

Exhibit

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

DAVID SCHIED,

Plaintiff,

v

No.04-577-CL

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

Defendants. /

VIDEO PROCEEDING - MOTION HEARING
BEFORE THE HONORABLE MELINDA MORRIS

Ann Arbor, Michigan - Wednesday, October 26, 2005

APPEARANCES:

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WITNESSES:

None.

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None offered.

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Ann Arbor, Michigan

Wednesday, October 26, 2005 at 2:01 p.m.

* * * * *

THE CLERK: -- Melinda Morris presiding. You may be seated. Number 1 on the docket, Schied v Lincoln Consolidated Schools, 04-577-CL.

MR. WEAVER: Good afternoon, your Honor, Mike Weaver on behalf of the Defendants.

THE COURT: Thank you.

MR. FIRESTONE: Joseph Firestone appearing on behalf of the Plaintiff, David Schied.

THE COURT: Thank you.

MR. WEAVER: Your Honor, the first motion up, I believe, is the Defendant's motion for summary disposition that was filed back in July.

THE COURT: Yes.

MR. WEAVER: Interestingly, we have here in the courtroom with us today Mr. Schied who is now today all cleaned up and may be quieter than the last time he was here. The Court may recall --

MR. FIRESTONE: I'm going to object, your Honor, I don't know what that's all about and I object to his characterization and I object to him saying these things in front of the Court and I think that he's completely out of line.

1 MR. WEAVER: Well, your Honor, it's relevant
2 in this way. The Plaintiffs have now argued in
3 response to the motion that somehow Mr. Schied was
4 completely compliant and when asked to produce
5 documents that were relevant to this claim, he did so.
6 That's what they claim at the pre-determination
7 hearing. The truth of the matter is, as the Court will
8 recall, I took his deposition one day and it ended in
9 about 5 minutes when he stormed out of the room and
10 refused to show me any documents at all and this Court
11 -- he came here when I filed a motion to dismiss his
12 claim or to compel his deposition and he acted out in
13 the court that day. And so it's just interesting that
14 he would be here today in a completely different
15 demeanor. But what it goes to, your Honor, is it
16 really goes to refute the fact, the history goes to
17 refute the fact that this gentleman was compliant at
18 any time with any requests from my client. But with
19 that said, I'll move on.

20 THE COURT: All right, could I see counsel at
21 the bench for a minute.

22 MR. WEAVER: Certainly.

23 (Bench conference on record at 2:03 p.m.)

24 THE COURT: Actually, I don't remember that
25 but that doesn't mean it didn't happen. (inaudible)

1 MR. WEAVER: (inaudible) the one order that I
2 had to come here for to get a deposition. He came --
3 this was before Joe. He came to his deposition with a
4 stack of documents like this. I was late. I admit it.
5 I called his attorney and said I got stuck in Oakland
6 Circuit Court (inaudible) blah, blah, blah. I get
7 about 5 minutes into his deposition then he refuses to
8 show me any documents even though he brought all these
9 documents with him. I said, "Well, you understand that
10 this is about your criminal conviction, that's the
11 whole basis of this case." He said, "I understand
12 that, I'm not going to show you the documents until I
13 want to show you the document," and then a couple of
14 minutes later, he stormed out. So I filed a motion to
15 dismiss the claim or to compel, recognizing you'd make
16 me take his deposition and you did. You said that he
17 had to take -- sit for a deposition and he had to talk
18 about certain things and then Joe filed a motion later
19 when he got on the case and limited it even further
20 what I could ask about his criminal conviction. But
21 when he was here the last time, not only did he argue
22 with his lawyer at the table, he argued in the
23 building, he argued outside, but --

24 THE COURT: All right, the reason I called you
25 up here, I read your briefs, okay, obviously, and it's

1 an interesting issue and my question is I think you
2 would agree that it's the kind of thing that ~~it could~~
3 ~~be a good faith misunderstanding as to what was~~
4 ~~required.~~ Now, let me finish.

5 MR. WEAVER: I understand.

6 THE COURT: Okay, so, therefore, I presume, in
7 terms of the bigger picture, that there were other
8 problems with him, is that right?

9 MR. WEAVER: He was only there a month. He's
10 a probationary employee and when (inaudible) comes in
11 and says, "You're a probationary employee conditional
12 on your criminal history check," and the criminal
13 history check shows that he's got a conviction for
14 ~~_____~~

15 THE COURT: I know that but wait, wait, wait.

16 MR. WEAVER: But he doesn't disclose that.

17 THE COURT: No, I know that.

18 MR. WEAVER: And ignorance of the law is no
19 excuse.

20 MR. FIRESTONE: It's not ignorance. It's the
21 mistake ---

22 THE COURT: But that's what I'm saying. The
23 issue is whether judicial clemency, so to speak, - and
24 Texas is a rare state, okay, they have different laws
25 than - but - in fact, I was a little surprised to see

1 this law because (inaudible) laws are in the other
2 direction not this direction, so it's kind of
3 interesting. But evidently down there if you serve two
4 thirds of your probation or something and do exemplary
5 work, you can get, you can not only get the probation
6 discharged, but you can get the conviction set aside.

7 MR. WEAVER: But then you have to go beyond
8 that to get the expunction.

9 THE COURT: Right.

10 MR. WEAVER: And if you read the expunction
11 order, it says when he got that pardon, he was then
12 eligible for expunction. He didn't do it. He didn't
13 do anything and the Michigan law that we cited clearly
14 says if you have applied for expunction, we would
15 presume you haven't been convicted. He never applied
16 until 6, 8 months after he left us. That's the
17 problem. So he didn't do the next step. That's his
18 fault, not mine.

19 THE COURT: Wait, wait, wait. But you will
20 agree that he was eligible for it. In fact, he is now
21 (inaudible) right, so all my question is if all that
22 shows that he would have otherwise been eligible
23 (inaudible) probation or for whatever, or a teacher,
24 what -- I mean I'm just trying to understand why it is
25 that the District is being so, for lack of better

1 ~~words, so hard-nosed about this.~~

2 MR. WEAVER: Well, here's what happened.

3 THE COURT: Can I understand it?

4 MR. WEAVER: They called him in for a meeting
5 and just like my deposition, they said, "Show us the
6 documents." He refuses to do so. I'll show 'em to you
7 when I'm ready, you can't look at these. I keep the
8 originals at home. You can't look at 'em. Fine. The
9 point of the matter is, Judge, it doesn't matter under
10 Michigan law or Texas law. The Texas law we cited in
11 response to Joe's motion clearly shows he hadn't had it
12 expunged. The order of expungement says at that point,
13 he can now say he's never been convicted. Before that,
14 he couldn't say it. He made a false statement on his
15 pre-employment documents. That ends the inquiry.

16 THE COURT: Okay (inaudible) I mean you
17 certainly have a right to say something now, too. It's
18 just that I wanted to kind of get a picture of what was
19 going on with his client and I think I understand, so
20 I'll hear your arguments, okay?

21 (Bench conference ends at 2:07 p.m.;
22 proceedings continue)

23 MR. WEAVER: Your Honor, this is a case where
24 the only contract of employment is attached to our
25 supplemental brief at exhibit A and it's a probationary

1 teacher contract of employment, and at paragraph 7, it
2 says, "Probationary status. The teacher is herewith
3 retained on a probationary basis as defined in the
4 tenure act," and it cites the act. "Continuing tenure
5 is not here and afforded to the teacher at this time
6 but is specifically withheld pending satisfactory
7 performance during the probationary period." Now, what
8 is not part of the contract is the document that we've
9 attached that the Plaintiff signed indicating, quote,
10 "I have not been convicted of or pled guilty or nolo
11 contendere (no contest) to any crimes." And that
12 document is attached to our original motion as exhibit
13 C, your Honor, and that motion, and that document goes
14 on to talk about it's governed by Public Act 68 and
15 Public Act 83. And the document clearly is signed by
16 the Plaintiff on September 11, 2003. Without a doubt,
17 he has an obligation to answer that document truthfully
18 and he didn't. The order of expunction that the
19 Plaintiff now relies upon is interesting and that's
20 attached to the Plaintiff's motion for summary
21 disposition as exhibit C. What does that say? On the
22 bottom of the first page, it says, "A pardon was issued
23 to petitioner on June 1, 1983 by Governor Mark White,
24 thereby making the above referenced case eligible for
25 expunction." He didn't do anything about it. When

1 they entered the order of expunction a year after his
2 separation from Lincoln Schools, your Honor, then and
3 only then did the document say, "Petitioner may deny
4 the occurrence of the expunged arrest and prosecution
5 and this expungement order except," blah, blah, it goes
6 on and on. But only then. In October of 2004, a year
7 later, could he deny that. His ignorance of the law
8 does not excuse his improper answer, your Honor. Now,
9 the Plaintiff's argue, in response to our motion, that
10 somehow we've breached the contract and they say that
11 the document he signed about nolo contendere was part
12 of the contract. I don't believe it was. If it's not
13 then that doesn't matter. That argument fails. Even
14 if it was, your Honor, the document refers to the 2
15 Public Acts that I've cited. The Public Act states,
16 and I've attached it as exhibit D to our supplemental
17 brief -- well, let me back up and tell you how they
18 argued. They argue that since the initial document
19 signed by the Plaintiff where he denied being convicted
20 of a crime -- By the way, the crime was [REDACTED]
[REDACTED]
[REDACTED] was the charge, was the sentence. But
23 he says, the Plaintiff, in their response, that, well,
24 the document says it would be reviewed by the Michigan
25 State Police and since that's the case and the Michigan

1 State Police report didn't uncover any criminal
2 history, then they've breached their contract by
3 relying upon the Federal. Well, it's not true because
4 it refers to the Public Act and the Public Act
5 specifically says, "This school shall request the
6 Department of State Police to conduct a criminal
7 records check through the Federal Bureau of
8 Investigation." It's exactly what we did. What did
9 that record show? That record showed the conviction
10 for [REDACTED]. Obviously
11 and rightfully, my client was concerned. We called him
12 in for a meeting. Now, Mr. Schied appears today by way
13 of his motion in response to our motion and says I gave
14 them all the -- offered to give them all the documents
15 but Dr. Harris left abruptly. That's not true and it
16 certainly never came out in their deposition that way.
17 With that said, his behavior was consistent with his
18 behavior at the first deposition I took of him where he
19 refused a ruling for said documents --

20 MR. FIRESTONE: I'll object again, your Honor.
21 This man has no idea what his behavior was and what
22 he's saying is that the affidavits which we attach are
23 false. Those 3 people who attached affidavits were
24 present in that meeting. Mr. Weaver was not there. He
25 can't testify to you.

1 THE COURT: I'll confine my ruling to only
2 evidence that's on the record and the legal issues
3 involved.

4 MR. WEAVER: Your Honor, I only have 2
5 affidavits that are signed. If there's a third one, it
6 wasn't attached to the pleading that I received from
7 Plaintiff.

8 MR. FIRESTONE: Again?

9 MR. WEAVER: Pardon me? I can show it to you,
10 Joe, it's not attached.

11 MR. FIRESTONE: All right.

12 MR. WEAVER: But I'll let Mr. Firestone give
13 me that when he wants to give it to me. Your Honor,
14 the record is really quite clear. This is a gentleman
15 who made a false statement on a preliminary document
16 which was a contingent for his employment. When it was
17 determined that his statement was false, we conducted
18 an investigation or attempted to have a meeting with
19 him. We suspended him and attempted to have a second
20 meeting. His behavior was the same and at that --

21 THE COURT: Let me ask you something.

22 MR. WEAVER: Yes, your Honor.

23 THE COURT: Is his behavior, either here in
24 Court the last time or when you tried to take his
25 deposition or even at the meeting with the school

1 district, important for purposes in deciding this
2 motion?

3 MR. WEAVER: In part (inaudible) it is, your
4 Honor, because it shows the history of his behavior.
5 But secondly, we tried, you know, they've argued that
6 somehow we didn't give him a chance to explain himself
7 and it's just untrue.

8 THE COURT: Yes, but even if his behavior, in
9 your opinion, had been exemplary throughout, your
10 position, legally, on legal issue would remain the
11 same, is that right?

12 MR. WEAVER: It certainly would, your Honor.
13 There's no question, although I would submit that it's
14 possible that had he complied, I'm not certain what the
15 District might have done but, certainly, without
16 compliance and without any explanation as to what
17 happened when he was convicted of [REDACTED]
18 [REDACTED], I don't know, I'd have to
19 speculate as to what they would have done.

20 THE COURT: All right.

21 MR. WEAVER: Your Honor, this is, this is
22 simply a case where, really, that ends the inquiry.
23 You are a probationary employee. Your employment is
24 contingent upon a satisfactory criminal investigation.
25 They don't dispute that, not at all. And the criminal

1 investigation revealed that he had a conviction that he
2 didn't disclose, so not only was there a false
3 statement made, the point is, the false statement ends
4 the employment. So the Plaintiffs have argued in
5 response to this motion that there is some for cause
6 requirement, and we've addressed that in our pleadings
7 but, really, there isn't when he's a probationary
8 employee. He didn't become part of the collective
9 bargaining agreement because he was only a probationary
10 employee and I don't believe they dispute that in any
11 way, your Honor. The salient point is that under the
12 Texas law, and we've cited it in response to their
13 motion for summary disposition or partial summary
14 disposition, under the Texas law, "An order of pardon
15 from the Judge is not an order of expunction," it's
16 different. Article 42.12, Section 20, of the Texas
17 Code. I'm not certain if that's exactly how you, how
18 they identify their statutes, but under the Texas Code
19 it indicates that the pardon is not, is not the same as
20 an expunction. In 55.02, likewise, sets forth the
21 procedure for expunction and its requirements. And,
22 really, if you just read the document, paragraph 7
23 says, now, in October of 2004, now, he can deny that he
24 had been convicted, pled no contest or nolo contendere
25 or pled guilty to a crime. Not in September of 2003,

1 only after October of 2004. He never did. We've cited
2 the cases, your Honor, White v Thomas, and I'll spell
3 this, Y-A-C-O-N-B-O-N-E v Bolger, and those 2 cases
4 deal with -- in fact the White case deals with a Texas
5 Sheriff Department who decided not to hire a deputy
6 because that deputy had a crime that wasn't disclosed
7 that was later expunged. That's exactly what we have
8 here. Now, admittedly, that's not a court, that's not
9 a State of Michigan or a Michigan Supreme Court or a
10 Sixth Circuit Court of Appeals opinion but it is right
11 on. Likewise, Taconbone v Bolger case, ~~the UPS - the~~
12 ~~United States Postal Service decided not to hire~~
13 ~~somebody who failed to disclose a conviction from~~
14 ~~another state that was not, that was ultimately~~
15 ~~pardoned, the exact same thing as we have here.~~ So
16 there's precedent on those minute issues that they
17 have. There's precedent on the other issues as we've
18 cited in our, our complaint, our motion for summary
19 disposition. Your Honor, they talk about defamation as
20 another claim and, candidly, it just isn't there. The
21 letters that we cite tell him. You failed, you
22 misrepresented a document. That's the exhibit C where
23 he said I was never convicted before. And it says you
24 were actually convicted. That's true. It's in the FBI
25 documents. There's no question about it. Now, there

1 are people who were copied on that letter. Every one
2 of those individuals was in the room when this
3 information was discussed. There were people there to
4 benefit him because they were union representatives, so
5 this wasn't my client disclosing some secret. In fact,
6 it's a public record, it's a public record. It can't
7 possibly be deemed a secret and it's all true. The
8 document he signed is inaccurate. The conviction is a
9 matter of public record. It is now expunged but when
10 my client authored that letter, it wasn't expunged.
11 And when my clients made the decision not to take this
12 man from probationary status to full-time teacher, it
13 was not expunged. You know, had my clients not done
14 anything, you know, had they left him as an employee
15 and he does something wrong, we're here for a different
16 lawsuit. We're here because some parent says you knew
17 this guy had a conviction [REDACTED]
18 [REDACTED] and you didn't do anything about it. You
19 left him with my children and now look what happened.
20 So we avoided that lawsuit, your Honor, we did the
21 right thing and we would ask that the Court grant
22 summary disposition.

23 THE COURT: All right, thank you, counsel.
24 Mr. Firestone.

25 MR. FIRESTONE: I guess I would start by

1 asking whether or not the Court has 3 affidavits
2 attached to our response to their motion for summary
3 disposition.

4 THE COURT: I believe so but let me make sure
5 that's true. I remember reading --

6 MR. FIRESTONE: There should be the affidavit
7 of Claudia Guteran, Donny Reeves, and Linda Soper.

8 THE COURT: Yes.

9 MR. FIRESTONE: Then I would ask Mr. Weaver to
10 tell us whose he does not have.

11 MR. WEAVER: There's one that wasn't signed
12 that I didn't have. I'll look through it and find them
13 while you're making your argument, Joe. I don't have
14 Claudia Guteran, don't have it all.

15 MR. FIRESTONE: Well, clearly, it was a
16 copying error, right?

17 MR. WEAVER: I don't know, I can't read minds.

18 MR. FIRESTONE: I will share my copy. I need
19 it back and I will get you a copy. It's clearly
20 referenced in our brief and, obviously, the tab was
21 attached. I apologize to Mr. Weaver for the clerical
22 error but it could have been remedied.

23 Your Honor, almost 26 years ago, nearly 24
24 years before applying at Lincoln Consolidated Schools,
25 the 183rd District Court in Texas did the following:

1 permitted Mr. Schied to withdraw his plea, dismissed
2 the indictment and set aside the conviction, all by
3 order. That order is what ~~Clayar v Texas~~, 70 Southwest
4 3rd, 815, a 2002 case, calls judicial clemency. It is
5 what Clayar says -- and what Clayar says is that the
6 effect of that judicial clemency is to wipe away the
7 conviction and they say that at page 819. They
8 continue on, that Court continues on and says that the,
9 quote, "The person whose conviction is set aside
10 pursuant to Article 42.12, section 20, is not a
11 convicted felon," is not a convicted felon, and that's
12 at page 820. Thus, your Honor, under the controlling
13 Texas law, because Mr. Schied received such a set aside
14 pursuant to Article 42.12, section 20, he is not a
15 convicted felon. On September 11, 2003, the date of
16 the statement in which Mr. Schied indicated to the
17 school district that he was not a convicted felon, his
18 status, in fact, under the law of Texas, was that he
19 was not a convicted felon. Clayar says that directly
20 at page 820. This Court should grant full faith and
21 credit to that decision and to Texas law because
22 ~~otherwise Mr. Schied is left in the ultimate catch 22.~~
23 He understood, and we know by the law of Texas that
24 Texas doesn't consider him a convicted felon. It was
25 wiped away with the order setting aside the conviction.

1 So Mr. Schied comes to Michigan and is asked, are you a
2 convicted felon, and the answer is, no, and he properly
3 answered that way on his statement to the Lincoln
4 Consolidated Schools.

5 On November 4 and November 6, Defendant,
6 Sandra Harris, the then Superintendent of Schools at
7 Lincoln Consolidated, met with Mr. Schied and his
8 representatives and as the affidavits indicate and the
9 notes by Ms. Guteris confirm, Ms. Harris was presented
10 -- Dr. Harris, excuse me -- was presented with the set
11 aside order which she chose not to read and not to
12 believe, she was presented with the pardon by Mr.
13 Schied's union representative who's employed by the
14 Michigan Education Association, and Mr. Schied offered
15 an explanation of both of those documents to Dr. Harris
16 at the November 6 meeting, yet she disregarded those.
17 Instead, willing to believe an erroneous FBI report, a
18 report which, on its face, told her to check and make
19 sure that it is correct because it is not an infallible
20 report.

21 Your Honor, the Defendants do this Court a
22 disservice when they attempt to avoid the clear effects
23 of Clayar and exaggerate the law of Michigan. They
24 suggest to the Court that there are significant
25 exceptions to the non-disclosure requirements of the

1 Michigan set aside act. They say, and I quote, " --
2 that the exceptions are for a number of state
3 authorities for a variety of reasons, including denial
4 of employment or a professional license and enhancement
5 of a sentence for a later felony conviction. The fact
6 of the matter is that MCL 780.623(2), sub 2, has the
7 exceptions. It says that the State Police will retain
8 a non-public record that is to be made available only
9 to a court, to the judicial branch, to law enforcement,
10 a prosecuting attorney, the Attorney General, and the
11 Governor.

12 THE COURT: Let me interrupt you because I am
13 not concerned about that, the fact that there are
14 exceptions. That is if his record was, for all
15 purposes, equivalently expunged as it would have been
16 in Michigan, for instance if he had gotten an order of
17 expungement, he could have honestly answered that
18 question, no, I have not been convicted and if the
19 District had suggested that he answered it
20 untruthfully, the court would find that no, he did not
21 because, in fact, once a record is expunged in
22 Michigan I'm talking about now, he would be allowed to
23 say I've never been convicted. So I think what you're
24 addressing is exceptions to that general rule in
25 Michigan but I think here it's a question of what was

1 the legal consequence of what occurred in Texas under
2 Texas law and the difference of opinion here between
3 the two of you, I think, and you can certainly correct
4 me if you think I'm wrong, is that the Defendant says
5 that when he got the judicial clemency and the pardon
6 he was eligible for the expunction and it was only upon
7 expunction that he could honestly say I've never been
8 convicted. Your obviously opinion is different. That
9 is you say that the judicial clemency and the pardon
10 allowed the set aside and the wiping away of the
11 conviction and that he then could answer honestly I've
12 never been convicted. Isn't that really the issue or
13 no?

14 MR. FIRESTONE: Yes, your Honor, I just think
15 that we are -- we're unfortunately trapped in trying to
16 compare apples to oranges, okay, and what I mean by
17 that is as I understand it, and I have to concede that
18 this is not an argument that we made in our brief, but
19 as I understand it Texas law changed over time. Trying
20 to deal with Texas law at the time that this all arose,
21 I think that Clayar v Texas is the controlling law. I
22 think it's still the controlling law with respect to a
23 set aside and that is, the set aside, even more than
24 the pardon, that the Plaintiffs rely upon, the order
25 setting it all aside because Clayar says that is wiping

1 it out, okay?

2 THE COURT: Could I -- I hate to interrupt you
3 because I know you have a point to make and I want you
4 to make it but is, so that I understand Texas law more
5 completely, what was the purpose of the pardon if he
6 already had the set aside?

7 MR. FIRESTONE: A pardon just -- you mean what
8 was Mr. Schied's purpose in getting the pardon?

9 THE COURT: No, I mean why would anyone need a
10 pardon if they've already had their conviction set
11 aside, if they have nothing to be pardoned from, why is
12 a pardon important?

13 MR. FIRESTONE: The only additional right that
14 a pardon restores that the set aside does not, at least
15 as I understand it, is the right to carry a concealed
16 weapon if you get a permit for it, okay? The purpose
17 in getting it may simply be to -- because it's
18 available and because it grants an additional cover so
19 to speak, an additional step away from events of the
20 past.

21 THE COURT: Okay, thank you.

22 MR. FIRESTONE: In Michigan, it's interesting.
23 I have not been able to find, although I'd be happy to
24 hear from Mr. Weaver, I have not been able to find an
25 expungement statute. There is the set aside statute

1 beginning at MCL 780.620, and am following from there,
2 and it's this applies to oranges if you will that's the
3 problem. The set aside, the set asides are comparable,
4 and the set asides are, in Michigan, there are limited
5 exceptions to when the information can be disclosed.
6 Now, again, the only reason that I bring it up is that
7 I think the Defendant has overstepped substantially in
8 their description of the set-aside. The set-aside --
9 The Defendant has said that it includes denial of
10 employment, that it can be disclosed, it's an exception
11 to the non-disclosure for purposes of employment and
12 they just say denial of employment when the actual
13 exception only applies to employment with a law
14 enforcement agency. They refer to professional
15 licenser, I assume to try to tie Mr. Schied's teaching
16 certificate to that, somehow but in fact the exception
17 only applies to the licensing function of an agency of
18 the judicial branch. It's for us, it's for attorneys
19 only. So I wanted to be sure that the Court was aware
20 that there are limitations, substantial limitations on
21 the disclosure. Yes, there are exceptions but there
22 are also exceptions under the Texas set-aside statute
23 and there are two: one is for a later conviction to
24 enhance a sentence, okay, if they come back after
25 having the set-aside and the pardon and they come back

1 and they're convicted again, and that's the same in
2 Michigan; and the other is for licensing under the day
3 care, under the day care statute in Texas. Now, what's
4 interesting is that the Clayar court points those 2
5 exceptions out and says, well, if the Texas legislature
6 had meant more than those 2 exceptions --

7 THE COURT: It would have said so?

8 MR. FIRESTONE: It would have said so.

9 THE COURT: Let me ask you this, counsel, if
10 -- and I appreciate that description of what the
11 exceptions are in Michigan for the set-aside or
12 expungement just so I want to see the relationship
13 between Michigan and Texas law here, assume for a
14 moment that the Plaintiff, instead of having applied
15 for a teaching position at a public school, applied for
16 a license as a lawyer in Michigan, he would have had a
17 valid set-aside from Texas, right, but under Michigan
18 law equivalent set-asides in Michigan have this
19 exception for licensed attorneys. ~~Would your position~~
20 ~~be that he would be required to disclose it in Michigan~~
21 ~~or can he rely on the Texas law?~~ *are we to go w/ Michigan law
or Texas law?*

22 MR. FIRESTONE: Well, the answer to that is
23 twofold. One is that I, yes, I believe that he would
24 have to disclose it under the set-aside law in
25 Michigan. The question would be whether or not,

1 because, and I can't answer that in this case. I don't
2 know why at the time that Mr. Schied applied to Lincoln
3 that conviction still appeared and there was no
4 notification on that FBI report that it had been set
5 aside, okay, yet now, and even before he got the
6 expunction, there were criminal reports where it did
7 not appear, okay.

8 I think that the Defendants also overstate
9 the -- or misstate the Vanact case. The Vanact case
10 did not turn on whether or not the information about
11 Vanact could be physically destroyed and that's what
12 they suggest and it didn't turn on what limitations
13 there are under Connecticut law or exceptions under
14 Connecticut law, although it did, to some extent, focus
15 on how many exceptions there are under Connecticut law.
16 Instead, what the question that was posed to the Court
17 and what the Court considered was whether a pardon
18 conviction under Connecticut law remains a conviction
19 under the Michigan set-aside law because Vanact was
20 trying to get a set-aside of a Michigan conviction.
21 And so you can only get a set-aside if you have one
22 conviction. If you have more, you're not eligible for
23 the set-aside. So the question was these prior
24 convictions in Connecticut, were they convictions under
25 the Michigan set-aside. And what the Court of Appeals

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said was,

"Upon the grant of an absolute pardon in Connecticut, the pardoned individual is no longer considered by law to have been convicted or otherwise adjudicated guilty of the pardoned crime. While the circumstances supporting conviction may remain, the fact of the conviction is, in the eyes of the law, gone forever."

The Court of Appeals reversed the trial court on the question of whether or not there was more than one conviction. The trial court had concluded that there was more than one conviction and that Vanact was not eligible for the set-aside and they said, no, there's only one because it's in the eyes of the law gone forever.

Defendants cite to Ralford v Texas. I'm not sure why, your Honor. Ralford was denied an expunction under Texas law because Ralford didn't have a pardon and we agree. If you don't have the pardon, you aren't eligible for an expunction.

Finally, your Honor, for the first time in its supplement brief, in their supplemental brief, the Defendants claim that Mr. Schied was a probationary teacher with no just cause and they claim that they are the only ones who have attached the probationary

1 contract. Well, that's not true, your Honor. We
2 attached the probationary contract at exhibit F of our
3 response brief and paragraph 8 of that contract reads
4 as follows:

5 "The provisions of this contract are subject
6 to the terms and conditions to be determined in
7 the master agreement, if developed, between the
8 WLEA," which is the Washtenaw-Livingston Education
9 Association and the Board of Education."

10 Well, such a collective bargaining agreement
11 was developed and it was attached to our response brief
12 and it says at Article 18, paragraph B, "No teacher,"
13 doesn't say probationary, doesn't say tenure, it says,
14 "no teacher shall be disciplined or reprimanded without
15 just cause." Now, we are in no way discounting the
16 right of the school district to non-renew in accordance
17 with the tenure act but when Mr. Schied became employed
18 with the school district, he became a member of the
19 WLEA and subject, as his probationary contract says, to
20 the terms and conditions of the collective bargaining
21 agreement and that agreement says that no teacher shall
22 be terminated. I'm sorry, no teacher shall be
23 disciplined or reprimanded without just cause. And
24 what they did in this case, they disciplined him. They
25 did it without just cause because he was not, as Clayar

1 says, was not a convict at the time that he answered
2 that question. It had been wiped away. With respect
3 to the --

4 THE COURT: Let me, let me make sure I
5 understand you on that. If he's subject to the just
6 cause provisions of the collective bargaining agreement
7 than wouldn't this whole issue of whether he was a
8 convicted felon or not and, therefore, subject to just
9 cause termination, be a matter for an administrative
10 hearing under the, under the tenure act?

11 MR. FIRESTONE: No, your Honor, he's not
12 subject to the tenure act because he's a probationer.

13 THE COURT: Right, but what about -

14 MR. FIRESTONE: That's conceded, okay. He
15 doesn't have tenure rights under the tenure act.

16 THE COURT: Right.

17 MR. FIRESTONE: He doesn't have arbitration
18 rights under the collective bargaining agreement
19 because he's a probationer. In other words, the
20 collective bargaining agreement says that he can grieve
21 but he's excluded from arbitration, binding
22 arbitration, as a probationary employee, so the only
23 recourse for enforcement of that provision is to come
24 to Circuit Court.

25 THE COURT: ~~So he can grieve the --~~

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MR. FIRESTONE: He grieved.

THE COURT: -- the discharge?

MR. FIRESTONE: Well, they -- did he grieve
it.

MR. WEAVER: He did not, your Honor.

MR. FIRESTONE: No, I guess, I guess the
termination meeting would be taken as the grievance. I
mean all of his union representatives were there. It
was a challenge to whether or not they had just cause
to terminate him. And, actually, now that I'm talking
out loud, I'm not sure that he is subject to the
grievance procedure at all and I'd have to double-check
that. I apologize. I may have overstated.

With respect to the public policy claim, I
believe that under the established law of Sucadowski
and Dudawitz that we have set forth a clear legislative
commitment to treating Mr. Schied as a person who is
not a convicted felon, both through the school code and
through the set-aside statute. He, obviously, doesn't
have a cause of action under either statute because the
set-aside was in Texas so he can't pursue a cause of
action under our set-aside act but there's a clear
public policy and he has set forth that public policy
and he has been terminated in violation of that public
policy.

1 As to the defamation claim, we think that the
2 letters are pretty clear that not only were they sent
3 out to people not all of whom were in the meeting but
4 it was placed in his personnel file which, by the
5 school code, any hiring school entity would have to
6 request a copy of that. Thank you, your Honor.

7 THE COURT: Thank you, counsel.

8 MR. WEAVER: Your Honor, what we've heard here
9 today is sort of like I like the law when it fits me
10 but I don't like it when it doesn't fit me. It falls
11 under Michigan law but, well, for this part, you really
12 gotta' look at Texas law or he falls under the
13 collective bargaining agreement but when he didn't
14 exhaust his administrative remedies, he doesn't really
15 fall under the collective bargaining agreement. That's
16 their arguments, right? It's a bunch of red herrings,
17 your Honor. The question asked of him in the document
18 that -- the question is, do you check this box, "I have
19 not been convicted of, pled guilty or nolo contendere,
20 (no contest to any crime.)" He could not answer that
21 the way he did. That's exhibit C to our motion for
22 summary disposition. And a governor's pardon is not an
23 expunction. If it was, Mr. Schied wouldn't have gone
24 to get the expunction.

25 THE COURT: What about, what about counsel's

1 point that Clayar says that the conviction is wiped
2 away with the set-aside and that a person is then not a
3 convicted felon?

4 MR. WEAVER: Doesn't that fly in the face of
5 the Texas statute. I've got too many pleadings here
6 today, Judge, but let me find it quickly. Article
7 41.12, Section 20, Texas Code of Criminal Procedure:

8 "Any time after the Defendant has
9 satisfactorily completed one-third of the original
10 community supervision period, the period of
11 community supervision may be reduced or terminated
12 by the Judge. If the Judge discharges a Defendant
13 under Section he may set aside the verdict or
14 permit Defendant to withdraw his plea and shall
15 dismiss the indictment against the Defendant."

16 We agree with, we agree with all of that.
17 But what the statute and the code doesn't say, and you
18 look at Texas Constitution, Article 4, Section 11, it
19 just says it absolves the party of the legal
20 consequences that were imposed. It does not say, it
21 does not say that you could deny it ever happened. You
22 cannot do that until you get an expunction and that's
23 why the expunction was secured by this gentleman a year
24 after his termination. And as I pointed out in
25 paragraph 7 of that document, your Honor -- I'll find

1 it so I don't paraphrase it -- Well, first of all, on
2 the second page it says the pardon was issued making
3 him eligible for expunction. So he knew at that point
4 he was eligible but he didn't do anything about it.
5 Then it says in paragraph 1 that the expunction is
6 granted. Paragraph 2, "The Respondent (inaudible)
7 State of Texas, shall return all records and files
8 concerning that conviction." Paragraph 3, "That the
9 State of Texas shall delete it from their records and
10 indexes." Paragraph 4, "The Court Clerk shall not
11 permit inspection of those records." Paragraph 5, "The
12 Clerk shall deliver back to Mr. Schied his files."
13 Paragraph 6, the Clerk shall destroy the files." And
14 paragraph 7, "The Petitioner may deny the occurrence of
15 the expunged arrest and prosecution." That's October
16 of 2004, your Honor, over a year after he answered a
17 question that said have you ever been convicted. It
18 didn't say is it expunged, is it pardoned, is it set
19 aside, none of that. It's really just a red herring on
20 this disclosure issue or set-aside versus expungement
21 because if you're not expunged, you cannot answer the
22 question the way Mr. Schied did on September 11, I
23 believe it was, 2003. You just can't do it. And their
24 willingness to flipflop between Texas law and Michigan
25 law and saying sometimes it applies and sometimes it

1 doesn't just doesn't cut it. You know, the FBI report
2 does say check it to see if it's infallible so what do
3 the Plaintiffs now submit to the Court, the affidavit
4 and notes of Ms. Guteras. Well, I think an examination
5 of those is pretty relevant. On page 1 - because
6 remember the Plaintiffs are now here saying, you know,
7 that they showed the documents to my client and showed
8 her that this was expunged and the like. Well, first
9 of all, he makes a misstatement. Dr. Harris, that's
10 the H, says, "Were you convicted [REDACTED] [REDACTED] [REDACTED]
11 [REDACTED] [REDACTED] [REDACTED]?" Answered by Mr.
12 Schied, "Yes, it was overturned." Well, it wasn't
13 overturned. It was never overturned. Not even now
14 it's never been overturned. It's been expunged, that's
15 different. And then it says, "David read information
16 off a document referring to an early determination."
17 It doesn't say there, on the very next line, that he
18 showed them the document, gave them a copy of the
19 document, handed them the document or anything even
20 close. "Would you describe the circumstances revolving
21 around [REDACTED]" Answered by Mr. Schied, "I don't
22 recall them." Seems disingenuous at best. Dr. Harris
23 asked or copied down a little bit after there's a
24 number 1, 2, and 3. Dr. Harris asked for a copy of the
25 order of dismissal. "David Schied, he'll refer to

1 legal counsel, will not give copies at this time."
2 Now, they've stood here and told you that Ms. Guteran's
3 affidavit supports these notes and says the notes are
4 accurate, so you look on page 2. Dr. Harris asked for
5 copy of order of dismissal. D, for David Schied,
6 "requested legal rep prior to giving documents to
7 anyone." And then you look at -- I think there's one
8 other part where he says, essentially, the same thing,
9 but I think you get the point. This gentleman never
10 gave them the documents to explain it and, candidly,
11 had he given the documents, it wouldn't have made a
12 difference because the answer he gave on a document
13 that his employment was contingent upon was false. He
14 had been convicted. Whether it was set aside, a pardon
15 or anything else, you cannot deny it until you get an
16 expungement. He never had the expungement and that's
17 Texas law, that's Michigan law. And the rest, quite
18 candidly, your Honor, is fluff and a red herring.

19 THE COURT: All right, since you both have
20 motions for summary disposition, I think both should
21 probably be allowed to have any rebuttal so if you have
22 something further counsel, I'll allow it.

23 MR. FIRESTONE: I'll just -- very briefly, two
24 points. First, I believe what I said was November 6
25 she was given the documents and in fact that is what

1 Donny Reeves affidavit says and I think that I even
2 said that it was Donny Reeves who gave her the
3 documents. And the other interesting comment that Mr.
4 Weaver made in rebuttal was that what the set-aside
5 does is to relieve Mr. Schied of the legal effects of
6 the --

7 THE COURT: Legal consequences.

8 MR. FIRESTONE: Legal consequences. Well, one
9 of those legal consequences is the employment issue and
10 if he really has been relieved of the legal
11 consequences then his employment never should have been
12 terminated. Thank you.

13 THE COURT: Well, ~~it is a vexing issue and the~~
14 ~~Court was initially going to take it under advisement,~~
15 but I have reviewed your briefs carefully and I've
16 reviewed the cases you've cited and it's one of those
17 cases that -- it requires a certain result in ~~this~~
18 ~~Court's opinion but maybe one that isn't entirely just~~
19 ~~under all circumstances~~ and that is, the way the Court
20 reads the Texas law, which is undisputedly the law that
21 must be interpreted here, as to whether Plaintiff
22 complied or not and, therefore, was allowed to answer
23 the way he did, the Court finds that that law requires,
24 before he can deny that he's ever been convicted of a
25 crime, the expunction for which he was eligible for

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once he had the set-aside and the pardon but which he never sought until after he was terminated by the Lincoln School District, so the Court will grant summary disposition to the Defendant.

MR. WEAVER: Thank you, your Honor, we'll prepare an order.

MR. FIRESTONE: Thank you, your Honor.

THE COURT: You're welcome.

(Court in recess at 2:51 p.m.)

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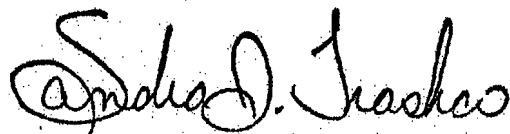
COUNTY OF WASHTENAW) ss.

STATE OF MICHIGAN)

I certify that this transcript consisting of 37 pages is a true and accurate transcription to the best of my ability of the video proceeding in this case before the Honorable Melinda Morris as recorded by the clerk.

Videotape proceedings were recorded and provided to this transcriptionist by the Circuit Court and this certified reporter accepts no responsibility for any events that occurred during the above proceedings, for any inaudible and/or indiscernible responses by any person or party involved in the proceeding or for the content of the videotape provided.

Dated: December 18, 2005



Sandra Traskos, CER 7118