STATE OF MICHIGAN
IN THE SUPREME COURT
(On Appeal from the Michigan Court of Appeals)
(Judges Borello, Meter and Stephens)

TARA HAMED,

Plaintiff-Appellee,

v

SC No. 139505
COA No. 278017
Wayne CC. No. 03-327525-NZ
Hon. Michael Sapala

WAYNE COUNTY, THE WAYNE COUNTY SHERIFF'S DEPARTMENT, THE WAYNE COUNTY SHERIFF, SERGEANT KENNETH DARWISH, and CORPORAL NETTIE JACKSON,

Defendants-Appellants.

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COUNTER-STATEMENT OF APPELLATE JURISDICTION

Plaintiff-Appellee Tara Hamed ("Ms. Hamed") agrees that the Statement of Appellate Jurisdiction set forth in the Defendants-Appellants' brief is correct.

COUNTER-STATEMENT OF THE QUESTIONS FOR REVIEW

I. MAY DEFENDANTS WAYNE COUNTY AND WAYNE COUNTY SHERIFF'S DEPARTMENT BE HELD LIABLE FOR *QUID PRO QUO* SEXUAL HARASSMENT UNDER MCL 37.2103(i)?

Plaintiff-Appellee Tara Hamed answers: "Yes"

Defendants-Appellants Wayne County and Wayne County's Sheriff's Department:	"No"
The Wayne Circuit Court answered:	"No"
The Court of Appeals answered:	"Yes"
This Court should answer:	"Yes"

II. IS THE PLAINTIFF'S INCARCERATION IN THE WAYNE COUNTY JAIL A PUBLIC SERVICE WITHIN THE MEANING OF MCL 37.2301(b)?

Plaintiff-Appellee Tara Hamed answers:	"Yes"
Defendants-Appellants Wayne County and Wayne County's Sheriff's Department:	"No"
The Wayne Circuit Court answered:	"Yes"
The Court of Appeals answered:	"Yes"
This Court should answer:	"Yes"

III. DID THE TRIAL COURT PROPERLY EXERCISE ITS DISCRETION BY PERMITTING THE PLAINTIFF TO AMEND HER COMPLAINT TO ALLEGE VIOLATIONS OF THE MICHIGAN CIVIL RIGHTS ACT?

Plaintiff-Appellee Tara Hamed answers:	"Yes"
Defendants-Appellants Wayne County and Wayne County's Sheriff's Department:	"No"
The Wayne Circuit Court answered:	"Yes"
The Court of Appeals answered:	"Yes"
This Court should answer:	"Yes"

COUNTER-STATEMENT OF FACTS

I. Background Facts

On August 31, 2001, Ms. Hamed, then twenty-nine years old, was arrested in Detroit and transferred to Livingston County on an outstanding bench warrant for child support arrearage.[1] (102a-103a; 148a). She was held in Livingston County Jail for eight days on that warrant until September 7, 2001 when she appeared in Livingston Circuit Court. (102a-103a; 165a-166a). Following a hearing in Livingston Circuit Court, the Honorable Stanley J. Latreille issued a Support Enforcement Order, imposing a conditional sentence that was to begin on September 14, 2001 if she did not either pay $1,500.00 to the court by September 14 for the child support arrearage or enter an inpatient treatment facility by that date. (65a-66a). In pertinent part, the Support Enforcement Order stated:

> [Ms. Hamed] to be released today & to check into [inpatient] treatment program by 9/14/01 at 5:00 p.m./ if not in program [Ms. Hamed] to report to jail on 9/14 at 5:00 to serve 45 days w/ $1,500 release payment.

Although Ms. Hamed was free to leave as it related to the Livingston County child support arrearage, she was nonetheless detained after the conclusion of the hearing in order to be transported to the Wayne County jail on an alleged probation violation in Wayne County for allegedly testing positive for marijuana. (103a; 147a-148a). At approximately 11:30 p.m. on September 7, 2001, Ms. Hamed was transported from Livingston County to the Wayne County Jail Division I by Wayne County Officers Aren Klein and Brian Chase. (67a; 89a-90a; 102a-103a; 148a; 167a).

Upon arriving at the Wayne County Jail around midnight, Deputies Klein and Chase took

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[1] The Court of Appeals mistakenly states that Ms. Hamed was arrested on September 7, 2001. (6a). The record shows that Ms. Hamed was detained in the Livingston County Jail from August 31, 2001 until September 7, 2001 and then in the Wayne County Jail from September 7, 2001 until September 12, 2001.

Ms. Hamed to the Male Registry for booking on the alleged probation violation. (67a; 1b-8b; 9b; 31b). Ms. Hamed was taken to the Male Registry section of the jail because the Female Registry was not open on weekends. (24b). She was placed in Cell #2 by Deputy Johnson, the only officer on duty in the Male Registry at the time. (91a; 102a-103a; 149a-151a; 16b; 26b). Upon entering the Male Registry, Officers Klein and Chase each noticed that the door to the Registry Command Office was open and the light was on, although the Male Registry area was dark and the lights were out. (69a; 13b-14b, 16b; 29b-31b).

At that point, Officer Chase "called Sergeant Darwish in the shift command and asked him if he was sending anyone down to the registry because [Chase] had a concern being that she was a female in the first place." (68a). Sergeant Darwish then asked: "Well, is Reginald Johnson down there?" When Chase said "yea," Sergeant Darwish said, "well, don't worry about it and that's all he said and he hung up." (29b). After notifying Sergeant Darwish of their concerns of leaving Ms. Hamed alone with Deputy Johnson, Officers Klein and Chase departed at about 1:00 a.m. on September 8, 2001. (68a, 71a; 14b-21b; 32b-36b).[2]

Deputy Johnson was solely entrusted with Ms. Hamed's safety, despite a personnel file that was replete with reprimands. (38b-72b).[3] In addition, it was also known that Deputy

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[2]None of the closed circuit television cameras worked within the Male Registry, and thus no duty officer could see into the Male Registry when the doors were closed, allowing Deputy Johnson to act freely without a possibility of intervention or observation. (78b). Further, Ms. Hamed was left alone with Deputy Johnson in the Male Registry in contravention of jail policy and the American Correctional Association's *Standards for Adult Local Detention Facilities*. (19b-20b; 84b-89b).

[3] According to Jail Administrator and Deputy Chief Dwayne Fordam, Deputy Johnson had 14 formal disciplines in his file, which was an inordinately high number for a jail staff member. (91b). Ms. Betty Boyd, the Personnel Director of the Wayne County Sheriff's Department, agreed that Deputy Johnson's record was "somewhat abysmal." (105b-106b). Among the documented incidents in Deputy Johnson's file were threatening to murder a landlady who started eviction proceedings against him, using excessive force against a detainee, physically assaulting an inmate, sleeping on duty and using a county vehicle without authorization and crashing the vehicle. (91b; 96b-98b, 100b-102b, 105b-106b).

Johnson acted "too freely" around female inmates. (107b).

To process Ms. Hamed for booking, Deputy Johnson pulled her out of Cell #2 and brought her outside the Registry Control Center, also known as "the Bubble," to answer his questions. (89a-90a; 102a-103a; 149a, 151a-152a; 9b; 110b). From inside the Registry Control Center, all the cells, except for a special segregation cell, could be independently closed and locked automatically without a key. (78b). In addition, the key to the Registry Command Office, which is secured on the midnight shift and during weekends, was kept in the Registry Control Center. (69a-70a; 13b-14b, 29b-31b; 112b).

While Ms. Hamed was standing outside the Registry Control Center, Corporal Gary Zarb came down from the Fourth Floor to get his time card from inside the office before leaving again. (73b-74b). When Corporal Zarb started smoking a cigarette, Ms. Hamed asked him for a cigarette but he refused. (74a; 91a-92a; 152a; 77b; 110b). It was against jail policy to give detainees cigarettes or to smoke in a non-smoking facility and a breach of security. (22b; 93b). Deputy Johnson then asked Corporal Zarb for some cigarettes and was given three. (74a; 89a-90a; 92a; 102a; 152a; 110b; 112b). After giving Deputy Johnson the cigarettes, Corporal Zarb left the Male Registry and did not return, leaving Deputy Johnson once again alone with Ms. Hamed. (92a; 77b; 110b).

Deputy Johnson then brought Ms. Hamed inside the Registry Control Center and sat her down next to his computer station in the back of the office while taking down her information. (74a; 103a; 153a). He gave her two cigarettes to smoke, inquired about her drug dependency and offered to "help" her after she got released. (74a; 89-90a; 93a; 102a; 153-154a; 110b). After giving her cigarettes and asking "What's a girl like you doing in here?," Deputy Johnson wrote his telephone number down and handed it to her and told her to get in touch with him once

she was released and that he would "take care" of her. (74a-77a; 93-94a; 102a; 154-155a; 110b; 115b).

After fingerprinting and photographing Ms. Hamed, Deputy Johnson told her to return to Cell #2, which remained unlocked. (77a; 89a; 93a-94a; 110b; 115b). When Ms. Hamed asked for another cigarette, Deputy Johnson told her to go to Cell #7, which is located in the dark corner of the Male Registry. (89a, 93a-94a; 104a; 156a; 110b). Ms. Hamed found that cell filled with cockroaches in the bathroom area, and she became frightened and upset. (94a-95a; 156a; 110b). After sitting in shock in this dark cell for about 20 minutes, she asked Deputy Johnson, who was in the Registry Control Center and talking to her through the glass and door, for permission to go to another cell. (95a; 102a; 156a-157a; 110b; 116b). He told her to go to a cell with a letter-number combination. (89a; 102a; 156a-157a; 110b; 116b).

Entering what she believed to be an unlocked cell, but what turned out to be the Registry Command Office, Ms. Hamed realized that the room was dark and that it was not a cell. (81a; 89a-90a; 95a; 103a; 157a-158a, 110b; 116b). Deputy Johnson told her to keep going, and, following right behind her, he closed the door to the room. (81a; 95a; 103a; 158a; 110b-111b; 116b; 117b).

Deputy Johnson started touching her hips and moving his hands to her breasts, despite Ms. Hamed's protests for him to stop. (81a; 89a-90a; 95a-96a; 103a; 158a-159a; 111b; 117b). When Deputy Johnson heard a sound, he stepped outside the room and closed the door, preventing Ms. Hamed from leaving. (89a-90a; 95-96a, 103a, 159a; 111b; 117b). He then turned on the lights and sexually assaulted Ms. Hamed. (82a-86a; 89a-90a; 96a-97a; 103a; 159a-162a; 168a; 111b; 117b).

Afterwards, Deputy Johnson directed Ms. Hamed to go back to Cell #2. (86a; 89a-90a;

98a; 103a; 162a; 111b; 117b). A female deputy, Corporal Nettie Jackson, then entered the Male Registry and took Ms. Hamed to the woman's side for processing and changed her into "her greens." (86a; 98a; 102a; 162a; 107b; 111b; 117b). After searching her and removing her clothing and personal property, Corporal Jackson brought Ms. Hamed back over to the Male Registry. (162a-163a; 111b; 117b). Although Corporal Jackson was ready to take Ms. Hamed upstairs, Deputy Johnson told her that another female detainee had just entered and that he would take both of them upstairs. (103a; 163a; 108b; 111b). Ms. Hamed was then placed in Cell #12. (103a; 163a; 111b; 117b). Thereafter, Ms. Hamed was taken to the medical section and then to the Fifth Floor where female detainees are held. (87a; 111b; 112b).

Ms. Hamed told other female detainees on the Fifth Floor about the sexual assault, but she did not tell any officers at the jail about it because she did not trust them, considering that one of their brethren had just raped her. (87a; 89a-90a; 163a). However, Ms. Hamed did ask a female deputy to contact Internal Affairs because she wanted to file a "very serious charge," but the officer never made the contact for her. (90a; 164a).

Ms. Hamed remained in the Wayne County Jail for five days, until she was released after 9:00 p.m. on Wednesday, September 12, 2001. (87a, 99a, 163a-164a). Ms. Hamed was released after she appeared at a hearing on September 12, 2001 before Judge Harvey F. Tennen on the alleged probation violation. (119b). Following the hearing, Judge Tennen reinstated her probation. (120b).

The next day Ms. Hamed reported the sexual assault to the Internal Affairs Division, providing the clothing that she was wearing during the assault. (90a; 103a; 165a). DNA evidence conclusively proved that Deputy Johnson had sexually assaulted Ms. Hamed. (121b-122b). Following a criminal trial, Deputy Johnson was convicted by a jury of CSC-II. (123b).

II. Procedural Facts

Ms. Hamed filed her original Complaint on August 19, 2003 against Wayne County, Wayne County Sheriff's Department, and Deputy Johnson, among others. She filed an Amended Complaint on July 23, 2004. (169a-219a). On October 13, 2006, Ms. Hamed took a Default Judgment against Deputy Johnson after Wayne County refused to defend him. Ms. Hamed then filed an Amended Verified Complaint on December 12, 2006, adding claims of *quid pro quo* sexual harassment (Count I) and hostile environment sexual harassment (Count II) under the Elliott-Larsen Civil Rights Act ("CRA"). (201a-219a).

Following a hearing on March 30, 2007 (17a-45a), Judge Michael Sapala denied the motion brought by Wayne County and the Wayne County Sheriff's Department (collectively "Wayne County") to strike Ms. Hamed's Amended Verified Complaint as to her *quid pro quo* sexual harassment claim under the CRA (Count I). (22a-23a). Judge Sapala also denied Wayne County's motion to dismiss for failure to state a claim under MCR 2.116(8) based upon its claims that (i) Ms. Hamed was "an individual serving a sentence of imprisonment" and (ii) the Wayne County Jail is not a "place of public accommodation" that provides a "public service" within the meaning of the CRA. (2a). Nevertheless, Judge Sapala granted Wayne County's motion to dismiss Count II of Ms. Hamed's Amended Verified Complaint as to hostile environment sexual harassment and took under advisement a decision on Wayne County's motion for summary disposition as to Count I as to *quid pro quo* sexual harassment. (2a). Following another motion hearing on April 17, 2007 (46a-62a), Judge Sapala, relying upon this Court's decision in *Zsigo v Hurley Medical Center*, 475 Mich 224; 716 NW2d 220 (2006), entered an order finding that Wayne County was not vicariously liable for Ms. Hamed's *quid pro quo* claim of sexual harassment under the CRA. (3a-4a).

Ms. Hamed then appealed as of right to the Michigan Court of Appeals, claiming that Judge Sapala erred in finding that Wayne County was not vicariously liable under the CRA because *Champion v Nationwide Security Inc.*, 450 Mich 702; 545 NW2d 596 (1996), not *Zsigo*, controlled the analysis of *quid pro quo* sexual harassment under the CRA. Wayne County cross-appealed, claiming in pertinent part that the trial court erred in concluding that Wayne County was providing a "public service" within the meaning of the CRA when Deputy Johnson raped Ms. Hamed and that Judge Sapala erred in denying its motion to strike Ms. Hamed's Amended Verified Complaint adding the CRA claims.

Agreeing with Ms. Hamed, the Court of Appeals (Borello, P.J. and Meter and Stephens, JJ.) in a published *per curiam* opinion, *Hamed v Wayne County*, 284 Mich App 681; 775 NW2d 1 (2009), found that Judge Sapala erred in determining that Wayne County could not be vicariously liable for *quid pro quo* sexual harassment under MCL 37.2103(i) of the CRA. (5a-16a). Rejecting Wayne County's contention that *Champion* applies only to employment discrimination actions under article 2 of the CRA, the Court of Appeals held that the strict liability analysis of *Champion* was applicable to this case under article 3 of the CRA. (8a-11a). The Court of Appeals also disagreed with Wayne County's assertion that Ms. Hamed was excluded from the scope of the CRA, finding that she was not "an individual serving a sentence of imprisonment" under MCL 37.2301(b). (11a-14a). Finally, the Court of Appeals ruled that the Judge Sapala did not abuse his discretion in allowing Ms. Hamed to amend her Verified Complaint to allege violations of the CRA, finding no basis in fact for Wayne County's assertion that Ms. Hamed materially changed her allegations in contradiction of her previous sworn testimony. (14a-16a). The Court of Appeals thus reversed Judge Sapala's order granting summary disposition to Wayne County as to Ms. Hamed's claim for *quid pro quo* sexual

harassment and remanded the case for further proceedings. This Court should now affirm the Court of Appeals' decision.

SUMMARY OF THE ARGUMENT

At its core, this case is about the Equal Protection Clause of the Michigan Constitution, which enjoined the Legislature to enact legislation to protect the citizens of our state from discrimination. That legislation was the Elliott-Larsen Civil Rights Act ("CRA"), which was intended to provide protection against discrimination that was at least as extensive as the Equal Protection Clauses of the federal and state constitutions. As a remedial statute, the CRA is liberally construed to prevent discrimination and to guarantee equal protection under the law. Under the CRA, individuals may not be denied full and equal enjoyment of public services because of their sex.

Here, Ms. Hamed was discriminated against because of her sex when she was sexually assaulted by Deputy Johnson in the course of his official duties while booking her in the Male Registry of the Wayne County Jail for an alleged probation violation. Specifically, Ms. Hamed suffered *quid pro quo* sexual harassment in violation of MCL 37.2103(i) when Deputy Johnson, the sole deputy on duty in the Male Registry, made her compliance with his sexual advances a condition of transferring her from his police authority and effectively denied her equal access to public police services because of her sex. Put simply, a police officer cannot use his badge, weapon and uniform to sexually harass and exert *quid pro quo* demands for sexual favors without violating the CRA and the Equal Protection Clauses of both the state and federal constitutions.

I. Wayne County is liable for *quid pro quo* sexual harassment under MCL 37.2103(i) pursuant to *Champion,* the adoption of Restatement Agency, 2d, § 219(2)(d) or the violation of its nondelegable duty to protect Ms. Hamed from harm.

There are three common-law bases for imposing liability upon Wayne County under MCL 37.2103(i), all of which are centered upon job-created power and authority. First, in *Champion,* this Court held that the employer was vicariously liable under MCL 37.2103(i) for *quid pro quo* sexual harassment when one of its supervisors raped a subordinate. In accord with *Champion*, the Court of Appeals thus correctly ruled that Wayne County was likewise vicariously liable under MCL 37.2103(i) for Deputy Johnson's sexual assault of Ms. Hamed. Like a supervisor, Deputy Johnson used his job-created power and authority and instrumentalities entrusted to him by Wayne County to facilitate the sexual assault. Contrary to Wayne County's contention, imposing strict vicarious liability will not open the flood gates to an unrestricted flow of liability for local units of government as this is fortunately the rare case in which a law enforcement official rapes a pretrial detainee. Further, all three policy factors favor the imposition of vicarious liability upon Wayne County in order to reduce the incidence of tortious conduct by its deputies, assure adequate compensation for Ms. Hamed, and spread the cost resulting from the misuse of police authority among the entire community.

Alternatively, as a mutually supporting independent ground for affirmance, this Court should hold Wayne County vicariously liable for *quid pro quo* sexual harassment under MCL 37.2103(1) by adopting the concurring opinion in *Zsigo* recognizing that *Champion* implicitly adopted the exception stated in Restatement Agency, 2d, § 219(2)(d). Because Deputy Johnson was "aided in accomplishing" his sexual assault of Ms. Hamed "by the existence of the agency relationship," Wayne County should be held vicariously liable for Ms. Hamed's injuries.

Finally, Wayne Count is also liable for *quid pro quo* sexual harassment under MCL

37.2103(i) based upon its common-law nondelegable duty to protect Ms. Hamed from harm, which was breached when she was sexually assaulted by Deputy Johnson. Whether this Court agrees with one or all of these rationales for imposing liability upon Wayne County under MCL 37.2103(i), the Court of Appeals' decision should be affirmed.

II. Ms. Hamed's pretrial detention in the Wayne County Jail is a public service within the meaning of MCL 37.2301(b).

Second, the public services of the Wayne County Jail fall squarely within the CRA, as the plain language of the statute does not preclude its application because of a person's status as a pretrial detainee. In this case, Ms. Hamed was a pretrial detainee, and thus not "serving a sentence of imprisonment" at the time that she was sexually assaulted. Even so, as recently determined by Judge O'Meara in *Mason v Granholm,* there was no rational basis for the amendment to MCL 37.2301(b) barring prisoners from the protection of the CRA. Given that the CRA is read as providing protection against discrimination at least as extensive as the Equal Protection Clauses of the state and federal constitutions, the amendment barring prisoners from enjoying the protections of the CRA is unconstitutional.

III. Judge Sapala did not abuse his discretion in denying Wayne County's motion to strike Ms. Hamed's Amended Verified Complaint alleging *quid pro quo* sexual harassment under MCL 37.2103(i).

Finally, Judge Sapala did not abuse its discretion in granting Ms. Hamed's motion to file an Amended Verified Complaint to allege violations of the CRA. As the Court of Appeals properly determined, there was no merit to Wayne County's contention that the allegations contained in Ms. Hamed's Amended Verified Complaint contradicted or were inconsistent with her prior sworn statements. Thus, this Court should affirm the Court of Appeals' decision finding that Wayne County was subject to liability for quid-pro-quo sexual harassment and remand the case to the trial court for further proceedings.

ARGUMENT

I. DEFENDANTS WAYNE COUNTY AND WAYNE COUNTY SHERIFF'S DEPARTMENT MAY BE HELD LIABLE FOR *QUID PRO QUO* SEXUAL HARASSMENT UNDER MCL 37.2103(i).

A. Standards of Appellate Review

This Court reviews a trial court's order granting summary disposition de novo. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Adair v State of Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). The reviewing court accepts all well-pleaded factual allegations as true and construes them in a light most favorable to the non-moving party. *Id*. The motion may be granted only when the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id*. A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). When ruling on a motion brought under MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Reed, supra*. The moving party is entitled to judgment as a matter of law if the evidence viewed in the light most favorable to the nonmoving party fails to establish a genuine issue of material fact. *Id*.

Whether Wayne County may be vicariously liable for *quid pro quo* sexual harassment under MCL 37.2103(i) involves a question of law that is reviewed de novo. *Kaiser v Allen*, 480 Mich 31, 35; 746 NW2d 92 (2008). In determining an issue of statutory interpretation, this Court's primary aim is to ascertain and give effect to the intent of the Legislature. *Haynes v Neshewat*, 477 Mich 29, 34; 729 NW2d 488 (2007). The best source for determining legislative intent is the specific language of the statute. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648

(2004). Thus, when resolving an issue of statutory interpretation, this Court examines the language of the statute, and if the statutory language is clear and unambiguous, this Court assumes that the legislature intended its plain meaning and enforces the statute as written. *Roberts v Mecosta County General Hospital*, 466 Mich 57, 63; 642 NW2d 663 (2002). Nothing will be read into a clear statute which is not within the manifest intention of the Legislature as derived from the statutory language. *Id*.

B. <u>Legal Discussion</u>

(1) <u>The CRA is liberally construed as a remedial statute to provide protection against discrimination that is *at least as extensive as* the Equal Protection Clauses of the U.S. and Michigan Constitutions</u>.

The Equal Protection Clause of the Michigan Constitution, Const 1963, art 1, § 2, directed the Legislature to provide legislation to redress discrimination, and that legislation was the CRA.[4] *Dep't of Civil Rights ex rel Forton v Waterford Twp Dep't of Parks & Recreation*, 425 Mich 173, 187-188; 387 NW2d 821 (1986); *Neal v Dep't of Corrections*, 232 Mich App 730, 739; 592 NW2d 370 (1998), vacated and cited with approval, *Doe v Dep't of Corrections (Doe II)*, 240 Mich App 199; 611 NW2d 1 (2000). The CRA was passed by the Legislature as 1976 PA 453, signed by then Governor Milliken, and put into law effective in 1977. As stated in *Neal, supra,* 232 Mich App at 734, citing *Noecker v Department of Corrections*, 203 Mich App 43; 512 NW2d 44 (1993):

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[4] The Equal Protection Clause states:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. *The legislature **shall** implement this section by appropriate legislation*. (Emphasis added.)

In *Dep't of Civil Rights*, this Court noted that the constitutional command directing the Legislature to implement this clause "is the only provision of the Declaration of Rights to provide so." 425 Mich at 188.

> The purpose of the Civil Rights Act is to prevent discrimination directed against a person because of that person's membership in a certain class and to eliminate the effects of offensive or demeaning stereotypes, prejudices and biases.

By enacting the CRA, the Legislature "intended to centralize and make uniform the patchwork of then existing civil rights statutes applying to the private sector" and "to broaden the scope of then-existing civil rights statutes to include governmental action." *Neal, supra* at 738-739, citing *Dep't of Civil Rights, supra*.

The CRA is a remedial statute of "manifest breadth and comprehensive nature and must be "liberally construed to suppress the evil and advance the remedy." *Eide v Kelsey-Hayes*, 431 Mich 26, 34, 36; 427 NW2d 488 (1988), citing 3 Sands, Sutherland Statutory Construction [4th ed], § 60.01, p 55). The CRA was intended to provide protection against discrimination that was *at least as extensive as* the Equal Protection Clauses of the U.S. and Michigan Constitutions. *Dep't of Civil Rights, supra*.

(2) Under the CRA, discrimination because of sex includes *quid pro quo* sexual harassment.

The CRA has eight sections: Article 1: General Provisions; Article 2: Employers, Employment Agencies and Labor Organizations; Article 3: Public Accommodations and Services; Article 4: Educational Institutions; Article 5: Housing; Article 6: Civil Rights Commission and Civil Rights Department; Article 7: Violations, Penalties and Remedies; and Article 8: Remedies. The majority of the published cases relating to the CRA have interpreted the general provisions of Article 1, which apply to all the articles of the CRA. The CRA defines discrimination on the basis of sex to include *quid pro quo* sexual harassment:

> (i) Discrimination because of sex includes sex harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:

(i) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain . . . public services . . .

(ii) Submission or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's . . . public services . . .

See *Chambers v Trettco, Inc*, 463 Mich 297, 310; 614 NW2d 910 (2000)(noting that sexual harassment consists of *quid pro quo* harassment and hostile environment harassment).

Although the vast majority of *quid pro quo* sexual harassment claims occur in the context of employment, MCL 37.2103(i)(i) and (ii) "address not only employment but also discrimination with regard to public services, public accommodations, educational institutions and housing." *Diamond v Witherspoon*, 265 Mich App 673, 685; 696 NW2d 770 (2005). As explained in *Diamond*:

> To establish a claim of *quid pro quo* sexual harassment in the provision of public services, a plaintiff must demonstrate by a preponderance of the evidence, that (1) he or she was subjected to unwelcome sexual conduct or communications as described in the statute, and (2) that the public service provider or the public service provider's agent used submission to or rejection of the proscribed conduct as a factor in a decision affecting the decision to provide public services. [*Id*. at 688-689, citing MCL 37.2103(i) and *Chambers, supra* at 310)].

Further, governmental immunity is not a defense to a claim brought under the CRA. *Mack v Detroit*, 467 Mich 186, 195 n 9; 648 NW2d 47 (2000), superseded in part on other grounds by statute as stated in *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 414; 716 NW2d 236 (2006); MCL 37.2103(g) and (h). Finally, common-law agency principles apply to *quid pro quo* cases brought under the CRA. See *Chambers, supra* ("Because the Civil Rights Act expressly defines 'employer' to include 'agents,' we rely on common-law agency principles in determining when an employer is liable for sexual harassment committed by its employees.")

(3) <u>This Court should apply *Champion* and hold Wayne County vicariously liable for *quid pro quo* sexual harassment under MCL 37.2103(i)</u>.

The question presented in this case is whether the Court of Appeals correctly determined that Wayne County may be held vicariously liable for *quid pro quo* sexual harassment where Deputy Johnson's sexual assault of Ms. Hamed while she was being booked in the Male Registry of the Wayne County Jail was accomplished through *job-created power and authority* analogous to that of a supervisor in an employment context. Here, Deputy Johnson, as the sole officer on duty in the Male Registry, was entrusted by Wayne County with a substantial degree of job-created power and authority as to require Ms. Hamed to submit to his commands simply because Deputy Johnson ordered her to do so. As the Court of Appeals properly observed, the present case is controlled by *Champion*.

In *Champion*, this Court considered whether an employer is vicariously liable for *quid pro quo* harassment under MCL 37.2103(i) when one of its supervisors raped the plaintiff, a subordinate employee, thereby causing her constructive discharge. In that case, this Court held that "an employer is liable for such rapes where they are accomplished through the use of the supervisor's managerial powers." 450 Mich at 704-705. As noted in *Champion*, "when an employer gives its supervisors certain authority over other employees, it must also accept responsibility to remedy the harm caused by the supervisors' unlawful exercise of that authority." *Id*. at 712. Accordingly, this Court concluded that "we adopt the nearly unanimous view that imposes strict liability on employers for *quid pro quo* sexual harassment committed by supervisory personnel." *Id*. That rule recognizes that most employers are corporate entities that cannot function without delegating supervisory power and that allowing employers "to hide behind a veil of individual employee action will do little, if anything to eradicate discrimination in the workplace." *Id*. at 712-713.

Because Deputy Johnson's sexual assault of Ms. Hamed flowed from the very exercise of

the power and authority that Wayne County conferred upon him, it is appropriate in this case, as it was in *Champion*, to hold Wayne County vicariously liable for *quid pro quo* sexual harassment under MCL 37.2103(i). As the Court of Appeals properly noted:

> In the instant case, Johnson did not merely use his position to find opportunities to commit a sexual assault against a female inmate. Rather, he used his authority as a turnkey to exploit her sexually. As the sole deputy in charge of plaintiff, Johnson had both physical power and legal authority over her. He alone had the authority to decide when she would be referred to the female area of the prison [sic]. He could use his authority to decide which cell plaintiff would be placed in, and to direct her around the jail. Plaintiff's amended complaint pleads facts sufficient to support a claim that Johnson's managerial authority was instrumental and integral tool in perpetrating the sexual assault. (10a).

(a) <u>Applying *Champion* is consistent with the proper jurisprudential development of the CRA to protect citizens from discrimination as mandated by the Equal Protection Clause of the Michigan Constitution</u>.

It is important to underscore that the Court of Appeals' decision does not break new legal ground, but merely represents the logical extension of the principle of strict vicarious liability applied in *Champion* to *quid pro quo* sexual harassment under MCL 37.2103(i).[5] For strict vicarious liability to apply under *Champion*, the supervisor must accomplish the *quid pro quo* sexual harassment through the use of his supervisory managerial power and authority. In a nutshell, the common features binding *Champion* and this case are *job-created power and authority*. Thus, extending *Chapman* to this case is dictated by the fact that Deputy Johnson, the sole deputy on duty at the time in the Male Registry of the Wayne County Jail, accomplished the *quid pro quo* sexual assault of Ms. Hamed through the exercise of job-created power and control, far exceeding those of any supervisor, providing him with the "magnitude of authority" that allowed him to rape Ms. Hamed. See *Policeman's Benevolent Assn' of N J v Township of Washington*, 850 F2d 133, 141 (CA 3, 1988) (noting that police officers exercise "the most

[5] Ms. Hamed vigorously disagrees with Wayne County's characterization that applying *Champion* represents a "sea change in the law." (Wayne County Br. at 19). As the Court of Appeals observed, *Champion*, not *Zsigo*, controls the interpretation of the CRA. (8a-9a).

awesome and dangerous power that a democratic state possesses with respect to its residents – the power to use lawful force to arrest and detain them").[6] Similar to a supervisor being empowered by an employer so as to affect the terms and conditions of an employee's employment, Deputy Johnson, as the sole officer on duty in the Male Registry near midnight on September 7, 2001 and the early morning hours of September 8, 2001, was conferred by Wayne County with the power and authority to affect the terms and conditions of Ms. Hamed's detention.

As such, there is no principled legal basis to limit the application of *Champion* to employment contexts. As already noted, MCL 37.2103(i) applies to discrimination generally, including public services, and is not restricted solely to the employment context. *Diamond, supra,* 265 Mich App at 685. Moreover, the extension of *Champion* to this case is consistent with the proper jurisprudential development of the CRA governing *quid pro quo* sexual harassment and confines its reach to only supervisory and quasi-supervisory officials, i.e., those acting with the power and authority of supervisors over subordinate individuals, who commit rapes in the course of their official duties. Most important, the CRA is to be "liberally construed" as coextensive with the Equal Protection Clauses under the state and federal constitutions in affording citizens protection from discrimination. *Eide, supra,* 431 Mich at 34. Applying *Champion* to this case thus fulfills the promise made to the citizens of this state in the Equal Protection Clause of the Michigan Constitution to protect them against discrimination.

(b) <u>Liability is limited to the rare law enforcement officer who commits a sexual assault through the use of power and authority entrusted in him</u>.

Contrary to Wayne County's wild assertion, it is simply not true that "the Court of Appeals' decision imposes absolute and strict vicarious liability upon counties and county

[6] As even Wayne County deputies themselves realize, they exercise enormous power and authority over detainees in custody. (37b; 109b).

officials for the unforeseeable, intentional and criminal acts of *all governmental employees* who commit acts outside the scope of their employment and not in the performance of a function of their job." (Wayne Br. at 27) (Emphasis in original). Rather, consistent with remedial purposes identified in *Champion*, it imposes strict vicarious liability on counties ***only*** for *quid pro quo* sexual harassment by a deputy through the use of his police authority, which is tantamount to the exercise of a supervisor's managerial powers. See *City of Oklahoma v Tuttle*, 471 US 808, 834 (1985) (J. Stevens, dissenting) ("When a police officer is engaged in the performance of his official duties, he is entrusted with civic responsibilities of the highest order. His mission is to protect the life, the liberty, and the property of the citizenry.")[7]

Here, Wayne County provided Deputy Johnson with his position as a deputy, his uniform, keys and access to the Male Registry and conferred upon him all the power and authority to process detainees. Indeed, it was only because of the power and authority given to him by Wayne County that Deputy Johnson was able to order Ms. Hamed about the various open cells in the Male Registry and eventually assault her in the unlocked Registry Command Office. Just as a supervisor is given by his employer certain power and authority over an employee, this deputy had power and authority over citizens given to him by Wayne County. Like any other employer, Wayne County should be strictly liable under Article 1 of the CRA for this type of *quid pro quo* sex discrimination.

As in this case, the defendant in *Champion* also argued that it never authorized its

[7] See also *Applewhite v City of Baton Rouge*, 380 So 2d 119, 121 (La Ct App 1979), where the Louisiana Court of Appeals held the city vicariously liable for rape committed by a police officer based upon the special status of law enforcement officers:

> A police officer is a public servant given considerable public trust and authority. Our review of the jurisprudence indicates that, almost uniformly, where excesses are committed by such officers, their employers are held to be responsible for their actions even though those actions may be somewhat removed from their usual duties. This is unquestionably the case because of the position of such officers in our society.

employee to rape the plaintiff on the job. But *Champion* rejected the defendant's claim that it could not be liable on the ground that the supervisor's rape of the plaintiff occurred outside the scope of employment:

> This construction of agency principles is far too narrow. It fails to recognize that when an employer gives its supervisors certain authority over other employees, it must also accept responsibility to remedy the harm caused by the supervisors' unlawful exercise of that authority. From his scheduling decisions that allowed him to work alone with Ms. Champion to his ordering her into a remote part of the building, Mr. Fountain used his supervisory power to put Ms. Champion in the vulnerable position that led to her rape. In fact, there is little doubt that Mr. Fountain would have been unable to rape Ms. Champion but for his exercise of supervisory authority.
>
> Therefore, we adopt the nearly unanimous view that imposes strict liability on employers for *quid pro quo* sexual harassment committed by supervisory personnel. The rationale supporting this rule recognizes that most employers are corporate entities that cannot function without delegating supervisory power. Allowing employers to hide behind the veil of individual employee action will do little, if anything, to eradicate discrimination in the workplace.
>
> Indeed, immunizing an employer where it did not authorize the offending conduct would create an enormous loophole in the [CRA] statute. Such a loophole would defeat the remedial purpose underlying this state's civil rights statute and would lead to a construction that is inconsistent with the well-established rule that remedial statutes are to be liberally construed.
>
> In fact, under defendant's construction, an employer could avoid liability simply by showing that it did not authorize such conduct, employees would no longer have a remedy for *quid pro quo* sexual harassment. [450 Mich at 712-713 (citations and footnotes omitted)].

Thus, affirming the Court of Appeals' decision hardly imposes absolute and strict vicarious liability upon counties for the intentional and criminal acts of all governmental employees, for it is the rare law enforcement official who commits a sexual assault through the use of power and authority entrusted in him by counties. Fortunately, this is an anomalous case for it is an aberrant occurrence when a law enforcement official rapes a detainee while being booked for an alleged criminal offense.

Finally, Wayne County's argument (Defendants' Br. at 24) that it is not liable for the acts

of its deputies under Article 7, § 6 of the 1963 Michigan Constitution and MCL 51.70 was decisively repudiated by the Court of Appeals in *Graves v Wayne County*, 124 Mich App 36; 333 NW2d 740 (1983), quoting from *Lockaby v Wayne County*, 406 Mich 65, 77; 276 NW2d 1 (1979).[8] In *Graves*, the plaintiff argued that Wayne County was vicariously liable for the injuries that he sustained when he was shot in the back by a deputy sheriff and was paralyzed. Reversing the trial court's order granting summary judgment to Wayne County, the Court of Appeals trenchantly observed:

> We further hold that Const 1963, art 7, § 6 does not exempt the county from liability for a deputy sheriff's alleged wrongs under the doctrine of *respondeat superior*. **This section of the Michigan Constitution only exempts a county from any vicarious liability arising from acts of the county sheriff, <u>not</u> deputy sheriffs**. In *Lockaby, supra*, p 77, while not directly addressing this issue, the Court said "[while] the county is constitutionally immune from '[responsibility]' for the sheriff's 'acts' that immunity does not extend to the acts of others in its employ." (Footnote omitted.) All seven justices of the *Lockaby* Court held that count I of Lockaby's complaint should be reinstated against defendant Wayne County. Count I alleged an intentional tort perpetrated against plaintiff by "unknown and unidentified officers, guards, and agents" of the defendant Wayne County Sheriff's Department. Thus, *Lockaby* strongly implies that while the aforementioned constitutional exemption applies to acts of the sheriff, it does not apply to the acts of deputy sheriffs, or other employees of the sheriff. [124 Mich App at 42-43] (Emphasis added.)

Accordingly, Wayne County can be held vicariously liable for Deputy Johnson's sexual assault of Ms. Hamed in this case.

(c) <u>All three policy reasons support the imposition of strict vicarious liability upon Wayne County</u>.

In determining whether the doctrine of *respondeat superior* should be applied in a case involving *quid pro quo* sexual harassment arising under MCL 37.2103(i) when a police officer or deputy sheriff on duty misuses his official authority and commits an act of rape, three policy

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[8] Article 7, § 6 provides that a "county shall never be responsible for [the sheriff's] acts, except that the board of supervisors may protect him against claims by prisoners for unintentional injuries received while in his custody;" MCL 51.70 provides in pertinent part that "[a] sheriff shall not be responsible for the acts, defaults, and misconduct in office of a deputy sheriff."

factors should be considered. See *Mary M v City of Los Angeles*, 54 Cal 3d 202, 214-219; 814 P2d 1341, 1347-1350; 285 Cal Rptr 99, 105-108 (Cal 1991), citing *John R v Oakland Unified School Dist*, 48 Cal 3d 438; 769 P2d 948; 256 Cal Rptr 766 (Cal 1989).[9] The three policy objectives underlying the imposition of *respondeat superior* liability are (1) to prevent recurrence of the tortious conduct; (2) to provide greater assurance of compensation for the victim; and (3) to ensure that the victim's loss will be equitably borne by those who benefit from the enterprise that gave rise to the injury. See Catherine Fisk and Erwin Chermerinsky, *Symposium: Civil Rights without Remedies: Vicarious Liability under Title VII, Section 1983, and Title IX*, 7 Wm & Mary Bill of Rts J 755, 785 (1999) (noting that "[v]icarious liability for tortious conduct of employees serves three purposes").[10] All the policy considerations support the application of the doctrine of *respondeat superior* in this case, especially given the special quality of the interests at stake.

(i) Reducing the Incidence of Tortious Conduct

The first policy objective is to prevent the recurrence of the tortious conduct because it "creates a strong incentive for vigilance by those in a position to guard against the evil to be prevented." *Mary M, supra* at 214, quoting *Pacific Mut Life Ins Co v Haslip*, 499 US 1, 14 (1991). As stated by the U.S. Supreme Court in *Owen v City of Independence*, 445 US 622, 652

[9] In *Mary M*, the California Supreme Court held that a police department could be vicariously liable for a sexual assault committed by one of its officers. In that case, the officer, while on duty in a marked squad car, had pulled over the plaintiff for erratic driving, detained her, and performed a field sobriety test which the plaintiff failed. *Id.* at 1342-43. He then placed the victim in his squad car and drove to her home, after which he raped her. *Id.* In *Mary M*, the Court held that the City of Los Angeles should be liable for the rape committed by the police officer because of the "extraordinary power and authority" police officers have over residents and that the risk of abuse is a cost associated with its enterprise. *Id*. at 1349.

[10] See also David B. Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 Cornell L Rev 66, 93 (1995) (arguing that "[i]mposition of vicarious liability . . . may be the most cost effective and efficient manner of preventing and eradicating sexual harassment," relying upon Richard A. Posner, *An Economic Analysis of Sex Discrimination Law*, 56 U Chi L Rev 1311, 1332 (1989)).

n 36 (1980):

> In addition, the threat of liability against the city ought to increase the attentiveness with which officials at the higher levels of government supervise the conduct of their subordinates. The need to institute systemwide measures in order to increase the vigilance with which otherwise indifferent municipal officials protect citizen's constitutional rights is, of course, particularly acute where the frontline officers are judgment-proof in their individual capacities.

Here, the imposition of vicarious liability on Wayne County would encourage county jails to take preventive measures for ensuring the safety and well-being of detainees, without impairing the effectiveness of proper law enforcement activities.

(ii) <u>Assuring Adequate Compensation for Ms. Hamed</u>

The second policy factor is to ensure that victims of misconduct by law enforcement officials are properly compensated. *Mary M, supra* at 215. Applied to this case, it is appropriate to compensate Ms. Hamed since Deputy Johnson is judgment-proof. Thus, unless Ms. Hamed is compensated, she will effectively have no remedy for her injuries. See *Marbury v Madison*, 5 US 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.").

(iii) <u>Spreading the Risk of Loss among the Community</u>

The third policy consideration is to spread the risk of loss among the community. As noted by the California Supreme Court in *Mary M*:

> At the outset, we observed that society has granted police officers extraordinary power and authority over its citizenry. An officer who detains an individual is acting as the official representative of the state, with all of its coercive power. As visible symbols of that power, an officer is given a distinctively marked car, a uniform, a badge, and a gun. As one court commented, "police officers [exercise] the most awesome and dangerous power that a democratic state possesses with respect to its residents – the power to use lawful force to arrest and detain them." (*Policeman's Benev Ass'n of N. J. v Washington Tp*. (3d Cir. 1988) 850 F.2d 133, 141.) Inherent in this formidable power is the potential for abuse. The cost resulting from misuse of that power should be borne by the

> community, because of the substantial benefits that the community derives from the lawful exercise of police power. [54 Cal 3d at 216-217].

This factor also heavily favors holding Wayne County vicariously liable for the sexual assault of Deputy Johnson who, as a result of the exercise of the lawful authority conferred upon him by the county, caused the injury to Ms. Hamed, regardless of whether the county knew or approved of his wrongful conduct.

Contrary to Wayne County's claim, subjecting counties to vicarious liability in this case will not impose a severe economic strain. Nor would it, as the Attorney General claims, "subject[] governmental entities to almost limitless liability for *quid pro quo* sexual harassment." (Attorney General's Amicus Brief in support of Leave Application, p 39).[11] While it is true that the imposition of strict vicarious liability for *quid pro quo* sexual harassment under MCL 37.2103(i) comes at a cost, as do all our rights and liberties, including the right to due process and equal protection, Wayne County and the Attorney General exaggerate the threat to the financial stability of counties and municipalities. As already stated, this unfortunate case is exceptional since it is the rare law enforcement officer who abuses his official position to rape a pretrial detainee. Thus, like any private entity, counties and municipalities would rarely be subject to strict vicarious liability under MCL 37.2103(i) for the sexual assaults of its supervisory or quasi-supervisory officials. For Wayne County, this is a one-time cost as its liability is limited to Ms. Hamed under the specific facts and circumstances of this case.

(4) <u>Alternatively, this Court should hold Wayne County vicariously liable by adopting the concurring opinion in *Zsigo* recognizing that the exception stated in 1 Restatement Agency, 2d, § 219(2)(d) applies to *quid pro quo* sexual</u>

[11] Because sexual assaults by law enforcement officers are rare occurrences, it is simply not the case, as the Attorney General contends, that applying *Champion* here "will have dramatic consequences for liability for State and its agencies arising from the actions of its employees" by "erod[ing] the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*. . . ." (Amicus Brief in support of Leave Application, p 2).

harassment under MCL 37.2103(1).

Although this Court has held that vicarious liability cannot be imposed against an employer for an employee's intentional torts that are outside the scope of the employment, this case also raises the question whether Wayne County may be vicariously liable for *quid pro quo* sexual harassment under MCL 37.2103(1) on the ground that an employer may be vicariously liable for such torts when the employee is "aided in accomplishing" the tort "by the existence of the agency relationship" under 1 Restatement Agency, 2d, § 219(2)(d). See *McCann v Michigan*, 398 Mich 65, 71; 247 NW2d 521 (1976), citing *Bradley v Stevens*, 329 Mich 556, 562; 46 NW2d 382 (1951). Thus, apart from whether this Court applies *Champion* to hold Wayne County strictly liable for *quid pro quo* sexual harassment under MCL 37.2103(i), vicarious liability may be imposed on the basis of the Restatement exception. While this Court declined to adopt the Restatement exception in *Zsigo,* the specific facts and circumstances of the present case are distinguishable as to warrant its application here on the ground that Deputy Johnson was "aided in accomplishing" his sexual assault of Ms. Hamed "by the existence of the agency relationship" with Wayne County, which conferred upon him job-created power and authority over Ms. Hamed as her jailer.[12]

As the concurring opinion in *Zsigo* observed, this Court in *Champion*, rejecting the defendant's claim that it could not be liable on the ground that the supervisor's rape of the plaintiff occurred outside the scope of employment, implicitly adopted 1 Restatement Agency,

[12] Applying § 219(2)(d) to this case is fully consistent with the incisive observation made by Justice Cooley in *Kreiter v Nichols*, 28 Mich 496, 498 (1874):

> No man can be excused from responding for the negligent conduct of his servant because of having instructed him to be careful, or for his frauds because of having told him to be honest. While he is not liable for wrongs which the servant may step aside from employment to commit, *he is fully responsible for the manner in which his business is conducted, and if he gives proper directions he must take it upon himself the risk of their being obeyed*. (Emphasis added.)

2d, § 219(2)(d). 475 Mich at 234-235 (citing *Champion, supra* at 450 Mich at 711-712, including footnotes 6 and 7 and *Henson v City of Dundee*, 682 F2d 897, 909 (CA 11, 1982) (imposing vicarious liability upon an employer for *quid pro quo* sexual harassment committed by a supervisor accords with common-law principles)). As the concurring opinion in *Zsigo* correctly pointed out, the scope of § 219(2)(d) may be read narrowly "so as not to impose strict liability based on the employer-employee relationship or on the mere opportunity to commit the tort." *Zsigo, supra* at 233. [13]

In determining whether § 219(2)(d) applies, the concurring opinion in *Zsigo* referenced the three factors considered by the Vermont Supreme Court in *Doe v Forrest*, 176 Vt 476; 853 A2d 48 (2004): (1) the opportunity created by the relationship; (2) the powerlessness of the victim to resist the perpetrator and prevent the unwanted contact; and (3) the opportunity to prevent and guard against the conduct. *Zsigo, supra* at 234. In *Doe*, a police officer sexually assaulted a female cashier in a convenience store. There, the Vermont Court Supreme, applying the three-factor balancing test, held that the sheriff was vicariously liable because his deputy used his agency position to commit an assault while on duty. The concurring opinion in *Zsigo* noted that applying the Restatement exception in light of these factors "does not result in strict liability and also serves to protect those who cannot protect themselves." *Id*. at 241.

The specific facts and circumstances of this case clearly support the application of the Restatement exception. See *Graves, supra*, 124 Mich App at 36 (applying § 219(2)(d) in

[13] Contrary to Wayne County's unsupported assertion, there is no basis for its claim that adoption of the Restatement exception "would expose employers to liability that knows no boundaries when their employees act outside the scope of their authority." (Defendants' Br. at 21). As the concurring opinion in *Zsigo* demonstrates, appropriate limits may be placed upon the "aided in accomplishing the tort by the existence of the agency relation" rule, without "eviscerating the general scope of the employment rule" so as to confine its application to only those cases where the agent is given job-created power and authority to commit tortious acts. This was borne out in *Zsigo*, where the concurring opinion, applying the Restatement exception, determined that the plaintiff failed to show that the hospital was vicariously liable for her injuries.

determining whether Wayne County was vicariously liable for injuries resulting when the victim was shot in the back by an off-duty deputy sheriff and was paralyzed). By virtue of the agency relationship, Wayne County created an opportunity for Deputy Johnson to carry out his sexual assault of Ms. Hamed. First, unlike the nursing assistant in *Zsigo* whose employment relationship with the hospital provided him with "a mere opportunity for tortious activity," Deputy Johnson could not have perpetrated the sexual assault without availing himself of job-created power and authority and the instrumentalities of Wayne County. See *Salinas v Genesys Health Sys*, 263 Mich App 321, 323; 688 NW2d 112 (2004) (noting that the Restatement exception will only apply where "the agency itself empowers the employee to commit the tortious conduct"). As already noted, Wayne County provided Deputy Johnson with his position as a deputy, his uniform, keys and access to the Male Registry and bestowed upon him all the power and authority to accomplish the rape.[14]

Second, while being booked in the Male Registry of the Wayne County Jail for an alleged probation violation, Ms. Hamed was in no position to protect or defend herself against the sexual assault by Deputy Johnson. Simply put, she was not "free to walk away" from Deputy Johnson, an on-duty, uniformed deputy exerting apparent authority over her. *Diamond*, *supra* at 688 (noting that "plaintiffs were not free to 'walk away' from Witherspoon, an on-duty, uniformed police officer exerting apparent authority over plaintiffs"). In short, she was in Deputy Johnson's complete and exclusive control, and without any possibility of fleeing his attack given her confinement and restrictions of her freedom of movement.

[14] Moreover, Wayne County is responsible for the "state created danger" into which Ms. Hamed was inserted, exposing her to the dangerous situation that it created while she was within the County's control and custody. As attested by the renowned penologist E. Eugene Miller, who previously reviewed Wayne County Jail Divisions I and II in a report issued on September 25, 2000, Wayne County created or increased the danger that Ms. Hamed would be exposed to a sexual assault, even though it assumed an affirmative obligation to take adequate steps to provide for her care, custody and safety. (84b-94b; 124b-142b).

Third, there were no protections of which Ms. Hamed could have availed herself to prevent the unwanted sexual attack. In fact, Sergeant Darwish expressly permitted Ms. Hamed to be left alone with Deputy Johnson in the Male Registry, directing the two transfer officers to abandon her in Deputy Johnson's sole custody. Moreover, ***none*** of the closed circuit television cameras worked within the Male Registry, and thus no duty officer could see into the Male Registry when the doors were closed, thereby allowing Deputy Johnson to act freely without a possibility of intervention or observation.

Accordingly, Wayne County should be vicariously liable under the Restatement exception because it gave Deputy Johnson access and control over pretrial detainees, authority to process, direct and control the movements of detainees and to enforce his commands, together with the instrumentalities – the holding cells and rooms in the Male Registry of the Wayne County Jail and the keys to these cells and rooms – to accomplish the rape.

Applying the Restatement exception here does not mean that the exception swallows the general rule of *respondeat superior* liability. Properly applied, the scope of the aided-by-agency-relation liability should and can be narrowly read without eroding traditional principles of agency law. As explained by the concurring opinion in *Zsigo*, "it is clear that the Vermont court's approach [in *Doe*] does not result in strict liability and also serves to protect those who cannot protect themselves." *Zsigo, supra* at p 233. Nor does the recognition of the Restatement exception open Pandora's Box to unrestrained liability on the part of counties and municipalities. In fact, as already stated, this is an aberrant case since sexual assaults by police officers upon pretrial detainees are rare occurrences.

Thus, this Court should make explicit *Champion's* implicit adoption of § 219(2)(d) of the Restatement, and thus subject Wayne County to vicarious liability where Deputy Johnson was

"aided in accomplishing" the sexual assault by the existence of an agency relationship with Wayne County based upon *job-created power and authority*. Here, the action of a police officer in sexually assaulting a pretrial detainee is far more serious than that involved in an ordinary state tort because it was made possible by his official position and so should be treated as the action of the officer's employer. See *Tuttle*, *supra*, 471 US at 834 (J. Stevens dissenting) ("When a police officer is engaged in the performance of his official duties, he is entrusted with civic responsibilities of the highest order."). Finally, imposing vicarious liability upon Wayne County for *quid pro quo* sexual harassment under MCL 37.2103(1) based upon the Restatement exception is consonant with the remedial purpose of the CRA to provide protection against discrimination that is *at least as extensive as* the Equal Protection Clauses of the state and federal constitutions. *Dep't of Civil Rights, supra,* 425 Mich at 173.

(5) <u>Wayne County is also liable for *quid pro quo* sexual harassment under MCL 37.2103(i) based upon its non-delegable duty to protect Ms. Hamed from harm while she was in custody in the Wayne County Jail</u>.

Michigan law also imposes liability on employers for wrongful acts committed by their agents acting outside the scope of their authority when the conduct violated a nondelegable duty of the employer. See *Huhtala v Travelers Ins Co*, 401 Mich 118, 127; 257 NW2d 640 (1977)("Although the relationship between the innkeeper and guest was contractual, the source of the innkeeper's obligation was not an express promise but public policy: the law implies a covenant, coextensive with the duty imposed on negligence theory, that an innkeeper will take appropriate steps to guard a guest against assault."); *Johnson v Detroit, Ypsilanti & Ann Arbor Railway*, 130 Mich 453, 454; 90 NW 274 (1902) (holding that "it is the duty of the carrier to protect its passengers against injury from the willful misconduct of its servants while performing the contract to carry"); *McKee v Owen*, 15 Mich 115, 126 (1866) (noting that "the reasons and

analogies of the law fixing the liability of carriers and innkeepers, so far as the liabilities of the two are analogous").[15] As Dean Prosser explained:

> Even where the servant's ends are entirely personal, the master may be under such a duty to the plaintiff that responsibility for the servant's acts may not be delegated to him. This is true in particular in those cases where the master, by contract or otherwise, has entered into some relation requiring him to be responsible for the protection of the plaintiff. The employees of a carrier, for example, would be under a duty to a passenger to exercise reasonable care to protect him against assaults on the part of third persons, even for personal motives, and they are not less under a duty of care to protect against their own assaults, which is the duty of the master as well. **It follows that the master will be liable even for such entirely personal torts as the rape of a passenger. The same is true of innkeepers and hospitals**. [*Law of Torts*, § 70 at 465 (1971)(Footnotes omitted.) (Emphasis added.)]

In this case, Wayne County should be held liable for Deputy Johnson's sexual assault based upon the breach of its nondelegable duty to protect Ms. Hamed from harm committed by its employee while she was a pretrial detainee in Wayne County Jail.[16]

Such a nondelegable duty was found by the Indiana Supreme Court in *Stropes v Heritage House Childrens Ctr*, 547 NE2d 244 (Ind 1989) when determining that a group home may be

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[15] See *Exacerbating the Exasperating*, *supra* at 94-95 (1995) ("A nondelegable duty is any duty for which the principal retains absolute responsibility, and generally arises where a special relationship exists which requires a heightened duty of care.")(citing Restatement Agency, 2d, § 214 (1957)). Section 214 of the Restatement defines the nondelegable duty as follows: "A master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duty to a servant or other person is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty." Under Restatement Agency, 2d, § 219(c), "A Master is Liable for Torts of His Servants [when] the conduct violated a non-delegable duty of the master." See *Symposium: Civil Rights without Remedies: Vicarious Liability under Title VII, Section 1983, and Title IX*, 7, *supra* at 770 (noting that "[s]ection 219(2)(c) of the Restatement provides for employer liability for employee conduct outside the scope of employment when "the conduct violated a non-delegable duty of the master" and "recognizes that, in some instances, the law imposes automatic liability on employers for harms caused by their agents, irrespective of employer's fault, by stating that employers have a nondelegable duty to protect certain persons from certain harms.")(citing Restatement Agency, 2d, § 214 (1957)).

[16] Even though Ms. Hamed presents this argument for the first time in this appeal, this Court should consider it because it is necessary to a proper determination of the case where the necessary facts have already been presented in the trial court. *Prudential Ins Co v Cusick*, 369 Mich 269, 290; 120 NW2d 1 (1963).

liable when a severely retarded minor resident of a group home was sexually assaulted by a nurse's aide. Reversing the summary dismissal of the minor's claim, the Indiana Supreme Court noted that "once one has, by contract or otherwise, assumed the duty to protect another, the nature of that duty may be such that the responsibility for providing protection cannot be delegated even though the protective tasks themselves are." *Id*. at 250.

In *Stropes*, the Indiana Supreme Court recognized that the common law standard of care imposed upon common carriers extended to other enterprises entrusted with the care and safety of individuals who have ceded control and autonomy to them. As explained in *Stropes*, "[t]he concept of control is common to the theoretical underpinnings of both the doctrine of *respondeat superior* and its common carrier exception" and that "[t]he imposition of liability under the common carrier exception is premised on the control and autonomy surrendered by the passenger to the carrier for the period of accommodation." *Id*. at 252. In *Stropes*, the Indiana Supreme Court also observed, quoting *Rabon v Guardsmark, Inc*, 571 F2d 1277, 1281 n 5 (CA 4, 1978), that "[a]nother rationale underlying the exception is that 'common carriers are thought to be charged with public responsibilities; the stringent standard is therefore imposed as a matter of public policy." *Id*. at 253, n 6.

The common carrier's liability is not grounded on the theory of negligence nor upon the assumption that the act is within the scope of the servant's authority or within the scope of his employment. Rather, it is grounded upon the theory of the breach of an absolute duty resting upon the carrier to see that its passengers are not injured by the servants to whose care or custody they have been committed or exposed. Thus, as the Indiana Supreme Court observed:

> Under *respondeat superior*, employer liability is coextensive with the powers and advantages engendered by the employment relationship. Because liability is predicated conceptually on the employer's ability to command or control his employee's acts, an employer can be held responsible only for those acts of his employee which are

> committed within the scope of their employment relationship. ***Under the common carrier exception to respondeat superior, however, the range of employee activities deemed to be under the employer's dominion is irrelevant***. Liability is predicated on the passenger's surrender and the carrier's assumption of the responsibility for the passenger's safety, the ability to control his environment, and his personal autonomy in terms of protecting himself from harm; therefore, the employer can be held responsible for any violation by its employee of the carrier's non-delegable duty to protect the passenger, regardless of whether the act is within the scope of employment. [547 NE2d at 253] (Emphasis added.)

Accordingly, based upon the common-carrier exception to *respondeat superior*, the *Stropes* court concluded that the group home had "a nondelegable duty to provide protection and care so as to fall within the common carrier exception." *Id*. at 254. Therefore, the group home was liable for the staff member's breach of that duty whether or not the staff member was acting within the scope of employment.

The same applies with even greater force in this case. Here, this Court should apply Michigan's common-carrier exception to *respondeat superior* and hold that Wayne County (the master) had a nondelegable duty to protect Ms. Hamed from the sexual assault committed by Deputy Johnson (its servant). As in *Stropes*, quoting *Indianapolis Union Ry Co v Cooper*, 6 Ind App 202, 205; 33 NE2d 219, 220 (1893), which recognized that "Indiana's common law has long recognized the extraordinary standard of care imposed on common carriers . . . to protect its passengers from assaults and injuries by its servants," Michigan's common law likewise has long held common carriers to a similar standard of care where the question of liability for the breach of this duty does not depend upon whether the servant's tortious conduct is performed within the scope of his employment. Here, this Court should extend Michigan's well-established common-law standard of care imposed upon common carriers to other enterprises, particularly public entities, entrusted with the care and safety of individuals who have ceded control and autonomy to them. See *Rabon, supra*, 571 F2d at 1281 n 5 (noting that "common carriers are

though to be charged with public responsibilities; the stringent standard of care is therefore imposed as a matter of public policy"). Specifically, Wayne County's heightened duty of care is based upon a special relationship predicated upon the implied assurance that Ms. Hamed would be treated safely as a pretrial detainee upon her surrender of control and Wayne County's assumption of responsibility to protect pretrial detainees from sexual assaults by its own servants. As a matter of public policy, Wayne County should at least be held to the same standard of care that governs innkeepers and common carriers. Based upon the breach of its nondelegable duty to protect Ms. Hamed from harm, Wayne County is thus liable for her injuries for *quid pro quo* sexual harassment under MCL 37.2103(i).[17]

C. Conclusion

To sum up, this Court should affirm the Court of Appeals' decision finding Wayne County vicariously liable for *quid pro quo* sexual harassment under MCL 37.2103(i) based upon an extension of *Champion* to this case. Alternatively, as a mutually supporting independent ground for affirmance, this Court should apply the exception stated in 1 Restatement Agency, 2d, § 219(2)(d), thereby holding Wayne County vicariously liable under MCL 37.2103(i) on this basis. Finally, Wayne County is liable for *quid pro quo* sexual harassment under MCL 37.2103(i) based upon a nondelegable duty to protect Ms. Hamed from harm pursuant to Michigan's common-carrier exception to the doctrine of *respondeat superior*.

II. THE PLAINTIFF'S INCARCERATION IN THE WAYNE COUNTY JAIL IS A PUBLIC SERVICE WITHIN THE MEANING OF MCL 37.2301(b).

[17] As an exception to *respondeat superior* liability, this theory of recovery is not based upon vicarious liability, although some commentators have treated the breach of the nondelegable duty imposed upon common carrier, innkeepers, hospitals and others, as a form of vicarious liability. See *Symposium: Civil Rights without Remedies: Vicarious Liability under Title VII, Section 1983, and Title IX*, 7, *supra* at 792 ("The nondelegable duty concept makes common carriers, and in some cases, hospitals, innkeepers, and schools vicariously liable for their employees' intentional and negligent torts committed outside the scope of employment against passengers, patients, guests, and students.") (Footnote citing cases omitted).

A. Standards of Appellate Review

Whether Plaintiff's detention in Wayne County Jail is a public service within the meaning of MCL 37.2301(b) involves a question of law that is reviewed de novo. *Kaiser*, *supra*, 480 Mich at 35. The construal of a constitutional provision presents a question of law that is reviewed de novo. *Mahaffey v AG*, 222 Mich App 325, 334; 564 NW2d 104 (1997). In interpreting constitutional provisions, the primary duty of the judiciary is to ascertain the purpose and intent of the provision at issue. *White v Ann Arbor*, 406 Mich 554, 562; 281 NW2d 283 (1979). To determine the intent of a constitutional provision, this Court considers the intent of the people who adopted the provision at issue, applying the rule of "common understanding." *Straus v Governor*, 459 Mich 526, 533; 592 NW2d 53 (1999); *Lapeer County Clerk v Lapeer Circuit Court*, 469 Mich 146, 155; 665 NW2d 452 (2003). When a provision of the Michigan Constitution is nearly identical to a provision of the United States Constitution, the provisions will be construed to afford coextensive rights absent a compelling reason to justify a contrary interpretation. *People v Reichenbach*, 459 Mich 109, 118-119; 587 NW2d 1 (1998).

B. Legal Discussion

Article 3 of the CRA establishes the specific provisions prohibiting discrimination in the provision of public services. MCL 37.2302(a) provides in pertinent part:

> Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public services because of . . . sex . . .

In *Dep't of Civil Rights*, this Court observed:

> The Legislature's addition of "public service" to [subsection] 302(a), thereby including state action violations that amount to constitutional deprivation with private

> sector, non-state action legislative violations, can be explained by the fact that *article 1, § 2 of the Michigan Constitution* provides "the legislature *shall* implement this section by appropriate legislation." It is the only provision of the Declaration of Rights to provide so. [425 Mich at 188 (emphasis in original)]

As the Court of Appeals noted in *Neal, supra,* 232 Mich App at 739, citing *Dep't of Civil Rights* at 188-189:

> Thus, insofar as subsection 302(a) of the Civil Rights Act governs "public service," it is essentially a codification of the constitution's Equal Protection and Antidiscrimination Clauses, broadened to include categories not covered under the constitution, such as age, sex and martial status.
>
> "In order to state a claim under MCL 37.2302(a), plaintiff must establish four elements: (1) discrimination based on a protected characteristic (2) by a person, (3) resulting in the denial of the full and equal enjoyment of the goods, services, facilities, privileges, or accommodations (4) of a place of public accommodation." See *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). As defined, "person" includes "a political subdivision of the state," MCL 27.2103(g), while "political subdivision" includes "a county." MCL 27.2103(h). "Public service" is defined in MCL 37.2301(b) as follows:
>
> (b) "Public service" means a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof or a tax exempt private agency established to provide service to the public, except that public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment.

Under subsection 301(b), a "public service" includes a "public facility . . . owned, operated or managed by or on behalf . . . of a political subdivision [of the state]." By the plain language of this subsection, "public service" includes a police department and facility operated by Wayne County.[18]

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[18] As the Court of Appeals pointed out in *Doe II*), adopting Judge White's concurrence in *Doe v Dep't of Corrections* (*Doe I*), 236 Mich App 801; 601 NW2d 696 (1999), the phrase "established to provide service to the public" modifies only "a tax exempt private agency"

(1) <u>As a pretrial detainee in Wayne County Jail, Ms. Hamed was a member of the public</u>.

To begin, pretrial detainees in Wayne County Jail, such as Ms. Hamed, are members of the public in a general sense. *Neal, supra*, 232 Mich App at 737, quoting *Martin v Dep't of Corrections*, 424 Mich 553; 384 NW2d 392 (1986) (Cavanagh, J., dissenting) (recognizing that "resident inmates are obviously members of the public in a general sense"). Further, the public services of the Wayne County Jail are extended, offered or otherwise made available to individuals. See *Haynes, supra*, 477 Mich at 38.

(2) <u>Wayne County offers "public services" through its operation of Wayne County Jail</u>.

In *Doe II, supra*, 240 Mich App at 199, the special panel of the Court of Appeals adopted the reasoning of the majority opinion in *Neal, supra*, 232 Mich App at 730, recognizing that prisons operated by MDOC are places of "public service" within the meaning of subsection 301(b). In *Neal*, the Court of Appeals noted that the U.S. Supreme Court in *Pennsylvania Dep't of Corrections v Yeskey*, 524 US 206 (1998) concluded that "state prisons fall squarely within the statutory definition of 'public entity'" under the American with Disabilities Act of 1990 (ADA), 42 USC § 12132. 232 Mich App at 736. Because "[t]he statutory definition of 'public entity' at issue in *Yeskey* is similar to the definition of "public service" set forth in subsection 301(b), the Court of Appeals in *Neal* concluded that "the Supreme Court's reasoning in *Yeskey* applies equally to this case." *Id*. "Thus, under the plain language of subsection 301(b), the MDOC clearly falls within the broad statutory definition of "public service." *Id*. at 736-737.

The reasoning and result in *Neal* applies with even greater force to the present case since the Wayne County Jail is far more accessible to members of the public than a prison operated by

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pursuant to the last antecedent rule of statutory construction.

MDOC. Although county jails are established by statute to incarcerate felons and misdemeanants, they also serve as detention facilities to house members of the public who have *not* been convicted of any crime. MCL 800.1 *et seq.*; MCR 6.106(B). Among the numerous individuals housed in a jail or county correctional facility who are not serving a sentence of imprisonment for a felony or misdemeanor offense are individuals arrested on an outstanding warrant or because a police officer believed that there was probable cause that a crime was committed. Members of the public are also housed in a jail for collateral reasons, such as being too intoxicated to leave or those who are material witnesses to a crime. Whereas *all* prisoners housed in a prison are serving a sentence of imprisonment after having been convicted of a criminal offense, there are many people in a jail or county correctional facility who are merely being detained and are *not* serving a sentence of imprisonment. *A fortiori* the Wayne County Jail is public building or facility within the meaning of MCL 37.2302(a).

(3) Ms. Hamed was denied public services because of her sex.

As alleged in Plaintiff's Amended Verified Complaint, Ms. Hamed was denied public services because of her sex. In *Diamond, supra,* 265 Mich App at 676-678, the Court of Appeals held that the CRA applied when a police officer sexually assaulted women that he had detained in exchange for releasing them from his custody. In *Diamond*, the Court of Appeals held that the "plain language of the CRA includes situations outside the realm of employment where an individual's access to public accommodations or public services is affected." As the Court of Appeals recognized in *Diamond*:

> Plaintiffs were not free to leave the public services environment created when the [police sergeant] stopped and detained each Plaintiff. [The police sergeant] used his position as a uniformed police officer in a marked police car to stop each plaintiff, detain her against her will, exert authority over her, and finally humiliate and sexually assault her. [*Id*. at 688].

In *Diamond*, the Court of Appeals aptly explained that the women had public services imposed on them and there not free to leave. *Id*. Simply put, the officer made sexual conduct a condition of obtaining police services – specifically, being released from custody – and the officer's conduct substantially interfered with the public services rendered to them to which they were entitled without regard to sex.

Likewise, Deputy Johnson used his authority as the only deputy on duty in the Male Registry of the Wayne County Jail to demand sex from Ms. Hamed. He used Ms. Hamed's submission to, or rejection of, his advances as a factor in determining how he would provide public services, namely, whether he would treat Ms. Hamed in the manner required for booking a woman into the Wayne County Jail. Deputy Johnson demonstrated his control when he gave Ms. Hamed cigarettes and allowed her to smoke, in violation of the rules of the jail, a non-smoking facility. He further exerted control when he moved Ms. Hamed from Cell #2 to Cell #7, which was dimly lit and filled with cockroaches. He then directed her to enter the Registry Command Office so that he could close and lock the door without detection, and thus isolate Ms. Hamed from anyone who might enter the Male Registry. Not only did Deputy Johnson take advantage of the circumstances, he actively used his power and authority to create an environment in which he could rape Ms. Hamed without detection. Contrary to the Attorney General's outrageous suggestion that Deputy Johnson's sexual assault of Ms. Hamed did not substantially interfere with "public services" to which Ms. Hamed was entitled, the facts clearly show that he conditioned her receipt of those services upon complying with his demand for sex.

(4) <u>The amendment to MCL 37.2301(b) excluding prisoners from bringing an action under subsection 302(a) does not apply to pretrial detainees</u>.

While the Legislature, in response to the *Neal* decision, saw fit to exclude prisoners from the provisions of MCL 37.2301(b), it did not include pretrial detainees within this exclusion.

Specifically, Public Act 202 of 1999 amended MCL 37.2301(b), effective March 10, 2000, to make the CRA inapplicable to "an individual serving a sentence of imprisonment" in "a state or county correctional facility."

Contrary to Wayne County's position, this amendment was never intended to exempt those detainees awaiting probation hearings while housed at the Wayne County Jail. As originally drafted, House Bill No. 4475 defined any "state correctional facility" to be "a facility that houses prisoners under the jurisdiction of the MDOC and includes a Community Corrections Center, a community residential home and a youth correctional facility." (143b-159b). Similarly, as originally drafted, House Bill No. 4476 specifically attempted to amend Section 301 to exempt the ownership, operation, or management of a local jail or state correctional facility from the definition of "public service." The original definition of House Bill No. 4475 was rejected in lieu of the modifying phase "regarding an individual serving a sentence of imprisonment," which also was restated in the definition of "public service."

The Legislature could have adopted the original proposals in House Bill Nos. 4475 and 4476 and broadly and uniformly exempted all "local jail[s] or state correctional facilit[ies]." It chose not do so. Rather, the Legislature adopted the narrower exemption of those individuals "serving a sentence of imprisonment," which was not included in the original bills. Thus, in the 1999 amendment, the Legislature clearly defined its intent as follows:

> This Amendatory act is curative and intended to correct any misinterpretation of legislative intent in the Court of Appeals decision *Neal v Department of Corrections*, 232 Mich App 730 (1998). This legislation further expresses the intent of the Legislature that an individual serving a sentence of imprisonment in a state or county correctional facility is not within the purview of this act.

Accordingly, this Court should decline to read into the CRA an exclusion barring *pretrial detainees* from bringing an action under subsection 302(a). See *Empire Iron Mining Partnership*

v Orhanen, 455 Mich 410, 421; 565 NW2d 844 (1997) (noting that a court must not judicially legislate by adding into a statute provisions that the Legislature did not include). If it is the Legislature's intent to exempt pretrial detainees in county correctional facilities from the purview of the CRA, then it is incumbent upon the Legislature to draft and enact a statute that so provides. See *Doe v Roe*, 240 Mich App 199, 201; 611 NW2d 1 (2000). But, as will be discussed, any such amendment would be unconstitutional as even the Legislature's amendment to the CRA barring prisoners from the protections of the CRA violates the Equal Protection Clauses under federal and state constitutions. See *Mason v Granholm*, 2007 U.S. Dist. LEXIS 4579 (ED Mich 2007).

In any event, it is clear that the Legislature chose its words carefully and did not exempt a county correctional facility from the CRA when the discrimination occurred against a person served by the facility, but only as it relates to "actions and decisions regarding an individual serving a sentence of imprisonment." This Court must focus on the language selected by the Legislature and cannot ignore the words chosen. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27-28; 528 NW2d 681 (1995). Because the CRA does not define "serving a sentence of imprisonment," this Court gives undefined terms their ordinary meanings. *Haynes, supra*, 477 Mich at 36, citing *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). If this Court determines that a word is unclear, it must accord the word its ordinary and generally accepted meaning. *Turner, supra*.

As set forth in the American Heritage Dictionary (4th ed. 2009), "sentence" is commonly defined as a "court judgment, especially a judicial decision of the punishment to be inflicted on one adjudged guilty." Similarly, Black's Law Dictionary (6th ed. 1990) defines "sentence," in the relevant sense, to mean "the judgment formally pronounced by the court or judge upon the

defendant after his conviction in a criminal prosecution, imposing the punishment to be inflicted, usually in the form of a fine, incarceration, or probation."

Clearly, Ms. Hamed was a pretrial detainee, and thus not serving a *sentence* of imprisonment at the time that she was sexually assaulted. As the record shows, after a hearing in Livingston Circuit Court on September 7, 2001, Judge Latreille entered an order that stated that Ms. Hamed was to report to the Livingston County Jail on September 14, 2001 at 5:00 p.m. ***if*** she was not enrolled in an inpatient treatment program. Since her conditional sentence imposed by Judge Latreille was not to begin until seven days after her sexual assault, if the sentence was to begin at all, Ms. Hamed was not serving a sentence of imprisonment at the time that she was sexually assaulted.

Further, Ms. Hamed was in the Wayne County Jail only because she had been transferred there to appear in court on an alleged probation violation. As the Court of Appeals properly noted, Ms. Hamed was not being held at the Wayne County Jail to serve a sentence – she was only being processed for an alleged probation violation when she was sexually assaulted. (13a). Accordingly, because Ms. Hamed was merely a pretrial detainee and not an individual serving a sentence of imprisonment in a county correctional facility at the time that she was sexually assaulted, the exemption stated at MCL 37.2301(b) clearly does not apply.[19]

(5) <u>As a pretrial detainee awaiting a probation hearing, Ms. Hamed had neither</u>

[19] It also does not matter whether Ms. Hamed was in a correctional facility in Livingston County or Wayne County – her conditional sentence was not to begin, if it was to begin at all, until seven days *after* the sexual assault. As Judge Sapala correctly explained at the motion hearing on March 30, 2007:

> [B]y any reasonable understanding of the English language she was not serving a term of imprisonment. She wasn't even serving a jail sentence. She wasn't serving time under any sentence; she was awaiting disposition. The legislature could have clearly included language that indicated that people awaiting disposition in county jail would be included. [29a]

been "sentenced" nor was serving a term of imprisonment at the time that she was sexually assaulted.

Although county jails are established by statute to incarcerate felons and misdemeanants, they also serve as detention facilities to house persons merely charged with crimes as pretrial detainees. MCL 800.1 *et seq*.; MCR 6.106(B). Under Michigan law, it is well-settled that a pretrial detainee is not a person who has been imprisoned. See *Jones v City of Hamtramck*, 905 F.2d 908, 909 (CA 6, 1990), citing *Hawkins v Justin*, 109 Mich App 743; ; 311 NW2d 465 (1981) and *Perreault v Hosteler*, 884 F.2d 267, 270 (CA 6, 1989); United States Sentencing Guidelines § 4A1.2(b)(1) (defining "sentence of imprisonment" as "a sentence of incarceration"). Thus, the Court of Appeals aptly noted in this case that the CRA exemption "does not encompass all legally incarcerated persons." (12a). Moreover, as the Court of Appeals observed, "[Wayne County] concede[s] that the exclusionary phrase in MCL 37.2301(b) does not exclude all individuals legally detained in a correctional facility" and "conceded that pretrial detainees are not within the ambit of MCL 37.230[1](b)." (*Id*.)

Notably, Ms. Hamed was one of those individuals *not* serving a sentence of imprisonment. As already stated, she was not transferred to the Wayne County Jail to serve a sentence of imprisonment, but rather to be adjudicated on an alleged probation violation, the presumptive legal basis for her detention. Indeed, after being detained four days in Wayne County Jail, Ms. Hamed was eventually released from custody on September 12, 2001 without ever "serving a sentence of imprisonment" on the alleged probation violation but was continued on probation! (119b-120b).[20]

[20] Pursuant to MCR 6.445(A), a warrant was issued for the arrest of Ms. Hamed for the alleged violation of her probation involving a failed drug test. Before she could be adjudicated for violating her probation, she had to be arraigned on the charge and provided with written notice of the alleged violation and advised that she could waive her right to a contested hearing. MCL 771.4; MCR 6.445(b)(1); *People v Terrell*, 134 Mich App 19; 349 NW2d 810 (1984). The

In any event, as a pretrial detainee, she was presumed to be innocent, with the same panoply of rights as those possessed by the detainees in *Diamond*. In *Bell v Wolfish*, 441 US 520, 535-537 (1979), the United States Supreme Court, in an opinion authored by Justice Rehnquist, noted:

> For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. A person lawfully committed to a pretrial detention has not been adjudged guilty of any crime. He has had only a "judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest.". . . [T]he Government . . . may detain him to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution.

Anticipating the issue of Ms. Hamed's detention status as opposed to serving a "sentence of imprisonment, Justice Rehnquist declared:

> Loss of freedom of choice and privacy are inherently incidents of confinement in such a facility. As the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with little restraint as possible does not convert the conditions of restrictions of detention into "punishment." [*Id.* at 537].

See also *Aldini v Johnson*, 609 F3d 858, 866 (CA 6, 2010) (noting that "in *dicta* in *Wolfish* that individuals who have not had a probable-cause hearing are not yet pretrial detainees for constitutional purposes"). Given that Ms. Hamed was assaulted as she was being "registered" in the Male Registry of the Wayne County Jail and before she appeared before the court in a probation hearing to adjudicate the alleged probation violation, it is clear that she was not "serving a sentence of imprisonment" at the time of the sexual assault.

(6) <u>The amendment to the CRA excluding prisoners from bringing an action under subsection 302(a) violates the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and the 1963 Michigan Constitution, art 1, § 2</u>.

Beyond the fact that the amendment stated at MCL 37.2301(b) barring prisoners from the

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adjudication or hearing is necessary before her probation could be revoked. *People v Myers*, 306 Mich 100; 10 NW2d 323 (1943); *People v Tebedo*, 107 Mich App 316; 309 NW2d 250 (1981).

protection of the CRA does not apply to pretrial detainees, such as Ms. Hamed, the amendment suffers from a far more serious problem of a constitutional dimension. As a matter of statutory construction, the CRA must be interpreted in conformity with the provisions of the federal and state constitutions. Courts have a duty to construe a statute as constitutional, and every reasonable presumption must be made in favor of constitutionality, unless unconstitutionality is clearly apparent. *Mich United Conservation Club v Dep't of Treasury*, 239 Mich App 70; 608 NW2d 141 (1999), aff'd 463 Mich 995; 625 NW2d 783 (2001).

As already noted, the equal protection of the law is guaranteed by both the federal and state constitutions. US Const, Am XIV; Const 1963, art 1, § 2; *Frame v Nehls*, 452 Mich 171, 183; 550 NW2d 739 (1996). Specifically, Article 1, § 2 of the Michigan Constitution provides:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

By its own terms, this constitutional provision directed the Michigan Legislature to provide legislation to redress discrimination, and "[t]he ELCRA is that legislation." *Mason, supra*, 2007 U.S. Dist. LEXIS 4579 at *4-5 (citing *Dep't of Civil Rights, supra*, 425 Mich at 188 and *Neal, supra*, 232 Mich App at 739)). Indeed, all citizens, whether prisoners or pretrial detainees, are protected from invidious discrimination on the basis of sex by the Equal Protection Clause of the Fourteenth Amendment. *See Wolff v McDonnell*, 418 U.S. 539, 556 (1974).

Recently, the Federal District Court for the Eastern District of Michigan, the Honorable John Corbett O'Meara presiding, declared in *Mason v Granholm* that the amendment of MCL 37.2301(b) deprives prisoners of the equal protection of the laws in violation of the Fourteenth Amendment to the U.S. Constitution. In *Mason*, Judge O'Meara found that the CRA amendment failed the rational basis test, rejecting the MDOC's contentions that the CRA

amendment "does advance legitimate interests such as protecting the public fisc, preventing windfall awards, reducing judicial intervention in the management of prisons, deterring frivolous lawsuits by prisoners and reducing trivial or inconsequential suits." *Mason, supra* at *8. As Judge O'Meara noted:

> Viewing the statute in the context of this case, the ELCRA amendment essentially permits the state to discriminate against female prisoners without fear of accountability under Michigan civil rights law. Given the state's abhorrent and well-documented history of sexual and other abuse of female prisoners, the court finds this amendment particularly troubling. See generally *Everson v Mich Dep't of Corrections*, 391 F.3d 737, 741 (CA 6, 2005) ("The problem of sexual abuse and other mistreatment of female inmates has long plagued the MDOC.") It appears that the state legislature has not attempted to deter frivolous lawsuits, but rather preclude meritorious ones. [*Id*. at *11].

Thus, Judge O'Meara concluded that the amendment to the CRA violated "prisoners' equal protection rights and is unconstitutional" under the federal constitution. *Id*. at *13.

Given that the Michigan Constitution secures the same right of equal protection and due process as the federal constitution, and given that the CRA is coterminous with the Equal Protection Clauses of the federal and state constitutions, this Court must conclude that the amendment to the CRA is unconstitutional under the Equal Protection Clause of both the federal and state constitutions. This necessarily follows because the Equal Protection Clause of the Michigan Constitution cannot be analyzed as providing *lesser* protection than its federal counterpart, absent a compelling reason to justify a contrary interpretation. *Reichenbach, supra*, 459 Mich at 118-119. Simply put, there is no compelling reason to justify a contrary interpretation to *Mason*.

Consequently, in analyzing the Equal Protection Clause of the Michigan Constitution, this Court is not free to deviate from the conclusion reached by Judge O'Meara that the amendment to the CRA is unconstitutional. See *Smith v Mount Pleasant Public Schools*, 285 F Supp 2d 987, 991-992 (ED Mich 2003) (noting that it is unnecessary to "discuss the plaintiff's

state constitutional claims separate from the analysis under federal law" where the state and federal constitutions secure the same right of equal protection and due process). For this Court to conclude otherwise and declare the amendment to the CRA to be constitutional is to hold that the Equal Protection Clause of the Michigan Constitution provides ***less*** protection than its federal counterpart. Accordingly, this Court is constitutionally compelled to interpret the CRA as allowing pretrial detainees to bring an action under subsection 302(a), or else violate the Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution and Article 1, § 2 of the 1963 Michigan Constitution. [21]

To deprive Ms. Hamed, or any other pretrial detainee, of the protection of the CRA would place in jeopardy the civil rights of ***every*** citizen in this State, as even those citizens detained for a mere traffic stop as in *Diamond* would fall outside the ambit of the CRA. In no uncertain terms, barring pretrial detainees from bringing a cause of action under subsection 302(a) would swiftly lead to the evisceration of the protections afforded by the CRA for anyone stopped by the police, even momentarily based upon a suspicion, whether justified or not. That

[21]But even assuming *arguendo* that this Court is not constitutionally compelled to follow *Mason* in analyzing the Equal Protection Clause of the Michigan Constitution, the reasoning in *Mason* is authoritatively persuasive, especially as it pertains to pretrial detainees. See *Abela v General Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004)("Although lower federal court decisions may be persuasive, they are not binding on state courts.") As in *Mason,* there is no valid governmental interest to be served by barring pretrial detainees from the protection of the CRA. See anno: *Sex discrimination in treatment of jail or prison inmates,* 12 ALR4th 1219. Further, as a pretrial detainee who had yet to be adjudicated guilty of the alleged probation violation at the time of the sexual assault, Ms. Hamed, like any other free citizen, fully enjoyed the presumption of innocence and rights guaranteed by the due process clauses under the state and federal constitutions. See *Jackson v Bishop*, 404 F2d 571, 576 (CA 8, 1968) (noting that "a prisoner of the state does not lose all his civil rights during and because of his incarceration" and "continues to be protected by the due process and equal protection clauses which follow him through the prison doors."); *State of New Jersey v Foy*, 146 NJ Super 378; 369 A2d 995 (1976) (declaring a requirement that a pretrial detainee appear in a lineup to be a denial of the equal protection of the laws under the Fourteenth Amendment where "the fact of confinement does not allow the State to arbitrarily strip him of his personal liberties"). Simply put, pretrial detainees do not lose the right to equal protection by virtue of their legal status as pretrial detainees.

is the policy of a police state, not a free society.

C. Conclusion

Thus, Ms. Hamed's incarceration in the Wayne County Jail is properly considered to be a "public service" within the meaning of MCL 37.2301(b). The exemption in MCL 37.2301(b), which was added by the Legislature in response to the *Neal* decision, clearly does not apply to pretrial detainees, such as Ms. Hamed. Further, at no time before or after the sexual assault was Ms. Hamed "serving a sentence of imprisonment" in "a state or county correctional facility." Moreover, reading the CRA so as to preclude pretrial detainees, such as Ms. Hamed, from bringing an action under subsection 302(a) is not only contrary to the canons of statutory interpretation, it would also violate the Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and the 1963 Michigan Constitution, art 1, § 2.

III. JUDGE SAPALA PROPERLY EXERCISED HIS DISCRETION BY PERMITTING MS. HAMED TO AMEND HER COMPLAINT TO ALLEGE VIOLATIONS OF THE MICHIGAN CIVIL RIGHTS ACT.

A. Standard of Appellate Review

A decision allowing a pleading to be amended is within the sound discretion of the trial court and reversal is only appropriate when the trial court abuses that discretion. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (2003). An "abuse of discretion" occurs when there is more than one reasonable and principled outcome, and the trial court selects an outcome outside this range of principled decisions. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). This Court will not reverse a trial court's decision granting leave to amend unless it constituted an abuse of discretion that resulted in injustice. *Weymers, supra* at

654.

B. Legal Discussion

It is well-settled that courts freely grant leave to amend a complaint when justice so requires. MCR 2.118(A)(2); *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973); *Weymers, supra* at 658. The rules governing the amendment of pleadings are designed to facilitate amendment except when prejudice to the opposing party would result. Further, as set forth in MCL 600.2301:

> The court in which any action or proceeding is pending has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, ***at any time before judgment rendered therein***. (Emphasis added).

Thus, a motion to amend should ordinarily be denied only for particularized reasons. *Fyke, supra* at 656. Reasons justifying denial of leave to amend include undue delay, bad faith or dilatory motive, or undue prejudice to the defendant. *Weymers, supra* at 658. Although delay may bring about circumstances that result in prejudice justifying denial of leave to amend, mere delay by itself is insufficient to deny leave to amend. *Fyke, supra* at 663-664. To establish prejudice justifying the denial of leave to amend the defendant must show that the new allegations are offered so late as to preclude a fair trial. *Weymers, supra* at 659-660.

(1) Ms. Hamed's Amended Complaint did not make new factual allegations to support her claims under the CRA.

Contrary to Wayne County's contention, Judge Sapala did not abuse his discretion in allowing Ms. Hamed to amend her Verified Complaint as she made no new factual allegations in adding her claims under the CRA. In this case, Ms. Hamed has been questioned over and over again during many years about the series of events that led to her sexual assault by Deputy Johnson while being booked in the Male Registry of the Wayne County Jail. After being

sexually assaulted, Ms. Hamed understandably did not reproduce every detail whenever she was questioned as she was forced continually to relive this awful experience. Nonetheless, her core factual allegations have always remained the same. Simply put, there is absolutely no basis in the factual record for Wayne County's cavalier assertion that "the factual allegations in Plaintiff's amended complaint . . . are ***contradicted*** by sworn testimony that Plaintiff had already given in her deposition and in the criminal trial against Johnson." (Defendants' Br. at 36) (Emphasis added.). As the Court of Appeals pointed out, there is an important difference between "inconsistency" and "contradiction." (15a). Thus, in affirming Judge Sapala's order allowing Ms. Hamed to amend her complaint, the Court of Appeals properly rejected Wayne County's spurious accusation that "the allegation in plaintiff's amended complaint directly contradicted her prior sworn statements." (*Id*.)

Indeed, the Court of Appeals confirmed that Ms. Hamed consistently testified to significant aspects of her claim, namely, "that she was highly emotional, under the direct supervision and control [of] Johnson and that Johnson had non-consensual sexual contact with her. (*Id*.) The Court of Appeals further elaborated that slight differences in what Deputy Johnson said were "not substantial, because all of Johnson's alleged statements imply that he had power to act to plaintiff's advantage or disadvantage, thus giving her an incentive to please him." *Id*. While Wayne County argues that Ms. Hamed was inconsistent about whether the door was locked when Deputy Johnson assaulted her in the Registry Command Office, the Court of Appeals rightly pointed out that, whether the door was locked or not, Ms. Hamed was certainly not free to leave, and there was never any question that she was raped therein. In any case, there was ample testimony that the Male Registry was dark or dimly lit, making it even more difficult for Ms. Hamed to know for certain the cell numbers or whether a door was locked. Thus, as the

Court of Appeals properly determined, the so-called "inconsistencies" of which Wayne County complains hardly merit the dismissal of Ms. Hamed's Amended Verified Complaint, as they are minimal at best and are subject of impeachment under cross-examination. See *People v Hooper*, 157 Mich App 699; 403 NW2d 605 (1987).

(2) Ms. Hamed's Amended Complaint adding claims under the CRA was made in good faith and without dilatory motive.

It is also frivolous of Wayne County to repeat the unsupported and preposterous allegation that Ms. Hamed acted in bad faith or had a dilatory motive in amending her Verified Complaint. (Defendants' Br. at 37). Although Wayne County glibly claims prejudice allegedly based on Ms. Hamed delay's in filing her Amended Verified Complaint, the Court of Appeals found that there was no evidence of delay or prejudice. (16a). There was also no evidence that the new allegations were offered so late as to preclude a fair trial. *Weymers, supra* at 659-660. Indeed, considering that complaints may be amended *at any time before judgment is entered* under MCL 600.2301 and that courts freely grant leave to amend a complaint when justice so requires under MCR 2.118(A)(2), it would have been an abuse of discretion for Judge Sapala to have denied Ms. Hamed's motion to amend her Verified Complaint, since there were no reasons justifying denial of leave to amend.

C. Conclusion

Judge Sapala properly exercised his discretion in denying Wayne County's motion to strike Ms. Hamed's Verified Complaint adding the CRA claims. As the Court of Appeals correctly determined, Judge Sapala's decision was not outside a principled range of decisions.

CONCLUSION AND RELIEF

Based upon the foregoing, this Court should affirm the Court of Appeals decision and remand this case for further proceedings. First, Wayne County is liable for *quid pro quo* sexual

harassment under MCL 37.2103(i) pursuant to *Champion*, the adoption of Restatement Agency, 2d, § 219(2)(d) or the violation of its nondelegable duty to protect Ms. Hamed from harm. Second, Ms. Hamed's pretrial detention in the Wayne County Jail is a public service within the meaning of MCL 37.2301(b). Finally, Judge Sapala did not abuse his discretion in permitting Ms. Hamed to amend her complaint to allege *quid pro quo* sexual harassment.

Respectfully Submitted,

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