Nos. A23-0374; A23-0484

STATE OF MINNESOTA
IN COURT OF APPEALS

Andrea Anderson

Appellant/Plaintiff,

v.

Aitkin Pharmacy Services, LLC dba Thrifty White Pharmacy and George Badeaux

Respondents/Defendants

On appeal from Aitkin County, Ninth Judicial District
Honorable David F. Hermerding, Judge Presiding.

BRIEF OF APPELLANT/PLAINTIFF

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STATEMENT OF THE LEGAL ISSUES

I. Is Appellant entitled to judgment as a matter of law for sex discrimination in violation of the Minnesota Human Rights Act where the pharmacy and its head pharmacist adopted and enforced a policy permitting employees to turn away patients seeking emergency contraception to prevent pregnancy without safeguards to ensure patients can receive their time-sensitive medication?

II. Did the district court err and abuse its discretion in denying Appellant's motion for a new trial where the jury's verdict was not justified by the evidence and where there were numerous prejudicial errors in jury instructions and evidentiary rulings?

Issues Raised in the District Court:

Appellant filed motions for judgment as a matter of law and for a new trial on September 9, 2022. Appellant argued that judgment must be granted to Appellant because undisputed evidence at trial supported a ruling on liability under the Minnesota Human Rights Act ("MHRA") and Respondents did not raise any defenses or exemptions. Appellant further argued that she is entitled to a new trial because the verdict was not supported by the evidence, there were numerous substantial and prejudicial errors in jury instructions, and the court erred and abused its discretion regarding certain evidentiary rulings.

District Court Ruling:

On January 12, 2023, the district court denied Appellant's motions.

Manner Preserved:

On September 9, 2022, Appellant filed motions for judgment as a matter of law and for a new trial which were denied on January 12, 2023. Opposing counsel served written

notice of the court's order on January 30, 2023. The district court entered final judgment on March 17, 2023.

Appellant appealed the denial of her motion for a new trial on March 10, 2023, within 60 days of service of written notice of the order on Appellant. Minn. R. App. P. 104.01 subds. 1, 2; 103.03(d). Appellant appealed the denial of her motion for judgment as a matter of law on March 27, 2023, within 60 days of entry of final judgment and within 60 days of service of written notice of the order denying Appellant's motion for judgment as a matter of law. Minn. R. App. P. 104.01 subds. 1, 2. The two appeals were consolidated on April 4, 2023.

Most Apposite Authorities:

- Minn. Stat. § 363A.03 subds. 4, 34, 42
- Minn. Stat. §§ 363A.11, 363A.17
- Minn. R. Civ. P. 5A
- *Int'l Union v. Johnson Controls, Inc.,* 499 U.S. 187, 188 (1991)
- *Minn. Min. and Mfg. Co. v. State,* 289 N.W.2d 396 (Minn. 1979)
- *U.S. JayCees v. McClure*, 305 N.W.2d 764 (Minn. 1981)
- *State by McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985)
- *Black v. Snyder*, 417 N.W.2d 715 (Minn. App. 1991)
- *Potter v. LaSalle Court Sports & Health Club*, 384 N.W.2d 873 (Minn. 1986)

STATEMENT OF THE CASE

Respondents Thrifty White and George Badeaux adopted and enforced a policy that, on its face, singled out women in need of access to time-sensitive emergency contraception for denials of goods and services. As a result, Appellant Andrea Anderson, who was already a mother and foster mother and could not risk the medical complications of an additional pregnancy, was shamed and humiliated by Mr. Badeaux and had to travel two hours in inclement weather with her child in tow to obtain her time-sensitive contraceptive prescription in a different town. The jury found that Respondents had caused $25,000 worth of harm to Ms. Anderson. Yet the jury found no liability for any party for unlawful discrimination.

Where undisputed evidence at trial demonstrates that a defendant to an MHRA claim has adopted and enforced a policy that, on its face, discriminates against a member of a protected class, the plaintiff has established liability. *Minn. Min. & Mfg. Co. v. State*, 289 N.W.2d 396, 399-400 (Minn. 1979) (hereinafter *3M v. State*) (benefits plan expressly excluding pregnancy constitutes unlawful discrimination even if underlying purpose was cost-savings); *Kraft, Inc. v. State*, 284 N.W.2d 386, 387 (Minn. 1979) (rule denying full-time employment to individuals married to full-time employees is facially discriminatory based on marital status even if underlying purpose of policy was to avoid unfair nepotism); *Int'l Union v. Johnson Controls*, 499 U.S. 187, 199 (1991) (a discrimination claim based on "explicit facial discrimination" depends only on the "explicit terms of the discrimination").

Ms. Anderson plainly established liability for discrimination, and Respondents declined to raise statutory or constitutional defenses. Ms. Anderson is entitled to judgment as a matter of law. In the alternative, in light of numerous substantial errors in jury instructions and evidentiary rulings, Ms. Anderson is entitled to a new trial.

STATEMENT OF FACTS

I. Ms. Anderson And Mr. Novack's Contraception Failed And They Made The Personal Decision Not To Have Additional Children

In January 2019, Andrea Anderson resided in McGregor, Minnesota with her long-term partner, Adam Novack, and their young son. Trial Transcript ("Trial Tr.") at 518:6-25; 519:10-17; 426:21-427. Ms. Anderson's labor with her son had been long, painful, and difficult. *Id*. at 423:20-424:18; 523:1-12. Ms. Anderson and Mr. Novack also served as foster parents. *Id*. at 426:5-12; 519:18-23. Because of how difficult Ms. Anderson's labor had been, and so they could continue to have space in their home for foster children, the couple decided not to have additional biological children. *Id*. at 523:13-22; 428:10-16. On January 20, 2019, the couple were intimate and their condom broke, putting them at risk of an unplanned and unwanted pregnancy. *Id*. at 427:6-428:16; 522:5-25.

II. Emergency Contraception Is A Time-Sensitive Medication That Is Effective At Preventing Pregnancy After A Condom Fails

As Appellant's expert Kelly Cleland explained in her uncontroverted testimony, pregnancy occurs when ovulation and intercourse take place in close proximity. First, there is a spike in luteinizing hormone which results in ovulation, which is the release of an egg. Trial Tr. at 332:1-6. Then, the sperm ejaculated through intercourse fertilizes that egg. *Id*.

at 327:21-24; 328:4-6. The fertilized egg then travels through the fallopian tube and implants in the uterine lining. *Id*. at 327:24-328:3.

A condom prevents pregnancy by preventing sperm from reaching an egg. *Id*. at 332:12-20. In the event that a condom fails and sperm is released, emergency contraception, such as Plan B or ella, can prevent pregnancy. *Id*. at 333:22-334:1. EC works by delaying ovulation so that there is no egg present for the sperm to fertilize. *Id*. at 338:13-22. If ovulation does not take place within five days of intercourse, the sperm will die before it can fertilize an egg. *Id*. at 327:5-17. There is no benefit in taking EC after five days because at that point the sperm will have died, which is why EC labels contain time limits. *Id*. at 327:5-12. But because most women do not know exactly when they will ovulate, all parties agreed that EC is a time-sensitive medication, that patients should take EC as quickly as they can access it, and that any delay in access to EC could result in a pregnancy. *Id*. at 190:1-11; 344:19-345:23.[1]

III. Ms. Anderson's Doctor Prescribed Her The Only EC Considered Effective For Her, ella, Which Is Only Available By Prescription

After realizing that the condom broke, Ms. Anderson called her doctor's office. Trial Tr. at 429:1-7. After discussing Ms. Anderson's weight, a nurse at the office prescribed her ella. *Id*. at 430:21-431:10. There are different types of EC and they are not interchangeable.

[1] All parties agree EC is a time-sensitive medication. Trial Tr. at 188:17-21; 344:22-345:13. Defendant-Respondent George Badeaux believes that life begins at fertilization and that EC may also be able to impact a pregnancy after fertilization. The scientific dispute about whether EC actually can have an impact post-fertilization is immaterial to the question of liability, because Mr. Badeaux has never raised a constitutional or statutory defense related to his religious beliefs in this case. *See infra* § I.C.

The nurse specifically prescribed an EC called ella rather than the more commonly known EC Plan B because Plan B may be ineffective for women like Ms. Anderson who weigh over 165 pounds. *Id*. at 192:9-19; 323:7-324:2; 339:5-12. Ella is also considered to be more effective than Plan B overall because ella can prevent ovulation after the spike in lutenizing hormone has occurred, but Plan B cannot. *Id*. at 337:2-338:10. Additionally, Plan B is available over the counter or by prescription while ella is only available by prescription. *Id*. at 339:13-22.[2]

IV. Mr. Badeaux Called Ms. Anderson And Told Her That He Would Refuse To Fill Her Prescription The Following Day

After obtaining her prescription for ella, Ms. Anderson called Thrifty White to ensure that her medication would be covered by her insurance and that Thrifty White had access to the medication. Trial Tr. at 432:1-9. Thrifty White was the closest pharmacy to her home. *Id*. at 431:21-25. Ms. Anderson spoke to a pharmacy technician at Thrifty White, who confirmed that the medication was covered and that the pharmacy did not have ella in stock, but could order the drug, and that it would be available the next day. *Id*. at 432:11-25.

Shortly after Ms. Anderson spoke with the pharmacy technician, Thrifty White's chief pharmacist, George Badeaux, called Ms. Anderson. *Id*. at 196:10-197:12. Mr. Badeaux informed Ms. Anderson that he would not fill Ms. Anderson's prescription

[2] Many patients choose to obtain Plan B by prescription because it is less expensive with insurance cost-sharing. Trial Tr. at 192:20-193:3. As a result, a pharmacist's refusal to dispense Plan B harms patients even when Plan B is also available over the counter.

because of his personal beliefs.[3] *Id*. at 197:6-19; 434:14-435:6. Mr. Badeaux told Ms. Anderson that a different pharmacist was scheduled to be in the following day but might not show up due to a pending snowstorm. *Id*. at 197:20-24; 435:12-15. Mr. Badeaux informed Ms. Anderson that if that happened, and Mr. Badeaux was the only pharmacist working the next day, he would refuse to fill her prescription. *Id*. at 200:11-24.

Mr. Badeaux testified that the pharmacist scheduled to work the following day, Mr. Grand, had never missed work due to snow, and consistently came to work "rain or shine," but he did not communicate this to Ms. Anderson. *Id*. at 198:4-15; 208:23-209:1. Mr. Badeaux testified that he did not call Mr. Grand to see if he thought he would be able to make it in the next day, nor did he call the other pharmacists Thrifty White had on staff to see if one of them could come in the next day in light of the time-sensitive medication that would be arriving. *Id*. at 198:16-199:12; 244:20-245:2; 258:23-259:4. He did not make any arrangements with other pharmacies in the area to assist Ms. Anderson in making alternative arrangements. *Id*. at 243:8-244:2; 258:2-10; 265:5-9.

Mr. Badeaux testified that he has never filled an EC prescription and that on at least three prior occasions he had turned patients away who came to him with valid prescriptions for emergency contraception. Trial Tr. at 211:5-12. Each time he turned away a patient, he made no plan to ensure the women were able to get these time-sensitive medications without delay, stigma, or judgment. *Id*. at 211:5-220:12. Likewise, with Ms. Anderson, he intended to turn her away if he were the only one working when she showed

[3] *See* n.1, *supra*.

up, he did not make any alternative arrangements to ensure she could access her time-sensitive medication, and he left her on her own to try to find a place willing to fill her prescription. *Id*. at 201:11-202:10; 435:19-23. He also did not tell Ms. Anderson that her medication was time-sensitive and needed to be filled as quickly as possible even though part of his duties was to provide that type of information to patients and he was aware that a delay would put her at risk of pregnancy. *Id*. at 203:11-204:6; 181:21-182:19. For any medication other than EC, Mr. Badeaux would only turn patients away if there was a medical contraindication, a forged prescription, or concerns about substance abuse. *Id*. at 182:20-183:9; 718:10-719:4.

V. Thrifty White Was Aware Its Chief Pharmacist Refused To Fill EC Prescriptions, Yet It Declined to Protect Patients At Risk of Pregnancy

When Mr. Badeaux was hired for the position of chief pharmacist at Thrifty White, he did not disclose to his employer that he had refused to fill EC prescriptions in the past and that he would continue to do so. Trial Tr. at 262:14-23; 290:24-291:5. Before Ms. Anderson sought to fill her prescription, Thrifty White's owner, Matt Hutera, found out about Mr. Badeaux's prior refusals from a customer complaint. *Id*. at 262:18-23; 291:24-292:3.

In 1999, the Minnesota Board of Pharmacy had issued a newsletter bulletin regarding pharmacists who refuse to fill prescriptions for emergency contraception. ADD-1.[4] Mr. Hutera and Mr. Badeaux were aware of the bulletin by the time Ms. Anderson

[4] "ADD- __" refers to the page numbers at the bottom of the Addendum to Appellant's Brief, filed herewith.

sought to have her EC prescription filled. Trial Tr. at 266:15-21; 681:19-682:6. According to the bulletin, prescriptions for emergency contraception must be filled "for the protection of the public." ADD-1; Trial Tr. at 249:4-16. If a pharmacist refuses, he must make arrangements ahead of time to have the prescription filled by a different staff person at the pharmacy. ADD-1; Trial Tr. at 251:20-25. Pharmacists must discuss their concerns ahead of time with their management to ensure alternative staffing arrangements can be made. ADD-1. If the pharmacy refuses to fill these prescriptions, the pharmacist-in-charge must make arrangements ahead of time with a nearby pharmacy so the prescription is immediately available to the patient. *Id*.

In 2015, after Mr. Hutera received the customer complaint, he and Mr. Badeaux devised a "plan" for EC refusals. They chose not to make any advance arrangements with other pharmacies because they believed it would be better to let patients figure out for themselves where to take their prescriptions at the time of the refusal. Trial Tr. at 252:1-17; 301:25-302: 19. By the time Mr. Badeaux refused to fill Ms. Anderson's prescription in 2019, four years after the 2015 "plan," Mr. Badeaux had made no advance arrangements with any other pharmacy to fill EC prescriptions, and he did not make any advance arrangements with other Thrifty White pharmacists to provide back-up, and he had turned away yet another patient in need of EC. *Id*. at 258:2-262:5. Mr. Hutera testified that during the entirety of Mr. Badeaux's interactions with Ms. Anderson—when Mr. Badeaux called Ms. Anderson to tell her that he would refuse to fill her prescription, when he failed to tell her that her prescription was time sensitive, and when he failed to make arrangements ahead of time to ensure she could have her prescription filled quickly by another pharmacist

or at a different pharmacy—he was acting fully in accordance with the EC-specific "plan" that the two had verbally agreed upon in 2015. *Id*. at 310:14-311:18.

About a month after Mr. Badeaux refused Ms. Anderson, he and Mr. Hutera formulated a new plan. ADD-2.[5] Under the new plan, if Mr. Badeaux was working alone when someone needed an EC prescription, he would contact another pharmacist to see if they could come in. *Id*. If they came in, they could work a four-hour shift if they choose. *Id*. The pharmacist would also inform patients of other locations where they could obtain the prescription and transfer the prescription to the pharmacy of that patient's choice. *Id*. Respondents successfully asked pre-trial that Ms. Anderson be precluded from introducing evidence of this new policy which was on Ms. Anderson's exhibit list, and which Respondents characterized as a "subsequent remedial measure." ADD-99. During trial, the court rejected Ms. Anderson's repeated requests to introduce evidence about this new plan for impeachment purposes when Mr. Hutera falsely claimed that the plan all along was for Mr. Badeaux to call another pharmacist for backup, or to rebut claims of infeasibility when Mr. Hutera testified that it would not be "financially feasible" to pay other pharmacists to come in and fill EC prescriptions if Mr. Badeaux refused. Trial Tr. at 686:16-687:8.[6]

[5] Ms. Anderson was not permitted to introduce this plan at trial, but it had been the subject of motions in limine and multiple trial objections. *See infra* § II.G.
[6] *See infra* § II.G.

VI. As A Result Of Thrifty White's Policy Ms. Anderson Had To Leave Her Town To Obtain Her Time-Sensitive Medication And Suffered Anxiety, Shame, Stigma, and Added Cost

If Ms. Anderson wanted to ensure she could access her time-sensitive medication as quickly as possible, then she could not rely on Thrifty White in light of Mr. Badeaux's phone call. Trial Tr. at 448:14-25. Ms. Anderson tried to have her prescription filled at a CVS in a nearby town but was unable to have it filled there. *Id*. at 436:5-14. She ultimately had her prescription filled at Walgreens in Brainerd. *Id*. at 436:15-438:9. She had to make the long drive in unsafe winter conditions with her young child in tow to ensure she could access her medication in a timely manner. *Id*. at 441:6-23; 446:18-448:1. When she arrived at the Walgreens in Brainerd, for the first time her in life while filling a prescription, she felt watched and judged and was afraid that the pharmacist would turn her away because she was asking for a medication someone had already made her feel awful for wanting. *Id*. at 449:1-17. Thrifty White was aware that Mr. Badeaux's behavior caused Ms. Anderson added expense, and sent her a $100 gift card for gas. *Id*. at 446:8-17. The jury found that Mr. Badeaux's actions caused Ms. Anderson $25,000 in emotional harm.

VII. Thrifty White And Mr. Badeaux Chose Not To Raise Any State Or Federal Constitutional Claims Or Defenses In This Litigation

Though Mr. Badeaux testified about his religious beliefs at trial, both he and Thrifty White chose not to raise any constitutional or statutory defenses based on those religious beliefs. *See* Dkt. 10, 12, 13, 17. As a result, the Attorney General was never notified of any constitutional challenges and the constitutional issues were never raised or briefed. *See* ADD-4.

VIII. Outcome

Ms. Anderson alleged that Thrifty White discriminated against her based on sex in public accommodation. She further alleged that Thrifty White and George Badeaux discriminated against her in business. Finally, she alleged that George Badeaux aided and abetted discrimination against her. At trial, the jury answered all liability questions on the special verdict form in the negative, yet found Ms. Anderson had suffered $25,000 in emotional harm as a result of Mr. Badeaux's conduct, which was fully sanctioned by Thrifty White. ADD-31. Ms. Anderson subsequently brought a motion for judgement as a matter of law and a motion for a new trial. Dkt. 156, 159. The trial court denied both. ADD-34-74.

ARGUMENT

I. Ms. Anderson Is Entitled To Judgment As A Matter Of Law On All Of Her Claims

A. Standard Of Review

The Court of Appeals applies a *de novo* standard of review to orders denying judgment as a matter of law ("JMOL"). *Longbehn v. Schoenrock*, 727 N.W.2d 156, 159 (Minn. App. 2007) (citing *Huyen v. Driscoll*, 479 N.W.2d 76, 78 (Minn. App. 1991)). "JMOL is appropriate when a jury's verdict has no reasonable support in fact or is contrary to law." *Id.* (citing *Diesen v. Hessburg*, 455 N.W.2d 446, 452 (Minn. 1990)). Courts "must view the evidence in the light most favorable to the nonmoving party and determine whether the verdict is manifestly against the entire evidence or whether despite the jury's findings of fact the moving party is entitled to judgment as a matter of law." *Id.* (citing

Navarre v. S. Washington Cty. Schs., 652 N.W.2d 9, 21 (Minn. 2002)). "Implicit in [the rules governing review of JMOL] is the premise that there must exist some evidence to support the verdict, and if there exists no supportive evidence or if the jury's verdict is perverse and palpably contrary to the evidence, an appellate court will, and should, reverse." *Reedon of Faribault, Inc. v. Fidelity and Guar. Ins. Underwriters Inc.,* 418 N.W.2d 488, 491 (Minn. 1988) (citations omitted). There is no evidence to sustain the jury's finding that Thrifty White and George Badeaux did not discriminate against Ms. Anderson. Its verdict is palpably contrary to the evidence, and the court therefore must reverse.

B. Respondents Adopted And Enforced A Policy That On Its Face Discriminated Against Ms. Anderson Based On Her Membership In A Protected Class

1. Thrifty White Violated The Prohibition On Discrimination In A Place Of Public Accommodation

The MHRA prohibits discrimination based on sex in "place[s] of public accommodation," which include a business "whose goods [and] services" are "sold, or otherwise made available to the public." Minn. Stat. §§ 363A.03, subd. 34; 363A.11, subd. 1. Sex expressly "includes, but is not limited to, pregnancy, childbirth, and disabilities related to pregnancy or childbirth." Minn. Stat. § 363A.03, subd. 42. An outright refusal of goods or services is not required for a finding of public accommodation discrimination. Rather, it constitutes discrimination to "deny any person the *full and equal enjoyment of the goods [and] services* . . . of a place of public accommodation because of . . . sex. Minn. Stat. § 363A.11, subd. 1(a)(1) (emphasis added); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 612-615 (1984) (finding unlawful discrimination under the MHRA where

organization offered women less fulsome memberships than men). There is no dispute that Thrifty White is a place of public accommodation under Minn. Stat. § 363A.03, subd. 34. Thus, the only questions are whether Thrifty White denied Ms. Anderson the full and equal enjoyment of the goods and services it offered, and whether such denial was "because of sex." The only conclusion that can be drawn from the evidence presented at trial in this case is that the jury verdict is manifestly against the entire evidence, and Ms. Anderson is entitled to judgment as a matter of law with respect to her claim of public accommodation discrimination.

a. Thrifty White Denied Ms. Anderson Full And Equal Enjoyment Of Goods and Services

With respect to the "full and equal enjoyment" element of the claim, the district court instructed the jury, over Ms. Anderson's objection, that in order to prevail, she must show she suffered not simply a denial of "full and equal enjoyment" but also a "tangible change in conditions" or a "material disadvantage" with respect to the goods and services that were offered to the public. Trial Tr. at 760:4-766:20; 828:5-15; ADD-15.[7]

Regardless of whether the district court was correct about the relevant standard, the undisputed evidence at trial is that Ms. Anderson was treated differently from any other patient seeking any other prescription, in a material and tangible way. Indeed, the jury found that Mr. Badeaux's actions caused Ms. Anderson $25,000 in emotional harm. ADD-

[7] *See infra* § II.E. Ms. Anderson disagrees that this is the correct standard. Even if this were the proper standard, Ms. Anderson satisfies it, and she is entitled to JMOL on her public accommodations discrimination claim.

33. Thrifty White also acknowledged that its actions caused her financial harm, and sent her a $100 gift card for gas. Trial Tr. at 446:8-17.

Respondents testified that the only prescriptions Mr. Badeaux refused to fill for reasons other than a legitimate medical concern or evidence of abuse or fraud were prescriptions for emergency contraception and that no other patient would receive a call like Ms. Anderson had. Trial Tr. at 182:20-183:9; 718:10-719:4; 190:24-191:18. Mr. Badeaux also knew and declined to tell Ms. Anderson that her medication was time sensitive and that she should take it as quickly as possible, even though that type of information is typically conveyed to patients. *Id*. at 188:13-190:11; 202:11-203:5.

As a result, unlike any other patient, Ms. Anderson had to locate a different pharmacy willing to fill her prescription, leave her town, and travel two hours round trip to ensure she could receive her medication promptly. Trial Tr. at 435:16-438:9; 441:6-23; 446:18-448:1. When she arrived at the out-of-town pharmacy, for the first time her in life while filling a prescription, she felt watched and judged and was afraid the pharmacist would turn her away because she was asking for a medication someone had already made her feel awful for wanting. *Id*. at 449:1-17. The jury found that Mr. Badeaux's actions caused Ms. Anderson $25,000 in emotional harm. ADD-33.

The district court's order denying Ms. Anderson's motion for a JMOL asserts that there is other evidence the jury could have used to find Respondents were not liable for discrimination, specifically, that Mr. Badeaux did not intend to judge or humiliate Ms. Anderson. But "[w]hether a [challenged action or policy] involves disparate treatment through explicit facial discrimination does not depend on why the [defendant]

discriminates but rather on the explicit terms of the discrimination." *Johnson Controls*, 499 U.S. at 199; *3M v. State*, 289 N.W.2d at 399-400 (a policy that expressly singles out pregnancy for worse treatment is sex discrimination even if underlying purpose was a benign reason like cost savings). The relevant question for liability is not whether Mr. Badeaux intended to judge or humiliate Ms. Anderson. *LaPoint v. Family Orthodontics P.A.*, 892 N.W.2d 506, 517 (Minn. 2017) (animus is not required for a finding of discrimination based on pregnancy under the MHRA). The question is whether Thrifty White intended to deny Ms. Anderson full and equal enjoyment of its goods and services solely because she was seeking a medication to prevent pregnancy. Minn. Stat. § 363A.11.

Additionally, the wholly foreseeable impact on Ms. Anderson was not limited to shame and humiliation. Ms. Anderson had to leave her town in wintry conditions and drive for hours with her child in tow just to ensure she would receive her time-sensitive medication, shouldering inconvenience and risk that no other customer would have to. Further, even if Mr. Badeaux's intent was simply to warn her his beliefs might prevent her from timely getting her medication, that itself is a form of lesser treatment compared to other patients; patients seeking any other type of medication would not have had to endure a conversation with a pharmacist about his personal, religious, or moral beliefs, none of which are relevant to her health and medical decision making, yet all of which risked impeding her ability to obtain her prescribed medication. Even viewing the facts in the light most favorable to Respondents, no reasonable basis exists upon which to conclude that Ms. Anderson received "full and equal" service from Thrifty White.

b. Discrimination Based On Issues Related To Pregnancy And Childbirth Is Expressly A Form Of Sex Discrimination Under The MHRA

The evidence at trial demonstrates that Ms. Anderson is a member of a protected class and that Thrifty White denied her full and equal access to goods and services because of her sex. First, Respondents did not dispute that Ms. Anderson was a woman seeking emergency contraception to prevent pregnancy and that Thrifty White was fully aware of this. The only question is whether the discrimination occurred because of her sex.

In 1977, the Minnesota legislature added "pregnancy, childbirth, and disabilities related to pregnancy and childbirth" to the definition of "sex" in the MHRA. Minn. Stat. § 363A.03, subd. 42 (formerly Minn. Stat. § 363.01, subd. 29 (1977)). In 1979, the Minnesota Supreme Court noted that this amendment clarified that the original legislative intent all along was to include discrimination related to pregnancy. *3M v. State*, 289 N.W.2d at 399.

The holding in *3M v. State* compels the conclusion that Ms. Anderson was discriminated against because of her sex. As discussed above, Respondents admitted that the only reason she received a call from Mr. Badeaux telling her that he would refuse to fill her prescription is that she was seeking a prescription for emergency contraception—a prescription to prevent pregnancy. As discussed, Thrifty White knew of and sanctioned these actions by Mr. Badeaux.

The policy adopted by Thrifty White and applied to Ms. Anderson singled out women seeking medication related to pregnancy for refusals. In *3M v. State*, it did not matter that 3M's actions were not intended to harm women, only to save money. 289

N.W.2d at 399; *cf. Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1742 (2020) (holding that "intentional discrimination based on sex violates Title VII, even if it is intended only as a means to achieving the employer's ultimate goal . . ."); *see also Johnson Controls*, 499 U.S. at 199 (liability is based on the "explicit terms of the discrimination" and "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect."). In *3M v. State*, a desire to reduce costs was not a defense to a policy that expressly singled out a protected class for lesser treatment. 289 N.W.2d at 400. The undisputed evidence in this case demonstrates that Mr. Badeaux and Thrifty White adopted and enforced a facially discriminatory policy. Ms. Anderson is entitled to judgment as a matter of law on her claim of discrimination in public accommodations.

2. Thrifty White And George Badeaux Committed Business Discrimination Against Ms. Anderson.

Business discrimination under the MHRA requires Ms. Anderson to prove that Mr. Badeaux and/or Thrifty White intentionally refused to do business with her because of her sex. Minn. Stat. § 363A.17. The same analysis as above applies to the "because of her sex" element of this claim and is incorporated here. The remaining elements of (1) intent and (2) refusal, are also irrefutably established by the evidence at trial. Thrifty White intentionally adopted a facially discriminatory policy targeting women in need of medication to prevent pregnancy and intentionally applied this policy to Ms. Anderson, causing her emotional harm. Furthermore, although the jury did not reach the question,

neither Mr. Badeaux nor Thrifty White proved that there was a legitimate business purpose for their actions.

As defined in the Court's jury instructions, a "legitimate business purpose" means there is an overriding legitimate, non-discriminatory business purpose necessary for safe and efficient operation of the business, and there are no other acceptable alternative policies or practices which would better accomplish the business purpose or accomplish it equally well with a lesser differential discriminatory impact. ADD-18; *Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 879 (6th Cir. 1973).[8] Ms. Anderson was not permitted to introduce evidence at trial about the alternative policy Thrifty White put in place *after* Ms. Anderson was denied service to better achieve its goals while lessening the impact on customers, even after Thrifty White claimed at trial such a policy would not be financially feasible. *See infra* § II.G. However, Thrifty White could have heeded the pharmacy board's 1999 recommendation, which existed to safeguard patient health and safety in the case of pharmacist refusals. ADD-1. It simply declined to do so. Trial Tr. at 252:1-17; 301:25-302:19; 258:2-262:7. Accordingly, Ms. Anderson is entitled to judgment as a matter of law with respect to her claim of business discrimination against Thrifty White and Mr. Badeaux.

[8] Minnesota courts have not determined whether to adopt the standard laid out in *Head* as the legitimate business purpose standard under the MHRA. In any event, Ms. Anderson can easily meet this definition.

a. Mr. Badeaux and Thrifty White Acted Intentionally

According to the Court's jury instructions, a person acts intentionally for the purposes of business discrimination when they either (1) want to cause the consequences of their acts; or (2) knows that their acts are substantially certain to cause those consequences. ADD-19. As discussed below, this instruction was erroneous because it applies to intentional torts, not MHRA claims. *See infra* § II.D. This court reviews Ms. Anderson's request for JMOL *de novo*, and should apply the proper standard, though she should prevail under either standard.

With respect to Mr. Badeaux, the undisputed evidence presented at trial demonstrates that he acted intentionally in his interactions with Ms. Anderson. Thrifty White intentionally adopted and enforced a facially discriminatory policy targeting women in need of emergency contraception to prevent pregnancy. This satisfies the correct definition of "intent" under the MHRA. *Compare In re Geiger*, 113 F.3d 848 (8th Cir. 1997) (intentional torts are based on the consequences of an act rather than the act itself) *with* Minn. Stat. § 363A.17(3) (it is unlawful to "intentionally refuse to do business with [another] because of a person's . . sex"); *Krueger v. Zeman Constr. Co.*, 758 N.W.2d 881, 886 (Minn. App. 2008) (noting that plaintiff could have brought a business discrimination claim on the theory that defendant "intentionally refus[ed] to do business with her.").

To the extent this Court applies the intentional tort definition of intent to the MHRA, Thrifty White wanted to cause, or knew its actions would cause, the consequences Ms. Anderson faced, and the $25,000 in damages the jury found she suffered. Mr. Badeaux acted intentionally when he picked up the phone to unnecessarily insert himself in the

process of Ms. Anderson receiving her prescription, and when he did not inform her of the time-sensitive nature of her prescription or of the fact that he was actually quite confident Mr. Grand would come in the next day. Mr. Badeaux also acted intentionally when he failed to make alternative arrangements for Ms. Anderson or any other woman seeking prescription EC. Trial Tr. at 258:2-259:4; 261:24-262:7; 620:11-621:2. This was not the first time Mr. Badeaux intentionally interfered with a woman's attempt to fill an EC prescription. *See generally* Trial Tr. at 211:5-221:19. Each time, Mr. Badeaux failed to help the women find another pharmacy or pharmacist to fill their prescription. *Id*. at 241:16-10; 243:8-244:4; 261:4-14. He did not tell them they could purchase the medication over the counter. *Id*. at 238:10-239:17. And he knew that each woman had walked away feeling judged. *Id*. at 567:22-568:20. He hid these interactions from his employer, both when he was initially employed and even after they developed a "plan" to address them. *Id*. at 232:7-234:12; 262:14-263:12. His intent was to dissuade, not assist. This evidence demonstrates that Mr. Badeaux *wanted* to cause the consequences of his actions—preventing these women from obtaining their prescriptions to the extent possible. Mr. Badeaux made no back-up plans to ensure Ms. Anderson could still access her time-sensitive medication at Thrifty White or at any other pharmacy, despite having guidance from the pharmacy board. With this evidence, no reasonable juror could conclude that Mr. Badeaux did not know that the consequence of his actions would be to provide a lesser degree of service to Ms. Anderson based on the fact that she was seeking a medication that would prevent her from getting pregnant.

Thrifty White also knew that the consequences of the "plan" it put in place were substantially certain to cause women to be turned away without their time-sensitive prescriptions and forced to find alternatives on their own. Trial Tr. at 718:4-719:4. Thrifty White's knowledge and intent is further demonstrated by the fact that Mr. Hutera testified that he knew about the pharmacy board's guidance, but that while they relied on it for purposes of allowing Mr. Badeaux to refuse to fill EC prescriptions, they declined to protect the public by implementing the second half of the guidance, which required the pharmacist "to make arrangements with a nearby pharmacy" to fill these prescriptions. ADD-1; *see* Trial Tr. at 684:11-21; 717:23-719:4. In other words, Respondents accepted the part of the guidance that worked for them but rejected the part that told them what to do to protect patients in need of time-sensitive medication to prevent pregnancy.

b. Mr. Badeaux And Thrifty White Refused To Do Business With Ms. Anderson

The undisputed evidence at trial showed that Mr. Badeaux told Ms. Anderson that he would refuse to fill her prescription and that he meant it. Trial Tr. at 200:11-25. He had refused to fill three prior prescriptions for emergency contraception and had no intention of filling Ms. Anderson's.

With respect to Thrifty White, Mr. Badeaux's actions were taken on behalf of Thrifty White and in full accordance with Thrifty White's policy. Thus, a refusal by Mr. Badeaux is a refusal by Thrifty White. Second, Thrifty White's policy was to allow Mr. Badeaux to refuse to fill prescriptions. For Ms. Anderson, that policy required her to spend extra time, energy, and money to get a time-sensitive prescription from a pharmacy in a

different town. The only alternative was to go to Thrifty White knowing the chief pharmacist intended to turn her away without helping her get her medication elsewhere or from a different pharmacist in a timely manner. No reasonable fact finder could conclude otherwise.

c. No Legitimate Business Purpose Supports Respondents' Refusal

Although the jury did not reach this issue, the district court opined in its order denying Ms. Anderson's motion for JMOL that the jury could reasonably have found there was a legitimate business purpose for turning away women seeking EC because it was difficult for a rural pharmacy to hire pharmacists. If this were the law, however, this exception would drive a truck-sized hole through the MHRA, and deprive the 40 percent of Minnesotans living in rural Minnesota of anti-discrimination protections. As a matter of law, the Court can conclude that a tight labor market, in itself, is not a permission slip to discriminate.

Tight labor market aside, Respondents could have adopted the recommendations of the pharmacy board to protect the public in case of pharmacist refusal, but they declined to do so. Additionally, after Ms. Anderson was turned away, Thrifty White adopted a policy that would have required Mr. Badeaux to try to find a backup pharmacist or to recommend specific pharmacies nearby that would willingly dispense the medication. ADD-2. Despite the fact that Respondents expressly testified at trial that such a plan was not financially feasible, Ms. Anderson was not permitted to produce evidence of this subsequent policy to rebut that claim. *See infra* § II.G. Under the district court's definition, a legitimate business

purpose is essentially any reason a defendant comes up with to justify unlawful discrimination regardless of whether feasible alternatives could lessen the impact of their behavior. Respondents were aware of feasible alternatives and chose not to use them. They did not have a legitimate business purpose to turn Ms. Anderson away.

3. George Badeaux Aided And Abetted Thrifty White's Discrimination.

Ms. Anderson is entitled to a judgment as a matter of law against Mr. Badeaux on the aiding and abetting claim. The MHRA provides, "[i]t is an unfair discriminatory practice for any person . . . intentionally to aid, abet, incite, compel, or coerce a person to engage in any of the practices forbidden by this chapter . . . " or to "intentionally obstruct or prevent any person from complying with [the MHRA]." Minn. Stat. § 363A.14(1), (3). An employee may be held liable for aiding and abetting an employer's MHRA violation, to the extent that an employer's liability did not arise solely from that employee's own conduct. *See Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 801 (Minn. 2013). For purposes of aiding-and-abetting liability, an individual's acts satisfy the intentionality requirement if those actions were objectively unreasonable. *Davis v. Hennepin Cty.*, 559 N.W.2d 117, 123 (Minn. App. 1997). For an individual to be held liable for aiding and abetting business discrimination under the MHRA, that individual must have input into the daily operations of the business. *See Bailey v. Millennium Charity Plus, Inc.*, No. Civ. 03-3181 (DWF/SRN), 2005 WL 2105540, at *7 (D. Minn. Aug. 30, 2005). An individual or entity is liable for aiding and abetting a violation of the MHRA when the principal intended to take actions, those actions amounted to unlawful discrimination, and the accomplice gave "substantial assistance or encouragement to the other." *Matthews v. Eichorn Motors,*

Inc., 800 N.W.2d 823, 830 (Minn. App. 2011) (citing Restatement (Second) of Torts § 876(b)).

There is no dispute that Mr. Badeaux (1) had direct influence over and input into the daily operations of Thrifty White; (2) that Mr. Badeaux and Mr. Hutera jointly developed the facially discriminatory policy in place at Thrifty White that allowed Mr. Badeaux to turn away patients with EC prescriptions; and (3) that Mr. Badeaux was acting pursuant to that policy when he turned Ms. Anderson away. Mr. Badeaux's conduct in developing such a policy was objectively unreasonable, not only because it was facially discriminatory, but also because it did not even comport with the pharmacy board's guidance document, which instructed pharmacists to ensure that alternatives were immediately available. For these reasons, Mr. Badeaux is liable for aiding and abetting Thrifty White's discrimination against Ms. Anderson, as a matter of law.

C. Respondents Are Not Entitled To A Religious Exemption At Trial Where MHRA Claims Lack Any Statutory Exemption And Respondents Declined To Raise Constitutional Defenses

At trial, Respondents' primary defense against the MHRA claims relied on an argument that their lesser treatment of Ms. Anderson was motivated not by her sex—specifically, her capacity to become pregnant—but by Mr. Badeaux's personal beliefs about her capacity to become pregnant and Thrifty White's desire to accommodate those beliefs.[9] *See, e.g.*, Trial Tr. at 160:11-21; 162:8-15; 601:14-20. As discussed below, this is

[9] Because no relevant defense was raised, neither the court nor the jury was ever asked to consider whether Thrifty White could lawfully fire Mr. Badeaux rather than allow him to continue to violate the rights of Thrifty White's patients. Under Title VII case law at the

not a legally permissible defense in this case. Yet, in the court's denial of Ms. Anderson's request for JMOL, the court stated that the adoption of facially discriminatory policy cannot violate the MHRA because this would run afoul of the Minnesota and United States constitutional guarantees of free exercise of religion. ADD-14. As a result, the district court indicated (for the first time) that it did not instruct the jury that a facially discriminatory policy violates the MHRA as requested by Ms. Anderson, and further declined to grant Ms. Anderson's request for JMOL, because the court believed the proper reading of the MHRA would be unconstitutional. Respondents have never raised any constitutional claims in this case, and the parties never briefed the question of whether the MHRA violates the state or federal constitution. *See Bostock*, 140 S. Ct. at 1754 (declining to address defendants' free exercise claims in relation to an anti-discrimination law where they declined to affirmatively raise the issue).

An employee's personal beliefs do not provide carte blanche to discriminate. The MHRA recognizes a number of statutory exemptions from its general ban on

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time of Mr. Badeaux's refusal, requiring an employer "to bear more than a de minimis cost" to provide a religious accommodation constituted an undue hardship and was not required under Title VII. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). After this appeal was docketed, the U.S. Supreme Court ruled that an employer can deny a religious accommodation where "the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." *Groff v. DeJoy*, No. 22-174, 2023 WL 4239256, at *11 (U.S. June 29, 2023). Accepting as true Mr. Hutera's testimony that providing non-discriminatory service to its patients while continuing to employ Mr. Badeaux would not be financially feasible and would have shut down the only pharmacy in a small town, Trial Tr. at 686:16-687:8, 719:5-721:10, Thrifty White could have lawfully fired Mr. Badeaux under either the *Groff* or *Trans World Airline* standard rather than allow him to continue discriminating against patients like Ms. Anderson.

discrimination, *see* Minn. Stat. §§ 363A.26 (MHRA exemption in enumerated contexts for religious associations, religious corporations, or religious societies); 363A.24 (exemption to public-accommodation law for restrooms, locker rooms, youth programming, sports teams), but it does not exempt discriminatory treatment resulting from a secular corporation's employee's personal views. *See* Minn. Stat. § 645.19 ("Exceptions expressed in a law shall be construed to exclude all others."). If discriminating because of one's personal beliefs about another person's sex, race, religion, or other protected status could insulate a defendant from MHRA liability, these limited statutory exemptions would be redundant. Indeed, providing a generalized exemption for discriminatory conduct resulting from a defendant's personal beliefs would swallow the rule against discrimination. *Cf. Newman v. Piggie Park Enterps., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966) (finding Title II violation by owner of whites-only restaurant chain who opposed racial integration on religious grounds, holding owner "does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens"), *rev'd on other grounds Newman v. Piggie Park Enters., Inc.*, 377 F.2d 433 (4th Cir. 1967); *see also 303 Creative LLC v. Elenis*, No. 21-476, slip op. at 12-13 (U.S. June 30, 2023) (reaffirming the state's "compelling interest in eliminating discrimination in places of public accommodation" and the role anti-discrimination laws play in "vindicat[ing] the deprivation of personal dignity that surely accompanies denials of equal access to public establishments," citing *Roberts*, 468 U.S. at 628 and *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968)).

To seek an exemption from a law on constitutional grounds, a defendant must affirmatively raise a statutory or constitutional claim. *Compare Bostock*, 140 S. Ct. at 1754 (declining to address defendants' statutory and constitutional free exercise claims in relation to an anti-discrimination law where defendants declined to affirmatively raise the issue), *with Black v. Snyder*, 471 N.W.2d 715 (Minn. App. 1991) (addressing defendant's First Amendment claim where they expressly sought exemption from MHRA on religious grounds), *Burwell v. Hobby Lobby Stores Inc*., 573 U.S. 682 (2014) (addressing Hobby Lobby's religious liberties claim made under the Religious Freedom Restoration Act for a religious exemption to the Affordable Care Act), *and Masterpiece Cakeshop, LTD v. Co. Civil Rights Com'n.*, 138 S. Ct. 1719 (2018) (addressing Masterpiece Cakeshop's religious liberties claim affirmatively made under the First Amendment for a religious exemption to Colorado's anti-discrimination laws).

The question of whether a law unlawfully burdens a person's religious practice requires discovery, briefing, and consideration of issues separate and distinct from the question of statutory liability including: 1) the nature of the constitutional infringement; 2) the proper level of scrutiny; 3) the nature of the state's interest in the challenged law; 4) whether the law is sufficiently related to the state's interest; and, depending on the level of scrutiny, 5) whether the law is narrowly tailored to meet that interest. *See Skeen v. State*, 505 N.W.2d 299, 315-16 (Minn. 1993); *see also State by McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 851-52 (Minn. 1985) (explaining that where an individual claims that the MHRA violates their constitutional religious liberties, the court must then determine whether the law burdens the defendant's free exercise of religion, whether such

burden is justified by a compelling government interest, and whether the statute is the least restrictive means to achieve the states goals); *Black*, 471 N.W.2d at 718-19 (explaining the process for analyzing defendant's claim that the MHRA violates their constitutional religious liberties).

The MHRA provides no relevant statutory exemption for religious refusals, and Respondents chose not to plead any constitutional defense. *See generally* Dkt. 10 at 3; Dkt. 13 at 7-8. Additionally, the Attorney General was not notified as required when parties raise constitutional challenges, which means the state did not have the opportunity to present its interest in the challenged law. Minn. R. Civ. P. 5A. Where a defendant does not properly and affirmatively raise the issue, the court may not consider it. *Bostock*, 140 S. Ct. at 1754 (declining to address religious liberties claims in Title VII case where defendant declined to affirmatively raise the issue). Given that Respondents declined to raise a constitutional issue and none was ever litigated in the district court, it is an error to effectively *sua sponte* determine that a plain reading of the MHRA would be unconstitutional as applied to Respondents. Where a facially discriminatory policy is applied to a plaintiff and harms her, she is entitled to relief under the MHRA absent an exemption or defense. *Johnson Controls*, 499 U.S. at 199-200 (finding that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect" and to prevail defendants instead must raise and meet the requirements of an express statutory defense such as a bona fide occupational qualification in the Title VII context). Respondents had the option of raising a

constitutional claim but chose not to. The district court cannot litigate this issue on Respondents' behalf without participation of the parties or the state.

II. Ms. Anderson Is Entitled To a New Trial

A. Standard of Review

This court typically reviews a district court's decision to grant a new trial for an abuse of discretion. *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018) (citing *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 892 (Minn. 2010)). But when a district court decides a motion for a new trial because of an error of law rather than an exercise of discretion, a de novo standard of review applies. *Halla Nursery, Inc. v. Baumann-Furie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990).

A jury verdict may be set aside if it is "not justified by the evidence, or is contrary to law . . ." Minn. R. Civ. P. 59.01. The applicable test is whether "the verdict is so contrary to the preponderance of the evidence as to imply that the jury failed to consider all the evidence or acted under some mistake or from some improper motive, bias, feeling or caprice, instead of honestly and dispassionately exercising its judgment." *LaValle v. Aqualand Pool Co., Inc*., 257 N.W.2d 324, 328 (Minn. 1977). It is a less demanding standard than the standard for granting JMOL. *Clifford v. Gerritom Med, Inc.*, 681 N.W.2d 680, 687 (Minn. 2004).

A new trial may also be granted where errors of law occur at trial. Minn. R. Civ. P. 59.01. "[A] court errs if it gives a jury instruction that materially misstates the law." *George v. Estate of Baker*, 724 N.W.2d 1, 10 (Minn. 2006) (citation omitted). The question of whether a jury instruction was erroneous is reviewed *de novo*. *Christie*, 911 N.W.2d at

838. The error in jury instruction necessitates a new trial where the error was prejudicial, which means there is a reasonable likelihood that a more accurate instruction would have changed the outcome of the case. *Id*. (citations omitted). "A new trial is also required if the instruction was erroneous and its effect cannot be determined." *Id.* Errors may be found both in the content of the instructions provided and also based on instructions that were erroneously omitted. *Becker v. Alloy Hardfacing & Eng'g Co.,* 401 N.W.2d 655, 659 (Minn. 1987) (reversing and remanding for new trial based on omission of instruction).

A new trial may also be granted for evidentiary errors. An evidentiary error will compel a new trial if it results in prejudicial error to the complaining party. *George*, 724 N.W.2d at 9 (citation omitted). "An evidentiary error is prejudicial if it might reasonably have influenced the jury and changed the result of the trial." *Id.* (citation omitted).

B. The Verdict of No Liability Is Not Justified By The Evidence And Is Contrary To Law Where Respondents Adopted And Enforced A Facially Discriminatory Policy Resulting In $25,000 of Emotional Harm To Ms. Anderson

Ms. Anderson is entitled to a new trial because the verdict of no liability is not justified by the undisputed evidence presented at trial, as described above in Section I.B. The Court's ruling involved substantial errors of law and also constituted an abuse of discretion.

The court deferred to its JMOL ruling in denying Ms. Anderson's motion for a new trial based on the verdict being contrary to the evidence. ADD-59. The Court's JMOL order was based on the following errors of law: 1) it required Ms. Anderson to prove she suffered a "tangible change in conditions" or a "material disadvantage" in a case involving a facially

discriminatory policy in business and public accommodations, ADD-43-44; *infra* § II.E; 2) it found as a matter of law that a facially discriminatory policy is non-discriminatory if it was not adopted based on animus or a desire to harm a protected class, ADD-44-50; *3M v. State,* 289 N.W.2d at 396 (a policy that expressly singles out pregnancy for worse treatment is sex discrimination even if underlying purpose for doing so was a benign reason such as cost savings); *Johnson Controls*, 499 U.S. at 200 (a policy preventing women from working certain positions was discriminatory regardless of the "beneficence of an employer's purpose"); 3) it granted Respondents a religious exemption where none had been affirmatively claimed, the issue had not been briefed, and the state was not notified, ADD-44-50; *supra* § I.C; 4) it applied the *McDonnell-Douglas* test to a direct-evidence case involving disparate treatment resulting from a facially discriminatory policy targeting women seeking EC to prevent pregnancy, ADD-50; *Goins v. W. Grp*., 635 N.W.2d 717, 722 (Minn. 2001) (citations omitted) ("Courts have found direct evidence of discriminatory motive where a statement or a policy is discriminatory on its face."); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) ("[T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination."); and 5) it applied the definition of intent used solely for intentional torts to an MHRA claim, ADD-51-52; *infra* § II.D.

The court's ruling also constitutes an abuse of discretion. The evidence at trial demonstrates that Respondents adopted a facially discriminatory policy targeting women seeking EC to prevent pregnancy, enforced this policy against Ms. Anderson, and harmed

her in doing so. This is sufficient for a finding of liability. *3M v. State*, 289 N.W.2d at 396; *Johnson Controls*, 499 U.S. at 200; *supra* § I.

Additionally, the district court instructed the jury that, for the business discrimination claim, Respondents could prevail if the they had a legitimate business interest in the unlawful discrimination. The court held that this requires consideration of alternative policies or practices. ADD-18. In its ruling, the court disregarded undisputed evidence demonstrating that Thrifty White chose not to avail itself of alternative policies and practices that could have prevented the harm to Ms. Anderson, such as the 1999 pharmacy board guidance. *See* ADD-52-53.

The jury's verdict is contrary to the preponderance of the evidence and must be set aside. *LaValle*, 257 N.W.2d at 324. For all of the reasons discussed in Section I.B. and I.C. above, Ms. Anderson is entitled to a new trial.

C. The Court Erred By Instructing The Jury That It Could Not Hold An Employer Accountable For The Actions Of Its Employee

Under the MHRA, an employer is liable for the conduct of its employees when it knows or should have known of the conduct and fails to take responsive action. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564-65 (Minn. 2008). In some circumstances, an employer is strictly liable for a supervisory-level employee's discriminatory actions. *Id*. at 566-71. But in this case, the Court gave the jury an opposite instruction: that the jury *could not* consider Mr. Badeaux's actions to determine Thrifty White's liability.

Though this case proceeded to trial against two defendants, Thrifty White and George Badeaux, only Thrifty White was charged with public accommodations

discrimination. ADD-13. At trial, the owner of Thrifty White testified that Mr. Badeaux was acting in accordance with Thrifty White's policies at all times during his interaction with Ms. Anderson. Trial Tr. 728:19-729:2. Given this undisputed testimony, if the actions of George Badeaux were discriminatory, then as a matter of law, Thrifty White must be held liable for that discrimination. *See U.S. Jaycees v. McClure*, 305 N.W.2d 764, 774 (Minn. 1981) (finding Jaycees organization could violate public accommodations discrimination law by adopting and enforcing a facially discriminatory policy against women); *Bilal v. Nw. Airlines, Inc.*, 537 N.W.2d 614, 619 (Minn. 1995) (finding that plaintiff could have been successful had she shown discrimination "on the part of NWA *or its employees*") (emphasis added)); *Potter v. LaSalle Sports & Health Club*, 368 N.W.2d 413, 414-15, 418 (Minn. App. 1985) (hereinafter "*Potter I*") (finding prima facie case of discrimination in public accommodations against health club where employees targeted gay men for enforcement of a facially neutral policy); *Bray v. Starbucks Corp.*, No. A17-0823, 2017 WL 6567695, at *1-2, *9 (Minn. App. 2017) (denying defendant summary judgment where plaintiff sued Starbucks for discrimination based on actions of its employees); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 WL 1197415, at *19 (D. Minn. Mar. 16, 2015) (finding plaintiff could prevail against defendant Fairview if he established "that, pursuant to the MHRA, he was denied the full and equal enjoyment of an individual seeking professional and humane medical care *from an emergency room physician*" (emphasis added)).

On December 21, 2021, Ms. Anderson sought an instruction specifying that she could prevail if she were to establish that Thrifty White denied her full and equal services

because she was seeking emergency contraception or that Thrifty White maintained a discriminatory policy and it was applied to Ms. Anderson by Thrifty White or its agent(s). Dkt. 113 at 16. On August 2, 2022, mid-trial, Ms. Anderson learned that the Court would not use her proposed instruction. Trial Tr. 767:5-15. Instead, the Court intended to instruct the jury that Ms. Anderson could establish public accommodations discrimination by proving that she is a member of a protected class and that Thrifty White denied her full and equal enjoyment of goods or services because of her sex. ADD-15. The draft instructions included no reference to agents or policies.

To compound the confusion, the Court opted to include a multiple defendant instruction without also including a caveat anywhere else in the instructions informing the jurors of when they *must* consider Thrifty White responsible for the actions of Mr. Badeaux. ADD-12. The multiple defendant instruction informed jurors that there were two defendants in the lawsuit and they were being tried separately and must be judged separately, and that judgement about one defendant should not influence jurors' judgment about the other defendant. *Id.*

Ms. Anderson timely objected upon being presented with the Court's instructions and sought inclusion of language specifying (1) that a company is responsible for the actions of its employees acting within the scope of their employment, and (2) that Thrifty White could be liable for discrimination by virtue of adopting a discriminatory policy that is enforced by its employees. Trial Tr. at 767:1-769:13; 831:10-833:17. In addition to oral objections and requests for modifications, Ms. Anderson's counsel also emailed proposed language, at the Court's direction, asking the Court to instruct the jury that, "Thrifty White

is a corporation and can act only through its officers and employees. The conduct of an officer or employee acting within the scope of their employment is the conduct of the corporation." ADD-30. The Court did not include this proposed language and maintained the multiple defendant instruction without any caveats or clarifications. ADD-12.

During closing statements, Ms. Anderson's counsel argued that "Thrifty White is not only Mr. Hutera, it is also his employees including its chief pharmacist, Mr. Badeaux. . . . If you find that Thrifty White's pharmacist-in-charge, Mr. Badeaux, discriminated in his official employment following Thrifty White's policies, you must also find that Thrifty White discriminated." Trial Tr. at 887:20-888:5 Thrifty White objected and the jury was excused for a lengthy period of time for argument. *Id.* at 887:6-890:5. When the jury returned, Ms. Anderson's counsel was able to continue with this statement. *Id.* at 895:2-16.

However, during Thrifty White's closing statement, its counsel pointed to the multiple defendant instruction and correctly noted that despite what Ms. Anderson had argued, "[T]his instruction says nothing about George Badeaux's actions being the actions of Thrifty White. You need to read the instructions and follow what the judge tells you." *Id*. at 937:2-14. In this regard, Thrifty White's statements were incorrect and misleading, but accurately characterized the Court's ruling regarding the law of the case as reflected in the jury instructions.

In effect, the Court affirmatively instructed the jury that it could not hold Thrifty White accountable even if George Badeaux fully complied with Thrifty White's policy when denying Ms. Anderson "full and equal" access to goods and services. Ms. Anderson

proved, through undisputed evidence admitted by Respondents themselves, that Mr. Badeaux was acting at all relevant times within the scope of his employment and pursuant to store policy. The jury instructions were erroneous and prejudicial.

D. The Court Erred In Instructing The Jury That It Must Find That A Defendant Intended The Consequences Of Its Actions Under the MHRA

Regarding Ms. Anderson's business discrimination claim and aiding and abetting claim, Thrifty White requested an instruction specifying that "intent" or "intentionally" means that a person: "1. Want[s] to cause the consequences of his or her acts, or 2. Knows that his or her acts are substantially certain to cause those consequences." Dkt. 135 at 6. In support, Thrifty White provided the Court with a copy of jury instructions defining "intent" in the context of intentional torts, for a battery claim. Dkt. 160, ¶5 and Ex. B. The Court granted the request over Ms. Anderson's objection. ADD-19.

It is well-established that with respect to *intentional torts*, the actor must "intend the consequences of an act, not simply the act itself." *Kawaauhau v. Geiger*, 523 U.S. 57, 61–62 (1998) (citations and quotations omitted); *see also In re Geiger*, 113 F.3d at 852 (the legal category of intentional tort "is based on 'the consequences of an act rather than the act itself'" (quoting Restatement (Second) of Torts § 8A, cmt. a, at 15 (1965))). The MHRA does not include this additional element requiring the actor to intend both the act itself and the consequences of the act. This instruction was erroneous.

Under the MHRA, it is unlawful discrimination "to intentionally refuse to do business with [another] because of a person's . . . sex." Minn. Stat. § 363A.17(3). "Intent" for a discrimination claim is established by showing that there is a link between the

protected class and the action alleged to be discriminatory. *See LaPoint*, 892 N.W.2d at 513 (holding that a plaintiff must show that her protected characteristic "actually motivated" the defendant's negative action). Unlike with intentional torts, there is no additional requirement that the defendant intended any further consequence or results in order to trigger liability. *See, e.g.*, *Krueger*, 758 N.W.2d at 886 (noting that plaintiff could have brought, but declined to bring, a business discrimination claim on the theory that the defendant discriminated by "intentionally refusing to do business with her").

Respondents presented no authority for including this heightened, additional intent element and it was reversible error for the district court to require it.

E. The Court Erred In Requiring Ms. Anderson To Prove She Suffered The Equivalent Of An Adverse Employment Action In A Non-Employment Case Involving A Facially Discriminatory Policy

On December 21, 2021, Ms. Anderson proposed a jury instruction for public accommodations discrimination. Dkt. 113. She asked the court to instruct the jury that she could prove this claim two ways: "if she proves by a preponderance of the evidence that Thrifty White denied Ms. Anderson full and equal access to goods and services, compared to other customers, because she was seeking emergency contraception" or "if Thrifty White maintained a policy allowing Thrifty White pharmacists to deny full and equal service to individuals seeking emergency contraception, compared to other customers, and the policy was applied to Ms. Anderson by Thrifty White or its agent(s)." *Id.* at 16.

The court denied Ms. Anderson's request in its entirety. Instead, the court instructed the jury that Ms. Anderson had to prove that "Thrifty White denied her full and equal enjoyment in goods or services because of her sex." ADD-15. The court further instructed

that "there was a violation of 'full and equal enjoyment' in the goods and services offered by Thrifty White if Andrea Anderson received a material disadvantage or tangible change in conditions in the goods or services offered to the public." The court went on to define "material disadvantage" as "inferior service" and "tangible change in conditions" as "more than minor differences in services or access to goods." ADD-15-17. Ms. Anderson objected to the requirement that she prove that she suffered a material disadvantage or tangible change in conditions. Trial Tr. 760:4-766:20; 828:5-15. The court included the instruction over her objection. ADD-15-17.

The phrases "material disadvantage" and "tangible change in conditions" apply to employment discrimination claims. *See Bahr v. Cappella Univ*., 788 N.W.2d 76, 83 (Minn. 2010) (stating that an "adverse employment action" for purposes of the MHRA must "include some tangible change in duties or working conditions" and must involve "some material employment disadvantage"). No Minnesota state court has ever required a plaintiff to prove she suffered a "material disadvantage" or a "tangible change in conditions" in the context of a public accommodations discrimination claim.[10]

[10] The only court that has ever applied the equivalent of an "adverse employment action" to a public accommodations claim is a federal district court in an unpublished opinion. *See Rumble v. Fairview Health Servs*., 2015 WL 1197415, at *19. In *Rumble*, the court mistakenly claimed that Minnesota courts require "some tangible change . . . in conditions, or some material . . . disadvantage" in order to find discrimination under every provision of the MHRA. *Id*. (internal quotation marks omitted). In support, the court cited exclusively to employment discrimination cases, many of which did not even involve the MHRA. *Id*. (citing *Bahr*, 788 N.W.2d at 83 (defining "adverse employment action" under the employment discrimination provision of the MHRA); *Burchett v. Target Corp*., 340 F.3d 510, 518 (8th Cir. 2003) (defining "adverse employment action"); *Brannum v. Mo. Dep't of Corr*., 518 F.3d 542, 549 (8th Cir. 2008) (defining "adverse employment action" under

This Court has previously instructed that courts should afford different interpretations to different provisions of the MHRA, particularly where the provisions do not mirror one another in language or scope. *See N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553, 560 (Minn. App. 2020) (expressly declining to apply prior interpretation of MHRA employment discrimination provision to the MHRA education discrimination provision because the two provisions have different language and scope).

The plain language of the MHRA requires only that Ms. Anderson prove she did not receive "full and equal enjoyment of the goods, services, facilities, privileges, and advantages [of Thrifty White]. . . because of . . . sex." Minn. Stat. § 363A.11, subd. 1(a)(1). It is well-established under Minnesota law that "[w]hen an individual or a company has been held to have violated the provisions of a specific civil rights law, the act of discrimination itself constitutes sufficient injury for the law to provide a remedy, in the absence of statutory language requiring more." *Potter v. LaSalle Court Sports & Health Club*, 384 N.W.2d 873, 875 (Minn. 1986) (hereinafter "*Potter II*"). In *Potter II*, a health club wanted to "reduce or eliminate the 'gay atmosphere' by, among other things, preventing or discouraging homosexual members from congregating and loitering in the workout room." *Id*. at 874. It adopted a "workout or leave" policy that prohibited loitering, and targeted gay customers for enforcement of the policy. *Id*. at 874-75. The club was ultimately found liable for discrimination that caused $0 in damages, but the plaintiff was

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Title VII in a case that did not involve MHRA claims); and *Jones v. Fitzgerald*, 285 F.3d 705, 714 (8th Cir. 2002) (discussing adverse employment action under Title VII in a case that did not involve MHRA claims)).

awarded $1,000 in punitive damages. *Id*. at 874, 876. The defendant in *Potter II* argued that "telling a member to 'workout or leave' is too trivial a matter to be an injury." *Id*. at 875. The court rejected this argument, noting that the discriminatory act, in itself, constitutes sufficient injury to warrant a remedy. *Id*. While *Potter II* involved a city ordinance prohibiting discrimination in public accommodations, the Minnesota Supreme Court approvingly quoted *Potter II* in an MHRA case, finding that "the act of discrimination itself constitutes sufficient injury for the law to provide a remedy" under the MHRA as well. *Krueger v. Zeman Const. Co.*, 781 N.W.2d 858, 862 (Minn. 2010) (quoting *Potter II*, 384 N.W.2d at 875).

Given the plain language of the public accommodations provision of the MHRA, a restaurant cannot expressly single out customers based on their protected status for worse treatment. If a restaurant charges $1.99 for a hamburger, but it intentionally charges customers $2.00 for a hamburger if they are Black or Christian or gay, that restaurant is still liable for discrimination even if the material difference in cost is a penny. As the Minnesota Supreme Court expressly ruled, "the act of discrimination itself constitutes sufficient injury for the law to provide a remedy, in the absence of statutory language requiring more." *Krueger*, 781 N.W.2d at 865 (quoting *Potter II*, 384 N.W.2d at 857) (emphasis omitted). The district court's instruction was erroneous, unduly narrow in its definition of acts that may constitute discrimination, and required Ms. Anderson to prove facts beyond her actual burden.

F. The Court Erred In Requiring The Jury To Find That Ms. Anderson Is A Member of a Protected Class Where The Court Refused To Instruct The Jury On What Classes Are Statutorily Protected

On December 21, 2021, Ms. Anderson proposed a jury instruction for public accommodations discrimination. Dkt. 113 at 16. Ms. Anderson specifically asked that the court instruct the jury that she must prove by a preponderance of the evidence that she was discriminated against "because she was seeking emergency contraception." *Id*. The court rejected this instruction. In its place, the court directed the jury that in order to prevail, Ms. Anderson must first prove that she is "a member of a protected class" and second that she was discriminated against "because of her sex." ADD-15. The instructions noted that "[s]ex' includes, but is not limited to, pregnancy, childbirth, and disabilities related to pregnancy or childbirth. The ability to become pregnant is also included under the term sex." ADD-17. The court declined to define "protected class" and declined to note that "sex" is a "protected class." The court further instructed the jury that where a term is undefined. they should use the "common, ordinary meaning of that word or phrase." ADD-24.

After receiving a draft of the Court's instruction, Ms. Anderson requested that the court remove the instruction obliging Ms. Anderson to prove she is a member of a protected class, or in the alternative to expressly note that "sex is a protected class." Trial Tr. 823:4-828:4. The court declined to do either.

"Protected class" is a legal term of art without an "ordinary meaning." Even in the legal realm, different civil rights statutes may include different enumerated protected classes. *Compare* Minn. Stat. § 363A.08 subd. 2 (prohibiting employment discrimination

based on race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, familial status, membership or activity in a local commission, disability, sexual orientation, age) *with* 42 U.S.C. § 2000e-2(a) (prohibiting employment discrimination based on race, color, religion, sex, national origin). These enumerated protected classes themselves may be imbued with different meaning in different jurisdictions. *See, e.g.*, *3M v. State*, 289 N.W.2d at 399 (finding that the MHRA's definition of sex was always intended to be inclusive of pregnancy, childbirth and related issues even when Title VII's definition of "sex" was not).

It is undisputed that Ms. Anderson demonstrated that she is a member of a protected class as a woman seeking emergency contraception to prevent pregnancy. It was an error to inform the jurors that they should define "protected class" based on "ordinary meaning," and it was an error to treat "sex" and "protected class" as two separate and distinct terms. With proper instruction, the jury would have found that Ms. Anderson easily met that element.

G. The Court Erred And Abused Its Discretion In Refusing To Allow Ms. Anderson To Introduce Evidence of Subsequent Remedial Measures To Rebut Respondents' Claims Of Infeasibility And For Impeachment Purposes

The district court's rulings denying Ms. Anderson's repeated efforts to introduce evidence of subsequent remedial measures were erroneous as a matter of law and also constituted an abuse of discretion. Evidence of subsequent remedial measures is admissible at trial unless it is being admitted to "prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction." Minn. R. Evid. 407. The rule does not broadly prohibit admitting subsequent remedial measures

evidence, and even expressly permits such evidence to prove the "feasibility of precautionary measures, if controverted, or impeachment" or for any other unenumerated reason consistent with the Rules of Evidence. *Id*. The court erred in its pre-trial ruling that the Ms. Anderson could only submit subsequent remedial evidence "[i]f the course of trial involves defendants suggesting there was no way to craft and enforce a policy that both satisfied Mr. Badeaux's beliefs and the pharmacy's duty to be nondiscriminatory." ADD-99-100.

After Mr. Hutera became aware that Mr. Badeaux refused to fill a prescription in 2015, the two made a verbal agreement to make sure patients were able to fill their emergency contraception prescriptions in a timely manner. Trial Tr. 262:24-264:15. The unwritten policy was not communicated to the other pharmacists, *id.* at 298:20-23, and the first time the policy was tested, Mr. Badeaux turned away a client without filling the client's prescription or calling for another pharmacist on backup. *Id*. at 262:14-263:7. Mr. Badeaux did not recall if he and Mr. Hutera ever discussed calling a pharmacist to fill a prescription for emergency contraception in a timely manner. *Id*. at 258:11-259:4.

Mr. Hutera testified that he had a verbal plan with Mr. Badeaux regarding emergency contraception. *Id*. at 297:19. Mr. Hutera claimed that the plan as of 2015 and in place at the time Ms. Anderson sought to have her prescription filled, was that if Mr. Badeaux was the only pharmacist on staff, he would not dispense emergency contraception due to his personal beliefs. Trial Tr. at 297:20–24. Instead, Mr. Badeaux would contact another pharmacist to come in and fill the prescription if no pharmacist was scheduled for that day or the next. *Id.* at 297:20-24; 300:1-8. If no one was available to come in to fill the

prescription, Mr. Badeaux would tell the patient to fill the prescription at another pharmacy. *Id*. at 304:4-12.

This is not an accurate account of the 2015 policy. The 2015 policy did not include having Mr. Badeaux call a second pharmacist to come on duty to fill the prescription. It was not until *after* Ms. Anderson was turned away that Thrifty White had a plan that included back-up pharmacists. *See* ADD-1-2. Ms. Anderson could have proved this by admission of an email dated February 2019, weeks *after* Ms. Anderson was rejected, indicating that the new policy *going forward* would incorporate backup pharmacists. *Id.* Ms. Anderson was not permitted to introduce this document to impeach due to an error of law and abuse of discretion.

Mr. Hutera further testified that he could not have had a second pharmacist on duty or even on-call when Mr. Badeaux was working because "[f]inancially, it's not feasible." Trial Tr. at 686:16-687:8. Once again, Ms. Anderson was never able to introduce evidence to rebut these claims of infeasibility with the February 2019 policy. Trial Tr. at 225:12-229:8; 721:14-727:19. As a result of the unimpeached testimony and unchecked claims of infeasibility, Defense counsel was able to argue in their closing that Thrifty White was a small-town pharmacy that could not afford to pay another pharmacist to come in if Mr. Badeaux refused to fill a prescription, despite the fact that this is exactly what they did *after* Ms. Anderson was turned away. Trial Tr. at 928:4-931:6; ADD-2-3.

In its order regarding Ms. Anderson's motion for a new trial, the court indicated that it excluded evidence of the February 2019 email "because of the concern the jury would use said evidence for an improper purpose under 407." ADD-60. But this could have been

cured by an instruction rather than by a wholesale refusal to permit Ms. Anderson to prove to the jury the true nature of the actual policy in place at the time she sought to have her prescription filled, or to rebut claims of infeasibility.

The Court's rulings were highly prejudicial to Ms. Anderson and denied her a fair trial for at least two reasons. First, as to public accommodations discrimination, the Court instructed the jury (over Ms. Anderson's objection) that Ms. Anderson must have received "more than minor differences in service or access to goods," and Respondents were given free rein to severely and improperly exaggerate the supposed safeguards in place when Ms. Anderson sought to have her prescription filled at Thrifty White. ADD-17. Second, with regard to business discrimination, the jury was asked whether there are "other acceptable alternative policies or practices which would better accomplish the business purpose or accomplish it equally well with a lesser differential discriminatory impact." ADD-14. Ms. Anderson was not permitted to show that Thrifty White subsequently adopted a policy that it claimed at trial would have been unacceptable due to cost.

H. The Court Erred And Abused Its Discretion In Admitting All Of Ms. Anderson's Private Therapy Records Where She Sought Damages Solely Based On Shame, Stress, Embarrassment and Other Such Harms

During discovery, Defendant CVS filed a motion to compel discovery into Ms. Anderson's therapy records, arguing that she had waived privilege in the records by alleging emotional distress damages. Dkt. 27, 30. Ms. Anderson opposed the motion. Dkt. 33. The district court granted CVS's motion. Dkt. 43. At trial, Ms. Anderson sought to exclude her therapy records and testimony from her therapist. Trial Tr. at 411:2-415:12. The district court denied Ms. Anderson's motion in limine. Dkt. 144. Ms. Anderson's

therapy records were introduced as an exhibit, *see* Trial Tr. at 451:5-8, and she, her partner, and her therapist testified at trial regarding many irrelevant and prejudicial things contained in those records including Ms. Anderson's conversations in therapy about her relationship with her children, her mother, and her partner, and whether she had problems controlling her anger. *See, e.g.*, Trial Tr. at 492-494, 535-540, 627-671. For example, Thrifty White's counsel was able to show Ms. Anderson's partner, Adam Novack, the therapy records and ask him if he was aware that Ms. Anderson had concerns that he may be an alcoholic. *Id*. at 535:10-540:6. It was an error for the district court to grant discovery into Ms. Anderson's privileged therapy records and to admit evidence from those records and her therapist at trial.

Therapist-patient privilege is based on important societal interests in the confidence and trust necessary for effective mental health care. *See Jaffee v. Redmond,* 518 U.S. 1, 10 (1996) (citing *Trammel v. U.S.*, 445 U.S. 40, 51 (1980)). "Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. . . . For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Id*. Just as with any other privilege, the relevant question is not whether relevant information can be obtained by destroying the privilege. The question is whether the possible relevance outweighs the critical interest in effective, confidential mental health treatment.

In Minnesota state courts, medical privileges such as the therapist-patient privilege are codified in statute. Minn. Stat. § 595.02. Minn. R. Civ. P. 35 addresses the waiver of

privilege in litigation. Under Rule 35.03, a party waives their medical privilege if they voluntarily place a physical or mental condition in controversy. If a party does not put her medical condition "in controversy," her medical records are not discoverable, even if the assertion of privilege requires suppressing evidence that is otherwise admissible and important to a claim or defense. *Muller v. Rogers,* 534 N.W.2d 724, 727 (Minn. App. 1995).

Merely seeking emotional distress damages does not put a party's mental health "in controversy." In *Gillson*, a plaintiff brought claims under the Minnesota Human Rights Act for sexual harassment. *Gillson v. State Dept. of Nat. Res*., 492 N.W.2d 835, 840-41 (Minn. App. 1992). The court held that Gillson's mental condition was not put in controversy simply because she was seeking damages for mental anguish or suffering. *Id.* at 842. "Recoverable pain and suffering does not have to be severe or accompanied by physical injury. A trial court can award damages based on subjective testimony" such as "diminished sense of self-worth and deterioration of relationship with children." *Id*. (citations and quotations omitted).

Here, Ms. Anderson wasn't seeking damages for any medical or mental health condition that would have put her therapy records at issue. Instead, she testified that Respondents' refusal to fill her emergency contraception prescription caused her to feel "upset, angry, frustrated." Trial Tr. at 457:24. She and her partner testified about the effect this had on their intimate relationship. Trial Tr. at 460:2-25, 528:14-530:16. Ms. Anderson also testified that, as a result of the disclosures, she no longer saw any therapist because she no longer trusted that her conversations with a therapist would be private. Trial Tr. at

455. She testified that she was very "exposed" and did not "feel safe" talking to a therapist. *Id*.

Ms. Anderson's testimony about her feelings of frustration, embarrassment, and anger, and the effect on her ability to be intimate with her partner because of Respondents' conduct are not the kinds of harms that waive her medical privilege in her therapy records. It was an error for the district court to rule that she had waived the privilege, order discovery into her therapy records, and admit those irrelevant and prejudicial records at trial.

CONCLUSION

For the reasons discussed, this Court should reverse the district court's denial of Ms. Anderson's motion for judgment as a matter of law as to both Respondents, order them jointly and severally liable for the damages found by the jury, and remand for further determination of punitive damages. Alternatively, this Court should reverse the district court's denial of Ms. Anderson's motion for a new trial.

Dated: June 30, 2023

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the following requirements:

1. The brief was drafted using Microsoft Word 365 word-processing software.
2. This brief was drafted using Times New Roman 13-point font, compliant with the typeface requirements; and
3. There are 13,730 words in this brief.

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