

STATE OF MICHIGAN
IN THE SUPREME COURT

KEVIN SMITH,

Plaintiff/Appellant,

v.

CITY OF FLINT,

Defendant/Appellee.

Supreme Court No: 152844

Court of Appeals Case No. 320437

Lower Court Case No. 13-100532-CA

TOM R. PABST (P27872)
Representing Plaintiff/Appellant
2503 S. Linden Road
Flint, MI 48532
(810) 732-6792

WILLIAM KIM (P76411)
Representing Defendant/Appellee
1101 S. Saginaw Street
Flint, MI 48502
(810) 766-7146

PLAINTIFF/APPELLANT KEVIN SMITH'S
SUPPLEMENTAL BRIEF

TABLE OF CONTENTS

INDEX OF AUTHORITIES iii

BASIS OF JURISDICTION..... vi

STATEMENT OF ISSUES PRESENTED..... vii

 I. STATEMENT OF FACTS 1

 II. LEGAL ARGUMENT 2

 A. THE JURISPRUDENCE OF MICHIGAN WILL BE BETTER SERVED
 BY A SUPREME COURT OPINION RATHER THAN BY OTHER ACTION 2

 1. MODERN GENESIS OF TEXTUALISM..... 3

 2. TEACHING MODERN JUDGES HOW TO FOLLOW THIS COURT’S
 CARDINAL RULE OF STATUTORY CONSTRUCTION, TEXTUALISM,
 THAT ENSURES JUSTICE UNDER THE LAW, MAKES THIS CASE
 WORTHY OF A SUPREME COURT OPINION 6

 3. HOW TO APPLY FAITHFUL TEXTUALISM TO THE ISSUES IN
 THIS CASE 10

 a. ISSUE #1: WHETHER THE COURT OF APPEALS’ ERRED IN
 APPLYING *PEÑA, SUPRA*, A MICHIGAN CIVIL RIGHTS ACT
 CASE, TO THE PLAINTIFF’S CLAIM UNDER MCLA 15.361 10

 1) “LOCATION” 14

 2) “...TERMS...OR PRIVILEGES OF EMPLOYMENT” 16

 b. ISSUE #2: WHETHER THE PLAINTIFF ALLEGED SUFFICIENT
 FACTS TO ESTABLISH THAT HE SUFFERED AN ADVERSE
 EMPLOYMENT ACTION UNDER THE WPA, MCLA 15.362 17

 1) THE APPLICABLE STANDARD OF REVIEW FOR AN
 MCR 2.116(C)(8) MOTION..... 17

 2) SMITH’S COMPLAINT “ALLEGED SUFFICIENT FACTS
 TO ESTABLISH THAT HE SUFFERED AN ADVERSE
 EMPLOYMENT ACTION UNDER THE WPA” 18

- c. ISSUE #3: WHETHER THE PLAINTIFF ALLEGED SUFFICIENT FACTS TO ESTABLISH THAT HE ENGAGED IN PROTECTED ACTIVITY UNDER THE WPA, MCLA 15.36221
 - 1) THE APPLICABLE STANDARD OF REVIEW FOR AN MCLA 15.362(C)(8) MOTION21
 - 2) SMITH’S COMPLAINT “ALLEGED SUFFICIENT FACTS TO ESTABLISH THAT HE ENGAGED IN PROTECTED ACTIVITY UNDER THE WPA, MCLA 15.362”21
- III. CONCLUSION.....24

INDEX OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Ben P. Fyke & Sons, Inc. v. Gunter</i> , 390 Mich. 649 (1973)	18, 20, 21, 24
<i>Brown v. City of Detroit</i> , 478 Mich. 589 (2007).....	7
<i>Burlington Industries, Inc. v. Ellerth</i> , 524 U.S. 742 (1998)	16
<i>Burlington Northern & Santa Fe Railway v. White</i> , 548 U.S. 53 (2006)	7
<i>Empire Mining Partnership v. Orhanen</i> , 455 Mich. 410 (1997).....	7
<i>Faragher v. City of Boca Raton</i> , 524 U.S. 775 (1998)	16
<i>Debano-Griffin v. Lake County</i> , 486 Mich. 938 (2010)	23
<i>Iron County v. Sundberg, et al.</i> , 222 Mich. App. 120 (1997).....	23
<i>Halloran v. Bhan</i> , 470 Mich. 572 (2004).....	8
<i>Kirkaldy v. Rim</i> , 266 Mich. App. 626 (2005)	8
<i>Koons Buick Pontiac GMC v. Nigh</i> , 543 U.S. 50 (2004)	5
<i>Maiden v. Rozwood</i> , 461 Mich. 109 (1999).....	18, 21, 23
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803).....	2, 3, 5, 6, 8, 10-11, 13, 15, 24-25
<i>McNeil-Marks v. MidMichigan Medical Center-Gratiot</i> , Court of Appeals Case No. 326606	23
<i>Milavetz, et al v. U.S.</i> , 08-1119, slip opinion.....	5
<i>Neal v. Wilkes</i> , 470 Mich. 661 (2004)	6-8
<i>Neason v. GMC</i> , 409 F.2d 873 (2005)	16
<i>Oakland Hospital Corp. v. Michigan State Tax Commission</i> , 24 Mich. App. 138 (1970).....	7
<i>Omne Financial, Inc. v. Shacks, Inc.</i> , 460 Mich. 305 (1999)	7, 8
<i>Peña v. Ingham County Road Commission</i> , 255 Mich. App. 299 (2003).....	vii, 1, 6, 7, 10-13

People v. Davis, 468 Mich. 77 (2003)8

People v. Phillips, 469 Mich. 390 (2003)8

Pohutski v. City of Allen Park, 465 Mich. 675 (2002).....7, 8

Roberts v. MCGH, 466 Mich. 57 (2002)7

Spees v. James Marine, Inc., 617 F.3d 380 (6th Cir. 2010).....16

State Farm Fire & Cas. Co. v. Old Republic Ins. Co., 466 Mich. 142 (2002)8

Steelworkers v. Weber, 443 U.S. 193 (1979).....3, 4

Sun Valley Foods Co. v. Ward, 460 Mich. 230 (1999).....3, 24

Wymer v. Holmes, 429 Mich. 66 (1987)6

White v. Burlington Northern & Santa Fe Railway, 310 F.3d 443
(6th Cir. 2002).....7, 11

White v. Burlington Northern & Santa Fe Railway, 364 F.3d 789
(6th Cir. 2004).....7, 12

White v. Burlington Northern & Santa Fe Railway, 548 U.S. 53 (2006)7, 16

Whitman v. City of Burton, 493 Mich. 303 (2013)9

<u>Statutes/Court Rules/Other</u>	<u>Page(s)</u>
MCLA 15.361	i, 6, 10, 21, 23
MCLA 15.362	i, ii, vii, 1, 2, 6, 8-21, 23-26
MCLA 37.2202	11-13
MCLA 141.439	23
MCLA 750.490	23
MCR 2.116.....	17, 18
MCR 2.118.....	17, 20, 21, 24

MCR 7.305..... vi, 2

Michigan Practice17, 20, 21, 24

Law360, Dallas, Nov. 16, 2014, interview of Justice Scalia, by Jesse Davis.....2, 5

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). Additionally, this Supreme Court has authority to order oral argument and supplemental briefing pursuant to MCR 7.305(H)(1).

STATEMENT OF ISSUES PRESENTED

- I. Whether this Court should accept this Application or take other action?

Plaintiff/Appellant Smith answers: “Yes. This case is the perfect opportunity for this Court to issue an Opinion which not only clarifies Michigan law but will also provide a blueprint for the future practical application of textualism to the clear and unambiguous language of MCLA 15.362.”

- II. Whether the Court of Appeals erred in applying *Peña v. Ingham County Road Commission*, 255 Mich. App. 299 (2003), a Michigan Civil Rights Act case, to Plaintiff’s claim under the Whistleblower Protection Act?

Plaintiff/Appellant Smith answers: “Yes”.

- III. Whether the Plaintiff alleged sufficient facts to establish that he suffered an adverse employment action under the Whistleblower Protection Act, MCLA 15.362?

Plaintiff/Appellant Smith answers: “Yes”.

- IV. Whether the Plaintiff alleged sufficient facts to establish that he engaged in protected activity under the Whistleblower Protection Act, MCLA 15.362?

Plaintiff/Appellant Smith answers: “Yes”.

I. STATEMENT OF FACTS

Plaintiff, Police Officer and Police Union President, Kevin Smith (hereinafter “Smith”), filed this Michigan Whistleblower Protection Act (hereinafter “WPA”) case on 5/31/13. Smith specifically, factually pled that he was retaliated against for engaging in protected activity under the WPA. (Ex. 3, Third Amended Complaint, esp. ¶¶18, 47-49). Smith specifically, factually pled that the retaliation took the form of (a) being singled out as the only Police Officer assigned to exclusively patrol the extremely dangerous north end of Flint at night and, (b) a shift change that sabotaged his ability to carry out his duties as Union President. (Ex. 3, Third Amended Complaint, esp. ¶¶49, 23-31).

The Circuit Court, relying on the Michigan Elliott-Larsen Civil Rights Act (hereinafter “ELCRA”) case of *Peña v. Ingham County Road Commission*, 255 Mich. App. 299 (2003) (cited by Defendant) – not the WPA – found that Smith did not set forth a sufficient adverse employment action occurring within the ninety (90) day statute of limitations and dismissed his WPA claim.

Thereafter, Smith filed an Application for Leave to the Court of Appeals, which was denied. Smith then filed an Application for Leave to this Court, which ordered the Court of Appeals to accept the Application, “as on leave granted”, stating, in pertinent part –

“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, Order dated 12/10/14).

The Court of Appeals, in a 2-1 “for publication” decision, held, *inter alia*, that Smith did not state such a claim under MCLA 15.362, and also held that *Peña, supra*, “continues to apply...”. (Ex. 8, COA Majority Opinion at pp. 4-5).

Smith then filed an Application for Leave to this Court, which entered an Order stating –

“On order of the Court, the application for leave to appeal the November 5, 2015 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). The parties shall file supplemental briefs within 42 days of the ate of this order addressing whether: (1) the Court of Appeals erred in applying *Peña v. Ingham County Road 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.*; (2) the plaintiff alleged sufficient facts to establish that he suffered an adverse employment action under the WPA, see MCL 15.362; and (3) the plaintiff alleged sufficient facts to establish that he engaged in a protected activity under the WPA, see MCL 15.362. The parties should not submit mere restatements of their application papers.” (Supreme Court Order dated 6/10/16).

II. LEGAL ARGUMENT

A. THE JURISPRUDENCE OF MICHIGAN WILL BE BETTER SERVED BY A SUPREME COURT OPINION RATHER THAN BY OTHER ACTION

There is only one thing that will provide a remedy to the inconsistent Circuit Court and Court of Appeals’ decisions surrounding MCLA 15.362 – textualism. This case is a wonderful opportunity for this Court to issue an Opinion which not only clarifies Michigan law but will also provide a blueprint for the future *practical* application of textualism to interpret a clear and unambiguous statute – in this case MCLA 15.362. As United States Supreme Court Justice Scalia said, “some judges aren’t faithful textualists because they don’t know how (to be)”.¹ We are therefore asking this Court to accept this case and, just like the United States Supreme Court did in *Marbury, infra*, issue a Michigan Supreme Court Opinion which shows modern day Judges (and all of us for that matter) “how”.

¹ Law360, Dallas, Nov. 16, 2014, interview of Justice Scalia, by Jesse Davis.

1. MODERN GENESIS OF TEXTUALISM

Textualism is a statutory rule of construction requiring Judges to look to the words and text of the Statute itself, first and foremost, to determine the law's intent and applicability. If the law is clear and unambiguous, it is to be applied as written to the facts of the case and no further interpretation or analysis is necessary or proper. *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); *Sun Valley Foods Co. v. Ward*, 460 Mich. 230, 236 (1999) ("If the language of the statute is unambiguous, the legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted.").

The modern day judicial renaissance of "textualism" can be found in the dissenting opinion of United States Supreme Court Justice Rehnquist in *Steelworkers v. Weber*, 443 U.S. 193 (1979). There, Justice Rehnquist criticized liberal and activist judicial interpretations of Title VII of the Civil Rights Act of 1964 as "Orwellian", especially when the result was to "switch" the meaning of the Statute by "judicial legislation" via reading some words into and some words out of the actual text, in that particular case, Title VII. He aptly compared liberal and activist Judges who refused to be bound by the text of the Statute, as mandated by *Marbury, supra*, as modern day judicial "Houdini's", or "escape artists".

In Justice Rehnquist's eloquent words, here is what he thought of judicial legislation and Justices who felt licensed to disregard the actual text of statutes, such as Title VII, like Houdinis breaking free of a straight jacket –

"As if this were not enough to make a reasonable observer question this Court's adherence to the oft-stated principle that our duty is to **construe** rather than **rewrite** legislation, *United States v. Rutherford*, 442 U.S. 544, 555 (1979), the

Court also seizes upon 703 (j) of Title VII as an independent, or at least partially independent, basis for its holding. Totally ignoring **the wording** of that section, which is obviously addressed to those charged with the responsibility of interpreting [443 U.S. 193, 222] the law rather than those who are subject to its proscriptions, and totally ignoring the months of legislative debates preceding the section's introduction and passage, which demonstrate clearly that it was enacted to prevent precisely what occurred in this case, the Court infers from 703 (j) that 'Congress chose not to forbid all voluntary race-conscious affirmative action.' *Ante*, at 206.

Thus, by a tour de force reminiscent **not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini**, the Court **eludes** clear statutory language, 'uncontradicted' legislative history, and uniform precedent in concluding that employers are, after all, permitted to consider race in making employment decisions. It may be that one or more of the principal sponsors of Title VII would have preferred to see a provision allowing preferential treatment of minorities written into the bill. Such a provision, however, would have to have been expressly or impliedly excepted from Title VII's **explicit prohibition** on all racial discrimination in employment. There is no such exception in the Act." *Steelworkers, supra*, at p. 222. (emphasis added).

The great U.S. Supreme Court Justice, Antonin Scalia, agreed with Justice Rehnquist's statements, set forth hereinabove. As we know, Justice Scalia was probably the best modern day example of a "textualist" Justice of the Supreme Court. He famously said –

"...judges don't have the power to interpret those statutes to avoid an undesired outcome..."

* * *

"It's arrogant for judges to substitute their own opinions of what the best outcome of a case should be in lieu of the literal meaning of statutes that have been democratically determined."

* * *

"You show me a judge who is happy with every decision he renders, and I will show you a bad judge... You think every law Congress enacted is a good law? Come on. And it's your job to apply that law that Congress wanted.

You're not supposed to sit in judgment of its wisdom. Or stupidity." (Law360, Dallas, Nov. 16, 2014, interview of Justice Scalia, by Jesse Davis).

Concerning the substitution of "legislative history" in place of a clear and unambiguous statutory text, Justice Scalia was even more outspoken and compared it to "ventriloquism" –

"I have often criticized the Court's use of legislative history because it lends itself to a kind of *ventriloquism*. The Congressional Record or committee reports are used to make words appear to come from Congress's mouth which were spoken or written by others (individual Members of Congress, congressional aides, or even enterprising lobbyists)."²

"Our cases have said that legislative history is irrelevant when the statutory text is clear. The footnote advises conscientious attorneys that this is not true, and that they must spend time and their clients' treasure combing the annals of legislative history in all cases: **To buttress their case where the statutory text is unambiguously in their favor; and to attack an unambiguous text that is against them.** If legislative history is relevant to confirm that a clear text meant what it says, it is presumably relevant to show that an apparently clear text does not mean what it seems to say."³ (Emphasis added).

The essence of Justice Renquist and Justice Scalia's colorful comparisons to Houdini and ventriloquism goes back, of course, to *Marbury, supra*. After all, the textualist principle ("to say what the law is") set forth in *Marbury* was a mandate, not a suggestion, to the judiciary. Without this mandate, there cannot be a real separation of powers. And, importantly, if there is going to be a principled approach to ensure consistency and justice in modern times, we must *still* follow *Marbury's* mandate.

² *Koons Buick Pontiac GMC v. Nigh*, 543 U.S. 50, 72 (2004).

³ *Milavetz, et al v. U.S.*, 08-1119, slip opinion, p. 14.

As will be demonstrated, this departure from *Marbury's* mandate is precisely what the Court of Appeals did in *Peña, supra*, and what the Court of Appeals' 2-1 majority did in the case at hand. Again, this is why a Michigan Supreme Court **Opinion** is needed which teaches modern day Judges and lawyers "how".

**2. TEACHING MODERN JUDGES HOW TO FOLLOW THIS COURT'S CARDINAL
RULE OF STATUTORY CONSTRUCTION, TEXTUALISM, THAT
ENSURES JUSTICE UNDER THE LAW, MAKES THIS
CASE WORTHY OF A SUPREME COURT OPINION**

At issue in this case is the interpretation of Michigan's Whistleblower Protection Act ("WPA"), being MCLA 15.361, *et. seq.*, including specifically MCLA 15.362. How has this very Court interpreted Statutes to ensure justice under the law? One has to look no further than this Court's own decision in *Neal v. Wilkes*, 470 Mich. 661 (2004) to see that this Court adheres to the mandate in *Marbury, supra*, for Judges to "say what the law is." There, a young woman passenger on an ATV was injured when the operator drove across the mowed backyard lawn of a residential homeowner, and plaintiff was thrown off the ATV. She then filed a lawsuit against the homeowner and the homeowner raised the Recreational Use Act (hereinafter "RUA") as a defense, whereupon the trial court granted defendant's motion for summary disposition. However, the Michigan Court of Appeals, relying on this Court's 1987 decision in *Wymer v. Holmes*, 429 Mich. 66 (1987), reversed the trial court's grant of summary disposition to defendant, and ruled that the recreational use statute had been construed to only apply to large tracks of undeveloped land, not urban/residential land such as involved in the *Wymer* case.

Justice Markman, writing for this Court, reversed the *Wymer* decision and reasoned as follows:

“Defendant contends that our decision in *Wymer* should be overruled because it is inconsistent with the plain language of the RUA. We agree. ‘[O]ur primary task in construing a statute, is to discern and give effect to the intent of the Legislature.’ *Sun Valley Foods Co. v. Ward*, 460 Mich. 230, 236, 596 NW2d 119 (1999). **‘The words of a statute provide ‘the most reliable evidence of its intent’** *Id.*, quoting *United States v. Turkette*, 452 U.S. 576, 593, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). Although the *Wymer* Court noted that its task was to ascertain the legislative intent, it failed to recognize that **the language of the statute is the best source for determining legislative intent.** Instead, *Wymer* found it ‘reasonable to assume that the Michigan statute has the similar general purpose **of similar acts** in other jurisdictions....’ [5] *Wymer*, *supra* at 77, 412 NW2d 213. That purpose being to ‘open[] up and mak[e] available vast areas of vacant but private lands to the use of the general public’ in order to ‘promot[e] tourism.’ *Id.* at 78, 412 NW2d 213, quoting *Thomas v. Consumers Power Co.*, 58 Mich.App. 486, 495-496, 228 NW2d 786 (1975). **If that were the Legislature’s purpose, it could have used the words ‘vacant or undeveloped land of another,’ rather than the words ‘the lands of another.’**⁴

* * *

Because this construction is, as the Court of Appeals itself recognized, not supported by the statutory language, we are compelled to abandon this construction and overrule *Wymer*.⁵
See *Neal*, *supra*, at pp. 665-667; emphasis added.

This Court in *Neal* further elaborated on choices the RUA statutory language could have made, but did not:

⁴ The above words by Justice Markman concerning the Recreational Use Statute, echo those applied by the Sixth Circuit’s 2004 *en banc* panel’s decision which effectively overruled *White v. Burlington Northern & Santa Fe Railway*, 310 F.3d 443 (6th Cir. 2002) – the 2002 decision being the one relied on by the Michigan Court of Appeals in *Peña*, *supra* – that if Congress had intended to require an “ultimate employment decision”, Congress would have used that qualifying language. *White v. Burlington Northern & Santa Fe Railway*, 364 F.3d 789 (6th Cir. 2004) *en banc*, *aff’d*, *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53 (2006).

⁵ The Michigan Supreme Court has consistently applied the same cardinal rule of statutory construction as set forth in *Neal*, *supra*; to wit: *Brown v. City of Detroit*, 478 Mich. 589 (2007) (Justice Cavanagh opinion at p. 593); *Pohutski v. City of Allen Park*, 465 Mich. 675 (2002) (Justice Corrigan at pp. 682-684). Stated another way, the worst place to look for legislative intent when a statute is unambiguous is legislative history. See generally, *Oakland Hospital Corp. v. Michigan State Tax Commission*, 24 Mich. App. 138 (1970). See also *Empire Mining Partnership v. Orhanen*, 455 Mich. 410, 421 (1997) (“Provisions not included in the statute by the legislature should not be included by the courts.”); *accord: Roberts v. MCGH*, 466 Mich. 57 (2002) (Justice Young Opinion at p. 63); *Omne Financial, Inc. v. Shacks, Inc.*, 460 Mich. 305 (1999) (Justice Kelly Opinion at pp. 310-311).

“The RUA makes no distinction between large tracts of land and small tracts of land, undeveloped land and developed land, vacant land and occupied land, land suitable for outdoor recreational uses and land not suitable for outdoor recreational uses, urban or suburban land and rural land, or subdivided land and unsubdivided land. **To introduce such distinctions into the act is to engage in what is essentially legislative decision-making.**”

Neal, supra, at p. 667; emphasis added.

There it is! There is the crucial watershed of statutory construction between (1) what IS⁶, that is, what the language of the statute itself says versus (2) judicial public policy making, that is, what each trial court judge and Court of Appeals panel thinks the language of the statute OUGHT to say. As Michigan Courts have correctly observed, this Supreme Court has reiterated clearly and often that the courts of this state may read nothing into an unambiguous statute. See, e.g., *Halloran v. Bhan*, 470 Mich. 572, 577 (2004); *Neal, supra*, at p. 670, n 13 (“Plaintiff . . . is adding words to the act that simply are not there.”); *People v. Phillips*, 469 Mich. 390, 395 (2003); *People v. Davis*, 468 Mich. 77, 79 (2003); *State Farm Fire & Cas. Co. v. Old Republic Ins. Co.*, 466 Mich. 142, 146 (2002) (“Because the proper role of the judiciary is to interpret and not to write the law, courts do not have authority to venture beyond the unambiguous text of a statute.”); *Pohutski, supra*, at p. 683 (an unambiguous statute must be enforced as written); *Omne Financial, Inc., supra*, at pp. 311-312 (courts may not speculate regarding legislative intent beyond the plain meaning of a statute). See also *Kirkaldy v. Rim*, 266 Mich. App. 626 (2005). *And yet, it keeps happening in the Circuit Courts and with Court of Appeals Panels in Michigan, especially regarding MCLA 15.362 of the WPA.*

⁶ *Marbury, supra*, at p. 177 (“It is emphatically the province and duty of the judicial department to say what the law IS.”) (emphasis added).

I, Tom R. Pabst, am very proud to say that I helped change the Whistleblower Protection Act law of Michigan by bringing the case of *Whitman v. City of Burton*, 493 Mich. 303 (2013), before this Michigan Supreme Court. This very Michigan Supreme Court ruled in our favor on the most important issue, a textualist interpretation of MCLA 15.362, and stated the law of Michigan to be as follows –

“Defendants argue that in order to assert an actionable claim under the WPA, an employee’s primary motivation for engaging in protected conduct must be ‘a desire to inform the public on matters of public concern.’ However, MCL 15.362 does not address an employee’s ‘primary motivation,’ nor does the statute’s plain language suggest or imply that *any* motivation must be proved as a prerequisite for bringing a claim. Further, the WPA does not suggest or imply, let alone mandate, that an employee’s protected conduct must be motivated by ‘a desire to inform the public on matters of public concern’ as a prerequisite for bringing a claim. Therefore, we hold that, with regard to the question whether an employee has engaged in conduct protected by the act, there is no ‘primary motivation’ or ‘desire to inform the public’ requirement contained within the WPA. **Because there is no statutory basis for imposing a motivation requirement, we will not judicially impose one. To do so would violate the fundamental rule of statutory construction that precludes judicial construction or interpretation where, as here, the statute is clear and unambiguous.**” *Whitman, supra* at p. 313.

So, let’s now apply “faithful textualism” to the case at hand to demonstrate why this case is worthy of a Supreme Court Opinion rather than just an Order vacating and reversing the Court of Appeals.

**3. HOW TO APPLY FAITHFUL TEXTUALISM
TO THE ISSUES IN THIS CASE**

**a. ISSUE #1: WHETHER THE COURT OF APPEALS' ERRED IN APPLYING
PEÑA, SUPRA, A MICHIGAN CIVIL RIGHTS ACT CASE, TO THE
PLAINTIFF'S CLAIM UNDER MCLA 15.361 ET SEQ**

In the case at hand, the Court of Appeals did not base its decision on the language of the applicable WPA section, MCLA 15.362, but on an ELCRA case, *Peña, supra*, which was interpreting MCLA 37.2202(1)(a) of the ELCRA –

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

Notably, in *Peña, supra*, the Court of Appeals ruled that an adverse employment action under the ELCRA must be in the form of an “ultimate employment decision” such as a discharge, or other similar, “*material*” adverse action. *Id.* at pp. 358-360. Using this judicially created standard from *Peña*, the Court of Appeals 2-1 majority in the case at hand determined that being singled out as the only Police Officer assigned to exclusively patrol the extremely dangerous north end of Flint at night, which was also a shift change that sabotaged his ability to carry out his duties as Union President, was not “material” enough and therefore “did not constitute an adverse employment action.” (Ex. 8, COA Majority Opinion, p. 5).

The holding in *Peña, supra*, and of the Court of Appeals’ Majority in the case at hand, is precisely the type of judicial activism Justice Renquist and Justice Scalia so eloquently warned against. Instead of turning to the clear and unambiguous language of MCLA 15.362, the Court of Appeals 2-1 majority departed from *Marbury, supra*, and used the ELCRA case of *Peña* to impose its own subjective belief about what type of retaliatory action *ought* to be required under the WPA.

We get it. We realize a Judge may believe with all his heart that escaping, as Justice Renquist put it, like “Houdini” from the *Marbury* textualist straight jacket will be better for society. But that’s not his/her role as a Judge.

So, let’s do what is supposed to be done, that is, let’s go directly to the clear and unambiguous language of MCLA 15.362 –

“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.” See MCLA 15.362; emphasis added.

The first thing one will notice is that the Court of Appeals’ words from *Peña*, “ultimate employment decision” or similar, “material” adverse action, are not in the Statute.⁷ The Court of Appeals approach in *Peña* is a perfect example of how a departure from the mandate in *Marbury*, *supra*, leads to judicial legislation. No matter how well intended, the Court of Appeals in *Peña* departed from the text of the Statute, in that case being MCLA 37.2202(1)(a). Consider the thoughtful, but totally anti-textualist approach used by the Court

⁷ The words “ultimate employment decision” and similar, “material” adverse action are not only NOT in MCLA 15.362 of the WPA, it is not in the applicable ELCRA section, MCLA 37.2202(1)(a), either. This is why the 2002 *White v. Burlington* case relied on by the Court of Appeals in *Peña* was overturned, and why *Peña* should no longer be followed in Michigan for both WPA and ELCRA cases.

of Appeals' Panel in *Peña*, to justify the departure from the plain and unambiguous language of the Statute –

“Although there is no exhaustive list of adverse employment actions, typically it takes the form of an **ultimate employment decision**, such as ‘**a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.**’ *White v. Burlington N & SF R Co.*, F.3d 443, 450 (C.A.6, 2002), citing *Kocsis, supra* at 886, *Crandy, supra* at 136, and *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 662 (C.A.6, 1999). See, also, *Hilt-Dyson v. Chicago*, 282 F.3d 456, 465-466 (C.A.7, 2002). **In determining the existence of an adverse employment action, courts must keep in mind the fact that ‘[w]ork places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer’s act or omission does not elevate [606 N.W.2d 359] that act or omission to the level of a materially adverse employment action.’** *Blackie v. Maine*, 75 F.3d 716, 725 (C.A.1, 1996).” (emphasis added).

In one paragraph, the Court of Appeals' panel in *Peña* inserted language nowhere to be found in MCLA 37.2202(1)(a), the words “ultimate employment decision” and the words taken from a now overturned 2002 Sixth Circuit decision⁸, and further, attempts to justify this judicial legislation by commanding that Courts, instead of looking to the statutory text, “*must*” keep in mind the fact that “work places are rarely idyllic retreats...”. Under the doctrine of true “faithful textualism”, *Peña* should not apply to ELCRA cases. To apply it to the WPA is even more of a magic act. Why? Because MCLA 15.362 of the WPA is *broader* than MCLA

⁸ It bears repeating that this language from the 2002 *White* decision was why the *en banc* panel of the Sixth Circuit effectively overruled it by the use of straight forward textualist reasoning: that if Congress had intended to require an “ultimate employment decision”, it would have used that qualifying language instead of “discriminate against” which literally means, “*any kind of adverse action.*” *White v. Burlington Northern & Sante Fe Railway.*, 364 F.3d 789, **801-802** (6th Cir. 2004) (*en banc*).

37.2202(1)(a) of the ELCRA. 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 pertinent portion of the WPA again:

“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...*” See 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 decision” such as a discharge, or similar “material” adverse action, etc? The simple answer is, it can’t. And surely, the retaliatory acts in the case at hand of singling out Officer Smith 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 a change of “location” and a change of his “privileges” of employment. Moreover, it is far worse than a mere “threat”.

Thus, the Court of Appeals reliance in the case at hand on the judicial legislation by the Court of Appeals’ panel in the ELCRA case of *Peña, supra*, is, unfortunately, another example of a probably well-meaning but improper departure from the mandate as set forth in *Marbury, supra*.

The text of MCLA 15.362 sets forth what the Michigan Legislature determined to be material and, after all, they are the ones who, metaphorically speaking, make the gate and decide how far open the gate will be to the public concerning “**location**” and “**terms** and...**privileges** of employment.” (emphasis added).

1) “LOCATION”

The Court of Appeals’ majority in the case at hand once again used a Houdini-esque approach to re-write MCLA 15.362 concerning the word, “location”; *to wit*:

“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 nature of ‘job duties’ that fall squarely within the discretion of a police department’s fundamental role in 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 from one 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).

By doing this, the Court of Appeals’ majority effectively inserted the following words into MCLA 15.362, after “location”, that are not in the Statute as written and enacted by the Legislature –

“An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee’s compensation, terms, conditions, location, *unless it’s a significant change of location, and further, this cannot mean a police officer in the same city where he is employed even if the department itself divides the city into separate districts...*”

Additionally, the Court of Appeals undoubtedly sincere but totally subjective interpretation of the term “location” was done without any pretense of objectivity or even turning to a dictionary definition. And, of course, the departure from the mandate of *Marbury* in this fashion plants the seed for future *Judges* to arbitrarily decide what does or does not amount to a “significant” change of location. Here are just two examples –

- A future Court of Appeals Judge could find a State Trooper who is reassigned from East Lansing to Copper Harbor in the Upper Peninsula doesn’t have a case because this is not a “significant” change of location – after all, it’s still “within the same State.”
- A future Court of Appeals Judge could use the Opinion to say that the humiliating move of a law partner from a pent house type office with a great view that he earned through 30 years of hard work and loyal service, to a dingy, dark basement office with no view, because he was a whistleblower, could not have a case because this does not amount to a “significant” change of “location” as a matter of law.

These are just two examples of the slippery slope caused by departing from *Marbury* and textualism, i.e., what constitutes a “significant change” (the words the Court of Appeals majority wants to add to “location” in MCLA 15.362) will undoubtedly vary from Judge to Judge. As a practical matter, some changes in location may be far worse than others giving the case more value. This would factor into the decision whether the case is even worth pursuing by a practicing attorney, but it’s not the judiciary’s role to depart from the clear and unambiguous language of MCLA 15.362 and decide which cases are substantial enough economically to make worth pursuing.

Notably, the Court of Appeals’ dissent in the case at hand, by sticking to the word “location” *as set forth in MCLA 15.362*, correctly stated –

“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, pp. 1-2; emphasis added).

The bottom line is that we are asking this Court to do what it needs to do, that is, to teach the Court of Appeals’ judges and trial court judges “how” to properly apply textualism to MCLA 15.362 by accepting leave and issuing an Opinion in the case at hand.

2) “...TERMS...OR PRIVILEGES OF EMPLOYMENT”

A “term” and/or “privilege” of Smith’s employment was to work first shift, 8:00 a.m. to 4:00 p.m., so that he could perform his duties as Union President. (Ex. 3, Third Amended Complaint, ¶¶31-33). It was customary at Defendant City for the Union President (not just Smith but all past Presidents) to work first shift. Defendants, by changing Smith’s hours, discriminated against him concerning a “term” and/or “privilege” of employment because this made him unable to perform his union duties.

Notably, the vast majority of Federal Courts now hold that “reassignments” and/or “work hour changes” are sufficient adverse employment actions. See, for example, *White v. Burlington Northern & Sante Fe Railway*, 548 U.S. 53, 68 (2006) (**a mere “schedule change” for a mother with young children was given as an example of an adverse employment action**); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Spees v. James Marine, Inc.*, 617 F.3d 380, 391-392 (6th Cir. 2010) (**transfer from day shift to night shift is an adverse employment action**); *Neason v. GMC*, 409 F.2d 873, 879 (2005) (the majority of Federal Circuits have rejected the “ultimate employment decision” standard).

Once again, according to the plain and unambiguous language of MCLA 15.362, Smith has properly pled and raised a question of fact that the reassignment and shift change, which precluded his ability to perform his duties as Union President, are adverse actions since it affects a “term” and/or “privilege” of his employment. Again, we ask this Supreme Court to accept this Application and issue an Opinion so it can articulate and teach the Court of Appeals and trial courts how to apply textualism to MCLA 15.362.

b. ISSUE #2: WHETHER THE PLAINTIFF ALLEGED SUFFICIENT FACTS TO ESTABLISH THAT HE SUFFERED AN ADVERSE EMPLOYMENT ACTION UNDER THE WPA, MCLA 15.362

1) THE APPLICABLE STANDARD OF REVIEW FOR AN MCR 2.116(C)(8) MOTION

The applicable standard of review for an MCR 2.116(C)(8) Motion is that, “(8) the opposing party has failed to state a claim on which relief can be granted.” As set forth in Professor Soave’s Treatise, Michigan Practice, “At the hearing on the motion, the relevant inquiry is whether, assuming all well-pleaded facts are true, the plaintiff’s claim is so clearly unenforceable as a matter of law that no factual development within the framework of the pleadings could justify a right to recovery. The pleaded facts as well as all conclusions that can fairly be drawn from them should be considered.” (Citations omitted).

Moreover, “the judge *must* give each party an opportunity to amend his pleadings in accordance with Rule 2.118 unless the evidence then before the court shows that amendment would not be justified. Michigan Court Rule 2.118 commands that amendments be freely granted. Accordingly, the plaintiff should ordinarily be given an opportunity to amend lest a valid cause of action be lost simply for failure to plead it properly. If the amendment cures the defect, the case should proceed in the usual fashion.” Soave, Michigan Practice, at esp.

pp. 134-135 (emphasis added); *Ben P. Fyke & Sons, Inc. v. Gunter*, 390 Mich. 649 (1973) (an amendment is not an act of grace, but a right).

As set forth in the case of *Maiden v. Rozwood*, 461 Mich. 109, 118 (1999), “A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings. [*Id.* at 119-120 (citations omitted).]

2) SMITH’S COMPLAINT “ALLEGED SUFFICIENT FACTS TO ESTABLISH THAT HE SUFFERED AN ADVERSE EMPLOYMENT ACTION UNDER THE WPA”

Smith’s Third Amended Complaint cited the actual text of MCLA 15.362 in ¶47 of said Complaint –

“(47) That we have an employee protection law in Michigan known as the “Whistleblowers’ Protection Act,” being MCLA §15.361, *et seq.*, which provides, in pertinent part, that –

‘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.” See MCLA §15.362.’” (Ex. 3, Third Amended Complaint, ¶47).

Smith’s Third Amended Complaint then factually tracked the text in the pleadings concerning how he was retaliated against by his employer in ways that are consistent with the text of MCLA 15.362 concerning especially the “terms”, “location” and “privileges” of his employment; *to wit*:

- “(23) That when Kevin Smith did go out on the road to patrol, the City of Flint, in particular Chief Lock and Captain Patterson, retaliated and discriminated against him in terms of both *shift assignments* and areas of *duty assignments*.
- (24) That specifically, Kevin Smith was talking with Lt. Tidwell about a metro car whereupon she said, ‘No, you’ve (Kevin) got to go out on the north end, because you (Kevin) can’t be assigned to the south end’.
- (25) That Kevin Smith asked Lt. Tidwell, ‘What do you mean I can’t work the south end’, which of course is a more safe area as opposed to the north end, *which is considered crime ridden and a much more dangerous area of assignment for police officers*.
- (26) That Lt. Tidwell responded saying, ‘I don’t know why, I just follow orders and that was the order I got from Capt. Patterson’.
- (27) That Kevin Smith thereupon, almost immediately, went to Capt. Patterson and asked him why he was prohibited from working the south end, only the north end, which is far more dangerous. Whereupon Capt. Patterson responded to him directly, ‘You (Kevin) can’t work the south end because the Chief said so’, referring to Chief Lock.
- (28) That Kevin Smith then almost immediately went to Chief Lock and asked why he couldn’t be assigned to the south end as opposed to the north end, whereupon the Chief said to Kevin, ‘I don’t’ know what he’s talking about. I never said anything like that to Capt. Patterson’.

- (29) That Kevin Smith thereafter went back to Capt. Patterson and asked if he could please tell Kevin why it is that *he was being assigned exclusively to the north end*, and never to the south end. Whereupon, Capt. Patterson responded to Kevin, ‘You’re being a smart ass, aren’t you?’ Patterson just said ‘Look, you’re not going to be assigned to the south end, and this was an order or instruction that was also communicated to me by Sgt. Bigelow who told me point blank that you could not get a metro car or a south end car *because you’re not supposed to be assigned to the south end, just the north end*’.
- (30) *That Kevin Smith, Plaintiff, knows the police officers who work for the City of Flint and he does not know of any patrol officer that is assigned to work the north end exclusively, or any other area for that matter. If there was one, he would know as the Union President. Additionally, Defendant City aborted this form of harassment only after Plaintiff’s counsel argued in this very Court that such assignments were harassment and/or adverse employment actions under clearly established civil rights law, an argument made in the presence of Defense Counsel. Upon information and belief, Defendants aborted this harassment/adverse employment action the same day and/or within a day or two of the oral argument.*
- (31) *That Kevin Smith, Plaintiff, is also being discriminated against in terms of shifts that he works. Because all union business needs to be conducted during daytime hours, and this is one of the rules of the City’s HR department that they insist upon, Kevin was nevertheless assigned to the night shift by Chief Lock. This was done deliberately so as to thwart my operating as President representing the City of Flint police officers.”*

Thus, the facts pled by Plaintiff precisely track and fit into the actual text of MCLA 15.362. For this reason alone, the Court of Appeals’ 2-1 majority decision must be reversed. If the Complaint is somehow deemed to be not specific enough factually, the proper remedy for this still pending case is not to throw the claim out but to allow an amendment. MCR 2.118; *Ben P. Fyke, supra*; Soave, Michigan Practice, *supra*.

**c. ISSUE #3: WHETHER THE PLAINTIFF ALLEGED SUFFICIENT FACTS
TO ESTABLISH THAT HE ENGAGED IN PROTECTED ACTIVITY
UNDER THE WPA, MCLA 15.362**

**1) THE APPLICABLE STANDARD OF REVIEW FOR
AN MCLA 15.362(C)(8) MOTION**

The applicable standard of review is the same as that set forth in the previous section.

Maiden, supra; Soave, *Michigan Practice, supra*; MCR 2.118; and *Ben P. Fyke, supra*.

**2) SMITH’S COMPLAINT “ALLEGED SUFFICIENT FACTS TO
ESTABLISH THAT HE ENGAGED IN PROTECTED
ACTIVITY UNDER THE WPA, MCLA 15.362”**

Smith’s Complaint cited the actual text of MCLA 15.362 which contains the Legislature’s clear and unambiguous language concerning what constitutes protected activity;

to wit –

“(47) That we have an employee protection law in Michigan known as the “Whistleblowers’ Protection Act,” being MCLA §15.361, *et seq.*, which provides, in pertinent part, that –

**‘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.” See MCLA §15.362.”
(Ex. 3, Third Amended Complaint, ¶47).

Smith's Complaint *factually* tracked the above text in his pleadings; *to wit* –

- (14) That it came to pass that the City was going to ask for a \$5.3 million millage from the residents so they could put more police officers on the street, which of course, was sorely needed.
- (15) *That in fact, the \$5.3 million millage did pass, which should have afforded the City the opportunity to hire 30-50 new police officers to put on the street and protect the citizens of the City of Flint. This would be at a rate of approximately \$32,000 per year.*
- (16) That Kevin Smith, Plaintiff, came to learn that the City of Flint was only going to hire 7-8 new officers with the \$5.3 million millage.
- (17) *That Kevin Smith spoke out against this and said that, in his judgment, that the \$5.3 million millage was not being used properly, or for what the citizens voted it to be used for, and he made his opinion known to the press, the public, to Captain Patterson and to Chief Lock. These matters were written up in the Flint Journal and widely disseminated to everybody.*
- (18) *That it was Kevin Smith's strong **suspicion**, and he voiced it to the public, the press, Chief Lock and Captain Patterson that a large portion of that \$5.3 million in millage monies **supposed to be used to hire new police officers** was in fact put in the general fund for use and payment of regular bills for the City of Flint, not police protection. Captain Patterson actually agreed with this statement.*
- (19) *That in fact, Kevin Smith told the current Emergency Financial Manager (“EFM”), Ed Kurtz, about his criticism for not hiring more police officers.*
- (20) *That additionally, Kevin Smith also filed a complaint with the Federal authorities, and made it known to City officials, that they were misusing impound lot monies that could have been used to put more police officers on the street and protect the citizens of the City of Flint.*

Please note that Defendant City's employees and/or the State of Michigan employees, “Chief Lock”, “Captain Patterson”, “Emergency Financial Manager Kurtz”, “Emergency

Financial Manager Brown”, “City officials”, and Defendants’ Attorney⁹ are all “public bodies”. MCLA 15.361(d), including esp. ¶iii. The “Federal authorities” (¶20 of the Third Amended Complaint) are also public bodies. MCLA 15.361(d)(v). So, too, Smith only has to report a “suspected” violation of law, not an actual violation pursuant to the text of the Statute. Here, he alleged that he reported what he believed to be just that, and even used the word “suspicion” in ¶18.

Another troubling aspect of the Court of Appeals’ majority Opinion is that they again, Houidi-like, judicially legislated the word “suspected” out of MCLA 15.362, and further, also attempt to impose a *heightened pleading standard* by asserting that the Plaintiff must set forth an actual law that was broken in the Complaint! (Ex. 8, COA Majority Opinion, p. 6). While the Court of Appeals’ majority gave MCLA 15.362 lip service, the Opinion itself at p. 6 goes on to reframe Plaintiff’s reports as merely criticisms of Defendants’ policy decisions – without ever giving Plaintiff or his Counsel the opportunity to point out the laws Plaintiff **suspected** were being violated, MCLA 750.490 and MCLA 141.439. See *DeBano Griffin v. Lake County*, 486 Mich. 938 (2010). Not only is the Court of Appeals reasoning contrary to the Michigan Supreme Court’s command in *Maiden, supra*, that, “all well-pleaded factual allegations are accepted as true *and construed in a light most favorable to the nonmovant*”, but it is also contrary to published case law that Michigan is essentially a notice pleading State. Specifically, Plaintiff only has to allege sufficient facts to put the Defendant on notice of the “nature” of the claims. *Iron County v. Sundberg, Carlson & Associates, Inc.*, 222 Mich. App. 120, 124 (1997).

⁹ Under the newly published Court of Appeals case of *McNeil-Marks v. MidMichigan Medical Center-Gratiot*, Court of Appeals Case No. 326606 “for publication”, issued 6/16/16, Defendants’ Attorney is also a “public body” under the WPA.

Moreover, 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. As indicated, by doing this, the Court of Appeals' majority Opinion effectively took the word "suspected" out of MCLA 15.362, an act of prohibited judicial legislation. *Sun Valley Foods Co., supra*. Further, the Court of Appeals' majority acted 100% contrary to MCR 2.118 and *Ben P. Fyke, supra*, which would require that Plaintiff be allowed to amend the Complaint to cure any (alleged) deficiencies.

The bottom line is that the facts pled by Plaintiff precisely track and fit into the text of MCLA 15.362 concerning protected activity. For this reason, the Court of Appeals' decision must be reversed. If the Complaint is deemed to be not specific enough factually, the proper remedy in this still pending case is not to throw the claim out but to allow an amendment. MCR 2.118; *Ben P. Fyke, supra*, Soave, Michigan Practice, *supra*.

Finally, the issue of whether Michigan now imposes a heightened pleading standard on WPA cases, and what factual specificity is required to comport with the text of MCLA 15.362 is also another reason that this Court should issue an Opinion, rather than an Order merely vacating the Court of Appeals "for publication" decision.

III. CONCLUSION

The jurisprudence of Michigan needs a Supreme Court Opinion in this case. The one thing that overcomes the almost irresistible temptation for Circuit Court and Court of Appeals' Judges to, even with the best of intentions, overstep their bounds by deciding cases on what they each think the law ought to be *is the faithful adherence to textualism*. This battle has been going on at least since the 1803 decision in *Marbury, supra*. The State of Michigan, more than ever, needs a modern, point-by-point Opinion which teaches "how" to

properly apply textualism to stop the epidemic of liberal and/or activist Judges doing, even with the best of intentions, whatever they want to MCLA 15.362. “Faithful textualism”, as Justice Scalia labels it, does not care about things like political ideology or whether one is or isn’t born into privilege. Instead, it is only concerned with what the law “is”. *Marbury, supra*.

The case at hand is therefore a perfect opportunity for this Supreme Court, with all of its talent and resources, to teach us, judges and lawyers alike, how faithful textualism is to be properly applied to a clear and unambiguous Statute such as MCLA 15.362. This Court can demonstrate in this case why “Houdini-esque” escapes from, and “ventriloquist” attacks on, a clear and unambiguous Statute, *no mater how well meaning*, do more harm than good by the chaos and inconsistency it causes. In other words, an **Opinion** by this Court in *this* case will provide the blueprint for the *practical* application of textualism, like an important illustration and example in a great law book.

How this case turns out is also important to not only Officer Smith but other law enforcement officers, especially in these volatile times between the police and the public. Does the State of Michigan really want the *good* Police Officers, like Plaintiff Kevin Smith, 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?

Only the Michigan Supreme Court can answer those questions and this case is the appropriate one to make this much needed clarification happen by an Opinion, as opposed to other action.

We therefore pray that this Court accept this very important case so that all of us lawyers and judges who care can know *how* to properly and consistently apply and argue textualism regarding Statutes, such as MCLA 15.362, *to accomplish what the Legislature intended.*

Respectfully submitted,

7/15/16
Date

/s/TOM R. PABST
TOM R. PABST (P27872)
Representing Plaintiff/Appellant
2503 S. Linden Road
Flint, Michigan 48532
(810) 732-6792
office@tomrpabstpc.com