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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 REPLY BRIEF PURSUANT TO THE COURT'S APRIL 10, 2024 ORDER

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RECEIVED by MSC 8/20/2024 4:39:36 PM

TABLE OF CONTENTS

Index of Authorities ii

Statement of Questions Presented iii

ARGUMENT 1

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. 1

a. Plaintiff-Appellant has a Claim Under the Statute as "An Employee" Against Defendant Saginaw County, "An Employer." 1

b. Assuming, in arguendo, that an Employment Relationship Between the Parties is Necessary Under the Whistleblowers' Protection Act, Janetsky's Status as a County Employee is Supported by the County's Documents and the Circumstances of Her Employment. 2

c. The Court of Appeals' Decision Creates an Untenable Legal Position for Whistleblowers Appointed to a County Position. 3

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). 4

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. 6

a. Janetsky Established a Question of Material Fact Regarding Her Claim of False Imprisonment 6

b. Janetsky Established a Question of Material Fact Regarding Her Claim of Assault and Battery. 8

CONCLUSION 10

RECEIVED by MSC 8/20/2024 4:39:36 PM

INDEX OF AUTHORITIES

Cases

Chambers v. City of Detroit, 786 F. Supp. 2d 1253, 1273–74 (E.D. Mich. 2011) 6
Espinoza v. Thomas, 189 Mich. App. 110 (1991) 9
Janetsky v. Cnty. of Saginaw, 982 N.W.2d 374, 379 (Mich. 2022) 4
Miller v. Dep't of Corr., No. 164862, 2024 WL 2109772, at *4 (Mich. May 10, 2024) 1
Napier v. Jacobs, 429 Mich. 222 (1987) 5
People v. Cameron, 291 Mich.App. 599, 614, 806 N.W.2d 371 (2011) 10
People v. Kinsey, No. 361281, 2023 WL 6168356, at *3 (Mich. Ct. App. Sept. 21, 2023) 9
People v. Starks, 473 Mich. 227, 234, 701 N.W.2d 136 (2005) 10
People v. Terry, 217 Mich.App. 660, 662, 553 N.W.2d 23 (1996) 10
Russell v. Bronson Heating & Cooling, 345 F. Supp. 2d 761, 796 (E.D. Mich 2004) 10
South Haven v. Van Buren Co. Bd. Of Comm'rs, 478 Mich. 518, 528 (2007) 1
Stowers v. Woldzko, 386 Mich. 119 (1971) 7
Suchodolski v. Mich. Consol Gas Co., 412 Mich. 692, 695, 316 NW2d 710 (1982) 4
Suchodolski v. Mich. Consol. Gas Co., 412 Mich. 692, 694-695 (1982) iii
Town v. Michigan Bell Telephone, 455 Mich. 688 (1997) 5
Vagts v. Perry Drug Stores, Inc., 204 Mich. App. 481, 516 N.W.2d 102 (1994). 6
Wells Fargo Bank, N.A. v. Null, 304 Mich. App. 508, 537, 847 N.W.2d 657, 676 (2014) 3
Whitman v. City of Burton, 493 Mich. 303, 313 (2013) 1

Other Authorities

M.C.L. 691.1407(5) 3
MCL 600.2591 1
MCL 771.1(1) 4, 5

RECEIVED by MSC 8/20/2024 4:39:36 PM

STATEMENT OF QUESTIONS PRESENTED

a. 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.

b. 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.

c. 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.

RECEIVED by MSC 8/20/2024 4:39:36 PM

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.

a. Plaintiff-Appellant has a Claim Under the Statute as "An Employee" Against Defendant Saginaw County, "An Employer."

Defendants-Appellees assert that the Whistleblowers Protection Act ("WPA") prohibits employers from retaliating against their employees, as opposed to any qualifying employee under the Act, reading limitations into the Act that do not exist. (Defendants-Appellees' Supplemental Brief, pp. 2-3). In support of this argument, Defendants-Appellees put forth a series of nonsensical scenarios as if the causation requirement necessary to succeed on a claim under the Act, simply does not exist. Defendants-Appellees' reasoning is extremely specious. It ignores that plaintiffs must still meet the prima facie elements to pursue a claim, including causation, and may be sanctioned for filing a frivolous claim. *See Whitman v. City of Burton*, 493 Mich. 303, 313 (2013); MCL 600.2591.

Tellingly, Defendants-Appellees do not address this Court's similar interpretation of the Elliott-Larsen Civil Rights Act ("ELCRA"), in *Miller v. Dep't of Corr*., No. 164862, 2024 WL 2109772, at *4 (Mich. May 10, 2024). In *Miller*, this Court declined to read limitations into the statutory language that would have restricted protections to specific persons, similar to what Defendants seek here. This Court's reasoning in *Miller* is equally applicable here. Like *Miller*, no qualifying language exists in the WPA with regard to "an employee," and must be accepted as written. MCL 15.362. Given the clear and unambiguous language, the statute must be enforced as written. *South Haven v. Van Buren Co. Bd. Of Comm'rs*, 478 Mich. 518, 528 (2007).

b. Assuming, *in arguendo*, that an Employment Relationship Between the Parties is Necessary Under the Whistleblowers' Protection Act, Janetsky's Status as a

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County Employee is Supported by the County's Documents and the Circumstances of Her Employment.

Defendants-Appellees next urge this Court to disregard their admissions that Saginaw County was Janetsky's co-employer and argues that "the County had no control over Janetsky's condition of employment . . . the substance of her work - - or her supervision by Chief Assistant Prosecutor Boyd." (Defendants-Appellees' Supplemental Brief, p. 4). This argument is disingenuous in the extreme. Defendants-Appellees' admissions that they are Janetsky's co-employer, and the legal reality of that admission, should not be disregarded by this Court. Moreover, the evidence in the record reflects that the County, acting as a co-employer, authorized Janetksy to leave work due to emotional distress and altered Janetsky's reporting structure – specifically removing her from Boyd's supervision – following her internal complaint of retaliation. (Appellant's Appendix, Vol. 1, pp. 78, 126-28; Vol. 2, p. 311). Such evidence directly contradicts Defendants-Appellees' assertion that Saginaw County had no control with regard to Boyd's supervision over Janetsky. Indeed, the evidence in the record reflects that the County acted as a co-employer, regardless of the statutory authority of Prosecutor McColgan or the expectations set forth in Boyd's Job Description. The actions and representations of the County belie their current position that only Prosecutor McColgan could take the employment actions they were jointly making.

While Janetsky asserts that the employment relationship between the parties is not relevant to the question of whether Janetsky can bring a claim under the WPA, if such a relationship were necessary, Saginaw County's acknowledgement that they were Janetsky's co-employer would be sufficient; the application of the economic reality test is superfluous and has otherwise never been applied in a situation where a self-acknowledged co-employer is the party-defendant. Should this

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Court determine the application of the economic reality test is appropriate here, Plaintiff-Appellant refers back to her Supplemental Brief.

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

Contrary to Defendants-Appellees' position at summary disposition, they have now taken the position that a county prosecutor may be sued under the WPA. (Defendants-Appellees' Supplemental Brief, pp. 7-8). It was Defendants-Appellees' position at the time of summary judgment that "the Prosecutor, John McColgan, is the highest elected official and as such is entitled to absolute immunity under M.C.L. 691.1407(5)." (Appellant's Appendix, Vol. 1, p. 195). Defendants-Appellees cannot now take a contrary position because it suits them, indeed, they are judicially estopped from doing so:

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

Wells Fargo Bank, N.A. v. Null, 304 Mich. App. 508, 537, 847 N.W.2d 657, 676 (2014) (citations omitted). After previously successfully asserting that the Chief Prosecutor was absolutely immune to claims, Defendants-Appellees now argue that the Chief Prosecutor is an appropriate defendant under the WPA. This is precisely the situation that the principle of judicial estoppel is intended to prohibit.

Moreover, this does not alter the fact that should the Court of Appeals' decision stand, local prosecutors, and likely appointees of elected officials more broadly, will be left without defendant-

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entities for WPA claims and limited to pursuing justice through the elected official – a temporary arm of the County – rather than the County they've perhaps worked on behalf of for decades. Such a result demonstrates a significant disassociation from municipal employers, who, realistically, represent themselves to be co-employers of the employee, benefit from the employee's work, provide human resources services to the employee, pay the employee, set policies and practices for the employee etc. A result in which municipalities are insulated from retaliatory discharge claims cannot stand.

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).

Defendants-Appellees argue that Janetsky's efforts to correct the plea and sentencing agreement was not a refusal to violate the law, and, thus, does not give rise to a public policy claim. (Defendants-Appellees' Supplemental Brief, p. 8). However, Defendants-Appellees' argument fails to consider the straightforward legislative policy expressed in MCL 771.1 and the implications of that policy as contemplated by *Suchodolski v. Mich. Consol Gas Co.*, 412 Mich. 692, 695, 316 NW2d 710 (1982). 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." *Janetsky v. Cnty. of Saginaw*, 982 N.W.2d 374, 379 (Mich. 2022) (Clement, C.J., concurring in part); (Appellant's Appendix, Vol. 3, pp. 487-88). In enacting MCL 771.1(1), the Legislature prohibits a court from sentencing a defendant convicted of CSC-III to probation. Janetsky specifically sought to bring a plea agreement into compliance with MCL 771.1(1), rather than allow a criminal prosecution to run afoul of the statute and contrary to a straightforward legislative expression of policy. Janetsky's efforts to remedy a prosecution that was not in compliance with MCL 771.1(1) is functionally

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equivalent to refusing to violate the law; in both instances, the intent of the action is to uphold the law and the legislative policy expressed therein.

Defendants-Appellees next seemingly argue that the evidentiary record does not support that McColgan or Boyd opposed Janetsky's efforts to remediate the criminal prosecution. (Defendants-Appellees' Supplemental Brief, p. 10). It is, apparently, undisputed that Janetsky did seek to bring the plea arrangement into compliance with MCL 771.1(1). It is, likewise, unrebutted that Boyd was angry with her for pressing the issue, reluctantly signed the motion to set aside the plea, and subsequently retaliated against her, giving rise to a public policy claim. (Plaintiff-Appellant's Application, pp. 2-4, 16-19).

Defendants-Appellees lastly assert "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.'" (Defendants-Appellees' Supplemental Brief, p. 13). This argument fails for several reasons. First, this argument is being raised for the first time here and was not previously preserved, despite ample notice that Janetsky was alleging a constructive discharge claim under public policy. Accordingly, this argument is improper. *Napier v. Jacobs*, 429 Mich. 222 (1987). Second, this argument attempts to overcomplicate the settled query of demonstrating constructive discharge and add another requirement to this standard that is not supported in the jurisprudence.[1]

[1] Defendants-Appellees appear to rely on the business judgment rule set forth in *Town v. Michigan Bell Telephone*, 455 Mich. 688 (1997) in asserting that Janetsky must demonstrate that Boyd's actions, themselves, violated public policy. This rule is irrelevant to this matter. The business judgment rule requires that a plaintiff show evidence of discrimination as opposed to merely questioning whether an "employer is wise, shred, prudent, or competent." *Town*, 455 Mich. at 704. Janetsky's complaint of retaliation is not based on actions that implicate the business judgment rule, like a layoff or failure to promote. As set forth below, a constructive discharge is premised on the showing of deliberately intolerable working conditions, which are present here.

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"A plaintiff can support their claim for wrongful termination [under public policy] by establishing that he/she was constructively discharged for refusing to violate the law." *Chambers v. City of Detroit*, 786 F. Supp. 2d 1253, 1273–74 (E.D. Mich. 2011) (citations omitted); *see e.g.*, *Vagts v. Perry Drug Stores, Inc.*, 204 Mich. App. 481, 516 N.W.2d 102 (1994).

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

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

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.

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

Defendants-Appellees again assert that this Court should provide employers with a legal privilege to falsely imprison employees "to compel employees to abide supervisory critique."

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(Defendants-Appellees' Supplemental Brief, p. 20). There is no legal support for this proposition, nor is there any support found in policy considerations, primarily because the assertion is based on a false factual premise. Under Defendants-Appellees' recitation, if Defendant Boyd had not falsely imprisoned Janetsky in order to critique her, then she would evade any and all consequences of supposed legitimate supervisory critique. (*Id.*). However, this is simply nonsense. As set forth in Plaintiff-Appellant's Reply Brief, Defendant Boyd had numerous options available to him to relay any supposed workplace critiques to Janetsky, including a written communication, disciplinary action, phone call, a coordinated meeting, etc. (Plaintiff-Appellant's Reply Brief p. 9). There is simply no legitimate basis to strip employees of their personal liberty in order for a supervisor to chastise them.[2] *See Stowers v. Woldzko*, 386 Mich. 119 (1971) ("False imprisonment is the unlawful restraint of an individual's personal liberty or freedom of locomotion.").

Finally, Defendants-Appellees briefly assert that Janetsky cannot pursue a claim of false imprisonment, because she remained in the office after Collison entered. (*Id*., pp.17-18). However, whether Boyd subsequently allowed Janetsky an opportunity to leave does not obviate the period in which he unlawfully detained her. At some point, every plaintiff who has asserted a claim of false imprisonment was allowed to leave their place of confinement. What is material is that Janetsky demonstrate each element of the intentional tort, which, for the reasons set forth in her

[2] Troublingly, Defendants-Appellees suggest that it is Plaintiff-Appellant who is seeking a change to the status quo, as if employers are currently allowed to falsely imprison employees in order to censure them, and, further, that not allowing this to occur would result in employers being "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 being sued for termination of violation of public policy)." (*Id.*). This, again, has no basis in reality or in the law. First, Defendants-Appellee's assertion assumes discharge axiomatically gives rise to a public policy claim and, second, their assertion that Defendant Boyd's option was to engage in an intentional tort or be sued for a violation of public policy is manifestly incorrect. Defendants-Appellees fail to consider the element of causation necessary to a public policy claim, which is present here absent Boyd's affirmative termination of Janetsky. Moreover, Defendants-Appellees' commit-this-tort-or-face-that-public-policy-claim defense is nonsensical. It is not a recognized defense for a defendant to assert that they committed an intentional tort to avoid liability under some other legal theory.

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brief in chief, she has done. It is the jury's responsibility to sort through these facts and assess liability and damages.

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

Defendants-Appellees argue that there is insufficient evidence to sustain Janetsky's assault and battery claim because "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." (original emphasis) (Defendats-Appellees' Supplemental Brief p. 17). Both of these arguments are blatantly contradicted by the evidentiary record.

First, the characterization that Defendant Boyd "slammed" the door shut while her hand was on the door was not contrived by Judge Gleicher or by Janetsky; it is a direct reflection of Janetsky's deposition testimony:

> *Q*: Did you try to pull the door open?
>
> *A*: I had been trying to open the door when he slammed his hand on the door, yes.
>
> *Q*: Did you pull the door open before he put his hand on the door?
>
> *A*: I could not get the door open because he slammed his hand on the door. I tried to open the door.
>
> \- - -
>
> *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

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> his desk and walked toward the door and then behind you at the door?
>
> *A*. As I'm walking toward the door, he was already standing, he's already out from behind his chair. He had a straight shot to go this way, so I'm walking this way toward the door, he comes behind me like this and throws his hand on the door to block it.
>
> *Q*. And what hand did he put on the door?
>
> *A*. His left hand because he was facing me.
>
> *Q*. And did he have any contact with you when his left hand went on the door.
>
> *A*. No, he did not - - I could - - all I could feel was the slam - - the bang of the door.
>
> *Q*. So he was behind you at this time.
>
> *A*. Correct.

(Appellant's Appendix, Vol. 1, pp. 65-66). As set forth above, Janetsky's explicit testimony describes an unlawful battery to her person, *vis a vis* the door she had her hand on. *See Espinoza v. Thomas*, 189 Mich. App. 110 (1991) ("contact with the car the plaintiff occupies is sufficient to establish a battery"); *see also People v. Kinsey*, No. 361281, 2023 WL 6168356, at *3 (Mich. Ct. App. Sept. 21, 2023) ("[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."). Such evidence establishes a question of material fact regarding her claim of assault and battery.

Moreover, there is ample evidence that Boyd intended to commit an assault and battery, such that a jury must weigh the evidence. While Boyd undoubtedly intended to stop Janestky from leaving the room, he likewise intended to cause violent physical contact to the door to which Janetsky's hand was affixed causing Janetsky to feel "the slam - - the bang of the door."

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(Appellant's Appendix, Vol. 1, p. 65). To intentionally cause the door to slam while Janetsky's hand was on the door constitutes sufficient intent for battery. See M Civ JI 115.02; *see also People v Kinsey, supra*. 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.'" *People v. Cameron*, 291 Mich.App. 599, 614, 806 N.W.2d 371 (2011) (citation omitted); *see also People v. Terry*, 217 Mich.App. 660, 662, 553 N.W.2d 23 (1996). Assuming, in arguendo, no battery was committed, "[t]he intent needed for an assault is the intent to commit a battery or an intent to create in the victim a reasonable fear or apprehension of an immediate battery." *Russell v. Bronson Heating & Cooling*, 345 F. Supp. 2d 761, 796 (E.D. Mich 2004). Boyd's slamming of the door, in conjunction with his other contemporaneous behavior – yelling and appearing visibly agitated – caused Janetsky to fear physical contact and think "that I would have to fight my way out of the room." (Appellant's Appendix, Vol. 1, pp. 61-67). Such evidence is more than sufficient to establish a quation of material fact as to Boyd's intent, for purposes of Janetsky's assault and battery claim.

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,

PITT, MCGEHEE, PALMER BONANNI & RIVERS, PC

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Dated: August 20, 2024

PROOF OF SERVICE

Carrie Bechill states that she served counsel of record with Plaintiff-Appellant's Reply 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 August 20, 2024.

/s/ Carrie Bechill
Carrie Bechill, Legal Assistant

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