Order

Michigan Supreme Court
Lansing, Michigan

March 30, 2022

Bridget M. McCormack,
Chief Justice

162332-3

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

DENISE DOSTER,
Plaintiff-Appellant,

v

SC: 162332-3
COA: 349560, 350941
Saginaw CC: 17-034216-CD

COVENANT MEDICAL CENTER, INC.,
Defendant-Appellee.

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On January 12, 2022, the Court heard oral argument on the application for leave to appeal the September 17, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and REMAND this case to the Saginaw Circuit Court for entry of an order denying the defendant's motion for summary disposition, rendering judgment in favor of the plaintiff for $540,269.64, and for further proceedings consistent with this order.

The plaintiff, Denise Doster, sued her employer for age discrimination under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*., in connection with its decision to hire a younger candidate for a position in her department. After discovery, the defendant filed a motion for summary disposition under MCR 2.116(C)(10), arguing that it had a legitimate, nondiscriminatory reason for its hiring decision. The trial court denied the motion, finding a question of fact remained as to whether the employer's proffered reason was pretextual. The defendant did not appeal, and the case proceeded to trial where the jury found for the plaintiff and awarded $540,269.64. After the verdict, the defendant appealed, arguing in part that the trial court erred in denying its motion for summary disposition. The Court of Appeals reversed; it held that the trial court should have granted the defendant's motion for summary disposition.

The panel believed that the plaintiff presented no evidence to raise a genuine issue of material fact about pretext. *Doster v Covenant Med Ctr, Inc*, unpublished per curiam opinion of the Court of Appeals, issued September 17, 2020 (Docket Nos. 349560 and 350941), p 6. This was an error; when the evidence presented at the summary-disposition stage is viewed in the light most favorable to the plaintiff, reasonable minds can differ as

to whether age discrimination was a motivating factor in the defendant's decision to hire a younger candidate over the plaintiff. See *Johnson v VanderKooi*, 502 Mich 751, 761 (2018); *Hazle v Ford Motor Co*, 464 Mich 456, 465-466 (2001).

When reviewing a motion for summary disposition under MCR 2.116(C)(10), a court's role is narrow. It "considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." *Johnson*, 502 Mich at 761 (quotation marks and citation omitted). In its review of the evidence, the court cannot make findings of fact. *Minter v Grand Rapids*, 275 Mich App 220, 230 (2007), rev'd in part on other grounds, 480 Mich 1182 (2008).

In the motion for summary disposition and response, the parties disputed the significance of an interviewer's written notes which referenced the chosen candidate "being young." The plaintiff argued that this evidence supported pretext; the defendant disagreed. The trial court held that it could not make a finding of fact as to which interpretation was more likely. Thus, when viewed in a light most favorable to the plaintiff, the trial court held that the evidence created a genuine issue of material fact as to whether age discrimination was a motivating factor in the defendant's hiring decision.

The Court of Appeals, however, found that the defendant's explanation about this evidence was reasonable while the plaintiff's was premised on "speculation." *Doster*, unpub op at 7. And for that reason, it reversed the trial court. To be sure, speculation isn't enough to give rise to a genuine issue of material fact. *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 316 Mich App 1, 16 (2016). But it's not a reviewing court's proper role to choose between competing interpretations of facts, but rather to determine whether the trial court was correct when it determined there was a material dispute of fact requiring the motion be denied. The trial court did not err when it determined that, viewed in a light most favorable to the plaintiff, there was a genuine issue of material fact about whether this evidence supported pretext such that the case should not be dismissed before a trial.

Justice ZAHRA finds the evidence supporting the plaintiff's claim wanting as well. And his consideration of it is reasonable. But, respectfully, Justice ZAHRA makes the same mistake the panel did. In reviewing an appeal from a denial of a summary-disposition motion, our job is not to determine the best understanding of competing evidence, but rather whether the trial court was correct that there was a question of fact that merited a jury trial. Justice ZAHRA cites *Hazle v Ford Motor Co*, 464 Mich 456, to support his conclusion. But in that case, there was no evidence of pretext at all—only a statement made by the plaintiff's attorney. *Id.* at 474. Statements of counsel are not evidence. *Hazle* stands for the unremarkable proposition that a motion for summary disposition should be granted where there is no disputed evidence.

Justice ZAHRA also criticizes the Court's decision to involve itself in this case. We share his view that this Court should focus its time and attention on jurisprudentially significant issues. We believe the proper role of a reviewing court in determining that a litigant's claim should be dismissed is such an issue. And we assume that the jury that awarded the plaintiff $540,269.64 believed its time and attention was also significant. Reasonable minds could disagree about the evidence the plaintiff provided. The trial court was correct to let the jury decide which interpretation was more credible.

We do not retain jurisdiction.

ZAHRA, J. (*dissenting*).

I would deny leave to appeal because the Court of Appeals correctly determined that plaintiff presented insufficient evidence of age discrimination to survive defendant's motion for summary disposition. Although the record at the time of summary disposition contains evidence sufficient to create a prima facie case of age discrimination, defendant articulated a legitimate, nondiscriminatory reason for its action. Because plaintiff failed to offer any evidence that defendant's stated reasons were a pretext for discrimination, defendant was entitled to summary disposition as a matter of law.[1] The majority's contrary conclusion is wholly unfounded, as it is based solely on an out-of-context portion of an interviewer's note. Moreover, the Court's action of summarily reversing by order an unpublished opinion of the Court of Appeals is the latest in a series of cases in which the Court imprudently engages in error correction involving applications taken from unpublished opinions of the Court of Appeals. We should not spend our judicial resources on matters that lack jurisprudential significance. For these reasons, I dissent.

Plaintiff, Denise Doster, worked as a recruiter in the human resources (HR) department of defendant, Covenant Medical Center, Inc., for many years. When she was over 60 years old, plaintiff applied for a position as an HR generalist with defendant, but defendant hired Brent Ruddy, a 27-year-old, instead. Plaintiff then filed this age discrimination action, and defendant moved for summary disposition.

To avoid summary disposition of an employment discrimination claim, a plaintiff must proceed through the *McDonnell Douglas* framework.[2] Under that framework, "once a plaintiff establishes a prima facie case of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case."[3] If the employer makes such an articulation, "the plaintiff must demonstrate that the

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[1] See *Hazle v Ford Motor Co*, 464 Mich 456, 477 (2001).

[2] *McDonnell Douglas Corp v Green*, 411 US 792, 802-803 (1973).

[3] *Hazle*, 464 Mich at 464.

evidence in the case, when construed in the plaintiff's favor, is sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff."[4] Whether plaintiff satisfied this last step is the issue on appeal.

Plaintiff was interviewed by a panel, but Alison Henige, defendant's HR manager, made the ultimate hiring decision. Henige testified that Ruddy was the best fit for the position because he had consulting experience and defendant needed someone who could "hit the ground running" as a consultant. In contrast, plaintiff did not have consulting experience. Another interviewer testified that, unlike plaintiff, Ruddy "could articulate and give past experience to [employment-related] questions." Plaintiff did not present evidence to dispel the testimony that experience was the basis of the hiring decision, let alone that age was a motivating factor. Indeed, she admitted that her consulting experience amounted to simply "talking" with people. Plaintiff testified that she believed that discrimination was the reason she did not get the job because another person with three years of experience in HR as a consultant got the job. She stated, "I just felt like I was discriminated against," adding that "[t]hey gave that job to him, and that was my job." Plaintiff's responses were similar to those of the plaintiff in *Hazle*, who stated, " 'Well, because I felt I was very qualified for the position and just from my own observation I just feel that I'm a better qualified person. They hired a Caucasian woman. So I felt it was a racial issue.' "[5] The *Hazle* Court explained that the plaintiff's subjective claim failed to create a genuine issue of material fact concerning whether the defendants discriminated in their employment decision.[6] Likewise, plaintiff's mere feeling here that she was discriminated against is not enough to overcome defendant's showing of a legitimate reason for its decision. This is especially so given that plaintiff plainly lacked the consulting experience of the applicant defendant hired.

To create an issue of material fact, the majority plucks two words out of the middle of a sentence in Henige's interview notes—"being young." These words, without more, are innocuous and insufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor in hiring Ruddy. Context matters. For example, had Henige made two columns, one identified as "pro" and the other as "con," and the words "being young" were written under the pro column, a reasonable inference of

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[4] *Id.* at 465 (quotation marks and citation omitted). This Court has inconsistently applied both "motivating factor" and "but for" causation standards in discrimination cases under the Civil Rights Act, MCL 37.2101 *et seq*. See *Hrapkiewicz v Wayne State Univ Bd of Governors*, 501 Mich 1067 (2018) (MARKMAN, C.J., dissenting). I take no position here on which standard is proper because the parties have not argued that we should apply the "but for" standard and because the outcome would be the same under either standard.

[5] *Hazle*, 464 Mich at 476-477.

[6] *Id.* at 477.

unlawful age discrimination could have been drawn in plaintiff's favor. But this was not the case. The context here proves damning to plaintiff's claim. Henige's notes summarize Ruddy's comments about values. She wrote, "Accountability—having the same standards & following them," and "Respect—being young—took a while to gain [respect with] leaders." Read in context, the note clearly indicates that Ruddy stated in his interview that, being young, it took a while for him to gain the respect of his leaders. The note does not in any way suggest that defendant relied on Ruddy's age when making its hiring decision. Henige's notes simply do not support plaintiff's claim as a matter of law.

Further, using the Court's limited resources to reverse the Court of Appeals' unpublished opinion in this matter is ill-advised. It has become commonplace for this Court to reverse by order perceived errors in opinions that are unpublished. This is a waste of our judicial resources, and it is not why the people of Michigan elected us to serve at the highest level of the judicial branch of government. As Michigan's court of last resort, we should use our precious resources to interpret the Constitution and laws of Michigan and to correct errors of lower courts that, if left uncorrected, will stain the fabric of Michigan's jurisprudence. The time expended on error correction is time taken away from matters that are of significant and vital concern to the more than 10 million people of Michigan.

For these reasons, I would deny leave to appeal.

VIVIANO and CLEMENT, JJ., join the statement of ZAHRA, J.

STATE OF MICHIGAN

COURT OF APPEALS

DENISE DOSTER,

Plaintiff-Appellee,

v

COVENANT MEDICAL CENTER, INC.,

Defendant-Appellant.

UNPUBLISHED
September 17, 2020

Nos. 349560; 350941
Saginaw Circuit Court
LC No. 17-034216-CD

Before: CAVANAGH, P.J., and BORRELLO and TUKEL, JJ.

PER CURIAM.

In Docket No. 349560, defendant, Covenant Medical Center, Inc., appeals as of right a judgment for plaintiff entered after a jury trial. The jury found that defendant failed to promote plaintiff, Denise Doster, because of her age, in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. In Docket No. 350941, defendant appeals as of right an award of attorney fees to plaintiff, with its sole argument being that if this Court reverses the judgment for plaintiff in Docket No. 349560, it must also vacate the award of attorney fees. This appeal is being decided without oral argument pursuant to MCR 7.214(E)(1). We reverse the judgment for plaintiff and remand this case for judgment in favor of defendant and a vacation of the attorney-fee award.

I. UNDERLYING FACTS

Plaintiff worked as a recruiter in defendant's human resources (HR) department for many years. In October 2016, when she was over 60 years old, plaintiff applied for a position as an HR "generalist" with defendant. Evidence established that an HR generalist performs both recruiting and consulting work. Plaintiff alleged that defendant committed age and race discrimination[1] against her when it hired a younger white male, Brent Ruddy, instead of her for the HR generalist

[1] Plaintiff is an African American female. The trial court granted summary disposition to defendant regarding the claim of racial discrimination, and this ruling has not been appealed.

position. Plaintiff was interviewed before a panel consisting of Alison Henige, Kevin Birchmeier, Mollie Andrews, Lisa Killey, and Sandie Haley.[2] Henige, as defendant's HR manager, made the ultimate hiring decision. She and others testified that Ruddy was chosen for the position because he was experienced in consulting and plaintiff was not, and consulting was a vital need for the company at the time.

Before trial began, defendant filed a motion for summary disposition under MCR 2.116(C)(10), contending that it was entitled to judgment as a matter of law with regard to the claim of age discrimination. Defendant conceded that plaintiff had established a prima facie case, see, e.g., *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001), and the parties agreed that defendant had proffered legitimate, nondiscriminatory reasons for its hiring decision. The dispute, therefore, surrounded whether plaintiff established a genuine issue of material fact regarding whether defendant's proffered reasons were merely a pretext for unlawful discrimination. The trial court concluded that plaintiff had done so, and therefore it denied defendant's motion and allowed the case to proceed to trial. Defendant contends that this decision by the trial court was erroneous.

The case ultimately went to trial and the jury found that age discrimination, not defendant's business judgment, was the reason that it did not promote plaintiff. After plaintiff prevailed at trial, the trial court ordered defendant to pay plaintiff's attorney fees. This appeal followed.

II. DOCKET NO. 349560

In Docket No. 349560 defendant raises multiple arguments that the trial court erred and that reversal is warranted. To summarize, defendant argues that the trial court erred by (1) not dismissing plaintiff's claim due to judicial estoppel, (2) denying defendant's motion for summary disposition regarding defendant's age discrimination claim, and (3) denying defendant's motion for a judgment notwithstanding the verdict or in the alternative for a new trial because it (a) failed to provide the jury with a constructive discharge jury instruction, and (b) improperly excluded relevant testimony from one of defendant's employees who also applied for the HR generalist position. We agree with defendant's second argument and, because that issue is dispositive, decline to address defendant's remaining arguments.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and is reviewed de novo. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206; 815 NW2d 412 (2012). This Court reviews a motion brought under MCR 2.116(C)(10) "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018). Summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). "Only the substantively admissible evidence actually

[2] Ruddy was interviewed by the same panel members, with the addition of Erik Fielbrandt.

proffered may be considered." *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 525; 773 NW2d 57 (2009) (quotation marks and citation omitted). "Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient." *McNeill-Marks v Midmichigan Med Ctr-Gratiot*, 316 Mich App 1, 16; 891 NW2d 528 (2016).

The moving party has the initial burden to support its claim with documentary evidence, but once the moving party has met this burden, the burden then shifts to the nonmoving party to establish that a genuine issue of material fact exists. *AFSCME v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). Additionally, if the moving party asserts that the nonmovant lacks evidence to support an essential element of one of his or her claims, the burden shifts to the nonmovant to present such evidence. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7; 890 NW2d 344 (2016).

MCL 37.2202(1)(a), a provision of the ELCRA, provides that an employer may 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."

If a plaintiff can produce direct evidence of impermissible age bias, then "the plaintiff can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Hazle*, 464 Mich at 462. "In many cases, however, no direct evidence of impermissible bias can be located." *Id.* If a plaintiff cannot produce direct evidence of impermissible bias, then the plaintiff "must first offer a 'prima facie case' of discrimination." *Id.* at 463. In order to prove a prima facie case, a plaintiff must "present evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination." *Id.*

After a plaintiff has "has sufficiently established a prima facie case, a presumption of discrimination arises." *Id.* (quotation marks and citation omitted). This presumption of discrimination is rebuttable and, as such, "once a plaintiff establishes a prima facie case of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case." *Id.* at 464. "The articulation requirement means that the defendant has the burden of producing evidence that its employment actions were taken for a legitimate, nondiscriminatory reason." *Id.* After an employer produces evidence that its actions were taken for a legitimate, nondiscriminatory reason, then the presumption of discrimination "drops away." *Id.* at 465.

After the presumption of discrimination by an employer drops away, and if the employer has moved for summary disposition, then "the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." *Id.* (quotation marks and citation omitted). "[A] plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful] discrimination." *Id.* at 465-466 (quotation marks and citation omitted; alteration in

original). At this stage the question the trial court must answer when ruling on the employer's motion for summary disposition "is exactly the same as the ultimate factual inquiry made by the jury: whether consideration of a protected characteristic was a motivating factor, namely, whether it made a difference in the contested employment decision." *Id*. at 466. "The only difference is that, for purposes of a motion for summary disposition or directed verdict, a plaintiff need only create a question of material fact upon which reasonable minds could differ regarding whether discrimination was a motivating factor in the employer's decision." *Id*.

Plaintiff did not present any direct evidence of age discrimination in this case, but the parties agree that plaintiff presented a prima facie case of age discrimination and that defendant articulated legitimate reasons for its hiring decision, namely that plaintiff lacked required consulting experience. Consequently, in order to prevail when defendant moved for summary disposition on plaintiff's age discrimination claim, plaintiff was required to present evidence that was "sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." *Hazle*, 464 Mich at 465. (quotation marks and citation omitted).

In *Hazle*, our Supreme Court concluded that the plaintiff in that case, who had alleged racial discrimination,[3] had failed to raise a genuine issue of material fact regarding the issue of pretext. *Id*. at 477. The Court stated:

> The essence of defendants' stated reasons for their decision to hire Michelle Block over plaintiff was that they did not believe that plaintiff was as qualified as Michelle Block for the office manager position. While plaintiff was not required to seek to show that she was in fact more qualified than Block in order to survive summary disposition, plaintiff *was* required to demonstrate that the evidence in this case would permit a jury to find that defendants' explanation was a pretext for race discrimination. Other than her subjective claim that she was more qualified than Michelle Block, plaintiff has offered nothing to support her claim that defendants acted with racial animus. [*Id*. at 476 (emphasis added).]

The Court emphasized that when the plaintiff was asked why she believed that racial discrimination had played a role in the hiring decision, the plaintiff answered, " 'Well, because I felt I was very qualified for the position and just from my own observation I just feel that I'm a better qualified person. They hired a Caucasian woman. So I felt it was a racial issue.' " *Id*. at 476-477.

The Supreme Court concluded:

> The record in this case contains evidence sufficient to create a prima facie case of race discrimination . . . . In response, defendants articulated a legitimate, nondiscriminatory reason for their action. Plaintiff, however, was unable to offer any evidence that the defendants' stated reasons were a pretext for discrimination,

[3] The same standard applies to age and race discrimination cases. *Hazle*, 464 Mich at 462.

> that is, that race was a motivating factor in their employment decision. Defendants were therefore entitled to summary disposition as a matter of law. [*Id*. at 477.]

The Court also stated that the "[p]laintiff, and the Court of Appeals for that matter, would have the jury second-guess defendants' business judgment concerning whether Block or plaintiff was better qualified." *Id*. at 475-476.

In this case, Henige testified in her deposition that Ruddy was "the best fit for the position." When asked to elaborate, she said that that this was the case

> [b]ecause he had good consulting experience, recent consulting experience, and like I mentioned, we needed someone that could hit the ground running as a consultant and not need as much coaching, and time to learn the laws, and know how to help our leaders.

In contrast, Andrews testified that plaintiff did not know "specifics" about HR consulting. She opined that plaintiff would end up focusing on recruiting and that "actual assistance for HR legal risks will be put to the side." Andrews testified that Ruddy did have experience in consulting, but that Ruddy had limited experience in recruiting. Andrews also testified, however, that consulting was a bigger need for defendant at the time of hiring. In addition, the evidence clearly showed that Ruddy did have some recruiting experience.

Killey testified that after plaintiff's interview, the panel members decided that plaintiff did not have the "necessary skill sets that was [sic] needed for the position" and lacked knowledge of employment law. Similarly, Haley testified that she had a concern about plaintiff's lack of consulting experience. She stated that, "[b]ased on the experience level between the two of them, [Ruddy] was a better fit for the team than [plaintiff] would have been." Haley stated that in the past, when a recruiter had been hired as a consultant, the company suffered.

Plaintiff admitted that her consulting experience amounted to "talking" with people. Plaintiff testified that she believed that discrimination was the reason she did not get the job because "another person with three years of experience in HR as a consultant got the job." She stated, "I just felt like I was discriminated against," adding, "[t]hey gave that job to him, and that was my job." Plaintiff's responses were similar to those of the plaintiff in *Hazle*, who, as noted, stated, " 'Well, because I felt I was very qualified for the position and just from my own observation I just feel that I'm a better qualified person. They hired a Caucasian woman. So I felt it was a racial issue.' " *Id*. at 476-477.

As noted by defendant on appeal, the trial court relied on a single piece of evidence in denying defendant's motion for summary disposition—a notation by Henige on her interview scoring sheet about Ruddy "being young." In Henige's interview notes regarding Ruddy, she made a notation about "values." She wrote, "Accountability—having the same standards & following them," and "Respect—being young—took a while to gain [with] leaders." The court concluded that it could not interpret this statement and that the statement could be evidence that Henige "did place some emphasis on the age of Mr. Ruddy in comparison to that of the plaintiff for purposes of making her decision." The court said:

> I don't think the Court for purposes of deciding a motion for summary disposition can give interpretation to that statement without there being some testimony to put that in context. I guess the Court could go out on a limb and assume that that means that being young took a while to gain the respect of leaders, however, that's just one interpretation.

The court added, "While this handwritten comment may be viewed as nothing more than a record of a response given, such evidence also may support the conflicting inference that this comment was noted as evidence of defendant's preference for a younger applicant."

The trial court erred by concluding that this notation was sufficient to raise a genuine issue of material fact regarding pretext. To begin with, plaintiff conceded that the use of the word "young" was Ruddy's, not Henige's, and that Henige merely wrote down what Ruddy had said. In any event, there is no natural and common-sense manner in which to interpret the statement other than Ruddy explaining why, as a young person, it had taken some time to earn his colleagues' respect. If anything, even viewing the statement in the light most favorable to plaintiff, as we view all of the evidence for purposes of the summary disposition motion, had defendants in fact had discriminatory intent, it likely would have redounded to plaintiff's benefit as it constituted a concession by Ruddy that his youth had been something of a disadvantage in his then-current position, albeit one he had overcome. All of the other interview participants' notes support that conclusion. Haley noted in her interview notes that Ruddy had stated that "accountability & respect resonate with him." Similarly, Andrews wrote "accountability" and "respect—huge/earned" in her notes about Ruddy, and Erik Fielbrandt wrote the following on his notes concerning Ruddy: "Accountability—Easier when held to the same standard," and "Respect—Takes some time to earn the respect of leaders." Thus, contrary to the trial court's conclusion, the notation did not provide any evidence of "defendant's preference for a younger applicant."

We find that the present case is directly analogous to *Hazle*. Plaintiff's assertions were similar to the plaintiff's assertions in *Hazle*. And the trial court "would have the jury second-guess defendants' business judgment concerning whether [Ruddy] or plaintiff was better qualified." *Id.* at 475-476. Plaintiff presented no evidence to raise a genuine issue of material fact regarding pretext, and the trial court should have granted defendant's motion for summary disposition with regard to the age-discrimination claim.

Plaintiff argues that defendant had a pattern of hiring young job applicants, but this evidence was not in the documents produced for the summary-disposition proceedings. When reviewing a trial court's ruling on a motion for summary disposition, "we must limit our review to the evidence presented to the trial court at the time [the] motion was decided." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). In addition, in discussing these hiring decisions, plaintiff makes no assertions regarding the ages of the other individuals in the applicant pools when hiring decisions were made. As such, this supposed "evidence" demonstrates nothing of import because the young individuals who were hired might have been the oldest individuals who applied, or at least no younger than other applicants. Plaintiff also argues that an inference could be made that defendant failed to follow its own hiring policies, but again, the evidence about this alleged failure was not in the documents produced for the summary-disposition proceedings. Rather, that evidence was introduced at trial and, therefore, cannot be considered for summary disposition purposes.

Plaintiff also makes an argument about interview panel members changing their scores on interview sheets, but this argument is unpersuasive. That someone reflected upon which score to give a candidate and changed his or her mind mid-interview is not, as plaintiff claims, evidence of a discriminatory plot. As noted by defense counsel at the summary-disposition hearing, "All the evidence shows is somebody wrote down a score, crossed it out, and wrote something else. People do that all the time." Indeed, Henige testified that she ultimately made the hiring decision in this case. Henige reviewed the interview scoring sheets "for their notes," but testified that the sheets were merely advisory to assist her in making her decision. In fact, Henige did not even "tally . . . up" the scores when making her hiring decision. Similarly, Birchmeier also testified that any numerical "scoring" on the interview scoring sheets was simply advisory and not dispositive. Consequently, there was no evidence that the scoring sheets actually affected Henige's hiring decision and, even if they did, no evidence established that the scoring changes were caused by age discrimination. Thus, the scoring sheets also fail to establish that defendant discriminated against plaintiff because of her age.

Henige wrote in plaintiff's interview notes, in the section dealing with why the applicant is interested in the position, "Why apply now." Plaintiff contends that question was evidence of age bias. We do not agree. It is completely reasonable to inquire about why someone who had been in one position for many years was now interested in a different position. For example, if plaintiff chose to apply for the HR generalist position because she was unhappy with her then-current job, such knowledge could have been important and useful for defendant in making its hiring decision. Construing that evidence in the light most favorable to plaintiff, it would require speculation to infer that the question of "Why apply now," could evidence invidious discrimination as opposed to a bona fide inquiry about the applicant's motivation. A denial of summary disposition cannot be premised on speculation. See *McNeill-Marks*, 316 Mich App at 16 ("Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient."). Plaintiff also notes that the job posting for the HR generalist position did not specifically mention consulting, but it was abundantly clear from the deposition testimony of defendant's employees that even if the position posting did not use the word "consulting," the position of HR generalist did indeed involve a combination of consulting and recruiting work. And the posting itself clearly placed an emphasis on consulting work such as analyzing and interpreting laws and knowing about regulatory-compliance issues.

Although plaintiff produced additional evidence *at trial* that defendant may have violated its own policies by failing to favor an internal candidate for the HR generalist position, this Court is charged with viewing only the evidence presented to the trial court at the time it decided defendant's motion for summary disposition. See *Pena*, 255 Mich App at 313 n 4. As such, we may not address the evidence introduced at trial on this issue, and we thus decline to do so. The trial court erred by denying defendant's motion for summary disposition.

III. DOCKET NO. 350941

Defendant argues that, if we reverse the trial court's summary disposition ruling, the award of attorney fees must also be vacated. We agree.

MCL 37.2802, a provision of the ELCRA, states:

> A court, in rendering a judgment in an action brought pursuant to this article, may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant in the action if the court determines that the award is appropriate.

"A party must be a financially successful or prevailing party to be entitled to an award of fees and costs under" MCL 37.2802. *Meyer v City of Center Line*, 242 Mich App 560, 576; 619 NW2d 182 (2000) (quotation marks and citation omitted). "To be considered a prevailing party, a plaintiff must receive at least some relief on the merits of plaintiff's claim, such as an award of damages, an injunction, or a declaratory judgment on a favorable consent decree or settlement." *Id*. *Meyer* is binding caselaw under MCR 7.215(J)(1). Because the trial court should have granted defendant's motion for summary disposition, plaintiff was not a prevailing party in this case. Thus, we vacate the award of attorney fees.

IV. CONCLUSION

In Docket No. 349560 we reverse and remand for entry of judgment in favor of defendant. In Docket No. 350941 we vacate the trial court's attorney fee award. We do not retain jurisdiction. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello
/s/ Jonathan Tukel