IN THE SUPREME COURT OF IOWA

NO. 21-1072

SHARI L. MARTIN,

Plaintiff – Appellant,

Vs.

THOMAS A. TOVAR, Individually and in his official capacity, and CITY OF MUSCATINE, A Municipal Corporation,

Defendants – Appellees.

APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR MUSCATINE COUNTY, HONORABLE JUDGE STUART P. WERLING'S JANUARY 4, 2018 RULING GRANTING DEFENDANT/APPELLEE CITY OF MUSCATINE'S MOTION FOR SUMMARY JUDGMENT, CASE NO. LACV022876.

APPELLEE CITY OF MUSCATINE'S FINAL BRIEF

(NON-ORAL SUBMISSION TO IOWA COURT OF APPEALS REQUESTED)

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CERTIFICATE OF FILING

I, Brandon W. Lobberecht, attorney for Appellee, City of Muscatine, hereby certify that I filed the Appellee's Final Brief with the Iowa Supreme Court by depositing a copy thereof in the Iowa Appellate Court's electronic filing system on the 30th day of December, 2021, pursuant to Iowa R. App. P. 6.901(1) and Iowa Ct. R. 16.1221(1).

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PROOF OF SERVICE

I, Brandon W. Lobberecht, in compliance with Iowa R. App. P. 6.13, hereby certify that I served a copy of Appellee's Final Brief on this 30th day of December, 2021, to the following attorney of record through the court's electronic filing system, pursuant to Iowa R. App. P. 6.901(1) and Iowa Ct. R. 16.1221(2):

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ROUTING STATEMENT

This appeal should be transferred to the Iowa Court of Appeals. Iowa R. App. P. 6.1101(3) (2021). Appellee, City of Muscatine, (hereinafter "City") contends this case does not present constitutional issues, substantial issues of legal principles, or novel/complex questions of Iowa law that require retention and review by the Iowa Supreme Court. *See* Iowa R. App. P. 6.1101 (2021). Rather, this appeal involves an issue well known to the Iowa Courts: Can an employer be vicariously liable for the criminal actions of their employees conducted outside the scope of employment?

There is substantial and long-standing Iowa precedent that has addressed vicarious liability regarding an employee's sexual misconduct while working for an employer. *See Godar v. Edwards,* 588 N.W.2d 701, 703-704 (Iowa 1999); *Riniker v. Wilson,* 623 N.W.2d 220 (Iowa App. 2000); *Giudicessi v. State,* 868 N.W.2d 418 (Iowa App. 2015). Additionally, the legislature has pronounced in the Iowa Municipal Tort Claims Act that a municipality is only vicariously liable for acts committed by a police officer within the scope of employment. *See* Iowa Code § 670.2 (2021).

The Appellant seeks to have the appellate court disregard the established precedent and legislation and adopt a new form of "aided by agency" liability based upon an outdated version of the Restatement of the

Law. However, as set forth herein this theory is contrary to both Iowa precedent and the Iowa Municipal Tort Claims Act and should be declined.

STATEMENT OF THE CASE

(a) Nature of the Case

This is an appeal of a grant of summary judgment to an employer, Appellee City of Muscatine, under a claim of respondeat superior/vicarious liability for its employee's sexual misconduct and assault against the Appellant, Shari Martin (hereinafter "Martin"). (Appendix I p. 315). The District Court, following established Iowa precedent, held that Officer Thomas Tovar (hereinafter "Tovar") was not acting within the course of his employment when he sexually assaulted Martin and therefore the City could not as a matter of law be vicariously liable for those acts. (Appendix I p. 323).

(b) Relevant events of the Prior Proceedings

On February 4, 2015, Martin filed a five (5) count lawsuit against Tovar and the City, asserting separate counts/claims of: (1) Assault/Sexual Abuse; (2) Battery; (3) Intentional Infliction of Emotional Distress; (4) False Imprisonment; and (5) Invasion of Privacy. (Appendix I pp. 71; 79). However, Martin's **only** theory of liability against the City in each count/claim is *respondeat superior*/vicarious liability as codified in Iowa Code § 670.2. (Appendix I pp. 71; 80; 83 – 85; 87). Iowa Code § 670.2 holds municipalities

liable for its torts and those committed by its officers and employees "acting within the scope of their employment or duties." *See* Iowa Code § 670.2(1) (2021). This case does not include any claim of direct liability by Martin against the City through a separate theory of negligent hiring, training, supervision or retention.

On June 5, 2017, the City filed a Motion for Summary Judgment asserting as a matter of law that it could not be held vicariously liable for the actions of Officer Tovar. (Appendix I pp. 56 – 58). The Appellant resisted. (Appendix I pp. 127 – 129).

(c) Disposition of the case in District Court

On January 4, 2018, the Iowa District Court in and for Muscatine County granted summary judgment to the City in this matter, which included dismissal of all of Martin's claims against it. (Appendix I pp. 315 – 328). This appeal followed. (Appendix I pp. 360 – 362).

STATEMENT OF FACTS

(a) Tovar's Felonious Sexual Assault Of Martin.

In the early morning hours of February 16, 2013, Muscatine Police Officers initiated a traffic stop of a vehicle operated by David Faust for suspicion of operating while intoxicated. (Appendix I pp. 70; 76 – 77; 89 – 90). At the time of the traffic stop, Martin was a passenger in Faust's vehicle and Tovar was one of the Muscatine Police Officers participating in the traffic stop and criminal investigation. (Appendix I pp. 70; 76 – 77; 89 – 90). After the traffic stop Tovar transported Martin to her hotel room at the Clarion hotel and sexually assaulted her. (Appendix I pp. 71; 77 – 78).

Martin did not remember the assault until the next morning when Faust arrived back to the hotel room. (Appendix I pp. 185, Transcript pgs. 145-6). Martin testified she does not have any specific memories regarding the sexual assault in the hotel room other than remembering someone (a police officer) was laying on top of her and talked on a radio. (Appendix I pp. 160; 185 – 186, Transcript pgs. 145 – 150). She told Faust the extent of her recollections. (Appendix I p. 185, Transcript pg. 146). Faust then called the Muscatine Police Department to report the incident. (Appendix I p. 186, Transcript pgs. 150 - 151).

Muscatine Police officer, Lieutenant Anthony Kies, responded to the Clarion hotel to begin an investigation regarding Martin's complaint/report. (Appendix I p. 186, Transcript pg. 150). At the conclusion of its investigation, the City decided to discipline Tovar by terminating his employment as a result of his conduct on February 16, 2013 with Martin. (Appendix I p. 73; Appendix II pp. 7 – 20). However, Tovar resigned from his employment on February 19, 2013 before any discipline could be assessed against him. (Appendix I p. 73; Appendix II pp. 7 – 20).

Tovar was charged by the State of Iowa with the felony crime of sexual abuse in the third degree as a result of his interactions with Martin at the Clarion hotel on February 16, 2013. (Appendix I p. 71). In his criminal trial, Tovar testified that he had a consensual sexual encounter with Martin at the Clarion hotel after transporting her there from the scene of the traffic stop. (Appendix I pp. 71 – 72; 103 – 113, Transcript pgs. 430 – 518).

However, Tovar further admitted he took the following actions before, during, and after his encounter with Martin to conceal the sexual encounter:

- When he arrived to the hotel, he turned off the camera in his vehicle and turned off his body microphone because he "didn't want the police department to know what [he] was doing that [he] shouldn't have

been…" while at the hotel with Martin. (Appendix I pp. 72; 104, Transcript pg. 457; 109, Transcript pgs. 494 – 495).

- After arriving at the hotel, and while engaging in sexual intercourse with Martin, he falsely told police dispatch that the was "cleared" from the hotel and available for another call when he was still at the hotel with Martin. (Appendix I pp. 72; 106, Transcript pgs. 467 – 468; 109, Transcript pg. 496).
- Tovar stopped having sexual intercourse with Martin to respond to a domestic violence call that was dispatched to him. While in route to the call, he drove his squad car without activating his overhead lights, the siren, or the dash camera to avoid having any type of recording showing he had still been at the hotel with Martin. (Appendix I pp. 72 – 73; 106 – 107, Transcript pgs. 468 – 469; 109 – 110, Transcript pgs. 495 - 497).
- After Martin's incident was reported to the Muscatine Police Department, Tovar intentionally lied to fellow officers by telling them that Martin had broken her key card to her hotel room, which caused him to be at the hotel longer than he initially indicated to police dispatch. (Appendix I pp. 72; 105, Transcript pg. 463; 108, Transcript pgs. 483 – 484; 111, Transcript pgs. 510 – 511; 112, Transcript pgs. 513 – 514; 113, Transcript pg. 517). Tovar testified he lied because he

was "trying to cover [his] tracks" as part of an effort to "cover up the amount of time [he] spent at the hotel and how long [he] took to get to [his next dispatch call]." (Appendix I pp. 72; 105, Transcript pg. 463; 108, Transcript pgs. 483 – 484; 111, Transcript pgs. 510 – 511; 112, Transcript pgs. 513 – 514; 113, Transcript pg. 517). He further testified he lied because he "didn't want to lose [his] job over [his encounter with Martin]." (Appendix I pp. 72; 105, Transcript pg. 463; 108, Transcript pgs. 483 – 484; 111, Transcript pgs. 510 – 511; 112, Transcript pgs. 513 – 514; 113, Transcript pg. 517).

After the close of his criminal trial, a Muscatine County jury found Tovar guilty of the criminal offense of sexual abuse in the third degree, a class C felony. (Appendix I p. 73; Appendix II p. 32).

(b) The City Did Not Have Notice Tovar Would Commit A Sexual Assault Against A Third Party.

The City was never notified before February 16, 2013 that Tovar had engaged in, or was accused of engaging in, any type of sexual assault, sexual abuse, or sexual harassment against anyone. (Appendix I pp. 73; 114 – 125; Appendix II pp. 7 – 15). Lt. Kies testified that, before Martin's incident was reported, he was not aware of any complaints alleging Tovar had sexually assaulted anyone. (Appendix I p. 160; Appendix II pp. 189 – 191). Lt. Kies also testified he had heard "rumors" that Tovar may have engaged in sexual

activity with women while in uniform but that the rumors were not presented to him until after Martin's incident occurred. (Appendix I p. 160; Appendix II pp. 189 – 191).

Muscatine Assistant Police Chief, Phillip Sargent, testified that, before Appellant's incident was reported, he was not aware of any complaints or allegations of sexual misconduct by Tovar. (Appendix I p. 161; Appendix II pp. 192 – 193, Depo. pgs. 51 - 52). Muscatine Police Captain, Steven Snider, testified that before Martin's incident was reported, he was not aware of any complaints alleging Tovar had nonconsensual sex with any women, either on or off duty. (Appendix I p. 161; Appendix II pp. 194 – 196, Depo. pgs. 31 – 32, 34 - 35).

Muscatine Police Chief, Brett Talkington, testified that, before Appellant's incident was reported, he was not aware of any complaints alleging Tovar had inappropriate sexual contact with any member of the public while on duty. (Appendix I p. 161; Appendix II pp. 197 – 201, Depo. pgs. 64 – 65).

Randy Hildebrant, Martin's boyfriend at the time, provided an affidavit to Appellant's counsel. (Appendix II pp. 141 – 142). Mr. Hildebrant averred in his affidavit that, during Tovar's criminal trial in 2016 (3 years after Martin's incident occurred), he overheard Lt. Kies allegedly tell Iowa

Division of Criminal Investigation Special Agent, Richard Rahn, that other police officers knew there had been "prior complaints" made about Tovar. (Appendix II pp. 141 – 142). Mr. Hildebrant further stated in the affidavit he believed Lt. Kies "inferred" through this statement that the department knew Tovar had engaged in inappropriate sexual conduct with females before Martin's sexual assault on February 16, 2013. (Appendix II pp. 141 – 142).

Mike Kellor submitted a citizen's complaint against Tovar in 2010 after he witnessed Tovar pick up B.W. in his personal vehicle. (Appendix I pp. 285; 298 – 299, Depo. pgs. 23 – 24). Mr. Kellor testified he made the complaint only because he was concerned B.W. may have committed a crime and was a fugitive that wasn't being caught. (Appendix I pp. 285; 298 – 299, Depo. pgs. 23 – 24). There is no evidence Mr. Kellor alleged Tovar engaged in sexual misconduct with B.W. as part of his complaint to the City.

(c) Prior Employment Discipline Administered Against Tovar Does Not Include Any Acts Or Allegations Of Sexual Misconduct.

Although Tovar had some instances of discipline administered against him during his employment with the City, all of those related to his work performance and/or demeanor towards co-workers. None of the issues with Tovar were terminable offenses nor did any of the incidents or allegations

relate to actual or alleged sexual misconduct. (Appendix I p.161; Appendix II pp. 76 – 131; 133 – 140; 197 – 200, Depo. pgs. 49 – 50).

(d) An Additional Alleged Act Of Sexual Misconduct Made Against Tovar Was Not Reported To The City Before February 16, 2013.

After the City moved for summary judgment, another female, B.W., alleged she was previously sexually assaulted by Tovar on September 22, 2010 in the basement of the Muscatine Police Station. (Appendix I pp. 242 – 262). She alleged Tovar, while alone in a room with her, grabbed her, handcuffed her to a desk, and forced his fingers under her clothing and into her vagina. (Appendix I pp. 242 – 262).

B.W. admitted she did not talk to any police officers about the incident, did not file any complaint or report with the City or the police department, and did not seek any medical care related to the incident. (Appendix I pp. 285; 293 – 297, Depo. pgs. 73 – 74). The only person B.W. claims to have told about the alleged sexual assault by Tovar in 2010 was her boyfriend, and he did not contact the City or police department or file any type of complaint or report. (Appendix I pp. 285; 293 – 297, Depo. pg. 74).

Notwithstanding her admissions that the incident was never reported to the City and was not witnessed by anyone from the City, B.W. speculated another officer could have heard the incident and the officer also gave her a

"look" that she believes indicated he "knew" about the assault. (Appendix I pp. 242 – 262).

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN FINDING TOVAR'S NONCONSENSUAL SEXUAL INTERCOURSE WITH MARTIN WAS OUTSIDE THE SCOPE OF EMPLOYMENT FOR THE CITY. THEREFORE, VICARIOUS LIABILITY CANNOT BE IMPOSED AGAINST THE CITY AND SUMMARY JUDGMENT IN FAVOR OF THE CITY MUST BE AFFIRMED.

1. Issue Preservation

The City agrees Martin has preserved the right to challenge the District Court's summary judgment ruling on appeal, having previously resisted the motion before the District Court. (Appendix I pp. 56 – 58; 127 – 129; 315 – 328).

2. Scope And Standard Of Review

The City agrees the appropriate standard of review for an appeal of a summary judgment ruling is "for correction of errors at law." *Slaughter v. Des Moines University College of Osteopathic Medicine*, 925 N.W.2d 793, 800 (Iowa 2019).

3. Argument

A. The District Court Correctly Applied Iowa's *Respondeat Superior* Liability Principles To This Case When Ruling Upon The City's Motion For Summary Judgment.

The general rule for respondeat superior liability in Iowa is that "an employer is liable for the negligence of an employee committed while the employee is **acting within the scope of his or her employment**." *Godar v. Edwards*, 588 N.W.2d 701, 705 (Iowa 1999) (internal citations omitted)(emphasis added). An act is "deemed to be within the scope of one's employment 'where such act is necessary to accomplish the purpose of the employment and is intended for such purpose.' " *Id*. However, there is ***no liability*** to the employer when the employee acts for **personal reasons that are substantially different from those authorized by the employer**. (emphasis added) *Id*. at 706.

The Iowa Supreme Court has previously followed Restatement (Second) of Agency § 229(2) (1957) to determine whether an employee's conduct falls within the scope of his/her employment. *Id.* The relevant factors include:

> (a) whether or not the act is one commonly done by such servants;
> (b) the time, place and purpose of the act;
> (c) the previous relations between the master and the servant;

> (d) the extent to which the business of the master is apportioned between different servants;
> (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
> (f) whether or not the master has reason to expect that such an act will be done;
> (g) the similarity in quality of the act done to the act authorized;
> (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
> (i) the extent of departure from the normal method of accomplishing an authorized result; and
> (j) whether or not the act is seriously criminal.

Id.

The Restatement (Second) of Agency instructs that the "ultimate question" is "whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed." *Id*. (citing Restatement (Second) of Agency § 229, cmt. a (1957)). Regarding crimes committed by employees while on duty for their employer, the Restatement notes that "…serious crimes are not only unexpectable but in general are in nature different from what servants in a lawful occupation are expected to do." *See* Restatement (Second) of Agency § 231, cmt. a (1957).

B. Iowa Precedent Supports An Employee's Sexual Assault Of A Third-Party Is A Substantial Deviation From Authorized Employment Activity And Does Not Further Any Legitimate Business Interest To Impose Vicarious Liability.

As the District Court properly noted, the Iowa Courts have had several occasions to examine whether an employee's sexual assault of a third-party leads an employee to vicarious liability. In *Godar v. Edwards*, the plaintiff sought to hold a school district vicariously liable for repeated sexual abuses committed against him by the school's curriculum director. *Id*. at 703-4. The sexual abuse occurred both on and off school district property. *Id*. at 704. At trial, the school district moved for a directed verdict regarding plaintiff's vicarious liability/respondeat superior claims and the trial court granted the directed verdict. *Id*. at 705.

The Iowa Supreme Court in *Godar* held the curriculum director's sexual abuses were a substantial deviation from his employment duties and substantially different from any conduct authorized by the school district. *Id*. at 706. Even though the curriculum director had the "opportunity to become acquainted" with plaintiff through his job duties, the sexual abuses did not support a finding that the conduct "furthered the educational objectives of the school district." *Id*. at 707. The Court found that "there was simply no evidence to show that [the director's] alleged conduct was *expected,*

foreseeable, or sanctioned by the school district", nor was sexual abuse a "normal" risk associated with education that it should be borne by the school district. (emphasis added) *Id*. Accordingly, the Supreme Court held that the district court granted directed verdict in favor of the school district. *Id*.

In *Riniker v. Wilson,* 623 N.W.2d 220 (Iowa Ct. App. 2000), the plaintiff asserted a respondeat superior claim against a car dealership for the alleged sexual abuse, harassment, assault, battery, and threats made by the dealership's general manager/salesman against her. *Id*. at 224. The dealership moved for directed verdict and the trial court granted the motion. *Id*. at 225. The Iowa Court of Appeals upheld the directed verdict, holding that although the manager/salesman met plaintiff through his employment at the dealership and some of the acts occurred on the dealership's premises, the conduct was a substantial deviation from his employment and was "not necessary to accomplish the purpose of his employment." *Id*. at 232.

More recently, the Iowa Court of Appeals examined these types of vicarious liability claims in the context of a mental health professional/former patient relationship. *Giudicessi v. State*, 868 N.W.2d 418 (Iowa Ct. App. 2015). In *Giudicessi* the plaintiff alleged a psychiatrist working for the State of Iowa at the University of Iowa Hospitals and Clinics used information he received through treatments he provided to plaintiff to establish a sexual

relationship with her. *Id*. at 419-20. Plaintiff later asserted that the relationship was inappropriate and sought to hold the State liable based upon a respondeat superior claim. *Id*. at 420. The State filed for summary judgment, the trial court denied the motion, and the matter was reviewed by the Court of Appeals under interlocutory review. *Id*.

The *Giudicessi* Court found it persuasive that the psychiatrist knew the relationship was wrong and ***he actively tried to keep the relationship a secret from his employer*** when determining his conduct was not performed within the scope and course of his employment. (emphasis added) *Id*. at 423-4. The Court held that the psychiatrist "pursued the relationship for his own personal interest and not the interests of UIHC" and, although it was possible for plaintiff to believe the relationship was a continuation of therapy sessions with the psychiatrist, the actions of the psychiatrist showed he was not intending the relationship to be part of his employment duties. *Id*. at 424. Accordingly, the psychiatrist pursued the relationship for his own gratification, his acts were substantial deviations from his employment with UIHC, and the Court of Appeals granted the summary judgment requested by the State. *Id*.

C. The District Court Did Not Err In Finding Tovar's Felonious Sexual Assault Of Martin Was Outside The Scope Of His Employment.

The undisputed facts establish that Tovar's sexual assault of Martin was outside the scope of any authorized employment activity.

Tovar was charged with, and found guilty of, criminally sexually assaulting Martin at the Clarion hotel on February 16, 2013. (Appendix I p. 71). He was found guilty of sexual abuse in the third degree, a class C felony punishable up to ten years in prison. (Appendix I p. 73; Appendix II p. 32). Tovar's act of committing a serious felonious crime weighs heavily in favor that the conduct is outside the scope of an authorized employment activity. *See e.g. Godar,* 588 N.W.2d at 706 (citing Restatement (Second) of Agency § 229, cmt. a (1957)).

Tovar admitted he knew that a sexual encounter with Martin while on the job for the City was not authorized or approved, and he took steps to try to prevent the City from ever finding out about his activities. In order to try to conceal his conduct from the City, Tovar:

(1) Turned off his video camera while at the Clarion hotel with Martin (Appendix I pp. 72; 104, Transcript pg. 457; 109, Transcript pgs. 494 – 495);

(2) Falsely gave a radio signal to the police dispatch advising he was no longer at the Clarion hotel with Martin when, in fact, he still was with her (Appendix I pp. 72; 106, Transcript pgs. 467 – 468; 109, Transcript pg. 496);

(3) Deliberately refused to activate his lights, sirens, and video camera while in route to a subsequent domestic disturbance call to hide that he was at the hotel with Martin for an extended period of time (Appendix I pp. 72 – 73; 106 – 107, Transcript pgs. 468 – 469; 109 – 110, Transcript pgs. 495 - 497; and

(4) Intentionally lied to fellow officers about his whereabouts and the amount of time he spent with Martin at the hotel (Appendix I pp. 72; 105, Transcript pg. 463; 108, Transcript pgs. 483 – 484; 111, Transcript pgs. 510 – 511; 112, Transcript pgs. 513 – 514; 113, Transcript pg. 517)

Tovar's criminal sexual assault was a substantial deviation from any authorized conduct in his employment and did not serve to further any legitimate business interest of the City. Tovar knew the act was not authorized or condoned, which is why he took steps to try to keep the City from finding out about the conduct. *See e.g. Giudicessi*, 868 N.W.2d at 423-4 (emphasizing

the employee's knowledge of committing wrongful/unauthorized conduct weighs in favor of finding the act was not within the scope of employment). Following the City's investigation, the City intended to terminate Tovar's employment; however, Tovar voluntarily resigned before termination could be administered. (Appendix I p. 73; Appendix II pp. 7 – 20).

4. Conclusion

The undisputed facts and analysis by the District Court are fully supported by established Iowa case law. The District Court committed no legal error in following this precedent and granting Summary Judgment to the City. Therefore, this appellate court must AFFIRM the District Court's January 4, 2018 summary judgment ruling in its entirety.

II. THE DISTRICT COURT DID NOT ERR IN HOLDING TOVAR'S FELONIOUS SEXUAL ASSAULT OF MARTIN WAS NOT FORESEEABLE TO, OR COMMITTED THROUGH AN INSTRUMENTALITY PROVIDED BY, THE CITY.

1. Issue Preservation

The City agrees Martin has preserved the right to challenge the District Court's summary judgment ruling on appeal, having previously resisted the motion before the District Court. (Appendix I pp. 56 – 58; 127 – 129; 315 – 328).

2. Scope And Standard Of Review

The City agrees the appropriate standard of review for an appeal of a summary judgment ruling is "for correction of errors at law." *Slaughter v. Des Moines University College of Osteopathic Medicine*, 925 N.W.2d 793, 800 (Iowa 2019).

3. Argument

To uphold the district court's summary judgment ruling, the appellate court must confirm that no disputed issues of material fact existed to render summary judgment inappropriate and the district court correctly applied the law to those undisputed facts. *Royce v. Hoening,* 423 N.W.2d 198, 200 (Iowa 1998). As set forth below, the District Court committed no error in finding no disputed issues of material fact existed in this matter.

A. Tovar's Felonious Sexual Assault Of Martin Was Not Foreseeable.

There is no admissible evidence in the record supporting the City knew or had reason to know Tovar was likely to commit a nonconsensual sexual assault of a member of the public. Martin admits in her briefing the District Court correctly found that none of Tovar's employment discipline involved an allegation of involvement in sexual misconduct. (Appellant's Final Brief, pg. 95; Appendix I p. 322). The appropriate standard is not, as Martin seems to suggest, an examination of whether Tovar was ever disciplined during his

employment for any reason. The appropriate standard is whether it was foreseeable to the City that Tovar was likely to commit a sexual assault while on the job. No such evidence exists.

The District Court committed no legal error in finding that Martin's proffered examples of Tovar failing to meet department expectations or follow department procedures, **none of which involve allegations of sexual misconduct**, does not allow a reasonable finding it is foreseeable Tovar would commit a sexual assault against her. (Appendix I p. 322). The District Court also correctly found that allegations Tovar was involved in a domestic assault with an ex-girlfriend or rumors that he was romantically involved with other women, **neither of which involve allegations sexual misconduct**, does not allow a reasonable finding it is foreseeable Tovar would commit a sexual assault against Martin. (Appendix I p. 322).

The District Court further correctly found that B.W.'s testimony failed to raise a genuine issue of material fact to preclude summary judgment because the complaint raised was never reported to the City. (Appendix I pp. 322 – 323). While B.W. alleged she had been sexually assaulted by Tovar in September 2010, it is undisputed this alleged assault was never reported to the City before Martin's incident on February 16, 2013. (Appendix I pp. 285; 293 – 297, Depo. pgs. 73 – 74). Prior to providing her testimony in this case in

November 2017 (more than 4 years after Martin's incident), B.W. only ever told her then-boyfriend about the alleged incident and she confirmed he never reported it to the City. (Appendix I pp. 285; 293 – 297, Depo. pg. 74).

In reviewing the record, the Court must consider every ***legitimate*** inference that can be reasonably deduced from the record. *Phillips v. Covenant Clinic,* 625 N.W.2d 714, 718 (Iowa 2001). However, the Iowa Supreme Court has held that "an inference is not legitimate if it is based on speculation and conjecture". *Id.* "Speculation is not sufficient to generate a genuine issue of fact" to preclude summary judgment. *Hlubek v. Pelecky*, 701 N.W.2d 93, 96 (Iowa 2005).

In resisting this summary judgment, the Appellant presented the District Court with B.W.'s speculation that another officer could hear her being assaulted by Tovar and her belief that the officer, based on a look he allegedly gave her, "knew" she was going to be or had been assaulted by Tovar. As the District Court found, this is inadmissible evidence that does not generate genuine issues of material fact. (Appendix I pp. 322 – 323). The District Court correctly applied Iowa law regarding summary judgment, which is to only consider "such facts as would be admissible in evidence." *See Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 96 (Iowa 2012).

Although not discussed by the District Court in detail within its ruling, the purported testimony via affidavit of Martin's then-boyfriend, Randy Hildebrant, also fails to generate a genuine issue of material fact. Hildebrant's affidavit avers he allegedly heard Lt. Kies make a statement in 2016 (3 years after Martin's incident) that there were "prior complaints" made about Tovar to the police department. (Appendix II pp. 141 – 142). Hildebrant concludes, based on his own speculation, Lt. Kies meant "sexual assaults" when he used the phrase "prior complaints." (Appendix II pp. 141 – 142). There is no foundation to support Hildebrant's "interpretation" of Lt. Kies's alleged statement. As an evidentiary principle, a "[l]ay opinion will be excluded if the factual foundation for the opinion is inadequate." *Sonnek v. Warren*, 522 N.W.2d 45, 50 (Iowa 1994) (internal citation omitted). There is no evidence Hildebrant has some sort of specialized training, expertise or skill to be able to interpret what another person meant when making a statement. Additionally, the critical piece of Hildebrant's affidavit, *i.e.* what Lt. Kies meant by using the words "prior complaints", is pure speculation that cannot defeat summary judgment. *See Hlubek*, 701 N.W.2d at 96.

For these reasons, the District Court correctly held there is no genuine issue of material fact supporting Tovar's sexual assault of Martin was foreseeable to the City.

B. Tovar's Sexual Assault Was Not Committed With An "Instrumentality" Of The City.

There is also no genuine issue of material fact supporting Tovar used an "instrumentality" of the City to commit the sexual assault. While Tovar may have been on duty and in uniform at the time of the sexual assault, there is no evidence any "instrumentalities" of the City were used in commission of the assault. There is no evidence Tovar: made any threats to Martin; asserted he had lawful authority to have sex with her; or used police-issued instrumentalities (*i.e.* his gun, handcuffs, radio, squad car or any other police-issued device) to commit the act.

4. Conclusion

As noted in Comment a. of the Restatement (Second) of Agency § 229, "…the ultimate question [for vicarious liability] is whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed." Felonious sexual assault does not provide any benefit to the City and is not an act incidental to any authorized police activity. Instead, it is an act performed for personal sexual gratification of the offender and is a serious felony crime. Comments a. through f. to the Restatement (Second) of Agency § 229 strongly support this type of intentional sexual conduct is not performed within the scope of employment to impose vicarious liability.

For these reasons, there is no error of law for the appellate court to correct. The District Court correctly found there are no genuine issues of material fact for resolution by a jury and the City is entitled to summary judgment as a matter of law. Therefore, this appellate court must AFFIRM the District Court's January 4, 2018 summary judgment ruling in its entirety.

III. THE DISTRICT COURT DID NOT ERR IN DECLINING TO ADOPT MARTIN'S "AIDED BY AGENCY" THEORY OF LIABILITY WHICH IS CONTRARY TO IOWA STATUTORY AND CASE LAW.

1. Issue Preservation

The City agrees Martin has preserved the right to challenge the District Court's summary judgment ruling on appeal, having previously resisted the motion before the District Court. (Appendix I pp. 56 – 58; 127 – 129; 315 – 328).

2. Scope And Standard Of Review

The City agrees the appropriate standard of review for an appeal of a summary judgment ruling is "for correction of errors at law." *Slaughter v. Des Moines University College of Osteopathic Medicine*, 925 N.W.2d 793, 800 (Iowa 2019).

3. Argument

In resisting the Motion for Summary Judgment, Martin asked the District Court to adopt a new theory of vicarious liability, whereby employers

of police officers should be automatically liable for any intentional tortious conduct committed by an officer while on duty, without regard to whether the act is within the scope of employment. The District Court committed no legal error in failing to adopt this "strict liability" approach, as the theory is contrary to both the legislative intent of the Iowa Municipal Tort Act and longstanding Iowa precedent.

A. The "Aided By Agency" Theory Is Contrary To Long-Standing Iowa Precedent Requiring Acts To Occur Within The Scope Of Employment Before An Employer Can Be Vicariously Liable.

Iowa common law on vicarious liability is deeply rooted in the "scope of employment" analysis. Since at least the 1920s, Iowa common law has always focused on whether the act was within the scope of employment before imposing liability to the employer. *See Rosenstein v. Bernhard & Turner Automobile Co.*, 180 N.W.282, 283 (Iowa 1920) ("The rule is that a master is responsible for the wrongful acts of the servant committed in the business of the master, and within the scope of his employment, even though the servant doing the act departed from the instruction of the master."); *see also Sandman v. Hagan*, 154 N.W.2d 113, 117 (Iowa 1967) ("It is well established in Iowa that under the common law the master and servant may each and both be liable for a servant's torts within the course of employment.").

There is no Iowa case law the City can find supporting vicarious liability to an employer for an employee's tortious conduct merely because the employee was on duty or "on the clock" at the time the act was committed. As discussed in more detail below, the Iowa case law has rejected that proposition.

i. The "Aided By Agency" Theory Is Antithetical To Iowa's Body Of Law.

The Iowa courts have rejected the notion that some connection, however tenuous, between the tort or victim and an employment relationship is enough to impose liability against the employer. This is true even if the employment arguably "aids" the employee in some manner to commit the tortious act against a third party, such as introducing the offender to the victim or providing an opportunity for the tort to occur.

For example, in *Godar*, the plaintiff was a student who was sexually abused by a teacher, including abuse that occurred on school grounds on occasion. 588 N.W.2d at 704. The *Godar* Court held:

> …the fact that the abuse occurred on school district property does not make the school district automatically liable for abuse by its employee. Nor is it sufficient to show the abuse would not have occurred but for [the teacher's] employment by the school district.

Id. at 707.

In *Lindemulder v. Davis County Community School Dist.*, 2016 WL 1679835 (Iowa Ct. App. 2016), the Iowa Court of Appeals upheld summary judgment in favor of a school district for the unforeseen sexual abuse committed by a teacher against a student. *Id*. at 11. The *Lindemulder* Court further stated:

> The fact that some of the sexual activity occurred on school property and at school-sponsored events does not impose strict liability on the School district or prove the inappropriate relationships would not have happened but for the employment relationship.

Id.

In *Riniker v. Wilson*, the Iowa Court of Appeals upheld dismissal of vicarious liability in favor of a car dealership for an employee's sexual abuse against a co-worker's wife. 623 N.W.2d 220, 224 (Iowa Ct. App. 2000). The *Riniker* Court noted that even though the employee became acquainted with the plaintiff by virtue of his employment position and some of the alleged conduct occurred on business property, those facts do not make the employer automatically liable for sexual conduct which is far removed from the scope of employment. *Id*. at 231-2.

ii. This Court Should Decline To Follow A Vague Restatement Section That Conflicts With Its Body Of Case Law And Has Never Been Previously Adopted By Iowa Courts.

Martin's "aided by agency" argument is based upon very broad language contained in the Restatement (Second) of Agency § 219(2)(d). That section provides, in relevant part:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
> …
> (d) the servant purported to act or speak on behalf of the principal and there was reliance upon apparent authority, *or he was aided in accomplishing the tort by the existence of the agency relation*.

(emphasis added).The only examples of "aided by agency" liability contained within the comments to the Restatement are: (1) a telegraph operator that sends false messages purporting to come from third persons and (2) a store manager who operates for an undisclosed principal and uses the position to cheat customers. *See id*. at Comment e. Neither of these examples are very helpful in understanding the intent of the drafters and both seem to focus on misrepresentations to the third party or acts of deceiving the third party through the employment.

"While the Restatement is a restatement of common law by respected legal scholars that may have persuasive power, it is not binding on [the Iowa

courts].” *Lambert v. Iowa Dept. of Transp.*, 804 N.W.2d 253, 259 (Iowa 2011). The Iowa courts “look to the Restatement not as the law but as a guide.” *Heinz v. Heinz*, 653 N.W.2d 334, 339 (Iowa 2002). Accordingly, the Iowa courts should only adopt a rule or rationale within the Restatement when it is “deemed consistent with [the Iowa courts’] body of law and have persuasive force.” *Moad v. Libby*, 863 N.W.2d 37, 2015 WL 1055080, at *2 (Iowa Ct. App. 2015).

The only reference the City can find in Iowa case law regarding Restatement (Second) of Agency § 219(2)(d) is in *Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553 (Iowa 2017). In *Haskenhoff*, the Iowa Supreme Court examined whether a direct claim of negligence, as opposed to vicarious liability, can be pursued against an employer for coworker harassment. *Id*. at 571. In discussing the history of vicarious liability claims for workplace harassment, the *Haskenhoff* Court noted the U.S. Supreme Court has relied upon an “aided by the agency relation” in § 219(2)(d) for purposes of Title VII cases as a practical matter to impose liability against the employer for a supervisor that harasses another. *Id*. at 573. The Iowa Supreme Court noted it has followed the same rationale for purposes of imposing liability vicariously against an employer under the Iowa Civil Rights Act (“ICRA”) for a hostile-work-environment claim involving a

supervisor. *Id*. (citing *Farmland Foods, Inc. v. Dubuque Human Rights Com'n*, 672 N.W.2d 733, 744 (Iowa 2003)). But the *Haskenhoff* decision did not expressly adopt § 219(2)(d), did not discuss the provision in detail, nor did it make an "aided by agency" theory of liability applicable beyond the ICRA.

In its summary judgment ruling, the District Court examined *Haskenhoff* and correctly held the Iowa Supreme Court "limited its holding to cases involving supervisor harassment in a hostile-work-environment case" and nothing about the decision extends the holding to "an employee's unauthorized criminal activity committed outside the scope of employment against a non-employee." (Appendix I pp. 323 – 325).

A strict application of § 219(2)(d)'s broad "aided by agency" language would make the scope of employment requirement in § 219(1) meaningless. A creative argument can almost always be made in cases involving torts committed by an employee that the act was "aided" in some manner by the agency relationship. In example, an argument could be made in *Godar*, *Lindemulder*, and *Riniker* that the offending employees would not have met their victims but-for their employment. Therefore, the agency relationship provided some "aid" in committing the tort against the victims. But, as

previously discussed, the Iowa courts in each of these cases held vicarious liability should not be imposed based upon those connections alone.

iii. The Restatement (Third) Of Agency Has Abandoned The "Aided By Agency" Language Contained In The Restatement (Second) Of Agency.

The drafters of the Restatement (Third) of Agency specifically abandoned the "aided by agency" language in § 219(2)(d) when updating the Restatement. Restatement (Third) of Agency § 7.03(2) (2006), which is the updated counterpart to § 219(2)(d), now only provides for vicarious liability for conduct committed by an employee "acting in the scope of employment" or "acting with apparent authority in dealing with a third party on or purportedly on behalf of the principal." Comment b. of § 7.03 further provides, in relevant part:

> [Restatement (Second) of Agency] Section 219(2)(d) concludes with a further general basis for an employer's vicarious liability, which is whether an employee was 'aided in accomplishing the tort by the existence of the agency relation.' **This Restatement does not include 'aided in accomplishing' as a distinct basis for an employer's (or principal's) vicarious liability. The purposes likely intended to be met by the "aided in accomplishing" basis are satisfied by a more fully elaborated treatment of apparent authority and by the duty of reasonable care that a principal owes to third parties with whom it interacts through employees and other agents. See § 7.05.**

(emphasis added).

The Restatement (Third) of Agency § 7.05 provides for a claim of direct liability against an employer for negligent selection, training, supervision and/or retention of an employee/agent. This is already a separate type of tort recognized in Iowa and covers certain employee torts committed outside the scope of employment if the requisite evidence exists to impose liability. *See Godar*, 588 N.W.2d at 709 (adopting the claim of negligent hiring, retention and supervision). A claim of negligent hiring, retention or supervision was never pled by Martin in this case.

The modified language to the Restatement (Third) of Agency precludes a reasonable interpretation that mere evidence the employment relationship "aided" the commission of an employee's tort is enough to impose vicarious liability to the employer. Iowa's body of law already follows the principles enunciated by the Restatement (Third) of Agency by imposing vicarious liability against employers for acts committed in the scope of employment or a claim of direct liability if the employer negligently hired, supervised, trained, or retained an employee (sometimes even when the tort occurs outside the scope of employment). Martin's claims in this case only concern the scope of employment analysis.

B. The "Aided By Agency" Theory Directly Conflicts With The Iowa Municipal Tort Claims Act.

The Iowa legislature specifically limited the liability of municipalities to only tortious acts committed by a municipal employee within the scope of employment. The Iowa Municipal Tort Claims Act ("IMTCA") provides:

> Except as otherwise provided in this chapter, every municipality is subject to liability for its torts and those of its officers and employees, **acting within the scope of their employment or duties**, whether arising out of a governmental or proprietary function.

(emphasis added) Iowa Code § 670.2(1) (2021).

Allowing the theory of liability proffered by Martin not only creates new law in Iowa that has never existed, it directly conflicts with the IMTCA by substantially expanding the limited scope of liability expressed by the legislature. The Iowa courts, respectfully, do not have the authority to create new law nor do they have the authority to issue a decision that is tantamount to a judicial repeal of a legislative act. *See e.g., Eddy v. Casey's General Store, Inc.*, 485 N.W.2d 633, 637 (Iowa 1992) (declining to formulate the court's own particular version of common law negligence in contravention with the dramshop act because such action would effectuate a judicial repeal of the act).

C. The Iowa Courts Must Decline To Follow Outside Jurisdictional Case Law That Have Imposed Strict Liability Against Employers Of Police Officers For Purported Public Policy Reasons.

The outside jurisdictional case law relied upon by Martin respectfully go above and beyond the plain language of § 219(d)(2) and irrationally imposes strict liability against only employers of police officers. These Courts appear to be imposing judicially created forms of public policy rather than applying the Restatement's intended principles or an extension of their state's common law. These cases should not be held persuasive to the Iowa Courts.

(1) Delaware Law

In *Sherman v. State Department of Public Safety*, the Delaware Supreme Court imposed liability against the State for a police officer that forced an arrestee to perform oral sex on him in exchange for seeking release from custody. 190 A.3d 148 (Del. 2018). In rationalizing the imposition of liability, the *Sherman* Court noted police officers, unlike other types of employees, wield a "potent coercive power" over arrestees such that liability can be imposed if the employment aided in commission of the tort. *Id*. at 179. The *Sherman* Court further noted that the cause of action is meant to incentivize police departments to carefully hire and train officers and protect "a class of victims poorly positioned to protect themselves." *Id*. at 188. The dissenting justice in *Sherman* criticized the majority for finding a new cause

of action based upon public policy concerns and intruding upon the authority of the legislature. *Id*. at 194-200.

After *Sherman*, the Delaware Superior Court in *Bates v. Caesar Rodney School District* refused to extend "aided by agency" liability to the employer of a coach and teacher that engaged in a sexual relationship with a student. 2018 WL 11360454 (Del. Sup. Ct. 2018). The *Bates* Court found the doctrine enunciated by the Delaware Supreme Court should not be applied to teacher-student relationships because there is not the same type of coercive authority or power in such relationships as there is with police officers over citizens. *Id*. at *5.

(2) Vermont Law

In *Doe v. Forrest*, the Vermont Supreme Court found a police officer's act of coercing a convenience store employee to perform oral sex on him was conduct occurring outside the scope of employment but still imposed vicarious liability under § 219(2)(d). 853 A.2d 48 (Vt. 2004). The *Forrest* Court rationalized its decision was "defining the common law" rather than intruding upon its legislature's function to expand or create theories of liability. *Id*. at 67. In finding a viable cause of action, the *Forrest* Court noted certain policy considerations, such as the "extraordinary power that a law enforcement officer has over a citizen" and that "costs of police misconduct

should be borne by the community because the community derives substantial benefits from the lawful exercise of power." *Id*. at 61-3. The dissenting justice in *Doe* noted that there is no empirical authority suggesting this theory of liability will incentivize or deter future conduct and the public policy concerns raised by the majority should be addressed through the state legislature rather than the court. *Id*. at 69-77.

A few years later, the Vermont Supreme Court in *Doe v. Newbury Bible Church* refused to apply its "aided by agency" theory of liability against the employer of a pastor that sexually abused a parishioner. 933 A.2d 196 (Vt. 2007). To distinguish its result from *Forrest*, the *Newbury* Court noted the pastor was not a public actor and did not have the same power, authority and influence over others as a police officer may have. *Id*. at 199.

(3) California Law

In *Mary M. v. City of Los Angeles*, the California Supreme Court imposed vicarious liability for a police officer that forcibly raped a citizen after driving her home. 814 P.2d 1341 (Cal. 1991). The *Mary M.* Court justified its result as furthering "public policy" and limited its holding to impose vicarious liability when a police officer "while on duty, commits a sexual assault by misusing his official authority." *Id*. at 1391. The *Mary M.* Court held imposing liability on public entities for officer sexual assaults

"would encourage the employers to take preventative measures", would afford a means of compensation to victims, and would spread the risk of loss to the community. *Id*. at 1347-9. **The *Mary M.* Court did not rely upon or examine § 219(2)(d) as part of its holding.**

Several California justices have later criticized the decision in *Mary M.* as being wrongly decided. *See Farmers Ins. Group v. County of Santa Clara*, 906 P.2d 440, 459-461 (Cal. 1995) (Baxter, J., George, J., & Lucas, C.J. writing separately with criticisms of *Mary M.*); *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 907 P.2d 358, 367 (Cal. 1995) (George, J. writing separately and advocating for overruling *Mary M.*).

(4) Louisiana Law

In *Applewhite v. City of Baton Rouge*, the Louisiana Court of Appeals held that the employer of a police officer and correctional officer can be "held responsible for their actions even though those actions may be somewhat removed from their usual duties." 380 So.2d 119, 121 (La. Ct. App. 1979). The *Applewhite* Court found, under its reading of its prior case law, that "employers are held to be responsible for their actions even though those actions may be somewhat removed from their usual duties." *Id*. **The *Applewhite* Court did not rely upon or examine § 219(2)(d) as part of its holding.**

In *Doe v. Morris*, the U.S. District Court for the Eastern District of Louisiana found liability could be imposed under Louisiana state law for a police officer's rape of an intoxicated college student. 2013 WL 3933928 (E.D. La. 2013). **Like *Applewhite*, the *Morris* Court did not rely upon or examine § 219(2)(d) as part of its holding and merely applied pre-existing state law.**

(5) New Mexico Law

In *Pena v. Greffet*, the U.S. District Court for New Mexico was tasked with applying New Mexico state law to determine if liability could be imposed against the employer of a correctional officer for the officer's rape of a detainee. 110 F.Supp.3d 1103 (D. N.M. 2015). Notably, the *Pena* Court heavily questioned the applicability and validity of the "aided by agency" theory of liability. The *Pena* Court discussed the absurd results that can result from the broad language used in the Restatement:

> As an initial matter, the Court will point out the obvious defect in the aided-in-agency theory: it comes close to creating strict vicarious liability for employers, and, despite purporting to be an exception, it nearly swallows the general rule that respondeat superior does not attach to intentional torts. If § 219(2)(d) were read literally, a creative plaintiff's lawyer could make a colorable argument for vicarious liability in almost every intentional tort case in which the tortfeasor happens to be gainfully employed. If a barista poisoned a patron's coffee, the patron could sue the coffee shop under

> the theory that the barista was only able to commit the tort because he or she worked for the coffee shop. If a utility worker used his uniform and credentials to get invited into a woman's home, and then proceeded to sexually assault the woman, the utility worker's agency relationship with the utility company could be said to have aided him in his sexual assault. If a drive-by shooting was committed using a company car or a police department—or security company-issued gun, then the plaintiff could name the issuing employer. Most open-endedly of all, a plaintiff might even be able to name a tortfeasor's employer in a drive-by shooting, even if the employer issued neither the gun nor the car, if the tortfeasor bought the gun or the car using his or her salary—which, after all, he or she obtained by virtue of the employment (*i.e.,* agency) relationship.

Id. at 1119.

The *Pena* Court further noted the Restatement (Third) of Agency's abandonment of the "aided by agency" language:

> The *Third Restatement* 's dismissive treatment of the aided-in-agency theory raises questions as to whether courts were ever correct to apply it, and, even if so, whether they should continue to apply it—given that the theory was a whole-cloth creation of an earlier *Restatement*—in contexts beyond those in which controlling authority mandates its application, *e.g.,* Title VII.

(italics original) *Id*. at 1131.

However, despite its concerns about the applicability and authority of the doctrine, the *Pena* Court "predicted" the New Mexico Supreme Court,

which it characterized as "unabashedly liberal on civil-rights and civil-liberties issues", would likely impose liability under the facts of this case given the court's prior adoption of § 219(2)(d). *Id*.

Prior to *Pena*, the New Mexico Supreme Court in *Ocana v. American Furniture Co.* discussed § 219(2)(d) in the context of a workplace harassment case that also alleged intentional torts of assault, battery and intentional infliction of emotional distress. 91 P.3d 58, 70-2 (N.M. 2004). The *Ocana* Court appears to have implicitly adopted an aided-in-agency theory of vicarious liability without much discussion. *Id*. at 71-2.

(6) Indiana Law

In *Cox v. Evansville Police Department*, the Supreme Court of Indiana allowed liability to be imposed upon the employer of an on-duty police officer that commits sexual assault by misusing official authority. 107 N.E.3d 453 (Ind. 2018). The *Cox* Court further noted "[w]e stress that the unique authority that cities vest in police officers drives this conclusion." *Id*. at 463. Interestingly, the *Cox* Court noted the officer's sexual assault was not part of his assigned duties and the "misconduct was the antithesis of law enforcement and community protection." *Id*. Nonetheless, the *Cox* Court found a question of fact existed as to whether the conduct "arose naturally or predictably from the employment" to be within the scope of liability. *Id*. at 464. **The *Cox* Court**

did not rely upon or examine the language in § 219(2)(d) in support of its holding.

(7) Summary Of These Outside Jurisdictions

A common denominator in these various jurisdictions is that these courts have imposed vicarious liability against ***only*** employers of police officers to further perceived public policy interests. There is no language in § 219(2)(d) that intends to apply liability only to employers of certain professions because of a unique authority, power or opportunity created by the profession, or a unique circumstance of the victim. Yet, that is the rationale often used by these courts in their decisions.

The aided by agency theory applied by these courts is not an extension of common law. If it were, the doctrine would apply equally to all employers and not just employers of police officers, or at least logically extend to other types of analogous situations. One can argue that other professions have similar disparities in power and authority between the offender and the victim, such as in the context of teacher-student, priest-parishioner, or physician-patient abuse/assault cases. Yet, these jurisdictions apply the theory only against employers of police officers.

Many of these jurisdictions do not cite to any pre-existing case law in their jurisdictions that support the theory of liability. Some of them, such as

California, Louisiana, and Indiana, do not even reference or cite Restatement (Second) of Agency § 219(2)(d) at all as a persuasive or instructive authority for their decisions. Instead, many of these jurisdictions rationalize that imposing liability will ultimately lead to deter the conduct (without citing to any empirical evidence in support) and provide victims with compensation they otherwise may not receive from the offender.

The Iowa courts should not follow the lead of these courts, especially given the legislature's pronouncement in the IMTCA that a municipality is only liable for a police officer's conduct arising within the scope of authorized employment duties. To do so would be to create new law, judicially repeal the IMTCA, significantly expand the scope of employer liability to cover unforeseeable intentional torts that do not serve any legitimate business interest, and would make employers general insurers of their employees through strict liability. Whatever policy reasons may exist for recognizing this type of cause of action are better suited for presentment to, and discussion within, the Iowa legislature in order to change existing legislation in the IMTCA.

(8) The Facts Of These Cases Are Distinguishable From The Case At Hand.

Additionally, the facts in this case are materially distinguishable from those presented in the outside jurisdictions relied upon by Martin. There is no

evidence Tovar made any type of threats to Martin to coerce her into sexual intercourse, such as threatening to arrest her or detain her unless she engaged in sex with him. There is no evidence Martin was under arrest, detained/restrained, or threatened with any police-issued instrumentality (*i.e.* gun, baton, taser, etc.) by Tovar. There is no evidence that Martin felt compelled to have sexual intercourse with Tovar because he was a police officer. There is no evidence that Tovar asserted he had lawful authority as a police officer to engage in sex with her without her consent.

There are no facts supporting Tovar used or abused a position of authority as a means of committing the sexual assault. The only evidence in this case is that Tovar engaged in sexual intercourse with Martin without her consent. The mere fact that he was a police officer or was on duty at the time should not be enough to impose vicarious liability to the City, which had no knowledge or information to suspect Tovar would engage in that activity.

D. Several Other Jurisdictions Have Discussed And Declined To Follow An "Aided By Agency" Theory Of Liability.

(1) Michigan Law

In *Zsigo v. Hurley Medical Center*, the Michigan Supreme Court declined to impose vicarious liability against the employer of a nursing assistant that sexually assaulted a patient. 716 N.W.2d 220 (Mi. 2006). In

rejecting the "aided by agency" language of § 219(2)(d), the *Zsigo* Court noted the theory "strays too far from the rule of respondeat superior employer nonliability" by failing to focus on the scope of employment and the theory threatens to "[swallow] the rule and amounts to an imposition of strict liability upon employers." *Id*. at 226. The *Zsigo* Court aptly concluded adopting the theory, as was done by the Vermont Supreme Court in *Doe v. Forrest*:

> …would expose employers to the 'threat of vicarious liability that knows no borders' for acts committed by employees that are clearly outside the scope of employment. We recognize the danger of adopting an exception that essentially has no parameters and can be applied too broadly.

Id. at 229.

(2) Illinois Law

In *Powell v. City of Chicago*, the Fourth District Appellate Court of Illinois declined to recognize an "aided by agency" theory of liability for a police officer's sexual assault of a detainee in the officer's custody. 2021 WL 2717159 (Ill. App. 2021). The *Powell* Court noted its "strong precedent against finding that sexual assault can be within the scope of employment" and that sexual assaults are "not the type of conduct [the officer] is employed to perform and does not further the City's business." *Id*. at *5-6.

(3) Maine Law

In *Mahar v. StoneWood Transport*, the Supreme Judicial Court of Maine declined to apply § 219(2)(d) to extent employer liability to an employee's physical assault of the plaintiffs in a road-rage altercation. 823 A.2d 540, 542-6 (Me. 2003). The *Mahar* Court opined § 219(2)(d) was intended to be limited to cases where the employment relationship aided in deceit against the plaintiff. *Id*. at 546.

(4) Minnesota Law

Recently the U.S. District Court for Minnesota in *Miles v. Simmons University* opined that the Minnesota Supreme Court would not likely adopt an aided-by-agency theory as an alternative to traditional scope-of-employment liability. 514 F.Supp.3d 1070, 1078-9 (D. Minn. 2021). In *Miles*, the plaintiff's webcam recorded her using the restroom while she was participating in a virtual class session. Id. at 1072-3. The plaintiff alleged that a professor recorded her using the restroom with a cell phone and later posted the materials on the internet. *Id*. at 1073. In addition to denying the proffered theory of liability, the *Miles* Court noted the Minnesota state courts have only applied an aided-by-agency theory to hostile work environment cases and discussed the potential for the theory to employ a form of strict employer liability if broadly interpreted and applied. *Id*. at 1077-9.

(5) Summary Of These Outside Jurisdictions

The decisions and rationale provided by these outside jurisdictions are more in line with Iowa common law and the IMTCA. In many of these states, like in Iowa, the Restatement (Second) of Agency § 219(2)(d) has been narrowly applied to only supervisor workplace harassment cases and has not been adopted more broadly to cover any employee's tortious conduct committed on duty.

Iowa has a long-standing, well-established common law of imposing vicarious liability only for acts committed within the scope of employment. The Iowa legislature has held the same with respect to municipal employers in Iowa Code § 670.2. Therefore, the Iowa courts should follow the lead of these jurisdictions and decline to apply a broad, vague/undefined, and outdated theory of liability proposed by the language of § 219(2)(d). For all of these reasons, this Court should refuse to adopt a new theory of "aided by agency" liability advocated for by Martin, and AFFIRM the District Court's January 4, 2018 summary judgment ruling in its entirety.

CONCLUSION

The District Court committed no legal error in granting summary judgment to the Appellee. The undisputed admissible evidence in this case wholly supports Tovar's felonious sexual assault of Martin was an act

performed outside the scope of his employment with the City. There are no genuine issues of material fact regarding whether the act was foreseeable to the City or that an instrumentality of the City was used during the assault. The evidence supports that Tovar detoured significantly from his authorized duties as a police officer to engage in sexual intercourse with Martin. That act in no way benefited the City. Tovar further knew his conduct was wrongful and/or not authorized by his employer, and he took great measures to try to keep the City from ever finding out the incident occurred. Accordingly, the District Court correctly determined the City is entitled to summary judgment as a matter of law.

Martin's proposed theory of "aided by agency" liability is contrary to Iowa common law and directly conflicts with the legislative pronouncement in the IMTCA, which provides municipalities will be vicariously liable only for acts committed by its employees within the scope of employment. This Court must decline to adopt a new theory of law that has never previously existed and that will significantly expand vicarious liability. Any policy reasons that may exist for recognizing the theory should be presented to, and discussed within, the Iowa legislature, not the Iowa courts, in order to change the law through legislation.

Appellee, City of Muscatine, respectfully requests this Court **AFFIRM** the District Court's January 4, 2018 summary judgment ruling in its entirety.

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REQUEST FOR NON-ORAL SUBMISSION

Appellee, City of Muscatine, respectfully requests that this case be submitted to the appellate court without oral argument.

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CERTIFICATE OF COST

I hereby certify the costs paid for printing Appellee's Appeal Final Brief was the sum of $0.00 because it was electronically prepared and submitted.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 10,358 words excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in font size 14 with a type style of Times New Roman.

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