Exhibit U

STATE OF MICHIGAN
IN THE COURT OF APPEALS

DAVID SCHIED,

Plaintiff/Appellant,

v

LINCOLN CONSOLIDATED SCHOOLS, LINCOLN CONSOLIDATED SCHOOLS BOARD OF EDUCATION and DR. SANDRA HARRIS,

Defendants/Appellees.

Court of Appeals No. 267023
Washtenaw County Circuit
Court Case No. 04-577-CL

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APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

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STATEMENT OF QUESTIONS INVOLVED

I. **Under Texas law David Schied is not a convicted felon, his conviction having been "wiped away" and his civil rights fully restored by gubernatorial pardon, and he correctly asserted such status in his employment application. Did the trial court err when it disregarded or misapplied established Texas law and instead held that Mr. Schied could not properly deny the 1977 conviction?**

The Appellants answer "Yes."
The Appellees answer "No."
The Circuit Court answered "No."

II. **David Schied's individual employment contract incorporated all terms contained in the collective bargaining agreement applicable to the District's teachers, including a just cause for discipline provision. Did the trial court err when it failed to address the issues of material fact as to whether the District had just cause to discharge Mr. Schied?**

The Appellants answer "Yes."
The Appellees answer "No."
The Circuit Court did not address the question.

III. **Through the Set Aside Act and the Revised School Code the legislature has declared that a set aside criminal conviction is deemed not to have occurred and that when a conviction is set aside an individual may teach in schools in our state. Neither statute provided a cause of action for Mr. Schied. Did the trial court err by not addressing the viability of Mr. Schied's public policy discharge claim?**

The Appellants answer "Yes."
The Appellees answer "No."
The Circuit Court did not address the question.

IV. **As a matter of law Mr. Schied is not a convicted felon and made no misrepresentations to Appellees regarding that fact. There are genuine issues for trial regarding Mr. Schied's defamation and self publication defamation claims. Did the trial court err when it did not address these issues?**

The Appellants answer "Yes."
The Appellees answer "No."
The Circuit Court did not address the question.

JURISDICTIONAL STATEMENT

Appellant claims an appeal from the Washtenaw County Circuit Court's order entered November 16, 2005. Appellant timely filed his claim of appeal, pursuant to MCR 7.203(A)(1) and MCR 7.204(A)(1)(b), on December 7, 2005.

INTRODUCTION

In 1977, Appellant David Schied, then only 20 years old, was convicted and sentenced to [redacted] probation for [redacted], a felony in Texas. A short two years later, Mr. Schied no longer would have a recognized criminal record because the 183rd District Court set aside the conviction and dismissed the indictment through its Early Termination Order of the Court Dismissing the Cause ("Early Termination Order" or "set aside order"). (Ex A)[1] Tex Code Crim Proc 42.12 § 20. When the 183rd District Court engaged in this act, denominated in Texas as "judicial clemency," Mr. Schied was no longer, as a matter of law, a convicted felon. *Cuellar v Texas*, 70 SW 3d 815; 818-19 (Tex Ct of Crim Appeals, 2002).

Then in 1983, in order to make sure that all of his Texas constitutional rights were restored, Mr. Schied sought a Governor's Pardon. On June 1, 1983, Mr. Schied received that pardon, fully extinguishing any possible remaining penalty or disability. (Ex B) *Cf RRE v Glenn*, 884 SW2d 189, 193 (Tex Ct of Appeals, 1994).

Against this legal backdrop, twenty years after any penalty or disability was eliminated and twenty-six years after Texas no longer considered Mr. Schied a convict, the following scenario played out.

STATEMENT OF FACTS

In 2000, while living in California Mr. Schied earned and was granted a teaching certificate. He taught in California public schools for two years and then decided to move with his family to Michigan. Mr. Schied applied for and was granted a Temporary

[1] All exhibit references are to the attachments to the Brief in Support of Plaintiff's Response to Defendants' Motion for Summary Disposition, unless otherwise noted.

Teacher Employment Authorization and has subsequently been granted a Provisional Teaching Certificate.

Mr. Schied was hired by the Lincoln Consolidated Schools on September 11, 2003. After his interview, the District officials indicated that they were going to recommend hiring Mr. Schied, so they asked that he complete an employment form. Among the questions asked on the application was whether he had "been convicted of, or pled guilty or nolo contendere (no contest) to any crimes." This question was propounded pursuant to MCL 380.1230 and MCL 380.1230a. (Ex D) Mr. Schied answered, "No." Mr. Schied's answer was truthful because the December 20, 1979, Early Termination Order resulted in the withdrawal of his plea, the dismissal of the indictment and the Judgment of Conviction being set aside.

After the application was completed and Mr. Schied was teaching, the District performed a standard criminal background check on Mr. Schied. On October 10, 2003, the District received the results. While the State Police returned no criminal history, an FBI report referenced a 1977 conviction. (Ex E) The FBI report failed to contain information about the withdrawal of the plea, dismissal of the indictment, the set aside of the conviction or the Governor's Pardon. But the report did state that the District's decision-making official, Defendant Harris, must give Mr. Schied the opportunity to correct any deficiencies or errors in the report:

> If the information on the record is used to disqualify an applicant, the official making the determination . . . for . . .employment **shall provide the applicant the opportunity to** complete, or **challenge the accuracy** of, the information contained in the FBI identification record. The deciding official **should not deny . . . employment based on the information in**

the record until the applicant has been afforded a reasonable time to correct or complete the information, or has declined to do so.

(Emphasis added)

On October 13, 2003, three days after receiving the FBI report, the District proffered an individual Probationary Teacher Contract of Employment to Mr. Schied. (Ex F) An individual contract is expressly subject to the terms and conditions of the collective bargaining agreement between the District and the teachers' association, the Washtenaw-Livingston Education Association (WLEA).

As a teacher in the District, Mr. Schied's terms and conditions of employment were governed by the collective bargaining agreement. Significant to this case are two provisions from the collective bargaining agreement. The first provision is Art 18, ¶B, which provides, in pertinent part, "No teacher shall be disciplined or reprimanded without just cause." (Ex G) The second provision is Art 23, ¶A, which states in part, "The following matters shall not be the basis of any grievance filed under the [grievance] procedure outlined in this Article: 1. The termination of services or the failure to re-employ any probationary teacher." (Attached as Ex A)

Apparently, as a result of the FBI report, on November 3, 2003, Mr. Schied was called to what Superintendent Sandra Harris characterized as a "pre-termination" meeting. In that meeting, Dr. Harris accused Mr. Schied of lying to the District about his criminal history.

Mr. Schied presented Dr. Harris with the Early Termination Order of the Court Dismissing the Cause and attempted to explain its meaning to her. (See Affidavit of Claudia Gutierrez) In the end, the meeting was adjourned. Ignoring the information provided by Mr. Schied, Dr. Harris issued a letter addressed to Mr. Schied, which was

copied en masse to school personnel, WLEA representatives and Mr. Schied's personnel file. (Ex H) In this letter she stated Mr. Schied had misrepresented himself on employment forms and that her office received information that he had, "... indeed been convicted of [redacted] in the state of Texas in 1977."

On November 6, 2003, a follow-up meeting was conducted. At this meeting, Dr. Harris was given a copy of the Texas Court's Early Termination Order of the Court Dismissing the Cause and the Governor's pardon. Again, Mr. Schied and his representatives tried, in vain, to explain the significance of these documents to Dr. Harris. (See Affidavits of Donnie Reeves, Linda Soper and Ms. Gutierrez)

Dr. Harris irresponsibly ignored the legal effect of the Texas court order and Governor's Pardon, and on November 6, 2003, sent Mr. Schied a letter calling him a liar and a convict, and informing him that he was terminated. Dr. Harris stated, "[W]e hold the stance that you misrepresented yourself when completing the employment paperwork for our school district. Although your criminal record may have been cleared, you have indeed been convicted of [redacted]" (Ex I) As with the first letter, this second letter was copied to numerous school district personnel and WLEA representatives as well as Mr. Schied's personnel file.

Following his termination, Mr. Schied filed this lawsuit challenging the District's improper actions. The complaint was amended once. The amended complaint alleged that the District and its superintendent, 1) breached the collective bargaining agreement by discharging Mr. Schied without just cause, 2) violated Michigan public policy as articulated in the Set Aside Act, MCL 780.622 and the Revised School Code, MCL

380.1535a, 3) violated 28 CFR 50.12 by failing to provide Mr. Schied the opportunity to correct the FBI report and 4) defamed Mr. Schied through the superintendent's letters.

On October 26, 2005, the parties appeared for a hearing on opposing motions for summary disposition. The trial court, while granting complete summary disposition to the Defendants gave a terse exposition of the law concerning the set aside and governor's pardon; and gave no explanation why the conclusion with respect to the set aside and governor's pardon led to a dismissal of Mr. Schied's case. Rather, after declaring the issue "vexing," and concluding that her ruling was not "entirely just under all [the] circumstances," the court held that having the set aside and governor's pardon was not sufficient for Mr. Schied to deny that he had been convicted. (Transcript 10/26/05, p 35) Instead, Mr. Schied would have had to also procure an expunction (the term Texas uses for expungment), which he did not do until after being terminated from the District. On November 16, 2005, the court's order was entered. And on December 7, 2005, this appeal was filed.

ARGUMENT

I. Under Texas law David Schied is not a convicted felon, his conviction having been "wiped away" and his civil rights fully restored by gubernatorial pardon, he correctly asserted such status in his employment application. The trial court erred when it disregarded or misapplied established Texas law and instead held that Mr. Schied could not properly deny the 1977 conviction.

Standard of Review

Summary disposition decisions and orders are reviewed *de novo* by the appellate courts. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Moreover, when addressing questions of statutory interpretation the appellate courts engage in a

complete record review, examining the record *de novo*. *In re MCI Telecom*, 460 Mich 396, 413; 596 NW2d 164 (1999). Such thoroughgoing review is particularly essential in the instant case where the Court is engaging in statutory interpretation of the statutes of a foreign jurisdiction.

Argument

David Schied, having been released from the penalties and disabilities of his conviction and having been decreed not a convict, properly and reasonably responded to the question posed in the District's employment application. What constitutes a conviction, and whether an individual is a convict is determined in accordance with the law of the state in which the underlying offense occurred. *US v Sauseda*, 2000 US Dist Lexis 21323 (WD Tex, unpublished 1/10/2000) (attached as Ex B). In the instant case, the controlling Texas statute and case law make it clear that Mr. Schied was no longer deemed to have been convicted. Mr. Schied could fairly and reasonably answer, "I have not been convicted of, or pled guilty or nolo contender (no contest) to any crimes."

The first action taken by the State of Texas to remove Mr. Schied's conviction status was the 1979 entry of an order pursuant to Tex Code Crim Proc 42.12 §20. Section 20 reads as follows:

> At any time, after the defendant has satisfactorily completed one-third of the original community supervision period or two years of community supervision, whichever is less, the period of community supervision may be reduced or terminated by the judge. Upon the satisfactory fulfillment of the conditions of community supervision, and the expiration of the period of community supervision, the judge, by order duly entered, shall amend or modify the original sentence imposed, if necessary, to conform to the community supervision period and shall discharge the defendant. If the judge discharges the defendant under this section, the judge may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against the defendant, who shall thereafter be released from all penalties and

> disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty . . . .[2]

This provision has two components. The first is a discharge for satisfactory completion of community supervision. The second is a discretionary vacation of the defendant's conviction. This is referred to as "judicial clemency" and was explained in *Cuellar*, 70 SW3d at 819-20 (emphasis added), as follows:

> If a judge chooses to exercise this judicial clemency provision the conviction is wiped away, the indictment dismissed, and the person is free to walk way from the courtroom 'released from all penalties and disabilities' resulting from the conviction. Art. 42.12 § 20(a). Once the trial judge signs the Article 42.12, § 20, order **the felony conviction disappears**, except as specifically noted in subsection (1) and (2).

Thus, when a judicial clemency order is entered the conviction is wiped away and disappears. The court in *Chalmers v Ridge*, 2003 US Dist Lexis 20465 (ND Tex, unpublished 11/12/03) (attached as Ex C) recognized this important legal principle when the magistrate judge opined:

> As this statute makes clear, discharging the defendant from community supervision does not automatically vacate his conviction. Rather, the judge *may* enter an order setting aside the conviction or allowing the defendant to withdraw his guilty plea. *See United States v. Sauseda, 2000 U.S. Dist. LEXIS 21323, 2001 WL 694490 at *2 (W.D. Tex. Jan. 10, 2001)*; *State v. Cuellar, 70 S.W.3d 815, 820 (Tex. Crim. App. 2002)* (only a person whose conviction is set aside under *article 42.12, §20* is not a convicted felon).

In the instant case, Mr. Schied received discretionary judicial clemency. On December 20, 1979, the 183rd District Court entered an order in Mr. Schied's case that provided in part, "It is therefore the order of the Court that the defendant be and he is hereby permitted to withdraw his plea of guilty, the indictment against defendant be and

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[2] The statute creates two exceptions to the release; both are not applicable to this case. The exceptions are, 1) in the event of another conviction and 2) where the defendant is an applicant or licensee of a child care facility.

the same is hereby dismissed and the Judgment of Conviction be hereby set aside as provided by law."

The legal effect of this order was explained by the Texas Criminal Court of Appeals in *Cuellar*. In that case, on July 26, 1979, Mr. Cuellar pled guilty to possession of heroin, a felony. His prison sentence was suspended and he was placed on community supervision for five years. On September 1, 1981, after having fulfilled the conditions of community supervision, the court entered an order pursuant to Tex Code Crim Proc 42.12 §20, similar to the one entered in regard to Mr. Schied, which stated:

> It is the order of the court that the *judgment of conviction* entered in said cause be and is hereby set aside and the indictment against said defendant be and the same is hereby dismissed ...
>
> *Cuellar,* at 816.

In November 1996, Mr. Cuellar was a passenger in a car en route to his hunting lease. The car was pulled over on a routine traffic violation. The officer asked Mr. Cuellar if he was in the possession of any weapons and Mr. Cuellar truthfully responded he had a hunting rifle behind the back seat. The officer processed Mr. Cuellar's license for criminal history and learned of the 1976 violation. Mr. Cuellar was arrested and charged with unlawful possession of a firearm by a felon.[3] Mr. Cuellar pled not guilty. The trial court found him guilty of the charge. Mr. Cuellar appealed, arguing that the evidence presented was legally insufficient in that there was no underlying conviction to support a conviction under §46.04(a) since his 1976 conviction

[3] Texas Penal Code § 46.04 provides: (a) A person who has been convicted of a felony commits an offense if he possesses a firearm: (1) after conviction and before the fifth anniversary of the person's release from confinement following conviction of the felony or the person's release from supervision under community supervision, parole, or mandatory supervision, which ever is later; or (2) after the period described by Subdivision (1), at any location other than the premises where the person lives.

was set aside pursuant to 42.12 §20. In other words, he argued that as a matter of law, his prior conviction never occurred; therefore he could not be a felon in possession of a firearm. The Fourth Court of Appeals agreed with Mr. Cuellar.

The State appealed and the Criminal Court of Appeals of Texas affirmed the Fourth Court of Appeals. In reviewing the statute the court explained that there are two types of discharge, mandatory upon completion of the community supervision conditions and permissive to fully remove the criminal conviction. Mr. Cuellar was discharged under the second type which is not a matter of right, but a matter of "judicial clemency within the trial court's discretion." The Court held:

> In sum, a person who successfully completes all the terms of and conditions of community supervision must be discharged from community supervision. This is not a discretionary matter. However, whether to dismiss the indictment and set aside the conviction is wholly within the discretion if the trial court. But, a person whose conviction is set aside pursuant to an Article 42.12, § 20, order *is not a convicted felon.*
>
> *Cuellar,* at 820 (emphasis in original)

Mr. Schied successfully completed his community supervision. The Presiding Judge of the 183rd Criminal District Court of Texas exercised his discretion and granted Mr. Schied the second type of discharge provided for in 42.12 §20 – that of judicial clemency, which resulted in Mr. Schied withdrawing his guilty plea, the court dismissing the underlying indictment and setting aside the Judgment of Conviction, and the release of Mr. Schied from all penalties and disabilities arising from the withdrawn plea. Just as the prosecution was wrong in its attempt to charge with Mr. Cuellar of being a person "who has been convicted" under Texas Penal Code § 46.04, Appellees were wrong in deeming Mr. Schied to "have indeed been convicted."

To the extent that Texas' first action, the grant of judicial clemency, did not fully remove all penalties and disabilities, the State's second action completely restored all of Mr. Schied's civil rights. *RRE v Glenn*, 884 SW2d 189, 193 (Tex Ct of Appeals, 1994) holds, "Nothing in the Constitution contemplates the full restoration of the rights of felons other than by executive pardon." On June 1, 1983, upon the recommendation of the Texas Board of Pardons and Paroles, and under his constitutional authority set forth in Tex Const art IV, §11(b), Governor Mark White pardoned Mr. Schied. By that proclamation the governor granted "a full pardon and restoration of full civil rights."

Under Texas law, therefore, as of 1983, Mr. Schied's conviction had been wiped away, he was no longer a convict and all of his civil rights had been fully restored. Because all of the events – the crime, the conviction, the set aside and the pardon – occurred in Texas and are controlled by Texas law, Mr. Schied's status when he applied at the Appellee District is likewise defined by Texas law. It is "crystal clear" to the Texas legal system that Mr. Schied's conviction has disappeared. *Cuellar*, 70 SW3d at 819. It is likewise certain that his civil rights have been fully restored.

The trial court either disregarded or misunderstood this clear Texas annunciation of its laws. Instead, the court errantly added a requirement that Mr. Schied had to acquire an expunction order before he was able to deny the non-existent (as of 1983) conviction. The court's conclusion, however, is antithetical to the clear import of Texas case law.

By reaching a conclusion contrary to the established Texas law, the court failed to grant full faith and credit and give proper legal effect to the 183rd District Court's crystal clear order setting aside Mr. Schied's conviction. This Court should reverse the

trial court's order by following its established comity principles as evidenced by its decision in *People v Van Heck*, 252 Mich App 207; 651 NW2d 174 (2002).

In *Van Heck*, between 1975 and 1979, Mr. Van Heck was convicted of five misdemeanor criminal convictions: criminal mischief, assault and three larceny counts. Mr. Van Heck received an unconditional and absolute pardon for these convictions from the Connecticut Board of Pardons. In 1979 Mr. Van Heck was convicted in Michigan of assault with a dangerous weapon after he threatened a co-worker with a shotgun. Thereafter he sought to have his Michigan conviction set aside pursuant to MCL §780.621(9), which provides for the set aside of a conviction if the offender has only one conviction. The Prosecutor and Attorney General objected to the set aside, arguing that Mr. Van Heck's prior Connecticut convictions made him ineligible. The trial court denied the set aside, finding that to grant it would violate, " 'the spirit, if not the letter, of the Michigan statute given the fact that [Van Heck] would not be entitled to relief had all of the convictions occurred in Michigan.' " *Van Heck*, 252 Mich App at 210.

This Court reversed, finding that the effect of the Connecticut statutory pardon was substantially more significant than a set aside under Michigan law. This Court noted that under Connecticut law one who is granted a full pardon is entitled to have all police and court records erased; records destroyed after three years and upon their destruction the individual is deemed never to have been arrested and may swear so under oath. The Court went on to note that the exceptions to the record destruction are extremely limited under the Connecticut statute. 252 Mich App at 213–214. Accordingly, in light of the sweeping nature of the obliteration of the past criminal record, the Court held that once an absolute pardon is granted under Connecticut law,

the pardoned individual, "... is no longer considered by the law to have been 'convicted' or otherwise adjudicated guilty of the pardoned crime." 252 Mich App at 214. The Connecticut pardon was akin to a gubernatorial pardon under Michigan Const 1963, art 5 §14, which " 'reaches both the punishment prescribed for the offense and the guilt of the offender. It releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. 252 Mich App at 216; 651 NW2d 174 (2002), *citing, People v Stickle,* 156 Mich 557, 564; 121 NW 497 (1909), *quoting People ex rel Forsyth v Court of Sessions of Monroe County,* 141 NY 288, 294-295; 36 NE 386 (1894).

Texas' Article 42.12, §20 "judicial clemency" details the withdrawal of a plea, dismissal of the indictment and the set aside of the judgment of conviction. The Michigan set aside act merely provides that if the court makes the appropriate finding, it may, "enter an order setting aside the conviction." MCL §780.621(9). Despite this generic language, Michigan recognizes that upon entry of a set aside order under Michigan law, "**the applicant, for purposes of the law, shall be considered not to have been previously convicted [...]**[4]." (emphasis added). Certainly, if Michigan recognizes that a conviction which has been set aside under its set aside act is deemed not to have occurred, it cannot ignore and fail to enforce, as set forth in *Cuellar*, the Texas order which not only provides that the Judgment of Conviction is set aside, but also that the plea is *withdrawn and the indictment dismissed*; particularly given the

[4] The limited exceptions (which are not present here) to this effect relate to: no entitlement to remission of fines, costs, etc., sex offender registry, double jeopardy, victim's rights, actions for incarceration and certain state police records. See MCL §§780.622 & 623.

governor's full pardon fully restoring Mr. Schied civil rights. The trial court's decision must be reversed by this Court.

II. David Schied's individual employment contract incorporated all terms contained in the collective bargaining agreement applicable to the District's teachers, including a just cause for discipline provision. The trial court erred when it failed to address the issues of material fact as to whether the District had just cause to discharge Mr. Schied.

Standard of Review

The appellate court is to review grants of summary disposition *de novo*. The admissible evidence is to view in a light most favorable to the non-moving party. *Maiden,* 461 Mich at 119-120. When a party proffers affidavits and other documentation to support its motion, the opposing party may not rest on its allegations or defenses but must come forward with countervailing affidavits and documentation:

> The reviewing court should evaluate a motion for summary disposition under *MCR 2.116(C)(10)* by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules.

Id at 121. The Court is to determine whether the moving party is entitled to judgment as a matter of law. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Argument

Mr. Schied's individual employment contract expressly incorporated all the terms of the collective bargaining agreement (CBA) between his collective bargaining representative, the WLEA, and the District. The collective bargaining agreement provided, in pertinent part: **"No teacher shall be disciplined or reprimanded without**

just cause." (Ex F, Article 18, ¶B) This provision did not distinguish between probationary and tenured teachers and therefore is understood to apply to all teacher employees, including Mr. Schied. But Mr. Schied had no grievance arbitration remedy because Article 23, ¶A excludes probationary termination from the grievance process. Thus, Mr. Schied brought the instant action. *Cf Viera v Saginaw Bd of Ed,* 91 Mich App 555, 559; 283 NW2d 796 (1979); *Shippey v Madison District Public Schools,* 55 Mich App 663; 223 NW2d 116 (1974).

In the well-known and well-regarded arbitration opinion entitled *Enterprise Wire Co,* 46 LA 359, 363-364 (Daugherty, 1966), Arbitrator Carroll Daugherty set forth his seven tests to evaluate whether an employer has just cause for discharge. The tests are:

> 1. Did the company give the employee forewarning or foreknowledge of the possible or probably [sic] disciplinary consequences of the employee's conduct?
> 2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?
> 3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
> 4. Was the company's investigation conducted fairly and objectively?
> 5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
> 6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
> 7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

The trial court initially began to probe for the answers to these tests in a bench conference with counsel when she inquired as to why the District and superintendent

did not accept Mr. Schied's explanation of his application answer. The District's counsel, who is not a witness in this case and was not in attendance at either the November 3 or 6, 2003, meeting, proffered answers to the Court's query that were contrary to the record evidence. Counsel's obfuscatory and unsupported assertions were contrary to the sworn affidavits of Mr. Schied's representatives who were actually in attendance at the meetings. In the end, the court never addressed the admissible facts before it and never opined on the just cause issue.

Even a cursory review of the existing record reveals significant issues of material fact, which the court did not address and which must be submitted to the trier of fact. *Toussaint v Blue Cross and Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980); *Ewers v Stroh Brewery Co,* 178 Mich App 371, 376; 443 NW2d 504 (1989).

First and foremost is the District's reliance on the FBI report. Arbitrator Daugherty queries whether the employer conducted a fair and objective investigation in trying to determine whether the employee committed the offense alleged. In the instant case, the offense alleged was Mr. Schied's representation about his criminal history in light of the FBI report. But the FBI report is quite explicit in its direction to the report's user:

> If the information on the record is used to disqualify an applicant, the official making the determination . . . for . . .employment **shall provide the applicant the opportunity to** complete, or **challenge the accuracy** of, the information contained in the FBI identification record. The deciding official **should not deny . . . employment based on the information in the record until the applicant has been afforded a reasonable time to correct** or complete the information, or has declined to do so.
>
> (Emphasis added)

The record, to the extent that it is developed through the un-refuted affidavits of Claudia Gutierrez, Donnie Reeves and Linda Soper, demonstrates that the District accepted the FBI report as true and accurate, ignored and disregarded the Early Termination Order and Governor's Pardon presented by Mr. Schied and his representatives, and prejudged Mr. Schied's purported misrepresentation. It is up to a jury, therefore, to determine whether the District's reliance on the FBI report was reasonable under the circumstances and whether Mr. Schied's discharge was for just cause.

A second, but related, issue of material fact concerns the District's rejection of the Early Termination Order and Governor's Pardon presented to it. In the meetings on November 3 and 6, 2003, Mr. Schied not only reviewed the express language contained in each document, but also explained what they meant and why his reading of them led him to answer the employment application the way he did. With the District having this information there is an issue of material fact as to whether it could have concluded that it was terminating Mr. Schied with just cause if the investigation had been conducted fairly and reasonably.

The third issue of material fact is whether David Schied made a misrepresentation on his employment application. After all, Mr. Schied had been through the process to acquire both the set aside order and the gubernatorial pardon. He understood what those documents represented. Mr. Schied was aware that he had been released from the disabilities inflicted by the conviction. He, therefore, answered the employment application in a truthful and accurate manner.

Finally, as set forth above, the standard of review on summary disposition for both the trial court and Court of Appeals is whether admissible evidence presented

through depositions, affidavits and other documents has been met by the opposing party so as to defeat a triable issue of fact. In this case, Mr. Schied presented three unchallenged affidavits that attest to what occurred in the November 3 and 6, 2003, meetings. These affidavits were either ignored or not scrutinized by the trial court. Ms. Guiterrez', Mr. Reeves' and Ms. Soper's affidavits establish the District's lack of just cause, as detailed above. In light of the un-refuted, admissible evidence before the Court, this matter must be remanded to the trial court for trial on the significant issues of material fact.

III. Through the Set Aside Act and the Revised School Code the legislature has declared that a set aside criminal conviction is deemed not to have occurred and that when a conviction is set aside an individual may teach in schools in our state. Neither statute provided a cause of action for Mr. Schied. The trial court erred by not addressing the viability of Mr. Schied's public policy discharge claim.

Standard of Review

Summary disposition orders are reviewed *de novo* by this Court. The admissible evidence is to view in a light most favorable to the non-moving party. The Court is to determine whether the moving party is entitled to judgment as a matter of law. *West*, 469 Mich at 183.

Argument

In dismissing this case, the trial court made no ruling with regard to Mr. Schied's public policy discharge claim. Mr. Schied contends, however, that he has set forth a cognizable claim under the clearly stated public policy of this state. A public policy discharge claim arises when the legislature has declared the public policy of the state, but not provided the plaintiff a statutory claim to protect it. *Suchodolski v Michigan*

Consolidated Gas Co., 412 Mich 692, 695; 316 NW 2d 710 (1982); *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 80; 503 NW2d 645 (1993). A public policy discharge claim may be asserted where, "...there are explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty. ... [s]econd, such a cause of action has been found to be implied where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment [and] ...[f]inally, a cause of action has also been found to be implied where the alleged reason for the discharge was the employee's exercise of a right conferred by a well-established legislative enactment. *Garavaglia v Centra, Inc*, 211 Mich App 625; 536 NW2d 805 (1995) (public policy discharge grounded in National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B)), citing *Suchodolski*, supra.

The Michigan Legislature has clearly expressed the public policy effect of a court order setting aside a conviction under Michigan law: "Upon the entry of an order [setting aside a conviction] pursuant to section 1 [MCL 780.621(9)], the applicant, for purposes of the law, **shall be considered not to have been previously convicted**, except as provided in this section and section 3." MCL 780.622 (emphasis added). Thus, there is exists in Michigan a clear public policy that once a set aside is entered, the conviction is deemed not to have occurred.

This public policy is further demonstrated in MCL 780.623(5) which prohibits disseminating information relating to a conviction which has been set aside and provides for incarceration and civil fines for those who improperly disseminate such information: [except in specifically defined circumstances,] " ...a person, other than the

applicant, who knows or should have known that a conviction was set aside under this section and who divulges, uses, or publishes information concerning a conviction set aside under this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $500.00, or both."

Accordingly, it is the public policy of the State of Michigan to recognize the set aside of a conviction and once set aside, the conviction is deemed not to have occurred, and that except in limited circumstances (which are not present in this case) information relating to the set aside may not be divulged.

In addition, when a teacher's criminal conviction is reversed, the Legislature has provided:

> All of the following apply to a person described in this section whose conviction is reversed upon final appeal:
>
> (a) The person's teaching certificate shall be reinstated upon his or her notification to the superintendent of public instruction of the reversal.
>
> (b) If the suspension of the person's teaching certificate under this section was the sole cause of his or her discharge from employment, the person shall be reinstated, upon his or her notification to the appropriate local or intermediate school board of the reversal, with full rights and benefits, to the position he or she would have had if he or she had been continuously employed.

MCL 380.1535a(5).

This certification provision evidences a public policy of permitting teachers to return to the classroom when their criminal convictions have been reversed. Indeed, this statutory provision contains no limitation as to the basis of the reversal and would certainly include a "set aside" which, as a matter of law results in the conviction being "wiped away" or "never having occurred."

And as noted in Mr. Schied's complaint, he does not have a direct claim under the cited statutes. Indeed, a Michigan court would not entertain a set aside of a Texas

conviction; obviously the proper forum would be the Texas criminal courts – where Mr. Schied obtained his relief. It is also true that Mr. Schied did not lose his teaching certificate. However, that does not mean he has failed to state a public policy discharge claim based upon the public policies specifically identified in the cited statutes. The Defendants have violated this State's public policy in wrongfully terminating Mr. Schied by 1) failing or refusing to give full force and effect to the set aside Order; 2) failing or refusing, after being informed of the set aside and Governor's Pardon, to restore Mr. Schied's employment with full rights and benefits; and 3) divulging, using and publishing information concerning the conviction when they knew or should have known that the plea was withdraw, the indictment dismissed, the conviction was set aside and that Mr. Schied had been granted a Governor's Pardon. Accordingly, this Court should remand Mr. Schied's public policy discharge claim to the trial court for trial on the merits.

IV. As a matter of law Mr. Schied is not a convicted felon and made no misrepresentations to Appellees regarding that fact. There are genuine issues for trial regarding Mr. Schied's defamation and self publication defamation claims. The trial court erred when it did not address these issues.

Standard of Review

The appellate court is to review grants of summary disposition *de novo*. The admissible evidence is to view in a light most favorable to the non-moving party. The Court is to determine whether the moving party is entitled to judgment as a matter of law. *West*, 469 Mich at 183.

Argument

Again, the trial court did not address Mr. Schied's defamation claim. Yet, the admissible facts demonstrate a viable claim to be evaluated by the trier of fact. On

November 5 and 6, 2003, Defendant Harris published letters that contain defamatory statements about Mr. Schied that she knew or should have known to be false, i.e., that he is a convicted felon and that he submitted false information to the District. The letters were published to a laundry list of school personnel, WLEA representatives and to Mr. Schied's personnel file. (See Exs H and I) Mr. Schied's personnel file is subject to disclosure under Michigan's FOIA.

Defendant Harris stated as "fact," and not opinion, that Mr. Schied was a liar and a convict. As explained above, as a matter of law, Mr. Schied is not a convicted felon; therefore his statements to the District were true. Accordingly, Defendants' argument that Plaintiff's defamation claim fails because Defendant Harris' statements were true, fails on its face.

At the time Dr. Harris published those false and defamatory statements, she had been given the Texas court order setting aside the conviction and the Governor's pardon. (See Affidavits of Gutierrez, Reeves and Soper) Her publication of the letters with these documents in hand raises a genuine issue of material fact as to whether these publications were done with malice or reckless disregard for the truth; thus voiding any possible qualified privilege.

Since having his contract terminated, Mr. Schied has sought alternate employment. He has been asked the reasons for his separation from Lincoln Consolidated and has been compelled to re-publish Defendant Harris' defamatory statements to prospective employers. (See for example, Schied Dep 6/28/05 at pp. 80, 82-83, transcript attached as Ex K to Defendants' Brief) Undoubtedly, as Mr. Schied continues to seek alternate employment, he will be faced with again repeating

Defendants' defamatory statements. As such, Mr. Schied has set forth sufficient facts to create an issue of trial upon which to base a claim for self-publication defamation. See *Grist v The Upjohn Company,* 16 Mich App 452; 168 NW2d 389 (1969) (Court of Appeals held the trial court properly instructed jury that it could find publication element of defamation claim satisfied where former employee was required to repeat former employer's slanderous statement related to her discharge to potential employer). Accordingly, Mr. Schied's defamation claim should be remanded to the trial court for trial on the merits.

RELIEF REQUESTED

For all the reasons set forth above, Appellant David Schied requests that this Honorable Court reverse the trial court's dismissal of this matter and remand the case for trial on the merits.

Respectfully submitted,

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