

STATE OF MICHIGAN
IN THE SUPREME COURT

KEVIN SMITH,
Plaintiff/Appellant,

v.

CITY OF FLINT,
Defendant/Appellee.

Supreme Court No:

Court of Appeals Case No. 320437
Lower Court Case No. 13-100532-CA

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PLAINTIFF/APPELLANT KEVIN SMITH'S
APPLICATION FOR LEAVE TO APPEAL

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BASIS OF JURISDICTION

This Supreme Court has jurisdiction to consider Plaintiff's Application for Leave to Appeal pursuant to MCR 7.305(B)(2)(3)(4) and (5).

NATURE OF ORDERS APPEALED FROM, INCLUDING
SUMMARY OF BASIS FOR REQUESTED RELIEF

This Application for Leave to this Supreme Court is important to the jurisprudence of Michigan. MCR 7.305(B)(2)(3)(4) and (5). Specifically, this Appeal primarily concerns the issue of what standard should Michigan apply to the interpretation of MCLA 15.362’s anti-retaliation language in the Whistleblower Protection Act (hereinafter “WPA”) that, “An employer shall not...otherwise discriminate against an employee regarding the employee’s compensation, terms, conditions, location or privileges of employment.” This area of WPA and civil rights law, which addresses what constitutes an “adverse employment action”, is in disarray and desperately needs clarification by the Michigan Supreme Court. In this very case, this Supreme Court not only ordered the Court of Appeals to accept Plaintiff’s Application, but directed the Court of Appeals to, “...specifically address whether the plaintiff has stated a claim that he suffered discrimination regarding his terms, conditions, location or privileges of employment.” (Ex. 1, Supreme Court Order).

The Defendant, the Circuit Court, and now the Court of Appeals in a 2-1 “for publication” decision *that contradicts itself*, assert that Michigan should apply the “ultimate employment decision”/“similar, materially adverse action” standard as set forth in the Michigan ELCRA case of *Pena v. Ingham County Road Comm.*, 255 Mich. App. 299, 312 (2003), to not only MCLA 37.2202(1)(a) of the ELCRA, but to MCLA 15.362 of the WPA – even though neither statute contains the words, “ultimate employment action” or “similar, materially adverse action.”

Plaintiff Smith asserts that Michigan should focus on the “clear and unambiguous” language of MCLA 15.362¹, and then apply, if necessary, the standard set forth by the United States Supreme Court in *Burlington Northern and Santa Fe Railway Company v. White*, 548 U.S. 53, 68 (2006), which is whether the challenged action “might well have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”

Additionally, the Circuit Court’s decision, and now the Court of Appeals 2-1 majority “for publication” decision, were also clearly erroneous and materially unjust for the following reasons:

- (1) The WPA statutory definition of prohibited adverse actions under MCLA 15.362 is different and broader, than the ELCRA’s definition under MCLA 37.2202(1)(a); and
- (2) The ELCRA case that the Circuit Court and the Court of Appeals relied on, *Pena, supra*, was interpreting MCLA 37.2202(1)(a), of the ELCRA, not MCLA 15.362, of the WPA; and
- (3) The clear and unambiguous language of MCLA 15.362 of the WPA does not state that an adverse action must take the form of an “ultimate employment decision” such as a discharge or other “similar, materially adverse” actions; and
- (4) The *Pena, supra*, decision itself relied on a 2002 Federal case which was overturned by an *en banc* panel, which *en banc* panel decision was affirmed by the United States Supreme Court in *White v Burlington Northern & Santa Fe Railway*, 548 U.S. 53 (2006); and
- (5) Shift changes and duty assignment changes, such as those suffered by Plaintiff Kevin Smith in the case at hand, *now* constitute adverse employment actions pursuant to the clear and unambiguous language of MCLA 15.362, and also Federal and State of Michigan civil rights cases; and

¹ *Whitman v. City of Burton, et al.*, 493 Mich. 303, 313 (2013).

- (6) The Court of Appeals 2-1 majority in the case at hand defines the word, “location” as contained in MCLA 15.362 in the narrowest possible manner as a matter of law despite the WPA being *remedial* legislation designed to provide a broad remedy; and
- (7) Even if ELCRA cases are to be applied to the WPA regarding what constitutes an adverse employment action, the Circuit Court and the Court of Appeals erred by ignoring the published case of *Meyer v. City of Centerline*, 242 Mich. App. 560 (2000), which held that “retaliatory harassment” by a supervisor, or a supervisor’s decision not to take action to stop harassment by co-workers, constitutes an adverse employment action; and
- (8) The Court of Appeals 2-1 majority also assessed costs against the Plaintiff despite the fact that the primary issue involved in this appeal is of such importance that the Michigan Supreme Court had to order the Court of Appeals’ panel to address it.

Another issue, amongst others, that is very important to the jurisprudence of Michigan was the Court of Appeals 2-1 majority’s imposition of a *heightened* pleading standard to a WPA case². Instead of limiting the opinion to the issue the Supreme Court directed them to address, and to the issues raised at the Circuit Court and Court of Appeals level by the parties, the Court of Appeals 2-1 majority (a) arrogated to itself the power to address issues (e.g. whether Plaintiff engaged in protected activity or pled a “Type II” whistleblower claim) that were never raised (and therefore waived by the Defendant), and worse (b) issued a decision which disregards MCR 2.118(A)(2) and the case of *Ben P. Fyke & Sons, Inc. v. Gunter Co*, 390 Mich. 649, 659 (1973) (“The allowance of an amendment is not an act of grace but a

² In Michigan the heightened pleading standard only applies to medical malpractice cases, fraud cases, defamation cases and cases involving novel legal concepts. (Ex. 2, Soave, Michigan Practice, §5.4 at esp. p. 115). Also, Appellate Courts scrutinize dismissals of civil rights complaints “with special care” because of their importance to society, and “the Court ‘must construe the complaint liberally in the plaintiff’s favor and accept as true all factual allegations and permissible inferences therein.’” See, for example, Sixth Circuit Practice Manual, 2nd Edition, p. 38.

right...”), in a still pending case which therefore arbitrarily and capriciously precludes an opportunity to amend the Complaint.

The bottom line is that the issues in this Application are not only important to the jurisprudence of Michigan, but to society itself. Plaintiff’s attorneys and Defendants’ attorneys, employers and employees, as well as Trial Court Judges and Court of Appeals Judges alike, need clear lines to be drawn regarding the issue of what is meant by the language contained in the Whistleblower Protection Act, MCLA 15.362, that, “An employer shall not...otherwise discriminate against an employee regarding the employee’s compensation, terms, conditions, location or privileges of employment.” So, too, civil rights cases and whistleblower cases are at the zenith of importance to society. Why? This remedial legislation was passed to eradicate the evils of discrimination (ELCRA) and harm such as the poisoning of livestock which was later consumed by humans regarding the PBB scandal in the late 1970’s in Michigan that led to the passing of Michigan’s WPA.

For these reasons, Plaintiff, Officer Kevin Smith, respectfully requests this Supreme Court accept this Application for Leave to establish clarity in this important area of law for lawyers, Trial Court and Court of Appeals Judges, and for society. Further, Plaintiff also asks this Court to peremptorily reverse the Circuit Court and vacate the Court of Appeals’ “for publication” decision pursuant to MCR 7.305(H)(1), accordingly.

STATEMENT OF ISSUES PRESENTED

- I. What standard should Michigan apply to the interpretation of MCLA 15.362's anti-retaliation language in the Whistleblower Protection Act that, "An employer shall not...otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment"?

Plaintiff asserts: Michigan should focus on the clear and unambiguous language of MCLA 15.362, and then apply, if necessary, the standard set forth by the United States Supreme Court in *Burlington Northern and Santa Fe Railway v. White*, 548 U.S. 53, 68 (2006), which is whether the challenged action "might well have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"

The Defendant, the Circuit Court, and now the Court of Appeals in a 2-1 "for publication" decision assert: Michigan should apply the "ultimate employment decision" and "similar, materially adverse action" standard as set forth in the Michigan ELCRA case of *Pena v. Ingham County Road Comm.*, 255 Mich. App. 299, 312 (2003), to not only MCLA 37.2202(1)(a) of the ELCRA, but to MCLA 15.362 of the WPA – even though neither statute contains the words, "ultimate employment decision" or "similar, materially adverse action."

- II. Whether Michigan now imposes a "heightened" pleading standard to remedial statutes such as the WPA and the ELCRA?

Plaintiff asserts: Michigan does not impose a heightened pleading standard to a WPA claim, and further, it is *materially unjust* for the Court of Appeals to even address issues that were never raised by the parties in the Circuit Court or Court of Appeals Briefs (and therefore waived by the Defendant), and worse, to issue a decision as a matter of law that prevents the Plaintiff the opportunity to amend the Complaint contrary to MCR 2.118 and *Ben P. Fyke & Sons v. Gunter*, 390 Mich. 649, 659 (1973) ("The allowance of an amendment is not an act of grace but a right..."). The Court of Appeals majority opinion also did not limit itself to the issues the Supreme Court directed them to consider, and further, engaged in judicial legislation concerning MCLA 15.362 by effectively taking the word, "suspected" out of MCLA 15.362.

Neither the Circuit Court nor the Defendant (at the Circuit Court or Court of Appeals level) ever raised this issue: One assumes that because the Court of Appeals 2-1 majority's unilateral imposition of a heightened pleading standard (without giving Plaintiff an opportunity to amend the Complaint pursuant to MCR 2.118 in a still pending case) allows the Defendant to prevail, the Defense would be in agreement with the Court of Appeals 2-1 majority's decision.

- III. Whether this Application for Leave should be granted where the Circuit Court erroneously granted summary disposition as to the WPA claim by – if Elliott-Larsen Civil Rights Act cases are to be applied to the WPA – ignoring the published case of *Meyer v. City of Centerline*, 242 Mich. App. 560 (2000), which held that retaliatory harassment by a

supervisor or a supervisor's decision not to take action to stop harassment by co-workers, can constitute an adverse employment action and, further, the Court of Appeals did not even address this issue?

Plaintiff/Appellant answers, "Yes".

Trial Court answered, "No".

Defendant/Appellee answers, "No".

Court of Appeals did not address this specific issue even though it was raised and, further, found against the Plaintiff/employee.

STATEMENT OF FACTS

Plaintiff, Police Officer and Police Union President, Kevin Smith, filed this Whistleblower Protection Act (hereinafter “WPA”) case on 5/31/13. (Ex. 4, Timeline). Kevin Smith reported to public bodies, including Defendant City of Flint and its employees (MCLA 15.361(d)), that \$5.3 million in millage money, as well as impound lot monies, were being used illegally *in the General Fund*, instead of being used for the hiring of more police officers. (Ex. 3, Third Amended Complaint, esp. ¶s 14-20). This is the “suspected” violation (MCLA 15.362) Plaintiff was reporting concerning MCLA 750.490 and MCLA 141.439. See, e.g., *Debano-Griffin v. Lake County*, 486 Mich. 938 (2010).

Defendant City’s Chief Lock and Captain Patterson thereupon singled out Kevin Smith to be the **only** officer **solely** assigned to patrol the extremely dangerous north end of Flint, Michigan, at night, an act akin to playing "Russian Roulette" with this family man's life disproportionately to any other officer.³ (Ex. 3, Third Amended Complaint, ¶s 20-35, including Affidavit attached thereto). This shift change was not only extremely dangerous, but also sabotaged Kevin Smith’s ability to carry out his duties as Union President. (Ex. 3, Third Amended Complaint, esp. ¶s 31-34).

The Circuit Court, relying on the Elliott-Larson Civil Rights Act (hereinafter “ELCRA”), and not the WPA, case of *Pena v. Ingham County Road Comm*, 255 Mich. App. 299 (2003) cited by Defendant, found that Plaintiff did not set forth a sufficient adverse employment action occurring within the 90 days statute of limitations and dismissed the WPA claim. (Ex. 4, Timeline; Ex. 5, Order Granting Defendant’s Motion for Summary Disposition of Plaintiff’s Whistleblower Protection Act Claim). The oral argument transcript establishes

³ The "order" brings to mind the Old Testament story of King David (before his repentance) and Uriah the Hittite, 2 Samuel 11:15: "Place Uriah up front where the fighting is fierce. Then pull back and leave him to be struck down dead".

that the Circuit Court based its decision on the *Pena, supra*, ELCRA case. (Ex. 6, Oral Argument Transcript, esp. pp. 5-6, 13-15).

Kevin Smith thereafter filed an Application for Leave to the Court of Appeals, which was denied. (Ex. 7, Order Denying Application for Leave). Smith then filed an Application for Leave to the Michigan Supreme Court. The Michigan Supreme Court ordered the Court of Appeals to accept the Application for Leave to Appeal, stating:

“On order of the Court, the application for leave to appeal the April 28, 2014 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted. **On remand, we DIRECT the Court of Appeals to specifically address whether the plaintiff has stated a claim that he suffered discrimination regarding his terms, conditions, location or privileges of employment.**”

(Ex. 1, Supreme Court Order; emphasis added).

The Court of Appeals 2-1 majority then issued its “for publication” decision which seeks to continue to apply the ELCRA case of *Pena’s* “ultimate employment decision” and “similar, materially adverse action” standard to a Michigan Whistleblower Protection Act case, even though the language “ultimate employment decision” and “similar, materially adverse action” is nowhere to be found in either the ELCRA or the WPA (Ex. 8, COA Majority Order, pp. 1-4) – and the *Pena* case was based on a 2002 Federal Sixth Circuit case that has now been overturned on this exact same point⁴.

The Court of Appeals 2-1 majority also went beyond the Supreme Court’s directive – which was specifically pointed out in fn 1 of the Dissenting Opinion – to try to change the law

⁴ The Michigan Court of Appeals in *Pena*, relied on the case of *White v. Burlington Northern & Santa Fe Railway*, 310 F.3d 443 (6th Cir. 2002) to equate an “adverse employment action” to an “ultimate employment action”. *Pena, supra* at p. 312. However, in 2004 the Sixth Circuit met *en banc* and effectively overruled its earlier 2002 decision. *White v. Burlington Northern & Santa Fe Railway*, 364 F.3d 789 (6th Cir. 2004 *en banc*). The *en banc* panel’s reasoning was that if Congress had intended to require an “ultimate employment action”, Congress would have used that qualifying language. *Id.* at p. 802. The Sixth Circuit *en banc* panel’s decision was affirmed by the U.S. Supreme Court. *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53 (2006).

of Michigan by imposing a *heightened* pleading standard to WPA cases to hold that Plaintiff did not sufficiently plead a Type II whistleblower claim and that Plaintiff did not engage in WPA protected activity. These issues were not raised by the Defendant at the Circuit Court level or on Appeal. Notwithstanding that these issues were waived by the Defendant, never raised by any of the parties on Appeal and, therefore, never briefed, it goes beyond what the Supreme Court directed the Court of Appeals to do. The Court of Appeals 2-1 majority arrogated to itself the power to impose a *heightened* pleading standard in order to achieve the materially unjust result of finding that the Plaintiff did not engage in protected activity under the WPA (Ex. 8, COA Majority Opinion at pp. 5-7) and did not sufficiently plead a “Type II” claim. (Ex. 8, COA Majority Opinion, p. 6, first full ¶). The Court of Appeals 2-1 majority also assessed costs (Ex. 8, COA Majority Opinion, p. 7) against the Plaintiff, notwithstanding the fact that the issue on Appeal concerning how to define an adverse employment action under the WPA was of such importance that the Supreme Court ordered the Court of Appeals to address it.

Plaintiff, Kevin Smith, has now filed this Application to the Supreme Court because the issues in this Application are important to the jurisprudence of Michigan and society itself.

LEGAL ARGUMENT

A. The Issues Involved in This Case are Important to Michigan’s Jurisprudence and Society

1. What standard should Michigan apply to the interpretation of MCLA 15.362’s anti-retaliation language in the WPA that, “An employer shall not...otherwise discriminate against an employee regarding the employee’s compensation, terms, conditions, location or privileges of employment”?

In the case at hand, the Michigan Supreme Court made it clear previously that there is an extremely important legal issue involved in this particular case that is worthy of being

addressed by the Michigan Supreme Court when it ordered the Court of Appeals to accept Plaintiff's Application (Ex. 1, Supreme Court Order). Specifically, the overarching issue the Supreme Court directed the Court of Appeals to address is how to interpret MCLA 15.362's language, "An employer shall not...otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment." (Ex. 1, Supreme Court Order). In other words, what standard or test should Michigan apply to the interpretation of this language contained in MCLA 15.362?

The Circuit Court, and now the Court of Appeals majority in a "for publication" decision, seeks to have Michigan use the "ultimate employment decision" and the "similar, materially adverse action" standard from the ELCRA case of *Pena, supra*, that was interpreting the ELCRA, not the WPA (Ex. 8, COA Majority Order, pp. 1-4: "Moreover, in determining whether a retaliatory action provided for in the statute occurred, we hold that the objective and material standard provided by *Pena continues to apply.*").

The Plaintiff, on the other hand, seeks to have this Supreme Court clarify this area of law by focusing on the clear and unambiguous language of MCLA 15.362, and then, if necessary, apply the standard set forth by the U.S. Supreme Court in *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53, 68 (2006) – a standard much more consistent with the actual language of MCLA 15.362; *to wit*:

"An employer shall not...otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment."

The standard the United States Supreme Court applies to Title VII's anti-retaliation section would be far more consistent with giving practical and realistic effect to *remedial* legislation (whether it be Title VII, Michigan ELCRA, Michigan WPA), the standard being

whether the challenged action “might well have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination’”. *Burlington, supra* at p. 68.

a. The Circuit Court clearly erred by granting Defendants’ MSD as to Plaintiff’s WPA cause of action because the clear and unambiguous language of the WPA, MCLA 15.362, does not state that an adverse employment action must take the form of an “ultimate employment decision”, such as a discharge or other “similar, materially adverse action”

(1) *Whitman v. City of Burton, et al*, 493 Mich. 303 (2013)

Where a statute such as MCLA §15.362 of the WPA is clear and unambiguous⁵, nothing is to be added or taken out of the language of the statute by the judiciary⁶. The Michigan Supreme Court recently reemphasized this cardinal rule of statutory construction in one of my cases, the WPA case of *Whitman v. City of Burton*, 493 Mich. 303 (2013)⁷:

"When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself. *If the language of the statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted.*" *Id.*, at p. 311. (emphasis added) (footnotes omitted)

By relying on the ELCRA case of *Pena, supra*, the Circuit Court in the case at hand added statutory requirements to the **WPA** that are simply not in there. (Ex. 6, Oral Argument

⁵ *Brown v. City of Detroit*, 478 Mich. 589, 594 (2007) (Justice Cavanaugh opinion at p. 593) ("The statutory language in this case is unambiguous"); accord, *Kimmelman v. HDM, Ltd.*, 278 Mich. App. 569, 571; NW2d 265 (2008) (Judge Davis: "The language of the WPA is unambiguous..."); *Trepanier v. Nat'l Amusements, Inc.*, 250 Mich. App. 578; 649; NW2d 754 (2002) (Per curiam: Judge Mark Cavanaugh, Judge Doctoroff and Judge Jansen--...we decline to interpret the WPA so as to create a limitation that is not apparent in the unambiguous language of the statute."); *Phinney v. Perlmutter*, 222 Mich. App. 513, 544; 564 NW2d 532 (1997) (Judge Wahls: "The language of the statute is clear and unambiguous"). See also *Whitman, supra*, at p. 313.

⁶ *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law **IS**.") (emphasis added).

⁷ The Michigan Supreme Court WPA *Whitman* case was also cited with approval by the even more recent Michigan Supreme Court decision in the WPA *Wurtz, infra*, case, too. 495 Mich. 242, n14. Please keep this in mind as its importance will become more and more apparent as one reads this Brief.

Transcript at esp. pg. 13-15). Specifically, the Circuit Court was adding to the WPA statutory language that the adverse action must be in the form an "ultimate employment decision" such as a discharge or other "similar, materially adverse actions"⁸. *Pena, supra*, at p. 312. And this is precisely what Defense Counsel somehow convinced the Circuit Court to follow – Defense Counsel argued:

"The WPA requires that there be some tangible, in most cases, an economically consequential employment decision that has affected a person. The *Pena* case, from our view, is right on point.

* * *

The reasoning was because there wasn't this adverse employment action which usually takes the form of some **ultimate employment action** – a promotion denial, a termination, something to that effect." (emphasis added)

The Circuit Court then "took the bait" and applied a case interpreting the ELCRA, *Pena*, to a WPA case:

“MR. KOWALKO: But you’re following *Pena* –
 THE COURT: Yes.
 MR. KOWALKO: – to base your decision?
 THE COURT: Yes. Okay.”
 (Ex. 6, Oral Argument Transcript, pp. 5, 6, 15).

So, now, let's take a look to see if the WPA contains the wording or language "ultimate employment decision" or "materially adverse":

“15.362. Discharge threats, or discrimination against employee for reporting violations of law.

Sec. 2. 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

⁸ Notably, this language is not only not in the WPA, it is not even in the applicable ELCRA section, either. MCLA §37.2202(1)(a).

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.” See MCLA 15.362, emphasis added.

Obviously, the **WPA** does **not** contain the language *Pena, supra*, applied to the ELCRA. Thus, the Circuit Court erred by adding language requiring an “ultimate employment action” or “similar, materially adverse action” to the WPA. So, too, the Court of Appeals majority’s reliance on *Pena, supra*, was also contrary to the statutory language itself.

In the case at hand, the actions taken against Plaintiff Police Officer Smith easily fit in the categories set forth in the *remedial*⁹ WPA's MCLA §15.362 regarding "terms, conditions, locations or privileges of employment". Indeed, requiring Plaintiff Smith to exclusively patrol the notoriously dangerous north end of Flint easily constitutes discrimination by Plaintiff Kevin Smith’s employer regarding a “term” or “condition” or “location” or “privilege of employment”. The Court of Appeals dissent recognized this, too:

“I would hold that there is a question of fact regarding whether plaintiff’s claims constitute discrimination. *Plaintiff’s hours and the **location** of his shift were changed, which I believe relate to the **terms and location** of his employment.*” (Ex. 9, COA Dissenting Opinion, p. 2; emphasis added).

For the reason that the words, “ultimate employment action” and “similar, materially adverse actions” are not in MCLA 15.362, the Circuit Court's decision granting Defendant's MSD, and the Court of Appeals 2-1 majority’s affirmance, as to Plaintiff's WPA claim must be reversed, and further, Plaintiff Kevin Smith respectfully requests that this Supreme Court accept his Application.

⁹ *Henry v. Detroit*, 234 Mich App 405, 409 (1999).

b. The Court of Appeals' 2-1 "for publication" decision continues to use a standard not found in MCLA 15.362 and that has been soundly rejected by most jurisdictions, including the United States Supreme Court itself

In the case at hand, the Court of Appeals 2-1 majority seeks to keep the *Pena* case's "ultimate employment decision" standard alive by pretending *Pena* is consistent with the language of the statute, and consistent with the United States Supreme Court's decision in *Burlington, supra* – when the "ultimate employment action" standard is clearly inconsistent with both MCLA 37.2201(1)(a) of the ELCRA, MCLA 15.362 of the WPA, and the *Burlington, supra* case. The Court of Appeals 2-1 majority stated:

"Plaintiff asserts that the federal law on which *Pena* relied has been overruled. We note that federal courts have rejected the interpretation that an adverse employment action must take the form of an 'ultimate employment decision.' In *White v. Burlington N & Santa Fe R Co*, 364 F.3d 789, 801-802 (CA 6, 2002), the Court of Appeals for the Sixth Circuit, sitting *en banc*, rejected the 'ultimate employment decision' limitation imposed on retaliation claims. The United States Supreme Court affirmed that decision and explained that actionable retaliation was not properly limited to 'ultimate employment decisions.' *Burlington N & Santa Fe R Co v. White*, 548 U.S. 53, 67; 126 S.Ct. 2405; 165 L.Ed.2d 345 (2006). The Supreme Court explained that the anti-retaliation provision of Title VII claims may include actions and harms occurring either in or outside the workplace, but any actions must be materially adverse to a reasonable employee or job applicant. *Id.* at 67-68.

* * *

Moreover, in determining whether a retaliatory action provided for in the statute occurred, we hold that the objective and material standard provided *by Pena continues to apply...*" (Emphasis added)

There is, however, a gaping hole in the reasoning of the Court of Appeals 2-1 majority's opinion. *Pena's* "ultimate employment decision"/"similar, materially adverse action" standard is not consistent at all with the test set forth by the United States Supreme Court in *Burlington, supra*. For this reason, the Court of Appeals' majority never stated what the U.S. Supreme Court actually explained in *Burlington, supra* – but we will. The U.S.

Supreme Court said that the test is simply whether the challenged action, “might well have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination’”. *Burlington, supra* at p. 68. Notably, according to the U.S. Supreme Court, even a mere “reassignment of duties”, can constitute retaliatory discrimination even where both the former and present duties fall within the same job description. *Id.* at pp. 70-71. And this is precisely what happened with Kevin Smith in the case at hand. Incidentally, this is also the test that is applied to First Amendment retaliation claims. See *Thaddeus X v. Blatter*, 175 F.3d 378 (6th Cir. 1999 *en banc*).

Let's now take a closer look at the United States Supreme Court decision in *Burlington, supra*. The United States Supreme Court explained:

"We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. **Context matters.** 'The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.' *Oncala, supra*, at 81-82. ***A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children.*** Cf., e.g., *Washington, supra*, at 662 (finding flex-time schedule critical to employee with disabled child). A supervisor's refusal to invite an employee to lunch is normally trivial, a non-actionable petty slight. But to retaliate by excluding an employee from **a weekly training lunch** that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. See 2 EEOC 1998 Manual §8, p. 8-14. Hence, 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.' *Washington, supra*, at 661." (emphasis added)

Notwithstanding the Court of Appeals majority 2-1 attempt to gloss over the *real* standard set forth by the United States Supreme Court in *Burlington, supra* – and to pretend that it is entirely consistent with *Pena, supra*, – the U.S. Supreme Court’s reasoning is far

more persuasive and gives a realistic and practical effect to *remedial* legislation (whether it be Title VII, the Michigan ELCRA, or the Michigan WPA)¹⁰.

Notably, in the Sixth Circuit case of *Neason v. GMC*, 409 F.2d 873 (E.D. Mich. 2005), a copy attached as Ex. 10, explains precisely why the “ultimate employment decision” standard set forth in *Pena, supra*, is no longer good law regarding the adverse employment action issue, even for an ELCRA case. Significantly, *Neason, supra*, came out a year *before* the U.S. Supreme Court decision in *Burlington, supra*, and in *Neason*, the Sixth Circuit predicted that Michigan will follow the majority of federal courts and reject the “ultimate employment decision” standard of *Pena*; *to wit*:

“The Michigan Supreme Court also requires a plaintiff to show an adverse employment action under the Elliott-Larsen Civil Rights Act (“Elliott-Larsen”). *Sniecinski v. Blue Cross and Blue Shield of Mich.*, 469 Mich. 124, 134-35, 666 N.W.2d 186 (2003). While the Sixth Circuit rejected the “ultimate employment decision” standard for Title VII claims, it is uncertain whether the standard would apply to Elliott-Larsen claims. Neither the Sixth Circuit nor the Michigan Supreme Court has spoken on the question as to whether a challenged employment decision must be permanent in order to be actionable under Elliott-Larsen, and decisions by the Michigan Court of Appeals are in conflict. Some Michigan Court of Appeals cases did not require a permanent employment decision,^[5] while other cases did.^[6]

In the absence of Michigan Supreme Court precedent, federal courts are bound by the decisions of the intermediate state courts, absent “other persuasive data that the highest court of the state would decide 879*879 otherwise.” *Hampton v. United States*, 191 F.3d 695, 701-02 (6th Cir.1999) (citations omitted). When state law is unsettled, it is the job of the federal court to predict how the state’s highest court would rule on the issue. *Mills v. GAF Corp.*, 20 F.3d 678, 681 (6th Cir.1994). Michigan state courts have described the Elliott-Larsen Act as remedial in nature, and said it should be construed liberally to provide a broad remedy. *Kassab v. Mich. Basic Prop. Ins. Ass’n*, 441 Mich. 433, 441 n. 11, 491 N.W.2d 545 (1992) (citations omitted); *Neal v. Dep’t of Corrs.*, 230 Mich. App. 202, 207, 583 NW2d 249 (1998). While Michigan courts are not

¹⁰ *Henry v. Detroit*, 234 Mich. App. 405, 409 (1999).

bound by Title VII precedent when interpreting similar provisions of the Elliott-Larsen Act, those precedents are highly persuasive and may be afforded substantial consideration. *Barrett; Cole v. General Motors Corp.*, 236 Mich. App., 452, 600 NW2d 421 (1999).

In the interest of providing a broad remedy, and in consideration of the weight of Title VII precedent, *it is likely that the Michigan Supreme Court would reject the 'ultimate employment decision' standard for Elliott-Larsen claims.* The majority of federal circuits have rejected such a standard for Title VII claims. *White*, 364 F.3d at 801. *Moreover, a standard that recognizes as actionable intermediate employment decisions, such as suspension with later reinstatement, provides a far broader remedy than a standard limited only to permanent employment actions.* In consideration of this, Plaintiff has asserted an adverse employment action under the Elliott-Larsen Act.

[5] See, e.g., *Mick v. Lake Orion Comty. Schs.*, 204 WL 1231944, *7 n. 9, 2004 Mich. App. LEXIS 1400, 21 n. 9 (June 3, 2004); *Hager v. Warren Consol. Schs.*, 2002 WL 44411, “11, 2002 Mich. App. LEXIS 8, *38-39 (Jan. 8, 2002); *Meyer v. City of Center Line*, 242 Mich. App. 560, 570-71, 619 NW2d 182 (Sept. 15, 2000).

[6] See, e.g., *Henning v. Wireless*, 2005 WL 155498, *2, 2005 Mich. App. LEXIS 1428, *3 (June 17, 2003); *Pena v. Ingham County Rd. Comm’n*, 255 Mich. App. 299, 311, 660 NW2d 351 (2003).” (emphasis added).”

The opinion in *Neason, supra*, hits the nail right on the head, and was prophetic. Our Michigan Supreme Court is now, "textualist", and will not apply language such as "ultimate employment decision" to MCLA 37.2202(1)(a) of the ELCRA (or to MCLA 15.362 of the WPA) that is not in there. *Whitman, supra*. See also *Wurtz v. Beecher Metropolitan Dist.*, 495 Mich. 242 n 14 (2014). For these reasons also, the Circuit Court clearly erred in this case when granting Defendant's MSD as to Plaintiff's WPA claim, and so did the Court of Appeals 2-1 majority, when basing the respective decisions on the, “ultimate employment decision” and “similar, materially adverse action” standard from an outdated case, *Pena, supra*.

c. The Circuit Court and Court of Appeals majority also erred by not recognizing that the WPA statutory categories of adverse actions is “different” and broader than that of the ELCRA

(1) Wurtz v. Beecher Metropolitan Dist, 495 Mich. 242 (2014)

From time to time, an area of law falls into such "disarray" that the Michigan Supreme Court will take the bull by the horns to clarify it. See, for example, *Odom v. Wayne County*, 482 Mich. 459 (2008) (Michigan Supreme Court clarifying the law regarding governmental tort immunity).

In the recent case of *Wurtz, supra*, the Michigan Supreme Court took the first step towards clarifying the widespread confusion at all levels of the Michigan courts concerning the issue of what constitutes an "adverse employment action" in civil rights¹¹ employment cases. Specifically, the Michigan Supreme Court explained that the ELCRA is *not* the same as the WPA regarding adverse employment actions:

"Many courts, including this one, have at times grouped the collection of retaliatory acts that an employer might take toward a whistleblower under the broader term 'adverse employment actions.' See, e.g., *Whitman*, 493 Mich. At 313; cf. *Chandler*, 456 Mich. at 399 (drawing the second element of a prima facie WPA claim directly from the statutory language). *But the way that the term has obtained meaning resembles the telephone game in which a secret is passed from person to person until the original message becomes unrecognizable.* The term 'adverse employment action' was originally developed and defined in the context of federal antidiscrimination statutes to encompass the various ways that an employer might retaliate or discriminate against an employee on the basis of age, sex, or race. See *Crady v. Liberty Nat'l Bank & Trust Co of Indiana*, 993 F.2d 132, 136 (CA 7, 1993) ('A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.'). The term 'adverse employment

¹¹ *Anzaldua v. Band*, 216 Mich. App. 561, **580** (1996), *result aff'd* 257 Mich 530 (1998) (recognizing the Michigan's Whistleblower Protection Act is under the "umbrella" of the civil rights laws).

action' appeared in this Court's jurisprudence for the first time in an age discrimination case, *Town v. Michigan Bell Tel Co*, 455 Mich. 688, 695; 568 NW2d 64 (1997), though the statute at issue in that case, as here, did not contain the term. Michigan courts then adopted the federal definition of 'adverse employment action' in the context of making out a prima facie case under Michigan's Civil Rights Act. *Wilcoxon v. Minnesota Mining & Mfg Co*, 235 Mich. App. 347, 362-366; 597 NW2d 250 (1999). Finally, the term crept into WPA cases. See *Debano-Griffin v. Lake Co*, 493 Mich. 167, 175-176; 828 NW2d 634 (2013); *Brown v. Detroit Mayor*, 271 Mich. App. 692, 706; 723 NW2d 464 (2006), aff'd in relevant part, 478 Mich. 589 (2007).

While the term 'adverse employment action' may be helpful shorthand for the different ways that an employer could retaliate or discriminate against an employee, *this case illustrates how such haphazard, telephone-game jurisprudence can lead courts far afield of the statutory language. That is, despite courts' freewheeling transference of the term from one statute to another, the WPA actually prohibits **different** 'adverse employment actions' than the federal and state antidiscrimination statutes.* So we take this opportunity to return to the express language of the WPA when it comes to the necessary showing for a prima facie case under that statute. Put another way, a plaintiff's demonstration of some abstract "adverse employment action" as that term has developed in other lines of case law will not be sufficient. Rather, the plaintiff must demonstrate one of the specific adverse employment actions listed in the WPA." (emphasis added)

Notably, this area of law, "adverse employment actions", has been in such disarray that even scholarly and thoughtful Court of Appeals Judge Whitbeck erred and was reversed in *Wurtz*. So, too, the case at hand is yet another perfect illustration of a Circuit Court Judge who is normally an exceptionally smart jurist¹², falling prey to the ongoing confusion regarding "adverse employment actions" in the WPA and anti-discrimination statutes such as Michigan's ELCRA. (Ex. 6, Oral Argument Transcript, esp. pp. 5-6, 13-15).

¹² See, for example, *Hunter v. SISCO*, Michigan Supreme Court No. 147335, issued 12/19/14, in which his interpretation of "bodily injury" in the governmental immunity statute was ultimately upheld by the Michigan Supreme Court.

Notably, the Court of Appeals majority in the case at hand then cites the Michigan Supreme Court's clear admonition against conflating the ELCRA with the WPA in *Wurtz* as if it supports their continuing conflation of the statutes. (See Ex. 8, COA Majority Opinion, p. 4). In other words, the Court of Appeals 2-1 majority cites *Wurtz* for the proposition that *Pena* (an ELCRA case interpreting ELCRA) is applicable to the WPA!?!)

Importantly, the WPA is broader than the ELCRA, as it specifically includes even a "threat" and a mere change in "location", as prohibited adverse actions. Here is a comparison, starting with the applicable ELCRA provision:

"An employer shall not do any of the following: (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition or privilege of employment because of religion, race, color, national origin, age, sex, height, weight, or marital status." MCLA 37.2202(1)(a).

Now, let's look at the WPA:

"15.362. Discharge threats, or discrimination against employee for reporting violations of law.

Sec. 2. 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."

MCLA 15.362 (emphasis added).

How could a mere "threat" or a mere change of work "location", with no change in pay or benefits, ever amount to an "ultimate employment action" such as a discharge, or a

“similar, “materially adverse action”, etc? The simply answer is, it can’t. And surely, the discriminatory acts of retaliation in this case of playing “Russian Roulette” with Officer Smith’s life by *singling him out* to be *solely* assigned to work in the dangerous north end of Flint at night, which also sabotaged his ability to carry out his duties as Union President during the day, is far worse than a mere “threat.”

Thus, the Circuit Court’s error, as well as the Court of Appeals error, in the case at hand, while understandable, is still clear error. MCLA 15.362; *Wurtz, supra*; *Whitman, supra*. For this reason also, Plaintiff respectfully requests that this Court accept his Application and issue appropriate orders reversing/vacating the Circuit Court’s granting of Defendant’s MSD and the Court of Appeals’ affirmance of same.

d. The inconsistencies and contradictions within the Court of Appeals decision itself are more proof that this Application should be accepted

(1) Is *Pena v. Ingham County Road Comm., 255 Mich. App. 299 (2003)* still good law or not?

The Court of Appeals’ decision contradicts itself concerning the issue of adverse employment actions, leaving the state of the law as clear as mud. For example, the Court of Appeals majority spends four pages lobbying to keep the *Pena, supra*, case alive stating:

“Moreover, in determining whether a retaliatory action provided for in the statute occurred, *we hold that the objective and material standard provided by Pena continues to apply.*” (Ex. 8, COA Majority Opinion, pp. 4-5; emphasis added).

Then, after just stating that they want the *Pena* case to continue to be the standard, state on page 5:

“*Although the trial court erroneously equated an ‘adverse employment action’ with an ‘ultimate employment decision’, we will not reverse* when the Court reaches the right result, albeit for the wrong reason.” (Ex. 8, COA Majority Opinion, p. 5, emphasis added).

Simply put, the Court of Appeals majority decision contradicts itself. Further, it does not *help* lawyers or trial court level judges understand what an “adverse employment action” is under the WPA or the ELCRA. Why? Because the Court of Appeals decision on the one hand admits that it is erroneous to equate an “adverse employment decision” with an “ultimate employment decision”, but on the other hand departs from this by *describing* and applying the “ultimate employment decision” standard that had its genesis from the *Pena* case, as if it somehow still applies. (Ex. 8, COA Majority Opinion, pp. 3-4).

(2) The Court of Appeals majority and the dissenting opinion in this very case can't agree on what “location” means

More confusion is caused by the Court of Appeals majority finding as a matter of law that the word “location” under MCLA 15.362 is to be given the narrowest possible interpretation as a matter of law. The reasoning of the Court of Appeals majority was as follows:

“Further, plaintiff’s subsequent assignment to patrol duty on the north end of Flint does not constitute an adverse employment action. While retaliation related to an employee’s ‘location’ is expressly covered under the WPA, we do not construe ‘location’ under the statute to encompass the action here. Plaintiff’s assignment to patrol areas of the city is more in the fundamental role in securing public safety. We discern the statute’s reference to a change in location to another of an employer with multiple offices. Here, the area where officers patrol *within the same city they were sworn to protect* concerns job assignments, not a matter of location. As a result, plaintiff’s assignment to a particular patrol duty within the city of Flint, objectively, is simply not covered by the WPA.” (Ex. 8, COA Majority Opinion, p. 5; emphasis added).

The Court of Appeals majority’s narrow interpretation of “location” is contrary to the *remedial* nature of the WPA. See *Henry v. Detroit*, 234 Mich. App. 405, 409 (1999).

Moreover, it is planting the seed for unjust future decisions. For example, using the same logic the Court of Appeals majority attempts to apply here, a State Trooper who is moved from the Lansing area to the farthest northwest area of Michigan's Upper Peninsula, would never have a claim – after all, it's “within *the same State* they were sworn to protect.” It is for precisely this reason that the U.S. Supreme Court in *Burlington, supra*, and the vast majority of federal circuits and States emphasize that, “context matters.” In some instances, that State Trooper in the above hypothetical, would not have a claim if he, in fact, is single, has no children, and is an outdoorsman who prefers to be in the farthest outpost of the Upper Peninsula. However, if his residence, for example, is in the Lansing area, his wife has a job in Lansing, and his children go to school in the Lansing area, a reasonable person could find such a drastic change of location to be a retaliatory adverse action.

So, too, the dissenting opinion does not buy into the Court of Appeals majority's attempt to define away “location” or to argue that a “job assignment” – no matter how dangerous – could never be discrimination concerning the “terms and location of his employment.” In fact, the Court of Appeals dissent explains it as follows:

“However, plaintiff's assignment to the night shift in Flint's north end provides a closer question. Plaintiff, who had worked from 8:00 a.m. until 4:00 p.m. in his capacity as union president, was informed in writing that he was being assigned to road patrol. The letter stated that plaintiff's hours would be 8:00 a.m. to 4:00 p.m. However, plaintiff was actually assigned the night shift in the north end of Flint. Plaintiff asserts that the north end was ‘considered crime ridden and a much more dangerous area of assignment for police officers’ and that the south end was ‘a more safe area’ compared to the north end. Plaintiff indicated that he did not know of any other patrol officers that were assigned to work the north end (or any other area) exclusively. Plaintiff also alleged that he was told that he would not be allowed to work in the south end. In addition, plaintiff claimed that his assignment to night shift prevented him from conducting his union duties, which must

be performed during daylight hours. According to plaintiff, his assignment to the night shift was deliberately designed to thwart his union duties. In response, defendant claimed that plaintiff's concerns regarding his hours and shift were only his subjective complaints, and that plaintiff did not provide any objective evidence that his transfer affected the terms, conditions, location, or privileges of his employment.

I would hold that there is a question of fact regarding whether plaintiff's claims constitute discrimination. *Plaintiff's hours and the location of his shift were changed, which I believe relate to the terms and location of his employment.* In particular, plaintiff was informed in writing that his hours on road patrol would be 8:00 a.m. until 4:00 p.m., which was consistent with his former schedule. Plaintiff's work hours relate to a term of his employment. Moreover, accepting plaintiff's claims as true, it does appear as though he would be unable to perform his union duties during his shift, even assuming he was able to obtain a supervisor's permission as required by Order 18. *In addition, plaintiff was assigned exclusively to the north end, which relates to the terms and location of his employment.* Plaintiff alleged that this area was more dangerous and that no other officers were exclusively assigned to that area. Viewing the complaint in a light most favorable to plaintiff, *Maiden v. Rozwood*, 461 Mich. 109, 119; 597 NW2d 817 (1999), I believe that plaintiff has established a question of fact whether these actions could be objectively and materially adverse to a reasonable person. *Pena v. Ingham Co Rd Comm*, 255 Mich. App. 299, 312; 660 NW2d 351 (2003). Accordingly, I would hold that there is a question whether the actions by defendant constituted discrimination regarding the terms and location of defendant's employment pursuant to 15.362.¹

For the reasons stated, I would reverse and remand to the trial court for further proceedings.

/s/Karen M. Fort Hood

¹ I limit my dissent to the issue that our Supreme Court directed this Court to consider and, thus, do not address the majority's discussion of whether plaintiff pled sufficient facts to establish a protected activity. *Smith v. City of Flint*, 497 Mich. 920; 856 NW2d 384 (2014)." (Ex. 9, COA Dissenting Opinion, pp. 1-2).

As one can see, however, even the Court of Appeals dissent still relies on *Pena, supra*, too. What does all of this mean? It means that at the present time, the law is so unsettled

concerning what constitutes an adverse employment action under MCLA 15.362, and whether *Pena, supra*, is still good law in Michigan, that it is not surprising that every Court of Appeals panel, *and even within panels of the Court of Appeals as in this case*, will issue opinions that are inconsistent and contradictory. This is all the more reason for this Court to accept this Application.

e. The bottom line: the time is ripe for the Michigan Supreme Court to straighten out the disarray and establish how to interpret MCLA 15.362's anti-retaliation language, "An employer shall not...otherwise discriminate against an employee regarding the employee's compensations, terms, conditions, location or privileges of employment"

In the case at hand, the Court of Appeals panel could not agree on how to interpret MCLA 15.362, concerning what constitutes an adverse employment action. An outdated ELCRA case, *Pena, supra* with a standard ("ultimate employment action" and "similar, materially adverse action") not found in the text of MCLA 15.362, continues to be applied. Even the word "location" is given the narrowest possible interpretation as a matter of law, which is the opposite of the legal standard to be applied to a "remedial" statute. So, should Michigan continue to apply the *Pena* "ultimate employment action" and "similar, materially adverse action" standard? – or the United States Supreme Court standard in *Burlington, supra*? – or something else? For these reasons, the time is ripe for the Supreme Court to help the citizens, lawyers and judges of this State by accepting this Application and clarifying these very important legal issues.

2. The Court of Appeals Majority's Imposition of a Heightened Pleading Standard to the Remedial WPA is Contrary to Michigan Law and Materially Unjust in the Case at Hand

The Court of Appeals 2-1 majority went way beyond the Supreme Court's directives and the issues raised and briefed by the parties at the Circuit Court and Court of Appeals'

levels¹³. Specifically, the Supreme Court directed the panel to address Plaintiff's pleadings only in the context of:

“On remand, we DIRECT the Court of Appeals to specifically address whether the plaintiff has stated a claim that he suffered discrimination regarding the terms, conditions, location, or privileges of employment.” (Ex. 1, Supreme Court Order).

Instead of following the Supreme Court's directive, the Court of Appeals majority improperly disposed of Plaintiff's “Type II” WPA claim by imposing a **heightened** pleading standard contrary to established published Michigan law:

“Initially, we note that plaintiff do not allege any facts that would implicate that he was a type 2 whistleblower. While he merely reproduced in his complaint the keywords of the WPA that he ‘participated in an investigation and/or inquiry and/or hearing by a public body,’ plaintiff alleged zero facts in support of this conclusory assertion. Consequently, the unsupported assertion that he was a type 2 whistleblower is not sufficient to survive a motion for summary disposition. See *Ypsilanti Fire Marshal v. Kircher*, 273 Mich. App. 496, 544; 730 NW2d 481 (2007) (‘It is axiomatic that conclusory statements unsupported by factual allegations are insufficient to state a cause of action.’).” (Ex. 8, COA Majority Opinion, p. 6).

What the Court of Appeals majority did here was to improperly impose a heightened pleading standard to the Michigan Whistleblower Protection Act claim. The **heightened** pleading standard the Court of Appeals seeks to use only applies in Michigan to medical malpractice cases¹⁴, libel/slander cases¹⁵, fraud cases¹⁶ or cases based upon novel legal

¹³ As set forth correctly in the dissent's footnote¹, “I limit my dissent to the issue that our Supreme Court directed this Court to consider and, thus, do not address the majority's discussion of whether plaintiff pled sufficient facts to establish a protected activity. *Smith v. City of Flint*, 497 Mich. 920; NW2d 384 (2014).”

¹⁴ *O'Toole v. Fortino*, 97 Mich. App. 797, 803 (1980); MCL 600.2912b.

¹⁵ *Pursell v. Wolverine-Pentronix, Inc.*, 44 Mich. App. 416, 420-422 (1973), after remand 91 Mich. App. 700 (1979).

¹⁶ MCR 2.112(B)(1).

concepts¹⁷. This is a WPA case, *not a medical malpractice case, nor is it a defamation case, nor is it a fraud case, nor is it a case based on novel legal concepts*. Therefore, in this case, the normal “**notice**” pleading standard applies. As set forth in the treatise Michigan Court Rules Practice, Dean & Longhofer, §2111.3:

“While Michigan Practice might be called ‘fact pleading’ it is primarily concerned with the **notice** function.” (emphasis added).

Iron County v. Sundberg, Carlson & Associates, Inc., 222 Mich. App. 120 (1997) states, in pertinent part:

“Under Michigan’s rule of general fact-based pleadings, see MCR 2.111(B)(1), the only facts and circumstances that must be pleaded ‘with particularity’ are claims of ‘fraud or a mistake’. MCR 2.112(B)(1). In other situations, MCR 2.111(B)(1) provides that the allegations in a complaint must state ‘the facts, without repetition, on which the pleader relies’, and ‘the specific allegations necessary reasonably to inform the adverse party’ of the pleaders claims (citations omitted). **A complaint is sufficient under MCR 2.111(B)(1) as long as it ‘contains allegations that are specific enough reasonably to inform the defendant of the nature of the claim against which he must defend** (citations omitted). 222 Mich. App. at 124.” (emphasis added).

Additionally, the rationale behind the rule of “notice” pleading is that it prevents endless motions/litigation about how much specificity is enough. As Professor Soave explained in his treatise, Michigan Practice:

§5.4 The Body – Statement of Claim

“Reams of paper have been spent and whole volumes written on the proper way to state a cause of action. The difficulties in this area are the result of several factors. Among these are that it is impossible to put a verbal handle on the degree of specificity required in a complaint other than in terms of abstractions which are themselves subject to varying interpretation.” (Ex. 2, p. 114).

¹⁷ *Kewin v. MMLI Co.*, 79 Mich. App. 639, 656 (1977), reversed in part 409 Mich. 401 (1980).

The bottom line of **modern** pleadings is that discovery is now the place to obtain factual details. As Professor Soave stated in his treatise, Michigan Practice –

“...The primary purpose for modern pleadings is to give notice of the nature of the claim. *The burden of narrowing the issues for trial is substantially shifted from the pleadings to the exploratory processes of discovery and to the pretrial conference.*

* * *

*The reason for the shift in emphasis is quite simply that forcing the pleadings to carry the full burden of screening cases and narrowing issues as well as providing notice to the defendant is **unworkable**.* Discovery is not available until after a case is underway and an instance that the parties narrow the issues before even they fully comprehend them is unfair. If the plaintiff is required to state detailed facts which he does not have and cannot obtain, a perfectly valid claim may be lost for merely technical reasons. Also, the requirement that the pleadings be narrowed at the outset has in the past results in locking the plaintiff’s case into a mold which he subsequently discovers does not fit. Neither situation is consistent with the overriding policy of deciding cases fairly, expeditiously and on their merits.

* * *

...It must be remembered that a motion for more definite statement is not a substitute for discovery. It is assumed that there will be very few instances where the pleadings give the parties all the information that they desire concerning their opponent’s case. The proper course of action is to initiate discovery rather than challenge the pleadings.”
(Ex. 2, §5.4, pp. 114, 116-117; emphasis added).

Thus, another reason for this Court to accept leave is to prevent the Court of Appeals majority’s opinion being used in the future as a weapon against valid WPA claims by its improper imposition of a heightened pleading standard.

Importantly, the Defendant never raised the issue of whether Plaintiff sufficiently pled a “Type II” WPA claim at the Circuit Court level in a Motion for More Definite Statement, a Motion for Summary Disposition, or on appeal. Why the Court of Appeals majority would address it as if it had been an issue raised at the Circuit Court level or in briefing to the Court of Appeals is a mystery. In any event, by not raising it at the Circuit Court level or on

Appeal, Defendant waived any argument concerning the “Type II” WPA claim. See *Welniak v. Alcantara*, 100 Mich. App. 714, 717-718 (1980). In fact, Defendant’s Motion for More Definite Statement (and subsequent MSD) only concerned the issue of whether Plaintiff pled an “adverse employment action” concerning the WPA claim while relying on the ELCRA case of *Pena, supra*. Moreover, the issue of whether Plaintiff pled a “Type II” WPA claim was never raised by the Defendant on Appeal either! For these reasons, it was never briefed by either side. And, again, please remember that Michigan is a “notice” pleading State. *Iron County v. Sunberg, et al.*, 222 Mich. App. 120, 124 (1997); *Goins v. Ford Motor Company*, 131 Mich. App. 185, 195 (1983). For this reason, the *factual details* concerning Plaintiff’s allegations of a “Type II” WPA violation are for discovery and not the pleadings. (Ex. 2, Soave, Michigan Practice, §5.4).

Moreover, because this is still a pending case, had the issue been raised by Defendant regarding Plaintiff’s “Type II” cause of action as pled, Plaintiff would also have the “right” to amend. “The allowance of an amendment is not an act of grace, but a right...” *Fyke, supra.*, at p. 659.

Thus, the Court of Appeals 2-1 majority opinion striking Plaintiff’s “Type II” cause of action as a matter of law is “materially unjust” (MCR 7.305) and contrary to the Michigan Court Rules, published Supreme Court and Court of Appeals’ precedent and it is therefore another good reason for this Court to accept this Application.

a. The Court of Appeals Opinion regarding WPA protected activity is also materially unjust and involved judicial legislation by effectively taking the word “suspected” out of MCLA 15.362

Instead of following the Supreme Court’s directive, the Court of Appeals majority *also* went way beyond the directive to limit its review of Plaintiff’s pleadings and the issues

actually briefed on Appeal by finding that Plaintiff did not plead any WPA “protected activity”. (Ex. 8, COA Majority Opinion, pp. 5-7). Again, this was never raised by the Defendant at the Circuit Court level as Defendant’s basis for its Motion for More Definite Statement and Motion for Summary Disposition was the issue of whether Plaintiff pled an “adverse employment action” under the WPA. Thus, again, Defendant waived it. *Welniak, supra*. Again, for this reason, the issue was never briefed on Appeal by either party. Had the issue of what law Plaintiff “suspected” (MCLA 15.362) of being violated been raised, and had Plaintiff been allowed to answer Interrogatories or brief this subject, Plaintiff would have pointed the Defendant, the Circuit Court, and the Court of Appeals majority to the Supreme Court’s Order in *Debano-Griffin v. Lake County*, 486 Mich. 938 (2010) citing MCLA 750.490 and MCLA 141.439 as laws that Plaintiff Kevin Smith **suspected** were being violated in the case at hand. And, again, Plaintiff has the “right” to amend the pleadings per MCR 2.118 and *Fyke, supra* – a right arbitrarily and capriciously taken away by the Court of Appeals without the issue being raised at the Circuit Court level or in the Appellate Briefs! For this reason alone, the Court of Appeals’ decision is “materially unjust” (MCR 7.305) and this is yet another good reason to accept this Application.

Finally, another disturbing aspect of the opinion of the Court of Appeals majority is that they *judicially legislated* the word “suspected” out of MCLA 15.362. While the Court of Appeals majority gave it lip service, the opinion at p. 6 goes on to reframe Plaintiff’s reports as merely criticisms of Defendant’s policy decisions – without ever giving Plaintiff the opportunity to point out the laws Plaintiff *suspected* were being violated, MCLA 750.490 and MCLA 141.439. See *Debano-Griffin, supra*, 486 Mich. 938 (2010). And, remember, this issue was NEVER raised by Defendant at the Circuit Court level and therefore was never

briefed by either party to the Court of Appeals. And, as indicated, by doing this the Court of Appeals majority opinion therefore effectively took the word “suspected” out of MCLA 15.362, an act of prohibited judicial legislation. *Sun Valley Foods Co. v. Ward*, 460 Mich. 230, 236 (1999). Thus, the Court of Appeals decision was “materially unjust” for this reason also, and further, was improper as it judicially legislates by pretending the word “suspected” is not contained in MCLA 15.362. MCR 7.305; *Whitman, supra*. This is yet another good reason for this Court to accept this Application.

3. What About Meyer v. City of Centerline, 242 Mich. App. 560 (2000)?

Another reason for accepting this application concerns the case of *Meyer, supra*. This issue was briefed at the Circuit Court level and to the Court of Appeals in the case at hand. The Court of Appeals majority ignored it completely.

Even if ELCRA cases are to be applied to WPA cases, why did the Circuit Court in this case ignore *Meyer, supra*? Unlike *Pena, supra*, whose foundation was the 2002 *White v. Burlington, supra*, case that was overturned by an *en banc* panel of the Sixth Circuit and the *en banc* panel’s decision was affirmed by the United States Supreme Court, the *Meyer, supra* case was not based on a Federal case that has been overturned. And the *Meyer, supra*, case held that retaliatory harassment by a supervisor, or a supervisor’s decision not to take action to stop harassment by co-workers, constitutes an adverse employment action. *Id.* at pp. 569-572.

Since the actions as pled (Ex. 3, Third Amended Complaint, ¶s 23-70) could easily constitute “retaliatory harassment by a supervisor” or a “supervisor’s decision not to take action to stop harassment by co-workers”, if the Circuit Court and the Court of Appeals is to apply ELCRA cases to a WPA case, this aspect of the *Meyer, supra* case should have been

applied. This is yet another reason that the Circuit Court committed reversible error in this case, and further, another valid reason for this Court to accept this Application.

CONCLUSION

The issues in this Application are important to the jurisprudence of Michigan and to society. MCR 7.305(B)(2)(3)(4) and (5). The area of law concerning what constitutes an “adverse employment action” under MCLA 15.362 of the WPA and MCLA 37.2202(1)(a) of the ELCRA is in disarray. In the recent case of *Wurtz v. Beecher Metropolitan District*, 495 Mich. 242 n. 14 (2014), this Supreme Court took the first step towards clarifying the wide spread confusion at all levels of the Michigan Courts by pointing out that the language of the respective statutes is not the same. The main issue in the case at hand will add to what *Wurtz* started by *specifically addressing* how to interpret the WPA’s statutory language, “An employer shall not...otherwise discriminate against an employee regarding the employee’s compensation, terms, conditions, location or privileges of employment.” MCLA 15.362. This issue is so obviously important that this Supreme Court directed the Court of Appeals panel in the case at hand to address it. (Ex. 1). Predictably, the Court of Appeals decision was split which, in and of itself, is yet another example of the disarray in the lower courts that supports the need for Supreme Court involvement. So, should Michigan continue to use the “ultimate employment action”/“similar, materially adverse action” standard set forth in *Pena, supra*, even though the Court of Appeals panel in *Pena* relied on a Federal case that was subsequently overturned? Should Michigan rely solely on the text of MCLA 15.362? Or should Michigan, if need be, follow the lead of the United States Supreme Court and most States and utilize the “chill test” as set forth in *Burlington & Northern Santa Fe Railway v.*

White, 548 U.S. 53, 68 (2006)? Only the Michigan Supreme Court can answer those questions and this case is the appropriate one to make this much needed clarification happen.

There are additional important issues in this case, too. Is Michigan going to depart from clearly established law and impose a heightened pleading standard on remedial statutes such as the WPA and the ELCRA? Is Michigan going to tolerate judicial legislation by the Court of Appeals concerning MCLA 15.362? Does the “retaliatory harassment” cause of action set forth in *Meyer v. City of Centerline*, 242 Mich. App. 560 (2000) apply to a WPA claim? And, as for Plaintiff, Police Officer Kevin Smith, and other law enforcement officers who have the courage to blow the whistle, does the State of Michigan really want them to be afraid to report what they suspect is illegal activity concerning millions of dollars for fear of being solely and exclusively assigned to the most dangerous location night after night in one of the most dangerous cities in the world?

For all of the above reasons, Plaintiff Kevin Smith, by and through his Attorney, Tom R. Pabst, respectfully request that this Supreme Court accept this Application for Leave to Appeal.

Respectfully submitted,

12/16/15
Date

/s/TOM R. PABST
TOM R. PABST (P27872)
Attorney for Plaintiff