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IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 22-1599
Polk County No. CVCV060174

SCOTT HAMPE,
Plaintiff—Appellant,

v.

CHARLES GABUS MOTORS, INC. D/B/A TOYOTA OF DES MOINES and GADIMINA ENTERPRISES, INC. D/B/A MID-IOWA OCCUPATIONAL TESTING,
Defendants—Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE JOSEPH SEIDLIN, DISTRICT COURT JUDGE

FINAL BRIEF FOR DEFENDANT-APPELLEE CHARLES GABUS MOTORS, INC. D/B/A TOYOTA OF DES MOINES

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ROUTING STATEMENT

Defendant-Appellee Charles Gabus Motors, Inc. d/b/a Toyota of Des Moines ("CGM") believes transfer to the Court of Appeals is appropriate as this case presents issues of the application of existing legal principles.

The Supreme Court may wish to retain this case to address the issue presented involving use of an "alternates" list in random drug-testing. This issue has been identified but not definitively resolved by the Supreme Court. *Dix v. Casey's General Stores, Inc.*, 961 N.W.2d 671, 691-692 (Iowa 2021). Plaintiff-Appellant Scott Hampe ("Hampe") has, however, failed to preserve this issue for appeal.

STATEMENT OF THE CASE

On May 8, 2020, Hampe filed a petition alleging CGM and Gadimina Enterprises ("Mid-Iowa") violated Iowa Code §730.5. *See* Petition (APP. 11-13). He filed an Amended Petition on July 17, 2020 elaborating upon the claimed violations. *See* Amended Petition (APP. 14-17). On December 30, 2021, Hampe requested leave to file a Second Amended Petition to assert common law claims. *See* Motion to Amend (APP. 18-20). Over objection, the District Court entered a ruling on February 8, 2022 allowing the filing of Hampe's Second Amended Petition. Ruling on Motion to Amend (APP. 54-61). CGM answered Hampe's petitions on May 29, 2020, August 21, 2020, and February 28, 2022 (APP. 65-83). *See generally* Answers.

On March 2, 2022, CGM and Mid-Iowa filed motions for summary judgment. See Motions (APP. 107-330). On March 27, 2022, Hampe filed a motion for partial summary judgment. See Motion (APP. 664-708). The District Court held a hearing upon the summary judgment motions on July 29, 2022.

On September 27, 2022, the District Court granted the summary judgment motions from CGM and Mid-Iowa, and denied Hampe's motion. *See* Ruling on Summary Judgment (APP. 935-953). The following day, on September 28, 2022, Hampe filed a Notice of Appeal. (APP. 954).

STATEMENT OF FACTS

Hampe is a former employee of CGM. (APP. 22). He was initially hired in automotive sales, and eventually worked his way into leasing manager. (APP. 170)(Pl's Depo. 23:10–16). Hampe understood that CGM's reason for terminating his employment on December 5, 2019, was due to Hampe's refusal to take a drug test consistent with CGM's prohibition on controlled substance usage by employees. (APP. 171-172)(Pl's Depo: 29:21—30:5); (APP. 191-200).

When Hampe started employment with CGM in 2008, he became aware that CGM performed random monthly drug testing as a condition of employment. (APP. 173)(Pl's Depo. 34:2–10). Hampe signed an acknowledgement of CGM's Controlled Substance Abuse Policy. (APP. 172-173)(Pl's Depo. 33:14—34:3); (APP. 190). Hampe was aware that any urine sample provided was to be his "own, and not to be altered in any way." (APP. 174)(Pl's Depo. 39:6–15). Hampe also understood that refusal to consent to a drug test would be grounds for termination from employment, even for a first

offense. (APP. 175)(Pl's Depo. 45:2–24). Hampe signed an additional acknowledgement of CGM's policy on November 18, 2013, including that employees who violated the policy could be terminated. (APP. 175)(Pl's Depo. 44:23—45:24); (APP. 201). Hampe never submitted any questions regarding the scope or application of the Policy. (APP. 175)(Pl's Depo. 42:5–7).

CGM selected December 5, 2019 as a day to conduct random, unannounced drug testing. (APP. 203; 206-207). In order to generate a testing list, CGM provided a list of its employees to a third–party entity independent of CGM, Mid-Iowa. (APP. 206-207). CGM instructed Mid–Iowa to conduct a random selection of employees for testing; it did not ask or identify Hampe to be tested. (APP. 203-204, 208). Mid–Iowa ran the CGM employee list through proprietary software from "Drug Test Now," a computer–based random number generator, which selected fifteen (15) CGM employees for testing and eight (8) employees as alternates out of one–hundred and sixty–five (165) employees. (APP. 206-207; 210;

212). The proprietary software provides an equal chance of random selection. (APP. 206-207). The output list was given to CGM on November 27, 2019. (APP. 206-207; 215-216). Hampe was listed as an alternate. (APP. 206-207; 215-216).

On December 5, 2019, CGM sought to drug test a maximum of fifteen (15) randomly selected employees from the computer–generated list. (APP. 203). Not all of the employees on the Mid–Iowa–generated list were physically present at the dealership when they were called to test, and thus CGM moved through the list to the alternates. (APP. 204). On December 5, 2019, twelve CGM employees from the list generated by Mid–Iowa were drug tested and Hampe was a refusal to test. (APP. 218, 226, 326, 330, 438, 463)(CONFID. APP 9-14).

On December 5, 2019, Hampe was scheduled to be at work at CGM. (APP. 176)(Pl's Depo. 49:4–11). Hampe attended work with his shift starting at 9:00am. (APP. 176)(Pl's Depo. 49:12–15). At the outset of his shift, Hampe was told by phone to submit to a drug test by General

Manager, JP Phillips. (APP. 176-177)(Pl's Depo. 49:16 —50:3). Hampe did not immediately report to the testing area but arrived approximately thirty (30) minutes later. (APP. 177)(Pl's Depo. 50:23 —51:12). The CGM supervisor present was CGM Human Resources Director Kelsey Gabus McBride ("KGM"). (APP. 177)(Pl's Depo. 52:8—53:6). KGM had completed reasonable suspicion supervisory training. (APP. 202-203; 220-224).

Hampe entered a restroom with a single toilet stall and urinal. (APP. 178)(Pl's Depo. 59:22–25). There was a door to the toilet stall, but Hampe did not close the door or attempt to close it. (APP. 178)(Pl's Depo. 60:3–18). The collector from Mid-Iowa, Sarah Ghee ("Ghee"), did not instruct Hampe to keep the stall door open, nor was the door broken ("It was your choice not to close the door, correct?" "Yes."). (APP. 188)(Pl's Depo. 151:19 —152:9). Hampe was unaware of what Ghee could or could not observe. (APP. 178; 187)(Pl's Depo. 60:5–10; 141:18–21). Hampe provided a filled sample cup to Ghee, who measured the temperature with a laser gun. (APP.

178)(Pl's Depo. 61:5–8). Hampe recalls seeing a temperature of 101 degrees on the laser gun, though he did not have his glasses on, and the sample was dumped as out–of–temperature range.[1] (APP. 178; 182)(Pl's Depo. 61:9–21; 80:10–16). Hampe was asked to drink water and provide an additional specimen, which he did approximately twenty (20) minutes later. (APP. 179)(Pl's Depo. 62:1—63:25). Hampe's second specimen was of lesser volume, and Hampe was again directed to drink water and provide another specimen. (APP. 179)(Pl's Depo. 64:1–4). At no time on December 5, 2019 did Hampe provide a "usable" urine sample for drug testing. (APP. 209).

After approximately twenty more minutes, Hampe decided to leave. (APP. 179)(Pl's Depo. 64:25—65:7). Hampe informed KGM he had to leave. (APP. 180)(Pl's Depo. 69:1–9). KGM told Hampe that if he left, his employment would be terminated. (APP. 180)(Pl's Depo. 69:1–9). Hampe waited

[1] Ghee also did not believe the sample resembled human urine because it was "neon" in color, resembling Mountain Dew. (APP. 182)(Pl's Depo. 78:8–10); (APP. 225). Hampe has no evidence to support his "feeling" that Ghee "targeted" him. (APP. 189)(Pl's Depo. 154:13—155:7).

another fifteen minutes, and again told KGM he was leaving. (APP. 181)(Pl's Depo. 70:1–19). Hampe was again told that if he left his employment would be terminated. (APP. 181)(Pl's Depo. 70:16–21 ("And she said, 'No. If you leave, you're fired'")). Hampe left. (APP. 181)(Pl's Depo. 70:25). Ghee completed the testing form as "Declined to Participate." (APP. 226).

At 11:59 am on December 5, 2019, Hampe sent an email to CGM offering to return, but stating "whatever decision you end up making is in the best interest of the company." (APP. 183-184(Pl's Depo 84:7-87:15); (APP. 227). The President/ CEO of CGM responded that due to Hampe's long employment with the dealership "he "kn[e]w the rules." (APP. 227; 228). Hampe sent an additional email on December 6, 2019 to a CGM owner asking for "forgiveness," and stating the Gabus family had "always been fair" to him. (APP. 189)(Pl's Depo. 89:9–14); (APP. 229). Hampe admitted he had made "a mistake," and offered to submit to additional drug testing. (APP. 185)(Pl's Depo. 90:10–14); (APP. 229). Hampe sent

another email, on December 13, 2019, to KGM stating he "underst[ood] her job and trying to make sure everyone follows a certain standard," and that he was "truly sorry" for "putting [her] in that situation." (APP. 185)(Pl's Depo. 92–93); (APP. 230).

Hampe subsequently filed a lawsuit alleging CGM had violated Iowa Code § 730.5 in eight (8) particulars. (APP. 231-238). Though Hampe testified he felt "targeted" he was unaware of how CGM generated its pool of employees to be tested. (APP. 186)(Pl's Depo. 100:12–15).

ARGUMENT

Hampe's employment at CGM was terminated after he walked out of random drug testing against the repeated admonitions of CGM that he would be terminated if he left. Hampe purposefully defied CGM and left drug-testing purportedly to tend to an ill teenage daughter at home. After later acknowledging his mistake to CGM in walking out, Hampe brought suit arguing varied violations of the law by CGM and Mid-Iowa. The District Court found Hampe's claims lacked

merit and granted summary judgment motions from CGM and Mid-Iowa.

Hampe's appeal seeks to overturn the District Court's dismissal of his claims. He employs a "kitchen sink" approach raising a multitude of implausible and overly technical arguments. The District Court's ruling should be affirmed because Hampe's claims are factually unsupported, lacking in supportive law, and barred by doctrines of immunity and exclusive remedy.

I. THE DISTRICT COURT CORRECTLY DISMISSED HAMPE'S DRUG-TESTING CLAIMS.

Preservation of Error:

Hampe presents new arguments that were not previously made to the District Court. "Generally, a party must raise an issue and the district court must decide it for that issue to be properly preserved for appellate review." *Duck Creek Tire Service, Inc. v. Goodyear Corners, L.C.*, 796 N.W.2d 886, 892 (Iowa 2011). "When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for

appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). CGM addresses below the specific arguments that were not presented to or ruled upon by the District Court.

Standard of Review:

This matter comes before the Court upon Hampe's appeal from the District Court's ruling granting the motions for summary judgment filed by CGM and Mid-Iowa. "The standard of review of a district court's grant of summary judgment is for correction of errors at law." *Campbell v. Delbridge*, 670 N.W.2d 108, 110 (Iowa 2003).

Iowa Rule of Civil Procedure 1.981(3) provides:

> **The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no *genuine* issue as to any *material* fact and that the moving party is entitled to judgment as a matter of law.**

(emphasis added). A "genuine" issue of fact exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Junkins v. Branstad*, 421 N.W.2d 130, 132 (Iowa 1988). Further, for an issue of fact to be

"material" there must be a "dispute . . . over facts that might affect the outcome of the suit, given the applicable governing law." *Id.* When reasonable minds could differ on the resolution of an issue, a fact question exists. *Hoefer v. Wisconsin Educ. Ass'n Ins. Trust*, 470 N.W.2d 336, 338 (Iowa 1991). Alleged factual disputes that would not affect the outcome do not warrant a dismissal of an otherwise properly supported motion for summary judgement. *Id.* Summary judgement, simply put, "shall be granted when there is no genuine issue of material fact." *Borschel v. City of Perry*, 512 N.W.2d 565, 567 (Iowa 1994).

It is well settled law reviewing courts "review the record in a light most favorable to the party opposing summary judgment." *Downs v. A & H Const., Ltd.*, 481 N.W.2d 520, 522 (Iowa 1992) (citing *Hike v. Hall*, 427 N.W.2d 158, 159 (Iowa 1988)). As such, the moving party has the burden of demonstrating that there are no issues of material fact. *Hoefer*, 470 N.W.2d at 338. However, the Iowa Supreme Court succinctly affirmed the notion set forth by an Iowa district court

that, "there is no genuine issue of fact if there is *no evidence*." *Hoefer*, 470 N.W.2d at 338 (emphasis added). The party resisting summary judgement cannot simply rely on the allegations set forth in their pleading. *Id.* at 338–39 (citing Iowa R. Civ. P. 237(e) [now Rule 1.981]). Therefore, the party opposing summary judgment "must set forth specific facts which constitute competent evidence showing a prima facie claim." *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 454 (Iowa 1989).

Argument:

In *Dix v. Casey's General Stores, Inc.*, the Iowa Supreme Court affirmed that employers are held only to the standard of "substantial compliance" for the entirety of Iowa Code § 730.5. 961 N.W.2d 671, 682 (Iowa 2021). "Substantial compliance is said to be compliance in respect to essential matters necessary to assure the reasonable objectives of the statute." *Id.* (citations omitted). The "essential nature" is twofold; both to "protect the 'employer's right to ensure a drug–free workplace' and ensure the accuracy of drug tests used for adverse

employment actions while also protecting 'employees who are required to submit to drug testing.'" *Id.* (citations omitted). As stated in *Dix*, "if the employer's actions fall short of strict compliance, but nonetheless accomplish the important objective[s]" expressed by the particular part of Section 730.5 in issue, "the employer's conduct will substantially comply with the statute." *Id.* (citations omitted).

Furthermore, the Court in *Dix* clarified that employers would only be liable for equitable or monetary remedies to an "*aggrieved*" employee. 961 N.W.2d at 692 (emphasis in original)(relying upon Iowa Code §730.5(15)(a)). "[N]ot every violation of [Section 730.5] results in liability." *Id.* "Aggrieved" means "having legal rights that are adversely affected," and "aggrieved party" means "a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions." Black's Law Dictionary 73, 1154 (11th ed. 2019). Determining whether an employee is "aggrieved" so as to create liability by the employer for violations of the statute "necessarily depends on the nature of the violation." *Id.*

Hampe would be required to affirmatively demonstrate how he suffered harm as a result of any claimed violation. In *Dix*, the Court held:

> **Regardless of whether Casey's failure to comply with its own policy here amounts to a lack of substantial compliance, the employees have not pointed to any way this potential failure harmed, or aggrieved, them. We reject the employees' attempt to garner equitable relief for each purported violation of the testing requirements without also identifying how the violation caused them harm. General claims of harm to their privacy interests do not suffice.**

961 N.W.2d at 694.

Hampe would be required to sufficiently identify causally-related harm as a result of any failure to "substantially comply" with the "important objectives" of Section 730.5.

A. HAMPE CANNOT ESTABLISH AGGRIEVEMENT BECAUSE HIS EMPLOYMENT WAS TERMINATED FOR VIOLATING A DIRECTIVE OF HIS EMPLOYER.

Hampe cannot draw a causal connection from any of the alleged violations of Iowa Code § 730.5 and his termination from employment with CGM because he was terminated for leaving the dealership against the directive of the Human

Resources Director; not for his drug test. (APP. 181)(Pl's Depo. 70:16–25).

CGM's alleged violations of Section 730.5 were not the catalyst for Hampe's termination; the results of Hampe's drug test were, and remain, unknown. (APP. 226). Instead, Hampe was terminated for violating a directive by his employer not to leave dealership premises. (APP. 181)(Pl's Depo. 70:16–21, 25); (APP. 227, 228). This case is comparable to *Whitman v. Casey's Gen. Stores, Inc.*, an unreported case by the Iowa Court of Appeals, which found a jury had substantial evidence to reject a Section 730.5 claim because the employer decided to terminate the employee "before he knew the results of the drug test and the results of the test did not change [the employer's] mind," and for reasons "independent and separate from the drug test results." 2019 WL 467817, at *2–3 (Iowa Ct. App. 2019).

Because the evidence demonstrates Hampe's termination was not due to his drug testing specimens or results, but because he walked out of work against the directive of KGM,

Hampe's termination from employment was not "because of a drug testing program" and he is not an "aggrieved employee".

B. CGM SUBSTANTIALLY COMPLIED WITH IOWA CODE 730.5 AND HAMPE WAS NOT AGGRIEVED BY THE RANDOM SELECTION PROCESS.

An assessment of CGM's random employee selection is guided by the *Dix* case. 961 N.W.2d 671 (Iowa 2021). As described in *Dix*, Section 730.5(8) "allows an employer to conduct unannounced, suspicionless drug testing of employees selected from a predefined pool, identifying three types of pools the employer may use: the entire employee population at a particular work site, the entire full-time employee population at a work site, or '[a]ll employees at a particular work site who are in a pool of employees in a safety-sensitive position.'" *Dix*, 961 N.W.2d at 685.

In *Dix*, the District Court and Supreme Court both found the employer's selection process substantially complied with Section 730.5(8) "even though the list was not completely accurate." *Id.* at 691. This finding of substantial compliance is despite the fact the employer in *Dix* sought to randomly test

90% of the 184 employees on its list, 21 employees "switched shifts with others or were otherwise approved for leave" before the list was completed, 6 employees called in or went home sick or were "no shows", 2 employees were inadvertently left off the list, and an unknown number of other employees were excluded from the list. *Id.* at 689. The Court, nonetheless, found no statutory violation because:

> **With respect to providing an accurate list of employees scheduled to work on the day of testing, we agree with the district court that substantial compliance allows some give in compiling the list for the selection process, particularly for employees who missed work the day of testing for illness or as no shows. To hold [the employer] violated the pooling requirement by including those six individuals on the list would make it nearly impossible for any employer to comply with pooling requirements from a practical standpoint. The same is true for the two employees inadvertently excluded from the list. An employer is allowed some room for human error.**

Id. at 690. CGM's selection process would likewise be in substantial compliance with the statute.

Hampe proffers two (2) sections of argument claiming CGM and Mid-Iowa violated Iowa Code §§ 730.5(1)(L) & 730.5(8)(3) in

selecting employees for random drug testing. Brief, pp. 26-42. First, Hampe complains that CGM used an "alternate system" whereby employees would only be tested should the primary testing group not total fifteen (15) employees. *Id.* Second, Hampe argues efforts were not made beforehand to determine whether specific employees were scheduled for work at the time of drug-testing. *Id.* However, the selection process employed by CGM and Mid-Iowa substantially complied with the statutory objectives of Iowa Code §730.5. Even more, Hampe fails to show how he would have been "aggrieved" under either circumstance.

The District Court held:

> **It can be argued that the list here did not technically comply with the statute. Nevertheless, Hampe has not produced any facts showing there is a genuine issue as to whether he was aggrieved. At best, it is purely speculative as to whether Hampe would or would not have been selected for testing had the list included any employees who were not scheduled to work the day of the test or who were otherwise excused. No evidence was shown that indicates any deficiencies in the list were attributable to an effort to single out Hampe for testing.**

(APP. 942). The District Court did not expressly address Hampe's argument regarding the alternates list. *Id.*

While the District Court suggested it could be argued "the list here did not technically comply with the statute", the Supreme Court has acknowledged "Holding an employer liable for even the slightest technical violation of the comprehensive drug-testing scheme would defeat its purposes." *Dix*, 961 N.W.2d at 682.

1. THE USE OF AN "ALTERNATES" LIST SUBSTANTIALLY COMPLIES WITH IOWA CODE 730.5 AND HAMPE WOULD NOT BE AGGRIEVED BY ITS USE.

Preservation of Error: While Hampe presented argument upon the propriety of using an alternate list, the District Court did not issue a ruling upon this point. (APP. 942). Nor did Hampe present any "motion requesting a ruling in order to preserve error for appeal." See *Meier*, 641 N.W.2d at 537. As such, Hampe has failed to preserve error upon this argument.

Argument: Hampe argues CGM and Mid-Iowa used "an alternate system to exempt nine employees from testing and to target Hampe". Brief, p. 26. This argument is not only non-sensical from a practical perspective as it presumes an exceptionally onerous method to "target" an individual for

termination[2], but it also lacks statutory support that would prohibit use of an alternate list.

The Iowa Supreme Court in *Dix* did not decide whether "the use of alternates violated the statutory requirement to utilize a random selection process." 961 N.W.2d at 691. CGM submits the use of "alternates" should not be prohibited to the extent the employer's selection process substantially complies with §730.5. *See Vance v. Iowa Dist. Ct. for Floyd Cty.*, 907 N.W.2d 473, 477 (Iowa 2018) (stating the rules of statutory interpretation require a court to "enforce the plain language of the statute when the statute's language is unambiguous."). The use of alternates is not specifically referenced in Section 730.5, but neither are they precluded. Iowa Code § 730.5(1)(l) states only that selection for unannounced testing "shall be

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[2] Hampe's logic – without a shred of evidentiary support - surmises CGM and Mid-Iowa intentionally conspired to terminate Hampe's at-will employment by setting up company-wide random drug-testing, creating an alternate list for employees to only potentially be subject to testing, placing Hampe upon the alternate list where he may or may not be subject to testing, and manipulating testing so that employees in front of Hampe would be unavailable for testing so that Hampe would be required to submit to testing. Then, after all these actions, CGM and Mid-Iowa would concoct a scheme to reject Hampe's urine specimens and after Hampe would threaten to leave testing CGM would specifically warn Hampe that his employment would be terminated if he walked-out only to get Hampe to voluntarily leave in order to terminate his employment. Such a scenario is absurd.

done based on a neutral and objective selection process by an entity independent from the employer," and that employees have "an equal chance of selection for initial testing." If selection methodology is consistent with these objectives, it is consistent with the statute. *See Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009)(affirming "substantial compliance" means compliance with reasonable objectives of the statute); *see also Residential & Agric. Advisory Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 48 (Iowa 2016) ("Failing to comply with every word of a statute is not fatal in every situation."). Hampe cannot show CGM's selection process violated these objectives because the selection of all employees to be tested, whether deemed regular or "alternates," were selected based on neutral criteria by Mid–Iowa. (APP. 206-207; 210; 212).

If anything, Hampe's selection as an "alternate" only *decreased* his potential for undergoing a test as CGM could have just as easily created a random selection of the twenty–three listed employees to be tested on December 5, 2019, or

for that matter, a selection of twenty–five, fifty, one–hundred, or more employees. *See* Iowa Code §§ 730.5(1)(l); 730.5(8)(a).

The identification of an alternate list serves only to make it more likely that an employer will be able to test a sufficient number of employees. It does not increase the likelihood of any particular employee to be selected. The existence of an alternate list has no impact whatsoever upon the testing of employees upon the primary list, and the inclusion of individuals upon the alternate list only makes it less likely these employees will be subject to testing. In the absence of an alternate list employers would simply lengthen the primary list requiring the testing of more employees. Alternate lists serve as a practical tool for both employers and employees.

Hampe cannot show he was "aggrieved" by use of an alternate list. Upon appeal, Hampe argues the District Court was "flat out wrong" in finding he failed to show aggrievement by the use of an alternate list. Brief, p. 39. Hampe's critique of the District Court falls flat, however, because Hampe's only effort at showing "aggrievement" is to argue "by definition

CGM's drug test was unauthorized because the statute does not permit alternates" so Hampe must have been "aggrieved".[3] *Id.* This circular argument is completely hollow and, if accepted, would nullify the requirement that a party show actual "aggrievement" in order to obtain a remedy. There was, in fact, no "aggrievement" by Hampe in being placed upon an alternate list.

2. CGM AND MID-IOWA DID NOT "EXEMPT" EMPLOYEES OR "TARGET" HAMPE.

Hampe argues the employee pool "provided a mechanism for [CGM] to surreptitiously exempt and target its employees". Brief, p. 31. The selection methodology used in this case was, however, practical and in furtherance of the statutory objectives to randomly select employees with no evidence of surreptitious exemption or targeting.

Hampe attacks the random selection arguing that too many people were included in the selection pool in a

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[3] Hampe confusingly argues "the outcome would have been different if CGM didn't exempt 9 employees from testing, namely employees Iliff, Lane and Mendoza Villegas". Brief, pp. 39-40. This flawed argument – identifying only three (3) employees – would seemingly challenge CGM's methods in requesting that employees submit to testing, rather than use of an alternate list. CGM addresses this argument in Section I(A)(3) below.

supposedly purposeful effort to "target" Hampe. Brief, p. 31. He further claims that KGM specifically "targeted" him. *Id.* at 35. These baseless allegations are completely devoid of any merit; and, are in fact, nonsensical from any rationale perspective (*see* footnote 2).

First, it does not make logical sense for an employer to "target" a single employee like Hampe by going through the expensive and time-consuming process of drug-testing. *See, e.g.*, Iowa Code § 730.5(1)(l) (requiring use of a third–party vendor for randomized employee selection); *id.* § 730.5(6)(b) ("An employer shall pay all actual costs for drug or alcohol testing of employees[.]); *id.* § 730.5(6)(c) ("An employer shall provide transportation or pay reasonable transportation costs to employees if drug or alcohol sample collection is conducted at a location other than the employee's normal work site."); *id.* § 730.5(7)(*h*) ("A medical review officer shall, prior to the results being reported to an employer, review and interpret any confirmed positive test results, including both quantitative and qualitative test results[.]"). Employees in Iowa are

generally “at–will,” meaning they can be terminated at any time, for any lawful reason. *See, e.g.*, *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 281 (Iowa 2000). Even in the unlikely scenario that an employer is motivated to terminate an individual employee and institutes an “across–the–board” drug test in order to do so, the “targeted” employee would still have to have a confirmed positive drug test (or refuse to test) in order to be terminated under Iowa Code § 730.5. *See id.* §730.5(9)(b) (“The policy shall provide that any action taken against an employee or prospective employee shall be based only on the results of the drug or alcohol test.”). In other words, Hampe would have either been using drugs or refusing to test to be effectively “targeted”, when CGM could have ended Hampe’s at–will employment at any time for any lawful reason.

Hampe had no evidence he was, or could have been, targeted by the testing pool or selection processes, which undermines Hampe’s argument that he would be “aggrieved” by any lack of strict compliance with the statute. *See* Iowa

Code § 730.5(15)(a). Hampe's argument, founded upon claims of technical violations, completely falls apart in seeking to impute purposeful targeting upon KGM.

Second, KGM specifically testified at deposition to the absence of targeting, stating:

> **Q: Did you ever at any time direct Mid-Iowa to specifically place Scott Hampe on the random selection drug testing list?**
> **A: No.**
>
> **Q: Did you at any time direct them to place any of your employees on the list specifically?**
> **A: No.**

(APP. 421)(Dep. 54:13-19). This testimony is consistent with KGM's prior affidavit testimony that neither she nor anyone at CGM "requested or suggested in any way, shape, or form to anyone at Mid-Iowa that Plaintiff Scott Hampe ("Hampe") be included on the list for random drug testing on December 5, 2019." (APP. 203-204).

KGM described the process used by CGM for testing on December 5, 2019. In her affidavit, KGM stated:

> **On the morning of December 5, 2019, I provided the Mid–Iowa random list of employees to dealership department managers, including**

General Manager JP Phillips, and asked employees be contacted one–by–one to report to the dealership's lunchroom for drug testing.

The managers were to move through the list, and if an employee was not physically present in the workplace, they were to move on to the next employee on the list. Not "physically present" could include employees who were on leave, were not scheduled to work, or were scheduled but were not in the dealership when called to report (for instance, on a service call).

On December 5, 2019, not all of the fifteen (15) employees on the randomly generated list from Mid–Iowa were physically present in the dealership on the morning of December 5, 2019. For that reason, the employees on the "alternates" list were called and told to report to the lunchroom for drug testing.

(APP. 204). At deposition, she further clarified:

Q: Would all of the employees on the initial list be tested before Toyota started testing alternates?
A: Asked.

Q: What do you mean by that?
A: They would be asked or looked for before we moved to the alternate list.

Q: Okay. So of these 15 employees on page 306, each one of these employees were asked to take a drug test before alternates were asked; is that right?
A: When I do the list, I call the manager. I say, "I need this person, this person, this person."

"So and so is off." Okay, so I cross it off. They're off. Move on. I also call the department heads. Once I know who's off, I move on to the alternates.

Q: ... You receive the initial list and then you start to check to see who's at work that day in the initial list?
A: I exhaust the initial list before I move to alternates.

Q: By determining whether or not –
A: They're on the facility site or not.

Q: But then once you get to the alternates, you pick any order?
A: No, that's not what I said. I go in order.

Q: Okay.
A: Same thing; exhaust through the top to the bottom.

(APP. 387-388)(Dep. 20:17-21:23). This process "substantially complies" with the "important objectives" of Section 730.5 to randomly select employees for unannounced drug-testing.

Hampe attempts to impeach KGM's testimony regarding the testing process by arguing she previously required Hampe, Bob Link, and Brandon Brown to submit to testing when not at work. Brief, pp. 32-33. But, importantly, Hampe has no evidence whatsoever that KGM ever knew these individuals

were asked to submit to testing when not at work. Neither of the affidavits Hampe obtained from Link and Brown shows KGM knew either employee was off work when requested to submit to testing. (APP. 900-903). Nor does Hampe's own deposition testimony show KGM's involvement or knowledge. (APP. 180, 283)(Dep. 66:10-15). Unbeknownst to KGM, it seems Hampe had been called by a manager for testing on November 27, 2019. (APP. 816-817). KGM did not request the manager call Hampe in for testing, nor was she aware of this call at the time of testing on November 27, 2019. *Id.* Hampe's effort to impeach KGM's testimony fails for lack of evidence.

Hampe then argues three (3) specific employees (Joseph Iliff, Christopher Lane, Carlos Mendoza Villegas) were "exempted" from testing despite being punched-in at the time of testing. Brief, pp. 35-38. CGM demonstrated the fallacy with this argument at the District Court, but Hampe repeats this flawed argument upon appeal. In doing so, Hampe disregards KGM's testimony that Iliff and Lane were both parts-drivers who were working off-site ((APP. 396-398)(Dep.

29:13-31:1)) and could have been anywhere in the State at the time of testing ((APP. 400)(Dep. 33:6-11)). Thus, neither Iliff nor Lane would have been at CGM's place of business at the time of testing. Hampe also fails to acknowledge the Daily Punch Report showing Mendoza Villegas did not punch in to work until 11:54 AM (APP. 442) while Mid-Iowa's last sample collection was almost 45 minutes earlier at 11:10 AM (APP. 466). This evidence shows Mid-Iowa's testing had concluded prior to Villegas' arrival at the work site. Together, the evidence shows these three (3) employees were not tested because none of them were physically on-site at the time of testing, which is consistent with KGM's description of how testing was conducted.

3. THE PROCESS USED TO RANDOMLY SELECT EMPLOYEES SUBSTANTIALLY COMPLIED WITH IOWA CODE 730.5 AND HAMPE WAS NOT AGGRIEVED BY THE PROCESS.

Iowa Code §730.5 is a comprehensive (or "byzantine" according to the Iowa Court of Appeals) workplace drug–testing scheme, and its provisions on employee selection for

testing are no exception. *See Dix*, 961 N.W.2d at 681. For unannounced drug testing, the statute provides:

> **The selection of employees to be tested from the pool of employees subject to testing shall be done based on a neutral and objective selection process by an entity independent from the employer and shall be made by a computer–based random number generator that is matched with employees' social security numbers, payroll identification numbers, or other comparable identifying numbers in which each member of the employee population subject to testing has an equal chance of selection for initial testing, regardless of whether the employee has been selected or tested previously. The random selection process shall be conducted through a computer program that records each selection attempt by date, time, and employee number.**

Iowa Code § 730.5(1)(l).

CGM instructed Mid–Iowa to conduct a random selection of employees for testing; it did not ask or identify Hampe to be tested and Hampe was by statute to be included in the testing pool regardless of how recently he had been tested. (APP. 208); *see* Iowa Code § 730.5(1)(l). Mid–Iowa ran the CGM employee list through proprietary software from "Drug Test Now," a computer–based random number generator, which selected fifteen (15) employees for testing and eight (8)

employees as alternates. (APP. 206-207; 210; 212). The proprietary software provided for an equal chance of random selection, as provided for under Iowa Code §730.5(1)(l). (APP. 206-207). The output list was given back to CGM on November 27, 2019, to be used for testing on December 5, 2019. (APP. 206-207; 215-216). This process comported with the intents and purposes of Iowa Code §730.5 to randomly select employees for testing.

Iowa Code § 730.5(8)(a)(1) and (2) allow for unannounced testing from the following "pools of employees": (1) the "entire employee population at a particular work site of the employer except for … employees who are not scheduled to be at work at the time the testing is conducted because of the status of the employees or who have been excused from work pursuant to the employer's work policy prior to the time the testing is announced to employees," or (2) the "entire full–time active employee population at a particular work site except for … employees who are not scheduled to be at work at the time the testing is to be conducted because of the status of the

employee or who have been excused from work pursuant to the employer's working policy."[4]

In this case, the list provided to Mid–Iowa for random selection did not remove employees from the dealership location who were not scheduled for or excused from work. (APP. 204). Instead, employees who were on the list generated by Mid–Iowa, but not physically present at work on December 5, 2019, were not tested. (APP. 204).

Though CGM did not remove "employees not scheduled to be at work due to their status" or "excused employees" from its "pool" of dealership employees given to Mid–Iowa for random selection, CGM nonetheless "substantially complied" with the statute. *See Dix*, 961 N.W.2d at 682. In *Dix*, where employees had also challenged the employer's creation of the testing pool, the Iowa Supreme Court stated that Section 730.5's "selection requirements are aimed at preventing employers from targeting or exempting specific employees for

[4] An additional potential "pool" exists for "[a]ll employees at a particular work site who are in a pool of employees in a safety–sensitive position," which is not applicable in this case. Iowa Code §730.5(8)(a)(3).

drug tests," and thus meeting these objectives results in substantial compliance. 961 N.W.2d at 689.

The case-at-bar is similar to *Dix*, where the Iowa Supreme Court upheld a finding of substantial compliance with the Code's testing pool and selection requirements. In *Dix*, the employer gave its third–party vendor a list of worksite–specific employees, which included employees who had switched shifts or were approved for leave between generation of the list and actual testing. *See id.* The list included employees who called in sick, went home sick before the test announcement, or were "no shows" on the date of the testing. *See id.* The list was also alleged to be missing employees who should have been in the defined testing pool. *See id.* In that case, the Iowa Supreme Court upheld a finding of "substantial compliance", stating the statute "allows some give in compiling the list for the section process, particularly for employees who missed work the day of testing for illness or as no shows." *Id.* at 689–90. "An employer is allowed some room for human error." *Id.*

In the case-at-bar, CGM likewise substantially complied with the statute's "testing pool" requirements because its actions met the intent of its provisions: "preventing employers from targeting or exempting specific employees for drug tests." *Id*. at 689; *Sims*, 759 N.W.2d at 338. Based on the plain language of §730.5(8)(a)(1) and (2), the groups of employees protected by the testing pool parameters are those *not* scheduled to be at work due to their "status" or who have been "excused" from work on the day of testing, and CGM's process kept such employees from being tested on December 5, 2019. (APP. 204; 218). Thus, the intent of the "testing pool" provisions were met in this regard.

Hampe's argument that CGM should have reviewed the specific schedules of individual employees in order to narrow the pool of employees for selection would have only encouraged and invited the supposed "targeting" he now complains of. CGM's process did not involve looking at any specific employee's schedule for information to include or exclude them from testing. (APP. 204); (APP. 387-388)(Dep.

20:17-21:23). It was blind. Contrary to Hampe's unsupported allegations, there is no evidence of purposeful "exemption" or "targeting".

Hampe argues the testing pool "impermissibly contained 10 other individuals" supposedly showing the "entire selection process was a fraud." Brief, p. 38. This claim is based upon KGM's belief the 165-person pool included one (1) person that did not formally begin employment and seven (7) employees that had been terminated prior to testing. (APP. 816-817). The inclusion of these individuals was inadvertent. *Id.* The inadvertent inclusion of these individuals would not, however, increase the odds of Hampe's selection; and, therefore, could not support a "targeting" claim or aggrievement of Hampe. To the contrary, CGM's inclusion of additional people would only reduce the likelihood Mid-Iowa's random number generator would select Hampe. This result is, of course, true because the greater number of people on the list makes it less likely that a particular person would be randomly selected. Hampe's argument does not support his effort to establish liability

because CGM's selection pool was in "substantial compliance" with the "important objectives" of the statute AND because Hampe would not have been "aggrieved".

C. CGM SUBSTANTIALLY COMPLIED WITH IOWA CODE 730.5(9)(b) AND HAMPE WAS NOT AGGRIEVED BY SUPERVISORY TRAINING.

Preservation of Error: Hampe's argument at the District Court was that KGM had not completed trainings, "CGM has provided no information in the record that the specific topics required by the statute were covered in any of KGM's trainings", and that had KGM been trained "she would have known of the requirement for employees to be scheduled to be at work on the date of the test" and "the statute doesn't allow for alternates." (APP. 351-352). The District Court held "Hampe argues [KGM's] training is unsatisfactory, but does not state any specific facts as to how the training is insufficient." (APP. 943).

Upon appeal, Hampe presents new arguments claiming "training did not include information about [] 'the documentation and corroboration of employee alcohol and other drug abuse,' or 'the referral of employees who abuse alcohol or

other drugs to the employee assistance program or to the resource file…" Brief, p. 47. These new arguments challenging KGM's training were not presented to or ruled upon by the District Court.

Hampe has also abandoned his prior argument of "aggrievement" and now makes a new claim that "training surely would have taught KGM that she was not authorized to terminate Hampe". *Compare* (APP. 351-352) *with* Brief, p. 48. Hampe has failed to preserve his arguments.

Argument: Hampe argues KGM "never completed initial training" and the District Court "glossed over the fact that the content of KGM's training did not meet the requirements of the statute". Brief, pp. 45-46. These claims are incorrect and disproven by the record.

First, Hampe relies upon KGM's testimony where she denied recollection of "a different type of training that was an initial course". Brief, p. 46. This testimony does not support Hampe's claim that KGM never had an initial training. Of course she did. CGM offered into evidence extensive records of

certifications confirming KGM's receipt of the requisite supervisory training. (APP. 202-203, 220-224). These certifications include trainings completed in 2016 (1 hour), 2017 (2 hours), 2018 (2 hours), and 2019 (1 hour), which more than meet the statutory requirements of Section 730.5(9)(h). (APP. 220-223).

Second, Hampe argues the content of KGM's training was insufficient "because it did not include training on the documentation and corroboration of employee drug abuse or referral of employees who abuse drugs to CGM's employee assistance program." Brief, p. 46. At deposition, KGM testified:

> **Q: ...Did Ms. Kading give you any training on how to oversee the drug testing program at Toyota when you first took on that role?**
> **A: Yes.**
>
> **Q: Can you tell me about that?**
> **A: She would have gone over how to do preemployment testing with me, the steps that we take, gone over the policy.**
>
> **. . .**
>
> **Q: Apart from receiving some direction from Dee, did you do any other training?**
> **A: Yeah, we do training with Mid-Iowa.**

Q: Okay. Would that training have started back in 2016 for you specifically?
A: For me specifically? I can't remember when my first one was. It might have been prior to moving into human resources.

Q: Okay. So apart from Mid-Iowa and Dee, any other types of training?
A: No.

Q: Do you know what types of training Mid-Iowa does for you?
A: Reasonable suspicion training.

Q: And what is that?
A: It goes over what to look for in somebody who might be under the influence, how to conduct a reasonable suspicion training meeting, how to document, things like that.

(APP. 375-376)(Pl's Dep. 8:17-24, 9:5-23). In light of this testimony and the submitted certifications, the District Court was undoubtedly correct to find no merit in Hampe's arguments.

Furthermore, even if Hampe could provide sufficient evidence of noncompliance, which he cannot, Hampe cannot show he was "aggrieved" by a lack of supervisor training. Hampe argued at the District Court he was "aggrieved by losing his job because he never should have been tested in the first

place". (APP. 351). Now, Hampe's new argument is that "training surely would have taught KGM that she was not authorized to terminate Hampe after evidence of his sample was destroyed without sending it to a laboratory for confirmatory testing and review by a medical review officer." Brief, p. 48. There is no support for Hampe's logic leap to conclude training would have addressed the disposal of specimens by a third-party testing company or that referrals of employees to assistance programs would have altered Hampe's termination after he walked out of testing despite repeated admonitions that he would be terminated if he did so.

D. CGM SUBSTANTIALLY COMPLIED WITH IOWA CODE 730.5(7)(a) AND HAMPE WAS NOT AGGRIEVED BY MONITORING.

Preservation of Error: At the District Court, Hampe resisted summary judgment arguing Mid-Iowa's agent was able to hear Hampe urinate and undo his zipper and that Hampe was embarrassed "that she was watching him". (APP. 357). The District Court rejected Hampe's claim finding Hampe did not "allege any facts to show CGM maintained any control over

[Mid-Iowa's agent] or aided [the agent] in any alleged violation" and that "Employers are protected from liability for statutory violations by third parties." (APP. 945). Upon appeal, Hampe presents a new argument that "[t]he statute doesn't authorize a company like Mid-Iowa to be involved in any substantive aspect of an employer's drug test", and "[Mid-Iowa's agent] should have never been in the restroom in the first place". Brief, p. 56. Hampe has failed to preserve error upon his arguments.

Argument: Hampe argues the District Court "was wrong" to find CGM immune for Mid-Iowa's actions and further claims "[Mid-Iowa's agent] should have never been in the restroom in the first place, and her presence alone in the restroom with Hampe is a violation of his right to privacy under Iowa Code §730.5(7)(a)". Brief, p. 56. In regard to site collection privacy, Iowa Code §730.5(7)(a) provides:

> **The collection of samples shall be performed under sanitary conditions and with regard for the privacy of the individual from whom the sample is being obtained and in a manner reasonably calculated to preclude contamination or substitution of the sample. If the sample collected is hair which would entail removal of an article of clothing or urine, procedures shall**

> **be established to provide for individual privacy in the collection of the sample unless there is a reasonable suspicion that a particular individual subject to testing may alter or substitute the hair or urine sample to be provided, or has previously altered or substituted a hair or urine sample provided pursuant to a drug or alcohol test. For purposes of this paragraph, "individual privacy" means a location at the collection site where hair collection or urination can occur in private, which has been secured by visual inspection to ensure that other persons are not present, which provides that undetected access to the location is not possible during hair collection or urination, and which provides for the ability to effectively restrict access to the location during the time the sample is provided. If an individual is providing a hair or urine sample and collection of the hair or urine sample is directly monitored or observed by another individual, the individual who is directly monitoring or observing the collection shall be of the same gender as the individual from whom the hair or urine sample is being collected.**

These standards were substantially met for Hampe's drug screen, which occurred inside a bathroom stall in the CGM dealership. (APP. 178)(Pl's Depo. 59:22–25). In that bathroom, there was both a stall and a urinal, and Hampe entered the stall with an operational door. (APP. 188)(Pl's Depo. 151:19—152:9). Hampe, who is now claiming a lack of privacy, chose not to close the stall door. (APP. 188)(Pl's Depo.

151:19—152:9). Similar to the *Dix* case, these circumstances with "typical bathroom stalls," while not "meet[ing] the utmost privacy standards," nonetheless "meet the essential objective of" Section 730.5(7)(a) and did not amount to a failure of substantial compliance. 961 N.W.2d at 694.

Furthermore, the site collector's gender would not amount to substantial noncompliance because Hampe was not "directly observed" providing the specimens. Hampe testified Mid-Iowa's agent, Ghee, stood on the opposite side of the toilet stall wall, and thus was not "directly monitoring or observing" Hampe's filling of the sample cup. (APP. 178, 187)(Pl's Depo. 60:5–10; 141:18–21). Ghee's presence on the opposite side of a bathroom stall would not constitute "directly monitoring or observing the collection" as the *Dix* court found "an employer's bathrooms fitted with individual stalls does not amount to a failure to substantially comply with the statute". *Dix*, 961 N.W.2d at 694.

Also, CGM had no role whatsoever in the collection of any specimen from Hampe. It was Mid-Iowa's agent that served as

the collector. As such, Hampe's arguments would have no application to the claims asserted against CGM; but, instead, pertain only to the claims asserted against Mid-Iowa. Even more, CGM would be entitled to statutory immunity for claims against CGM based upon Mid-Iowa's third-party conduct under Section 730.5(11)(a). *See* Section I(G) below.

Finally, Hampe is similar to the employees in *Dix* who did not prevail on their claims of noncompliance because Hampe was not "aggrieved" by the alleged lack of privacy. 961 N.W.2d at 694. In *Dix*, the Court held "[g]eneral claims of harm to. . . privacy interests do not suffice." *Id.* Hampe was not harmed, or "aggrieved," by any alleged noncompliance with the privacy standards of Iowa Code § 730.5(7)(a). Hampe's alleged subjective embarrassment would be indistinguishable from *Dix* and similarly deficient to establish "aggrievement".

E. CGM SUBSTANTIALLY COMPLIED WITH IOWA CODE 730.5(9)(b) AND HAMPE WAS NOT AGGRIEVED BY CGM'S UNIFORM POLICY.

Preservation of Error: At the District Court, Hampe resisted summary judgment arguing he should have been given "a

similar exception" to CGM's drug testing policy as he claimed had been provided to others accused of having positive drug test results. (APP. 356). The Court rejected Hampe's argument finding the circumstances involving other employees were different and CGM "was not required to offer Hampe continuous employment." (APP. 943).

Upon appeal, Hampe now argues the "written policy does not call for uniform disciplinary requirements" so Hampe was "aggrieved" because the testing was not authorized. Brief, pp. 63-64. Again, Hampe has changed his argument upon appeal. The district court did not issue a ruling upon Hampe's new argument, nor did Hampe present any "motion requesting a ruling in order to preserve error for appeal." See *Meier*, 641 N.W.2d at 537. Hampe has failed to preserve error upon this argument.

Argument: Hampe argues that CGM's "written policy does not call for uniform disciplinary requirements because CGM has discretion in what level of discipline, to render". Brief, p. 63.

But the language in CGM's Controlled Substance Policy complies with Iowa Code §730.5(9)(b)(1). (APP. 191-201).

Page two of CGM's Controlled Substances Policy states: "The refusal of any applicant and/or employee to consent to a drug test where required shall be grounds for denying them employment and/or termination of employment, even for a first offense." (APP. 192). This consequence is stated again on page 4 of CGM's Controlled Substances Policy: "If an employee has a positive result, employment will be terminated." (APP. 194). These provisions are uniform.

Hampe admitted he understood that termination for a refusal to test, even a first offense, would result in termination. (APP. 175)(Pl's Depo. 45:2–22). It is also undisputed that Hampe decided to leave the CGM premises on December 5, 2019 after KGM directly warned him that his departure would result in termination. (APP. 181)(Pl's Depo. 70:1–25)("And she said, 'No. If you leave, you're fired'")). There is no "aggrievement" under these circumstances. Importantly, Hampe fails to identify any actual "aggrievement" as he argues

only that not having a "uniform" policy invalidates subsequent testing. Brief, p. 64.

Hampe separately relies upon the affidavits of Marcy Davis and Steven Fowler to argue "CGM treated the results of Fowler's and Davis' drug tests differently". Brief, p. 30. He fails, however, to cite to any evidence that KGM was aware of the alleged discussions between Mid-Iowa's collector and the affiants. *Id.* Furthermore, neither of these affidavits involved a "confirmed positive test result for drugs or alcohol" or "the refusal of the employee … to provide a testing sample." *Compare* (APP. 494-496, 499-500) *with* Section 730.5(9)(b). As such, Iowa Code §730.5(9)(b) would not apply to the circumstances of either Davis or Fowler and their situations have no bearing upon the uniform requirements contained in Iowa Code §730.5(9)(b).

Contrary to Hampe's claim that "Davis tested positive for THC and Ghee suspected Fowler's was adulterated" (Brief, p. 30), both Davis and Fowler indicated they "passed" drug-testing (APP. 494, 499). Neither of these individuals, who

"passed" testing, would have been similarly-situated to Hampe, whose employment was terminated due to his refusal to stay on the premises against the directive of KGM. (APP. 171-172)(Pl's Depo: 29:21-30:5); (APP. 191-200). Because neither Davis nor Fowler serves as a valid comparator, Hampe's argument fails to demonstrate any "exception" to CGM's uniform requirements.

As such, CGM substantially complied with Iowa Code §730.5(9)(b)(1), and Hampe cannot show he was "aggrieved" by any such alleged violation as a matter of law.

F. CGM SUBSTANTIALLY COMPLIED WITH IOWA CODE 730.5(9)(a)(1) AND HAMPE WAS NOT AGGRIEVED BY CGM'S WRITTEN POLICY.

Preservation of Error: Hampe argues violations of CGM's written policy in (1) not sending his specimen to a laboratory, (2) not sending his specimen to a medical review officer, (3) not sending him home pending receipt of a negative test result, (4) concluding his specimen was adulterated based upon Mid-Iowa's agent, and (5) requiring him to provide a second specimen. Brief, pp. 65-66. These arguments were not made

in resisting CGM's summary judgment at the District Court.[5] In granting CGM's motion, the District Court found nothing in CGM's policy was "inconsistent with section 730.5" and nothing in the policy "creates additional procedures than required of section 730.5." (APP. 946). There were no further rulings on this subject relative to CGM's policy. *Id.* Hampe has failed to preserve error upon his argument.

Hampe has also failed to preserve error upon the claimed "aggrievement". In seeking summary judgment, Hampe argued had CGM followed its policies "the drug test should have never taken place." (APP. 687). Upon appeal, Hampe argues he was "aggrieved" because the "outcome likely would have been different" but there is no way to know because "CGM and Mid-Iowa destroyed the samples". Brief, p. 66. This argument was not raised or ruled upon at the District Court.

Argument: Hampe's alleged technical violations of policy relied upon an "unemployment recording" that was not included in the submitted summary judgment materials. For this reason

[5] Hampe presented this argument in support of his motion for summary judgment that was rejected as moot. (APP. 687; 951).

alone, Hampe's request for summary judgment was not supported by the proffered evidence.

Furthermore, it was Mid-Iowa that "handle[d] collection of the urine specimens." (APP. 253); *see also* (APP. 178-179)(Pl's Depo. 61:5-21, 64:1-4). CGM had no role in the collection of Hampe's urine specimen, sending to a laboratory for analysis, review by an MRO, or concluding Hampe had offered adulterated or insufficient specimens.[6] As such, Hampe's arguments would have no application to the claims asserted against CGM; but, instead, pertain only to the claims asserted against Mid-Iowa.[7]

CGM "substantially complied" with its policies to the extent the circumstances were under its control. The policies identified by Hampe would only apply after an employee has provided a sufficient and usable test specimen. *See* (APP. 256-

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[6] Hampe's appeal argument regarding the destruction of his specimens (Brief, pp. 48-54) is directed at the conduct of third-party, Mid-Iowa, not CGM and would be the subject of employer immunity. *See* Section I(G) below.

[7] Mid-Iowa's summary judgment brief set forth additional reasons Hampe's claim under Section 730.5(9)(a)(1) failed because the requirements only applied to "samples" as defined under 730.5, and not to Hampe's deficient urine specimens. (APP. 256-258). These arguments are incorporated by CGM.

258). Hampe failed to do so. (APP. 329). For this reason, the policies cited by Hampe do not apply to these circumstances.

CGM would also have been entitled to statutory immunity for these claims based upon Mid-Iowa's third-party conduct under Section 730.5(11)(a). *See* Section I(G).

Finally, Hampe argues he was "aggrieved" because "the outcome likely would have been different" had the policies been followed. Brief, p. 66. At the same time, Hampe admits there is no way of knowing whether his "aggrievement" claim is true because the specimens were destroyed. *Id.* So, Hampe's "aggrievement" argument is limited to not sending specimens to the laboratory or medical review officer with no claim of "aggrievement" over claimed violations in not sending him home pending receipt of a negative test result, concluding his specimen was adulterated based upon Mid-Iowa's agent, or requiring him to provide a second specimen.

Hampe's only remaining "aggrievement" argument takes issue with policies that involve sending a specimen to a laboratory or MRO for analysis. This argument is, however,

ineffectual because Hampe "failed to present any material facts showing that he supplied a sample 'capable of revealing the presence of drugs to be tested,' or that Mid-Iowa somehow improperly handled his out-of-temperature urine sample." (APP. 949). The "only evidence before the court" was that Hampe's specimen could not "have been validly tested for the presence of drugs." *Id.* Furthermore, the record shows no "aggrievement" because Hampe was terminated for leaving CGM's premises and refusing to provide a sufficient specimen; whether information was collected about his deficient specimens would have no causal link to the termination of his employment with CGM. *See Dix*, 961 N.W.2d at 694.

G. CGM HAS IMMUNITY FOR CLAIMS BASED UPON THE ACTIONS OF MID-IOWA.

Hampe seeks to make CGM liable for actions taken by third-party, Mid-Iowa.[8] Under Iowa Code §730.5(11), CGM

[8] Hampe argues upon appeal "CGM and Mid Iowa acted in concert for the entire scope of the December 5, 2019, test" in an effort to argue "CGM either directly violated the statute or *aided in* the violation of it". Brief, p. 25. This argument would effectively nullify the statutory immunity and Supreme Court's acknowledgement of immunity for third-party conduct. *Dix*, 961 N.W.2d at 684. The mere act in retaining third-parties, which is required by statute (Iowa Code §§730.5(1)(l), (7)(b), (7)(f), (7)(h), (7)(i)), does not constitute "aiding in" a statutory violation.

has statutory immunity for the actions of a third party because the facts show CGM "established a policy and initiated a testing program in accordance with the testing and policy safeguards provided for under this section".

Iowa Code §730.5(11)(a) grants an employer statutory immunity under the following provision:

> **11. Employer immunity**. A cause of action shall not arise against an employer who has established a policy and initiated a testing program in accordance with the testing and policy safeguard provided for under this section, for any of the following:
>
> a. Testing or taking action based on the results of a positive drug or alcohol test result, indicating the presence of drugs or alcohol, in good faith, *or on* the refusal of an employee or prospective employee to submit to a drug or alcohol test.

This provision requires two conditions for immunity based upon a refusal to test, which are that the employer: (1) "has established a policy … in accordance with the … policy safeguards provided for under this section"; and (2) "has … initiated a testing program in accordance with the testing … safeguards provided for under this section." Iowa Code

§730.5(11)(a).[9] The Supreme Court has confirmed "the immunity provision could cover claims premised on third–party conduct". *Dix*, 942 N.W.2d at 684.

CGM met the required elements for statutory immunity for claims based upon Mid-Iowa's third-party conduct. *See* Iowa Code §730.5(11)(a). CGM established a written policy for controlled substance testing that substantially complies with Iowa Code §730.5's procedural safeguards. *See Sims*, 759 N.W.2d at 338 (defining "substantial compliance" as "compliance in respect to essential matters necessary to assure the reasonable objectives of the statute.").

CGM adopted and maintained a written Controlled Substance Policy prohibiting employees from reporting to duty under the influence of controlled substances and requires urinalysis and other screening for controlled substances.

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[9] Under the plain language of the statute, "good faith" is not required to take action against Hampe for his refusal to submit. *See* Iowa Code §730.5(11) (stating there is no cause of action where the employer test[ed] or [took] action based on the results of a positive drug … test result …, in good faith, *or* on the refusal of an employee to submit to a drug … test" (emphasis added)). Even if the "good faith" requirement applied Hampe did not have sufficient evidence that CGM acted outside of the statutory definition of "good faith", which is "reasonable reliance on facts, or that which is held out to be factual, without the intent to be deceived, and without reckless, malicious, or negligent disregard for the truth". Iowa Code §730.5(1)(f).

(APP. 191-195; 202; 228). CGM's policy was provided to every employee subject to testing and was available for review by employees and prospective employees. (APP. 202); Iowa Code § 730.5(9)(a)(1). In addition, while not applicable in this case, CGM's policy contained the required provisions applicable to minors. *Compare* (APP. 203) *with* Iowa Code §730.5(9)(a)(1)–(4). CGM's policy substantially complied with Iowa Code §730.5(9)(b)(1) on "uniform requirements" for discipline. *See* Section I(E). These policy provisions meet the "procedural safeguards" in the first sentence of Iowa Code §730.5(9)(b)(1).

CGM has also initiated a testing program in accordance with Iowa Code §730.5's safeguards, as:

1. CGM's program only included the types of testing allowed by Iowa Code §730.5(8)(e). *Compare* Iowa Code §730.5(4) *with* (APP. 192-193).

2. CGM scheduled tests during, or immediately before or after, regular work periods. Iowa Code § 730.5(6)(a); (APP. 203).

3. CGM paid employees for all time required to test.

Iowa Code § 730.5(6)(a); (APP. 203).

4. CGM paid all of the costs of testing. Iowa Code § 730.5(6)(b); 78–80 (APP.203); (CONFID. APP 9-15).

5. CGM provided employees with a list of the drugs for which they would be tested in its Policy. Iowa Code § 730.5(7)(c)(2); (APP. 202).

6. CGM only took adverse employment action based on confirmed positive test results, for those employees who provided a testing sample for testing. Iowa Code §730.5(7)(g); (APP. 192-193, 203).

7. CGM avoided obtaining any employee medical information other than whether their test result was negative or confirmed positive, by directing employees to provide that information not to CGM, but to the MRO—the person who, per Iowa Code §730.5(1)(g), is qualified to interpret that information as it relates to an employee's test result. Iowa Code §730.5(7)(i); (APP. 193-194).

8. CGM notified employees of confirmed positive test results, and their right to a confirmatory test of the secondary

sample, via certified mail. Iowa Code §730.5(7)(j); (APP. 194).

CGM's statutory immunity is consistent with the intent of the statute in ensuring drug–free workplaces. CGM is, therefore, immune from Hampe's claims of violations attributable to the actions of Mid–Iowa. *See* Iowa Code §730.5; *Sims*, 759 N.W.2d at 338.

Hampe argues against the application of immunity claiming that in *Dix* the Court "clarified that the immunity provisions contained in section (11) do not apply to subsection (15) claims." Brief, p. 24. Hampe misconstrues the *Dix* decision. In *Dix*, the Court stated:

> **...the court of appeals concluded the immunity must be limited to protect an employer from liability for statutory violations by third parties, such as the independent testing entity or a medical review officer. While we agree that the immunity provision could cover claims premised on third-party conduct, the language of the statute reveals its protection is not so limited.**
>
> **We conclude the immunity provided by subsection (11) does not apply to civil actions under subsection (15)(a) alleging the employer violated section 730.5.**

961 N.W.2d at 684. For context, the Court of Appeals had previously held:

> **We agree it is reasonable to construe section 730.5(11)(a) as inoculating employers only from suits arising from third-party conduct. Such a construction resolves the apparent circularity of the immunity clause and is consistent with the civil remedy at section 730.5(15) being applicable against '[a] person' rather than exclusively the employer.**

Dix v. Casey's General Stores, Inc., 942 N.W.2d 1, 6 (IA App 2020).

Contrary to Hampe's claim, Section 730.5(11)(a) provides employers with immunity from "liability for statutory violations by third parties". Id. Here, Hampe claims violations pertaining to the actions of a third party, Mid-Iowa. The Court in *Dix* acknowledged employer immunity for third-party conduct.

II. THE DISTRICT COURT CORRECTLY DISMISSED HAMPE'S COMMON LAW CLAIMS.

Hampe filed a Second Amended Petition to include claims of Fraud, Invasion of Privacy, Conspiracy, and "Reckless Disregard". (APP. 22-30). However, Hampe's new claims were

dismissed because (1) Hampe did not provide a timely resistance to summary judgment, (2) Hampe provided “no facts addressing his stated claims that the Defendants targeted Hampe”, and (3) Hampe’s common law claims were precluded by the exclusive remedy of Section 730.5. (APP. 950-951).

A. HAMPE FAILED TO TIMELY RESIST SUMMARY JUDGMENT.

CGM’s Motion for Summary Judgment was filed on March 2, 2022. (APP. 107-108). Hampe did not respond regarding the common law claims until July 21, 2022. (APP. 950); *see also* Second “Supplement to Resistance” (APP. 904-917). The District Court rightfully found Hampe’s response was untimely and opted not to consider its contents or accompanying affidavits. (APP. 950).

Hampe complains the District Court “did not set a deadline for Hampe to file supplement [to] his resistance”. Brief, p. 68. The Court, however, was under no such duty to set a “supplemental resistance” deadline that Hampe never requested.

On March 20th Hampe requested either an extension to respond to summary judgment pleadings by April 1st or continuance of the April 15th hearing. (APP. 333-337). On April 15th the Court continued the summary judgment hearing until July 29th, as requested. (APP. 849). Hampe neither requested nor received any other extensions of time to resist summary judgment. Instead, Hampe took it upon himself to file untimely "supplemental resistances" months later, on July 21st. The District Court was correct to find Hampe's submissions were untimely.

B. HAMPE'S EXCLUSIVE REMEDY WAS LIMITED TO THE IOWA CODE 730.5 DRUG-TESTING CLAIMS.

Hampe's suit was brought pursuant to Iowa Code §730.5. (APP. 11, 14, 22). His requested remedies related to harms he claimed arose out of the end of his employment with CGM. (APP. 12-13, 16, 23-24).

Hampe's common law claims were based upon the drug test. (APP. 24-30). In fact, Hampe admitted his tort claims were based on "ascertain[ing] for the first time the order in

which he was required to submit his urine sample in relation to other employees selected" for drug testing. (APP. 19).

As such, Hampe's tort claims were admittedly based upon the same facts and allegations he claimed violated Iowa Code §730.5. However, Iowa law makes clear Hampe could not pursue these legal claims because "the civil cause of action provided by Iowa Code section 730.5 is the exclusive remedy for a violation of section 730.5." *Ferguson v. Exide Technologies, Inc.*, 936 N.W.2d 429 (Iowa 2019).

Iowa Code §730.5 sets forth a comprehensive statutory scheme allowing unannounced, suspicionless drug–testing. *See Dix*, 961 N.W.2d at 678. This comprehensive statute provides for a civil cause of action alleged violations of the statute with enumerated remedies for "aggrieved" employees. Iowa Code § 730.5(15); *see also Ferguson*, 936 N.W.2d at 436. The Iowa legislature provided for certain specified damages "including reinstatement or hiring, with or without back pay, or any other equitable relief as the court deems appropriate including attorney fees and court costs" and injunctive relief.

Iowa Code §§730.5(15)(a)(1), (2). There is no provision for emotional distress or punitive damages. *Id.*

Under Iowa law, "where the legislature has provided a comprehensive scheme for dealing with a specified kind of dispute, the statutory remedy provided is generally exclusive." *Van Baale v. City of Des Moines*, 550 N.W.2d 153, 156 (Iowa 1996)(quoting *1A C.J.S. Actions* § 14 n. 55 (1985); *cf. Snyder v. Davenport*, 323 N.W.2d 225, 227 (Iowa 1982)(finding the case squarely within the statutory scheme, and holding that a suit against a liquor licensee for selling liquor to an intoxicated person may be brought only by following the dramshop act); *Goebel v. City of Cedar Rapids*, 267 N.W.2d 388, 392 (Iowa 1978)(noting the federal rule that when Congress has established a comprehensive statutory scheme, the scheme is presumed to be the exclusive remedy)); *see also Ferguson*, 936 N.W.2d at 433.

In fact, in *Ferguson*, the Iowa Supreme Court considered whether an employee's wrongful termination claim was barred by the exclusive remedy provided by Iowa Code §730.5. 936

N.W.2d 429. The Court ultimately reversed the district court's prior order for judgment on the common law wrongful–discharge claim and vacated "those portions of the jury's damages that would be available only under a common law tort theory" holding "*the civil cause of action provided by Iowa Code section 730.5 is the exclusive remedy for a violation of section 730.5.*" *Id.* at 436 (emphasis added). In so holding, the Court stated:

> **...when the legislature includes a right to civil enforcement in the very statute that contains the public policy a common law claim would protect, the common law claim for wrongful discharge in violation of public policy becomes unnecessary. In this situation, the 'legislature has weighed in on the issue and established the parameters of the governing public policy.' If the legislature considers the remedies it has provided inadequate, it is free to modify them. However, we need not provide an alternative court remedy when the legislature already provided one. Thus, we hold that when a civil cause of action is provided by the legislature in the same statute that creates the public policy to be enforced, the civil cause of action is the exclusive remedy for violation of that statute.**

Id. at 434–435 (internal citations omitted).

Similarly, just months prior to the *Ferguson* decision, the federal district court granted an employer's motion to dismiss a wrongful termination claim in *Dickey v. Turner Construction Company*. *See* 421 F.Supp.3d 645 (S.D. Iowa 2019). In *Dickey*, the Court recognized the scope of Iowa Code § 730.5's provisions, stating:

> **Not only does section 730.5 set forth a comprehensive framework for disputes about workplace drug testing, but it contemplates and provides a private cause of action for the precise conduct that [the employee] alleges as the basis for his wrongful discharge claim.**
>
> **. . .**
>
> **Here, the Iowa legislature has already conducted the requisite balancing of competing interests and provided a private cause of action and a limited set for remedies when, among other violations, an employer terminates an employee based on a refusal to take a drug test that did not comply with the statute.**

Id. at 655–656. Like the later *Ferguson* decision, the federal court in *Dickey* rejected the employee's effort to assert a common law tort claim that "rest[ed] upon the exact same legal issue of whether [the defendant] violated [Iowa Code § 730.5]." *Id.* at 656 (internal citations omitted).

In the case-at-bar, the District Court cited to the *Ferguson* and *Dix* cases to reference the exclusive remedy for violation of Section 730.5. (APP. 951).

Hampe's exclusive remedy for claimed violation(s) was limited to those provided by the statute. Hampe could not assert other legal claims arising out of the drug testing to seek additional damages beyond those allowed by Iowa Code §730.5.

C. HAMPE'S COMMON LAW CLAIMS ARE BARRED BY EMPLOYER IMMUNITY.

Hampe's tort claims are subject to dismissal based upon employer immunity at Iowa Code §730.5(11).

Iowa law provides employers, like CGM, with immunity from causes of action other than those asserted under Iowa Code § 730.5. *Id.*; *see also Dix*, 961 N.W.2d at 671. Iowa Code §730.5(11) states "a cause of action shall not rise" against employers that take adverse employment action based on an employee's "refusal . . . to submit to a drug test". CGM met the elements of Section 730.5(11) employer immunity by "establish[ing] a drug–testing policy" and "initiat[ing] a testing

program” consistent with statutory and policy safeguards. *See* Section I(G).

The Supreme Court recently addressed the scope of employer immunity from claims outside Iowa Code §730.5 in *Dix.* 961 N.W.2d at 682–684. In *Dix*, the Court considered the employer's immunity prior to “reach[ing] the numerous ways in which the employees claim [the employer] violated section 730.5...” *Id.* at 682. The Court stated:

> **... subsection (11) immunizes employers from causes of action other than those arising from the employer's violations of section 730.5, such as invasion of privacy or wrongful termination.**

Id. at 684. The *Dix* holding precludes Hampe's tort claims as a matter of law because each is a cause of action expressly based upon actions pertaining to drug testing. (APP. 24-30).

D. HAMPE FAILED TO PRODUCE EVIDENCE TO SUPPORT HIS COMMON LAW CLAIMS.

Even if Hampe's tort claims were not precluded by exclusive remedy or immunity, these claims were still subject to dismissal because Hampe did not have sufficient evidence to show a genuine issue for trial. *Hlubek v. Pelecky, 701*

N.W.2d 93, 95-96 (Iowa 2005) (citing Iowa R. Civ. P. 1.981(5)); *Hoefer*, 470 N.W.2d at 338–39.

1. HAMPE HAD INSUFFICIENT EVIDENCE OF FRAUD.

Hampe's fraud claim was based upon his allegations that CGM "repeatedly violated Iowa's drug testing law"; its unannounced drug testing was not "random"; he was "unlawfully required to submit a urine sample," and other "violat[ions] of Iowa's drug testing law." (APP. 27-28). Hampe's allegations were rightfully dismissed.

The elements of common law fraud are (1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent to deceive, (6) reliance, and (7) resulting injury and damage. *B&B Asphalt Co. v T.S. McShane Co.*, 242 N.W.2d 279, 284 (Iowa 1976). Hampe could not meet the 1st, 2nd, 3rd, or 6th elements, because he could not show CGM made "material" "representations" upon which he relied on December 5, 2019. The allegations pertained to alleged representations regarding the "random" nature of the drug test and Hampe's location on the "alternate" list. (APP. 24-25). However, Hampe admits he

was "not informed" of his "alternate" status, and he did not testify that any representative of CGM made statements to him on or about December 5, 2019 about the "random" nature, selection process, employee lists, or other aspects of the drug test; instead, he was only asked to report for testing. (APP. 30); (APP. 176-177)(Pl's Depo. 49:16—50:3). Hampe's legal claim was based upon nuances of the testing pool and selection process learned of during discovery, not representations made to Hampe on December 5, 2019. (APP. 19).

Hampe also had insufficient evidence he was "targeted" for the December 5, 2019 drug test (APP. 95), and could not establish the elements of scienter or intent to deceive. "The element of scienter requires a showing that alleged false representations were made with knowledge they were false." *B&B Asphalt Co.*, 242 N.W.2d at 284. As noted above, Hampe could not establish that a CGM representative involved with the December 5, 2019 drug test made a representation regarding the testing pool, selection process, or "randomness"

of Hampe's selection. Nor was there evidence he was "targeted" on December 5, 2019 (APP. 950), or deceived in any manner (APP. 186)(Pl's Depo. 100:12–15).

2. HAMPE HAD INSUFFICIENT EVIDENCE OF AN INVASION OF PRIVACY.

Hampe's invasion of privacy claim alleged CGM "unreasonably intruded upon the solitude and seclusion of" Hampe in "unlawfully conducting and requiring [Hampe] to submit his urine sample." (APP. 28).

The Iowa Supreme Court first recognized the tort of invasion of privacy in *Bremer v. Journal–Tribune Publishing Co.*, 76 N.W.2d 762, 764–65 (Iowa 1956). Since recognition of the tort, the Iowa Supreme Court has adopted and applied the invasion of privacy principles articulated in *Restatement (Second) of Torts* subsection 652A(2). *See Stessman v. Am. Blackhawk Broadcasting Co.*, 416 N.W.2d 685, 686 (Iowa 1987) (citing previous cases). Here, it appears Hampe alleged an "unreasonable intrusion upon the seclusion of another" per the *Restatement (Second) of Torts* subsection 652A(2). (APP. 28).

However, an invasion of privacy claim is based upon the "method of obtaining information, not the content of the information obtained, or even the use put to the information by the intruder following the intrusion." *Koeppel v. Speirs*, 808 N.W.2d 177, 181 (Iowa 2011) (noting employees assert violation of privacy claim because of unknown camera in bathroom). "[T]he tort protects against acts that interfere with a person's mental well–being by intentionally exposing the person in an area cloaked with privacy." *Id.* at 184. Iowa law requires two elements to assert such a violation of privacy claim: (1) an intentional intrusion into a matter in which the plaintiff has a right to expect privacy, and (2) the intrusion is "highly offensive" to a reasonable person. *Id.* While the analysis into whether "privacy is expected" or the intrusion is highly offensive is generally a fact–based question, it can also be determined as a matter of law. *See id.* at 178; *e.g.*, *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871, 879 (8th Cir. 2000).

In this case, Hampe could not demonstrate he was "exposed in any way," since the act of providing a urine specimen occurred in a restroom stall with the only other person present on the other side of the wall, circumstances the Supreme Court has deemed sufficiently protective of an employee's privacy. *See Koeppel*, 808 N.W.2d at 184 (holding an exposure must occur to support an invasion of privacy claim); *Dix*, 961 N.W.2d at 694 (holding that "typical bathroom stalls" meet the essential nature of Section 730.5's privacy requirement); (APP. 178, 188)(Pl's Depo. 59:22–25)(describing conditions of drug test). Hampe also testified he chose to leave the bathroom stall door open, which undermines any finding of a subjective, individual expectation of privacy. *See Koeppel*, 808 N.W.2d at 185 (stating the plaintiff's "reasonable belief" an intrusion has occurred is needed); *Fletcher*, 220 F.3d at 877 ("[T]he plaintiff in an invasion of privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy."); (APP. 188)(Pl's Depo. 151:19—152:12). Hampe also apologized to CGM and offered to submit

to additional drug testing, further undermining any expectation of privacy in submitting to a drug screen. *See id.*; (APP. 184-185)(Pl's Depo. 89—93); (APP. 230).

3. HAMPE HAD INSUFFICIENT EVIDENCE OF A CONSPIRACY.

Hampe's conspiracy claim was based on CGM and/or Mid–Iowa "requir[ing] [Hampe] to submit to an unannounced drug test." (APP. 29). Hampe's civil conspiracy claim is a theory of vicarious liability and is not separately actionable. *Basic Chemicals, Inc. v. Benson*, 251 N.W.2d 220, 233 (Iowa 1977). Hampe has not established any underlying "wrong" nor the required elements of a civil conspiracy claim.

"A conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish by unlawful means some purpose not in itself unlawful." *Basic Chemicals, Inc.*, 251 N.W.2d at 232. "The tort of civil conspiracy requires proof of an agreement or understanding to effect a wrong against another. Civil conspiracy is 'an avenue for imposing vicarious liability on a party for the wrongful conduct of another with whom the party

has acted in concert.'" *Stewart v. Iowa Mach. & Supply Co., Inc.*, 772 N.W.2d 15 (Iowa Ct. App. 2009) (Table) (quoting *Wright v. Brooke Group Ltd.,* 652 N.W.2d 159, 172 (Iowa 2002)) (citations omitted). "While a civil conspiracy is based upon intentional activity, the element of intent is satisfied when a defendant knowingly and voluntarily participates in a common scheme to commit an unlawful act or a lawful act in an unlawful manner. There is no such thing as accidental, inadvertent or negligent participation in a conspiracy." *Wright*, 652 N.W.2d at 173 (quoting *Adcock v. Brakegate, Ltd.*, 645 N.E.2d 888, 894–95 (Ill. 1994)).

Hampe had no evidence CGM and Mid–Iowa "had an agreement" or "understanding" to "effect a wrong" against Hampe. Nor could he show an "underlying wrong" committed against him. *See Seymour v. City of Des Moines*, 2006 WL 8436827 at *8-9 (S.D. IA 2006).

CONCLUSION

CGM requests the District Court order be affirmed, the appeal be dismissed, and appellate attorney fees and costs be taxed to Hampe.

REQUEST FOR ORAL ARGUMENT

Defendant-Appellee Charles Gabus Motors, Inc. (d/b/a Toyota of Des Moines) respectfully requests to be heard at oral argument on this appeal if such right is granted to Appellant Scott Hampe.

/s/Andrew T. Tice
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CERTIFICATE OF FILING

The undersigned hereby certifies that the Final Brief of the Defendant-Appellee Charles Gabus Motors, Inc. d/b/a Toyota of Des Moines was electronically filed via the Iowa Supreme Court's Electronic Data Management System (EDMS) on the 2nd day of June, 2023.

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CERTIFICATE OF SERVICE

It is hereby certified that on the 2nd day of June, 2023, the undersigned party, or person acting on its behalf, did file via EDMS the foregoing document, which gives notice thereof to the following:

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1. This final brief complies with the type-volume limitation of Iowa R. App. P.6.903(1)(g)(1) or (2) because:

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/s/ Andrew T. Tice JUNE 2, 2023
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