IN THE SUPREME COURT OF IOWA

No. 21-1898

TRACY WHITE,

Appellee,

vs.

STATE OF IOWA and IOWA DEPARTMENT OF HUMAN SERVICES,

Appellants.

Appeal from the Iowa District Court for Polk County
Hon. Scott Rosenberg, District Judge

APPELLANTS' AMENDED FINAL REPLY BRIEF

BRENNA BIRD
Attorney General of Iowa

TESSA M. REGISTER
Assistant Solicitor General

KAYLA BURKHISER REYNOLDS
Assistant Attorney General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5112
(515) 281-4902 (fax)
tessa.register@ag.iowa.gov
kayla.burkhiser@ag.iowa.gov

ATTORNEYS FOR APPELLANTS

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I. The State preserved error on whether the district court erroneously admitted evidence unrelated to White.

White argues that the State did not preserve its objections to the "me-too" evidence that was unrelated to White. Appellee's Br. at 32. White first argues that the State did not preserve any error because it did not object to the improper evidence at trial. *Id.* Second, she argues that even if the State did preserve error, it was only for exhibits, not testimony. *Id.* Third, White argues that the State waived any objections because it offered evidence that it objected to in its motion in limine. *Id.* White is incorrect.

First, the State preserved error through its motion in limine. Generally, a "denial of a motion in limine does not preserve error for appellate review." *State v. Thoren*, 970 N.W.2d 611, 620–21 (Iowa 2022). If, however, the ruling on the motion in limine "reaches the ultimate issue" and declares evidence "admissible or inadmissible," it is a final ruling, and the moving party does not have to object at trial. *Id.* at 621 (quoting *State v. Alberts*, 722 N.W.2d 402, 406 (Iowa 2006)). Even if the court does not describe the ruling as "final," so long as the court does not "equivocate or state it would reconsider its ruling at trial," then "the court's ruling [has] the effect of a definitive evidentiary ruling." *Quad City Bank*

& Tr. v. Jim Kircher & Assocs., P.C., 804 N.W.2d 83, 90–91 (Iowa 2011).

Here, the court's ruling on the State's motion in limine was final, thereby preserving error. The court ruled on the motion in limine orally from the bench and there is no transcript of the relevant ruling. At trial, however, the court stated—in response to the State raising its motion in limine objections—that "[*a*]*ny* standing objections will be allowed, and, therefore, the Court will recognize them at the time they are introduced or presented *or talked about*." [5/5/21 Tr. 9:9–12] (emphasis added). The court also explained the State "will not need to make an objection at that time, and the record should reflect that *you are not waiving any objections to the ones that you have any standing objections*." [*Id.* Tr. 9:12–15] (emphasis added).

The court did not suggest that its motion in limine ruling was conditional or open for reconsideration. Rather, the court recognized that exhibits were "stipulated to" save for portions the State objected to in the motion in limine. [*Id.* Tr. 9:7–9]. Additionally, the court went further and stated that *any* standing objections would be allowed to the exhibits and that the State did not waive *any* objections to them. [*Id.* Tr. 9:9–15]. Thus, the ruling had the effect of a definitive evidentiary ruling, preserving error. *See Quad City Bank & Tr.*, 804 N.W.2d at 90–91.

Second, the State's objection encompassed exhibits and related testimony. Contrary to White's argument that the State never objected to the testimony, Appellee Br. at 32, the court stated that "any" standing objection would be recognized anytime the exhibits were even "talked about." [5/5/21 Tr. 9:9–12]. And the State's standing objection included exhibits that contained discussion of "black employees, African-American employees, gay/lesbian employees . . . . references to ADA or disability accommodations of various workers . . . civil rights complaints, ethnicity, sexual preference . . . ." [*Id.* Tr. 8:13–19]. Thus, the standing objection was for all the exhibits—even when "talked about"—that the State objected to in its motion in limine. [*Id.* Tr. 9:7–15]. Thus, far from being "difficult to tell what [the State] think[s] was covered by [its] motion in limine," Appellee Br. at 33, the court was clear: anything objected to in the motion in limine, including when "talked about." [*Id.* Tr. 9:7–15].

Finally, White argues that the State waived its arguments because it did not object during trial and because it offered evidence covered by its motion in limine. Neither is correct.

The State did not waive its objections by offering exhibits G, P, Q, S, L1, and Y1 into evidence. In criminal cases, parties may enter evidence that they failed to exclude in a motion in limine to "remove the sting" without waiving objections raised in the motion

in limine. *State v. Daly*, 623 N.W.2d 799, 801 (Iowa 2001); *see also State v. Griffin*, 323 N.W.2d 198, 202 (Iowa 1982); *State v. Jones*, 271 N.W.2d 761, 766 (Iowa 1978). While chiefly discussed in the criminal context, the Iowa Court of Appeals has acknowledged the principle in the civil context. *Featherstone v. Hy-Vee, Inc.*, No. 04-1710, 2006 WL1231662, at *5 (Iowa Ct. App. Apr. 26, 2006) ("[P]laintiff was put in the untenable position of having to decide whether to voir dire the jury on the possible prejudicial effect any abortion testimony would have on its consideration of damages, or remain silent on the issue until it would likely be raised later by Hy-Vee."). This makes sense, a party should not have to "abandon all trial tactics to preserve error." *Jones*, 271 N.W.2d at 766.

And the court's ruling on the State's standing objections is clear that "the record should reflect that *you are not waiving any objections to the [exhibits] that you have any standing objections [to]*." [5/5/21 Tr. 9:13–15] (emphasis added). In sum, the State did not waive its motion in limine objections, preserving error for appeal.

II. Receiving a report of sexual harassment is not harassment.

Considering the substance of White's claim, White spends significant time discussing cases in which a plaintiff observed or overheard misconduct directed at another person of the same

protected class. In the right case, such observations, when coupled with severe misconduct, may well contribute to a hostile work environment. And when totaling White's alleged harassment, the State indeed included White's evidence relating to comments she personally heard but were not aimed directly at her. Appellant Br. at 50.

But White asks this Court to go further. White argues that when she received reports that other women were being harassed, the act of receiving reports constituted harassment against White herself.

When a state employee experiences or learns of sexual harassment, that employee should report it to a supervisor, who in turn should report it up the chain. [5/7/21 Tr. 45:21–46:13]. Here, Ms. Jackson reported to White in the fall of 2017 that she was unhappy with Ms. Patterson. [5/7/21 Tr. 118:19–119:2]. At the time of this report, White directly supervised Ms. Patterson, and thus Ms. Jackson reported to the proper person under state policy. [5/5/21 45:15–17]. White understood the conversation to be a report—she took notes and she "translated in my mind to hostile work environment," [5/10/21 Tr. 57:8–17], though White never learned of most of the specifics until trial. [5/10/21 Tr. 150:17–151:2].

This is not harassing conduct, and is materially different from overhearing a sexist epithet directed at another person. Yet White claims that learning of Ms. Patterson's misdeeds contributed to the severity of her harassment, and White indeed seeks damages based on learning of Patterson's misconduct. Appellee Br. at 65.

White's expansive theory is not limited to Ms. Jackson's harassment—White seeks damages based on receiving reports from other women. For instance, White did not overhear or observe the "Daddy" comments, they were reported to her by two employees (who themselves overheard it). [5/10/21 Tr. 85:18–88:6]. White coached the male employee in response. [*Id.* at 88:18-25]. White also alleges the "eye candy" comment contributed to her sexual harassment. But this comment was received by an HHS employee, who reported it to another HHS employee, who reported it to White. [5/10/21 Tr. 138:12–21]. Again, receiving reports is not harassing conduct—it is remedial conduct.

While determining whether particular conduct constitutes harassment is often case- and context-specific, the law should not sweep so far as to include the act of receiving a report of sexual harassment. Indeed, extending liability not just to the harassment victim, but also to any person in the reporting chain who learns of the victim's harassment, undermines the remedial goals of the Iowa Civil Rights Act.

Because the disputed evidence did not alter White's actual work environment, nor is it proper me-too evidence, the district court erred in allowing the irrelevant and inflammatory evidence at trial.

III. White still fails to substantiate her future emotional distress damages award.

White next argues that the award of $530,000 in future emotional distress damages is appropriate. First, she argues that there was sufficient evidence to support the verdict. Appellee Br. at 42–49. Second, she argues that the verdict should be sustained because other cases have contained similar or larger awards. *Id.* at 49–58. The first is incorrect, and the second responds to an argument the State is not making.

For starters, the State's argument is that the award of *future* emotional damages is excessive. Appellant's Br. at 44–45. Separate from challenging the district court's denial of the State's judgment notwithstanding the verdict, the State is not contesting the amount of *past* emotional damages. But White—without distinguishing between past and future emotional damages—argues that she presented sufficient evidence for both. White details the emotional pain she experienced at work while McInroy was still there. Appellee's Br. at 44–45. Again, the State is not contesting her past emotional damages, which were only $260,000. *See* Appellant's Br.

at 44–45. And evidence of past emotional harm is unrelated to White's future emotional harm. *See Stampf v. Long Island R.R. Co.*, 761 F.3d 192, 208 (2d Cir. 2014) (holding $100,000 in future emotional damages was excessive when plaintiff had not been diagnosed with an emotional disorder and any on-going harm was speculative).

White asserts her future emotional damages are justified because she "would likely continue to experience these symptoms into the future" and that she "feels revictimized each time she thinks about what she endured. She continues to feel angry, sad, and guilty. She is less trusting, hopeful, and confident." Appellee's Br. at 47. But this is not enough to support $530,000 in future emotional damages. *See Shepard v. Wapello Cnty.*, 303 F. Supp. 2d 1004, 1024–25 (S.D. Iowa 2003) (holding $50,000 in future emotional damages was excessive because plaintiffs' feelings of anger, confusion, and lower self-esteem were not "unusually severe" to justify the high future damages amount).

For one thing, White's therapist said that there is only a "potential" that White is susceptible to psychological issues in the future. [5/13/21 Tr. 30:11–18]. Far from testifying about how White's "symptoms could last far into the future," Appellee's Br. at 48, all White's therapist said is that there is a *potential* that White is *susceptible* to future psychological issues. [5/13/21 Tr. 30:11–18].

Moreover, White's therapist did not say what psychological issues these might be or how long they might last. *Id.* She admitted that psychologically "I don't know what the outcome will be long term." [*Id.* Tr. 29:14–15]. Similarly, although White's husband said that what happened "bothers" her, he also said that "her attitude's much, much better with going to work, wanting to go to work" and that their marriage and social lives have improved. [5/12/21 Tr. 219:20–220:6].

White had more to say about how her life has improved. White testified that her new manager is "kind," and her work environment is "healthy" with "a sense of partnership" and "team." [5/10/21 Tr. 152:3–11]. Her work environment is now "so different" that she could not "even describe it." [*Id.* Tr. 152:17–18]. White also used to go to therapy "a lot" but now only sees her therapist when she needs a "tune up." [*Id.* Tr. 160:10–20]. When offered medication, she refused. [*Id.* Tr. 160:21–161:13]. She said she did not need it. [*Id.* Tr. 161:11–13]. Her therapist said that White is "feeling hopeful" and that work "was going to go in a different direction. She felt supported." [5/13/21 Tr. 28:10–12]. White ignores this evidence.

Instead, White switches to her other argument: that the $530,000 for future emotional harm is appropriate because other sexual harassment cases, based on other facts, sometimes result in high damages amounts. Appellee's Br. at 49–55. This misses the

point. The State is not objecting to high damages awards generally; a high damages award could be justified when the wrongful conduct involved is egregious and the emotional distress is severe and persistent. *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 773 (Iowa 2009). The problem here is the lack of any specific evidence supporting the $530,000.

And in comparing to other cases, White does not distinguish between past and future emotional damage verdicts. *See* Appellee's Br. at 50–53. White also mixes in several settlement agreements without explaining how they are relevant to comparing jury verdicts.

White next argues that this case is like *Smith v. Iowa State University of Science & Technology*. It is not. First, the emotional distress award in *Smith* did not distinguish between past and future emotional damages. *Smith v. Iowa State Univ. of Sci. & Tech.*, 851 N.W.2d 1, 31–33 (Iowa 2014). Second, the court focused on how Smith's abusers were aware of and exploited his unique vulnerabilities, justifying higher damages. *Id.* at 32. White does not allege any unique vulnerabilities that were exploited. *See* Appellee's Br. at 57. Third, Smith sought treatment and was diagnosed with "extreme stress and anxiety" that "was significantly impacting his life." *Smith*, 851 N.W.2d at 32–33. White, by contrast, has the "potential" of being "susceptible" to future psychological

issues. [5/13/21 Tr. 30:11–18]. She declined medication, said she did not need it, and sees her therapist only for "tune ups." [5/10/21 Tr. 160:19–161:13].

Last, White insists that "[t]he fact that this verdict may be higher than some previous ones upheld by this Court may reflect the limited number of cases the Court hears." Appellee's Br. at 58 (footnote omitted). Alternatively, "[i]t may mean that [White] was hurt more than those other plaintiffs" or "that the consensus of the community as to the monetary worth of human anguish is changing." *Id.* But the issue here is not the number of cases this Court hears, nor whether White was hurt more than other plaintiffs, nor even what the community consensus is. It is whether White presented sufficient evidence to support her specific claim of future hurt and anguish justifying $530,000—more than double the $260,000 for past emotional damages. She did not. And the trial court abused its discretion in not remitting the future emotional-distress damages.

IV. Jury Instruction 16 was erroneous.

Finally, White argues that Jury Instruction 16 was not erroneous. First, White argues that the State did not make its arguments below. *Id.* at 68. Second, White argues that harassment of non-plaintiffs by different harassers that White was unaware of

is relevant to notice and patterns of harassment. *Id.* at 69. Neither is correct.

The State made its arguments at trial. The State objected that "the very last sentence in [Instruction 16] which instructs the jury that conduct of which Tracy White was unaware is relevant to her claim of sexually hostile work environment is an incorrect statement of law and is not pertinent to *any issue* in this case . . . ." [5/19/21 Tr. 25:22–26:3] (emphasis added). The State's argument here does not exceed the objection: harassment of non-plaintiffs that White was unaware of is "not pertinent to any issue" as it cannot be used to establish a pattern or practice of harassment against White. Nor can it be used to establish that HHS knew about White's harassment.

Harassment that White was unaware of is not relevant for establishing a practice or pattern against *her*. Even so, Instruction 16 allowed the jury to consider harassment—which White did not know about and was not against her—to determine "whether harassment was part of a pattern or practice." That is not the law. *Moylan v. Maries Cnty.*, 792 F.2d 746, 749 (8th Cir. 1986) ("The plaintiff must show a practice or pattern of harassment *against her* . . . .") (emphasis added).

The jury instruction that White cites from *Madison v. IBP, Inc.* supports this understanding. 257 F.3d 780, 794 n.10 (8th Cir.

2001) ("You may consider harassment that [plaintiff] was unaware of, in determining intent, and whether the harassment was a part of the pattern and practice of harassment *against her*.") (emphasis added), *judgment vacated on other grounds*, 536 U.S. 919 (2002) (mem.). So evidence of not just any harassment will do; it must be harassment against the plaintiff. *See id.* Instruction 16 has no such limitation. Thus, it was an erroneous statement of law.

Instruction 16 also allowed the jury to consider harassment of non-plaintiffs by different harassers that White did not know about for the purposes of determining whether HHS had notice. That is also not the law. *Sellars v. CRST Expedited, Inc.*, 13 F.4th 681, 698 (8th Cir. 2021) ("Reports made by *non-plaintiff* victims about *different* harassers at separate worksites were not probative of whether the employer had constructive notice that sexual harassment was pervasive and open in an individual plaintiff's work environment.") (emphasis added).

White quotes at length from *Sandoval v. American Building Maintenance Industry* to assert that juries can consider evidence of harassment against *any* non-plaintiff to establish notice. Appellee's Br. at 71–72. But in *Sandoval*, the Eighth Circuit noted that non-plaintiff evidence could be relevant but remanded to the district court to determine whether allegations of sexual harassment by non-plaintiffs from multiple worksites put defendants on

constructive notice of plaintiffs' sexual harassment. *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 801 (8th Cir. 2009). It did not. *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 765 F. Supp. 1138, 1170–71 (D. Minn. 2010) (deeming evidence about non-plaintiffs harassed by different employees at different locations as irrelevant to notice).

Allowing the jury to consider *any* harassment against *anyone* at HHS—even harassment that White was unaware of—to establish a pattern, practice, or notice of harassment *against White* was erroneous. *Sellars*, 13 F.4th at 698 ("We thus decline the Plaintiff's request that liability be assessed on the basis that [defendants] 'knew or should have known Plaintiffs *would be* harassed' because it was 'on notice of a serious risk that *any* female driver was *likely to be sexually harassed.*'"). The district court erred in giving Instruction 16 and should be reversed.

CONCLUSION

For all these reasons, as well as the reasons stated in the State's opening brief, the verdict cannot stand. This Court should enter judgment for the State, order a new trial, or order a remittitur to conform the damages to the evidence presented.

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa

/s/Tessa Register
TESSA REGISTER
Assistant Solicitor General

/s/ Kayla Burkhiser Reynolds
KAYLA BURKHISER REYNOLDS
Assistant Attorney General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 725-5390 / 281-6780
(515) 281-4902 (fax)
tessa.register@ag.iowa.gov
kayla.burkhiser@ag.iowa.gov

ATTORNEYS FOR APPELLANTS

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/s/Kayla Burkhiser Reynolds
Assistant Attorney General

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This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 3,122 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/Kayla Burkhiser Reynolds
Assistant Attorney General

CERTIFICATE OF FILING AND SERVICE

I certify that on June 27, 2023, this amended reply brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

/s/Kayla Burkhiser Reynolds
Assistant Attorney General