

STATE OF MICHIGAN  
IN THE SUPREME COURT

LINDA RIVERA,

Plaintiff-Appellant,

v.

SVRC INDUSTRIES, INC.,

Defendant-Appellee.

MSC No. 159857

COA No. 341516

Trial Ct. No. 16-031756-NZ

Hon. Patrick J. McGraw

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**PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF**

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**TABLE OF CONTENTS**

STATEMENT OF QUESTIONS PRESENTED ..... iii

INDEX OF AUTHORITIES .....iv

SUPPLEMENTAL ARGUMENT .....1

I. THAT THE RECORD SUPPORTS PLAINTIFF’S CONTENTION THAT HER COMMUNICATION WITH DEFENDANT’S CHIEF OPERATING OFFICER DEMONSTRATED SHE WAS “ABOUT TO REPORT” A SUSPECTED VIOLATION OF LAW ..... 1

II. THAT PLAINTIFF’S COMMUNICATION WITH DEFENDANT’S COUNSEL CONSTITUTED A “REPORT” PURSUANT TO MCL 15.362 WHERE (A) DEFENDANT’S COUNSEL INITIATED CONTACT WITH PLAINTIFF (RATHER THAN PLAINTIFF CONTACTING HIM), AND (B) DEFENDANT’S COUNSEL WAS AWARE OF PLAINTIFF’S ALLEGATIONS PRIOR TO THEIR CONVERSATION ..... 8

III. THAT THE WHISTLEBLOWERS’ PROTECTION ACT IS NOT PLAINTIFF’S EXCLUSIVE REMEDY ..... 15

IV. THAT THE RECORD SUPPORTS PLAINTIFF’S CONTENTION THAT HER PROTECTED ACTIVITY CAUSED HER FIRING ..... 23

RELIEF SOUGHT .....25

**STATEMENT OF QUESTIONS PRESENTED**

- I. Whether the record supports plaintiff's contention that her communication with defendant's chief operating officer demonstrated that she was "about to report" a violation or a suspected violation of law?
- II. Whether plaintiff's communications with defendant's counsel constituted a "report" pursuant to MCL 15.362 where (a) defendant's counsel initiated contact with plaintiff (rather than plaintiff contacting him), and (b) defendant's counsel was aware of plaintiff's allegations prior to their conversation?
- III. Whether the Whistleblowers' Protection Act (MCL 15.361 *et seq.*) is plaintiff's exclusive remedy in this case?
- IV. Whether the record supports plaintiff's contention that her protected activity caused her firing, that is, whether plaintiff has sufficient evidence beyond the temporal proximity of the events to show causation?

**INDEX OF AUTHORITIES**

**CASES**

*Anzaldua v Neogen Corp*,  
292 Mich App 626; 808 NW2d 804 (2011) ..... 16-17, 21

*Barrett v Whirlpool Corp*,  
556 F3d 502 (CA 6, 2009) ..... 24

*Bryson v Regis Corp*,  
498 F3d 561 (CA 6, 2007) .....23 n11

*Cadwell v City of Highland Park*,<sup>1</sup>  
unpublished opinion per curiam of the Court of Appeals,  
issued May 28, 2015; 2015 WL 3448616 (Docket No. 318430) ..... 9 n2

*Campbell v G4S Secure Solutions (USA), Inc*,  
645 F App’x 506 (CA 6, 2016) .....3-5, 8

*Campbell v Human Services Dep’t*,  
286 Mich App 230; 780 NW2d 586 (2009) .....24

*Chandler v Dowell Schlumberger Inc*,  
456 Mich 395; 572 NW2d 210 (1998) .....14

*Ciccarelli v Plastic Surgery Affiliates, PC*,  
unpublished opinion per curiam of the Court of Appeals,  
issued March 27, 2001; 2001 WL 699094 (Docket No. 219780) .....18

*Clark v Walgreen Co*,  
424 F App’x 467 (CA 6, 2011) ..... 23 n11

*Cooney v Bob Evans Farms, Inc*,  
645 F Supp 2d 620 (ED Mich, 2009) .....3, 5

*Dean v St Mary’s of Michigan*,  
unpublished opinion per curiam of the Court of Appeals,  
issued January 23, 2020; 2020 WL 402054 (Docket Nos. 345213, 345374) .....18-20

*DeBoer v Musashi Auto Parts*,  
124 F App’x 387 (CA 6, 2005) ..... 23 n11

---

<sup>1</sup> All unpublished opinions are attached hereto in alphabetical order as **Exhibit 1**.

*DeMaad v City of Southfield*,  
 unpublished opinion per curiam of the Court of Appeals,  
 issued Aug. 10, 2006; 2006 WL 2312086 (Docket No. 267291) ..... 11 n5

*Deneau v Manor Care, Inc*,  
 219 F Supp 2d 855 (ED Mich, 2002) .....18

*Dixon v Gonzales*,  
 481 F3d 324 (CA 6, 2007) ..... 23

*Dolan v Continental Airlines*,  
 208 Mich App 216; 526 NW2d 922 (1995) .....16-17

*Dolan v Continental Airlines/Continental Exp*,  
 454 Mich 373; 563 NW2d 23 (1997) .....16

*Driver v Hanley (After Remand)*,  
 226 Mich App 558; 575 NW2d 31 (1997) ..... 16-17

*Dudewicz v Norris-Schmid, Inc*,  
 443 Mich 68; 503 NW2d 645 (1993) .....11-13, 17-18

*Farha v Cogent Healthcare of Michigan, PC*,  
 164 F Supp 3d 974 (ED Mich, 2016) ..... 4-5

*Fogwell v Klein*,  
 unpublished opinion per curiam of the Court of Appeals,  
 issued Sept. 25, 2001; 2001 WL 1134883 (Docket No. 223761) .....2, 5, 8

*Garavaglia v Centra, Inc*,  
 211 Mich App 625; 536 NW2d 805 (1995) ..... 17

*Hall v Consumers Energy Co*,  
 unpublished opinion per curiam of the Court of Appeals,  
 issued May 30, 2006; 2006 WL 1479911 (Docket No. 259634) ..... 18

*Hayes v Lutheran Social Services of Michigan*,  
 300 Mich App 54; 832 NW2d 433 (2013) ..... 10

*Henry v City of Detroit*,  
 234 Mich App 405; 594 NW2d 107 (1999) .....8-10, 12-13, 15, 24

*Irwin v Ciena Health Care Mgmt, Inc*,  
 unpublished opinion per curiam of the Court of Appeals,  
 issued December 7, 2010; 2010 WL 4977928 (Docket No. 294239) .....21-22

*Janetsky v County of Saginaw*,  
unpublished opinion per curiam of the Court of Appeals,  
issued April 23, 2020; 2020 WL 1968566 (Docket Nos. 346542, 346565) . . . . . 20 n9

*Kimmelman v Heather Downs Mgmt Ltd*,  
278 Mich App 569; 753 NW2d 265 (2008) . . . . . 13, 21

*Koontz v Ameritech Services, Inc*,  
466 Mich 304; 645 NW2d 34 (2002) . . . . . 15

*Lamer v Metaldyne Co LLC*,  
240 F App’x 22 (CA 6, 2007) . . . . . 24-25

*Landin v HealthSource Saginaw, Inc*,  
305 Mich App 519; 854 NW2d 152 (2014) . . . . . 19

*Lewandowski v Nuclear Mgt*,  
272 Mich App 120; 724 NW2d 718 (2006) . . . . . 17

*Maiden v Rozwood*,  
461 Mich 109; 597 NW2d 817 (1999) . . . . . 16

*McNeill-Marks v MidMichigan Medical Center-Gratiot*,  
316 Mich App 1; 891 NW2d 528 (2016) . . . . . 16

*McNeill-Marks v MidMichigan Medical Center-Gratiot*,  
502 Mich 851; 912 NW2d 181 (Mem)(2018) . . . . . 21

*Mosher v City of Kalamazoo*,  
unpublished opinion per curiam of the Court of Appeals,  
issued Jan. 17, 2019; 2019 WL 254526 (Docket No. 342978) . . . . . 13

*Nair v Oakland County Community Mental Health Authority*,  
443 F3d 469 (CA 6, 2006) . . . . . 11

*Nguyen v City of Cleveland*,  
229 F3d 559 (CA 6, 2000) . . . . . 23

*Pace v Edel-Harrelson*,  
499 Mich 1; 878 NW2d 784 (2016) . . . . . 20-21

*Pratt v Brown Machine Co, A Division of John Brown, Inc*,  
855 F2d 1225 (CA 6, 1988) . . . . . 22

*Rivera v SVRC Industries, Inc*,  
327 Mich App 446; 934 NW2d 286 (2019) . . . . . 8, 12, 14, 16, 20-21

*Rymal v Baergen*,  
262 Mich App 274; 686 NW2d 241 (2004) ..... 23

*Shallal v Catholic Social Services of Wayne County*,  
455 Mich 604; 566 NW2d 571 (1997) ..... 1-2, 5, 7

*Sheiko v Underground RR*,  
unpublished opinion per curiam of the Court of Appeals,  
issued Dec. 16, 2008; 2008 WL 7488019 (Docket No. 277766) ..... 15

*Truel v City of Dearborn*,  
291 Mich App 125; 804 NW2d 744 (2010) ..... 9

*Vagts v Perry Drug Stores*,  
204 Mich App 481; 516 NW2d 102 (1994) ..... 21

*West v Gen Motors Corp*,  
469 Mich 177; 665 NW2d 468 (2003) ..... 23-24

*Whitaker v US Sec Associates, Inc*,  
774 F Supp 2d 860 (ED Mich, 2011) ..... 11

*Whitman v City of Burton*,  
493 Mich 303; 831 NW2d 223 (2013) ..... 13, 23

*Wurtz v Beecher Metro Dist*,  
494 Mich 242; 848 NW2d 121 (2014) ..... 19-20

**STATUTES**

MCL 15.361 ..... iii

MCL 15.362 ..... .ii-iii, 8-9, 15 n8, 16

**RULES**

MCR 2.116 ..... 16

MRE 404 ..... 24

## SUPPLEMENTAL ARGUMENT

**I. That the record supports plaintiff's contention that her communication with defendant's chief operating officer demonstrated that she was "about to report" a violation or a suspected violation of law**

In its March 25, 2020 Order, the Supreme Court directed briefing on whether the record supports plaintiff's contention that her communication with defendant's Chief Operating Officer demonstrated that she was "about to report" a violation or suspected violation of law. Plaintiff submits that the analysis of whether Plaintiff was "about to report" should not be limited only to the evidence of her communications with the Chief Operating Officer. "Being about to report" is a state of mind and, as such, courts should look to the entire record to determine whether evidence supports a plaintiff's contention that he or she was "about to report." This type of review is in keeping with the various cases that have analyzed whether there is a factual issue as to whether an employee was "about to report." Comparing the facts of this case to the several cases analyzing the issue shows that Plaintiff has created a factual question, for the jury, as to whether she was about to report.

In *Shallal v Catholic Social Services of Wayne County*, 455 Mich 604; 566 NW2d 571 (1997), this Court provided the most in depth analysis of the issue that was and is binding on the Court of Appeals in this case. In *Shallal*, the Court noted the legislative analysis of the statutory text provided that the "about to" report language was intended to protect "conscientious employees who intended to, but were discharged in retaliation before they could, report." *Id.* at 612. Turning to the dictionary, the Court then explained, "'About' is defined as 'on the verge of' when followed by 'to report.'" *Id.* The *Shallal* case involved allegations about the president of the employer drinking on the job and misusing agency funds. *Id.* at 606. The plaintiff employee discussed the need to report the president with her supervisor, other staff members, and an honorary board

member. *Id.* Plaintiff did not make a report at that time, because she feared retaliation. *Id.* at 606-607. After an unrelated investigation, the plaintiff told the president of “her intention to report [the president’s] abuses of alcohol and agency funds if he failed to, in her words, ‘straighten up.’” *Id.* at 607-608. She specifically said, “And if you don’t straighten up . . . I will report [you] to the department, to the board, anybody, everybody.” *Id.* After the confrontation, the plaintiff continued to talk about reporting the president with co-workers, stating, “We’re all enablers.” *Id.* The Supreme Court found sufficient evidence of being “about to report,” reasoning:

Plaintiff’s conditional threat to her employer was credible evidence that she had finally decided that she was going to report him. Giving her employer the opportunity to correct his behavior does not in any way affect whether she had formed the requisite intent to report her supervisor. In fact, her threat furthered the public policy goal of the statute, which is to combat the corruption or criminally irresponsible behavior of employers. A plaintiff should not be required to say “magic words” in order to reap the protections of the statute. It should be sufficient that plaintiff actually threatened to report her employer.

*Id.* at 616.

In several post-*Shallal* opinions, courts oftentimes turned to the facts of *Fogwell v Klein*, unpublished opinion per curiam of the Court of Appeals, issued Sept. 25, 2001; 2001 WL 1134883 (Docket No. 223761). In *Fogwell*, the plaintiff worked as a dental hygienist for the defendant dentist. 2001 WL 1134883, at \*1. The plaintiff became concerned regarding the legality of the defendant’s billing practices. *Id.* She copies records, sought legal advice regarding her personal liability, and placed two calls to an insurance hotline, but ended those calls before speaking with anyone. *Id.* She also contacted the Department of Consumer and Industry Services and requested a complaint form, but did not complete it. *Id.* At a later time, the plaintiff met with the defendant, shared her concerns about the billing practices, and notified defendant she had consulted an attorney and attempted to contact an insurance hotline. *Id.* Less than a month later, defendant terminated the plaintiff’s employment when she refused to indicate whether she intended to stop

pursuing the matter. *Id.* The Court of Appeals found that a reasonable person could view the plaintiff's actions, coupled with her refusal to answer the defendant's questions, as clear and convincing evidence that she was "about to report." *Id.* at \*2.

In *Cooney v Bob Evans Farms, Inc.*, 645 F Supp 2d 620 (ED Mich, 2009), the plaintiff worked as a server at a Bob Evans restaurant. *Id.* at 623. On one morning, the plaintiff allegedly observed an employee smoking marijuana in the parking lot prior to the restaurant opening. *Id.* at 624. She subsequently struggled with whether she should report the incident. *Id.* She spoke about the incident with two co-workers, who both encouraged the plaintiff to report the matter to management. *Id.* at 624-625. Two other employees testified that they heard the plaintiff talking openly about the allegations. *Id.* at 625 n2. Unbeknownst to the plaintiff, one of the co-workers notified the general manager of the plaintiff's allegations and an investigation ensued during which no one would corroborate the plaintiff's allegations. *Id.* at 625. The following day, the plaintiff reported the alleged drug use to the assistant manager. *Id.* When the plaintiff subsequently met with the general manager, the manager placed the plaintiff on suspension pending an investigation. *Id.* at 625-626. The plaintiff alleged she told the manager:

[T]hat she was violating my civil rights and I wasn't appreciating how I was being treated and that I was going to file a formal complaint with Civil Rights because I was doing the right thing by coming forward and reporting the drug use. And I didn't feel it was fair that I was being sent home.

*Id.* at 626. After being terminated, the plaintiff again threatened to file a complaint with the Department of Civil Rights. *Id.* at 627. The federal district court found that the statements she made that she was "going to" file with the Michigan Department of Civil Rights was sufficient, although minimal, evidence to conclude she was "about to report." *Id.* at 628-629.

In *Campbell v G4S Secure Solutions (USA), Inc.*, 645 F App'x 506 (CA 6, 2016), the plaintiff worked for a General Motors contractor as a fire chief, overseeing compliance and

inspection at a GM facility. *Id.* at 507. When the plaintiff reported to her supervisor that she suspected two fire officers were falsifying records, her supervisor instructed her to explore the issue further. *Id.* Two months later, the plaintiff submitted a document summarizing her conclusion that the two employees had falsified reports, inspections, and attendance logs. *Id.* Her supervisor then stated that he would take it from there and did speak with upper level managers about the issue; however, GM directly hired the plaintiff's supervisor and the contractor replaced him. *Id.* The new supervisor later recommended the plaintiff's removal from the GM account and the contractor subsequently terminated her employment. *Id.* The plaintiff testified that the defendant terminated her, because she told supervisors "that she felt obligated" to report the fire officers' falsifications to the Occupational Safety and Health Administration and to the state counterpart agency. *Id.* at 508. At the same time, the plaintiff testified that she never told anyone that she was actually thinking about making a report. *Id.* The Sixth Circuit found that the only evidence that the plaintiff was about to report the alleged violations was her own deposition testimony. *Id.* at 510. The Court continued, "Merely telling a superior of an alleged violation and testifying to having visited the regulatory agency's website and intending to later report the violation do not clearly and convincingly demonstrate that an employee was about to report." *Id.*

In *Farha v Cogent Healthcare of Michigan, PC*, 164 F Supp 3d 974 (ED Mich, 2016), the defendant medical practice hired the physician plaintiff. *Id.* at 978-979. At some point, the plaintiff sent an email to the regional medical director complaining that her supervising physician was making mistakes during admissions by starting the wrong treatments on patients. *Id.* at 982. The plaintiff last contacted the regional medical director the day prior to her termination, concerning a heart attack patient who had not been attended to by her supervisor during the night shift; when plaintiff arrived the following morning, the patient had to be transferred to a different

hospital, because twelve to eighteen hours had elapsed after the patient experienced a heart attack and the patient had not received treatment. *Id.* The plaintiff allegedly called her supervisor and said, “I’m going to report this incident, it’s not acceptable, I’m going to report it to higher authorities.” *Id.* The plaintiff testified that “higher authorities” included hospital administration and the State of Michigan. *Id.* The plaintiff never made a report, believing she needed patient details, which she could not retrieve, because the defendant discharged her the following day. *Id.* The District Court found the plaintiff’s actions, specifically her statement to her supervisor that she was going to report the incident to higher authorities, were sufficient to meet the heightened standard for “about to report” claims and gave rise to a factual question. *Id.* at 993.

Several principles arise from the above case law. *Shallal* shows that an employee’s threat to report can evidence that the employee is “about to report,” especially when coupled with other evidence of the employee’s mindset. The more certain that threat is, the more likely the employee is about to report as demonstrated in *Fogwell* and *Cooney*. *Campbell* shows that a plaintiff’s testimony alone may not be enough to meet the clear and convincing standard; as such, the more corroborating evidence one can present the more likely he or she can meet that standard. Moreover, a review of these cases shows that the evidence presented by Plaintiff, including her verbal and text conversation with the chief operating officer, gives rise to a factual question whether Plaintiff was about to report.

In the instant matter, Plaintiff verbally reported L.S.’s comments and discussed the need to make a police report with COO Snyder. (**Appendix, No. 14, Excerpts of the Deposition of Linda Rivera, at 281a, 284a-285a**). When Plaintiff mentioned making a police report, Snyder said she would speak with President Emerson. (**App. No. 14, at 285a**). In the meantime, Plaintiff also spoke with Ms. Flynn about how to handle the situation. (**App No. 14, at 286a**). Ms. Flynn

testified that Plaintiff spoke about filing a police report and that Plaintiff felt one should be filed. **(Appendix, No. 13, Excerpts of the Deposition of Yvonna “Eve” Flynn, at 279a)**. Plaintiff continued to engage in conversation with Ms. Snyder via text message:

Snyder: Trying to call attorney

Snyder: Talked w dean/talked w attorney/will fill u in tomorrow/document. Thx

Rivera: Deb- I was advised we should immediately make out a police report!

Rivera: He is a hostile employee that was a threat!

Snyder: Dean talked w the attorney and he said no police report. The attorney will be at SVRC at 830 Wednesday morn to talk w lyle

Rivera: Uhhhh Deb . . . I dont feel comfortable not file police report. I prefer [t]he authorities have a record of this incident. WEDNESDAY is a long time away to look over my shoulder wondering if he is lurking in the parking lot. He is an ex-marine.

Rivera: Eve confirmed Lyle has a key. All job coaches have a key to the building.

Rivera: Can I ask why the attorney said no police report?? I called Sylvester 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??

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.

Rivera: Sylvester is my significant other. I am upset bcuz an ex-marine just threatened me. I am a[n] employee too!! I am discussing my personal experience. Lyle looked right at me and said those things. So SVRC doesn't care about threats coming from a disgruntled angry employee that are directed at his supervisor and the director that told him about his 3 day suspension. It happened at work, but you are saying I should file a PPO personally, and nothing with SVRC even though it took place at work. . . . Wow. That's all I can

say.

**(Appendix, No. 15, Text Messages Between Linda Rivera and Denise Snyder, at 289a-292a).**

Amidst texting with Ms. Snyder, Plaintiff went back to the production area, upset, crying, and said to employees, Virginia Young, Jay Page, and Danielle Petre, that she did not know why she was being told to not fill out a police report. **(App. No. 14, at 287a-288a).**

As noted in her text messages, Plaintiff further discussed the situation and reporting to the police with the Chairman of Defendant's Board of Directors, Sylvester Payne. **(App. No. 14, at 284a).** Specifically, she discussed why a threat would not be documented with the police as soon as possible. **(App. No. 14, at 284a).** Mr. Payne likewise testified that Plaintiff had shared L.S.'s threat with him and they discussed whether a police report should be filed. **(Appendix, No. 11, Excerpts of the Deposition of Sylvester Payne, at 272a).** Ultimately, they agreed that a police report should be filed. **(App. No. 11, at 273a).** Plaintiff further discussed the situation with a friend, Jerry Orr, who urged Plaintiff to start a paper trail and make a police report. **(App. No. 14, at 282a-283a).**

COO Snyder also shared her conversations with Plaintiff with President Emerson. President Emerson testified that Snyder told him Plaintiff wanted to file a police report. **(Appendix, No. 12, Excerpts of the Deposition of Dean Emerson, at 276a).** Emerson testified, "Linda felt that a police report needed to be filed." **(App. No. 12, at 276a).** It was Emerson who told COO Snyder, after speaking with Mr. Mair, that a police report should not be filed. **(App. No. 12, at 277a).** Ms. Snyder also shared the text messages with Mr. Emerson. The following morning, she showed the text messages to Mr. Emerson and identified who said what in the text messages. **(App. No. 12, at 275a).**

As in *Shallal*, Plaintiff not only communicated her intentions to the relevant decision-

makers, but numerous conversations with co-workers corroborated her intent. These actions, speaking to a Board member, a friend, and several co-workers, constitute significant evidence that corroborates her state of mind, that she was about to report, as in *Fogwell*. Unlike *Campbell*, Plaintiff need not rely solely on her own testimony, but her testimony is supported by text messages and other witnesses' testimony, including the relevant decision-makers. When comparing the facts set forth immediately above with the factual spectrum set forth in the cases discussed above, Plaintiff respectfully submits that a genuine issue of material fact exists regarding whether she was "about to report" L.S.'s suspected criminal behavior to the police and, as such, the Court of Appeals erred in finding summary disposition appropriate regarding Plaintiff's "about to report" claim.

**II. That plaintiff's communications with defendant's counsel constituted a "report" pursuant to MCL 15.362 where (a) defendant's counsel initiated contact with plaintiff (rather than plaintiff contacting him), and (b) defendant's counsel was aware of plaintiff's allegations prior to their conversation**

**A. That plaintiff made a "report" where defendant's counsel initiated contact with plaintiff**

The Court of Appeals seemingly held that one cannot make a "report" where someone other than the employee, including the public body, initiates contact. The *Rivera* panel held:

[P]laintiff did not "on [her] own initiative, take[] it upon [herself] to communicate the employer's wrongful conduct to a public body in an attempt to bring the, yet hidden, violation to light. . . ." [*Henry v City of Detroit*, 234 Mich App 405, 410; 594 NW2d 107 (1999).] Rather, plaintiff spoke with Mair at defendant's request. In other words, when she spoke with Mair, plaintiff was not an "initiator" and did not "take[] it upon [herself]" to communicate with Mair.

*Rivera v SVRC Industries, Inc*, 327 Mich App 446, 462-463; 934 NW2d 286 (2019). In evaluating an employee taking the "initiative," the Court of Appeals improperly focuses on who initiates contact or starts the conversation, such a requirement is not based upon the plain language of the statute.

Indeed, the term “report” in the statute is silent and the language is not dependent on who initiated contact with a public body, but logically anticipates additional situations where a public body would initiate contact with the plaintiff. In other words, a “report” can be made without the plaintiff being the one who initiates contact and one cannot read such a requirement into the word “report.” An employee need not be the one who makes the report to engage in a protected activity<sup>2</sup> and, if an employee is not required to be the one who makes the report, the statute cannot require the employee to initiate the contact during which a report is made. While *Henry* referred to two types of whistleblowers, more recent iterations of what constitutes protected activity has expanded to three types of whistleblowing. See, e.g., *Truel v City of Dearborn*, 291 Mich App 125, 138; 804 NW2d 744 (2010).<sup>3</sup> In these recitations, however, courts and attorneys overlook two additional types of protected activity. A person can also engage in protected activity when “a person acting on behalf of the employee” either (1) reports, or (2) is about to report, a violation of law to a public body. MCL 15.362. It is therefore logically deductive that the term “report” cannot require the protected employee to initiate contact when another employee can not only initiate the contact, but also make the report for him or her. *Id.*<sup>4</sup>

This is not to say that one taking the initiative is immaterial to the analysis of whether an employee engaged in protected activity. Although it is not contained with the definition of “report,” it is a logical prerequisite that before one can make a report the person to choose to

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<sup>2</sup> “MCL 15.362 does not require the report to be made by the individual bringing the WPA claim.” *Cadwell v City of Highland Park*, unpublished opinion per curiam of the Court of Appeals, issued May 28, 2015; 2015 WL 3448616, at \*3 (Docket No. 318430).

<sup>3</sup> “There are three types of protected activity: (1) reporting to a public body a violation of a law, regulation, or rule, (2) being about to report such a violation to a public body, or (3) being asked by a public body to participate in an investigation.”

<sup>4</sup> There are several reasons to consider the *Henry* characterizations as simply wrong. First, the characterization of a type I whistleblower mentions the rejected notion that an employee must report an “employer’s wrongful conduct,” it is also wrong about the statute requiring the whistleblower act on his own initiative in creating the factual scenario in which the person makes the report.

convey information, take the initiative, or intend to make the “report.” A person does not accidentally make a report. In other words, to make a “report” does not require an employee to start the conversation with the public body, it does require the employee to actually make a report. To illustrate the point, an employee could be questioned by a local police department. The employee possesses knowledge of a suspected violation of law. Regardless of whether the employee went to the police station of his own volition to make a report or whether the police department interviewed the employee on the scene, the employee faces a choice to make the report. If the employee simply walked into a police station and made the report, it would demonstrate he was a *Henry* type 1 whistleblower. If he was questioned at the scene by a police officer and reports the violation, he could qualify as both a *Henry* type 1 and 2 whistleblower. If he was questioned at the scene by a police officer and chose not to report the violation, he would only qualify as a *Henry* type 2 whistleblower. The initiative the employee takes is the choice to make the report. It should not matter if the public body approaches the plaintiff or if the plaintiff approaches the public body, if in the context of the conversation the plaintiff makes a “report.”

Although there is little case law on the issue, indeed, courts have focused on whether an actual report has been made. For example, in *Hayes v Lutheran Social Services of Michigan*, 300 Mich App 54; 832 NW2d 433 (2013), the plaintiff was a home-healthcare provider who learned of a client’s use of marijuana. *Id.* at 56. The plaintiff called 9-1-1 and subsequently spoke with an official from the Bay Area Narcotics Enforcement Team. *Id.* During the conversation, she inquired about potential consequences of knowing about drug use and not reporting it; at the end, plaintiff declined to take any further action. *Id.* The Court of Appeals found that the plaintiff did not “report any illegal behavior.” *Id.* at 60. She simply did not take any initiative to make an actual report.

Similarly, in *Nair v Oakland County Community Mental Health Authority*, 443 F3d 469 (CA 6, 2006), the plaintiff had complained about a reduction in his hours and sent a letter to the governing board, stating, “I have serious concerns about my legal, ethical and moral obligations.” *Id.* at 473. The Court found that the plaintiff could not show that he made a report or was about to report a violation of law, holding:

[T]he only evidence on which he relies is the November 8 letter to the board. Nowhere in the letter does he report a violation or suspected violation of the law, and nowhere does he suggest that he is about to report such a violation. That he concludes the letter by generically mentioning “my legal, ethical and moral obligations,” does not show that the Authority has violated any law or that Nair intended to report any such violation.

*Id.* at 480.<sup>5</sup> “The common feature in each of these cases is that the plaintiff failed to take even a modest step toward identifying and reporting a suspected violation of a law, rule, or regulation.” *Whitaker v US Sec Associates, Inc*, 774 F Supp 2d 860, 870-871 (ED Mich, 2011).

The focus should not be on the one who initiates the conversation, but on the content of what is conveyed from the employee to the public body. One cannot stretch the term “report” to encompass such extraneous definitions. That an employee or someone acting on the employee’s behalf must consciously decide to give an account or make known the condition of something is a logical necessity to make a “report,” but to analyze how one comes about making that choice is immaterial. The Court of Appeals erred by reading into the statute something that is not there, i.e., that a report is dependent on who started the conversation or who initially caused the conversation to occur. In the instant case, Plaintiff took the initiative and made the decision to report L.S.’s unlawful behavior to a protected body. This is all the statute requires. The plain language only requires the employee “reports . . . a violation or suspected violation of a law. . . .” *Dudewicz v*

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<sup>5</sup> For a further example, see *DeMaad v City of Southfield*, unpublished opinion per curiam of the Court of Appeals, issued Aug. 10, 2006; 2006 WL 2312086 (Docket No. 267291).

*Norris-Schmid, Inc.*, 443 Mich 68, 74-75; 503 NW2d 645 (1993).

***B. That plaintiff made a “report” where defendant’s counsel was aware of plaintiff’s allegations prior to their conversation***

The Court of Appeals, in coming to the determination that Plaintiff did not make a “report,” found that the fact that the particular public body, here the lawyer, was already aware of the suspected violation of law to be dispositive of whether Plaintiff engaged in a protected activity.<sup>6</sup>

The Court held:

Additionally, the trial court appears to have assumed the nature of plaintiff’s discussion with Mair was that of “reporting.” We do not agree. Indeed, the information that plaintiff conveyed to Mair was the same as that which she had already directly communicated to defendant, and that information was already known to Mair by virtue of plaintiff’s earlier communications with defendant itself. As a consequence, the information was no longer “as yet hidden,” at the time of plaintiff’s communication with Mair. We conclude, in this context, the plaintiff’s communications with Mair do not constitute “reporting” under the WPA.

*Rivera*, 327 Mich App at 463; 934 NW2d 286. Again, this reasoning relies upon the characterization from *Henry* of a type 1 whistleblower as one who communicates to “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.” *Henry*, 234 Mich App at 410; 594 NW2d 107. Plaintiff submits that the Court of Appeals imposition that the actual or suspected violation be “hidden” or “unknown” to the public body in order for the employee to make a report is an extra-statutory requirement, which is not permitted under the rules of statutory construction. Moreover, there is nothing in the statutory language that supports such a conclusion.

The *Rivera* Court’s use of *Henry*’s characterization’s mention of “as yet hidden” as an

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<sup>6</sup> The Court of Appeals makes this determination without a factual basis. There was no affidavit from Mr. Mair and neither Mr. Emerson nor Ms. Snyder testified regarding their conversations with Mr. Mair. In fact, to provide such testimony, Defendant would have had to waive the attorney-client privilege. Although one can speculate what information Mr. Mair had, there is a factual lacuna regarding this issue. The Court of Appeals making this determination further erred by assuming a fact and drawing inferences in Defendant’s favor.

extra-textual requirement is unprecedented and wrongheaded as, if accepted, it would serve to defeat the remedial nature of the statute. Research did not reveal any published or unpublished cases where another court had interpreted MCL 15.362 or *Henry* in such a manner. It is important to note that much of the *Henry* characterization is simply wrong in several respects and has been repudiated by subsequent courts. For instance, the characterization requires the employee report “the employer’s wrongful conduct.” *Henry*, 234 Mich App at 410; 594 NW2d 107. Courts have since dispensed with the requirement that the report or violation be by an employer. *See, e.g., Kimmelman v Heather Downs Mgmt Ltd*, 278 Mich App 569, 575; 753 NW2d 265 (2008)(“There is absolutely nothing, express or implied, in the plain wording of the statute that limits its applicability to violations of law by the employer or to investigations involving the employer.”); *Dudewicz*, 443 Mich at 74-75; 503 NW2d 645. The *Henry* characterization also requires the employee to act with a particular motivation, the report must be made “to bring . . . the violation to light to remedy the situation or harm done by the violation.” *Henry*, 234 Mich App at 410; 594 NW2d 107. Again, Courts have rejected any such motivation or intent requirement. In *Whitman v City of Burton*, 493 Mich 303; 831 NW2d 223 (2013), the Supreme Court held:

[W]e hold that, with regard to the question whether an employee has engaged in conduct protected by the act, there is no “primary motivation” or “desire to inform the public” requirement contained within the WPA. Because there is no statutory basis for imposing a motivation requirement, we will not judicially impose one.

*Id.* at 313; *see also Mosher v City of Kalamazoo*, unpublished opinion per curiam of the Court of Appeals, issued Jan. 17, 2019; 2019 WL 254526 (Docket No. 342978)(rejecting “any sort of intent element on the employee’s part as a prerequisite for bringing a claim.”). Indeed, the phrase “as yet hidden” is situated amongst bad company and there is no textual basis for the Court to impose such a requirement.

In 1998, the Supreme Court indicated that the words “report,” “about to report,” and

“requested by a public body to participate in an investigation” were and “are clear and do not readily lend themselves to more than one interpretation.” *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998). It appears, twenty years later, that the words have somehow rendered themselves unclear and ambiguous. In light of the history of judicial attempts to rewrite the statutory language, it is not a surprising development. This most recent attempt to graft upon the statute extra-textual requirements found in one, poorly reasoned appellate decision should be rejected. However, even considering the several definitions of “report” that have been proffered by the Court of Appeals, it becomes apparent that whether the violation is known or unknown by the public body does not change whether the employee made a “report.” One can give “a detailed account of an event,” even if one or more of the persons who hear the account know the events. *See Hays*, 300 Mich App at 60, 832 NW2d 443. The listener’s knowledge, reaction, or beliefs are immaterial to what the reporter does or says. Additionally, one may hear new details one did not previously know or may learn a different perspective. A police officer may want multiple witnesses to confirm that a suspect committed a violation. One can make and repeat “a charge against” someone regardless of whether the public body knows the charge. *Rivera*, 327 Mich App at 463-464; 934 NW2d 286. One might have a very good incentive to repeat a charge, especially if the person the report is directed to did not take action the report desired.<sup>7</sup> This especially could happen when the public body is the employee’s employer or works closely with the employer. A public body may have heard a summary of what an employee has reported; and the public body may still have interest in hearing the allegations directly from the employee. Certainly, a judge or jury trying a case might find it informative to hear a summary of

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<sup>7</sup> One can further imagine a scenario where the public body knows of a violation and wants to keep that violation secret; if it learned another knew about the violation, such as an employee making a report, it would have motive to retaliate against the employee with an unlawful purpose.

expected testimony but would still rely upon actual testimony. Regardless of the definition used for “report,” the knowledge of the public body is immaterial. As Judge CAVANAGH noted, “The WPA does not require that the public body receive, act upon, or acknowledge receipt of the report.” *Sheiko v Underground RR*, unpublished opinion per curiam of the Court of Appeals, issued Dec. 16, 2008; 2008 WL 7488019 (Docket No. 277766)(CAVANAGH, J., dissenting).

“Because the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute.” *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Here, there is nothing in the statutory text which requires the public body to be devoid of previous knowledge of the violation or suspected violation the employee reports. Endorsing the use of the *Henry* characterization as a substantive requirement, especially when it comes to the violation being “hidden” from the public body, permits an appellate panel to drift far afield from the statutory text. Most importantly, it permits a judge to justify his or her own policy preferences by rewriting a statute while ignoring the legislatively adopted policy reflected in the plain language of the statute. Because the Court of Appeals erred by adding a judicially created and imposed requirement that the violation or suspected violation be unknown to the public body, Plaintiff made a “report,” even were we to assume that Mr. Mair had some knowledge of her allegations prior to her direct communication with him.<sup>8</sup>

### **III. That the Whistleblowers’ Protection Act is not plaintiff’s exclusive remedy**

The Court of Appeals erred in finding that the Whistleblowers’ Protection Act was Plaintiff’s exclusive remedy. The Court reasoned as follows:

Plaintiff’s “public policy” claim that she was terminated because she “attempted to

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<sup>8</sup> One can make another argument at this point. If one assumes that Mr. Emerson or Ms. Snyder, both or others conveyed Plaintiff’s allegations to Mr. Mair, Plaintiff would still satisfy the protected activity requirement as those individuals would have been “a person acting on behalf of the employee.” MCL 15.362.

report' LS's conduct to the police or "refused to conceal" LS's alleged violations of the Anti-Terrorism Act arises from the same activity as do her claims under the WPA. See MCL 15.362; see also *McNeill-Marks [v MidMichigan Medical Center-Gratiot]*, 316 Mich App 1, 25; 891 NW2d 528 (2016)]. Indeed, a refusal to conceal unlawful conduct from a public body is not distinguishable from reporting or being about to report that conduct to a public body because there is "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." *Id.* at 26. Accordingly, the trial court erred by denying summary disposition on plaintiff's claim for retaliation in violation of public policy because they were duplicative of her claims under the WPA. MCR 2.116(C)(10); *Maiden [v Rozwood]*, 461 Mich 109, 120; 597 NW2d 817 (1999)].

*Rivera*, 327 Mich App at 468; 934 NW2d 286. This reasoning is wrong on two bases. First, the Court erred in finding the WPA to be an exclusive remedy when it had already determined the WPA was inapplicable, contradicting the binding Court of Appeals precedent holding that the WPA cannot be the exclusive remedy when it provides no remedy at all. Second, the Court of Appeals erred in finding that all of the protected activity alleged by Plaintiff fell within the definition of protected activity of the WPA, when it clearly does not.

"As a general rule, remedies provided by statute for the violation of a right having no common-law counterpart are exclusive rather than cumulative." *Driver v Hanley (After Remand)*, 226 Mich App 558, 566; 575 NW2d 31 (1997). The Michigan Courts have repeatedly held that the WPA provides the exclusive remedy "for an employee who suffers retaliation for reporting or planning to report a suspected violation of a law, regulation, or rule to a public body." *Anzaldua v Neogen Corp*, 292 Mich App 626, 631; 808 NW2d 804 (2011). In the instant case, the Court of Appeals had previously determined that the WPA did not provide Plaintiff with a remedy. Under such situations, there can be no preemption of the public policy claim as has been repeatedly held by the Court of Appeals in both binding and persuasive authority. In *Dolan v Continental Airlines*, 208 Mich App 216; 526 NW2d 922 (1995), *aff'd in part and rev'd in part Dolan v Continental Airlines/Continental Exp*, 454 Mich 373; 563 NW2d 23 (1997), the Court of Appeals stated,

“Given that the WPA affords no protection under the circumstances, plaintiff’s public policy tort claim is not preempted by the WPA.” 208 Mich App at 321. In *Driver*, the Court of Appeals similarly held:

In this case, the circuit court determined that the WPA was not applicable to the facts regarding plaintiff’s discharge. Because the WPA provided no remedy at all, it could not have provided plaintiff’s exclusive remedy. Therefore, we hold that the circuit court abused its discretion when it denied plaintiff’s motion on the ground that the WPA provided plaintiff’s exclusive remedy.

226 Mich App at 566 (internal citations omitted). In *Anzaldua*, the Court of Appeals again noted that “if the WPA does not apply, it provides no remedy and there is no preemption.” 292 Mich App at 631. The Court of Appeals has previously read its precedent in a similar manner. For instance, in *Lewandowski v Nuclear Mgt*, 272 Mich App 120; 724 NW2d 718 (2006), the Court explained:

Citing *Driver v Hanley (After Remand)*, 226 Mich App 558, 566; 575 NW2d 31 (1997), plaintiff argues that if the WPA provides no remedy at all, it cannot be a plaintiff’s exclusive remedy. [] *Driver* does stand for this proposition. . . .

272 Mich App at 127. The Supreme Court agreed that a public policy claim is sustainable where there “is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue.” *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 80; 503 NW2d 645 (1993).

In addition to this binding precedent, persuasive authorities have likewise held that the WPA cannot be the exclusive remedy when it is inapplicable to the facts of the case. In a federal case applying Michigan law, the District Court for the Eastern District of Michigan stated:

In *Driver v Hanley*, the Michigan Court of Appeals clarified the holding in *Dudewicz* by noting that a public policy claim is sustainable “only where there is not an *applicable* statutory prohibition against discharge in retaliation for the conduct at issue.” 226 Mich App at 566; 575 NW2d at 36 (emphasis in original); *see also Garavaglia v Centra, Inc*, 211 Mich App 625, 630; 536 NW2d 805 (1995). *Driver* further noted that when the WPA provides no remedy at all, it cannot provide a plaintiff’s “exclusive remedy.” 226 Mich App at 566; 575 NW2d at 36. Accordingly,

a *sine qua non* of any preclusion by the WPA would be the applicability of the express remedy of the WPA. *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 80; 503 NW2d 645 (1993). Further, in order for the express remedy of the WPA to apply, a whistleblowers' "report, or attempted report, must be made to a 'public body.'" *Id.* at 74, n3; 503 NW2d 645.

*Ciccarelli v Plastic Surgery Affiliates, PC*, [unpublished opinion per curiam of the Court of Appeals, issued March 27, 2001; 2001 WL 699094, at \*2 (Docket No. 219780)]. Although *Ciccarelli* is an unpublished opinion the Court should find its logic persuasive.

*Deneau v Manor Care, Inc*, 219 F Supp 2d 855, 869 (ED Mich, 2002). The Michigan Court of Appeals has further considered these principles "well settled," stating:

However, because the WPA provides no remedy for plaintiff's allegation of retaliatory discharge, the trial court erred in also dismissing plaintiff's claim that his discharge constitutes a violation of public policy. It is well settled that because the WPA represents Michigan's public policy against discharge for reporting suspected violations of law to a public body, any public policy claim of wrongful discharge arising from such activity is preempted by the WPA. If, however, the WPA does not apply and provides no remedy, neither then can it be plaintiff's exclusive remedy. Thus, where, as here, the WPA provides no remedy at all, it cannot constitute a plaintiff's exclusive remedy.

*Hall v Consumers Energy Co*, unpublished opinion per curiam of the Court of Appeals, issued May 30, 2006; 2006 WL 1479911, at \*2 (Docket No. 259634).

Based on the above quotations and citations, it is the well-settled law of Michigan that where the WPA provides no remedy, it cannot be a plaintiff's exclusive remedy. The Court of Appeals in this case erred by deviating from that principle. However, the Court of Appeals' error and refusal to comply with the Michigan Court Rules respecting *stare decisis* does not appear to be unintentional. Not only did this Court of Appeals panel ignore these arguments when raised in a motion for reconsideration, but subsequent panels have crafted additional meritless arguments in an attempt to avoid the same binding precedent.

In *Dean v St Mary's of Michigan*, unpublished opinion per curiam of the Court of Appeals,

issued January 23, 2020; 2020 WL 402054 (Docket Nos. 345213, 345374), the Court of Appeals reviewed a trial court's dismissal of a public policy claim based upon MCL 333.20176a as recognized in *Landin v HealthSource Saginaw, Inc*, 305 Mich App 519; 854 NW2d 152 (2014). *Dean*, 2020 WL 402054, at \*4-\*5. The Court of Appeals upheld the dismissal, reasoning as follows:

Plaintiff did not invoke the WPA below, and maintains on appeal that he does not have an actionable WPA claim because he does not assert that he reported misconduct to anyone other than defendant itself. And, as defendant is a private hospital, it is not a public body for purposes of authorizing a cause of action under the WPA. Instead, plaintiff specifically argues that WPA preemption does not apply to the specific facts of his case. Defendant responds, not that it constituted a public body for purposes of the WPA, but instead asserts that all public-policy claims stemming from allegations of employer retaliation are preempted by the WPA, regardless if the specific facts would give rise to a remedy under the WPA. Thus, the parties disagree on whether the WPA preempts only those claims for which the WPA provides a cause of action, or whether the WPA generally preempts all public-policy based employer retaliation claims, including those for which the WPA offers no remedy. We agree with defendant.

In *Wurtz v Beecher Metro Dist*, 494 Mich 242, 248; 848 NW2d 121 (2014), our Supreme Court noted that the trial court dismissed a public-policy claim on the ground that "the WPA provided the exclusive avenue of relief," then concluded that the plaintiff "could not satisfy all of the WPA's elements," while implying no inconsistency in finding that the WPA provided the exclusive remedy even where the facts did not trigger its applicability. The Court then affirmed on the ground that "the WPA does not apply when an employer declines to renew a contract employee's contract." *Id.* at 249. The Court did not suggest that the claim might remain actionable on public-policy grounds despite the inapplicability of the WPA. Indeed, the Court stated that "[t]he WPA's language governs this case without any additional judicial interpretation" and reiterated that the WPA did not apply to the plaintiff's status as one seeking renewal of an employment contract. *Id.* at 257. The Court's recognition that the public-policy claim below was dismissed for failing to trigger the WPA's protections, coupled with its assertion that the WPA still governed the matter, indicates that the WPA is the exclusive avenue for redressing retaliatory employment actions. This is true whether or not the WPA provides a remedy for the specific forms of, or reasons for, retaliation in a given case.

*Dean*, 2020 WL 402054, at \*5.<sup>9</sup>

Plaintiff cites to the *Dean* case to demonstrate not only that the additional arguments raised are not accurate, but also to show this Honorable Court that the need to reverse the *Rivera* panel on this point is significant as other panels are drifting further and further away from the binding precedent above. The author of the *Rivera* opinion sat as presiding judge over the *Dean* panel. In light of the significant precedent mandating the opposite conclusion, the *Dean* panel had to find Supreme Court opinion to predicate its rationale. In *Wurtz*, the plaintiff alleged violations of the Whistleblowers' Protection Act and wrongful termination in violation of public policy. *Id.* at 247. The trial court dismissed the public policy claim, holding that the WPA was the plaintiff's exclusive remedy. 495 Mich at 248. The Supreme Court evaluated the statutory language of the WPA and found that a contract employee, who had completed the contract term, could not suffer an adverse employment action as defined in the WPA, because the WPA did not apply to the pre-employment setting. *Id.* at 249-257. The Supreme Court did not analyze the public policy claim and the viability of that claim as it was not before the Supreme Court. The *Dean* Court, however, relied upon the *Wurtz* Court's failure "to suggest that the claim might remain actionable on public-policy grounds despite the inapplicability of the WPA." When the question, however, was placed directly before the Supreme Court, it came to the opposite conclusion.

In *Pace v Edel-Harrelson*, 499 Mich 1; 878 NW2d 784 (2016), the plaintiff claimed her termination violated the WPA and, alternatively, public policy. *Id.* at 5, 5 n4. The Supreme Court determined that the plaintiff did not engage in protected activity under the WPA, because he reported a suspected future violation of the law. *Id.* at 6-10. Nevertheless, the Supreme Court remanded the case "to the Court of Appeals for consideration of the merits of plaintiff's claim of

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<sup>9</sup> See also *Janetsky v County of Saginaw*, unpublished opinion per curiam of the Court of Appeals, issued April 23, 2020; 2020 WL 1968566 (Docket Nos. 346542, 346565).

discharge against public policy.” *Id* at 10 (citing *Anzaldua*, 292 Mich App at 631; 808 NW2d 804 (“[I]f the WPA does not apply, it provides no remedy and there is no preemption.”)).<sup>10</sup> Not only does the *Rivera* Court’s rationale directly contradict several binding precedents, but also subsequent attempts to justify such a position are likewise without merit. As such, the Court of Appeals erred in finding that the WPA provided Plaintiff with an exclusive remedy when it also found that Plaintiff did not have a viable WPA claim.

Regardless of how the Court of Appeals determined the issue of whether Plaintiff had a viable WPA claim, it also erred by failing to find that some of the allegations raised by Plaintiff in support of her public policy claim fall outside the protection of the WPA. Courts have focused on whether the “conduct at issue” is covered by the WPA or not. For instance, in *Vagts v Perry Drug Stores*, 204 Mich App 481; 516 NW2d 102 (1994), the Court of Appeals held:

[A] “public policy claim is sustainable . . . only where there also is not an applicable statutory prohibition against discharge in retaliation *for the conduct at issue*.” In other words, where a statute confers upon a victim of retaliation the right to sue, that person may not also assert a claim of discharge in violation of public policy. . .

*Id.* at 485 (citations omitted; emphasis added). Similarly, in *Kimmelman v Heather Downs Mgmt Ltd*, 278 Mich App 569; 753 NW2d 265 (2008), the Court stated, “[W]here there exists a statute explicitly proscribing *a particular adverse employment action*, that statute is the exclusive remedy, and no other ‘public policy’ claim can be maintained.” *Id.* at 573 (emphasis added). The Court of Appeals has read these two cases as standing “for the proposition that if a statute *would* allow a plaintiff to recover for wrongful termination, then the plaintiff is limited to that as the sole remedy.” *Irwin v Ciena Health Care Mgmt, Inc*, unpublished opinion per curiam of the Court of Appeals,

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<sup>10</sup> See also *McNeill-Marks v MidMichigan Medical Center-Gratiot*, 502 Mich 851; 912 NW2d 181, 195 (Mem)(2018)(ZAHRA, J., dissenting)(“I would reverse the judgment of the Court of Appeals and remand this case to the Court of Appeals for consideration of the merits of plaintiff’s claim of termination against public policy.”).

issued December 7, 2010; 2010 WL 4977928, at \*3 (Docket No. 294239).

If Plaintiff's claims were solely limited to her reporting LS's actual or suspected violations of law to Mr. Mair and this Court determined that was protected under the WPA, the WPA would be the exclusive remedy for that claim. However, Plaintiff claimed that she failed or refused to conceal LS's violations, not just from Mr. Mair, but also from Mr. Payne, a Board member, and others. The failure or refusal to conceal a violation of a law has been found to be protected under Michigan public policy. *Pratt v Brown Machine Co, A Division of John Brown, Inc*, 855 F2d 1225, 1236 (CA 6, 1988). As such, the "conduct at issue" in this case includes conduct not protected by the WPA and, therefore, the WPA cannot preempt a public policy claim founded upon conduct not protected under the WPA. As the trial court correctly noted:

The plaintiff told her boyfriend, Sylvester Payne, a Board Member of SVRC, about the incident that took place, which Ms. Snyder sternly told the plaintiff that she should not have done that. The plaintiff told other people, who are not considered public bodies, as well as a person who is currently considered a public body, about the incident that occurred. Because the plaintiff did tell others and wanted something to be done about the situation, her claim for public policy has been met.

**(Appendix, No. 9, Opinion and Order of Trial Court Denying Motion for Summary Disposition, at 203a).**

The Court of Appeals erred in finding simultaneously that the WPA did not apply and that the WPA preempted her public policy claim. This holding is contradicted by significant precedent that was and is binding on the Court of Appeals. Regardless of whether the WPA applies to the facts of this case, the Court of Appeals also erred by finding all of the alleged "protected activity" were preempted by the WPA, where the conduct at issue in her public policy claim was broader than and is not protected under the WPA. The Court of Appeals erroneous holding regarding the preemption issue requires reversal as the Court of Appeals opinion is published and contradictory to prior precedent. For these reasons, Plaintiff respectfully requests that this Honorable Court

reverse the Court of Appeals and hold that the WPA cannot preempt a public policy claim that involves conduct at issue, which is not protected by the WPA.

**IV. That the record supports plaintiff's contention that her protected activity caused her firing**

To establish causation, a plaintiff must show that his or her protected activity was a “significant factor” in the employer’s decision to take the adverse employment action. *Rymal v Baergen*, 262 Mich App 274, 303; 686 NW2d 241 (2004). In other words, a plaintiff must show that the “employer took adverse employment action because of [her] protected activity.” *Whitman*, 493 Mich at 320; 831 NW2d 223. “Something more than a temporal connection between protected conduct and adverse employment action is required to show causation. . . .” *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003).<sup>11</sup> However, the burden of establishing a prima facie case of retaliation is not onerous, but one that is easily met. *See Nguyen v City of Cleveland*, 229 F3d 559, 563 (CA 6, 2000); *Dixon v Gonzales*, 481 F3d 324, 333 (CA 6, 2007). As argued before the trial court and Court of Appeals, the record contains evidence beyond temporal proximity sufficient to raise a factual issues regarding the issue of causation.

Although not sufficient by itself to establish a factual question of causation, close temporal proximity between the protected activity and the adverse employment action does increase the inference of a causal relationship. *Rymal*, 262 Mich App at 303; 686 NW2d 241. In this case, there is a span of eighteen (18) days between Plaintiff first engaging in a protected activity and her termination. The timing of Plaintiff’s termination coincides with the termination of L.S., who also

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<sup>11</sup> This Court should note that the *West* Court relied upon Sixth Circuit precedents for this proposition. The Sixth Circuit has repeatedly found close temporal proximity to be sufficient to establish a factual question regarding the issue of causation where the proximity is particularly close, within three months. *See, e.g., Bryson v Regis Corp*, 498 F3d 561, 571 (CA 6, 2007); *Clark v Walgreen Co*, 424 F App’x 467, 473 (CA 6, 2011). Suspicious timing can also be a strong indicator of pretext when accompanied by other independent evidence. *DeBoer v Musashi Auto Parts*, 124 F App’x 387, 394 (CA 6, 2005).

engaged in activity protected by the Whistleblowers' Protection Act in that he reported a suspected violation to the Michigan State Police. The similar treatment of the two whistleblowers, Plaintiff and L.S., should also give rise to an inference of causation. This piece of evidence anecdotally serves as "background evidence to establish a pattern of discrimination," and would further increase the inference that Defendant had an intent to retaliate. *Campbell v Human Services Dep't*, 286 Mich App 230, 238; 780 NW2d 586 (2009); MRE 404(b)(1). Courts have recognized that in determining the existence of a causal relationship, "courts may consider whether the employer treated the plaintiff differently from similarly situated individuals". *Barrett v Whirlpool Corp*, 556 F3d 502, 516-517 (CA 6, 2009). If treating a person who engaged in protected activity differently than those who did not similarly engage in protected activity gives rise to an inference of causation, it is a logical corollary that treating multiple people negatively who all engaged in protected activity would likewise give rise to such an inference.

Defendant further told Plaintiff not to engage in protected activity, clearly a negative reaction. When Plaintiff pushed the issue of filing a police report, Ms. Snyder told Plaintiff that Mr. Emerson or the attorney said, "no police report." Courts have found statements by employers in response to protected activity that demonstrate a negative reaction or an express of displeasure to constitute additional evidence of retaliation. *See West*, 469 Mich at 186-187; 665 NW2d 468; *Henry*, 234 Mich App at 414; 594 NW2d 107. The record also contains evidence that Defendant's view of Plaintiff changes before versus after Plaintiff engaged in protected activity. Before Plaintiff engaged in protected activity, Plaintiff was told she would likely take over supervising employees at a new location; whereas, after Plaintiff engaged in protected activity, Defendant viewed Plaintiff as expendable and available for lay off. Courts have found that where "an employer treats an employee differently after she asserts her rights . . . than before she had done

so, a retaliatory motive may be inferred for purposes of the prima facie case.” *Lamer v Metaldyne Co LLC*, 240 F App’x 22, 30 (CA 6, 2007).

In addition to the above, there is significant record evidence that calls into question both the factual basis for Plaintiff’s termination and whether reason given truly was Defendant’s motivation. First, Defendant failed to provide any documents or evidence that the Board authorized a reduction in force where the Chairman of the Board of Directors testified that they would always be made aware of and be given a chance to approve or disapprove economic layoffs. (**Appendix, No. 3, at 118a-119a**). Second, Plaintiff requested Defendant to provide documentary evidence establishing there was a bona fide reduction in force; Defendant simply referred Plaintiff to deposition testimony. (**Appendix, No. 3 at 136a-138a**). Defendant did not produce any documents supporting the notion that Defendant had a need to engage in a reduction of force of one person. *Id.* Third, documents produced by Defendant showed that Defendant was not operating in a deficit in October 2016 when it terminated Plaintiff. (**Appendix, No. 3 at 141a-142a**). Fourth, Plaintiff was told that things were going well and that she would likely supervise employees at one of Defendant’s facilities after the farmer’s market project was completed. (**Appendix, No. 3 at 116a**). Defendant did not rely upon particularized facts to show that it needed to engage in a reduction in force and the significant amount of evidence regarding causation and pretext permits a reasonable person to conclude, especially when viewing the evidence in a light most favorable to Plaintiff, that Defendant terminated Plaintiff in retaliation for her activity protected under the Whistleblowers’ Protection Act and Michigan public policy.

### **RELIEF SOUGHT**

For the reasons set forth above and in Plaintiff-Appellant’s Application, Plaintiff-Appellant respectfully requests that this Honorable Court grant her application, reverse the Court of Appeals’

decision below, and reinstate the trial court's denial of summary disposition in favor of Plaintiff.

Respectfully submitted,  
THE MASTROMARCO FIRM

Dated: May 6, 2020

By: /s/ Kevin J. Kelly  
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**CERTIFICATE OF SERVICE**

I hereby certify that on **May 6, 2020**, I presented the foregoing papers to the Clerk of the Court for filing and uploading to the Michigan Court of Appeals electronic filing system, which will send notification of such filing to **David A. Wallace & Kailen C. Piper**.

THE MASTROMARCO FIRM

/s/ Kevin J. Kelly  
KEVIN J. KELLY (P74546)

STATE OF MICHIGAN  
COURT OF APPEALS

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THEODORE CADWELL and GLENN QUAKER

UNPUBLISHED

May 28, 2015

Plaintiffs-Appellees,

v

No. 318430

Wayne Circuit Court

CITY OF HIGHLAND PARK,

LC No. 10-012583-NO

Defendant-Appellant.

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Before: TALBOT, C.J., and CAVANAGH and METER, JJ.

PER CURIAM.

In this claim brought, in part, under the whistleblower protection act (WPA), MCL 15.361 *et seq.*, defendant Highland Park appeals as of right the judgment of the trial court, after a jury trial, awarding damages to plaintiffs Theodore Cadwell and Glenn Quaker. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Defendant first argues that the trial court erred in denying defendant’s summary disposition motion concerning plaintiff’s WPA claim because no “protected activity” occurred. We disagree. A grant or denial of summary disposition is reviewed *de novo* on appeal. *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008). As the Michigan Supreme Court explained in *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (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.

“Issues of statutory construction involve questions of law that [this Court] review[s] *de novo*.” *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 271; 826 NW2d 519 (2012).

MCL 15.362 states:

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.

From this statutory language, the Michigan Supreme Court has identified three elements that establish a violation of the WPA:

(1) The employee was engaged in one of the protected activities listed in the provision.

(2) [T]he employee was discharged, threatened, or otherwise discriminated against regarding his or her compensation, terms, conditions, location, or privileges of employment.

(3) A causal connection exists between the employee's protected activity and the employer's act of discharging, threatening, or otherwise discriminating against the employee. [*Wurtz v Beecher Metro Dist*, 495 Mich 242, 251-252; 848 NW2d 121 (2014).]

"The protected activities listed in the act consist of reporting or being about to report a violation of a law, regulation, or rule, or being requested by a public body to participate in an investigation, hearing, inquiry, or court action." *Id.* at 251 n 13; see also MCL 15.362. Where the protected activity is the act of reporting a violation of law, that report must be made to a "public body" as that term is defined in the WPA. MCL 15.362; see also *Brown v Mayor of Detroit*, 478 Mich 589, 594; 734 NW2d 514 (2007) ("[t]he WPA protects an employee who reports or is about to report a violation or suspected violation of a law or regulation to a *public body*"). Pursuant to MCL 15.361(d), a "public body" includes:

(i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government.

(ii) An agency, board, commission, council, member, or employee of the legislative branch of state government.

(iii) A county, city, township, village, intercounty, intercity, or regional governing body, a council, school district, special district, or municipal corporation, or a board, department, commission, council, agency, or any member or employee thereof.

(iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body.

(v) A law enforcement agency or any member or employee of a law enforcement agency.

(vi) The judiciary and any member or employee of the judiciary.

“The language of the WPA does not provide that this public body must be an outside agency or higher authority. There is no condition in the statute that an employee must report wrongdoing to an outside agency or higher authority to be protected by the WPA.” *Brown*, 478 Mich at 594. Thus, “[i]t does not matter if the public body to which the suspected violations were reported was also the employee’s employer.” *Id.* at 595.

Here, Quaker, the deputy chief of police for defendant’s police department, reported a suspected violation of criminal laws by Gregory Yopp (Gregory), the son of defendant’s mayor, Hubert Yopp (Mayor Yopp), to Cadwell, who was at that time the chief of police for defendant’s police department. Because the definition of a “public body” includes “[a] law enforcement agency or any member or employee of a law enforcement agency[.]” MCL 15.361(d)(v) (emphasis supplied), Quaker’s act was a protected activity. See *Brown*, 478 Mich at 595 (where a plaintiff reported suspected violations to the chief of police, he had engaged in a protected activity under the WPA). Thus, as it pertained to Quaker, the trial court correctly denied the motion.

With regard to Cadwell, the trial court ruled that a question of fact existed because Cadwell held a supervisory role in the police department and, accordingly, “would have had some oversight of the operation and in reporting the arrest to the Wayne County Prosecutor.” Again, Cadwell was the chief of police at the time of the arrest. Lynesha Jones testified that she was the officer in charge of the investigation into Gregory’s arrest and that she forwarded the case to the Wayne County Prosecutor. According to Jones, forwarding the case was solely her responsibility. While acknowledging that she worked under Quaker and Cadwell, Jones denied having any conversations with either regarding Gregory’s prosecution. However, evidence was submitted creating a question of fact regarding whether Cadwell participated in a protected activity under the WPA. Cadwell testified that Mayor Yopp

made an indication that because the narcotics – there was not a large amount of narcotics seized, that *we* should not have submitted that information to the Wayne County Prosecutor, but that *we* should have handled that in-house. And *we* explained to him, you know, as an Investigator he knows, when you do an Investigator’s write-up, you put all the facts in and the Prosecutor, who’s writing the Warrant, makes that determination. You know, we can’t just, arbitrarily not submit evidence or indications of evidence. [Emphasis added.]

Viewed in the light most favorable to plaintiffs, Cadwell’s testimony supports a reasonable inference that he was involved in the submission to the Wayne County Prosecutor of the evidence concerning Gregory’s suspected violation of criminal laws. Although Cadwell’s use of the term “we” could arguably be understood as referring to the police department generally, it could also reasonably be understood to express that he was involved at least in a supervisory role in submitting the evidence to the prosecutor. Cadwell’s testimony that “we” explained to Mayor Yopp the reason why the information was submitted to the prosecutor lends further support to

the view that Cadwell had some level of involvement in the decision to forward the information to the prosecutor.

Further, MCL 15.362 does not require the report to be made by the individual bringing the WPA claim. The statute specifically prohibits an employer from taking retaliatory action against an employee “because the employee, *or a person acting on behalf of the employee*, reports . . . a violation or a suspected violation of law . . . to a public body . . . .” MCL 15.362 (emphasis supplied). It is undisputed that Jones was the officer who forwarded Gregory’s case, along with the evidence against him, to the Wayne County Prosecutor’s Office. However, Cadwell’s testimony quoted above supports a reasonable inference that he was involved in the decision to forward the information. Certainly, the Wayne County Prosecutor’s Office would be a “public body” under the WPA. See MCL 15.361(d); see also *Ernsting v Ave Maria College*, 274 Mich App 506, 515-518; 736 NW2d 574 (2007) (the federal Department of Education is a public body under MCL 15.361(d)(v) because it has the “power to conduct civil and criminal investigations in order to enforce the laws under its purview”). Plaintiffs presented evidence that they reported suspected illegal activity to a public body, and thus, defendant was not entitled to summary disposition with regard to plaintiffs’ claims under the WPA.

Defendant next argues that the trial court erred when it denied defendant’s motions for a directed verdict and for judgment notwithstanding the verdict (JNOV) on the same underlying issue discussed above, i.e., whether plaintiffs engaged in a protected activity. We disagree. A trial court’s decision on a motion for a directed verdict or JNOV is reviewed de novo. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). This Court must “review the evidence and all legitimate inferences in the light most favorable to the nonmoving party.” *Id.*, quoting *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). The motion “should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law.” *Sniecinski*, 469 Mich at 131.

Defendant first moved for a directed verdict after plaintiffs concluded their opening statement. As this Court stated in *Fenton Country House, Inc v Auto-Owners Ins Co*, 63 Mich App 445, 448-449; 234 NW2d 559 (1975):

As a starting point, this Court must recognize that this method of disallowing a party from presenting its case to the jury is a limited and disfavored one. That view of such directed verdicts has developed because the opening statement is only for the jury’s benefit, and must be made using simple language a jury likely will understand. Only the very general nature of the case need be described. [Citations omitted.]

“The specific test to be used in examining the opening statement is whether it encompassed all of the ultimate facts proposed to be proven and essential to plaintiff’s . . . cause of action.” *Id.* at 449 (quotation marks and citation omitted). The test is a “very loose test which must be used to judge the offer of proof found in the opening statement . . . .” *Id.*

Defendant argued that a directed verdict was warranted because plaintiffs’ opening statement made no reference to any evidence that would satisfy the first element of a WPA claim—the existence of a protected activity. Defendant’s argument centers on a statement by

plaintiffs' attorney in which he summarized the case as one in which defendant retaliated against plaintiffs for failing to prevent Gregory's prosecution. However, defendant ignores the rest of plaintiffs' opening statement. Plaintiffs' attorney asserted that Quaker reported Gregory's arrest to Cadwell. Plaintiffs' attorney also asserted that Gregory's case was forwarded to the Wayne County Prosecutor's Office. As was discussed in the previous issue, these acts are protected activities under the WPA. Accordingly, a directed verdict was not warranted on the basis of plaintiffs' opening statement. See *id.* at 448-449.

Defendant moved for a directed verdict on the fourth day of trial, arguing that no evidence had been presented that demonstrated that either plaintiff participated in a protected activity under the WPA. The trial court denied the motion. Defendant renewed the motion the following day, and it was again denied. Following trial, defendant moved for a JNOV, again arguing that no evidence of a protected activity was presented at trial. This motion was also denied. On appeal, defendant argues that the trial court erred because no evidence was presented demonstrating that plaintiffs participated in a protected activity. However, evidence had been presented that Quaker reported Gregory's arrest to Cadwell. Cadwell testified at trial that he reviewed the investigator's report that was prepared and sent to the Wayne County Prosecutor's Office and that he directed Jones to forward the case to the prosecutor, and Quaker testified that Jones's investigative report was prepared under his supervision. In accordance with our analysis above, this evidence demonstrated that plaintiffs participated in a protected activity under the WPA—that being reporting illegal activity to a public body. Accordingly, the trial court correctly denied defendant's motions for a directed verdict and JNOV.

Defendant next argues that the trial court erred when it denied defendant's motion for remittitur or a new trial regarding damages. "The grant or denial of a motion for a new trial or remittitur is reviewed for an abuse of discretion." *Landin v Healthsource Saginaw, Inc.*, 305 Mich App 519, 546; 854 NW2d 152 (2014), lv granted \_\_\_ Mich \_\_\_; 860 NW2d 927 (2015). "When reviewing such motions, this Court views the evidence in the light most favorable to the nonmoving party, giving due deference to the trial court's decision because of its ability to evaluate the credibility of the testimony and evidence presented to the jury." *Id.* A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Radeljak v DaimlerChrysler Corp.*, 475 Mich 598, 603; 719 NW2d 40 (2006).

A trial court may grant a new trial under MCR 2.611(A)(1)(e) if "[a] verdict or decision [is] against the great weight of the evidence or contrary to law." If competent evidence exists to support a jury's verdict, the verdict should not be set aside simply because the trial court would weigh the evidence differently. *Bd of Co Rd Comm'rs of Kalamazoo Co v Bera*, 373 Mich 310, 314; 129 NW2d 427 (1964). The motion should be granted only if the jury's verdict is "manifestly against the clear weight of the evidence." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999) (quotation marks and citation omitted). The verdict must be upheld if there is any interpretation of the evidence that logically explains the jury's findings. *Allard v State Farm Ins Co*, 271 Mich App 394, 407; 722 NW2d 268 (2006).

Remittitur is governed by MCR 2.611(E), which states, in part:

(1) If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for new trial on condition that

within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support.

To determine whether remittitur is appropriate, “a trial court must decide whether the jury award was supported by the evidence.” *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 462; 750 NW2d 615 (2008). This Court described the factors to be considered in *Freed v Salas*, 286 Mich App 300, 334; 780 NW2d 844 (2009):

(1) whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; (2) whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; and (3) whether the amount actually awarded is comparable with awards in similar cases both within the state and in other jurisdictions.

The WPA allows a plaintiff to recover “actual damages . . . .” MCL 15.363(1). Damages for emotional distress are encompassed within this term. *Phinney v Perlmutter*, 222 Mich App 513, 559-560; 564 NW2d 532 (1997), abrogated in part on other grounds by *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005). “A plaintiff asserting a cause of action has the burden of proving damages with reasonable certainty, and damages predicated on speculation and conjecture are not recoverable.” *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005). Uncertainty regarding the fact of damages is fatal to recovery, while uncertainty regarding only the amount of damages is not. *Wolverine Upholstery Co v Ammerman*, 1 Mich App 235, 244; 135 NW2d 572 (1965).

Defendant first argues that the jury’s award of damages for future lost wages was not supported by the evidence. Defendant’s argument appears to be that this award was improper because no documentary evidence was admitted to support it. Defendant offers no authority for such a requirement and, accordingly, has abandoned the issue. *Flint City Council v Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002) (“this Court will not search for authority to support a party’s position, and the failure to cite authority in support of an issue results in its being deemed abandoned on appeal”). Further, as defendant acknowledges, both plaintiffs testified that they would have remained employed for an additional seven years had they not been laid off and that they were unable to obtain employment. Plaintiffs’ testimony established the fact of damages due to future lost wages. Defendant’s argument is without merit.

Defendant also argues that the trial court abused its discretion when it denied the motion for a new trial or remittitur because the jury’s award of \$500,000 to each plaintiff for emotional distress was not supported by the evidence. We agree. After reviewing the trial testimony, we have found insufficient evidence that either plaintiff suffered from emotional distress. Significantly, *plaintiffs themselves* point to no such testimony in their brief on appeal. Rather, plaintiffs argue that the jury could infer that such damages occurred because Mayor Yopp implied that plaintiffs were involved in stealing money from the police department. In essence, plaintiffs argue that it was permissible for the jury to simply speculate that plaintiffs suffered from emotional distress. However, a plaintiff must prove the fact of damages, not simply rely on

speculation that damages might have occurred. *Health Call of Detroit*, 268 Mich App at 96; *Wolverine Upholstery Co*, 1 Mich App at 244.

Remittitur is appropriate here because the jury's award was not supported by the evidence. *Silberstein*, 278 Mich App at 462. As MCR 2.611(E)(1) contemplates, the only error was the excessiveness of the jury's verdict. The factors discussed in *Freed* weigh in favor of granting remittitur. It appears that the "verdict was the result of . . . [a] mistake of law or fact . . . ." *Freed*, 286 Mich App at 334. In addition, the verdict was not "within the limits of what reasonable minds would deem just compensation for the injury sustained," *id.*, given the insufficiency of the evidence.

Accordingly, we reverse in part the trial court's opinion and order denying defendant's motion for a new trial or remittitur and remand with instructions that the trial court, pursuant to MCR 2.611(E)(1), "deny [the] motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount . . . the evidence will support." Because the only portion of the award not sufficiently supported by the evidence was the award of \$500,000 to each plaintiff for emotional distress, plaintiffs should be provided 14 days to consent to a judgment reduced by this amount.

Plaintiffs also argue on appeal that the trial court erred when it limited their recovery of future lost wages to a period of seven years after their discharge, and ask that this Court remand the case to allow the trial court to award these additional damages. However, plaintiffs did not file a cross-appeal, and as appellees, they may not obtain a decision more favorable than was provided below. *In re Herbach Estate*, 230 Mich App 276, 284; 583 NW2d 541 (1998). Thus, this Court may not provide plaintiffs the relief they seek. Moreover, plaintiffs have abandoned the issue. Plaintiffs argue that the trial court's limitation was erroneous because, "[u]nder applicable case law, [p]laintiffs should have been allowed to recover damages based upon their life expectancies . . . ." Plaintiffs, however, fail to cite any such "applicable case law . . . ." "[T]his Court will not search for authority to support a party's position, and the failure to cite authority in support of an issue results in its being deemed abandoned on appeal." *Flint City Council*, 253 Mich App at 393 n 2. Further, plaintiffs point to no evidence presented at trial regarding their life expectancies. Plaintiffs are not entitled to appellate relief.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Patrick M. Meter

STATE OF MICHIGAN  
COURT OF APPEALS

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TRUDY CICCARELLI,

Plaintiff-Appellee,

v

PLASTIC SURGERY AFFILIATES, P.C., and  
HASHIM ALANI, M.D.,

Defendants-Appellants.

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UNPUBLISHED

March 27, 2001

No. 219780

Oakland Circuit Court

LC No. 97-000144-CZ

Before: Doctoroff, P.J., and Holbrook, Jr. and Hoekstra, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment for plaintiff, conforming to a jury verdict rendered in this wrongful discharge action. The jury determined that defendants: (1) failed to properly compensate plaintiff for overtime hours, in violation of the Fair Labor Standards Act (FLSA),<sup>1</sup> 29 USC § 201 *et seq.*; (2) wrongfully discharged plaintiff in retaliation for filing a complaint with the United States Department of Labor (USDOL), in violation of well-established Michigan public policy; and (3) without good cause, discharged plaintiff from her just-cause employment status. We affirm in part, reverse in part, vacate in part, and remand.

Defendants first contend that plaintiff's implied cause of action for discharge in violation of public policy was precluded by the Whistleblowers Protection Act (WPA), MCL 15.361 *et seq.*; MSA 17.428(1) *et seq.*, on the theory that the WPA provides the exclusive remedy for a discharge in retaliation for reporting violations of the FLSA. However, defendants did not assert this defense until almost four months after trial, when they attempted to file a nonconforming reply brief in support of their own post-trial motion for judgment notwithstanding the verdict, new trial, to amend the judgment or, in the alternative, remittitur. Defendants would have this Court excuse their failure to plead this defense, and not deem it to be waived pursuant to MCR 2.111(F), on the theories that the trial court lacked subject matter jurisdiction over plaintiff's claims, or that the exclusivity of the remedy in the WPA requires a determination that plaintiff

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<sup>1</sup> The FLSA provides concurrent federal and state jurisdiction over civil actions to recover damages for violations of, among other things, its provisions regarding payment for overtime. 29 USC §§ 207(a)(1) and 216(b).

failed to state a claim on which relief could be granted. See *Campbell v St John Hospital*, 434 Mich 608, 615-616; 455 NW2d 695 (1990).

Defendants' assertion that the trial court lacked jurisdiction over plaintiff's claim misapprehends the concept of subject matter jurisdiction. As the Supreme Court has repeatedly explained,

“[j]urisdiction over the subject matter is the right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial.” [*Bowie v Arder*, 441 Mich 23, 39, 490 NW2d 568 (1992), quoting *Joy v Two-Bit Corp*, 287 Mich 244, 253-254, 283 NW 45 (1938).]

This is not a case where a statutory provision expressly divests the circuit court of jurisdiction over plaintiff's class of claim and vests it with another tribunal. Compare *Harris v Vernier*, 242 Mich App 306, 312-313; 617 NW2d 764 (2000). Here, notwithstanding the particular facts of the case, the trial court clearly had subject matter jurisdiction to adjudicate implied causes of action for discharge in violation of public policy. See Const 1963, art 6, § 13; MCL 600.605; MSA 27A.605; *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 695-696; 316 NW2d 710 (1982).

As for failing to state a claim on which relief can be granted, we first note that a *sine qua non* of any preclusion by the WPA would be the applicability of the express remedy of the WPA. *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 80; 503 NW2d 645 (1993). Further, in order for the express remedy of the WPA to apply, a whistleblower's “report, or attempted report, must be made to a ‘public body.’” *Id.* at 74, n 3. That is, § 2 of the WPA provides:

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [MCL 15.362; MSA 17.428(2).]

“[W]hen a statute specifically defines a given term, that definition alone controls.” *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996). Hence, despite the fact that the USDL may appear to be a “public body” in the general sense of the word, because it is

not a “public body” within the definition given by MCL 15.361(d); MSA 17.428(1)(d),<sup>2</sup> the WPA would be inapplicable to a discharge in retaliation for making a report to the USDL of an employer’s violations of the FLSA. Although defendants advance factual alternatives that would bring this case within the WPA, when deciding whether plaintiff pleaded a claim on which relief could be granted, we accept all well-pleaded allegations as true and draw all inferences in

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<sup>2</sup> MCL 15.361(d); MSA 17.428(1)(d) provides:

“Public body” means all of the following:

(i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government.

(ii) An agency, board, commission, council, member, or employee of the legislative branch of state government.

(iii) A county, city, township, village, intercounty, intercity, or regional governing body, a council, school district, special district, or municipal corporation, or a board, department, commission, council, agency, or any member or employee thereof.

(iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body.

(v) A law enforcement agency or any member or employee of a law enforcement agency.

(vi) The judiciary and any member or employee of the judiciary.

Except with regard to law enforcement agencies (and their members) and the judiciary (and its members), the definition of “public body” is expressly limited to bodies of *state* government or its political subdivisions. Further, under the rule of statutory construction known as *noscitur a sociis* (known by its associates), the law enforcement and judicial categories would also be limited to those of state or local government. See *The Herald Co v Bay City*, 463 Mich 111, 129-130, n 10; 614 NW2d 873 (2000). Moreover, even if *noscitur a sociis* were not dispositive of this potential ambiguity, the USDL would not qualify as a public body under the judicial or law enforcement prongs of the WPA by any definition of those terms known to Michigan law. Clearly, the USDL is not a public body within the meaning of the WPA. Accord, *Driver v Hanley (After Remand)*, 226 Mich App 558, 562-566; 575 NW2d 31 (1997).

plaintiff's favor. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). We hold that plaintiff did not fail to state a claim on which relief could be granted in this regard.

We also note that, had defendants raised this defense in a timely manner, plaintiff could have easily pleaded a violation of the WPA in the alternative. Hence, allowing defendants to belatedly raise this defense would be unfairly prejudicial to plaintiff. See *Meridian Mutual Ins Co v Mason-Dixon Lines, Inc (On Remand)*, 242 Mich App 645, 647-648; 620 NW2d 310 (2000). For this same reason, it would be unfairly prejudicial to plaintiff to now allow defendants to raise the defense that the FSLA, itself, provided her exclusive remedy. Consequently, we hold that defendants, by not pleading them, waived any defense that either the WPA or the FSLA provided plaintiff's exclusive remedy. MCR 2.111(F); *Campbell, supra* at 615-616.

We next address defendants' contention that there was insufficient evidence of a causal link between plaintiff's filing of a complaint with the USDL and her discharge to sustain her claim for wrongful discharge in violation of public policy. Our review of the record reveals that the timing of plaintiff's discharge was highly coincidental with her complaint to the USDL. Moreover, defendants' own separation from employment form indicates that plaintiff's discharge was predicated, in part, on information that plaintiff provided to her coworkers, which was then passed along to defendants. Plaintiff testified that, while on vacation, she told one of these coworkers that she had complained to the USDL. When viewed in the light most favorable to plaintiff, the circumstantial evidence was strong enough to create an issue of fact for the jury regarding whether defendants' discharge of plaintiff was causally related to her complaint to the USDL. See *Snell v UACC Midwest, Inc*, 194 Mich App 511, 514; 487 NW2d 772 (1992).

Defendants also argue that they are entitled to a new trial because the trial court abused its discretion in ruling that defendants could not call three of their four proposed witnesses, as a discovery sanction for defendants' failure to file a witness list. It is within a trial court's discretion to bar witnesses as a sanction for not filing a witness list; however, the exercise of such discretion requires the careful consideration of all of the circumstances in order to determine what sanction is just and proper. *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990). Although it does not appear that the testimony of these witnesses would have surprised plaintiff or worked any hardship on her, inasmuch as plaintiff attended their depositions, we are also mindful that defendants, despite having access to those same depositions, have failed to identify for the trial court, or for this Court, any testimony that would have altered the outcome of the case had they been given the chance to present it. Consequently, defendants have not established that a failure to reverse on this ground would be inconsistent with substantial justice. MCR 2.613(A); *Merrow v Bofferding*, 458 Mich 617, 634; 581 NW2d 696 (1998).

We next address defendants' assertions that the trial court erred by not directing a verdict, or granting JNOV, on plaintiff's claim for wrongful discharge from just-cause employment.

It is a settled tenet of Michigan law that employment contracts for an indefinite term produce a presumption of employment at will absent distinguishing features to the contrary. *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980). To overcome this presumption,

evidence may be produced that proves the existence of an express contract for a definite term or an express provision in a contract that forbids termination absent just cause. Proof of a promise of job security implied in fact, such as employment for a particular term or a promise to terminate only for just cause, may also overcome the presumption. *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627; 473 NW2d 268 (1991). Furthermore, company policies and procedures may become an enforceable part of an employment relationship if such policies and procedures instill legitimate expectations of job security in employees. *Rood v General Dynamics Corp*, 444 Mich 107, 117-118; 507 NW2d 591 (1993). [*Dolan v Continental Airlines*, 454 Mich 373, 383-384; 563 NW2d 23 (1997).]

Plaintiffs' only basis for claiming to have had just-cause employment stems from two provisions in defendants' employee handbook, one of which establishes a probationary period for new hires, and a second that sets out a policy regarding discipline and lists infractions that will warrant oral counseling actions, or written conference actions, and states that a given number of such infractions within a specific period of time will warrant termination. However, what is conspicuously lacking from the handbook is any indication that these disciplinary policies are "all-inclusive." That is, as the Supreme Court has repeatedly pointed out, "a nonexclusive list of common-sense rules of behavior that can lead to disciplinary action or discharge, clearly reserves the right of an employer to discharge an employee at will." *Dolan, supra* at 388, quoting *Rood, supra* at 142. Consequently, the court should have directed a verdict for defendants, or granted JNOV, on this claim. Moreover, our decision in this regard renders moot the balance of defendants' arguments on appeal.

In sum, we affirm the judgment for plaintiff with regard to the awards for her FLSA claim and her public policy wrongful discharge claim. We reverse the judgment for plaintiff with regard to her claim for wrongful termination from just-cause employment. We vacate that portion of the judgment awarding statutory interest calculated on the previous awards, and we remand to the trial court to reassess interests and costs.

Affirmed in part, reversed in part, vacated in part and remanded for such other proceedings as are deemed necessary, consistent with this opinion. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ Donald E. Holbrook, Jr.

/s/ Joel P. Hoekstra

*If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.*

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STATE OF MICHIGAN  
COURT OF APPEALS

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BRIAN DEAN, D.O.,

Plaintiff/Counterdefendant-  
Appellant,

v

ST. MARY'S OF MICHIGAN,

Defendant/Counterplaintiff-  
Appellee.

UNPUBLISHED  
January 23, 2020

Nos. 345213; 345374  
Saginaw Circuit Court  
LC No. 17-033584-CK

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Before: BOONSTRA, P.J., and TUKEL and LETICA, JJ.

PER CURIAM.

Plaintiff, a physician formerly employed by defendant hospital, appeals<sup>1</sup> as of right the trial court's orders granting summary disposition in favor of defendant and denying in part his motion for reconsideration. We affirm.

I. FACTS

The trial court's order granting summary disposition includes a summary of some of the facts underlying this case:

Around January 14, 2016, Plaintiff was employed by Defendant as an emergency room physician. During the course of Plaintiff's employment, Plaintiff notified Defendant of activities the Plaintiff believed to be alleged malpractice and that he was not "liked" which he claimed exhibited an alleged animosity towards him. On July 19, 2016, Plaintiff was notified of termination of

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<sup>1</sup> We note that defendant's challenge to our jurisdiction is misplaced because whether plaintiff raised an issue that was decided below bears on issue preservation and the applicable standard of review, not on our appellate jurisdiction.

his employment for cause. The termination letter stated Plaintiff violated Sections 2.6.3, 2.6.4, and 3.2.3 of his employment agreement with Defendant and that he breached several of the bylaws, Plaintiff also alleges that defamatory letters started after he refused to repay his “sign-on” bonus.

After the termination, Plaintiff states that Defendant continued to retaliate against him by making defamatory statements to various potential employers. Plaintiff also claims that Defendant falsely related information to two hospitals, stated that Plaintiff violated federal and Michigan statutes, failed to abide by the bylaws, rules, and regulations; and lastly, that Plaintiff failed to perform his duties in accordance with the standard of care.

When defendant terminated plaintiff’s employment and staff privileges before expiration of the contractual term, plaintiff commenced this action, claiming breach of contract, breach of bylaws, defamation, and violation of public policy. Defendant filed a counterclaim for repayment of plaintiff’s signing bonus, alleging breach of contract, unjust enrichment, claim and delivery, and common-law and statutory conversion. After both parties filed cross-motions for summary disposition, the trial court granted defendant’s motion and ordered plaintiff to repay his full signing bonus. Plaintiff filed a motion for reconsideration that the trial court granted in part, reducing the amount he was required to pay to defendant, but otherwise denied. This appeal follows.

## II. EVIDENTIARY ISSUES

Plaintiff argues that the trial court erred by denying his discovery request for certain documents defendant resisted disclosing as peer-review materials and his request to submit an additional deposition after the cross-motions for summary disposition were argued and decided. We review a trial court’s evidentiary rulings for an abuse of discretion. *Price v Long Realty, Inc.*, 199 Mich App 461, 466; 502 NW2d 337 (1993). “An abuse of discretion occurs when the trial court’s decision is outside the range of reasonable and principled outcomes.” *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

### A. PEER-REVIEW MATERIALS

On appeal, plaintiff provides little information about the documents at issue. He asserts that they were created after he was terminated and that all but one of the documents’ authors “were not part of a peer review committee.” Plaintiff does, however, refer to his request for production below, in which he described many documents and referred to an earlier request for “all peer review materials related to Plaintiff.” In responding to the motion, defendant noted that it had generally complied with plaintiff’s discovery requests, but not the one for peer-review materials because those materials were absolutely privileged. The trial court reviewed the documents at issue *in camera* and announced on the record its finding that they were peer-review materials and thus privileged from disclosure.

We review “de novo as a question of law the applicability of a privilege.” *Denhof v Challa*, 311 Mich App 499, 510; 876 NW2d 266 (2015) (quotation marks omitted). We review any attendant factual findings for clear error. MCR 2.613(C).

MCL 333.21513(d) requires the “owner, operator, and governing body” of a licensed hospital to organize its “medical staff to enable an effective review of the professional practice in the hospital for the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients.” MCL 333.20175(8) states that “[t]he records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency . . . are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena.”

In *Krusac v Covenant Med Ctr*, 497 Mich 251, 257-263; 865 NW2d 908 (2015), our Supreme Court recognized that the statutory privilege protecting peer-review materials extended to administrative and criminal investigations, and overruled extant caselaw to extend coverage to objective facts that may be presented within peer-review materials.

Plaintiff cites *Krusac*, 497 Mich at 260, for the proposition that only records that are created by peer-review committees are protected. However, although much of the discussion in *Krusac* is indeed directed toward “peer review committees,” the Supreme Court also clarified that, for purposes of that case, it would “use ‘peer review committee’ to refer generally to ‘*individuals* or committees assigned a professional review function’ under MCL 333.20175(8) and ‘*individuals* or committees assigned a review function’ under MCL 333.21515.” *Krusac*, 497 Mich at 257 n 1 (emphasis added). Thus, plaintiff’s argument, that some of the materials sought might have been the work product other than of an actual peer-review committee, is unavailing here.

Plaintiff also asserts that defendant did not apply its own statutorily required bylaws to his situation and argues that this demonstrates that peer-review operations were not involved. However, plaintiff does not explain why any given deviation from normal operational policy or duty would undercut the status of peer-review materials. Further, our Supreme Court in *Krusac* rejected any suggestion that any failure of the defendant’s duty “to publish certain information in the medical record should be deemed a waiver,” on the ground that “deeming the peer review privilege waived is not among the sanctions provided by the Legislature for violations of § 20175(1).” *Id.* at 262 n 9.

As noted, the trial court ruled against disclosure of these documents only after examining them. This action complied with *Krusac*, in which the Supreme Court noted its approval of the practice of having the trial court examine requested materials *in camera* to determine if they are privileged. *Id.* at 254-255, 258. But the results of such off-the-record investigation and fact-finding are not entirely present on the record.

We also decline plaintiff’s request for us to engage in our own *in camera* review of the subject documents, as plaintiff’s legal arguments regarding the status of the privileged documents are meritless. Thus, we affirm the trial court’s determination that the documentation plaintiff sought here was not subject to disclosure because it was privileged peer-review material.

## B. SUPPLEMENTAL EXHIBIT

The trial court entered a scheduling order setting a trial date and stating that motions for summary disposition “shall be timely filed and heard before the Court no later than 60 days

before trial.” The trial court heard the parties’ cross-motions for summary disposition four days before that deadline. Two days later, plaintiff moved to file the transcript of the deposition of plaintiff’s physician colleague as a supplemental exhibit. Plaintiff’s counsel stated that the deposition was taken the same day that plaintiff filed his response to defendant’s motion for summary disposition. Defendant’s counsel objected. The trial court determined that it would not consider the deposition because “the motion for summary disposition was heard, and that all documents were to be provided within a certain time period,” but “weren’t provided within a certain time period.”

In his motion below, plaintiff cited MCR 2.116(G)(1)(a)(iv), which in turn states that “no additional or supplemental briefs may be filed without leave of the court.” Plaintiff, perhaps recognizing that this rule refers to briefs, not depositions or other late-offered evidence, cited this authority for the proposition that courts have the inherent authority to limit and thus allow the presentation of evidence. However, defendant does not dispute that the trial court had the discretion to excuse the poor timing and accept the deposition; instead, defendant argues that the court did not abuse its discretion in declining to do so in this instance. Further, plaintiff does not suggest that the court was unaware of its ability to exercise its discretion in favor of accepting the deposition. Even so, plaintiff notes that discovery was still open at the time the deposition was taken. However, just as specific statutory provisions trump related general ones,<sup>2</sup> the trial court’s specific timing limitations relating to motions for summary disposition covered the offering of evidence for that purpose, even if discovery remained open for other purposes. Plaintiff otherwise points out that his counsel below “explained to the Circuit Court that the transcript was not available at the time of filing of the response to the motion for summary disposition.” Neither explanation suggests that counsel offered specific reasoning below why plaintiff could not have timely offered a transcript of a deposition taken in response to a motion filed 21 days before it was heard—or, at least, asked to delay the hearing for that reason—nor offers to supply the lack of specific reasoning on appeal.

Plaintiff thus fails to demonstrate that the trial court misunderstood its prerogatives here and that it misapplied the ordered scheduling particulars. Furthermore, plaintiff makes only general assertions that the new deposition would have helped him oppose defendant’s motion for summary disposition. He fails to specify in his motion and supporting brief below or in his appellate brief, how that testimony would have served that purpose or explain why the trial court should have regarded it as sufficiently compelling to justify excusing plaintiff’s untimeliness. We conclude that this lack of argument abandons any claim of error. *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003) (“An appellant’s failure to properly address the merits of his assertion of error constitutes abandonment of the issue.”). Alternatively, plaintiff fails to demonstrate that any error affected the outcome here. *Barnett v Hidalgo*, 478 Mich 151, 172; 732 NW2d 472 (2007) (stating that reversal was not required over a preserved nonconstitutional error where the appellant “failed to show that it was more probable than not that the alleged error was outcome determinative”).

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<sup>2</sup> See *Gebhardt v O’Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994).

For these reasons, we reject this claim of error.

### III. PUBLIC-POLICY CLAIM

Plaintiff argues that the trial court erred by dismissing his public-policy claim as preempted by the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*

We review a trial court's decision on a motion for summary disposition *de novo*. *Ford Credit Int'l, Inc v Dep't of Treasury*, 270 Mich App 530, 534; 716 NW2d 593 (2006). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. This Court reviews *de novo* a trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(8) to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). In reviewing a trial court's decision on a (C)(8) motion, we accept as true all factual allegations supporting the claim and reasonable inferences that may be drawn from them. *Id.*

At-will employment relationships may generally be terminated at any time, with or without cause, meaning for any reason or no reason. *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982). "However, an exception has been recognized to that rule, based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable." *Id.* at 695. Our Supreme Court has noted that such public-policy grounds for actionable wrongful termination are usually set forth in statutory prohibitions of adverse employment actions against "employees who act in accordance with a statutory right or duty," but also recognized where the adverse action is in response to an employee's "refusal to violate a law in the course of employment," or "exercise of a right conferred by a well-established legislative enactment." *Id.* at 695-696.

We have held that, in light of our Supreme Court's reliance on legislative enactments in recognizing public-policy bases for wrongful termination actions, "where a statute confers upon a victim of retaliation the right to sue, that person may not also assert a claim of discharge in violation of public policy . . . ." *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 485; 516 NW2d 102 (1994).

The WPA prohibits retaliatory employment action against an employee "because the employee . . . reports or is about to report . . . 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 . . . ." MCL 15.362. "It is the general rule in this state that when a statute creates a new right or imposes a new duty having no counterpart in the common law, the remedies provided in the statute for its violation are exclusive and not cumulative." *Shuttleworth v Riverside Osteopathic Hosp*, 191 Mich App 25, 27; 477 NW2d 453 (1991). "[N]o common-law counterpart existed before passage of the WPA and . . . , therefore, the act is the exclusive remedy for an employee whose employment is terminated in retaliation for reporting an employer's violation of the law. *Id.* (citation omitted).

“The WPA protects an employee who reports or is about to report a violation or suspected violation of a law or regulation *to a public body.*” *Brown v Mayor of Detroit*, 478 Mich 589, 594; 734 NW2d 514 (2007). For this purpose, MCL 15.361(d) broadly defines “public body” to cover various officials or agencies of state or local government, with its subparagraph (*iv*) adding “[a]ny other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body.”

Plaintiff did not invoke the WPA below, and maintains on appeal that he does not have an actionable WPA claim because he does not assert that he reported misconduct to anyone other than defendant itself. And, as defendant is a private hospital, it is not a public body for purposes of authorizing a cause of action under the WPA. Instead, plaintiff specifically argues that WPA preemption does not apply to the specific facts of his case. Defendant responds, not that it constituted a public body for purposes of the WPA, but instead asserts that all public-policy claims stemming from allegations of employer retaliation are preempted by the WPA, regardless if the specific facts would give rise to a remedy under the WPA. Thus, the parties disagree on whether the WPA preempts only those claims for which the WPA provides a cause of action, or whether the WPA generally preempts all public-policy based employer retaliation claims, including those for which the WPA offers no remedy. We agree with defendant.

In *Wurtz v Beecher Metro Dist*, 495 Mich 242, 248; 848 NW2d 121 (2014), our Supreme Court noted that the trial court dismissed a public-policy claim on the ground that “the WPA provided the exclusive avenue of relief,” then concluded that the plaintiff “could not satisfy all of the WPA’s elements,” while implying no inconsistency in finding that the WPA provided the exclusive remedy even where the facts did not trigger its applicability. The Court then affirmed on the ground that “the WPA does not apply when an employer declines to renew a contract employee’s contract.” *Id.* at 249. The Court did not suggest that the claim might remain actionable on public-policy grounds despite the inapplicability of the WPA. Indeed, the Court stated that “[t]he WPA’s language governs this case without any additional judicial interpretation” and reiterated that the WPA did not apply to the plaintiff’s status as one seeking renewal of an employment contract. *Id.* at 257. The Court’s recognition that the public-policy claim below was dismissed for failing to trigger the WPA’s protections, coupled with its assertion that the WPA still governed the matter, indicates that the WPA is the exclusive avenue for redressing retaliatory employment actions. This is true whether or not the WPA provides a remedy for the specific forms of, or reasons for, retaliation in a given case.

Accordingly, we affirm the trial court’s dismissal of plaintiff’s public-policy claim.

#### IV. CONTRACT CLAIM

Plaintiff argues that in granting defendant’s motion for summary disposition the trial court erred by crediting defendant’s position that it terminated plaintiff for cause. “In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial.” *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

A written Physician Employment Agreement executed in January 2016 governed the relationship between the parties. Section 3.2.3(a) of the agreement provided that defendant “may immediately terminate this Agreement” if plaintiff “ceases to satisfy any requirement stated in Section 2.6.” The latter included the following:

- 2.6.3 maintain membership in and abide by the bylaws, rules, and regulations of the Medical Staff of St. Mary’s as are necessary for performance of Physician’s services;
- 2.6.4 abide by all applicable state and federal statutes and regulations and standards of accrediting and certifying bodies, and canons of professional ethics, as each may be amended . . .

Section 3.3.2 provided that should the agreement be terminated, for any reason, “Physician’s medical staff privileges shall automatically terminate without the right of appeal.”

Section 4.2 provided for a signing bonus:

Upon Physician becoming fully credentialed with St. Mary’s and St. Mary’s primary third party payors (as determined in the sole discretion of St. Mary’s) and full execution of this Agreement, St. Mary’s shall pay Physician a signing bonus of Thirty Thousand and 00/100 Dollars (\$30,000.00) (“Signing Bonus”). Physician agrees that should he or she fail to fulfill any of her obligations under this Agreement, and St. Mary’s terminates this Agreement with cause pursuant to Section 3.2.2 or Section 3.2.3 during the first twelve (12) months of this Agreement, or Physician voluntarily terminates this Agreement without cause during the first twelve (12) months of this Agreement, the Signing Bonus amounts received by Physician shall be repaid to St. Mary’s in full within thirty (30) days of terminating h[is] employment; provided, however, that 1/12th of the Signing Bonus shall be deemed forgiven for each full month that Physician performs duties and fulfills her obligations under this Agreement (e.g., if Physician is employed by St. Mary’s for six months, one-half of the Signing Bonus repayment obligation is forgiven). . . .

Paragraph 11 spelled out that the agreement “constitutes the entire agreement of the parties concerning the subject matter hereof and supersedes all previous representations, understandings and agreements of the parties, whether oral or written, concerning the same,” and “may only be modified, altered, amended, revised or extended by a written document signed by the parties herein.”

The trial court explained its decision on the contract claims as follows:

[T]he contract provided to Plaintiff . . . stated within that Defendant could terminate Plaintiff for two reasons; first being without cause by providing Plaintiff with 90 days advanced written notice or second, that Plaintiff could be

terminated immediately if Plaintiff failed to satisfy any requirements stated in Section 2.6 of the agreement.

Here, Plaintiff did not need 90 days' notice because St. Mary's had cause to terminate without giving notice. The cause is justified from the multiple employees and patients complaints and the treatment Plaintiff was providing to the patients. Here, Plaintiff doesn't even contest that multiple claims were filed against him, that they were investigated and discussed with him. Therefore, because Plaintiff did violate the contract, Defendant did have cause to terminate him, even without the 90 days' notice.

The trial court initially ordered that plaintiff repay the entire \$30,000 signing bonus, but, on plaintiff's motion for reconsideration, reduced the obligation to \$20,000. Plaintiff was thus held to repay a prorated portion of that bonus. However, he implicitly argues that he should be allowed to retain the entire bonus on the ground that defendant terminated him without cause.

In wrongful discharge cases, generally the trier of fact decides whether the employee was discharged for cause. See *Toussaint v Blue Cross & Blue Shield*, 408 Mich 579, 620-624; 292 NW2d 880 (1980). But where a party moving for summary disposition supports the motion with documentary evidence, the opposing party may not rest on mere allegations or denials in that party's pleadings, but must offer evidence to establish the existence of a genuine issue of material fact. MCR 2.116(G)(4); see also *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005). "Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient." *McNeill-Marks v MidMichigan Med Ctr*, 316 Mich App 1, 16; 891 NW2d 528 (2016).

In this case, defendant offered an affidavit from a nurse manager of its emergency department, in which the latter attested to having personally observed plaintiff insulting and threatening patients, reporting work he had not performed, and instructing staff without rationale to send all waiting emergency-room patients home. According to this witness, plaintiff's improper interactions with patients twice resulted in the involvement of security personnel. This witness additionally reported that he once referred plaintiff to a call from defendant's pharmacy concerning a patient with a documented allergy to a prescribed medication. Plaintiff "cursorily" retorted that "he was 'the doctor' and did not care about the Pharmacy Department's concern." Plaintiff then "hung the phone up without addressing the concern."

The director of defendant's emergency department attested in an affidavit that he had received several complaints that plaintiff had spoken insultingly to staff and patients and refused to examine or treat patients needing attention. This witness reported that, upon his personal follow-up in one case, he concluded that plaintiff had documented conducting a full examination in a situation where he had not offered an examination or treatment.

Plaintiff asserts that evidence in support of a (C)(10) motion must be substantively admissible, *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 525; 773 NW2d 57

(2009), and that the latter witness offered hearsay.<sup>3</sup> However, we conclude that, to the extent that defendant provided such information, it was not to prove the truth of the matters asserted, but rather to explain why its official developed and further investigated concerns about plaintiff. Moreover, we agree with defendant that the patients' oral statements that the latter witness entertained would be excepted from the rules against hearsay as "made for purposes of medical treatment or medical diagnosis in connection with treatment," MRE 803(4), and that any written accounts may qualify as records "kept in the course of a regularly conducted business activity," MRE 803(6).

Plaintiff himself acknowledged in his deposition that defendant had to contend with numerous complaints about him. Although plaintiff has consistently denied the factual bases of those complaints, and attributed pernicious motives to some of his colleagues, he has offered nothing beyond these conclusory denials and opinions to rebut defendant's substantial evidence implicating him in misconduct. And plaintiff's opinions concerning his colleagues' motives do not rise above mere speculation, given that plaintiff does not suggest or offer any evidence that defendant responded differently to other employees who had created similar concerns, or that defendant otherwise did not generally undertake its disciplinary measures with reasonable consistency.

For these reasons, plaintiff cannot demonstrate that the trial court erred by granting defendant's motion for summary disposition on its contract claim.

#### V. BYLAWS CLAIM

Plaintiff invoked defendant's Medical Staff Bylaws to claim that defendant denied him pretermination procedural rights in connection with the complaints against him.

Article VII of the bylaws is headed "CORRECTIVE ACTION," and sets forth grounds and procedures for addressing problems for a practitioner's performance, including for suspension and termination. Article VIII is headed "HEARING AND APPELLATE REVIEW PROCEDURE," and sets forth the avenues through which a practitioner facing adverse action may respond, including a hearing and internal appellate review. Plaintiff asserts that defendant failed to abide by the bylaws because it failed to provide him with notice of the particulars deemed to require corrective action, failed to engage the Medical Executive Committee, failed to involve an ad hoc committee, and failed to provide plaintiff with a hearing or appellate opportunities.

Defendant does not assert that all of the procedures set forth in the bylaws were in fact followed, but emphasizes that the bylaws disclaim their having any contractual significance. In particular, ¶ 4.6.3 states that "[t]he effect of expiration or other termination of a contract upon a Practitioner's Medical Staff membership status and clinical privileges will be governed solely by

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<sup>3</sup> Hearsay, meaning testimony relating a person's unsworn, out-of-court assertions offered to prove the truth of the matter asserted, MRE 801(c), is generally inadmissible, MRE 802, subject to several exemptions and exceptions as provided by the rules of evidence, MRE 801-805.

the terms of the Practitioner's contract with the Medical Center." Paragraph 4.9 is headed "BYLAWS NOT A CONTRACT," and provides as follows:

These Bylaws shall not be deemed as a contract of any kind between the Governing Body or the Medical Center and the Medical Staff or any individual member thereof. Applications for, the conditions of, and the duration of appointment to the Medical Staff or the granting of Clinical Privileges as a Practitioner or Allied Health Professional shall not be deemed contractual in nature since the continuance of any such privileges at this Medical Center is based solely upon a Practitioner's continued ability to justify the exercise of such privileges. The Governing Body is obligated to use fundamental fairness in dealing with Medical Staff members, Allied Health Professionals and applicants for those positions and may fulfill that obligation by following the procedures specified in these Bylaws and related documents or any other procedures which are fair in the circumstances.

The trial court did not recognize any need to determine whether defendant failed to follow any procedures set forth in its bylaws with regard to any part of plaintiff's employment, termination, or hospital privileges, on the ground that the bylaws gave rise to no enforceable procedural rights. The court's explanation of its decision to grant defendant summary disposition of the bylaws claim pertinently stated:

Defendant's main argument is that the bylaws specifically state within that these bylaws are not a contract. The contract between Plaintiff and Defendant was clear and unambiguous[;] . . . it stated that Plaintiff had no right of appeal. Plaintiff even admits within his deposition that the bylaws specifically state they are not a contract . . . . Even within the bylaws it states in section 4.9 Bylaws not a contract . . . .

Also pursuant to the bylaws . . . the effect of the termination of a contract is governed and subject to the "contract" with the medical center. . . .

. . . The contractual disclaimer at issue in this case . . . clearly evidences and communicates the employer's intent not to be bound by the handbook provisions.

Here Plaintiff's argument is that enforcing a contractual disclaimer would be against public policy. . . . The bylaws simply stated that they were not a part of the contract and Plaintiff acknowledged that.

Therefore, based on case law, this Court finds that the bylaws were not considered a part of the contract (they defer to the terms of the employment contract), and therefore Defendant's motion is granted and Plaintiff's motion is denied.

In reaching its decision, the trial court cited *Lytle v Malady (On Rehearing)*, 458 Mich 153; 579 NW2d 906 (1998). In that case, our Supreme Court held that a “proper cause” provision in an employee handbook did not overcome the presumption of at-will employment where the handbook “provided that ‘[t]he contents of this booklet are not intended to establish . . . any contract between . . . [the employer] and any employee,’” and thus “clearly communicated to employees that the employer did not intend to be bound by the policies stated in the handbook.” *Lytle*, 458 Mich at 166 (WEAVER, J., joined by BOYLE and TAYLOR, JJ.), 185-186 (MALLET, J., concurring in pertinent part).

Again, ¶ 4.9 of the bylaws states that they “shall not be deemed as a contract of any kind,” and also that “[t]he Governing Body is obligated to use fundamental fairness . . . and may fulfill that obligation by following the procedures specified in these Bylaws.” The bylaws’ disclaimer of contract status “of any kind” demonstrates that they have no legal status under any theory, including incorporation, reliance, or mutuality. The statement that the Governing Body “*may* fulfill” its obligation to be fair “by following the procedures specified” (emphasis added) underscores that the bylaws constitute mere guidelines instead of any kind of mandatory authority.

In arguing that operation of law grants the bylaws greater legal significance than their disclaimers of contract status suggests, plaintiff relies on MCL 331.6(2), which states in pertinent part:

The [hospital] board shall provide for a system of accounts to conform to a uniform system required by law and for annual auditing of the accounts of the treasurer by a certified public accountant. . . . The board shall adopt bylaws, rules, and policies governing the operation and professional work of the hospital and the eligibility and qualifications of its medical staff. Physicians, nurses, attendants, employees, patients, and persons approaching or on the premises of the hospital and furniture, equipment, and other articles used or brought on the premises shall be subject to the bylaws, rules, and policies as the hospital board may adopt or authorize to be adopted. The board may deny or revoke staff membership, or suspend or reduce hospital privileges to a physician who violates a provision of the medical staff bylaws, rules, and policies.

MCL 333.21513(d), which, as noted above, also requires the “owner, operator, and governing body” of a licensed hospital to organize its “medical staff to enable an effective review of the professional practice in the hospital for the purpose of reducing morbidity and mortality and improving the care provided . . . .”

But plaintiff cites no authority for the proposition that this statutory mandate effectively grants every person subject to such bylaws a cause of action for a hospital’s failure to strictly abide by them. Indeed, the only remedy specified in MCL 331.6(2) is a hospital board’s prerogative to take adverse administrative action against violators; there is no implication that the referenced “[p]hysicians, nurses, attendants, employees, patients, and persons approaching or on the premises of the hospital” have a cause of action, in contract or otherwise, if they are aggrieved by a hospital’s failure to adhere to the bylaws.

Even so, “[i]t is well settled under Michigan law that an employer’s statement of policy contained in a manual or handbook can give rise to contractual obligations in certain circumstances.” *Bodnar v St John Providence, Inc*, 327 Mich App 203, 213; 933 NW2d 363 (2019), lv pending. But as the Supreme Court stated in *Lytle*, 458 Mich at 166, the circumstances bringing about such obligation must constitute the basis for a reasonable expectation rising to the level of an enforceable promise and this outcome is averted by a “contractual disclaimer” that “clearly evidences and communicates the employer’s intent not to be bound by the handbook provisions,” *id.* at 170.

Plaintiff takes issue with the trial court’s reliance on *Lytle*, on the grounds that it neither applied the same bylaws at issue in the present case, nor involved physicians with hospital staff privileges. However, plaintiff fails to explain how these factual differences render *Lytle* inapt.

In *Toussaint*, 408 Mich at 598, our Supreme Court held that an employment contract may take on a just-cause provision “by express agreement, oral or written, or as a result of an employee’s legitimate expectations grounded in an employer’s policy statements.” But *Toussaint* involved no written disclaimers concerning the legal enforceability of any such statements or expectations. Plaintiff suggests that the policy statements here at issue should create enforceable rights even despite such disclaimers, on the ground that the employer in *Toussaint* voluntarily set forth the policies at issue. He also argues that the Supreme Court attached significance to that employer’s expectation of deriving a benefit from doing so, see *id.* at 619, in contrast to the legislative mandate at work in this case. But plaintiff presents a distinction without a difference. Plaintiff offers us no reason to doubt that the Legislature expected hospitals themselves to be among the beneficiaries of the requirement to set forth bylaws and policies governing their operations, and, as noted, nothing in the legislation creating a hospital’s bylaws suggests a private cause of action. See MCL 331.6(2) and 333.21513(d). Thus, the caselaw establishes that the trial court here correctly determined that the written statements of policy did not rise to the level of enforceable promises in light of the express disclaimers of any contractual significance involved with these bylaws.<sup>4</sup>

## VI. DEFAMATION CLAIM

Plaintiff next argues that the trial court erred in dismissing his defamation claim but he fails to identify any specific document or other communication that he alleges was defamatory or specify the exact words he takes issue with. The trial court’s rationale for rejecting plaintiff’s defamation claim indicate that plaintiff complained of unfavorable performance reports that defendant offered other prospective employers.

Defamation requires proof of “(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to

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<sup>4</sup> Plaintiff cites two nonbinding cases from the Saginaw Circuit Court. We agree with the trial court that available binding authority resolves this issue and thus consultation of nonbinding authority is unwarranted.

negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication.” *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).

In granting defendant summary disposition of plaintiff’s defamation claim, the trial court did not address the truth of the subject communications or any attendant damages. Instead, the court decided that defendant was exercising a well-established employer’s privilege in issuing the relevant communications. The trial court first noted that plaintiff had admitted signing a document allowing defendant to release information about his employment, which plaintiff does not dispute.

The trial court then cited *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 78-79; 480 NW2d 297 (1991), in which we recognized that “[a]n employer has the qualified privilege to defame an employee by making statements to other employees whose duties interest them in the subject matter,” and recited the elements of the qualified privilege as “(1) good faith, (2) an interest to be upheld, (3) a statement limited in scope to this purpose, (4) a proper occasion, and (5) publication in a proper manner and to proper parties only.” The trial court additionally cited MCL 333.20175(5), which requires “a health facility” to report certain adverse actions taken against health professionals, and subsection (6), which provides:

Upon request by another health facility or agency seeking a reference for purposes of changing or granting staff privileges, credentials, or employment, a health facility or agency that employs, contracts with, or grants privileges to health professionals licensed or registered under [the Public Health Code<sup>5</sup>] shall notify the requesting health facility or agency of any disciplinary or other action reportable under subsection (5) that it has taken against a health professional licensed or registered under [the Public Health Code] and employed by, under contract to, or granted privileges by the health facility or agency.

The trial court determined that, because plaintiff agreed in writing that defendant would be free to provide information about him to prospective employers, “[t]he only way Plaintiff could overcome this, is if Plaintiff shows that Defendant did this out of malice,” but that “there was no showing of malice on the Defendant’s part.”

Plaintiff asserts that the trial court erred by failing to consider the evidence that defendant did not follow its bylaws, that defendant relied on hearsay over plaintiff’s denials in deciding to terminate him and providing damaging information to others, that the director of defendant’s emergency department “made admissions that contradict the very statements Defendant had made about Plaintiff,” and that defendant offered defamatory statements after plaintiff “refused to submit to Defendant’s bribe letter.”

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<sup>5</sup> MCL 333.16101 *et seq.*

Concerning the bylaws, as discussed earlier, they clearly disclaim their own contractual significance while deferring to actual contracts. Accordingly, citing defendant's election to act against plaintiff as expeditiously as allowed by the employment agreement, as opposed to through exercise of bylaws procedures, as evidence of bad faith on defendant's part in reporting negatively on plaintiff's employment is speculative.

As to plaintiff's assertion that defendant defamed him with hearsay that he denied, plaintiff's incomplete briefing of this issue specifies neither the alleged hearsay and attendant denials, nor defendant's emergency department director's and defendant's seemingly contradictory statements. In any event, as explained earlier, plaintiff's hearsay objections are without merit. Further, that a medical employer would take note of second-hand information concerning physician misconduct or dereliction of duty, while looking skeptically upon an employee's self-serving explanations in the matter, strikes us as unremarkable. This is likewise the case if not all of an employer's sources of information are entirely consistent about such matters. This seems of particular significance, given that plaintiff's amended complaint asserted that his employment ended not because he was determined actually to have failed to comply with applicable rules and regulations, but because of his "alleged" failure. Truth is an absolute defense to a defamation claim. *Porter v Royal Oak*, 214 Mich App 478, 486; 542 NW2d 905 (1995). That there were such allegations is undisputed.

The trial court additionally stated that defendant "fails to provide any evidence that those who authorized the letter to prospective employers were in anyway involved in the claims asserted in this lawsuit." Plaintiff does not suggest that the court erred in concluding that he failed to show any linkage between defendant's unfavorable reports about his performance and any of defendant's personnel who might have harbored animosity against him.

For these reasons, we reject plaintiff's challenge to the trial court's decision to grant defendant summary disposition on his defamation claim.

## VII. MOTION FOR RECONSIDERATION

In asserting that the trial court abused its discretion in partially denying his motion for reconsideration,<sup>6</sup> plaintiff offers only cursory argument, referring to what is "set forth more fully in the proceeding [sic] discussions," and also "in Plaintiff's motion for reconsideration." Plaintiff thus asks us to search through his appellate brief for an argument supporting reconsideration, or to treat his motion and supporting brief below as fully incorporated into his appellate brief. But, pursuant to MCR 7.212(C)(7), which sets forth detailed requirements for arguments presented in an appellant's brief, an appellant cannot rely on the reader to discover pertinent arguments from other parts of his brief or incorporate by reference his lower-court advocacy. We therefore deem this issue abandoned for lack of clear argument, as required by the

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<sup>6</sup> See *Kokx v Bylenga*, 241 Mich App 655, 658-659; 617 NW2d 368 (2000) (stating that a court's decision on a motion for reconsideration is reviewed for an abuse of discretion).

court rules. See *Keller*, 256 Mich App at 339-340; *Rickner v Frederick*, 459 Mich 371, 377 n 6; 590 NW2d 288 (1999).

Affirmed.

Defendant may tax costs under MCR 7.219(A).

/s/ Mark T. Boonstra

/s/ Jonathan Tukul

/s/ Anica Letica

STATE OF MICHIGAN  
COURT OF APPEALS

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RONALD DeMAAGD,

Plaintiff-Appellant,

v

CITY OF SOUTHFIELD,

Defendant-Appellee.

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UNPUBLISHED

August 10, 2006

No. 267291

Oakland Circuit Court

LC No. 2004-060091-CL

Before: Davis, P.J., and Cooper and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendant. We affirm. Plaintiff was employed by defendant as Deputy City Administrator from 1989 until 2004. This case arises out of plaintiff's termination. Plaintiff alleges that his termination was causally connected to reports he made that defendant might violate its own City Charter by hiring Dale Iman as City Administrator, in violation of the Whistleblowers' Protection Act (WPA), MCL 15.362 *et seq.* Plaintiff also alleges that the City Charter precludes defendant from terminating him without just cause. The trial court granted defendant's motion for summary disposition, and plaintiff appealed.

In 1989, defendant's City Administrator at the time, Robert Block, recruited plaintiff for the position of Deputy City Administrator. No such position existed at the time, so Block submitted plaintiff's appointment to the City Council, which passed a resolution hiring plaintiff for the position. Plaintiff did not go through any of the processes required by the City Charter to become a part of the Civil Service. By 1998, plaintiff's relationship with Block had broken down, but the City Council did not renew Block's contract, and Donald Gross became City Administrator in 1999. Plaintiff continued serving as Deputy City Administrator "without discussion." In the November 2003 general election, the people of the City of Southfield voted to amend the City Charter to formally provide that the City Administrator could appoint a Deputy City Administrator. Plaintiff again simply continued working as he had been, and no actions were taken by anyone regarding his position.

Plaintiff apparently executed his job responsibilities satisfactorily for some time, but members of the city administration began having concerns with him. In 2000, the City Council asked Gross to keep plaintiff from attending City Council meetings because he was disruptive and inappropriate. A number of individuals, including council members, Gross, and city attorney John Beras personally observed and received complaints regarding instances of

impropriety by plaintiff. These ranged from belittling or insulting behavior to his general demeanor to actual physical confrontations. Several opined that plaintiff had become “a different person.” On August 22, 2003, plaintiff left a voicemail message listing a variety of improprieties he had known about for “too long” and threatening to become a whistleblower, a threat he did not follow through on. Gross became sufficiently concerned about plaintiff to ask plaintiff to take a two-week leave of absence. Plaintiff took that leave of absence.

In 2004, defendant retained PAR Group as an independent consultant to help find a new City Administrator. After some research, PAR Group provided defendant’s City Council with a list, which the City Council eventually pared down to Dale Iman as its finalist. However, for reasons that were, and apparently remain, unknown to anyone, a number of newspaper clippings then surfaced “all over the city” pertaining to allegations of Iman’s past legal problems involving his stepson. These clippings generated widespread concern. Plaintiff took a number of the clippings and forwarded them to various members of the city administration. All of the deposition testimony from the recipients of these articles indicates that plaintiff never told them why he was forwarding the articles to them. Ultimately, defendant decided that the legal problems described in the articles were irrelevant, and Dale Iman became the new City Administrator. Several members of the city administration met with Iman to discuss plaintiff, and over the course of his interviewing, Iman had other individual discussions with administration members concerning plaintiff. Iman wrote plaintiff a letter offering plaintiff the opportunity to resign, which plaintiff did not take. Iman terminated plaintiff on July 1, 2004.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id.*, 119. When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact, although “the mere possibility that the claim might be supported by evidence produced at trial” is insufficient. *Id.*, 120-121. Because the trial court considered evidence beyond just the pleadings, MCR 2.116(C)(8) is not applicable. *Id.*, 119-120.

Plaintiff first argues that the trial court improperly used judicial notice to reach a conclusion about a disputed material fact. We disagree. “Under MRE 201(b), a ‘judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’” *Meyerhoff v Turner Const Co*, 210 Mich App 491, 494; 534 NW2d 204 ((1995), aff’d in relevant part and vac’d on other grounds 456 Mich 933 (1998)). Plaintiff alleges that the trial court judicially noticed that defendant conducted an adequate background check of Iman. However, the trial court stated that “*even* the Chief of Police” found the background checks “*inadequate*.” (Emphasis added.) Further, even if the trial court judicially noticed that defendant conducted an adequate background check, we do not understand how this prejudiced plaintiff’s claims under the WPA or the City Charter. A party may not leave it to this Court to search for a factual or

legal basis for that party's claims. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004); *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Plaintiff next argues that the trial court erred in concluding that he was not engaged in a "protected activity" under the WPA. We disagree. "To establish a prima facie case under [the Whistleblowers' Protection Act], a plaintiff must show that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action." MCL 15.362; *West v General Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003). "Whether a plaintiff has established a prima facie case under the WPA is a question of law subject to review de novo." *Manzo v Petrella*, 261 Mich App 705, 711; 683 NW2d 699 (2004). "An employee is engaged in protected activity under the Whistleblowers' Protection Act who has reported, or is about to report, a *suspected* violation of law to a public body." MCL 15.362; *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 610; 566 NW2d 571 (1997) (emphasis added).

The parties do not dispute the underlying basis for plaintiff's argument: if Iman had been convicted of a felony, the City Charter would have barred defendant from hiring him. Furthermore, the parties do not appear to dispute that Iman was not, in fact, actually ever convicted of a felony. Therefore, the gravamen of plaintiff's argument is that he was engaged in a protected activity under the WPA because he reported a suspected violation of the law and did not know that the suspicion was untrue. Defendant raised two objections to this: first, that plaintiff's suspicion was not reasonable, and second, that plaintiff did not actually "report" anything.

Plaintiff argues correctly that MCL 15.362 does not contain an explicit reasonableness requirement, but rather clearly states that the only potentially applicable exception is "unless the employee knows that the report is false." Defendant relies on Michigan Civil Jury Instruction 107.04, which states:

Plaintiff must reasonably believe that a violation of law or a regulation has occurred. It is not necessary that an actual violation of law or a regulation has occurred, but the employee can not have a reasonable belief if [he] knows [his] report is false.

Plaintiff argues that M Civ JI 107.04 should not be given if it is an inaccurate statement of law. See *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 330-333; 683 NW2d 573 (2004). We agree.

However, our Supreme Court has observed that "Many courts have held that a plaintiff is precluded from recovering under a whistleblower statute when the employee acts in bad faith." *Shallal, supra* at 621. The underlying purpose of the WPA is to protect the public "by removing barriers that may interdict employee efforts to report violations or suspected violations of the law." *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 378-379; 563 NW2d 23 (1997). Although this purpose can only be served by granting whistleblowers considerable benefit of the doubt, it does not seem that this purpose would be served by permitting them to act with reckless abandon justified by a technical lack of awareness that their reports were untrue. Such an approach could, for example, tend to encourage employees to remain *deliberately*

unaware of the truth. Therefore, M Civ JI 107.04 is the only practical way to serve the goals of the WPA. A whistleblower plaintiff cannot make a wholly unfounded or unreasonable assertion that there has been or will be a violation of the law without running afoul of the WPA's underlying good faith requirement.

We decline to decide whether plaintiff's belief was reasonable because of the related question whether plaintiff actually "reported" anything at all within the WPA's definition. The WPA requires that an employee "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." MCL 15.362. Plaintiff correctly asserts that the applicable "violation of a law" here is a violation of defendant's City Charter that would have occurred if defendant had hired a convicted felon. Therefore, plaintiff argues that "whatever general public knowledge may have existed about Mr. Iman's problems with the law in the communities where he formerly resided, it was plaintiff who put two and two together and *pointed out that the city charter was at issue*" (emphasis added). However, we have carefully reviewed all of the deposition testimony included in the lower court record, and we conclude that the record simply fails to support plaintiff's assertion.

Plaintiff admits that the newspaper clippings themselves were already "all over the city." All he did was take some of them and pass them on to other members of the city administration. Plaintiff's own deposition does not contain any indication that he told anyone, verbally or in writing, of his concern that it would violate the City Charter if Iman had been convicted of a felony and was hired. Rather, plaintiff discussed Iman's attitude toward unions with some of the people. Plaintiff may have discussed the charter provision regarding felony convictions with the city attorney in reference to *a different candidate*, but his testimony on that point is ambiguous. The city attorney testified that he was unable to speculate as to why plaintiff gave him the articles, because plaintiff "simply dropped them off," but he felt plaintiff was simply trying to derail the hiring process. All the other deponents testified that plaintiff did not tell them why he was giving them the articles, that they had no discussions with plaintiff at all regarding Iman, or that they were not even aware that plaintiff was involved. In sum, there is no evidence whatsoever in the record that plaintiff actually reported an impending potential violation of the City Charter. Therefore, the trial court properly found that plaintiff could not establish an essential element of a prima facie WPA claim.

It is therefore not necessary for us to address the other arguments plaintiff raises in support of his WPA claim. We note, however, that the record is replete with indications that plaintiff's behavior was gravely troubling to a number of city administration members, who were already discussing plaintiff's termination before Iman's legal troubles became an issue, but they felt that there was nothing they could or should do until a new City Administrator was retained. We also note that we are unconvinced that one angry voicemail message a year previously is sufficient to establish, at a summary disposition stage, that any of plaintiff's actions in this matter were in bad faith. However, we do not now decide these matters.

Plaintiff's final argument is that, by operation of the City Charter, his position was protected from termination except for just cause. Under the circumstances, we disagree. We review de novo questions of statutory construction, with the fundamental goal of giving effect to the intent of the Legislature. *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175, amended on other grounds 468 Mich 1216 (2003). Interpretation of a city charter is

treated as an issue of statutory interpretation. *Livonia Hotel, LLC v City of Livonia*, 259 Mich App 116, 131; 673 NW2d 763 (2003).

Under defendant's City Charter, "The civil service of the city shall be divided into unclassified and classified service." Plaintiff argues that the position of Deputy City Administrator is not included in the specifically enumerated "unclassified" positions, so it must be "classified." The City Charter further provides that "Any employee or officer in the classified civil service" may only be removed for just cause. This is a reasonable argument. However, plaintiff admits that he was not hired pursuant to the City Charter, he was hired pursuant to a City Council resolution, and he never went through the process – required by the City Charter – to become a member of the civil service. Therefore, he could not have been a member of the civil service at all, whether in a classified or unclassified position. His employment was purely a creature of the City Council's resolution. After the 2003 amendment to the City Charter, which formally added a Deputy City Administrator position, no steps were taken to reconcile or convert plaintiff from his original position to the Charter position. Plaintiff was not employed under the City Charter, so he cannot be protected under the City Charter.

The trial court properly found that plaintiff did not make a protected "report" under the WPA, and he was not a "classified employee" under the City Charter. Therefore, we perceive no need to address any of the other issues raised.

Affirmed.

/s/ Alton T. Davis

/s/ Jessica R. Cooper

/s/ Stephen L. Borrello

STATE OF MICHIGAN  
COURT OF APPEALS

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MARY T. FOGWELL,

Plaintiff-Appellant,

V

DANIEL KLEIN,

Defendant-Appellee.

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UNPUBLISHED

September 25, 2001

No. 223761

Ingham Circuit Court

LC No. 99-090024-NZ

Before: Cavanagh, P.J. and Markey and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff worked as a hygienist for defendant, a dentist. In the summer of 1997, plaintiff became concerned about the legality of some of defendant's billing practices. She copied various records and sought legal advice concerning her own potential liability for the practices. She placed two calls to an insurance hotline, but terminated both calls without speaking to another person or leaving any information. Plaintiff also contacted the Department of Consumer and Industry Services and requested a complaint form, but did not complete or file the form.

In January 1999, plaintiff and defendant met to discuss various matters. Plaintiff informed defendant of her concerns about the billing practices and told him that she had consulted an attorney and had attempted to contact the insurance hotline. On February 2, 1999, defendant terminated plaintiff's employment when plaintiff declined to indicate whether she intended to stop pursuing the matter. In a letter dated February 2, 1999, defendant informed plaintiff that she was not discharged because she had indicated that she was about to report her suspicions to any public body.

Plaintiff filed suit, alleging that her discharge for protected activity violated the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.* Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that no issue of fact existed as to whether plaintiff had reported or was about to report a suspected violation of the law. The trial court agreed with defendant and granted his motion.

We review a trial court's decision on a motion for summary disposition de novo. *Silver Creek Twp v Corso*, 246 Mich App 94, 97; 631 NW2d 346 (2001). This Court views the evidence submitted in a light most favorable to the non-moving party. *Chop v Zielinski*, 244 Mich App 677, 679; 624 NW2d 539 (2001).

Under the WPA, an employer may not discharge, threaten, or otherwise discriminate against an employee because the employee reports or is about to report a violation or suspected violation of a law, regulation, or rule to a public body. MCL 15.362. To establish a prima facie claim under the WPA, a plaintiff must show that: (1) he was engaged in protected activity; (2) the defendant discharged him; and (3) a causal connection existed between the activity and the discharge. *Chandler v Dowell Schlumberger, Inc.*, 456 Mich 395, 399; 572 NW2d 210 (1998). Protected activity consists of: (1) reporting to a public body a violation or a suspected violation of a law, regulation, or rule; (2) being about to report such a violation; or (3) being asked by a public body to participate in an investigation. MCL 15.362. An employee who is about to report a violation or a suspected violation is on the verge of doing so. *Shallal v Catholic Social Services*, 455 Mich 604, 612; 566 NW2d 571 (1997). A nonreporting employee must establish being about to report a violation or a suspected violation by clear and convincing evidence. MCL 15.363(4).

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. We agree. Plaintiff alleged that defendant discharged her because she engaged in an activity protected under the WPA. The evidence indicated that while plaintiff never actually reported a suspected violation of the law to any public body, she engaged in several activities that indicated she was about to report. These activities included copying of records, attempts to contact the insurance hotline, and obtaining a complaint form. Plaintiff informed defendant of these activities and her concerns with his billing practices only one week prior to her termination even though many of these activities occurred over a year before. In fact, plaintiff was terminated by defendant shortly after she refused to answer a direct question concerning her intentions to stop pursuing the matter. Plaintiff's proof "need not consist of a concrete action to satisfy the 'about to' report element" of the WPA. *Shallal, supra* at 615. A reasonable person could conclude that plaintiff's actions, coupled with her refusal to answer defendant's question about not reporting him, provided clear and convincing evidence to satisfy the "about to report" language of the WPA. See *Shallal, supra* at 615.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Jessica R. Cooper

STATE OF MICHIGAN  
COURT OF APPEALS

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WARREN HALL,

Plaintiff-Appellant,

v

CONSUMERS ENERGY COMPANY and PMC  
CONSTRUCTORS AND TECHNICAL  
SERVICES, LLC,

Defendants-Appellees.

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UNPUBLISHED

May 30, 2006

No. 259634

Charlevoix Circuit Court

LC No. 03-176019-NZ

Before: Meter, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition of his claims for retaliatory discharge in violation of public policy and the Whistleblower's Protection Act (WPA), MCL 15.361 *et seq.* We affirm the summary dismissal of plaintiff's claim under the WPA, but reverse and remand as to plaintiff's claim of wrongful discharge in violation of public policy.

Plaintiff worked for defendant PMC Constructors and Technical Services, LLC (PMC) as a carpenter at a nuclear power plant owned by defendant Consumers Energy Company. During his employment, plaintiff allegedly reported numerous regulatory safety violations to PMC management, including three written "condition reports" that PMC was required to forward to the federal Nuclear Regulatory Commission (NRC). PMC eventually laid plaintiff off, citing a lack of work.

After learning that PMC had retained less experienced carpenters, plaintiff filed the instant suit alleging that he was discharged for having raised and reported regulatory violations, in violation of both public policy and the WPA. Although plaintiff timely served PMC's registered agent by mail, the complaint erroneously named a different but similar entity and the agent returned the documents. Plaintiff thereafter filed and served an amended complaint, but after the 90-day limitations period set by the WPA had expired. See MCL 15.363(1). Finding that the WPA constituted the exclusive remedy for plaintiff's claim of retaliatory discharge but was time-barred, the trial court dismissed plaintiff's complaint.

On appeal, plaintiff argues that the trial court erred in granting summary disposition of his claim under the WPA. Because we conclude on review *de novo* that plaintiff was not

engaged in activity protected by the WPA, we disagree.<sup>1</sup> *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999) (a trial court's grant of summary disposition is reviewed de novo).

An employee is engaged in a protected activity under the WPA if he has reported or is about to report a suspected violation of a state or federal law, regulation, or rule to a public body. *Shallal v Catholic Social Services of Wayne County*, 455 Mich 604, 610; 566 NW2d 571 (1997). A "public body" under the WPA is any body that is created or primarily funded by state or local authority, including a member of that body. See *Manzo v Petrella*, 261 Mich App 705, 713-714; 683 NW2d 699 (2004); see also MCL 15.361(d). Here, plaintiff alleged in his complaint that he was wrongfully discharged for having reported or attempted to report suspected nuclear regulatory violations to the NRC. Such activity involves the report or attempt to report allegedly unlawful conduct to a body created and funded by a federal, rather than state or local, authority. Thus, plaintiff was not engaged in activity protected by the WPA, i.e., the report of suspected unlawful conduct to a "public body," and the act is, therefore, inapplicable under the facts of this case. Summary disposition of plaintiff's claim under the WPA was therefore proper, as the act provides no remedy for his allegation of retaliatory discharge.

However, because the WPA provides no remedy for plaintiff's allegation of retaliatory discharge, the trial court erred in also dismissing plaintiff's claim that his discharge constitutes a violation of public policy. It is well settled that because the WPA represents Michigan's public policy against discharge for reporting suspected violations of law to a public body, any public policy claim of wrongful discharge arising from such activity is preempted by the WPA. See *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 70, 78-79; 503 NW2d 645 (1993) (the remedies provided by the WPA are exclusive, not cumulative). If, however, the WPA does not apply and provides no remedy, neither then can it be plaintiff's exclusive remedy. *Id.* at 80; see also *Driver v Hanley (After Remand)*, 226 Mich App 558, 566; 575 NW2d 31 (1997). Thus, where, as here, the WPA provides no remedy at all, it cannot constitute a plaintiff's exclusive remedy. *Driver, supra*. Consequently, the trial court erred in holding that the WPA precluded plaintiff's claim for retaliatory discharge in violation of public policy.

We affirm in part, reverse in part, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter  
/s/ Joel P. Hoekstra  
/s/ Jane E. Markey

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<sup>1</sup> Because the WPA is not applicable under the facts of this case, we do not address plaintiff's claim that the "relation back doctrine" operates to bring his amended complaint within the 90-day limitations period set by the act.

STATE OF MICHIGAN  
COURT OF APPEALS

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JANINE IRWIN,

Plaintiff-Appellant,

v

CIENA HEALTH CARE MANAGEMENT, INC.,  
d/b/a GOLDEN OAKS MEDICAL CARE  
FACILITY,

Defendant-Appellee.

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UNPUBLISHED  
December 7, 2010

No. 294239  
Oakland Circuit Court  
LC No. 2008-093145-CD

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant. In her lawsuit, plaintiff claimed she was wrongfully terminated from her employment as a licensed practical nurse (“LPN”), with one count based on her discharge being a violation of the Whistleblower Protection Act (“WPA”), MCL 15.361 *et seq.*, and another count based on the discharge being a violation of public policy.<sup>1</sup> We affirm in part and reverse in part.

A. SUMMARY DISPOSITION ON THE PUBLIC POLICY CLAIM

Plaintiff argues that the trial court erred when it granted defendant’s motion for summary disposition pursuant to MCR 2.116(C)(8) on plaintiff’s violation of public policy claim. We agree, but because summary disposition was proper under MCR 2.116(C)(10), the decision will not be reversed. A trial court’s decision on a motion for summary disposition brought under MCR 2.116(C)(8) is reviewed *de novo*. *Adair v Mich*, 470 Mich 105, 119; 680 NW2d 386 (2004). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). “All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant.” *Adair*, 470 Mich at 119. The motion should be granted only when the claim is “so

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<sup>1</sup> Plaintiff agreed at the trial court to dismiss the WPA claim, so only the public policy claim is reviewed on appeal.

clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* (quotations and citations omitted).

“[I]n the absence of a contract providing to the contrary, employment is usually terminable by the employer or the employee at any time, for any or no reason whatsoever.” *McNeil v Charlevoix County*, 484 Mich 69, 79; 772 NW2d 18 (2009). However, an employer is not free to discharge an employee when that discharge would be contrary to public policy. *Id.* A claim for termination of employment in violation of public policy must be based on an “objective legal source” establishing public policy. *Kimmelman v Heather Downs Mgmt Ltd*, 278 Mich App 569, 573; 753 NW2d 265 (2008). Such “[a] cause of action for wrongful discharge may be implied where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment.” *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 452; 750 NW2d 615 (2008), quoting *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 695; 316 NW2d 710 (1982). Thus, if the pleadings support a finding that plaintiff was discharged because she refused to violate the law during the course of her employment, she would have stated a valid claim.

Because we must confine our review to the pleadings alone and accept plaintiff’s factual allegations in her complaint as true, the following facts are established: (1) plaintiff was an employee of defendant; (2) on June 14, 2008, a registered nurse ordered plaintiff to administer insulin to a patient; (3) plaintiff did not believe that any physician order existed that authorized the administering of the insulin; (4) plaintiff refused to follow the order because of this lack of a legitimate physician order; (5) and plaintiff was reprimanded, suspended, and later discharged because of her refusal to follow the nurse’s order.

Plaintiff’s complaint alleges that she was discharged because she refused to participate in actions that represented a “clear violation of the standard of care” she owed the patient. However, construing this claim in a light most favorable to plaintiff, results in the issue becoming whether plaintiff was asked to violate the law when she was asked to administer the insulin.<sup>2</sup> Under the Public Health Code, “prescribing is limited to a prescriber.” MCL 333.17708(3). And a “prescriber,” in turn, is

a licensed dentist, a licensed doctor of medicine, a licensed doctor of osteopathic medicine and surgery, a licensed doctor of podiatric medicine and surgery, a licensed optometrist certified under part 174 to administer and prescribe therapeutic pharmaceutical agents, a licensed veterinarian, or another licensed

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<sup>2</sup> We note that not viewing this claim in this manner will result in plaintiff losing because concepts such as the “standard of care” are not based on an “objective legal source,” instead it is defined as “the skill and care ordinarily possessed and exercised by practitioners of the same profession in the same or similar communities.” *Cox v Bd of Hosp Managers of Flint*, 467 Mich 1, 22; 651 NW2d 356 (2002); see also *Gonzales v St John Hosp & Med Ctr*, 275 Mich App 290, 294; 739 NW2d 392 (2007) (reinforcing the idea that standard of care is not derived from an objective legal source because expert testimony is *required* to establish the applicable standard of care).

health professional acting under the delegation and using, recording, or otherwise indicating the name of the delegating licensed doctor of medicine or licensed doctor of osteopathic medicine and surgery. [MCL 333.17708(2).]

It is clear that plaintiff, an LPN, and the nurse supervisor, a registered nurse, did not qualify as a “prescriber” under the Public Health Code. Thus, looking at the facts as provided in the pleadings in a light most favorable to plaintiff, we conclude that plaintiff did state a valid wrongful termination public policy claim when she alleged her employment was terminated because she refused to violate the law during the course of her employment.

The trial court’s opinion and order stated the following with respect to plaintiff’s public policy violation claim:

The Court also agrees that Plaintiff’s public policy theory fails to state a claim. The problem here is not that Plaintiff’s allegations do not describe a policy violation but rather that the policy violation is based on the Whistleblower Protection Act. Moreover, Plaintiff has not identified any other legal source for the public policy she claims to have been violated in this case. In this context, Plaintiff’s remedy is solely under the Whistleblower Protection Act, and she cannot simultaneously pursue a common law public policy claim. See *Vagts v Perry Drug Stores*, 204 Mich App 481[; 516 NW2d 102] (1994). Therefore, summary disposition of this count is appropriate as well.

The trial court was incorrect when it stated that the public policy claim was based on the WPA. The only reference to the WPA in plaintiff’s complaint involved Count II. And that count was based on the allegation that plaintiff was discharged because she “was about to report to an authority the fact that the defendant was not complying with the standard of care that it was required to render to the patients.” Clearly, this allegation of being fired for being about to report to another authority is distinct and separate from the first allegation of being fired for failing to follow an order that was contrary to the law. Thus, the trial court’s rationale for granting summary disposition was erroneous. The trial court’s reliance on *Vagts v Perry Drug Stores*, 204 Mich App 481; 516 NW2d 102 (1994), was misplaced. The *Vagts* Court stated,

[A] “public policy claim is sustainable . . . only where there also is not an applicable statutory prohibition against discharge in retaliation *for the conduct at issue*.” In other words, where a statute confers upon a victim of retaliation the right to sue, that person may not also assert a claim of discharge in violation of public policy . . . . [*Vagts*, 204 Mich App at 485 (citations omitted; emphasis added).]

This Court recently restated this principle as “where there exists a statute explicitly proscribing *a particular adverse employment action*, that statute is the exclusive remedy, and no other ‘public policy’ claim can be maintained.” *Kimmelman*, 278 Mich App at 573 (emphasis added). *Vagts* and *Kimmelman* simply stand for the proposition that if a statute *would* allow a plaintiff to recover for wrongful termination, then the plaintiff is limited to that statute as the sole remedy. Here, the WPA would *not* allow plaintiff to recover for being discharged for refusing to follow an order that was contrary to the law. The WPA only protects employees from being discriminated against because the employee either reported or was about to report the employer

to a “public body.” MCL 15.362. Because the WPA does not address an employer discharging an employee for refusing to break the law, plaintiff was not barred from pursuing a public policy claim. Accordingly, the trial court erred when it ruled that plaintiff was limited to the WPA for recovery.

However, the trial court also granted defendant’s motion for summary disposition based on the fact that plaintiff’s employer was Northern Oak Management Company, L.L.C. – and not defendant – “as indicated in the letter describing the terms and conditions of Plaintiff’s employment.” Although the trial court did not refer to which subrule it was relying upon when it granted summary disposition on this aspect, because the court relied on evidence outside the pleadings in making its ruling, the motion is considered being granted under MCR 2.116(C)(10). *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

A trial court’s decision on a motion for summary disposition brought under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). “A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [A defendant] is entitled to judgment as a matter of law if the claim suffers a deficiency that cannot be overcome.” *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997) (citations omitted).

Here, there is no dispute that the proper defendant should be Northern Oak, and not defendant. Northern Oak hired plaintiff and was responsible for the personnel decisions at the facility. Plaintiff even admitted this error when she sought to “substitute Northern Oak Management Company in place of Ciena Healthcare Management” in the trial court. Because this is a deficiency that plaintiff cannot overcome, defendant was entitled to judgment as a matter of law, and summary disposition under MCR 2.116(C)(10) was warranted. Accordingly, because the trial court did not err when it granted summary disposition for this reason, any error introduced because of also granting the motion on MCR 2.116(C)(8) grounds does not require reversal.

## B. AMENDING THE COMPLAINT

Plaintiff argues that the trial court abused its discretion when it denied her motion to amend the complaint. We agree. A trial court’s decision regarding a party’s motion to amend its pleadings is reviewed for an abuse of discretion. *Wormsbacher v Philip R. Seaver Title Co Inc*, 284 Mich App 1, 8; 772 NW2d 827 (2009). “An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes.” *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

MCR 2.118(A) sets forth the requirements for amendment of pleadings. Specifically, MCR 2.118(A)(2) provides that “[e]xcept as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.” “Because a court should freely grant leave to amend a complaint when justice so requires, a motion to amend should ordinarily be denied only for particularized reasons.” *Wormsbacher*, 284 Mich App at 8, citing *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007). Some reasons that justify denying leave to amend include “undue delay, bad faith or dilatory motive, repeated failure to cure

deficiencies by amendments previously allowed, undue prejudice to the defendant, or futility.” *Wormsbacher*, 284 Mich App at 8.

Here, the trial court concluded that allowing plaintiff to name a new defendant would be futile since, regardless of the named defendant, plaintiff failed to state a claim on which relief could have been granted. As discussed in Part A, *supra*, the trial court erred when it determined that plaintiff failed to state a public policy claim on which relief could be granted. Thus, because the trial court’s decision was based on an erroneous application of law, the court abused its discretion when it denied plaintiff’s motion to amend the complaint. See *Donkers v Kovach*, 277 Mich App 366, 368-369; 745 NW2d 154 (2007) (stating that an error of law can lead a trial court to abuse its discretion).

We note that defendant’s reliance on *Miller, supra*, at the trial court is misplaced. The *Miller* Court held that, in that particular instance, allowing the plaintiff to amend the complaint would have been futile. *Miller*, 477 Mich at 107-108. However, the dispositive fact in *Miller* was that the request to amend the complaint, by substituting a new party, came *after* the statute of limitations had lapsed. *Id.* Because pleadings do not relate back to their original date of filing when new parties are substituted or added, the Court found adding the new party would be futile. *Id.* at 106-108. In the instant case, the statute of limitations had not lapsed with respect to the public policy claim<sup>3</sup> when plaintiff moved to amend the complaint. Thus, there was no “particularized reason” to refuse plaintiff’s request to amend the complaint, and the trial court abused its discretion when it denied plaintiff’s request.

Affirmed in part, reversed in part, and remanded for further proceeding consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens  
/s/ William C. Whitbeck  
/s/ Karen M. Fort Hood

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<sup>3</sup> Plaintiff consented to dismiss the WPA claim and acknowledged that the status of limitations had expired with respect to that claim.

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STATE OF MICHIGAN  
COURT OF APPEALS

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JENNIFER JANETSKY,

Plaintiff-Appellee,

v

COUNTY OF SAGINAW and CHRISTOPHER  
BOYD,

Defendants-Appellants,

and

SAGINAW COUNTY PROSECUTOR'S OFFICE  
and JOHN MCCOLGAN,

Defendants.

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UNPUBLISHED

April 23, 2020

Nos. 346542, 346565

Saginaw Circuit Court

LC No. 15-028306-CL

JENNIFER JANETSKY,

Plaintiff-Appellee,

v

COUNTY OF SAGINAW, JOHN MCCOLGAN,  
and CHRISTOPHER BOYD,

Defendants-Appellants,

and

SAGINAW COUNTY PROSECUTOR'S OFFICE,

Defendant.

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Before: FORT HOOD, P.J., and BECKERING and BOONSTRA, JJ.

PER CURIAM.

In Docket No. 346542 of these consolidated appeals,<sup>1</sup> defendants Saginaw County (the County) and Christopher Boyd (Boyd) appeal by right the portion of the trial court's November 7, 2018 order denying their motion for summary disposition under MCR 2.116(C)(7) (governmental immunity). In Docket No. 346565, the County, Boyd, and defendant John McColgan (McColgan) appeal by leave granted<sup>2</sup> the portion of the order denying their motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). We reverse and remand for entry of an order granting summary disposition in favor of defendants.

### I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff was employed as an assistant prosecuting attorney in the Saginaw County Prosecutor's Office from January 2010 until December 2015, when she resigned. At all relevant times, McColgan was the Saginaw County Prosecuting Attorney and Boyd was the Chief Assistant Prosecutor and plaintiff's supervisor.

Plaintiff was assigned a sexual assault case in October 2013 (the 2013 sexual assault case). The criminal defendant was charged with multiple counts of first-degree criminal sexual conduct (CSC-I). Plaintiff alleged in her complaint that in 2014, without her knowledge or approval, Boyd reached a plea deal with the defendant that included an agreement that the defendant would plead guilty to third-degree criminal sexual conduct (CSC-III) and be sentenced to probation;<sup>3</sup> the agreement was reached and entered shortly before plaintiff's wedding, but plaintiff did not discover that the deal had been made until she returned to work. When plaintiff reviewed the file after returning to the office, she believed that Boyd had scored the sentencing guidelines incorrectly, had offered probation on a CSC-III conviction in violation of MCL 771.1(1), and had violated the Crime Victims Rights Act (CVRA) by failing to properly inform the victims. Although, according to plaintiff, Boyd objected to plaintiff's characterization of the plea deal, he ultimately signed a motion drafted by plaintiff to vacate the sentencing agreement. Subsequently, the trial court granted the motion to vacate the sentencing agreement and to allow the criminal defendant to withdraw his plea.

Plaintiff filed suit in November 2015, alleging that after she "reported these violations of law and informed McColgan and Boyd that she refused to acquiesce to them . . . [,] Boyd created

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

<sup>2</sup> See *id.*

<sup>3</sup> Plaintiff asserted in her complaint, and asserts in her briefs on appeal, that the deal approved by Boyd included only probation, not jail time. However, plaintiff testified at her deposition that the deal included probation and jail time, but not prison time. Further, plaintiff alleged that she drafted the motion to set aside the plea deal. That motion described the plea deal as including one year in county jail and attached the plea agreement, which stated, "Recommending 1 yr co. jail."

a hostile [work] environment . . .” Specifically, plaintiff alleged in her complaint, and testified in her deposition, that she had become afraid of Boyd since her report to McColgan, and that after the 2014 meeting, her duties had been altered and she was no longer “solely responsible for sex crimes charging.” Further, plaintiff alleged that at a meeting in Boyd’s office in June 2015, Boyd became enraged while discussing whether plaintiff should have kept him informed of developments in a case by text message. According to plaintiff, Boyd admitted that he was still angry about what had occurred with the 2013 sexual assault case, yelled at plaintiff, ordered her to sit down, and at one point briefly held a door to block her from leaving, causing her to fear for her physical safety. Plaintiff alleged in her complaint that in June 2015, her “doctors diagnosed her as psychiatrically disabled from working due to the hostile work environment created by Boyd and allowed to continue by McColgan” and that she was placed on medical leave, which continued “until December 15, 2015, at which time she involuntarily resigned her employment . . . due to intolerable working conditions.” Plaintiff’s complaint alleged (1) violation of the Whistleblowers’ Protection Act (WPA), MCL 15.361 et seq.; (2) violation of public policy; (3) assault and battery; (4) intentional infliction of emotional distress; and (5) false arrest/false imprisonment.

Defendants sought summary disposition of plaintiffs’ claims on various grounds, including governmental immunity and the absence of a genuine issue of material fact. The trial court granted summary disposition on all claims brought against the Saginaw County Prosecutor’s Office and McColgan, as well as on plaintiff’s claim of intentional infliction of emotional distress in its entirety (*id.*). However, the court denied defendants’ motion for summary disposition with respect to plaintiff’s claims of assault and battery and false imprisonment, both with respect to Boyd and with respect to the vicarious liability of the County, and also denied the motion with respect to her WPA claim and her public policy claim.

These appeals followed. On appeal, plaintiff does not challenge the dismissal of the claims against the Saginaw County Prosecutor’s Office, the dismissal of plaintiff’s intentional tort claims against McColgan on the grounds of absolute immunity, or the dismissal of her intentional infliction of emotional distress claim in its entirety.

## II. INTENTIONAL TORT CLAIMS

The County and Boyd argue that the trial court erred by failing to dismiss plaintiff’s intentional tort claims (i.e., assault and battery and false imprisonment) on governmental immunity grounds. We agree. This Court reviews *de novo* questions of statutory interpretation involving the application of governmental immunity. *Jones v Bitner*, 300 Mich App 65, 72; 832 NW2d 426 (2013); *Co Rd Ass’n of Mich v Governor*, 287 Mich App 95, 117-118; 782 NW2d 784 (2010). We also review *de novo* a trial court’s decision to grant or deny summary disposition. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). “Summary disposition under MCR 2.116(C)(7) is appropriate when a claim is barred by immunity granted by law.” *Seldon v Suburban Mobility Auth for Regional Trans*, 297 Mich App 427, 432; 824 NW2d 318 (2012). In reviewing a ruling under subrule (C)(7), this Court “consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them.” *Seldon*, 297 Mich App at 432-433 (citation omitted); see also *Tarlea v Crabtree*, 263 Mich App 80, 87; 687 NW2d 333 (2004).

Governmental agencies are generally immune from tort liability for actions taken in furtherance of governmental functions. MCL 691.1407(1). A “governmental agency” includes

“the state or a political subdivision” such as a county. MCL 691.1401(a); MCL 691.1401(e). A “governmental function” is “an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.” MCL 691.1401(b). The prosecution of a criminal suspect is a governmental function. See *Payton v Detroit*, 211 Mich App 375, 392; 536 NW2d 233 (1995). This includes “the decisions involved in determining which suspects should be prosecuted and which should be released.” *Id.*

MCL 691.1407(2) provides that every “officer and employee of a governmental agency . . . shall be immune from tort liability for injuries to persons . . . caused by the officer . . . while in the course of employment or service,” if that officer “is acting or reasonably believes he or she is acting within the scope of his or her authority,” provided that the officer’s conduct does not constitute “gross negligence that is the proximate cause of the injury or damage.”<sup>4</sup> Additionally, “there is no exception to governmental immunity for intentional torts committed by governmental employees exercising their governmental authority, and governmental employers may not be held liable for the intentional tortious acts of their employees.” *Mays v Governor*, 323 Mich App 1, 68; 916 NW2d 227 (2019) (quotation marks and citations omitted).

In this case, the trial court stated the following regarding the County’s assertions of governmental immunity:

[N]ow we’re talking about . . . vicarious liability and absent an exception the Defendant’s position is governmental immunity applies to the County therefore the County is out. However, Plaintiff alleges under [MCL 691.1407(3)] it does not alter the law of intentional torts as it existed before July 7th, 1986, citing the *Ross versus Consumer’s* case at 420 Mich 567 (1989) where it was held that the governmental agency can be held liable under respondent superior vicarious liability when the individual [tortfeasor] acted during the course of his or her employment and within the scope of his or her authority and noting that, the Defendants are not liable under respondent superior for their employee’s criminal acts that are beyond the scope of the . . . employer’s business; however, they . . . can be responsible for misconduct as to actions to the Plaintiff during the course of their employment and in the scope of their authority . . . as a supervisor.

Here, governmental immunity has been pled. . . . [H]owever . . . you also have to look at three elements: acts were . . . undertaken during the course of employment, the employee was acting or reasonably believed that he was acting within the scope of his authority, the acts undertaken in good faith or were not undertaken with malice, the acts were discretionary and not ministerial. Now . . . that applies to the County and the issue is, well, is . . . the County immune[]? From what I have at this point . . . I find that . . . there can be vicarious

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<sup>4</sup> MCL 691.1407(7)(a) defines “gross negligence” as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” There is no allegation of gross negligence in this case.

liability, not direct but vicarious, and as a result that motion is denied for purposes of summary disposition.

Regarding Boyd, the trial court did not specifically mention governmental immunity, but stated that there was a question of fact regarding plaintiff's claims that Boyd assaulted, battered, and falsely imprisoned her.

We conclude that the trial court erred by concluding that the County could be held vicariously liable for alleged intentional torts committed by Boyd. This Court has frequently stated that a municipality may not be held vicariously liable for the intentional torts of its employees. See *Mays*, 323 Mich App at 68; *Payton*, 211 Mich App at 393 (“even if the officers were not engaged in the exercise of a governmental function within the scope of their employment, the city is nonetheless entitled to immunity because it cannot be held liable for the intentional torts of its employees”), citing *Alexander v Riccinto*, 192 Mich App 65, 71-72; 481 NW2d 6 (1991). This is true whether or not the employee acted in good faith or in the course of his employment:

If the factfinder determines that defendant . . . acted in good faith and in the course of his employment and was thus engaged in the exercise of a governmental function, the defendant city is immune, from tort liability. If the factfinder determines that defendant . . . did not act in good faith or in the course of his employment, the defendant city is still immune, because it cannot be held vicariously liable for the intentional torts of its employees. [*Alexander*, 192 Mich App at 71-72.]

Accordingly, although plaintiff argues that Boyd's conduct was so egregious as to be completely outside the scope of his employment, that argument does not aid her in establishing the County's vicarious liability. The trial court erred by denying the County's motion for summary disposition under MCR 2.116(C)(7) regarding plaintiff's tort claims. *Seldon*, 297 Mich App at 432.

Regarding Boyd's immunity as a governmental employee,<sup>5</sup> to invoke his entitlement to governmental immunity from intentional tort claims, a governmental employee must establish that he was acting in the course of his employment, that his actions were, or he reasonably believed them to be, within his scope of authority, that his actions were taken in good faith or without malice, and that the actions were discretionary, rather than ministerial in nature. *Odom v Wayne Co*, 482 Mich 459, 473; 760 NW2d 217 (2008). Course of employment “embraces the circumstances of the work environment created by that relationship, including the temporal and spatial boundaries established,” and also action “undertaken in furtherance of the employer's purpose.” *Backus v Kauffman (On Rehearing)*, 238 Mich App 402, 408; 605 NW2d 690 (1999), lv den 462 Mich 910 (2000). Scope of authority is the “‘reasonable power that an agent has been delegated or might foreseeably be delegated in carrying out the principal's business.’” *Id.* at 409, quoting *Black's Law Dictionary* (7th ed), p 1348.

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<sup>5</sup> The trial court's decision to grant summary disposition in favor of McColgan on plaintiff's intentional tort claims has not been challenged on appeal.

In this case, plaintiff does not dispute that her June 2015 meeting with Boyd took place in Boyd's office during normal working hours. Plaintiff testified that during the meeting they discussed how plaintiff should keep Boyd informed of developments in cases apt to draw media attention, but that Boyd also agreed that he was still angry over her handling of the sexual assault case.

In *Schwartz v Golden*, 126 Mich App 790, 795; 338 NW2d 218 (1983), this Court noted that our Supreme Court had held that "purely personal, non-work-connected, disputes and acts of such gross and reprehensible nature as to constitute intentional and wilful misconduct were outside the course of employment but that 'horseplay' and assaults resulting from the stresses, tensions, and associations of the working environment, human and material, were within the course of employment." *Id.*, citing *Crilly v Ballou*, 353 Mich 303, 326-327; 91 NW2d 493 (1958).

Boyd's alleged conduct at the June 2015 meeting, taken as true, cannot reasonably be characterized as "non-work-connected," or of a "gross and reprehensible nature." *Golden*, 126 Mich App at 795 (citation omitted). Rather, this conduct, at most, resulted from "the stresses, tensions, and associations of the working environment." *Id.* Moreover, it is not disputed that it was within the scope Boyd's authority and discretion to meet with assistant prosecutors and to discuss issues related to the prosecution of cases.

Further, plaintiff did not raise a genuine issue of material fact concerning Boyd's lack of good faith. The good-faith standard concerns a defendant's honest belief and good faith as opposed to malicious intent. *Odom*, 482 Mich at 481. Malicious intent can be inferred if the defendant willfully intended to harm the plaintiff or demonstrated a reckless indifference to the possibility that his actions would cause harm. *Id.* at 475 (citations omitted). The record does not show that Boyd's allegedly tortious actions, whether or not they represented acceptable or professional behavior, were undertaken with malicious intent; again, these sort of workplace disputes do not constitute "intentional or willful misconduct" and are not of such a "gross and reprehensible nature" as to support a finding of malice. *Golden*, 126 Mich App at 795 (citation omitted). We conclude that the trial court erred by denying Boyd's motion for summary disposition under MCR 2.116(C)(7) regarding plaintiff's intentional tort claims. *Seldon*, 297 Mich App at 432. Because we reverse the trial court on this ground, we do not address defendants' additional argument that plaintiff was unable to establish a genuine issue of material fact regarding the elements of false imprisonment or assault and battery.

### III. WPA CLAIM

The County, Boyd, and McColgan argue that the trial court erred by denying their motion for summary disposition under MCR 2.116(C)(10) regarding plaintiff's WPA claim, because plaintiff had not established a genuine issue of material fact that she had engaged in a protected activity prior to an adverse employment action. We agree.

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

App 618, 621; 689 NW2d 506 (2004). We review de novo issues of statutory interpretation as questions of law. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997).

The WPA prohibits workplace retaliation against an employee who “reports or is about to report . . . a violation or a suspected violation of a law or regulation or rule . . . to a public body, unless the employee knows that the report is false . . .” MCL 15.362; *Rivera v SVRC Indus, Inc*, 327 Mich App 446, 455; 934 NW2d 286 (2019). To survive summary disposition, a plaintiff must first establish a prima facie case that “(1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action.” *Pace v Edel-Harrelson*, 499 Mich 1, 6; 878 NW2d 784, 787 (2016) (quotation marks and citation omitted). If a plaintiff establishes a prima facie case, the burden then shifts to the defendant employer to offer a legitimate reason for the adverse employment action, and a plaintiff may then offer evidence to demonstrate that the defendant's offered reason is pretextual. See *Debano-Griffin v Lake Co*, 493 Mich 167, 176–179; 828 NW2d 634 (2013); *Roulston v Tendercare (Mich), Inc*, 239 Mich App 270, 281; 608 NW2d 525 (2000).

A plaintiff need not be correct in reporting, or being about to report, an actual violation of the law in order to receive WPA protection; however, a plaintiff must reasonably believe that a violation has occurred. See M Civ JI 107.04 (“Plaintiff must reasonably believe that a violation of law or a regulation has occurred.”); *Smith v Gentiva Health Servs (USA) Inc*, 296 F Supp 2d 758, 762 (ED Mich, 2003) (“the employee must have been . . . subjectively reasonable in the belief that the conduct was a violation of the law”);<sup>6</sup> see also MCL 15.362 (stating that an employee is not entitled to WPA protection if the employee “knows the report is false.”).

In this case, the trial court found that a question of material fact existed regarding whether plaintiff was subjected to an adverse employment action after she reported to McColgan that Boyd had offered a plea bargain involving a jail sentence and probation instead of a prison term and failed to update the victims in connection with a plea proceeding in the 2013 sexual assault case. Plaintiff argued below and argues on appeal that Boyd’s conduct was in violation of MCL 771.1(1), which forbids a sentence of probation for CSC-III, and the CVRA, MCL 780.751 *et seq*. Assuming, without deciding, that plaintiff suffered an adverse employment action and that her meeting with McColgan constituted a “report to a public body” under the WPA, we conclude that the trial court erred by finding a question of material fact regarding whether plaintiff had engaged in a “protected activity” under the WPA.

Plaintiff, in her deposition testimony, responded to the question of whether she thought Boyd was engaged in “criminal conduct” by stating that she believed Boyd “was engaged in unethical conduct.” Plaintiff also admitted at her deposition that she did not report to any other agencies or public bodies that Boyd had violated either MCL 771.1(1) or the CVRA. However, she argued before the trial court, and argues on appeal, that she reported to McColgan in his capacity as the Saginaw County Prosecuting Attorney that Boyd had violated these laws. Plaintiff

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<sup>6</sup> Decisions of lower federal courts are not binding on this Court, but may be persuasive. *Vanderpool v Pineview Estates, LLC*, 289 Mich App 119, 124 n 2; 808 NW2d 227 (2010).

stated at her deposition that she was concerned about the “impact” of the plea deal on the office and that even if Boyd had not intended “to do anything improper” she was concerned about “the appearance of impropriety.” She also testified that during this meeting with McGolgan, she stated that “as an office we needed to do the right thing and try to come up with a solution where we can fix the problem, keep the victims calm and move forward with the case.” The result of this meeting was that McGolgan authorized plaintiff to file a motion to set aside the plea, ultimately signed by Boyd, stating that the Boyd had “inadvertently” scored the sentencing guidelines incorrectly.

Regarding the mixed jail-time and probation sentence offered under the plea agreement, we conclude that plaintiff could not have reasonably believed that this was a “violation of the law” under the WPA. *Smith*, 296 F Supp 2d at 762. Although MCL 771.1(1) does prohibit the trial court from imposing probation for a CSC-III conviction, it does not explicitly state that a sentence that combines jail time and probation is forbidden. More importantly, plaintiff has not provided any authority, and this Court has found none, supporting the idea that a prosecutor offering a plea deal that turns out to contain an invalid sentence “violates the law” for the purposes of the WPA. The trial court, not the prosecutor, is responsible for actually imposing a defendant’s sentence, whether under a plea agreement or after a verdict. See *People v Cobbs*, 443 Mich 276, 282; 505 NW2d 208 (1993). The trial court is not bound by a plea agreement or sentencing recommendation. *Id.*, see also *People v Killebrew*, 416 Mich 189, 208; 330 NW2d 834 (1982). None of the language in MCL 771.1(1) states or implies that the statute is violated if the prosecution *offers* or *agrees* to a sentence that includes probation for a CSC-III conviction. And we are not prepared to state that every plea agreement that contains an invalid sentence is a violation of the law under the WPA. Plaintiff, as a prosecutor, was undoubtedly aware of the ultimate responsibility of the trial court in imposing a sentence, and was also aware that discovering the invalidity of a sentence or proposed sentence under some specific statute is hardly a unique occurrence. The rules of criminal procedure and the sentencing process provide methods for catching and fixing these issues either before or after sentencing; we do not feel it necessary or appropriate to muddy the waters by stating that a prosecutor (or a defense attorney) violates the law by advocating for or agreeing to a particular sentence. We conclude that the trial court erred by finding a question of material fact on this issue.

Similarly, plaintiff has provided no authority that a prosecutor “violates” the CVRA under the WPA by failing to properly inform the victims. MCL 780.756(3) requires the prosecuting attorney to offer the victims of a crime “the opportunity to consult with the prosecuting attorney to obtain the victim’s views about the disposition of the prosecution for the crime, including the victim’s views about dismissal, plea or sentence negotiations, and pretrial diversion programs.” As plaintiff acknowledges, the victims in the 2013 sexual assault case were offered the opportunity to consult with the prosecuting attorney and express these views, and were kept informed of the times and dates of hearings. The plain language of the CVRA does not require that the victims be kept constantly informed of every new development in a case. Moreover, it is not clear that it was *Boyd’s* specific responsibility to inform the victims under the CVRA; plaintiff admits that she had been the one to contact and consult with the victims in the 2013 sexual assault case in the past. Even if plaintiff only belatedly learned of Boyd’s actions when she returned from her honeymoon, that does not mean that Boyd violated the CVRA by failing to inform plaintiff of new developments in the case, or by failing to ensure that someone else from the prosecutor’s office contacted the victims. For similar reasons to those underlying our decision regarding the alleged

violation of MCL 771.1(1), we conclude that plaintiff could not have reasonably believed that Boyd violated the CVRA, and the trial court erred by finding a question of material fact on this issue. *Walsh*, 263 Mich App at 621.

In sum, the trial court erred by denying defendants' motion for summary disposition on plaintiff's WPA claim. Because we determine that the trial court erred by determining that plaintiff was involved in protected activity, we do not consider defendants' arguments concerning the statute of limitations<sup>7</sup> or the County's argument that it was not plaintiff's "employer" under the WPA.

#### IV. "PUBLIC POLICY" RETALIATION CLAIM

Defendants also argue that the trial court erred by holding that plaintiff's "public policy" wrongful termination claim was not preempted by the WPA. We agree. Whether plaintiff's public-policy claim was preempted by the WPA presents a question of law that we review de novo. *Rapistan Corp v Michaels*, 203 Mich App 301, 306; 511 NW2d 918 (1994), citing *Cardinal Mooney High Sch v Mich High Sch Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

At-will employment relationships may generally be terminated at any time, with or without cause, meaning for any reason or no reason. *Suchodolski v Mich Consolidated Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982). "However, an exception has been recognized to that rule, based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable." *Id.* at 695. Our Supreme Court has stated that such public-policy grounds include adverse action in response to an employee's "refusal to violate a law in the course of employment," or in response to the employee's "exercise of a right conferred by a well-established legislative enactment." *Id.* at 695-696. However, "where a statute confers upon a victim of retaliation the right to sue, that person may not also assert a claim of discharge in violation of public policy under *Suchodolski*." *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 485; 516 NW2d 102 (1994), citing *Dudewicz v Norris-Schmid Inc*, 443 Mich 68, 78-80; 503 NW2d 645 (1993). The WPA is "the exclusive remedy for an employee whose employment is terminated in retaliation for reporting an employer's violation of the law." *Shuttleworth v Riverside Osteopathic Hosp*, 191 Mich App 25, 27; 477 NW2d 453 (1991).

Although plaintiff argues that she was asked to violate the law when Boyd asked her to agree with his proposed plea agreement and not file a motion to set it aside, it is clear that the gravamen of her complaint was that she was retaliated against for reporting Boyd's conduct to McGolgan. The WPA is the exclusive remedy for such claims, and the trial court erred by holding otherwise. *Shuttleworth*, 191 Mich App at 27; see also *Wurtz v Beecher Metro Dist*, 495 Mich 242, 248; 848 NW2d 121 (2014).

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<sup>7</sup> However, we do note that to the extent the trial court based its decision regarding the limitations period on the "continuing wrongs" doctrine, this doctrine has been disavowed in Michigan. See *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 290; 696 NW2d 646 (2005), amended on other grounds 473 Mich 1205 (2005); *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 280; 769 NW2d 234 (2009).

## V. CONCLUSION

In Docket No. 346542, we reverse the portion of the trial court's order denying summary disposition of plaintiff's intentional tort and vicarious liability claims against Boyd and the County. In Docket No. 346565, we reverse the portion of the trial court's order denying summary disposition of plaintiff's WPA and public-policy claims against Boyd, McColgan, and the County. We remand for entry of an order granting summary disposition in favor of defendants consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Jane M. Beckering

/s/ Mark T. Boonstra

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STATE OF MICHIGAN  
COURT OF APPEALS

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LEONARD SCOTT MOSHER,  
Plaintiff-Appellant,

UNPUBLISHED  
January 17, 2019

v

CITY OF KALAMAZOO,  
Defendant-Appellee.

No. 342978  
Kalamazoo Circuit Court  
LC No. 2017-000206-CZ

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Before: LETICA, P.J., and CAVANAGH and METER, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant with regard to plaintiff's claim of unlawful retaliation under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.* We agree with the trial court's conclusion that plaintiff failed to establish a material question of fact as to the existence of a causal connection between plaintiff's protected activity and the adverse employment action taken by defendant. Accordingly, we affirm.

I. FACTUAL BACKGROUND

Plaintiff began working for defendant as a mechanical inspector and plan reviewer on September 27, 2016. Plaintiff was an at-will employee during a six-month probationary period. His job duties included inspecting new construction and remodeling projects to ensure compliance with applicable codes. At the time of his one-month performance evaluation, Robert McNutt—plaintiff's supervisor and defendant's building official—indicated that plaintiff met expectations in all areas and was "making progress as expected at this point."

Relevant to this appeal, plaintiff was tasked with inspecting a newly constructed residential dwelling at 1812 Elder Street. The property was owned by Habitat for Humanity, and Shaun Wright was the primary mechanical contractor for the project. On the morning of January 6, 2017, plaintiff met with Wright at the Elder Street property to determine whether the heating system was capable of maintaining a temperature of 68 degrees Fahrenheit in each bedroom as

required by the Michigan Residential Code.<sup>1</sup> The heat was not turned on when plaintiff arrived at the property, so he agreed to complete the inspection later, after the heating system had been running for several hours. When plaintiff returned around 3:00 p.m., the heating system was blowing 80-degree air from headers in the living room and dining room. Using a digital thermometer, plaintiff measured the temperatures in the bedrooms and determined that the temperature did not rise above 64 degrees in either room. Plaintiff therefore concluded that the heating system did not satisfy the code requirements. After communicating with Tom Tishler from Habitat for Humanity on January 11, 2017, plaintiff noted in defendant's records that the inspection was "disapproved."

When Tishler and Wright followed up with plaintiff in February, plaintiff explained that the heating system did not satisfy the requirements of the Michigan Residential Code. At some point thereafter, Wright contacted McNutt about the issue. McNutt visited the property, observed that the building was warm throughout, and approved the mechanical permit. McNutt later explained that he disagreed with plaintiff's assessment because the code required that the heating facilities be capable of "maintaining" the specified temperature, and it did not appear that plaintiff allowed the building to obtain that temperature before inspecting it.

Despite defendant's standard policy and for unknown reasons, plaintiff did not receive a two-month performance evaluation. By the time of plaintiff's four-month performance evaluation, McNutt reported that plaintiff needed improvement in several areas, including the categories for cooperation with others, open mindedness, judgment, problem solving ability, accuracy, relations with employees, relations with supervisor, internal and external customer service, and exercising self-control. In the comments section, McNutt wrote:

[Plaintiff] struggles with the constructive criticism and the thought that he may not be correct in the interpretation of the codes. He tends to be argumentative when some[]one questions his work. He has a felling [sic] that the contractors are testing him and he feels that he needs to hold them to the most strict letter of the codes when not every situation falls into the strictest letter of the codes. He is disruptive to the rest of the inspection staff when he is trying to convince the other inspectors that he is correct and everyone else is wrong.

Defendant fired plaintiff on March 17, 2017.

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<sup>1</sup> Rule 303.9 of the 2015 Michigan Residential Code provides:

**Required heating.** Where the winter design temperature in Table R301.2(1) is below 60°F (16°C), every *dwelling unit* shall be provided with heating facilities capable of maintaining a room temperature of not less than 68°F (20°C) at a point 3 feet (914 mm) above the floor and 2 feet (610 mm) from exterior walls in habitable rooms at the design temperature. The installation of one or more portable space heaters shall not be used to achieve compliance with this section.

Plaintiff initiated this action, alleging that defendant violated the WPA by terminating his employment because he reported a violation of state law, i.e. the Michigan Residential Code, to defendant. Plaintiff alleged that defendant retaliated against him for failing the Elder Street inspection because it learned that Wright planned to appeal the inspection results and defendant did not have a board of appeals in place. Defendant denied a retaliatory motive for plaintiff's termination and, during discovery, it asserted that plaintiff "was terminated due to poor job performance, his incompetent application of the code, and his inability to get along with coworkers, staff and citizens."

McNutt testified that he fired plaintiff because plaintiff became increasingly difficult to work with. McNutt indicated that plaintiff did not follow appropriate procedures, despite repeated instructions, and was so belligerent that some of defendant's other inspectors refused to speak to plaintiff. McNutt acknowledged that plaintiff made some improvement after his second performance evaluation, but then other inspectors reported plaintiff saying he planned on "going back to rocking the boat" after his six-month probationary period ended. Laura Lam, the former director of Community Planning and Development, testified that she was not surprised by the declining results on plaintiff's four-month performance evaluation because McNutt had already spoken to her about the issues identified in the evaluation. Several other employees recalled instances of plaintiff's negative or disruptive attitude.

Defendant moved for summary disposition, arguing that plaintiff did not engage in activity protected by the WPA and that he could not establish a causal nexus between his report of the code violation at the Elder Street property and his subsequent termination. The trial court agreed and dismissed plaintiff's case. This appeal followed.

## II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Kelsey v Lint*, 322 Mich App 364, 370; 912 NW2d 862 (2017). A dispositive motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* A trial court deciding a motion for summary disposition under this rule must consider the "pleadings, affidavits, depositions, admissions, and other admissible evidence submitted by the parties in the light most favorable to the nonmoving party." *Robins v Garg (On Remand)*, 276 Mich App 351, 361; 741 NW2d 49 (2007). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

## III. ANALYSIS

In granting defendant's motion for summary disposition, the trial court opined that the circumstances involved in this case were distinguishable from "classic" WPA activity, noting that plaintiff was performing his job duties and that McNutt, acting as plaintiff's supervisor, disagreed with and overruled plaintiff's decision. Plaintiff first argues that the trial court erred

by focusing on what it perceived to be classic WPA activity, rather than the precise mandates of the WPA. We agree.

“To establish a prima facie case under the WPA, a plaintiff need only show that (1) he or she was engaged in protected activity as defined by the act, (2) he or she suffered an adverse employment action, and (3) a causal connection exists between the protected activity and the adverse employment action.” *Whitman v City of Burton*, 493 Mich 303, 313; 831 NW2d 223 (2013). Among other activities, the WPA protects an employee who “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 . . . .” MCL 15.362. The unambiguous language of the WPA does not require that the plaintiff report a violation to an outside agency or higher authority. *Brown v Mayor of Detroit*, 478 Mich 589, 594; 734 NW2d 514 (2007). Consequently, “[i]t does not matter if the public body to which the suspected violations were reported was also the employee’s employer.” *Id.* at 595. Furthermore, the WPA does not contain limiting language requiring that “the employee be acting outside the regular scope of his employment.” *Id.* at 596.

In light of these established principles, the trial court’s opinion that plaintiff’s case was distinguishable from “classic” whistleblower activity was irrelevant to the viability of plaintiff’s cause of action. Plaintiff believed that the Elder Street property did not meet code requirements and reported this determination to defendant by advising McNutt of his decision and marking the results of the inspection as “disapproved” in defendant’s records. The mere fact that plaintiff’s job required him to inspect properties for code compliance does not alter the fact that he reported “a violation or a suspected violation of a law or regulation or rule . . . to a public body,”<sup>2</sup> MCL 15.362, which is activity that falls within the protections of the WPA without regard to whether “the reporting is part of the employee’s assigned or regular job duties,” *Brown*, 478 Mich at 596.

Plaintiff also contends that the trial court erred by considering his motivation for reporting the code violation at the Elder Street property. Plaintiff is correct that the statutory language does not incorporate any sort of intent element on the employee’s part as a prerequisite for bringing a claim for unlawful retaliation under the WPA. *Whitman*, 493 Mich at 313. However, we do not construe the trial court’s ruling as having been based upon plaintiff’s motivation or intent. Rather, the trial court briefly referenced the issue of intent in hypothesizing about how a “classic” WPA claim might arise under similar circumstances.<sup>3</sup> Nevertheless, as

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<sup>2</sup> For purposes of the WPA, a public body includes “[a] county, *city*, township, village, intercounty, intercity, or regional governing body, a council, school district, special district, or municipal corporation, *or a board, department, commission, council, agency, or any member or employee thereof.*” MCL 15.361(d)(iii) (emphasis added).

<sup>3</sup> The trial court reasoned that if the circumstances surrounding plaintiff’s report had been closer to what the court perceived to be classic whistleblower activity, it would “raise[] questions in terms of not his performance of the job but his performance as a citizen trying to make sure that

defendant notes in its appellate brief, the trial court's opinion regarding the nature of plaintiff's report was not the ultimate basis for its ruling. In fact, the court concluded that even if it were to assume that plaintiff engaged in protected activity, plaintiff could not establish the necessary causal relationship between the protected activity and his subsequent discharge.

Turning to plaintiff's claim of error concerning the trial court's analysis of the causation element, "[a] plaintiff may establish a causal connection through either direct evidence or indirect and circumstantial evidence." *Shaw v Ecorse*, 283 Mich App 1, 14; 770 NW2d 31 (2009). When the plaintiff relies on circumstantial evidence, the burden-shifting framework applied to other types of employment discrimination statutes applies. *Debano-Griffin v Lake Co*, 493 Mich 167, 171, 175-176; 828 NW2d 634 (2013). "A plaintiff may present a rebuttable prima facie case on the basis of proofs from which a factfinder could infer that the plaintiff was the victim of unlawful [retaliation]." *Id.* at 176 (quotation marks and citation omitted; emphasis omitted; alteration in original). The burden then shifts to the employer to offer a legitimate reason for the adverse employment action. *Id.*; *Shaw*, 283 Mich App at 8. In order to avoid summary disposition, the plaintiff bears the burden of showing "that a reasonable fact-finder could still conclude that the plaintiff's protected activity was a 'motivating factor' for the employer's adverse action." *Debano-Griffin*, 493 Mich at 176. In other words, the plaintiff must establish a triable question of fact as to whether the employer's proffered reasons were a mere pretext for unlawful retaliation. *Id.* Pretext can be established "directly by persuading the court that a retaliatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Roulston v Tendercare (Mich), Inc.*, 239 Mich App 270, 281; 608 NW2d 525 (2000).

Plaintiff maintains that the trial court erred by granting defendant's motion for summary disposition because he presented sufficient evidence of the causal nexus between his report of a code violation at the Elder Street property and his subsequent termination. According to plaintiff, the close timing between his report, his negative performance evaluation, and his eventual termination were strongly indicative of a causal connection between his protected activity and the adverse employment actions taken by defendant. Plaintiff also emphasizes McNutt's reaction to the inspection results and the role McNutt played in the relevant events in order to suggest that plaintiff's termination was intended, in part, to appease Wright and improve relations between defendant and Habitat for Humanity. Lastly, plaintiff contends that defendant provided inconsistent and shifting reasons for terminating his employment, thereby demonstrating that its proffered reasons were pretexts. We disagree.

Plaintiff inspected the Elder Street property on January 6, 2017, and determined that the heating system did not satisfy the code requirements. On January 11, 2017, he formally "disapproved" the mechanical inspection in defendant's records. On February 13, 2017, plaintiff received his four-month performance evaluation, indicating that he needed improvement in

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the law was complied with." The trial court did not otherwise reference plaintiff's motivation in reporting the violation, other than to note that plaintiff was performing his job duties.

several areas. Plaintiff was fired on March 17, 2017, approximately eight days after McNutt reversed plaintiff's denial of the mechanical permit for the Elder Street property.

Although temporal proximity between protected activity and adverse employment action may be evidence of causation, it does not establish the requisite causal nexus in and of itself. *Shaw*, 283 Mich App at 15. As the trial court noted in its oral ruling, the record reveals intervening circumstances that negate the inference of causation arising from the timing of these events. While plaintiff's initial performance evaluation contained positive feedback, that evaluation only covered his first month of employment, during which he was training. He did not begin to independently inspect properties until the period covered by his second evaluation, at which point the deficiencies in his performance and attitude had become apparent. McNutt cited these deficiencies in plaintiff's second evaluation, and McNutt's criticisms were largely corroborated by other employees. Furthermore, while the parties focused primarily on the propriety of plaintiff's inspection of the Elder Street property throughout the lower court proceedings, McNutt described numerous other examples of plaintiff's unsatisfactory performance and behavior, discussing the same with Lam and following up with an email to defendant's human resources department after plaintiff's termination. In light of these intervening circumstances, the timing of the events does not suggest a retaliatory motive.

We are unpersuaded by plaintiff's arguments concerning the implications of McNutt's involvement in reversing the Elder Street inspection results. Plaintiff contends that McNutt "vehemently disagreed" with his opinion regarding the code compliance at the Elder Street property, but the record does not support this assertion. McNutt and plaintiff both testified that they discussed plaintiff's inspection of the Elder Street property, but the record contains little detail about the content of their conversation or McNutt's initial response. Rather, McNutt testified that he did not know the details of the inspection failure until after he spoke with Wright about it. While it is true that McNutt ultimately reversed plaintiff's decision, McNutt did not reinspect the property or overrule plaintiff's decision until after plaintiff received the four-month performance evaluation on February 13, 2017, indicating that he required improvement in areas such as judgment, problem solving, accuracy, and human relations; struggled with constructive criticism about the correct interpretation of the code; and was generally disruptive to the rest of the inspection staff. In fact, the record does not demonstrate that McNutt was even aware of Wright's dissatisfaction or intent to appeal plaintiff's decision until February 15, 2017, at the earliest, when Wright copied McNutt on an email regarding the situation. Thus, plaintiff's contention that McNutt gave him a poor evaluation and ultimately terminated his employment in order to accommodate Wright and Habitat for Humanity is completely speculative and insufficient to avoid summary disposition. See *id.* ("Speculation or mere conjecture 'is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference.' ") (citation omitted).

Plaintiff also makes much of what he characterizes as defendant's shifting or conflicting reasons for his termination. But, again, his argument is unsupported by the record. Although the reasons articulated by defendant and its representatives varied somewhat, the same general factors were consistently referenced beginning from the time of plaintiff's four-month performance evaluation and continuing throughout the litigation of this matter. Specifically, those factors included defendant's dissatisfaction with plaintiff's understanding of the code and inspection methods; his inability to cooperate with others, including staff, supervisors, and third

parties with whom he interacted in the course of his work; and his disruptive attitude. Defendant presented ample evidence of these factors and each constitutes a legitimate, nonretaliatory reason for terminating plaintiff's employment. Even viewing the evidence in the light most favorable to plaintiff as the nonmoving party, plaintiff did not present sufficient evidence from which reasonable minds could differ as to whether a causal connection exists between plaintiff's report of the code violation and defendant's subsequent termination of plaintiff's employment. Therefore, plaintiff failed to establish a prima facie case under the WPA, and the trial court did not err by granting summary disposition in defendant's favor.

Affirmed.

/s/ Anica Letica

/s/ Mark J. Cavanagh

/s/ Patrick M. Meter

STATE OF MICHIGAN  
COURT OF APPEALS

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STACEY SHEIKO,

Plaintiff-Appellant,

v

UNDERGROUND RAILROAD and VALERIE  
HOFFMAN,

Defendants-Appellees.

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UNPUBLISHED

December 16, 2008

No. 277766

Saginaw Circuit Court

LC No. 06-058921-CL

Before: Hoekstra, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

In this suit alleging violations of the Michigan’s Whistle blowers’ Protection Act (WPA), plaintiff appeals as of right the circuit court’s order granting summary disposition under MCR 2.116(C)(10) (genuine issue of material fact) to defendants. We affirm.

Plaintiff argues that the court erred in granting summary disposition for defendant because it applied an evidentiary standard inconsistent with the WPA.

We review de novo a motion for summary disposition under MCR 2.116(C)(10). *Manzo v Petrella & Petrella & Assoc, PC*, 261 Mich App 705, 711; 683 NW2d 699 (2004). Additionally, “[w]hether a plaintiff has established a prima facie case under the WPA is a question of law subject to de novo review.” *Id.*

In order to prevail on whistleblower claim, a plaintiff must make a prima facie showing that “(1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action.” *West v Gen Motors Corp*, 469 Mich 177, 184-185; 665 NW2d 468 (2003). Under the Act, a plaintiff engages in protected activity if she has reported, or is about to report, a suspected illegal activity to a public body. *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 610; 566 NW2d 571 (1997).

Here, plaintiff testified that on September 28, 2005 she submitted an anonymous complaint regarding alleged illegal activity at the Underground Railroad to the Attorney General’s office via submission of an online complaint form. Plaintiff further stated that a screen “popped up” after she “hit the submission button” which indicated that the complaint “had gone through.” Plaintiff alleged that she received a confirmation screen, but she did not retain any documentary proof of the filing. In support of her claim, plaintiff attached an undated copy of

the allegedly filed complaint to the Attorney General's office. However, upon defense counsel's request, the consumer affairs division of the Attorney General's office verified that it did not receive an Internet web complaint against defendants on September 28, 2005 or September 29, 2005. Plaintiff also testified that she told defendant Hoffman at a meeting on September 29, 2005 something to the effect that she had made a report to a governing body or governmental body about concerns that there were illegalities in the organization. Hoffman terminated plaintiff on October 19, 2005, less than three weeks later. The termination occurred though plaintiff's evaluation report in May 2005 referred to plaintiff's efforts as "laudable."

Defendants moved for summary disposition arguing that plaintiff had failed to present evidence that she had filed a complaint. After a hearing, the circuit court stated:

[T]he Plaintiff argues that she participated in protected activity when she submitted a two page report to the Attorney General on September 28, 2005. If in fact the Plaintiff had filed an internet complaint with the Attorney General, it would have been assigned a complaint department file number . . . . There is no internet/web complaint number against the Underground Railroad or Valerie Hoffman by Ms. Sheiko for September 28 or 29, 2005. The Plaintiff must provide facts from which one could reasonably conclude that she was engaged in a protected activity.

This Court concludes that the Plaintiff's claim must fail in that she has failed to provide objective proof that such a complaint was filed. Her claim is unsupported other than by her own comments and an anonymous letter that was allegedly sent of which the receiving party has no knowledge, complaint number or website number or any other identifying characteristic indicating that it was received.

As mentioned, the circuit court granted defendants summary disposition pursuant to MCR 2.116(C)(10).

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto, supra* at 362; see also MCR 2.116(G)(3) and (4). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto, supra* at 362. Generally speaking, where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363, 547 NW2d

314. “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v Gen. Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Courts are liberal in finding genuine issues of material fact. *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). [*White v Taylor Distributing Co, Inc*, 275 Mich App 615, 620 n 2; 739 NW2d 132 (2007)].

Defendants’ motion for summary disposition challenged whether plaintiff engaged in protected activity. The motion specifically claimed that plaintiff failed to genuinely show that she “reported” or was “about to report” a violation to the Attorney General’s office. In support, defendant submitted documentary evidence that the Attorney General had not received a complaint against defendants around the time near plaintiff claimed she had submitted it. The “burden then shifts to [plaintiff] to establish the existence of a genuine issue of disputed fact.” *Quinto, supra* at 362; MCR 2.116(G)(3) and (4). Despite this burden plaintiff cites her deposition testimony that she submitted the report online to the Attorney General. Plaintiff’s deposition testimony however merely restates allegations in her complaint that she filed a report. Plaintiff has not gone “beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.” *Quinto, supra*. We conclude that plaintiff did not submit sufficient evidence to rebut defendants’ evidence that plaintiff did not report a violation to the Attorney General’s office. Here, the evidence submitted by defendants showed that plaintiff’s claim, i.e. that she had filed a complaint with the Attorney General, lacked genuineness. Under these circumstances, plaintiff’s mere insistence that she had filed a complaint with the Attorney General does not restore genuineness to her claim.

Plaintiff also claims that an issue of fact exists because of computer error or that a different department of the Attorney General’s office may have the report or that the Attorney General’s office misplaced the report. These allegations, however, are purely speculative; further, plaintiff has the burden of establishing the existence of a material factual dispute. *Quinto, supra*.

Finally, plaintiff argues that the circuit court committed reversible error because it failed to consider her argument that she was “about to” report a violation to a public body. Indeed, it does not appear from the circuit court’s opinion that it considered plaintiff’s argument. However, plaintiff did not plead in her complaint that she was “about to” report a violation and only raised the matter in opposition to defendant’s summary disposition motion. Plaintiff cannot fail to raise a claim in the lower court, and then on appeal argue that the court’s failure to consider that claim is reversible error. See *Czybor’s Timber, Inc v Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006) (“A party may not take a position in the trial court and subsequently seek redress in an appellate court based on a position contrary to that taken in the trial court.”) (citation and quotation marks omitted). For this reason, we conclude that the circuit court did not commit error requiring reversal when it declined to consider plaintiff’s argument that she was about to engage in protected activity.

Moreover, although plaintiff did state that she had made a report to a public body, the statement was vague and Hoffman denied that this statement was ever made. MCL 15.363

expressly requires that “[a]n employee shall show by clear and convincing evidence that he or she or a person acting on his or her behalf was about to report, verbally or in writing, a violation or a suspected violation of a law of this state, a political subdivision of this state, or the United States to a public body.”

Clear and convincing evidence is defined as evidence that produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. . . . Evidence may be uncontroverted, and yet not be ‘clear and convincing. . . . Conversely, evidence may be ‘clear and convincing’ despite the fact that it has been contradicted. [*Kefgen v Davidson*, 241 Mich App 611, 625; 617 NW2d 351 (2000) (citations omitted).]

We conclude plaintiff’s single, unsubstantiated, uncorroborated deposition statement does not meet the clear and convincing standard under the WPA.

We affirm.

/s/ Joel P. Hoekstra

/s/ Brian K. Zahra

STATE OF MICHIGAN  
COURT OF APPEALS

---

STACEY SHEIKO,

Plaintiff-Appellant,

v

UNDERGROUND RAILROAD and  
VALERIE HOFFMAN,

Defendants-Appellees.

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UNPUBLISHED

December 16, 2008

No. 277766

Saginaw Circuit Court

LC No. 06-058921-CL

Before: Hoekstra, P.J., and Cavanagh and Zahra, JJ.

CAVANAGH, J. (*dissenting*).

I respectfully dissent. I would reverse the order granting defendants' motion for summary disposition and remand for further proceedings.

In this WPA claim brought under MCL 15.362, the primary dispute is whether plaintiff established a genuine issue of material fact that she reported suspected illegal activity to a public body, i.e., her engagement in protected activity. See *West v Gen Motors Corp*, 469 Mich 177, 184-185; 665 NW2d 468 (2003); *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 610; 566 NW2d 571 (1997). Defendants argued that plaintiff's self-serving deposition testimony to that effect was insufficient. The trial court agreed, as does the majority opinion of this Court. I disagree and conclude that plaintiff met her burden.

Plaintiff testified in her deposition that on September 28, 2005, she submitted an anonymous complaint regarding alleged illegal activity at the Underground Railroad to the Attorney General's office via submission of an online complaint form. Plaintiff further testified that a screen "popped up" after she "hit the submission button" which indicated that the complaint "had gone through." Under the WPA, a plaintiff engages in protected activity if she has reported a suspected illegal activity to a public body. The WPA does not require that the public body receive, act upon, or acknowledge receipt of the report. Here, through sworn testimony, plaintiff indicated that she made such a report. The trial court concluded that plaintiff's testimony was incredible because it was not supported by "objective proof." The majority of this Court appears to agree, and concludes that plaintiff's claim that she filed the complaint "lacks genuineness."

In reaching these conclusions, both the trial court and the majority of this Court have ignored several well-established rules that govern the review of motions brought under MCR

2.116(C)(10). First, motions brought under MCR 2.116(C)(10) test the factual support of a plaintiff's claim. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Second, the court must consider the documentary evidence submitted in the action, including deposition testimony. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). Third, the court is not permitted to assess credibility or determine facts on a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Fourth, all reasonable inferences from the record evidence must be resolved in favor of the nonmoving party. *Veenstra, supra*. And fifth, this Court is liberal in finding a genuine issue of material fact that requires a trial to resolve. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005).

In this case, plaintiff testified that she submitted an anonymous complaint regarding alleged illegal activity at the Underground Railroad to the Attorney General's office. Thus, the transcript of plaintiff's deposition testimony is the documentary evidence that provides the factual support for her claim that she engaged in protected activity. Whether plaintiff's testimony is worthy of belief—or “genuine”—was not an issue for the trial court to consider and is not an issue for this Court to determine. Again, weighing credibility is not permitted in deciding a motion for summary disposition. *Id.* If someone other than plaintiff would have testified that they saw, knew, or heard that plaintiff filed such a complaint, plaintiff's case would not have been dismissed on this ground. It is only because plaintiff filed her complaint anonymously and without initially advising anyone else of her protected behavior that her claim is unfairly suspect and vulnerable. As a consequence, plaintiff has been wrongfully denied the protection of the WPA—the purpose of which is to protect the public health and safety by encouraging employees to report illegal or suspected illegal activity of their employers—simply because she initially told no one of her efforts and she did not get a “receipt” upon filing her complaint. See *Trepanier v Nat'l Amusements, Inc*, 250 Mich App 578, 584; 649 NW2d 754 (2002).

Further, concluding that plaintiff did not file such a complaint—as the trial court and this Court in essence did—constitutes an impermissible finding of fact. Whether plaintiff's testimony that she filed a complaint with the Attorney General's office is worthy of belief is a matter solely for the fact-finder to determine. See *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004). Thus, I would conclude that a genuine issue of material fact exists as to the issue whether plaintiff was engaged in protected activity before she was terminated from her employment.

I would also hold, contrary to the trial court's conclusion, that plaintiff presented sufficient circumstantial evidence to establish a causal relationship between the protected activity and her termination. “A causal connection can be established through circumstantial evidence, such as close temporal proximity between the protected activity and adverse actions, as long as the evidence would enable a reasonable fact-finder to infer that an action had a . . . retaliatory basis.” *Rymal v Baergen*, 262 Mich App 274, 303; 686 NW2d 241 (2004). Plaintiff testified that she told defendant Valerie Hoffman at a meeting on September 29, 2005, something to the effect that she had made a report to a governmental body about her concerns that there were illegalities in the organization. Again, plaintiff's testimony must be accepted as credible for summary disposition purposes. *Burkhardt, supra* at 646-647. Hoffman terminated plaintiff on October 19, 2005, less than three weeks later. The termination occurred even though plaintiff's

evaluation report in May 2005 referred to plaintiff's efforts as "laudable." And plaintiff presented testimony from three witnesses to her work. Plaintiff's work was characterized as "impeccable," "very thorough and effective," "beyond what was required of her," and "timely completed." Viewing these circumstances in a light most favorable to plaintiff, a reasonable fact-finder could conclude that Hoffman terminated plaintiff because plaintiff engaged in the protected activity of reporting a violation or suspected violation of the law to the Attorney General's office.

In summary, plaintiff made a prima facie showing under the WPA that (1) she was engaged in protected activity, (2) she was terminated from her employment, and (3) a causal connection exists between the protected activity and the termination. See *West, supra*. Thus, I would reverse the grant of summary disposition in defendants' favor, and the matter would be remanded for further proceedings.

/s/ Mark J. Cavanagh