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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. 166477
MCOA No. 346542
Lower Case No. 15-028306-CL-SP

PLAINTIFF-APPELLANT'S REPLY TO DEFENDANT-APPELLEE'S RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

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. 166477
MCOA No. 346565
Lower Case No. 15-028306-CL-SP

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ORAL ARGUMENT REQUESTED

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ARGUMENT

I. Whistleblowers' Protection Act ("WPA")

A. The Economic Reality Test is Inapplicable to Determine Whether Saginaw County was Plaintiff-Appellant's Employer under the WPA.

It is undisputed that Plaintiff-Appellant Jennifer Janetsky ("Plaintiff-Appellant" or "Janetsky") was an "employee" and Defendant-Appellee Saginaw County an "employer" as defined by the Whistleblowers' Protection Act ("WPA"). MCL 15.361(a)-(b). It is further undisputed that jurisprudence universally holds appointees of county elected officials to be employees of their respective county. *See e.g.*, *Bauer v. Saginaw Cnty*., 332 Mich. App. 174, 195 (2020). It is likewise undisputed that Saginaw County represented itself as Janetsky's co-employer: "In accordance with County Policies #322 and #326, John McColgan and the County of Saginaw, **as Co-Employers**, engaged an independent investigator . . ." (Appellant's Appendix, Vol. 2, p. 311) (emphasis added). Yet, Defendants-Appellees persist in asserting 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 asserting that a further inquiry is need – the application of the economic reality test. (Defendants-Appellees' Response, pp. 32-33) (original emphasis).

This is a specious attempt to avoid liability by discarding the rules of statutory construction, flouting jurisprudence, ignoring its own party-admissions, and contriving a basis to apply a test that has <u>never</u> been used in this context. Indeed, Defendant-Appellee Saginaw County completely fails to address its party-admissions in its responsive briefing, which, taken in conjunction with the undisputed nature of the parties qualifying, respectively, as an "employee" and "employer," as defined under the WPA, eliminates any question as to whether Saginaw County can be held liable under the WPA in this matter. Contrary to this legal reality, Defendants-Appellees argue that

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Janetsky must demonstrate that she was a Saginaw County employee *vis a vis* a different set of parameters: the economic reality test. Yet, Defendants-Appellees cannot cite to a single case that has adopted this approach. The economic reality test has been used *exclusively* to determine whether a plaintiff is an independent contractor or employee. *Pedell v. Heartland Health Care Ctr.*, No. 271276, 2007 WL 840876, at *6 (Mich. Ct. App. Mar. 20, 2007) ("The 'economic reality test' is used to determine whether a person is an employee or an independent contractor.") (citing *Chilingirian v. City of Fraser*, 194 Mich. App. 65 (1992)); *see also Chilingirian*, 194 Mich. App. 65 (holding that, upon application of the economic reality test, an attorney working at a firm retained by the City of Fraser was an independent contractor). Because Defendants-Appellees have, at no time, asserted that Janetsky was an independent contractor, the economic reality test is inapplicable here.

Despite this, Defendants-Appellees' misrepresent jurisprudence to support their argument: "As the *Clark* case observes, the economic realities test is appropriate 'because it looks to the employment situation *in relation to the statutory scheme*' at issue. *Clark*, 459 Mich at 688; 594 NW2d at 450, *emphasis added*." (Defendants-Appellees' Response, p. 35). Defendants-Appellees' misleading selection of the *Clark* opinion purports to be an expansive principle of law, as if the economic reality test was commonly called upon across statutory schemes. However, the *Clark* opinion is much narrower in this regard:

> "The principle that an employer is entitled to protection from tort liability in exchange for essentially a no-fault obligation to pay benefits is expressed in the exclusive remedy provision of the WDCA . . . [however] **the provision does not define the term 'employer**,' . . . **That being the case, we have regularly applied the 'economic realities test' to determine whether an employment relationship exists for purposes of the exclusive remedy provision, and thus whether an individual or entity is the 'employer' of a given employee**. As we have stated, the test is

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> appropriate because it 'looks to the employment situation in relation to the statutory scheme of workers' compensation law with the goal of preserving and securing the rights and privileges of all parties.'"

Clark v. United Techs. Auto., Inc., 459 Mich. 681, 687–88, 594 N.W.2d 447, 450 (1999) (citations omitted) (emphasis added). In sum, the economic reality test is utilized specifically because the exclusive remedy provision of the WDCA "does not define the term 'employer.'" *Id*. However, such is not the case here, where the WPA clearly defines "employer" and "employee." MCL 15.361(a)-(b). Not only does the WPA clearly define these terms, Saginaw County has admitted to being Janetsky's "co-employer." (Appellant's Appendix, Vol. 2, p. 311). Moreover, the economic reality test has simply never been used to ascertain whether a statutorily defined and self-identified employer, or co-employer, of a plaintiff was likewise an employer for purposes of the WPA.

B. While Superfluous, Application of the Economic Reality Test Favors Plaintiff-Appellant.

Assuming, *in arguendo*, that the economic reality test was applicable here, Defendants-Appellees have failed to rebut the numerous circumstances surrounding Janetsky's employment that confirm that Saginaw County was a co-employer. (See Plaintiff-Appellant's Application, pp. 14-15). Rather, Defendants-Appellees merely assert that "because the prosecutor retains his statutory prerogative to control, discipline and discharge the APAs at his sole 'pleasure,' MCL 49.35, the county cannot be considered an 'employer' of Janetsky for purposes of the WPA." (Defendant-Appellees' Response, p. 34). Yet, the prosecutor's statutory authority is separate and apart from the factual inquiry into "the totality of the circumstances surrounding the work performed," set forth in the economic reality test. *Chilingirian*, 194 Mich. App. at 69-70.

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The Court of Appeals correctly held that two of the four factors favored Janetsky.[1] In addition, Janetsky presented compelling, unrebutted evidence that the County asserted specific control over Janetsky's employment, including a letter co-authored by County Controller Belleman demonstrating joint action and joint decisionmaking, 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 . . . you will report to Mark Gaertner, John McColgan and Christi Lopez . . . [you will] not have any official interaction with Mr. Boyd." (Appellant's Appendix, Vol. 2, p. 311) (emphasis added). When viewed in totality, the County is undoubtedly a co-employer.

C. The Court of Appeals' Decision Creates an Untenable Legal Position for Whistleblowers Appointed to a County Position.

Finally, if this Court upholds the Court of Appeals' finding that a county is not the employer of a county prosecutor, county prosecutors face an unusual legal predicament. As articulated in Plaintiff-Appellant's Application for Leave to this Court, because County Prosecutors' Offices are not legal entities, but arms of the County, the County and not the County Prosecutors' Office are the appropriate parties to sue. (Plaintiff-Appellant's Application, p. 12). Eliminating this option for assistant prosecuting attorneys means that "there is no legal entity for the individual to seek redress from – only a potential individual defendant-employer." (*Id.*). Furthermore, "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." (*Id.*, p. 13).

[1] Defendants-Appellees assert that "Janetsky work was to accomplish the goal of the state to enforce its CSC statutes, as much or more than any goal of the county." (Defendants-Appellee's Response, FN6). However, it would be hubris to assert the prosecuting CSC felony cases within the county's jurisdiction was not an integral part of the county's prosecutor's office department and a common goal shared amongst the parties.

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Defendants-Appellees misquote Plaintiff-Appellant's Brief to say: "She claims that if Saginaw County is not the employer, the APAs 'would have no cognizable defendant for a claim under the WPA (or a public policy claim.'" (Defendants-Appellees' Response, p. 36). That is not what Plaintiff-Appellant articulated in her Application. Plaintiff-Appellant, per the Court of Appeals' decision, has a viable WPA claim against Chief Assistant Prosecutor Boyd, but she does not have a legal entity to seek redress from.

Moreover, the effect of the Court of Appeals' decision is to eliminate any potential employer-defendants from liability under the WPA for Chief Assistant Prosecutors. Defendants-Appellees apparently disagree, arguing "there is an elected county prosecutor." (*Id*.). This is contrary to Defendants-Appellees' prior position in this case. It was Defendants-Appellees' position at the time of summary judgment that "the Prosecutor, John McColgan, is the highest elected official and as such is entitled to absolute immunity under M.C.L. 691.1407(5)." (Appellant's Appendix, Vol. 1, p. 195). Defendants-Appellees cannot now take a contrary position because it suits them, indeed, they are judicially estopped from doing so:

> "'Judicial estoppel precludes a party from adopting a legal position in conflict with a position taken earlier in the same or related litigation.' This Court has held that '[u]nder the doctrine of judicial estoppel, a party that has unequivocally and successfully set forth a position in a prior proceeding is estopped from setting forth an inconsistent position in a later proceeding.' For the doctrine to apply, the party's position in the prior proceeding must have been '"wholly inconsistent" ' with the same party's position in the later proceeding. The doctrine was developed to prevent parties from playing '"fast and loose' with the legal system.'"

Wells Fargo Bank, N.A. v. Null, 304 Mich. App. 508, 537, 847 N.W.2d 657, 676 (2014) (citations omitted). Defendants-Appellees have asserted a position that is diametrically opposed to their previous position; after previously successfully asserting that the Chief Prosecutor was absolutely immune to claims, Defendants-Appellees now argue that the Chief Prosecutor is an appropriate

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defendant under the WPA. This is precisely the situation that the principle of judicial estoppel is intended to prohibit.

II. Public Policy

As this Court previously clarified 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 v. Cnty. Of Saginaw*, 982 N.W.2d 374, 376 (Mich. 2022). Defendants-Appellees argue: (1) Janetsky's attempt to set aside the plea and sentencing agreement was not a refusal to violate the law, (2) a constructive discharge is not an actionable adverse action, and (3) if a constructive discharge was an actionable adverse action, Janestky has not presented sufficient evidence. (Defendants-Appellees' Response, pp. 36-41).

Defendants-Appellees raise most of these arguments for the first time. The only arguments raised with regard to Plaintiff-Appellants' public policy claim at the motion for summary disposition, or on appeal, was that the claim was barred by the WPA and "Janetsky was not discharged or terminated." (Appellant's Appendix, Vol. 2, pp. 390-91). The Court of Appeals likewise acknowledged that whether Janetsky's public policy claim was legally or factually supported were not arguments raised by Defendants-Appellees. (*Id*., Vol. 2, p. 323). To the extent Defendants-Appellees raise arguments not previously asserted, they are improper. "A general rule of trial practice is that failure to timely raise an issue waives review of that issue on appeal." *Napier v. Jacobs*, 429 Mich. 222, 227, 414 N.W.2d 862, 864 (1987). Defendants-Appellees never asserted that Janetsky did not engage in a protected activity to give rise to a public policy claim, yet do so now *vis a vis* the assertion that the activity Janetsky originally alleged was not a refusal to violate the law. Defendants-Appellees likewise never asserted that Janetsky had not presented sufficient evidence of a constructive discharge, but do so now. At best, Defendants-Appellees preserved their

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argument that a constructive discharge is not an actionable adverse action by previously asserting, "Janetsky was not discharged or terminated." Defendants-Appellees should not now be provided with an opportunity to assert arguments they have failed to preserve.

If this Court is inclined to entertain Defendants-Appellees' arguments, Plaintiff-Appellant responds here:

First, Defendants-Appellees do not appear to dispute that Janetsky, did in fact, attempt to set aside the Hannahs plea and sentencing agreement. Rather, they argue that because McColgan authorized Janetsky to correct the agreement and because Boyd signed the withdrawal motion, that Janetsky was not asked to violate the law. (*Id*., pp. 37-38). However, this argument does not negate the unrebutted evidence that Janetsky attempted to set aside the Hannahs plea and sentencing agreement, and additional evidence that Boyd was angry with her for pressing the issue, and subsequently retaliated against her, giving rise to a public policy claim. (Plaintiff-Appellant's Application, pp. 16-19); see also *Janetsky*, 982 N.W.2d 374 (Clement, C.J., concurring in part) ("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), I believe that should give rise to a common-law claim for termination in violation of public policy.").

Second, it is notable that Defendants-Appellees fail to cite any jurisprudence supporting their position that a constructive discharge is not a cognizable adverse action for purposes of a public policy claim. This is likely because such a position is insupportable as it is well established that a constructive discharge is actionable under Michigan public policy: "A plaintiff can support their claim for wrongful termination by establishing that he/she was constructively discharged for refusing to violate the law." *Chambers v. City of Detroit*, 786 F. Supp. 2d 1253, 1273–74 (E.D.

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Mich. 2011) (citations omitted); *see e.g.*, *Vagts v. Perry Drug Stores, Inc.*, 204 Mich. App. 481, 516 N.W.2d 102 (1994).

Third, Plaintiff-Appellant has presented substantial evidence supporting her constructive discharge.

> A constructive discharge is established where 'an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation or, stated differently, when working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign.' Where reasonable persons could reach different conclusions regarding whether these elements are established, the issue becomes a question of fact for the jury and not one properly decided by the trial court.

Vagts, 204 Mich. App. at 487–88. Based on the facts set forth in Janetsky's Application to this Court, such circumstances existed here. Boyd specifically targeted Janetsky for verbal abuse and embarrassment in front of her peers, unjustifiably criticized her, and was physically threatening. (Plaintiff-Appellant's Application, pp. 2-3). His retaliatory treatment culminated in an incident in which he physically blockaded Janetsky in his office, while yelling at and berating her, causing Janetsky to be fearful of physical contact and think "that I would have to fight my way out of the room." (*Id*., pp. 3-4). Moreover, Boyd acknowledged that he was "upset" and "embarrassed" by what had occurred in the Hannahs case. (*Id*., p. 4). Such evidence must be presented to a jury for determination.

III. False Imprisonment

The crux of Defendants-Appellees' argument is premised on an interesting characterization of the facts ("Boyd was Janetsky's supervisor and <u>blockaded</u> her exit for '30 seconds or less' in order to address a specific workplace issue." (emphasis added) (Defendants-Appellees' Response, p. 46)) and the false premise that "supervisors must possess 'at least some authority' to insist that

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employees remain at a workplace meeting." (*Id*., p. 47). In sum, it is Defendants-Appellees' apparent position that Defendant Boyd had authority to physically "blockade" Janetksy's exit, while yelling and berating her, in order to "critique" her.

There is absolutely no basis for Defendants-Appellees' argument. Supervisors and employers are not entitled to "blockade" an employee in an office, against the employee's wishes, in order to "critique" or discipline them. Defendants-Appellees act as if Defendant Boyd had no other methods or opportunities to communicate any supposed workplace critiques to Janetsky; as if Boyd could not schedule a subsequent meeting with Janetsky (possibly inviting others, like McColgan and Janetsky's union representative to join as well), or draft a written communication, like an e-mail, memorandum, disciplinary action etc., or otherwise suspend or terminate her employment.[2] Indeed, Defendant Boyd had numerous options available to him. Instead, Boyd chose to aggressively block Janetsky from leaving his office – not to simply "address a specific workplace issue," (Defendants-Appellees' Response, p. 46) – but to yell at and berate her in retaliation for reporting the unlawful plea agreement in the Hannahs case to McColgan and seeking to correct it, as is evidenced by his outcry: **You're damn right I'm still upset about Hannahs. You embarrassed me!"** (Appellant's Appendix, Vol. 1, pp. 67-70). Boyd simply did not have a legally cognizable privilege to detain Janetsky in this manner.

[2] Defendants-Appellees' oversimplistic assertion that employees' movement can be restricted by their supervisors in order "to face supervisory critique," otherwise they will "easily evade supervisory discipline and direction" is remarkably out of touch with reality. (Defendants-Appellees Response, p. 47). As set forth, supervisors and employers have numerous options available to them in order to discipline or critique an employee.

Furthermore, despite Defendants-Appellees' assertion that "[i]f discharged, Janetsky could claim to have been discharged in violation of a 'public policy' affording her a right not to face a negative supervisory critique," as if, first, discharge axiomatically gives rise to a public policy claim and, second, Defendant Boyd's option was to engage in an intentional tort or be sued for a violation of public policy is manifestly incorrect. Defendants-Appellees fail to consider the element of causation necessary to a public policy claim, which is present here absent Boyd's affirmative termination of Janetsky. Moreover, Defendants-Appellees' commit-this-tort-or-face-that-public-policy-claim defense

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Finally, Defendants-Appellees briefly assert that Janetsky cannot pursue a claim of false imprisonment, because she remained in the office after Collison entered. (Defendants-Appellees Response, pp.45-46). However, whether Boyd subsequently allowed Janetsky an opportunity to leave does not obviate the period in which he unlawfully detained her. At some point, every plaintiff who has asserted a claim of false imprisonment was allowed to leave their place of confinement. What is material is that Janetsky demonstrate each element of the intentional tort, which, for the reasons set forth in brief in chief, she has done. It is the jury's responsibility to sort through these facts and assess liability and damages.

IV. Assault and Battery

Defendants-Appellees' position as to Janetsky's claims of assault and battery is puzzling. While acknowledging that Janetsky testified that her hand was on the door when "Boyd's hand 'slammed on the door,'" Defendants-Appellees appear to assert that if Defendant Boyd's hand "slammed" on a closed door – as opposed to an open door – then there can be no battery. (Defendants-Appellees Response, pp. 43-44). However, there is absolutely no legal or logical basis for this distinction. Whether the door was open or closed is irrelevant. The critical and undisputed facts are that Janetsky's hand was on the door when Boyd's hand "slammed on the door." Such facts constitute "an intentional, unconsented, or offensive touching of something closely connected" with Janetsky. (Appellant's Apendix, Vol. 3, p. 486); *see also* M Civ JI 115.02.

Defendants-Appellees next assert that Boyd's intentional slamming of the door is insufficient to show intent for purposes of an assault and battery. (Defendants-Appellees' Response, pp. 44-45). However, there is ample evidence that Boyd intended to commit an assault and battery, such that a jury must weigh the evidence.

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is nonsensical. It is not a recognized defense for a defendant to assert that they committed an intentional tort to avoid liability under some other legal theory.

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> "A battery is the wil[l]ful and harmful or offensive touching of another person which results from an act intended to cause such a contact. Protection of the interest in freedom from unintentional and unpermitted contacts with the plaintiff's person extends to any part of his body or to anything which is attached to it and practically identified with it."

Espinoza v. Thomas, 189 Mich. App. 110, 119, 472 N.W.2d 16, 21 (1991) (citations omitted) ("contact with the car the plaintiff occupies is sufficient to establish a battery"). "The intent needed for an assault is the intent to commit a battery or an intent to create in the victim a reasonable fear or apprehension of an immediate battery." *Russell v. Bronson Heating & Cooling*, 345 F. Supp. 2d 761, 796 (E.D. Mich. 2004). It is Defendants-Appellee's contention that Boyd did not intend to batter Janetsky: "His demonstrable intent was to keep her from leaving his office." (Defendants-Appellees' Response, p. 45). However, it is apparent from the evidence that Boyd, in slamming the door, likewise intended to cause violent physical contact to the door to which Janetsky's hand was affixed. It is unlikely that such an aggressive action could be seen as accidental.

Moreover, his behavior towards Janetsky, before and after he "slammed on the door," further demonstrates his intent. "[M]otive is particularly relevant in establishing intent." *People v. Kinsey*, No. 361281, 2023 WL 6168356, at *3 (Mich. Ct. App. Sept. 21, 2023) (citing *People v Fisher*, 449 Mich. 441, 453; 537 NW2d 577 (1995). This incident occurred after months of discord between Boyd and Janetsky, stemming from Janetsky's reporting of the illegal plea deal in Hannahs and efforts to correct it. Since then, Boyd had created a hostile work environment for Janetsky, frequently yelling at her, unjustifiably criticizing her, and at times becoming so loud and physically threatening that Janetsky's peers subsequently attempted to comfort her. (Appellant's Appendix, Vol. 1, pp. 156-62). Immediately before slamming his hand on the door, Boyd was yelling loudly "with a bright red face," and he was becoming more and more agitated. (*Id.*, pp. 61-

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65). Upon slamming his hand on the door, Janetsky 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). Following the incident, Boyd continued yelling at Janetsky, accused her of being insubordinate, and acknowledged that he was "upset about Hannahs." (*Id.*, pp. 61-70, 154-62). As Defendants-Appellees opined, "context matters." (Defendants-Appellees' Response, p. 46). The context in which this incident took place provides ample evidence, warranting jury review, as to whether Boyd committed an assault and/or battery.

CONCLUSION

For all the reasons given and authorities cited above, Plaintiff-Appellant 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: January 29, 2024

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CERTIFICATE OF COMPLIANCE

The undersigned certifies this brief complies with the applicable formatting and word count described in MCR 7.212(G).

1. Exclusive of the portions exempted by MCR 7.312(A); the brief contains:

   A. 3,878 words.

2. In proportionally spaced typeface using "Times New Roman" in font size 12.

Respectfully submitted,

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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 January 29, 2024.

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