

**STATE OF MICHIGAN
IN THE SUPREME COURT**

KEVIN SMITH,
Plaintiff-Appellant,
v.

SC No. 152844
COA No. 320437
Genesee CC No. 13-100532-CZ

CITY OF FLINT,
Defendant-Appellee.

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**DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO
PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

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STATEMENT OF THE BASIS FOR JURISDICTION

Defendant-Appellee agrees with Plaintiff-Appellant's Statement of the Basis for Jurisdiction.

STATEMENT OF THE QUESTIONS PRESENTED

(1) Did the Court of Appeals err in applying *Peña v Ingham Co Rd Comm*, 255 Mich App 299 (2003), a Michigan Civil Rights Act case, to the plaintiff's claim under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*?

Defendant-Appellee answers "No"

Plaintiff-Appellant answers "Yes"

Court of Appeals answers "No"

(2) Did the plaintiff allege sufficient facts to establish that he suffered an adverse employment action under the WPA, *see* MCL 15.362?

Defendant-Appellee answers "No"

Plaintiff-Appellant answers "Yes"

Court of Appeals answers "No"

(3) Did the plaintiff allege sufficient facts to establish that he engaged in a protected activity under the WPA, *see* MCL 15.362?

Defendant-Appellee answers "No"

Plaintiff-Appellant answers "Yes"

Court of Appeals answers "No"

I. INTRODUCTION

Pursuant to the Court's June 10 Order, Defendant-Appellee City of Flint ("City") now files this supplemental brief addressing the issues as directed. Plaintiff-Appellant Kevin Smith ("Smith") would have the Court believe that review is needed, in order to provide the lower courts with guidance on how to read antiretaliation and whistleblower statutes. However, nothing could be further from the truth. Instead, the foundational issue here is whether the Court of Appeals correctly applied *stare decisis* in its analysis. Since the Court of Appeals did so, the City respectfully requests that this Court deny leave to appeal and affirm the decision of the lower court.

II. FACTUAL AND PROCEDURAL HISTORY

Plaintiff-Appellant Smith, a police officer with the Flint Police Department, has been president of the City of Flint police officers' union since approximately February 2011. When he became union president, he was assigned to work full-time on union business, while paid by the City, according to the terms of the collective bargaining agreement then in place. On April 24, 2012, Emergency Manager Michael Brown issued Order 18, which removed the provision creating this assignment from the collective bargaining agreement. However, Smith continued to act as full-time union president for the remainder of 2012.

In November 2012, the City of Flint submitted a five-year, six-mill millage proposal to the electorate. *See* Appendix A: 2012 Millage Proposal. By its own terms, this millage was "to be used solely for the purpose of providing police and fire protection." *Id.* The millage passed, and soon thereafter Smith began complaining to various persons that millage funds were not being used to hire new police officers. Several months later, in March 2013, the City transferred Smith from the eliminated assignment of full-time union president to the Patrol Operations Bureau, an assignment appropriate for his rank of police officer. Smith was placed on the night shift and assigned to patrol the north side of Flint.

Smith filed this action, including a claim under the Whistleblower Protection Act (“WPA”), on May 31, 2013. On January 27, 2014, the Genesee Circuit Court granted the City’s motion for summary disposition and dismissed Smith’s WPA claim, holding that Smith had failed to show an adverse employment action because he had failed to allege an “ultimate employment decision.” Smith appealed, and on November 5, 2015, the Court of Appeals affirmed the decision of the trial court, albeit on different grounds. Specifically, the Court of Appeals held that Smith had failed to satisfy the standard for an adverse employment action under the WPA, because none of the alleged retaliatory acts met the “objective and material” standard. In addition, the Court of Appeals held that Smith has failed to allege that he had been engaged in protected activity, as required by the WPA, because his complaints were ones of policy and not legality.

Smith then applied for leave to appeal. On June 10, 2016, this Court ordered the scheduling of oral argument on Smith’s application for leave and directed that the parties submit supplemental briefs on: (1) whether the Court of Appeals erred in applying *Peña v Ingham Co Rd Comm* to Smith’s WPA claim; (2) whether Smith alleged sufficient facts to establish that he suffered an adverse employment action under the WPA; and (3) whether Smith alleged sufficient facts to establish that he engaged in protected activity under the WPA. Pursuant to this Court’s June 10 Order, the City now files this supplemental brief.

III. STANDARD OF REVIEW

The Trial Court granted summary disposition pursuant to MCR 2.116(C)(8). A (C)(8) summary disposition motion tests whether the opposing party has failed to state a claim on which relief can be granted. MCR 2.116(C)(8). All well-pled factual allegations are accepted as true and construed in a light most favorable to the non-moving party. *Johnson v Pastoriza*, 491 Mich 417, 434-35 (2012). However, conclusory allegations are not entitled to acceptance and are insufficient to state a cause of action. *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 63 (2014).

Review of a trial court's ruling on summary disposition is a question on law on which *de novo* review is warranted. *Debano-Griffin v Lake County Bd of Comm'rs*, 493 Mich 167, 175 (2013).

IV. ANALYSIS

Although Smith requests leave to appeal under the guise of textualism and clarifying contradictory decisions from the lower courts, what Smith truly seeks is for this Court to abandon *stare decisis* and create chaos in the area of whistleblower and antiretaliation law. To do this, Smith misconstrues existing precedent, the plain language of the statute, and the Michigan rules of statutory interpretation to reach unwarranted conclusions and patently absurd results. Contrary to Plaintiff's arguments, the Court of Appeals correctly applied the law to this case, and this Court should deny leave to appeal and uphold the decision of the Court of Appeals.

A. PEÑA'S "MATERIAL AND OBJECTIVE" STANDARD WAS CORRECTLY APPLIED TO SMITH'S WHISTLEBLOWER PROTECTION ACT CLAIM

Smith argues that the Court of Appeals erred in applying *Peña v Ingham Co Rd Comm.*, 255 Mich App 299 (2003), a case involving the Elliot-Larson Civil Rights Act (ELCRA), to this case, which involves the WPA. Specifically, Smith criticizes the usage of *Peña's* "ultimate employment decision" element because (1) the WPA is broader than the ELCRA and *Peña* is therefore inapplicable, and (2) *Peña's* "ultimate employment decision" standard relied on federal decisions that have since been overruled by the United States Supreme Court. These arguments lack merit, because the Court of Appeals did not rely on *Peña's* "ultimate employment decision" standard in reaching its decision. Instead, the Court of Appeals used *Peña's* "material and objective" analysis to determine if an adverse employment action, as defined by the WPA, had occurred. Thus, the Court of Appeals correctly applied the binding precedent of *Peña* to this case.

As a general rule, "[b]ecause whistleblower claims are analogous to other antiretaliation employment claims brought under employment discrimination statutes prohibiting various discriminatory animuses, they 'should receive treatment under the standards of proof of those

analogous [claims].” *Debano-Griffin*, 493 Mich at 175-76 (citing *Shallal v Catholic Soc Servs*, 455 Mich 604, 617 (1997)). However, the statutory language creating the cause of action determines what elements must be alleged to state a claim. See *Wurtz v Beecher Metro Dist*, 495 Mich 242, 250-51 (2014). Thus, while the *elements* of an antiretaliation claim will differ based on the language of the underlying statute, the *standard of proof* used to determine if those elements are satisfied are the same among the whistleblower and antiretaliation statutes.

1. A whistleblower claim under the Whistleblower Protection Act is narrower than an antiretaliation claim under the Elliot-Larson Civil Rights Act

When applying antiretaliation and whistleblower statutes, this Court has directed that what actions constitute an “adverse employment action” will be defined by the statute creating the cause of action. See *Wurtz*, 495 Mich at 250-51. The statutory language of the WPA limits an adverse employment action under that statute to a discharge, threat, or discrimination against an employee’s “compensation, terms, conditions, location, or privileges of employment.” MCL §15.362. In contrast, an antiretaliation claim under the ELCRA prohibits “[r]etaliat[ing] or discriminat[ing] against a person” generally. MCL §37.2701(a).

Thus, contrary to Smith’s arguments, a WPA claim is actually *narrower* than an ELCRA claim. The statutory language of the ELCRA prohibits all retaliation or discrimination, while the statutory language of the WPA prohibits only discrimination against “compensation, terms, conditions, location, or privileges of employment.” Compare MCL §37.2701(a) with MCL §15.362. Smith’s argument, that a WPA whistleblower claim should be construed more broadly and expansively than an ELCRA retaliation claim, is without merit and provides no reason to overturn the decision of the Court of Appeals. Instead, as this court has previously directed, the standard of proof for whistleblower and antiretaliation claims should be treated similarly.

2. The “ultimate employment decision” and “material and objective” standards of proof from *Peña* are separate and independent

Smith’s confusion regarding *Peña* is perhaps understandable, because in *Peña*, the Court of Appeals analyzed the plaintiff’s claims using two separate and independent standards of proof. In that case, the plaintiff claimed to be the victim of retaliation in violation of the ELCRA’s antiretaliation provision. *See* MCL §37.2701(a). To establish the elements of this claim, the *Peña* plaintiff needed to prove “(1) that he was engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.” *Peña*, 255 Mich App at 310-11.

The *Peña* court looked to various authorities in order to define what qualified as an “adverse employment action.” It concluded that the plaintiff needed to satisfy two main standards of proof to show an adverse employment action. *Id.* at 311-12. First, it determined that an adverse employment action is “an employment decision that is ‘materially adverse in that it is more than [a] mere inconvenience or an alteration of job responsibilities’ and that ‘there must be some objective basis for demonstrating that the change is adverse because a plaintiff’s subjective impressions as to the desirability of one position over another [are] not controlling.’” *Id.* (*citing Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 346, 364 (1999) (internal citations omitted)). Second, the *Peña* court also determined that an adverse employment action must also take the form of an “ultimate employment decision.” *Id.* at 312 (*citing White v Burlington Northern & Santa Fe Co*, 310 F3d 443, 450 (6th Cir 2002)).

Smith is correct that the Sixth Circuit’s *White v Burlington Northern* decision, on which *Peña* relied in formulating the “ultimate employment decision” standard, has since been overruled in part by the United States Supreme Court. *See Burlington Northern & Santa Fe Ry v White*, 548 US 53, 69-70 (2006). However, while the United States Supreme Court rejected the “ultimate

employment decision” standard, it also *reinforced* the importance and applicability of the “material and objective” standard when dealing with antiretaliation and whistleblower claims. *See id. at 68*; *see also infra* Section IV.B (discussing the “material and objective” standard from *Burlington Northern* in greater depth and applying it to this case). Phrased another way, the United States Supreme Court’s decision in *Burlington Northern* only highlights how the Court of Appeals conducted the proper analysis and correctly disregarded the analysis of the trial court.

Thus, even if *Peña’s* “ultimate employment decision” standard is no longer controlling,¹ the Court of Appeals decision at issue here was not based on *Peña’s* “ultimate employment decision” standard. Instead, it was based on *Peña’s* “material and objective” standard, which remains the standard by which antiretaliation and whistleblower claims are measured. The Court of Appeals was therefore correct in applying *Peña’s* “material and objective” standard to Smith’s WPA claim.

3. The Court of Appeals correctly applied *Peña* to this case by analyzing whether Smith satisfied the “material and objective” standard of proof in fulfilling the statutory elements of a Whistleblower Protection Act claim

Here, the Court of Appeals did not simply rubber-stamp the trial court’s decision. Instead, the Court of Appeals relied on *Wurtz*, which established that the statutory language of the WPA requires that a plaintiff needs to show that he was “discharged, threatened, or otherwise discriminated against, in a manner that affected his compensation, terms, conditions, location, or privileges of employment.” *Wurtz*, 495 Mich at 251-52. However, although the WPA’s adverse employment action element is *narrower* than the ELCRA’s general prohibition on retaliation or

¹ *See* MCR 7.215(J)(1) (“A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.”).

discrimination, *Debano-Griffin* directs that the *standard of proof* in both claims should be the same. *See Debano-Griffin*, 493 Mich at 175-76. Thus, while the actions that constitute an “adverse employment decision” under the WPA may only constitute a limited subset of the “adverse employment actions” prohibited by the ELCRA, the same “material and objective” standard should apply under both types of claims.

As a result, to properly allege a cause of action under the WPA, Smith needed to show that his “compensation, terms, conditions, location, or privileges of employment” were materially and objectively affected. Here, the Court of Appeals concluded, correctly, that Smith had failed to do so. *See infra* Section IV.B. The Court of Appeals then affirmed the decision of the trial court on those grounds, as the trial court had reached the right result, even if the Court of Appeals disagreed with the trial court’s method. *See Gleason v Dep’t of Transp*, 256 Mich App 1, 3 (2003).

The controlling authorities here are clear, and no compelling reason exists to overturn *stare decisis*. What actions constitute an “adverse employment action” is defined by the statute which created the cause of action. *See Wurtz*, 495 Mich at 251-52. The standard of proof required to determine if those actions rise to the level of an “adverse employment action” are the same among whistleblower and antiretaliation statutes. *See Debano-Griffin*, 493 Mich at 175-76. The Court of Appeals correctly applied the “material and objective” standard to the specific elements required under the WPA, and determined that Smith had failed to state a claim on which relief could be granted. The Court of Appeals therefore ruled consistent with Michigan law, and leave to appeal should be denied on those grounds.

4. Overturning *stare decisis* is not warranted and all factors weigh in favor of upholding the past precedent of *Debano-Griffin*

Debano-Griffin clearly establishes that the standard of proof for antiretaliation and whistleblower statutes should be construed similarly and directs the use of the “material and objective” standard to WPA claims. *See id.* Despite Smith’s frequent cries of “textualism,” what

he truly seeks is to overturn *stare decisis* and change the rules to allow him to prevail. This Court has set forth a three-part test for use when determining whether to overturn *stare decisis*. See *Hamed v Wayne County*, 490 Mich 1, 25 (2011). First, whether the decision at issue was wrongly decided. *Id.* Second, whether the decision at issue “defies practical workability.” *Id.* Third, whether the reliance interests in the decision at issue would work undue hardship should *stare decisis* be overturned. *Id.*

Here, all three factors weigh against overturning *stare decisis*. *Debano-Griffin* was not wrongly decided, and does not conflict with the statutory language of the WPA, but instead directs that the standard of proof in a WPA claim be similar to that done for other antiretaliation and whistleblower statutes, both state and federal. This direction and distinction does not, by any means, defy practical workability. There is no question that the elements themselves are defined by the underlying statute. See *Wurtz*, 495 Mich at 250-51. However, the WPA and all other similar claims are silent as to the standard of proof, and *Debano-Griffin* provides useful and necessary guidance in this area.

Finally, overturning *Debano-Griffin* would create chaos in the area of whistleblower and antiretaliation law. Lower courts would be left without guidance as to what the applicable standard of proof is in whistleblower and antiretaliation claims. Such claims under Michigan law include common-law public policy claims, WPA claims, ELCRA claims, Public Health Code claims, MCL §333.20180, Michigan Occupational Safety and Health Act claims, MCL §§408.1065; 408.1031(2); 408.1029(10), Minimum Wage Law claims, MCL §408.395, Payment of Wages and Fringe Benefits Act claims, MCL §408.483, and Persons with Disabilities Civil Rights Act claims, MCL §37.1602. Furthermore, overturning *Debano-Griffin* will create additional opportunities for confusion between state and federal courts, especially when state-law claims are raised in federal proceedings, as is often the case when private businesses are the defendants in those claims.

Overturing *Debano-Griffin* can only serve to needlessly and unnecessarily complicate an area of law that numerous statutes and a multitude of private parties rely on. Here, the Court of Appeals correctly applied *stare decisis* and utilized *Peña*'s "material and objective" standard. This Court should deny Smith's application for leave to appeal and uphold the decision of the Court of Appeals.

B. SMITH'S REASSIGNMENT TO PATROL THE NORTH SIDE OF FLINT WAS NOT A MATERIALLY OR OBJECTIVELY ADVERSE EMPLOYMENT ACTION SUBJECT TO THE PROTECTIONS OF THE WHISTLEBLOWER PROTECTION ACT

Smith argues that three actions should qualify as adverse employment actions under the WPA. First, he alleges that the transfer from the full-time union president position to the Patrol Operations Bureau constitutes an adverse employment action. Second, he alleges that the assignment to the night shift also constitutes an adverse employment action. Finally, he alleges that his assignment to patrol the north side of Flint constitutes an adverse employment action. All of these allegations are conclusory and not entitled to acceptance, because Smith failed to allege that these alleged adverse employment actions were both materially and objectively adverse, nor can this conclusion be reasonably inferred from his factual allegations.

1. The United States Supreme Court has explained how to determine when an employment action is materially and objectively adverse

It is helpful here to further examine what a plaintiff must show to allege a materially and objectively adverse employment action under the WPA. Pursuant to the statutory language, Smith needed to show that he was "discharged, threatened, or otherwise discriminated against, in a manner that affected his compensation, terms, conditions, location, or privileges of employment." *Wurtz*, 495 Mich at 251-52. As Smith was not discharged or threatened, he needed to allege that he was discriminated against in a manner that affected his "compensation, terms, conditions, location, or privileges of employment."

Furthermore, the discrimination must still be materially and objectively adverse. Smith has cited frequently to *Burlington Northern & Santa Fe Ry v White*, looking to the United States Supreme Court for guidance as to how antiretaliation and whistleblower statutes should be construed. See *Burlington Northern*, 548 US at 53. In regards to a federal whistleblower claim, *Burlington Northern* clearly states that “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, ‘which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’” *Id.* at 68 (internal citations omitted); see also *Faragher v City of Boca Raton*, 524 US 775, 788 (1998) (holding that standards for judging hostility must filter out “the ordinary tribulations of the workplace”).

Also, as Smith has himself noted, “context matters.” *Burlington Northern*. 548 US at 69. The question here is not whether a reasonable person would be dissuaded from reporting illegality by the actions of an employer, but rather if a reasonable *police officer* in Smith’s position would do so. A reasonable person, who on average will work a daytime schedule in relative safety, would likely be adversely affected by conditions that a reasonable police officer would accept as a matter of course. As the United States Supreme Court stated, “a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an ‘act that would be immaterial in some situations is material in others.’” *Id.* at 69 (internal citation omitted).

Federal courts have faithfully applied this standard of proof to claims that include both locational and temporal adverse employment actions. For example, the Eighth Circuit has held that the relocation of a plaintiff within her office, that did not render her unable to complete her duties or otherwise interfere with her employment, did not constitute a materially adverse employment action. *Fercello v County of Ramsey*, 612 F3d 1069, 1078-79 (8th Cir 2010). Similarly, the Tenth Circuit has found, in a retaliation claim, that the failure of a police department to transfer an

employee from the night shift to the day shift did not constitute a materially adverse employment action. *McGowan v City of Eufala*, 472 F3d 736, 742-43 (10th Cir 2006). These same standards should, and by binding precedent do, apply to claims under the WPA. *See Debanon-Griffin*, 493 Mich at 175-76.

2. Smith's alleged adverse employment actions were not materially or objectively adverse to a reasonable police officer in Smith's position

Under the material and objective standard, Smith's transfer, from a position that was eliminated prior to any alleged report, cannot possibly be seen as being materially or objectively adverse.² No reasonable police officer would have been dissuaded from reporting an illegality because of something which effectively occurred eight months prior, and which any reasonable officer would have expected to happen eventually. This alleged adverse employment action thus fails to meet the material and objective standard.

Similarly, Smith's assignment to the night shift of the Patrol Operations Bureau cannot be construed as an action that would dissuade a reasonable police officer from reporting an illegality. Police services are required around the clock, and indeed, coverage of nighttime hours is crucial. This is a well-known and understood fact among police officers. Plaintiff has failed to allege any material and objective reason why the transfer to the night shift should be seen as something that would dissuade a reasonable police officer from reporting an illegality. Simply being assigned to the night shift can thus not be seen as an adverse employment action in the context of a police officer's employment.

² As the Court of Appeals noted, the transfer from the eliminated position of full-time union president, to the Patrol Operations Bureau, also runs afoul of the statutory requirement that WPA be brought "within 90 days after the occurrence of the alleged violation of this act." *See* MCL §15.363(1).

Furthermore, Smith's change in the patrol area to which he was assigned is not materially or objectively a change in location. As the Court of Appeals noted:

“Plaintiff’s assignment to patrol an area of the city is better characterized as a ‘job duty’ that falls squarely within the discretion exercised by a police department in its fundamental role of securing public safety. We discern the statute’s reference to a change in location to be a significant, objective one, such as a move from one city to another or where an employer has multiple locations, from one location to another. Here, the area where officers patrol *within the same city they were sworn to protect* concerns job assignments; patrol areas are not a matter of “location for the purposes of the WPA.”

Smith v City of Flint, 313 Mich App 141, 150-51 (2015) (emphasis in original). Being assigned to patrol the north end did not make Smith unable to complete his duties or interfere with his employment. Both prior to and after his reports of alleged illegalities, he was and remains a police officer, sworn to uphold the laws of the United States, State of Michigan and City of Flint. No reasonable police officer would be dissuaded from reporting an illegality by being assigned to patrol a specific location within the City that he was sworn to protect. As a result, there is no material or objective reason why the change in location should constitute an adverse employment action under the WPA.

Finally, while being ordered to patrol a portion of the City with higher crime rates might be seen as less desirable by some, police coverage of such areas is still required by the nature of police work. In fact, enhanced police presence in areas with higher crime rate areas is commonly prioritized, in order to both respond to complaints of criminal activity and dissuade criminal activity by the visible presence of police. Any police officer of the Flint Police Department could be called on to respond in that area. Assignment to the north end cannot be seen as being materially or objectively adverse, to the point that a reasonable police officer would be dissuaded from reporting a violation of law.

Smith has thus failed to allege any action by the City that can constitute a materially or objectively adverse employment action under the WPA. The Court of Appeals correctly identified and analyzed this issue, and upheld the dismissal of Smith's WPA claim on those grounds. Smith's application for leave to appeal should therefore be denied and the Court of Appeals decision upheld.

C. SMITH'S COMPLAINTS REGARDING THE UTILIZATION OF FUNDS FROM THE 2012 MILLAGE WERE NOT A REPORT OF A VIOLATION OR SUSPECTED VIOLATION OF LAW

The Court of Appeals also correctly determined that Smith had failed to allege a protected activity because he failed to allege a violation or suspected violation of law. Smith, in his third amended complaint, alleges that the City misused millage funds by not hiring more police officers. The Court of Appeals examined these allegations, and also took judicial notice of the millage proposal itself. The millage proposal read, "Shall the Charter of the City of Flint be amended to authorize the City to levy an additional tax on real and personal property in an amount not to exceed six (6.0) mills for five (5) years, for fiscal years beginning on July 1, 2012 through July 2, 2016, for the sole purpose of providing police and fire protection?" See Appendix A. By its own terms, the millage funds were not restricted to hiring new police officers, but rather to providing police and fire protection generally. *Id.*

The statutory language of MCL §15.362 is clear - a whistleblower must report, or be about to report, a "violation or a suspected violation of a law or regulation or rule promulgated pursuant to law" in order to be able to claim the protections of the WPA. MCL §15.362. This Court has previously directed that it would be a violation of law for a local unit to use funds, raised by a millage for a particular purpose, for a different purpose. See *City of S Haven v Van Buren County Bd of Comm'rs*, 478 Mich 518, 532-33 (2007). However, as the Court of Appeals noted here, the plain language of the millage itself contradicts Smith's conclusory allegations that using millage funds for any purpose besides hiring police officers was a violation of law. *Smith*, 313 Mich. App.

at 152-53. Nowhere, in the millage as presented to the electorate, were the funds earmarked for the hiring of additional police officers. Instead, the funds were to be restricted to “providing police and fire protection.”

Smith here seeks to stretch the statutory language of MCL §15.362 to include not just a “violation or a suspected violation of law,” but to instead include a “violation or a suspected violation of law or a suspected law.” Such an interpretation violates long-standing principles of statutory interpretation in Michigan, in particular the principle of *expressio unius est exclusio alterius*, or that the express mention of one thing implies the exclusion of other things. *See Stowers v Wolodzko*, 386 Mich 119, 133 (1971). Here, where the statutory language of MCL §15.362 expressly mentions “violations and suspected violations,” but does not mention “laws and suspected laws,” the correct interpretation of the statute is that a report of a violation of a suspected law cannot possibly satisfy the statutory element.

Smith’s allegations and the reasonable inferences drawn from those allegations simply fail to establish that any illegal activity was occurring. Nowhere in Smith’s third amended complaint does Smith allege that he reported a violation or suspected violation of law, regulation, or rule. Instead, Smith’s reports, as noted by the Court of Appeals, were essentially disagreements with policy decisions made by the City regarding how millage funds were used.

Smith’s allegations that he reported a violation of law, regulation, or policy are entirely conclusory, in an attempt to satisfy the statutory elements required by the WPA. Such conclusions, without factual allegations that support them, are not entitled to acceptance or the presumption of truth. Smith has therefore failed to state a claim on which relief can be granted. As the Court of Appeals noted, it is of no consequence that the issue of Smith’s failure to allege a protected activity was not specifically raised or briefed in the trial court. *Smith*, 313 Mich App at 153; *see also* MCR

2.116(I)(1). The Court of Appeals thus correctly ruled that Smith had failed to state a claim on which relief can be granted, and upheld the dismissal of this case by the trial court.

V. **RELIEF REQUESTED AND CONCLUSION**

Smith seeks to challenge the existing *stare decisis* of whistleblower and antiretaliation claims under the guise of textualism. However, the Court of Appeals correctly applied *Peña's* “material and objective” standard to this case, pursuant to authorities directing that whistleblower and antiretaliation claims be subject to the same standard of proof. Under that standard, Smith failed to allege an adverse employment action under the WPA because the alleged actions were not materially or objectively adverse. In addition, Smith failed to allege a protected activity, because he failed to allege that he reported a violation or suspected violation of law, and was instead simply reporting his disagreement with policy decisions made by the City. For any or all of these reasons, the City respectfully requests that this Court deny Smith’s application for leave to appeal and uphold the decision of the Court of Appeals.

Respectfully submitted,

Dated: July 21, 2016

/s/ Stacy Erwin Oakes

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**STATE OF MICHIGAN
IN THE SUPREME COURT**

KEVIN SMITH,
Plaintiff-Appellant,
v.

SC No. 152844
COA No. 320437
Genesee CC No. 13-100532-CZ

CITY OF FLINT,
Defendant-Appellee.

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DEFENDANT-APPELLEE'S APPENDIX

TABLE OF CONTENTS:

2012 Police and Fire Millage

2b

2012 EM 473
PRESENTED: 8/6/12
ADOPTED: 8/7/12

**RESOLUTION TO PLACE A PROPOSED CITY CHARTER AMENDMENT
AUTHORIZING A MILLAGE FOR POLICE AND FIRE PROTECTION AS A BALLOT
QUESTION AT THE GENERAL ELECTION TO BE HELD NOVEMBER 6, 2012**

BY THE EMERGENCY MANAGER:

A police and fire protection millage is needed to provide funds for the safety and welfare of the citizens of the City of Flint, and

If the millage were not levied, the City of Flint would be unable to provide needed police and fire protection, and

It is proposed that six (6.0) mills be authorized to be levied and with the estimated total revenue from this millage during its first year being \$5,383,924 and the City is requesting this millage authorization for five (5) years, for fiscal years beginning on July 1, 2012 through July 1, 2016, and

Section 19 of the Local Government and School District Fiscal Accountability Act [MCL 141.1519(t)] provides that the Emergency Manager may order a millage election to be held at the general November election; and

The proposed Flint City Charter amendment would add language to Section 7-201(A), as follows:

For fiscal years beginning on July 1, 2012 through July 1, 2016, the tax rate limitation is increased by the rate of six (6.0) mills (\$6.00 per \$1,000.00) of taxable value of all real and personal property in the City, with all revenue received as a result of this provision being disbursed to the City of Flint to be used solely for the purpose of providing police and fire protection.

Pursuant to the Home Rule Cities Act [MCL 117.21], the above proposed language shall be submitted for review and approval of the Attorney General's Office and the Governor of the State of Michigan, and

The Emergency Manager hereby orders the proposed Charter amendment language authorizing an additional millage of six (6.0) mills (\$6.00 per \$1,000.00) on the taxable valuation of all real and personal property within the City, with all revenues received as a result of this provision being disbursed to the City of Flint to be used solely for the purpose of police and fire protection, be submitted to the electors of the City of Flint by being placed on the ballot of the November 6, 2012 general election, as follows:

PROPOSAL

FLINT CITY CHARTER AMENDMENT

POLICE AND FIRE PROTECTION MILLAGE

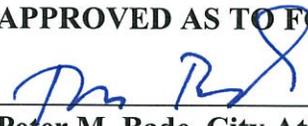
Shall the Charter of the City of Flint be amended to authorize the City to levy an additional tax on real and personal property in an amount not to exceed six (6.0) mills for five (5) years, for fiscal years beginning on July 1, 2012 through July 1, 2016, for the sole purpose of providing police and fire protection? It is estimated that six (6.0) mills would raise approximately \$5,383,924 in the first year.

YES _____

NO _____

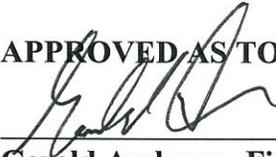
That the appropriate City Officials are authorized and directed to take all steps required by law to submit said ballot question to the electors of the City of Flint at the November 6, 2012 general election.

APPROVED AS TO FORM:



Peter M. Bade, City Attorney

APPROVED AS TO FINANCE:



Gerald Ambrose, Finance Director

EM DISPOSITION:

ENACT _____ FAIL _____

DATED 8-7-12 _____



Michael K. Brown, Emergency Manager