STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER JANETSKY,

Plaintiff-Appellee,

v

COUNTY OF SAGINAW and CHRISTOPHER BOYD,

Defendants-Appellants,

and

SAGINAW COUNTY PROSECUTOR'S OFFICE and JOHN MCCOLGAN,

Defendants.

UNPUBLISHED
September 28, 2023

No. 346542
Saginaw Circuit Court
LC No. 15-028306-CL

JENNIFER JANETSKY,

Plaintiff-Appellee,

v

COUNTY OF SAGINAW, JOHN MCCOLGAN, and CHRISTOPHER BOYD,

Defendants-Appellants,

and

SAGINAW COUNTY PROSECUTOR'S OFFICE,

Defendant.

No. 346565
Saginaw Circuit Court
LC No. 15-028306-CL

ON REMAND

Before: BOONSTRA, P.J., and GLEICHER, C.J., and M.J. KELLY, J.

PER CURIAM.

This case is back before us on remand from our Supreme Court. Based on our Supreme Court's holdings, we reverse in part and affirm in part the trial court's denial of defendant County of Saginaw's (the County), defendant Christopher Boyd's (Boyd), and defendant John McColgan's (McColgan) motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact), and remand for entry of an order granting the motion with respect to all of plaintiff's claims except her claim for retaliation under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The pertinent facts and procedural history leading to the initial appeals in this case were set forth in our previous opinion:

> Plaintiff was employed as an assistant prosecuting attorney in the Saginaw County Prosecutor's Office from January 2010 until December 2015, when she resigned. At all relevant times, McColgan was the Saginaw County Prosecuting Attorney and Boyd was the Chief Assistant Prosecutor and plaintiff's supervisor.
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> Plaintiff was assigned a sexual assault case in October 2013 (the 2013 sexual assault case). The criminal defendant was charged with multiple counts of first-degree criminal sexual conduct (CSC-I). Plaintiff alleged in her complaint that in 2014, without her knowledge or approval, Boyd reached a plea deal with the defendant that included an agreement that the defendant would plead guilty to third-degree criminal sexual conduct (CSC-III) and be sentenced to probation; the agreement was reached and entered shortly before plaintiff's wedding, but plaintiff did not discover that the deal had been made until she returned to work. When plaintiff reviewed the file after returning to the office, she believed that Boyd had scored the sentencing guidelines incorrectly, had offered probation on a CSC-III conviction in violation of MCL 771.1(1), and had violated the Crime Victims Rights Act (CVRA)[ ] by failing to properly inform the victims. Although, according to plaintiff, Boyd objected to plaintiff's characterization of the plea deal, he ultimately signed a motion drafted by plaintiff to vacate the sentencing agreement. Subsequently, the trial court granted the motion to vacate the sentencing agreement and to allow the criminal defendant to withdraw his plea.
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> Plaintiff filed suit in November 2015, alleging that after she "reported these violations of law and informed McColgan and Boyd that she refused to acquiesce to them . . . [,] Boyd created a hostile [work] environment . . . ." Specifically, plaintiff alleged in her complaint, and testified in her deposition, that she had become afraid of Boyd since her report to McColgan, and that after the 2014

> meeting, her duties had been altered and she was no longer "solely responsible for sex crimes charging." Further, plaintiff alleged that at a meeting in Boyd's office in June 2015, Boyd became enraged while discussing whether plaintiff should have kept him informed of developments in a case by text message. According to plaintiff, Boyd admitted that he was still angry about what had occurred with the 2013 sexual assault case, yelled at plaintiff, ordered her to sit down, and at one point briefly held a door to block her from leaving, causing her to fear for her physical safety. Plaintiff alleged in her complaint that in June 2015, her "doctors diagnosed her as psychiatrically disabled from working due to the hostile work environment created by Boyd and allowed to continue by McColgan" and that she was placed on medical leave, which continued "until December 15, 2015, at which time she involuntary resigned her employment . . . due to intolerable working conditions." Plaintiff's complaint alleged (1) violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*; (2) violation of public policy; (3) assault and battery; (4) intentional infliction of emotional distress; and (5) false arrest/false imprisonment.
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> Defendants sought summary disposition of plaintiffs' claims on various grounds, including governmental immunity and the absence of a genuine issue of material fact. The trial court granted summary disposition on all claims brought against the Saginaw County Prosecutor's Office[ ] and McColgan, as well as on plaintiff's claim of intentional infliction of emotional distress in its entirety. However, the court denied defendants' motion for summary disposition with respect to plaintiff's claims of assault and battery and false imprisonment, both with respect to Boyd and with respect to the vicarious liability of the County, and also denied the motion with respect to her WPA claim and her public policy claim. [*Janetsky v Saginaw Co*, unpublished per curiam opinion of the Court of Appeals, issued April 23, 2020 (Docket Nos. 346542 & 346565), unpub op at 2-3 (footnote omitted).]

In Docket No. 346542 of the consolidated appeals,[1] Boyd and the County appealed by right the portion of the trial court's November 7, 2018 order denying their motion for summary disposition under MCR 2.116(C)(7). In Docket No. 346565, the County, Boyd, and McColgan appealed by leave granted[2] the portion of the order denying their motion for summary disposition under MCR 2.116(C)(10). Plaintiff did not challenge the dismissal of the claims against the Saginaw County Prosecutor's Office, the dismissal of plaintiff's intentional tort claims against McColgan on the grounds of absolute immunity, or the dismissal of her intentional infliction of emotional distress claim in its entirety.

This Court reversed the trial court's denials of summary disposition and remanded the case for entry of an order granting summary disposition in favor of defendants on all of the remaining

[1] See *Janetsky v Saginaw Co*, unpublished order of the Court of Appeals, entered March 20, 2019 (Docket No. 346565).

[2] See *id*.

claims. *Janetsky*, unpub op at 10. This Court concluded that Boyd and the County were entitled to governmental immunity in connection with plaintiff's assault-and-battery and false-imprisonment claims, on the grounds that "a municipality may not be held vicariously liable for the intentional torts of its employees," that "Boyd's alleged conduct at the June 2015 meeting, taken as true, cannot reasonably be characterized as non-work-connected, or of a gross and reprehensible nature," *id*. at 5 (quotation marks and citation omitted), and that "plaintiff did not raise a genuine issue of material fact concerning Boyd's lack of good faith," *id*. at 6. This Court additionally concluded that the WPA wholly preempted plaintiff's public-policy wrongful-termination claim. *Id*. at 9.

This Court also held that Boyd, McColgan, and the County were entitled to summary disposition of plaintiff's WPA claim, on the grounds that, "[a]ssuming, without deciding, that plaintiff suffered an adverse employment action and that her meeting with McColgan constituted a 'report to a public body' under the WPA," plaintiff nonetheless failed to establish "a question of material fact regarding whether plaintiff had engaged in a 'protected activity' under the WPA." *Id*. at 7.

In light of its decisions, this Court declined to consider "defendants' arguments concerning the statute of limitations or the County's argument that it was not plaintiff's 'employer' under the WPA." *Id*. at 9 (footnote omitted).

Plaintiff sought leave to appeal in our Supreme Court. After hearing oral arguments on whether to grant leave, our Supreme Court, in lieu of doing so, issued a 15-page order featuring several partially-dissenting statements by various Justices. The majority reversed this Court's judgment in part, holding that this Court had "erred by concluding that: (1) defendant Christopher Boyd is entitled to immunity from tort liability because there is no genuine issue of material fact concerning whether he acted in good faith, (2) plaintiff has not established a genuine issue of material fact that she engaged in protected activity under the [WPA], by reporting actual or suspected violations of the law, and (3) the WPA provides the exclusive remedy for plaintiff's public-policy claim." *Janetsky*, ___ Mich at ___; 982 NW2d at 375 (citation omitted); slip op at 2. Our Supreme Court remanded the case to this Court "for consideration of the issues raised by defendants but not addressed by that court during its initial review." *Janetsky*, ___ Mich at ___; 982 NW2d at 375; slip op at 2. Our Supreme Court further stated that it expressed no opinion "as to whether plaintiff's public policy claim is otherwise legally or factually supported and leave that issue for further consideration on remand." *Id*. at 3.

II. THIS COURT'S UNDERSTANDING OF OUR SUPREME COURT'S REMAND ORDER

As stated, our Supreme Court has directed this Court to consider issues raised by defendants but not addressed during our initial review. We conclude that the following issues were raised by defendants and not addressed in our initial opinion: (1) whether plaintiff had demonstrated a genuine issue of material fact regarding whether Boyd committed false imprisonment, (2) whether plaintiff had demonstrated a genuine issue of material fact regarding whether Boyd committed assault and battery, (3) whether plaintiff's WPA claim was barred by the applicable statute of limitations, (4) whether the County was plaintiff's "employer" for the purposes of her WPA claim, and (5) whether plaintiff suffered an "adverse employment action" for the purposes of her WPA claim. Additionally, regarding plaintiff's public-policy wrongful

termination claim, although the parties focused their appellate arguments on the issue of whether that claim was preempted by the WPA, our Supreme Court has directed us to explore on remand the issue of whether that claim is "otherwise legally or factually supported." We will therefore also consider whether the trial court erred by denying defendants' motion for summary disposition with respect to plaintiff's public-policy claim, given our Supreme Court's determination that the WPA was not the exclusive remedy for such claims.

III. UNADDRESSED ISSUES RAISED BY DEFENDANTS

A. FALSE IMPRISONMENT

As noted, our Supreme Court concluded that "a reasonable jury could conclude that Boyd's alleged conduct toward plaintiff lacked good faith and therefore he is not entitled to governmental immunity," but declined to consider whether plaintiff had established a question of fact concerning whether Boyd committed false imprisonment. *Janetsky*, ___ Mich at ___ & n 3; 982 NW2d at 375 & n 3; slip op at 2 & n 3. We conclude that plaintiff did not establish a genuine issue of material fact and that the trial court therefore erred by denying defendants' motion for summary disposition with respect to this claim.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Ford Credit Int'l Inc*, 270 Mich App at 534. "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

"'False imprisonment is the unlawful restraint of an individual's personal liberty or freedom of locomotion.'" *Clarke v K Mart Corp*, 197 Mich App 541, 546; 495 NW2d 820 (1992),, quoting *Stowers v Wolodzko*, 386 Mich 119, 134; 191 NW2d 355 (1971). "The elements of false imprisonment are [1] an act committed with the intention of confining another, [2] the act directly or indirectly results in such confinement, and [3] the person confined is conscious of his confinement." *Moore v Detroit*, 252 Mich App 384, 387; 652 NW2d 688 (2002) (bracketed ordinals retained, quotation marks and citations omitted). For the purposes of the tort of false imprisonment in a workplace setting, "brief confinements or constraints are insufficient." *Id*. at 388.

In this case, the trial court recited the elements of false imprisonment and then denied summary disposition of that claim with the following explanation:

> [F]rom what it appears to the Court it sounds like this is an extremely brief encounter. What's being alleged by the Plaintiff it was enough to make her feel that she was falsely imprisoned and it's really a reasonableness standard. . . . [I]t has to be reasonable . . . in substance. Does it make any sense? A reasonable person would feel that way. And from what has been alleged at this point there is a genuine issue as to material fact as to all those elements.

We disagree with the trial court. Plaintiff's false-imprisonment claim was premised on plaintiff's allegation that, at a meeting held in Boyd's office in 2015, Boyd briefly held the door

to block her from leaving his office. Plaintiff testified at her deposition, however, that she did not try to open the door after Boyd closed it. Further, she testified that when she yelled back at Boyd and demanded a union representative, Boyd opened the door and yelled for the union's vice president to come to the meeting. She estimated that the confrontation at the door lasted "thirty seconds or less." Plaintiff's own testimony indicates that, although she initially stated that she was going to leave, after brief argument and obtaining the presence of a union representative, she sat down and continued the discussion. Plaintiff therefore did not establish that she was actually confined or conscious of any confinement; at best, Boyd's office door remained closed for 30 seconds before being opened. *Moore*, 252 Mich App at 387 (noting that the plaintiff's confinement or restraint caused by the defendant's conduct was "momentary and fleeting."). Additionally, "'[t]he essence of a claim of false imprisonment is that the imprisonment is false, *i.e.*, without right or authority to do so.'" *Id.*, quoting *Hess v Wolverine Lake*, 32 Mich App 601, 604; 189 NW2d 42 (1971). In the situation plaintiff described, Boyd, as plaintiff's direct supervisor, possessed at least some authority to insist that plaintiff remain at a workplace meeting in his office, at least if she wished to continue her employment. In sum, viewed in the light most favorable to plaintiff, *Walsh*, 263 Mich App at 621, plaintiff failed to establish a genuine issue of material fact regarding her alleged false imprisonment, and the trial court erred by denying defendants' motion for summary disposition regarding that claim.

B. ASSAULT AND BATTERY

As noted, our Supreme Court concluded that "a reasonable jury could conclude that Boyd's alleged conduct toward plaintiff lacked good faith and therefore he is not entitled to governmental immunity," but it declined to consider whether plaintiff had established a genuine issue of material fact concerning whether Boyd committed assault and battery. *Janetsky*, ___ Mich at ___ & n 3; 982 NW2d at 375 & n 3; slip op at 2 & n 3. We conclude that plaintiff did not establish a genuine issue of material fact and that the trial court therefore erred by denying defendants' motion for summary disposition regarding plaintiff's claim for assault and battery.

"A battery occurs when there is a wilful, harmful, or offensive touching of the plaintiff or of an object that is 'attached to [the plaintiff] and practically identified with' the plaintiff's body." *Clarke*, 197 Mich App at 549, quoting *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991). "An assault is defined as any intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact." *Espinoza*, 189 Mich App at 119. See also *People v Johnson*, 407 Mich 196, 254; 284 NW2d 718 (1979) (civil assault requires that the tortfeasor "either have intended to commit a battery or to cause in the plaintiff an apprehension of a battery" (quotation marks and citation omitted)).

In this case, plaintiff did not allege that Boyd actually touched her, but argued that her claim for battery was supported by her and Boyd's struggle over the door to his office. The record does not support plaintiff's argument—in fact, plaintiff testified at her deposition that she didn't continue to touch the door handle or attempt to open the door after Boyd closed it. Further, plaintiff has not supported her argument that a door may become "attached to" and "practically identified with" the body of a person trying to open it. *Clarke*, 197 Mich App at 549 (citation omitted). The trial court acknowledged that plaintiff had not alleged an actual touching, yet held that there was

a genuine issue of material fact regarding plaintiff's assault and battery claim based on the "allegation that [plaintiff] was holding onto the door and it was allegedly closed by Mr. Boyd and when you look at . . . the evidence presented at this point I find that there is a genuine issue as to material fact regarding that claim." To the extent the trial court's statement indicates that it found a genuine issue of material fact regarding whether a civil battery had occurred, it erred by doing so.

Further, plaintiff's allegations and testimony do not establish a genuine issue of material fact regarding whether Boyd's conduct constituted civil assault. Plaintiff did not testify that Boyd intentionally threatened to do her injury, and we conclude that the force Boyd applied to his own office door was not "force unlawfully directed toward" plaintiff's person. *Espinoza*, 189 Mich App at 119. Plaintiff described a heated confrontation and less-than-civil behavior on the part of Boyd, but, viewed in the light most favorable to her, Boyd's behavior falls short of assault as a matter of law. *Id*.; see also *Johnson*, 407 Mich at 254.

C. STATUTE OF LIMITATIONS—WPA CLAIM

The trial court rejected defendants' statute-of-limitations defense regarding plaintiff's WPA claim. We review de novo the question of whether a claim is barred by a statute of limitations. *McKiney v Clayman*, 237 Mich App 198, 201; 602 NW2d 612 (1999). We conclude that the trial court was correct in its ruling; however, the abolition of the "continuing wrongs" doctrine places a temporal limitation on plaintiff's claim for damages.

Under the WPA, "[a] person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act." MCL 15.363(1). The trial court held that this limitations period began to run on June 5, 2015, after plaintiff was placed on administrative leave, and that plaintiff filed her complaint 84 days after that date.

The record indeed confirms that plaintiff filed her WPA claim within 90 days of June 5, 2015. However, "a claim for constructive discharge for separation from employment occurring after the alleged discriminatory acts cannot serve to extend the period of limitations for discriminatory acts committed before the termination." See *Joliet v Pitoniak*, 475 Mich 30, 32; 715 NW2d 60 (2006). When, as in this case, a plaintiff's claim is "based on alleged discriminatory conduct that occurred before she resigned her position," such that the adverse employment action alleged does not coincide with the date of termination of plaintiff's employment, "the relevant date for the period of limitations is not plaintiff's last day of work, but the date of the last discriminatory incident or misrepresentation." *Id*.at 32-33, 41. In other words, because plaintiff alleges that she was constructively discharged as the result of retaliatory conduct from her employer, it is *that conduct*--not merely plaintiff's last day of work or the start of her administrative leave—that must fall within the 90-day limitations period of the WPA.

In this case, the record shows that the triggering event for plaintiff's decision to resign and eventually to litigate, or what plaintiff's attorney called "the straw that broke the camel's back creating the intolerable working conditions that resulted in her leaving her employment and never returning," was the June 1, 2015 meeting with Boyd. Because that meeting took place only four days earlier than the June 5, 2015 date the trial court referenced, adjusting the calculation for the

running of the period of limitations to count from that triggering event brings a total of 88 days, which is still within the 90 days allowed under the limitations period. For these reasons, the trial court reached the correct result in declining to dismiss Plaintiff's WPA claim on statute-of-limitations grounds. See *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997) (this Court will not reverse when the trial court reaches the correct result, regardless of the reasoning employed). However, to the extent that the trial court stated or implied that plaintiff could seek damages for conduct that occurred more than 90 days before the date she filed suit, it erred by doing so; as we stated in our initial opinion, "to the extent the trial court based its decision regarding the limitations period on the 'continuing wrongs' doctrine, this doctrine has been disavowed in Michigan." *Janetsky*, unpub op at 9 n 7, citing *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 290; 696 NW2d 646 (2005), amended on other grounds 473 Mich 1205 (2005). and *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 280; 769 NW2d 234 (2009). Plaintiff's claim for damages under the WPA is therefore limited to that flowing from conduct that took place within the limitations period.

D. SAGINAW COUNTY WAS NOT PLAINTIFF'S EMPLOYER—WPA CLAIM

The trial court declined to dismiss the County as a defendant with respect to plaintiff's WPA claim on the basis that the County was not plaintiff's employer. We conclude that this was error. This issue presents a question of law that we review de novo. See *Rapistan Corp v Michaels*, 203 Mich App 301, 306; 511 NW2d 918 (1994), citing *Cardinal Mooney High Sch v Mich High Sch Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

For purposes of the WPA, an "employee" is "a person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied," including "a person employed by the state or a political subdivision of the state except state classified civil service." MCL 15.361(a). An "employer" in turn is "a person who has 1 or more employees," including "an agent of an employer and the state or a political subdivision of the state." MCL 15.361(b).

Our state Constitution directs that counties have elected prosecutors, Const 1963, art VII, § 4, and, under MCL 49.35, assistant prosecuting attorneys are engaged, and retained, by those elected county prosecutors. Our constitution and statutes do not explicitly state, however, whether a county is therefore the "employer" of assistant prosecutors hired by the elected prosecutor.

This Court has employed the "economic-reality" test in determining whether an employer-employee relationship exists for the purposes of the WPA:

> The economic reality test looks to the totality of the circumstances surrounding the work performed. Relevant factors to consider under the test include: (1) control of a worker's duties; (2) payment of wages; (3) right to hire, fire, and discipline; and (4) performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal. All the factors are viewed as a whole and no single factor is controlling. [*Chilingirian v City of Fraser*, 194 Mich App 65, 69-70; 486 NW2d 347 (1992), remanded on other grounds 442 Mich 874 (1993) (citations omitted).]

In this case, the trial court held that there was at least a question of material fact, under the economic-reality test, whether the County was plaintiff's employer under the WPA. We disagree. Although factors (2) and (4) favor finding an employer-employee relationship, factors (1) and (3) weigh against it. Further, when the factors are viewed in totality, it is clear that a county 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, 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, and therefore that the trial Court should have granted summary disposition in favor of the County on plaintiff's WPA claim.

E. ADVERSE EMPLOYMENT ACTION—WPA CLAIM

As noted, our Supreme Court concluded that this Court erred by holding that plaintiff had not established a genuine issue of material fact regarding whether she had reported actual or suspected violations of the law and thus engaged in "protected activity" under the WPA; our Supreme Court concluded that "there is a question of fact as to whether plaintiff reported suspected violations of the law under MCL 771.1 and MCL 780.756(3)." In our previous opinion, this Court assumed, without deciding, that plaintiff had suffered an adverse employment action as retaliation for her protected activity. We now conclude, in light of our Supreme Court's holding, that the trial court correctly permitted plaintiff's WPA claim to proceed, albeit with the limitation on damages we discussed in Section III(C) of this opinion.

The WPA prohibits workplace retaliation against an employee who "reports or is about to report . . . a violation or a suspected violation of a law or regulation or rule . . . to a public body, unless the employee knows that the report is false . . . ." MCL 15.362. A plaintiff advancing a WPA claim "must show that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action." *Pace v Edel-Harrelson*, 499 Mich 1, 6; 878 NW2d 784, 787 (2016) (quotation marks and citation omitted).

Defendants argue that Boyd's conduct at the June 2015 meeting could not, as a matter of law, constitute an adverse employment action because plaintiff's duties were not changed as a result of that matter, nor was her compensation reduced; further, defendants essentially argue that plaintiff was treated no more harshly than other employees. We disagree that, as a matter of law, such conduct could never constitute an adverse employment action. The record shows that, immediately after the meeting, plaintiff complained to McColgan and Pat Duggan, a fellow assistant prosecutor and also a union grievance officer, as well as union representatives, concerning Boyd's conduct towards her; plaintiff was placed on paid administrative leave and ultimately resigned in December, citing Boyd's alleged retaliation, harassment, and assault as the reason for her resignation.

The WPA provides that an employer "shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment" based on the employee's engagement in protected activity. MCL 15.362. A reasonable jury could find that plaintiff's terms, conditions, or privileges of

employment were threatened by Boyd at the June 2015 meeting, or that plaintiff was otherwise discriminated against; further, plaintiff alleged that Boyd admitted that he was "mad" about the case in which plaintiff had reported suspected violations of the law, saying "you embarrassed me." We therefore conclude that plaintiff established a genuine issue of material fact regarding the elements of her WPA claim, and that the trial court did not err by denying defendants' motion for summary disposition regarding this claim.

IV. PLAINTIFF'S PUBLIC-POLICY WRONGFUL TERMINATION CLAIM

As stated, our Supreme Court held that this Court erred by holding that the WPA provided the exclusive remedy for plaintiff's public-policy wrongful termination claim. Our Supreme Court instructed this Court on remand to "assess whether plaintiff's public-policy claim is legally and factually supported." Id., ___ Mich at ___ n 1; 982 NW2d at 375 n 1; slip op at 2 n 1. We now do so, and conclude that it is not; the trial court therefore erred by denying defendants' motion for summary disposition regarding this claim.

In *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982), our Supreme Court held as follows:

> In general, in the absence of a contractual basis for holding otherwise, either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason. However, an exception has been recognized to that rule, based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable. Most often these proscriptions are found in explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty.
>
> The courts have also occasionally found sufficient legislative expression of policy to imply a cause of action for wrongful termination even in the absence of an explicit prohibition on retaliatory discharges. Such a cause of action has been found to be implied where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment. [Citations omitted.]

In this case, our Supreme Court held that "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." We therefore analyze plaintiff's claim as based on that alleged refusal.

Specifically, plaintiff alleges that, while she was engaged in personal business, Boyd offered a defendant an agreement for a sentence of probation with jail time in exchange for pleading guilty to CSC-III, that MCL 771.1(1) did not authorize the sentence offered, and also that the victims had not been properly kept up to date in connection with the plea and sentencing agreement as required by the CVRA. However, the record shows that, despite plaintiff's concern that the victims had not been kept up to date, she was able to meet with the victims, provide new information, and receive additional feedback upon her return to the office. Because this took place before plaintiff's attempt to set aside the plea and sentencing agreement at issue, it appears that

plaintiff's attempts to do so were based on her belief that the sentence violated MCL 771.1(1), not based on any violation of the CVRA.

We conclude that *plaintiff* could not have been asked to violate, nor could she have violated, MCL 771.1(1). MCL 771.1(1) permits a trial 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." It does not, by its plain language, prohibit the prosecution from *offering* a plea and sentencing agreement involving probation. The Legislature is presumed to intend the meaning it plainly expressed. *People v Matoon*, 271 Mich App 275, 278; 721 NW2d 269 (2006). Had the Legislature wished to prohibit the prosecution from offering or agreeing to a sentence that turns out to be invalid under MCL 771.1(1), it could have done so; instead, it placed the burden on the trial court to avoid violating MCL 771.1 by imposing an invalid sentence of probation. Therefore, we conclude that plaintiff was not asked to violate the law, and that her motion to correct the plea and sentencing agreement based on its invalidity under MCL 771.1(1) was not a "refusal to violate the law." We conclude that plaintiff's attempt to bring the plea and sentencing agreement into compliance with MCL 771.1(1) does not place it within the limited class of legislative expressions of public policy that have been found to imply a cause of action for wrongful termination. See *Suchodolski*, 412 Mich at 694-695 (noting that courts have "*occasionally* found sufficient legislative expression of policy to imply a cause of action for wrongful termination even in the absence of an explicit prohibition on retaliatory discharges") (emphasis added). The trial court therefore erred by allowing plaintiff's public-policy claim to survive summary disposition.

V. CONCLUSION

Our Supreme Court left untouched our holding that the County was entitled to governmental immunity, but, as stated, reversed this Court with regard to Boyd's entitlement to governmental immunity. *Janetsky*, ___ Mich at ___; 982 NW2d at 375 (citation omitted); slip op at 2. In light of our review of the issues raised by defendants but not previously decided by this Court, and our review of plaintiff's public-policy wrongful termination claim, in Docket No. 346565, we reverse in part and affirm in part the trial court's denial of defendants' motion for summary disposition under MCR 2.116(C)(10), and remand for entry of an order, otherwise consistent with this opinion, granting the motion with respect to all of plaintiff's claims except her claim for retaliation under the WPA. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Michael J. Kelly