

STATE OF MICHIGAN
COURT OF APPEALS

BRUCE WHITMAN,
Plaintiff-Appellee,

v

CITY OF BURTON and CHARLES SMILEY,
Defendants-Appellants.

FOR PUBLICATION
April 24, 2014

No. 294703
Genesee Circuit Court
LC No. 08-087993-CL

ON REMAND

Before: O'CONNELL, P.J., and SAAD and BECKERING, JJ.

O'CONNELL, P.J. (*concurring*).

I concur fully with Judge Saad's majority opinion. I write separately to urge our Supreme Court to grant leave in the event of an appeal and to consider the whistleblower claim in the context of plaintiff's breach of the agreement to forgo wage benefits. The record establishes that plaintiff attended the meeting at which city administrators agreed to forgo wage benefits. By doing so, plaintiff bound himself to a contractual agreement, which he later breached by demanding the forgone benefits. In my view, if there is any causal connection between plaintiff's whistleblower conduct and the decision not to reappoint him, plaintiff severed that connection by breaching the agreement to forgo wage benefits. To allow plaintiff to benefit from his breach is to ignore the substance and purpose of basic contract law and of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*

In contract law, "[o]ne who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for failure to perform." *Sentry Ins v Lardner Elevator Co*, 153 Mich App 317, 323; 395 NW2d 31 (1986). In this case, plaintiff and his similarly situated colleagues reached an agreement with defendants to forgo certain benefits. This agreement clearly benefitted the city and all of its residents, including plaintiff in his capacity as a resident of the City of Burton. Plaintiff then breached the agreement by demanding the forgone benefits. Plaintiff now attempts to benefit from his breach by conjuring an action under the WPA.

In my opinion, plaintiff's breach of contract precludes him from maintaining this specious action under the WPA.

/s/ Peter D. O'Connell