

STATE OF MICHIGAN
IN THE SUPREME COURT

CRAIG HECHT,

Plaintiff-Appellee,

v

NATIONAL HERITAGE ACADEMIES,
INC.,

Defendant-Appellant.

Supreme Court No. _____

Court of Appeals No. 306870

Genesee County Circuit Court
Case No. 10-93161-CL

Hon. Geoffrey L. Neithercut

Open
10-28-14

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**APPELLANT NATIONAL HERITAGE ACADEMIES, INC'S
APPLICATION FOR LEAVE TO APPEAL**

ORAL ARGUMENT REQUESTED

FILED

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
STATEMENT OF APPELLATE JURISDICTION	vi
JUDGMENT APPEALED FROM AND RELIEF SOUGHT	vi
STATEMENT OF QUESTIONS PRESENTED	vii
INTRODUCTION AND REASONS FOR GRANTING LEAVE.....	1
BACKGROUND	5
The parties.....	5
Hecht’s racist remark in classroom full of schoolchildren	5
Investigation of Hecht’s racist statement	6
Hecht tampers with the investigation.....	8
Comments involving race at the Academy	10
Hecht’s post-termination employment.....	11
Hecht sues NHA	13
The Court of Appeals’ panel majority affirms.....	14
Judge Wilder’s dissent	17
STANDARDS OF REVIEW.....	18
ARGUMENT.....	19
I. The Court of Appeals’ decision articulates a weaker standard for proving employment discrimination than this Court’s precedents.....	19
A. Hecht had no direct evidence of unlawful discrimination; what a person thinks another person’s unidentified words mean does not directly and without inference prove unlawful animus.....	20
1. This Court’s precedents addressing direct evidence are muddled, leading to the confusion in the Court of Appeals’ decision below	20

2.	Weaver's belief about what Caine-Smith meant by an unknown statement is not evidence that requires the conclusion that NHA discriminated against Hecht.....	24
B.	Hecht did not indirectly prove unlawful discrimination because his situation was not nearly identical in all relevant respects to the African Americans who allegedly made comments involving race	26
II.	The trial court abused its discretion by admitting evidence of and allowing argument about NHA's disclosure of Hecht's unprofessional conduct as required by MCL 280.1230b.....	30
CONCLUSION AND REQUESTED RELIEF		35

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Awkerman v Tri-County Orthopedic Group, PC,</i> 143 Mich App 722; 373 NW2d 204 (1985).....	33
<i>Davis v Motorcity Casino,</i> No 299505, 2011 WL 5966218 (Mich Ct App, Nov 29, 2011).....	27
<i>DeBrow v Century 21 Great Lakes, Inc,</i> 463 Mich 534; 620 NW2d 836 (2001).....	21
<i>Harrison v Olde Financial Corp,</i> 225 Mich App 601; 572 NW2d 679 (1998).....	22
<i>Hazle v Motor Co,</i> 464 Mich 456; 628 NW2d 515 (2001).....	passim
<i>Lytle v Malady,</i> 458 Mich 153; 579 NW2d 906 (1998).....	26, 27
<i>People v Duncan,</i> 494 Mich 713; 835 NW2d 399 (2013).....	18
<i>Pontiac Firefighters Union Local 376 v City of Pontiac,</i> 482 Mich 1; 753 NW2d 595 (2008).....	18
<i>Radtke v Everett,</i> 442 Mich 368; 501 NW2d 155 (1993).....	28
<i>Sniecinski v Blue Cross & Blue Shield of Michigan,</i> 469 Mich 124; 666 NW2d 186 (2003).....	passim
<i>Town v Michigan Bell Telephone Co,</i> 455 Mich 688; 568 NW2d 64 (1997).....	2, 27

Federal Cases

<i>Barnes v GenCorp Inc,</i> 896 F2d 1457 (CA 6, 1990).....	27
<i>Brown v Packaging Corp of America,</i> 338 F3d 586 (CA 6, 2003).....	26
<i>Clayton v Meijer, Inc,</i> 281 F3d 605 (CA 6, 2002).....	27

	<u>Page(s)</u>
<i>Gross v FBL Financial Services, Inc,</i> 557 US 167 (2009).....	20
<i>Hall v United States Department of Labor,</i> 476 F3d 847 (CA 10, 2007).....	17, 22
<i>Jacklyn v Schering-Plough Healthcare Products Sales Corp,</i> 176 F3d 921 (CA 6, 1999).....	21, 22
<i>Johnson v Kroger Co,</i> 319 F3d 858 (CA 6, 2003).....	22, 24
<i>Jones v Bessemer Carraway Medical Center,</i> 151 F3d 1321 (CA 11, 1998).....	22
<i>McDonnell Douglas v Green,</i> 411 US 792 (1973).....	1
<i>Merritt v Dillard Paper Co,</i> 120 F3d 1181 (CA 11, 1997).....	22
<i>Mills v First Federal Savings & Loan Association of Belvidere,</i> 83 F3d 833 (CA 7, 1996).....	25
<i>Patten v Wal-Mart Stores E, Inc,</i> 300 F3d 21 (CA 1, 2002).....	22
<i>Price Waterhouse v Hopkins,</i> 490 US 228 (1989).....	20
<i>Scheick v Tecumseh Public School,</i> 766 F3d 523 (CA 6, 2014).....	22
<i>Texas Department of Community Affairs v Burdine,</i> 450 US 248 (1981).....	19
<i>University of Texas Southwest Medical Center v Nassar,</i> 133 S Ct 2517 (2013).....	20
<i>Visser v Packer Engineering Associates,</i> 924 F.2d 655 (CA 7, 1991).....	25
<i>Wright v Murray Guard, Inc,</i> 455 F3d 702 (CA 6, 2006).....	27

State Statutes

MCL 37.2202..... 19
MCL 380.1230b..... passim

Federal Statutes

42 USC 2000e-2..... 20

State Rules

MCR 2.613..... 18
MCR 7.301..... vi

Other Authorities

House Bill 5060 First Analysis 11/8/95..... 12

STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction under MCR 7.301(A)(2) to grant leave to appeal from the Court of Appeals' opinion entered on October 28, 2014.

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant National Heritage Academies, Inc. seeks leave to appeal the Court of Appeals' October 28, 2014 opinion affirming the Genesee County Circuit Court's judgment in favor of Plaintiff Craig Hecht. The judgment awarded Hecht more than \$535,000 after Hecht was fired for making a racist "joke" in a classroom full of third graders and then interfering with NHA's investigation of the incident. NHA respectfully requests this Court grant leave to appeal and reverse the lower court.

STATEMENT OF QUESTIONS PRESENTED

1. Whether a person’s summary of what she *understood* a decision-maker *meant*—as opposed to evidence of what the decision-maker *actually said*—constitutes “direct evidence” of intentional discrimination where even the summary is subject to multiple reasonable benign interpretations.

Court of Appeals says: Yes

Plaintiff Hecht says: Yes

Defendant National Heritage Academy says: No

Trial court did not address this issue.

2. Whether Plaintiff Hecht, who made a joke about white superiority in a classroom full of schoolchildren that was brought to the Defendant school’s attention through coworker complaints, was similarly situated to non-Caucasian coworkers who engaged in racial banter in settings where children were not present and whose conduct was not brought to Defendants’ attention.

Court of Appeals says: Yes

Trial court says: Yes

Plaintiff Hecht says: Yes

Defendant National Heritage Academy says: No

3. Whether MCL 380.1230b, which immunizes an employer from “any liability” for disclosing a former employee’s unprofessional conduct to schools, nonetheless allows a terminated employee to use such a disclosure to inflate his damages against the school.

Court of Appeals says: Yes

Trial court says: Yes

Plaintiff Hecht says: Yes

Defendant National Heritage Academy says: No

INTRODUCTION AND REASONS FOR GRANTING LEAVE

Plaintiff Craig Hecht, a white teacher, made a racial “joke” in front of his third-grade class that “white is better than brown” and “[b]rown should burn.” An African American special-education paraprofessional and a white library aide both reported Hecht’s comments to their employer, Defendant National Heritage Academies. When NHA investigated, Hecht implored the paraprofessional to change his statement. Hecht also left phone messages for the library aide that she did not return. NHA ultimately ended its employment of Hecht because he made inappropriate racial statements in front of students and interfered with the school’s investigation. A jury awarded Hecht more than \$535,000 for racial discrimination, accepting Hecht’s argument that he was treated less favorably than African American coworkers who sometimes bantered with each other outside the presence of children.

A non-lawyer might say that this case represents everything that is wrong about our legal system: a school cannot fire a teacher even after the teacher makes racist remarks in a classroom full of children and then tries to interfere with the school’s investigation into the incident. But for three reasons, the case’s jurisprudential significance is far greater than simple injustice.

First, muddled employment-discrimination decisions of this Court caused the Court of Appeals’ panel majority to treat circumstantial evidence as direct evidence of discrimination. When a plaintiff has no direct evidence of discrimination, he must satisfy the burden-shifting framework the U.S. Supreme Court set forth in *McDonnell Douglas v Green*, 411 US 792 (1973). In contrast, direct evidence that discriminatory animus caused the adverse employment decision allows a plaintiff to skirt the *McDonnell Douglas* framework. *Hazle v Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). The Court of Appeals concluded that Hecht presented direct evidence in the form of another employee’s testimony that she *understood* a comment from school principal Linda Caine-Smith to mean that racial bantering happened at the school

among African American employees but not the other way around. As Judge Wilder explained at length in his dissent, what the employee *thought* Caine-Smith meant is not “direct evidence” of discrimination:

[Corinne] Weaver’s testimony is not direct evidence of discrimination because it did not recount an actual statement by Caine-Smith. *Nothing* in the record establishes what Caine-Smith actually said to Weaver, and Caine-Smith denied saying directly, or by implication, that statements made by African American employees should be treated differently than statements made by white employees. As such, Weaver’s testimony constitutes, at best, Weaver’s interpretation of what Caine-Smith *may* have meant by what she said. [COA Dissent 3.]

As a result, “Weaver’s summation of what Caine-Smith allegedly said cannot *on its face* establish that plaintiff’s race was a factor in Caine-Smith’s decision to terminate plaintiff.” (*Id.*)

Nonetheless, the panel majority, relying on this Court’s muddled precedents, concluded that what Weaver *thought* Caine-Smith meant was direct evidence even though the evidence was subject to multiple reasonable interpretations. Indeed, the majority’s analysis demonstrates that Weaver’s testimony, if believed, does not *require* the conclusion that discrimination occurred at all. This Court’s review and clarification of the law regarding direct and indirect evidence in employment-discrimination actions is necessary.

Second, this Court’s intervention is needed to clarify when an employee is “similarly situated” to another employee such that their comparison is relevant in a jury’s determination of whether employment discrimination has occurred. In *Town v Michigan Bell Telephone Co*, 455 Mich 688, 700; 568 NW2d 64 (1997), the Court explained that for a coworker to be similarly situated to the plaintiff the two must be nearly identical in all relevant aspects. Here, Hecht claims that he is similarly situated in all relevant respects to African American employees who engaged in bantering that involved race. But none of the bantering Hecht identified was made in a classroom during instructional time in front of children. None of the bantering Hecht identified

was reported to NHA decision-makers. And none of the bantering Hecht identified involved an employee interfering with NHA's investigation. Tellingly, Hecht admits that he made remarks about burning brown tables using "brown tables" as proxy for dark-skinned people; admits that NHA should have disciplined him; and admits that the African Americans who engaged in bantering should *not* have been disciplined. It is not possible to say that Hecht was "similarly situated" to the employees who engaged in the bantering under this Court's decision in *Town*. Yet that is precisely what the Court of Appeals' panel majority held here.

Third, Hecht was able to inflate his damages by arguing to the jury that he could never obtain another job as a schoolteacher because the Revised School Code requires NHA to report his unprofessional conduct to any school that considers hiring him. MCL 380.1230b. But state law is supposed to grant NHA immunity from "*any liability*" for making the required disclosure about Hecht's inappropriate classroom behavior; and pursuant to that same law, Hecht released NHA from any liability for disclosing accurate information about his racist remarks. In allowing Hecht to nonetheless use NHA's mandatory disclosure to inflate his damages, the lower courts penalized NHA for complying with state law, contrary to the statute's plain language and the broad grant of immunity the Legislature intended.

Given the magnitude of the Court of Appeals' errors and the effect they will have on employment litigation in this state, leave to appeal is warranted for numerous reasons. To begin, this case involves issues of importance to the public and affects school districts throughout Michigan. The case's importance is underscored by the amicus brief Michigan's Attorney General filed below, in which he highlighted the importance of schools and employers readily disclosing instances of professional misconduct. The Attorney General's amicus brief noted several recent examples of school employees who were accused of inappropriate conduct towards students in one school, then unwittingly hired by another school where the employee

harmed other students. That is precisely the kind of outcome the Legislature intended to prevent by enacting MCL 380.1230b.

Moreover, the Court of Appeals' decision is the only Michigan appellate decision interpreting the scope of immunity under the mandatory disclosure law. As a result, lower courts and federal courts will necessarily rely on the decision when applying the statute in all future cases.

Most fundamentally, the decision below represents a significant departure from this Court's precedents, some of which are less than clear. Characterizing circumstantial evidence as direct evidence and treating disparately situated employees as similar has a pernicious effect, one that causes employers to question their ability to terminate employees engaged in even egregious misconduct.

The Court of Appeals' decision in this case creates an inhospitable environment for economic growth; what company wants to open or expand its business in Michigan with uncertainty in the law governing employment discrimination? And the outcomes have an adverse effect on the public's view of the judiciary. It is difficult for a member of the public to understand why a school must pay more than half a million dollars to a former teacher whom the school fired for suggesting in front of a classroom of third graders that "[b]rown should burn," and who then asked those children, "White is better than brown, right?"

For all these reasons, and those explained in more detail below, the Court should grant leave to appeal or peremptorily reverse and remand the case to the circuit court for entry of judgment of in favor of NHA.

BACKGROUND

The parties

National Heritage Academies, Inc. owns and operates Linden Charter Academy, a “public independently owned school” that seeks to “offer every student, no matter where they come from, the opportunity for college.” (Caine-Smith Tr, 7/13/11, 169-170.) NHA’s educational philosophy consists of four pillars, one of which is the moral education of its students. (*Id.* at 170.) NHA does not believe that it “can just educate somebody’s mind” but that schools must “take into consideration” a student’s “heart and character.” (*Id.*) NHA schools emphasize nine different moral virtues each school year. (*Id.* at 171.) Among these are “respect” and “integrity.” (*Id.*) NHA expects every person it employs to “exemplify those moral virtues” and NHA’s teachers are expected to “model the characteristics of behavior as outlined in the moral focus curriculum.” (*Id.* at 171-172.)

The Academy is a primarily African-American school in Flint, Michigan. (Caine-Smith Tr, 7/13/11, 172). It has a “zero tolerance policy about racial intolerance.” (Def Ex 24). NHA employed Hecht, a white male, as an at-will teacher and administrator for eight years. (Hecht Tr, 7/12/11, 222-223). For much of that time Hecht was a teacher. (*Id.*) He was teaching third grade when NHA decided to end his employment on November 6, 2009.

Hecht’s racist remark in classroom full of schoolchildren

On November 3, 2009, Lisa Code, a white library aide, entered Hecht’s third-grade classroom to return a computer table. (Hecht Tr, 7/12/11, 222, 228.) The classroom was full of students. (Code Tr, 7/13/11, 98; Bell Tr, 7/13/11, 124.) Floyd Bell, an African-American paraprofessional, was also in the classroom. (Bell Tr, 7/13/11, 122.) After Code realized that

she had mistakenly brought back the wrong color table, she asked Hecht whether he wanted a white table, as before, or the brown table she had brought. (Hecht Tr, 7/12/11, 228.)

Hecht told Code, “You know I want a white table, white tables are better.” (*Id.* at 229; Code Tr, 7/13/11, 73.) Despite Code’s calling a “foul”¹ on Hecht, he continued making racist comments declaring that “[w]e need to get rid of the brown tables” and “[w]e can take all these brown tables and we can burn the brown tables.” (Hecht Tr, 7/12/11, 229; Hecht Tr, 7/13/11, 38-39.) Hecht even involved a child in the conversation, looking over his shoulder and asking, “White is better than brown, right?” (*Id.*; Code Tr, 7/12/11, 75; Def’s Ex 10, Bell’s Statement.) Bell also called “foul” but Hecht did not respond. (Bell Tr, 7/13/11, 125.)

Hecht acknowledged what was apparent to Bell and Code: his comments referred to race and were *intended to mean that “white people are better than brown people.”* (Hecht Tr, 7/13/11, 37, 43; Unwin Tr, 7/14/11, 12; Code Tr, 7/13/11, 74, 95-96; Bell Tr, 7/13/11, 123, 125-126.) And Hecht knew that it was inappropriate to make racial jokes in front of third-grade students. (Hecht Tr, 7/13/11, 56; Code Tr, 7/13/11, 102.)

Investigation of Hecht’s racist statement

Later that same day, Code reported the incident to Corrine Weaver, the Academy’s dean and the second highest school administrator. (Weaver Tr, 7/12/11, 148.) Weaver reported the complaint to the Academy’s principal, Linda Caine-Smith, who initiated an investigation. (*Id.* at 151-152; Caine-Smith Tr, 7/13/11, 177.)

¹ The staff and students at the Academy created a “social contract,” an understanding regarding how they would treat each other and expect to be treated by others. (Hecht Tr, 7/13/11, 34-35.) If someone broke the rules established by the social contract, school employees call a “foul” on that person. (Hecht Tr, 7/12/11, 234.) The person on whom the foul is called is supposed to respond by stopping the offensive conduct and giving two ups, which means making two positive comments about the person who called foul. (Weaver Tr, 7/12/11, 179-180.)

Caine-Smith and Weaver separately meet with Bell, Code, and Hecht, and received written reports from each. (Caine-Smith Tr, 7/13/11, 177; Weaver Tr, 7/12/11, 142-144, 148-149, 172.) Bell and Code provided consistent reports that identified that Hecht's comments included that "brown should burn" and that white was better than brown. (Weaver Tr, 7/12/11, 142-144, 172; Def's Ex 10; Def's Ex 9.) They both also stated that Hecht had involved a student. (Weaver Tr, 7/12/11, 143; Def Ex 10.)

Hecht's story varied. In his first meeting with Weaver, Hecht confirmed the general discussion of white and brown tables but denied he had meant his comments to be racist. (See Weaver Tr, 7/17/11, 148-149.) The next day, Hecht told Caine-Smith that he had not said that "brown should burn" at all. (Caine-Smith Tr, 7/13/11, 183.) Then, a few hours later, Hecht sent Caine-Smith a written statement confirming that he had indeed said "white tables are better than brown tables" and that "all brown tables should burn." (Def's Ex 11.) And Hecht admitted that he had intentionally involved a nearby student, asking the third-grader "Right?" after making his comments about white being better than brown. (*Id.*)

After engaging in this initial investigation, Caine-Smith was concerned that Hecht had made racist remarks in a classroom of third graders and persisted in doing so even after being challenged by Bell and Code. (Caine-Smith Tr, 7/13/11, 179, 181.) So Caine-Smith turned for help to Courtney Unwin, NHA's Employer Relations Manager. (*Id.* at 183.) Caine-Smith told Unwin that she believed Hecht had "clearly lied" during their first conversation based on the fact that his story changed so markedly between their meeting and Hecht's later submission of his written statement. (Def's Ex 14.)

Unwin also spoke with Hecht, and he changed his story yet again. (Unwin Tr, 7/14/11, 11-12.) Hecht now characterized his remarks as a “tasteless joke.” (*Id.* at 12; Def’s Ex 3.) Contradicting his written statement and those of Code and Bell, Hecht claimed that there were no children by him and that no children heard him when he made his racist comment. (*Id.*) Later that day, Hecht called Unwin again, this time claiming that he could not even remember saying anything about brown tables burning. (Unwin Tr, 7/14/11, 15.)

During the conversation with Unwin, Hecht first sought to justify his conduct by reference to incidents in which African-Americans had bantered about race. (Unwin Tr, 7/14/11, 13; Def’s Ex 3.) Hecht told Unwin of one incident involving a picture of Dora the Explorer in the Academy’s gym. (*Id.*) Hecht would not tell Unwin who was involved in that situation. (Unwin Tr, 7/14/11, 14.) Nor did he complain at the time the incident occurred. (*Id.*) Unwin asked Caine-Smith about that incident. Caine-Smith had never heard of it and told Unwin that no one had ever complained about the comment. (*Id.*)

That same day Caine-Smith and Unwin discussed Hecht’s comments in the classroom and his untruthful reporting of the incident. They discussed several possible disciplinary options including a final written warning and termination. (Unwin Tr, 7/14/11, 17.) Caine-Smith then called Hecht to her office and told him his was being put on leave pending further investigation. Caine-Smith directed Hecht to leave the building immediately. (Caine-Smith Tr, 7/13/11, 184.)

Hecht tampers with the investigation

Hecht did not leave the building as his supervisor had instructed. Instead, Hecht went to where Bell was tutoring students and told the students to leave (cutting into their instructional time) so that he could talk to Bell. (Bell Tr, 7/13/11, 132-33; Def’s Ex 15, Bell 2d Statement.) Hecht spoke to Bell about changing the statement that Bell had given to NHA. (Hecht Tr,

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7/13/11, 46; Bell Tr, 7/13/11, 133.) Bell responded that he would not lie for Hecht; Hecht remained silent and did not deny that he was asking Bell to lie. (Bell Tr, 7/13/11, 136-137.)

Hecht also tried to contact Code. He called both her cell phone and home phone on the evening of November 4, leaving a message that he was desperate. (Code Tr, 7/13/11, 86-88; Def's Ex 17, Code 2d Statement.) Hecht had never before called Code. (Code Tr, 7/13/11, 99-100.)

The next morning, Bell reported Hecht's actions to Caine-Smith. (Bell Tr, 7/13/11, 137.) Bell informed Caine-Smith that Hecht's comments (asking Bell to lie) had made the previous day "one of the most uncomfortable days in my life." (Def's Ex 15, Bell 2d Statement.) Concerned, Caine-Smith asked Code if Hecht had also contacted her. (Caine-Smith Tr, 7/13/11, 186.) Code told Caine-Smith of Hecht's calls. (*Id.*; Code Tr, 7/13/11, 86-88; Def's Ex 17, Code 2d Statement.) Caine-Smith immediately contacted Unwin again. (Caine-Smith Tr, 7/13/11, 186; Unwin Tr, 7/14/11, 21.)

Caine-Smith and Unwin were disturbed by Hecht's actions. First, Hecht had deliberately disobeyed a direct order to leave the building. (Caine-Smith Tr, 7/13/11, 185; Unwin Tr, 7/14/11, 21.) Second, Hecht interrupted individual instruction time and dismissed students from instruction to address his personal matters. (Caine-Smith Tr, 7/13/11, 185; Unwin Tr, 7/14/11, 22.) Most important, Hecht tried to get Bell to change his story. (Caine-Smith Tr, 7/13/11, 185-186; Unwin Tr, 7/13/11, 22.) Both Caine-Smith and Unwin viewed Hecht's failure to protest when Bell accused Hecht of asking Bell to lie as demonstrating that was *exactly* what Hecht was doing. (*Id.*) For these reasons, Caine-Smith and Unwin concluded that Hecht was interfering with NHA's investigation. (Caine-Smith Tr, 7/13/11, 186; Unwin Tr, 7/14/11, 54.)

Before learning of Hecht's interference with the investigation, Caine-Smith and Unwin were considering giving Hecht a final warning and requiring him to make a public apology for his racist comment. (Unwin Tr, 7/14/11, 17.) But after learning of Hecht's interference with the investigation, they instead terminated Hecht for "imped[ing] the investigation." (Hecht Tr, 7/13/11, 19-20.) NHA later hired a teacher to replace Hecht. Like Hecht, that teacher is white. (Caine-Smith Tr, 7/13/11, 187.)

Comments involving race at the Academy

It is undisputed that there was occasional racial banter and comments at the Academy. For instance, Weaver heard African Americans engage in "genuine [racial] banter" on 10-20 occasions over 10 years. (Weaver Tr, 7/12/11, 177-178; Weaver Tr, 7/13/11, 107-108.) She also testified that she remembers hearing the use of the "n" word no more than three times during the same period. Significantly, no children were present during these incidents, and there was no evidence that anyone reported being offended or complained to the administration. (*Id.*)

As Hecht mentioned to Unwin, an African-American staff member once made a comment that because a Dora the Explorer mural had been painted with darker skin, she "looks more like [Lakisha]," a name used in the African-American community. (Scott Tr, 7/12/11, 192; Hecht Tr, 7/13/11, 11; Bell Tr, 7/13/11, 144-45; Caine-Smith Tr, 7/13/11, 199; Unwin Tr, 7/14/11, 13.) But again, no students were present who could have overheard this remark, and no one reported the incident to management. (Weaver Tr, 7/12/11, 178; Code Tr, 7/13/11, 101; Scott Tr, 7/12/11, 197-99; Caine-Smith Tr, 7/13/11, 188.) Nor did anyone present take offense. (Unwin Tr, 7/14/11, 14.) Caine-Smith had never heard of it before Hecht mentioned it. (*Id.*)

On another occasion, when Academy staff members were on a bus to a professional development meeting, an African-American staff member overheard Weaver mention that she was making pork chops for supper, and asked “[w]hy would you be making pork chops; you’re white?” (Weaver Tr, 7/12/11, 136-37.) Weaver called “foul,” and the staff member responded by giving her positive affirmations. (*Id.* at 178-179.) Weaver was not offended and never reported the incident to the administration. (*Id.* at 135-139.) A different African-American staff member told Weaver she should not eat soul food because she was white. (*Id.* at 139, 140, 142.) Again, Weaver was not offended but she did call “foul.” (*Id.* at 180.) The staff member responded with positive affirmations. (*Id.*) Weaver did not complain to the administration (*Id.*)

Two additional instances were identified at trial that did not include Weaver. On one occasion an African American staff member allegedly told Code she could not do something because she was white. (Code Tr, 7/13/11, 90.) Code was not offended. (*Id.*) Nor did Code report the incident. (*Id.* at 91.) And Hecht testified that he once heard an African-American secretary refer to an African-American student as “light skinned.” (Hecht Tr, 7/13/11, 13.) Hecht did not call “foul” or complain to the administration. (*Id.*) Again, NHA was unaware of these alleged incidents until this litigation.

Hecht’s post-termination employment

After Hecht’s employment was ended, NHA received at least one request from schools to which Hecht had applied for disclosure of unprofessional conduct. (Unwin Tr, 7/14/11, 25-26; Hecht Tr, 7/13/11, 24-26.) A section of the Revised School Code, MCL 380.12305, codifying 1996 Public Act 189, requires a school hiring an applicant to request information from an applicant’s current or immediate past employer regarding any unprofessional conduct in which the applicant may have engaged. MCL 380.1230b(2). “Unprofessional conduct” is broadly

defined as, among other things, “1 or more acts of misconduct.” MCL 380.1230b(8)(b). Upon receiving such a request, a school is required to provide information and documentation to the requesting school of any unprofessional conduct by the applicant. MCL 380.1230b(3). The statute provides that “an employer *shall* provide the information requested and make available to the requesting school . . . copies of all documents in the employee’s personnel record relating to the unprofessional conduct.” *Id.* (emphasis added).

The aim of the legislature in passing PA 189 was to “protect students by keeping teachers (and others) with a record of unprofessional conduct out of schools.” House Bill 5060 First Analysis 11/8/95, 2. It had come to the Legislature’s attention that “teachers can be pushed out of one district for unprofessional conduct, including sexual abuse of students, and move on to positions in other districts because secret agreements suppress information about their employment history.” *Id.* In the Legislature’s view, the bill would protect “employers that release such information in good faith.” *Id.*

Hecht’s prospective school employers requested documentation pursuant to PA 189. As the law required, NHA notified these schools truthfully that Hecht had been found to have “engaged in unprofessional conduct,” “made a racially offensive statement,” and “improperly attempted to induce co-workers to change their statements about the incident while employed at NHA.” (Unwin Tr, 7/14/11, 24-25; Pl Ex 13.) None of the schools to which Hecht applied offered him a position. (Hecht Tr, 7/13/11, 24-26.)

Within weeks of being fired by NHA, Hecht was working at Saginaw Valley Preparatory Academy as a substitute teacher. (Hecht Tr, 7/13/11, 59.) There was a long-term teaching position available as the regular seventh-grade teacher. (*Id.* at 59-61.) Hecht would have been hired for this position (*id.* at 60-61), but he failed a drug test (*id.* at 59-60).

After being terminated by Saginaw Valley, Hecht resumed substitute teaching. (Hecht Tr, 7/13/11, 25). While Hecht worked as a substitute at Seymour Elementary in Flushing, the principal of the school told him that he had received his “PA 189 results” and that his services at the school would be terminated that day. (*Id.* at 25-26) When the substitute-teacher placement service for whom Hecht was working received the PA 189 disclosure, it advised that the Genesee County schools no longer wanted to use his services. (*Id.* at 25; Pl Ex 14.)

Hecht never applied for another teaching position, even though the undisputed evidence showed that a PA 189 “unprofessional conduct response” does not automatically disqualify a person from being employed as a teacher. Indeed, NHA itself has offered employment to persons who have had a PA 189 unprofessional-conduct response. (Unwin Tr, 7/14/11, 26-27.) Instead of looking for other teaching jobs, Hecht secured full-time employment as a machine operator earning approximately \$14 per hour. (Hecht Tr, 7/13/11, 26-27.) NHA paid Hecht \$51,000 annually while he was employed. (Pl Ex 8.)

Hecht sues NHA

In February 2010, Hecht sued NHA in the Genesee County Circuit Court, alleging race discrimination under the Elliot-Larsen Civil Rights Act, MCL 37.2202. Specifically, Hecht alleged that his race was a substantial cause for NHA’s decision to discharge him and that he was treated less favorably than similarly-situated African-American employees. (Compl ¶¶ 17-18.)

Before trial, NHA moved to bar Hecht from introducing evidence relating to NHA’s mandatory disclosure of Hecht’s unprofessional conduct. The trial court denied the motion, holding that the disclosure was material to Hecht’s claim of future economic damages. (Mot in Limine Hrg Tr, 7/11/11, 10.)

In July 2011, the case proceeded to trial by jury. At the close of Hecht's case, NHA moved for directed verdict. (7/13/11 Tr, 110-114, attached as Exhibit A.) That motion was denied. (*Id.* at 114.) The jury returned a verdict in favor of Hecht. The jury awarded Hecht damages for past economic loss in the amount of \$50,120 and future economic damages in the amount of \$485,000. (Jury Verdict Tr, 7/15/11, 4.) The trial court entered judgment consistent with the jury's verdict on August 8, 2011. (7/8/11 J, attached as Exhibit B.) The trial court entered an order awarding Hecht attorneys' fees and costs in the amounts of \$117,075 and \$6,527.92, respectively. (7/18/11 Order Granting Fees and Costs.)

After the trial court entered judgment, NHA moved for judgment notwithstanding the verdict or, in the alternative, a new trial on liability because Hecht had failed to prove that his race caused his dismissal. NHA also moved for a new trial because the trial court had admitted evidence of NHA's required disclosures under the Michigan Revised School Code. (Br in Supp of Mot for JNOV 15-17.) The trial court denied NHA's motion. (Order Den Mot for JNOV, attached as Exhibit D.) NHA timely appealed. (10/25/11 Claim of Appeal.)

The Court of Appeals' panel majority affirms

On appeal, NHA argued that the trial court erred by denying its motion for directed verdict and its JNOV motion. (NHA Appeal Br 34.) NHA argued that there was insufficient evidence to send the case to the jury or to support the jury's verdict that race was a motivating factor in Hecht's dismissal. NHA argued that there was no direct evidence of discrimination presented at trial and no circumstantial evidence demonstrating that Hecht was treated differently from similarly situated African-Americans. (*Id.* at 23-26.) NHA also renewed its argument that the trial court had erred in allowing evidence of NHA's mandatory disclosure obligation under the Revised School Code. (*Id.* at 36-42.)

The panel majority rejected these arguments and affirmed. With respect to sufficiency of the evidence, the majority held that both direct evidence and circumstantial evidence supported the conclusion that race was a motivating factor in Hecht's dismissal. (COA Op 3-7, attached as Exhibit E.) The majority stated that direct evidence is " 'evidence which, if believed *requires* the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.' " (*Id.* at 3 (emphasis added) (quoting *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001)).) The majority then said that the "only direct evidence of discrimination was a statement *attributed* to Caine-Smith." (*Id.* (emphasis added).) Still, the majority held Weaver's testimony concerning Caine-Smith's reaction when she reported Hecht's racist remarks and Caine-Smith's knowledge of racial bantering was sufficient to establish direct evidence of discrimination. (*Id.* at 3-5.)

The majority quoted the testimony, in full, that it believed required the conclusion that Hecht's race was a motivating factor.

[Plaintiff's Counsel]: Did you bring that information to her attention?

Weaver: I think I told her that, you know, those things do happen around here, but they were under different circumstances.

[Plaintiff's Counsel]: How did she respond when you said, "those things do happen around here"?"

Weaver: I—I think her point was that it happens amongst African Americans. And it's not the other way around. And this wh—and that this one was reported, someone was offended, and we had an obligation to follow up on it. [*Id.* at 3.]

From this the majority concluded:

There need be no inference drawn to understand that Caine-Smith's response was an acknowledgement that while racial bantering among African Americans occurred, it did not occur between a white person such as plaintiff and an African American, and in firing plaintiff for such bantering one could conclude that Caine-Smith was motivated at least in part by plaintiff's race. In other words, if *Weaver's interpretation* is believed by the trier of fact, it would demonstrate that plaintiff's race was at least a motivating factor in the employer's actions because if he were a black person saying that same comment to another black person, then he would not have been punished. Caine-Smith stating to Weaver that the situation was distinguishable because the incident was reported and someone was offended certainly is important, but it does not negate her previous statement. [*Id.* at 4 (emphasis added).]

The panel majority acknowledged that "Weaver's testimony constitutes a summation of what Caine-Smith *may have meant* rather than a statement of what Caine-Smith actually said," and was subject to "differing interpretations." (*Id.* (emphasis added).) Even though Weaver's summation was subject to differing interpretations, the majority concluded that it supported the jury's verdict. (*Id.*)

The majority further concluded that even assuming that what it found to be direct evidence did not exist, there was "sufficient circumstantial evidence that plaintiff was similarly situated to African American employees who had made racial remarks at school and to other employees who were not punished." (Ex E, COA Op 7.)

Addressing the evidentiary issue, the majority held that the trial court had not abused its discretion by admitting evidence and argument about NHA's required disclosures under Michigan law. (*Id.* at 7-9.) The majority acknowledged that the Revised School Code requires such disclosures and "provided for immunity from civil liability." (*Id.* at 7-8.) But it held that this immunity applied in actions based on the disclosure itself and did not bar the admission of the fact of such disclosures in a discrimination suit. (*Id.* at 8.) The majority affirmed.

Judge Wilder's dissent

Judge Wilder vigorously dissented, concluding that “the trial court should not have submitted this case to the jury.” (COA Dissent 1, attached as Exhibit F.) First, Judge Wilder explained that the “plaintiff failed to present any direct evidence of discrimination.” (*Id.* at 2.) Judge Wilder noted that “[e]vidence is not direct evidence when its consideration may lead to different conclusions” because “if direct evidence is believed, it ‘proves the existence of a fact in issue *without* inference or presumption.’” (*Id.* (quoting *Hall v United States Dep’t of Labor*, 476 F3d 847, 855 (CA 10, 2007)).) Judge Wilder believed that “Weaver’s testimony is not direct evidence of discrimination because it did not recount an actual statement by Caine-Smith.” (*Id.* at 3.) Indeed, “[n]othing in the record establishes what Caine-Smith actually said to Weaver, and Caine-Smith denied saying directly, or by implication, that statements made by African American employees should be treated differently than statements made by white employees.” (*Id.*) “Weaver’s testimony constitutes, at best, Weaver’s *interpretation* of what Caine-Smith *may have meant* by what she said.” (*Id.* (emphasis added).) Because Caine-Smith’s statement was subject to varying interpretations, something Hecht himself admitted, the case “should have been evaluated by the trial court as a circumstantial-evidence case.” (*Id.* at 4.)

Judge Wilder then analyzed the case according to the traditional *McDonnell Douglas* burden-shifting approach. Under that analysis, Judge Wilder concluded that Hecht “failed to establish that defendant’s stated reasons for terminating him were pretextual rather than legitimate and nondiscriminatory.” (*Id.* at 5.) In particular, Judge Wilder noted that Hecht failed to demonstrate that he “was similarly situated to any other employee who made racially-based remarks.” (*Id.* at 6.) The fact that NHA did not discipline African-American employees for racial remarks could not constitute discrimination when NHA “never received complaints about those remarks.” (*Id.*) Furthermore, Judge Wilder found it significant that Hecht “failed to show

he was similarly situated to any other employee who interfered with the investigation of an incident.” (*Id.*) Accordingly, because Hecht had not presented direct evidence and failed to present sufficient circumstantial evidence to survive *McDonnell Douglas*’ burden-shifting analysis, Wilder concluded that the case should never have been submitted to the jury.²

STANDARDS OF REVIEW

Appellate courts review decisions denying motions for directed verdict or judgment notwithstanding the verdict de novo. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). Directed verdict or JNOV is appropriate if the evidence, when viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law. *Id.*

Appellate courts review a trial court’s decision to admit evidence for abuse of discretion. *People v Duncan*, 494 Mich 713, 722; 835 NW2d 399 (2013). “The trial court abuses its discretion when its decision falls outside [the] range of principled outcomes.” *Pontiac Firefighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008). An error of law is always an abuse of discretion. *Duncan*, 494 Mich at 723. Admitting evidence in error is also grounds for a new trial if refusal to do so is “inconsistent with substantial justice.” MCR 2.613(A).

² Judge Wilder disagreed that NHA was not appealing the trial court’s denial of its directed motion verdict in addition to the denial of its JNOV motion. (Ex F, COA Dissent 7; see also NHA Appeal Br 22, 34.) He noted that the standard of review for both was the same. (Ex F, COA Dissent 7.)

ARGUMENT

I. **The Court of Appeals' decision articulates a weaker standard for proving employment discrimination than this Court's precedents.**

To prevail in this case, Hecht had to prove that NHA ended his employment because of his race. More specifically, Hecht had to prove that even though he made a racist comment in a classroom of third graders and then attempted to interfere with NHA's investigation of that incident, NHA's decision to end his employment was caused by his race.

The Elliott-Larsen Civil Rights Act prohibits employers from discriminating against individuals because of race. MCL 37.2202(1)(a). Specifically, the relevant section of ELCRA provides as follows:

An employer shall not . . . [f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition or privilege of employment because of religion, race, color, national origin, age, sex, height, weight, or marital status. [*Id.*]

A plaintiff can prove intentional discrimination in violation of the ELCRA "by direct evidence or by indirect or circumstantial evidence." *Sniecinski*, 469 Mich at 132. Regardless of the method of proof, the plaintiff at all times has the burden to prove that discriminatory animus caused the adverse-employment decision. See *id.* at 134-135. "Under the direct evidence test, a plaintiff must present direct proof that the discriminatory animus was causally related to the adverse employment decision." *Id.* at 135. If the plaintiff relies on indirect evidence, causation is presumed subject to being rebutted by defendant's articulation of a legitimate, nondiscriminatory reason for its employment decision. *Id.* (citing *Texas Dep't of Cmty Affairs v Burdine*, 450 US 248, 254 (1981)). Here, Hecht claims, and the Court of Appeals' panel majority agreed, that he proved discrimination by both direct and indirect evidence.

A. Hecht had no direct evidence of unlawful discrimination; what a person thinks another person's unidentified words mean does not directly and without inference prove unlawful animus.

The panel majority held that Weaver's deposition testimony about what she *thought* Caine-Smith's unremembered words meant is "direct evidence" of discrimination. But Weaver's testimony requires a factfinder to infer what Caine-Smith actually said from what Weaver believed Caine-Smith's unremembered statement meant, and then determine which of various plausible meanings to give the unremembered statement. As Judge Wilder explained, this is not direct evidence that requires the conclusion that NHA discriminated against Hecht. Because this Court's precedents are unclear regarding what constitutes direct evidence, the panel majority erroneously concluded that Weaver's testimony, was direct evidence supporting Hecht's claims.

1. *This Court's precedents addressing direct evidence are muddled, leading to the confusion in the Court of Appeals' decision below.*

In *Hazle v Ford Motor Co*, 464 Mich 456; 628 NW2d 515 (2001), this Court adopted the federal standard for direct evidence. The court explained that " 'direct evidence' " is " 'evidence which, if believed, *requires* the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.' "³ 464 Mich at 462 (emphasis added) (quoting *Jacklyn v*

³ In *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124; 666 NW2d 186 (2003), this Court formally adopted the mixed-motive "motivating factor" analysis that applies to discrimination claims under Title VII of the Civil Rights Act of 1964 by adopting the reasoning of the plurality in *Price Waterhouse v Hopkins*, 490 US 228, 244 (1989). *Id.* at 133 & n 6. While the present case was pending in the Court of Appeals, the U.S. Supreme Court rejected the *Price Waterhouse* plurality's analysis because the ordinary meaning of the word "because" as used in Title VII's retaliation provision and the ELCRA imposes but-for causation. *Univ of Tex SW Med Ctr v Nassar*, 133 S Ct 2517, 2524-2533 (2013); see also *Gross v FBL Fin Servs, Inc*, 557 US 167 (2009). The mixed-motive standard survives under Title VII solely because Congress amended Title VII to adopt it. 42 USC 2000e-2(m). The Michigan Legislature has not made a similar amendment to ELCRA. The mixed-motive analysis is therefore unsupported by ELCRA's text. This issue was not raised below (nor could it have been resolved by any of the lower courts given that it involved binding decisions from this Court). But the issue is entirely legal and thus amenable to review by this Court without further development of the record.

Schering-Plough Healthcare Prods Sales Corp, 176 F3d 921, 926 (CA 6, 1999)). This Court has not revisited the issue of what constitutes direct evidence of discrimination. But see *Sniecinski*, 469 Mich at 132-136 (referencing the direct-evidence standard, but rejecting the plaintiff's claim for failure to prove causation).

In an earlier decision, the Court stated that a remark that “may be subject to varying interpretations” was direct evidence of discrimination. *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534, 538-539; 620 NW2d 836 (2001). In *DeBrow*, the plaintiff's supervisor allegedly told the plaintiff that he was “getting too old for this shit” while firing him. *Id.* The Court reasoned that the remark could “reasonably be taken as merely an expression of sympathy that does not encompass a statement that the plaintiff's age was a motivating factor in removing him from his position” or it could evidence age animus. *Id.* at 538. But the Court later seemingly contradicted this conclusion by adopting the reasoning of the Court of Appeals' dissent, which concluded that the statement at issue [c]learly . . . suggests that plaintiff's age was a *factor* in the mind of his employer at the point plaintiff was removed from his position.” *Id.* at 540.

A statement reasonably subject to differing interpretations demonstrates that the statement is not the sort of evidence that, if believed, *requires* the conclusion unlawful discrimination was a substantial cause for the employment decision. Thus, the analysis in *DeBrow* is inconsistent with the standard for direct evidence that the Court later adopted in *Hazle*. See *Hazle*, 464 Mich at 462. Yet because this Court has not directly disavowed *DeBrow*, the panel majority below felt entitled to rely on *DeBrow* as an accurate statement of Michigan law regarding direct evidence of discrimination and upheld the trial court judgment based on *DeBrow*. (Ex E, COA Op 4–5.)

Federal jurisprudence counsels strongly in favor of this Court using this case as the vehicle to disavow *DeBrow* and endorse *Hazle* as the only appropriate articulation of the direct-evidence standard in Michigan. The federal courts of appeal, applying the same direct-evidence standard this Court adopted in *Hazle*, have reasoned that “direct evidence of discrimination does not require a factfinder to draw *any* inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group.” *Johnson v Kroger Co*, 319 F3d 858, 865 (CA 6, 2003) (emphasis added) (citing the definition of direct evidence in *Jacklyn*, 176 F3d at 926, that this Court adopted in *Hazle*). Instead, it “proves the existence of a fact in issue without inference or presumption.” *Hall v United States Dep’t of Labor*, 476 F3d 847, 855 (CA 10, 2007); *Johnson*, 319 F3d at 865 (“[D]irect evidence of discrimination does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group.”); *Jones v Bessemer Carraway Med Ctr*, 151 F3d 1321, 1323 (CA 11, 1998). It is only because direct evidence is capable of proving discrimination without anything more that makes resort to inferences unnecessary. See *Harrison v Olde Fin Corp*, 225 Mich App 601, 610 & n 10; 572 NW2d 679 (1998).

As Judge Wilder noted in his dissent (Ex F, COA Dissent 3), the federal appellate courts have developed the analysis of direct evidence to exclude statements that “can plausibly be interpreted two different ways—one discriminatory and the other benign” because such statements “do[] not directly reflect illegal animus” *Hall*, 476 F3d at 855 (quotation omitted); *Patten v Wal-Mart Stores E, Inc*, 300 F3d 21, 25 (CA 1, 2002); *Merritt v Dillard Paper Co*, 120 F3d 1181, 1189 (CA 11, 1997); see *Scheick v Tecumseh Pub Sch*, 766 F3d 523, 531 (CA 6, 2014) (Statement that the defendant wanted plaintiff to retire was not direct evidence because

it “would require an inference to conclude that retirement was a proxy for age (as opposed to either years of service or a desire that he leave the position voluntarily).”).

Here, the panel majority below premised its conclusion that Hecht had introduced direct evidence of discrimination on this Court’s reasoning in *DeBrow* that a statement that can reasonably be given multiple meanings can still be direct evidence. (Ex E, COA Op 4.) The panel majority acknowledged “[i]t is true that Weaver’s testimony constitutes a summation of what Caine-Smith *may* have meant rather than a statement of what Caine-Smith actually said. As such, it could reasonably be subject to differing interpretations.” (*Id.*) The panel majority noted that it was “equally plausible” that the point attributed to Caine-Smith could mean (1) that because Hecht is white, his racially charged comments should not be tolerated in the way that comments by African Americans could be; (2) that Caine-Smith felt pressure to impose a stricter punishment on Hecht for his comments because he is white; or (3) that Caine-Smith was searching for an explanation as to why no one had complained in the past about racial bantering at the school. (*Id.*) Hecht offered an additional interpretation: that because racial bantering was prevalent at the school, Hecht’s punishment should not be severe. (Closing Argument Tr, 7/14/11, 115.) Because Weaver’s mere belief about what Caine-Smith may have meant is subject to multiple plausible interpretations, it is not evidence that, if believed, *requires* the conclusion that Hecht’s race caused NHA to end his employment. Accordingly, while the Court of Appeals followed *DeBrow*, it should have followed *Hazle*.

The Court should take the opportunity presented to grant leave, disavow the inconsistent standard set forth in *DeBrow*, and clarify that, under *Hazle*, statements subject to multiple plausible interpretations—some of which are benign—can never constitute “direct evidence” of discrimination.

2. *Weaver's belief about what Caine-Smith meant by an unknown statement is not evidence that requires the conclusion that NHA discriminated against Hecht.*

As Judge Wilder explains, Weaver's "constructed belief about what [Caine-Smith] meant when she made her unknown (to this record) statement" is not direct evidence. (Ex F, COA Dissent 5.) Simply put, an individual's belief about what a decision-maker meant is not the equivalent of evidence of what the decision-maker actually said. Only the latter is direct evidence.

As discussed above, direct evidence is evidence that, if believed, "requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle*, 464 Mich at 462. Direct evidence of discrimination does not require any inferences to demand the conclusion that the challenged employment action was motivated at least in part by prejudice. *Johnson*, 319 F3d at 865.

The panel majority concluded that the following testimony concerning Caine-Smith's reaction when Weaver mentioned earlier racial bantering was the direct evidence of intentional discrimination:

[Plaintiff's Counsel]: Did you bring that information to her attention?

Weaver: I think I told her that, you know, those things do happen around here, but they were under different circumstances.

[Plaintiff's Counsel]: How did she respond when you said, "those things do happen around here"?"

Weaver: I—I think her point was that it happens amongst African Americans. And it's not the other way around. And this wh—and that this one was reported, someone was offended, and we had an obligation to follow up on it. [Weaver Tr, 12/14/10, 20-21.]

Weaver's testimony does not require the conclusion that Hecht's race substantially affected Caine-Smith's decision to end his employment. To reach that conclusion, a factfinder

must believe that Caine-Smith actually said something that indicated a racially discriminatory animus. And here, the factfinder did not even know what Caine-Smith said; Hecht's case was premised on a third party's statement of what the *third party* believed Caine-Smith *meant*.

To date, no one in this dispute has identified any precedent in which a court accorded "direct evidence" status to an individual's belief about what a decision-maker meant by a statement that was not even in the record. Hecht has cited no such authority, nor has the Court of Appeals. As Judge Wilder noted, the panel majority extended the scope of direct evidence "to conclude that direct evidence need not consist of evidence of what was *actually said* by the decision-maker, but may also encompass what the person hearing the decision-maker speak *thought* the decision-maker *meant*. (Ex F, COA Dissent 4.) Were that the case, "the subjective beliefs of plaintiffs in employment discrimination cases could, by themselves, create genuine issues of material fact, [and] virtually all defense motions for summary judgment in such cases would be doomed." *Mills v First Fed Sav & L Ass'n of Belvidere*, 83 F3d 833, 841-842 (CA 7, 1996) (citing *Visser v Packer Eng'g Assocs*, 924 F.2d 655, 659 (CA 7, 1991)).

As Judge Wilder correctly anticipates, there are massive ramifications of the panel majority's extension of the direct-evidence doctrine to include a person's summation of what another person purportedly said. Consider a supervisor that tells an employee that she is firing him because of his performance. In opposition to the employer's motion for summary disposition, the employee submits an affidavit that, from the tone of his supervisor's voice, he believes that what she *meant* was that she didn't like him because his performance was outshining women in his department. That affidavit testimony would be direct evidence, and sufficient to survive summary disposition and force a trial. That result cannot possibly be right, yet it is the natural outcome of the panel majority's reasoning.

In sum, Weaver's speculation about what Caine-Smith's unremembered actual statement meant is not direct evidence. The panel majority's explanation of this Court's direct-evidence jurisprudence warrants review.

B. Hecht did not indirectly prove unlawful discrimination because his situation was not nearly identical in all relevant respects to the African Americans who allegedly made comments involving race.

In cases "involving indirect or circumstantial evidence, a plaintiff must proceed by using the burden-shifting approach set forth in *McDonnell Douglas Corp v Green*, 411 US 792, 93 S Ct 1817, 36 L Ed 2d 668 (1973)." *Sniecinski*, 469 Mich at 133-134. The burden-shifting analysis applies when courts consider whether to grant motions for directed verdict or JNOV.⁴ See *id.*

The burden-shifting approach allows a plaintiff to obtain a presumption of discrimination by making out a *prima facie* case of discrimination. *Id.* To establish a rebuttable *prima facie* case of discrimination, a plaintiff must present evidence that "(1) she was a member of the protected class; (2) she suffered an adverse employment action; . . . (3) she was qualified for the position; but (4) she was discharged under circumstances that give rise to an inference of discrimination." *Lytle v Malady (On Reh'g)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). If the plaintiff can make out a *prima facie* case, the burden shifts to the defendant to "articulate a legitimate, nondiscriminatory reason for the adverse employment action." *Id.* at 173. If the defendant articulates such a reason, the plaintiff bears the burden of showing that the defendant's reasons were a mere pretext for discrimination. *Id.* at 174.

⁴ The Court of Appeals concluded that the burden-shifting analysis is not applicable to motions for JNOV. (Ex E, COA Op 6 (citing *Brown v Packaging Corp of Am*, 338 F3d 586, 591 (CA 6, 2003) (Nelson, J, concurring)).) This Court applied the burden-shifting analysis in *Sniecinski*, an appeal from a denial of JNOV. 469 Mich at 131.

There are two ways to demonstrate circumstances that give rise to an inference of race discrimination. A plaintiff can show that he was replaced by a person of a different race. See *Lytle*, 458 Mich at 177-178 n 27 (quoting *Barnes v GenCorp Inc*, 896 F2d 1457, 1465 (CA 6, 1990)). Or a plaintiff can show that “similarly situated” coworkers of a different race were treated differently for engaging in the same or similar conduct. See *Town v Michigan Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). The evidence presented at trial demonstrates that Hecht was replaced by another white teacher. (Caine-Smith Tr, 7/13/11, 187.) Accordingly, Hecht had to show that he was treated differently from similarly situated coworkers.

In *Town*, this Court explained that that for an employee to be similarly situated, “all of the relevant aspects” of the employee’s employment situation must be “nearly identical.” *Town*, 455 Mich at 700. Naturally, that the comparator employees are similarly situated in terms of job functions and positions. See *Lytle*, 458 Mich at 179. In the disciplinary context, to be similarly situated, “the plaintiff and his proposed comparator must have engaged in acts of ‘comparable seriousness.’” *Wright v Murray Guard, Inc*, 455 F3d 702, 710 (CA 6, 2006) (quoting *Clayton v Meijer, Inc*, 281 F3d 605, 611 (CA 6, 2002)); see *Davis v Motorcity Casino*, No 299505, 2011 WL 5966218, *4 (Mich Ct App, Nov 29, 2011) (applying *Wright*).

Here, Hecht was not able to demonstrate that he was treated worse than similarly situated coworkers because there were no similarly situated coworkers. Hecht did not identify any non-Caucasian coworker who interfered with an NHA investigation who was treated better than Hecht, nor any coworker who made racist remarks in front of a room full of schoolchildren. And although Hecht identified several different instances in which coworkers made racial comments, none of those situations is “nearly identical” to what Hecht did.

First, Hecht made his “joke” in a classroom full of third graders. There is no evidence that any of the other statements were made in a classroom. Only the comment Hecht attributes to a secretary involved a student. And even there, the comment did not involve a student in making a racist joke. It is hard to identify a more important distinction in a school setting than that this incident occurred in a classroom in the presence of students and Hecht involved a student in his racist joke.

Second, NHA received reports from coworkers who were offended by Hecht’s comments. Those reports triggered NHA’s legal obligation to investigate and take prompt remedial action to prevent future misconduct by Hecht. See, e.g., *Radtke v Everett*, 442 Mich 368, 396-397; 501 NW2d 155 (1993). There is no evidence that offended coworkers reported any of the other incidents to NHA. Indeed, there is no evidence that coworkers were ever even offended by the other alleged comments.

Third, none of the other incidents involved teachers. The other incidents all involved paraprofessionals, aides, and a secretary.

Fourth, Code and Bell reported to NHA that they understood Hecht’s comment that “we can burn the brown tables” to also refer to brown-skinned people. And Hecht confirmed that this was what he intended. There is no evidence that any of the other statements included reference to doing violence to a particular race.

Fifth, as the Court of Appeals’ dissent explains, Hecht not only made racist statements in a classroom, he also interfered with NHA’s investigation. (Ex F, COA Dissent 6.) Hecht “committed *two* terminable offenses and was fired, but he failed to present any evidence that any other employee committed two terminable offenses and was not fired.” (*Id.* (emphasis added).)

Even Hecht admits that he had not engaged in conduct similarly sanctionable to African-Americans who made racial comments. During closing, Hecht admitted that his conduct was worthy of discipline by NHA (albeit he disagreed with the discipline imposed). Specifically, Hecht admitted that NHA was free to “have given [Hecht] a documented verbal reminder, could have given him a written warning, could have given him a final written warning, including a suspension from work.” (Hecht Closing, 7/14/11, 116-17.) And Hecht admitted that the comments made by other employees did not warrant discipline. (*Id.* at 110.) If Hecht was similarly situated to the other employees who were not disciplined, any discipline of Hecht would arguably be disparate treatment. Hecht’s concession that the other employees should not have been disciplined but that NHA was entitled to discipline him is an admission that he engaged in misconduct that was more severe, i.e., not similar, than the misconduct other employees are now alleged to have committed.

The panel majority concludes that there was “sufficient circumstantial evidence that plaintiff was similarly situated to African American employees who had made racial remarks at school and to other employees who were not punished.” (Ex E, COA Op 7.) To reach that conclusion, the panel majority only addresses the fact that, with regard to all of the earlier racial comments, no one ever complained to NHA. (*Id.*) The panel majority did not address the fact that Hecht made his racist joke in a classroom during instructional time, that Hecht’s joke included the suggestion that a race of people should be burned because of their skin color, or that Hecht not only made a racial joke in a classroom but that he also tampered with NHA’s investigation of the incident. There is no evidence, circumstantial or otherwise, that any NHA employee who has engaged in such gross misconduct has not been fired. Accordingly, the Court of Appeals’ decision in this case is inconsistent with the requirement in *Town* that a similarly

situated coworker be nearly identical in all relevant respects. Consequently, the evidence presented at trial fails to show that Hecht's race caused his termination, and NHA is entitled to JNOV.

Again, there are significant implications of the panel majority's expanding the ambit of Michigan anti-discrimination laws. By substantially weakening the "similarly situated" standard, the Court of Appeals has opened employers to entirely new categories of employment liability. The effect of requiring that courts only consider comparison with coworkers who are nearly identical in all relevant respects to the plaintiff is not, as the trial court suggested, how "a constructive Appeals Court [could] eliminate racial discrimination lawsuits." (JNOV Hrg Tr 28, attached as Exhibit C.) It merely ensures that employees like Hecht obtain a legal presumption of discrimination only in circumstances that actually show discriminatory treatment. Again, leave is warranted.

II. The trial court abused its discretion by admitting evidence of and allowing argument about NHA's disclosure of Hecht's unprofessional conduct as required by MCL 280.1230b.

The Revised School Code requires schools to request, and previous employers to disclose, information regarding a potential employee's unprofessional conduct before the school can hire the person. MCL 380.1230b. To promote full and accurate disclosures, the Legislature provided broad immunity from civil liability to the disclosing employer and the receiving school. The panel majority nonetheless concluded that Hecht was entitled to use NHA's statutory obligation to increase his damages against NHA by arguing that NHA's obligations prevented Hecht from being entrusted with another teaching job. This decision eviscerates the immunity the Revised School Code purports to grant, and it resulted in a damages award in this case that does not comport with substantial justice.

The Legislature adopted MCL 380.1230b to promote the disclosure of information about unprofessional conduct by applicants for employments in Michigan schools. The Legislature broadly defined “unprofessional conduct” to include “1 or more acts of misconduct” MCL 380.1230b(8)(b). The statute imposes four obligations before a school may hire an applicant. MCL 380.1230b(1), (4). First, a school must obtain from an employment applicant a statement that authorizes his former and current employers to disclose unprofessional conduct and releases the former and current employers from any liability:

[A] school district, local act school district, public school academy, intermediate school district, or nonpublic school shall request the applicant for employment to sign a statement that does both of the following

(a) Authorizes the applicant’s current or former employer or employers to disclose . . . any unprofessional conduct by the applicant and to make available . . . copies of all documents in the employee’s personnel record maintained by the current or former employer relating to that unprofessional conduct.

(b) *Releases the current or former employer, and employees acting on behalf of the current or former employer, from any liability for providing information described in subdivision (a), as provided in subsection (3) [MCL 380.1230b(1) (emphasis added).]*

Second, the school must ask the applicant’s current or last employer to disclose any unprofessional conduct. MCL 380.1230b(2). Third, an employer receiving the request is obligated to disclose unprofessional conduct when requested. MCL 380.1230b(3). Fourth, the school receiving the information is prohibited from using the information about unprofessional conduct for any purpose other than evaluating whether to hire the applicant. MCL 380.1230b(5). The statute does not prevent a school from hiring an applicant whose unprofessional conduct is disclosed by a current or former employer. Indeed, evidence admitted at trial showed that NHA has hired individuals with a negative report.

The Legislature imposed broad protection for both requesting schools and disclosing employers to ensure that if they acted in good faith, they would not be burdened by litigation for fulfilling their legal duties. The Legislature not only required that an applicant release former employers “from any liability for providing information” about unprofessional conduct, MCL 380.1230b(1)(b), but also granted immunity to employers, MCL 380.1230b(3). Specifically, “[a]n employer . . . that discloses information under this section in good faith is immune from civil liability for the disclosure.” MCL 380.1230b(3).

Here, Hecht released NHA from any liability for disclosing his unprofessional conduct to prospective employers. (NHA Br in Supp of JNOV Mot, Ex A.) NHA complied with the law and accurately disclosed Hecht’s racist in-classroom joke and efforts to tamper with NHA’s investigation. (Unwin Tr, 7/14/11, 24-29) Hecht has never suggested that NHA acted in bad faith. But he nonetheless has argued that he was entitled to use NHA’s disclosure to demonstrate why he will never again be able to obtain a teaching job and, consequently, why his wage-loss claims should extend until he reaches retirement age several decades from now. (PI Closing Argument Tr, 7/14/11, 120-125) Indeed, Hecht argued to the jury that the statutorily required disclosures “branded [him] with the scarlet letter of racism” meaning “he’ll never find a job as a teacher again.” (*Id.* at 124-125) Hecht emphasized that “[he] and his little family groan with the anguish of what happened here. Every time he tries to get on his feet, [NHA] kick[s] him back down again with these [statutory disclosures].” (*Id.* at 126) The jury evidently agreed with Hecht’s closing argument because it awarded him front pay of \$485,000, representing the wage differential between his job at NHA and his subsequent job as a machine operator, calculated over more than 22 years. (Jury Verdict Tr, 7/15/11, 4.)

Hecht's argument and evidence of NHA's disclosure of his unprofessional conduct should not have been admitted because it imposed liability on NHA for its mandatory disclosure. If Hecht is branded with a scarlet letter of racism, it is because of what he did—*not* NHA's statutorily-required disclosure. Hecht's unprofessional conduct, not any NHA purported violation of ELCRA, led schools to conclude that they should not entrust their students to a teacher who thought it was funny to suggest "burning all the brown ones" to his students. Accordingly, the imposition of damages for 22 years in this action because Hecht cannot find another teaching job is "liability for providing the information" to other schools—i.e., liability for the disclosure. Contra MCL 380.1230b(1)(b), (3).

The Michigan courts have applied the same approach to other statutes granting immunity for disclosing information required by law. In *Awkerman v Tri-County Orthopedic Group, PC*, 143 Mich App 722, 726-728; 373 NW2d 204 (1985), the court reasoned that the immunity granted by MCL 722.625 to individuals who, in good faith, report child abuse included immunity from damages for shame and humiliation based on the filing of an incorrect child-abuse report in an action for medical malpractice. The court explained that if such consequential damages were available in a malpractice action, they would defeat the public policy behind the statutory immunity and create a catch-22 for physicians faced with civil liability if they erroneously file an incorrect report, and criminal liability if they fail to file. *Id.* at 727-728.

The same is true here if Hecht can recover consequential damages in his ELCRA suit based on the effect of the statutorily-required disclosure of his unprofessional conduct. Accordingly, imposing additional damages on NHA because of the effect of the statutory disclosure is unlawful.

In reaching the opposite conclusion, the panel majority below made two critical mistakes. First, the majority court limited the immunity from “any liability” for disclosing unprofessional conduct to actions against an employer for the disclosure itself. (Ex E, COA Op 8.) As discussed above, the plain statutory language is not so limited. It applies to “any liability from providing information” about unprofessional conduct. MCL 380.1230b(1)(b) (emphasis added). The liability imposed here is liability that arises from the disclosure, just as consequential damages in a malpractice action for filing an incorrect child-abuse report arise from the report. The panel majority’s decision frustrates Michigan public policy promoting the disclosure of unprofessional conduct by applicants for employment by schools.

The panel majority erred a second time by failing to acknowledge that Hecht’s inability to find another teaching job was the result of his unprofessional conduct, not NHA’s decision to end Hecht’s employment. (Ex E, COA Op 8.) The court justifies Hecht’s testimony and argument about the statutory disclosures as a preemptive attack on any argument that Hecht failed to mitigate his damages. (*Id.*) But the damages of which Hecht complains are the result of his own conduct and cannot be imposed on NHA under MCL 380.1230b. (Given the tenor of Hecht’s attacks on NHA for complying with its statutory duties, characterizing Hecht as having introduced the evidence to rebut any argument that he failed to mitigate his damages is strained.)

In sum, the panel majority’s decision disables the broad immunity that the Legislature granted to schools and employers for complying with the disclosure requirements of the Revised School Code. The decision in this case is the only one that interprets the scope of the immunity granted under MCL 380.1230b. Accordingly, if allowed to stand, the majority’s atextual interpretation of the statutory immunity is effectively precedential despite its unpublished status. The Court should therefore grant leave, reverse, and remand the case for a new trial.

CONCLUSION AND REQUESTED RELIEF

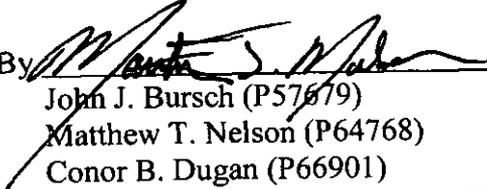
When an employer is forced to pay more than half a million dollars for firing a teacher who make racist remarks in front of a classroom full of third-grade children, lied to his supervisors about the incident, and encouraged witnesses to lie as well, something is obviously amiss. What is amiss here is the panel majority's view of Michigan employment law, a view that (1) conflates direct and circumstantial evidence, (2) ignores the requirement that an employee be treated differently than "similarly situated" employees, and (3) essentially strips the Revised School Code's immunity provision of any applicability in a teacher termination. As explained at length above, the Court of Appeals' decision will have implications far beyond the circumstances of this case.

Accordingly, NHA respectfully requests that the Court grant leave, reverse, and either direct that summary disposition be entered in favor of NHA or remand for a new trial. Alternatively, NHA asks that the Court peremptorily reverse.

Dated: December 9, 2014

Respectfully submitted,

WARNER NORCROSS & JUDD LLP

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STATE OF MICHIGAN
IN THE SUPREME COURT

CRAIG HECHT,

Plaintiff-Appellee,

v

NATIONAL HERITAGE ACADEMIES,
INC.,

Defendant-Appellant.

Supreme Court No. _____

Court of Appeals No. 306870

Genesee County Circuit Court
Case No. 10-93161-CL

Hon. Geoffrey L. Neithercut

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**NOTICE OF FILING
APPLICATION FOR LEAVE TO APPEAL**

PLEASE TAKE NOTICE that an Application for Leave to Appeal in the above-referenced matter was filed with the Michigan Supreme Court on December 9, 2014.

Dated: December 9, 2014

WARNER NORCROSS & JUDD LLP

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NOTICE OF HEARING

PLEASE TAKE NOTICE that Appellant National Heritage Academies, Inc.'s
Application for Leave to Appeal, will be submitted to the Court for hearing on January 13, 2015,
a Tuesday at least 21 days after the Application is filed.

Dated: December 9, 2014

WARNER NORCROSS & JUDD LLP

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PROOF OF SERVICE

The undersigned states that she is an employee of Warner Norcross & Judd LLP, and that on December 9, 2014, she caused to be served the **Defendant-Appellant's Application for Leave to Appeal and Notice of Hearing** on Glen N. Lenhoff, via first-class mail at the addresses listed above; and a copy of the **Notice of Filing Application for Leave to Appeal** on the Genesee County Circuit Court, 900 S. Saginaw Street, #204, Flint, Michigan 48502, and the Michigan Court of Appeals, 350 Ottawa Avenue, N.W., Grand Rapids, Michigan 49503, by first-class mail, postage prepaid.



Andrea L. Rule

December 9, 2014

Via Hand Delivery

Clerk of the Court
Michigan Supreme Court
925 West Ottawa Street
Lansing, Michigan 48915

Re: ***Craig Hecht v National Heritage Academies, Inc***
Supreme Court No. _____
Court of Appeals No. 306870
Genesee County Circuit Court No. 10-93161-CL

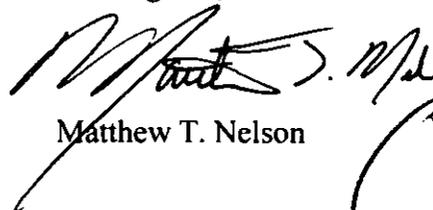
Dear Clerk:

Enclosed for filing in the above-referenced matter are the following documents:

- Application for Leave to Appeal (original + 7 copies);
- \$375.00 filing fee;
- Notice of Hearing; and
- Proof of Service

Please file these documents in your usual manner, and return date-stamped copies to our courier for our file. Thank you for your assistance, and please advise if you have any questions or concerns.

Best regards,


Matthew T. Nelson

Enclosures

cc: Glen N. Lenhoff
Genesee County Circuit Court (w/Notice of Filing Application & Proof of Service only)
Michigan Court of Appeals (w/Notice of Filing Application & Proof of Service only)

