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STATE OF MICHIGAN
IN THE SUPREME COURT
(On Appeal from the Michigan Court of Appeals)

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-Appellees,
and

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

Defendants.

Supreme Court No. 166477
MCOA No. 346542
Lower Case No. 15-028306-CL

JENNIFER JANETSKY,

Plaintiff-Appellant,
vs.

COUNTY OF SAGINAW and JOHN McCOLGAN, individually and in his official capacity as Saginaw County Chief Prosecutor, and CHRISTOPHER BOYD, individually and in his capacity as Saginaw County Chief Assistant Prosecutor, jointly and severally,

Defendants-Appellees,
and

SAGINAW COUNTY PROSECUTOR'S OFFICE,

Defendant.

Supreme Court No. 166478
MCOA No. 346565
Lower Case No. 15-028306-CL

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Cary S. McGehee (P42318)
PITT, McGEHEE, PALMER & RIVERS, PC
Attorneys for Plaintiff-Appellant
117 W. Fourth St., Ste. 200
Royal Oak, MI 48067
Ph: (248) 398-9800
cmcgehee@pittlawpc.com

Timothy S. Ferrand (P39583)
CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.
Attorneys for Defendants-Appellees County of Saginaw, Saginaw County Prosecutor's Office, John McColgan and Christopher Boyd
19176 Hall Rd., Ste. 200
Clinton Township, MI 48038
Ph: (586) 228-5600
tferrand@cmda-law.com

Douglas J. Curlew (39275)
CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.
Attorneys for Defendants-Appellees County of Saginaw, Saginaw County Prosecutor's Office, John McColgan and Christopher Boyd
17436 College Parkway
Livonia, MI 48152
Ph: (734) 261-2400
dcurlew@cmda-law.com

ANSWER OF DEFENDANTS-APPELLEES COUNTY OF SAGINAW, SAGINAW COUNTY PROSECUTOR'S OFFICE, JOHN McCOLGAN AND CHRISTOPHER BOYD

OPPOSING

PLAINTIFF-APPELLANT JANETSKY'S APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT REGARDING THE OPINION AND ORDER FROM WHICH APPEAL IS SOUGHT

In relevant substance, the Defendants-Appellees can concur that Plaintiff-Appellant Jennifer Janetsky is appealing (1) the September 28, 2023, opinion of the Michigan Court of Appeals on remand from this Court, together with (2) the Court of Appeals' subsequent denial of Janetsky's motion for reconsideration of that opinion. But Janetsky wrongly identifies November *18*, 2023, as the date of the order denying reconsideration. The correct date is November 8, 2023.

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COUNTER-STATEMENT REGARDING JURISDICTION

Plaintiff-Appellant Janetsky's cursory reference to jurisdiction in the "Material Proceedings and Judgment and Order Applied [sic, Appealed]" section of her application is uninformative. From the perspective of timing, the Defendants-Appellees acknowledge that Janetsky filed her application within the permissible 42-day period following the November 8, 2023, denial of her motion for reconsideration in the Court of Appeals. MCR 7.305(C)(2)(c). This Court has jurisdiction to consider the application. MCR 7.303(B)(1).

But grant of the application would be proper only if Janetsky can satisfy the criteria of MCR 7.305(B). As demonstrated below, Janetsky cannot do so.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS CORRECTLY CONCLUDE THAT SAGINAW COUNTY (HAVING NO CONTROL OVER THE WORKPLACE CONDITIONS AND CONDUCT OF WHICH PLAINTIFF-APPELLANT JANETSKY COMPLAINS), WAS NOT JANETSKY'S "EMPLOYER" FOR PURPOSES OF THE WHISTLEBLOWER PROTECTION ACT?

Plaintiff-Appellant Janetsky answers: "No."

Defendants-Appellees County of Saginaw, Boyd and McColgan answer: "Yes."

II. DID THE COURT OF APPEALS CORRECTLY CONCLUDE THAT JANETSKY HAS NO EVIDENCE TO SUSTAIN HER CLAIM ALLEGING "TERMINATION" IN VIOLATION OF "PUBLIC POLICY"?

Plaintiff-Appellant Janetsky answers: "No."

Defendants-Appellees County of Saginaw, Boyd and McColgan answer: "Yes."

III. DID THE COURT OF APPEALS CORRECTLY CONCLUDE THAT JANETSKY HAS NO EVIDENCE TO SUSTAIN HER "ASSAULT AND BATTERY" CLAIM?

Plaintiff-Appellant Janetsky answers: "No."

Defendants-Appellees County of Saginaw, Boyd and McColgan answer: "Yes."

IV. DID THE COURT OF APPEALS CORRECTLY CONCLUDE THAT JANETSKY HAS NO EVIDENCE TO SUSTAIN HER "FALSE IMPRISONMENT" CLAIM"?

Plaintiff-Appellant Janetsky answers: "No."

Defendants-Appellees County of Saginaw, Boyd and McColgan answer: "Yes."

V. GIVEN THE RECORD IN THIS CASE, SHOULD JANETSKY'S APPLICATION BE DENIED FOR LACK OF MERIT IN THE ISSUES SHE PRESENTS?

Plaintiff-Appellant Janetsky answers: "No."

Defendants-Appellees County of Saginaw, Boyd and McColgan answer: "Yes."

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COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Introduction.

Plaintiff-Appellant Jennifer Janetsky postulates a number of legal questions that she claims to be of "critical import to this state's jurisprudence." **(Janetsky Application, pp. x-xiv)**. But in substance, Janetsky envisions a jurisprudence under which poor job performance of employees could not be confronted by employers, without the employer being liable to justify in court the manner of every such confrontation.

As Janetsky would have it, any employee displeased by negative critique regarding their job performance could sue the employer for their hurt feelings. And they could do so regardless of how deleterious their job performance had been to the employer's business or how unsatisfactory (or even potentially dangerous) the employee's conduct had been to the employer's clients or to the public at large.

The supervisory actions of which Janetsky complains were prompted by demonstrable mistakes by Janetsky in critical aspects of her role as an assistant prosecuting attorney. Depending how one views the underlying facts, Janetsky's actions either (1) undermined a valid criminal sexual conduct prosecution or (2) unjustly prosecuted a defendant based on false testimony that Janetsky never vetted. Compounded by other dubious actions along the way, Janetsky then jeopardized yet another prosecution by communicating directly with a criminal defendant, whom Janetsky knew to be represented by counsel.

Even interpreting these failures as simple mistakes (rather than general incompetence), they harmed the public interest in efficacious adjudication of the criminal prosecutions, as well as the rights of the defendants. These are matters of obvious

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importance - - for which supervisory confrontation was not only appropriate but also necessary to protect the public interest. In denial of her documented missteps, Janetsky seeks to hold the Defendants-Appellees legally liable for daring to supervise her at all.

Janetsky's truncated factual recitation completely ignores the documented failures in Janetsky's job performance. But such context matters. When the events are reviewed in total, any supposed basis for Janetsky's legal claims and policy arguments vanishes.

Janetsky's Background in the Saginaw County Prosecutor's Office.[1]

Former Saginaw County Prosecuting Attorney Michael Thomas appointed Plaintiff-Appellee Janetsky as an assistant prosecuting attorney in January 2011. **(Appx. v. 1, pp. 43-4, 51, Janetsky Dep., pp. 66-8, 134; Appx. v. 3, p. 565, Notice of Employment).** Janetsky acknowledges that she was an "*at-will employee*." **(Appx. v. 1, p. 200, Janetsky Dep., p. 592; See also Appx. v. 3, p. 572, Assistant Prosecutor's Collective Bargaining Agreement, Art. X, Section 10.1).** Starting as an Assistant Prosecuting Attorney (APA) I, Janetsky reviewed warrants and handled sex crimes and domestic violence cases. **(Appx. v. 1, p. 52, Janetsky Dep., p. 137).** She later became an APA II handling "*nothing but sex crimes*." **(Appx. v. 1, p. 52, Janetsky Dep., p. 137).**

When John McColgan became the Saginaw County Prosecutor, Janetsky remained an APA II, running "the "Sex Crimes Unit." **(Appx. v. 1, pp. 54, 57, Janetsky Dep., pp. 152, 155).** Janetsky was reappointed by McColgan. **(Appx v. 2, p. 439, Boyd Dep. 159).** McColgan also appointed Christopher Boyd as Chief Assistant Prosecutor - -

[1] The Appellants' Appendix contains the deposition pages cited herein, together with some additional pages for context. The depositions were submitted in their entirety in the circuit court.

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to whom McColgan delegated the day-to-day management of the prosecutor's staff. **(Appx. v. 3, pp. 497-9, McColgan Dep., pp. 29-31)**.

Janetsky's job duties remained the same under McColgan and Boyd, except that beginning in 2015 Janetsky also had rotating assignments to "*warrant duty*" that "*everyone shared*." **(Appx. v. 1, pp. 55, 61, Janetsky Dep., pp. 153, 162)**. This was the only difference in her job responsibilities. **(Appx. v. 1, p. 62, Janetsky Dep., p. 163)**.

Critically, Janetsky acknowledges that Boyd "*managed the entire Prosecutor's Office all the time,*" encompassing *"[d]ay-to-day and everything else*." **(Appx. v. 1, p. 79, Janetsky Dep., p. 206)**. "*Every decision in that office was made by Chris Boyd,*" and *"[n]o decision got made in that office without going through Boyd*." **(Appx. v. 1, pp. 60, 80, Janetsky Dep., pp. 158, 207)**. This accords with the official "job description" for the Chief Assistant Prosecutor, which declares that the Chief Assistant Prosecutor is responsible for "*hiring, firing and disciplining employees*," including all assignments and supervision, with the goal of obtaining "*satisfactory job performance*" from employees of the prosecutor's office. **(Appx. v. 3, pp. 573-5, Chief Assistant Job Description)**.

Janetsky acknowledges that Boyd made all case assignments. **(Appx. v. 1, p. 58, Janetsky Dep., p. 156)**. Boyd reviewed case handling by "*all the trial attorneys*" on a regular basis. **(Appx. v. 1, p. 81, Janetsky Dep., p. 209)**. *"Anything and everything"* about the APAs' cases would be *"within his realm*." **(Appx. v. 1, p. 72, Janetsky Dep., p. 176)**. This included oversight of how a case might be resolved by plea. **(Appx. v. 1, pp. 65-6, 72, Janetsky Dep., pp. 168-9, 176)**.

Boyd met regularly with Janetsky about her files -- as he "*[a]bsolutely*" did with *all* the APAs. **(Appx. v. 1, pp. 67, 69, Janetsky Dep., pp. 170, 172)**. Boyd's meetings with

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the APAs addressed "*every aspect*" of their files, including (of particular relevance here) "*evidentiary problems*." **(Appx. v. 1, pp. 70, 71 Janetsky Dep., pp. 173-174)**.

The "Hannahs Case."

Plaintiff Janetsky alleges that Boyd and McColgan "*retaliated*" against her for reporting to McColgan that Boyd had made a supposedly "*illegal*" plea deal in a criminal sexual conduct (CSC) case. Janetsky identifies this as the "*Hannahs case*." **(Appx. v. 1, pp. 20-3, 26, First Amended Complaint, ¶¶ 33, 35-8, 41-2, 62)**.

Janetsky focuses almost exclusively upon the supposedly improper actions by Boyd, while ignoring her own actions. But the details of Janetsky's own handling of the "Hannahs" case are important. Those details explain why Boyd became involved in the plea negotiations. Those details (*together with Janetsky's continued personal contacts with the victim after the victim was charged with perjury and represented by criminal defense counsel*) also make manifest the justification for the supervisory actions by Boyd that Janetsky characterizes as "retaliation."

Janetsky's involvement in the "Hannahs" prosecution began when she was asked to obtain warrants for the seizure of the computers of the victim ("Allisen") and the accused in November of 2013. **(Appx. v. 1, pp. 82-4, Janetsky Dep., pp. 212-4)**. Police gave Janetsky a "*confession*" by the accused, which served as the basis for the criminal charges. **(Appx. v. 1, pp. 93, 95-6, Janetsky Dep., pp. 230, 240-1, 345)**.

Confident with the confession, Janetsky did not question Allisen's credibility. But events prove that she should have. The prosecution was ultimately dismissed after Allisen acknowledged giving perjured testimony during the preliminary examination.

Janetsky admits that "*[m]y whole case was Allisen's testimony and the confession*."

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(Appx. v. 1, p. 93, Janetsky Dep., p. 230). Janetsky did not ask officers to interview Allisen's sister (Aleesha) or subpoena the sister's testimony, even though the sister was present during the alleged criminal acts. **(Appx. v. 1, pp. 89, 91-4, 117-9, 162-3, Janetsky Dep., pp. 224, 226-7, 230, 233, 325-7, 488-9)**. Janetsky never knew what the sister's testimony might be. **(Appx. v. 1, pp. 91-2, Janetsky Dep., pp. 226-7, 233)**.

Nor did Janetsky seek a forensic analysis of the evidence on either of the computers that had been seized. **(Appx. v. 1, pp. 85-8, 159-61, Janetsky Dep., pp. 218-9, 220-21, 482-4)**. Janetsky did not even know what the police had done with the computers. **(Appx. v. 1, p. 85 Janetsky Dep., v. 1, p. 218)**.

By December 2013, Janetsky had received account information from Google regarding supposedly incriminating emails that were key to the case - - which information Janetsky turned over to the accused defendants' original defense attorney, William White, in late 2013 or early 2014. **(Appx. v. 1, pp. 158-9, 176, Janetsky Dep., pp. 481-2, 538)**. But again, Janetsky herself did not seek any analysis of this data. She did so only after being confronted by an exculpatory defense analysis of the data in April of 2015. **(Appx. v. 1, pp. 174-7, Janetsky Dep., pp. 536-9)**.

In testimony that highlights the dubious nature of her handling of the case, Janetsky admits she was previously aware of "*inconsistencies*" in Allisen's testimony - - which Janetsky knew were compounded by a two-year delay in Allisen's reporting of the alleged crime. **(Appx. v. 1, pp. 192-3, Janetsky Dep., pp. 554, 558)**. But Janetsky had not pursued these issues. Her testimony is telling:

> Q. And then after you got the confession you just *stopped looking* at the evidence?
>
> A. *We had everything we needed.*

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(Appx. v. 1, p. 158, Janetsky Dep., p. 480, lines 6-8).

Not satisfied with attorney White, the family of the accused sought assistance from Mark Van Benschotten, a former prosecutor. **(Appx. v. 3, pp. 505-10, Van Benschotten Dep., pp. 6-8, 23-5).** Van Benschotten met Janetsky twice, asking her to "*give the case a second look*" for purposes of a plea deal. **(Appx. v. 1, 10, pp. 107-8, 121-2, Janetsky Dep., pp. 265-6, 332-3).** Janetsky's best offer was a plea to one count of CSC I (a life offense). **(Appx. v. 1, pp. 111, 120 , Janetsky Dep., p. 271, 328).**

In the fuller factual recitation that accompanied Janetsky's prior application for appeal to this Court (Docket Nos. 161612 and 161613), Janetsky implied to this Court that Van Benschotten then attempted, at his own initiative, to improperly "*influence*" Boyd as a "*friend*." **(Appx. v. 4, p. 751, Janetsky Application, Nos. 161612 and 161613, p. 3).**[2] But Janetsky testified that *she told* Van Benschotten that he could try to seek a better deal from Christopher Boyd or John McColgan directly. **(Appx. v. 1, pp. 107, 110, 121-2, Janetsky Dep., pp. 265, 268, 332-3).** Janetsky acknowledges that it was "*absolutely normal*" for attorneys to do so, and Boyd and McColgan could "*trump*" an assistant prosecutor's offer. **(Appx. v. 1, pp. 122, Janetsky Dep., p. 333; Appx. v. 2, pp. 279, 306, Janetsky Dep., 757, 824).**

Confronted by Van Benschotten, Boyd originally stood by Janetsky's analysis and offered no better deal. **(Appx. v. 2, pp. 451-2, 462, Boyd Dep., pp. 210, 213, 232).** But additional information changed his mind. **(Appx. v. 2, p. 462, Boyd Dep., p. 232).**

Van Benschotten believed that Allisen's sister "*had exculpatory information*" that

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[2] There is no indication that Janetsky's interpretation of events has changed from what she offered in her prior submissions to this Court.

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would contradict Allisen, and he believed that that the prosecutor's office was deliberately avoiding the sister for that reason. **(Appx. v. 3, pp. 514, 523, Van Benschotten Dep., pp. 217, 257)**. Van Benschotten also learned that Allisen's computer had been "imaged," but not actually analyzed for what it might reveal about the source of allegedly incriminating emails. **(Appx. v. 3, pp. 516-7, 522, Van Benschotten Dep., pp. 237-8, 256)**.

Van Benschotten analyzed the Google information that Janetsky had ignored. He concluded the data showed that Allisen herself had created the emails. **(Appx. v. 3, pp. 519-20, 524, Van Benschotten Dep., pp. 243-4, 273)**. When reviewing the emails, Van Benschotten also noted misspellings common to Allisen's own emails, again indicating that Allisen herself wrote the emails that she claimed to have received from the accused. **(Appx. v. 3, pp. 524-5, Van Benschotten Dep., pp. 273-4)**.

At another meeting with Boyd, Van Benschotten highlighted these points. **(Appx. v. 3, pp. 511-3, Van Benschotten Dep., pp. 51-3)**. A new defense attorney, George Bush, also met with Boyd, reiterating Van Benschotten's analysis and asserting his own belief that discovery had been improperly withheld from the defense - - for which reason he intended to file a motion to suppress the "confession." **(Appx. v. 2, pp. 463-6, 408, 472, 476, Boyd Dep., pp. 233-6, 240, 244, 248)**.

In the wake of these contacts with Van Benschotten and Bush, Boyd became concerned, particularly because "*there had not been a statement taken from the other sister, Aleesha, which I found somewhat disturbing*." **(Appx. v. 2, p. 453, Boyd Dep., p. 223)**. Boyd discovered that Aleesha was not even listed as a *res gestae* witness. **(Appx. v. 2, p. 454, Boyd Dep., p. 224)**. Boyd also determined that some of the emails "*tended*

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to support the position of Mr. Van Benschotten." **(Appx. v. 2, p. 453, Boyd Dep., p. 223)**. Moreover, notwithstanding the "confession," the accused had also *denied* sending the emails, and "*[t]here was a "recorded statement*" of these denials. **(Appx. v. 2, p. 486-7, Boyd Dep., pp. 273-4)**.

Janetsky still believed that the confession "*in and of itself was enough.*" **(Appx. v. 2, p. 455, Boyd Dep., p. 225)**. Boyd "*wasn't convinced*," and he felt that Janetsky's evaluation of the case was "*unrealistic*" and "*not objective*." **(Appx. v. 2, pp. 455-6, 461, Boyd Dep., pp. 225-6, 231)**.

Defense attorney Bush moved to remand the case for a preliminary examination in the district court, which motion was to be heard on June 2, 2014. But Janetsky had plans to be away for her wedding and honeymoon on that date, so she and Boyd "*specifically discussed the fact that it was a motion to remand and it would need coverage*." **(Appx. v. 1, p. 130, Janetsky Dep., p. 382)**. Boyd chose to handle the matter himself and reached agreement with defense attorney Bush on a plea agreement to be entered at the hearing instead. **(Appx. v. 2, p. 481, Boyd Dep., p. 253)**. As explained by Boyd, "*I had exercised my authority as Chief Assistant to intervene in the case*," which "*is something I do on a regular basis in terms of dealing with cases, making decisions*." **(Appx. v. 2, p. 482, Boyd Dep., p. 262)**.

Janetsky previously told this Court that Boyd "*covertly met*" with Bush - - implying that Boyd tried to hide the event from Janetsky. **(Appx. v. 4, p. 752, Janetsky Application, Docket Nos. 161612 and 161613, p. 4)**. In reality, Boyd did not discuss the plea arrangement with Janetsky, because "*[s]he was not going to be handling the June 2nd hearing date*," and "*[s]he was leaving on her wedding; I wasn't going to bother*

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her with a matter that was under my auspicious [sic auspices]." **(Appx. v. 2, pp. 484-5, Boyd Dep., pp. 264-5)**.

Janetsky also suggested in her prior application that Boyd's intervention was "*highly unusual.*" **(Appx. v. 4, p. 752, Janetsky Application, Docket No. 161612 and 161613, p. 4)**. As quoted above, however, Janetsky testified that it was "*absolutely normal*" for defense attorneys to seek intervention by Boyd. **(Appx. v. 1, p. 122, Janetsky Dep., p. 333; Appx. v. 2, pp. 279, 306, Janetsky Dep., pp. 757, 824)**.

The sentencing guidelines recommended prison, but Boyd agreed with Bush to recommend that the accused serve one year in the Saginaw County jail, followed by probation and placement on the sex offender registry. **(Appx. v. 2, pp. 476-81, Boyd Dep., pp. 248-253)**. The plea was accepted by the judge at the hearing. **(Appx. v. 3, pp. 586-7, Plea Transcript, pp. 11-2)**.

Upon learning of it, Janetsky insisted that the plea was unlawful or "illegal", based on her interpretation that MCL 771.1(1). According to Janetsky this statute requires a defendant convicted of CSC III to serve time in "*prison*" and precludes probation. **(Appx. v. 1, pp. 124-5, Janetsky Dep., pp. 60-1; Appx. v. 1, pp. 20-1, First Amended Complaint, ¶ 33)**.

Janetsky also insisted that Boyd had violated the Crime Victims' Rights Act by not specifically advising Allisen that such a plea would be taken at the remand hearing. In fact, Janetsky herself had already told Allisen of the remand hearing, but she also told Allisen that "*they did not need to attend because it was merely a remand.*" **(Appx. v. 1, pp. 44-5, Janetsky Dep., pp. 70-1)**. Janetsky insisted that Boyd had the obligation to notify Allisen of the changed purpose of the hearing, so Allisen could address the Court

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at that hearing. **(Appx. v. 1, pp. 131-3, 140-1, Janetsky Dep., pp. 383-4, 392, 399, 404)**.

Boyd did not believe the plea deal to be improper or "*illegal*." He agrees that under MCL 771.1 "*a straight probationary term is not appropriate, and not allowed*." **(Appx. v. 2, p. 479, Boyd Dep., p. 251)**. But Boyd did not offer a "straight probationary term." The offer was for the defendant to "*do a year in the Saginaw County jail, and after having complied with his term of incarceration, could be placed on probation*." **(Appx. v. 2, p. 479, Boyd Dep., p. 251)**.

Boyd also did not believe the Crime Victims' Rights Act had been violated, because the victim does not have a veto over a plea offer, and Boyd understood that the victim had been made aware of the hearing - - at which time she could have spoken to Boyd, as was his intent. **(Appx. v. 2, pp. 447-8, 450, 489-93, Boyd Dep., pp. 183-4, 186, 284-8)**. Moreover, it is not the personal responsibility of the individual prosecutors in Saginaw County to notify victims of hearings, because the Crime Victims' Rights Division of the Prosecutor's Office handles that job. **(Appx. v. 2, p. 450, Boyd Dep., p. 186)**.

Notably, Boyd himself had actively lobbied for enactment of the Crime Victims' Rights Act. **(Appx. v. 2, p. 444, Boyd Dep., p. 175)**. The Act requires prosecutors to give victims "input" into the handling of criminal cases. **(Appx. v. 2, pp. 441-2, Boyd Dep., pp. 172-3)**. But Boyd does not interpret the statute to require repeated contacts with victims or to require a prosecutor to contact the victim "*about every single thing we intend to do*" or "*get permission*" from the victim to do it. **(Appx. v. 2, pp. 445-6, 490-1, Boyd Dep., 181-2, 285-6)**.

Janetsky had spoken with Allisen about her position regarding what punishment she wanted for the accused. **(App. v. 1, pp. 136-7, 142, Janetsky Dep., pp. 395-6, 408)**.

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Boyd was fully aware from Janetsky's "*what their position was before I entered into the agreement.*" **(Appx. v. 2, p. 491, Boyd Dep., p. 286).** But the prosecutor's "*ethical obligation was to make our own independent decision on how the case should be resolved after having heard the victims' opinion, and what their input was into the case.*" **(Appx. v. 2, p. 493, Boyd Dep., p. 288).** Again, Allisen would have had the opportunity to express objections at the sentencing hearing. **(Appx. v. 1, p. 133, Janetsky Dep., p. 392).**

At deposition, Janetsky herself admitted that the victims' wishes do not "*tie my hands, no.*" **(Appx. v. 1, p. 138, Janetsky Dep., p. 397).** Janetsky also acknowledged that Allisen would have had opportunity to object to the terms of the plea deal at the time of the actual sentencing. **(Appx. v. 1, p. 133, Janetsky Dep., p. 392).**

Janetsky further contended that Boyd also made an error by using the "C" rather than "B" grid of the sentencing guidelines. **(Appx. v. 1, pp. 126-8, Janetsky Dep., pp. 366-8).** But if such proved true, Boyd deemed this to be "*correctible*," without unsettling the conviction obtained by the plea. **(Appx. v. 2, p. 494, Boyd Dep., p. 289).**[3]

Janetsky's Alleged "Whistleblowing."

Upon return from her honeymoon, Janetsky made her alleged "whistleblower" report. She met Prosecutor McColgan to protest what she called "*a backdoor deal*" by Boyd, which she insisted was improper under the law and had to be fixed. **(Appx. v. 1, pp. 46-8, 143-8, Janetsky Dep., pp. 73-5, 410-4, 431).**

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[3] This Court's prior order "decline[d] to address whether actual violations of the law occurred." Finding that Janetsky "has presented sufficient evidence to create a question of fact that she *suspected* the law had been violated," this Court held that Janetsky had adequately stated a claim - - albeit subject to proof and other defenses that might apply. **(Appx., v. 4, p. 777, Remand Order, p. 3).**

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Critically, Janetsky admits that McColgan specifically *authorized* Janetsky to take whatever corrective action was necessary to rectify the plea situation *as she saw it*. **(Appx. v. 1, pp. 149, 152-3, Janetsky Dep., pp. 437, 450-1; Appx. v. 2, p. 268, Janetsky Dep, p. 734)**. And this point is important for analysis of Janetsky's application, particularly to the extent she seeks reversal of the Court of Appeals decision disposing of her alternative "public policy" claim.

The Defendants-Appellees had argued to this Court that Janetsky's "public policy" claim is preempted, because it is based upon the same conduct as her claim under the Whistleblower Protection Act. Conversely, this Court distinguished the two claims by characterizing Janetsky's "public policy" claim as "based on her refusal to violate the law -- i.e., her attempt to set aside the plea and sentencing agreement," while her WPA claim was based upon her "report" of suspicions that Boyd had violated the law. **(Appx. v. 4, p. 777, Remand Order, Docket Nos. 161612, 161613, p. 3)**. But Janetsky admits that McColgan never directed Janetsky to violate what she perceived the law to require. **(Appx. v. 1, p. 153, Janetsky Dep., p. 451)**. Nor did Boyd.

Janetsky previously acknowledged to this Court that McColgan "*instructed Boyd to 'correct' the problem*." **(Appx. v. 4, p. 754, Janetsky Application, Docket Nos. 161612 and 161613, p. 6)**. Janetsky implied, however, that McColgan either did not believe Janetsky or that he actually did not want her taking action.

But Boyd acknowledged that he was told by McColgan that McColgan "*had authorized her [Janetsky] to correct it"* and that *"I should meet with her and see if we could correct the matter, and to let him know what we decided*." **(Janetsky Appx., v. 1, p. 107, Boyd Dep., pp. 275, 277-8)**. As recited above, Janetsky acknowledged in her own

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testimony that McColgan had specifically authorized *her* to take whatever corrective action *she* deemed necessary. **(Appx. v. 1, pp. 149, 152-3, Janetsky Dep., pp. 437, 450-1; Appx. v. 2, p. 268, Janetsky Dep., p. 734)**. McColgan empowered Janetsky to correct the situation, not Boyd. McColgan communicated this directive to Boyd.

And Boyd, despite his disagreement with Janetsky's interpretation of the law, "*relented*" to Janetsky's insistence and signed a plea withdrawal motion that Janetsky drafted. **(Appx. v. 2, pp. 494-5, Boyd Dep., pp. 289, 292; Appx. v. 1, p. 150, Janetsky Dep., p. 438; Appx. v. 3, pp. 590-2, Motion to Withdraw Plea)**. Boyd did not, as Janetsky previously told this Court, "*pressure*" Janetsky or make "*improper demands*." **(Appx. v. 4, p. 755, Janetsky Application, Docket Nos. 16162 and 161613, p. 7)**. Boyd specifically told both McColgan and Janetsky that, "*If I made a mistake, that I wanted to sign the paperwork admitting that I made a mistake*." **(Appx. v. 2, pp. 488, 493, 495, Boyd Dep., pp. 282, 288, 292)**. And that was done.

Significantly, this Court's previous remand order referenced Janetsky's motion - - having been "*signed and filed by Boyd, requesting that the trial court set aside the sentencing agreement*" - - as a basis for Janetsky's WPA claim to proceed (i.e., as evidentiary support for Janetsky's suspicion that the law had, in fact, been violated). **(Appx. v. 4, p. 777, Remand Order, Docket Nos. 161612, 161613, p. 3)**. But these facts undermine Janetsky's "public policy" claim. Janetsky did not refuse "to violate the law," because Boyd never compelled her to do so. Boyd was under specific direction from McColgan to do what Janetsky thought right - - and Boyd did it by signing and filing Janetsky's motion.

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The CSC was remanded for a preliminary examination, at which time Allisen testified that the accused had sent Allisen the threatening emails that underlay some of the charges. **(Appx. v. 1, pp. 154-5, 157, Janetsky Dep., pp. 468, 473, 475)**. Attorney Bush pressed Janetsky for the complete computer data, and Bush obtained a defense expert review. **(Appx. v. 1, pp. 111-2, 114, Janetsky Dep., pp. 271-2, 274; Appx. v. 3, pp. 593-4, Order for Forensic Examination of Computer, 11/26/2014)**.

The defense analysis prompted Janetsky (*after a year of doing nothing with the computers*) to obtain an analysis of the computer and Google account information by a Michigan State Police expert (Pitt). **(Appx. v. 1, pp. 114, 116, 169, 177-8, Janetsky Dep., pp. 274, 276, 502, 539-40)**. And Janetsky admits that *the experts agreed* that the emails had been sent from the same computer on which they were received - - such that "*it surely looked*" like Allisen had created and sent the emails to herself and had committed perjury in her testimony at the preliminary examination. **(Appx. v. 1, pp. 98-100, 103, 165, 167-8, 172-3, 375, Janetsky Dep., pp. 248-50, 253, 497, 499, 501, 505-6, 921)**.

Attorney Bush and the mother of the accused highlighted these issues in letters to the prosecutors. **(Appx. v. 1, pp. 169-71, 174-5, Janetsky Dep., pp. 502-4, 536-7; Appx. v. 3, pp. 595-602, Bush Letter, 4/25/2015; Appx. v. 3, pp. 603-5, Nowaczewski Letter, 1/21/2015)**. It was only after receiving the defense forensic evidence and these letters in April 2015 that Janetsky belatedly took steps to investigate Allisen's credibility. **(Appx. v. 1, pp. 103, 105-6, Janetsky Dep., pp. 253, 255-6)**. And the case then fell apart.

Janetsky agreed with Boyd to dismiss the email related charges and to offer the accused a deal to plead to a "gross indecency" charge. **(Appx. v. 1, pp. 112, 194-9,**

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Janetsky Dep., pp.272, 573-5, 584-6). The accused rejected the proposed plea, and all charges were ultimately dismissed by *nolle prosequi* on June 8, 2015. **(Appx. v. 3, p. 606, Nolle Prosequi)**.

Meanwhile, on June 2, 2015, Janetsky and a Michigan State Police trooper, Jim Moore, met with Allisen to confront her about whether she had sent the emails to herself. **Appx. v. 2, pp. 383-4, 386-7, Janetsky Dep., pp. 942-3, 946-7)**. Allisen texted to Janetsky that she had confessed perjury to Moore that she had created the threatening emails, but Janetsky claims Allisen also "*recanted*" this confession in her text to Janetsky. **(Appx. v. 2, pp. 388-9, Janetsky Dep., pp. 954-5)**. Nevertheless, Allisen was prosecuted for perjury. **(Appx. v. 2, pp. 422, 427, Janetsky Dep., pp. 1030, 1045)**.

Despite being removed from handling the underlying CSC case (*and being put on leave as described below*), Janetsky, continued personal communications directly with Allisen. **(Appx. v. 2, pp. 390-4, 420-1, Janetsky Dep., pp. 956-60, 1019-20)**. This was so, even though Janetsky had been told by Boyd not to have further contact with Allisen. **(Appx. v. 2, pp. 393-4, Janetsky Dep., pp. 959-60)**.

This stream of communication by Janetsky to Allisen continued - - even after Allisen had been charged with perjury *and* after Allisen (represented by criminal defense counsel) had met with other prosecutors to accuse Janetsky of pressuring her to testify as she did. **(Appx. v. 2, pp. 423-7, Janetsky Dep., pp. 1041-5)**. Janetsky claims she "*reached out*" to Allisen from concern for Allisen's "*well-being*" and "*safety*." **(Appx. v. 2, pp. 428-33, Janetsky Dep., pp. 1048-53)**. Janetsky also insists that she did not initially know that Allisen was making accusations against her and that she (Janetsky) was not "*trying to interfere with the investigation*." **(Appx. v. 2, pp. 434-5, Janetsky Dep., pp.**

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1054, 1057). But Janetsky acknowledges that she knew Allisen was "*represented by legal counsel.*" **(Appx. v. 2, pp. 393-4, 425, 436, Janetsky Dep., pp. 959-60, 1043, 1060)**. She communicated to Allisen anyway - - despite still being employed as a prosecutor. **(Appx. v. 2, pp. 393-4, 425, 436, Janetsky Dep., pp. 959-960, 1043, 1060)**.

The alleged "retaliation."

On June 4, 2015, Janetsky presented a letter to Prosecutor McColgan. In that letter, Janetsky alleged that she had been subjected by Boyd to "*severe and pervasive*" harassment beginning June of 2014 in "*retaliation*" for Janetsky's accusations at her June 10, 2014 meeting with McColgan regarding Boyd's supposed plea deal. **(Appx. v.2, pp. 406-8, Janetsky Dep., pp. 976-7, 997; Appx. v. 3 pp. 610, Janetsky Letter, 6/4/15)**. Janetsky defines this "*retaliation*" as a "*hostile work environment*" created by the alleged "*harassment*" by Boyd. **(Appx. v. 3, p. 610-1, Janetsky Letter, 6/4/15, ¶¶ 2-3; Appx. v. 1, p. 23, First Amended Complaint, ¶¶ 42-3)**.

Yet by her own description (detailed below), Janetsky was not treated any differently by Boyd than the other APAs. And the record reflects that each alleged instance of "harassment" arose out of Boyd's supervisory obligations as Chief Assistant Prosecutor regarding issues unrelated to the CSC case involving Allisen.

Janetsky claims that "*retaliation*" began when she came back from her honeymoon and was assigned by Boyd to handle "*general warrant*" duties like other assistant prosecutors, rather than solely criminal sexual conduct warrants as she had previously. **(Appx. v. 2, pp. 216-7, 219-21, Janetsky Dep., pp. 651-2, 654-6)**. She acknowledges, however, that three different APAs were assigned warrant duty each day, with the assignment rotating through *all* the APAs in the office. **(Appx. v. 1, pp. 55-6, Janetsky**

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Dep., pp. 153-4).

Janetsky's prior application told this Court that Boyd set her up for failure by assigning her "*a heavier case load than other APAs*." **(Appx. v. 4, p. 756, Janetsky Application, Nos. 161612 and 161613 p. 8)**. But Janetsky has never offered evidence that her overall "case load" was heavier than that of other APAs. By Janetsky's own testimony, warrant duty was not "caseload" but, rather, a rotating assignment shared by *all* the APAs. **(Appx. v. 1, p. 55-6, Janetsky Dep., pp. 153-4)**.

Janetsky testified at deposition that she "*was more often assigned to the heavy [warrant] days*." **(Appx. v. 1, p. 62, Janetsky Dep., p. 163)**. But Janetsky has admitted that she has no documentation to support this allegation and no record of the days she was assigned to warrant duty. **(Appx. v. 1, pp. 61-4, Janetsky Dep., pp. 162-5)**. And Janetsky has never explained why she should be excepted from warrant duties that all the APAs shared or how she would be entitled to work exclusively on criminal sexual conduct matters.

Janetsky alleges that Boyd "*hid*" in his office a file that Janetsky needed for a hearing - - basing this conclusion on the file being found in Boyd's office under unrelated papers. **(Appx. v. 2, p. 272, Janetsky Dep., p. 750)**. Yet Janetsky acknowledges that Boyd's job included oversight of all cases. **(Appx. v. 1, pp. 69, 72, Janetsky Dep., pp. 172, 176)**. Boyd reviewed the case handling and file progress of "*all the attorneys*." **(Appx. v. 1, p. 81, Janetsky Dep., p. 209)**. Janetsky concedes that she has no direct evidence that Boyd intentionally hid the file, but she insists that the mere circumstance of the file being "*underneath piles of stuff that had no relation to it*" is "*enough*" to prove that intent. **(Appx. v. 2, pp. 272-3, Janetsky Dep., pp. 750-1)**.

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Janetsky also vaguely testified that "*[t]here are many things that happen with regards to my files that were not right.*" **(Appx. v. 2, p. 273, Janetsky Dep., p. 751)**. But when asked what "other things" happened that she could attribute to Boyd, she admitted, "*I don't have anything further.*" **(Appx. v. 2, p. 274, Janetsky Dep., p. 752)**.

Janetsky alleges that in January of 2015 *all* of the APAs attended a meeting where Boyd "*yelled*" at them - - collectively - - for being behind in their handling of warrants, such that Boyd "*didn't feel we were doing our jobs.*" **(Appx. v. 1, pp. 73-4, Janetsky Dep., pp. 200-1; Appx. v. 2, p. 222, Janetsky Dep., p. 657)**. Boyd allegedly told Janetsky to "*shut up*" when she tried to give input, and he allegedly said Janetsky was lying when she claimed not to be behind in the handling of warrants. **(Appx. v. 1, pp. 75-6, Janetsky Dep., pp. 202-3; Appx. 2, pp. 213-5, Janetsky Dep., pp. 647-9)**. But when another APA, Paul Fehrman, interjected, Boyd "*yelled at Fehrman*" too. **(Appx. v. 1, pp. 76, Janetsky Dep., pp. 203; Appx. v. 2, pp. 213-4, Janetsky Dep., pp. 647-8)**. Thus, by Janetsky's own description, she was treated no differently than the other APAs. There was nothing said at this meeting about the CSC case involving Allisen. **(Appx. v. 2, p. 216, Janetsky Dep., p. 651)**.

Similarly, in May of 2015, Boyd accused the APAs of too many adjournments in their cases. **(Appx. v. 2, pp. 201-2, 206, 253-61, Janetsky Dep., pp. 606-7, 611, 715-23)**. Again, Janetsky spoke up and got yelled at, but APA Richard King got yelled at too. **(Appx v. 2, pp. 201-2, 259-60, Janetsky Dep., pp. 606-7, 721-2)**. Boyd also yelled at APA Randy Price. **(Appx. v. 2, pp. 203-4, Janetsky Dep., pp. 608-9)**.

Janetsky's own testimony demonstrates that she was not singled out. As described in Janetsky's letter to McColgan, *all* the APAs were subjected to the same "*pervasive*"

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hostility from Boyd. In Janetsky's own words:

> I am *not the only APA* who has been subject to Judge Boyd's escalating verbal attacks. *Richard King, Pat Duggan, Randy Price and Paul Fehrman have **all** been treated with similar hostile and increasingly irrational behavior*, and several others have expressed fear of, and discomfort in, the current work environment. **(Appx. v. 3, p. 611, Janetsky Letter, 6/4/15, p. 2, ¶ 2, *emphasis added*)**.

Janetsky reiterated this at deposition. **(Appx. v. 2, pp. 206-7, Janetsky Dep., pp. 611-2)**. Janetsky also testified at deposition that even the support staff felt discomfort due to Boyd. **(Appx. v. 2, pp. 208-11, Janetsky Dep., pp. 613-6)**.

And in none of the above incidents does Janetsky describe any reference by Boyd to the CSC case involving Allisen. This is also true with regard to two incidents particular to Janetsky in March of 2015.

On the first occasion, Janetsky had gone home sick over March 12 and March 13, 2015, thereby missing a motion hearing, with the result that the judge called the prosecutor's office - - to express annoyance that Janetsky had not filed written responses to the motions. **(Appx. v. 2, pp. 244-5, 247-8, Janetsky Dep., pp. 689-90, 692-3)**. Boyd yelled at Janetsky, making clear "*that he felt I should have responded in writing to the motions*." **(Appx. v. 2, pp. 249-50, Janetsky Dep., pp. 694-5)**. Boyd also accused Janetsky of being dishonest about the reason for her absence - - which Janetsky concedes might have resulted from the fact that she had gone home sick (and thus missed court) for "*strep throat*" on March 12th and 13th, but then *sang* at a public event on March 14th. **(Appx. v. 2, pp. 238-42, Janetsky Dep., pp. 683-7)**.

Also in March of 2015, Janetsky returned from court claiming to have received a directive from a judge to include specific language in *nolle prosequi* orders. **(Appx. v. 2,**

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pp. 224-5, 228-31, 234, Janetsky Dep., pp. 659-60, 663-6, 671). Boyd accused Janetsky of "*lying*" about who authorized the language. **(Appx. v. 2, pp. 232, 235, Janetsky Dep., pp. 667, 676)**.

But Janetsky concedes that none of the above incidents resulted in discharge, discipline or a loss of pay or benefits. **(Appx. v. 2, pp. 223, 236-7, 251-2, 261, 274, Janetsky Dep., pp. 658, 681-2, 696, 700, 723, 752)**.

The final incident (*the one highlighted in Janetsky's June 4, 2015 letter and in her truncated recitation to this Court*) occurred on June 1, 2015, after Janetsky had texted Boyd to advise him that the defense attorney on a "*Currington*" case was going to withdraw. **(Appx. v. 2, pp. 275-8, 289-90, Janetsky Dep., pp. 753-6, 807-8)**. Janetsky claims she sent the text to comply with a directive to keep Boyd and McColgan informed of events and cases that might attract media attention. **(Appx. v. 2, pp. 255, 262-4, 285-6, 298, Janetsky Dep., pp. 717, 724-6, 767-8, 816)**. Boyd responded with a text saying that he expected to be kept advised in person, not by text. **(Appx. v. 2, pp. 281-2, 298, Janetsky Dep., pp. 760-1, 816)**.

When Janetsky went to Boyd's office in the company of an intern later that day, Boyd immediately ordered the intern "*out of the room, shut the door, and started yelling*" about Janetsky's earlier text message. **(Appx. v. 2, pp. 280-1, 311, Janetsky Dep., pp. 759-60, 829)**. According to Janetsky, Boyd "*shut the door, went back to his desk and ordered me to sit down*" in a "*loud voice*" - - repeating the same order louder after Janetsky said that she did not want to sit. **(Appx. v. 2, pp. 287-8, 312, 315-7, Janetsky Dep., pp. 769-70, 830, 833-5)**. Boyd admonished Janetsky that she and the other APAs "*clearly didn't understand his order and were wasting his time with all kinds of unnecessary . . .*

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texts that had nothing to do with what he wanted us to tell him." **(Appx. v. 2, pp. 283, 287-8, 319, Janetsky Dep., pp. 762, 769-70, 837)**. Boyd did not want texts "*about every little thing.*" **(Appx. v. 2, p. 327, Janetsky Dep., p. 845)**.

Janetsky demanded the presence of her union representative and protested that Boyd was being "*hostile and inappropriate.*" **(Appx. v. 2, pp. 325, 328-9, Janetsky Dep., pp. 843, 846-7)**. Boyd responded that Janetsky was being "*insubordinate.*" **(Appx. v. 2, p. 330, Janetsky Dep., p. 848)**. As Janetsky's description continues:

> I said I'm going to go and I started to move this way 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. **(Appx. v. 2, p. 335, Janetsky Dep., p. 853)**.

According to Janetsky, Boyd continued to yell that she "*wasn't leaving*" and was "*going to talk to [him].*" **(Appx. v. 2, pp. 345-6, Janetsky Dep., pp. 863-4)**.

Janetsky tells this Court that "[a]t the time Boyd "reached over Janetsky and shut the door, Janetsky's hand was on the doorknob." **(Janetsky Application, p. 4)**. But this is a direct misrepresentation of Janetsky's testimony.

Janetsky's testimony is that Boyd ordered the intern out of the room then "shut the door," before he ordered Janetsky to "sit down." **(Appx. v. 2, pp. 280-1, 287-8, 311-2, 315-7, Janetsky Dep., pp. 759-60, 769-70, 829-30, 833-5)**. Boyd certainly did not (*as the dissenting Court of Appeals judge characterized the record*) "slam[]" the door shut with Janetsky's hand on it. **(Appx., v. 4, pp. 804, 808, Concurring/Dissenting Opinion, pp. 4, 8)**. The door was already "*shut.*" What Boyd did put his hand against the *closed* door to prevent Janetsky from *opening* it and exiting his office in avoidance of the supervisory confrontation. Janetsky's assault and battery argument **(Janetsky**

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Application, pp. 26-27) is based on misrepresentation of her own testimony in these regards.[4]

Janetsky concedes that there was no physical contact between her and Boyd, and Boyd never touched, bumped, pushed or swung at Janetsky, nor raised his hand as if to do so. **(Appx. v. 2, pp. 359-60, Janetsky Dep., pp. 900-1)**. The entire interaction in the doorway lasted "*30 seconds or less*." **(Appx. v. 2, p. 346, Janetsky Dep., p. 864)**.

And Boyd then opened the door and "*screamed for Nate Collison*" (the Vice President of Janetsky's Union) to come into his office. **(Appx. v. 2, pp. 349-50, Janetsky Dep., pp. 867-8)**.

Collison came, and according to Janetsky, made clear that he was there "*in a supportive role for Jennife*r." **(Appx. v. 2, pp. 367-8, Janetsky Dep., pp. 908-9)**. Collison refused to "*chime in*" as Janetsky thought Boyd had hoped Collison would do. **(Appx. v. 2, p. 367, Janetsky Dep., p. 914)**. Collison just sat and looked "*uncomfortable*." **(Appx. v. 2, p. 367, Janetsky Dep., p. 908)**.

Collison wrote a memo of his observations at the request of Boyd - - the accuracy of which Collision confirmed at his deposition testimony. **(Appx. v. 3, pp. 527-30, Collison Dep., pp. 51, 56, 69-70)**. Collison wrote that the conversation he heard "*initially focused on a text message*" situation. **(Appx. v. 3, p. 607, Collison Memo, p. 1)**. Janetsky agrees with this. **(Appx. v. 2, p. 372, Janetsky Dep., p. 913)**.

It was Janetsky herself, not Boyd, who injected the CSC case into the discussion. Specifically, Janetsky accused Boyd that he was "*not mad about this text situation*," but,

[4] The specific details of Janetsky's testimony regarding Boyd's actions at the door is described in greater detail below in Argument section IV.A.

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rather, about the CSC case - - to which she claims Boyd responded "*You're darn right, you embarrassed me.*"[5] **(Appx. v. 2, pp. 373-4, Janetsky Dep., pp. 914-5)**. Collison observed that, "*neither Boyd nor Janetsky agreed on much*" as they argued about a plea deal. **(Appx. v. 3, pp. 607-8, Collison Memo, pp. 1-2)**. But the conversation eventually returned to the directive regarding media coverage, with Collison getting the impression that Janetsky and Boyd could reconcile - - and Boyd offering to take Janetsky to lunch. **(Appx. v. 3, pp. 608-9, Collison Memo, pp. 2-3)**. Janetsky confirms this lunch offer. **(Appx. v. 2, pp. 376-7, 379, Janetsky Dep., pp. 924, 927, 929)**.

But Janetsky was not conciliatory. Instead, she drafted the letter that she gave to McColgan on June 4, 2015 demanding an "*inquiry*" into the "*hostile work environment created by Judge Boyd.*" **(Appx. v. 2, pp. 406-8, Janetsky Dep., pp. 976-7, 997)**.

Based on the fears expressed by Janetsky, McColgan put Janetsky on "*a paid administrative leave because I was concerned of her condition*" **(Appx. v. 3, p. 500, McColgan Dep., p. 92)**. McColgan also initiated an investigation, by an outside law firm, of Janetsky's accusations against Boyd. **(Appx. v. 3, p. 612, McColgan Letter, 7/24/15)**. Thus, McColgan did, in fact, undertake the "*inquiry*" that Janetsky's letter demanded.

McColgan also told Janetsky to return to work, with her "*official reporting relationship*" to be to McColgan, Mark Gartner and Christie Lopez, and "*not to have any official interaction with Mr. Boyd.*" **(Appx. v. 3, p. 612, McColgan Letter, 7/24/15)**. McColgan's intent was to find "*a situation that would remedy*" the "*problem between Chris [Boyd] and Jennifer.*" **(Appx. v. 3, pp. 501-2, McColgan Dep., pp. 111-12)**.

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[5] Janetsky admits that she had told others - - both inside and outside of the prosecutor's office - - of the supposedly unlawful plea deal by Boyd. **(Appx. v. 2, pp. 411-9, Janetsky Dep., pp. 1004-12)**.

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But Janetsky refused to return, because her treating psychiatrist told her not to return as long as Boyd still worked at the prosecutor's office. **(Appx. v. 1, pp. 39-40, Janetsky Dep., pp. 56-7).**

Janetsky's contacts with Allisen.

While Janetsky remained on leave, her continuing contacts with Allisen were discovered. On October 9, 2015, Boyd and Deputy Chief Assistant Prosecutor Mark Gartner met with Allisen (*then the defendant in a perjury prosecution*), Allison's mother and Allisen's criminal defense attorney, Ken Wright. **(App. v. 3, pp. 532-5, Gartner Dep., pp. 16-7, 55-6).** Allisen and her mother alleged that Allisen had been "*pressured*" by Janetsky to testify in the manner she did at the preliminary examination. **(Appx. v. 3, pp. 538-9, 542-3, 548, 562-4, Gartner Dep., pp. 59-60, 63-4, 69, 85, 90-1).** They further revealed that Janetsky had continued to communicate with Allisen and her mother - - with Janetsky telling them that the CSC case ended as it did because the defendant's parents had "*paid off*" Boyd. **(Appx. v. 3, p. 541, Gartner Dep., p. 62).** They also said that Janetsky "*had told her [Allisen] to delete the texts after they talked.*" **(Appx. v. 3, p. 540, Gartner Dep., p. 61).** For Gartner this raised "*probable cause to start an investigation*" regarding whether Janetsky had been involved in "*subornation of perjury*" or "*destruction of evidence.*" **(Appx. v. 3, pp. 547-8, Gartner Dep., pp. 68-9).**

Exacerbating this concern, Allisen and her mother had no sooner left the building than they returned to show Boyd and Gartner that Janetsky had sent Allisen a text message while they had been in the meeting, with Janetsky saying "*I need to reach out to you.*" **(Appx. v. 3, pp. 544-5, Gartner Dep., pp. 65-6).** In Gartner's words, "*I think the straw that broke the camel's back is that she [Janetsky] was texting [them] while they*

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were in our office." **(Appx. v. 3, p. 561, Gartner Dep., p. 84)**.

Recognizing a conflict in investigating one of their own, the matter was referred by the Prosecutor's Office to the Michigan Attorney General's Office. **(Appx. v. 3, pp. 544, 546-52, Gartner Dep., pp. 65, 67-73)**. The Attorney General's representative, Richard Cunningham, advised the prosecutors that "*you may have to consider reporting it to the Attorney Grievance Commission*," particularly with regard to Janetsky contacting Allisen directly while Allisen was represented by attorney Wright. **(Appx. v. 3, pp. 552, 554, Gartner Dep., pp. 73, 76)**. The Attorney General's Office also told them to contact the Michigan State Police. **(Appx. v. 3, pp. 556-8, Gartner Dep., pp. 77-9)**.

Janetsky has (belatedly) claimed that the resulting contacts by McColgan and Boyd with the Attorney General, the Attorney Grievance Commission and the Michigan State Police were further "*retaliation*." But it is the position of the Defendants that the accusations by Allisen and her mother left them "*duty-bound*" to investigate. **(Appx. v. 3, pp. 545-8, Gartner Dep., pp. 66-9, 73)**.

Janetsky resigns.

Ultimately, Janetsky sent another letter to McColgan on December 14, 2015 declaring her "*involuntary resignation of employment*," because "*there is no realistic way that I can possibly return to work if he [Boyd] remains in the office*." **(Appx. v. 3, pp. 613, Janetsky Letter, 12/14/15)**. Janetsky took the position that she would not continue her employment with the prosecutor "*[s]o long as it is your intention to continue to allow Chief Assistant Boyd to work for you*." **(Appx. v. 3, p. 613, Janetsky Letter, 12/14/15)**.

Procedural Facts.

All four of the Defendants - - County of Saginaw, Saginaw County Prosecutor's

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Office, John McColgan and Christopher Boyd - - moved for summary disposition in the circuit court on grounds of "governmental immunity," together with non-immunity defenses. The motion was granted in part and denied in part. **(Appx. v. 4, pp. 727, 729, Order)**.

With regard to the Saginaw County Prosecutor's Office, the circuit court dismissed all of Plaintiff-Appellant Janetsky's claims, because that office is not a separate legal entity subject to suit. **(Appx. v. 4, p. 728, Order, ¶ 1)**. The circuit court also dismissed Janetsky's claim for "intentional infliction of emotional distress." **(Appx. v. 4, p. 728, Order, ¶ 3)**. Janetsky did not appeal either ruling.

With regard to John McColgan, the circuit court held that he had absolute immunity from tort liability under MCL 691.1407(5) against Janetsky's intentional tort claims for assault and battery, false imprisonment and intentional infliction of emotional distress. **(Appx. v. 4, p. 728, Order, ¶ 2)**. Janetsky has never appealed this ruling either.

Conversely, the circuit court denied summary disposition on ground of immunity to Christopher Boyd and Saginaw County against Janetsky's "assault and battery" and "false imprisonment" claims. **(Appx. v. 4, p. 728, Order, ¶¶ 4-5)**. Boyd and the County filed a timely claim of appeal by right against the denial of immunity on November 27, 2018. This appeal proceeded in the Court of Appeals under Case No. 346542.

The circuit court also denied summary disposition to Boyd, the County and McColgan with respect to Janetsky's "whistleblower" and "public policy" claims. **(Appx. v. 4, p. 729, Order, ¶¶ 6-7)**. On November 28, 2018, McColgan, Boyd and the County filed an application for leave to pursue interlocutory appeal from this aspect of the circuit court's order (alongside the immunity appeal by Boyd and the County). Leave for

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interlocutory appeal was granted, Case No. 346565, and the appeals were consolidated.

Of the multiple bases argued by the Defendants for dismissing Janetsky's whistleblower claim, the Court of Appeals addressed only the argument that Janetsky had not engaged in a "protected activity." **(Appx. v. 4, pp. 736-739, Original COA Opinion, 4/23/20, pp. 6-9)**. The Court of Appeals agreed with the argument and held the Defendants entitled to summary disposition against the WPA claim on that basis.

With respect to Janetsky's "public policy" claim, the Defendants argued on appeal that such claim was barred, because the Whistleblower Protection Act encompassed the claim alleged by Janetsky and, therefore, preempted any "public policy" claim based on the same transactions. The Court of Appeals agreed with this argument. **(Appx. v. 4, p. 739, Original COA Opinion, 4/23/20, p. 9)**.

The Court of Appeals also agreed with the Defendants that Boyd (and Saginaw County) had immunity against Janetsky's intentional tort claims. **(Appx. v. 4, pp. 733-736, Original COA Opinion, 4/23/20, pp. 3-6)**.

The combined effect of the circuit court order and original Court of Appeals decision was to grant summary disposition to the Defendants against all of Janetsky's claims. Janetsky filed an application for further appeal to this Court.

After supplemental briefing, this Court heard oral argument on the application and issued an order on December 1, 2022, reversing the Court of Appeals judgment in part and remanding the case "for consideration of the issues raised by defendants but not addressed by that court during its initial review." This Court made three specific rulings.

First, this Court held that questions of fact precluded the summary grant of governmental immunity to Boyd against Janetsky's intentional tort claims of

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"assault/battery and false arrest/imprisonment." **(Appx., v. 4, p. 776, Remand Order, p. 2)**. Specifically, this Court held that a jury could "conclude that he [Boyd] did not believe in good faith that this behavior was an appropriate exercise of his supervisory authority." ***Id***.

Second, although declining to address "whether actual violations of the law occurred," this Court held that Janetsky had presented "sufficient evidence to create a question of fact that she suspected the law had been violated" in the form of Boyd's sentencing agreement and that "[t]here is no evidence that the victims were consulted during or in anticipation of the negotiations that resulted in the plea bargain." **(Appx., v. 4, p. 777, Remand Order, p. 3)**. On those bases, the majority of this Court concluded that Janetsky's WPA claim could proceed, subject to proof and other possible defenses.

Finally, this Court held that Janetsky's claim alleging termination in violation of "public policy" was not preempted by the Whistleblower Protection Act. To do so, this Court expressly distinguished the "public policy" claim from Janetsky's WPA claim by characterizing the former as "based on her alleged refusal to violate the law - - i.e., her attempt to set aside that plea and sentencing agreement." ***Id***.

On remand the Court of Appeals summarized its task as follows:

> We conclude that the following issues were raised by defendants and not addressed in our initial opinion: (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 purposes of her WPA claim, and (5) whether plaintiff suffered an "adverse employment action" for purposes of her WPA claim. Additionally, regarding plaintiff's public-policy wrongful

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> termination claim, although the parties focus their appellate arguments of whether that claim was preempted by the WPA, our Supreme Court has directed us to explore on remand the issue of whether that claim is "otherwise legally or factually supported."
>
> **(Appx., v. 4, pp. 793-794, Court of Appeals Majority Opinion on Remand, pp. 4-5).**

The Court of Appeals majority concluded that the statute of limitations did not entirely preclude Janetsky's whistleblower claim and that Janetsky had established "a genuine issue of material fact" regarding whether she had been subjected to an adverse employment action. **(Appx., v. 4, pp. 796-799, COA Majority Opinion, pp. 7-8, 9-10)**. Therefore, Janetsky's WPA claim could proceed. But the court concluded that Saginaw County was not Janetsky's "employer" for purposes of the WPA. **(Appx., v. 4, pp. 797-798, COA Majority Opinion, pp. 8-9)**. The court held the county to be entitled to summary disposition against the WPA claim.

The Court of Appeals majority further held that all the Defendants are entitled to summary disposition against Janetsky's other remaining claims. The majority concluded that the facts would not support either a false imprisonment or an assault and battery claim against Boyd. **(Appx. v. 4, pp. 794-796, Majority Opinion, pp. 5-7)**. The majority also concluded that Janetsky's public policy claim could not be sustained, primarily because Janetsky was allowed to correct the perceived violations of law. **(Appx., v. 4, pp. 799-800, COA Majority Opinion, pp. 10-11)**.

Janetsky now comes to this Court for a second time. Ignoring the relevant context of Boyd's alleged actions, and making outright misrepresentation regarding the record of Boyd's actions with regard to his office door at the meeting of June 1, 2015, Janetsky seeks to resurrect her public policy, false imprisonment and assault and battery claims,

while bringing Saginaw County back as a Defendant for purposes of the whistleblower claim. But the record does not support Janetsky's arguments. And the policy implicated by her arguments should be rejected. Therefore, Janetsky's application to this Court should be denied.

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ARGUMENT

I. SUBSTANTIVE APPELLATE REVIEW WOULD BE *DE NOVO*, BUT REVIEW BY THIS COURT IS NOT JUSTIFIED.

This Court reviews *de novo* a decision on a motion for summary disposition, by reference to the substantively admissible evidentiary record submitted by the parties to the trial court. ***Bernardoni v City of Saginaw***, 499 Mich 470, 472-3; 886 NW2d 109, 111 (2016). Likewise, this Court reviews *de novo* issues of statutory interpretation. ***Elia Companies, LLC v University of Michigan Regents***, 511 Mich 66, 71; 993 NW2d 392, 395 (2023).

But review by this Court is discretionary. MCR 7.303(B)(1). To obtain such discretionary review, Janetsky must "show" that her case involves one or more of the grounds specifically enumerated in MCR 7.305(B).

Without specific reference to the rule, Janetsky substantively asserts that her claims are of major significance to the state's jurisprudence, thus implicating reliance upon MCR 7.305(B)(3).

But Janetsky's arguments find no support in the record or existing law. And the policy implicated by her arguments should be rejected. Therefore, Janetsky's application should be denied.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT SAGINAW COUNTY IS NOT JANETSKY'S "EMPLOYER" FOR PURPOSES OF THE WPA.

Janetsky's Whistleblower Protection Act argument asserts that Saginaw County can be held liable on her claim, simply because Janetsky and Saginaw County fit the respective definitions of "employee" and "employer" under the Act. **(Janetsky**

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Application, pp. 6). But as the Court of Appeals correctly recognized, the question is not whether Janetsky is *an* employee or whether Saginaw County is *an* employer. Rather, the question is "whether an employer-employee *relationship* exists" between Janetsky and the County "for purposes of the WPA." **(Appx. v. 4, p. 797, COA Majority Opinion, p. 8)**. Although the WPA defines "employee" and "employer," 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.

As this Court knows, the Michigan Constitution and multiple statutes compel counties to fund the activities of a multitude of governmental entities and officials that the counties neither created nor control. Primary examples are the state's circuit and probate courts (together with their judges). These are funded by the counties. But the courts and their judges are supervised exclusively by this Court and the State Court Administrative Office.

Similarly, an elected county prosecutor is an independent constitutional officer, Const 1963 art 7, §4, who appoints assistant prosecutors at his or her sole discretion. MCL 49.35. The county served by the elected prosecutor funds the prosecutor's staff, thereby determining the number of assistant prosecuting attorneys that the prosecutor may appoint. MCL 49.31. But it is entirely and solely the elected prosecutor who appoints, oversees and discharges APAs, as he or she sees fit.

By operation of the Public Employment Relations Act (PERA), Saginaw County, as the funding unit for the Saginaw County prosecutor, becomes a "co-employer" with the elected prosecutor of the unionized employees on the prosecutor's staff. ***St Clair Prosecutor v American Federation of State, County and Municipal Employees, AFL***

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CIO, 425 Mich 204, 233; 388 NW2d 231, 243 (1986). But the case law makes clear that such "co-employer" status does not afford Saginaw County any supervisory control over assistant prosecuting attorneys or their working conditions. As recognized by the Court of Appeals, this "tips the balance in favor of finding that the County was not [Janetsky's] 'employer' under the WPA." **(Appx. v. 4, p. 798, COA Majority Opinion, 9/28/23, p. 9)**.

Because the WPA does not define what constitutes an employer-employee *relationship* for purposes of WPA liability, the Court of Appeals has adopted the "economic reality test," which looks at "the totality of the circumstances surrounding the work performed." ***Chilingirian v City of Frasier***, 194 Mich App 65, 69-70; 486 NW2d 347, 349 (1992). Relevant factors 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," but these factors must be "viewed as a whole and no single factor is controlling." ***Id***.

In the Court of Appeals' view, factors (2) and (4) favor finding an employer/employee relationship between Janetsky and Saginaw County, while factors (1) and (3) weigh against it. **(Appx. v. 4, p. 798, COA Majority Opinion, p. 9)**.[6] But the Court of Appeals correctly considered the "totality" of the relationship to weigh against holding Saginaw County liable as an "employer" under the WPA.

As made clear in the case law recognizing the "co-employer" status of a county over the unionized staff of a prosecutor, the statutory authority of the elected prosecutor

[6] It should also be remembered that assisting prosecuting attorneys are often pursuing felony prosecutions under state law, rather than county-oriented proceedings. This would certainly be true for Janetsky prosecuting CSC felony cases. Therefore, the record only *partially* supports factor (4). Most of Janetsky's work was to accomplish the goal of the state to enforce its CSC statutes, as much or more than any goal of the county.

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over the tenure and supervision of the prosecutor's staff is neither diminished nor shared, except to the extent expressly authorized by the prosecutor. ***St Clair Prosecutor***, 25 Mich 237, 241; 388 NW2d at 245, 247.

The collective bargaining agreement covering assistant prosecuting attorneys in Saginaw County expressly confirms that the prosecutor "*retains all rights*" provided to him by law, including (1) the right to "hire and discharge" APAs "at will," (2) the right to control the APAs' schedules and work assignments, and (3) the right to judge and discipline the work performance of the APAs. **(Appx. v. 3, pp. 570-1, CBA, Article II, Sections 2.2 and 2.3)**. And it is 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.

The mandate of the WPA is that "[a]n 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 engages in conduct protected by the WPA. MCL 15.362. As just described, however, Saginaw County had no power to "discharge, threaten, or otherwise discriminate" against Janetsky with regard to her "compensation, terms, conditions, location or privileges of employment) for any reason. Aside from compensation (which is controlled by the CBA), all these other aspects of employment were entirely in the hands of the prosecutor.

Notwithstanding its "co-employer" status through its role of funding Janetsky's APA position, the county had no relationship with Janetsky whereby it could take action against her violative of the WPA, nor could the county intervene to prevent the prosecutor or any individual on the prosecutor's staff from committing such a violation. To hold Saginaw

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County liable to Janetsky under the WPA would be to render the county a third-party insurer.

Rather ironically, Janetsky cites ***Clark v United Technologies Automotive, Inc***, 459 Mich 681; 594 NW2d 447 (1999). Janetsky interprets ***Clark*** to say that if the "economic realities" factors favor one conclusion, but others favor the opposite, then the matter becomes a jury question. **(Janetsky Application, p. 16)**. But ***Clark*** neither states nor implies that conclusion.

"Questions of fact are the province of the jury, while questions of law are reserved to the courts." ***People v Kolanek***, 491 Mich 382, 411; 817 NW2d 528, 544 (2012). In particular, whether a statute applies to a given set of facts is a question of law. ***Alex v Wildfong***, 460 Mich 10, 21; 594 NW2d 469, 474 (1999). No jury question is implicated with regard to the "employer" status of Saginaw County, because there is no question regarding the "facts" of Janetsky's terms of employment. Rather, there is only a question of law regarding whether those facts render Saginaw County as Janetsky's "employer" for purposes of the WPA.

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*. In ***Clark***, this was the worker's disability compensation scheme. In the present case, the statutory scheme is the WPA. And the goals of the WPA are not served by imposing liability upon Saginaw County, which had no control over the conduct or conditions of which Janetsky complains. The relevant employer for purposes of the WPA is the Saginaw County prosecutor.

In the context of this case and the specific statutory scheme of the WPA, factors

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(1) and (3) of the economic realities test do not merely "weigh against" Janetsky. They weigh *heavily* against Janetsky - - and dispositively so.

Janetsky further contends that if Saginaw County is not deemed her "employer," she then faces a "legal quagmire," because case law holds that the "prosecutor's office" is not a legal entity that can be sued. **(Janetsky Application, p. 12)**. 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)." ***Id***. This is false.

Although there is no "prosecutor's office" that can be sued, there is an elected county prosecutor. Like other government officials, the prosecutor has both an individual and an "official" capacity. ***Mays v Snyder***, 323 Mich App 1, 68-9; 916 NW2d 227, 266 (2018). And, at least in official capacity, the WPA creates a waiver of immunities. ***Anzaldua v Band***, 457 Mich 530, 551-2, 578 NW2d 306, 315 (1998). Dismissal of the county does not deprive Janetsky of a cognizable defendant for her WPA claim.

In short, the Court of Appeals properly declared as a matter of law that Saginaw County is not Janetsky's "employer" for purposes of the WPA. There is no cause for further review of that question by this Court.

III. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT JANETSKY HAS NO BASIS FOR HER "PUBLIC POLICY" CLAIM.

In ***Suchodolski v Michigan Consolidated Gas Co***, 412 Mich 692; 316 NW2d 710 (1982), this Court declared that an employee can bring a common law tort action against an employer, if the employee's employment has been "terminated" for reasons "contrary to public policy." ***Suchodolski***, 412 Mich at 695; 316 NW2d at 711. This Court further recognized three specific forms of "public policy" from which such a claim could derive.

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These are (1) "proscriptions . . . found in explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty," (2) "discharge" of an employee for refusing to violate the law and (3) "discharge" of an employee on account of the employee's "exercise of a right as conferred by a well-established legislative enactment." ***Suchodolski***, 412 Mich at 695-6; 316 NW2d at 711-2.

To avoid preemption of Janetsky's public policy claim by the WPA, this Court specifically identified her public policy claim as "*based on her alleged refusal to violate the law - - i.e., her attempt to set aside that plea and sentencing agreement.*" **(Appx. v. 4, p. 777, Remand Order, p. 3)**. Thus, Janetsky's claim must be addressed under the second of the three established bases for a public policy termination claim - - i.e., "discharge" for refusing to violate the law. But the record shows that Janetsky was never asked to violate the law. Nor was she ever discharged.

Although Boyd disagreed with Janetsky's interpretation of the law relevant to the "plea and sentencing agreement," Janetsky has not produced any evidence that she ever had to "refuse" to violate the law. Janetsky admits that McColgan never directed her to violate the law. **(Appx. v. 1, p. 153, Janetsky Dep., p. 451)**. She acknowledges that McColgan authorized *her* to take whatever corrective action *she* deemed necessary. **(Appx. v. 1, pp. 149, 152-3, Janetsky Dep., pp. 413, 450-1; Appx. v. 2, p. 268, Janetsky Dep., p. 734)**.

Boyd likewise acknowledged being told by McColgan that McColgan "*had authorized her [Janetsky] to correct it.*" **(Janetsky Appx. v. 1, p. 107, Boyd Dep., pp. 275, 277-8)**. And, despite his disagreement on the law, Boyd signed and filed the

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withdrawal motion as Janetsky drafted it. **(Appx. v. 2, pp. 494-5, Boyd Dep., pp. 289, 292; Appx. v. 1, p. 150, Janetsky Dep., p. 438; Appx. v. 3, pp. 590-2, Motion to Withdraw Plea)**.

Furthermore, the Court of Appeals majority correctly observed that MCL 771.1(1) does not prohibit a prosecutor "from offering or agreeing to a sentence that turns out to be invalid." **(Appx. v. 4, p. 800, COA Majority Opinion, p. 11)**. The burden of proper sentencing is expressly on "the court" in its role as the ultimate arbiter of the penalty to be imposed after guilt is determined. As recognized by the Court of Appeals majority opinion, Janetsky "could not have been asked to violate, nor could she have violated, MCL 771.1(1)." **(Appx. v. 4, p. 800, COA Majority Opinion, p. 11)**.

The record also demonstrates that Janetsky was never formally "discharged" or "terminated" for any reason at all. Despite the dubious aspects of her job performance (*including her improper contacts with Allisen following initiation of the perjury prosecution*), Janetsky remained an employee of the prosecutor. It was the actions of Boyd that were investigated, not Janetsky. **(Appx., v. 3, p. 612, McColgan Letter, 7/24/15)**.

Janetsky was placed on temporary leave out of "concern[] of her condition." **(Appx. v. 3, p. 500, McColgan Dep., p. 92)**. Janetsky was then asked to return to work, with provision that she would no longer have to interact with Boyd. **(Appx. v. 3, p. 612, McColgan Letter, 7/24/15)**. The intent was to keep Janetsky as an employee by establishing circumstances that "would remedy" the problem between Boyd and Janetsky. **(Appx. v. 3, pp. 501-2, McColgan Dep., pp. 111-12)**. It was Janetsky who *chose to resign* her position, "[s]o long as" prosecutor McColgan allowed Boyd to continue

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to work for him. **(Appx. v. 3, p. 613, Janetsky Letter, 12/14/15).**

Thus, when Janetsky tells this Court that "she was *terminated* in retaliation for seeking to set aside an unlawful plea and sentencing agreement" **(Janetsky Application, p. 17, *emphasis added*)**, this is manifestly false. Rather, she purports to satisfy the "discharge"/"termination" element of her public policy claim based on her choice to resign, i.e., a "constructive" discharge. **(Appx. v. 1, p. 29, First Amended Complaint, ¶ 73).** But even assuming that a "constructive" discharge could suffice to satisfy the discharge/termination element of the public policy claim, the record cannot sustain that claim.

In light of the entire record described above, two facts become established. First, Janetsky's job performance afforded multiple points for supervisory critique. Second, to whatever extent that Boyd's manner of critiquing employees involved "yelling," Janetsky was not singled out (*in retaliation for the plea agreement situation or otherwise*). By Janetsky's own description, Boyd yelled at all the APAs - - causing them "*all*" to be in "fear" and "discomfort." **(Appx. v. 1, p. 76, Janetsky Dep., p. 203; Appx. v. 2, pp. 201-4, 213-4, 208-11, 259-60, Janetsky Dep., pp. 606-9, 646-8, 613-6, 721-2; Appx. v. 3, p. 611, Janetsky Letter, 6/4/15, p. 2, ¶ 2).**

Janetsky cannot claim to have been retaliated against for the plea agreement situation, when the acts of which she complains were also committed by Boyd against everyone else in the office - - none of whom had any involvement in reporting, condemning or correcting the plea agreement at all. Assuming Janetsky's description of Boyd's manner of addressing employees is accurate, Boyd's conduct is shown by the record simply to be his management style (for good or ill). Because Boyd treated

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everyone the same way, Janetsky can only speculate that such actions by Boyd toward her were motivated by any retaliatory intent. And Janetsky cannot satisfy the causation element of her claim by speculation. ***Skinner v Square D Co***, 445 Mich 153, 164-6; 516 NW2d 475, 480-1 (1994), ***Aho v Department of Corrections***, 263 Mich App 281, 292-3; 688 NW2d 104, 110-11 (2004).

It should also be recognized that endorsement by this Court of Janetsky's particular sort of "retaliation" allegations as sufficient to sustain a claim would open all negative supervisory critiques of employees to second-guessing scrutiny by courts and juries. To do so would allow any employee who disagrees with the substance or manner of a supervisory confrontation to characterize the matter as offending some proposed "policy."

Janetsky's primary complaint, for example, is that Boyd frequently yelled at her. But is supervisory yelling properly a matter for legal assessment?

This Court has recognized that "policy-making" is a legislative function in our democratic polity of separated governmental powers. ***Kyser v Kasson Township***, 486 Mich 514, 536; 786 NW2d 543, 556 (2010). "Public policy" is to be determined by reference to "our state and federal Constitutions, our statutes, and common law," not the mere policy preferences of the judiciary. ***Terrien v Zwit***, 467 Mich 56, 66-7; 648 NW2d 602, 608 (2002), ***Soaring Pine Capital Real Estate and Det Fund II, LLC v Park Street Group Realty Services, LLC***, 511 Mich 89, 102; ___ NW2d ___ (2023). And a public policy must be "explicit," "well defined" and "dominant." ***Terrien***, 467 Mich at 67-8; 648 NW2d at 608-9.

Surely there is no explicit, well defined or dominant policy that supervisors that

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cannot yell at those whom they supervise. (If such were the case, the coaches of professional athletic teams could be sued by their players constantly).

As exemplified by Janetsky herself, supervisory admonition is a necessary element of any employment situation. And a scolding supervisory critique that might be deemed abusively demeaning by one observer would just as easily be deemed a motivating "kick in the butt" by another. It is not appropriate for the courts to become arbiters of "best practices" for employee management.

In addition to, the alleged yelling, Janetsky also complains about sharing warrant duty with other APAs that she claims (without evidence) fell more heavily on her than others. Again, it is not appropriate for the courts to become arbiters that second-guess job assignments and workloads.

Moreover, because Janetsky claims to have been subject to constructive discharge by virtue of having resigned on account of McColgan refusing to fire Boyd, Janetsky effectively claims for herself a right to terminate other employees. Janetsky deems McColgan's because failure to fire Boyd to be a tort against her.

As described above, Janetsky has no basis to claim that she either refused a demand to violate the law or suffered any retaliation as a consequence. These realities are dispositive against Janetsky's public policy claim.

But the broader policy implications of Janetsky's arguments would have the courts dictating management style and terms of employment. Any such policy should be rejected. And Janetsky's application to make such arguments to this Court should be denied.

IV. THE COURT OF APPEALS DID NOT ERR BY CONCLUDING THAT JANETSKY HAS NO FACTUAL

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BASIS TO SUSTAIN HER INTENTIONAL TORT CLAIMS FOR "ASSAULT AND BATTERY" AND "FALSE IMPRISONMENT."

A. Janetsky's "assault and battery" argument defies her own testimony of the facts.

Janetsky (and the dissenting Court of Appeals judge) recite the facts as if Boyd slammed shut an open door that Janetsky had been holding. Any such version of events defies Janetsky's testimony.

Janetsky testified that she arrived at Boyd's office with an intern named Erica. **(Appx. v. 2, p. 280, Janetsky Dep., p. 759)**. Upon Janetsky having "made it about four steps into the office, Boyd stood up from his desk, told her [Erica] to go, [and] shut the door." **(Appx. v. 2, p. 311, Janetsky Dep., p. 829)**. This required Boyd to "[p]ush the door closed, because "[t]hey open in[ward]." **(Appx. v. 2, p. 311, Janetsky Dep., p. 829)**. This happened "rapidly." **(Appx. v. 2, p. 280, Janetsky Dep., p. 759)**. Ordering Erica out of the room, Boyd shut the door and started yelling," immediately after having "shut the door behind her." **(Appx. v. 2, pp. 280, 309, Janetsky Dep., pp. 759, 827)**.

With Erica gone and the door shut, Boyd returned to his desk, while Janetsky remained standing (having positioned a chair between herself and Boyd). **(Appx. v. 2, pp. 312, 315, Janetsky Dep., pp. 830, 833)**. Boyd "ordered" Janetsky "to sit down" as "[h]e was taking a seat." **(Appx. v. 2, pp. 312, 315, Janetsky Dep., pp. 830, 833)**. But Janetsky remained standing, despite Boyd specifically pointing his finger for her to sit. **(Appx. v. 2, p. 316, Janetsky Dep., p. 834)**.

Boyd then proceeded to yell at Janetsky "about the email and also about me being insubordinate for not sitting." **(Appx. v. 2, p. 318, Janetsky Dep., p. 836)**. This remained

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the gist of the verbal encounter, with Janetsky demanding the presence of her union representative and herself getting to the point of "yelling back." **(Appx. v. 2, pp. 328-330, 332-333, Janetsky Dep., pp. 846-848, 850-851)**.

Janetsky is specific that Boyd "had stood up, but he was still behind his desk until I tried to leave." **(Appx. v. 2, p. 334, Janetsky Dep., p. 852)**. In Janetsky's words:

> 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.
>
> **(Appx. v. 2, p. 337, Janetsky Dep., p. 855)**.

As she further explains:

> [H]e 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.
>
> **(Appx. v. 2, p. 335, Janetsky Dep., p. 853)**.

Janetsky never actually opened the door.

According to Janetsky, her hand was "on the door when his hand hit the top of the door right above my head." **(Appx. v. 2, p. 336, Janetsky Dep., p. 854)**. The door itself was not slammed. Rather, Boyd's hand "slammed on the door," such that Janetsky "never could get the door open." **(Appx. v. 2, pp. 339-340, 342-343, Janetsky Dep., pp. 857-858, 860-861)**.

The concurring/dissenting Court of Appeals judge characterized Boyd's actions as "intentionally and forcefully shutting the door while Janetsky held the handle." **(Appx. v. 4, COA Concurring/Dissenting Opinion, p. 8)**. This is a complete mischaracterization of Janetsky's testimony. Boyd did not shut the door while Janetsky held the handle.

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Rather, he held the door closed so she could not open it.

And she equivocates as to whether and where she herself was actually touching the door at the time. She can only say that she "believe[s]" her hand was on the door when Boyd's hand hit the top of the door. **(Appx. v. 2, p. 336, Janetsky Dep., p. 854)**.

To the extent that Janetsky could feel "the slam - - the bang of the door" (as highlighted by the concurring/dissenting Court of Appeals judge) **(Appx. v. 2, p. 337, Janetsky Dep., p. 855; Appx. v. 4, p. 804, COA Concurring/Dissenting Opinion, p. 4)**, her testimony makes clear that this was not a bang from the door slamming shut. It could only have been Janetsky feeling vibration of the door from the impact of Boyd's hand upon it.

Because she "believe[s]" she was touching the door, Janetsky would have this Court interpret Boyd putting his hand against the door to keep it closed as sufficient to constitute "battery." But the contrast between Janetsky's situation and the cases she cites shows the ludicrous nature of her position. In ***People v Starks***, 473 Mich 227; 701 NW2d 136 (2005), this Court was dealing with a criminal assault and battery charge in connection with criminal sexual conduct. In ***People v Kinsey***, *unpublished opinion per curiam of the Court of Appeals, issued September 21, 2023 (Docket No. 361281)*, the court was likewise dealing with the criminal prosecution of an intruder, who grabbed a door and "ripped the handle" out of the hands of the victim. Both actions are far different in manner, degree and context than the alleged action of Boyd holding his office door closed.

Moreover, an essential element of battery is "intent to injure," and an essential element of assault is intent to create an "apprehension of eminent contact." ***Young v***

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Morrall, 359 Mich 180, 187; 101 NW 358, 362 (1960), ***Mitchell v Daly***, 133 Mich App 414, 226-7; 350 NW2d 772, 778-9 (1984). There is absolutely no evidence from which to conclude that Boyd had any "intent to injure" Janetsky or to put her in any apprehension of contact. His demonstrable intent was to keep her from leaving his office. Indeed, Boyd was still yelling for Janetsky to "[s]it down." **(Appx. v. 2, pp. 345-346, Janetsky Dep., pp. 863-864)**. And Janetsky herself acknowledges that Boyd never touched her or raised his hand as if to do so. **(Appx. v. 2, pp. 359-60, Janetsky Dep., pp. 900-1)**.

The record affords no support for Janetsky to claim either an assault or a battery by Boyd. At most, Boyd held the door to prevent Janetsky from leaving. But Janetsky has no basis for her "false imprisonment" claim either, as described below.

B. Janetsky has no evidence of false imprisonment.

"False imprisonment is the unlawful restraint of an individual's personal liberty or freedom of locomotion." ***Stowers v Wolodzko***, 386 Mich 119, 134; 191 NW2d 355, 363 (1971). Janetsky would have this Court expand false imprisonment to include not just "unlawful" restraint, but also "*unwanted*" restraint, regardless of context.

The entire encounter at the door lasted only "30 seconds or less." **(Appx. v. 2, pp. 345-346, Janetsky Dep., pp. 863-864)**. At that point, it was Boyd who then opened the door. **(Appx. v. 2, p. 348, Janetsky Dep., p. 866)**. He yelled for Nate Collison, who was a union representative (vice president) as Janetsky herself had been demanding. **(Appx. v. 2, pp. 349-50, Janetsky Dep., pp. 867-868)**.

Significantly, Janetsky did not leave when Boyd opened the door. Rather, she awaited the arrival of Collison and then engaged in a prolonged verbal exchange with Boyd while Collison watched. Janetsky cannot claim to have been falsely imprisoned,

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when she actually chose to remain.

And, again, context matters. Janetsky was an employee under the direct supervision of Boyd. The entire purpose of the encounter between Janetsky and Boyd was to address workplace issues (i.e., when and how Boyd was to receive communications regarding cases drawing media attention).

It has been held by the Court of Appeals that "brief confinements or restraints" in the context of resolving a workplace issue "are insufficient for false imprisonment." ***Moore v City of Detroit***, 252 Mich App 384, 388; 652 NW2d 688, 691 (2002). In ***Moore***, a "management authority" restricted the exit of the plaintiff from workplace premises, in order to identify persons who should be subjected to discipline for participating with the plaintiff in an activity "against workplace rules." ***Id***. The plaintiff was subjected to a "momentary and fleeting" detention as management attempted to "identify the persons involved for appropriate disciplinary action." ***Id***.

Boyd's brief blockade of Janetsky's exist from his office in the context of compelling her to address her mistaken handling of his directive regarding notice of media coverage, is no more a "false imprisonment" than the circumstance in ***Moore***. Boyd was Janetsky's supervisor and blockaded her exit for "30 seconds or less" in order to address a specific workplace issue. As observed by the Court of Appeals on remand, "Boyd, as Plaintiff's direct supervisory, 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." **(Appx. v. 4, p. 795, COA Majority Opinion, p. 6)**.

And it is not a valid rebuttal to say that the proper course would have been for Boyd (or McColgan) simply to fire Janetsky, rather than detain her against her will. This would

take the circumstances full circle back to a "public policy" claim. If an employee is not obligated to face a supervisory confrontation (i.e., if Janetsky had an absolute right to leave), then how could Janetsky's refusal to face Boyd be a valid basis for discharge? If 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.

Here again, the policy implications that underlay Janetsky's arguments should be rejected. It would be bad enough for an assistant prosecuting attorney such as Janetsky to be able to evade supervisory critique at will. Janetsky's handling of the CSC case (and her subsequent inappropriate actions in contacting the perjury defendant) carried consequences that were adverse to the public interest in effective administration of criminal justice and adverse to the rights of the defendants.

But consider the consequences of allowing other types of workers to so easily evade supervisory discipline and direction. The policy implicated by Janetsky's arguments would allow police officers to refuse to hear admonition regarding limitations on use of force and would allow nuclear facility workers to evade critique over reactor safety issues.

As the Court of Appeals majority recognized, supervisors must possess "at least some authority" to insist that employees remain at a workplace meeting. It would bode ill for society at large, if, as Janetsky's reasoning would require, employers could not compel employees to face supervisory critique, without being subjected to "false imprisonment" litigation on the one hand or being sued on a "public policy" basis for terminating unwilling employees on the other.

The evidentiary record affords no basis for Janetsky's "false imprisonment" or "assault and battery" claims. More fundamentally, Janetsky's attempt to utilize these

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concepts as weapons against employee supervision should be rejected. Her application to this Court should be denied.

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CONCLUSION AND RELIEF REQUESTED

For the reasons described above, the issues proposed to this Court by Janetsky's application have no merit that would justify review by this Court. Janetsky's application should be denied.

/s/Douglas J. Curlew
Cummings, McClorey, Davis & Acho, P.L.C.
17436 College Parkway
Livonia, MI 48152
Ph: (734) 261-2400
Email: dcurlew@cmda-law.com
Attorneys for Defendants-Appellees County of Saginaw, Saginaw County Prosecutor's Office, John McColgan and Christopher Boyd

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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(B).

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

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/s/Douglas J. Curlew
Cummings, McClorey, Davis & Acho, P.L.C.
17436 College Parkway
Livonia, MI 48152
Ph: (734) 261-2400
Email: dcurlew@cmda-law.com
Attorneys for Defendants-Appellees County of Saginaw, Saginaw County Prosecutor's Office, John McColgan and Christopher Boyd

Dated: January 8, 2024

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2024, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the following: All Attorneys of Record; and I hereby certify that I have mailed by United States Postal Service the document to the following non-ECF participants: N/A.

/s/Marie E. Jones
Legal Assistant
Cummings, McClorey, Davis & Acho, P.L.C.