STATE OF MICHIGAN

COURT OF APPEALS

RODNEY DUSKIN,

Plaintiff-Appellant,

v

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant-Appellee.

UNPUBLISHED
September 30, 2021

No. 351975
Ingham Circuit Court
LC No. 06-001459-CD

Before: BECKERING, P.J., and SHAPIRO and SWARTZLE, JJ.

PER CURIAM.

In this case involving the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., plaintiff, Rodney Duskin, appeals as of right the trial court's order granting a directed verdict to defendant, the Department of Health and Human Services, and dismissing plaintiff's case. Plaintiff's sole issue on appeal is whether the trial court erred by excluding certain evidence. Because we conclude that the trial court's decision to exclude the evidence was not an abuse of discretion under the circumstances of this case, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

In 2004, defendant hired an outside contractor, SeDA Consulting, Inc. (SeDA), to review diversity in its working environment. The results from a study showed underrepresentation of minority males in leadership positions. A 2006 memo authored by defendant's Chief Deputy Director Laura Champagne explained that defendant's Office of Equal Opportunity and Diversity Programs (EODP) conducted a series of case studies aiming to identify barriers that specific groups of employees may have in either applying for or being successful in being promoted into management positions. In a previous appeal related to class certification, this Court explained the following in regard to the memo:

> On the basis of data collected from the [DHHS] leadership academy, hiring data, and information gathered through a focus group, the memo cites its "major finding" as follows: "A disparity exists in minority males being promoted into

> upper management positions, more specifically program manager, district manager, county director and first line supervisory positions throughout the Department." The recommendations to correct the problem include: providing applicants with more information about screening criteria and job requirements; facilitating access to position postings; expanding interview training; requiring department-wide consistency in application submission requirements, screening criteria, and hiring policies; preventing "working out of class"[1] candidates from competing for positions; requiring diversity on interviewing panels; and implementing targeted recruiting for the leadership academy. [*Duskin v Dep't of Human Servs*, 284 Mich App 400, 407; 775 NW2d 801 (2009) (*Duskin I*).]

In 2006, plaintiff, along with other male minority employees of defendant, filed a complaint against defendant. The trial court granted the claimants' motion for class certification. However, this Court reversed, concluding that "the determination whether there has been discrimination in awarding promotions will be very fact-intensive and highly individualized and, thus, entirely inappropriate for class treatment." *Id*. at 404. This Court labeled the lawsuit a "disparate treatment, employment discrimination suit," and stated that the "plaintiffs allege discrimination based on race, ethnicity, and gender in promotions to supervisory and management positions." *Id*. at 405. The Court noted that "[t]he proposed class is comprised of all 'minority' male employees of the [DHHS], including 616 African-American, Hispanic, Arab, and Asian males in various departments and offices throughout the state." *Id*.

The Michigan Supreme Court vacated this Court's opinion, stating:

> [I]n lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and we REMAND this case to the Ingham Circuit Court for reconsideration in light of *Henry v Dow Chemical*, 484 Mich 483; 772 NW2d 301 (2009), which was issued after the Court of Appeals decided this case. [*Duskin v Dep't of Human Servs*, 485 Mich 1064; 777 NW2d 168 (2010) (*Duskin II*).]

After the trial court denied defendant's motion for summary disposition and again certified a class action, this Court again reversed the trial court's decision. *Duskin v Dep't of Human Servs*, 304 Mich App 645, 647; 848 NW2d 455 (2014) (*Duskin III*). The *Duskin III* Court determined that the plaintiffs had failed to demonstrate needed elements for class certification, stating, in part:

> The minority males' combined suit would require proofs regarding different types of discrimination (racial or ethnic, and gender) and different methods of discrimination (disparate impact, and deliberate discrimination) against different actors (the Department as a whole, and an undetermined number of supervisors in individual departmental units). *Because there is no allegation of a single type or method of discrimination, or even an allegation that a single actor engaged in*

[1] This phrase relates to employees being asked to work temporarily in a higher-classification position.

> *discrimination*, we are definitely and firmly convinced that the trial court made a mistake when it found that the minority males raised common questions of law or fact. We conclude that the trial court clearly erred when it found that the minority males established commonality. [*Id*. at 656 (emphasis added).]

On remand, the trial court held a hearing regarding defendant's motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact); at that point, 11 individual plaintiffs remained. The trial court granted the motion in regard to claims of disparate impact, but allowed the case to proceed for claims of disparate treatment. Defendant then moved to sever, arguing that each claim involving disparate treatment would require individualized evidence because the various plaintiffs had all applied for different jobs. The trial court agreed and granted the motion.

Plaintiff, an African-American male employee of defendant, was selected to have his case tried first. Defendant filed a motion in limine to exclude plaintiff's proposed exhibits 5 through 34, arguing that they related solely to dismissed claims of disparate impact. The proposed exhibits were also submitted earlier in the proceedings; they consisted of, among other things, documents related to the SeDA study, the findings of the study, the findings of a focus group of minority males employed by defendant, and emails and a memorandum from defendant. During the hearing concerning the motion in limine, defense counsel argued that many of the proposed exhibits consisted of pattern-or-practice evidence that was inadmissible in a case dealing with individual disparate treatment. Defense counsel contended that plaintiff could not show that the evidence pertained directly to him and also argued that some of the evidence was inadmissible under MRE 407 as subsequent remedial measures. On the other hand, plaintiff's counsel argued that the evidence was useful as "background" for plaintiff's claims of lack of promotions and related to his "frustrations" and "anger" and would show how defendant's policies resulted in disparate treatment. The court granted defendant's motion in limine with regard to the study that was done and any "subsequent remedial measures," but stated that anything relating specifically to plaintiff could come in by way of appropriate motions during trial.[2] Plaintiff's counsel conceded that if pattern-or-practice and statistical evidence was excluded, then an expert statistician would not be needed. The court stated that the expert would be excluded on the basis of how the case had "been narrowed."[3]

At trial, plaintiff testified that he was currently a Path coordinator with defendant, meaning a "manager over the cash program for [his] local office." He oversaw policies and rules for family-independence assistance. Earlier, he was an analyst for the food-assistance program and had been part of the Technical Assistance Team, training others. Plaintiff admitted to having obtained multiple promotions early in his career. He was on an "11" level. He testified that he applied around 62 times seeking promotions within the department. He testified that he was trying to get above an 11 level. For 25 positions before 2009, he did not obtain interviews. He acknowledged that he did not know who made the decisions for positions for which he did not get interviews and

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[2] Plaintiff had argued for the admission of exhibits 5 through 34 as a group. He did not parse out or discuss the relevancy of any particular exhibit. And he did not seek to admit any of the exhibits at trial, such as by arguing that they related specifically to him or a position he sought.

[3] Exhibits 35 and 36, plaintiff's expert's curriculum vitae and expert report, were also excluded.

did not know why he was "screened out" for those particular positions. He also acknowledged that defendant's employees are approximately 80% female. Plaintiff testified that he had obtained interviews for five positions for which he applied. Of these five, an African-American male received one position, African-American females received two positions, and white females received two positions. He then referred to a different position that a white female obtained. He said that he thought he was being discriminated against for being an African-American man. He believed that color discrimination played a role because a lighter-skinned African-American man had been given a role instead of him.[4]

At the conclusion of plaintiff's case, the defense moved for a directed verdict, arguing that plaintiff failed to show that defendant's decision not to promote him was related to his race or gender. The court stated that it would take the motion under advisement and first hear the evidence from defendant.

Michael Derose, defendant's human-resources director, testified that plaintiff did not meet screening requirements for three positions he applied for from 2004 through 2006. Also, plaintiff did not obtain an interview for a fourth position, in 2006, but 33% of the people interviewed were African-American males. Derose testified that in 2008, plaintiff had an interview for a departmental manager position. The three-person interview panel included an African-American male. The position went to the individual who scored the highest during the interview. Plaintiff also interviewed for a senior executive assistant to the deputy director position in 2008. The interview panel consisted of an African-American male and an Indian male. In 2009, plaintiff was selected to be interviewed for a departmental specialist position, but he declined the interview. Plaintiff interviewed in 2013 for a business analyst position. An African-American male, Asian female, and African-American female were on the interview panel. The position went to an African-American male. In 2014, plaintiff interviewed for a state administrative manager position. The interview panel consisted of two white males and an African-American female. Plaintiff had the second highest interview score, but the position was awarded to the individual who scored the highest. Derose also spoke of many other positions, with many applicants, for which plaintiff did not meet the screening criteria for an interview.[5]

According to Derose, there was nothing out of the ordinary in any of the selection processes for the positions that plaintiff applied for and that people were treated consistently, with full documentation. Derose stated that plaintiff told him he wanted a management role at a level 15, but Derose had never seen someone make a jump from a level 11 to a level 15. Derose also questioned whether plaintiff had actually applied for 62 positions.

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[4] Plaintiff testified that he stopped submitting applications with DHHS in 2014.

[5] Derose testified that applicants apply for positions with the DHHS through the website neo.gov. When discussing the quantity of applications the DHHS receives each year, Derose testified that it was on track to receive 150,000 or more applications in 2019, with hiring needs in the range of 1,500 to 2,000. Given the volume of applications, he explained, "[q]uite often people don't get an interview if they just meet the minimum" qualifications.

At the conclusion of the testimony, the court granted defendant's motion for a directed verdict. The court dismissed plaintiff's case and this appeal followed.

II. ANALYSIS

Plaintiff argues that the trial court abused its discretion by granting defendant's motion in limine. We disagree.

Decisions regarding whether to admit evidence are reviewed for an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 613-614; 580 NW2d 817 (1998). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016) (quotation marks and citation omitted). This Court reviews "de novo questions of law underlying evidentiary rulings, including the interpretation of statutes and court rules." *Id.* "The admission or exclusion of evidence because of an erroneous interpretation of law is necessarily an abuse of discretion." *Id.*

As an initial matter, on appeal, plaintiff does not take issue with the trial court's directed-verdict ruling in connection with the evidence that was, ultimately, presented. Rather, he is arguing solely that the trial court erred by excluding various pieces of evidence that supported his employment discrimination claim.

MCL 37.2202(1)(a) states that 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.

The parties spend some time in their briefs discussing whether a disparate-impact or disparate-treatment claim was at issue. However, the lower court, in a summary-disposition ruling that has not been appealed, concluded that only a disparate-treatment claim was viable. As explained in *Duranceau v Alpena Power Co (After Remand)*, 250 Mich App 179, 181-182; 646 NW2d 872 (2002):

> A prima facie case of discrimination under the Civil Rights Act can be made by proving either disparate treatment or disparate impact. Disparate treatment requires a showing of either intentional discrimination against protected employees or against an individual plaintiff. Disparate impact requires a showing that an otherwise facially-neutral employment policy has a discriminatory effect on members of a protected class. [Citations omitted.]

In *Duranceau*, 250 Mich App at 182, a case involving alleged gender discrimination, the Court stated:

> To avoid summary disposition under the disparate treatment theory, the plaintiff must present sufficient evidence to permit a reasonable juror to find that

> for the same or similar conduct the plaintiff was treated differently from a similarly situated male employee. Gender must be proved to be a determining factor in the allegedly discriminatory decision. [Citation omitted.]

Indeed, intentional discrimination is always an element of a disparate-treatment claim. *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 360 n 6; 597 NW2d 250 (1999).

"In some discrimination cases, the plaintiff is able to produce direct evidence of racial bias. In such cases, the plaintiff can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). 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*. (quotation marks and citations omitted). "In many cases, however, no direct evidence of impermissible bias can be located. In order to avoid summary disposition, the plaintiff must then proceed through the familiar steps set forth in" *McDonnell Douglas Corp v Green*, 411 US 792, 802-803; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Hazle*, 464 Mich at 462. See also *White v Dep't of Transp*, ___ Mich App ___, ___; ___ NW2d ___ (2002) (Docket No. 349407); slip op at 3. As stated in *White*, ___ Mich App at ___; slip op at 4:

> First, the plaintiff must set forth a prima facie case. In *Hazle*, the Supreme Court determined that the plaintiff was required to 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. 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.
>
> If the defendant gives a legitimate, nondiscriminatory reason for the employment decision, the presumption of discrimination is rebutted, and the burden shifts back to the plaintiff to show that the defendant's reasons were not the true reasons, but a mere pretext for discrimination. At that point, in order to survive a motion for summary disposition, 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. [Quotation marks, citations, and brackets omitted.]

In addition, a plaintiff's "subjective claim that she was more qualified does not create a question of fact on whether the employer's proffered reason for the decision is pretextual." *White*, ___ Mich App at ___; slip op at 5.

In *Hazle*, 464 Mich at 467-468, the Court, analyzing whether the plaintiff had established a prima facie case under the *McDonnell Douglas* framework, stated:

> There is no dispute in this case regarding the first two elements: Plaintiff is black, and she did not receive the promotion for which she applied.
>
> At issue here are the third and fourth elements of a prima facie case. The third element requires proof that plaintiff was qualified for the position she sought. The fourth element requires proof that the job was given to another person under circumstances giving rise to an inference of discrimination.

The *Hazle* Court stated that a plaintiff is not required to show evidence of the relative qualifications of job candidates in order to survive a motion for a directed verdict, but it added that a plaintiff still must present some evidence leading to an inference of unlawful discrimination. *Id*. at 469-472. The Court stated, "In short, a plaintiff must offer evidence showing something more than an isolated decision to reject a minority applicant." *Id*. at 471.

Plaintiff contends that the evidence from the excluded exhibits was relevant and admissible to support an inference of discrimination. In *Bacon v Honda of America Mfg, Inc*, 370 F3d 565, 575 (CA 6, 2004)[6] the Sixth Circuit stated, "We subscribe to the rationale that a pattern-or-practice claim is focused on establishing a policy of discrimination; because it does not address individual hiring decisions, it is inappropriate as a vehicle for proving discrimination in an individual case." It added, "However, pattern-or-practice evidence may be relevant to proving an otherwise-viable individual claim for disparate treatment under the *McDonnell Douglas* framework." *Id*. The *Bacon* Court cited *Cooper v Fed Reserve Bank of Richmond*, 467 US 867; 194 S Ct 2794; 81 L Ed 2d 718 (1984). See *Bacon*, 370 F3d at 575. In *Cooper*, 467 US at 876, the Court stated:

> The crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. *The inquiry regarding an individual's claim is the reason for a particular employment decision*, while at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking. [Quotation marks and citation omitted; Emphasis added.]

The *Bacon* court recognized that pattern-or-practice evidence may constitute additional, relevant support for a viable disparate-treatment claim when combined with other evidence of discrimination. See *Featherly v Teledyne Indus, Inc*, 194 Mich App 351, 361-362; 486 NW2d 361 (1992) (stating that "[a]lthough the statistical evidence presented in this case may provide only weak circumstantial evidence of age discrimination, it nonetheless constitutes some factual support for the claim, especially when conjoined with the other facts evidencing age discrimination"). See also *White*, __ Mich App at __; slip op at 6-7 (explaining that statistics may support an inference that the defendant employer discriminated against individual members of a class, but the statistics

[6] Federal precedent construing federal civil-rights statutes may be looked to in interpreting the ELCRA. See *Barbour v Dep't of Social Servs*, 198 Mich App 183, 185; 497 NW2d 216 (1993).

must eliminate common nondiscriminatory explanations for the disparity and provide specific information, such as the number of postings and the composition of the applicant pool).

In this case, the trial court granted defendant's motion to sever, and that ruling has not been appealed. The court stated that the case "will be an employment discrimination case based on disparate treatment of each one of the parties that are involved." Moreover, in *Duskin III*, 304 Mich App at 655-656, this Court, in analyzing the commonality element necessary for a class action, stated:

> The minority males' combined suit would require proofs regarding different types of discrimination (racial or ethnic, and gender) and different methods of discrimination (disparate impact, and deliberate discrimination) against different actors (the Department as a whole, and an undetermined number of supervisors in individual departmental units). Because there is no allegation of a single type or method of discrimination, or even an allegation that a single actor engaged in discrimination, we are definitely and firmly convinced that the trial court made a mistake when it found that the minority males raised common questions of law or fact. We conclude that the trial court clearly erred when it found that the minority males established commonality.

The Court in *Duskin III* recognized that parts of the so-called pattern-or-practice evidence might be applicable to some plaintiffs but not others. The trial court's ruling was in accord with this conclusion.[7] The trial court concluded that anything relating specifically to plaintiff's circumstances in the proposed exhibits could come in by way of appropriate motions during trial.

In addition, and significantly, a review of the substance of the proposed evidence shows that it is vague with regard to alleged systemic acts of discrimination. While the *statistics* evidently showed a disparity regarding minority males in leadership positions, the evidence regarding actual discriminatory acts was vague and based on the results of a voluntary focus group during which 57 minority males expressed their subjective belief that "the culture" at defendant was deliberately discriminatory. In *Duskin I*, 284 Mich App at 417-418, this Court characterized the study summary as follows:

> Plaintiffs attempt to couch their alleged injuries as resulting from a general "culture" of discrimination against racial and ethnic minority males but, again, *they have shown no policy or practice of discrimination by the [DHHS]* that would suggest that common questions predominate over individual ones. While plaintiffs claim that the internal memo suggests that the [DHHS] acknowledges its own discriminatory practices, the document says no such thing. To the contrary, it merely acknowledges a disparity in the number of minority males in management

[7] We understand that additional plaintiffs' cases are yet to be tried. Our ruling is specific to plaintiff and the circumstances of this case; it does not bind the trial court when assessing the admissibility of evidence in the other cases.

> positions, sets forth complaints by volunteers in the focus group, and recommends that managers generally provide more information about open positions, ensure consistency in application and hiring policies, target more employees for the leadership academy, provide interview training, and ensure diversity on interview panels. *This does not, in any sense, suggest the presence of a standardized employment practice or policy of discrimination*. Nor does a numeric disparity suggest that any individual discrimination occurred where individual promotional decisions are based on nondiscriminatory reasons such as work experience, education, time on the job, work evaluations, or the superior qualifications of other applicants. Again, these are all based on individual hiring decisions and do not implicate an across-the-board policy. [Citation omitted; emphases added.[8]]

In light of the cited federal caselaw, the posture of the case (i.e., the fact that only plaintiff's disparate-treatment claim was at issue), and the nature of the evidence sought to be introduced, it is difficult to conclude that the trial court abused its discretion by disallowing the proposed evidence. Plaintiff argues that the evidence was relevant under MRE 401, but the trial court specifically noted that it did not want to "confuse" the jury. The court stated:

> And I don't want the jury confused with respect to Mr. Duskin as an individual and the types of activities that the department was engaging in in order to address what they thought might be some kind of systemic problem because that's two different things and I'm not going to confuse them with that.

MRE 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, *confusion of the issues*, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. [Emphasis added.]

It was not unreasonable for the trial court to conclude that presenting evidence of subjective complaints about defendant's "culture" would risk confusing the jurors; they might be inclined to judge the department as a whole instead of focusing on plaintiff's individualized circumstances, and they also might be inclined to put undue weight on vague claims of a discriminatory culture or a perception of discrimination. See *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735; 344 NW2d 347 (1983) ("[T]he idea of prejudice [under MRE 403] denotes a situation in which there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.") And it must be emphasized again that the court explicitly ruled that if anything in the materials pertained to plaintiff's own circumstances, he could introduce it. See *Campbell v Human Servs Dep't*, 286 Mich App 230, 238; 780 NW2d 586 (2009) (explaining that in a gender-discrimination case, acts of discrimination that occurred outside of the pertinent period of

[8] Although the *Duskin I* opinion has been vacated, we conclude that the panel's views of the study summary have persuasive value.

limitations may be used as background evidence to establish a pattern of discrimination, subject to the evidentiary rules and the court's discretion).

Plaintiff also refers to MRE 406. This rule states:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

But again, plaintiff did not present evidence that defendant as a whole organization routinely intentionally discriminated against minority males. While there was, evidently, a disparate impact as shown by statistics, plaintiff is proceeding in the present case solely on a disparate-treatment theory.

Plaintiff also contends that the trial court should have allowed Chris McBride, a former supervisor trainer for defendant, to provide opinion testimony about the Leadership Academy pursuant to MRE 701, which states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Plaintiff's counsel attempted to get McBride to provide testimony about concerns she had about the Leadership Academy program and how those concerns impacted plaintiff. The court ruled that counsel could ask McBride questions about these concerns only if she had information regarding plaintiff's applications for the Leadership Academy. McBride testified that she did not know plaintiff and did not recall ever seeing his application materials. Most importantly, she said that *she did not know* if it was proper for him to have not received an interview, because she had not reviewed his file. The trial court acted well within its discretion by concluding that McBride could not opine about the propriety of plaintiff being denied acceptance into the Leadership Academy, given that she did not have a foundation for providing such an opinion.

Further, plaintiff argues that the trial court should have gone through each piece of evidence individually instead of making one broad ruling regarding all of the evidence sought to be excluded. However, this particular argument has not been properly briefed. As stated in *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998):

> [A] mere statement without authority is insufficient to bring an issue before this Court. It is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. [Quotation marks and citation omitted.]

Plaintiff himself does not analyze each piece of evidence and argue why it was admissible. In fact, he fails to specifically describe the substance of the exhibits sought to be admitted. He is improperly leaving it up to this Court to "unravel and elaborate for him his arguments[.]" *Id*. At any rate, considering the circumstances present in this case, the trial court's decision to grant defendant's motion in limine and preclude evidence relating to the study was not an abuse of discretion.

Affirmed.

/s/ Jane M. Beckering
/s/ Douglas B. Shapiro
/s/ Brock A. Swartzle