State of Michigan
In the Supreme Court

Appeal from the Court of Appeals
Jansen, J., Whitbeck, P.J., Frank Kelly, J.

RICHARD L. WURTZ

Plaintiff-**Appellee**,

v.

BEECHER METROPOLITAN DISTRICT, a Michigan municipality, LEO McCLAIN, JACQUELIN CORLEW and SHEILA THORN, Jointly and Severally,

Defendants-**Appellants**.

Supreme Court Docket No. **146157**

Court of Appeals No. 301752

Genesee County Case No: 10-92901-CL
Hon. Judith A. Fullerton

BRIEF ON APPEAL OF DEFENDANTS-APPELLANTS BEECHER METROPOLITAN DISTRICT, LEO MCCLAIN, JACQUELIN CORLEW, AND SHEILA THORN

ORAL ARGUMENT REQUESTED

Respectfully submitted by:

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STATEMENT OF JURISDICTION

This Court has jurisdiction under MCR 7.301(A)(2) and MCR 7.302(H)(2) based upon leave granted after decision by the Court of Appeals. This Court granted leave by order dated June 5, 2013 [Apx 200a, 06/05/13 Order].

Defendants-Appellants Beecher Metropolitan District, Leo McClain, Jacquelin Corlew and Sheila Thorn appeal from the October 2, 2012 published Court of Appeals Opinion [Apx 183a, 10/02/12 Opinion], which reversed and remanded the Genesee County Circuit Court's December 6, 2010 order granting summary disposition under MCR 2.116(C)(10) in Defendants-Appellants' favor [Apx 181a, 12/06/10 Order].

STATEMENT OF QUESTIONS PRESENTED

I. Plaintiff-Appellee Wurtz admits that, despite his purported whistleblowing activity, he worked until the expiration of his written ten-year employment contract with the Defendant-Appellant Beecher Metropolitan District (BMD), he received all compensation and benefits to which he was entitled under that contract, and the contract did not obligate the Defendants-Appellants to renew or extend his employment. Where the Defendants-Appellants declined to act to renew or extend Plaintiff-Appellee Wurtz's contract beyond its ten-year term, did Wurtz sustain an adverse employment action under the Whistleblowers' Protection Act?

Plaintiff-Appellee says: Yes.

Defendants-Appellants say: No.

Trial Court said: No.

Court of Appeals said:

Presiding Judge Whitbeck:	Question of fact; remand for further discovery.
Judge Jansen:	Question of fact; remand for further discovery.
Judge Frank Kelly:	No.

II. Was there a fair likelihood that additional discovery would have yielded evidence creating a genuine issue of material fact as to whether Plaintiff-Appellee Wurtz sustained an adverse employment action under the Whistleblowers' Protection Act where there was no genuine issue of material fact that, despite his purported whistleblowing activity, Wurtz worked until the expiration of his written ten-year employment contract, he received all compensation and benefits to which he was entitled under that contract, the Defendants-Appellants declined to act to renew or extend Wurtz's contract beyond its ten-year term, and the Defendants-Appellants were not obligated to renew or extend Wurtz's employment contract beyond its ten-year term?

Plaintiff-Appellee says: Yes.

Defendants-Appellants say: No.

Trial Court said: No.

Court of Appeals said:

Presiding Judge Whitbeck:	Yes; remand for further discovery.
Judge Jansen:	Yes; remand for further discovery.
Judge Frank Kelly:	No.

STATEMENT OF FACTS AND PROCEEDINGS

A. Case Overview.

Defendants-Appellants are the Beecher Metropolitan District (BMD) and three out of five of its former elected board members, Jacquelin Corlew, Leo McClain, and Sheila Thorn. Plaintiff-Appellee Richard Wurtz was the BMD's attorney for a number of years, and then later served as the BMD's administrator under a ten-year written employment contract from February 1, 2000 to February 1, 2010. [Apx 122a, Plf Dep, p5]. Wurtz asserts that, prior to the expiration of his ten-year employment contract with the BMD, he engaged in protected whistleblowing activity, and that the BMD's non-renewal or non-extension of his employment contract was retaliatory and violated Michigan's Whistleblowers' Protection Act. Wurtz also asserts that because discovery was not complete, Defendants-Appellants' motion for summary disposition in the trial court was premature.

The trial court granted summary disposition in Defendants-Appellants' favor under MCR 2.116(C)(10), agreeing with Defendants-Appellants' argument that, despite Wurtz's purported whistleblowing activity, Defendants-Appellants did not take any adverse employment action against him where it was undisputed that the BMD fully satisfied its obligations to Wurtz under the terms of his written ten-year employment contract, the contract expired on its own terms, and having no obligation to do so, the Defendants-Appellants declined to act to renew or extend Wurtz's contract. [Apx 177a, 12/06/10 motion trans, p21].

Wurtz appealed and, in a 2-1 published opinion, the Court of Appeals reversed the trial court and remanded the case for further discovery. In doing so, the Court of Appeals relied on federal civil rights case law to conclude that the failure to renew an employment contract can be an adverse employment action under the Michigan Whistleblowers' Protection Act (WPA), and further opined

that Wurtz was not given sufficient opportunity to develop a record regarding this question where summary disposition was granted prior to the close of discovery. [Apx 183a, 10/02/12 Opinion].

Defendants-Appellants appealed and, on June 5, 2013, this Court issued an Order granting leave to appeal, and for the parties to address:

> (1) whether the plaintiff suffered an adverse employment action under the Whistleblower Protection Act (WPA), MCL 15.361 *et seq.*, when the defendants declined to renew or extend the plaintiff's employment contract, which did not contain a renewal clause beyond the expiration of its ten-year term; and (2) whether there was a fair likelihood that additional discovery would have produced evidence creating a genuine issue of material fact, MCR 2.116(C)(10), if the defendants' motion for summary disposition had not been granted prior to the completion of discovery. [Apx 200a, 06/05/13 Order].

B. Underlying Facts.

Plaintiff-Appellee Richard Wurtz is an attorney with a practice in Grand Blanc. He served as the BMD's attorney from 1985 to 2000. Thereafter, he served as the BMD's administrator under a written contract of employment from February 1, 2000 to February 1, 2010. [Apx 122a-123a, Plf Dep, pp5-6; Apx 9a, contract]. Wurtz would work part-time at the BMD, from approximately 8am to noon each work day, and then work as an attorney in private practice in the afternoon. [Apx 125a-126a, Plf Dep, pp17-18]. For his work at the BMD, he was paid about $79,000 in gross salary, plus benefits. [Apx 123a-124a, Plf Dep, pp8-10].

Regarding his written employment contract, Wurtz drafted it himself, and negotiated it with the BMD during the time he was still serving as the BMD's attorney. [Apx 123a, Plf Dep, pp6-7]. Wurtz admits that his contract did not provide for his employment beyond February 1, 2010; that he was employed for the full term of his contract; and that he received his full salary and benefits during the full term of his contact. [Apx 123a-124a, and 129a, Plf Dep, pp7-11, 32-33; Apx 9a, contract].

The BMD is a unit of local government that operates water and sewer utilities in an area of Genesee County. Jacquelin Corlew, Leo McClain, and Sheila Thorn served on the BMD's governing board during the time Wurtz served as the BMD's administrator. The BMD has twelve (12) employees, and five (5) elected board members. [Apx 125a, Plf Dep, pp14-17]. There is only one (1) administrator. [Apx 125a, Plf Dep, p14]. From mid-2008 through February 2010, Wurtz, as the administrator, was the only BMD employee that was not union. [Apx 125a, Plf Dep, pp14-17].

The BMD operated at a loss every year that Wurtz was its administrator. Wurtz attributes this to a costly footing drain disconnect program, and because the BMD went for 15 years without raising the services rates for its customers. [Apx126a, Plf Dep, pp18-21; Apx 12a, BMD's operating loss/net loss sheet for the years 2002-2007]. Further, for 11 of the 12 employees of the BMD (as stated above, only the administrator is non-union), there are three labor unions which the BMD must negotiate with (one union for the three clerical employees, one union for the five maintenance operators, and one union for the three management positions). [Apx 125a, Plf Dep, pp14-17]. Wurtz used to do the collective bargaining for the BMD before labor attorney, Hiram Grossman, was hired by the BMD in 2008. [Id.] At least one BMD board member, Sheila Thorn, openly criticized the union contracts Wurtz had negotiated as being too generous. [Apx 126a, Plf Dep, p21].

Wurtz admits that he never got along with Sheila Thorn ever since they first met in early 2006, which was before she was a BMD board member. Wurtz felt that Sheila Thorn disliked him and wanted him gone as the BMD's administrator from day one. [Apx 132a-133a, Plf Dep, pp44-46].

Wurtz states that he initially got along with BMD board member Leo McClain, but that they had a falling out over an employee with progressive discipline who was terminated in early 2004, and since that falling out, Wurtz doubted that Leo McClain wanted him to remain as the BMD's

administrator. [Apx 133a, Plf Dep, pp47-49].

Similarly, Wurtz states that he used to receive compliments on his job from BMD board member Jacquelin Corlew, but in 2007, they had a personal disagreement and she had not complimented him since then. [Apx 133a-134a, Plf Dep, pp49-50].

Perhaps not surprisingly, none of these three BMD board members voted in favor of extending or renewing Wurtz's employment contract beyond its ten-year term. [Apx140a, Plf Dep, pp74-77; Apx 44a, 03/11/09 minutes].

May 2008 - Wurtz raises an alleged Open Meetings Act violation: At a BMD board meeting on May 14, 2008, Wurtz complained that he believed the three individual Defendant-Appellant board members, Corlew, McClain, and Thorn, violated the Open Meetings Act (OMA) by meeting with labor attorney Hiram Grossman outside of a public meeting to discuss his retainer agreement. [Apx 134a-136a, Plf Dep, pp50-61; Apx 13a, 05/14/08 minutes]. Wurtz did not, however, recommend that the BMD board members perform a re-enactment at the next public meeting to rectify any potential OMA violation, as is permitted by MCL 15.270(5). [Apx 134a-135a, Plf Dep, pp52-57; Apx 137a, Plf Dep, pp64-65]. Instead, Wurtz wrote a May 22, 2008 letter about the alleged OMA violation to the County Prosecutor, the County Sheriff, and the Mt. Morris Police Chief. He notified the other two BMD board members, Mrs. McFadden and Mr. Miller, that he was sending the letter, and they signed it too. [Apx 135a, Plf Dep, pp54-57; Apx 17a, 05/22/08 letter]. The Prosecutor declined to prosecute, stating that there were many ways to correct the alleged OMA violation and he did not believe it to be criminally actionable. [Apx 19a, 06/05/08 response]. Neither the Sheriff nor the Mt. Morris Police Chief acted on Wurtz's letter either. [Apx 137a-138a, Plf Dep, pp63-66].

July 2008 - Wurtz alleges discrimination and demands benefits increase: In July 2008, Wurtz told the BMD board members that he had not received a benefits increase in two or three years and that if an increase was given to others but not him, he would consider it discrimination for his May 2008 OMA complaint letters. On July 9, 2008, the Board voted in favor of adjusting his benefits similar to others after the completion of union bargaining with the clerical and supervisor's units. [Apx 137a, Plf Dep, pp62-63; Apx 20a, 07/01/08 memo re: administrator report; and Apx 24a-25a, 07/09/08 minutes].

August 2008 - Wurtz releases the BMD Board from alleged discrimination: After the Board passed the July 9, 2008 resolution to increase his benefits, Wurtz stated at the August 13, 2008 public meeting that he was releasing the Board from any obligations over that resolution. Wurtz stated he felt uncomfortable that he had sounded threatening toward the Board before, and "it was an olive branch." [Apx 138a, Plf Dep, pp66-68; Apx 27a, 08/13/08 minutes].

January/February 2009 - Wurtz proposes new employment contract: In September 2008, the BMD had an estimated $50,000 fiscal year loss, which was up from a $35,000 loss the prior year. [Apx 30a, 09/17/08 minutes]. Then, at the January 14, 2009 public meeting, the Plante Moran accountants told the BMD that it needed to increase revenue or decrease expenses (or both). [Apx 34a, 01/14/09 minutes]. Wurtz offered to reduce his salary if the Board would extend his employment contract, but stated that he would not pursue the issue further if the Board did not feel the idea was worthy. [Apx 36a, 01/14/09 minutes; Apx 138a, Plf Dep, pp68-69]. Thereafter, on January 30, 2009, Wurtz gave the Board a written proposal, which also happened to mention the sizable donations he had made toward the BMD in the past. [Apx 138a-140a, Plf Dep, pp69-74; Apx 37a-39a, 01/30/09 memo re: proposed amendment to administrator's employment contract].

At the next public meeting on February 11, 2009, the Board permitted Wurtz to present his proposal for consideration with a proposed amended contract. [Apx 140a, Plf Dep, pp74-75; Apx 41a, 02/11/09 minutes].

March 2009 - The BMD Board declines to take action to renew or extend Wurtz's contract: At the March 11, 2009 public meeting, BMD board member Mr. Miller moved to have Wurtz draw up a new employment agreement with labor attorney Hiram Grossman. That motion was defeated by a 3 to 2 vote, with the three individual Defendant-Appellant board members (McClain, Corlew, Thorn) voting against it. [Apx 47a, 03/11/09 minutes]. Wurtz admits that, as of March 11, 2009, the Board voted not to take action to extend his employment contract, testifying that:

(Exhibit 15 [the 03/11/09 minutes] marked.)

Q. And then at the next meeting, I'm marking as Exhibit 15 the March 11, 2009 meeting, at that time if I call your attention to the second page, Sheila Thorn indicated that she had received a phone call from you suggesting that you meet with her to discuss your employment contract. That's what she said; right?

A. That may have been in furtherance of my memo where I said to contact me to let me know what your opinions are.

Q. And she said, quote, "Mrs. Thorn told Mr. Wurtz she did not want him calling her to meet in a private setting. Mrs. Thorn said all board members should be involved." End of quote.

Do you remember that?

A. Not specifically but that's what the minutes say.

Q. That would certainly be in keeping with your understanding of the Open Meetings Act; right?

A. My understanding of the Open Meetings Act is to make a decision. And talking to individual board members about what their feelings are before I waste time preparing any documents about retiring or not retiring does not constitute any other thing other than just having normal conversation with board members. There's no preclusion in my opinion that an administrator can't speak to individual board members about relevant topis except at a board meeting. That is ridiculous.

Q. You had suggested to the board that your contract be extended beyond February 1st, 2010, and at this meeting of July 11, 2009, on the last page, **a motion was made by Mr. Miller to have Mr. Wurtz draw up an employment agreement with Attorney Hiram Grossman, the motion was defeated three-to-two; right**?

A. **Yes.**

Q. **So the board at that time voted not to extend your employment contract; correct?**

A. **Correct.** [Apx 140a, Plf Dep, pp75-76 (emphasis added); Apx 47a, 03/11/09 minutes].

May 2009 - Wurtz alleges that the BMD Board's travel reimbursement is improper: In early May 2009, for the first time in over 20 years working for the BMD, Wurtz mentioned that he had concerns about the Board's reimbursement for travel expenses to the American Water Works Association (AWWA) conference. He circulated a May 8, 2009 memo and mentioned it in his May 13, 2009 Administrator's report, and at the Board meeting. [Apx 48a, 05/08/09 memo; Apx 49a, 05/13/09 report; Apx 56a, 05/13/09 minutes; Apx 140a, Plf Dep, pp76-77]. The Board had requested advance travel expenses to finance their upcoming trip to the AWWA conference in California. This request was no different than those in the previous eight years that Wurtz had been the administrator. This time, however, Wurtz took issue with it, citing to economic reasons. [Apx 140a-141a, Plf Dep, pp76-79; Apx 127a-129a, Plf Dep, pp23-32; Apx 49a, 05/13/09 report; Apx 56a, 05/13/09 minutes].

Wurtz acknowledged that this travel policy had been in effect during his entire tenure as the BMD's administrator, allowing for the Board to attend one in-state and one out-of-state conference per year. [Apx 127a, Plf Dep, pp23-25; Apx 50a, BMD travel policy]. The BMD board members would submit their estimated mileage expenses, along with hotel expenses, to Wurtz as the BMD's administrator. The BMD board members were not to drive more than 400 miles a day, and if a board

member wound up flying instead of driving, he/she would still receive the same travel reimbursement amount as if he/she had driven. [Apx 50a-52a, BMD travel policy; Apx 128a, Plf Dep, pp27-29]. Wurtz did not request the BMD board members to submit proof as to whether they had actually flown or drove to the AWWA conference, and he claimed to have no idea how the five (5) board members got to the AWWA conference each year before 2009. [Apx 128a, Plf Dep, p29].

Wurtz admitted that he also attended out-of-state conferences in 2000 and 2001, at Washington, DC, and Denver, CO, respectively. He received a per diem payment amount above his out-of-pocket expenses, which he asserted was to compensate him from time away from his law practice and to see to the Board's needs during the trip. [Apx 127a-128a, Plf Dep, pp25-26]. Wurtz acknowledged that he flew to the Denver, CO conference. [Apx 128a, Plf Dep, p27].

At the May 13, 2009 public meeting, Wurtz requested that the Board vote on the reimbursement procedure for that year because their decision would obligate him to issue the requested travel checks. The Board voted, 4 to 0 (Defendant Sheila Thorn is noted as absent from that meeting), that all entertainment activities were to be deducted from their per diem check for the upcoming AWWA conference, and that all board members were to receive the same per diem amount regardless of their choice of travel (flying vs driving), as had been done for many previous years. [Apx 127a, Plf Dep, pp23-24; Apx 128a-129a, Plf Dep, pp 29-30; Apx 140a-142a, Plf Dep, pp77-84; Apx 53a, 56a-57a, 05/13/09 minutes]. Per diem vouchers were to be approved and signed by Leo McClain before Wurtz issued and signed the checks. [Apx 142a, Plf Dep, pp82-83]. Wurtz testified that although he told the Board that he felt the BMD travel policy was inappropriate, he did not know whether it was considered illegal. [Apx 142a, Plf Dep, pp83-84].

June 2009 - The BMD Board attends the AWWA conference: The BMD board members

attended the AWWA conference in California in mid-June 2009. Afterward, Wurtz noticed that only Leo McClain had driven there. Wurtz saw only one parking charge for the five board members on the credit card receipt, and noted a charge for a dinner on the last night that he thought was excessive. Nevertheless, he issued payment for the bill. [Apx 143a-145a, Plf Dep, pp89-94].

July 2009 - Wurtz first seeks to be let out of his contract, then later seeks continued employment: In July 2009, Wurtz asked the Board to hold a "special meeting to discuss terms under which the Board and he can mutually discontinue their relationship." He sought to depart early and be bought out of his current contract. [Apx 142a, Plf Dep, pp84-85; Apx 58a-59a, 07/02/09 report; and Apx 60a-64a, 07/08/09 minutes]. At the July 8, 2009 public meeting, the Board voted 4 to 0 (Sheila Thorn is noted to have left the meeting at some time prior to the vote) to have a special meeting to discuss Wurtz's suggestion. [Apx 63a-64a, 07/08/09 minutes].

A closed session special meeting was held on July 15, 2009, but when the BMD's labor attorney, Hiram Grossman, showed up for the special meeting, Wurtz refused to participate, claiming that he had a "gentlemen's agreement" with the Board to have a special meeting only with them, without the presence of the BMD's labor attorney. [Apx 143a, Plf Dep, pp86-88; Apx 65a, 07/15/09 minutes). Wurtz stated that he was frustrated, but that thereafter, he wanted to pursue continued employment with the BMD and expressed a desire to do so. [Apx 142a-143a, Plf Dep, pp84-85, 88-89].

In that same month (July 2009), Wurtz asked the BMD's office manager to gather the Board's travel documents, so he could give them to the Sheriff's Department. [Apx 147a-148a, Plf Dep, pp103-106].

August 2009 - Wurtz contacts the Flint Journal and the Sheriff's Department: In

addition to contacting the Sheriff's Department, in August 2009 also Wurtz contacted the Flint Journal about his concerns with the Board's travel expenses. Wurtz stated that he did not go to the Board about it because he felt he would be retaliated against. [Apx 144a-145a, Plf Dep, pp90-94]. Wurtz has admitted, however, that he had never been retaliated against in the past, such as after his 2008 OMA complaint letter, stating:

> Q. Why didn't you go to the board and say you know what, guys, I got some questions about this bill? Whey did you go to the newspaper instead of the board?
> A. Because I wanted some quick action.
>
> Q. Whey didn't you think you would get it from the board?
> A. I think if you look at the relationship in the past, I was concerned for my employment, I was concerned that they would retaliate against me, that they would do something that would be against my interests as an employee.
>
> Q. **They hadn't retaliated against you in the past, had they?**
> A. **No.**
>
> Q. **Even though you had written a letter to the prosecutor accusing them of an Open Meetings Act violation, they didn't do anything in retaliation up to that point in time, did they**?
> A. **No**, partially because I admonished them that I wouldn't take it if they did. [Apx 145a, Plf Dep, p94 (emphasis added)].

At the next public meeting on August 12, 2009, a guest questioned the BMD's travel expense policy. [Apx 67a-68a, 08/12/09 minutes]. And at the August 26, 2009 public meeting, a guest named Mrs. Cooper stated that she had written to the Attorney General asking for an investigation about the BMD's travel expense policy. [Apx 72a-83a, 08/26/09 minutes]. Incidentally, Mrs. Cooper had also questioned the BMD's travel expense policy at the July 8, 2009 meeting [Apx 61a-63a, 07/08/09 minutes). Wurtz believes that Mrs. Cooper saw an article in the Flint Journal about the BMD's travel expense policy and reacted to it. [Apx 145a, Plf Dep, pp94-95]. Thereafter, Wurtz requested a

special meeting of the Board to again discuss the travel expense policy, although all of the travel monies had been paid out by that time. Wurtz did not, however, notify the Board that he had contacted the Sheriff's Department about the travel expense policy. [Apx 143a-144a, Plf Dep, pp89-92; Apx 72a-83a, 08/26/09 minutes].

September 2009 - Sheriff's Department investigation: On or about the morning of September 9, 2009, the Sheriff's Department arrived at the BMD offices and confiscated check registers, board minutes, bank statements, and other documents. A Flint Journal reporter also showed up. When Wurtz arrived at his office at the BMD, he met with the Sheriff's Department detectives and they asked him to point out where certain documents were kept. [Apx 145a, Plf Dep, pp96-98].

On September 25, 2009, the Board wanted to hold a special meeting to discuss the Sheriff's Department investigation, but Wurtz told them it would violate the Open Meetings Act, so no special meeting was held. [Apx 145a, Plf Dep, pp96-97; Apx 84a, 09/25/09 executive session notice; Apx 85a, 09/25/09 executive session agenda].

Wurtz has testified that, during a closed session at the September 30, 2009 special public meeting[1], the Board attempted to discuss Wurtz's desire to have his employment contract extended, but that Wurtz objected because he alleged it was not properly noticed. [Apx 146a-147a, Plf Dep, pp98-102; Apx 86a, 09/30/09 special meeting agenda]. Wurtz stated during the open session of the September 30, 2009 special public meeting that he would consider *any* action taken regarding

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[1]Wurtz attached the 09/30/09 closed session minutes in his trial court response brief, to which Defendants objected. [Apx 165a, 12/06/10 trns, p9]. Defendants-Appellants continue to object to the disclosure of, and attachment of those minutes, under MCL 15.267(2), which provides that closed session minutes "shall be retained by the clerk of the public body, are not available to the public, and shall only be disclosed if required by a civil action filed under section 10, 11, or 13 [of the Open Meetings Act]." This civil action was not filed under the OMA, but under the Whistleblowers' Protection Act.

extending his contract as retaliation for the recently initiated criminal investigation. Moreover, Wurtz stated that if the Board did *not* extend his contract, he would consider it retaliation. [Apx 87a-91a, 09/30/09 open session minutes]. Wurtz testified as follows in this regard:

Q. Now on page four of this September 30, 2009 minutes you indicated to the board that if any action is taken regarding renewing or not extending your contract, you will consider that retaliation and consider it whistleblowing; right?
A. Where are you?

Q. Right there.
A. Yes, having sat through the executive session, heard them talking about renewing or not renewing my contract, I considered that to be retaliation for what had happened with the criminal investigation and me telling them about their attempted meeting of talking about the criminal investigation and how to respond to it.

Q. So you think that if they didn't extend your contract that would be retaliation, is that your position?
A. Yes.

* * *

Q. What do you mean if any action is taken you will consider it whistleblowing?
A. I was at that point concerned that not keeping me as an employee was going to be retaliation for me cooperating with the criminal investigation. I did not request that they talk about considering extending or not renewing my contract when they went into that executive session. I could only conclude that they brought that up in the context of them having just been raided and news articles about their travel.

Q. **Your contract was due to expire February 1, 2010 and the board took no action to extend it; correct?**
A. **Correct.**

Q. **In fact at the meeting of November 11, 2009, the board voted not to extend your contract; correct?**
A. **Yes.** [Apx 146a-147a, Plf Dep, pp101-103 (emphasis added); see also, Apx 90a, 09/30/09 minutes; Apx 95a-96a, 11/11/09 minutes].

Wurtz took this position even though, as noted above, he admitted that on March 11, 2009, the Board had already once before voted *not* to extend his contract. [Apx 140a, Plf Dep, pp75-76;

Apx 47a, 03/11/09 minutes].

November 11, 2009 - Mrs. Odom's sewer back up issue; and the BMD Board reiterates its decision not to renew Wurtz's contract and to start the process to find a new administrator: At the November 11, 2009 public meeting, a resident of the BMD, Mrs. Odom, complained that Wurtz had lied to her about the BMD paying for some of her sewer back up cleaning expenses. [Apx 92a-94a, 11/11/09 minutes]. Mrs. Odom had previously appeared before the board on May 13, 2009 and asked the Board or BMD's insurer to help pay for the damages incurred after her sewer backed up. [See, Apx 53a-54a, 05/13/09 minutes]. At the May 13, 2009 public meeting, Wurtz had advised the Board that it was not obligated to cover Mrs. Odom's damages, but he wanted the Board to consider offering her a sum of money anyway for "moral liability" because he felt that it was the right thing to do. [Apx 54a, 05/13/09 minutes; Apx 141a-142a, Plf Dep, pp80-82].

At the July 8, 2009 public meeting, however, Wurtz had backtracked, telling the Board that he had not heard from Mrs. Odom, and that "they should keep in mind if the liability insurance finds out the District is covering the customer's claims on the side, they are liable to deny the District insurance." [Apx 63a, 07/08/09 minutes; Apx 141a-142a, Plf Dep, pp80-82].

Ultimately, after Mrs. Odom complained about the way Wurtz handled her issue at the November 11, 2009 public meeting, the Board voted unanimously to table the claim until they had more information on it, and for a special meeting could be had to discuss it further. [Apx 92a-94a, 11/11/09 minutes].

At the November 11, 2009 public meeting, the Board also voted, consistent with its previous vote in March 11, 2009, not to extend Wurtz's contract, and to instead start the process to find a new administrator. [Apx 95a-97a, 11/11/09 minutes; Apx 47a, 03/11/09 minutes; Apx 140a, Plf Dep,

pp75-76].

November 2009 - Wurtz's counsel's letter: On November 23, 2009, Wurtz's attorney, Charles A. Grossmann, wrote the BMD and the three individual Defendant-Appellant board members, listing incidents of Wurtz's alleged whistleblowing, including letters or statements made during BMD public meetings. [Apx 98a-99a, 11/23/09 letter]. In response, on November 25, 2009, the BMD's labor attorney, Hiram Grossman, wrote that the Board had no intention of changing its mind about their prior decision not to extend Wurtz's contract, citing to the considerable period of disagreements and personality clashes and the fact that the position was going to be full-time again, instead of part-time, as it was during Wurtz's ten-year contract. [Apx 100a-101a, 11/25/09 letter; Apx 148a, Plf Dep, pp107-108].

December 2009/January 2010 - alleged OMA violation: In December 2009 or January 2010, Wurtz again wrote to the Prosecutor, as well as the Mt. Morris Post Office, alleging that there was an Open Meetings Act (OMA) violation because BMD mail was allegedly being received at a post office box opened by only two BMD board members. [Apx 148a, Plf Dep, pp106-107].

Wurtz filed the subject lawsuit in Genesee County Circuit Court on January 19, 2010, and it was assigned to Judge Fullerton. [Apx 102a, Complaint; Apx 1a, trial court docket entries]. Wurtz went on to finish out his employment contract with the BMD, which expired by its own terms on February 1, 2010. [Apx 122a-123a, Plf Dep, pp5-8; Apx 9a, contract].

Also, after the Sheriff's September 2009 investigation into the BMD travel expenditures, the Prosecutor filed charges against all of the BMD board members in 2010, and those cases were consolidated before Judge Fullerton in the Genesee County Circuit Court. [Genesee County Case No. 2010-027446-FH].

C. Proceedings in the Trial Court.

Plaintiff's Complaint contained two counts: Count I - violation of the Whistleblowers' Protection Act; and Count II - wrongful termination in violation of public policy. [Apx 102a, Complaint]. Discovery was initiated, and the individual Defendants maintained their Fifth Amendment rights in light of the ongoing criminal prosecution. [Apx 118a, BMD's Resp to Req to Admit; Apx 152a, Req to Produce to BMD; Apx 174a, 12/06/10 motion trans, p18]. On November 15, 2010, Defendants moved for summary disposition under MCR 2.116(C)(10), arguing, among other things, that the Wurtz had not been discharged and had not suffered an adverse employment action, but that his employment ended at the expiration of the written contract that Wurtz had himself drafted, and that the BMD was under no obligation to act to renew or extend his contract. [Apx p4a, trial court docket entry; Apx 159a-166a, 174a-176a,12/06/10 motion trans].

Wurtz filed a response on November 29, 2010, arguing that his employment was terminated because his contract was not renewed or extended, and claiming that summary disposition was premature because discovery was incomplete. [Apx 4a, trial court docket entry; Apx 166a-174a, 176a, 12/06/10 motion trans].

Defendants filed a reply on December 2, 2010, arguing, among other things, that: (1) summary disposition was not premature and that the Wurtz failed to provide some independent evidence of a material factual dispute); (2) Wurtz was not fired; and (3) Wurtz admitted during his deposition that the Defendants voted on March 11, 2009 not to extend his employment contract, which was before his purported whistleblowing activity occurred. [Apx 4a, trial court docket entry].

Defendants' motion for summary disposition was heard on December 6, 2010. [Apx 157a, 12/06/10 motion trans]. After hearing oral argument, the trial court determined that, first, the WPA

provided the exclusive remedy for Wurtz's claim, as opposed to the wrongful discharge public policy claim pled in Wurtz's Complaint, Count II.[2] Second, the trial court held that the BMD did not take an adverse employment action against the Wurtz by merely allowing his employment contract to expire on its own terms after ten years; thus, his claim under the WPA failed. [Apx 177a, 12/06/10 motion trans, p21]. An order was entered that same day dismissing Wurtz's Complaint. [Apx 181a, 12/06/10 order; Apx 4a, trial court docket entries].

D. Proceedings in the Court of Appeals.

Wurtz filed an appeal as a matter of right regarding the trial court's ruling on his WPA claim, only. On October 2, 2012, the Court of Appeals, in a 2 to 1 published opinion, with Judge Kirsten Frank Kelly writing a separate dissenting opinion, reversed and remanded the case to the trial court, finding that:

1. By analogy to federal law under Title VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act, the non-renewal of a contract may qualify as an adverse employment action under the WPA, and "[w]hether non-renewal amounts to an adverse employment action in a particular instance will vary from case to case." [Apx 187a-189a, 10/02/12 Op, pp5-7]; and
2. The Plaintiff was not given sufficient opportunity to develop a record during discovery regarding this question, and that if discovery revealed evidence that "other similarly situated employee had their contracts renewed pro forma, plaintiff's claim that the decision to not renew his contract was adverse becomes more probable." [Apx 190a-191a, 10/02/12 Op, pp8-9].

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[2] Wurtz did not appeal this aspect of the trial court's ruling, and it is not at issue.

Finding that summary disposition was premature and improperly granted, the Court of Appeals reversed the trial court's grant of summary disposition and remanded the case "for discovery with regard to whether other employees had their contracts renewed, and with regard to what motivated defendants' decision to not renew plaintiff's contract in this case." [Apx pp190a-191a, 10/02/12 Op, pp8-9].

Judge Kirsten Frank Kelly filed a lengthy dissenting opinion. [Apx 192a-199a, 10/02/12 Op, Kelly, J., dissenting]. She concluded that as a matter of law no adverse employment action occurred, and that no additional amount of discovery would have assisted Wurtz in developing his case, for the following reasons:

1. It is uncontested that no action was taken by Defendants that was adverse regarding the terms and conditions of the Plaintiff's contract of employment, and that Plaintiff's contract did not obligate the Defendants to extend or renew it, or to rehire the Plaintiff after the contract expired.
2. By its plain language, the protections of the WPA do not extend to pre-employment negotiations or refusal to hire or to cover former employees who seek re-employment; rather, it only applies to an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment. And,
3. While the federal and state civil rights acts cover discriminatory pre-employment or failure to hire conduct as actionable, the WPA does not; thus, the majority erred in relying on federal civil rights cases to hold that non-renewal of an employment contract constitutes an adverse employment action under the WPA. Further, the primary federal civil rights case relied on by the majority is distinguishable because

that claimant's employment contract included a renewal clause, whereas the Plaintiff's employment contract in this matter did not. [Apx 192a-199a, 10/02/12 Op, Kelly, J., dissenting].

E. Michigan Supreme Court Grants Leave to Appeal on June 5, 2013.

On June 5, 2013, this Court granted Defendants-Appellants' application for leave to appeal, and directed the parties to address the following issues:

> (1) whether the plaintiff suffered an adverse employment action under the Whistleblower Protection Act (WPA), MCL 15.361 *et seq.*, when the defendants declined to renew or extend the plaintiff's employment contract, which did not contain a renewal clause beyond the expiration of its ten-year term; and (2) whether there was a fair likelihood that additional discovery would have produced evidence creating a genuine issue of material fact, MCR 2.116(C)(10), if the defendants' motion for summary disposition had not been granted prior to the completion of discovery. [Apx 200a, 06/05/13 Order].

ARGUMENT

I. NO ADVERSE EMPLOYMENT ACTION OCCURRED FOR PURPOSES OF THE WHISTLEBLOWERS' PROTECTION ACT WHERE IT IS UNDISPUTED THAT WURTZ COMPLETED HIS WRITTEN TEN-YEAR EMPLOYMENT CONTRACT; WURTZ RECEIVED ALL COMPENSATION TO WHICH HE WAS ENTITLED UNDER THE CONTRACT; THE CONTRACT DID NOT OBLIGATE THE DEFENDANTS TO RENEW OR EXTEND IT; AND THE DEFENDANTS DECLINED TO RENEW OR EXTEND THE CONTRACT.

In its Order granting leave to appeal, this Court directed the parties to address, "whether the plaintiff suffered an adverse employment action under the Whistleblower Protection Act (WPA), MCL 15.361 *et seq.*, when the defendants declined to renew or extend the plaintiff's employment contract, which did not contain a renewal clause beyond the expiration of its ten-year term." [Apx 200a].

A. Standard of Review.

In the trial court, Defendants were granted summary disposition pursuant to MCR 2.116(C)(10) for lack of a genuine issue of material fact. An appeal from a decision on a motion for summary disposition is reviewed de novo. *Stewart v State of Michigan*, 471 Mich 692, 696 (2004).

As set forth by this Court in *Maiden v Rozwood*, 461 Mich 109 (1999):

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996).
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> * * *
>
> A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial. [*Maiden*, 461 Mich at 119-120 (emphasis added)].

Affidavits, depositions, admissions, or other documentary evidence offered in opposition to a (C)(10) motion "shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6). A trial court deciding a (C)(10) motion may only consider the substantively admissible evidence actually proffered in opposition to the motion. *Maiden*, 461 Mich at 121. Thus, only evidence whose content or substance is admissible can establish the proper basis for establishing a genuine issue of material fact. *Id* at 123, n5.

Further, "[t]he proper interpretation of a statutory provision is a question of law that this Court reviews de novo." *Brown v Mayor of Detroit*, 478 Mich 589, 593 (2007), citing *Lincoln v General Motors Corp*, 461 Mich 483, 489 (2000). Accord, *Whitman v City of Burton*, 493 Mich 303, 311 (2013) ("This case involves the interpretation and application of a statute, which is a question of law that this Court reviews de novo.").

B. Preservation of Issue.

This issue was raised in Defendants' summary disposition motion in the trial court; was ruled upon by the Court of Appeals; and was included in this Court's Order granting leave to appeal.

C. Analysis.

Michigan's Whistleblowers' Protection Act (WPA), states in relevant part:

> 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 (emphasis added)].

In *West v General Motors Corp*, 469 Mich 177 (2003), this Court set forth the elements to establish a prima facie case under the WPA as follows:

> [A] plaintiff must show that (1) the plaintiff was engaged in protected activity as defined by the act, [footnote omitted] (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. [*West*, 469 Mich at 183-184, citing *Chandler v Dowell Schlumberger, Inc.*, 456 Mich 395, 399 (1998), and *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 610 (1997), disavowed and not followed in part as dicta, *Whitman v City of Burton*, 493 Mich 303 (2013).]

If the plaintiff can establish a prima facie case, then the burden would shift to the defendant to establish a legitimate business reason for the adverse employment action. *Shaw v City of Ecorse*, 283 Mich App 1, 8 (2009), citing *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 280-281 (2000). Thereafter, the plaintiff would have the burden of establishing that the proffered legitimate business reason were mere pretext for the adverse employment action. *Shaw,* 283 Mich App at 8; *Roulston*, 239 Mich App at 281.

As stated above, one element of establishing a prima facie case under the WPA requires a plaintiff to provide that "a causal connection exists between the protected activity and the discharge or adverse employment action." *West*, 469 Mich at 183-184. Use of the term "adverse employment action" has also been used in cases brought under Michigan's Elliott-Larsen Civil Rights Act (ELCRA) to mean an action that: (1) "must be materially adverse in that it is more than 'mere inconvenience or an alteration of job responsibilities,'" *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 364 (1999), quoting *Crady v Liberty Nat'l Bank & Trust Co*, 993 F.2d 132, 136 (CA.7,1993); and (2) "there must be some objective basis for demonstrating that the change is adverse because 'a plaintiff's 'subjective impressions as to the desirability of one position over

another' [are] not controlling,'" *Wilcoxon*, 235 Mich App at 364, quoting *Kocsis v Multi-Care Mgt, Inc*, 97 F.3d 876 (CA.6,1996).

In another ELCRA case, *Pena v Ingham County Rd Comm'n*, 255 Mich App 299 (2003), the Court of Appeals further described what may constitute an adverse employment action, stating:

> Although there is no exhaustive list of adverse employment actions, **typically it takes the form of an ultimate employment decision, such as "a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.**" *White v Burlington N & SF R Co*, 310 F.3d 443, 450 (CA.6, 2002), citing *Kocsis [v Multi-Care Mgt, Inc.*, 97 F.3d 876, 886 (CA.6,1996)], *Crady [v Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (CA.7,1993)], and *Hollins v Atlantic Co., Inc.*, 188 F.3d 652, 662 (CA.6, 1999). See, also, *Hilt-Dyson v Chicago*, 282 F.3d 456, 465-466 (CA.7, 2002). In determining the existence of an adverse employment action, courts must keep in mind the fact that "[w]ork places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action." *Blackie v Maine*, 75 F.3d 716, 725 (CA.1, 1996). [*Pena,* 255 Mich App at 311-312 (emphasis added)].

In the instant case, Wurtz did not sustain an adverse employment action when his ten-year employment contract expired on its own terms and was not renewed or extended, because he was not "discharged, threatened, or otherwise discriminated against regarding his compensation, terms, conditions, location, or privileges of employment" under MCL 15.362 of the WPA.

1. Wurtz concedes that the BMD fully complied with his employment contract, and the contract did not obligate the BMD to renew or extend his employment.

The terms of Wurtz's employment with the BMD were contained in a written contract which Wurtz drafted himself. [Apx 9a, contract; Apx 122a-124a, Plf Dep, pp5-7]. There is no dispute that the BMD fully complied with Wurtz's employment contract, even after his purported whistleblowing activity occurred. Wurtz has admitted that:

- his contract of employment with the BMD, which he drafted himself, did not provide for his employment beyond February 1, 2010 [Apx 122a-124a, Plf Dep, pp5-11; Apx 9a, contract];

- the BMD was under no obligation to continue his employment by extending his contract [Apx 129a, Plf Dep, p33]; and

- he continued to be employed as the BMD's administrator until his contract expired by its own terms on February 1, 2010, and that he received his full compensation and other benefits during that time [Apx 123a-124a, Plf Dep, pp7-10].

Despite the fact that his employment contract was totally and completely fulfilled, and that his employment with the BMD was not terminated but expired under the terms of the contract, Wurtz nevertheless argues that he suffered an adverse employment action for purposes of his claim under the WPA when the Defendants-Appellants declined to act to renew or extend his contract. In this regard, Wurtz testified that:

Q. You have filed a cause of action against the defendants in this case under the Whistleblowers' Protection Act. What adverse employment action do you claim was taken by the defendants against you?
A. They precluded me from any continued employment based on my criticism of their behavior.

Q. **How did they preclude you from continued employment**?
A. **By continuing my employment with or without a contract after February 1st, 2010.**

Q. **We already established that you were allowed to serve out the term of your written contract; correct**?
A. **Yes.**

Q. **You were not given any decrease in salary, were you**?
A. **No.**

Q. **You were not given any decrease in benefits as a result of any retaliation, were you**?
A. **No.**

Q. It is your position that - - strike that. The Beecher Metropolitan District was not under any obligation to continue your employment after February 1, 2010, were they?

A. **I think they were under an obligation to continue my employment.**

Q. **Certainly not under any obligation created by Exhibit No. 1, the express contract; correct?**

A. **Correct.**

Q. What obligation do you think they were under?

A. I think they were under an obligation to continue my employment for the fact that I had done an exemplary job during my time as administrator. ...

* * *

Q. **The board never agreed to any terms of employment with you other than what I've marked as Exhibit No. 1; correct?**

A. **Correct**. [Apx 129a-130a, Plf Dep, pp32-34 (emphasis added)].

First, as noted in the testimony quoted above, Wurtz admits that his terms of employment with the BMD were contained in written contract, and that the terms of the contract did not obligate the Defendants-Appellants to continue his employment. [Id.]

When interpreting a contract, the court strives to ascertain and enforce the parties' intent. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375 (2003). The court must first look to the contract's language and accord that language its plain meaning. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 61 (2003). The court must "read [the contract] as a whole, giving harmonious effect, if possible, to each word and phrase." *Id* at 50, n11. When the words used in a contract are clear, the contract must be enforced as written unless a provision is unlawful or violates public policy. *Id* at 51.

Here, Wurtz concedes that there is simply no intent expressed in the unambiguous terms of his employment contract to continue his employment beyond February 1, 2010, and the contract contains a fixed-term of employment "expiring on February 1, 2010." [Apx 9a, contract, ¶1; Apx

129a-130a, Plf Dep, pp33-34]. Instead, Wurtz asserts that his "exemplary" job performance during his time as the BMD's administrator obligated the BMD to continue to employ him in some capacity, be it either at-will or under another written contract. [Apx 129a-130a, Plf Dep, pp33-34].

To accept Wurtz's argument would be to imply that every written employment contract of finite duration must be renewed or continued if desired by an employee, despite the absence of any agreement to do so by the employer. In her dissenting opinion, Court of Appeals Judge Kirsten Frank Kelly rejected Wurtz's argument, stating:

> If we were to accept plaintiff's theory that he had a continued "employment relationship," we would have to accept that his employment would have continued past the expiration of his contract, regardless of the express terms of the contract; in other words, rendering the termination date and modification clause nugatory. We would also have to accept that implied in every written contract, there is an obligation or duty to the parties to renew or continue the employment if desired by the employee. This has no support whatsoever in our jurisprudence and in fact the premise is widely rejected. *Scholz v Montgomery Ward & Co, Inc*, 437 Mich 83, 93; 468 NW2d 845 (1991) (an implied contract is not actionable when there is an express contract covering the same subject matter). [Apx 196a-197a, 10/02/12 Op, Kelly, J., dissenting, pp5-6].

As stated above, Wurtz admits that Defendants-Appellants had no contractual obligation to renew or extend his employment with the BMD. Furthermore, Defendants-Appellants also had no extra-contractual obligation to renew or extend Wurtz's employment with the BMD. Wurtz's contract provided that: "Any modification or alteration of this Agreement shall be of force and effect only when in writing and executed by both parties hereto." [Apx 10a, contract, ¶8]. Wurtz admits that the Defendants-Appellants never agreed to any other terms. [Apx 130a, Plf Dep, p34]. Absent some promise or obligation to continue the employment relationship, a contract employee has no reasonable expectation of continued employment after the contract expires. *See, e.g. Charter Twp of Haring v City of Cadillac*, 290 Mich App 728, 738-742, 745-747, 750 (2010) (holding that the

defendants' obligations under a fixed-term wastewater services contract expired according to the terms of the contract, and that defendants had no extra-contractual legal duty to continue providing plaintiff with wastewater services after the contract expired); and *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 422-423 (1980) (tort claim not actionable without separate duty that is breached independent of the contractual duties agreed to by the parties).

Wurtz does not contend that the Defendants-Appellants promised him employment beyond the fixed-term of his contract. Indeed, he has admitted he had pre-existing personal conflicts with three out of five of the BMD board members - the three individual Defendants-Appellants - and that he did not believe that those three board members wanted him as the BMD's administrator long before his alleged whistleblowing even began. [Apx 132a-143a, Plf Dep, pp44-50].

Indeed, on March 11, 2009, *prior to* Wurtz's alleged whistleblowing activity, the three individual Defendants-Appellants voted to decline consideration of Wurtz's contract continuation proposal. [Apx 45a-47a, 03/11/09 minutes]. Wurtz acknowledged in his deposition that, on March 11, 2009, a motion was made by Mr. Miller to have him draw up an employment agreement with the BMD's labor attorney, Hiram Grossman, but that motion was defeated 3 to 2; thus, the Board at that time voted not to extend his contract. [Apx 140a, Plf Dep, p76].[3] Then, after seeking to terminate his contract early in July 2009 [Apx 58a, 07/02/09 memo; Apx 60a, 07/02/09 minutes; Apx 142a, Plf Dep, pp84-85], on November 11, 2009, Wurtz again pursued the issue of continuing

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[3]In his Affidavit in support of his opposition to Defendants' summary disposition motion, Wurtz alleged, contrary to his deposition testimony, that he did not believe that the Board determined on March 11, 2009 that his contact was not to be renewed. [Compare, Apx 156a, 11/24/10 Affidavit, with Apx 140a, Plf Dep, pp75-76]. However, "parties may not contrive factual issues merely by asserting the contrary in an affidavit after having given damaging testimony in a deposition," and "a trial court that disregards such testimony does not err." *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 256-257 (1993), citing *Downer v Detroit Receiving Hosp*, 191 Mich App 232 (1991).

his contract *after* his purported whistleblowing activity. But the three individual Defendants-Appellants again voted to decline entertaining Wurtz's suggestions of continuing his employment beyond the terms agreed to in his existing fixed-term contract. [Apx 47a, 03/11/09 minutes; 95a-96a, 11/11/09 minutes].

Wurtz has argued that Defendants-Appellants' position would call for the WPA to treat at-will employees differently or more restrictive than contract employees. This is not accurate. Allowing an employment contract with a definite termination date to expire, without taking action to renew it, is not the same as taking action to terminate an indefinite at-will employment relationship. It is the terms of employment that differ, not how the WPA treats them. While at-will employment is for an indefinite term, *McNeil v Charlevoix County*, 484 Mich 69, 86 (2009), a contract employee may have a definite, fixed term of employment. Simply put, unlike an at-will employee, Wurtz's employment was governed by a written contract. The written contract unambiguously provided that his employment would end on February 1, 2010. And his employment ended on February 1, 2010. There was no action, nor any adverse employment action, required to be taken in order to end Wurtz's employment with the BMD.

In rejecting Wurtz's at-will employment analogy, the Court of Appeals dissenting judge stated in relevant part that:

> Unlike an at-will employer, who must take affirmative steps to alter the course of an at-will employee's status, the employment relationship for one under a contract of employment simply expires, requiring no action on behalf of the employer. An at-will employment arrangement, therefore, is necessarily of uncertain duration; terminating an at-will employee necessarily affects the compensation, terms, conditions, location, or privileges of employment. But, here, the written employment contract is very specific as to the terms of employment including its duration which has been agreed to in writing by both parties. [Apx 196a, 10/02/12 Op, Kelly, J., dissenting, p5].

There is no genuine issue of material fact that the BMD fully satisfied its obligations under Wurtz's employment contract, that the contract had an express termination date of February 1, 2010, and that no extra-contractual promises or obligations existed to require the Defendants to continue Wurtz's employment with the BMD after it expired under the terms of his contract. The fact that Wurtz's employment was not continued beyond the end date of his contract was not an adverse employment action taken by the Defendants-Appellants. There was no termination decision, nor any discriminatory conduct, that caused Wurtz's employment with the BMD to end. Rather, his employment with the BMD ended on February 1, 2010 because the fixed-term employment contract that he agreed to, and drafted, said it would.

In her dissenting opinion in this case, Court of Appeals Judge Kirsten Frank Kelly correctly called Wurtz's "unilateral hope of being reemployed as a contract employee" nothing more than a "woulda, coulda, shoulda" claim of *future* employment. [Apx 197a, 10/02/10 Op, Kelly, J., dissenting, at p6). Judge Kelly's dissenting Opinion goes on to state that:

> Both plaintiff and the majority treat the situation as a "failure to renew" when, in fact, plaintiff's employment contact did not contain a renewal clause and defendants were under no duty to renew. The use of the phrase "failure to renew" is meaningless in this case; there cannot be a failure to act unless there is first an obligation, duty or contractual requirement to act. Plaintiff's contract simply terminated on its own and a new contract was never entered into, despite the unilateral hope of plaintiff. In this case, plaintiff's employment concluded by its own terms and no adverse action was taken. [Apx 197a, 10/02/10 Op, Kelly, J., dissenting, at p6].

In her dissenting opinion, Judge Kelly further noted that, in Wurtz's January 30, 2009 memo to the BMD, he stated that, because of conditions imposed by the Municipal Employee Retirement System (MERS), he would have had to be completely separated from the BMD for at least 30 days before beginning any period of new "contract" employment. [Apx 193a-194a, and 197a, 10/02/10

Op, Kelly, J., dissenting, at pp2-3, 6; Apx 37a-39a, 01/30/09 memo]. Thus, as recognized in Judge Kelly's dissenting opinion, Wurtz would be a former BMD employee seeking candidacy for re-hire or re-employment. As noted in *Roberts v Beecher Community School Dist*, 143 Mich App 266, 268 (1985) (distinguishing a contract nonrenewal from a mid-contract lay-off under the former School Code), "the nonrenewal of a contract terminates the legal relationship between the contracting parties...." As discussed in more detail below, unlike federal or state civil rights acts, the plain text of the WPA does not cover pre-employment or failure to hire conduct.

2. The Court of Appeals erred in relying on federal civil rights law that explicitly covers pre-employment/failure to hire conduct, because the plain text of the WPA does not cover such conduct.

In holding that the Defendants-Appellants' failure to renew Wurtz's employment contract may amount to an adverse employment action under the WPA, the Court of Appeals majority acknowledged that this is an issue of first impression in Michigan, stating:

> Michigan courts have also suggested that, in the CRA [civil rights act] context, the non-renewal of an employment contract may amount to an adverse employment action, [footnote omitted] although no Michigan case addresses the issue squarely. There are no Michigan cases interpreting the WPA that address the issue at all. [Apx188a, 10/02/12 Op, p6].

For example, in *Anzaluda v Band*, 457 Mich 530 (1998), this Court did not decide whether the non-renewal of plaintiff Ms. Anzaluda's employment contract constituted an adverse employment action under the WPA, as she alleged, because the issue before the Court was whether the WPA contained a right to a jury trial, and whether that right existed in suits against the state of Michigan and its subdivisions. *Id* at 532. Therefore, *Anzaluda* provides no insight into this issue.

Reisman v Regents of Wayne State Univ, 188 Mich App 526 (1991), a case relied upon by Wurtz, also does not address this issue. In *Reisman*, the plaintiff's theory was that she suffered racial

discrimination in the defendants' decision not to renew her contract, but to renew an African-American male's identical contract, based on the university's affirmative action policy, which the plaintiff challenged as invalid. *Id* at 532. The plaintiff had also alleged that the dean made statements concerning her "life time" employment. *Id* at 530.

In *Reisman*, the plaintiff, a Caucasian female, and another employee, Mr. Smith, an African-American male, were hired under two-year employment contracts at the same time. *Id* at 529. Both of their contracts were renewed two more times for one-year each. But then, Mr. Smith's contract was renewed but the plaintiff's was not. *Id* at 529-530. The plaintiff argued that it was because she was Caucasian and Mr. Smith was African-American, and that the university's affirmative action policy was invalid because it allegedly favored Mr. Smith's renewal. *Id* at 532. The plaintiff's claim for breach of collective bargaining contract was tried by a judge sitting as the Court of Claims. The judge issued a no cause. *Id* at 528. The plaintiff's reverse race discrimination claim was tried to a jury, which rendered a verdict for the plaintiff. *Id* at 528-529. Both claims were appealed. *Id.*

On appeal, the Court of Appeals affirmed the judge's decision that there was no breach of contact. *Id* at 530-531. The Court of Appeals reversed and remanded the race discrimination case based on an erroneous jury instruction. *Id* at 537.

While the plaintiff's reverse race discrimination theory in *Reisman* concerned the non-renewal of her employment contract, the parties apparently did not raise the issue of whether mere non-renewal of an expired employment contract could constitute an adverse employment action under Michigan's ELCRA. Further, in *Reisman*, the plaintiff's contract had been twice renewed in tandem with another employee, and she alleged that the university had an invalid affirmative action policy as applied to her. No such facts exist in this case, instead, more akin to the wastewater

treatment contract in *Charter Twp of Haring, supra*, here, there is a contract with an expiration term, and no contractual or extra-contractual obligation existed requiring that Wurtz's employment would be extended or continued beyond the contract's terms.

Keveney v Missouri Military Academy, 304 SW3d 98, 103 (Mo.S.Ct. 2010), a Missouri Supreme Court cited by Wurtz in the lower courts, is distinguishable and not binding on this Court. See, MCR 7.215 (published Michigan appellate decisions are binding precedent).

In *Keveney*, the plaintiff was terminated from his employment and at issue was whether his employment contract was terminated for cause, or was terminated in violation of public policy. *Keveney*, 304 SW3d at 100-101. That case did not address whether the expiration of a fixed-term employment contract constituted an adverse employment action for purposes of establishing a WPA claim under Michigan law. Therefore, the *Keveney* case is not persuasive and does not provide any guidance in the instant case.

In this case, the Court of Appeals majority looked for guidance to federal case law, and to the Second Circuit Court of Appeals's decision in *Leibowitz v Cornell University*, 584 F.3d 487 (CA.2, 2009) in particular. [Apx 187a-190a, 10/02/10 Op, pp 5-8].

In *Leibowitz*, the federal court of appeals held that non-renewal of the plaintiff's employment contract constituted an adverse employment action under Title VII of the Civil Rights Act of 1964 (42 USC §2000e et seq.), and the Age Discrimination in Employment Act (29 USC §621 et seq.). *Leibowitz*, 584 F.3d at 499-502. The plaintiff had a five-year appointment for employment with Cornell University, which expressly allowed for her reappointment "on the basis of recommendations by the department and the appropriate extension director and dean(s)." *Id* at 492-493. The plaintiff argued that prior to the non-renewal of her contract, the university had never

terminated, laid off, or failed to renew the contract of one holding her position, without cause. *Id* at 493. The plaintiff admitted, however, that her appointment/position was not a tenured one. *Id.* When the dean decided not to renew the plaintiff's contract, she sued claiming gender and age discrimination under, *inter alia*, Title VII and the ADEA. *Id* at 491-492, 496. The US District Court granted summary judgment for the defendants, holding that the plaintiff could not prove the existence of an adverse employment action in the defendants' decision not to renew her contract. *Id* at 497.

The Second Circuit Court of Appeals reversed, holding that the District Court "erred in concluding that the non-renewal of [the] plaintiff's employment contract was not an adverse employment action" under Title VII and the ADEA. *Id* at 502. In that regard, the Second Circuit Court of Appeals stated in relevant part:

> It is beyond cavil that employers subject to the strictures of the ADEA and Title VII may not discriminate on the basis of age or gender in deciding whether or not to hire prospective employees. See 29 USC § 623(a)(1) (it is "unlawful for an employer ... to fail or refuse to hire or to discharge any individual ... because of such individual's age"); *Nat'l R.R. Passenger Corp v Morgan*, 536 US 101, 114, 122 S.Ct 2061, 153 L.Ed.2d 106 (2002) (refusal to hire constitutes an adverse act under Title VII); *Kern v City of Rochester*, 93 F.3d 38, 45 (2d Cir.1996) ("Title VII is an employment law, available only to employees (or prospective employees) seeking redress for the unlawful employment practices of their employers.") (citations and internal quotation marks omitted). **Were we to accept defendants' argument here, we would effectively rule that current employees seeking a renewal of an employment contract are not entitled to the same statutory protections under the discrimination laws as prospective employees. In other words, under defendants' reasoning, an employee could bring a discrimination lawsuit if an employer refused to hire her based on her age and/or gender, but not if the same employer failed to renew an employment contract for the same discriminatory reasons. We decline to adopt that flawed legal analysis**, which is inconsistent with prior decisions of the Supreme Court and this Court.
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> * * *
>
> There is simply no reason that the discrimination laws should not apply with equal force to an employer's decision regarding a current employee who is denied a renewal

> of an employment contract. **An employee seeking a renewal of an employment contract, just like a new applicant or a rehire after a layoff, suffers an adverse employment action when an employment opportunity is denied and is protected from discrimination in connection with such decisions under Title VII and the ADEA**. The mere fact that the employer's decision not to renew is completely discretionary does not mean that it is not an "adverse" employment decision. [*Leibowitz*, 584 F.3d at 500-501 (emphasis added)].

In Wurtz's case, brought under Michigan's WPA, the Court of Appeals erred in relying on *Leibowitz* to conclude that the non-renewal of Wurtz's ten-year employment contract could constitute an adverse employment action, because the Court of Appeals failed to recognize a critical distinction between the federal civil rights acts at issue in *Leibowitz*, and Michigan's WPA - to wit - the federal civil rights acts explicitly cover pre-employment or failure to hire conduct, but Michigan's WPA does not.

The failure to hire an individual because of his/her gender is expressly forbidden under the text of Title VII, which states in relevant part that:

> (a) Employer practices
> It shall be an unlawful employment practice for an employer -
> (1) **to fail or refuse to hire** or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify **his employees or applicants for employment** in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. [42 USC §2000e-2(a)(1) and (2) (emphasis added)]

Title VII does not define the term "individual," but does define the term "employee" to mean: "an individual employed by an employer, except that the term 'employee' shall not include any person elected to public office in any State ..." 42 USC §2000e(f). The plain language of Title VII

prohibits discrimination in hiring and differentiates "employees" from "applicants for employment."

Similarly, the text of the ADEA also expressly prohibits age discrimination in hiring, stating:

> (a) Employer practices
> It shall be unlawful for an employer-
>
> (1) **to fail or refuse to hire** or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
> (3) to reduce the wage rate of any employee in order to comply with this chapter. [29 USC §623(a) (emphasis added)].

Unlike the text of these federal civil rights acts, which provided the basis for the Second Circuit Court of Appeals's holding in *Leibowitz*, the text of Michigan's WPA does not provide a cause of action for a employer who refuses to hire a person because of prior whistleblowing activity. And, as stated by this Court in *Whitman v City of Burton*, 493 Mich 303, 306 (2013), "the plain language of [the WPA] controls ...."

> When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent. [*Whitman*, 493 Mich at 311-312 (footnotes and citations omitted)].

Michigan's WPA provides in relevant part that: "An employer shall not discharge, threaten, or otherwise discriminate against an *employee* regarding the *employee's* compensation, terms, conditions, location, or privileges of employment because the *employee* ... reports or is about to

report ... a violation or suspected violation of a law or regulation or rule ... ." 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." MCL 15.361.

In contrast to the federal civil rights laws, Michigan's WPA does *not* contain any language indicating an intent to cover pre-employment failure or refusal to hire an individual because of his/her prior whistleblowing activity. Therefore, unlike the federal civil rights laws[4], the WPA does not extend to applicants for employment or to failure or refusal to hire an individual seeking employment. This is a critical distinction that the Court of Appeals majority failed to consider. The dissenting judge, however, correctly recognize this distinction, stating:

> By its plain language, the protections of the WPA do *not* extend to pre-employment negotiations or refusal to hire. Nor does it extend to cover former employees who seek reemployment. It only applies to an *employee* regarding the *employee's* compensation, terms, conditions, location, or privileges of employment. Thus, on its face, plaintiff's cause of action fails as a matter of law because his complaints are only directed at the district's refusal or failure to negotiate a new contract with a different termination date. Refusing to rehire or renew employment past the termination date of a written employment contract is simply not within the plain language of the WPA. Plaintiff, whose contract was fulfilled and terminated by its express terms, no longer falls within the definition of "employee," which the majority seeks to expand. "The proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges." *Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002). [Apx 195a, 10/02/12 Op, Kelly, J., dissenting, p4 (emphasis in original)].

Judge Kelly went on to state that the Court of Appeals majority mistakenly conflated Michigan's WPA with the civil rights act because, while the civil rights act explicitly covers pre-

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[4]Like the federal civil rights laws, Michigan's Elliott-Larsen Civil Rights Act (ELCRA) also expressly prohibits an employer from failing or refusing to hire an individual because of his/her gender, see MCL 37.2202(1)(a), and also differentiates an employee from an applicant for employment, see MCL 37.2202(1)(b).

employment conduct, the WPA does not. [Apx 197a, 10/02/12 Op, Kelly, J., dissenting, at p6]. Judge Kelly recognized that, while the very terms of the civil rights act permits an action for discrimination based on an employer's pre-employment conduct, "[n]o such right exists with the WPA." [Apx 198a, 10/02/12 Op, Kelly, J., dissenting, at p7]. "Merely because the 'adverse employment action' is treated the same in the CRA as the WPA, it does not follow that actions specifically prohibited by the CRA are somehow merged into the WPA. If the legislature intended to include pre-employment or failure to rehire conduct as actionable under the WPA - as it has done in the CRA - it would have." [Apx 198a, 10/02/12 Op, Kelly, J., dissenting, at p7, citing to *People v Kern*, 288 Mich App 513, 522 (2010)].

This Court has stated that, "the cornerstone of statutory interpretation … is the rule that the plain language used is the best indicator of the Legislature's intent." *Hamed v Wayne County*, 490 Mich 1, 23 (2011), cert denied, 132 S.Ct 1014, 181 L.Ed.2d 736 (2012). The text of a statute must prevail over policy interpretations of it. *Elezovic v Ford Motor Co*, 472 Mich 408, 421-422 (2005).

In *Elezovic,* this Court declined the defendants' invitation to effectively "piggyback on the rationale federal courts have used with Title VII" in interpreting Michigan's Elliott-Larsen Civil Rights Act, where doing so would "be contrary to the very wording of our CRA." *Id* at 421-422. Quoting an earlier decision of this Court in *Chambers v Trettco, Inc*, 463 Mich 297 (2000), the *Elezovic* Court stated:

> We are many times guided in our interpretation of the Michigan Civil Rights Act by federal court interpretations of its counterpart federal statute. **However, we have generally been careful to make it clear that we are not compelled to follow those federal interpretations. Instead, our primary obligation when interpreting Michigan law is always "to ascertain and give effect to the intent of the Legislature, ... 'as gathered from the act itself.'"** ... [W]e cannot defer to federal interpretations if doing so would nullify a portion of the Legislature's enactment.

[*Elezovic*, 472 Mich at 422 (emphasis added), quoting *Chambers*, 463 Mich at 313-314 (citations omitted).]

Similarly, in *Hamed*, this Court overruled an earlier decision in *Champion v Nationwide Security, Inc*, 450 Mich 702 (1996), because the *Champion* Court had erroneously relied on distinguishable federal civil rights case law. *Hamed*, 490 Mich at 23. In that regard, the *Hamed* Court stated:

> The *Champion* Court compounded its erroneous holding by relying on federal caselaw. [footnote omitted]. Unlike the federal civil rights act, the Michigan CRA specifically incorporates Michigan common-law agency principles. Hence, unlike federal courts applying the federal civil rights act, Michigan courts applying the Michigan CRA are bound by this state's common-law agency principles. Because federal courts are not so bound, their reasoning in this context is often inapposite given that the language of the CRA must guide our decisions. **For this reason, the Michigan Legislature's choice to incorporate agency principles into the CRA forecloses reliance on federal cases when determining whether a defendant will be vicariously liable under the CRA.** [*Hamed*, 490 Mich at 23-24 (emphasis added)].

In the instant case, the Court of Appeals majority erred in relying on federal case law interpreting federal civil rights statutes because, unlike the federal civil rights statutes (Title VII and the ADEA in particular), which expressly prohibit discriminatory conduct in failing or refusing to hire an applicant for employment, Michigan's WPA contains no such language. Hence, unlike the *Leibowitz* Court's application of the language of the federal civil rights statutes, Michigan courts applying Michigan's WPA are bound by the text of the WPA, which does not cover pre-employment conduct.

Similar to the circumstances in *Hamed*, here, the Michigan Legislature's choice not to incorporate pre-employment conduct into the WPA forecloses reliance on federal civil rights cases when determining whether an adverse employment action occurred for purposes of the WPA where

an employer declines to renew or extend an employment contract which does not contain any clause obligating the employer to renew or extend the contract.

Judge Kirsten Frank Kelly's well-analyzed dissenting opinion in this case explains the controlling point that, unlike the language of the federal civil rights acts, the language of Michigan's WPA simply does not cover the failure to hire type of conduct alleged to be an adverse employment action by Plaintiff-Appellee Wurtz in this case. Judge Kelly further keenly observed that, even if *Leibowitz* was applicable, the contract in *Leibowitz* contained a renewal clause, whereas Wurtz's contract does not. [Apx 198a, 10/02/12 Op, Kelly, J., dissenting at p7].

For these reasons, the Court of Appeals erred in opining that, by declining to take action to renew or extend Wurtz's employment contract, the Defendants may have taken an adverse employment action under Michigan's WPA. The Court of Appeals majority's failure to recognize a critical difference between the federal case law they relied on, and the plain text of Michigan's WPA, constitutes reversible error. Judge Kirsten Frank Kelly's dissenting opinion is highly persuasive on this issue, and Defendants-Appellants respectfully request that this Court reverse the Opinion of the Court of Appeals for the reasons set forth in Judge Kelly's dissent.

II. NO AMOUNT OF ADDITIONAL DISCOVERY WOULD HAVE PERMITTED WURTZ TO ESTABLISH A PRIMA FACIE WPA CLAIM, AND HIS NON-SPECIFIC ASSERTIONS THAT DISCOVERY WOULD REVEAL THAT THE DEFENDANTS-APPELLANTS HAD RENEWED OTHER EMPLOYEES' CONTRACTS IN THE PAST DID NOT ESTABLISH THAT THERE WAS A FAIR LIKELIHOOD THAT FURTHER DISCOVERY WOULD HAVE YIELDED EVIDENCE CREATING A GENUINE ISSUE OF MATERIAL FACT CONCERNING HIS WPA CLAIM.

In its Order granting leave to appeal, this Court directed the parties to address, "whether there was a fair likelihood that additional discovery would have produced evidence creating a genuine

issue of material fact, MCR 2.116(C)(10), if the defendants' motion for summary disposition had not been granted prior to the completion of discovery." [Apx 200a, 06/05/13 Order].

A. Standard of Review.

In the trial court, Defendants were granted summary disposition pursuant to MCR 2.116(C)(10) for lack of a genuine issue of material fact. An appeal from a decision on a motion for summary disposition is reviewed de novo. *Stewart v State of Michigan*, 471 Mich at 696.

B. Preservation of Issue.

This issue was raised by way of summary disposition motion and at oral argument in the trial court; was ruled upon by the Court of Appeals; and was included in this Court's Order granting leave to appeal.

C. Analysis.

Wurtz has argued that, because discovery was not complete, Defendants' motion for summary disposition in the trial court was premature. In general, summary disposition is premature if granted before discovery on a disputed issue is complete. But summary disposition is not premature if the discovery does not stand a fair chance of uncovering factual support for opposing the motion for summary disposition. *State Treasurer v Sheko*, 218 Mich App 185, 190 (1996).

Here, no amount of additional discovery would alter the fact that Wurtz's employment ended upon expiration of his employment contract, that the Defendants-Appellants declined to act to renew or extend his contract, and that the Defendants-Appellants had no obligation to renew or extend Wurtz's contract after its expiration. As stated by the dissenting Court of Appeals judge in this case, "Because plaintiff did not suffer an adverse employment action and because no amount of additional discovery would have assisted plaintiff in developing his case," the Court of Appeals erred in

holding that summary disposition was prematurely granted in this action. [Apx 192a, 10/02/12 Op, Kelly, J., dissenting, p1]. No additional discovery could alter the fact that Wurtz was not discharged, threatened, or discriminated against regarding the compensation, terms, conditions, locations or privileges of employment with the BMD as he is required to prove under MCL 15.362 of Michigan's WPA.

Further, Wurtz's non-specific assertions that discovery would reveal that Defendants-Appellants had renewed other employees' contracts in the past does not establish that there was a fair likelihood that further discovery would have yielded evidence creating a genuine issue of material fact concerning Wurtz's WPA claim. Wurtz's allegations that Defendants-Appellants had renewed contracts of other employees some time in the past has no bearing on Wurtz's claim under the WPA, and Wurtz has not asserted or provided independent evidence that he was similarly situated to any others who allegedly had their contacts renewed or extended in the past.

Additionally, even if Wurtz acquired information showing that the BMD had renewed or extended contracts of other employees in the past, this would not change the fact that Defendants-Appellants owed no such contractual or extra-contractual obligation to Wurtz. Wurtz has conceded that his fixed-term employment contract was wholly fulfilled. [Apx 123a-124a, Plf Dep, pp7-10].

Wurtz has previously cited to *Bellows v Delaware McDonald's Corp*, 206 Mich App 555 (1994), for the proposition that summary disposition was premature. Yet, the *Bellows* Court rejected the proposition that summary disposition is premature where discovery is not completed, stating:

> We also reject plaintiff's claim that summary disposition was premature because discovery was incomplete. This Court has held that a grant of summary disposition is premature if granted before discovery on a disputed issue is complete. *Mackey v Dep't of Corrections*, 205 Mich App 330, 333, 517 NW2d 303 (1994). However, a disputed issue must be before the court. *Pauley v Hall*, 124 Mich App 255, 263, 335

> NW2d 197 (1983). If a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence. *Michigan Nat'l Bank v Metro Institutional Food Service, Inc.*, 198 Mich App 236, 241, 497 NW2d 225 (1993); *Pauley, supra*. Here, plaintiff failed to do so. [*Bellows*, 206 Mich App at 561].

In this case, Wurtz failed to provide any independent evidence of a relevant material factual dispute. While he may have requested discovery of any other non-union BMD employees whose written employment contracts were extended or renewed, such discovery would not create a material factual dispute here because it is undisputed that Wurtz's fixed-term employment contract was not extended beyond its express end date, the BMD fulfilled the terms of that contract, and Defendants-Appellants had no contractual or extra-contractual obligation to extend or renew Wurtz's contract.

Further, while Wurtz has asserted that he is not aware of any other BMD employee who has not continued their employment after their expiration date [Apx 156a, Wurtz Affidavit], he has not asserted or provided independent evidence that he was similarly situated to any others who allegedly had their contacts renewed or extended in the past. Also, as Wurtz's own deposition testimony acknowledges, his position was different than the other 11 BMD employees inasmuch as from mid-2008 through February of 2010, he was the only employee that was not union. [Apx 125a, Plf Dep, p17]. And the five maintenance employees who were part of the Teamsters Union generally had three-year contracts, not ten-year contracts like Wurtz. [Apx 125a, Plf Dep, p15; Apx 9a, contract].

Wurtz has admitted that Defendants-Appellants had no contractual obligation to extend or renew his contract. [Apx 129a, Plf Dep, p33]. Yet he asserts that other employees' contracts were extended or renewed in the past, so he was allegedly treated differently. But Wurtz did not provide any independent evidence to the trial court that he was similarly situated to any other employees who

allegedly had their contacts renewed or extended in the past. Moreover, as stated above, *even if* Wurtz acquired discovery of other contracts that were extended in the past, this would not change the fact that Defendants-Appellants owed no contractual or extra-contractual obligation to Wurtz to do so, and that Defendants-Appellants fully honored his fixed-term employment contract.

Under Wurtz's position, if other employees have had their employment contracts renewed or extended, then an agreed upon end date written into a different employee's contract, that does not expressly provide for renewal or extension, must be unilaterally amended, extended, or renewed at that employee's whim where that employee has allegedly engaged in whistleblowing activity prior to the contract's end date. Such position results in ignoring the express terms of a written contract, which is contrary to principles of contract law. As stated by this Court in *Rory v Continental Ins Co*, 473 Mich 457 (2005):

> [U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written. We reiterate that the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of "reasonableness" as a basis upon which courts may refuse to enforce unambiguous contractual provisions. [*Id* at 461].

Wurtz neither presented nor alleged the existence of any evidence supporting his argument that Defendants-Appellants were under an obligation to extend his contract or otherwise continue to employ him after Defendants-Appellants fulfilled their obligations under the fixed-term employment contract Wurtz drafted for himself. Whether other employees had their contracts extended or renewed in the past does not create independent evidence of an obligation, agreement, or promise by these Defendants-Appellants to extend Wurtz's employment contract beyond its express end date.

Also, Wurtz's contract provided that: "Any modification or alteration of this Agreement shall be of force and effect only when **in writing** and **executed by both parties** hereto." [Apx 10a, contract, ¶8 (emphasis added)]. Wurtz admits that the Defendants-Appellants never agreed to any other terms. [Apx 130a, Plf Dep, p34].

Thus, as in *Bellows*, the mere fact that discovery was not complete was not a basis for denying summary disposition in this case. The Court of Appeals erred in holding to the contrary.

Defendants-Appellants respectfully request that this Court reverse the Court of Appeals Opinion for the reasons stated Judge Kirsten Frank Kelly's dissenting opinion, that: "Because plaintiff did not suffer an adverse employment action and because no amount of additional discovery would have assisted plaintiff in developing his case," the Court of Appeals erred in holding that summary disposition was prematurely granted in this action. [Apx 192a, 10/02/12 Op, Kelly, J., dissenting, p1].

RELIEF REQUESTED

Plaintiff-Appellee Richard Wurtz did not, as a matter of law, suffer an adverse employment action under Michigan's Whistleblowers' Protection Act when his written employment contract ended and was not extended or renewed, and where Defendants-Appellants were under no obligation to extend or renew it. Because Wurtz did not suffer an adverse employment action, no amount of additional discovery would have produced evidence creating a genuine issue of material fact.

Therefore, Defendants-Appellants BEECHER METROPOLITAN DISTRICT, LEO McCLAIN, JACQUELIN CORLEW and SHEILA THORN respectfully request that this Honorable Court reverse the October 2, 2012 Court of Appeals Opinion for the reasons set forth above and in Judge Kirsten Frank Kelly's dissenting opinion; reinstate the December 6, 2010 dismissal order of the trial court; and grant such other relief as this Court deems proper and just.

Respectfully submitted,
LANDRY, MAZZEO & DEMBINSKI, P.C.

By: _____

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