

STATE OF MICHIGAN  
IN THE SUPREME COURT

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LINDA RIVERA,	) Supreme Court No. 159857
	) Court of Appeals No. 341516
	) Case No. 16-031756-NZ-1
Plaintiff / Appellee,	)
v	)
	)
SVRC INDUSTRIES, INC.,	)
	)
Defendant / Appellant.	)

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**DEFENDANT/APPELLEE SVRC INDUSTRIES, INC BRIEF IN RESPONSE TO  
 PLAINTIFF/APPELLANT’S BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**

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## COUNTER-STATEMENT OF GROUNDS FOR APPLICATION

Defendant/Appellee, SVRC INDUSTRIES, INC. (“SVRC”), opposes Plaintiff/Appellant’s Application for Leave to this Michigan Supreme Court. Plaintiff/Appellant wrongfully contests the entire published opinion of the Michigan Court of Appeals, *Linda Rivera v SVRC Industries, Inc.*, Court of Appeals Docket No. 341516. (Court of Appeals Opinion and Order, Def’s Appx, Vol 1 at pg. 1).

Plaintiff/Appellant, Linda Rivera, (“Plaintiff”) instituted this litigation by filing her Complaint in the Saginaw Circuit Court on or about December 14, 2016. (Plf’s Complaint, Def’s Appx, Vol 1, pg. 13). Plaintiff’s Complaint sets forth a claim for retaliation arising out of the Michigan Whistleblowers’ Protection Act (“WPA”) and Michigan public policy. (Plf’s Complaint, Def’s Appx, Vol 1, pg 13 ). On or about October 23, 2017, Defendant filed a Motion for Summary Disposition. The trial Court denied the Motion and Defendant timely appealed by way of Application for Leave to Appeal. The Court of Appeals heard oral argument on or about February 12, 2019. The Court of Appeals subsequently requested supplemental briefing on the issue as to whether communications to SVRC outside attorney, Mr. Mair, constituted a “report” within the meaning of the Act. On or about April 4, 2019, the Court of Appeals issued its Opinion and Order remanding the case for entry of summary disposition in favor of SVRC. (Court of Appeals Opinion and Order, Def’s Appx Vol 1 at pg. 1).

Plaintiff files this Application for Leave to Appeal setting forth twelve (12) questions presented. First, Plaintiff asserts that the Court of Appeals panel violated MCR 7.215(C) and (J) for its definition of “report” under the Act. As this Court is well aware, MCR 7.215(C) is the rule

of stare decisis and MCR 7.215(J) requires the panel of the Court of Appeals to follow prior published decisions. Notably, the Court of Appeals panel defined the term “report” within the meaning of the Act (“WPA”) and as defined by well-established Michigan jurisprudence. Indeed, the Court relied on published authority, *Henry v City of Detroit*, 234 Mich App 405 (1999). In *Henry*, the Court of Appeals relied on the plain language of the WPA and interpreted a Type I whistleblower as one “who, on his own initiative, *takes it upon himself* to communicate the employer’s wrongful conduct to a public body in an attempt to bring the, *as yet hidden*, violation to light to remedy the situation or harm done by the violation.” 234 Mich App 405, 410 (Emphasis added). Moreover, the Court of Appeals panel relied on the dictionary definition of report, “to make a charge against” or “to make known the presence, absence, condition, etc.” of something. (Court of Appeals Opinion and Order, Def’s Appx at pg. 7 citing, *Random House Webster’s Dictionary* (2d ed), p 1120.). Clearly, the Court of Appeals did not violate MCR 7.215(C) and (J).

On June 15, 2018 this Court declined an application for leave to appeal on *McNeil Marks v MidMichigan Medical Center-Gratiot*. In that case, the Court of Appeals held that an attorney licensed by the State Bar of Michigan qualifies as a public body within the meaning of the WPA. Herein, Plaintiff largely relies on the *McNeil-Marks* opinion to assert a violation of the act for communication with Defendant’s general counsel. The Court of Appeals in this case correctly relied on the previous *McNeil-Marks* holding and applied the holding to the facts of this case. Indeed, the Court narrowly tailored the rule and held that communication to Defendant’s general counsel did not constitute protected activity under the act wherein Plaintiff communicated the same information that she previously communicated to her supervisor and she did so at the request of her supervisor. In other words, Plaintiff took no action on her own behalf to communicate any unlawful act to an attorney on her own initiative. Moreover, Plaintiff did not indicate that she was

planning to report any alleged unlawful activity, but rather that she wished her employer would do so. Notably, there is no support that there even was any unlawful activity to report. Plaintiff's Complaint does not allege what violation of any law, rule, or regulation was committed by LS. At best, the statements constitute actions that may occur in the future. The WPA only provides protection to an employee who reports an existing violation of law. *Pace v Edel Harrelson*, 499 Mich 1, 2 (2016).

Furthermore, Plaintiff was required to set forth clear and convincing evidence that she was "about to report" alleged illegal activity. *Shallal v. Catholic Services of Wayne County*, 455 Mich. 604, 611 (1997). Moreover, there is no evidence that Plaintiff provided objective evidence to her employer of her alleged intent to report. *Hays v. Lutheran Soc. Servs. of Mich.*, 300 Mich. App. 54, 62-63 (2013). At most, Plaintiff wanted her employer to make a report to the police. However, she did not indicate any intention of filing her own report, even after being told that she could do so.

Next, there is no evidence of causal connection. Plaintiff continues to rely solely on temporal proximity to assert a causal connection. It is well-established Michigan law that temporary proximity on its own is insufficient to establish causation. *Debano-Griffin v Lake Co*, 493 Mich 167, 177 (2013). There is no evidence that Plaintiff was laid off from her position *because* she engaged in alleged protected activity. Indeed, there is no dispute that other employees involved were not similarly laid off for their participation in the investigation. Moreover, there is significant evidence that Plaintiff was laid off for a legitimate business purpose, namely budgetary and economic reasons.

Finally, the WPA is the exclusive remedy for the type of action Plaintiff asserts. *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 573 (2008). Simply because Plaintiff's claims fail under the WPA does not entitle her to advance the same claims as a violation of public policy.

In short, the Court of Appeals relied on well-established Michigan jurisprudence, including *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604 (1997), *Hays v Lutheran Social Servs of Mich*, 300 Mich App 54 (2013), *Henry v Detroit*, 234 Mich App 405 (1999), *McNeil-Marks v MidMichigan Center-Gratiot*, 502 Mich 851 (2018), and the rules of agency. Plaintiff's purported grounds for appeal are insufficient.

For the reasons set forth herein, SVRC respectfully requests that this Honorable Court DENY Plaintiff's Application and AFFIRM the Court of Appeals' determinations.

**STATEMENT IDENTIFYING JUDGMENT**

Defendant/Appellee agrees that Plaintiff seeks leave to appeal the Court of Appeals opinion dated April 4, 2019 in *Linda Rivera v SVRC Industries, Inc.*, Court of Appeals Docket No. 341516. (Opinion and Order, Def's Appx, Vol 1 at pg. 1). The opinion reversed the Saginaw County Circuit Court's denial of summary disposition to SVRC Industries, Inc.. (Court of Appeals Opinion, Def's Appx, Vol 1 at pg. 1).

**COUNTER-STATEMENT OF QUESTIONS PRESENTED**

- I. WHETHER THE COURT OF APPEALS ERRED IN VIOLATING MCR 7.215(C) AND (J)?

The Plaintiff/Appellant answers: Yes.  
The Defendant/Appellee answers: No.  
The Court of Appeals answered: No.

- II. WHETHER THE COURT OF APPEALS ERRED IN ADDING EXTRA-STATUTORY REQUIREMENTS TO THE DEFINITION OF PROTECTED ACTIVITY UNDER THE WHISTLEBLOWERS' PROTECTION ACT?

The Plaintiff/Appellant answers: Yes.  
The Defendant/Appellee answers: No.  
The Court of Appeals answered: No.

- III. WHETHER THE COURT OF APPEALS ERRED IN FAILING TO FIND PLAINTIFF MADE A "REPORT" UNDER THE WHISTLEBLOWERS' PROTECTION ACT?

The Plaintiff/Appellant answers: Yes.  
The Defendant/Appellee answers: No.  
The Court of Appeals answered: No.

- IV. WHETHER THE COURT OF APPEALS ERRED IN FAILING TO FIND PLAINTIFF WAS "ABOUT TO REPORT" UNDER THE WHISTLEBLOWERS' PROTECTION ACT?

The Plaintiff/Appellant answers: Yes.  
The Defendant/Appellee answers: No.  
The Court of Appeals answered: No.

- V. WHETHER THE COURT OF APPEALS ERRED IN FAILING TO FIND A FACTUAL QUESTIONS REGARDING THE REMAINING ELEMENTS OF HER WPA CLAIM?

The Plaintiff/Appellant answers: Yes.  
The Defendant/Appellee answers: No.  
The Court of Appeals answered: No.

- VI. WHETHER THE COURT OF APPEALS ERRED IN FINDING THE WHISTLEBLOWERS' PROTECTION ACT WAS PLAINTIFF'S EXCLUSIVE REMEDY WHEN, AT THE SAME TIME, FOUND THAT THE ACT DID NOT APPLY TO THE FACTS OF THE CASE?

VII.

The Plaintiff/Appellant answers: Yes.  
The Defendant/Appellee answers: No.  
The Court of Appeals answered: No.

VIII. WHETHER THE COURT OF APPEALS ERRED IN FAILING TO FIND A  
FACTUAL QUESTION REGARDING WHETHER PLAINTIFF STATED A  
CLAIM OF RETALIATION IN VIOLATION OF MICHIGAN PUBLIC POLICY?

The Plaintiff/Appellant answers: Yes.  
The Defendant/Appellee answers: No.  
The Court of Appeals answered: No.

## COUNTER-STATEMENT OF FACTS

### I. BACKGROUND.

This litigation arises out of the employment relationship between Plaintiff/Appellee, Linda Rivera (“Plaintiff”) and Defendant/Appellant, SVRC Industries, Inc. (“Defendant” or “SVRC”). Plaintiff was employed at SVRC as the Director of Industrial Operations in its manufacturing division. (Plf’s Dep Trans, Def’s Appx, Vol 1 at pg. 44). Plaintiff’s responsibilities were related to the economic and financial health of SVRC. (Director of Industries Operations Job Description, Def’s Appx, Vol 1 at pg. 129). In fact, Plaintiff’s “primary responsibilities” for Plaintiff’s position included, “maximizing profits” and “budgeting, sales, marketing, and operations.” (Director of Industries Operations Job Description, Def’s Appx, Vol 1 at pg. 129). Indeed, SVRC’s Chief Executive Officer, Dean Emerson testified that “sales” were a crucial component of Plaintiff’s job responsibilities. (Dean Emerson Dep Trans, Def’s Appx, Vol 1 at pg. 165). Similarly, SVRC’s President and Chief Operating Officer, Debra Snyder, confirmed that a primary part of Plaintiff’s employment was in sales. (Debra Snyder Dep Trans, Def’s Appx, Vol 1 at pg. 227). Additionally, Plaintiff was responsible for maintaining updated contract files, yet Plaintiff failed to do so. (Debra Snyder Dep Trans, Def’s Appx, Vol 1 at pg. 228).

### II. SVRC’S FINANCIAL AND ECONOMIC STATUS AND PLAINTIFF’S PERMANENT LAYOFF.

Plaintiff was issued a Notice of Permanent Layoff, on October 6, 2016 just over one (1) year after she was hired. (Notice of Permanent Lay-Off, Def’s Appx, Vol 1 at pg. 247). The layoff was necessary for “budgetary and economic reasons.” (Notice of Permanent Lay-Off, Def’s Appx, Vol 1 at pg. 247). In 2016, at least two other individuals were laid off, including the Vice President

of Human Resources and a receptionist. (Dean Emerson Dep Trans, Def's Appx, Vol 1 at pg. 146). Again, in 2017, notices of lay-off were issued to at least fourteen (14) more employees. (Dean Emerson Dep Trans, Def's Appx, Vol 1 at pg. 143).

During the year of Plaintiff's employment, SVRC was in a concerning financial position, losing \$150,000 in total revenue in 2016. (Dean Emerson Dep Trans, Def's Appx, Vol 1 at pg. 142-43). CEO Emerson testified that the cause of the significant loss was due to declining sales and the loss of service contracts. (Dean Emerson Dep Trans, Def's Appx, Vol 1 at pg. 143). Despite Plaintiff's role to increase sales and service contracts, CEO Emerson testified that about nine (9) months into Plaintiff's employment, June 2016, there was an annual revenue differential of about \$120,000. (Dean Emerson Dep Trans, Def's Appx, Vol 1 at pg. 163-64). By September 2016, the annual revenue differential jumped to \$211,000.00. (Dean Emerson Dep Trans, Def's Appx, Vol 1 at pg. 166). Indeed, in September of 2015, the month before the Plaintiff started at SVRC, sales were \$211,000 higher than in September of 2016, the last month Plaintiff worked at SVRC. (Debra Snyder Dep Trans, Def's Appx, Vol 1 at pg. 227). Notably, of the \$150,000 net loss for SVRC in 2016, \$110,000 came from Plaintiff's division. (Dean Emerson Dep Trans, Def's Appx, Vol 1 at pg. 166). Indeed, Sylvester Payne, the then-Chairperson of SVRC's Board of Directors, confirmed that Plaintiff's division was struggling financially, experiencing a decline from 2015-2016. (Sylvester Payne Dep Trans, Def's Appx, Vol 2 at pg. 268-69).

Even more significantly, just one day prior to Plaintiff's last day of work, SVRC lost a significant industrial contract. (Dean Emerson Dep Trans, Def's Appx, Vol 1 at pg. 167). The value of this contract to SVRC was about \$45,000-\$55,000 a year. (Dean Emerson Dep Trans, Def's Appx, Vol 1 at pg. 169). Plaintiff's claim form for unemployment benefits submitted to

SVRC identified the “separation reason provided by the claimant” as “LACK OF WORK.” (Unemployment Benefits Claim Form, Def’s Appx, Vol 1 at pg. 279).

### **III. EMPLOYEE INCIDENT AND SUBSEQUENT INVESTIGATION.**

On September 15, 2016, Plaintiff, along with another employee, Eve Flynn, were tasked with issuing a disciplinary measure to then-SVRC employee, LS. (Plf’s Dep Trans, Def’s Appx, Vol 1 at pg. 57). Ms. Flynn is employed as a plant manager and is responsible for daily production operations. (Plf’s Dep Trans, Def’s Appx, Vol 1 at pg. 51). LS was being issued a three (3) day suspension for an event earlier in the day wherein he was acting insubordinate during an interaction with Ms. Flynn and for being disruptive at a public event. (Plf’s Dep Trans, Def’s Appx, Vol 1 at pg. 58). CEO Emerson made the decision to issue a suspension because the event amounted to LS’s “third write-up.” (Debra Snyder Dep Trans, Def’s Appx, Vol 1 at pg. 205).

LS became upset during the disciplinary meeting and made threatening comments regarding inappropriate subjects at the work setting, including his knowledge of firearms and his willingness to use them in the event of a “revolution.” (Plf’s Dep Trans, Def’s Appx, Vol 1 at pg. 75-76). LS testified that he made the following comments:

Q: Okay.

A: I said, “If and when” -- “If and when there’s a revolution in this country ever comes, I’m going to be the first one pulling the trigger and I don’t discriminate.”

(LS Dep. Trans, Def’s Appx, Vol 2 at pg. 300). The statements were not directed towards Ms. Flynn, nor Plaintiff. (LS Dep. Trans, Def’s Appx, Vol 2 at pg. 306).

Plaintiff notified Ms. Snyder of LS’s comments after the meeting. (Plf’s Dep Trans, Def’s Appx, Vol 1 at pg. (64-66)). Plaintiff testified that during this conversation, she indicated to Ms. Snyder that she felt a police report should be considered, and that Ms. Snyder did not instruct her to refrain from calling the police. (Plf’s Dep Trans, Def’s Appx at pg. 56). Ms. Snyder informed

Plaintiff that she would consult with Mr. Emerson and then advise her further. (Plf's Dep Trans, Def's Appx, Vol 1 at pg. 67-68).

Subsequently, a text message exchange took place between Ms. Snyder and Plaintiff. In pertinent part, the text messages read as follows:

**Plaintiff:** Can I ask why the attorney said no police report?? I called Sylvester [Payne] and told him about the Lyle situation and I asked him why a threat would not be documented with the police ASAP. He said he didn't know why either??

**Ms. Snyder:** Linda, Sylvester is not an employee of SVRC, he is a board member. Please be very careful with sharing confidential information about employees. **If you want to file a personal protection order you can do so, which may mean filing a police report**, but that is not what was advised by our attorney. Lets talk when you get to work in the morning.

(Text Messages, Def's Appx, Vol 2 at pg. 327)(emphasis added). The entirety of the text message conversation is set forth in Defendant's appendix. (Text Messages, Def's Appx, Vol 2 at pg. 327). The text message exchange clearly demonstrates that Ms. Snyder communicated to Plaintiff that SVRC would not be filing a police report on the advice of its outside counsel, but that Plaintiff was free to do so if she wished. (Text Messages, Def's Appx, Vol 2 at pg. 327).

Ms. Snyder's testimony is consistent with the communication set forth in the text messages. Ms. Snyder never instructed Plaintiff not to contact the police, but rather, informed Plaintiff that SVRC would not be making a police report, at the advice of counsel. (Debra Snyder's Dep Trans, Def's Appx, Vol 1 at pgs. 223-224). Plaintiff was free to do so on her own. (Debra Snyder's Dep Trans, Def's Appx, Vol 1 at pg. 223-224). The Plaintiff admitted that this interpretation of the text messages was correct during her deposition when she was asked about the text exchange:

Q: Okay. What it really says is that Dean talked to SVRC's lawyer and he advised SVRC not to make a police report, isn't that what that says?

A: Yes.

Q: Not you, SVRC, they're the ones that got the advice, the attorney's not talking to you, is he?

A: No.

\*\*\*

Q: Okay. It doesn't say don't file a police report, does it?

A: No.

(Plf's Dep Trans, Def's Appx, Vol 1 at pg. 89-90).

Thereafter, Plaintiff participated in an investigation conducted by outside counsel for SVRC, Greg Mair, at the direction of Ms. Snyder. (Plf's Dep Trans, Def's Appx, Vol 1 at pg. 98-99). Plaintiff testified that she provided the attorney with a statement. (Plf's Dep Trans, Def's Appx, Vol 1 at pg. 98). Plaintiff admittedly provided the attorney with the same information that she previously provided to Ms. Snyder. (Plf's Complaint, Def's Appx, Vol 1 at pg. 13). During the interview, Plaintiff was asked by the attorney what she wanted to happen to LS. Plaintiff testified as follows:

Q: I want you to say whatever you want to say.

A: Okay. My understanding is that an investigation was going on and hoping to handle it. When I had interviewed with SVRC's attorney, he had told me – or asked me if it was up to me what do I think Lyle should – What should happen to Lyle, did I want him to be fired, did if I was him, you know, what would be the ultimate fix for the situation. And my response to that attorney was its kind of a tricky situation. I want him to understand making those kind of statements is inappropriate. I made the comment that letting him go could also be concerning because its only adding to him being angry so I don't know if that could evolve in him being more hostile, and that was my answer to the attorney.

(Plf's Dep Trans, Def's Appx, Vol 1 at pg. 105-106).

Two other agency employees participated in the investigation: Jay Page and Eve Flynn. (Plf's Dep Trans, Def's Appx, Vol 1 at pg. 101). It is undisputed that both Mr. Page and Ms. Flynn continue to be employed by SVRC, and neither suffered adverse employment actions as a result of their participation in the investigation. (Plf's Dep Trans, Def's Appx, Vol 1 at pg. 99).

Plaintiff has expressed significant concerns with SVRC's decision not to report LS's conduct to the police, yet Plaintiff admittedly did not report to the police or other authorities herself.

Q: You've expressed almost continuously since we've started this deposition your concerns but you never called the police or reported this to any official governmental agency, did you?

A: I did not.

(Plf's Dep Trans, Def's Appx, Vol 1 at pg. 98). Ultimately, SVRC did address Plaintiff's concerns and terminated LS for his conduct related to the disciplinary incident. Plaintiff testified that she never saw LS at SVRC again. (Plf's Dep Trans, Def's Appx, Vol 1 at pg. 94).

#### **STANDARD OF REVIEW**

Defendant's Motion for Summary Disposition in this case was brought under MCR 2.116(C)(10). The Supreme Court "reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118 (1999). A motion under that Rule tests the factual support for a claim and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anzaldua v. Neogen Corp.*, 292 Mich. App. 626, 630 (2011) (*citing Driver v. Naini*, 287 Mich. App. 339, 344 (2010)). In responding to such a motion, the nonmoving party may not rest on the allegations in the pleadings, but must set forth, through documentary evidence, specific facts demonstrating a genuine issue for trial. *Id.*

#### **LAW AND ARGUMENT**

##### **I. THE COURT OF APPEALS PANEL DID NOT ERR IN ANALYZING "REPORT" UNDER THE ACT.**

To establish a prima facie case of retaliation under the WPA, a plaintiff must prove: (1) that she was engaged in a protected activity under the Act; (2) that she suffered an adverse employment action; and (3) that a causal connection exists between the protected activity and the adverse employment action. *Debano-Griffin v. Lake Co.*, 493 Mich. 167, 175 (2013).

The WPA “provides protection for two types of ‘Whistleblowers’: (1) those who report, or are about to report, violations of law, regulation or rule to a public body, and (2) those who are requested by a public body to participate in an investigation held by that public body or in a court action.” *Henry v Detroit*, 234 Mich App 405, 409 (1999). As stated above, a type I whistleblower is someone “who, on his own initiative, takes it upon himself to communicate the employer’s wrongful conduct to a public body in an attempt to bring the, as yet hidden, violation to light to remedy the situation or harm done by the public body.” *Id.* at 410.

Plaintiff claims that she “reported” Mr. Summerfield’s statements to SVRC attorney, Mr. Mair and that this conduct was protected activity under the WPA. (Plf’s Complaint, Def’s Appx, Vol 1 at pg. 13). To support this claim, Plaintiff relies on the Court of Appeals decision in *McNeil-Marks v MidMichigan Medical Center-Gratiot*, 316 Mich App 1, 23 (2016), where the Court of Appeals held that a licensed Michigan attorney qualifies as a member of a “public body” within the meaning of the WPA. Distinctly, in *McNeil-Marks*, the Plaintiff “reported” to *her personal attorney* a violation of a personal protection order (“PPO”), i.e. a violation of a law within the meaning of the WPA. *Id.* at pgs. 22-24. (emphasis added).

**A. THERE IS NO VIOLATION MCR 7.215(C) AND (J) WHEN THE COURT OF APPEALS PANEL RELIED ON PUBLISHED, BINDING AUTHORITY AND THE RULES OF STATUTORY CONSTRUCTION TO DEFINE THE MEANING OF “REPORT” UNDER THE ACT.**

As this Court is well aware, MCR 7.215(C)(2) provides, “A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis.” That further, MCR 7.215(J)(1) provides:

A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

The Court of Appeals appropriately conducted statutory interpretation of the meaning “report” under the Act. There is no dispute that the WPA does not define the meaning of “report.” A court may consult a dictionary definition to determine the plain and ordinary meaning of a term that is not defined by statute. *Epps v 4 Quarters Restoration, LLC*, 498 Mich 518, 529 (2015). Moreover, “when engaging in statutory construction, courts must construe the text as a whole.” *McNeill-Marks v MidMichigan Medical Center-Gratiot*, 502 Mich 851, 186 (2018) (Zahra dissenting). Additionally, “when interpreting a statute, this Court’s goal is to ascertain and give effect to the intent of the legislature by enforcing plain language as is written.” *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 276 (2006).

In *Henry v Detroit*, the Court defined “report” using the plain meaning of the statute. The Court stated:

**On the basis on the plain language of the WPA**, we interpret a type 1 whistleblower to be one who, on his own initiative, takes it upon himself to communicate the employer’s wrongful conduct to a public body in an attempt to bring the, as yet hidden, violation to light to remedy the situation or harm done by the violation.

*Id.* at pg. 410 (Emphasis added). The Court in *Henry*, used the “plain language” of the WPA, consistent with the rules of statutory construction. 234 Mich App 405, 410 (1999). Plaintiff relies

on *Hays v Lutheran Social Servs of Mich*, to assert that the Court of Appeals violated MCR 7.215(C) and (J).

Herein, Plaintiff alleges that she “reported” or was “about to report” within the meaning of the Act. (Plf’s Complaint, Def’s Appx, Vol 1 at pg. 18). Notably, Plaintiff’s “reported” claim relies only on the fact that she met with outside counsel for SVRC, Mr. Mair. (Plf’s Complaint, Def’s Appx, Vol 1 at pg. 18). Plaintiff admittedly met with the attorney at the direction of her supervisor. (Plf’s Dep Trans, Def’s Appx, Vol 1 at pg. 112). There is no evidence that she sought out the attorney on or own or that she was under the impression that he represented her individually. Moreover, Plaintiff communicated the same information that she previously told to Ms. Snyder. (Plf’s Complaint, Def’s Appx, Vol 1 at pg. 23). She did not relay new information to the attorney. (Plf’s Complaint, Def’s Appx, Vol 1 at pg. 23).

The Court of Appeals panel in this case held that Plaintiff was not a Type I whistleblower as defined by Court in *Henry* because she did not, “on [her] own initiative, tak[e] it upon [herself]” to communicate conduct “to a public body in an attempt to bring the, as yet hidden, violation to light.” *Henry v Detroit*, 234 Mich App 405, 410 (1999). Specifically, Plaintiff communicated the same information to the attorney for SVRC, Mr. Mair that she previously communicated to her employer directly. (Plf’s Complaint, Def’s Appx, Vol 1 at pg. 23). In addition, Plaintiff did not communicate with Mr. Mair to remedy the situation. (Plf’s Dep Trans, Def’s Appx, Vol 1 at pg. 105-106). When asked what she would like to happen to LS, she simply stated that she wanted him to understand that what he said was inappropriate. (Plf’s Dep Trans, Def’s Appx, Vol 1 at pg. 105-106). There is no mention of unlawful activity or an intent to file a police report. (Plf’s Dep Trans, Def’s Appx, Vol 1 at pg. 105-106).

The Court of Appeals panel also relied on the dictionary definition of the meaning report, stating in the context of the WPA, “report” means “to make a charge against” or “to make known the presence, absence, condition, etc.” of something. *Rivera v SVRC Industries, Inc.*, --NW2d--; 2019 WL 1494653, at \*7. (Court of Appeals Opinion and Order, Def’s Appx at Pg. 1). Again, Plaintiff’s meeting with SVRC attorney was for the purpose of an investigation that she was asked to participate in. She did not “make a charge against” LS or “make known” to the attorney the events that occurred. By her own admission she relayed the same information to the attorney that she previously relayed directly to her employer.

In his dissent authored in *McNeil-Marks*, Justice Zhara indicated that the Court of Appeals in *Hays v Luterhan Social Servs of Mich*, 300 Mich App 54 (2013) correctly “understood that a whistleblower employee’s communication with a public body is not enough for reporting an illegality under the WPA.” *McNeil-Marks, supra*, 502 Mich at 189. In *Hays*, the Plaintiff called the police to inquire about alleged illegal activity. 300 Mich App at 60. When asked if she wanted to make a report, she advised that she did not want to. *Id* at 60-61.

Similarly, Plaintiff spoke with SVRC attorney Mr. Mair, a public body under *McNeil-Marks*. (Plf’s Dep Trans, Def’s Appx, Vol 1 at pg. 112). By Plaintiff’s own testimony, Mr. Mair asked her what she would like the outcome to be and she did not indicate to Mr. Mair that she wanted a police report filed. (Plf’s Dep Trans, Def’s Appx, Vol 1 at pg. 105-106). Plaintiff, instead, pondered whether he should be fired and/or made aware that his statements are inappropriate. (Plf’s Dep Trans, Def’s Appx, Vol 1 at pg. 105-106). Moreover, Plaintiff did not testify that she found the statements to be a violation of a law, rule, or regulation. (Plf’s Dep Trans, Def’s Appx, Vol 1 at pg. 105-106).

**B. THE COURT OF APPEALS DID NOT ADD EXTRA-STATUTORY REQUIREMENTS TO THE DEFINITION OF PROTECTED ACTIVITY UNDER THE WHISTLEBLOWERS' PROTECTION ACT.**

As stated above, the WPA does not define the meaning of “report” under the Act. As a result, the courts are left to define the meaning of report employing the rules of statutory construction. Plaintiff asserts that the Court of Appeals added extra statutory requirements to the Act, disregarding that the term “report” is not defined within the Act. The Court then employed the definition of “report” as set forth by a published Court of Appeals opinion, *Henry v City of Detroit*, 234 Mich App 405 (1999). In reliance on *Henry*, the Court concluded that Plaintiff did not “report” within the meaning of the Act.

In *Henry v Detroit*, this Court held that the Plaintiff did not report within the meaning of the WPA because the plaintiff “took no initiative to communicate the violation to a public body.” 234 Mich App 405, 411 (1999). The Court began the analysis by characterizing Plaintiff as a type one whistleblower. *Id* at 411. When analyzing the plain language of the statute, the Court held that a type one whistleblower is “one who, on his own initiative, takes it upon himself to communicate the employer’s wrongful conduct to a public body in an attempt to bring the, as yet hidden, violation to light to remedy the situation or harm done by the violation.” *Id* at 410. This Court agreed with Defendant that the plaintiff had not engaged in protected activity under the WPA when his alleged “report” was deposition testimony. *Id* at 410. Specifically, “plaintiff took no initiative to communicate the violation to a public body, i.e., he was not an initiator.” *Id* at 411.

Again, Plaintiff took no action to communicate an alleged violation to a public body. She alleges she “reported” a violation to Mr. Mair. (Plf’s Complaint, Def’s Appx, Vol 1 at pg. 13). Similar to deposition testimony, Plaintiff did not meet with the attorney on her own volition, but was requested to do so by her employer. (Plf’s Dep Trans, Def’s Appx, Vol 1 at pg. 112). Then,

when she met with the attorney, she relayed the same information that she previously communicated to Ms. Snyder. (Plf's Complaint, Def's Appx, Vol 1 at pg. 23).

Notably, the purpose of the WPA is to protect the public and the employees who report a violation of a law, rule, or regulation to a public body. *Dolan v Continental Airlines/ Continental Exp*, 454 Mich 373, 378-79 (1997). Herein, Plaintiff's complaint is devoid of any allegations that serve the purpose of the WPA.

**C. THE COURT OF APPEALS DID NOT ERR IN FINDING PLAINTIFF DID NOT MAKE A "REPORT" UNDER THE ACT.**

In *Marks v MidMichigan Medical Center-Gratiot*, 316 Mich App 1, 23 (2016), the Court of Appeals held that a licensed Michigan attorney qualifies as a member of a "public body" within the meaning of the WPA.

Unlike the facts set forth in *McNeil-Marks*, Mr. Mair was not Plaintiff's personal attorney. The Michigan Rules of Professional Conduct provides that, "A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders, or other constituents." MRPC 1.13. The attorney was retained to represent SVRC, distinct from its employees. Therefore, Plaintiff expressing concern to her supervisor is one and the same as expressing concern to her employer's attorney. Indeed, internal complaints of violations are not covered by the WPA. (*Pasquale v Allied Waste Services, Inc*, Def's Appx, Vol 2 at pg. 340). There is no evidence that Plaintiff wanted the attorney or expected the attorney to act on her behalf.

**II. THE COURT OF APPEALS PANEL DID NOT ERR IN FINDING THAT PLAINTIFF WAS NOT "ABOUT TO REPORT" WITHIN THE MEANING OF THE ACT.**

To establish a prima facie case of retaliation under the WPA, a plaintiff must prove: (1) that she was engaged in a protected activity under the Act; (2) that she suffered an adverse employment action; and (3) that a causal connection exists between the protected activity and the adverse employment action. *Debano-Griffin v. Lake Co.*, 493 Mich. 167, 175 (2013). A plaintiff can establish that she was engaged in protected activity with evidence that she was “about to report” a suspected violation of law to a public body. *Shallal v Catholic Social Servs of Wayne Co.*, 455 Mich 604, 610 (1997). The *Shallal* Court stated that “plain language” of the WPA “restricts recovery under the act by requiring a nonreporting employee to establish being ‘about to’ report by offering clear and convincing evidence.” *Id.* at 611 (*citing* MCL 15.363(4)); *see also Chandler v. Dowell Schlumberger, Inc.*, 456 Mich. 395, 400 (1998) (an “employee seeking protection under the ‘about to report’ language of the act [must] prove his intent by clear and convincing evidence.”). Moreover, Michigan law is clear that an “employer is entitled ‘to objective notice of a report or a threat to report by the whistleblower.’” *Hays v. Lutheran Soc. Servs. of Mich.*, 300 Mich. App. 54, 62-63 (2013) (*quoting Roulston v. Tendercare (Mich.), Inc.*, 239 Mich. App. 270, 279 (2000)).

As the Court of Appeals panel correctly observed, Plaintiff brought forth no evidence in this case that she was ever “about to report” any violation of law to law enforcement, and certainly did not satisfy the “clear and convincing evidence” standard that governs the inquiry.

### **III. PLAINTIFF CANNOT ESTABLISH A QUESTION OF FACT FOR THE REMAINING ELEMENTS OF HER CLAIM FOR RETALIATION UNDER THE WPA.**

#### **A. THE “ABOUT TO REPORT” CLAIM.**

Even assuming, *arguendo*, that Plaintiff did engage in protected activity by being “about to report” a violation of some law, rule or regulation, she still could not set forth a prima facie case

of retaliation because there exists no causal connection between Plaintiff being laid off and her alleged protected activity. Moreover, even if Plaintiff could set forth a prima facie case, Defendant has put forth a legitimate, non-retaliatory reason for laying off Plaintiff which is not pretextual.

To establish a claim of retaliation under the WPA, a plaintiff may rely on direct or indirect evidence. *Debano-Griffin*, 493 Mich. at 176. Direct evidence is “evidence which, if believed, requires the conclusion that unlawful [retaliation] was at least a motivating factor in the employer’s actions.”<sup>1</sup> *Hazle v. Ford Motor Co.*, 464 Mich. 456, 462 (2001). Where, as here, no direct evidence of retaliation exists, a plaintiff’s presentation of a prima facie case under the WPA gives rise to a rebuttable presumption of retaliation if an employer cannot otherwise justify the adverse employment action.<sup>2</sup> *Id.* at 463. However, an employer is entitled to summary disposition if it offers a legitimate reason for its action in response, and the plaintiff fails to meet her burden of demonstrating that a reasonable fact-finder could still conclude that the plaintiff’s activity was a “motivating factor” for the employer’s adverse employment action. *Id.* at 464-465. To that end, a plaintiff “must not merely raise a triable issue that the employer’s proffered reason was pretextual, but that it was a pretext for [unlawful retaliation].” *Id.* at 465-466.

Plaintiff cannot establish a prima facie case of retaliation because she cannot overcome the hurdle of demonstrating the causal connection element. “A defendant is entitled to summary [disposition] when a plaintiff cannot factually demonstrate a causal link between the protected

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<sup>1</sup> Whistleblower claims are analogous to other anti-retaliation employment claims brought under employment discrimination statutes (such as Michigan’s Elliot Larsen Civil Rights Act), and consequently, “they should receive treatment under the standards of proof of those analogous [claims].” *Shallal*, 455 Mich. at 617.

<sup>2</sup> This is the familiar burden-shifting framework set forth by the United States Supreme Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

activity and the adverse employment action.” *Hilden v. Hurley Medical Center*, 504 Fed. App’x. 408, 413 (6th Cir. 2012) (quoting *West v. Gen. Motors Corp.*, 469 Mich. 177 (2003)).

In this case, Plaintiff relies on temporal proximity to assert a causal connection. This Court has stated that: “[s]omething more than a temporal connection between protected conduct and an adverse employment action is required to show causation” in claims under the WPA. *West*, 469 Mich. at 186; *see also, Debano-Griffin, supra*, at 177. Plaintiff brought forth no evidence beyond temporal proximity in this case. Plaintiff also claims that SVRC had a negative reaction to Plaintiff’s protected activity, however, the evidence does not support it. (Text messages; Def’s Appx at pg. 328).

Finally, even assuming, *arguendo*, that Plaintiff could set forth a *prima facie* case of retaliation, Defendant obviously had a legitimate, non-retaliatory economic reason for laying off the Plaintiff. To demonstrate that such a reason is pretextual, a plaintiff must show: (1) that the reason had no basis in fact; (2) that if the reason had a basis in fact, it was not an actual factor motivating the decision; or (3) that if the reason was a factor, that it was insufficient to justify the decision. *Dubey v. Stroh Brewery Co.*, 185 Mich. App. 561, 565-566 (1990).

As set forth above, there is much evidence that Plaintiff’s layoff was the result of economic, budgetary concerns. Plaintiff indicated in an unemployment form that the reason for her layoff was “lack of work.” (Unemployment Benefits Claim Form, Def’s Appx Vol 2 at pg. 279). Moreover, the CEO, COO, and a Board Member all confirmed that SVRC was in a concerning economic position that chiefly related to Plaintiff’s position. There is no evidence that there was another reason for Plaintiff’s lay off. Indeed, several other employees were let go at or near the time of Plaintiff’s lay off.

**B. THE “REPORTING” CLAIM.**

Plaintiff also claims that because she allegedly “reported” LS’s conduct to an attorney, she engaged in protected activity under the WPA for which she was laid off. *See* Exhibit 3 at pg. 8-10. To support this claim, Plaintiff relies in her Complaint on this Court’s decision in *McNeil-Marks v. Midmichigan Medical Center-Gratiot*, 316 Mich. App. 1, 23 (2016), where the Court held that an attorney may qualify as a member of a public body pursuant to his or her status as a member of the State Bar of Michigan.

Again, however, there is no causal connection between her “reporting” to an investigating attorney and any adverse employment action. The Plaintiff’s Complaint alleges that she informed “Defendant’s attorney about LS’s threatening statements.” (Plf’s Complaint, Def’s Appx, Vol 1 at pg. 18). However, as stated above, these same statements had already been related to Ms. Snyder. Why Defendant would allegedly retaliate against Plaintiff for providing that narrative to an attorney, but would not retaliate for providing that same narrative to Ms. Snyder cannot be explained. The Court of Appeals agreed. Moreover, other similarly situated employees also participated in the investigation, and none of these employees were subject to any adverse employment action. If the criteria for being laid off was reporting an employee’s threatening conduct to an attorney, then these other employees would have been laid off as well.<sup>3</sup>

**IV. THE WPA IS THE EXCLUSIVE REMEDY FOR PLAINTIFF’S CLAIMS.**

Plaintiff asserts that she is entitled to pursue her claim that she was discharged in violation of Michigan public policy, simply because the Court of Appeals held that she failed to establish a claim under the WPA. The logic is not there. Michigan law is clear that “where there exists a statute specifically proscribing a particular adverse employment action, that statute is the exclusive

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<sup>3</sup> Also, there is no record evidence anywhere in this case that the individuals who made the decision to lay off the Plaintiff were ever even aware of her specific statements to counsel.

remedy, and no other ‘public policy’ claim for wrongful discharge can be maintained.” *Kimmelmann v. Heather Downs Mgmt. Ltd.*, 278 Mich. App. 569, 573 (2008). Plaintiff is not entitled to pursue a claim for a public policy violation simply because she cannot prove a violation under the WPA. Rather, the WPA provides the exclusive remedy for the *type* of claim Plaintiff alleges; viability of the claim is irrelevant. Because the WPA provides a specific statutory remedy for employees who are terminated for reporting or being about to report violations of law, a plaintiff cannot pursue a claim for termination in violation of public policy. *Id.*

Indeed, the *McNeil-Marks* decision, *supra*, dealt with a situation involving a “reporting” claim that a plaintiff also attempted to classify as a “refusal to conceal.” 316 Mich. App. at 25-26. There, this Court affirmed dismissal of the plaintiff’s public policy claim, holding that:

[w]e see no logical distinction between the refusal to conceal and the report by which that refusal manifested itself; rather, the two are flip sides of the same coin. Because plaintiff’s public policy claim arises out of the same activity as her WPA claim, the trial court properly concluded that the latter claim preempts the former.

*Id.* at 26.

Similarly, herein, there is no distinction between a refusal to conceal and the alleged reporting act. “Because plaintiff’s public policy claim arises out of the same activity as her WPA claim,” the WPA is her exclusive remedy. *Id.*

### **CONCLUSION**

WHEREFORE, for the above-stated reasons, Defendant / Appellee’s, SVRC INDUSTRIES, INC., respectfully requests that this Honorable Court DENY Plaintiff / Appellant’s Application for Leave to Appeal and AFFIRM the Opinion and Order of the Michigan Court of Appeals.

Respectfully submitted

/S/ Kailen C. Piper  
KAILEN C. PIPER (P82865)