**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

Deputy Chief GARY A. BROWN and
Police Officer HAROLD C. NELTHROPE,

Plaintiffs/Appellees,

v

KWAME KILPATRICK, Mayor, City of
Detroit, and the CITY OF DETROIT,
a Municipal Corporation; jointly and severally,

Defendants/Appellants.

**Supreme Court Nos. 132016/132017**
COA Docket Nos. 259911/259923

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# PLAINTIFFS-APPELLEES' BRIEF IN RESPONSE TO DEFENDANTS-APPELLANTS' REPLY

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## I. COUNTERSTATEMENT OF FACTS

On October 20, 2006, Defendants served a reply ("Defendants' Reply") to Plaintiffs' Brief in Response to Defendants' Application, in which Defendants discuss a newly-decided, unpublished Michigan Court of Appeals opinion, *Bush v Detroit School Dist*, COA No. 268362; 2006 WL 2685088 (Mich App 2006), *per curiam*, decided September 19, 2006. Defendants' Reply claims that *Bush* "again upheld" the principle that the Michigan Whistleblower Protection Act, MCL §15.361 et seq. ("WPA"), does not protect public employees who investigate and report on wrongdoing as part of their assigned job duties **(Defendants' Reply, p. 1)**.

## II. ARGUMENT

This Court should not consider the *Bush* opinion with respect to the issue of whether the WPA protects employees whose job duties involve reporting misconduct. In the first place, *Bush* is an unpublished opinion and therefore not precedentially binding under the rule of *stare decisis*, MCR 7.215(C)(1). And, an application has been filed with this Court for leave to appeal the decision, Supreme Court No. 132370.

Second, in support of its ruling that the *Bush* plaintiff was not covered by the WPA because her job involved reporting of irregularities in the financial affairs of a public school, the *Bush* panel focused on two Court of Appeals decisions, *Phinney v Perlmutter*, 222 Mich App 513; 564 NW2d 532 (1997) and *Heckmann v Detroit Chief of Police,* 267 Mich App 480; 705 NW2d 689 (2005). However, these two decisions do not establish a rule of law that the WPA does not apply to employees whose job duties include the reporting of wrongdoing on the part of their employer.

In discussing *Phinney*, the *Bush* panel noted that one of the reasons cited by the *Phinney* court for finding that the *Phinney* plaintiff engaged in protected activity under the WPA was that,

unlike the police officer in *Dickson v Oakland University,* 171 Mich App 68; 429 NW2d 640 (1988), the *Phinney* plaintiff was not required to report her supervisor's alleged theft as part of her "job function." The *Bush* panel then distinguished the *Bush* plaintiff from the *Phinney* plaintiff, holding that "...[U]nlike the case in *Phinney,* the [*Bush* plaintiff's reporting of] financial irregularities was one of plaintiff's job functions." *Bush*, p. 5.

However, the *Bush* panel apparently did **not** consider the fact that, similar to this Court's commentary in footnote 4 of *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993), the *Phinney* court's brief reference to the *Phinney* plaintiff's job function did not indicate that the *Phinney* court "applied its judicial mind" with respect to whether *Dickson* established a rule of law regarding the issue of "job duties".[1] Also, it is important to note that neither the *Phinney* nor *Bush* opinions stated anything about footnote 4 of *Dudewicz.*

*Bush* states that the *Heckmann* court cited *Dudewicz* in noting that "the [*Heckmann*] plaintiff's report of financial violations to his superiors within the police department was part of

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[1] *Phinney* is an extensive opinion in which the Court of Appeals discussed, at length, several issues dealing with interpretation of the WPA, but then simply made a brief, almost passing observation about the plaintiff's job function not including the reporting of violations, *Phinney*, p. 555. The resolution of the case did not turn on this issue, and the *Phinney* court's lack of any analysis in its observation about the plaintiff's job function suggests that the court's brief reference was closer to an afterthought as opposed to a recognition of a binding rule of law (much akin to this Court's commentary in footnote 4 of *Dudewicz*). If the *Phinney* court believed that *Dickson* established a hard and fast rule of law with respect to a "job duties doctrine", it probably would not have bothered to list other factors to support its holding that the plaintiff engaged in protected activity, including the fact that the plaintiff's reports to the University of Michigan, a public body, did not have to be made to a "higher authority", and the fact that the plaintiff's reports triggered an investigation by the University, *Phinney*, p. 555. And, the *Phinney* court most certainly would have cited *Dudewicz* with respect to the job duties issue if it was true, as claimed by the instant Defendants, that *Dudewicz* "approved" *Dickson* with respect to a job duties issue **(See Defendants' Application Brief, at p. 19)**. In fact, the *Dudewicz* court did not even **remotely** discuss whether the *Dickson* panel established a binding rule of law by suggesting that a WPA plaintiff's job function cannot include reporting of violations.

the plaintiff's job function, which could not otherwise form the basis of a WPA claim," *Bush*, p. 5. This statement by the *Bush* panel is simply incorrect. *Heckmann* did not cite *Dudewicz* for this proposition, and the issue of whether the *Heckmann* plaintiff's job function involved reporting violations was not even raised in the *Heckmann* opinion.

## III. RELIEF REQUESTED

For the reasons stated above and in Plaintiffs' Response Brief, Plaintiffs request that this honorable Supreme Court deny Defendants' Application for Leave to Appeal, but in doing so, issue a preemptory order stating that:

(1) The WPA does not exclude from its protection an employee whose job duties include the discovery or reporting of violations of the law in a situation which otherwise satisfies the requirements of the Act; and

(2) The WPA does not require that an employee of a public body who reports a violation of the law to his or her supervisor must also report the violation to an outside public body in order to be afforded the protection of the Act in a situation which otherwise satisfies the requirements of the Act.

In the alternative, Plaintiffs request that the Defendants' Application for Leave be denied.

Respectfully submitted,

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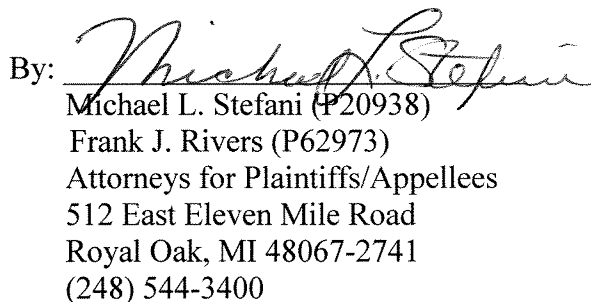

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Dated: November 20, 2006

**STATE OF MICHIGAN**

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**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF APPLICATION FOR CROSS-APPEAL**

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## I. STATEMENT OF FACTS

On October 30, 2006, Defendants served Plaintiffs with Defendants' Brief in Opposition to Plaintiffs' Application for Leave to Cross-Appeal ("Defendants' Response"). Defendants' Response claims that "previous Michigan decisions" have held that a governmental employee cannot be protected under the Michigan Whistleblower Protection Act, MCL §15.361 et seq. ("WPA") if he or she only reports misconduct to his or her superior, through "normal channels", in the "ordinary course" of his or her job duties, **and** he or she does not go "outside" to report the misconduct to a separate public authority **(Defendants' Response, p. 1)**.

## II. ARGUMENT

### A. None Of The Post-*Dickson* Cases Cited By Defendants Has Upheld Or Even Acknowledged Defendants' Interpretation Of The WPA

Defendants maintain that a governmental employee is not covered by the WPA in the "combination of circumstances" in which the employee reports to his or her superior and does not go outside "normal channels" to report misconduct to a separate public agency **and** where the employee is "just" reporting misconduct as part of his or her job function **(Defendants' Response, pp. 1, 7).** Defendants have seized upon the *Dickson* panel's *dicta* about a plaintiff's "job function" and reporting to a "higher authority" in their attempt to transform *dicta* into a doctrine. The fact remains that none of the post-*Dickson* cases cited by Defendants, including *Dudewicz*, has upheld or even acknowledged the existence of Defendants' "combination of circumstances" theory.

Defendants argue that the case law is "tangled" **(Defendants' Response, p. 1)**, but that characterization is based on Defendants' self-serving attempts to create authority from *obiter dicta*. *Dudewicz* did not state anything about "reporting to superiors" through "normal channels" (nor did

*Dickson*, for that matter) and *Dudewicz* only briefly acknowledged, in passing, the *Dickson* panel's suggestion that a WPA plaintiff report to a "higher authority". And, contrary to what Defendants contend **(See Defendants' Application Brief, p. 19)**, *Dudewicz* did not even remotely address whether the *Dickson* panel established a binding rule of law by suggesting that a WPA plaintiff's job function cannot include reporting of violations.

Defendants' contention that the *Dudewicz* court "applied its judicial mind" and "declared" that "*Dickson* was right in holding that a governmental employee was not a whistleblower because he only reported wrongdoing to his supervisor and did not go to outside channels to expose the wrongdoing" **(Defendants' Response, p. 6)** simply misstates the holding of both *Dickson* and *Dudewicz.*[1] It also ignores the fact that none of the Michigan cases cited by Defendants have discussed the Defendants' "combination of circumstances" interpretation of the WPA. And, with the exception of *Heckmann v Detroit Chief of Police*, 267 Mich App 480; 705 NW2d 689 (2005) and the *Brown* panel in this case, 271 Mich App 692 (2006), none of the cases have considered whether *Dudewicz* "upheld" *Dickson* with respect to an outside reporting requirement.

B. <u>*Heckmann* and *Brown* Demonstrate That The Court Should Issue A Peremptory Order</u>

Defendants contend that the Court of Appeals in *Heckmann* "recognized" that *Dickson* and *Dudewicz* "established a requirement" that a public employee is only covered by the WPA if he or she discloses misconduct to an outside agency **(Defendants' Response, pp. 6-7)**, but this claim is

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[1] In their efforts to promote an interpretation of the WPA which would preclude any conceivable scenario in which Brown could be covered by the Act, the Defendants proffer factors which were not even mentioned by the *Dickson* panel, e.g., whether an employee "reported to a superior" through "normal channels" **(Defendants' Response, p. 8, n.1)**. The fact that the *Dudewicz* court apparently did not give any thought to the issues raised by the Defendants further reinforces the fact that the court's commentary in footnote 4 was mere *obiter dicta*.

beyond disingenuous. What the *Heckmann* panel "recognized" is that the plain language of the WPA provides "no exception [from protection of the WPA] for reporting a violation or a suspected violation of a law to a public body when the whistleblower is also an employee of a public body", *Heckmann,* pp.494-495. But, the *Heckmann* panel stated that it "felt constrained" to follow *Dudewicz*'s possible approval of *Dickson* on this point, *Id.* Indeed, the language employed by the *Heckmann* panel, stating, "...**to the extent that the WPA requires** a whistleblower who is an employee of a public body to report a violation or a suspected violation of a law or regulation to a different public body...", *Heckmann*, p. 497 (emphasis added), strongly suggests that the panel was not convinced that this Court's commentary in footnote 4 of *Dudewicz* "upheld" an outside reporting requirement under *Dickson.*

This was the same concern that the *Brown* panel referenced in the instant case. The *Brown* panel noted that it faced the same struggle as the *Heckmann* panel: interpreting footnote 4 of *Dudewicz* as approving the outside reporting requirement mentioned in passing in *Dickson* would conflict with both the plain language of the WPA and the legislative intent of the Act, *Brown*, n. 5. But, the *Brown* panel, like the *Heckmann* panel, did not rule that the *Dudewicz* footnote was *obiter dicta,* apparently out of respect for the authority of this Court. Still, the *Brown* panel respectfully disagreed with footnote 4 in *Dudewicz*, if indeed it was intended to construe the WPA as requiring an employee of a public body to report to a separate public body. *Heckmann* and *Brown* simply demonstrate that this Court should issue a peremptory order to clarify the misimpression that may have been created by its comments in the *Dudewicz* footnote.

C. Defendants Ignore Both The Plain Language And Legislative Intent Of The WPA

1. Defendants Fail To Address The Plain Language Of The WPA

Defendants ask this Court to "address the various statutory and policy considerations" attendant to the WPA **(Defendants' Response, p. 1)**, but it is critical to note that **nowhere** in Defendants' Response do they address the fact, raised in Plaintiffs' Application, that the plain language of the WPA simply does not require, or suggest, that an employee of a public body report to an outside public body. Defendants do not attempt to discuss the fact that the plain language of the WPA does not make any distinction between an employee of a public body and other public employees, or between public and private sector employees, for that matter.[2] Defendants also do not contest that this Court has ruled that, as here, when a statute is not ambiguous, judicial construction is not permitted, *Shallal v Catholic Services of Wayne Co*, 455 Mich 604, 612; 566 NW2d 571 (1997). Unwarranted judicial construction is **precisely** what Defendants ask the Court to do in this case.[3]

2. Defendants Misstate the Legislative Intent of the WPA

Moreover, Defendants' contention that the purpose of the WPA **(Defendants' Response, p. 8)** is "to protect whistleblowers" **completely** misstates the legislative intent of the Act. The House

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[2] Defendants also choose to ignore the fact that the *Dudewicz* court did not discuss whether the plain language of the WPA supported an "outside reporting" requirement, or the exclusion of employees whose job duties include reporting, from the protection of the Act. Nonetheless, Defendants still maintain that the *Dudewicz* court's brief footnote comment was not *obiter dicta*, but rather was a recognition of a binding rule of law established under *Dickson*.

[3] Given that the plain language of the Act says nothing about outside reporting or job duties, the *Dickson* panel's failure to explain why it suggested a construction of the WPA which is at odds with the plain language of the Act demonstrates that *Dickson* did not establish a binding rule of law with respect to the WPA.

Legislative Analysis of the WPA makes clear that the intended purpose of the Act is to **bring to the attention of the public violations which would otherwise go hidden, for the protection of the public**:

> "Violations of the law by corporations or governments and by the men and women who have the power to manage them are among the greatest threats to the public welfare…**Because these institutions are large and impersonal and because they are regulated by complex and, to most people, unfamiliar statutes and rules, specific violations of law by them often go unnoticed by the public which is the victim**." House Legislative Analysis HB 5088, 5089; February 5, 1981 (Emphasis added)

Thus, the Michigan Legislature clearly intended the Act to **protect the public**, and sought to accomplish this by protecting whistleblowers from retaliation. And, Michigan courts have interpreted and applied the Act in this fashion. As the Court of Appeals ruled in *Henry v City of Detroit*, 234 Mich App 405; 594 NW2d 107 (1999):

> "The WPA is a **remedial statute** and must be **liberally construed** in favor of the persons it was intended to benefit. The underlying purpose of this Act is the **protection of the public**. The Act meets this objective by **protecting the whistleblowing employee**..." *Henry*, p. 409 [Citations omitted] (Emphasis added)

Contrary to Defendants' interpretation of the WPA, there is nothing in the Act or the legislative history which speaks to "normal channels" or "outside agencies" or even **suggests** that the Legislature was concerned with whether a whistleblower "went out on a limb" and reported to an "outside agency" as long as **violations are brought to the attention of the public**.

To suggest, as Defendants do, that Plaintiffs were not doing their "civic duty" **(Defendants' Response, p. 8)** by reporting misconduct to persons in authority in the Detroit Police Department, simply ignores two plain facts. The first is that, given the obvious negative consequences to the

Plaintiffs' careers for reporting the information which came to their attention about the Mayor, the Mayor's wife and his security team, whistleblowers like Brown and Nelthrope do need the protection of the Act to perform their duty, civic or otherwise. Second, the important thing is not whether the information was reported to Internal Affairs, Oliver, Beatty or some "outside" public body other than Beatty, but rather that Nelthrope's and Brown's reporting resulted in the misconduct being brought to the attention **of the public.**[4] If future Nelthropes and Browns can be openly retaliated against by their employer for reporting wrongdoing to their public body employer, wrongful behavior and illegal conduct may not be reported and the public will be the loser.

3. Defendants Ignore the Consequences of Their Interpretation of the WPA

Finally, it should be noted that Defendants' Response fails to address Plaintiffs' argument that Defendants' interpretation of the WPA would contravene the purpose of the Act. Engrafting a requirement to the WPA that an employee of a public body report to an "outside" public body would not encourage whistleblowing, but rather would simply make it more difficult for these whistleblowers to bring misconduct to light.

## III. RELIEF REQUESTED

For the reasons stated above and in Plaintiffs' Application for Leave to Cross-Appeal, Plaintiffs request that this honorable Court issue a peremptory order stating that the WPA does not require an employee of a public body who reports a violation of the law to his or her employer to also report the violation to an outside public body in order to be afforded the protection of the Act in a

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[4] Although Brown's investigation and reporting of Nelthrope's allegations were abruptly interrupted by his termination and Chief Oliver's explicit instructions to the Internal Affairs Division to discontinue all investigation of the Mayor's security team and the Mayor and his staff, Nelthrope's and Brown's reporting benefited the public **(See Plaintiffs' Response to Defendants' Application, p. 32, n. 11)**

situation which otherwise satisfies the requirements of the Act. In the alternative, Plaintiffs request that the Court grant Plaintiffs' Application for Leave to Cross-Appeal.

Respectfully submitted,

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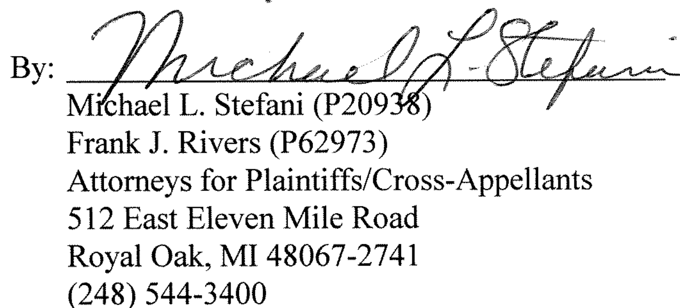

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