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

AS REQUESTED BY THIS COURT'S ORDER OF APRIL 10, 2024

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SUPPLEMENTAL ARGUMENT

Introduction.

Plaintiff-Appellant Jennifer Janetsky's supplemental brief to this Court affords little context for any direct response that is *supplemental* to what the Defendants-Appellees argued in their answer to Janetsky's application. Janetsky says nothing that she has not already briefed in her original application. A directly responsive brief would be a reiteration of what the Defendants-Appellees have already argued in their answer to Janetsky's application.

For example, Janetsky devotes considerable text to reiteration of her argument that Saginaw County is a "co-employer" of Janetsky for purposes of the Whistleblower's Protection Act (WPA). **(Janetsky Supplemental Brief, pp. 4-7)**. But Saginaw County never denied this. It is a matter of established law. ***St Clair Prosecutor v American Federation of State, County and Municipal Employees, AFL-CIO, Local 1518***, 425 Mich 204, 233; 388 NW2d 231, 243 (1986). And that status is plainly stated in the labor contract excerpts already provided to this Court. **(Defendants-Appellees' Appx., Vol. 3, p. 576, Labor Agreement, "Definitions," I)**. Such status was acknowledged in the Defendants-Appellees' original answer to Janetsky's application. **(Defendants-Appellees' Answer, pp. 32-3)**.

Focusing on the issues identified by this Court's order of April 10, 2024, the Defendants-Appellees intend this brief to be genuinely "supplemental" to what they have already said in their original answer. Particular focus will be given to the policy implications of Janetsky's arguments.

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I. JANETSKY'S EXPANSIVE INTERPRETATION OF THE WHISTLEBLOWER PROTECTION ACT DEFIES THE MANIFEST INTENT OF THE STATUTORY LANGUAGE.

"The goal of statutory interpretation is to effectuate the intent of the Legislature." ***Sunrise Resort Association, Inc v Cheboygan County Road Commission***, 511 Mich 325, 333; 999 NW2d 423, 427 (2023). Analysis begins with the statute's "plain language," and the Court must "examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme." ***Id.***, 511 Mich at 333-4; 999 NW2d at 327. "*Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context*." ***GC Timmis & Co v Guardian Alarm Co***, 468 Mich 416, 421; 662 NW2d 710, 713 (2003), *emphasis added*.

Janetsky focuses on the definitions of "employer" and "employee" in MCL 15.361 to argue that "[t]he WPA does not limit suit for recovery of damages against an employer to only the employer's specific employees." **(Janetsky Supplemental Brief, p. 3)**. But by focusing entirely upon these definitions, Janetsky ignores the substantive intent of the WPA as demonstrated by the operative text of MCL 15.362.

In relevant part, MCL 15.362 declares that "[a]n employer *shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions or privileges of employment* because the employee . . . reports or is about to report, verbally or in writing, a violation or a suspected violation of a law." MCL 15.362, *emphasis added*. Obviously the purpose of the statute is to prevent the listed actions by an employer. And, just as obviously, imposition of liability against an "employer" serves this purpose only if the "employer" has control over the employee's discharge, compensation, terms, conditions, location or privileges of employment.

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Janetsky's non-contextual focus on the definition provisions alone expands the pool of Defendants beyond the scope intended by the statute. A relevant hypothetical shows the fallacy of Janetsky's approach.

Suppose that a paralegal reports to the fire marshal a suspected violation of the fire code by the custodian of the building in which the paralegal's law firm leases its office space. If the paralegal then perceives some retaliation from her *law firm*, could she file a WPA suit against the *building owner* simply because she is an "employee" (of the law firm) and the building owner is an "employer" (of the custodian)? Proceeding from Janetsky's isolated focus on the definitions of the words "employer" and "employee" in MCL 15.361, the paralegal could do so - - even though the building owner had no control over the retaliation that the paralegal allegedly experienced as a consequence of her report.

Janetsky further argues that the status of Saginaw County as a co-employer of assistant prosecutors renders the actual relationship between the County and Janetsky irrelevant, such that the "economic reality test" applied by the Court of Appeals is "superfluous." **(Janetsky Supplemental Brief, pp. 1-4, 7)**.

But suppose the paralegal in the previous hypothetical had reported to police a suspected traffic violation by a driver who transported biopsy specimens for a medical office that leased space in the same building as the law firm. And then suppose that the delivery driver started blocking the paralegal's designated parking spot with his delivery truck each morning (thus impacting a condition of the paralegal's employment). Could the paralegal file a WPA suit against her own firm simply because she is an "employee" and the law firm is her "employer", even though the law firm had no role in the delivery

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driver's retaliatory actions?

The definitions of "employer" and "employee" cannot be read "in isolation" from the operative provision of the WPA found in MCL 15.362. See ***GC Timmis & Co,*** 468 Mich at 421; 662 at 713. And the meaning of the words "employer" and "employee" assume *particular* meaning when read in such context.

By its terms, the manifest intent of the WPA is that liability be imposed only upon an "employer" that has actual control over the statutorily identified aspects of an employee's employment, such that there is some *causal connection* between the actions (or omissions) of that "employer" and the WPA violations of which the "employee" complains. If not, then an "employer" can be held liable to serve as a de facto insurer against the conduct of others toward the "employee," even if the defendant "employer" had no power to prevent the actions that allegedly violated the WPA.

Even accepting the legal and documentable status of Saginaw County as a "co-employer" of Janetsky, the County had no control over Janetsky's condition of employment remained regard to the substance of her work - - or her supervision by Chief Assistant Prosecutor Boyd. As made clear in the case law recognizing the "co-employer" status of a county over unionized staff of a prosecutor, the statutory authority of the elected prosecutor 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 v American Federation of State, County, and Municipal Employees, AFL-CIO, Local 1518***, 425 Mich 204, 237, 241; 388 NW2d at 245, 247 (1986).

The same labor agreement that designated the Saginaw County Board of

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Commissioners and the prosecuting attorney as "Co-Employer" of assistant prosecutors also "*retain[ed]*" for the elected prosecution *all rights provided by law*." **(Defendants-Appellees' Appx., Vol. 3, pp. 567, 570, Labor Agreement, "Definitions" H, I, M and Art. II, Sec. 2.3)**. These expressly included the right of the prosecutor to hire and discharge assistant prosecutors "at will," while controlling their "work" and judging their "performance" and "competence." **(Defendants-Appellees' Appx., Vol. 3, pp. 570-1, Labor Agreement, Art. II, Sec. 2.3, a-i)**.

Janetsky's conditions of employment were under control of Prosecutor McColgan, who is empowered by statute to appoint and discharge assistant prosecutors at his pleasure, while designating their duties and their relative rank. MCL 49.33, 49.35, 49.42, 49.52.

Of particular relevance, an elected prosecutor has sole control over the appointment of a "chief assistant." MCL 49.32. It was Prosecutor McColgan who had sole control over Boyd's "rank" above the other assistant prosecutors, "in discharging the functions and performing the duties of the office of prosecuting attorney." MCL 49.33. Boyd's official job description as chief assistant was to "[m]anage, direct, schedule and counsel employees, including review of "cases and dispositions." **(Defendants-Appellees' Appx., Vol. 3, pp. 573-4, Chief Assistant Prosecutor Job Description)**.

It is for these reasons that the "economic reality test" serves the purpose of the WPA - - looking to the "totality of the circumstances" to determine whether an employer-employee relationship exists for purposes of the WPA. ***Chilingirian v City of Fraser***, 194 Mich App 65, 69-70; 486 NW2d 347, 349 (1992). The WPA is not intended as a form of insurance to guarantee financial compensation to whistleblowers. Again, the clear

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intent of the WPA is *to prevent the occurrence* of retaliation by the defendant employer against whistleblowing employees. This purpose is only served if the liability falls upon an "employer" who actually controls the continuation of employment and working conditions of the whistleblowing "employee."

The economic reality test considers the employer-employee relationship "as whole," including the relevant factors of (1) control of a worker's duties, (2) payment of wages, (3) the right to hire, fire and discipline and (4) whether the employee's duties are an integral part of the employer's business." ***Chilingirian v City of Fraser***, 194 Mich App 65, 69-70; 486 NW2d 347, 349 (1992). By reference to the text of MCL 15.362, it is the control of a worker's duties and the right to hire, fire and discipline the employee that is relevant for the purposes of the WPA.

Analyzing the matter in context, the Court of Appeals held that Saginaw County was not Janetsky's "employer" for purposes of the WPA. As stated by the Court of Appeals:

> [W]hen the factors are viewed in totality, it is clear that a county's prosecutor's office is substantially independent from the county itself. The county does not select its chief prosecutor, but must instead defer to the electoral process, and does not exercise supervisory authority over that official. And, other than funding the positions, the county has no role in hiring, retaining, disciplining, or terminating assistant prosecutors. We conclude that this substantial independence tips the balance in favor of finding that the County was not plaintiff's "employer" under the WPA. . . .
>
> **(Defendants-Appellees' Appx., v. 4, p. 798, COA Majority Opinion, p.)**.

The Court of Appeals judges were unanimous on this point. **(Defendants-Appellees' Appx., v. 4, p. 804, COA Concurring/Dissenting Opinion, p. 4)**.

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With regard to Janetsky, those matters relevant to the WPA were outside the control of Saginaw County, due to the retention of the statutory prerogatives of the elected prosecutor. Therefore, the Court of Appeals correctly considered the "totality" of the relationship to weigh against holding Saginaw County liable as an "employer" under the WPA. **(Defendants-Appellees' Appx., v. 4, p. 798, COA Majority Opinion, p. 9)**.

Janetsky's "supplemental brief" repeats the contention from her original application that the "employment status" of Janetsky with the County should be "decided by a jury." **(Janetsky Supplemental Brief, p. 10; Janetsky Application, pp. xi, 16)**. But as described in the Defendants-Appellees' original answer to Janetsky's application, no jury question is implicated. There is no dispute regarding the "facts" of Janetsky's employment. Rather, the only question is one of law regarding whether those facts render Saginaw County an actual "employer" for purposes of the WPA as manifested in MCL 15.362. **(Defendants-Appellee's Answer, p. 35)**.

Janetsky also repeats that she will have no legal entity from whom to obtain redress, if the County is not deemed her employer. **(Janetsky Supplemental Brief, p. 11; Janetsky Application, pp. 12-3)**. Again, this was already addressed in the Defendants-Appellees' original answer. **(Defendants-Appellees' Answer, p. 36)**. Although there is no "prosecutor's office" entity that can be sued, there is an elected county prosecutor, who has both an individual and an "official" capacity. ***Mays v Snyder***, 323 Mich App 1, 68-9; 916 NW2d 227, 266 (2018). The elected prosecutor, as an individual, has governmental immunity under MCL 600.1407(2), (3) and (5). But for the prosecutor in "official" capacity as an employer, the WPA effects a waiver of immunities. ***Anzaldua v Band***, 457 Mich 530, 551-2; 578 NW2d 306, 315 (1998). Dismissal of the

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County does not deprive Janetsky of a cognizable defendant for her WPA claim.

II. BECAUSE JANETSKY WAS NOT ACTUALLY "TERMINATED" (BUT, RATHER, ALLEGES "*CONSTRUCTIVE* DISCHARGE" HER "PUBLIC POLICY" CLAIM IMPROPERLY PUTS DETERMINATION OF "PUBLIC POLICY" IN THE HANDS OF A JURY.

This Court's order resolving Janetsky's prior application (Docket Nos. 161612, 161613) addressed the question of whether the WPA "preempted" Janetsky's claim alleging termination in violation of "public policy." This Court found that Janetsky's claim avoided preemption, because her WPA and "public policy" claims were based on different conduct.

Specifically, this Court concluded that "Plaintiff's WPA claim is based on reports to her supervisor of actual or suspected violations of the law in entering a plea and sentencing agreement." **(Defendants-Appellees' Appx., v. 4, p. 777, Remand Order, 12/21/22, p. 3)**. "By contrast, plaintiff'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." ***Id***.

On remand, the Court of Appeals majority addressed Janetsky's public policy claim through statutory interpretation alone. The majority concluded that, regardless of whatever extent a probationary sentence is prohibited by MCL 771.1(1), the statutory text does not prohibit a prosecutor "from *offering* a plea and sentencing agreement involving probation." **(Defendants-Appellees' Appx., v. 4, p. 800, COA Majority Opinion, p. 11)**. Therefore, Janetsky "was not asked to violate the law and . . . her motion to correct the plea and sentencing agreement was based on its invalidity under MCL 771.1(1) was not a refusal to violate the law." ***Id***.

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This reasoning accords with the analysis by Justices Zara and Viviano in their separate opinion regarding the order that resolved Janetsky's prior application to this Court. Justices Zahra and Viviano expressed the opinion that for Janetsky to prevail on her public policy claim, "there must actually be a violation of the law" or a request that the plaintiff-employee actually do so. **(Defendants-Appellees' Appx., v. 4, p. 786, Zahra/Viviano Opinion, p. 12)**. Chief Justice Clement likewise expressed her view that Janetsky "is obligated to demonstrate that MCL 771.1(1) was actually violated to support her common-law claim." **(Defendants-Appellees' Appx., v. 4, p. 780, Chief Justice Clement Opinion, p. 6)**.

Looking at the plain language of the statute, there is absolutely no reference in MCL 771.1(1) to the prosecutor at all. It is solely a directive to "the court" regarding the sentence that may be imposed. As summarized by Justices Zahra and Viviano, "[p]ut simply, MCL 771.1(1) constrains what *the sentencing court* may impose as a sentence, it does not constrain what *the prosecutor* may offer as a sentencing recommendation to a plea agreement." **(Defendants-Appellees' Appx., v. 4, p. 785, Zahra/Viviano Opinion, p. 11)**. The Court of Appeals majority came to the same conclusion. **(Defendants-Appellees' Appx., v. 4, p. 800, COA Majority Opinion, p. 11)**. Nothing Janetsky could have done - - and nothing that Janetsky could have been asked to do - - would violate the statute.[1]

To hold otherwise, this Court would need to "read into" the statute a prohibition

[1] Notably, Justices Zahra and Viviano also expressed the position that MCL 771.1(1) "does not expressly prohibit a sentence that *combines* jail time and probation." **(Defendants-Appellees Appx., v. 4, p. 784, Zahra/Viviano Opinion, p. 10, *emphasis added*)**.

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against the prosecutor that the statutory text does not include. To do so would run afoul of the long established principle that "[i]t is not within the province of this court to read therein a mandate that the Legislature has not seen fit to incorporate." ***Nickola v MIC General Ins Co***, 500 Mich 115, 125; 894 NW2d 552, 557 (2017), ***Jones v Grand Ledge Public Schools***, 349 Mich 1, 11; 84 NW2d 327, 332 (1957).

This reasoning is certainly correct and dispositive in the Defendants-Appellees' favor. But it ignores the more fundamental point - - i.e., that the evidentiary record rebuts any allegation that McColgan or Boyd asked Janetsky to violate MCL 771.1(1) or her interpretation thereof. **(See Defendants-Appellees' Answer, pp. 37-8)**.

Briefly summarized, Janetsky acknowledges that when she made her report to McColgan, his response was to *authorize her* to take whatever corrective action *she* deemed necessary. **(Defendants-Appellees' Appx., v. 1, pp. 149, 152-3, Janetsky Dep., pp. 413, 450-1; Defendants-Appellees' Appx. v. 2, p. 268, Janetsky Dep., p. 734)**. Janetsky also acknowledged that Boyd had been told by McColgan that Janetsky had been given that authority to take such corrective action. **(Janetsky Appx. v. 1, p. 107, Boyd Dep., pp. 275, 277-8)**. And Boyd signed and filed Janetsky's corrective motion. **(Defendants-Appellees' Appx., v. 2, pp. 494-5, Boyd Dep., pp. 289, 292; Defendants-Appellees' Appx., v. 1, p. 150, Janetsky Dep., p. 438; Defendants-Appellees' Appx., v. 3, pp. 590-2, Motion to Withdraw Plea)**.

Neither McColgan nor Boyd asked Janetsky to offer what she deemed an illegal plea deal. It was *Boyd* who had already offered the plea deal on the record.

And McColgan's immediate reaction to Janetsky's report was to authorize her to take the corrective action she deemed necessary. Boyd accepted and filed the corrective

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motion as Janetsky demanded. By her own description of events, Janetsky was never asked to violate MCL 777.1(1). Rather, *Boyd* had supposedly violated the statute. Janetsky was never asked to do so. And Janetsky was authorized from the time of her report to rectify the situation.

There is no evidentiary basis to sustain Janetsky's public policy claim, as that claim has been defined by this Court. Contrary to the phrasing used by Janetsky (Janetsky Supplemental Brief, pp. 12, 13), Janetsky did not merely "attempt" or make "efforts to set aside the plea and sentencing agreement. She was expressly authorized to do so - - and accomplished it.

But the broader point to be addressed in this "supplemental" brief is the nature of the "public policy" determination that must be made and who should make it. To determine whether an action violates "public policy," it is first necessary to determine what the relevant "public policy" actually is. ***Terrien v Zwit***, 467 Mich 56, 66; 648 NW2d 602, 608 (2002). In our democratic society, the substance of "public policy" should be declared by elected officials (whether executive, legislative or judicial - - depending on context).

This Court has recognized that "public policy" is such policy as is rooted in, and bounded by, the law adopted by the public of this state, as "reflected in our state and federal Constitutions, our statutes and the common law." ***Soaring Pine Capital Real Estate and Debt Fund II, LLC v Park Street Group Realty Services, LLC***, 511 Mich 89, 101-2; 999 NW2d 8, 15-6 (2023), ***Terrien***, 467 Mich at 66-8; 648 NW2d at 608-9. Such determination" is a question of law for the courts. ***Soaring Pine Capital Real Estate and Debt Fund II, LLC,*** 511 Mich at 100; 999 NW2d at 15, ***County of Ingham v Michigan County Road Commission Self-Insurance Pool***, 508 Mich 461, 476; 975

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NW2d 826, 833 (2021). But jury consideration of Janetsky's *particular* "public policy" claim will, conversely, require in non-elected jurors to declare public policy with regard to employee supervision.

Janetsky over simplifies her public policy claim by stating that MCL 771.1(1) is the only relevant or necessary declaration of public policy for her claim to succeed. **(Janetsky Supplemental Brief, p. 13)**. This is not true.

Assuming arguendo that Janetsky had any evidence to support her claim that McColgan or Boyd acted such that she had to "refuse" to violate MCL 771.1(1), the question of whether Boyd's offered plea deal violated the statute is a question of law for this Court. ***Visio v City of Village of Clarkston***, 506 Mich 37, 44; 954 NW2d 95, 99 (2020). With regard to that aspect of Janetsky's public policy claim, the final resolution must be by this Court itself.

But, even assuming that the offered plea deal did violate the statute, there is an *additional* policy determination that must be made for Janetsky's public policy claim to prevail. This is because Janetsky was not "terminated" by order of the prosecutor (or the county).

Instead, Janetsky resigned after McColgan did not dismiss Boyd. **(Defendants-Appellees' Appx., v. 3, p. 612, Janetsky Letter, 12/14/15)**. Therefore, Janetsky purports to satisfy the "discharge"/"termination" element of her public policy claim by showing a "*constructive* discharge" arising from an allegedly "hostile" work environment. **(Defendants-Appellees' Appx., v. 1, p. 29, First Amended Complaint, ¶ 73)**. This

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raises a second level of policy consideration.[2]

Janetsky specifically identifies the "hostile" conditions at issue as "*verbal abuse*" and "*verbal attacks*" by Boyd. **(Defendants-Appellees' Appx. v. 3, pp. 610-11, Janetsky Letter, 6/4/15, pp. 1-2)**. But the only way a jury could say Janetsky had been terminated (i.e., constructively discharged) in violation of public policy is for the jury to declare that the "hostile" working conditions she alleges as the basis for her resignation are themselves a violation of "public policy."

Specifically, it would not be enough for the jury to say that the alleged hostile conditions (i.e., the "verbal abuse") arose as retaliation for Janetsky refusing to violate the law. To constitute "constructive discharge," the working conditions themselves must be wrongful. If the actions by Boyd of which Janetsky complains were within the parameters of legally acceptable employee management and supervision, then those actions cannot sustain a constructive discharge. By definition, acts that are legally permissible in their context cannot give rise to liability. Cf. ***Gonyea v Motor Parts Federal Credit Union***, 192 Mich App 74, 80-1; 480 NW2d 297, 300-1 (1991).

As described at length in the Defendants-Appellees' Answer, Janetsky's own deposition testimony reveals the alleged "verbal abuse" to have been yelling by Boyd at Janetsky during meetings. **(Defendants-Appellees' Answer, pp. 18-21)**. She supplemented this with complaints about the nature of her work assignments and the supposed hiding of her files. **(Defendants-Appellees' Answer, pp. 16-18)**. So to

[2] As this Court has confirmed, "constructive discharge" is *not itself* a cause of action but, rather, affords a plaintiff pursuing a claim under another theory (e.g., the WPA) to counter an employer's contention that the plaintiff left employment voluntarily. ***Joliet v Pitoniak***, 475 Mich 30, 41; 715 NW2d 60, 68 (2006). Here Janetsky invokes "constructive discharge" to substitute for the "termination" element of her public policy claim.

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declare that Janetsky was constructively discharged, the jury would have to say (1) that Boyd acted tortiously (i.e., violated public policy) by yelling at Janetsky, by supposedly hiding her files and by way of her work assignments *and/or* (2) that McColgan violated public policy by not dismissing Boyd for doing so.

The Defendants-Appellees are not aware of any case law (or any declaration by the State's executive or legislature) that any of the alleged actions by Boyd or McColgan that supposedly led to Janetsky's "constructive discharge" violate any public policy. And if there is going to be creation and enforcement of a "public policy" against such actions (or a public policy requiring dismissal of supervisors who engage in those actions), such policy should be the affirmative declaration of elected public officials. Such declaration of policy should not be in the hands of six non-elected jurors deciding a particular case. This is particularly so, given that a different group of six jurors could reach a different conclusion in another case - - thus leaving the "policy" uncertain.

The role Janetsky postulates for a jury here is different in character than the "standard of care" determination entrusted to juries in negligence cases. In a negligence case, the "public policy" determination has been made as a matter of law by the courts via the parameters of the "duty" element. See ***Bailey v Schaaf***, 494 Mich 595, 614-5; 835 NW2d 413, 424-5 (2013), ***Sizemore v Smock***, 430 Mich 283, 293; 422 NW2d 666, 671 (1988). And, as recently demonstrated by a decision of this Court, even the parameters for determining the "standard of care" in a negligence case are bounded by policy considerations that are judicially prescribed. See ***Meyers v Rieck***, 509 Mich 460, 471-77; 983 NW2d 747, 753-7 (2022).

There is no authority for a jury to interpose its own collective assessment of good

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business practice as a basis for legal liability on the part of an employer. Indeed, in the context of cases alleging liability for race or age discrimination, juror assessment of the wisdom, prudence or competence of employee management decisions is precluded. ***Town v Michigan Bell Telephone***, 455 Mich 688, 764; 568 NW2d 64, 71-2 (1997), ***Hazle v Ford Motor Co***, 464 Mich 456, 475-6; 628 NW2d 515, 527-8 (2001).

Had Janetsky actually been terminated - - *and assuming there was evidence of Janetsky needing to "refuse" to violate MCL 711.1(1)* - - a jury would need only to determine whether her termination resulted from her refusal. But because Janetsky must show "constructive" discharge, a jury would need to determine not only whether Boyd's supervisory actions were motivated by Janetsky's refusal, but also whether Boyd's supervisory actions transgressed the bounds of what public policy allows supervisors to do as a matter of course. If Boyd's alleged supervisory actions (*yelling, holding files and job assignments to Janetsky*) were not themselves improper, the motivation behind them is irrelevant.

Janetsky's "public policy" claim cannot be sustained, without improperly allowing a jury to determine the public policy propriety of Boyd's supervision. More importantly, Janetsky has no evidence that she ever had to "refuse" to violate the law. The Court of Appeals majority correctly held that Janetsky's claim alleging termination in violation of public policy cannot be sustained.

III. JANETSKY HAS NO EVIDENCE OF THE REQUISITE FACTUAL BASIS FOR HER "FALSE IMPRISONMENT" AND "ASSAULT AND BATTERY" CLAIMS.

This Court's request for supplemental briefing asked whether Janetsky had established "the existence of a genuine issue of material fact regarding her intentional tort

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claims of false imprisonment and assault and battery." **(Order, 4/10/24, p. 2)**. Given the task, it is significant that Janetsky prefers to quote at length from the opinion of the dissenting Court of Appeals judge more than the actual record of her own testimony.

But this is understandable. Janetsky's testimony defeats her claims. Therefore, she prefers the misreading of the dissenting Court of Appeals judge to what Janetsky herself actually said.

Janetsky supports her assault and battery claim entirely by reference to the characterization by the dissenting Court of Appeals judge that Boyd "slammed" his office door shut while Janetsky held it and "[a] jury should decide whether Boyd's act of slamming the door shut while Janetsky held the handle" satisfies the battery standard. **(Defendants-Appellees' Appx., v. 4, pp. 804, 808, COA Dissenting Opinion, pp. 4, 8)**. Janetsky's supplemental brief quotes both such statements by the dissenting Court of Appeals judge. **(Janetsky's Supplemental Brief, pp. 16, 22)**.

It should be unnecessary to "supplement" the detailed three-page rebuttal set forth in the Defendants-Appellees' answer to Janetsky's application. **(Defendants-Appellees' Answer, pp. 42-45)**. Boyd had shut the door at the beginning of the encounter in his office (after directing an intern to leave). **(Defendants-Appellees' Appx., v. 2, pp. 280, 309, 311, Janetsky Dep., pp. 759, 827, 829)**. He never slammed the door at any time when Janetsky had her hand on the door or the handle. Rather, when Janetsky manifested her intent to leave, he put his hand on the door to prevent her from *opening* it. In Janetsky's words, Boyd "[p]ut his hand on the door and blocked my exist." **(Defendants-Appellees' Appx., v. 2, pp. 334-335, Janetsky Dep., pp. 853, 855)**.

Moreover, Janetsky completely ignores the intent element of both assault and

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battery. Battery requires "intent to injure," and assault requires intent to create "apprehension of eminent contact." ***Young v Morrall***, 359 Mich 180, 187; 101 NW 358, 362 (1960), ***Mitchell v Daly***, 133 Mich App 414, 426-7; 350 NW2d 772, 778-9 (1984). There is no evidence from which to derive either intent on the part of Boyd.

Boyd's intent, as alleged by Janesky, was to prevent Janetsky's exit and evasion of the supervisory confrontation over her perceived misunderstanding under the directive that Boyd be kept informed regarding cases generating media attention. **(Defendants-Appellees' Appx., v. 2, pp. 283, 287-8, 319, 327, Janetsky Dep., pp. 762, 769-70, 837, 845)**. As Janetsky concedes, there was no physical contact between her and Boyd, and Boyd never touched, bumped, pushed or swung at Janetsky, nor raised his had as if to do so. **(Defendants-Appellees' Appx., v. 2, pp. 59-60, Janetsky Dep., pp. 900-1)**.

In short, the "slamming" recited by the dissenting judge and adopted by Janetsky *never occurred*. And there is no evidence of the requisite "intent" on the part of Boyd to sustain an assault or battery claim. The Court of Appeals majority correctly found the evidence insufficient to sustain Janetsky's claims. **(Defendants-Appellees' Appx., v. 4, pp. 795-796, COA Majority Opinion, pp. 6-7)**.

Janetsky's false imprisonment claim is equally baseless. "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). As already stated in the Defendants-Appellees' answer, Janetsky would have this Court expand the definition beyond "*unlawful* restraint" to merely "*unwanted* restraint," regardless of context. **(Defendants-Appellees' Answer, p. 45)**.

The Court of Appeals majority correctly highlighted the brevity of time that Boyd

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blocked Janetsky's exit, which she described as "30 seconds or less." **(Defendants-Appellees' Appx., v. 4, pp. 794-5, COA Majority Opinion, pp. 5-6; Defendants-Appellees' Appx., v. 2, pp. 345-346, Janetsky Dep., pp. 863-864)**. But the Court of Appeals also observed that when Boyd opened the door, Janetsky chose not to leave. **(Defendants-Appellees' Appx., v. 4, p. 795, COA Majority Opinion, p. 6)**. In fact, she stayed for a lengthy discussion, as documented by union representative Nate Collison. **(Defendants-Appellees' Appx., v. 3, pp. 607-9, Collison Memo, pp. 1-3)**. Indeed, Janetsky herself lengthened the proceeding by interjecting the CSC plea issue from the previous year, which was quite beyond Boyd's intended discussion of communication regarding media attention.[3] And, as has been observed by the Court of Appeals, there is no false detention, "if plaintiff voluntarily agrees to stay with the defendant." ***Clarke v Kmart Corp***, 197 Mich App 541, 547; 495 NW2d 820, 823 (1992).

Janetsky particularly relies upon the statement of the dissenting Court of Appeals judge that "[t]he law does not recognize the 'privilege' of an employer to trap an employee in an office so he can berate her." **(Janetsky's Supplemental Brief, p. 21)**. Janetsky argues that "Boyd's supervisory role does not authorize him to detain Janetsky in his office without her consent." **(Janetsky's Supplemental Brief, p. 20)**. The Court of Appeals majority thought otherwise, stating that "Boyd, as plaintiff's direct supervisor, possessed at least some authority to insist that plaintiff remain at a workplace meeting in

[3] Boyd's intended focus on "a text message situation" is confirmed by both Janetsky and her union representative, Nate Collison, whom Boyd brought into the meeting at Janetsky's demand. **(Defendants-Appellees' Appx., v. 2, p. 72, Janetsky Dep., p. 913; Defendants-Appellees' Appx., v. 3, p. 607, Collison Memo, p. 1)**. It was Janetsky herself, not Boyd, who subsequently interjected the past CFC plea situation into the discussion. **(Defendants-Appellees' Appx., v. 2, pp. 373-4, Janetsky Dep., pp. 914-5; Defendants-Appellees' Appx., v. 3, pp. 607-8, Collison Memo, pp. 1-2)**.

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his office at least if she wanted to continue her employment." **(Defendants-Appellees' Appx., v. 4, p. 795, COA Majority Opinion, p. 6)**.[4]

In this regard, Janetsky again is asking a jury to determine a question of public policy. Obviously, the judges of the Court of Appeals disagreed 2-1 on the policy choice. Regardless of how this Court might resolve the policy, is certainly not appropriate for a six person jury to declare the State's policy in this regard.

To the extent this Court may chose to address the issue, the policy implications have already been addressed by the Defendants-Appellees in their original answer. **(Defendants-Appellees' Answer, pp. 46-48)**. First, this Court would be overruling the 20-year-old decision by the Court of Appeals in ***Moore v City of Detroit***, 252 Mich App 384, 388; 652 NW2d 688, 691 (2002), where it was held that brief detention for investigation of workplace rule violations did not constitute a false imprisonment. Second, leaving supervisory critique entirely subject to the will of the employee undermines the concept of management altogether.

As pointed out in the Defendants-Appellees' original answer, Janetsky's handling of the CSC case (and her subsequent inappropriate contacts with the former complainant once she became a represented perjury defendant) carried consequences adverse to the public interest in the effect of administration of criminal justice and adverse to the rights

[4] As pointed out in the Defendants-Appellees' answer, 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 for a supervisory confrontation against her will. This would take the circumstances full circle back to a "public policy" claim. If an employer is not obligated to face a supervisory confrontation, then how could Janetsky's refusal to face Boyd be a valid basis for termination? And, if terminated, Janetsky could claim to have been discharged in violation of a "public policy" affording her a right not to face a negative supervisory critique. **(Defendants-Appellees' Answer, pp. 46-47)**.

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of the Defendants. **(Defendants-Appellees' Answer, p. 47)**. Janetsky's performance demonstrated the need for supervision. As demonstrated by the facts of this case, neither the public, nor the criminal defendants, are properly served if Janetsky can simply avoid supervisory critique at will.

Again, as with the concept of "employer" under the WPA, the existence of a "false imprisonment" must be analyzed in context. Under Janetsky's reasoning, there would be no avenue for an employer to make supervisory critique of an unwilling employee without facing liability. An employer would be placed in the no-win situation of forcing the employees to face supervisory confrontation (with the result of being sued for false imprisonment) or firing the employee for refusing to address the confrontation (with the result of being sued for termination in violation of public policy).

And the loser will be the public that depends upon competent performance by private and public sector employees alike in multiple contexts. Recognition of a "privilege" to compel employees to abide supervisory critique is critical to avoid workplace anarchy and the degradation of goods and services on which we all depend.

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CONCLUSION AND RELIEF REQUESTED

For the reasons described above, together with those described in the Defendants-Appellees' original answer to Plaintiff-Appellant Janetsky's application, Janetsky's application should be denied.

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Date: June 6, 2024

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this supplemental brief complies with the applicable formatting and word count described in MCR 7.312(A).

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

   A. 5,676 words.

2. The brief has been prepared:

   B. in proportionally spaced typeface using "Arial" in font size 12.

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Date: June 6, 2024

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 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 documents to the following non-ECF participants: N/A.

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