IN THE IOWA SUPREME COURT
No. 23-0605

VALERIE RHEEDER,
Plaintiff-Appellee,

vs.

CITY OF MARION, DOUGLAS SLAGLE, SHELLENE GRAY, AND JOSEPH MCHALE,
Defendants-Appellants.

ON APPEAL FROM THE IOWA DISTRICT COURT IN LINN COUNTY CASE NO. LACV093892
ORDERS DATED JANUARY 20, 20230 AND APRIL 3, 2023

THE HONORABLE VALERIE L. CLAY,
DISTRICT COURT JUDGE

DEFENDANT-APPELLANT SHELLENE GRAY'S FINAL REPLY BRIEF

(TRIAL DATE - PENDING)

Margaret A. Hanson AT0011866
Kacy L. Flaherty-Tarpey AT0013761
DENTONS DAVIS BROWN PC
215 10th St., Suite 1300
Des Moines, Iowa 50309
Telephone: (515) 288-2500
E-mail: Maggie.Hanson@dentons.com
Kacy.Flaherty-Tarpey@dentons.com

ATTORNEYS FOR DEFENDANT SHELLENE GRAY

#3765449

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ARGUMENT

I. The District Court erred in finding that Gray could be held liable for Rheeder's retaliation claim because the undisputed facts demonstrate that Gray's alleged actions were not materially adverse.

A. The issue of materiality is dispositive of the question of Gray's potential liability for Rheeder's retaliation claim.

The District Court decided that Defendant Gray could potentially be liable to Rheeder for her retaliation claims on two bases. Gray, in her original brief to this Court, articulates the tension created by the District Court's January and April Rulings regarding significant Iowa precedential cases. (Gray Br. pp. 18–25) ("Gray seeks to harmonize the holdings in *Haskenoff* and *Godfrey* which state adverse action can be non-employment-related with *Rumsey* and *Vroegh* wherein the second step of the test for non-employer liability examines the non-employer-defendant's 'ability to effectuate' the harm within the context of employment."). In response, Plaintiff Rheeder side-steps Gray's argument by stating that *Vroegh* "does not create the ambiguity argued by Defendants." (Rheeder Br. pp. 80–82). What Rheeder fails to recognize, though, is that *Vroegh* is a sort of real-time application of the *Rumsey* standard, albeit in the context of discrimination rather than pure retaliation. *See Vroegh v. Iowa Dept. of Corr.*, 972 N.W.2d 686, 706–707 (Iowa 2022) (holding that a third-party insurer's role with the employer was

"insufficient to control or effectuate" adverse action for purposes of the claim). And, *Rumsey*, though decided in the same week as *Godfrey*, does not recognize *Godfrey*'s seeming distinction that "[w]ith respect to retaliation claims, the adverse action does not need to be employment-related to be unlawful." *See Rumsey v. Woodgrain Millwork*, 962 N.W.2d 9 (Iowa 2021); *Godfrey v. State*, 962 N.W.2d 84, 109 (Iowa 2021).

Gray has addressed that issue to its fullness in prior briefing. In this Reply, Gray will set that facet of the issue aside to focus specifically on the District Court's finding on the question of the materiality of the adverse action. The District Court found that Rheeder's retaliation claims against Gray were actionable because "a jury could objectively find that Gray's alleged actions would dissuade a reasonable person from reporting complaints of discrimination or harassment." (App. 691; January Ruling, p. 27). Rheeder also acknowledges that the key question is materiality of the alleged adverse action. (Rheeder Br. p. 82) (discussing materiality standard); (Gray Br. pp. 22–23) (discussing the *Burlington Northern* definition of what constitutes harm or injury that is sufficiently material to give rise to a retaliation claim).

So, while Gray presents a valid, live, and important question for this Court to answer regarding the tension created by the District Court's April and January Rulings and the existing Iowa case law on point, the parties and

the District Court seem to all agree that the analysis boils down to whether Gray's alleged adverse actions were "material." For purposes of summary judgment, that question can be resolved regardless of whether and how this Court resolves the tension in the law. The allegedly adverse actions in question must have been material to give rise to Rheeder's retaliation claim.

Accepting the facts recited by the District Court as true for purposes of ruling on summary judgment, there is no permutation of circumstances wherein Gray's alleged actions were materially adverse under the legal standards described below. Summary judgment is reviewed for correction of errors at law. *Feeback v. Swift Pork Co.*, 988 N.W.2d 340, 346 (Iowa 2023) (internal citations omitted). "Summary judgment is proper when the movant establishes there is no genuine issue of material fact and it is entitled to judgment as a matter of law." *Id.* "Summary judgment is not a dress rehearsal or practice run; 'it is the put up or shut up moment in a lawsuit when a [nonmoving] party must show what evidence it has that would convince a trier of fact to accepts its version of events.'" *Id.* (alteration in original) (quoting *Slaughter v. Des Moines Univ. Coll. of Osteopathic Med.*, 925 N.W.2d 793, 800 (Iowa 2019)).

The District Court erred in finding that Gray could be liable for retaliation against Rheeder because under the undisputed facts, her alleged

actions do not qualify as materially adverse. For the reasons stated herein, Gray asks that this Court find that the District Court erred in holding that Gray could be liable for retaliation and remand to the District Court with instructions to dismiss her from the lawsuit regardless of how it answers the question of potential legal tension created by the District Court's January and April Rulings and existing Iowa law.

B. There is no permutation of circumstances using the facts accepted as true by the District Court in which Gray's actions were material under the relevant legal standards.

It is undisputed and well established that adverse actions must be **materially** adverse to give rise to a retaliation claim. *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006); *see also Godfrey v. State*, 962 N.W.2d 84, 109–10 (Iowa 2021) ("the adverse action must still be material"). The reason for this requirement is simple: anti-retaliation provisions were enacted to "prevent employer interference with [employees'] 'unfettered access' to . . . remedial mechanisms." *Haskenhoff*, 897 N.W.2d at 587–88; *Burlington N.*, 548 U.S. at 68. To give rise to a retaliation claim under those provisions, materially adverse actions must "produce an actual 'harm or injury' to the plaintiff" that would "dissuade a reasonable person from making or supporting an allegation of discrimination or harassment." *Godfrey*, 962 N.W.2d at 109 (internal quotation marks omitted) (citing *Burlington N.*, 548

U.S. at 68; *Haskenhoff*, 897 N.W.2d at 587–89). This standard cannot be satisfied if the employee has, in fact, had unfettered access to the intended remedial mechanisms. Materially adverse actions can only include those actions that, in short, harm a reasonable person by chilling their ability to report retaliation or supplement a report thereof. *See Haskenhoff*, 897 N.W.2d at 587–88 (citing *Burlington N.* at 68 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006))).

Courts use an objective standard in evaluating retaliation claims because a "reasonable employee" standard is used in other Title VII contexts and avoids asking courts "to determine a plaintiff's unusual subjective feelings." *Burlington N.*, 548 U.S. at 68–69; *see also Godfrey*, 962 N.W.2d at 109. However, courts recognize that "[c]ontext matters." *Id.* at 69. Therefore, the standard is phrased in general terms and "the significance of any given act of retaliation will often depend upon the particular circumstances" involved. *Id.*; *see also Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998) ("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.").

This framework allows the law to recognize that an "'act that would be immaterial in some situations is material in others.'" *Id.* at 69 (quoting *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005)). "[C]ommon sense" is part of the contextual analysis. *See id.* at 70–71 ("Common sense suggests that one good way to discourage an employee . . . from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable."); *see also Haskenhoff*, 897 N.W.2d at 587–88 (relying on *Burlington N.*).

The facts necessary to demonstrate that Gray's alleged actions were not injurious to Rheeder are entirely objective and do not require any conjecture about Rheeder's subjective feelings. These facts were accepted as true by the District Court for purposes of its January and April Rulings.

On January 23 and 24, Rheeder alleges Gray committed adverse, retaliatory actions toward her. (App. 701; January Ruling, p. 11). Yet, during April 2019, Rheeder participated in the external investigation conducted by outside attorney Frances Haas, and she returned to work in early May. (*Id.* at pp. 12–14). On May 9, Rheeder voiced her concerns about working with Gray **in a meeting with Gray** and was told she would no longer need to work with Gray. (*Id.* at p. 15). Rheeder alleges that Gray took additional retaliatory

action shortly after the May 9 meeting. (*Id.*). Subsequently, Rheeder made the following reports or supplements to reports about Gray's behavior:

(1) May 13 (verbal complaint to HR);

(2) May 20 (written supplement to verbal complaint);

(3) June 4 (participated in discussion of investigation results with City);

(4) June 18 (filed ICRC Complaint);

(5) October 4 (filed additional charges with ICRC);

(6) September 27 (filed the instant suit); and

(7) January 17, 2020 (amended Petition).

(*Id.* at 15–16).

Rheeder made at least **two** complaints about Gray after the January 23 and 24 incidents, including participation in an external investigation and participation in a meeting where she verbally said she did not feel comfortable working with Gray (and was told she would not have to do so). Then, after the second incident of alleged retaliation (sometime after May 9), Rheeder made no less than **seven** additional complaints or supplements to complaints related to these alleged incidents, including another investigation, an escalation to the ICRC, and an escalation to the District Court.

An adverse action is only material if it causes harm to the employee by being of the character that would dissuade a reasonable employee from

accessing the remedial system as enacted by the relevant statutes. In this case, the plaintiff accessed the remedial system no less than **nine** times after the first alleged incident of retaliatory behavior. She was able to access multiple, escalating layers of the remedial system ranging from her employer (including internal and external investigations), the ICRC, and now, the District and Appellate courts. These facts are accepted as true for purposes of summary judgment, and they are objective rather than subjective. Rheeder was in no way prevented or deterred from accessing the protections designed to protect all workers from discriminatory, harassing, and retaliatory behavior at work. Moreover, the City preserved her job, granted paid and unpaid leave generously, and repeatedly offered equivalent employment in a different department. (*See id.* at pp. 12–15). Common sense and context dictate that these are not the type of behaviors that dissuade a reasonable person from reporting discriminatory or harassing behavior, and Rheeder was, in fact, not so dissuaded.

Based on the above legal standards and the facts accepted as true by the District Court for summary judgment, there is no set of circumstances under which Gray's alleged actions were materially adverse to Rheeder, nor would they have been to any reasonable worker. The District Court erred in finding that Gray could be held liable for a retaliation claim. Defendant Gray asks that

this Court remand the case to the District Court with instructions to dismiss Gray from any retaliation claim.

C. Rheeder's retaliation claim against Gray should be dismissed because it falls into the "triviality pitfall."

The Eighth Circuit Court of Appeals has described "the triviality pitfall" regarding this type of retaliation claim. *Lopez v. Whirlpool Corp.*, 989 F.3d 656, 665 (8th Cir. 2021); *see also Gustafson v. Genesco, Inc.*, 320 F.Supp.3d 1032, 1052 (S.D. Iowa 2018) (collecting cases). The triviality pitfall occurs when the plaintiff does not show that the retaliation produced some injury or harm. *AuBuchon v. Geithner*, 743 F.3d 638, 644 (8th Cir. 2014) ("an adverse employment action must be material, not trivial"); *see also Littleton v. Pilot Travel Ctrs., LLC*, 568 F.3d 641, 644 (8th Cir. 2009).

In *Lopez*, the Eighth Circuit Court of Appeals held that an employee who was threatened with retaliation through intimidation but still reported the incident incurred no harm or injury from the alleged retaliation. *Lopez*, 989 F.3d at 665 ("Lopez undercuts any argument about harm or injury from a threatened termination when she treated it as an empty threat. . . . She cites no evidence for us to conclude that a reasonable employee would have believed otherwise.").

The claims made against Gray are similar to those made by the plaintiff in *Lopez*. To the extent Rheeder's allegations against Gray are taken as true,

they apparently had nothing more than a trivial effect on Rheeder. As stated above, Rheeder reported alleged retaliation at least nine times following the incidents with Gray. Rheeder has not presented any evidence that a reasonable person would have felt dissuaded from reporting the incidents. Therefore, she has undercut her own argument that Gray's alleged actions were in any way materially adverse.

Based on the above legal standards and the facts accepted as true by the District Court for summary judgment, there is no set of circumstances under which Gray's alleged actions were materially adverse to Rheeder, nor would they have been to any reasonable worker. The District Court erred in finding that Gray could be held liable for a retaliation claim. Defendant Gray asks that this Court remand the case to the District Court with instructions to dismiss Gray from any retaliation claim.

II. The District Court abused its discretion by granting leave to amend, which substantially changed the issues in the case and caused significant prejudice to Gray.

Rheeder rests almost entirely on the District Court's broad discretion to grant leave to amend, including the discretion to amend to conform to the proof; but, this discretion is not unfettered and is reversible on appeal where there is clear abuse of discretion—where the court's decision rested on clearly untenable or unreasonable grounds. *Scott v. Grinnell Mut. Reinsurance Co.*,

653 N.W.2d 556, 561 (Iowa 2002). Generally, and as long as the amendment does not substantially change the issues or defense of the case, the court should permit the amendment. *Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 767 (Iowa 2002). Even an amendment that substantially changes the issues may still be allowed so long as the opposing party is not prejudiced or unfairly surprised. *Id.* Here, while Gray acknowledges the District Court's discretion, the allowed amendment poses a stark illustration of both a substantial change in the issues and prejudice to Gray.

A. Rheeder cannot seek the protections of notice pleading where she did not plead a hostile work environment theory as to her retaliation claims and Iowa courts have neither recognized nor defined a retaliatory hostile work environment claim.

Rheeder takes the position that the District Court's *sua sponte* permission to amend should be of no consequence to Gray given Iowa's notice pleading rules; yet, Rheeder fails to acknowledge the import and impact of the District Court's creation of a claim nonexistent under Iowa law. Practically speaking, notice pleading only does so much for a responding party if the responding party has no framework within which to apply the allegations pled. Said another way, the allowed amendment is prejudicial to Gray where the District Court created a new claim with scant guidance to the parties that is both conflicting and confusing.

Iowa courts have held that "if specific theories of recovery are identified in the pleadings, it may be inferred that these are the only theories on which the pleader relies." *Peterson v. Bottomley*, 582 N.W.2d 187, 188–89 (Iowa 1998) (citing *Davis v. Ottumwa YMCA*, 438 N.W.2d 10,13 (Iowa 1989) (holding a pleading asserting a claim for reimbursement of medical expenses on common-law theories did not give fair notice of a claim under federal ERISA statutes); *Shill v. Careage Corp.*, 353 N.W.2d 416, 420 (Iowa 1984) (holding that a pleading asserting a negligence theory of recover did not give fair warning of a claim based on implied warranty); *Gosha v. Woller*, 288 N.W.2d 329, 331 (Iowa 1980) (holding a pleading that set for the a theory of express warranty did not give fair warning of an intent to rely on an implied warranty)). And, further, the court "cannot 'invent[], *ex nihilo*, a claim which simply was not made." *Paskert v. Kemna-ASA Auto Plaza*, 950 F.3d 535, 539 (8th Cir. 2020) (quoting *Shannon v. Ford Motor Co.*, 72 F.3d 678, 685 (8th Cir. 1996)). At the time Rheeder filed her Iowa Civil Rights Complaint and when she filed her Petition in District Court in 2019, there is no way that Rheeder could have asserted a retaliatory hostile work environment claim, as **the *Godfrey* case[1] had not been decided.**

[1] This is no concession by Gray that *Godfrey* recognizes or creates a claim of retaliatory hostile work environment in Iowa.

As the District Court recognized in its January Ruling,

> In *Godfrey*, the Court disagreed with the plaintiff's contention that "[i]n determining whether the defendants' conduct was materially adverse, . . . this court should look at the cumulative effect of isolated incidents "because the plaintiff had "dismissed his hostile work environment claims and pursued only discrete discrimination and retaliation claims."

(App.713; January Ruling, p. 23) (citing *Godfrey*, 962 N.W.2d at 110). Rheeder attempts to take advantage not only of a theory of recovery not pled, but a claim not recognized or defined in this jurisdiction. Like in *Godfrey*, Rheeder has no claim for hostile work environment related to her retaliation claim, and the District Court should have reviewed the discrete acts in isolation.

B. The District Court's adoption of the *Menoken* standard is neither unequivocal nor supported.

Rheeder proffers support for the District Court's ruling based on one passing reference in *Godfrey* (Rheeder Br. p. 72): "Similarly, '[a] plaintiff may bring a 'special type of retaliation claim based on a 'hostile work environment' by alleging a series of 'individual acts that may not be actionable on [their] own but become actionable due to their cumulative effect.'" *Godfrey v. State*, 962 N.W.2d 84, 110 (Iowa 2021) (quoting *Menoken v. Dhillon*, 975 F.3d 1, 5 – 6 (D.C. Cir. 2020). Importantly, however, the

Godfrey Court did **not** adopt the *Menoken* standard, and, instead, painstakingly distinguished retaliation and hostile work environment claims and their respective standards. *Id.* (citing *Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 571 (Iowa 2015) ("[I]n *Farmland Foods*, we aligned ourselves with the unanimous view of the Supreme Court . . . that the continuing violation doctrine does not apply to cases involving discrete discriminatory acts, as opposed to hostile work environment claims.")).

The District Court noted "existing Iowa caselaw does not provide a fleshed-out standard for retaliation-based hostile work environment claims" and nevertheless proceeded to adopt the *Menoken* standard despite its further qualification that this test for retaliatory hostile work environment is "not universally accepted" and "[o]ther cases demonstrate considerable confusion over the applicable standard." (App. 713-714; January Ruling, pp. 23–24). So, not only does the standard have no basis in Iowa law, but other jurisdictions, including the Eighth Circuit, disagree or are unclear about its application. *See, e.g.*, *Mahler v. First Dakota Title Ltd. P'ship*, 931 F.3d 799, 807 (8th Cir. 2019); *Stewart v. Indep. Sch. Dist. No. 196*, 481 F.3d 1034, 1042 (8th Cir. 2007); *see also Tonkyro v. Sec'y of U.S. Dep't of Veteran Affairs,* 995 F.3d 828, 835 (11th Cir. 2021); *Yochim v. Carson*, 935 F.3d 586, 593 (7th Cir. 2019); *Flanagan v. Off. Of Chief Judge of Cir. Ct. of Cook Cnty.*, 893 F.3d

372, 375 (7th Cir. 2018); *Komis v. Sec'y of U.S. Dep't of Labor*, 918 F.3d 289, 298 – 99 (3d Cir. 2019).

Ultimately, and **even if** the Court could reach the conclusion that the claim is recognized through passing reference in *Godfrey*, retaliatory hostile work environment is an unexplored claim, with unknown parameters, that was never pled by Rheeder. To subject the Defendants to this untread territory without sufficient guidance from the courts would be substantially prejudicial. Accordingly, the District Court abused its discretion in allowing Rheeder to so amend.

C. The amendment to add retaliatory hostile work environment substantially changes the issues.

Notwithstanding Rheeder's attempt to do so, it cannot be disputed that the District Court, in its January Ruling, created a new claim under Iowa law. This is evident in the District Court's lengthy analysis, which was required not only to defend the recognition of the claim, but also to "define" the standard which should apply. (App. 708-709, 712-715; January Ruling, pp. 18-19, 22-25). And, while Rheeder significantly minimized the import in her briefing, she does acknowledge that with the District Court's adoption of the *Menoken* standard as to the new claim, came the **addition of an element** to the traditional analysis regarding discrete retaliation.

> For a "special type of retaliation claim," the D.C. Circuit held there is an additional element:
>
> > The acts in questions must be both "adequately linked such that they form a coherent hostile environment claim," and "of such severity or pervasiveness as to alter the conditions of . . . employment and create an abusive working environment." To determine whether a group of alleged acts is sufficiently linked, courts often consider whether the acts in question 'involve[d] the same type of employment actions, occur[ed] relatively frequently, and [were] perpetrated by the same managers."

(App. 713; January Ruling, p. 23 (citing *Menoken*, 975 F.3d at 6)). Here, the District Court recognizes that a retaliatory hostile work environment claim has an extra prong beyond what is required to prove a discrete retaliation claim. As distinguished from this case, Iowa courts have previously granted amendments where the facts or elements required to prove an added claim were "nearly identical." *See*, *e.g.*, *Rife*, 641 N.W.2d at 768 (citing *McElroy v. State*, 637 N.W.2d 488, 495 (Iowa 2001) (allowing late amendment where the issues were not substantially changed); *Davis v. Ottumwa Young Men's Christian Ass'n*, 438 N.W.2d 10, 15 (Iowa 1989) (same); *Ackerman v. Lauvner*, 242 N.W.2d 342, 345 (Iowa 1976) (same)). Here, the elements of the claim pled (discrete retaliation) cannot be imprinted on the aspirational claim (retaliatory hostile work environment).

The District Court's recognition of the retaliatory hostile work environment claim adds a new element, which consequently and certainly

injects new issues into the case—issues the parties have not had a chance to address, delve into in discovery, or upon which to move for summary judgment—regarding whether the actions alleged could be adequately linked and were severe and pervasive so as to meet the threshold inquiry. Had Gray and the other Defendants known this claim was asserted and the standard which to apply, they would have approached the claim accordingly—and far differently than they approached the retaliation claim (involving discrete and isolated acts) Rheeder actually pled. Accordingly, for the substantial change and injection of new issues the Court abused its discretion in allowing late amendment.

D. The late amendment is further prejudicial given the passage of time and critical case deadlines.

The District Court's decision to allow this late amendment is further prejudicial to the Defendants, as this case is squarely postured for trial. All critical deadlines have passed—to amend pleadings, close of discovery, and dispositive motions. *See Jochims v. Isuzu Motors, LTD*, 144 F.R.D. 350, 356 (S.D. Iowa 1992) (discussing deadlines and stating, "'it is well established that litigants these days [are] under the burden of heavy caseloads and clogged court calendar[s]. . . . [And] the flouting of [] deadlines causes substantial harm to the judicial system. . .' by increasing costs, disrespect to other lawyers and the judicial process. Adherence to reasonable deadlines is critical to

restoring integrity in court proceedings." (internal citations omitted)). Further, to the extent this Court is persuaded by the fact that the trial date is no longer imminent, the parties would still be prejudiced by the amendment—the parties have been in litigation for over **three** years and have conducted substantial discovery, engaged in significant motions practice, and appellate work[2]. The defense was prepared to defend a discrete retaliation claim based on the plain reading of the claims and the first Amended Petition. The parties should not now have to incur further expense to reopen and perform additional discovery, including depositions, research the parameters of this newly found claim, or move again for summary judgment.

CONCLUSION AND JOINDER

For all the reasons stated above and set forth herein and in Gray's prior briefing, the District Court abused its discretion and did not appropriately apply the available Iowa law in its January and April Rulings. Accordingly, the District Court's January and April Rulings should be reversed. Gray joins in the reply briefs filed by the Defendants City of Marion and Joseph McHale and Defendant Slagle.

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[2] *See, e.g.*, *Morales v. Miller,* 2011 WL 222527 at *3 (Iowa Ct. App. 2011) ("By the time the matter is brought to trial, this case will have been pending for over two years. To allow Plaintiffs to now change the potential nature of the defense will result in more expense to the defense.").

/s/Margaret A. Hanson
Margaret A. Hanson AT0011866
Kacy L. Flaherty-Tarpey AT0013761
DENTONS DAVIS BROWN PC
215 10th St., Suite 1300
Des Moines, Iowa 50309
Telephone: (515) 288-2500
E-mail: Maggie.Hanson@dentons.com
Kacy.Flaherty-Tarpey@dentons.com

ATTORNEYS FOR DEFENDANT / APPELLANT SHELLENE GRAY

CERTIFICATE OF FILING

The undersigned hereby certifies that she filed the foregoing Final Reply Brief on January 30, 2024, by electronically filing a copy thereof to the Clerk of the Iowa Supreme Court, 1111 East Court Avenue, Des Moines, Iowa 50319.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 30, 2024, a copy of the foregoing Final Reply Brief was served by electronically filing a copy thereof to: Ann E. Brown, counsel for Plaintiff/Appellee; Amy L. Reasoner, Holly A. Corkery, counsel for Defendants/Appellants City of Marion and Joseph McHale; Bridget Penick and Olivia Norwood, counsel for Defendant/Appellant Douglas Slagle.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 4,111 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1). 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 Word 2018 in Times New Roman 14.

ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost of printing the foregoing Final Reply Brief was the sum of $0.00.

/s/ Margaret A. Hanson
Margaret A. Hanson AT0011866
Kacy L. Flaherty-Tarpey AT0013761
DENTONS DAVIS BROWN PC
215 10th St., Suite 1300
Des Moines, Iowa 50309
Telephone: (515) 288-2500
E-mail: Maggie.Hanson@dentons.com
Kacy.Flaherty-Tarpey@dentons.com
ATTORNEYS FOR DEFENDANT /APPELLANT SHELLENE GRAY