

STATE OF MICHIGAN
IN THE SUPREME COURT

CRAIG HECHT,

Plaintiff-Appellee,

v

NATIONAL HERITAGE ACADEMIES,
INC.,

Defendant-Appellant.

Supreme Court No. 150616

Court of Appeals No. 306870

Genesee Circuit Court No. 10-
093161-CL

BRIEF OF ATTORNEY GENERAL BILL SCHUETTE AS *AMICUS CURIAE*

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INTEREST AND STATEMENT OF POSITION OF AMICUS CURIAE

The Attorney General is the chief law enforcement officer for the State of Michigan. In recognition of that duty, the court rules permit the Attorney General to file a brief as *amicus curiae* without seeking leave. MCR 7.312(H)(2).

The Attorney General supports each of National Heritage Academies' arguments but writes separately to address the third question: whether MCL 380.1230b, which immunizes an employer from civil liability for disclosing to schools a former employee's unprofessional conduct, nonetheless allows a terminated employee to use that disclosure to inflate his damages against the employer.

The plain text of the statute and this Court's precedents answer that question in the negative. What is more, the Legislature enacted MCL 380.1230b to protect children by encouraging the free flow of information between schools and current or former employers, acting in good faith, about prospective school employees. The Court of Appeals' decision in this case puts employers in a Catch-22: they are statutorily required to inform prospective school employers about unprofessional conduct, and yet their mandatory disclosures may be used against them to form the basis of future damages. This Court should reverse.

INTRODUCTION

Under the common law, Michigan employers had qualified immunity for disclosing unfavorable information about employees or former employees. Still, employers were reluctant to provide negative references for fear of defamation suits. Rather than disclose that a former employee was incompetent or even dangerous, employers would provide no information—or even falsely positive information—to avoid liability.

The Legislature recognized that the common-law regime promoted bad public policy, particularly where schools were concerned. To protect school children, the Legislature enacted MCL 380.1230b. The statute *requires* employers to inform prospective school employers of any unprofessional conduct by a current or former employee. To encourage frank communication, the Legislature provided absolute immunity from civil liability for good-faith disclosures made under the act.

The Court of Appeals below turned the statute’s plain language and underlying policy on their heads, holding that an employer’s statutorily required disclosure may be introduced at trial to prove a former employee’s future damages in an employment-discrimination claim. That holding contradicts the plain language of MCL 380.1230b, which provides immunity “from civil liability for the disclosure.” It is also in tension with this Court’s decisions in *Hannay v Department of Transportation*, 497 Mich 45; 860 NW2d 67 (Dec. 19, 2014), and *In re Bradley Estate*, 494 Mich 367; 835 NW2d 545 (2013), which define “liability” as “legal[] responsib[ility] for damages flowing from” an action, and as “all legal responsibility arising from” an action, respectively. Under this Court’s precedents and the

ordinary meaning of “liability,” MCL 380.1230b’s immunity from civil liability encompasses all legal responsibility for damages flowing from a school’s disclosure of unprofessional conduct, including damages in an employment-discrimination suit.

The Court of Appeals’ decision not only contradicts the statutory text and this Court’s precedents, it also eviscerates the policy underlying MCL 380.1230b and places employers right back in the Catch-22 they faced before its enactment: employers expose themselves to substantial liability when they protect children by informing prospective school employers about unprofessional conduct. The decision below opens the door for an employer to be found civilly liable when making the very disclosures the statute requires, so long as the basis for the suit is something other than the disclosure itself. That result renders the statutory immunity largely meaningless. If civil damages can be awarded based on disclosures—indeed, disclosures mandated by the Legislature—then employers will again have an incentive *not* to record and report unprofessional behavior. That is the opposite of what the Legislature intended.

ARGUMENT

- I. The Legislature has immunized an employer from civil liability, including the calculation of future damages, for disclosing a former employee’s unprofessional conduct to potential school employers.**
- A. The decision below is inconsistent with the plain language of the statute, the ordinary meaning of “liability,” and this Court’s decisions.**

The Legislature determined that negative references that employers must provide to schools under MCL 380.1230b(3) cannot form the basis of civil liability. The Court of Appeals’ determination below that § 1230b letters can nonetheless be used as evidence to prove future damages contradicts the statute’s plain language.

The statute encourages current and former employers to share information with potential future employers in at least four ways. First, it requires potential school employers to request that an applicant sign a statement authorizing his current or former employer to disclose “any unprofessional conduct by the applicant,” along with “all documents in the employee’s personnel record . . . relating to that unprofessional conduct.” MCL 380.1230b(1)(a). The potential employer must also ask the applicant to release his current or former employer “from any liability for providing [that] information.” MCL 380.1230b(1)(b). Prospective school employers are statutorily prohibited from hiring any applicant who *does not* execute the waiver. MCL 380.1230b(4).

Second, the statute requires potential employers to “request at least the applicant’s current employer or, if the applicant is not currently employed, the applicant’s immediately previous employer to provide” information regarding unprofessional conduct by the employee. MCL 380.1230b(2).

Third, the statute requires the applicant's current or former employer to disclose to the potential employer "any unprofessional conduct by the applicant" and to "make available . . . copies of all documents in the employee's personnel record relating to the unprofessional conduct." MCL 380.1230b(3).

Fourth, the statute immunizes employers from civil liability for their good-faith and statutorily required disclosures of unprofessional conduct: "An employer . . . that discloses information under this section in good faith is immune from civil liability for the disclosure." MCL 380.1230b(3). An employer "is presumed to be acting in good faith . . . unless a preponderance of the evidence establishes 1 or more of the following": (a) that the employer "knew the information disclosed was false or misleading"; (b) that the employer "disclosed the information with a reckless disregard for the truth"; or (c) that the disclosure "was specifically prohibited by a state or federal statute." *Id.*

By holding that damages in Hecht's civil case can be based in part on National Heritage Academies' statutorily required disclosure, the Court of Appeals has allowed the school to incur civil liability for that disclosure, which MCL 380.1230b(3) expressly precludes. MCL 380.1230b(3) (providing immunity "from civil liability for the disclosure"); see also § 1230(1)(b) (directing potential employers to obtain statements from applicants releasing former employers "from *any liability* for providing information" on unprofessional conduct (emphasis added)). The word "liability" has an ordinary meaning that broadly includes all debts, including damages. For example, Random House Webster's College Dictionary defines

“liability” as “moneys owed; debts or pecuniary obligations.” Random House Webster’s College Dictionary (1999), p 763. And Black’s Law Dictionary similarly defines “civil liability” in pertinent part as “the state of being obligated for civil damages.” Black’s Law Dictionary (8th ed.), p 933. Under the plain meaning of MCL 380.1230b’s text, an employer is immune from “moneys owed” and “debts or pecuniary obligations” for its disclosure of unprofessional behavior, and is immune from “being obligated for civil damages” for the disclosure.

This Court’s precedents interpreting the terms “liable for” and “tort liability” confirm this plain meaning of MCL 380.1230b. In *Hannay v Department of Transportation*, 497 Mich 45; 860 NW2d 67 (Dec. 19, 2014), this Court explained that the phrase “liable for bodily injury” in the motor vehicle exception to governmental immunity means “legally responsible for damages flowing from a physical or corporeal injury to the body.” *Id.* at 2, 16–17. Applying that here, schools should be immune from legal responsibility for damages flowing from the statutorily required disclosure of unprofessional conduct. And in *In re Bradley Estate*, 494 Mich 367; 835 NW2d 545 (2013), this Court defined “tort liability” under the governmental-immunity statute as “all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages.” *Id.* at 385. This Court also noted in *Bradley Estate* that the Legislature’s decision to use the word “liability” in describing governmental immunity, rather than “action” or “claim,” “indicates that our focus must be on the nature of the liability rather than the type of action pleaded.” *Id.* at 387. Thus,

under this Court's precedents, MCL 380.1230b's provision of immunity for "civil liability for the disclosure" encompasses all legal responsibility for damages flowing from a school's disclosure of unprofessional conduct, including damages in an employment-discrimination suit. The Court of Appeals' decision below contradicts this precedent.

B. The Court of Appeals' decision violates Michigan public policy, which is to shield employers from liability for disclosing information about unprofessional employee behavior.

The Court of Appeals' decision also violates the public policy of this State because it allows damages to be assessed based on a school's statutorily required disclosure.

By enacting this statute, the Legislature established that the State's public policy is to encourage employers to communicate freely about unprofessional conduct by former employees who are seeking employment in schools, where they will be entrusted with the care of children. As but one example of how a reluctance to share information can place children at risk, consider the news regarding a Saranac teacher who impregnated a student, left the Saranac School District's employ, and then was hired as a substitute teacher in other schools that lacked notice of his past improprieties. See Monica Scott, *Fallout from Saranac teacher sex scandal: Privacy laws can keep school leaders mum*, MLive (May 11, 2012), <http://goo.gl/NT4W1Y>; John Tunison, *Krag Sanford, former Saranac teacher who had sex with student, to be sentenced today*, MLive (July 31, 2012), <http://goo.gl/r4sB67>.

As discussed above, MCL 380.1230b(3) requires disclosure of unprofessional conduct. Because disclosure is mandated, and to ensure frank communication, the statute grants employers absolute immunity from civil liability for the disclosure, so long as the disclosure is made in good faith. *Id.* Without this immunity, there would be serious potential consequences for forcing an employer to disclose negative information about a current or former employee. For example, the former employer could find itself the subject of a defamation lawsuit. E.g., *Ball v White*, 3 Mich App 579, 584; 143 NW2d 188 (1966) (holding that a letter from an attorney to an employer accusing certain employees of theft was publication sufficient to support a libel claim). And even if the employer ultimately prevailed in a lawsuit—given the common law’s prior recognition of qualified immunity, *Moore v St Joseph Nursing Home, Inc*, 184 Mich App 766, 768–769; 459 NW2d 100 (1990)—the cost of litigation is high. See John Ashby, *Employment References: Should Employers Have an Affirmative Duty to Report Employee Misconduct to Inquiring Prospective Employers?*, 46 Ariz. L. Rev. 117, 118 (Spring 2004).

To avoid forcing employers, many of whom are themselves schools, into a Catch-22 between protecting children from unprofessional employees and protecting themselves from litigation exposure, the Legislature provided absolute (rather than qualified) immunity from civil liability for good-faith disclosures of unprofessional conduct. MCL 380.1230b(3). Thus, the Legislature has made a public-policy determination that the free flow of information about school employees is more important than any incidental harm that may occur to those employees as a result

of that disclosure. It was not unreasonable for the Legislature to shift the burden to the employee to explain prior misconduct. This policy determination is consistent with schools' quintessential duty to protect the safety of children in their care.

The Court of Appeals' ruling imposes the very Catch-22 that the absolute-immunity provision was designed to avoid: National Heritage Academies has been held civilly liable for damages flowing from its disclosure of Mr. Hecht's unprofessional conduct, without any finding that the disclosure was not in good faith.

Indeed the Court of Appeals' ruling leaves employers *worse off* than they were before the enactment of MCL 380.1230b. While qualified immunity at the common law was inadequate protection because employers still faced the possibility of expensive litigation costs, at least employers could avoid litigation exposure by remaining silent. Unfortunately, the Court of Appeals has now created a scheme whereby schools are statutorily *required* to provide information that will potentially increase their damages in a future lawsuit. It cannot be that the Legislature intended to force schools to provide disgruntled employees with the proof they need to show future damages.

Thus, rather than protecting employers for their statutorily required disclosures—as the Legislature clearly intended—the Court of Appeals' decision removes that protection and provides employers an incentive to hide unprofessional behavior. To avoid the legal risks of disclosure, a school's only alternatives are to ignore an employee's unprofessional conduct or to couch such conduct in softer

terms to avoid the statutory requirement of disclosure. In other words, the Court of Appeals' decision will have the perverse effect of concealing unprofessional conduct by school employees, placing the health and safety of children at risk.

The State's public policy on this point is confirmed by the Legislature's use of the same immunity language when it enacted MCL 423.452, which allows employers, upon request, to disclose "information relating to the individual's job performance that is documented in the individual's personnel file." Like the statute at issue in this case, MCL 423.452 provides absolute immunity for such good-faith disclosures, to encourage employers to communicate freely with prospective employers about incompetent or even potentially dangerous employees.

Indeed, Michigan and other state courts have interpreted immunity under analogous statutes to extend to any damages resulting from the act of disclosure, regardless of whether the disclosure forms the basis of the plaintiff's cause of action. In *Awkerman v Tri-County Orthopedic Group, PC*, 143 Mich App 722, 726-728; 373 NW2d 204 (1985), cited by National Heritage Academies, the plaintiff sued a physician for malpractice in Count I, and for wrongful reports of child abuse in Count III. The plaintiff tried to use the physician's erroneous child-abuse report as a basis for shame and humiliation damages under Count I, but the Court of Appeals rejected that attempt, explaining that "if plaintiffs' argument were accepted, the immunity granted to a physician who files a child abuse report would be entirely emasculated Thus the public policy behind the statute, i.e., to encourage reporting of suspected child abuse, would be defeated." *Id.* at 728; see also *May v Se*

Wyoming Mental Health Ctr, 866 P2d 732, 738 (Wyo 1993) (holding that statute providing immunity “from any civil or criminal liability that might otherwise result by reason of the action” “does not limit immunity to suits based only on the reporting,” but “[r]ather . . . provides immunity from any civil or criminal liability that might otherwise result because of the reporting”); *Maples v Siddiqui*, 450 NW2d 529, 530 (Iowa 1990) (affirming trial court’s grant of partial summary judgment on ground that loss of companionship damages resulted from the reporting of child abuse and thus were precluded by statutory immunity).

To allow the Court of Appeals’ interpretation to stand, this Court would have to conclude that the Legislature enacted a scheme to encourage—indeed, require—frank communication about employees while at the same time creating a former employee’s theory of damages. This Court should reject such an illogical construction of the statute that conflicts with the text and this Court’s precedents.

C. Hecht cannot show causation in any event.

Importantly, a teacher would—and under the policy of MCL 380.1230b, *should*—have trouble getting another school job based on unprofessional behavior regardless of whether the teacher’s dismissal constituted an ELCRA violation. Thus, Hecht’s damages theory also has a causation problem.

The reason Hecht has a negative reference letter—which under his theory is the sole obstacle to his getting another teaching job—is because of his unprofessional conduct, *not* because of any purported ELCRA violation by National Heritage Academies. The statute requires disclosure of unprofessional conduct.

Whether Hecht's firing and discipline was an ELCRA violation does not determine whether he engaged in unprofessional conduct. For example, a school could have several employees engaging in unprofessional conduct; if the school fired one employee, while only reprimanding the other employees, and it choose these different discipline options solely on the basis of race, that different treatment could be an ELCRA violation. But it does not follow that the employee did not engage in unprofessional conduct. Whether or not Hecht was unfairly singled out for discipline or termination on the basis of race—which the evidence at trial did not show—the fact remains that Hecht made inappropriate racial jokes within earshot of impressionable young schoolchildren. That is exactly the type of behavior that MCL 380.1230b was designed to guard against.

Regardless of whether the school violated ELCRA, the statute requires disclosure of unprofessional conduct. The fact that Hecht claims an ELCRA violation for his termination should not affect whether NHA is immune for its disclosure of unprofessional behavior under MCL 380.1230b.

Moreover, because Hecht's unprofessional conduct is the reason for the school's negative reference letter (i.e., making inappropriate racial jokes and attempting to induce co-workers to change their statements), Hecht's damages flow from his own conduct, and not from the letter—as NHA points out. Accordingly, Hecht's damages theory fails on any reading: if his damages "flow[ed] from" the letter, the school is immune under *Hannay*, see *supra* pp 9–10; but if his damages did not flow from the letter, he cannot show causation.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, the Attorney General, as *amicus curiae*, respectfully requests that this Court reverse the Court of Appeals' holding that mandatory disclosures under MCL 380.1230b are admissible to show damages.

Respectfully submitted,

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