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STATE OF MICHIGAN
IN THE SUPREME COURT

JENNIFER JANETSKY,

Plaintiff-Appellant,

-vs-

COUNTY OF SAGINAW, and CHRISTOPHER BOYD, Individually and in his capacity as Saginaw County Chief Assistant Prosecutor, jointly and severally,

Defendants-Appellee.

and

SAGINAW COUNTY PROSECUTOR'S OFFICE, and JOHN McCOLGAN, Individually, and in his official capacity as Saginaw County Chief Prosecutor

Defendants.

Supreme Court No.
MCOA No. 346542
Lower Case No. 15-028306-CL-SP

Jennifer Janetsky,

Plaintiff-Appellant,

v

County of Saginaw, John McColgan, and Christopher Boyd,

Defendants-Appellees,

and

Saginaw County Prosecutor's Office,

Defendant.

Supreme Court No.
MCOA No. 346565
Lower Case No. 15-028306-CL-SP

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PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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RECEIVED by MSC 12/20/2023 4:55:27 PM

TABLE OF CONTENTS

Index of Authorities iii

Material Proceedings and Judgement and Order Applied v

Statement of Questions Presented.....viii

Statement of Material Facts 1

Argument 6

I. The Court of Appeals Erred in Dismissing Plaintiff-Appellant's Claim under Michigan's Whistleblowers' Protection Act Against Saginaw County on the Basis that the County was Not Plaintiff-Appellant's Employer. 6

A. The Court of Appeals' Decision Violates the Rules of Statutory Construction: As an Assistant Prosecuting Attorney, Plaintiff-Appellant was an "Employee" of Saginaw County as Unambiguously Defined in the WPA. 8

B. The Court of Appeals' Decision is Contrary to Jurisprudence: It is Well Established that Counties are Co-Employers of Appointees of Elected Officials.....11

C. The Court of Appeals' Decision Creates a Legal Quagmire: Municipal Employees, like Prosecuting Attorneys, Asserting a Violation of the WPA are Left Without a Defendant-Entity Employer.....12

D. The Court of Appeals' Decision Weighed the Factors of the Economic Realities Test Improperly: The Circumstances Surrounding Plaintiff-Appellant's Employment Firmly Establishes that the County was a Co-Employer. 13

II. The Court of Appeals Erred in Dismissing Plaintiff-Appellant's Claim under Michigan's Public Policy Against All Defendants on the Basis that She Was Not Asked to Violate the Law. 16

III. The Court of Appeals Erred in Dismissing Plaintiff-Appellant's Intentional Tort Claims On the Basis that Plaintiff-Appellant had Not Presented Sufficient Evidence to Create a Genuine Issue of Material Fact.....19

A. The Court of Appeals Improperly Applied the Law, Erred in its Interpretation of the Facts, and Created a Novel Privilege for Supervisors and Employers to Falsely Imprison their Subordinate-Employees. 21

1. The Court of Appeals Erred in its Interpretation of the Law: The Period of Confinement is Irrelevant to a Prima Facie Claim of False Imprisonment. 22

2. The Court of Appeals Erred in its Interpretation of the Facts: The Evidentiary Record Clearly Establishes that Plaintiff-Appellant was Conscious of Her Confinement. 24

3. The Court of Appeals' Decision Creates a Bizarre Privilege Defense to Claims of False Imprisonment Entitling Supervisory Employees and Employers the Privilege to Detain Employees Against Their Will. 25

B. The Court of Appeals Improperly Applied the Law in the Dismissal of Plaintiff-Appellant's Assault and Battery Claim and Created an Inconsistency in the Jurisprudence. 26

Conclusion 28

RECEIVED by MSC 12/20/2023 4:55:27 PM

RECEIVED by MSC 12/20/2023 4:55:27 PM

INDEX OF AUTHORITIES

Cases

Adams v. Nat'l Bank of Detroit, 444 Mich. 329, 341 (1993) 16
Bauer v. Saginaw Cnty., 332 Mich. App. 174, 195, 955 N.W.2d 553, 564 (2020) 6
Branch County Board of Commissioners v. International Union et al., 260 Mich. App 189, 196 7
Chilingirian v City of Fraser, 194 Mich. App. 65 (1992) 3
Clark v. United Techs. Auto., Inc., 459 Mich. 681, 694, 594 N.W.2d 447, 453 (1999) 11
Dolan v. Continental Airlines/ Continental Express, 454 Mich. 373, 378, 563 N.W.2d 23 (1997) 4
Eide v. Kelsey-Hayes Co., 431 Mich. 26, 34, 427 N.W.2d 488, 491 (1988) 4
Fairley v. Dep't of Corrections, 497 Mich. 290, 296-97 (2015) 3
Fleet v. Koop, No. 227202, 2002 WL 235691, at *2 (Mich. Ct. App. Feb. 15, 2002) 7
Hess v Wolverine Lake, 32 Mich. App. 601, 604; 189 NW2d 42 (1971). 20
Hughson v. Antrim Co., 707 F. Supp. 304, 306 (W.D. Mich., 1988) 7
Janetsky v. Cnty. of Saginaw, 982 N.W.2d 374, 376 (Mich. 2022) 21
Janetsky v. Cnty. of Saginaw, No. 346542, 2020 WL 1968566 (Mich. Ct. App. Apr. 23, 2020) v
Janetsky v. Cnty. of Saginaw, No. 346542, 2023 WL 6322639, at *3 (Mich. Ct. App. Sept. 28, 2023) vi
Kardasz v. Spranger, No. 17-CV-10937, 2019 WL 1989021, at *10 (E.D. Mich. May 6, 2019) 7
Landin v. Healthsource Saginaw, Inc, 305 Mich. App. 519, 854 NW2d 152 (2014) 11
Miller v. Michigan Dep't of Att'y Gen., No. 21-10990, 2021 WL 4479699, at *4 (E.D. Mich. Sept. 30, 2021) 7
Moore v. Detroit, 252 Mich App 384, 387; 652 NW2d 688 (2002) 17
Moore v. Ingham Cnty. Prosecuting Att'y, No. 233003, 2003 WL 140142 (Mich. Ct. App. Jan. 17, 2003) 6
People v Starks, 473 Mich 227, 234; 701 NW2d 136 (2005) 21
People v. Kinsey, No. 361281, 2023 WL 6168356, at *3 (Mich. Ct. App. Sept. 21, 2023) 22
People v. Starks, 473 Mich. 227, 234, 701 N.W.2d 136 (2005) 22
People v. Terry, 217 Mich.App. 660, 662, 553 N.W.2d 23 (1996) 22
Phinney v. Perlmutter, 222 Mich. App. 513, 555, 564 N.W.2d 532 (1997) 4
Smith v. Town & Country Properties II, Inc., 338 Mich. App. 462, 475, 980 N.W.2d 131, 138 (2021) 5
South Dearborn Environmental Improvement Ass'n., Inc. v. Dep't of Environmental Quality, 502 Mich. 349, 360-61 (2018) 3
South Haven v. Van Buren Co. Bd. Of Comm'rs, 478 Mich. 518, 528 (2007) 4
St. Clair Prosecutor v AFSCME, Local 1518, 425 Mich 204, 225, 388 NW2d 231 (1986) 6
Suchodolski v. Mich. Consol Gas Co., 412 Mich. 692, 695, 316 NW2d 710 (1982) 11,12
Watson v. Gill, 40 Fed. Appx. 88, 89 (6th Cir. 2002) 7
Willoughby v. Lehrbass, 150 Mich App. 319 (1986) 18

Other Authorities

M Civ JI 115.02 21

M Civ JI 116.02 16
MCL 15.361(a) 1, 2, 4
MCL 49.31, 49.34 9
MCL 691.1401 4
MCL 691.1407 ..... v, 7
MCL 771.1(1) ..... viii, 12, 13
MCR 7.303(B)(1) vii
MCR 7.305(B)(5), (C)(2)(a) vii

RECEIVED by MSC 12/20/2023 4:55:27 PM

RECEIVED by MSC 12/20/2023 4:55:27 PM

MATERIAL PROCEEDINGS AND JUDGMENT AND ORDER APPLIED

This is a case with a long history. On November 19, 2015, Plaintiff-Appellant Jennifer Janetsky filed the present lawsuit against County of Saginaw ("County"), Saginaw County Prosecutor's Office, John McColgan ("McColgan"), and Christopher Boyd ("Boyd") asserting the following: (1) retaliation in violation of the Whistleblowers' Protection Act ("WPA"), (2) retaliation in violation of Michigan public policy, (3) assault and battery, (4) intentional infliction of emotional distress, and (5) false imprisonment.

At the conclusion of discovery, Defendants-Appellees filed a Motion for Summary Disposition. The trial court granted summary disposition on all claims brought against the Saginaw County Prosecutor's Office and McColgan based on case law that a County Prosecutor's Office is not a legal entity,[1] and because pursuant to MCL 691.1407, a Chief Prosecutor has absolute immunity from tort claims. The Court further dismissed Plaintiff's claim of intentional infliction of emotional distress in an order issued from the bench on November 7, 2018. (Appellant's Appendix, Vol. 2, pp. 175-279). However, the trial court denied Defendants' motion for summary disposition as to Plaintiff's claims against Boyd and the County of assault and battery, false imprisonment, and retaliation under the WPA and public policy.

Defendants-Appellees appealed the trial court's order and the Court of Appeals reversed and remanded for entry of an order granting summary disposition in favor of defendants on April 23, 2020, holding that: (1) Defendants Boyd and the County were entitled to governmental immunity as to the remaining intentional tort claims of false imprisonment and assault and battery, (2) there was no genuine issue of material fact that Plaintiff engaged in a protected activity under

[1] *See e.g.*, *Fleet v. Koop*, No. 227202, 2002 WL 235691, at *2 (Mich. Ct. App. Feb. 15, 2002) (citing *Hughson v. Antrim* Co., 707 F. Supp. 304, 306 (W.D. Mich., 1988); *Miller v. Michigan Dep't of Att'y Gen.*, No. 21-10990, 2021 WL 4479699, at *4 (E.D. Mich. Sept. 30, 2021).

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the WPA, and (3) Plaintiff's public policy claim was preempted by the WPA. *Janetsky v. Cnty. of Saginaw*, No. 346542, 2020 WL 1968566 (Mich. Ct. App. Apr. 23, 2020), *rev'd and remanded*, 982 N.W.2d 374 (Mich. 2022) (Appellant's Appendix, Vol. 2, pp. 312-318). Plaintiff-Appellant timely appealed to this Court.

On December 21, 2022, this Court reversed the Court of Appeals' order and remanded the case for consideration of the issues briefed, but not addressed by the Court of Appeals. *Janetsky v. Cnty. of Saginaw*, 982 N.W.2d 374 (Mich. 2022). In its opinion, this Court held:

> "The Court of Appeals erred by concluding that: (1) defendant Christopher Boyd is entitled to immunity from tort liability because there is no genuine issue of material fact concerning whether he acted in good faith, (2) plaintiff has not established a genuine issue of material fact that she engaged in protected activity under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, by reporting actual or suspected violations of the law, and (3) the WPA provides the exclusive remedy for plaintiff's public-policy claim."

Id. at 375.

On remand, the Court of Appeals took up the following questions previously raised by Defendants, but not addressed in that court's initial review:

> "(1) whether plaintiff had demonstrated a genuine issue of material fact regarding whether Boyd committed false imprisonment, (2) whether plaintiff had demonstrated a genuine issue of material fact regarding whether Boyd committed assault and battery, (3) whether plaintiff's WPA claim was barred by the applicable statute of limitations, (4) whether the County was plaintiff's "employer" for the purposes of her WPA claim, and (5) whether plaintiff suffered an "adverse employment action" for the purposes of her WPA claim."

Janetsky v. Cnty. of Saginaw, No. 346542, 2023 WL 6322639, at *3 (Mich. Ct. App. Sept. 28, 2023) (Appellant's Appendix, Vol. 2, p. 322). The Court of Appeals also considered whether

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Plaintiff's public policy claim was legally or factually supported, though it acknowledged that no such argument was raised by the parties. (*Id*., p. 323). In its opinion, issued on September 28, 2023, the Court of Appeals dismissed all of Plaintiff-Appellant's claims, excepting her retaliatory discharge claim against Defendant Boyd arising under the WPA. Plaintiff-Appellant filed a timely motion for reconsideration, which the Court of Appeals denied on November 18, 2023. (Appellant's Appendix, Vol. 2, pp. 319-329).

Plaintiff-Appellant applies for leave to appeal from the opinion of the Court of Appeals dated September 28, 2023, and denial of Plaintiff-Appellant's motion for reconsideration on November 18, 2023. This Court has discretion to exercise jurisdiction and grant leave to appeal under MCR 7.303(B)(1). *See also* MCR 7.305(B)(5), (C)(2)(a).

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STATEMENT OF QUESTIONS PRESENTED

1. Whether Plaintiff-Appellant, as an Assistant Prosecuting Attorney for Saginaw County, was Defendant Saginaw County's "employee," as that term is defined under Michigan's Whistleblowers' Protection Act.

The Court of Appeals' Answer: "No"

The Circuit Court's Answer: "Yes"

Plaintiff-Appellant's Answer: "Yes"

2. Whether Plaintiff-Appellant has a cognizable public policy claim when her claim is premised on workplace retaliation she suffered after she tried to bring a plea agreement into compliance with MCL 771.1(1) rather than being complicit in the entry of a plea deal that violated the statute.

The Court of Appeals' Answer: "No"

The Circuit Court's Answer: "Yes"

Plaintiff-Appellant's Answer: "Yes"

3. Whether Plaintiff-Appellant presented sufficient evidence so as to create a genuine issue of material fact as to her claim of false imprisonment when she demonstrated each of the prima facie elements, regardless of the length of her confinement.

The Court of Appeals' Answer: "No"

The Circuit Court's Answer: "Yes"

Plaintiff-Appellant's Answer: "Yes"

4. Whether Michigan common law affords supervisors and employers, including Defendant-Appellee Christopher Boyd, a privilege defense to claims of false imprisonment brought by subordinates, entitling them to detain subordinates, including Plaintiff-Appellant, without their consent.

The Court of Appeals' Answer: "Yes"

The Circuit Court's Answer: "No"

Plaintiff-Appellant's Answer: "No"

5. Whether Plaintiff-Appellant presented sufficient evidence so as to create a genuine issue of material fact as to her claim of assault and battery when she demonstrated each of the prima facie elements and consistent with a recent Court of Appeals decision.

The Court of Appeals' Answer: "No"

The Circuit Court's Answer: "Yes"

Plaintiff-Appellant's Answer: "Yes"

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NEED FOR APPELLATE REVIEW

The questions presented are ones of critical import to this state's jurisprudence:

1. **Whether Plaintiff-Appellant, as an Assistant Prosecuting Attorney for Saginaw County, was Defendant Saginaw County's "employee," as that term is defined under Michigan's Whistleblowers' Protection Act.**

The question of whether Plaintiff-Appellant, as an Assistant Prosecuting Attorney ("APA") for Saginaw County, was Defendant Saginaw County's "employee," as that term is defined under Michigan's Whistleblowers' Protection Act ("WPA"), presents an important issue of statutory interpretation: if a plaintiff fits the statutory definition of "employee," is the plaintiff required to further demonstrate their employment status through the economic reality test set forth in *Chilingirian v City of Fraser*, 194 Mich. App. 65 (1992), *remanded on other grounds* 442 Mich. 874 (1993)? This legal question is hugely impactful to WPA jurisprudence and to issues of statutory interpretation.

The Court of Appeals' decision on this significant legal question likewise carries considerable consequences, beyond those already set forth. For instance, in applying the economic reality test and determining that Plaintiff-Appellant, as an APA, was not an employee of Saginaw County, the Court of Appeals flouts established jurisprudence, which naturally assumes that a county is a co-employer of an APA, just as a county is a co-employer of other appointees of elected officials. *See e.g.*, *Bauer v. Saginaw Cnty.*, 332 Mich. App. 174, 195, 955 N.W.2d 553, 564 (2020) (citing to *St. Clair Prosecutor v AFSCME, Local 1518*, 425 Mich 204, 225, 388 NW2d 231 (1986)); *Moore v. Ingham Cnty. Prosecuting Att'y*, No. 233003, 2003 WL 140142 (Mich. Ct. App. Jan. 17, 2003); *Kardasz v. Spranger*, No. 17-CV-10937, 2019 WL 1989021, at *10 (E.D. Mich. May 6, 2019) (citing *Branch County Board of Commissioners v. International Union et al.*, 260 Mich. App 189, 196 (2003).

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The decision further creates a complicated legal landscape for county prosecutors, and likely for other appointees of elected officials. Taking this decision in conjunction with jurisprudence holding that County Prosecutors' Offices are not suable legal entities, county prosecutors are left without a defendant legal entity when pursuing a claim under the WPA, and likely for claims of public policy. *See e.g., Fleet v. Koop*, No. 227202, 2002 WL 235691, at *2 (Mich. Ct. App. Feb. 15, 2002) (citing *Hughson v. Antrim* Co., 707 F. Supp. 304, 306 (W.D. Mich., 1988); *Miller v. Michigan Dep't of Att'y Gen.*, No. 21-10990, 2021 WL 4479699, at *4 (E.D. Mich. Sept. 30, 2021). Moreover, because Chief Prosecutors have absolute immunity from tort claims pursuant to MCL 691.1407, Chief Assistant Prosecutors would have no cognizable defendant for a claim under the WPA or public policy. Such an outcome is incredibly significant to the rights of municipal employees, the intent of the Legislature in enacting the WPA, this state's public policy, and access to justice.

Finally, the Court of Appeals' analysis of Plaintiff-Appellant's employment status under the economic reality test, in which that court found two factors favored a finding that Plaintiff-Appellant was Saginaw County's employee but still held in favor of Defendants-Appellees, sets a precedent that is inconsistent with similar fact patterns and contrary to the applicable standard of review. *See Clark v. United Techs. Auto., Inc.*, 459 Mich. 681, 694, 594 N.W.2d 447, 453 (1999) ("where evidence of a putative employer's status is disputed, or where conflicting inferences may reasonably be drawn from the known facts, is the issue one for the trier of fact to decide"). Because the economic reality test is the threshold inquiry to determine whether a plaintiff is an employee or independent contractor for purposes of some civil rights claims, such as a claim under public policy, whether the showing of two out of four factors is sufficient for the question to be decided by a jury is significant to this state's common law. Moreover, the factors, as weighed here, in light

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of the evidence in the record, results in a material injustice to Plaintiff-Appellant; as a result of the Court of Appeals' weighing of the factors, Saginaw County was dismissed from this litigation entirely, and left Plaintiff-Appellant without a defendant-entity.

2. **Whether Plaintiff-Appellant has a cognizable public policy claim when her claim is premised on workplace retaliation she suffered after she tried to bring a plea agreement into compliance with MCL 771.1(1) rather than being complicit in the entry of a plea deal that violated the statute.**

The question of whether Plaintiff-Appellant has a cognizable public policy claim when her claim is premised on workplace retaliation she suffered after she tried to bring a plea agreement into compliance with MCL 771.1(1) centers on whether the statute is a "sufficient legislative expression of policy" to imply a wrongful discharge cause of action, as set forth in the bedrock case *Suchodolski v. Mich. Consol Gas Co.*, 412 Mich. 692, 695, 316 NW2d 710 (1982). The Court of Appeals was sharply divided on this issue. Guidance from this Court is needed on what circumstances warrant a finding that there is a "sufficient legislative expression of policy" to give rise to a public policy claim. This question is critical to this state's common law.

3. **Whether Plaintiff-Appellant presented sufficient evidence so as to create a genuine issue of material fact as to her claim of false imprisonment when she demonstrated each of the prima facie elements, regardless of the length of her confinement.**

The question of whether Plaintiff-Appellant has presented sufficient evidence so as to create a genuine issue of material fact as to her claim of false imprisonment when she demonstrated each of the prima facie elements, in part, hinges on the Court of Appeals' holding that Plaintiff-Appellant's confinement was too brief to be actionable. Again, the Court of Appeals was sharply divided on this issue. The Court of Appeals' decision runs contrary to established common law and the purpose of the tort's intention. 32 Am. Jur. 2d False Imprisonment § 15; Prosser & Keeton, Torts (5th ed), § 11, p. 48; Restatement Torts, 2d, § 35 cmt h. The decision is also premised on a false interpretation of this state's jurisprudence. Moreover, the effect of the decision is to create an

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untenable standard for Michigan courts; what period of unconsented confinement is acceptable under Michigan common law? This Court's intervention is needed on this significant and disputed legal issue.

4. **Whether Michigan common law affords supervisors and employers, including Defendant-Appellee Christopher Boyd, a privilege defense to claims of false imprisonment brought by subordinates, entitling them to detain subordinates, including Plaintiff-Appellant, without their consent.**

The secondary basis for the Court of Appeals' dismissal of Plaintiff-Appellants' false imprisonment claim was that court's finding that "[i]n the situation plaintiff described, Boyd, as plaintiff's direct supervisor, possessed at least some authority to insist that plaintiff remain at a workplace meeting in his office, at least if she wished to continue her employment." (Appellant's Appendix, Vol. 2, p. 324). The consequences of this finding are far-reaching. Indeed, it creates a privilege for supervisors and employers to detain subordinates without consent, i.e., an entirely new defense to the intentional tort of false imprisonment. This is a novel assertion with major significance to this state's jurisprudence and to the public interest. Does our common law really allow supervisors and employers to detain subordinates without consent?

5. **Whether Plaintiff-Appellant presented sufficient evidence so as to create a genuine issue of material fact as to her claim of assault and battery when she demonstrated each of the prima facie elements and consistent with a recent Court of Appeals decision.**

The question of whether Plaintiff-Appellant presented sufficient evidence of a battery is one of common law interpretation. Specifically, whether Plaintiff-Appellant's hand being on the door handle at the time that the tortfeasor slammed the door shut constituted an "offensive touching of something closely connected with a person." *See People v Starks*, 473 Mich. 227, 234; 701 NW2d 136 (2005). While the Court of Appeals determined that "plaintiff has not supported her argument that a door may become 'attached to' and 'practically identified with' the body of a person trying to open it" in this case, (Appellant's Appendix, Vol. 2, p. 324) in a recent case the

Court of Appeals determined, in a similar factual pattern, that a "[d]efendant's intentional and unconsented door handle grab suffices to prove a battery, which can be accomplished by an intentional, unconsented or offensive touching of something closely connected with a person." *People v. Kinsey*, No. 361281, 2023 WL 6168356, at *3 (Mich. Ct. App. Sept. 21, 2023) (Appellant's Appendix, Vol. 3, p. 477). This conflict in the jurisprudence creates a material issue in this state's jurisprudence and results in a substantial injustice to Plaintiff-Appellant.

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STATEMENT OF MATERIAL FACTS[2]

This case arises out of Plaintiff-Appellant, Jennifer Janetsky's ("Janetsky" or "Plaintiff-Appellant"), employment with and constructive discharge from the Saginaw County Prosecutor's Office following her protected whistleblowing activity and refusal to be complicit to an unlawful plea agreement.

Janetsky began her career with Saginaw County in January of 2011 when Chief Prosecutor Mike Thomas ("Thomas") hired Janetsky as an Assistant Prosecuting Attorney ("APA").[3] After just five months at the Saginaw County Prosecutor's Office, Janetsky was promoted to APA II and she began exclusively prosecuting sex crimes. (Appellant's Appendix, Vol. 1, p. 10). Janetsky was highly successful in her position, consistently returning trial results more than 40 percent above the national average.[4] (*Id*., p. 9). Due to her excellent performance, Janetsky received a number of promotions and merit raises throughout her tenure with Saginaw County, all of which were approved by the County. (*Id*., pp. 10-11, 308-310).

In November of 2012, Defendant John McColgan ("McColgan") was elected to a four-year term as Saginaw County's Chief Prosecuting Attorney, replacing Thomas. McColgan, in turn, hired Defendant Christopher Boyd ("Boyd") to be Saginaw County's Chief Assistant Prosecuting Attorney. In his capacity as Chief Assistant Prosecuting Attorney, Boyd oversaw roughly twenty APAs within the Saginaw County Prosecutor's Office, including Janetsky, assigning cases and

[2] Plaintiff-Appellant has previously set forth a comprehensive recitation of the facts in her prior briefing, including in her prior application for leave to this Court. (Appellant's Appendix, Vol. 3, pp. 497-511). Because of this Court's familiarity with this case and the scope of the issues presented, Plaintiff-Appellant has synthesized her "Statement of Material Facts" to highlight the facts pertinent to this leave application.

[3] As an APA, Janetsky was a Saginaw County employee. Janetsky's hiring documents from the County, identified her as a "Permanent" Employee within the "Prosecutor's Office" "Department." (Appellant's Appendix, Vol. 2, p. 307). The hiring paperwork further indicates that it "must be completed on all new [county] employees. One copy must be received in the Controller's Office with application before an employee is added to payroll." (*Id*.).

[4] Janetsky boasted a 94%-win rate of the 34 cases she tried in Saginaw County. (Appellant's Appendix, Vol. 1, page 9).

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otherwise handling the day-to-day responsibilities of running the office. (*Id*., Vol. 1, pp. 104, 106, 116).

In October of 2013, Boyd assigned Janetsky the Justin Hannahs ("Hannahs") prosecution, who was being charged with CSC 1st Degree (Relations: stepsister). However, on May 29, 2014, Boyd met with Hannahs' defense attorney of record and extended a plea offer without Janetsky's knowledge or agreement. (*Id*., p. 15). Boyd offered to dismiss three counts against Hannahs with regard to one victim and drop all charges entirely with regard to the second victim, if Hannahs pled guilty or no contest to CSC 3rd Degree. (*Id*., pp. 20, 150-153). The offer stipulated that if Hannahs accepted the plea, he would serve probation for the offense and escape any jail time. (*Id*.). Predictably, Hannahs accepted the plea offer and it was entered before Judge Boes on June 2, 2014.

Upon discovery of the plea deal, Janetsky realized that the entered plea agreement ran afoul of MCL 771.1(1), which states:

> "In all prosecutions for felonies, misdemeanors, or ordinance violations ***other than*** murder, treason, criminal sexual conduct in the first or third degree . . . the court may place the defendant on probation under the charge and supervision of a probation officer."

MCL 771.1(1) (emphasis added). Consequently, Janetsky took steps to rectify the situation. First, Janetsky met with McColgan to inform him of the unlawful plea arrangement. (*Id*., pp. 25-30, 119, 121-122, 154-155). Second, despite Boyd's protestations, Janetsky drafted a Motion to Set Aside the Sentence Agreement and Allow Defendant the Opportunity to Withdraw Plea, in order to bring the plea agreement into compliance with MCL 771.1. (*Id*., pp. 32-35, 150-153). Boyd signed and presented the motion to Judge Boes who granted it and remanded the case for preliminary examination. (*Id*. 35, 150-153).

After Janestky took the above action, Boyd created a hostile work environment for Janestky subjecting her to constant verbal abuse and heavy scrutiny. During several staff meetings, Boyd

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specifically targeted Janetsky yelling at her in front of her peers. (*Id*. pp. 37-58, 156-162). On one such occasion, Boyd became so loud and physically threatening that multiple attorneys offered Janestky words of comfort following the meeting. (*Id*., pp. 156-162). On another occasion, Boyd loudly and unjustifiably criticized Janestky in front of her peers in spite of her successful completion of a case telling her he "didn't want to hear another word from her." (*Id*.). On yet another occasion, after Janetsky had returned to work following an illness, Boyd accused her of faking the illness in order to have an excuse for not responding to motions in a case. (*Id*.). When Janetsky answered that the responses were, in fact, filed, Boyd accused her of not authoring the responses and demanded that she retrieve them "in less than a minute" in order to disprove him. (*Id*.) Boyd later instructed another employee to interview members of staff to determine whether Janetsky had actually been ill. (*Id*.). Boyd further harassed Janetsky setting her up to fail by assigning her a heavier caseload than other APAs and ignoring her requests for feedback and assistance. Because Boyd refused to speak to Janestky, it was nearly impossible for her to get the necessary administrative approval for any action she wished to take on her cases. (*Id*.). Boyd's utter desertion of his role as Janetsky's superior combined with his invariable hostility towards her produced an unbearable working environment. (*Id*., pp. 36-58).

On June 1, 2015, Boyd's hostility reached a critical peak. On this particular day, Boyd ordered Janetsky into his office. Upon entering the room, Boyd loudly and "with a bright red face yelling" ordered Janestky to "sit down." (*Id*., p. 61). Janetsky was hesistant to sit down, given Boyd's manner, which caused Boyd "physically became redder, he became more agitated and he began yelling more." (*Id*., p. 63). Janetsky informed Boyd, "[Y]ou're hostile and agitated and unprofessional and inappropriate . . . and I am not going to continue this conversation without my

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union present." (*Id*., p. 64). However, Boyd "continued to yell and did not get me my union rep." (*Id*., p. 65). When she tried to leave Boyd's office, Boyd

> "stood up. He's still yelling. He's not getting me my union rep. I said I'm going to go and I started to move this way toward the door . . . . I started to move to my left toward the door. That's when Boyd got up, he came flying out from behind the desk, very quickly came behind me, around me, behind me. Put his hand on the door and blocked my exit."

(*Id*.). At the time Boyd reached over Janetsky and shut the door, Janetsky's hand was on the doorknob. (*Id*.). After blocking the exit, Boyd screamed into Janetsky's face at least two more times demanding that she "**SIT DOWN!"** (*Id*., pp. 61-64, 154-155). Boyd ultimately permitted Nate Collison ("Collison"), Vice President of the Union, to enter his office, but Collison's presence did not deter Boyd from loudly accusing Janetsky of being insubordinate (for refusing to sit down), unprofessional, and "intentionally irritating." (*Id*., pp. 156-162). Boyd proceeded to yell at and berate Janestky so loudly that others in the office could clearly hear him, questioning her intelligence, loyalty, and work ethic. (*Id*.). Janetsky told Boyd that she felt he was treating her in a hostile manner because of what happened in the Hannahs case and Boyd replied**: "You're damn right I'm still upset about Hannahs. You embarrassed me!"** Janetsky was emotionally shaken to her core due to Boyd's intimidating and physically threatening conduct. (*Id*., pp. 67-70). She testified that she was fearful of physical contact and thought "that I would have to fight my way out of the room." (*Id*., p. 67). After this meeting, on June 3, 2015, Boyd removed Janetsky from the cases against Justin Hannahs, which she had been working on for the past year. (*Id*., pp. 77).

On June 4, 2015, Janetsky personally handed McColgan a letter notifying him that as a result of her reporting Boyd's illegal conduct he had created a severe and pervasive hostile work environment for her. (*Id*., pp. 154-155). Janetsky states in this letter:

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> ..."This harassment has become so severe and pervasive, that it has fully permeated a once peaceful work environment and begun to severely interfere with my ability to do my job without constant fear. It has caused severe negative health consequences, including two stress-related trips to the ER....The current environment is intolerable."

(*Id*.). She further requested in this letter that McColgan expeditiously investigate her complaints. After delivering the letter to McColgan, Janetsky left work due to resultant acute, work-related stress. (*Id*., pp. 71, 75).

On June 5, 2015, Janetsky met with Saginaw County's Personnel Director, Jennifer Broadfoot ("Broadfoot"). She was in tears when she met with Broadfoot and told her that:

> "...she believed that she had picked on the wrong person, and that her situation was worse since she filed (gave the June 5th letter to McColgan)...she felt people were gunning for her and were trying to force her out and that she loved her job, it was her calling." (*Id*., pp. 164-167).

Broadfoot accordingly gave permission for Janetsky to leave work for the day due to emotional distress. (*Id*., pp. 78, 126-128). At 11:11 p.m. that evening, McColgan sent Janetsky a text message placing her on paid administrative leave, although Boyd remained working. (*Id*., p. 166).

After Janetsky made her internal complaint of retaliation, McColgan and County Controller, Robert Belleman ("Belleman"), wrote a letter to Janetsky on County of Saginaw letterhead stating, in part, "In accordance with County Policies #322 and #326, John McColgan and the County of Saginaw, as Co-Employers, engaged an independent investigator . . . " (*Id*., Vol. 2, p. 311) (emphasis added). The two directed Janetsky as to her new reporting structure, "you will report to Mark Gaertner, John McColgan and Christi Lopez" and further directed Janetsky "not to have any official interaction with Mr. Boyd." (*Id*.). On December 11, 2015, Janetsky's psychiatrist wrote a letter to the County advising that Janetsky would not be able to return to work due to disabling psychiatric distress. (*Id*., Vol. 1, p. 173).

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ARGUMENT

I. The Court of Appeals Erred in Dismissing Plaintiff-Appellant's Claim under Michigan's Whistleblowers' Protection Act Against Saginaw County on the Basis that the County was Not Plaintiff-Appellant's Employer.

Michigan's Whistleblowers' Protection Act ("WPA") states that:

> "An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or suspected violation of law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action."

MCL 15.362. The Act defines an "employer" as "a person who has 1 or more employees. Employer includes an agent of an employer and the state or a political subdivision of the state." MCL 15.361(b). The Act further defines "employee" as "a person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied. Employee includes a person employed by the state or a political subdivision of the state except state classified civil service." MCL 15.361(a).

Here, Plaintiff-Appellant asserts that she was an "employee" of Saginaw County and that the County was an "employer" within the meaning of the WPA. Janetsky began working for Saginaw County as an Assistant Prosecuting Attorney in 2011, under the supervision of Chief Prosecutor Mike Thomas. In her hiring documents from the County, it identified her as a "Permanent" Employee within the "Prosecutor's Office" "Department." (Appellant's Appendix, Vol. 2, p. 307). The hiring paperwork further indicates that it "must be completed on all new [county] **employees**. One copy must be received in the Controller's Office with application before

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an employee is added to payroll." (*Id.*) (emphasis added). Thereafter, all status changes in her employment were approved by the County. (*Id.*, pp. 308-310). For four years, and under the leadership of two different Chief Prosecutors, Janetsky was employed by the County as an Assistant Prosecuting Attorney, performing work integral to the County and paid for by the County. When Janetsky was suffering retaliation, she met with the County's Personnel Director, Jennifer Broadfoot ("Broadfoot"), in order to apprise her of the situation. Broadfoot authorized Janetsky to leave work for the day due to her emotional distress. (*Id.*, Vol. 1, pp. 78, 126-128). After Janetsky made her internal complaint of retaliation, Chief Prosecuting Attorney John McColgan ("McColgan") and County Controller, Robert Belleman ("Belleman"), wrote a letter to Janetsky on County of Saginaw letterhead stating, in part, "In accordance with County Policies #322 and #326, John McColgan and the County of Saginaw, **as Co-Employers**, engaged an independent investigator . . . " (*Id.*, Vol. 2, p. 311) (emphasis added).[5] The two directed Janetsky as to her new reporting structure, "you will report to Mark Gaertner, John McColgan and Christi Lopez" and further directed Janetsky "not to have any official interaction with Mr. Boyd." (*Id.*). On December 11, 2015, Janetsky's psychiatrist wrote a letter to the County advising that Janetsky would not be able to return to work due to disabling psychiatric distress. (*Id.*, Vol. 1, p. 173).

It is undisputed that Saginaw County is an "employer" as defined by the WPA, however, Defendants-Appellees have asserted that Janetsky was "not an employee of Saginaw County as defined by the WPA." (*Id.*, Vol. 3, p. 385). In support of their argument, Defendants-Appellees do not dispute that Janestky fit the statutory language of an employee – that she was a person who

[5] Janetsky filed a Motion to Supplement the Evidentiary Record with the Court of Appeals on October 19, 2023 seeking to supplement the record with a document received by Janetsky in 2023, which likewise **"confirm(s) that Jennifer Janetsky was employed by Saginaw County from January 3, 2011, through December 14, 2015." (Appellant's Appendix, Vol. 2, pp. 330-335).** The Court of Appeals summarily denied Janetsky's motion without providing an explanation. (*Id.*, p. 360).

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performed a service for wages under a contract of hire for the County. See MCL 15.361(a). Rather, Defendants-Appellees assert that "the WPA does not define the circumstances by which a *particular* 'employee' becomes connected to a *particular* 'employer' for purposes of liability under the Act" and further, that "[t]he nature of the connection between Janestky and Saginaw County is critical in this case." (original emphasis) (*Id.*, Vol. 4, p. 563). The Court of Appeals adopted Defendants-Appellees' argument and applied the economic-reality test set forth in *Chilingirian v City of Fraser*, 194 Mich. App. 65 (1992), *remanded on other grounds* 442 Mich. 874 (1993) to determine whether an employer-employee relationship existed between the County and Janetsky, and, after applying the test, concluded that the County was not Janetsky's employer. (*Id.*, Vol. 2, pp. 326-27).

The Defendants-Appellees' argument and the Court of Appeals decision is inherently flawed in several critical respects. Specifically, the reasoning adopted by the Court of Appeals defies logic and the basic rules of statutory construction, flouts jurisprudence, and creates a legal quagmire for County Prosecutors who are left without a defendant-entity under the WPA. Moreover, assuming, *in arguendo*, that Janetsky was required to show she had sufficient employment ties with Saginaw County in order to hold it liable under the WPA, she has done so.

A. The Court of Appeals' Decision Violates the Rules of Statutory Construction: As an Assistant Prosecuting Attorney, Plaintiff-Appellant was an "Employee" of Saginaw County as Unambiguously Defined in the WPA.

Whether Janetsky was Saginaw County's employee under the WPA is an issue of statutory interpretation. "The primary goal when interpreting a statute is to discern the intent of the Legislature by focusing on the most 'reliable evidence' of that intent, the language of the statute itself." *Fairley v. Dep't of Corrections*, 497 Mich. 290, 296-97 (2015) (citations omitted); *see also South Dearborn Environmental Improvement Ass'n., Inc. v. Dep't of Environmental Quality*, 502

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Mich. 349, 360-61 (2018) ("[T]he most reliable evidence of that [Legislative] intent is the plain language of the statute."). "If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written." *South Haven v. Van Buren Co. Bd. Of Comm'rs*, 478 Mich. 518, 528 (2007) (quotation marks and citations omitted). Moreover, as a remedial statute, the WPA must "be liberally construed to suppress the evil and advance the remedy." *Eide v. Kelsey-Hayes Co.*, 431 Mich. 26, 34, 427 N.W.2d 488, 491 (1988); see also *Phinney v. Perlmutter*, 222 Mich. App. 513, 555, 564 N.W.2d 532 (1997) (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 the act is the protection of the public. *Dolan v. Continental Airlines/ Continental Express*, 454 Mich. 373, 378, 563 N.W.2d 23 (1997). "The act meets this objective by protecting the whistleblowing employee and by removing barriers that may interdict employee efforts to report violations or suspected violations of the law." *Id.* at 378- 379.

Here, the Court of Appeals has determined that Janetsky was not an "employee" as defined by the WPA.

The Act defines "employee" as "a person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied. Employee includes a person employed by the state or a political subdivision of the state except state classified civil service." MCL 15.361(a). The Legislature has defined "political subdivision" to mean "a municipal corporation, county, county road commission . . ." MCL 691.1401. Reading these provisions in conjunction with one another, the plain language of the WPA defines "employee" to include persons employed by a county who perform a service for wages, pursuant to a hiring agreement.

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Neither Defendants-Appellants nor the Court of Appeals put forth any argument as to why Janetsky does not fit within this straight-forward statutory language. Indeed, the Court of Appeals acknowledged that Janetsky, as an Assistant Prosecuting Attorney for Saginaw County, was paid for work she performed that was integral to the County. (Appellant's Appendix, Vol. 2, pp. 326-27). Moreover, it is undisputed that Janetsky performed her work pursuant to a written employment offer from the County that identified her as a "Permanent" Employee within the "Prosecutor's Office" "Department." (*Id*., p. 307). Based on the record (as set forth above), it is apparent that Janetsky was an "employee" as unambiguously defined by the WPA.

Yet, the Court of Appeals' decision disregards this straightforward statutory language and, instead, applies an additional hurdle to whistleblower-plaintiffs, requiring them to further demonstrate the strength of their employment relationship *vis a vis* the economic realities test set forth in *Chilingirian v City of Fraser*. However, such an inquiry is improper. First and foremost, the plain language of the statute must be enforced as written. *See South Haven*, 478 Mich. at 528. "[W]hen a statute defines a term, that definition alone controls." *Smith v. Town & Country Properties II, Inc.*, 338 Mich. App. 462, 475, 980 N.W.2d 131, 138 (2021), *appeal denied*, 509 Mich. 1086, 975 N.W.2d 928 (2022). Furthermore, the additional hurdle imposed by the Court of Appeals frustrates the purpose of the WPA, creating, rather than "removing barriers" that restrict protected whistleblowing activity. *See Dolan*, 454 Mich. at 378-79. Moreover, the question in *Chilingirian v. Fraser* was whether or not the plaintiff was an independent contractor, and, therefore, not entitled to the protection of the WPA. 194 Mich. App. 65. That argument has not been asserted here. Rather, the County has repeatedly admitted that Janetsky was an employee of the County, (Appellant's Appendix, Vol. 2, pp. 307, 311) and otherwise attempted to circumvent Janetsky's employment relationship with the County by asserting in its briefing that Janetsky was

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not an employee "for purposes of liability under the WPA." (*Id.*, Vol. 4, p. 563). In other words, it is the County's position that Janetsky was an employee in one regard, but not another. This argument does not give rise to an inquiry as to whether an individual is an independent contractor versus an employee. Indeed, it is a specious argument and irrelevant inquiry.

Because Janetsky was a County employee, as admitted by the County, and as so defined by the WPA, her employment status is definitive.

B. The Court of Appeals' Decision is Contrary to Jurisprudence: It is Well Established that Counties are Co-Employers of Appointees of Elected Officials.

The Court of Appeals' decision likewise runs contrary to established jurisprudence. It appears to be an unstated assumption that an Assistant Prosecuting Attorney is employed by the County in which they work. See e.g., *Moore v. Ingham Cnty. Prosecuting Att'y*, No. 233003, 2003 WL 140142 (Mich. Ct. App. Jan. 17, 2003) (Appellant's Appendix, Vol. 3, pp. 472-75) (a wrongful discharge case brought by a former Ingham County assistant prosecuting attorney against Ingham County, et al). Rather, the legal issue typically contested is whether or not the elected Chief Prosecutor is a co-employer, with the County, of the assistant prosecuting attorneys. Even when examining this question, it is taken for granted that the County is the default employer: "A prosecutor is a **co-employer with the county** as a result of the prosecutors' appointment/tenure statute." *Bauer v. Saginaw Cnty.*, 332 Mich. App. 174, 195, 955 N.W.2d 553, 564 (2020) (citing to *St. Clair Prosecutor v AFSCME, Local 1518*, 425 Mich. 204, 225, 388 NW2d 231 (1986)) (emphasis added).

Moreover, in similar settings where there is a question of the employment status regarding appointees of elected officials, courts have found the County to be a co-employer of the appointees, including for WPA purposes. For example, when examining whether or not deputies appointed by the then-Chief Deputy Clerk of Macomb County were employees of the County for purposes of

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the WPA, the Eastern District of Michigan opined "it seems to be an unstated assumption in caselaw cited by Plaintiffs that the county is a co-employer of deputies under the statutory scheme at issue here," similar to the scheme here. *Kardasz v. Spranger*, No. 17-CV-10937, 2019 WL 1989021, at *10 (E.D. Mich. May 6, 2019) (Appellant's Appendix, Vol. 3, p. 463) (citing *Branch County Board of Commissioners v. International Union et al.*, 260 Mich. App 189, 196 (2003) (upholding MERC decision that the County Clerk and the County were co-employers of Deputy County Clerks)).

Indeed, it is inherent in Michigan case law that individuals appointed to perform work for the County, as a deputy or prosecutor etc., are employees of the County.

C. The Court of Appeals' Decision Creates a Legal Quagmire: Municipal Employees, like Prosecuting Attorneys, Asserting a Violation of the WPA are Left Without a Defendant-Entity Employer.

To find that a County is not the employer of a County Prosecutor creates a legal quagmire for county prosecutors. The Michigan Courts have routinely ruled that County Prosecutors' Offices are not legal entities, and, therefore, cannot be sued. *See e.g.*, *Fleet v. Koop*, No. 227202, 2002 WL 235691, at *2 (Mich. Ct. App. Feb. 15, 2002) (Appellant's Appendix, Vol. 3, pp. 453-55) (citing *Hughson v. Antrim* Co., 707 F. Supp. 304, 306 (W.D. Mich., 1988); *Miller v. Michigan Dep't of Att'y Gen.*, No. 21-10990, 2021 WL 4479699, at *4 (E.D. Mich. Sept. 30, 2021) (Appellant's Appendix, Vol. 3, pp. 467-471). Rather, a prosecutor's office is a department of the county, just as a police department is a department of the city, therefore, "the county and city are the appropriate parties to sue." *Miller*, 2021 WL 4479699, at *4 (citing *Watson v. Gill*, 40 Fed. Appx. 88, 89 (6th Cir. 2002)). Accordingly, if an assistant prosecuting attorney or other appointed individual is not deemed to be an "employee" of the county, as in this case, there is no legal entity for the individual to seek redress from – only a potential individual defendant-employer. Moreover,

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because Chief Prosecutors have absolute immunity from tort claims pursuant to MCL 691.1407, Chief Assistant Prosecutors would have no cognizable defendant for a claim under the WPA (or public policy claim), if the Court of Appeals' decision is permitted to stand. Such a result cannot be permitted to stand, particularly in light of the remedial nature of the WPA and the accordant liberal interpretation that is required upon review. *See Eide*, 431 Mich. at 34.

Thus, Janetsky's logical and lawful employer must be the County itself, not solely the Chief's designated deputy. The two must be co-employers.

D. The Court of Appeals' Decision Weighed the Factors of the Economic Realities Test Improperly: The Circumstances Surrounding Plaintiff-Appellant's Employment Firmly Establishes that the County was a Co-Employer.

Finally, assuming, *in arguendo*, that Janetsky was required to show she had sufficient employment ties with Saginaw County in order to hold it liable under the WPA, she has done so, particularly when viewing the evidence in the light most favorable to her. Citing *Chilingirian v City of Fraser*, the Court of Appeals articulated the economic reality test as follows:

> The economic reality test looks to the totality of the circumstances surrounding the work performed. Relevant factors to consider under the test include: (1) control of a worker's duties; (2) payment of wages; (3) right to hire, fire, and discipline; and (4) performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal. All the factors are viewed as a whole and no single factor is controlling.

(Appellant's Appendix, Vol. 2, p. 326). Acknowledging that "the trial court held that there was at least a question of material fact," the Court of Appeals disagreed. (*Id.*, p. 327). The Court of Appeals held that while "factors (2) and (4) favor finding an employer-employee relationship, factors (1) and (3) weigh against it," and, further, "that a county prosecutor's office is substantially independent from the county itself," and "this substantial independence tips the balance in favor of finding that the County was not plaintiff's 'employer' under the WPA." (*Id.*). Such a balancing

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act gives undue weight to factors that serve the County and insufficient weight to factors favoring Janetsky and, ultimately, fails to view the evidence in the light most favorable to Janetsky.

The circumstances surrounding Janetsky's employment confirm that Saginaw County was a co-employer. County Prosecutors work under the auspices of the County in which they are employed. Indeed, Saginaw County's Prosecutor's Office is simply one "[d]epartment" of the County. (*Id*., p. 307). It is undisputed that the work performed by Janetsky was integral to the County and, further, that the County paid her wages. She joined the County when Mike Thomas was the Chief Prosecuting Attorney, but continued on under McColgan's tenure, as was customary. Furthermore, it is well established that the County has the ultimate authority over the employment of and pay arrangement with assistant prosecuting attorneys. MCL 49.31, 49.34; *see also St. Clair Prosecutor*, 425 Mich. at 244 ("Nor has there been any questioning of the authority of the county, through its board of supervisors, to control the number and remuneration of assistant prosecuting attorneys."). That overarching control is evidenced here by the County's approval of all status changes in Janetsky's employment. (*Id*., pp. 308-310). Moreover, the County asserted specific control over Janetsky's employment. For example, the County's Personnel Director, Broadfoot, authorized Janetsky to leave work for the day due to her emotional distress after Janetsky relayed her complaint of retaliation to her. (*Id*., Vol. 1, pp. 78, 126-128). Similarly, after Janetsky made her internal complaint of retaliation, County Controller Belleman co-authored a letter to Janetsky, with Chief Prosecuting Attorney McColgan, on County of Saginaw letterhead stating, in part, "In accordance with County Policies #322 and #326, John McColgan and the County of Saginaw, **as Co-Employers**, engaged an independent investigator . . . " (*Id*., Vol. 2, p. 311) (emphasis added). The two directed Janetsky as to her new reporting structure, "you will report to Mark Gaertner, John McColgan and Christi Lopez" and further directed Janetsky "not to have any official

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interaction with Mr. Boyd." (*Id.*). Such evidence of joint action and decision-making in relation to Janetsky's employment-related complaint and the circumstances of her employment was wholly disregarded by the Court of Appeals. Surely, even if the "economic-reality" test is applicable, viewing the evidence in the light most favorable to Janetsky, the evidence tips the balance in favor of Janetsky.

Even in lesser circumstances, courts have determined that appointees of elected officials are County employees for purposes of the WPA after weighing the factors in the economic reality test. For example, in *Kardasz v. Spranger*, the plaintiffs were recently appointed deputies appointed by the then-newly elected Chief Deputy Clerk of Macomb County, pursuant to statute. The plaintiffs were paid by the County and performed work integral to the County, but were not able to present evidence as to the County's control over their job responsibilities, ability to make employment decisions concerning them, or admissions by Macomb County that it was their employer, as has been presented here. Despite these differences, the Eastern District of Michigan weighed the evidence presented within the context of the economic reality test and, relying on the established case law holding that counties are co-employers of appointed employees, found that such circumstances – two out of four factors in conjunction with the case law – were sufficient to find that Macomb County was plaintiffs' co-employer:

> "Even though Macomb's lack of ability to appoint or revoke Plaintiffs' appointments weighs in its favor, other factors do not. For example, Macomb County paid Plaintiffs' wages, and it cannot be contested that the duties of the Chief Deputy Clerk and the Deputy Register of Deeds play an integral part in accomplishing the goals of the County. Additionally, it seems to be an unstated assumption in the caselaw cited by Plaintiffs that the county is a co-employer of deputies under the statutory scheme at issue here. Accordingly, the Court finds that the county was a co-employer of Plaintiffs."

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Kardasz, No. 17-CV-10937, 2019 WL 1989021, at *9 (citations omitted) (Appellant's Appendix, Vol. 3, p. 463).

A finding of two out of four factors in Janetsky's favor should be sufficient for the question of Janetsky's employment status to be decided by a jury, as in *Kardasz*. *Clark v. United Techs. Auto., Inc.*, 459 Mich. 681, 694, 594 N.W.2d 447, 453 (1999) ("where evidence of a putative employer's status is disputed, or where conflicting inferences may reasonably be drawn from the known facts, is the issue one for the trier of fact to decide"). Yet, Janetsky has provided ample additional evidence as to "the totality of the circumstances surrounding the work performed" to create a genuine issue of material fact for the jury, including but not limited to the County's admissions that it was Janetsky's employer and the County Controller's joint investigative initiative and asserted authority over Janetsky's work environment and reporting structure. Such circumstances belie that the "prosecutor's office is substantially independent from the county itself." (*Id.*, Vol. 2, p. 327).

For the foregoing reasons, this Court should consider this significant legal issue, reverse the lower court's decision, and find that Saginaw County was Janetsky's employer for purposes of her remaining claims.

II. The Court of Appeals Erred in Dismissing Plaintiff-Appellant's Claim under Michigan's Public Policy Against All Defendants on the Basis that She Was Not Asked to Violate the Law.

Michigan recognizes an "exception to the at-will employment doctrine 'based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable.'" *Landin v. Healthsource Saginaw, Inc*, 305 Mich. App. 519, 854 NW2d 152 (2014) (quoting *Suchodolski v. Mich. Consol Gas Co.*, 412 Mich. 692, 695, 316 NW2d 710 (1982)).

> "The courts have also occasionally found sufficient legislative expression of policy to imply a cause of action for wrongful

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> termination even in the absence of an explicit prohibition on retaliatory discharges. Such a cause of action has been found to be implied where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment."

Suchodolski, 412 Mich. at 695.

Here, Plaintiff-Appellant asserts that she was terminated in retaliation for seeking to set aside an unlawful plea and sentencing agreement. In its remand order, the Michigan Supreme Court clarified that Janetsky's public policy claim "is based on her alleged refusal to violate the law – i.e., her attempt to set aside that plea and sentencing agreement." *Janetsky*, 982 N.W.2d at 376. Justice Clement elaborated in a separate opinion:

> "To the extent that plaintiff can demonstrate that defendants retaliated against her as a result of her efforts to bring the underlying criminal prosecution into compliance with MCL 771.1(1), I believe that should give rise to a common-law claim for termination in violation of public policy as was recognized in *Suchodolski v Mich. Consol Gas. Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982)." *Id.*, (Clement, C.J., concurring in part).

On remand, the Court of Appeals disagreed:

> "[W]e conclude that plaintiff was not asked to violate the law, and that her motion to correct the plea and sentencing agreement based on its invalidity under MCL 771.1(1) was not a 'refusal to violate the law.' We conclude that plaintiff's attempt to bring the plea and sentencing agreement into compliance with MCL 771.1(1) does not place it within the limited class of legislative expressions of public policy that have been found to imply a cause of action for wrongful termination."

(Appellant's Appendix, Vol. 2, p. 329). The Court of Appeals reasoned that Janetsky "could not have been asked to violate, nor could she have violated, MCL 771.1(1)" because, the statute, "does not, by its plain language, prohibit the prosecution from *offering* a plea and sentencing agreement involving probation," and that the "burden" was instead "on the trial court to avoid violating MCL 771.1 by imposing an invalid sentence of probation." (*Id.*) (original emphasis).

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The Court of Appeals' reasoning is contrary to foundational public policy jurisprudence. The *Suchodolski* Court held that "sufficient legislative expression of policy" implies a wrongful discharge cause of action. *Suchodolski*, 412 Mich. at 695. The statute at issue here is a "legislative expression of policy." As Chief Justice Clement aptly summarized:

> "Because MCL 771.1(1) is an expression of the state's public policy, I do believe that it is a legitimate basis for plaintiff's claim that she was terminated in violation of that public policy when she alleges that she was retaliated against for seeking to achieve compliance with the statute."

Janetsky, 982 N.W.2d at 379 (Clement, C.J., concurring in part). Judge Gleicher elaborated on this on remand,

> "The public policy expressed in MCL 771.1(1) is straightforward: the Legislature prohibits a court from sentencing a defendant convicted of CSC-III to probation because in the Legislature's view, probation is a disproportionately light punishment for a serious sexual offense."

(Appellant's Appendix, Vol. 3, pp. 487-88). Because the statute is a "sufficient legislative expression of policy," Janetsky's efforts to set aside a plea agreement that was not in compliance with MCL 771.1(1) gives rise to a public policy claim:

> "Given the clear-cut public policy embodied in MCL 771.1(1), a prosecuting attorney should not apply his stamp of approval to a plea deal permitting a CSC-III defendant to enjoy a probationary sentence. According to Janetsky, Boyd did exactly that. And according to Janetsky, Boyd attempted to pressure her to keep quiet about the deal, and only reluctantly signed the motion to set aside the plea. Janetsky refused to quietly accede to advocating or overlooking an illegal sentence, and insisted that her office pursue a motion for plea withdrawal. These actions, she claims, precipitated Boyd's retribution.
>
> While Janetsky's WPA claim is based on a *report* of an illegal plea, her public policy claim arises from her active efforts to undo a wrong, which included exposing Boyd's complicity with the plea. Janetsky did not personally "fail" or "refuse" to violate a law in the course of her employment. But she exposed a legal violation and

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> demanded that it be remedied. If Janetsky was constructively discharged because she refused to sit idly by while a court and a prosecuting attorney violated the law, her discharge violated public policy."

(*Id*., p. 488) (original emphasis).

Because the issue presented raises a critical question of common law interpretation, and because the Court of Appeals erred in that interpretation and application to the facts, Plaintiff-Appellant asks this Court to grant her leave application and reverse the lower court's decision.

III. The Court of Appeals Erred in Dismissing Plaintiff-Appellant's Intentional Tort Claims On the Basis that Plaintiff-Appellant had Not Presented Sufficient Evidence to Create a Genuine Issue of Material Fact.

Plaintiff-Appellant's intentional tort claims of false imprisonment and assault and battery arise out of one particular encounter with Defendant Boyd. Judge Gleicher set forth the facts of that incident in her separate opinion:

> According to Janetsky, an intern accompanied her to Boyd's office, but Boyd told the intern to leave, shut the door, returned to his desk and, "with a bright red face yelling," "ordered" Janetsky to sit. Boyd repeatedly demanded that she sit, Janetsky recounted, despite that she told him she preferred not to. In response to her hesitation to sit, Boyd "physically became redder, he became more agitated and he began yelling more." Janetsky testified that she "first . . . tried to calmly respond and tell him that I was trying to follow his direct order," but Boyd admonished her for failing to sit, and also accused her "little cronies" of sending her "useless crap" in e-mails or texts. Janetsky claims that she responded, "[Y]ou're hostile and agitated and unprofessional and inappropriate . . . and I am not going to continue this conversation without my union present." Boyd "continued to yell and did not get me my union rep." When she tried to leave Boyd's office, Janetsky continued, Boyd
>
> > stood up. He's still yelling. He's not getting me my union rep. I said I'm going to go and I started to move this way toward the door . . . . I started to move to my left toward the door. That's when Boyd got up, he came flying out from behind the desk, very quickly came behind me, around me, behind me. Put his hand on the door and blocked my exit.

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Under questioning by defense counsel, she added the following details:

> *Q*. And did you reach for the [door] handle?
>
> *A*. I'm sure that I did.
>
> *Q*. Did you grab the handle?
>
> *A*. I - - yes, I believe my hand was on the door when his hand hit the top of the door right above my head.
>
> *Q*. And then your testimony is in the time that you started - - after you started to move toward the door, . . . Boyd came from around his desk and walked toward the door and then behind you at the door?
>
> *A*. As I'm walking toward the door, he was already standing, he's already out from behind his chair. He had a straight shot to go this way, so I'm walking this way toward the door, he comes behind me like this and throws his hand on the door to block it.
>
> *Q*. And what hand did he put on the door?
>
> *A*. His left hand because he was facing me.
>
> *Q*. And did he have any contact with you when his left hand went on the door.
>
> *A*. No, he did not - - I could - - all I could feel was the slam - - the bang of the door.
>
> *Q*. So he was behind you at this time.
>
> *A*. Correct.

Janetsky testified that her hand was on the door when Boyd slammed it shut. She estimated that the confrontation at the door lasted "thirty seconds or less." Boyd then abruptly "threw the door open" and called another assistant prosecutor into the room. During the conversation that ensued, Janetsky claimed that she told Boyd: "[Y]ou're not mad about this text situation, you're mad about the Hannahs case," and that Boyd responded, "[Y]ou're darned right, you embarrassed me." Although she had no physical contact with

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> Boyd, Janetsky testified that she was fearful of physical contact and thought "that I would have to fight my way out of the room."

(Appellant's Appendix, Vol. 3, pp. 481-82). Despite the facts set forth, the Court of Appeals dismissed both of Janetsky's remaining intentional tort claims finding that Janetsky had not presented sufficient evidence so as to create a genuine question of material fact. (*Id.*, Vol. 2, pp. 323-25). However, in reaching this conclusion, the Court of Appeals erred in its interpretation of the applicable law and failed to view the facts in the light most favorable to Janetsky.

A. The Court of Appeals Improperly Applied the Law, Erred in its Interpretation of the Facts, and Created a Novel Privilege for Supervisors and Employers to Falsely Imprison their Subordinate-Employees.

Pursuant to Michigan's Model Civil Jury Instructions:

> "False imprisonment is the unlawful restraint of an individual's personal liberty or freedom of movement. To constitute a false imprisonment, there must be an intentional and unlawful restraint, detention or confinement that deprives a person of his or her personal liberty or freedom of movement against his or her will. The restraint necessary to create liability for false imprisonment may be imposed either by actual physical force or by an express or implied threat of force."

M Civ JI 116.02. Michigan's common law has been consistent with the Restatement approach to the tort of false imprisonment: "an act committed with the intention of confining another, the act directly or indirectly results in such confinement, and the person confined another, the act directly or indirectly results in such confinement, and the person confined is conscious of his confinement." *See e.g., Adams v. Nat'l Bank of Detroit*, 444 Mich. 329, 341 (1993).

Janetsky's testimony, set forth above, describes an unlawful confinement consistent with the elements of false imprisonment. As Boyd was yelling and growing increasingly agitated, Janetsky announced her intention to leave Boyd's office and he immediately got up and, while Janetsky's hand was on the door handle, Boyd reached over her to slam the door shut, blocking

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her exit. Janetsky testified that, based on Boyd's aggressive behavior and his refusal to allow her to leave, she thought "that I would have to fight my way out of the room." (Plaintiff-Appellant's Appendix, Vol. 1, p. 67). Such facts are sufficient to satisfy the elements of false imprisonment.

Despite Janetsky's proofs, the Court Appeals dismissed Janetsky's false imprisonment claim, holding that Janetsky failed to establish a genuine issue of material fact, specifically finding that the confinement was too brief to be actionable, that Janetsky was not conscious of her confinement, and that "Boyd, as plaintiff's direct supervisor, possessed at least some authority to insist that plaintiff remain at a workplace meeting in his office, at least if she wished to continue her employment." (*Id*., Vol. 2, p. 324). The Court of Appeals erred in its application of the law as well as its view of the facts.

1. The Court of Appeals Erred in its Interpretation of the Law: The Period of Confinement is Irrelevant to a Prima Facie Claim of False Imprisonment.

Relying on *Moore v Detroit*, the Court of Appeals held that Janetsky "did not establish that she was actually confined or conscious of any confinement; at best, Boyd's office door remained closed for 30 seconds before being opened." (Appellant's Appendix, Vol. 2, p. 324) (citing *Moore v. Detroit*, 252 Mich App 384, 387; 652 NW2d 688 (2002)). The opinion implies that because the door was "closed for 30 seconds," Janetsky's confinement was too brief to be actionable. *Moore* does state, in obiter dictum, that "brief confinements or restraints are insufficient for false imprisonment." 252 Mich. App. at 387. However, the Court of Appeals' singular reliance on obiter dictum is problematic for several reasons.

First, the Court of Appeals' decision flouts established common law, which holds that the period of confinement is, of itself, irrelevant to liability for false imprisonment:

> "Any period of unlawful confinement, however brief, may result in liability for false imprisonment. Confinement for an appreciable length of time, however short . . . may be sufficient to create liability

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> for false imprisonment. Even if no 'appreciable' length of time elapses, the necessary element of false imprisonment is proven, if enough time elapses for the plaintiff to recognize the illegal restraint."

32 Am. Jur. 2d False Imprisonment § 15. "[T]he tort [of false imprisonment] is complete with even a brief restraint of the plaintiff's freedom." Prosser & Keeton, Torts (5th ed), § 11, p. 48. This is consistent with the purpose of the tort's intention to protect a person's "dignitary interest in feeling free to choose one's own location[.]" Restatement Torts, 2d, § 35 cmt h. In recognition of the purpose underlying the claim of false imprisonment, "[a]n intentional confinement that causes no physical harm, no pain, no anxiety, and no loss of opportunity can be a false imprisonment." Goldberg & Zipursky, *Torts As Wrongs*, 88 Tex L Rev 917, 955 (2010).

Second, the authority relied upon by the Court of Appeals is based on a false interpretation of jurisprudence. The Court of Appeals cited *Moore v. Detroit* for the proposition that "brief confinements or constraints are insufficient" for a claim of false imprisonment. (*Id*.) citing *Moore*, 252 Mich. App. at 388. *Moore*, in turn, cites *Willoughby v. Lehrbass* for this principal. *Id*. (citing *Willoughby v. Lehrbass*, 150 Mich App. 319 (1986). However, "*Willoughby* does not hold that 'brief' confinements are not actionable." (Appellant's Appendix, Vol. 3, p. 486). Rather, in *Willoughby*, the Court of Appeals held that the plaintiff had not "establish[ed] that he was intentionally and unlawfully restrained against his will" by one of the defendants. *Willoughby*, 150 Mich. App. at 350. The court reasoned that "[b]ecause plaintiffs did not specifically allege in their complaint that Lehrbass did any act which resulted in the detention of young Willoughby in Duvall's office . . . it would appear that no cause of action regarding false imprisonment exists against Lehrbass." *Id*. It was the alleged tortfeasor's lack of intent to confine the plaintiff that was critical in *Willoughby*. "*Willoughby* did not affect a sea change in Michigan's false imprisonment

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law by inserting a time component, and *Moore*'s indirect suggestion that it did should not be mechanically accepted by this Court." (*Id.*).

Furthermore, the Court of Appeals' holding that Janetsky's confinement was "too brief" to be actionable creates an ill-defined standard for Michigan courts to apply. In her separate opinion, Judge Gleicher queried: "What does 'too brief' mean in the false imprisonment context? Is five minutes 'too brief'? How are judges supposed to gauge the time component?" (*Id.*, p. 485). Indeed, what period of unconsented confinement is acceptable?

Rather than examine Janetsky's period of confinement for purposes of her prima facie case, the length of her confinement should be considered only for purposes of damages. "It is generally of no concern, except in determining damages, that the confinement is of a temporary nature." 32 Am. Jur. 2d False Imprisonment § 15. It is the province of the jury, and not the court, to determine whether a plaintiff's confinement merits an award of damages. The Court of Appeals' decision here intrudes into the jury's function.

Because the Court of Appeals has erred in its application of the law and created an unworkable standard for Michigan courts, Plaintiff-Appellant requests that this Court consider this issue and reverse the lower court's opinion.

2. The Court of Appeals Erred in its Interpretation of the Facts: The Evidentiary Record Clearly Establishes that Plaintiff-Appellant was Conscious of Her Confinement.

The Court of Appeals likewise erred in its interpretation of the facts. In its decision, that court held that Janetsky "did not establish that she was actually confined or conscious of any confinement; at best, Boyd's office door remained closed for 30 seconds before being opened." (Appellant's Appendix, Vol. 2, p. 324). As set forth above, the time period in which Janetsky was confined without consent is immaterial to her prima facie case; what is relevant is that Janetsky

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was conscious of her confinement. *See, Adams*, 444 Mich. at 341. And, Janetsky's testimony that she would have to "fight her way" out of the room amply demonstrates that she was completely conscious of her confinement. "The record supports that Janetsky was very much aware of her confinement, as her comment that she thought she would have to "fight her way" out of the room graphically attests." (*Id*., p. 483). Accordingly, Plaintiff-Appellant requests that this Court consider this case and issue a finding consistent with the evidence in the record, namely that Janetsky has submitted sufficient evidence for a jury to reasonably conclude that she was falsely imprisoned.

3. The Court of Appeals' Decision Creates a Bizarre Privilege Defense to Claims of False Imprisonment Entitling Supervisory Employees and Employers the Privilege to Detain Employees Against Their Will.

In its decision, the Court of Appeals opined: "In the situation plaintiff described, Boyd, as plaintiff's direct supervisor, possessed at least some authority to insist that plaintiff remain at a workplace meeting in his office, at least if she wished to continue her employment." (Appellant's Appendix, Vol. 2, p. 324). However, Boyd's supervisory role does not authorize him to detain Janetsky in his office without her consent.

In support of its assertion that Boyd had authority to confine Janetsky to his office, the Court of Appeals relied upon dictum from *Hess v. Village of Wolverine Lake*: "The essence of a claim of false imprisonment is that the imprisonment is false, I.e., without right or authority to do so." *Hess v Wolverine Lake*, 32 Mich. App. 601, 604; 189 NW2d 42 (1971). Such dictum is wholly inapplicable in this case. This principal has historically been applied to cases of alleged false imprisonment by police officers making an arrest. *See e.g., id*.; *Moore*, 252 Mich. App. at 387. It has never been applied in a case, in which the tortfeasor is an employer or supervisor, to suggest they had the "right or authority" to detain a subordinate. Indeed, to suggest that an employer or

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supervisor possesses authority to detain subordinates, equivalent to the authority endowed to police officers, is incomprehensible.

The law simply does not, and should not, provide such a privilege to supervisors and employers. As Justice Clement pointed out when determining whether Boyd was entitled to governmental immunity, "nothing about the nature of the office of an assistant prosecutor gives the officeholder a license to commit intentional torts such as those alleged in this case against coworkers…" *Janetsky v. Cnty. of Saginaw*, 982 N.W.2d 374, 376 (Mich. 2022) (Clement, C.J., concurring in part). Indeed, to excuse false imprisonment claims when committed by a supervisor would immunize them in the manner the Michigan Supreme Court has already opined does not merit immunization, even for government actors. *Id*., at 375. And, as Judge Gleicher aptly pointed out, "[t]he law does not recognize the 'privilege' of an employer to trap an employee in an office so that he can berate her." *(Id*., Vol. 3, p. 486).

Given the novelty of this decision and its far-reaching consequence to subsequent workplace tort claims, Plaintiff-Appellant asks this Court to grant her leave application and reverse the lower court's decision.

B. The Court of Appeals Improperly Applied the Law in the Dismissal of Plaintiff-Appellant's Assault and Battery Claim and Created an Inconsistency in the Jurisprudence.

"A battery is the willful or intentional touching of a person against that person's will [by another / by an object or substance put in motion by another person]." M Civ JI 115.02. Elaborating on this, Judge Gleicher noted in a separate opinion, "As the model jury instruction states and the law reinforces, a battery can be accomplished by an intentional, unconsented, or offensive touching of something closely connected with a person. See *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005)." (Appellant's Appendix, Vol. 3, p. 486).

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Janetsky's testimony, as set forth above, describes an unlawful battery to her person, *vis a vis* the door she had her hand on. Janetsky testified, unequivocally, "my hand was on the door when his [Boyd] hand hit the top of the door right above my head." (*Id*., Vol. 1, p. 65).

The Court of Appeals determined that a door cannot be sufficiently closely connected to a person for purposes of a battery: "plaintiff has not supported her argument that a door may become 'attached to' and 'practically identified with' the body of a person trying to open it." (*Id*., Vol. 2, p. 324). However, as Judge Gleicher opined, "A jury should decide whether Boyd's act of slamming the door shut while Janetsky held the handle satisfies that standard." (*Id*., Vol. 3, p. 463).

Indeed, the Court of Appeals only recently determined, in a similar factual pattern, that a "[d]efendant's intentional and unconsented door handle grab suffices to prove a battery, which can be accomplished by an intentional, unconsented or offensive touching of something closely connected with a person." *People v. Kinsey*, No. 361281, 2023 WL 6168356, at *3 (Mich. Ct. App. Sept. 21, 2023). It follows that a battery in one instance where a party is holding a door handle, must give rise to a battery in the next instance as well.

Further, because an attempt to commit a battery will establish an assault, *People v. Starks*, 473 Mich. 227, 234, 701 N.W.2d 136 (2005), "every battery necessarily includes an assault because a battery is the very 'consummation of the assault.'" *Cameron*, 291 Mich.App. at 614, 806 N.W.2d 371 (citation omitted); see also *People v. Terry*, 217 Mich.App. 660, 662, 553 N.W.2d 23 (1996). Based upon the facts in the record, there is, likewise, sufficient evidence to create a question of material fact as to whether Boyd's conduct constituted an assault on Janetsky.

Because of the inconsistencies created in the jurisprudence by the Court of Appeals' decision and the need for clarification on this question by this Court, Plaintiff-Appellant asks this Court to grant her leave application and reverse the lower court's decision.

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CONCLUSION

For all the reasons given and authorities cited above, Plaintiff requests that this Court grant the application for leave to appeal, reverse the decision of the Court of Appeals, and remand this case to the trial court for resolution on the merits by the jury.

Respectfully submitted,

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Dated: December 20, 2023

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was filed with the Michigan Supreme Court through the ECF filing system and that all parties to the above cause were served via electronic mail on December 20, 2023.

Signature: /s/ Carrie Bechill

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