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STATE OF MICHIGAN
IN THE SUPREME COURT

JENNIFER JANETSKY,

Plaintiff-Appellant,

-vs-

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

Defendants-Appellee.

and

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

Defendants.

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

Jennifer Janetsky,

Plaintiff-Appellant,

v

County of Saginaw, John McColgan, and Christopher Boyd,

Defendants-Appellees,

and

Saginaw County Prosecutor's Office,

Defendant.

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

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PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF PURSUANT TO THE COURT'S APRIL 10, 2024 ORDER

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals properly determined that Saginaw County was not the plaintiff's employer for purposes of her Whistleblowers' Protection Act claim.

   Plaintiff-Appellant's Answer: No.

2. Whether the plaintiff's alleged efforts to bring a criminal prosecution into compliance with MCL 771.1 gave rise to a common-law claim for termination in violation of public policy as recognized by *Suchodolski v. Mich. Consol. Gas Co*., 412 Mich. 692, 694-695 (1982).

   Plaintiff-Appellant's Answer: Yes.

3. Whether the plaintiff established the existence of a genuine issue of material fact regarding her intentional tort claims of false imprisonment and assault and battery.

   Plaintiff-Appellant's Answer: Yes.

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ARGUMENT

I. Question No. 1 from the Court: Whether the Court of Appeals properly determined that Saginaw County was not the plaintiff's employer for purposes of her Whistleblowers' Protection Act claim.

The Court of Appeals' dismissal of Saginaw County as a defendant to Plaintiff-Appellant Jennifer Janetsky's claim under the Whistleblowers' Protection Act ("WPA") after "finding that the County was not plaintiff's 'employer' under the WPA" was error for several reasons. *Janetsky v. Cnty. of Saginaw*, No. 346542, 2023 WL 6322639, at *6 (Mich. Ct. App. Sept. 28, 2023).

1. First, the Court of Appeals' holding is based on the false premise that a plaintiff may only bring a claim under the Act against their specific employer, when the statute contains no such limiting provision. The WPA prohibits "an employer" from retaliating against "an employee," without further qualification. MCL 15.362. Because it is undisputed amongst the parties that Saginaw County and Janetsky fit within these statutory definitions, respectively, there is no basis to inquire into the nature of the relationship between the parties, or to dismiss Janetsky's WPA claim against Saginaw County.

2. Second, while the inquiry was irrelevant, in determining that Saginaw County was not Janetsky's employer, the Court of Appeals erred by:

    a. disregarding jurisprudence uniformly holding that Assistant County Prosecutors and appointees are employees of their respective county;

    b. disregarding party-admissions issued by Saginaw County affirming that Janetsky was a County employee;

    c. inappropriately applying the economic reality test set forth in *Chilingirian v. City of Fraser*, 194 Mich. App. 65 (1992) when Saginaw County did not argue that Janetsky was an independent contractor and acknowledged she was an employee; and

    d. inappropriately weighing the factors in the economic reality test, such that a finding that two out of four factors weighed in Janetsky's favor still resulted in dismissal.

Finding error on any of the above bases would, on its own, be sufficient to overturn the Court of Appeals' dismissal of Saginaw County from Janetsky WPA claim.

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A. Pursuant to the Purpose and Plain Language of the Whistleblowers' Protection Act, Plaintiff-Appellant has a Claim Under the Statute as "An Employee" Against Defendant Saginaw County, "An Employer," Regardless of the Parties' Specific Employment Relationship.

Michigan's Whistleblowers' Protection Act states that:

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

MCL 15.362 (emphasis added). The WPA is a remedial statute whose underlying purpose is the protection of the public. *Dolan v. Continental Airlines/ Continental Express*, 454 Mich. 373, 378, 563 N.W.2d 23 (1997). "The act meets this objective by protecting the whistleblowing employee and by removing barriers that may interdict employee efforts to report violations or suspected violations of the law." *Id.* at 378- 379. As a remedial statute, the WPA must "be liberally construed to suppress the evil and advance the *Eide v. Kelsey-Hayes Co.*, 431 Mich. 26, 34, 427 N.W.2d 488, 491 (1988); see also *Phinney v. Perlmutter*, 222 Mich. App. 513, 555, 564 N.W.2d 532 (1997).

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

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road commission . . .” MCL 691.1401. Reading these provisions in conjunction with one another, the plain language of the WPA defines “employee” to include persons employed by a county who perform a service for wages, pursuant to a hiring agreement.

It is undisputed that Defendant-Appellee Saginaw County is “an employer” and Plaintiff-Appellant Janetsky is “an employee,” as those terms are defined under the WPA. As such, Janetsky has pled a cognizable WPA claim as “an employee” against Saginaw County, “an employer.” MCL 15.362 & MCL 15.363. The WPA does not limit suit for recovery for damages against an employer to only the employer’s specific employees. Rather, the Act repeatedly articulates protections for “*an* employee.” *Id*. (emphasis added). By contrast, when the Legislature chose to identify an employer’s obligations to its specific employees in the Act, it did so, stating: “An employer shall post notices and use other appropriate means to keep *his or her* employees informed of their protections and obligations under this act.” MCL 15.368 (emphasis added). If the Legislature had intended to similarly limit an employer’s anti-retaliation obligations to “his or her employees,” it would have indicated as much through its chosen language. However, the Act prohibits “an employer” from discriminating against “an employee,” without further qualification.

By the WPA’s plain language, therefore, “an employee” has a cause of action against “an employer,” regardless of the employment relationship of the parties. This interpretation is consistent with this Court’s recent decision in *Miller v. Dep’t of Corr*., in which this Court refused to read limiting language into the statute that was not present:

> “MCL 37.2701(a) prohibits retaliation against “a person”; i.e., one may not “[r]etaliate or discriminate against *a person* because *the person* has opposed a violation of this act ....” MCL 37.2701(a) does not specify that “the person” need be the plaintiff. If such retaliation or discrimination is alleged to have occurred, a violation of the ELCRA has been stated. MCL 37.2701(a) prohibits retaliation for invoking the rights contained in the ELCRA without limitation as to

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what form that retaliation might take."

Miller v. Dep't of Corr., No. 164862, 2024 WL 2109772, at *4 (Mich. May 10, 2024) (original emphasis). Similar to this Court's reasoning in Miller, no limiting language exists here and should not be read into the statute. "If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written." *South Haven v. Van Buren Co. Bd. Of Comm'rs*, 478 Mich. 518, 528 (2007). Enforcing the statute as written, in this instance, means holding that Plaintiff-Appellant Janestky, as "an employee," has a cause of action under WPA against Defendant-Appellee Saginaw County, "an employer," regardless of the specific relationship of the parties.

B. Assuming, *in arguendo*, that an Employment Relationship Between the Parties is Necessary Under the Whistleblowers' Protection Act, Janetsky's Status as a Saginaw County Employee is Supported by Jurisprudence, the County's Documents, and the Circumstances of Her Employment.

Assuming, for the sake of argument, that the WPA's prohibitions are restricted to an employer retaliating against its specific employees, Plaintiff-Appellant Janetsky was undoubtedly an employee of Saginaw County, pursuant to this state's jurisprudence, Saginaw County's party-admissions, and the circumstances of her employment.

a. It is Well Established Under this State's Jurisprudence that Counties are Co-Employers of Appointees of Elected Officials.

While the Michigan Constitution provides for counties to have elected prosecutors, and state statute, in turn, provides for assistant prosecuting attorneys to be appointed by the prosecuting attorney, there is no provision that specifies who employs assistant prosecuting attorneys. *See* Const. 1963, art. VII, § 4; see also MCL 49.35.

However, the jurisprudence of this state reflects a habitual acceptance that an Assistant Prosecuting Attorney is employed by the County in which they work. *See e.g.*, *Moore v. Ingham*

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

Moreover, in similar settings where there is a question of the employment status regarding appointees of elected officials, courts have found the County to be a co-employer of the appointees, including for WPA purposes. For example, when examining whether or not deputies appointed by the then-Chief Deputy Clerk of Macomb County were employees of the County for purposes of the WPA, the Eastern District of Michigan opined "it seems to be an unstated assumption in caselaw cited by Plaintiffs that the county is a co-employer of deputies under the statutory scheme at issue here," similar to the scheme here. *Kardasz v. Spranger*, No. 17-CV-10937, 2019 WL 1989021, at *10 (E.D. Mich. May 6, 2019) (Appellant's Appendix, Vol. 3, p. 463) (citing *Branch County Board of Commissioners v. International Union et al*., 260 Mich. App 189, 196 (2003) (upholding MERC decision that the County Clerk and the County were co-employers of Deputy County Clerks)).

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

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b. Saginaw County's Documents and Written Communications Uniformly Confirm the Parties' Employment Relationship.

Saginaw County's own documents and communications confirm that Janetsky was an employee of the County. Janetsky began working for Saginaw County as an Assistant Prosecuting Attorney in 2011, under the supervision of Chief Prosecutor Mike Thomas. In her hiring documents from the County, it identified her as a "Permanent" Employee within the "Prosecutor's Office" "Department." (Appellant's Appendix, Vol. 2, p. 307). The hiring paperwork further indicates that it "must be completed on all new [county] **employees**. One copy must be received in the Controller's Office with application before an employee is added to payroll." (*Id*.) (emphasis added). Thereafter, all status changes in her employment were approved by the County. (*Id*., pp. 308-310). For four years, and under the leadership of two different Chief Prosecutors, Janetsky was employed by the County as an Assistant Prosecuting Attorney, performing work integral to the County and paid for by the County. When Janetsky was suffering retaliation, she met with the County's Personnel Director, Jennifer Broadfoot ("Broadfoot"), in order to apprise her of the situation. Broadfoot authorized Janetsky to leave work for the day due to her emotional distress. (*Id*., Vol. 1, pp. 78, 126-128). Critically, after Janetsky made her internal complaint of retaliation, Chief Prosecuting Attorney John McColgan ("McColgan") and County Controller, Robert Belleman ("Belleman"), wrote a letter to Janetsky on County of Saginaw letterhead stating, in part, "In accordance with County Policies #322 and #326, John McColgan and the County of Saginaw, **as Co-Employers**, engaged an independent investigator . . . " (*Id*., Vol. 2, p. 311) (emphasis added).[1] The two directed Janetsky as to her new reporting structure: "you will report to Mark

[1] Janetsky filed a Motion to Supplement the Evidentiary Record with the Court of Appeals on October 19, 2023 seeking to supplement the record with a document received by Janetsky in 2023, which likewise **"confirm(s) that Jennifer Janetsky was employed by Saginaw County from January 3, 2011, through December 14, 2015."**

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Gaertner, John McColgan and Christi Lopez" and further directed Janetsky "not to have any official interaction with Mr. Boyd." (*Id*.). On December 11, 2015, Janetsky's psychiatrist wrote a letter to the County advising that Janetsky would not be able to return to work due to disabling psychiatric distress. (*Id*., Vol. 1, p. 173). The Court of Appeals completely ignored this wealth of evidence that, frankly, supports only one logical conclusion: Saginaw County was a co-employer of Janetsky.

c. While the Application of the Economic Reality Test is Inappropriate, Examination of the Factors Firmly Establishes that Saginaw County was Janetsky's Co-Employer.

In complete disregard of this state's jurisprudence and the undisputed facts set forth above, the Court of Appeals instead chose to apply the economic reality test, set forth in *Chilingirian*, to determine whether Janetsky was an employee of the County. *Janetsky*, 2023 WL 6322639, at *6. In addition to being a superfluous analysis for the reasons already stated, it is also the first time that the economic reality test has been applied when the statute at issue explicitly defines "employer" and "employee" and the parties do not dispute that they fit the respective definitions.

Indeed, the purpose of the economic reality test is to determine whether a plaintiff is an independent contractor or employee. *Pedell v. Heartland Health Care Ctr.*, No. 271276, 2007 WL 840876, at *6 (Mich. Ct. App. Mar. 20, 2007) ("The 'economic reality test' is used to determine whether a person is an employee or an independent contractor.") (citing *Chilingirian*, 194 Mich. App. 65); *see also Chilingirian*, 194 Mich. App. 65 (holding that, upon application of the economic reality test, an attorney working at a firm retained by the City of Fraser was an independent

(Appellant's Appendix, Vol. 2, pp. 330-335). The Court of Appeals summarily denied Janetsky's motion without providing an explanation. (*Id*., p. 360).

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contractor). Because Defendants-Appellees have, at no time, asserted that Janetsky was an independent contractor, the economic reality test is inapplicable here.

However, assuming, *in arguendo*, that Janetsky was required to demonstrate her employment status through the economic reality test, she has done so, particularly when viewing the evidence in the light most favorable to her. Citing *Chilingirian*, the Court of Appeals articulated the economic reality test as follows:

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

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

The circumstances surrounding Janetsky's employment confirm that Saginaw County was a co-employer. County Prosecutors work under the auspices of the County in which they are employed. Indeed, Saginaw County's Prosecutor's Office is simply one "[d]epartment" of the County. (*Id.*, p. 307). It is undisputed that the work performed by Janetsky was integral to the County and, further, that the County paid her wages. She joined the County when Mike Thomas

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was the Chief Prosecuting Attorney, but continued on under McColgan's tenure, as was customary. Furthermore, it is well established that the County has the ultimate authority over the employment of and pay arrangement with assistant prosecuting attorneys. MCL 49.31, 49.34; *see also St. Clair Prosecutor*, 425 Mich. at 244 ("Nor has there been any questioning of the authority of the county, through its board of supervisors, to control the number and remuneration of assistant prosecuting attorneys."). That overarching control is evidenced here by the County's approval of all status changes in Janetsky's employment. (*Id*., pp. 308-310). Moreover, the County asserted specific control over Janetsky's employment. For example, the County's Personnel Director, Broadfoot, authorized Janetsky to leave work for the day due to her emotional distress after Janetsky relayed her complaint of retaliation to her. (*Id*., Vol. 1, pp. 78, 126-128). Similarly, after Janetsky made her internal complaint of retaliation, County Controller Belleman co-authored a letter to Janetsky, with Chief Prosecuting Attorney McColgan, on County of Saginaw letterhead stating, in part, "In accordance with County Policies #322 and #326, John McColgan and the County of Saginaw, **as Co-Employers**, engaged an independent investigator . . . " (*Id*., Vol. 2, p. 311) (emphasis added). he two directed Janetsky as to her new reporting structure, "you will report to Mark Gaertner, John McColgan and Christi Lopez" and further directed Janetsky "not to have any official interaction with Mr. Boyd." (*Id*.). Such evidence of joint action and decision-making in relation to Janetsky's employment-related complaint and the circumstances of her employment was wholly disregarded by the Court of Appeals. Surely, even if the economic reality test is applicable, viewing the evidence in the light most favorable to Janetsky, the evidence tips the balance in favor of Janetsky.

Even in lesser circumstances, courts have determined that appointees of elected officials are County employees for purposes of the WPA after weighing the factors in the economic reality test. For example, in *Kardasz v. Spranger*, the plaintiffs were recently appointed deputies

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

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

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

A finding of two out of four factors in Janetsky's favor should be sufficient for the question of Janetsky's employment status to be decided by a jury, as in *Kardasz*. *Clark v. United Techs. Auto., Inc.*, 459 Mich. 681, 694, 594 N.W.2d 447, 453 (1999) ("where evidence of a putative employer's status is disputed, or where conflicting inferences may reasonably be drawn from the known facts, is the issue one for the trier of fact to decide"). Yet, Janetsky has provided ample additional evidence as to "the totality of the circumstances surrounding the work performed" to create a genuine issue of material fact for the jury, including but not limited to the County's

admissions that it was Janetsky's employer and the County Controller's joint investigative initiative and asserted authority over Janetsky's work environment and reporting structure. Such circumstances belie that the "prosecutor's office is substantially independent from the county itself." (*Id.*, Vol. 2, p. 327).

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

To find that a County is not the employer of a County Prosecutor creates a legal quagmire for county prosecutors. The Michigan Courts have routinely ruled that County Prosecutors' Offices are not legal entities, and, therefore, cannot be sued. *See e.g.*, *Fleet v. Koop*, No. 227202, 2002 WL 235691, at *2 (Mich. Ct. App. Feb. 15, 2002) (Appellant's Appendix, Vol. 3, pp. 453-55) (citing *Hughson v. Antrim* Co., 707 F. Supp. 304, 306 (W.D. Mich., 1988); *Miller v. Michigan Dep't of Att'y Gen.*, No. 21-10990, 2021 WL 4479699, at *4 (E.D. Mich. Sept. 30, 2021) (Appellant's Appendix, Vol. 3, pp. 467-471). Rather, a prosecutor's office is a department of the county, just as a police department is a department of the city, therefore, "the county and city are the appropriate parties to sue." *Miller*, 2021 WL 4479699, at *4 (citing *Watson v. Gill*, 40 Fed. Appx. 88, 89 (6th Cir. 2002)). Accordingly, if an assistant prosecuting attorney or other appointed individual is not deemed to be an "employee" of the county, as in this case, there is no legal entity for the individual to seek redress from – only a potential individual defendant-employer. Moreover, because Chief Prosecutors have absolute immunity from tort claims pursuant to MCL 691.1407, Chief Assistant Prosecutors would have no cognizable defendant for a claim under the WPA (or public policy claim), if the Court of Appeals' decision is permitted to stand. Such a result cannot be permitted to stand, particularly in light of the remedial nature of the WPA and the accordant liberal interpretation that is required upon review. *See Eide*, 431 Mich. at 34.

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II. Question No. 2 from the Court: Whether the plaintiff's alleged efforts to bring a criminal prosecution into compliance with MCL 771.1 gave rise to a common-law claim for termination in violation of public policy as recognized by *Suchodolski v. Mich. Consol. Gas Co.*, 412 Mich. 692, 694-695 (1982).

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

> "The courts have also occasionally found *sufficient legislative expression of policy* to imply a cause of action for wrongful termination even in the absence of an explicit prohibition on retaliatory discharges. Such a cause of action has been found to be implied where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment."

Suchodolski, 412 Mich. at 695 (emphasis added).

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

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

On remand, the Court of Appeals disagreed:

> "[W]e conclude that plaintiff was not asked to violate the law, and that her motion to correct the plea and sentencing agreement based on its invalidity under MCL 771.1(1) was not a 'refusal to violate

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> the law.' We conclude that plaintiff's attempt to bring the plea and sentencing agreement into compliance with MCL 771.1(1) does not place it within the limited class of legislative expressions of public policy that have been found to imply a cause of action for wrongful termination."

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

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

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

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

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

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

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

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

Indeed, Janetsky's effort to remedy an action that ran afoul of state statute, is the functional equivalent of refusing to engage in an action that violates state statute; in both instances, the activity is intended to uphold the law – whether it be preventing a violation or remedying a discovered violation. The Court of Appeals erred in ruling otherwise.

III. Question No. 3 from the Court: Whether the plaintiff established the existence of a genuine issue of material fact regarding her intentional tort claims of false imprisonment and assault and battery.

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

> According to Janetsky, an intern accompanied her to Boyd's office, but Boyd told the intern to leave, shut the door, returned to his desk and, "with a bright red face yelling," "ordered" Janetsky to sit. Boyd repeatedly demanded that she sit, Janetsky recounted, despite that she told him she preferred not to. In response to her hesitation to sit,

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Boyd "physically became redder, he became more agitated and he began yelling more." Janetsky testified that she "first . . . tried to calmly respond and tell him that I was trying to follow his direct order," but Boyd admonished her for failing to sit, and also accused her "little cronies" of sending her "useless crap" in e-mails or texts. Janetsky claims that she responded, "[Y]ou're hostile and agitated and unprofessional and inappropriate . . . and I am not going to continue this conversation without my union present." Boyd "continued to yell and did not get me my union rep." When she tried to leave Boyd's office, Janetsky continued, Boyd

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

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

> *Q*. And did you reach for the [door] handle?
>
> *A*. I'm sure that I did.
>
> *Q*. Did you grab the handle?
>
> *A*. I - - yes, I believe my hand was on the door when his hand hit the top of the door right above my head.
>
> *Q*. And then your testimony is in the time that you started - - after you started to move toward the door, . . . Boyd came from around his desk and walked toward the door and then behind you at the door?
>
> *A*. As I'm walking toward the door, he was already standing, he's already out from behind his chair. He had a straight shot to go this way, so I'm walking this way toward the door, he comes behind me like this and throws his hand on the door to block it.
>
> *Q*. And what hand did he put on the door?
>
> *A*. His left hand because he was facing me.

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> *Q*. And did he have any contact with you when his left hand went on the door.
>
> *A*. No, he did not - - I could - - all I could feel was the slam - - the bang of the door.
>
> *Q*. So he was behind you at this time.
>
> *A*. Correct.

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

(Appellant's Appendix, Vol. 3, pp. 481-82; see also Vol. 1, pp. 61-70, 154-162). Despite the facts set forth, the Court of Appeals dismissed both of Janetsky's remaining intentional tort claims finding that Janetsky had not presented sufficient evidence so as to create a genuine question of material fact. (*Id*., Vol. 2, pp. 323-25). However, in reaching this conclusion, the Court of Appeals erred in its interpretation of the applicable law and failed to view the facts in the light most favorable to Janetsky.

A. Janetsky Established a Question of Material Fact Regarding Her Claim of False Imprisonment.

Pursuant to Michigan's Model Civil Jury Instructions:

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

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

Janetsky's testimony, set forth above, describes an unlawful confinement consistent with the elements of false imprisonment. As Boyd was yelling and growing increasingly agitated, Janetsky announced her intention to leave Boyd's office and he immediately got up and, while Janetsky's hand was on the door handle, Boyd reached over her to slam the door shut, blocking her exit. Janetsky testified that, based on Boyd's aggressive behavior and his refusal to allow her to leave, she thought "that I would have to fight my way out of the room." (Plaintiff-Appellant's Appendix, Vol. 1, p. 67). Such facts are sufficient to satisfy the elements of false imprisonment.

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

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

Relying on *Moore v Detroit*, the Court of Appeals held that Janetsky "did not establish that she was actually confined or conscious of any confinement; at best, Boyd's office door remained

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closed for 30 seconds before being opened." (Appellant's Appendix, Vol. 2, p. 324) (citing *Moore v. Detroit*, 252 Mich App 384, 387; 652 NW2d 688 (2002)). The opinion implies that because the door was "closed for 30 seconds," Janetsky's confinement was too brief to be actionable. *Moore* does state, in obiter dictum, that "brief confinements or restraints are insufficient for false imprisonment." 252 Mich. App. at 387. However, the Court of Appeals' singular reliance on obiter dictum is problematic for several reasons.

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

> "Any period of unlawful confinement, however brief, may result in liability for false imprisonment. Confinement for an appreciable length of time, however short . . . may be sufficient to create liability for false imprisonment. Even if no 'appreciable' length of time elapses, the necessary element of false imprisonment is proven, if enough time elapses for the plaintiff to recognize the illegal restraint."

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

Second, the authority relied upon by the Court of Appeals is based on a false interpretation of jurisprudence. The Court of Appeals cited *Moore v. Detroit* for the proposition that "brief confinements or constraints are insufficient" for a claim of false imprisonment. *Janetsky*, 2023 WL 6322639, at *3 (citing *Moore*, 252 Mich. App. at 388). *Moore*, in turn, cites *Willoughby v. Lehrbass*

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for this principle. *Moore*, 252 Mich. App. at 388 (citing *Willoughby v. Lehrbass*, 150 Mich App. 319 (1986). However, "*Willoughby* does not hold that 'brief' confinements are not actionable." (Appellant's Appendix, Vol. 3, p. 486). Rather, in *Willoughby*, the Court of Appeals held that the plaintiff had not "establish[ed] that he was intentionally and unlawfully restrained against his will" by one of the defendants. *Willoughby*, 150 Mich. App. at 350. The court reasoned that "[b]ecause plaintiffs did not specifically allege in their complaint that Lehrbass did any act which resulted in the detention of young Willoughby in Duvall's office . . . it would appear that no cause of action regarding false imprisonment exists against Lehrbass." *Id.* It was the alleged tortfeasor's lack of intent to confine the plaintiff that was critical in *Willoughby*. "*Willoughby* did not affect a sea change in Michigan's false imprisonment law by inserting a time component, and *Moore*'s indirect suggestion that it did should not be mechanically accepted by this Court." (Appellant's Appendix, Vol. 3, p. 486).

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

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

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

The Court of Appeals likewise erred in its interpretation of the facts. In its decision, that court held that Janetsky "did not establish that she was actually confined or conscious of any confinement; at best, Boyd's office door remained closed for 30 seconds before being opened." (Appellant's Appendix, Vol. 2, p. 324). As set forth above, the time period in which Janetsky was confined without consent is immaterial to her prima facie case; what is relevant is that Janetsky was conscious of her confinement. *See, Adams,* 444 Mich. at 341. And, Janetsky's testimony that she would have to "fight her way" out of the room amply demonstrates that she was completely conscious of her confinement. "The record supports that Janetsky was very much aware of her confinement, as her comment that she thought she would have to "fight her way" out of the room graphically attests." (*Id.*, p. 483). Accordingly, Plaintiff-Appellant requests that this Court issue a finding consistent with the evidence in the record, namely that Janetsky has submitted sufficient evidence for a jury to reasonably conclude that she was falsely imprisoned.

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

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

In support of its assertion that Boyd had authority to confine Janetsky to his office, the Court of Appeals relied upon dictum from *Hess v. Village of Wolverine Lake*: "The essence of a claim of

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false imprisonment is that the imprisonment is false, I.e., without right or authority to do so." *Hess v Wolverine Lake*, 32 Mich. App. 601, 604; 189 NW2d 42 (1971). Such dictum is wholly inapplicable in this case. This principle has historically been applied to cases of alleged false imprisonment by police officers making an arrest. *See e.g.*, *id*.; *Moore*, 252 Mich. App. at 387. It has never been applied in a case, in which the tortfeasor is an employer or supervisor, to suggest they had the "right or authority" to detain a subordinate. Indeed, to suggest that an employer or supervisor possesses authority to detain subordinates, equivalent to the authority endowed to police officers, is incomprehensible.

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

B. Janetsky Established a Question of Material Fact Regarding Her Claim of Assault and Battery.

"A battery is the willful or intentional touching of a person against that person's will [by another / by an object or substance put in motion by another person]." M Civ JI 115.02. Elaborating on this, Judge Gleicher noted in a separate opinion, "As the model jury instruction states and the law reinforces, a battery can be accomplished by an intentional, unconsented, or offensive touching

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of something closely connected with a person. *See People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005).” (Appellant’s Appendix, Vol. 3, p. 486).

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

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

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

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

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CONCLUSION

For all the reasons given and authorities cited above, Plaintiff requests that this Court reverse the decision of the Court of Appeals and remand this case for trial on the merits.

Respectfully submitted,

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Dated: May 22, 2024

PROOF OF SERVICE

Carrie Bechill states that she served counsel of record with Plaintiff-Appellant's Supplemental Brief Pursuant to the Court's April 10, 2024 Order with this Proof of Service via the Michigan Supreme Court's electronic filing system to counsel of record on May 22, 2024.

/s/ Carrie Bechill
Carrie Bechill, Legal Assistant