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STATE OF MICHIGAN
IN THE SUPREME COURT

JENNIFER JANETSKY,
Plaintiff-Appellant,
v

COUNTY OF SAGINAW and CHRISTOPHER BOYD,
Defendants-Appellants
and

SAGINAW COUNTY PROSECUTOR'S OFFICE and JOHN McCOLGAN,
Defendants.
_____/

SC Docket: 166477
COA Docket: 346542
LC Case No: 15-028306-CL
(Saginaw County Circuit Court)

JENNIFER JANETSKY,
Plaintiff-Appellants
v

COUNTY OF SAGINAW, JOHN McCOLGAN, and CHRISTOPHER BOYD,
Defendants-Appellants
and

SAGINAW COUNTY PROSECUTOR'S OFFICE
Defendant.
_____/

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(Saginaw County Circuit Court)

BRIEF OF AMICUS CURIAE MICHIGAN ASSOCIATION FOR JUSTICE

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INTEREST OF AMICUS CURIAE MICHIGAN ASSOCIATION FOR JUSTICE

The Michigan Association for Justice (MAJ) is an organization of Michigan lawyers engaged primarily in litigation and trial work on behalf of plaintiffs in personal injury matters, and on behalf of employees and workers and individuals. The MAJ recognizes an obligation to assist this Court on the important issues that would substantially affect the orderly administration of justice in the courts of this state for these people. This case presents such issues, insofar as the outcome may affect the workplace civil rights of all Michigan citizens, and in particular, government employed attorneys, to be free from retaliation for reporting wrongdoing and illegal activity in the workplace under the Whistleblower Protection Act, MCL 15.361, *et seq.*

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QUESTION PRESENTED

I. **WHETHER THE COURT OF APPEALS PROPERLY DETERMINED THAT SAGINAW COUNTY WAS NOT THE PLAINTIFF'S EMPLOYER FOR PURPOSES OF HER WHISTLEBLOWERS' PROTECTION ACT, MCL 15.361 ET SEQ., CLAIM.**

II. **WHETHER THE PLAINTIFF'S 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).**

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STATEMENT OF FACTS

Amicus Curiae Michigan Association for Justice relies on the statement of facts set forth in the Court of Appeals' opinion below as well as in Plaintiff-Appellant's brief.[1]

ARGUMENT

I. THE COURT OF APPEALS ERRED IN DISMISSING PLAINTIFF-APPELLANT'S CLAIM UNDER MICHIGAN'S WHISTLEBLOWERS' PROTECTION ACT AGAINST SAGINAW COUNTY ON THE BASIS THAT THE COUNTY WAS NOT PLAINTIFF-APPELLANT'S EMPLOYER

The Court of Appeals erred in holding that Saginaw County was not Plaintiff's employer for purposes of the Michigan Whistleblower Protection Act ("WPA"), MCL 15.361, *et seq*. The WPA provides:

> 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 a suspected violation of a 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]

The WPA defines an "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 WPA defines "employer" as a person who has 1 or more employees.

[1] Neither the parties nor their counsel contributed monetarily or to the authorship of this brief. No monetary contributions have been made by any party or entity in the preparation of this brief.

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a. The Court of Appeals' Decision Violates the Rules of Statutory Construction: Saginaw County was Plaintiff's Employer under the Clear and Unambiguous Language of the WPA .

The Court of Appeals erred when it applied the economic realities test to determine whether the County was Plaintiff's employer. Because the words "employee" and "employer" are both defined by the WPA, the Court must first consult the statute's language to assess whether the County qualifies as Plaintiff's employer. "The primary goal in statutory interpretation is to ascertain and give effect to the Legislature's intent." *Bronson Methodist Hosp v Allstate Ins Co*, 286 Mich App 219, 223; 779 NW2d 304 (2009). The most reliable evidence of the Legislature's intent is the language of the statute itself. *Fairley v Dep't of Corrections*, 497 Mich 290, 296-297; 871 NW2d 129 (2015). Courts must "look to the specific statutory language to determine the intent of the Legislature, which is presumed to intend the meaning that the statute plainly expresses. When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted." *Bronson* at 223 (quotation marks omitted).

Circumstances where the Court may need to interpret the definition of "employee," exist in federal employment law statutes, which often use circular definitions for the term. For example, Title VII of the Civil Rights Act of 1964 defines an "employer" as a "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 USC 2000e(b). An "employee," in turn is defined as "*an individual employed by an employer.*" *Id.* 2000e(f) (emphasis added). The Employee Retirement Income Security Act similarly defines "employee" as "any individual employed by an employer," 29 USC 1002(6). The United States Supreme Court has observed that these definitions of employee are "completely circular and explain[] nothing." *Nationwide Mut Ins Co v Darden*, 503 US 318, 323; 112 S Ct 1344; 117 L Ed

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2d 581 (1992). In those circumstances, it is appropriate to look beyond the language of the statute to determine whether an individual is employed by a specific entity/employer.

Unlike Title VII and ERISA, the WPA provides a clear definition of "employee" rather than the circular ones that exist in federal laws. According to MCL 15.361(a), an employee is someone who meets two criteria: (1) they perform services in exchange for wages or other compensation, and (2) they do so under a contract for hire. An "employer," as outlined in MCL 15.361(b), is defined as "a person who has one or more employees." Therefore, when reviewing the WPA's definition of "employee" alongside its definition of "employer," it is clear that the Legislature intended that an employer is a "person who has 1 or more" "person[s] who perform[] a service for wages or other remuneration under a contract of hire, written or oral, express or implied." MCL 15.361(a) & (b).

Under this definition, the County was undeniably Plaintiff's employer/co-employer. Plaintiff served the County as an Assistant Prosecuting Attorney (APA), performing her duties in exchange for wages paid by the County. She also had a contract for hire through the collective bargaining agreement. In addition to the language in the WPA, the collective bargaining agreement also specifically defines the words "Employer" or "Co-Employer" to mean "the Prosecuting Attorney and the Saginaw County Board of Commissioners." Appellees' Appx 3, p 567**.** "Employee" in turn, is defined as "[a]n Assistant Prosecuting Attorney appointed by the Prosecutor as set forth by the statutes and the laws in the State of Michigan and is a licensed Attorney in the State of Michigan." *Id.* The collective bargaining agreement regulated various aspects of Plaintiff's employment, including her seniority, maximum salary, step increases, and severance pay. *Id.* at 571-572. Plaintiff's hiring paperwork is also entitled: "COUNTY OF SAGINAW NOTICE OF EMPLOYMENT" and identifies Plaintiff as being hired "in the following DEPARTMENT:

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Prosecutor's Office." *Id.* at 565. The hiring paperwork also includes her pay grade, which is governed by the collective bargaining agreement, as well as her employee status code, activity code, and effective date *Id*.

Because the County was Plaintiff's employer under the plain language of the WPA, the Court of Appeals erred when it applied the economic realities test.

b. The Court of Appeals Weighed the Factors of the Economic Realities Test Improperly: The Circumstances Surrounding Plaintiff's Employment Establish that Saginaw County was a Co-Employer.

Even if the economic realities test was applicable, the Court of Appeals misapplied the factors. The court applied the test set forth in *Chilingirian v City of Fraser*, 194 Mich App 65; 486 NW2d 347 (1992), *remanded on other grounds* 442 Mich 874 (1993) to assess whether Plaintiff was an employee of the County. In *Chilingirian*, the City of Fraser hired a private law firm as legal counsel for the city. The plaintiff was a member of the firm and handled much of the city's litigation. The city later voted to dismiss the plaintiff from all city-related work. The plaintiff filed suit against the city under the WPA, claiming that he was terminated for investigating "certain irregularities and potential violations by the city relating to a loan agreement between the city and the Michigan Department of Transportation." *Id.* at 66. The issue before the Court was whether the plaintiff was an employee of the city or an independent contractor.

The *Chilingirian* court affirmed summary disposition by the trial court but held that the trial court erred when it used the "control test," which is limited to situations involving respondeat superior and vicarious liability. *Id.* at 69. Instead, the court held that the economic realities test was the proper test to determine whether an individual was an employee or an independent contractor:

> The economic reality test looks to the totality of the circumstances surrounding the work performed. Relevant factors to consider under the test

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> 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. [*Id.,* at 69-70 (citations omitted).]

Applying the factors above, the Court held that the plaintiff was an independent contractor:

> In the present case, it is clear that plaintiff was not "in-house" counsel for the city. The city was only one of the law firm's clients, and the law firm provided legal services to a number of other clients. Plaintiff did not maintain an office on the city's premises, but instead maintained his own office and had his own support staff at his firm's location. Plaintiff was not involved in the city's pension program and the city did not pay plaintiff's salary. Instead, plaintiff would bill the city on a monthly basis at an hourly rate for the services rendered. Finally, plaintiff was not subject to the control of the city with respect to the method of his work, but only with respect to the results to be achieved. [*Id.* at 70.]

In the present case, the Court of Appeals acknowledged that factors (2) and (4) support an employer-employee relationship. Factors (1) and (3), however, weighed against it. Viewing the factors in totality, the Court concluded that the independence of the prosecutor's office weighed against finding an employee-employer relationship: "other than funding the positions, *the county has no role in hiring, retaining, discipling, 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 . . . ." *Janetsky v Cnty of Saginaw*, unpublished per curiam opinion of the Court of Appeals, issued September 28, 2023 (Docket No. 346542), 2023 WL 6322639, slip op at p 9 (Emphasis added).

The Court of Appeals erred in its analysis by focusing solely on the County's control over APAs and disregarding the APAs' economic dependence on the County. Though the Court of Appeals claimed to reject the trial court's "control test," its analysis still heavily emphasized control—specifically, the control over job duties and the authority to hire, fire, and discipline.

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When correctly applied, the economic realities test points to the conclusion that the County was Plaintiff's joint employer, a consideration the Court of Appeals failed to address.

In the context of Title VII, courts have "found that two parties can be considered joint employers and therefore both be liable under Title VII if they '"share or co-determine those matters governing the essential terms and conditions of employment."' *Butler v Drive Automotive Industries of America, Inc*, 793 F3d 404, 408 (CA 4, 2015) (citation omitted). "The basis for the finding that two companies are 'joint employers' is that 'one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer.'" *Torres–Negrón v Merck & Co*, 488 F3d 34, 40 n 6 (CA 1, 2007) quoting *Rivas v Federación de Asociaciones Pecuarias de PR*, 929 F2d 814, 820 n 17 (CA 1, 1991). The joint-employer doctrine is well established and has been previously applied by Michigan courts.[2] See generally *St Clair Cnty Intermediate Sch Dist v St Clair Cnty Educ Ass'n*, 245 Mich App 498, 515; 630 NW2d 909 (2001) ("In effect, the doctrine deems the party that did not sign the [collective bargaining] agreement as the employer under the agreement by examining whether that party has the characteristics of an employer.").

"Courts have formulated at least three tests that could be used in the joint employment context: the economic realities test, the control test, and the hybrid test. All three tests aim to determine, in a highly fact-specific way, whether an entity exercises control over an employee to the extent that it should be liable under Title VII." *Butler* at 411. Under the control test, courts

[2] The joint employment test have also been applied in discrimination cases brought under Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act, the Family Medical Leave Act (FMLA), and the Fair Labor Standards Act (FLSA). See, eg *Zheng v Liberty Apparel Co Inc*, 355 F3d 61 (CA 2, 2003); *Swallows v Barnes & Noble Book Stores*, 128 F3d 990, 992 n 2 (CA 6, 1997); *Astrowsky v First Portland Mortgage Corp*, 887 FSupp 332, 336-337 (D Me, 1995).

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"look to an entity's ability to hire, fire or discipline employees, affect their compensation and benefits, and direct and supervise their performance." *EEOC v Skanska USA Bldg, Inc*, 550 Fed Appx 253, 256 (CA 6, 2013). The economic realities test "differs from the control test in that it focuses on "degree of economic dependence of alleged employees on the business with which they are connected that indicates employee status." *Butler* at 411-412.

The four factors commonly cited by Michigan Courts under the economic realities test are those articulated above: (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. No single factor is controlling, however, and '"the list of factors is nonexclusive and other factors may be considered as each individual case requires."' *Duckworth v Cherokee Ins Co*, 333 Mich App 202, 211–212; 963 NW2d 610 (2020) quoting *Rakowski v Sarb*, 269 Mich App 619, 625; 713 NW2d 787 (2006).

As the Court of Appeals correctly noted, factors (2) and (4) weigh in favor of an employer-employee relationship. It is undisputed that the work performed by Plaintiff was integral to the County toward the accomplishment of a common goal, and it is also undisputed that the County paid Plaintiff's salary. Factors (1) and (3) are less determinative than the Court of Appeals concluded. The Court of Appeals placed too much weight on control and discipline without considering the nuances of the position held by Plaintiff. Pursuant to the collective bargaining agreement, the Prosecuting Attorney retained—among other rights—the right to hire, fire, promote, and discipline APAs. APAs, however, were still subject to the County's employee handbook and rules. The County controlled the maximum pay and implementation of step increases for APAs. It also held the exclusive right to determine the number of APAs in each classification and to adjust this number as needed. Moreover, the County retained the right "to

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determine all matters pertaining to the level of services to be provided by the Prosecutor's Office and the necessary equipment to provide such service." Appellees' Appx, pp 571. Finally, the County had the power to approve any requests for consolidation or reorganization of the prosecutor's office. Therefore, the County exercised a certain degree of control over the workers' duties and retained some authority regarding the hiring and firing of workers.

The economic realities test focuses on "degree of economic dependence of alleged employees on the business with which they are connected that indicates employee status." *Butler* at 411-412. When viewed through this lens, the totality of the factors favor finding an employer-employee relationship. Plaintiff, along with all other APAs, were economically dependent on the County. The County paid Plaintiff's salary, withheld employment taxes, and provided her with health and retirement benefits. Additionally, the County was obligated to pay severance to APAs if they were terminated without cause. The Prosecutor's Office was similarly dependent on the County, which exercised substantial control over it through its financial power. Moreover, the collective bargaining agreement explicitly expressed the parties' intent for Plaintiff and all APAs to be jointly employed by both the County and the Prosecutor's Office.

The County also exercised direct control over Plaintiff's employment. After Plaintiff was hired, all status changes in her employment were approved by the County. During the period when Plaintiff was facing retaliation, she reported the harassment and retaliation to Saginaw County's Personnel Director, Jennifer Broadfoot. Broadfoot permitted Plaintiff to leave work for the day due to emotional distress. Later that day, the Prosecutor placed Plaintiff on paid administrative leave. The Prosecutor, along with County Controller Robert Bellman, sent a letter to Plaintiff on County of Saginaw letterhead, which stated, in part: "In accordance with County Policies #322 and #326, John McColgan and the County of Saginaw, as Co-Employers, engaged an independent

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investigator . . . .” Appellees’ Appx, p 612. The letter also outlined Plaintiff's new reporting structure, stating, “you will report to Mark Gaertner, John McColgan and Christi Lopez” and further instructed Plaintiff “not to have any official interaction with Mr. Boyd.” *Id.* This evidence demonstrates that the County exercised joint control over Plaintiff’s employment.

In *Graves v Lowery*, 117 F3d 723 (CA 3, 1997), the Third Circuit held the plaintiff court clerks alleged sufficient facts to impose Title VII liability against the county as the plaintiffs’ *de facto* employer. In *Graves*, the plaintiffs were clerks, working in Magisterial District 12–1–04, which was funded by the county. *Id.* at 724. The plaintiff worked under District Justice Horace A. Lowery, who was appointed to fulfill the remaining term of a previous district justice. *Id.* Shortly after Lowery’s appointment, the plaintiffs submitted a formal complaint to the county administrator alleging sexual harassment against Lowery. *Id.* at 725. The county convened an investigation, which was chaired by the county’s chief clerk, and the county also made counseling services available to the plaintiffs. *Id.* The plaintiffs later filed a Title VII claim against the county on the basis that the county was a co-employer of the plaintiffs. *Id.* at 726.

The county filed a motion to dismiss the plaintiffs’ complaint, arguing that District Justice Lowery had the sole power to hire, fire and supervise his employees under Pennsylvania law; therefore, the county was not the plaintiffs’ employer. *Id.* The county relied on a Pennsylvania Supreme Court decision, which held:

> Since the court has the inherent right to hire, discharge and supervise, an employer-employee relationship exists by definition between the judges and their appointees. The fact that those employees are paid by the county does not alter the court's employer status. [*Id.* at 727, quoting *County of Lehigh v. Pennsylvania Labor Relations Bd*, 507 Pa 270; 489 A2d 1325, 1327 (1985).]

The district court granted the county’s motion, but the Third Circuit reversed. The Third Circuit agreed that courts are considered the employers of judicial personnel. That fact, however,

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did not preclude the possibility that "a county may share co-employer or joint employer status with the courts." *Id.* at 727. The Court applied the control test and held that the plaintiffs alleged sufficient facts that the county exercised enough control over the plaintiffs to impose employer status on the county. *Id.* at 727-729. Specifically, the clerks were funded by the county and were covered by the county's personnel policies, including sexual harassment policies. *Id.* Also, two of the clerks alleged that they were actually hired by county officials. *Id.* at 728. The Court found it significant that the clerks drafted a sexual harassment complaint pursuant to the county's policies and submitted it to a county official:

> Based on these actions, we find it reasonable to infer that the Clerks expected the County to have the authority to intervene in the situation. This expectation was solidified when the County convened an investigative panel and provided the Clerks with counseling services. Although employee expectations are not dispositive of employer status, they are relevant to our analysis. See *Armbruster v. Quinn*, 711 F.2d 1332, 1337 (6th Cir.1983) ("[T]he most important requirement is that there be sufficient indicia of an interrelationship ... to justify the belief on the part of an aggrieved employee that the [alleged co-employer] is jointly responsible for the acts of the immediate employer."). [*Id.* at 728-729.]

In *Williams v Franklin Cnty Mun Ct*, No. 2:10-CV-1155, 2011 WL 13160383, at *1 (SD Ohio, August 22, 2011), the plaintiff was employed as a Spanish interpreter in the Franklin County Municipal Court. Per Ohio statute, interpreters are appointed by the judge or judges of the municipal courts, but their salaries are paid out of the city treasury. The plaintiff filed a Title VII complaint for hostile work environment and retaliation against the City of Columbus.[3] The City filed a motion to dismiss on the basis that it was not the plaintiff's employer. The court denied the motion because plaintiff alleged facts that the City exercised sufficient control over her employment such that the City was the plaintiff's joint employer:

[3] The plaintiff also filed suit against the Municipal Court, but those claims was dismissed because there was no state statute authorizing suit against the Municipal Court.

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> The Plaintiff contends that the City and the Municipal Court jointly handled labor relations, compensation, and investigation and remediation of discrimination and retaliation at the Municipal Court. For example, Municipal Court employees were directed to the City's Employee Assistance Program for any counseling they may have needed. The Plaintiff also claims that the City Attorney, charged under the City Charter with providing legal counsel to the City and "all officers and departments thereof," was the Municipal Court's primary resource in working through the issues raised by Judge Hale's misconduct, suggesting that the City perceived itself to be potentially liable for the sexual harassment occurring at the Municipal Court. In particular, the Plaintiff alleges that the City Attorney directed the Municipal Court to quash the Columbus Dispatch story on Judge Hale's pervasive sexual harassment, cooperated with the Municipal Court administration to keep Judge Hale on the bench, and played a role in reassigning the Plaintiff to the magistrate judge's courtrooms in retaliation for her complaint against Judge Hale. [*Id.* at *4.]

Graves and *Williams* are instructive and further support the existence of an employer-employee relationship between the County and Plaintiff. Notably, *Graves* and *Williams* both applied the "control test," which focuses on the entity's control over the worker's terms and conditions of employment. Many of those same elements of control are present here. The County and Prosecutor's Office jointly handled labor negotiations, as evidence by the collective bargaining agreement. Plaintiff was bound by the terms of the collective bargaining agreement, as well as County's employee handbook and rules. Plaintiff filed a complaint with the County Controller and the County and Prosecutor jointly engaged an independent investigator pursuant to ***County Policies*** #322 and #326 (emphasis added). The County also played a role in changing Plaintiff's reporting structure. This evidence demonstrates that the County exercised joint control over Plaintiff's employment. Even when viewed in the context of the economic realities test, the only logical conclusion is that the County is Plaintiff's joint employer.

II. The Court of Appeals Erred in Dismissing Plaintiff-Appellant's Claim under Michigan's Public Policy Against All Defendants on the Basis that She Was Not Asked to Violate the Law.

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Generally, "either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason." *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 695; 316 NW2d 710 (1982). An exception to this rule has been recognized, however, "based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable." *Id.* Michigan common law recognizes that "an employer at will is not free to discharge an employee when the reason for the discharge is an intention on the part of the employer to contravene the public policy of this state." *Sventko v Kroger Co,* 69 Mich App 644, 647; 245 NW2d 151 (1976). And this Court has previously "recognized the existence of a line of authorities holding that even in an employment contract terminable at will, discharge of an employee for reasons motivated by bad faith, malice, or based on retaliation or for refusing 'to do that which public policy forbids or condemns' is actionable." *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 650; 292 NW2d 880 (1980) quoting *Prussing v General Motors Corp*, 403 Mich 366; 269 NW2d 181 (1978). The three commonly cited public policy exceptions to the at-will employment doctrine apply when:

> (1) the employee is discharged in violation of an explicit legislative statement prohibiting discharge of employees who act in accordance with a statutory right or duty, (2) the employee is discharged for the failure or refusal to violate the law in the course of employment, and (3) the employee is discharged for exercising a right conferred by a well-established legislative enactment. *Edelberg v Leco Corp*, 236 Mich App 177, 180; 599 NW2d 785 (1999).

The Court of Appeals majority rejected Plaintiff's public policy claim, concluding that Plaintiff was not asked to violate MCL 771.1(1), nor could she have. MCL 771.1(1) permits a court to place a defendant on probation in prosecutions for "felonies, misdemeanors, or ordinance violations other than murder, treason, *criminal sexual conduct in the first or third degree*, armed robbery, or major controlled substance offenses." (Emphasis added). In her concurrence, Chief Justice Clement correctly noted that Plaintiff identified an actual violation of MCL 771.1(1)

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because the defendant in the underlying case was convicted of CSC-III. Therefore, his conviction was not eligible for probation. *Janetsky v Cnty of Saginaw*, 510 Mich 1104, 1109; 982 NW2d 374 (2022) (Clement, C.J. concurring in part and dissenting in part). The Court of Appeals, however, sidestepped this fact by reasoning that the statute does not "prohibit the prosecution from *offering* a plea and sentencing agreement involving probation." Slip op. at p 11 (emphasis in original). Because the statute restricted the court, not the prosecutor, the Court concluded that Plaintiff was not asked to violate the law, nor did she refuse to violate the law when she filed a motion to correct the plea and sentencing agreement. Therefore, the Court held 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." *Id.*

The Court of Appeals erred in its analysis because it focused solely on whether Plaintiff was asked to violate the law and ignored the policy considerations implicated by Plaintiff's termination. "MCL 771.1(1) is a formal legislative expression of the state's public policy, which it presumably prefers to see obeyed." *Janetsky*, 510 Mich at 1108-1109 (Clement, C.J., concurring in part and dissenting in part). The defendant's sentence of probation in the underlying case violated the state's policy against sentencing criminals convicted of CSC III to probation. It is immaterial that Plaintiff was not asked to violate MCL 771.1(1). To the extent Plaintiff was terminated for her efforts to bring the sentence into compliance with the law; that undermines the legislative policy behind MCL 771.1(1) and could have a chilling effect on other APAs from doing the same. "[T]here is little reason to treat an employer's direct request to an employee to violate a law differently from an employee's efforts to achieve compliance with the law; in both

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circumstances, obedience to the state's public policy is at issue, and a retaliatory discharge undermines that public policy." *Id.* at 1009, n 5.

The three public policy exceptions cited above are not intended to be an exhaustive list. Other courts around the country that have similar public policy exceptions have reached the same result. In *Barron v Labor Finders of S.C.*, 393 SC 609, 614; 713 SE2d 634 (2011), the Supreme Court of South Carolina rejected the argument that the public policy exception was limited to specific situations. The court stated that the "[t]he public policy exception clearly applies in cases where either: (1) the employer requires the employee to violate the law, or (2) the reason for the employee's termination itself is a violation of criminal law." *Id.* at 614 (internal citations omitted). It is not, however, limited to these circumstances. *Id.*

In *Donevant v Town of Surfside Beach*, 414 SC 396, 415; 778 SE2d 320 (2015), aff'd 422 SC 264; 811 SE2d 744 (2018) the court held that the plaintiff stated a valid public policy claim after she was terminated for enforcing a building code: "Here, [the plaintiff] was enforcing the building code and therefore enforcing a clear mandate of public policy when she issued the stop-work order for unpermitted construction . . . ." In *Palmateer v Intl Harvester Co*, 85 Ill 2d 124; 421 NE2d 876 (1981) the Illinois Supreme Court similarly recognized a public policy tort for where the plaintiff alleged that he was terminated for reporting a suspected violation of the criminal code: "There is no public policy more basic, nothing more implicit in the concept of ordered liberty than the enforcement of a State's criminal code." *Id.* at 132 (internal citation omitted). The court stated: "The law is feeble indeed if it permits [the defendant] to take matters into its own hands by retaliating against its employees who cooperate in enforcing the law." *Id.* at 133-134. "No specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime, but public policy nevertheless favors citizen crime-fighters." *Id.* at 132.

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In *Alexander v Cleveland Clinic Found*, No. 95727, 2012 WL 1379834, at *1 (Ohio Ct App, April 19, 2012), the plaintiff was a private police officer and alleged he was terminated after he hit and dislodged a side mirror of an automobile in an attempt to stop the car while he was directing traffic. The plaintiff filed a suit for wrongful termination, alleging that he terminated in violation of public policy. Specifically, plaintiff alleged he was terminated for enforcing the law and relied on a state statute that provided "if a qualified nonprofit corporation establishes a police department, the department 'shall preserve the peace, protect persons and property, enforce the laws of the state' and 'each police officer . . . is vested with the same powers and authority as are vested in a police officer of a municipal corporation.'" *Id.* at 6 quoting R.C. 1702.80(D). The Ohio Court of Appeals agreed that the statute set for a clear public policy sufficient to justify an exception to the at-will employment doctrine and that the public policy of the "state would be would be seriously compromised (jeopardized) if employers were allowed to fire its police officers for upholding or enforcing the law . . . . Obviously, such retaliatory practices could deter or confuse even "non-traditional" police officers from performing their statutory functions." *Id.* at 7.

In *Jaeger v Res for Human Dev, Inc*, 605 SW3d 586, 589–590 (Mo Ct App, 2020), the Missouri Court of Appeals identified four public policy exceptions to at will employment.

> (1) refusing to perform an illegal act or an act contrary to a strong mandate of public policy; (2) reporting the employer or fellow employees to superiors or third parties for their violations of law or public policy; (3) *acting in a manner that public policy would encourage*; or (4) filing a claim for worker's compensation. [Emphasis added.]

Here, MCL 771.1(1) reflects a legislative policy that defendants found guilty upon verdict or *plea* of certain offices, including CSC III, not be sentenced to parole. In other words, the legislature expressly prohibits courts from sentencing a defendant convicted for CSC III to probation. The county prosecutor "is the chief law enforcement officer of the county from which

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he is elected, not the police . . . or the courts." *People v Evans*, 94 Mich App 4, 6; 287 NW2d 608 (1979). As the chief law enforcement officer, it is incumbent on the prosecuting attorney, and his assistants, to ensure that the laws are enforced and that sentences comply with the law. Plaintiff was enforcing a clear mandate of public policy through her efforts bring the sentence into compliance with the law. This is exactly the type of conduct public policy encourages, and the public policy would be compromised if employers were allowed to fire its law enforcement offices for enforcing the law. "The law is feeble indeed if it permits [the defendant] to take matters into its own hands by retaliating against its employees who cooperate in enforcing the law." *Palmateer* , 85 Ill 2d 133-134.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Amicus Curiae Michigan Association for Justice prays this Honorable Court issue an opinion holding that Saginaw County is Plaintiff's joint employer under the Whistleblower Protection Act, and that she was terminated in violation of the public policy of this state.

Respectfully submitted,

October 10, 2024

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Application for Leave to Appeal complies with the type-volume limitation pursuant to MCR 7.212(B)(3). The Application contains words of Times New Roman 12-point type. The word processing software used to prepare the brief was Word for Microsoft 365 (Official Microsoft Version 2204 Build 16.0.15128.20128).

Respectfully Submitted,

October 18, 2024

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