such a reasonable belief is an inherently factual issue:

The only thing you must decide with respect to this issue is whether plaintiff actually held the belief that [insert description of alleged wrongful activity, policy, or practice about which plaintiff “blew the whistle”^[16]] was unlawful or in violation of public policy, and whether that belief was reasonable. I charge you that there is a [law] [rule] [regulation] [public policy] that closely relates to the conduct about which plaintiff blew the whistle. That [law] [rule] [regulation] [public policy] states that [insert description of relevant law/rule/regulation/public policy]. You need not decide whether [the alleged wrongful activity] actually violated that [law] [rule] [regulation] [public policy]. The only thing you must decide is whether plaintiff believed that [the alleged wrongful activity] violated the [law] [rule] [regulation] [public policy] that I just described, and, if so, whether plaintiff’s belief was reasonable.

Model Jury Charges (Civil), 2.32, at 4-5 (underscored emphasis in original) (citing Dzwonar, 177 N.J. at 462-64).

construction company? Do you remember anything about that? A. I do not. . . . Q. This is a good thing, right? A. This is good, yeah. No, this is very good.”); (Pa433 at 129:11-18) (“Q. Are you aware that on August 25th of 2020, that Mr. Sloan had complained that there were certain electrical issues in the hospital that were not complaint with Code? A. No. . . .”); (Pa434 at 130:12-15) (“Q. If something like that had been brought to your attention such as like a code issue, electrical issue, or a safety issue, you would have looked into it? A. Yes.”); (Pa396 at 182:5-11) (“Are you aware – were you aware that in August – on August 25, 2020 that Mr. Sloan had complained to Ms. Carrocino that the electric was not code complian[t]? Are you aware that he made that complaint to her? A. No.”).

While identifying the NEC in and of itself is sufficient under Dzwonar and Chiofalo, even assuming *arguendo* it is not, Plaintiff’s identification of the NEC **and** the specific sections that were violated, satisfy the trial Court’s heightened standard of identification, warranting reversal. The Trial Court acknowledged as much at oral argument on reconsideration: Specifically:

MR. McOMBER: I think just look at the picture. I mean, literally, we have a picture where he’s saying -- he’s citing the provisions . . . and then he provided it and he’s saying what’s wrong.

THE COURT: Well, then, why didn’t you – why didn’t you just say at some point you were in the discovery or at least in opposition to the motion for summary judgment, why didn’t you say, you know, whatever that picture cites to? Why didn’t you just say –

MR. LUBER: It's an exhibit. It's cited in the brief. We very specifically –

THE COURT: Okay. . . . I've got to tell you, Mr. Luber, it's not that specific section is not cited in the brief and this is where we this is where we we're all in agreement up to this point. I think this is where we part company in just how specific you have to be. . . .

MR. LUBER: Well, Page 41 [of Plaintiff's Opposition Brief].

(2T at 25:8-26:15).

In sum, Plaintiff did exactly what the Trial Court stated would have been sufficient. A review of the pleadings, testimony, discovery and documentary evidence shows Plaintiff sufficiently identified numerous (and at least one) laws, rules, regulations or mandates of public policy Defendants violated for purposes of CEPA. A chart was provided to the Trial Court to illustrate this point. (Pa1173-74). Plaintiff could not have identified the NEC any more specifically, citing to the exact violation with a picture sent to Defendants in real time. Defendants produced the picture with the specific NEC citation. This alone warrants reversal.

2. The Life Safety Code and National Fire Protection Association Code¹⁷. (Pa217, Pa692-93, Pa1118, Pa1129, Pa1143, Pa1276-81)

The Trial Court likewise erred when finding Plaintiff's identification of the Life Safety Code ("LSC") and National Fire Protection Association Code ("NFPA")

¹⁷ CMS regulates compliance with the LSC and the LSC encompasses the NFPA codes and regulations.

was insufficient because Plaintiff did not “specify which code, which section, or which inspections” were violated. (Pa1276-81).

The Trial Court itself acknowledged Plaintiff engaged in protected conduct under the LSC and NFPA when he reported that Corporate Defendants “w[ere] not in compliance with critical life safety codes, testing and inspection during the furlough,” and that “Plaintiff reported to Carrocino that all critical Life Safety Code testing & inspections are on hold until after the furlough.” (Pa1118) (“Sloan reported to Carrocino in his weekly reports that inspections typically made pursuant to the [NFPA] were not being made.”); (Pa1129) (“Plaintiff reported to Moylett that the exit sign and fire extinguisher inspections were not being completed in accordance with the NFPA. This was not part of the waiver during Covid-19. ‘The following ITM considered critical are not included in the waiver: . . . portable fire extinguisher monthly inspection’”) (internal citations omitted); (Pa1143) (“He reported that preventative maintenance was not getting done ‘in accordance with the compliance code, particularly the National Fire Protection Agency (‘NFPA’).’ He specifically lists emergency lighting testing and inspections, fire extinguisher inspections, emergency shower inspections, gas alarms, emergency light and exit signs, and failing sprinklers.”). The mere fact that these inspections, testing and preventative maintenance were not being completed is the violation. Plaintiff testified “it is a code requirement. It is not suggestive. It is a code requirement” (Pa692-93); (Pa217 at

201:10–202:1).¹⁸ The holding that Plaintiff did not identify the LSC or NFPA – and specific subsections – is contradicted by the record.

Indeed, Defendants solicited testimony from Plaintiff on these issues during his deposition and addressed the citations in their opening summary judgment brief. For example, Plaintiff testified that he reported to Moylett that Defendants were non-compliant with the LSC and NFPA, did not complete the monthly inspections of the exit signs, and did not complete the fire extinguisher inspections. (Pa210 at 171:24-172:9; 173:5-20).

As such, the Court erred when concluding Plaintiff’s identification of the LSC and the NFPA were not specific enough and Plaintiff did not “specify which code, which section, or which inspections” were violated. See Hernandez v. Montville Twp. Bd. of Educ., 354 N.J. Super. 467, 473–74 (App. Div. 2002) (jury was **not** charged with determining if plaintiff’s complaints about the clogged toilets and **unlit exit sign** violated a **particularized** OSHA standard, subsection, or regulation).

3. **CMS: Section 1135 of the Social Security Act (Pa88, Pa754, Pa1116-17, Pa1146, Pa1219-20, Pa1218-34)**

Plaintiff also reported and identified very specific violations of CMS regulations, particularly Section 1135 of the Social Security Act. As detailed in

¹⁸ Plaintiff specifically cited to the LSC and the NFPA. (Pa1276-81) (NFPA 101-7.9.3.1.1; NFPA 101 (Exit Signs); NFPA 25 (Sprinklers); NFPA 10 (Fire Extinguishers; NFPA 101 Life Safety Code §§ 482.41(a)(1), 482.41(b)(1)(i), 482.41(b) (6), 482.41(b)(8)(i)-(ii), 482.41(d)(2), 482.41(d)(4)).

Plaintiff's complaint, discovery, testimony, Defendants' Motion for Summary Judgment, Plaintiff's opposition thereto and Motion for Reconsideration, Plaintiff reasonably believed a CMS Section 1135 waiver needed to be submitted to acquire the protections concerning their non-compliance of regulatory testing.

Defendants *conceded* that Plaintiff properly identified a rule of law. (1T at 18:15-19:12) ("It is undisputed that effective May 1st, 2020, the [CMS] had invoked their power and authority under Section 1135 of the Social Security Act to waive those requirements....Certainly we don't dispute that prior to the issuance of that waiver you could argue that it applies. But here, CMS, the federal government says, we are invoking our statutory power, we are waiving these requirements"); (Pa754 at ¶ 46) ("On April 21, 2020, Sloan emailed Moylett that they needed to discuss submitting a request for a waiver of regulatory testing and other requirements related to the Covid-19 Pandemic...") *id.* ¶ 48 ("Sloan's email attached waiver application documents for Moylett's review"); (Pa88 ¶14) ("On April 21, 2020 Sloan sent Moylett, White, and Carrocino an email with the subject line 'Life Safety Code Compliance.' ... Sloan advised Moylett that they needed to discuss submitting a Section 1135 waiver request regarding life safety code regulatory testing, attaching template Section 1135 documents to his message" (citations omitted)).

The Trial Court likewise found in the "Findings of Fact" section of the summary judgment opinion that "Sloan sent an email to Moylett stating that they

needed to discuss submitting a request for a waiver or regulatory testing and other requirements. . . . Sloan’s email attached the waiver application documents for review,” and “Sloan believed the forms had to be completed and sent to some authority for the hospital to acquire the waiver from compliance with the regulations.” (Pa1116-17 ¶ 4-5). Likewise, the Trial Court correctly *rejected* Defendants’ argument that “Sloan’s complaints regarding his general reference to Life Safety Code Maintenance Requirements cannot be protected activity because Sloan knew a blanket waiver applied.” (Pa1146 ¶ 34). The Trial Court found, “On this record, *it is a question of fact whether the blanket waiver applied*, whether it was applied for by Cape, and whether the blanket waiver was granted and was in effect when Sloan made his complaints.” *Ibid.* (emphasis added).

To be sure, Plaintiff sent an email with the subject: “Life Safety Code Compliance” and referenced and attached the Section 1135 of the Social Security Act waiver documents and guidance. (Pa1218-34). The body of the email states, in pertinent part, “[W]e need to discuss our organization submitting these documents to request a waiver for our **(Non-Compliance)** during the SOE of Covid-19.....we are unable to have our contracted testing companies come in and perform our regulatory testing...” (*Id.* at Pa1218). The attached documents state, in relevant part, “The waiver will allow facilities to delay inspection, testing, maintenance, and certain drills required by the [CMS]” and “Although the enactment of Social

Security Act 1135(2)(B)(1) specifically gives the authority to the [CMS] to waive certain Conditions of Participation waivers will not be granted unless requested by a health care organization and approved by CMS.” (Id. at Pa1219-20).

Given the evidence, the Trial Court’s “finding,” and Defendants’ admissions, there can be no real dispute that Plaintiff properly identified a law he believed was being violated (Social Security Act Section 1135, regulated by CMS) and how it was being violated (not submitting the waiver under Social Security Act Section 1135(2)(B)(1) for their regulatory inspection, testing and maintenance non-compliance). Plaintiff respectfully submits that his clear satisfaction of CEPA’s prong one “identification requirement” warrants reversal.

4. CMS: State Operations Manual. (Pa6, Pa75, Pa186-89, Pa193-94, Pa724-25, Pa869, Pa1115, Pa1500)

The Trial Court also failed to recognize that Plaintiff reported and identified non-compliant temperature and humidity levels in operating rooms. (Pa1500). As thoroughly detailed in Plaintiff’s complaint, testimony, his Opposition to Summary Judgment, Motion for Reconsideration, and Defendants’ document production, Plaintiff reported noncompliance with CMS for out-of-range temperature and humidity levels, presenting ongoing safety issues¹⁹. (Pa1500); (Pa187 at 79:24-

¹⁹ CMS is part of the U.S. Department of Health and Human Services department regulating for the health and safety of all individuals. CMS regulations and policies require Defendants to adhere certain patient and facility standards, including those relating to temperature and humidity levels. See <https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/Downloads/R99SOMA.pdf> ; <https://www.cms.gov/files/document/appendix-u-state-operations-manual>

80:2); (Pa194 at 107:4-108:11); (Pa724-25) (State Operations Manual, available at <https://www.cms.gov/RegulationsandGuidance/Guidance/Transmittals/Downloads/R99SOMA.pdf>). As Plaintiff detailed, CMS regulations require procedures to properly maintain temperatures and humidity levels with respect to the physical environment and “anesthetizing locations” (operating rooms) be in place to preclude microbial growth and infection. Plaintiff testified that CMS requires humidity levels be maintained between 20 and 60 %. (Pa187 at 79:24-80:2). When the relative humidity is above the maximum percentage, operating instruments/supplies are compromised and could severely affect the quality of patient care as operating outside of the temperature range increases infection rates and mold growth. Ibid.

Discovery revealed that Plaintiff raised these concerns throughout his employment to multiple individuals, including Carrocino, on more than 20 occasions, the last time being shortly before his termination. Ibid. Plaintiff testified that he knew this was a violation of CMS regulations; printed the regulations out, put them in a binder; emailed the printouts to Defendant Carrocino (and others); and discussed the safety concerns with the staff requesting the temperature to be lowered in the operating rooms because they were “hot” despite it being non-complaint with

¹⁹ Plaintiff kept a binder of the life safety codes, fire codes, and state codes in his office. (Pa133 at 78:3-18). Plaintiff kept a binder for each code that required compliance. Id. at 81:4-20. Plaintiff’s binder with the printed-out documents containing the out-of-range levels, were left at Corporate Defendants upon his termination and was never returned to him. (Pa187 at 80:3-18). Corporate Defendants have not produced the binder as part of this litigation. (Pa869).

the CMS regulations. (Pa186-87 at 76:7-78:3); (Pa187-88 at 78:20-80:2; 81:10-82:8; 82:17-24; 83:11-15; 84:19-24; 85:16-19); (Pa189 at 88:3-9); (Pa193-94 at 102:4-108:11). Plaintiff testified and noted within his opposition to Defendants' Motion:

Q. Okay. So if I understand you correctly, after having discovered that the temperature and humidity in the Ors as referenced in paragraph 24²⁰ **were outside the parameters set forth in CMS and state regulations** and you communicated that within a month of having begun your employment in 2018 to the people referenced in paragraph 26, you had no further communication with the people in paragraph 26 regarding that topic?

A. I had conversations with all of those individuals throughout my employment...

Even a cursory review of the CMS manual shows its inclusion of regulations for temperature and humidity levels in operating rooms, noting that the ranges must be between 20 and 60 percent to avoid microbial growth and reduce of infection: Temperature, humidity and airflow in anesthetizing locations [operating rooms] must be maintained within standard to inhibit microbial growth, reduce risk of infection...permits new and existing ventilation systems to operate at a RH of 20 percent or greater...CMS recommends that facilities maintain the upper range of RH at 60 percent or less as excessive humidity is conducive to microbial growth and compromises the integrity of wrapped sterile instruments and supplies.

(Pa724-25 ¶45-46).

Tellingly, Defendants also referred to, relied on, and cited same in their opening Motion. (Pa75) Indeed, Defendants solicited extensive testimony from

²⁰ Paragraph 24 of Plaintiff's Complaint reads: "For example, Defendant Cape's main operating rooms and same day surgery operating rooms were being used while the temperature and humidity levels were outside of the permissible range in non-compliance with CMS regulations and State Operations Manual Regulations." (Pa6).

Plaintiff on this very issue, using a document from their own production with one of Plaintiff's complaints on this topic. (Pa1500). ("I received a work order this morning for high humidity in OR's 3 & 4...The thermostats need to be raised so the room humidity is in compliance.") The Trial Court too, highlighted as "Findings of Fact" Plaintiff's reports under this source of law and regulation. (Pa1115) ("Sloan contends that he reported regularly that the temperature and humidity levels in the operating rooms were outside the permissible range and were not compliant with the [CMS] regulations. The issue was discussed at safety meetings, but staff requested that the temperature be lowered despite CMS regulations. Sloan contends he reported these concerns directly to Carrocino at least once a month.")

Despite this backdrop, the lower Court found that Plaintiff did not sufficiently identify the CMS regulations or state operations manual and how it was violated, claiming he failed to provide citations "that would enable this Court and any potential jury to evaluate Plaintiff's claims against a legal benchmark" is respectively, false. (Opinion. 29). As articulated above, this is wholly unsupported by the record and the Trial Court's own factual findings, warranting reversal.

E. The Trial Court Misinterpreted Hitesman, Which Is Readily Distinguishable. (Pa1159)

As discussed above, Plaintiff specifically identified statutes, regulations, and rules of law down to the specific subsections. (Pa1159 at §IV(A). On reconsideration, the Trial Court acknowledged that it exclusively relied upon

Hitesman (while ignoring Hernandez, Abbamont, and Mehlman) and ruled that Hitesman requires a heightened identification requirement. Specifically:

THE COURT: I just think that you have to provide the defendant with that citation and I think that you have to provide the Court with that citation when there's a summary judgment motion. Otherwise I'm just flying blind. How can I make the determination that the plaintiff reasonably did believe that there was a law that was violated?...

THE COURT: [] You're right. *I relied on Hitesman*. If I wrongly relied on Hitesman, then maybe I decided the case wrong but I think that you have to identify the law that you contend was violated. It is not enough to just say executive orders, Center for Disease Control regulations, National Fire Protection Association code, life safety codes and it is not -- it is unreasonable to expect that the defendant and the Court should have to dig through every exhibit in the case to find some reference.

(2T at 31:16-32:18).

Putting aside that Plaintiff did just that – he specifically identified pin-cited statutes, code, rules of law, and regulations before the case was filed, during discovery, at summary judgment, and again on reconsideration – the Court erroneously determined that Hitesman requires more than what is required for a plaintiff to reasonably believe that a law, rule, or regulation was violated, as in Hernandez, Abbamont, and Mehlman. In Hitesman, the plaintiff was a licensed nurse that reported to government officials in the media his belief that the employer hospital was at fault in causing “an increase in respiratory and gastrointestinal symptoms.” 218 N.J. at 18. The plaintiff was terminated and filed suit under CEPA,

alleging the disclosure was protected conduct under CEPA as a licensed registered nurse who reasonably believed the employer engaged in “improper quality of patient care.” Id. at 14-15 (quoting N.J.S.A. 34:19-3(a)(1), (c)(1)).

However, “CEPA defines ‘improper quality of patient care’ as ‘any practice, procedure, action or failure to act of an employer that is a health care provider *which violates any law or any rule, regulation or declaratory ruling adopted pursuant to law, or any professional code of ethics,*’” id. at 29 (emphasis added) (citing N.J.S.A. 34:19-2(f)), and at trial, the plaintiff relied only on the American Nurses Association (“ANA”) Code of Ethics for Nurses, Section 3.5, along with the defendant employer’s handbook, see id. at 22. The Supreme Court affirmed the “Appellate Division[’s] revers[al of] the liability verdict in Plaintiff’s favor” because

the authorities upon which plaintiff relied—the ANA Code, the Bridgeway Employee Handbook and the Bridgeway Statement of Resident Rights—neither measured the adequacy of patient care for purposes of N.J.S.A. 34:19-3(a)(1) and (c)(1), nor expressed a clear mandate of public policy as required by N.J.S.A. 34:19-3(c)(3). [Hitesman v. Bridgeway, Inc., 430 N.J. Super. 198,] 215-19 [(App. Div. 2013)]. The panel held that the liability verdict was accordingly against the weight of the evidence. Id. at 209. It characterized the parties’ dispute as nothing more than a “difference of opinion,” which did not give rise to a cause of action under CEPA. Id. at 219.

Id. at 24. Concurring with the Appellate Division, the Supreme Court determined the ANA and the defendants’ handbook articulates no public policy with respect to the control of infectious disease. In contrast to the guide at issue in Abbamont, 138

N.J. at 424, which specifically incorporated administrative regulations addressing safety, the Bridgeway Employee Handbook sets forth no authority which could be construed as an expression of public policy regarding infection control.” Id. at 38.

Here as an initial matter, Plaintiff is not a licensed medical provider and therefore is not relying upon the “improper quality of patient care” provision of CEPA. Moreover, as set forth above, Plaintiff disclosed and objected to his supervisors about conduct by Defendants which he reasonably believed violated various laws, rules, and regulations promulgated pursuant to law, and in so doing, a jury can weigh Defendants’ conduct against the authoritative standards that Plaintiff reasonably believed were violated. Accordingly, Plaintiff respectfully submits he readily satisfies the first element of CEPA’s “identification requirement,” and the facts of his case are more comparable to Mehlman, Hernandez, Maimone, and Abbamont, while Hitesman is readily distinguishable.

V. CONCLUSION

For these reasons, this matter should be reversed and remanded to the Trial Court.

Respectfully submitted,

Dated: November 25, 2024

/s/ Matthew A. Luber

Matthew A. Luber, Esq.

McOMBER McOMBER & LUBER, P.C.

Attorneys for Plaintiff, John Sloan

JOHN SLOAN,

Plaintiff-Appellant,

v.

**CAPE REGIONAL MEDICAL
CENTER, INC., CAPE
REGIONAL HEALTH SYSTEM,
INC., ED MOYLETT, JOANNE
CARROCINO, MARK GILL, and
BYRON HUNTER,**

Defendants-Respondents.

:
: **SUPERIOR COURT OF NEW**
: **JERSEY, APPELLATE DIVISION**
:
: Docket No. A-003581-23T1
:
: On Appeal From:
: Superior Court of New Jersey
: Law Division – Cape May County
: Docket No. CPM-L-462-20
:
: Sat Below:
: Hon. James H. Pickering, J.S.C.
:
:
:

**BRIEF OF DEFENDANTS-RESPONDENTS CAPE REGIONAL
MEDICAL CENTER, INC., CAPE REGIONAL HEALTH SYSTEM,
INC., ED MOYLETT, JOANNE CARROCINO, MARK GILL, AND
BYRON HUNTER**

FOX ROTHSCHILD LLP

Formed in the Commonwealth of Pennsylvania

Jacob S. Perskie, Esq. (ID No. 020862007)

Brian J. McGinnis, Esq. (ID No. 178652015)

Midtown Building, Suite 400

1301 Atlantic Avenue

Atlantic City, NJ 08401

(609) 348-4515 (tel.); (609) 348-6834 (fax)

jperskie@foxrothschild.com

bmcginnis@foxrothschild.com

Attorneys for Defendants-Respondents

Dated: January 14, 2025

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I. PRELIMINARY STATEMENT

This is a CEPA case. At issue is whether a CEPA plaintiff may evade summary judgment by gaming his discovery obligations; refusing to provide substantive responses to requests for the law, rule, regulation, or clear mandate of public policy on which the plaintiff relies; and, providing instead only broad categories of authority rather than the actual, specific provisions relating to his alleged whistleblowing? The trial court said “no.” CEPA is not a guessing game for defendants, and plaintiffs must identify the basis of their claims or face summary judgment. Such is the case here.

Defendants-Respondents are a hospital, hospital executives, and a health system located in Cape May County. In 2018, the hospital hired Plaintiff-Appellant John Sloan as its Director of Plant Operations, with responsibility for overseeing all facilities and maintenance functions at the hospital. On October 16, 2020, after an investigation, the hospital terminated Sloan’s employment after discovering he had botched a critical element of HVAC renovations during the COVID-19 pandemic and because he was dishonest during an investigation into his errors. Sloan filed suit under CEPA and alleged numerous instances of purported whistleblowing, which, he claimed, caused his termination.

Discovery spanned nearly three years, during which Defendants-Respondents served interrogatories and document requests on Sloan requiring him to identify—and produce copies of—the laws, rules, regulations, and clear mandates of public policy on which he purportedly relied. Sloan did not answer directly and produced no such documents, choosing instead to incorporate the allegations of his Complaint by reference. At no time during 951 days of discovery did Sloan amend or supplement his interrogatory answer, nor did he provide any additional detail when Defendants-Respondents reviewed these allegations at length with Sloan during three days of deposition.

Defendants-Respondents sought and the trial court granted summary judgment in favor of Defendants-Respondents as a matter of law because Sloan failed sufficiently to identify the specific law, rule, regulation or clear mandate of public policy he reasonably believed Defendants-Respondents to have violated. Instead, the trial court held that Sloan had identified only *generalized categories* of authority by common name and had not identified—during nearly three years of discovery and over three days of deposition—sufficiently specific provisions therein or citations thereto.

Faced with that dismissal, Sloan now mischaracterizes both the summary judgment record and binding CEPA precedent. He misconstrues CEPA's plain

text requirements and makes numerous arguments he failed to present to the trial court on the summary judgment record. None of these arguments have merit, nor do these strategies support a reversal of summary judgment.

But Sloan’s brief is even more remarkable for what Sloan does not say. Sloan neglects to mention his failure to respond sufficiently to a simple interrogatory. He declines to address the trial court’s rebuke of his gamesmanship of the discovery process and his attempt to engineer trial by surprise. He avoids any mention of the trial court’s factual findings, based on his own admissions, that he did not actually report many of the issues on which he claimed to be whistleblowing—an independent basis for the trial court’s decision, which Sloan does not contest and therefore waives here. And, he merely rehashes arguments twice rejected by the trial court because they turn on dubious interpretations of the law of CEPA.

This Court should affirm the decision below.

II. PROCEDURAL HISTORY

On December 21, 2020, Sloan filed a Complaint alleging that Defendants-Respondents had violated the Conscientious Employee Protection Act (“CEPA”), N.J.S.A. 34:9-1, et seq. and wrongfully terminated his employment in violation of public policy under New Jersey common law.

(Pa1).¹ Defendants-Respondents filed a timely Answer. (Pa29). Discovery concluded 951 days later, on August 31, 2023. (Da9).

On December 8, 2023, Defendants-Respondents filed a Motion for Summary Judgment, which Sloan opposed. (Pa46, Pa675). The trial court heard oral argument on January 19, 2024. (Da12, 1T). The trial court set, then variously adjourned, trial dates for February 4, 2024; March 18, 2024; May 13, 2024; and June 10, 2024, and several pretrial conferences were held. (Da11–14). Sloan filed and exchanged his pretrial materials on March 8, 2024, and Defendants-Respondents filed and exchanged theirs on March 12–13, 2024. (Da12–14).

Because Sloan’s pretrial disclosures and materials bore directly on issues raised in the then-pending summary judgment motion, Defendants-Respondents filed a letter to the trial court on March 26, 2024. (Da1–6). Sloan responded by letter on April 10, 2024. (Da7–8).

On May 17, 2024, the trial court issued an Opinion and Order granting Defendants-Respondents’ motion for summary judgment and dismissed Sloan’s

¹ As used herein “Pa” refers to Plaintiff-Appellants’ appendix; “Da” refers to Defendants-Respondents’ appendix; “1T” refers to the oral argument transcript for Defendants-Respondents’ motion for summary judgment dated January 19, 2024; “2T” refers to the oral argument transcript for Plaintiff-Appellants’ motion for reconsideration dated July 12, 2024; and “3T” refers to the oral argument transcript for Defendants-Respondents’ motion to compel dated November 4, 2022.

claims with prejudice and in their entirety. (Pa1111). On June 6, 2024, Sloan filed a motion for reconsideration. (Pa1155). After receiving full briefing on the motion, the trial court heard oral argument on July 12, 2024. (Da15; 2T). The trial court denied Sloan's motion orally the same day, issuing a written Order on July 15, 2024. (Da15–16, 2T). Sloan's Notice of Appeal followed on July 18, 2024. (Pa1482).

III. FACTS MATERIAL TO THE ISSUES ON APPEAL

Defendant-Respondent Cape Regional Medical Center, Inc. is a hospital located in Cape May Court House, New Jersey. (Pa51). Its parent corporation, which has no employees, is Defendant-Respondent Cape Regional Health System, Inc. (Pa273 at 33:9–16; Pa336 at 22:15–25). At all times relevant hereto, the individual Defendants-Respondents served in the following positions at the hospital: (1) Joanne Carrocino, Chief Executive Officer, (Pa273, at 30:11–31:2); (2) Mark Gill, Chief Financial Officer, (Pa334, at 15:8–16:5); (3) Byron Hunter, Vice President of Human Resources, (Pa355, at 20:1–7); and (4) Ed Moylett, Director of Human Resources and Safety Officer, (Pa405, at 16:3–17:10). The hospital hired Sloan as its Director of Plant Operations in 2018. (Pa182, at 61:9–13). In this role, Sloan bore ultimate responsibility for all aspects of plant, infrastructure, and maintenance for the

hospital. (Pa128, at 61:7–16; Pa132, at 76:20–77:16; Pa498–99). Sloan reported directly to Carrocino, the CEO. (Pa126, at 53:1–19).

In March 2020, with the beginning of the COVID-19 pandemic, it became clear that the hospital needed to convert intensive care unit (“ICU”) rooms 1–6 into negative pressure rooms to prevent air from ICU rooms containing COVID-positive or presumptive positive patients from re-circulating throughout the hospital. (Pa156, at 170:11–24; Pa177, at 40:14–18; Pa501). Although Sloan did not have state certification in heating, ventilation, and air conditioning (“HVAC”) work, (Pa199, at 128:7–12; Pa495–96), two members of his team—Sam White and Eric Raymond—were knowledgeable, state-certified, and highly experienced in HVAC work. (Pa456, at 62:13–18; Pa459, at 77:5–17; Pa468, at 15:17–16:10). Sloan, however, froze White and Raymond out of the HVAC renovations in ICU rooms 1–6, electing instead to direct the project himself. (Pa456, at 62:8–18; Pa479, at 58:5–10).

Sloan then botched key components of the renovation; specifically, in reconfiguring ICU rooms 1–6, Sloan neglected to close or cover the return vents in those rooms. (Pa449, at 34:1–15; Pa479, at 61:10–19). As a result, potentially COVID-contaminated air within ICU rooms 1–6 could be drawn through those return vents to Air Handling Unit (“AHU”) 18 and re-circulated

in the hospital through the nearby AHU 19, which supplied air to the hospital building's east lobby. (Pa447–48, at 30:20–31:17, 31:22–25).

In late March and early April 2020, after Sloan completed the renovations without their involvement, White and Raymond each met with Sloan to share concerns that the renovation had not been completed properly. (Pa449, at 34:1–15; Pa481, at 66:2–6). Raymond specifically advised Sloan that one of two things needed to happen to fix Sloan's mistakes, either: (1) close/cover the return vents in ICU rooms 1–6; or, (2) install a HEPA filter on AHU 18 to filter out potential contaminants. (Pa481, at 66:2–67:15; Pa485–86, at 85:15–86:16). Raymond brought Sloan specifications and cost quotes on the HEPA filter he recommended, but Sloan waved him off, stating that the cost of the filter (approximately \$6,000–\$7,000) was too much and that “the lady in the corner office,” i.e., Carrocino, the CEO, “wouldn't go for it.” (Pa485–86, at 85:15–86:16). There is no evidence in the record that Sloan actually discussed the HEPA filter with Carrocino or that Sloan covered the return vents in ICU rooms 1–6 in the succeeding months.

On June 5, 2020, Sloan sent an email to, *inter alia*, Carrocino, in which he claimed that the hospital's pandemic-related furloughs negatively affected his department's ability to complete required inspections, testing and maintenance. (Pa524–25; Pa338, at 30:3–31:10). This email frustrated

Carrocino, who reminded Sloan that his was not the only department that had been subject to furloughs, and that while other departments were doing the best they could under the circumstances, Sloan was “whining” and “making it all about [himself].” (Pa302, at 147:19–148:11). Carrocino further reminded Sloan that “everybody is working 24/7” and “nurses [were] risking their lives up in the ICU.” (Pa302, at 147:19–148:11). Carrocino emailed Sloan on the same day, reminding him that she had “made it very clear to [him] that critical life safety equipment had to be maintained in whatever furlough plan [he] put together” and that Sloan had “said on numerous occasions that [he] understood and it was not a problem.” (Pa527). Carrocino then immediately directed Sloan to bring back from furlough several members of his department, and three of the six department members subject to furlough were approved to work by June 9, 2020. (Pa527–28; Pa532–36; Pa233–35, at 53:11–58:16).

Months later, in late September 2020, Moylett attended a meeting with White, Sloan, and the Hospital’s security director. (Pa422, at 83:7–16). White again shared concerns that he was uncomfortable with Sloan’s renovation in the ICU. (Pa422, at 83:7–16). After the meeting, Moylett asked White to explain why he was uncomfortable. (Pa423, at 89:5–14). White responded by physically showing Moylett that Sloan had failed to close the return vents in ICU rooms 1–6, pointing out the still-uncovered, open return vents and

explaining the risks with respect to potential re-circulation of contaminated air. (Pa423, at 89:9–19). Moylett promptly advised Hunter of this conversation, and Hunter commenced an investigation. (Pa422, at 84:1–14).

Hunter and Moylett interviewed Raymond and White separately, each of whom recounted the various issues and their attempts to address them with Sloan; Raymond and White’s recollections of events during these interviews was consistent. (Pa371, at 83:1–14; Pa537–551). When Hunter and Moylett interviewed Sloan on October 5, 2020, Hunter asked Sloan to explain his work renovating the ICU. (Pa424, at 90:6–12; Pa537–551). When Hunter asked Sloan whether the return vents in ICU rooms 1–6 had been covered; Sloan responded that they had been. (Pa377, at 106:11–12; Pa424, at 92:6; Pa537–551). Later that day, Sloan emailed a floor plan to Hunter and Moylett to justify his actions.² (Pa553–556).

Following that meeting, Hunter directed White to check the return vents in ICU rooms 1–6, which revealed (through photographs White took on his cell phone) that the return vents in four of the six ICU rooms were neither closed nor covered. (Pa552–57). White sent the photographs, which depicted a “tissue test” indicating that air was being drawn into the open and uncovered return

² The floor plans provided by Sloan indicated that return vents had been closed in other areas Sloan converted but not for ICU rooms 1–6. (Pa553–556).

vents, to Hunter and Moylett that same day. (Pa552–57; Pa431, at 118:8–16).

Hunter and Moylett next met with Sloan days later, on October 9, 2020.

(Pa541–51, Pa562–64).

By then, Hunter had reviewed the floor plans Sloan had provided several days prior. (Pa562–64). Hunter noted that the floor plans did not state whether ICU return vents in ICU rooms 1–6 had been covered or closed. (Pa562–64; Pa541–51). Despite the fact that Moylett and White had verified that four of the six ICU rooms had return vents, which were neither covered nor closed a mere four days prior, *Sloan told Hunter and Moylett that the ICU rooms did not even have return vents.* (Pa562–64; Pa541–51). When pressed, Sloan then changed his answer, saying he would need to go up to the ICU to confirm for himself. (Pa562–64; Pa541–51; Pa377, at 106:11–107:18).

In other words, at this second meeting, Sloan told Hunter that Sloan needed to check ICU rooms 1–6 to confirm the existence of the return vents he had previously assured Hunter mere days earlier that were already covered. (Pa562–64; Pa541–51; Pa377, at 106:11–107:18). Hunter then discussed with Sloan the effect of uncovered returns on AHU 18 and the risk of re-circulating contaminated air and asked Sloan whether anyone had suggested, and whether Sloan had rejected as too expensive, the solution of installing a HEPA filter in

AHU 18; Sloan denied both. (Pa562–64; Pa541–51; Pa377, at 106:11–107:18; Pa425, at 95:11–19).

Hunter then confronted Sloan with the fact that Hunter had already confirmed there were return vents in the ICU rooms 1–6 and shared his concern that potentially contaminated air may have been re-circulated in the Hospital as a result of Sloan’s errors. (Pa562–64; Pa541–51; Pa377, at 106:11–107:18). Sloan had no explanation. (Pa425, at 96:25–97:4). At the conclusion of the meeting, Hunter advised Sloan that he was suspended. (Pa425, at 97:7–11). Hunter then advised Carrocino, Sloan’s direct supervisor. (Pa317, at 207:9–208:11; Pa317–18, at 209:17–212:25; Pa319, at 215:4–24). Due to Sloan’s egregious errors and his shifting explanations (i.e., first stating that the return vents were covered, then stating the rooms at issue had no such vents, then shifting to say he was not sure and needed to check), Carrocino lost confidence in Sloan’s ability to do his job and decided to terminate Sloan’s employment. (Pa321, at 225:21–226:12). On October 16, 2020, Hunter, Moylett, and Carrocino met with Sloan to inform him of his termination for poor performance and dishonesty. (Pa321–22, at 22:21–226:12; Pa398, at 192:13–17).

On December 21, 2020, Sloan filed a Complaint in Superior Court alleging that he had been terminated for whistleblowing, in violation of CEPA,

and that he was terminated in violation of public policy under Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980). (Pa1). Sloan's complaint detailed a series of alleged internal complaints to his supervisor, Carrocino, which he claimed were the true reason for his termination, including that he had reported: (1) illegal overstay of patients in the hospital's behavioral health unit ("BHU"); (2) insufficient supply and/or improper use of personal protective equipment ("PPE"); (3) failures of hospital personnel to follow COVID-19 social distancing protocols; (4) a purported inability to complete preventative maintenance and life safety inspections as a result of furloughs; and (5) non-compliant humidity and temperature levels in the hospital's operating rooms. (See generally, Pa1–28). Defendants-Respondents filed a timely Answer, and discovery commenced. (Pa29).

During the ensuing 951 days of discovery, Defendants-Respondents requested through interrogatories that Sloan specifically identify the sources of authority upon which he purported to rely to support his CEPA claim. (Pa579–80). Sloan declined to do so, choosing instead to refer Defendants-Respondents to his Complaint:

46. Set forth the activity, policy, or practice of Defendants that you believe violated a law, or a rule or regulation promulgated pursuant to the law.

ANSWER: [. . .] [W]ithout prejudice to the right of Plaintiff to amend, supplement, and/or modify his

response, *Plaintiff refers counsel to the facts previously disclosed at length in the Complaint, which speak for themselves.*

47. Set forth the law, or the rule or regulation promulgated pursuant to law, that the activity, policy, or practice of Defendants identified in the preceding Interrogatory allegedly violated.

ANSWER: Plaintiff incorporates by reference the response to Interrogatory No. 46.

[* * *]

49. Do you contend that your employment with Defendants was terminated contrary to a clear mandate of public policy? If your answer is “yes,” identify the public policy that Defendants violated in terminating your employment and set forth whether that public policy is contained in any of the following: (a) legislation; (b) administrative rule or regulation; (c) judicial decision; and/or (d) professional code of ethics.

ANSWER: [. . . .] [W]ithout prejudice to the right of Plaintiff to amend, supplement, and/or modify his response, *Plaintiff refers counsel to the facts previously disclosed at length in the Complaint, which speak for themselves.*

(Pa579–80) (emphasis supplied).³

During depositions on July 11, 2022, and September 8, 2022, Defendants-Respondents questioned Sloan at length regarding the allegations

³ Sloan’s objections to these interrogatories are omitted because Sloan has abandoned any argument that the interrogatories were objectionable by failing to raise or argue this point in his opening brief. See § IV-A-2, *infra*. Nevertheless, they are located at Pa579–80.

in his complaint and the provisions of authority on which he purported to rely. (See generally, Pa113–219). At the conclusion of the September session, Defendants-Respondents requested an additional day of deposition to review each of sixteen lengthy weekly reports Sloan emailed to Carrocino, which Sloan contended in his complaint to be a key vehicle for his alleged whistleblowing. (Pa214–15, at 189:9–192:19). When Sloan’s counsel refused, Defendants-Respondents filed a motion to compel Sloan’s continued deposition, and Sloan filed a cross-motion for a protective order. (Pa214–15, at 189:9–192:19; Da10).

On November 4, 2022, the trial court held oral argument, ultimately granting Defendants-Respondents’ motion to compel Sloan’s continued deposition. (Da54). During argument, the trial court highlighted Sloan’s gamesmanship during his depositions as a basis to grant the motion:

. . . [T]his witness [i.e., Sloan] could be evasive, intentionally elusive, it looked to me, not very cooperative, didn’t want to give straight answers.

I got the impression he kind of thought it was a game, maybe a match of wits. I didn’t like some of what I saw from him. Getting a simple, straight answer from him, at times, took two or three pages of questions, when he could have just answered the question the first time with a straight answer. I frankly was a little bit taken aback by that

I read about 55 pages [of deposition transcript], and I probably came up with six to eight examples of him not being straight.

(3T, at 4:23–5:10).

Sloan’s deposition concluded on December 5, 2022. (Pa220).

Defendants-Respondents painstakingly reviewed each of the sixteen weekly reports and, for each, asked Sloan whether the report contained any complaint by him that social distancing requirements were not being followed, that there was inadequate PPE, that he did not have proper access to ICU rooms 1–6 (i.e., to close the return vents), or that the operating room was out of compliance with temperature and humidity requirements. In response to each of these inquiries, Sloan admitted that he had not actually reported those issues in his weekly reports. (Pa241–260; Pa94–95).

Discovery concluded on August 31, 2023, after 951 days, during which Sloan neither served any amendment, supplement, or modification of his responses to the above-referenced interrogatories, nor produced any document representing any specific provision of purported authority on which he allegedly relied. (Da1). On December 8, 2023, Defendants-Respondents filed a Motion for Summary Judgment, arguing *inter alia* that Sloan had failed to identify a cognizable source of law with the minimum specificity CEPA requires. (E.g., Pa46, Pa90–92). The Court held oral argument on January 19,

2024. (Da12, 1T). As trial dates were set for February 4, 2024, March 18, 2024, May 13, 2024, and June 10, 2024, the parties exchanged pretrial materials, and the trial court held several pretrial conferences. (Da11–14).

As part of his March 8, 2023, pretrial information exchange, Sloan listed the following documents among his intended trial exhibits:

LLLL. Center for Medicare & Medicaid Service (“CMS”) Code Requirements; MMMM. Department of Health & Human Services CMS Mannuel [sic]; NNNN. Centers for Medicare & Medicaid Services State operations Manuel [sic]; OOOO. National Fire Protection Association Codes & Standards; PPPP. Life Safety Code; TTTT. Central [sic] for Disease Control Regulations.

(Da 4–6). Because these materials were not produced, nor were specific provisions therein sufficiently identified, Defendants-Respondents filed a letter to the trial court on March 26, 2024, in further support of the summary judgment motion. (Da1–6). Sloan responded on April 10, 2024. (Da7–8).

The trial court granted the motion for summary judgment in a May 17, 2024, opinion and order. (Pa1111). On June 6, 2024, Sloan filed a motion for reconsideration, which the trial court denied in an oral opinion after oral argument on July 12, 2024. (Pa1155, 2T). A written order followed on July 15, 2024. (Pa1480). Sloan filed a Notice of Appeal on July 18, 2024. (Pa1482).

IV. LEGAL ARGUMENT

This Court should affirm for any of several reasons. Sloan raises numerous arguments on appeal that he did not raise below. He misconstrues the CEPA case law and mischaracterizes the trial court's findings. And, he omits any explanation for his transparent attempt to game his discovery obligations. Because this Court should not entertain such tactics, and because the trial court's decision was correct under CEPA, this Court should affirm.

A. Standard of Review

1. Summary Judgment

Review of a trial court's entry of summary judgment is *de novo*. Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013) (internal citation omitted). A trial court must grant summary judgment where the record shows that "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment . . . as a matter of law." Rule 4:46-2(c). Although the record is viewed in the light most favorable to Sloan, summary judgment is nevertheless appropriate where the undisputed material facts show that no "rational factfinder [could] resolve the alleged disputed issue," or any component thereof, in Sloan's favor. Brill v. Guardian Life Ins., 142 N.J. 520, 540 (1995).

In the context of summary judgment, a fact is material only where it bears directly on the applicable legal elements of Sloan's CEPA claim. See, Brill, 142 N.J. 520 at 528–535; e.g., Celotex Corp. v. Catrett, 477 U.S. 317,

317–18 (1986) (stating that materiality requires a fact to be “essential to that party’s case, and on which that party will bear the burden of proof at trial”). Similarly, a material fact is only genuinely in dispute if it would require resolution by a jury; in light of CEPA’s burden of persuasion, mere speculation, earnest beliefs, or gut feelings are not enough. Brill, 142 N.J. at 540; Rule 4:46-2(c); e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249–51 (1986) (stating a dispute is genuine if it “properly can be resolved only by a finder of fact because [it] may reasonably be resolved in favor of either party” but not where “evidence is merely colorable” or “not significantly probative.”).

Crucially, Sloan may not manufacture a sufficiently genuine dispute of fact based on speculation, innuendo, or by merely contradicting his own sworn testimony. See generally Shelcusky v. Garjulio, 172 N.J. 185, 194–95 (2002); e.g., Jiminez v. All American Rathskeller, Inc., 503 F.3d 247, 251 (3d Cir. 2007) (stating an employee may not manufacture “a material issue of fact to defeat summary judgment” by merely “disputing his . . . own sworn testimony”) (internal quotation omitted). Where, as here, the factual record shows that Defendants-Respondents “must prevail as a matter of law,” the trial court “should not hesitate to grant summary judgment.” Brill, 142 N.J. at 540.

2. Scope of the Appeal

An appellant must raise any issue for which he requests appellate review in his opening brief. See generally, Rule 2:6-2(a). Failing to do so operates as a waiver, as appellate courts generally decline to address arguments not raised in the appellant’s opening brief. E.g., State v. Smith, 55 N.J. 476, 488 (1970); In re Bell Atlantic-New Jersey, 342 N.J. Super. 439, 442–43 (App. Div. 2001); Selective Ins. Co. of America v. Hojnoski, 317 N.J. Super. 331, 335 (App. Div. 1998); Interchange State Bank v. Veglia, 286 N.J. Super. 164, 188 (App. Div. 1995); Warren Twp. v. Suffness, 225 N.J. Super. 399, 412 (App. Div. 1988).

Sloan concedes that his appeal is “narrow” and that “the only issue on appeal is whether [Sloan] sufficiently identified at least one law, rule or regulation he believed Defendants violated.” (Pb1, Pb31). Sloan does not contest any of the following in his opening brief: (1) the entry of summary judgment on all claims as to Defendant-Respondent Mark Gill, (Pa1153); (2) the entry of summary judgment as to his common law claim for wrongful discharge in violation of public policy under Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980), (Pa1153); (3) the trial court’s denial of his motion for reconsideration, (Pa1480); (4) the trial court’s undisputed fact findings at summary judgment with respect to admissions he made in deposition testimony, (Pa1147–49); (5) the propriety of Defendants-Respondents interrogatories and/or document requests at issue; or (6) his ongoing obligation

promptly to supplement and/or amend interrogatories and to produce documents relevant to his claims during discovery pursuant to Rules 4:17 and 4:18. (See generally Pb1–50). Sloan’s failure to raise or argue these matters in his opening brief is a waiver, and the Court should disregard any belated reliance on the same by Sloan. Suffness, 225 N.J. Super. at 412.

B. This Court Should Reject the Numerous New Arguments Sloan Failed to Raise at the Summary Judgment Stage (Pa1317–21).

In New Jersey, “it is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available” Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); see also State v. Witt, 223 N.J. 409, 419 (2015) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)); State v. Galicia, 210 N.J. 364, 383 (2012) (stating “[g]enerally, an appellate court will not consider issues, even constitutional ones, which were not raised below.”); Brock v. Pub. Serv. Elec. & Gas Co., 149 N.J. 378, 391 (1997); North Haledon Fire Co. No. 1 v. Borough of North Haledon, 425 N.J. Super. 615, 631 (App. Div. 2012) (“[A]n issue not raised below will not be considered for the first

time on appeal.”); Soc’y Hill Condo Ass’n v. Soc’y Hill Assocs., 347 N.J. Super. 163, 177–78 (App. Div. 2002).⁴

Similarly, a motion for reconsideration under Rule 4:49-2, which is already limited to extremely narrow grounds, does not “provide the litigant with an opportunity to raise new legal issues” or factual matters that were omitted from the underlying motion.⁵ Medina v. Pitta, 442 N.J. Super. 1, 18 (App. Div. 2015); Del Vecchio v. Hemberger, 388 N.J. Super. 179, 188–89 (App. Div. 2006) (observing that a motion for reconsideration should be denied where it raises facts previously known or knowable to the movant that the movant failed to raise or argue prior to entry of judgment); see also, D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); Rule 4:49-2.

Sloan raises numerous arguments on appeal that he did not make in his brief or at oral argument in the trial court at the summary judgment stage. Sloan either raises these arguments for the first time on appeal or first presented them to the trial court on his motion for reconsideration, which is

⁴ Although there are rare exceptions to this rule for jurisdictional issues and matters of substantial public interest, see e.g., Nieder, 62 N.J. at 234, Sloan does claim that any such exception applies and thereby waives any such argument. Id.

⁵ In his brief, Sloan does not argue that the trial court improperly denied his motion for reconsideration, (see generally Pb1–50), which provides an independent basis on which this Court must reject arguments Sloan presented for the first time on reconsideration. Nieder, 62 N.J. at 234; Medina, 442 N.J. Super at 18.

not the subject of this appeal. (See generally, Pb1–50). Because these arguments are untimely, this Court should affirm. Nieder, 62 N.J. at 234.

1. Sloan Declined to Distinguish *Hitesman v. Bridgeway* at the Summary Judgment Stage (Pa1317–18).

Sloan argues that the trial court misapplied Hitesman v. Bridgeway, 218 N.J. 8 (2014), insisting that this case is distinguishable. (Pb3, Pb47–50). Setting aside that his arguments are substantively wrong and inconsistent with CEPA case law and the discovery obligations of every litigant, Sloan declined to raise this argument on summary judgment. (Pa675–742). As such, the Court should disregard these untimely arguments and affirm. Nieder, 62 N.J. at 234.

Defendants-Respondents cited Hitesman extensively in their summary judgment briefing and oral argument before the trial court, arguing *inter alia* that Sloan’s reference only to *generalized categories* of authority rather than specifically identifying the source(s) of law upon which he purported to rely, was dispositive. (Pa83–86, Pa1105; see generally 1T). Sloan did not cite, describe, or attempt to distinguish Hitesman in his summary judgment brief in the trial court. (See generally, Pa675–742). Nor did he make any such argument or otherwise refer to Hitesman during oral argument before the trial court. (See generally 1T). Sloan’s failure to argue that Hitesman was distinguishable at the summary judgment stage precludes him from doing so

for the first time on appeal; here, such a failure is also dispositive. Nieder, 62 N.J. at 234, Hitesman, 218 N.J. at 40–41.

Raising the argument for the first time on reconsideration, Sloan claimed that Hitesman is distinguishable on the grounds that the court denied summary judgment and the matter proceeded to trial. (Pa1188–89). But Sloan misconstrues Hitesman’s procedural posture. See § III-C-2, infra. Sloan’s argument is also untimely as a matter of law, as a litigant may not raise new arguments for the first time on a motion for reconsideration that could have been raised on the underlying motion. Medina, 442 N.J. Super. at 18; Del Vecchio, 388 N.J. Super. at 188–89; D’Atria, 242 N.J. Super. at 401.

Now Sloan attempts to distinguish Hitesman on *different* grounds, which he failed to raise in the trial court both on summary judgment and on reconsideration. Sloan now argues for the first time on appeal that Hitesman is limited to CEPA cases under the licensed health care professional “improper quality of care” prong of N.J.S.A. 34:19-1(a)(1). (Pb 47–50). Here, too, Sloan misunderstands Hitesman’s core point. See, § III-C-2, infra. But assuming *arguendo* that Sloan’s interpretation was correct, which it is not, he may not raise on appeal a new argument he failed to brief or argue in the trial court at the summary judgment stage. Nieder, 62 N.J. at 234. This Court should affirm.

2. Sloan Raised Specific National Fire Protection Association Code and Life Safety Code Provisions for the First Time on Reconsideration (Pa1318, Pa1320–21).

Sloan argues that the trial court’s holding that he failed to “identify the Life Safety Code or National Fire Protection Association – and specific subsections – is contradicted by the record.” (Pb41). In support, Sloan makes the unqualified assertion, unsupported by any citation to the *summary judgment record*, that he properly cited NFPA §§ 101, 25, and 10 and Life Safety Code §§ 482.41(a)(1), 482.41(b)(1)(i), 482.41(b)(6), 482(b)(8)(i)–(ii), 482.41(d)(2), 482.41(d)(4) in the trial court. (Pb41 n.18) (citing only materials attached to Sloan’s Motion for Reconsideration). This is not true. Sloan cited none of these specific provisions in his briefing or oral argument at the summary judgment stage; nor did he identify these specific sections, or produce documents reflecting them, in response to Defendants-Respondents’ interrogatories directly on point. (Pa675–742; 1T; Pa579–80).

Instead, Sloan first raised these specific citations on his motion for reconsideration—a stage at which it is well-established that a party may not present new arguments, issues, or facts to the court. (Pa1276–81); Medina, 442 N.J. Super. at 18; Del Vecchio, 388 N.J. Super. at 188–89; D’Atria, 242 N.J. Super. at 401. This Court should reject Sloan’s arguments to the contrary.

3. The Court Should Reject Sloan’s Citation to Section 1135, which He First Raised on Reconsideration and

which Merely Attempts to Revive Untimely and Legally Deficient Life Safety Code Arguments (Pa1319).

Sloan alleges that he properly “identified very specific violations of CMS regulations, particularly Section 1135 of the Social Security Act” in the trial court. (Pb41).⁶ This, too, is incorrect. Indeed, Sloan first stated to the Court that his alleged whistleblowing relied on Section 1135 in his motion for reconsideration. (See generally, Pa675–742, Pa1178–79). Moreover, this argument fundamentally misconstrues the substance of Section 1135, which empowers the United States Secretary of Health and Human Services to “temporarily waive or modify” various regulatory requirements “during any portion of any emergency period.” 42 U.S.C. § 1320b-5(b).

Thus, this portion of Section 1135’s text provides no mandatory, affirmative obligations on hospitals; rather, it provides a discretionary process by which covered facilities may seek exemptions from *other* regulatory requirements. Id. In other words, Sloan’s belated citation to Section 1135 is a “hail mary” attempt to recharacterize his concerns about purported Life Safety Code compliance into a specific statutory citation that he neglected to identify for the trial court during discovery or otherwise prior to reconsideration in any event. The Court should not entertain this belated and substantively misguided

⁶ Sloan provides no citation to support his proposition that the Social Security Act, a federal statute enacted by Congress, is a “CMS regulation[n].” (Pb41).

argument. Medina, 442 N.J. Super. at 18; Del Vecchio, 388 N.J. Super. at 188–89; D’Atria, 242 N.J. Super. at 401.

4. Sloan First Raised Specific CMS Temperature and Humidity Standards on Reconsideration (Pa1319–20).

Sloan argues that he sufficiently identified CMS temperature and humidity guidelines for hospital operating rooms at the summary judgment stage. (Pb44). In support of this argument, Sloan references hyperlinks in his summary judgment briefing. (Pb45). But this proves the trial court’s point—i.e., the links themselves were to *generalized* links to agency manuals, not specific code sections therein. (Pa1137–38). Sloan’s purported cite to “Section 485.623(b)(5) of the CMS [Centers for Medicare and Medicaid Services] regulations” embodying these requirements appeared for the first time in Sloan’s reconsideration papers. (Pa1180–81). Moreover, *the trial court correctly found, based on Sloan’s own admissions, that Sloan did not actually report purported temperature or humidity issues in the operating room in his weekly reports to Carrocino—which independently precludes this argument, even had Sloan raised it sufficiently on summary judgment.* (Pa1148–49); see also § III-D, infra.

This Court should affirm. Medina, 442 N.J. Super. at 18; Del Vecchio, 388 N.J. Super. at 188–89; D’Atria, 242 N.J. Super. at 401.

C. Because the Trial Court Correctly Analyzed CEPA's Requirements and Sloan's Discovery Burdens in Granting Summary Judgment, this Court Should Affirm (Pa1139–1147).

1. CEPA, Generally (Pa1123–24).

CEPA prohibits employers from retaliating against employees who engage in certain protected whistleblowing actions, such as where an employee:

- a. Discloses, or threatens to disclose to a supervisor . . . an activity, policy or practice of the employer . . . that the employee reasonably believes:

- (1) is in violation of a law, or a rule or regulation promulgated pursuant to law [or]

[* * *]

- c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:

- (1) is in violation of a law, or a rule or regulation promulgated pursuant to law [or that] . . .

- (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare

N.J.S.A. 34:19-3. Notwithstanding its broad premise, CEPA does not govern every workplace complaint—e.g., mere private disagreements with employer practices, however earnest, are insufficient to establish liability. Maw v. Advanced Clinical Communications, Inc., 179 N.J. 439, 445 (2004) (internal

citation omitted). Rather, CEPA requires that an employee complaint about employer conduct implicate a “law,” “rule or regulation promulgated pursuant to law,” or a “clear mandate of public policy.” N.J.S.A. 34:19-3(a)(1), (c)(1), (c)(3).

2. CEPA’s Identification Requirement (Pa1139–1147).

Although CEPA does not require a plaintiff to be an attorney or to prove a violation to legal certainty when making an internal complaint, “the [trial] court must make a threshold determination that there is a substantial nexus between the complained-of conduct” and a legally sufficient source of authority under CEPA—i.e., a law, rule, regulation, or clear mandate of public policy. Dzwonar v. McDevitt, 177 N.J. 451, 464 (N.J. 2003); N.J.S.A. 34:19-3(a)(1), (c)(1), (c)(3). Once litigation commences, a CEPA plaintiff “must, at a minimum, identify authority that applies to the activity, policy, or practice of the employer.” Hitesman v. Bridgeway, Inc., 218 N.J. 8, 16 (2014). Thus, a CEPA plaintiff, with the assistance of their counsel, must identify either a law, rule or regulation, i.e., specific statutory or regulatory provisions, or a clear mandate of public policy, i.e., “an analog to a constitutional provision, statute, and rule or regulation promulgated to law such that . . . there should be a high degree of public certitude in respect of acceptable versus unacceptable conduct. Maw, 179 N.J. at 444; id. at 444–45 (stating further “the legislative

requirement of a ‘mandate’ as opposed to a less rigorous standard for the type of public policy that is implicated”).

The purpose of CEPA’s identification requirement is twofold. First, it permits the parties and the trial court to determine whether the employee’s complaint relates to a legally viable source of authority under CEPA—i.e., a sufficiently specific “law, rule or regulation” or “clear mandate of public policy.” N.J.S.A. 34:19-3(a)(1), (c)(1), (c)(3). Second, it provides the specific benchmark against which the objective reasonableness of the plaintiff’s belief of the employer’s violation may be tested by the factfinder. Dzwonar, 177 N.J. at 464.

Thus, in Hitesman, the court considered a CEPA claim from a terminated health care worker employed at a nursing home. 218 N.J. at 14. The employee initially cited the American Nursing Association standards, the hospital’s employee handbook, and the hospital’s statement of residents’ rights as the law, rule, regulation or public policy underlying his CEPA claim. Id. at 15. The New Jersey Supreme Court rejected these references as insufficient and further held that the employee’s generalized reference to CDC and State health policies was insufficient as a matter of law:

The record does not indicate whether these were the sources to which plaintiff generally referred; at trial, he revealed neither the name nor the contents of the CDC guidelines and state policies, and offered no document

constituting or relating to such guidelines and policies into evidence ***[T]he trial record is devoid of proof that would put the defendant on notice of any CDC or state regulatory standard against which its conduct was to be assessed, or enable the trial judge, the jury, or an appellate court to evaluate plaintiff's claims against the statutory benchmark. In short, plaintiff did not identify, offer into evidence, or cite in his proposed jury instructions any federal or state regulatory 'standard precautions' for infection control.***

Id. at 40–41 (emphasis supplied). The Hitesman court thus held that because the employee relied only on generalized references to authority, without identifying sufficient authority with the required specificity, the employee's claim failed as a matter of law under CEPA. The Court's reasoning in Hitesman is directly on point in this case, and this Court should affirm.

Sloan's attempts to distinguish Hitesman, which he did not argue below at the summary judgment stage, misunderstand the case. (See generally Pa675–742; 1T). ***For the first time on reconsideration***, Sloan argued that Hitesman was procedurally distinguishable because the trial court denied a summary judgment motion in Hitesman and permitted the case to proceed to trial. (Pa1188–89). But, as the Appellate Division noted, that was the point: a ““trial court can and should enter judgment for a defendant”” where, as here, an employee fails to identify sufficiently a “law or policy.” Hitesman v. Bridgeway, 430 N.J. Super. 198, 211–12 (App. Div. 2013) (quoting Dzwonar,

177 N.J. at 463). Indeed, the panel concluded that because the plaintiff failed to meet CEPA’s identification requirement, “his claim . . . *should not have been submitted to the jury.*” Id. at 212 n.7 (emphasis supplied).⁷ The New Jersey Supreme Court affirmed. Hitesman, 216 N.J. at 42.

Now, for the first time on appeal, Sloan argues that Hitesman is distinguishable insofar as its holding is limited to CEPA cases under the licensed health care professional “improper quality of care” prong of N.J.S.A. 34:19-1(a)(1). (Pb47–50). This, too, is incorrect. As the New Jersey Supreme Court expressly stated, “[w]e further hold that a plaintiff asserting his or her employer’s conduct is incompatible with a clear mandate of public policy concerning the public health must, at a minimum, identify authority that applies” to the employer’s activity or practice. Hitesman, 218 N.J. at 15. But even assuming *arguendo* that Sloan’s attempted distinction was correct, which it is not, Sloan does not address the key reasoning behind the Court’s decision in Hitesman—i.e., he offers no argument as to why a CEPA claim should

⁷ Sloan raises the CEPA Model Jury Instructions for the first time on appeal, arguing that only a jury can decide this issue. (Pb37 n. 16). Again: although it is true that whether a CEPA plaintiff’s belief was objectively reasonable is usually a question for the factfinder, the question of whether a law, rule, regulation, or clear mandate of public policy has been sufficiently identified is a determination of law for the Court. Hitesman, 218 N.J. at 40–41. And where no such identification is forthcoming, a CEPA claim “*should not [be] submitted to the jury.*” Hitesman, 430 N.J. Super. at 212 n.7 (emphasis supplied).

proceed to a jury where the employee “reveal[s] neither the name nor the contents of the CDC guidelines and [other] state policies” he allegedly relied upon “and offer[s] no document constituting or relating to such guidelines and policies” in discovery. Id. at 40–41. This failure is dispositive, as the New Jersey Supreme Court correctly held in Hitesman and as the trial court held below. Id. at 41; (Pa1139–1147).

CEPA’s identification requirement is not new, nor is it a high bar. Nevertheless, throughout the proceedings below, Sloan has variously protested this requirement as a “nonexistent,” improperly heightened, or impossible standard. (Pa1195). Sloan’s protests fall flat. Indeed, publicly available complaints filed by Sloan’s counsel in other CEPA cases in Superior Court across the state *routinely* include specific citations to authority purportedly relied upon for alleged whistleblowing—belying the notion that the low bar of CEPA’s identification requirement is somehow unacceptably burdensome. E.g., Harrison v. The Arc of Cape May, Inc., Civil No. CPM-L-89-23, Pa1381, ¶ 11 (identifying the New Jersey Mandatory Overtime Restrictions for Health Care Facilities Act, N.J.S.A. § 34:11-56a31 and corresponding regulations N.J.A.C. 8:43E-8.1) (filed March 6, 2023); Gonzalez v. General Dynamics d/b/a Jet Aviation International, Inc., Civil No. BER-L-3216-23, Pa1399, ¶ 22 (identifying Federal Aviation Administration regulation § 9-1-1 (filed June 20,

2023); Harmon v. IKEA Distribution Services, Inc., Civil No. BUR-L-1043-22, Pa1428, ¶¶ 34–35 (identifying Occupational Health and Safety Administration regulations of powered industrial trucks, 29 C.F.R. § 1910.178(a)(4)) (filed June 3, 2022); Obiedzinski v. Township of Tewksbury, Civil No. HNT-L-391-20, Pa1447–48, ¶ 34 (identifying the New Jersey Farmland Assessment Act of 1964, N.J.S.A. § 54:4-23.1) (filed Oct. 19, 2020).⁸

3. The Trial Court Correctly Analyzed and Applied CEPA’s Requirements in the Context of Sloan’s Discovery Obligations (Pa1139–1147).

In granting summary judgment, the trial court correctly summarized and applied CEPA’s straightforward identification requirement. The trial court noted that Hitesman requires a CEPA plaintiff, with the assistance of his counsel, specifically to identify the applicable authority “so that the jury could determine if there was a law, rule, regulation or clear mandate of public policy that plaintiff reasonably believed had been violated. *A general reference to a law, rule, or regulation, is simply not sufficient.*” (Pa1134) (emphasis supplied).

Crucially, the trial court found that Defendants-Respondents directly requested Sloan to identify the specific sources of authority upon which he

⁸ Because these Complaints are Superior Court records, the Court may properly take judicial notice of the same. See generally, State v. Silva, 394 N.J. Super. 270, 274–78 (App. Div. 2007); N.J. R. Evid. 201(b)(4).

purported to rely in interrogatories. (Pa1136–37). The Court further found that Sloan declined to do so, instead “providing a response which ‘refers counsel to the facts previously disclosed at length in the Complaint, which speak for themselves.’” (Pa1137). The Court then reviewed Sloan’s Complaint and the summary judgment record and determined that Sloan failed to meet CEPA’s identification requirement with sufficient specificity when Sloan elected instead to rely solely on generalized references to authority. (Pa1137–49).

The trial court specifically rejected Sloan’s approach of citing only general categories of purported authority rather than specific provisions therein:

A general reference to [a] “code” is not sufficient; instead, Sloan is required to identify the law, rule, regulation, or other authority that provides a ***definite standard*** by which a jury can measure an employer’s conduct. Sloan has not done that.

Further, it is not up to Cape, or in regard to this Motion, it is not up to the court, to hunt through the ten (10) laws, rules, and regulations which Sloan cites only generally, and only by common name, to find the specific law, rule, or regulation that provides a standard. ***That is Sloan’s obligation.***

(Pa1143) (emphasis supplied). The trial court’s point—i.e., that CEPA requires a plaintiff specifically to identify the authority he relies upon, instead of forcing employers and trial courts to look for the needle of a specific provision in the haystack of an entire *category* or *title* of law—is correct. Hitesman, 216

N.J. at 40–42; Chiofalo, 238 N.J. 541–44; Dzwonar, 177 N.J. at 464. In other words, the trial court adhered to well-established CEPA principles and traditional burdens of proof.

The trial court emphasized that its decision turned not only on its application of well-established CEPA case law, but also Sloan’s disregard of his discovery obligations:

[The Court’s] findings here further the purposes of discovery. ***Cape served discovery that sought the very information at issue:*** the law, rule, regulations, or clear mandate of public policy Sloan contends Cape violated. As reviewed at length above, Sloan never identified in the Complaint, in answers to interrogatories, and even in his deposition what [specific] law, rule, regulations, or clear mandate of public policy he alleged Cape violated The discovery process is to eliminate concealment and surprise in litigation ***To allow Sloan to proceed to trial where Sloan never provided in the discovery process the law, rule, regulation, or clear mandate of public policy would not further the purpose of the discovery process.***

(Pa1146) (emphasis supplied).

Again: at no time prior to the end of discovery did Sloan amend or supplement his interrogatory answers to identify additional authority, as was his obligation under Rule 4:17. Nor did he produce any document purporting to relate to such authority during discovery. Sloan did, however, list ten entire categories of purported authority among his intended trial documents in his pretrial information exchange, and he produced ***nearly seventy pages*** of

purported authority *for the first time with his reconsideration papers*. (Da1–6, Pa1237–Pa1306). This is exactly the sort of gamesmanship the trial court rejected in granting summary judgment. (Pa1137, Pa1139, Pa1143, Pa1146); see also, Wymbs ex rel. Wymbs v. Township of Wayne, 163 N.J. 523, 543 (2000) (“The discovery rules were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits to the end that judgments therein be rested upon the real merits of the causes and not upon the skill and maneuvering of counsel.”) (internal citation omitted); id. (quoting Lang v. Morgan’s Home Equip. Corp., 6 N.J. 333, 338 (1951) for the proposition that “[a]lthough the discovery rules are to be construed liberally and broadly, ‘[c]oncealment and surprise are not to be tolerated.’”).

For this same reason, the Court should reject Sloan’s citation to purported National Electric Code provisions⁹ regarding sewage in an ejector pit. (Pb36). Sloan did not identify this issue in response to an interrogatory directly on point, instead referencing his complaint—which also lacks any reference to this issue. (Pa579–80). He did not produce any documents containing this purported standard during discovery. And, when questioned exhaustively about the bases for his internal complaints over three days of

⁹ Throughout the history of this case, Sloan has provided no citation to any statute or regulation at the federal, state, or local levels that embodies any such purported requirement.

deposition, Sloan *never once* identified this specific issue. (See generally, Pa113–264). Again: the trial court correctly held that Sloan failed to identify sufficient authority in the context of his discovery obligations.¹⁰

Finally, Sloan’s reliance on Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405 (1994), Mehlman v. Mobil Oil Corp., 153 N.J. 163 (1998), Hernandez v. Montville Twp. Bd. of Educ., 354 N.J. Super. 467 (App. Div. 2002), and Chiofalo v. State, 238 N.J. 627, is misplaced. Each of these cases is either distinguishable or supports Defendants-Respondents’ position, not Sloan’s.

In Abbamont, the issues submitted for appellate review were “whether a local board of education may be held vicariously liable for the retaliatory acts of its school officials” and “whether punitive damages are available” against a public entity in a CEPA case. 138 N.J. at 410. Even so, the New Jersey Supreme Court noted that the employee, an industrial arts teacher, had satisfied CEPA’s identification requirement when he identified “an administrative

¹⁰ Furthermore, the face of the document Sloan cites on this point shows that Sloan is *not actually engaging in a CEPA complaint* to his supervisor, Carrocino—i.e., he identifies a construction error *to a third party*, the hospital’s outside contractors, and requests those contractors “add this to [the hospital’s] original punch list” and “let [him] know when it’s corrected.” (Pa1020–21). There is nothing in the record that confirms Carrocino actually received and/or reviewed this email at the time. Nor is there anything in the record to show Carrocino considered this matter was in connection with Sloan’s termination.

regulation that specifically requires ‘dependable ventilation’ that provides ‘a minimum amount of outdoor air supply and exhaust on movement’ for different types of industrial arts, including metal work. N.J.A.C. 6:22-5.2.” Id. at 424. Thus, even though Abbamont’s discussion of the identification requirement is *dicta*, it supports the trial court’s decision here because the plaintiff in that case identified a *specific* regulation at issue, unlike Sloan.

Nor does Mehlman support Sloan’s position. In Mehlman, a toxicologist working for an oil company was terminated for objecting to hazardous levels of benzene in gasoline sold commercially in the United States, Japan, and Europe. 153 N.J. at 169–172. The “crucial issue” in Mehlman “was whether [the toxicologist] satisfied his burden of proof on the question of whether the sale [of the gasoline at issue] was ‘incompatible with a clear mandate of public policy concerning the public health, safety or welfare [under] N.J.S.A. 34:19-3(c)(3).’” Id. at 172–73. The New Jersey Supreme Court held that the toxicologist satisfied CEPA’s identification requirement because he identified at least *two specific federal regulations* pertaining to the hazards posed by benzene to human health—*i.e.*, 16 C.F.R. § 1500.14 (a United States Consumer Product Safety Commission regulation requiring hazard labeling for gasoline sales above certain benzene concentration levels) and 29 C.F.R. § 1910.1028 (an Occupational Safety and Health Administration regulation lowering

permissible benzene exposure limits for workers per eight-hour workday)—as well corresponding Japanese regulations. Id. at 174–75. Thus, Mehlman, strongly contrasts with this case, in which Sloan elected to rely on generalized categories of authority instead of identifying the specific provisions of authority upon which he purportedly relied.

Hernandez is similarly unavailing. In Hernandez, the employee, a night custodian at an elementary school, was terminated after making internal complaints about overflowing toilets and an unlit fire exit sign. 354 N.J. Super. at 470–71. In finding the custodian had met CEPA’s identification requirement, the Appellate Division noted that he referenced specific Occupational Health and Safety Administration standards regarding maintaining sanitary washing facilities and “against unlit exit signs, particularly in an elementary school setting.” Id. at 474. Unlike the custodian in Hernandez, the trial court here found that Sloan “did not specify which portion or section” of the Life Safety or fire codes “Cape was violating or which inspections were not getting done.” (Pa1139, Pa1143 (noting that “[i]nstead of identifying the law, rule, regulation, or clear mandate of public policy that Sloan contends Cape violated, Sloan cites to his own deposition testimony,” which identified only a general category of requirements)).

Chiofalo is distinguishable in three key respects. First, the defendants in that case argued that the employee, a member of the State Police, first raised CEPA's identification requirement on appeal. 238 N.J. at 536–37. This fact is a key contrast with this case, in which Defendants-Respondents properly raised the identification requirement in both briefing and argument at the summary judgment stage. Second, Chiofalo addressed N.J.S.A. 34:19-3(a)(2) and 3(c)(2), which relate to criminal or fraudulent activity. The New Jersey Supreme Court noted that New Jersey courts had not “explicitly imposed [CEPA’s identification] requirement on plaintiffs proceeding” under these subsections, reasoning that “‘criminal’ or ‘fraudulent’ activity is often apparent and commonly recognizable,” as distinguished from the types of authority implicated in this case. Id. at 543–45. Third, and crucially, the employer in Chiofalo “never asked for a criminal code citation . . . or some legal citation to support the claim of fraud” underpinning the employee’s claim. Id. at 545. This fact contrasts sharply with this case, in which Defendants-Respondents directly asked Sloan to identify specific authority in interrogatories. (Pa579–80).

Despite these distinctions, Chiofalo specifically supports the trial court’s decision on both CEPA’s identification requirement and Sloan’s failure to comply with his discovery obligations:

We reiterate, however, that we do not expect whistleblower employees to be lawyers on the spot;

once engaged in the legal process, and with the assistance of counsel or careful examination by the court, however, the legal underpinnings for claimed behavior . . . should be able to be teased out sufficiently for identification purposes

[W]e acknowledge that there certainly are areas where conduct is so obviously criminal that one need not pinpoint a Title 2C provision to avoid dismissal of a CEPA claim. However, even in those areas, *if a defendant questions the source of law relied upon by the plaintiff, that source should be provided by the plaintiff.*

Id. at 544–45 (emphasis supplied); id. at 541–42 (stating the “identification [requirement] is important for . . . the [CEPA] analysis, so when no such law or policy is forthcoming, judgment can and should be entered for the defendant.”) (internal citation and quotation omitted). This Court should affirm.

D. Sloan Does Not Contest the Trial Court’s Findings of Fact That Independently Support Summary Judgment (Pa1147–49).

Sloan’s appeal rests entirely on the question of whether he has met CEPA’s identification requirement. (Pb31) (conceding that the identification requirement is “the only issue on appeal”). But the trial court’s opinion does not turn solely on this issue. (Pa1147–49). Rather, the trial court’s findings of undisputed material fact provide an independently sufficient basis to grant summary judgment. (Pa1147–49). Because Sloan does not challenge these findings on appeal, this Court should affirm. (See generally, Pb1–50).

For example, the trial court found that Sloan admitted he did not actually complain about allegedly improper overstay in the hospital's Behavioral Health Unit ("BHU"), a basis for his CEPA claim as alleged in his Complaint, (Pa 5, ¶¶ 18–22):

Cape contends that Sloan never participated in protected activity because he never actually made any complaints or reported his concerns. Defendant's Brief, p. 18. Cape references deposition testimony where Sloan admits that he did not complain to anyone about the restraint of people in the BHU:

Q: Safe to say you did not complain to anyone about what you considered to be the illegal restraint of anyone in the BHU?

A: Correct.

In Sloan's Opposition Brief, he does not address this argument directly. To the extent Sloan contends that he was retaliated against because he complained about the operation of the BHU, Summary Judgment is granted to Cape and against Sloan because Sloan did not participate in protected conduct.

(Pa1147–48). Thus, the trial court correctly found that Sloan admitted he did not engage in CEPA-protected conduct with respect to the BHU. (Pa1148). Sloan does not challenge this finding on appeal. (See generally Pb1–50).

The trial court made similar findings about purported internal complaints contained in Sloan's weekly reports to his supervisor, Defendant-Respondent Carrocino, i.e., the heart of Sloan's CEPA claim, (Pa17–18, ¶¶ 87–90):

Cape asserts that Sloan’s weekly reports do not constitute protected activity because he did not actually complain about the issues in his weekly reports. Cape provides a chart with each weekly report, and corresponding deposition testimony as to four areas of alleged complaints.

In his Opposition Brief, Sloan contends Cape “cherrypicks” certain deposition testimony and ignores other evidence. In Cape’s statement of facts, they review each weekly report, and show clearly that Sloan conceded during his deposition that the weekly reports do not include any complaints from him regarding social distancing, PPE, his access to ICU Rooms 1–6, and Operating Room temperature and humidity

To the extent Sloan contends that he was retaliated against because he complained in weekly reports about the Hospital not enforcing social distancing requirements, the hospital not having adequate PPE, him not having access to ICU Rooms 1–6, and the Operating Room temperature and humidity, Summary Judgment is granted to Cape and against Sloan because Sloan did not participate in protected conduct.

(Pa1148–49). Thus, the trial court found as a matter of undisputed fact that Sloan admitted he had not *actually* complained about alleged violations of social distancing, inadequate PPE, not having access to ICU rooms, or temperature and humidity requirements for the operating room. (Pa1148–49).

The trial court also rejected Sloan’s argument that his own admissions were somehow misleading or “cherrypicked” deposition testimony—i.e., Sloan claims that notwithstanding his undisputed admissions, he made other complaints to Defendant-Respondent Carrocino verbally or in writing about

these matters. (Pa1148). The trial court found that Sloan failed to “provide any such citation or reference” to the summary judgment record to support this argument. (Pa1148). Accordingly, the trial court rejected Sloan’s speculative argument. (Pa1148); see also, Shelcusky v. Garjulio, 172 N.J. 185, 194–95 (2002); Jiminez v. All American Rathskeller, Inc., 503 F.3d 247, 251 (3d Cir. 2007) (stating an employee may not manufacture “a material issue of fact to defeat summary judgment” by merely “disputing his . . . own sworn testimony . . .”). In short, the trial court correctly held that Sloan’s failure to rebut his own admissions on the summary judgment record with specific record citations, rather than self-serving statements or speculation, was dispositive.

V. CONCLUSION

This is a straightforward case. During discovery, Sloan made the tactical decision not to specifically identify the purported authority on which his CEPA claim relied. At summary judgment, Sloan similarly elected to rely only on generalized categories of authority rather than specific provisions therein. The trial court correctly applied well-established CEPA principles, in light of the parties’ respective discovery obligations and burdens of proof, and properly granted summary judgment. This Court should affirm.

Respectfully submitted,

s/ Brian J. McGinnis

FOX ROTHSCCHILD LLP

Jacob S. Perskie, Esq. (ID No. 020862007)

Brian J. McGinnis, Esq. (ID No. 178652015)

Midtown Building, Suite 400

1301 Atlantic Avenue

Atlantic City, NJ 08401

(609) 348-4515 (tel.); (609) 348-6834 (fax)

jperskie@foxrothschild.com

bmcginnis@foxrothschild.com

Attorneys for Defendants-Respondents

Dated: January 14, 2025

JOHN SLOAN, Plaintiff, v. CAPE REGIONAL MEDICAL CENTER, INC, CAPE REGIONAL HEALTH SYSTEM, INC., ED MOYLETT, JOANNE CARROCINO, MARK GILL, BYRON HUNTER, ABC CORPORATIONS 1-5 (fictitious names describing presently unidentified business entities) and JOHN DOES 1-5 (fictitious names describing presently unidentified individuals), Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003581-23T1 On Appeal From: Superior Court of New Jersey Law Division – Cape May County Docket No. CPM-L-462-20 Sat Below: Hon. James H. Pickering, J.S.C
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**REPLY BRIEF OF PLAINTIFF/APPELLANT
JOHN SLOAN**

McOMBER McOMBER & LUBER, P.C.
50 Lake Center Drive, Suite 400
Marlton, New Jersey 08053
(856) 985-9800 Phone
Attorneys for Plaintiff/Appellant John Sloan

Matthew A. Luber, Esq. – NJ ID #037892010
mal@njlegal.com
Meghan A. Pazmino, Esq. – NJ ID #306642019
map@njlegal.com
Jeffrey D. Ragone, Esq. – NJ ID #276772018
jdr@njlegal.com

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I. PRELIMINARY STATEMENT (Pa1149-51, Pa1152, Pa1153, Pa1111-14)

As previously explained, the Trial Court expressly concluded that Plaintiff established all of the prima facie elements for his CEPA claim. (Pa1149; Pa1151-1152). It further concluded that Plaintiff met his burden on pretext. (Pa1152). It also found there was a clear retaliatory motive by hospital executives. (Pa1151). The Trial Court even determined that the wrongful termination could support punitive damages. (Pa1153). This is why the only question on appeal is whether Plaintiff appropriately identified at least one source of law, regulation, or public policy that serves as the underlying basis for his CEPA claim. Because he absolutely did, the Court need not go any further.

Cornered, Defendants resort to hollow rhetoric, present a tortured recitation of the procedural history and discovery record, and attempt to distract the Court with issues and facts not germane to this appeal. Defendants even try to argue several “independent bases” existed for granting summary judgment. There were not. The **only** reason this case was dismissed is the Trial Court’s erroneous conclusion that Plaintiff failed to **sufficiently** identify a **single** source of law, rule, regulation or public policy in support of his CEPA claim. (Pa1111-Pa1114) (“Sloan has failed to adequately identify the law, rule, regulation or clear mandate of public policy he reasonable believed Cape violated.”).

The reality is, neither the actual record nor the relevant case law supports, or

could have supported, a dismissal here. The Trial Court overlooked clear record evidence and brief citations and exhibits in which Plaintiff repeatedly, precisely, and adequately identified laws, regulations, and public policies in support of his CEPA claim. The Trial Court also disregarded a complete body of clear New Jersey precedent on the issue (Dzwonar, Chiofalo, Abbamont, Hernandez, and Mehlman), and instead, at Defendants' prompting, exclusively relied upon the decision in Hitesman, a factually, procedurally, and legally inapposite case. (2T at 32:5-12) ("THE COURT: . . . I do rely on Hitesman. You're right. I relied on Hitesman. If I wrongly relied on Hitesman, then maybe I decided the case wrong but I think that you have to identify the law that you contend was violated...").

Reversal is warranted.

II. ARGUMENT

A. **Defendants' Assertion That Plaintiff Is Precluded From Contending the Trial Court Misinterpreted And Erred In Its Reliance On Hitesman Is Wholly Meritless (Pa721-22, Pa1140)**

Defendants' first argument attempts to procedurally "preclude[]" Plaintiff from contending the Trial Court erred in its sole reliance on Hitesman in granting summary judgment. Defts. Br., at 21-23. Of course, Plaintiff could not have challenged the Trial Court's misinterpretation of Hitesman until after it committed the reversible error in the first place. Defendants' futile sleight of hand relies solely on Nieder v. Royal Indemnity Insurance, where the Supreme Court explained, "our

appellate courts will decline to consider questions or issues not properly presented to the trial court.” 62 N.J. 229, 234 (1973); Defts. Br., at 22, 23.

Here, the true “question or issue” that was before the Trial Court is the same as the core issue on appeal—whether there is sufficient evidence in the record for a jury to determine that Plaintiff reasonably believed there was a violation of laws, rules, public policy, or regulations promulgated pursuant to law.¹ Plaintiff’s brief in opposition to summary judgment spent eight pages on this first prong of CEPA, proffering numerous legal and record citations including, but not limited to, Defendants’ “non-complian[ce] with the National Electric Code sections 501.10(b)(1) and 501.15(A)(4)[, Ex. G,] at CRMC 797-799,” and significant reliance on Abbamont v. Piscataway Township Board,² which was repeatedly cited favorably by the Supreme Court in Hitesman v. Bridgeway, see 218 N.J. 8, 34, 38 (2014). (Pa721-722). Indeed, the Trial Court’s misstatement that Plaintiff relied on the “National Electric Code without any citation generally, nor specifically,” (Pa1140), was an oversight that, on its own, warrants reversal. If the Trial Court did not commit the oversight, it would have been constrained to determine that prong one of Plaintiff’s prima facie case was met under Hitesman, Abbamont, and the rest

¹ Indeed, Defendants acknowledge “it is true that whether a CEPA plaintiff’s belief was objectively reasonable is usually a question for the factfinder.” Defts. Br., at 30 n.6.

² 138 N.J. 405 (1994).

of CEPA's jurisprudence. Defendants' assertion that Plaintiff is somehow precluded from making any of these arguments is not only meritless, but incredible.

B. Plaintiff Specifically Identified the Laws, Rules and Regulations He Relied Upon to Support His CEPA Claims In the Complaint, Throughout Discovery, at Summary Judgment and On Reconsideration. (Pa1115, Pa1140, Pa1146, Pa1148, Pa1149, Pa1151, Pa1152, Pa1153)

The Trial Court acknowledged that Plaintiff repeatedly complained about legal and safety issues. (Pa1115). It also recognized that Plaintiff identified sources of law, code, and regulations. (Pa1140) (Pa1146). In fact, the Trial Court, while ignoring other identifications, expressly recognized that Plaintiff complained that Defendants were not in compliance with the Life Safety Code ("LSC"):

Cape also contends that Sloan's complaints regarding his general reference to Life Safety Code Maintenance Requirements cannot be protected activity because Sloan knew a blanket waiver applied. The court rejects that argument. While it appears a blanket waiver was available to hospitals, Sloan counters the argument by asserting that Cape did not apply for the blanket waiver. On this record, it is a question of fact whether the blanket waiver applied, whether it was applied for by Cape, and whether the blanket waiver was granted and was in effect when Sloan made his complaints.

(Pa1146).³

³ See also (Pa1148) ("Cape also points to a section of Sloan's deposition where he conceded that he did not send photographs to anyone that showed staff not wearing gloves or masks. In his Opposition, Sloan pointed to other parts of his deposition where he did make reports regarding this issue, and that action was taken based on his reports. The court rejects Cape's argument as there

The Trial Court also found that Plaintiff's termination constitutes adverse employment action. (Pa1149) ("Plaintiff was terminated. No one has seriously argued that is not adverse employment action. The court finds the third prong has been satisfied"). The Trial Court ruled that a jury could find that Plaintiff's protected activity caused his termination. (Pa1151) ("Cape argues Sloan was terminated over four months after Sloan sent a June 5, 2020 email. While this email certainly made Cape, through Carrocino, desirous of terminating Sloan, and she decided then she wanted to terminate him, Sloan does not contend that was his only protective activity. Sloan alleges there was other protected activity that occurred in 2020. The court therefore rejects Cape's lack of temporal proximity argument. When the facts are viewed in the light most favorable to Sloan, *a reasonable jury could find that Sloan's alleged protected activity caused his termination*") (emphasis added).

In addition, the Trial Court found "evidence that the ICU HVAC situation^[4] was pretext." (Pa1152). Specifically, "Carrocino testified that in June 2020 she knew she wanted to terminate Sloan and she just did not like him. Further, White and Raymond knew of the vent situation for months but did not report it, and then when they finally did report it Sloan was terminated, and they were not disciplined

is a question of fact as to whether Sloan reported the use of photographs to Cape, and then whether Cape took action to remove the photographs from continued distribution.").

⁴ This is Defendants' purported legitimate non-retaliatory reason for Plaintiff's termination.

at all. Finally, there is some question of fact as to how long after Sloan was terminated it took the Hospital to fix the ICU vents. If a jury finds it took the hospital a long time, that too is evidence of pretext.” Ibid. In turn, “the court [found] *there is sufficient evidence to support a finding of punitive damages.*” (Pa1153) (emphasis added).

In short, the record and the Trial Court’s own opinion demonstrate Plaintiff met his burden for his retaliation claim and pretext. See Dzwonar, 177 N.J. 451, 464 (2003); Hernandez, 354 N.J. Super. 467, 474 (2002); Mehlman, 153 N.J. 163, 172-73 (1998); (Pa1151-1153). With that backdrop, the liberal and remedial nature of CEPA, and the robust record to be viewed in the most favorable light to the Plaintiff, the Trial Court’s dismissal of this case is perplexing. The notion that Plaintiff met all of the prima facie elements, but his claim still fails because he only generally identified the laws, rules, regulations and policies he relies upon to support his CEPA claims is erroneous on several levels. For one, it is patently untrue. At a minimum, Plaintiff specifically identified the National Electric Code (“NEC”), the National Fire Protection Agency Codes, the LSC, Centers for Medicare and Medicaid Services (“CMS”), and Section 1135 of the Social Security Act repeatedly throughout this case. For another, Defendants **and** the Trial Court acknowledged Plaintiff’s sources of law, regulations, and codes.

i. The National Electric Code (Pa316, Pa433, Pa434, Pa396, Pa721, Pa1020-22)

In opposition to Defendants’ Motion for Summary Judgment, Plaintiff specifically stated: “Electric in the sewage ejector pit was non-compliant with the national electric code sections 501.10(b)(1) and 501.15(A)(4).” (Pa721). Plaintiff also cited his internal complaint and objection **that was made in real time** to CEO Defendant Carrocino (among others). *Ibid.* **The internal complaint** includes a picture of the non-compliant ejector pit and **specifically cites the relevant codes on the picture itself**. (Pa721 (citing Pa1020-1022)).

Prior to Summary Judgment, Plaintiff identified NEC §501.10(b)(1) and §501.15(A)(4). Defendants themselves **produced** the document to Plaintiff during discovery in October 2022. Plaintiff also solicited testimony regarding these particular safety issues at the depositions of Defendant Carrocino, Defendant Hunter and Defendant Moylett. (Pa316 at 203:15–204:11); (Pa433 at 129:11-18); (Pa434 at 130:12-15); (Pa396 at 182:5-11).

ii. The NFPA Codes (Pa208, Pa210, Pa721, Pa728, Pa729)

Likewise, Defendants’ contention that Plaintiff did not specifically identify the NFPA until Plaintiff’s Motion for Reconsideration is simply incorrect. Defts. Br. § B(2). Defendants had direct knowledge of Plaintiff’s allegations regarding the NFPA for years as evidenced by their choice to solicit extensive testimony regarding Plaintiff’s objections and reasonable beliefs of non-compliance with the NFPA at

his deposition. (Pa208 at 165:2-11⁵; 171:24-172:11⁶); (Pa210 at 173:5-12⁷; 171:24–172:11⁸; 173:5-20).⁹

Plaintiff cited to this testimony in opposition to Defendants’ Motion for Summary Judgment before the Trial Court. Plaintiff specifically stated (i) “Plaintiff reported to Defendant Carrocino that preventative maintenance inspections at certain intervals and certain times of the year were not getting done in accordance with the compliance code, particularly the NFPA. Sloan Dep. Day 2 at 165:2-11” (Pa728); (ii) “Plaintiff reported to Defendant Carrocino that the sprinkler lines were failing.

⁵ The cited testimony specifically reads: “Q. Well, is there a law, a legal rule, or a legal regulation which provides some empirical or objective measure of maintenance in a hospital. A. No. There is a compliance code that requires you to do certain inspections at certain intervals and certain times of the year. Those were not getting done during COVID. Q. And whose code was this? A. NFPA. National Fire Protection Agency.”

⁶ The cited testimony specifically reads: “Q. Okay. And that was a component part of the NFPA which, again, didn’t have a particular date which fell between the commencement of the furlough and October 5, 2020; correct? A. Exit signs are a monthly inspection. Q. Okay. Were they done on a monthly basis? A. You are talking about during COVID? Q. I’m talking about from the point that the furlough began up until October 5, 2020. A. No, they were not fully completed. Q. Why not? A. There was no staff to do it.”

⁷ The cited testimony specifically reads: “Q. So if I understand what you’ve said, the only thing that actually we were required to do as a component part of the NFPA code that we didn’t accomplish was the monthly inspections of the lit exit signs; correct? A. And fire extinguisher inspections. Q. Did we do them? A. No.”

⁸ The cited testimony specifically reads: “Q. Okay. And that was a component part of the NFPA which, again, didn’t have a particular date which fell between the commencement of the furlough and October 5, 2020; correct? A. Exit signs are a monthly inspection. Q. Okay. Were they done on a monthly basis? A. You are talking about during COVID? Q. I’m talking about from the point that the furlough began up until October 5, 2020. A. No, they were not fully completed. Q. Why not? A. There was no staff to do it.”

⁹ The cited testimony specifically reads: “Q. Did you report these failures to the National Fire Protection Agency? A. No, I did not. Q. Why not? A. Because I reported them to Ed Moylett.”

Ex. C, Carrocino Dep. at 175:15-17” (Pa729); (iii) “Plaintiff reported to Defendant Moylett that the exit sign and fire extinguisher inspections were not being completed in accordance with the NFPA. Id. at 171:24-172:11; 173:5-12” (Pa728); and (iv) “NFPA inspections were not being completed as a result of the furlough, rendering the hospital non-compliant. Ex. J, Sloan Dep. (Day 2) at 173:16-20”) (Pa721).

iii. The Life Safety Code (Pa17-18, Pa228, Pa692-94, Pa721, Pa724, Pa728-29, Pa730, Pa970, Pa1146)

Plaintiff identified the Life Safety Code by name in his original pleading /Complaint, in his deposition testimony, and in his opposition to Defendants’ Motion for Summary Judgment before the trial court—all before Plaintiff’s Motion for Reconsideration. (Pa17-18), (Pa692-694), (Pa721), (Pa724), (Pa728-729).¹⁰ Plaintiff specifically reported, *inter alia*, (i) the hospital was “two months behind for inspections, testing, maintenance and repairs of critical equipment...”; (ii) “All critical Life Safety Code testing and inspections are on hold until after the furlough” (iii) and that Corporate Defendant did not submit the waiver to absolve them of their non-compliance with the Life Safety Code. (Pa728; Pa730). He explained the wavier temporarily modified the “inspection testing and maintenance provisions of the Life

¹⁰ Plaintiff specifically testified “Again, it says all critical life safety codes and testing and inspections are on hold until after the furlough. That clearly states that the stuff is not getting done. It is a code.” Defendants questioned further: “Q. It doesn’t say that is a violation of the code, does it?” to which Plaintiff responded “It is a code requirement. It is not suggestive. It is a code requirement.”

Safety Code and Health Care Facilities Code.” (Pa728 citing Pa970).

Defendants even specifically questioned Plaintiff at his deposition on the inspection, testing and maintenance provisions of the Life Safety Code non-compliance he was alleging. (Pa724 citing Pa228 at 32:16-25¹¹). Accordingly, Defendants’ claim that Plaintiff did not specifically identify the Life Safety Code or the provisions in which he reasonably believed the Defendants were non-complaint with until reconsideration is false. See (Pa1146) (acknowledging Plaintiff complained about LSC waiver and rejecting Defendants’ argument to contrary).¹²

iv. CMS & Section 1135 of the Social Security Act. (Pa6, Pa187, Pa725-26)

Plaintiff specifically identified the CMS regulations in his original pleading/Complaint, provided a hyperlink to the regulations in his Complaint, explained the violations in his deposition testimony, and cited the specific portions Plaintiff believed were being violated in opposition to Defendants’ Motion for

¹¹ This testimony specifically reads: “Q. So was it your understanding that as of this May 1 update, May 1, 2020, that is, update from ASHE, that ASHE was advising that CMS had issued a blanket waiver regarding inspection, testing and maintenance provisions of the Life Safety Code and Healthcare Facilities Code? A. If you filled the forms out and sent the forms in, yes.”

¹² See also, Pa1148 (“Cape also points to a section of Sloan’s deposition where he conceded that he did not send photographs to anyone that showed staff not wearing gloves or masks. In his Opposition, Sloan pointed to other parts of his deposition where he did make reports regarding this issue, and that action was taken based on his reports. The court rejects Cape’s argument as there is a question of fact as to whether Sloan reported the use of photographs to Cape, and then whether Cape took action to remove the photographs from continued distribution.”)

Summary Judgment before the trial court. (Pa6) (Pa187 at 79:24-80:2); (Pa725-726).

Plaintiff's Complaint specifically states: "In addition to reckless patient care, at all times relevant hereto, Defendant Cape disregarded compliance and knowingly acted contrary to the regulatory requirements of the Centers for Medicare and Medicaid Services temperature controls." (Pa6 at ¶25).¹³ The next paragraph, specifically states: "The temperature and humidity levels were problematic and presented ongoing safety issues – when the relative humidity is above the maximum percentage, operating instruments and supplies are compromised and could severely affect the quality and cleanliness of patient care as operating outside of the temperature range increases infection rates and mold growth." (Pa6 at ¶ 26).

Plaintiff's testimony confirms his whistleblowing regarding the non-complaint temperature and humidity levels. (Pa187 at 79:24-80:2 ("Q. Tell me if you would what the CMS regulations said regarding humidity levels? A. The humidity levels must be maintained between 20 and 60 percent.")). Moreover, in opposition to Defendants' Motion for Summary Judgment, Plaintiff verbatim cited and quoted the relevant portions of the CMS guidelines that he believed were being

¹³ Paragraph 24 of Plaintiff's Complaint included a footnote that specifically states: Hospitals adhere to the Centers for Medicare and Medicaid Services ("CMS") Regulations. CMS is part of the U.S. Department of Health and Human Services department regulating for the health and safety of all individuals. CMS regulations and policies require Defendants to adhere certain patient and facility standards, including those relating to temperature and humidity levels. *See* <https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/Downloads/R99SOMA.pdf>."

violated (CMS §485.623(b)(5)) and which were disclosed in the hyperlink in Plaintiff's complaint. (Pa725)¹⁴. Importantly, Defendants have not, at any time, disputed Plaintiff's reliance on the CMS regulations, but rather characterized them as only pertaining to food which Plaintiff disposed of in his opposition. Ibid.

Likewise, with respect to Section 1135 of the Social Security Act, Defendants contention that Plaintiff did not specifically identify this Act until reconsideration is incorrect as they conceded same in their Motion for Summary Judgment before the trial court. (See, 1T at 18:15-19:12) ("It is undisputed that effective May 1st, 2020, the [CMS] had invoked their power and authority under Section 1135 of the Social Security Act to waive those requirements....Certainly we don't dispute that prior to the issuance of that waiver you could argue that it applies. But here, CMS, the federal government says, we are invoking our statutory power, we are waiving these requirements"). Further, Defendants know this to be a specific law Plaintiff was relying upon as they referred to it in their affirmative Motion for Summary Judgment. Defts. MSJ at 15 (citing Section 1135 of the Social Security Act, 42 U.S.C. § 1320b-5(b)).

¹⁴ The CMS regulations specifically state: "Temperature, humidity and airflow in anesthetizing locations [operating rooms] must be maintained within standard to inhibit microbial growth, reduce risk of infection...permits new and existing ventilation systems to operate at a RH of 20 percent or greater...CMS recommends that facilities maintain the upper range of RH at 60 percent or less as excessive humidity is conducive to microbial growth and compromises the integrity of wrapped sterile instruments and supplies." MSJ Opp. at 45. This quotes verbatim CMS § 485.623(b)(5).

In short, Defendants false narrative – that they were somehow surprised or uninformed regarding the sources of law, rule, regulation and policies – is belied by the record, the briefing, their own documents, and their own arguments at summary judgment, on reconsideration, and during this appeal. For these reasons, too, reversal is warranted.

C. Defendants Continued Concentration on An Interrogatory Response Should be Rejected Out of Hand.

As previously explained, Plaintiff properly objected to two interrogatories that were not limited in scope to Plaintiff's employment or the law, rule, regulations or public policies to support Plaintiff's CEPA allegations. Specifically, the discovery requests at issue, read: "46) Set forth the activity, policy, or practice of Defendants that you believe violated a law, or a rule or regulation promulgated pursuant to the law" and "47) Set forth the law, or the rule or regulation promulgated pursuant to law, that the activity, policy, or practice of Defendants identified in the preceding Interrogatory allegedly violated".

Plaintiff properly objected to these requests on the basis, inter alia, the requests were vague, ambiguous, not sufficiently particularized to permit Plaintiff to determine what is requested or make a meaningful response and that the information

was not within the possession, custody or control of the Plaintiff.¹⁵ **Critically, at no point did Defendants follow-up, meet and confer, file a discovery motion, otherwise raise an issue with Plaintiff's proper objections.** In any event, R. 4:46-2(c) is clear: summary judgment should only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged, and that the moving party is entitled to a judgment or order as a matter of law."

* * *

In sum, Plaintiff respectfully submits the Trial Court erroneously interpreted and applied Hitesman when granting Defendants' Motion for Summary Judgment. As discussed above and Plaintiff's opening brief, there can be no real dispute that Plaintiff reported countless acts that he believed to be unlawful and specifically articulated the legal authority in which he reasonably believed Defendants violated, in accordance with Dzwonar, Chiofalo, Abbamont, Hernandez, and Mehlman, permitting Plaintiff's claims to be presented to a jury.

¹⁵ Plaintiff also specifically objected because the requested information was not in the possession, custody, or control of the Plaintiff. As stated in Plaintiff's opposition to Defendants' Motion for Summary Judgment, Plaintiff kept a binder of the life safety codes, fire codes and state codes in his office. The binder was not mailed back to Plaintiff with his belongings and was not produced as part of the litigation by Defendants. Ex. A to Luber Cert. p. 6 n. 6; Pltf. MFR Br. n 6. Plaintiff kept a binder for each code that required compliance. Id.

III. CONCLUSION

For these reasons, this matter should be reversed and remanded to the Trial Court.

Respectfully submitted,

Dated: February 4, 2025

/s/ Matthew A. Luber
Matthew A. Luber, Esq.
McOMBER McOMBER & LUBER, P.C.
Attorneys for Plaintiff, John Sloan

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION**

JOHN SLOAN,
Plaintiff,

v.

CAPE REGIONAL MEDICAL
CENTER, INC, CAPE REGIONAL
HEALTH SYSTEM, INC., ED
MOYLETT, JOANNE CARROCINO,
MARK GILL, BYRON HUNTER,
ABC
CORPORATIONS 1-5 (fictitious
names describing presently
unidentified business
entities) and JOHN DOES 1-5
(fictitious names describing
presently unidentified
individuals),
Defendants.

SUPERIOR COURT OF NEW
JERSEY

APPELLATE DIVISION

DOCKET NO.: A-003581-23T1

On Appeal From:

Superior Court of New Jersey

Law Division – Cape May County

Docket No. CPM-L-462-20

Sat Below:

Hon. James H. Pickering, J.S.C

AMICUS CURIAE BRIEF

Alan H. Schorr
(Bar # 016721993)
Of Counsel and
On the Brief

Dated: February 4, 2025

SCHORR & ASSOCIATES, P.C.
5 Split Rock Drive
Cherry Hill, New Jersey 08003
(856) 874-9090 (telephone)
(856) 874-9080 (fax)
alanschorr@schorrlaw.com
Attorneys for Amicus Curiae
National Employment
Lawyers Association -
New Jersey

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I. PRELIMINARY STATEMENT

The Conscientious Employee Protection Act (CEPA) is remedial legislation entitled to liberal construction. The Supreme Court has long recognized its public policy purpose to protect conscientious employees and whistleblowers from retaliation by employers. Its legislative purpose is to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such retaliation against such employees. The object of CEPA is not to make lawyers out of conscientious employees but rather to prevent retaliation against those employees who object to employer conduct that they reasonably believe to be unlawful or indisputably dangerous to the public health, safety, or welfare.

In this case, NELA-NJ is very concerned with the opinion of the Trial Court, which disregarded the well-established criteria for an employee's reasonable belief that a law has been violated and replaced it with a nearly impossible requirement that a conscientious employee must know the exact statute or regulation number and must so advise the employer in order to satisfy the first prong of the *prima facie* elements of CEPA claim. NELA-NJ is very concerned that the standard used by the trial court will make it almost impossible for most workers to ever establish that they reasonably believed that the employer was

engaging in unlawful behavior or that they engaged in whistleblowing activities.

The Trial Court was confused and relied upon inapposite case law in order to fashion a new and much higher bar for a plaintiff to jump over in order to establish a *prima facie* case under CEPA. If this dismissal is upheld, it will chill conscientious employees who will be hesitant to object to and report unlawful activities for fear that they will not be protected. An employee should not be required to be a lawyer. A reasonable belief does not and should not require an employee to quote statutory and regulatory citations in order to be protected by CEPA.

For the reasons set forth below, the Appellate Division should reverse and clarify the proper standard for an employee to engage in protected activity, specifically under CEPA subsection a(1).

II. STATEMENT OF PROCEDURES

The procedural histories set forth in the Appellant's and Respondents' brief are essentially accurate. It is important to note here, however, that the docket and procedural history does not reflect that the Defendants ever filed a motion seeking a more specific response to discovery. The Defendants never asked the Court to require the Plaintiff to provide exact statute and code cites. The Defendants never sought from the Court a more definite statement or more specific discovery.

Rather, the Defendants appeared to have lie in wait and then, only for the first time on summary judgment, complained that the Plaintiff had not been specific enough.

III. STATEMENT OF MATERIAL FACTS

NELA-NJ takes no position on whether the Plaintiff met the burden-shifting test of establishing a CEPA complaint, nor whether the Defendant can establish that the Plaintiff was terminated as a result of alleged poor job performance or whether the reason was pretextual. NELA-NJ views this appeal as a narrow one, restricted to whether the Plaintiff established a *prima facie* case that he engaged in whistleblowing activity. Those facts are set forth in Plaintiff/Appellant's brief at Pb5-8, 13-18.

IV. AMICUS LEGAL ARGUMENT

A. BECAUSE CEPA IS A REMEDIAL STATUTE, IT SHOULD BE LIBERALLY INTERPRETED IN ORDER TO PROTECT WHISTLEBLOWERS. THE TRIAL COURT DID THE OPPOSITE.

CEPA is considered remedial legislation entitled to liberal construction, its public policy purpose to protect whistleblowers from retaliation by employers having been long recognized by the courts of this State. Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 431 (1994); Lippman v. Ethicon, Inc., 222 N.J. 362 (2015). Our Supreme Court has declared that it is beyond dispute that the legislative purpose animating CEPA is, as expressed initially in Abbamont, *supra*,

to "protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct." 138 N.J. at 431, 650 A.2d 958; Lippman, *supra*, at 378.

1. The Supreme Court, in Chiofalo v. State, clarified that it is not required for a whistleblower to cite to precise statutes and regulation sections in order to be protected by CEPA.

The Supreme Court recently addressed a very similar situation as the one here, in Chiofalo v. State, 238 N.J. 527 (2019). In Chiofalo, the lower Courts had ruled that Mr. Chiofalo failed to identify at the summary judgment stage any law or regulation that he believed the employer violated in allegedly ordering Chiofalo to destroy documents, and as a direct result, had granted and affirmed summary judgment. *Id.* at 537. The Supreme Court reversed.

The Supreme Court began with a history of CEPA, which was a codification of common law in Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980), to cement this State's commitment to "protect and encourage employees to report illegal or unethical workplace activities." Dzwonar v. McDevitt, 177 N.J. 451, at 461, (*quoting Abbamont*, *supra*, 138 N.J. at 431). The Court, following Dzwonar, emphasized that the identification of particular law should be made by either "the court or the Plaintiff. Chiofalo at 541 (*emphasis as in the original*). In other words, the Court also has responsibility for identifying the law, even if the

plaintiff does not.

The Supreme Court was clear that the plaintiff is not required to identify every single statute number or regulation number:

Importantly, Dzwonar notes that a plaintiff need not "allege facts that, if true, actually would violate that statute, rule, or public policy." 177 N.J. at 463. A plaintiff is required only to "set forth facts that would support an objectively reasonable belief that a violation has occurred." *Id.* 177 N.J. at 464. The statute's salutary public policy is not furthered by any implied requirement "to make lawyers out of conscientious employees"; rather, and more accurately, its design is "to prevent retaliation against those employees who object to employer conduct that they reasonably believe to be unlawful." *Ibid.* (quoting Mehlman v. Mobil Oil Corp., 153 N.J. 163, 193-94 (1998)).

Chiofalo, *supra*, at 542.

In the Chiofalo case, the statute number supporting the Plaintiff's complaint was not identified until the undersigned cited it in NELA-NJ's Supreme Court *amicus* brief. *Id.* at 545. The Supreme Court held that even that late identification was enough. The Court stated, "We reiterate, however, that we do not expect whistleblower employees to be lawyers on the spot; once engaged in the legal process, and with the assistance of counsel or careful examination by the court, however, the legal underpinnings for claimed behavior that is perceived as criminal or fraudulent should be able to teased out sufficiently for identification purposes." *Id.* 544-45.

B. THE PLAINTIFF MORE THAN ADEQUATELY IDENTIFIED THE LEGAL UNDERPINNINGS OF HIS CLAIM. THE TRIAL COURT DISREGARDED IT.

As set forth above, our Supreme Court has ruled that CEPA plaintiffs are not expected to be lawyers, and must only identify the laws enough so that with the assistance of counsel and the “careful examination of the Court”, the legal underpinnings can be understood. The Plaintiff more than met that low threshold.

The Plaintiff produced in discovery, and also produced at Summary Judgment, an email from August 25, 2020, in which the Plaintiff made a written complaint, with accompanying photograph, that the National Electric Code was being violated. On the photograph and in the summary judgment brief, the Plaintiff specifically identified Sections 501.10(b)(1) and 501.15(A)(4). (Pa720). For purposes of satisfying his requirement of demonstrating a complaint with a reasonable belief that he was complaining about a violation of law or public policy, this alone should have been sufficient. The Complaint, although not specifically identifying statute numbers, was quite specific regarding the laws that he complained about.

The Plaintiff, at deposition and at Summary Judgment, produced an email in which the Plaintiff advised the Defendants that they would need to apply for a waiver because they were non-compliant with inspection, testing, and maintenance

during COVID, pursuant to “Section 1135 of the Social Security Act.” (Pa1219-1220).

Similarly, the Plaintiff produced documentation and a link to the State Operations Manual for the Centers for Medicare and Medicaid Services (CMS) regarding non-compliant temperature and humidity levels. Since the manual is large, the Plaintiff provided the Court with a hyperlink so that the Court could easily view the manual. With a simple Ctr-F keystroke, the Court could find the sections relating to temperature and humidity. However, the Court did not review the documents attached by hyperlink. Pb29, fn.14. (Pa705-06).

The Plaintiff/Appellant, in his brief, highlight numerous other citations to law, which even without specific citation to a particular numbered section, certainly provided the Defendants and the Court with the legal underpinnings of his complaints which could be easily identified by counsel and careful consideration of the Court. Here the Court not only failed to carefully consider - the Court did not consider at all, and then improperly viewed the facts in the light most favorable to the moving Defendants.

C. THE COURT APPLIED THE INCORRECT LEGAL STANDARDS.

- 1. The court should not have applied the Hitesman standard because Mr. Sloan was not a health care professional alleging improper quality of patient care.**

Amicus can assist the Court in understanding the history of the CEPA statute, which will then explain how and where the Trial Court erred in applying the incorrect standard. The undersigned has been the legislative liaison for NELA-NJ since 1995 and therefore has first-hand knowledge and experience regarding the evolution of the CEPA statute and the case law interpreting it.

The Conscientious Employee Protection Act was first enacted in 1986. Section 3 (N.J.S.A. 34:19-3), P.L. 1986, c.105 originally stated:

3. An employer shall not take any retaliatory action against an employee because the employee does any of the following:

a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or any other person that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law;

b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer, or any other person; or

c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated

pursuant to law;

(2) is fraudulent or criminal; or

(3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare.

The Statute has been amended three times. The first amendment in 1989, 1988 N.J. A.N. 661, added a clause to subsections (a) and (b) applying the statute to the policy or practice of the employer, OR ANOTHER EMPLOYER, or any other person, WITH WHOM THERE IS A BUSINESS RELATIONSHIP.

Subsection (c)(3) was also amended to add protection of the environment to the public policies protected:

(3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare, OR PROTECTION OF THE ENVIRONMENT.

In the ensuing years, especially from 1994-1997, there were several landmark CEPA cases in which the subject of what constitutes a public policy was deeply explored - Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405 (1994); Mehlman v. Mobil Oil Corp., 291 N.J. Super. 98 (App. Div. 1996), aff'd, 153 N.J. 163 (1998); and several cases involving medical professionals whose cases were dismissed or partially dismissed based a complaint of improper health care that was held to fail to articulate a specific statute or regulation. Falco v. Community Medical Center, 296 N.J. Super. 298 (App. Div. 1997); Chelly v.

Knoll Pharmaceuticals, 295 N.J. Super. 478 (App. Div. 1996); Young v. Schering Corp., 275 N.J. Super. 221 (App. Div. 1994), aff'd 141 N.J. 16 (1995).

This flurry of public policy opinions caused alarm in the medical community because there are few specific statutes governing the quality of health care. For example, there was no numbered statute or regulation specifically related to leaving a patient in a soiled bed or not reporting problems in clinical trials. Responding to these concerns, and with strong lobbying by the New Jersey State Nurses Association, the legislature passed an amendment to CEPA which, at the time, was intended to protect medical professionals and other medical watchdog employees from retaliation for complaining about or reporting improper quality of healthcare.

In 1997, CEPA was amended to add a clause to subsections (a), (b), and (c)(1) that added OR, IF THE EMPLOYEE IS A LICENSED OR CERTIFIED HEALTH CARE PROFESSIONAL, CONSTITUTES IMPROPER QUALITY OF PATIENT CARE. 1996 N.J. S.N. 878. According to the Senate and Assembly Health Committee statements to the bill adopted as the amendment:

"[i]n a growing number of cases, health care professionals are being pressured to accept seriously inadequate staffing levels and delegate their responsibilities to unqualified, non-professional staff. It is of the utmost importance that health care professionals are able to speak out against, and refuse to participate in, these and other practices by their

employers which endanger the well-being of patients."

Assembly Health Committee, Statement to Senate Bill No. 878, (February 10, 1997); Senate Health Committee Statement to Senate Bill No. 878, (Nov. 7, 1996), *accord Klein v. University of Medicine and Dentistry of New Jersey*, 377 N.J. Super. 28, 39 (App. Div. 2005), certif. denied, 185 N.J. 39 (2005).

The new clause, added in 1997, has created a line of cases involving health care workers. In *Klein, supra*, Dr. Sanford Klein was a board-certified anesthesiologist and dentist. He brought a claim strictly under the "health care professionals" clause. He alleged that he complained that the radiology department was outdated and too small and needed to be expanded or improved for efficiency. *Id.* at 37. The Court held that health care workers bringing CEPA actions under the "health care professionals" cannot assert general complaints of inefficiency or subjective statements and must articulate a statutory or regulatory clear mandate of public policy.

The case relied upon a definition that had been adopted along with amendment:

"Improper quality of patient care" is defined as "any practice, procedure, action or failure to act of an employer that is a health care provider which violates any law or any rule, regulation or declaratory ruling adopted pursuant to law, or any professional code of ethics."

N.J.S.A. 34:19-2f.

In the opinion of NELA-NJ, the Klein decision circumvented the entire purpose of adding the health care professionals clause. If the purpose of the clause was to "protect health care professionals are able to speak out against, and refuse to participate in, these and other practices by their employers which endanger the well-being of patients," then the Klein decision completely eviscerated that protection because health care workers were still required to cite a statute or regulation, which held them to a higher standard than other conscientious employees, and provided them with no additional protection different than any other category of worker.

The case of Hitesman v. Bridgeway, Inc., 218 N.J. 8 (2014) was a very similar case to Klein. James Hitesman was a registered nurse who was terminated after he complained to management about the rate of infectious diseases among patients, reported his concerns to governmental agencies and the press, and disclosed partially-redacted records of patient care to a television reporter. The case was dismissed on a motion to dismiss. The specific holding in Hitesman was expressly limited to the "improper quality of healthcare" clause. The Court specifically ruled:

We hold that claims asserted under N.J.S.A. 34:19-3(a)(1) and (c)(1)'s "improper quality of patient care" provision must be premised upon a reasonable belief that the employer has violated a law, rule,

regulation, declaratory ruling adopted pursuant to law, or a professional code of ethics that governs the employer and differentiates between acceptable and unacceptable conduct in the employer's delivery of patient care.

Hitesman v. Bridgeway, *supra*, at 15.

In the case at bar, Mr. Sloan was not a health care professional and he did not bring his claim asserting “improper quality of patient care”. Since the higher standard of specificity required by Klein and Hitesman is expressly limited to health care professional CEPA plaintiffs who are alleging violation of the “improper quality of patient care” clause, it was error for the Court to hold Mr. Sloan to this heightened standard.

2. The Court should differentiate Dzwonar v. McDevitt, because that case was brought exclusively under subsection 3(c), and not under subsection 3(a), and expressly only applies to subsection 3(c) cases.

The Court continued to fail to recognize that the different subsections of CEPA have different standards of specificity. The Court erroneously applied the standard of specificity set forth in Dzwonar v. McDevitt, 177 N.J. 451 (2003). The Dzwonar case was filed in 1998, shortly after the amendment of 1997. In that case, Regina Dzwonar and Cynthia Burgess brought a claim exclusively under subsection N.J.S.A. 34:19-3(c)(3), which provides:

An employer shall not take any retaliatory action against an employee because the employee does any of the following:

c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:

(3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

Dzwonar *supra*, at 462.

The plaintiffs in that case alleged that their employer, a labor union, failed to follow proper protocols in notifying the rank and file members of administrative changes that were being made. This Court narrowly and explicitly limited its analysis only to subsection 3(c). The Court concluded that, pursuant subsection 3(c), the plaintiffs failed to articulate any public policy that a reasonable person could conclude was in violation of public policy:

We agree with the lower courts that when a plaintiff brings an action pursuant to N.J.S.A. 34:19-3c, the trial court must identify a statute, regulation, rule, or public policy that closely relates to the complained-of conduct.

Dzwonar, *supra*, at 463.

By its specific language, the Supreme Court clearly intended this requirement only to apply to CEPA plaintiffs who bring claims exclusively under the “objects to or refuses to participate in” of subsection (c), and not under the whistleblowing provisions of subsection 3(a). The Supreme Court, however,

continued by ruling that it is the “*trial court*” that must identify the public policy, however, not the plaintiff:

We do not agree, however, that a plaintiff must allege facts that, if true, actually would violate that statute, rule, or public policy.

Dzwonar, *Id.*

The Court went on to explain that “The Legislature intended CEPA to “encourage, not thwart, legitimate employee complaints.” *citing* Estate of Roach v. TRW, Inc. 164 N.J. 598, 610 (2000):

We therefore conclude that N.J.S.A. 34:19-3c does not require a plaintiff to show that a law, rule, regulation or clear mandate of public policy actually would be violated if all the facts he or she alleges are true. Instead, a plaintiff must set forth facts that would support an objectively reasonable belief that a violation has occurred.

Dzwonar, at 451.

First, the attorneys for Mr. Sloan more than adequately set forth specific facts underpinning Mr. Sloan’s reasonable belief that his employer was violating law and public policy, and therefore they met the standard under subsection 3(c). However, Mr. Sloan did not allege that the defendants violated the catch-all provision of CEPA. He specifically alleged that he disclosed these complaints to his supervisors and management, and therefore invoked the protection of subsection 3(a), to which Dzwonar expressly does not apply. Count One of the

plaintiff's complaint only alleges subsection 3(a) violations (reporting and complaining). There are no 3(c) violations alleged (objecting to or refusing to participate in).

While the Plaintiff should have been more specific, the pleadings clearly only allege 3(a) violations. Count One (the only CEPA claim) alleges, in its pertinent entirety:

139. Throughout the course of his employment, Plaintiff reported and complained about Defendants' safety and regulatory violations, including but not limited to those promulgated by the Centers for Medicare and Medicaid Services Regulations.

140. Defendants had knowledge of Plaintiff's complaints and/or protests.

141. As a direct result of Plaintiff raising complaints and/or threatening to disclose raising complaints, Defendants took retaliatory action against Plaintiff by subjecting him adverse employment action, ultimately leading to his unlawful termination.

Plaintiff's Complaint, Count One, *Pa*26.

Because of the history of amendments of the CEPA statute and the sequence of cases that came before the Court, a conflation of different standards of specificity have developed that is so confusing that Courts often apply the incorrect standards. The specificity required by Klein and Hitesman are expressly limited to cases where a health care professional alleges "improper quality of

patient care” under subsection 3(c). Dzwonar is expressly limited to cases brought under subsection 3(c), and even more specifically, subsection 3(c)(3). These case are explicitly not applicable to claims under 1(a) or 3(a).

D. THE PROPER STANDARD FOR SPECIFICITY IN SECTION 3(a) CASES IS SET FORTH IN CHIOFALO v. STATE.

The most recent and relevant case regarding the specificity of the identification of law was carefully examined in Chiofalo v. State, 238 N.J. 527 (2019). In Chiofalo, the Court recounted the history of CEPA and specifically of the requirements set forth in the cases of Hitesman and Dzwonar. While Chiofalo was analyzed under subsections (a)(2) and (c)(2), the Supreme Court made clear that it is not the plaintiff’s responsibility to identify precise statutes so long as the parties and court can understand the basis for the plaintiff’s reasonable belief that the actions were against public policy. Although Sgt. Chiofalo had never articulated a precise statute, and although the statute was never identified until the undersigned identified it in an amicus brief, the Supreme Court held that it was adequate to survive summary judgment because Sgt. Chiofalo had identified behavior that the Court could discern was unlawful.

The Court explained:

We reiterate, however, that we do not expect whistleblower employees to be lawyers on the spot; once engaged in the legal

process, and with the assistance of counsel or careful examination by the court, however, the legal underpinnings for claimed behavior that is perceived as criminal or fraudulent should be able to be teased out sufficiently for identification purposes.

Chiofalo, *supra* at 544-45.

In this case, the Plaintiff provided the legal basis for his claim, provided explicit statute and regulation numbers, *and* provided hyperlinks to the Court for the specific code sections cited. The trial court either chose not to access the hyperlinks or was unable to do so, but did not advise the Plaintiff of such problems until mentioning them at oral argument and in the summary judgment decision. *Order and Opinion at 25-26*. The Court could have easily requested the Plaintiff to provide the documents linked to his brief, but chose not to do so. Furthermore, when the Plaintiff provided explicit statutes and code numbers for each of Mr. Sloan's complaints in his motion for reconsideration, the Court rejected it, claiming it was too late. In doing so, the Court disregarded Chiofalo, which requires the "careful examination of court." The Court below did the opposite, refusing to examine the legal underpinning and then rejecting them.

Mr. Sloan and his counsel more than met their burden of providing the legal underpinnings of the Plaintiff's reasonable belief that his employer's actions were unlawful and against public policy. The trial court erred in applying the incorrect

standard and refusing to engage in a careful examination.

E. THE TRIAL COURT APPLIED AN INAPPROPRIATE DOUBLE STANDARD AND DID NOT FOLLOW THE SUPREME COURT'S STANDARD OF SUMMARY JUDGMENT.

At the summary judgment stage the trial court is to "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. at 520, 540 (1995); Meade v. Tp. of Livingston, 249 N.J. 310, 327 (2021). "The court's function is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' " Rios v. Meda Pharm., Inc., 247 N.J. 1, 13, (2021) (*quoting Brill*, 142 N.J. at 540).

Here, it appears that the trial court turned the standard upside down, viewing all evidence in the light most favorable to the defendant moving party and weighing the evidence accordingly. The Court specifically held that the grant of summary judgment was appropriate because the plaintiff did not identify the precise statutes until summary judgment and should have done so in discovery. *Opinion at 34*. First, the Court acknowledged that the Plaintiff did identify the rules and regulation at summary judgment, which contradicts the Court's later

holding that Plaintiff never identified the precise statute numbers. Then the Court proceed to grant summary judgment as a discovery sanction even though no such motion for more specific discovery had ever been filed. That is where the Court's erroneous double standard became the most obvious.

Even in its appeal brief, the Defendants repeatedly and emphatically claim that discovery spanned nearly three years and 951 days, and the plaintiff never amended or supplemented his interrogatory answers. *Db2*, 4, 12, 15. But the Defendants neglected to advise the Court that the Defendants never moved for a more specific Complaint nor did they move for more specific answers to interrogatories.

If the Defendants did not think that the Plaintiff's 28 page, 146 paragraph Complaint was specific enough, the Defendants could have and should have filed a motion for a more definite pleading, pursuant to R.4:6-4. But the Defendants never filed such a motion. If the Defendants did not think that the interrogatory answers were specific enough, the Defendants could have and should have filed a motion for more specific answers to interrogatories, pursuant to R.4:17-5. But the Defendants never filed any such motion. If the Defendants believed that the Plaintiff had given evasive or incomplete answers during written discovery or deposition, the Defendants could have and should have filed a motion, pursuant to

R.4:23-1(b) to compel the Plaintiff to provide a more specific answer. But the Defendants never filed any such motion.

Instead, the Defendants lie in wait and then moved for summary judgment, accusing the Plaintiff of failing to amend interrogatory answers. Summary judgment is not the appropriate time to seek discovery sanctions. Such requests should have been made during discovery. It was error to hold the Plaintiff responsible for non-specific answers when the Defendants made no effort to seek the Court's order during discovery for more specific answers. This was not a discovery motion and the Court erred in assessing discovery sanctions against the Plaintiff by dismissing his case when the Defendants had never made such a request of the Court prior to summary judgment.

Likewise, in their appeal brief, the Defendants chide the Plaintiff for declining to distinguish Hitesman. *Db21*. Yet, the Defendants never explain why, after the Plaintiff identified that it was the Chiofalo standard that was appropriate, *Plaintiff Opposition Brief*, at 42-43, the Defendants completely ignored that important Supreme Court precedent. It was the Defendants who were derelict in not bringing discovery motions, and yet the Court sanctioned the Plaintiff by improperly dismissing his case. The Court applied incorrect and double standards, giving the Defendant all benefits of the doubt and all inferences - the exact

opposite of what was required by law.

Indeed, in Chiofalo, the Supreme Court took the time to scold the defendants in that case for complaining that they were never provided with an exact statute number when throughout litigation and trial they had never done so. Chiofalo at 545. It was grossly inequitable for the Trial Court to dismiss the Plaintiff's case for failing to provide exact statute numbers until summary judgment, when the Defendants passed up every opportunity to move the Court to order more specific pleadings and answers to discovery during the 951 days of discovery.

F. SUMMARY JUDGMENT WAS INCORRECTLY GRANTED AND THE MATTER SHOULD BE REMANDED.

The Plaintiff's Complaint, together with discovery, motion briefs, oral argument and additional information in Plaintiff's reconsideration brief, was more than enough to identify the legal underpinnings of his complaints to his employer, which form the basis for this valid CEPA claim. The Defendants never filed any motions seeking more specific information, nor did the Defendants ever file a motion for more specific discovery. The Trial Court erred in assessing a discovery sanction in the absence of such a motion,

The Trial Court erred in declining to carefully examine Plaintiff's evidence,

which was more than specific enough to identify the law relied upon. The Trial Court employed the wrong legal standard for summary judgment and the wrong legal standard for specificity of the laws relied upon for a section 3(a) claim.

Amicus recognizes that our Courts have issued confusing and even conflicting standards in a series of CEPA cases, but the one overriding principle is that conscientious employees are not expected to be lawyers. The Trial Court failed to carefully examine the evidence and did not view the evidence in the light most favorable to the non-moving party Plaintiff. Accordingly, *Amicus* NELA-NJ asks the Court to reverse the denial of summary judgment and affirm the legal standards set forth herein.

Dated: January 29, 2025

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Alan H. Schorr', with a large, stylized initial 'A' at the beginning.

Alan H. Schorr
Attorney for *Amicus*, NELA-NJ

JOHN SLOAN,

Plaintiff-Appellant,

v.

**CAPE REGIONAL MEDICAL
CENTER, INC., CAPE
REGIONAL HEALTH SYSTEM,
INC., ED MOYLETT, JOANNE
CARROCINO, MARK GILL, and
BYRON HUNTER,**

Defendants-Respondents.

:
: **SUPERIOR COURT OF NEW**
: **JERSEY, APPELLATE DIVISION**
:
: Docket No. A-003581-23T1
:
: On Appeal From:
: Superior Court of New Jersey
: Law Division – Cape May County
: Docket No. CPM-L-462-20
:
: Sat Below:
: Hon. James H. Pickering, J.S.C.
:
:
:

**BRIEF OF DEFENDANTS-RESPONDENTS CAPE REGIONAL
MEDICAL CENTER, INC., CAPE REGIONAL HEALTH SYSTEM,
INC., ED MOYLETT, JOANNE CARROCINO, MARK GILL, AND
BYRON HUNTER IN RESPONSE TO MERITS BRIEF OF
AMICUS CURIAE NELA-NJ**

FOX ROTHSCHILD LLP

Formed in the Commonwealth of Pennsylvania
Jacob S. Perskie, Esq. (ID No. 020862007)
Brian J. McGinnis, Esq. (ID No. 178652015)
Midtown Building, Suite 400
1301 Atlantic Avenue
Atlantic City, NJ 08401
(609) 348-4515 (tel.); (609) 348-6834 (fax)
jperskie@foxrothschild.com
bmcginnis@foxrothschild.com
Attorneys for Defendants-Respondents

Dated:

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I. PRELIMINARY STATEMENT

This is a CEPA case. Plaintiff-Appellant John Sloan appeals from the trial court's grant of summary judgment against him and the dismissal of his claims in their entirety. The trial court correctly found that Sloan failed to identify the sources of law on which he relied with the specificity CEPA requires on summary judgment and that Sloan improperly attempted to rely on authority he had not identified during discovery. Sloan protests, variously arguing that he should be able to rely on: (1) *generalized* references to entire *titles* or *categories* of law identified by common name only, instead of the specific provisions therein upon which he actually relied; (2) sources of authority he did not identify in discovery, despite being asked directly to do so in written discovery and over three days of deposition testimony; and (3) sources of authority and arguments that he presented *for the first time* upon reconsideration and/or on appeal.

The Court has granted leave to an amicus curiae to file a merits brief in support of Sloan's appeal. But amicus mischaracterizes key CEPA precedent and exceeds the proper scope of the appeal. Indeed, amicus's submission merely parrots Sloan's arguments which the trial court correctly rejected both because they turn on dubious interpretations of CEPA case law and because the record contradicts them.

II. PROCEDURAL BACKGROUND

On May 17, 2024, the trial court granted Defendants-Respondents' motion for summary judgment and dismissed Sloan's claims in their entirety. (Pa1111).² On June 6, 2024, Sloan filed a motion for reconsideration, which the trial court denied in an oral opinion on July 12, 2024, and in a written order on July 15, 2024. (Pa1155; 2T; Pa1480). Sloan filed a Notice of Appeal on July 18, 2024. (Pa1482).

This Court accepted Sloan's opening brief and appendix on November 25, 2024, and Defendants-Respondents' opposition brief and appendix on January 15, 2025. On February 4, 2025, the National Employment Lawyers Association/New Jersey ("NELA/NJ" or "amicus") filed a motion for leave to appear as amicus curiae, along with its proposed brief in support of Sloan. On February 13, 2025, Defendants-Respondents filed their opposition to the motion. On February 20, 2025, the Court issued two orders—granting NELA/NJ's motion to file a merits brief and providing NELA/NJ with time to appear at oral argument. On February 21, 2025, NELA/NJ filed its merits brief. (See generally, Docket).

² As used herein, "Pa" refers to Sloan's appendix, "Pb" refers to Sloan's opening brief, "Db" refers to Defendants-Respondents' brief, "Ab" refers to amicus's brief, and "3T" refers to the transcript of the oral argument in the trial court on Defendants-Respondents motion to compel a third day of Sloan's deposition dated November 4, 2022.

III. FACTS MATERIAL TO THE MOTION

In an effort to avoid duplicative submissions, Defendants-Respondents rely on the statement of facts asserted in their opening brief. (Db5–Db16.)

IV. LEGAL ARGUMENT

A. Amicus Mischaracterizes Clear CEPA Precedent.

In advancing arguments in Sloan’s favor, amicus substantially mischaracterizes key CEPA precedent—which is both on point and dispositive of Sloan’s appeal.

Most egregious is amicus’s recitation of Chiofalo v. State, 238 N.J. 527 (2019). Citing Chiofalo, amicus argues for reversal of summary judgment because even though “Sgt. Chiofalo had never articulated a precise statute . . . the Supreme Court held that [his claim] was adequate to survive summary judgment.” (Ab17). Amicus neglects to mention that the employer in Chiofalo “never asked for a criminal code citation . . . or some legal citation to support” the plaintiff’s claims during discovery or on summary judgment in the trial court. 328 N.J. at 545. In this case, on the other hand, it is well-established that Defendants-Respondents repeatedly asked Sloan to provide the specific provisions he relied on (both in written discovery and over three days of deposition) and properly raised this issue in the trial court on summary judgment. (See generally Db1–Db44).

In glossing over this key point, amicus cites the following passage of

Chiofalo:

We reiterate, however, that we do not expect whistleblowers to be lawyers on the spot; once engaged in the legal process, and with the assistance of counsel or careful examination by the court, however, the legal underpinnings for claimed behavior that is perceived as criminal or fraudulent should be able to be teased out sufficiently for identification purposes.

(Ab17–Ab18) (citing Chiofalo, 238 N.J. at 544–45). But amicus conveniently omits the key language that follows—i.e., “*if a defendant questions the source of law relied upon by the plaintiff, that source should be provided by the plaintiff.*” 328 N.J. at 544–45 (emphasis supplied). This crucial language from Chiofalo is *directly on point in this case*. See also id. at 541–42 (stating the “identification [requirement] is important for . . . the [CEPA] analysis, so when no such law or policy is forthcoming, judgment can and should be entered for the defendant.”).

Amicus also relies on a dubious interpretation of Hitesman v. Bridgeway, Inc., 218 N.J. 8 (2014). That is, amicus insists that “[t]he specific holding in Hitesman was expressly limited to the ‘improper quality of healthcare’ clause of CEPA” applicable to licensed health care professionals,” i.e., claims brought under N.J.S.A. 34:19-3(a)(1) or 34:19-3(c)(1). (Ab12–Ab13). ***But this is not what the Hitesman court held.*** Indeed, the New Jersey Supreme Court

specifically stated “[w]e further hold that a plaintiff asserting his or her employer’s conduct is incompatible with a clear mandate of public policy concerning the public health”—i.e., alleged violations of N.J.S.A. 34:19-3(c)(3), which are *not* limited to licensed health care professionals—“must, at minimum, identify authority that applies” to the employer’s activity or practice. Hitesman, 218 N.J. at 15. Thus, amicus’s argument on this point is substantively wrong. It is also confusing, as neither amicus nor Sloan explains *why* the general principles of Hitesman and CEPA more broadly—i.e., that a plaintiff must identify a sufficient source of authority or have judgment entered against them—should apply in some kinds of CEPA cases but not Sloan’s. See also, Klein v. Univ. of Medicine and Dentistry of New Jersey, 377 N.J. Super. 28, 39–40 (App. Div. 2005), certif. denied, 185 N.J. 39 (2005) (stating “[t]he determination of whether the plaintiff has adequately established the existence of” a sufficient source of authority “is an issue of law” and stating further that “CEPA requires judicial resolution of threshold issues respecting the existence of a statutory, regulatory, or other clear mandate of public policy before the trier of fact” can determine the objective reasonableness of an employee’s belief.).

Amicus also suggests that the principles explained in Dzwonar v. McDevitt, 177 N.J. 451 (2003), are limited to claims under N.J.S.A. 34:19-3(c). There are several problems with this approach. First, Sloan has not

properly raised this issue below or in his opening brief. As such, Dzwonar's reach is not within the scope of this appeal, and amicus's argument is immaterial. Second, amicus does not attempt to explain *how* or *why* N.J.S.A. 34:19-3(c), the provision involving an employee who "objects to . . . any activity, policy, or practice" of an employer does not apply to Sloan's alleged whistleblowing, in which he plainly claims that he "object[ed]" to alleged conduct by Defendants-Respondents. N.J.S.A. 34:19-3(c). Third, amicus does not address leading CEPA cases that cite Dzwonar with approval in other CEPA contexts for its general principle that CEPA's identification requirement is a threshold determination of law for the court. See, e.g., Hitesman, 218 N.J. at 30–31; Chiofalo, 238 N.J. at 542–43. Thus, proposed amicus's strained reading of Dzwonar is both strained and immaterial.

Ultimately, it is amicus and Sloan who argue for a "nearly impossible requirement" under CEPA. (Ab1). Under their view, a CEPA plaintiff need not identify the factual basis of his claim during discovery. Instead, the plaintiff may rely on gamesmanship and unspecific, generic descriptions of authority during discovery; they may cite to general categories of law, instead of the specific provisions therein they claim to rely on, at summary judgment; and, if these tactics prove unsuccessful, they may present new arguments, citations, and documents—which they knew or should have known about all along—*for*

the first time upon reconsideration or on appeal. As the trial court correctly held, this approach is untenable under well-established standards governing CEPA and the discovery process. This Court should affirm.

B. Amicus’s Remaining Arguments Are Improper.

Apart from its highly misleading recitation of foundational CEPA principles, amicus makes several additional arguments in support of Sloan’s appeal. The Court should disregard these arguments, which exceed the scope of the appeal and mischaracterize the record.

First, amicus presents speculative and immaterial arguments about the proceedings below. (Ab20–22). They variously argue that Defendants-Respondents “should have filed a motion for a more definite pleading,” “should have filed a motion for more specific answers to interrogatories,” and “should have filed a motion to compel” during discovery. (Ab20–21). But these arguments exceed the scope of this appeal because Sloan did not raise them before this Court. It is well established that an “amicus must take the case on appeal as they find it,” Carrion, 249 N.J. at 279 (citing Gandhi, 201 N.J. at 191), and that “an amicus curiae . . . cannot raise issues not raised by the parties.” Bethlehem Twp. Bd. of Educ., 91 N.J. at 48–49 (1982).

In his opening brief, Sloan did not challenge the propriety of Defendants’ interrogatory or his ongoing obligations under Rules 4:17 and

4:18 to supplement and/or amend discovery responses during the discovery period. (See generally, Pb1–50). His failure to raise these issues in his opening brief is a waiver. Rule 2:6-2(a); e.g., State v. Smith, 55 N.J. 476, 488 (1970); In re Bell Atlantic-New Jersey, 342 N.J. Super. 439, 442–43 (App. Div. 2001); Selective Ins. Co. of America v. Hojnoski, 317 N.J. Super. 331, 335 (App. Div. 1998); Interchange State Bank v. Veglia, 286 N.J. Super. 164, 188 (App. Div. 1995); Warren Twp. v. Suffness, 225 N.J. Super. 399, 412 (App. Div. 1988).

Crucially, amicus’s argument encapsulates the entire problem with Sloan’s approach in this case. It is not the job of Defendants-Respondents to articulate the factual and legal underpinnings of Sloan’s claims. As the trial court correctly held, “that is Sloan’s obligation.” (Pa1143). During discovery, Sloan and his counsel made a tactical choice to limit his CEPA claim to matters asserted in his Complaint and in his deposition testimony. As the trial court correctly held, Sloan may not reverse course after discovery ends simply because this gamble did not succeed. (Pa1146).

Second, amicus states that the trial court held that “a conscientious employee must know the exact statute or regulation number and must so advise the employer in order to satisfy the first prong” of CEPA’s prima facie case. (Ab1). The trial court held no such thing. Instead, the trial court simply held that once litigation commences, a CEPA plaintiff, *with the assistance of his*

counsel, must specifically identify the applicable authority such that the court and “the jury could determine if there was a law, rule, regulation or clear mandate of public policy that plaintiff reasonably believed had been violated. A general reference to a law, rule or regulation is simply not sufficient.” (Pa1134). This is not, as proposed amicus suggests, a “nearly impossible standard.” (Ab1). Rather, it is a well-established requirement that is consistent with Chiofalo, Hitesman, the broader body of CEPA case law, and the rules and purposes of the discovery process. (See § IV-A, *supra*).

Third, amicus states that Sloan relied on an August 25, 2020, email and photograph identifying a violation of “Sections 501.10(b)(1) and 501.15(A)(4)” of the National Electric Code. (Ab6). But Sloan never identified this issue as a basis of his alleged whistleblowing *during discovery*—whether in response to interrogatories directly on point; in his Complaint, which he incorporated by reference as a response to the same; or over *three days of deposition testimony*. (Pa579–Pa580; Pa1–Pa28; Pa113–Pa264). As the trial court correctly held, “[t]he [purpose of the] discovery process is to eliminate concealment and surprise in litigation,” and Sloan’s failure to identify this issue during discovery is dispositive. (Pa1146).

Fourth, proposed amicus states that Sloan relied upon Section 1135 of the Social Security Act. (Ab6–Ab7). This, too, ignores the record. Again, Sloan

first argued that his alleged whistleblowing relied on Section 1135 in his motion for reconsideration. (See generally, Pa675–742, Pa1178–79). Moreover, this argument is merely an attempt to recharacterize *insufficient, overly generalized references* to the Life Safety Code, about which the trial court found Sloan “did not specify which portion or section . . . Cape was violating or which inspections were not getting done.” (Pa1139, Pa1143).³

Fifth, amicus states Sloan provided “a link to the State Operations Manual . . . regarding non-compliant temperature and humidity levels.” (Ab7). Acknowledging that this “manual is large,” amicus suggests that the Court should have searched through the entire manual to locate the precise section Sloan relied on. But this is exactly the sort of generalized reference to an entire category of purported authority the trial court properly rejected. (Pa1143). As the trial court correctly held, “it is not up to the court, to hunt through the ten (10) laws, rules, and regulations which Sloan cites only generally, and only by common name, to find the specific law, rule, or regulation that provides a

³ As Defendants-Respondents noted in their merits brief, this argument fundamentally misconstrues the substance of Section 1135, which creates an elective waiver process “during any portion of any emergency period.” 42 U.S.C. § 1320b-5(b). In other words, Section 1135 cannot *itself* be violated, insofar as it provides no mandatory, affirmative obligations on hospitals but rather provides a discretionary process by which covered facilities may seek exemptions from *other* regulatory requirements, which Sloan failed sufficiently to identify. Id.

standard. That is Sloan’s obligation.” (Pa1143). Moreover, the trial court found that Sloan admitted repeatedly under oath that *he did not actually report this issue* to CEO Joanne Carrocino, which was dispositive—a key fact that both Sloan and amicus decline to acknowledge. (Pa1148–Pa1149; Pa241–Pa260; Pa94–Pa95).

Sixth, proposed amicus accuses Defendants-Respondents of “[lying] in wait” instead of attempting to conduct discovery in good faith. (Ab21). This specious accusation lacks support. Indeed, as the trial court held, Defendants-Respondents “served discovery that sought the very information at issue.” (Pa1146). Instead of responding to these direct requests, Sloan elected to incorporate the allegations of his Complaint by reference. (Pa579–Pa580). Defendants-Respondents then spent two days of deposition questioning Sloan about these allegations. Defendants-Respondents were forced to file a motion to compel a third day of deposition, which the trial court granted, and with respect to which the trial court specifically noted that Sloan had been “evasive, intentionally elusive . . . not very cooperative . . . didn’t want to give straight answers . . . he kind of thought it was a game, maybe a match of wits.” (3T, at 4:23–5:10). To the extent anyone attempted to game the discovery process, it was Sloan—not Defendants-Respondents.

Seventh, and finally, amicus suggests that the trial court’s grant of summary judgment was an improper “discovery sanction.” (Ab21, Ab22). Not so. The trial court simply held that CEPA does not impose a guessing game on employers or the court; instead, a CEPA plaintiff, with the assistance of his counsel, must identify the basis of his claims *with specificity during discovery*. (Pa1143–Pa1146). Having failed to do so, summary judgment was proper. This is an uncontroversial proposition that is consistent with CEPA case law, traditional civil burdens of proof, and the discovery process.

V. CONCLUSION

Sloan and amicus seek to rewrite clear standards under CEPA and well-established principles regarding discovery and burdens of proof. The trial court correctly declined to entertain such a radical departure from settled law. This Court should do the same and affirm the decision below.

Respectfully submitted,

s/ Brian J. McGinnis

FOX ROTHSCHILD LLP

Jacob S. Perskie, Esq. (ID No. 020862007)

Brian J. McGinnis, Esq. (ID No. 178652015)

Midtown Building, Suite 400

1301 Atlantic Avenue

Atlantic City, NJ 08401

(609) 348-4515 (tel.); (609) 348-6834 (fax)

jperskie@foxrothschild.com

bmcginnis@foxrothschild.com

Attorneys for Defendants-Respondents

Dated: