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IN THE IOWA SUPREME COURT

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

APPEAL FROM IOWA DISTRICT FOR POLK COUNTY
THE HONORABLE JOSEPH SEIDLIN

FINAL BRIEF OF APPELLEE GADIMINA ENTERPRISES, INC., d/b/a MID-IOWA OCCUPATIONAL TESTING

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO MID-IOWA ON HAMPE'S CLAIMS OF VIOLATION OF IOWA CODE § 730.5

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ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals because it presents the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a) (2022).

STATEMENT OF THE CASE

Nature of the Case:

This case involves: 1) the lawful actions of Hampe's employer Appellee/Defendant Charles Gabus Motors, Inc. d/b/a Toyota of Des Moines (hereinafter "CGM") and a third-party vendor Appellee/Defendant Gadimina Enterprises, Inc. d/b/a Mid-Iowa Occupational Testing (hereinafter "Mid-Iowa") during a random drug test, and 2) the lawful discharge of Appellant/Plaintiff Scott Hampe (hereinafter "Hampe") by CGM following Hampe's refusal to test pursuant to Iowa Code section 730.5.

Course of Proceedings

Hampe filed his original Petition on May 8, 2020 asserting just one claim against both Defendants: Violation of Iowa Code Section 730.5. (App. 11, 5/8/20 Petition). Hampe amended his Petition twice, with his December 30, 2021, Second Amended Petition adding three new common law claims for Fraud, Invasion of Privacy, Conspiracy, and Reckless Disregard more than a year after this action began. (App. 14, 12/30/21 Second Amended

Petition). In response, Mid-Iowa sought a continuance of the May 31, 2022 trial, which was granted. (App. 62, 02/24/22 Motion to Continue).

Mid-Iowa and CGM filed Motions for Summary Judgment on March 2, 2022 seeking complete dismissals as to all of Hampe's claims, including the new common law claims. (App. 107, App. 163, 3/2/22 CGM Motion for Summary Judgment and Appendix; App. 239, App. 274, 3/2/22 Mid-Iowa Motion for Summary Judgment with Appendix). Hampe resisted the Defendants' dispositive motions in filings on March 21, 2022, and March 25, 2022. (App. 348, 3/21/22 Hampe MSJ Resistance; App. 502, 3/25/22 Hampe MSJ Resistance). CGM and Mid-Iowa filed their Replies on March 31, 2022 and April 8, 2022, respectively. (App. 709, 3/31/22 CGM MSJ Reply; App. 740, App. 729, App. 725, 04/08/22 Mid-Iowa MSJ Reply with Supp. Appendix and SOAF).

On March 27, 2022, Hampe filed a Partial Motion for Summary Judgment, seeking a finding of liability as to his section 730.5 claims only, against both Defendants. (App. 664, 3/27/22 Hampe Motion for Partial Summary Judgment). While the Defendants filed Resistances to the Partial Motion for Summary Judgment, Hampe failed to file any supportive Replies. (App. 774, 4/11/22 CGM Resistance; App. 854, App. 871, 4/29/22 Mid-Iowa Resistance and Responses to SOF). However, on July 29, 2022, Hampe

filed a Supplemental Resistance to the Defendants' Motions raising arguments supporting his common law claims for the first time. (App. 904, 7/21/22 Hampe Supp. Resistance). Defendants replied to Hampe's untimely Supplemental Resistance. (App. 918, 7/27/22 CGM Reply to Supp. Resistance; App. 931, 7/28/22 Mid-Iowa Reply to Supp. Resistance).

The District Court heard oral arguments on July 29, 2022 as to all of the pending summary judgment motions, issuing a ruling on September 27, 2022 that dismissed Hampe's Second Amended Petition in its entirety as to both Defendants. (App. 935, 9/27/22 MSJ Ruling). The District Court properly found that Hampe failed to generate a fact issue as to whether CGM and Mid-Iowa substantially complied with Iowa Code section 730.5 and as to whether Hampe was aggrieved, as required for a finding of liability under section 730.5. (App. 935, 9/27/22 MSJ Ruling). The District Court further held section 730.5 is the exclusive remedy for Hampe's drug testing claims, and Hampe failed to submit any facts beyond those related to his 730.5 claims to support separate common law claims. (App. 935, 9/27/22 MSJ Ruling). Regarding his common law claims, the District Court ruled that Hampe's July 21 Supplemental Resistance was untimely and would not be considered. (App. 935, 9/27/22 MSJ Ruling).

Hampe did not file an Iowa Rule of Civil Procedure 1.904 Motion to Reconsider, Amend, and Enlarge the Rulings on Motions and Cross Motions for Summary Judgment, instead filing a Notice of Appeal on September 28, 2022 leading to this current proceeding. (App. 954, 9/28/22 Notice of Appeal).

STATEMENT OF THE FACTS

The Parties

Plaintiff, Scott Hampe, is a former employee of CGM. (App. 11, Plaintiff's Petition). CGM is a car dealer operating in Grimes, Iowa. (App. 11, Plaintiff's Petition). At the time of the events giving rise to Plaintiff's Petition, Plaintiff was working as a car salesperson for CGM, and was in fact CGM's most successful salesperson. (App. 277-278, (Hampe Depo. 23:5–9, 27:15–28:1)).

Defendant Mid-Iowa is a drug testing company that provides occupational drug testing services to Iowa employers. (App. 11, Plaintiff's Petition). The events leading to the present action stem from a drug test Mid-Iowa performed at CGM on December 5, 2019.

Mid-Iowa's Drug Testing Procedures

Mid-Iowa's occupational drug testing procedures are narrowly focused to ensure scientific accuracy, individual privacy, and compliance with state and federal laws. When an employer engages with Mid-Iowa to perform an occupational drug test, the employer provides Mid-Iowa with a list of potential employees to be tested. (App. 305-308, (Def. Ans. Rog. 7)). Mid-Iowa then uses a computerized random number generator to randomly select employees for testing. (App. 305-308 (Def. Ans. Rog. 7)). If the

employer in question uses a primary and alternate selection system, Mid-Iowa will randomly identify a primary list of employees to test, and thereafter identify an alternate list of employees to test in the event anyone on the primary list is unavailable on the test date. (App. 309, (Def Ans. Rog. 9), App. 310, (Random Selection Summary)).

When collecting urine specimens for drug testing, Mid-Iowa's testing employee ("the collector") provides test subjects an isolated collection site in which to provide a urine specimen, preferably a single-toilet bathroom. (App. 311, (Def. Testing Policies)). The test subject must provide a urine sample of at least 45 milliliters in volume in a collection cup. (App. 323, (Def. Testing Policies)). The collector then checks the specimen's temperature to ensure it is between 90 degrees and 100 degrees Fahrenheit. (App. 322, (Def. Testing Policies)). The collector also examines the specimen for any unusual color, odor, or other signs of adulteration. (App. 324 (Def. Testing Policies)). Provided the specimen is of sufficient volume, within the proper temperature range, and has no clear signs of adulteration, the collector then performs an immunoassay screen in the presence of the test subject. (App. 313, (Def. Testing Policies)).

If the test subject provides a urine specimen that is less than 45 milliliters in volume, is out of the 90–100-degree temperature range, or is

clearly adulterated, the collector cannot test the specimen and must instead immediately discard it in the presence of the test subject. (App. 319, (Def. Testing Policies)). Thereafter, the test subject is required to remain on-site and drink fluids until they can provide another specimen, for a period of up to three hours. (App. 319, (Def. Testing Policies)). If a test subject refuses to participate in testing or leaves the collection site before a test can be performed, it is considered a refusal to test. (App. 314, (Def. Testing Policies)).

Plaintiff's Drug Test

Here, Mid-Iowa performed a random selection of CGM employees on or about November 27, 2019, in preparation for an occupational drug test. (App. 310, (Random Selection Summary)). Mid-Iowa randomly selected 15 CGM employees to form a primary list of test subjects, and then, as requested by CGM, prepared an alternate list of eight additional employees to be used in the event of any absences. (App. 310, (Random Selection Summary)). Through this randomized selection procedure, Hampe was identified as the last individual on the alternate list to be tested. (App. 310, (Random Selection Summary)).

Mid-Iowa performed an occupational drug test at CGM on December 5, 2019. (App. 280, (Hampe Dep. 50:20–23)). On the date of testing, only

six individuals on the primary list and seven on the alternate list (including Hampe) were available onsite for testing. (App. 326-327, (Monthly Testing Summary)). That morning, a CGM general manager, J.P. Phillips, called Hampe's workstation and notified him that he had been selected for the random drug test. (App. 280, (Hampe Dep. 50:8–14)). Hampe went to CGM's employee lunchroom, which served as the waiting room for individuals to be tested. (App. 280, (Hampe Dep. 51:21–23)). Kelsey Gabus McBride ("McBride"), a CGM employee, oversaw the waiting area while Mid-Iowa performed the drug tests. (App. 280, (Hampe Dep. 52:8–13)).

When Hampe arrived at the waiting area, Sarah Ghee ("Ghee"), Mid-Iowa's collector, led Hampe into a single-stall restroom that had been designated as the collecting site for the day. (App. 281, (Hampe Dep. 58)). Ghee provided Hampe a urine specimen collection cup and explained the testing procedures. (App. 281, (Hampe Dep. 58)). Hampe entered the single stall and produced a specimen while Ghee waited against the bathroom wall opposite the sink. (App. 281, (Hampe Dep. 58, 59:22–25)). When Hampe returned with his specimen, Ghee measured its temperature and found it to be 104 degrees—well outside of the 90–100-degree range required for testing. (App. 329, (Ghee Statement), Mid-Iowa App. 55 (Instant Testing Form)). Pursuant to Mid-Iowa's testing procedures, Ghee disposed of

Hampe's specimen in front of him and informed him he would need to provide another specimen for testing. (App. 281-282, (Hampe Dep. 61:13–62:15)). Hampe attempted to provide a second specimen shortly after but was unable to produce the full 45 milliliters required for testing. (App. 282, (Hampe Dep. 63:24–64:4)). Ghee disposed of Hampe's second insufficient specimen and instructed him to drink fluids and wait in the testing area until he could provide a testable specimen. (App. 329, (Ghee Statement), App. 282, (Hampe Depo. 63:24–64:4)).

Plaintiff's Refusal to Test and Termination

Despite Ghee's instructions, Hampe never provided a third urine specimen for testing. Shortly after providing his second insufficient urine specimen, Hampe reported to McBride that his thirteen-year-old daughter was home sick and that he needed to take her to the doctor. (App. 282-283, (Hampe Dep. 65:1–13, 68:25–69:1)). McBride informed Hampe that if he left without completing his drug test it would be considered a refusal to test, and CGM would terminate his employment. (App. 283, (Hampe Dep. 69:2–12)). Approximately 15 minutes later, Hampe informed McBride that he was leaving. McBride again told Hampe that his employment would be terminated if he left. (App. 283-284, (Hampe Dep. 69:20–70:25)). Notwithstanding these repercussions, Hampe left CGM a few minutes later.

(App. 283-284, (Hampe Dep. 69:20–70:25)). CGM terminated Hampe's employment later that day for refusing to submit to the drug test. (App. 278-279, (Hampe Dep. 29:21–30:1)).

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO MID-IOWA ON HAMPE'S CLAIMS UNDER IOWA CODE § 730.5.

A. Mid-Iowa Did Not Aid CGM In Violating Iowa Code §§ 730.5(1)(*l*), 730.5(8)(a), 730.5(9)(h), And 730.5(9)(b).

Hampe has attempted to amass several claimed violations of Iowa Code section 730.5, Iowa's private sector drug-free workplace statute, as against both CGM, his employer, and Mid-Iowa, a third-party entity that provided occupational drug testing services to CGM. In this appeal, Hampe claims there is no meaningful dispute that CGM and Mid-Iowa worked in concert and cannot "decouple their actions from each other." (Hampe Proof Brief at p. 25). However, Hampe's attempt to bind CGM and Mid-Iowa to each other fails for three reasons: (1) Hampe failed to preserve error as necessary to raise such arguments on appeal; (2) the specified subsections of the statute do not apply to Mid-Iowa as Mid-Iowa was not Hampe's employer and did not aid CGM; and (3) Mid-Iowa did not have the requisite knowledge or control to commit such violations of the statute.

i. Hampe did not properly preserve error on his argument that Mid-Iowa aided CGM in violating Iowa Code §§ 730.5(1)(l), 730.5(8)(a), 730.5(9)(h), and 730.5(9)(b).

First, Hampe has failed to preserve error on the claimed violations under Iowa Code sections 730.5(1)(*l*), 730.5(8)(a), 730.5(9)(h), and

730.5(9)(b) as to Mid-Iowa. While Hampe declares on appeal that his briefing will treat CGM and Mid-Iowa as one, this approach by Hampe is improper. (Hampe Proof Brief at p. 25). "Our error preservation rules provide that error is preserved for appellate review when a party raises an issue **and the district court rules on it**." *State ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12, 20 (Iowa 2013) (emphasis added). While Hampe raised the theory that Mid-Iowa "aided" in the violation of the statute pursuant to section 730.5(15)(a)(1) at summary judgment, the only commentary in the District Court's Ruling on Hampe's "aiding" theory was in regard to subsections 730.5(7)(a)-(b) and 730.5(7)(h), where the District Court ruled that there was no evidence to suggest **CGM aided** in any alleged violation of the statute under the specified subsections. (App. 945, 09/27/22 MSJ Ruling at p. 11).

The District Court, in fact, made no ruling as to Mid-Iowa's liability under subsections 730.5(1)(*l*), 730.5(8)(a), 730.5(9)(h), and 730.5(9)(b) under either direct liability or an "aiding" theory:

- **Section 730.5(1)(*l*) CGM's use of an alternate list at random selection** - While Hampe raised the issue in his cross motion for summary judgment, albeit through a different code

section[1], that does not absolve him of demonstrating the second requirement of preservation: a ruling on that issue by the district court. *State ex rel. Miller*, 834 N.W.2d at 20. The argument was not considered or ruled on by the District Court as to either CGM or Mid-Iowa. (App. 935, 9/27/22 MSJ Ruling).

- **Section 730.5(8)(a) CGM's inclusion of certain employees in the selection pool for random drug testing** - While the District Court ruled on Hampe's argument regarding CGM's selection pool, the ruling only concerned CGM's conduct, not Mid-Iowa's. (App. 941-942, 9/27/22 MSJ Ruling at pp. 7-8). Without a ruling as to Mid-Iowa's liability, error has not been preserved as to Mid-Iowa. *State ex rel. Miller*, 834 N.W.2d at 20.
- **Section 730.5(9)(h) CGM's training of supervisory personnel** - In its Ruling, the District Court examined this issue only as to CGM. (App. 942-943, 9/27/22 MSJ Ruling at pp. 8-9). As no ruling exists relating to Mid-Iowa and section

[1] In his partial motion for summary judgment, Hampe argued the use of alternates was a violation of section 730.5(8)(a). This appeal raises 730.5(1)(l) as the section violated regarding the use of alternates for the first time. (Hampe Proof Brief at p. 29)

730.5(9)(h), this argument has not been properly preserved. *State ex rel. Miller*, 834 N.W.2d at 20.

- **Section 730.5(9)(b) CGM's disciplinary policy** - The District Court made no ruling on this issue as to Mid-Iowa, focusing its analysis solely on CGM's conduct. (App. 943-944, 9/27/22 MSJ Ruling at pp. 9-10). Again, error has not been properly preserved. *State ex rel. Miller*, 834 N.W.2d at 20.

By failing to elicit a ruling from the District Court that encompassed the many facets of his argument, Hampe ultimately failed to preserve error, and therefore cannot advance said arguments on appeal.

ii. To the extent the Court finds Hampe did preserve error, sections 730.5(1)(l), 730.5(8)(a), 730.5(9)(h), and 730.5(9)(b) do not apply to Mid-Iowa as it was not Hampe's employer and did not aid CGM.

Second, these alleged violations—specifically CGM's use of an alternate list, pool selection, supervisor training, and uniform application of disciplinary policies—cannot and do not apply to Mid-Iowa because Mid-Iowa was not Hampe's employer.[2] Section 730.5 explicitly focuses on the relationship and actions between employers and employees. *See* Iowa Code

[2] As Mid-Iowa was not Hampe's employer, Mid-Iowa does not, and has not, claimed to have statutory immunity pursuant to section 730.5(11) as argued by CGM. Accordingly, Hampe's argument on appeal regarding statutory immunity does not apply to Mid-Iowa.

§ 730.5. "Section 730.5 is a comprehensive statute creating a detailed scheme **employers** must follow in utilizing workplace drug testing." *Dix v. Casey's General Stores, Inc.*, 961 N.W.2d 671, 681 (Iowa 2021) (emphasis added).

The statute is rife with reference to the obligations of employers; yet, it lacks any directive to third parties. Iowa Courts apply the plain meaning of the language of a statute if it is unambiguous. *Beverage v. Alcoa, Inc.*, 975 N.W.2d 670, 680 (Iowa 2022) ("Our first step is determining whether the meaning of the provision is ambiguous; if it is not, we go no further and apply the unambiguous meaning of the language used in the provision."). Section 730.5 is unambiguous, particularly as to its application to employers, and Hampe has proffered no case law or other authority to support reading of the statute to extend liability to third party sample collectors like Mid-Iowa. In fact, the only manner in which the statute could conceivably extend liability to a third party is at subsection 730.5(15)(a)(1) which provides that "[a] person who violates this section or who aids in the violation of this section is liable to an aggrieved employee or prospective employee . . ." Iowa Code § 730.5(15)(a)(1). Notably, though, Iowa courts have yet to analyze the scope and application of this provision, or to what extent the statute as a whole applies to non-employer third parties.

While the term "aids" is not defined under the statute, "aids" is a well-recognized legal term of art that espouses a plain and specific meaning. "When there is no statutory definition to guide us, we interpret terms 'in the context in which they appear and give each [word] its plain and common meaning.'" *Banilla Games, Inc. v. Iowa Dep't of Inspections & Appeals*, 919 N.W.2d 6, 14 (Iowa 2018) (citing *Ramirez-Trujillo v. Quality Egg, LLC*, 878 N.W.2d 759, 770 (Iowa 2016)). In the criminal sense to "aid" means "[t]o **assist or facilitate** the commission of a crime, or to **promote** its accomplishment." *Aid and Abet*, Black's Law Dictionary (11th ed. 2019) (emphasis added)[3]. The "definition of criminal aiding and abetting is not substantially different from the definition of civil aiding and abetting." *Heick v. Bacon*, 561 N.W.2d 45, 54 (Iowa 1997). To establish a civil claim for aiding and abetting under Iowa law, a party must establish three elements:

1. The primary wrongdoer breached a duty;

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[3] *See also Asplund v. iPCS Wireless, Inc.*, 602 F.Supp.2d 1005, 1011 (N.D. Iowa 2008) ("While the Iowa Supreme Court has not construed the ICRA's aiding -and-abetting provision, Plaintiff has a colorable argument that the Iowa Supreme Court would draw upon its criminal jurisprudence and hold that aiding and abetting occurs under ICRA when a person actively participates or in some manner encourages *the commission* of an unfair or discriminatory practice *prior to or at the time of its commission*." (Emphasis added.))

2. The defendant knew of the wrong on the part of the primary actor;

3. The defendant gave "substantial assistance" in the achievement of the primary violation.

PFS Distrib. Co. v. Raduechel, 492 F.Supp.2d 1061, 1084 (S.D. Iowa 2007); *see* Iowa Civ. Jury Instr. No. 3500.4; *Tubbs v. United Cent. Bank*, 451 N.W.2d 177, 182 (Iowa 1990) (citing the Restatement (Second) of Torts § 876)). Thus, liability as an aider and abettor depends on proof of an underlying tort or primary violation.

The Restatement (Second), Torts § 876(b), entitled "Persons Acting in Concert," provides:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he:
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Restatement (Second), Torts § 876(b). The Iowa Supreme Court specifically adopted the Restatement's language of "knows the other's conduct

constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct him" as a theory of recovery for "aiding and abetting." *See Reilly v. Anderson*, 727 N.W.2d 102 (Iowa 2006); *Heick*, 561 N.W.2d at 51; *Ezzone v. Riccardi*, 525 N.W.2d 388, 398 (Iowa 1994). Therefore, proof of knowledge and substantial assistance are the two main elements in a claim for aiding and abetting.

The test established for civil aiding and abetting should be applied to the analysis for whether a party's conduct constitutes "aiding" under section 730.5(15)(a)(1). Notwithstanding, Hampe has no evidence, other than "[j]ust a feeling" to suggest Mid-Iowa was working with CGM "to try to target him." (App. 289, (Hampe Dep. 154:11 – 155:10)). This is simply insufficient to establish Mid-Iowa had knowledge of any alleged violation by CGM or even aided in said violation, and therefore Hampe's "aiding" claim, even if the District Court had ruled on it, could not have survived summary judgment.

iii. To the extent the Court finds the referenced sections of the statute do apply to a third party like Mid-Iowa, Hampe's claims still fail, as Mid-Iowa had no knowledge of or control over CGM's policies and/or decisions relating to drug testing.

1. <u>Mid-Iowa had no knowledge of or control over CGM's decision to use an alternate list for drug</u>

<u>testing and therefore cannot be liable under section 730.5(1)(*l*).</u>

Hampe argues Mid-Iowa violated section 730.5(1)(*l*) because CGM utilized a list of eight alternates in its December 5, 2019 random selection test. (Hampe Proof Brief at p. 29). Section 730.5(1)(*l*) is silent as to the use of alternates, and in fact, nowhere does section 730.5 state the use of an alternate list is improper. *See* Iowa Code § 730.5(1)(*l*). Instead, this section requires:

> 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.

Id.

Initially, and while Hampe is correct that the issue of the use of alternates in random drug testing came before the Iowa Supreme Court in *Dix*, the *Dix* Court declined to issue a ruling as to whether the same violated

section 730.5. *Dix*, 961 N.W.2d at 679. Accordingly, *Dix* provides no precedent on this issue.

Mid-Iowa is a drug testing company that provides occupational drug testing services—primarily sample collection and preliminary analysis—to Iowa employers. (App. 11, Petition). When an employer engages Mid-Iowa to perform an occupational drug test, the employer provides Mid-Iowa with a list of potential employees to be tested. (App. 306-308, (Def. Ans. Rog. 7)). Mid-Iowa then uses a computerized random number generator to randomly select employees for testing. (App. 306-308, (Def. Ans. Rog. 7)). If the respective employer uses a primary and alternate selection system, Mid-Iowa will randomly identify a primary list of employees to test, and thereafter, an alternate list of employees to test in the event anyone on the primary list is unavailable on the test date. (App. 309, (Def. Ans. Rog. 9), App. 310 (Random Selection Summary)).

In this case, Mid-Iowa randomly selected 15 CGM employees to form a primary list of test subjects, and then, at CGM's request and direction, prepared an alternate list of eight additional employees to be used in the event of any absences. (App. 310, (Random Selection Summary)). Through this random selection procedure, Hampe was identified as the last individual on the alternate list. (App. 310, (Random Selection Summary). Again, Mid-

Iowa is separate and independent from CGM, and there is no evidence to imply Mid-Iowa dictates the conditions under which CGM conducts its employee drug testing. There is no language within this section to suggest a third party is charged with overseeing an employer's random selection policy in this way. *See* Iowa Code § 730.5(1)(*l*).

Notwithstanding, Mid-Iowa used an objective selection process with the help of a computerized random number generator to perform the random selection requested. (App. 306-308, (Def. Ans. Rog. 7)). Therefore, Mid-Iowa carried out its duties within the bounds of the statute and substantially complied with section 730.5(1)(*l*) to the extent it imposes any liability on a third-party entity. *See* Iowa Code § 730.5(1)(*l*); *see also Dix*, 961 N.W.2d at 682 ("Employing a substantial, rather than a strict, compliance standard strikes a proper balance between these sometimes-competing purposes behind section 730.5, particularly in light of the detailed conditions placed on employers in carrying out a drug-testing program.").

2. Mid-Iowa had no knowledge of or control over CGM's decision as to which employees to include in the selection pool and cannot be held liable under section 730.5(8)(a).

Mid-Iowa is not subject to section 730.5(8)(a), which does not apply to non-employers based on its plain language. *See* Iowa Code § 730.5(8)(a) ("**Employers may** conduct unannounced drug or alcohol testing of

employees who are selected from any of the following pools of employees. . .") (emphasis added). Plaintiff admitted in his cross motion for summary judgment that CGM, not Mid-Iowa, determines which employees to include in the drug testing pool. (App. 672-673, Plf. MSJ at pp. 6-7). Hampe has not made any allegations, nor is there any support in the record, that Mid-Iowa had knowledge of CGM's employee roster or its accuracy. The record also does not support any notion that Mid-Iowa had the ability to make decisions as to which employees were included in the testing pool for the December 5, 2019 random test. Similarly, the record lacks any evidence that Mid-Iowa had knowledge of or control over CGM employee work schedules.

Instead, for the December 5, 2019 test, Mid-Iowa relied on the information CGM provided. CGM provided Mid-Iowa with a list of employees that Mid-Iowa then inputted into its Drug Test Now random generator software to produce a random employee list for testing. (App. 306-308, (Def. Ans. Rog. 7); App. 699, Plf SOF ¶ 10-12).

Without any evidence to suggest that Mid-Iowa participated meaningfully in CGM's decision as to how to run its drug testing program, Hampe cannot sustain his claims against Mid-Iowa as to violations of 730.5(8)(a). Therefore, even assuming section 730.5(8)(a) could apply to third parties, Hampe's claims still fail as against Mid-Iowa.

3. Mid-Iowa had no knowledge of or control over CGM's supervisor training and cannot be liable under section 730.5(9)(h).

In one of his strangest arguments, Hampe attempts to extend liability under section 730.5(9)(h)— concerning training of supervisors conducting an employer's drug testing—to Mid-Iowa. (Hampe Proof Brief at pp. 44-48). Iowa Code section 730.5(9)(h) states:

> In order to conduct drug or alcohol testing under this section, an **employer** shall require supervisory personnel of the **employer** involved with drug or alcohol testing under this section to attend a minimum of two hours of initial training and to attend, on an annual basis thereafter, a minimum of one hour of subsequent training.

Iowa Code § 730.5(9)(h) (emphasis added).

It is undisputed that CGM is the sole employer in this action. (App. 11, (Plaintiff's Petition)). It is equally undisputed that McBride was the CGM supervisor conducting its random drug testing. (App. 280, (Hampe Dep. 52:8-13)).

Even if Hampe had properly preserved error, he could not prevail on this argument as to Mid-Iowa. First, there is no validity to Hampe's claim that McBride's training was inadequate. As the District Court correctly noted, McBride produced evidence of her completed training, and Hampe failed to identify any specific facts to suggest the training was insufficient.

(App. 943, 9/27/22 MSJ Ruling at p. 9). Further, Hampe has neither made nor supported any assertion that Mid-Iowa had knowledge of or control over any training to which CGM subjected its supervisory employees. There is simply no record support that **any** Defendant has violated section 730.5(9)(h) as alleged.

4. <u>Mid-Iowa had no knowledge of or control over CGM's drug testing policy and its provisions or application thereof and cannot be liable under section 730.5(9)(b).</u>

Hampe's allegations that CGM's disciplinary policies were not uniformly applied amongst its employees cannot survive against Mid-Iowa. Per Iowa Code section 730.5(9)(b):

> The **employer's** written policy shall provide uniform requirements for what disciplinary or rehabilitative **actions an employer shall take** against an employee or prospective employee upon receipt of a confirmed positive test result for drugs or alcohol or upon the refusal of the employee or prospective employee to provide a testing sample. . . .

Iowa Code § 730.5(9)(b) (emphasis added).

This subsection explicitly concerns **employers**, which Mid-Iowa is not. *See id.* Hampe cannot identify any record evidence to suggest that Mid-Iowa participated in, had knowledge of, or control over how CGM drafted,

administered or enforced its policies. Again, even assuming subsection 730.5(9)(b) applied to third parties like Mid-Iowa, this claim fails.

B. Mid-Iowa Substantially Complied With Iowa Code § 730.5(7), 730.5(7)(a), and 730.5(9)(a)(1) And Hampe Was Not Aggrieved By Any Alleged Action Or Inaction By Mid-Iowa.

Mid-Iowa maintains that there is no existing authority suggesting its actions fall within the purview of section 730.5. However, without conceding that the statutory framework applies to alleged action or inaction by Mid-Iowa, Mid-Iowa did substantially comply with the statute, and the District Court found that Hampe has failed to generate any genuine issue of material fact to suggest otherwise. The parties agree that substantial compliance is the standard by which section 730.5 statutory compliance must be evaluated. *See Dix*, 961 N.W.2d at 682 ("[W]e conclude that section 730.5 claims should be evaluated using a substantial compliance standard."). This standard "balances the interests of the employer and the employee" and "if the employer's actions fall short of strict compliance, but nonetheless accomplish the important objective[s]" of the statute or particular part thereof, "the employer's conduct will substantially comply with the statute." *Id.* (citing *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009)).

Hampe has also failed to proffer any evidence that he was aggrieved by any alleged action or inaction of Mid-Iowa. By the plain language of section 730.5, Hampe cannot prevail on his claims that Mid-Iowa violated the statute unless he can show such violation "aggrieved" him. *See* Iowa Code § 730.5(15)(a); *see also Dix*, 961 N.W.2d at 692 ("Section 730.5(15)(a) only makes the employer 'liable to an *aggrieved* employee.'") (emphasis in original). Accordingly, "not every violation results in liability." *Dix*, 961 N.W.2d at 692 (Iowa 2021). Rather, to succeed on a claim for violation of the statute, employees must point to a way in which the alleged violation "harmed, or aggrieved, them." *Id.* at 694 ("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.").

i. Sections 730.5(7), 730.5(7)(a), and 730.5(9)(a)(1) do not apply to Mid-Iowa as it was not Hampe's Employer.

Without duplicating prior briefing, as iterated in Section I.A.ii *infra*, Hampe has proffered no authority to suggest that third parties are subject to liability under Iowa Code section 730.5 and/or any of its discrete subparts, including subsections 730.5(7), 730.5(7)(a), and 730.5(9)(a)(1).

ii. To the extent the Court finds § 730.5(7) does apply to Mid-Iowa, Mid-Iowa is not liable for disposing of Hampe's first or second specimen.

Error Preservation: Plaintiff preserved error on issue of whether Mid-Iowa violated Iowa Code § 730.5(7).

Standard of Review: Agreed.

1. Mid-Iowa substantially complied with Section 730.5(7).

On December 5, 2019, Hampe failed to provide Mid-Iowa with a testable urine sample. On appeal, Hampe appears to only take issue with the first specimen he provided to Mid-Iowa, which Ghee discarded after she made a preliminary determination regarding the specimen. More specifically, Ghee observed that Hampe's first specimen did not smell like urine, it was the color of Mountain Dew, and it measured at 104 degrees Fahrenheit[4]. (App. 281, (Hampe Dep. 61:11-15), App. 329 (Ghee Statement), App. 330, (Instant Testing Form)).

The parties to this action agree that section 730.5(7) governs the collection of samples for purposes of drug testing, but what Hampe fails to recognize, and what the District Court correctly held, is that these requirements **apply only to "samples" as defined in section 730.5**; they **do**

[4] While Hampe contends the temperature was actually 101 degrees Fahrenheit (see Hampe Proof Brief at pp. 20–21), such a dispute is immaterial, as the parties agree that the temperature was above 100 degrees Fahrenheit.

not apply to specimens that cannot be tested. Hampe's first specimen was not a testable "sample" in the context of section 730.5, and therefore, Ghee was authorized to dispose of the specimen.

Contrary to Hampe's suggestion that a sample collector is required by statute to accept **any** substance the test subject hands over, section 730.5 itself limits that proposition. Section 730.5 is very clearly aimed at safeguarding against the alteration, substitution, and/or tampering of specimens provided for drug testing. To that end, the statute contemplates precursory analysis of a provided specimen to determine whether it can even be submitted for testing. The statute, in fact, specifically defines the term "sample" as "from the human body" and "capable of revealing the presence of alcohol or other drugs, or their metabolites …." Iowa Code § 730.5(1)(k). Not just any substance qualifies as a "sample."

The statute also requires, for urine collection, that a sample actually **be** urine[5] before it can be split. *Id.* at § 730.5(7)(b) ("**If the sample is urine**, the sample shall be split . . . .") (emphasis added). The same subsection requires the sample be of a specific volume—45 milliliters—such that the

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[5] For clarification, Mid-Iowa does not intend to suggest that there was any finding in this case that Hampe's first specimen was not urine. Mid-Iowa only makes note of the statute's language to support its argument that preliminary analysis of a specimen is contemplated and allowed by the statute.

sample can be split for purposes of confirmatory testing. *Id.* Finally, the statute allows for the direct monitoring or observation of a test subject if reasonable suspicion of alteration, substitution, or tampering exists. *Id.* § 730.5(7)(a). The statute does not restrict who may conduct such superficial analyses. *See generally* Iowa Code § 730.5.

Despite Hampe's argument that she was not so permitted, Ghee undertook the contemplated initial analysis of Hampe's specimen—taking the temperature of the specimen and making other qualitative and quantitative determinations concerning color, smell, and volume. (App. 329, (Ghee Statement), App. 330, (Instant Testing Form)). In so doing, Ghee referred to Mid-Iowa's Drug Testing Collection Procedures. (App. 313-315, (Workplace Drug Testing Collection Procedure)). These procedures contain step-by-step directives to the sample collector, including to: "check[] specimen temperature to ensure that it is between 90 – 100 deg. F"; "note[] any abnormalities of the specimen"; and "check[] for other signs of adulteration." (App. 313-315, (Workplace Drug Testing Collection Procedure)). If the specimen is outside the stated temperature range, the "[c]ollector notifies donor that they will have to provide an additional sample . . ." (App. 313-315, (Workplace Drug Testing Collection Procedure)). It is only after the donor provides a specimen within the

acceptable temperature range and having no further abnormalities that the collector proceeds to perform the immunoassay screen, split the specimen, and forward the specimen to the laboratory for further testing and analysis by a medical review officer. (App. 313-315, (Workplace Drug Testing Collection Procedure)). It is noteworthy then, that while Hampe attempts to argue Mid-Iowa also violated subsections 730.5(7)(c)(2), (7)(h), (7)(j), because Hampe's specimen did not clear the preliminary analysis and could not be forwarded for further testing, these subsections of the statute were not triggered and do not apply. *See* Iowa Code § 730.5(7)(c)(2), (7)(h), & (7)(j).

While section 730.5 itself is silent as to acceptable sample color, smell, and even the objective measure of temperature, Mid-Iowa's Collection Procedures and Ghee's corresponding actions, particularly taking the temperature of Hampe's specimen, on December 5, 2019 find support in federal law and guidance. Both the federal regulations concerning Department of Transportation drug testing, as well as the Substance Abuse and Mental Health Services Administration (SAMHSA) guidelines provide that the "acceptable temperature range" for a urine specimen is 90–100 degrees Fahrenheit. *See* 49 C.F.R. § 40.65(b)(1); *see also Collection Site Manual for the Collection of Urine Specimens for Federal Agency Workplace Drug Testing Programs*, SAMSHA (2022), available at

https://www.samhsa.gov/sites/default/files/2022-urine-collection-site-manual.pdf. Section 730.5 already contains direct reference to the standards adopted by SAMSHA, *see* Iowa Code §§ 730.5(1)(b) & (7)(f), thereby suggesting that federal guidance is instructive in interpreting the statute. In fact, ignoring the statute's express reference to the SAMHSA guidelines would contravene courts' general rule to "avoid an interpretation or application of a statute that renders other portions of the statute superfluous or meaningless." *Little v. Davis*, 974 N.W.2d 70, 75 (Iowa 2022).

Further, the Iowa Supreme Court has previously referred to federal authority to guide its interpretation of section 730.5. In *Dix*, the Iowa Supreme Court was tasked with interpreting a specific provision of 730.5 related to "safety sensitive positions" to determine whether an employer properly defined the term in its policy. *See Dix*, 961 N.W.2d at 686 ("Many private employers…have some employees who are covered by DOT requirements and others who are not, which makes consistent application of terminology with federal regulations all the more relevant."). Recognizing that "'[s]afety-sensitive' is a term of art that has a specialized purpose within the context of workplace drug testing," the Court surveyed the Department of Transportation ("DOT") regulations and guidance that inform employers how to determine whether an employee falls under the safety-sensitive

mandatory testing scheme. *Id.* at 686. The court used the DOT authority to interpret "safety sensitive" under 730.5 and ultimately concluded the employer misclassified the plaintiff-employees as safety-sensitive employees as defined in section 730.5(1)(j). *Id.* at 689.

Principles of statutory interpretation are also instructive. To determine "the meaning of a statute rendered ambiguous by a particular set of circumstances," Iowa courts "consider the proposition sought to be addressed by the legislature." *Sanford v. Fillenwarth*, 863 N.W.2d 286, 289 (Iowa 2015). "Ambiguity exists if reasonable minds may differ or may be uncertain as to the meaning of the statute." *State v. Green*, 470 N.W.2d 15, 18 (Iowa 1991). A statute's silence on a particular issue may render it ambiguous. *See, e.g.*, *Ne. Cmty. Educ. Ass'n v. Ne. Cmty. Sch. Dist.*, 402 N.W.2d 765, 769 (Iowa 1987) (finding Iowa's collective bargaining statute ambiguous because it is "silent as to whether the suspension may be with or without pay"). To resolve the ambiguity and ultimately determine legislative intent, "[the court] consider[s] (1) the language of the statute; (2) the objects sought to be accomplished; (3) the evils sought to be remedied; and (4) a reasonable construction that will effectuate the statute's purpose rather than one that will defeat it." *Id.* The court additionally "consider[s] the legislative

history of a statute, including prior enactments," to ascertain legislative intent. *Doe v. Iowa Dep't of Hum. Servs.*, 786 N.W.2d 853, 858 (Iowa 2010).

The Iowa Supreme Court has articulated "[t]he manifest purpose of section 730.5 is to regulate drug testing initiated by employers for the purpose of influencing employment decisions." *Tow v. Truck Country of Iowa, Inc.*, 695 N.W.2d 36, 39 (Iowa 2005). To this end, "[s]ection 730.5 aims to provide privacy protections and is designed to ensure *accurate* drug tests to prevent employees from being subject to discipline based on an illegal drug test." *Dickey v. Turner Constr. Co.*, 421 F. Supp. 3d 645, 652 (S.D. Iowa 2019) (emphasis in original). Thus, instituting an acceptable temperature range advances the Iowa Legislature's intent in enacting 730.5 to ensure accurate testing.

Ghee had the authority not only to take the temperature of Hampe's specimen, but also to discard the out-of-temperature specimen and require Hampe to provide another. Hampe has failed to generate a fact issue on Mid-Iowa's substantial compliance with Iowa Code section 730.5(7)[6].

2. To the extent the Court finds Mid-Iowa did not substantially comply, Hampe was not aggrieved.

[6] Notably, while Hampe does not seem to take issue with the disposal of the second specimen he provided, Mid-Iowa notes that Hampe's second specimen was undisputedly not of sufficient volume to test pursuant to Iowa law. (App. 329, (Ghee Statement), App. 282, (Hampe Dep. 63:24–64:4)).

Hampe also cannot show that Mid-Iowa's disposal of his first, out-of-temperature urine specimen "harmed, or aggrieved" him in any way, as Mid-Iowa provided him **two** additional opportunities to give a testable urine sample—the latter of which he refused. (App. 278-279, (Hampe Dep. 29:21 – 30:1), App. 281-282, (Hampe Dep. 61:13 – 16:17, 63:24 – 64:4, 64:18 – 20, 65:1 – 13, 68:25 – 69:12, 69:20 – 70:25), App. 329, (Ghee Statement)). After providing his second specimen, which was of insufficient volume, Mid-Iowa asked Hampe to, again, provide a usable sample. (App. 282, (Hampe Dep. 63:24 – 64:4)). Hampe, instead, left the test site. (App. 281-283, (Hampe Dep. 61:13–16:17, 63:24–64:4, 64:18 – 20, 65:1–13, 68:25–69:12, 69:20–70:25)). It was Hampe's decision to leave, not Mid-Iowa's disposal of his first urine specimen, that led to CGM's decision to terminate. (App. 278-279, (Hampe Dep. 29:21 – 30:1)).

Hampe cites the *Woods* case for the proposition that he was aggrieved. (Appellant's Proof Brief at p. 54). Yet, the *Woods* case presents an entirely distinguishable set of facts. *See Woods v. Charles Gabus Ford, Inc.*, 962 N.W.2d 1 (Iowa 2021). In *Woods*, the Court found that the employer had not provided Woods adequate notice of his right to a confirmatory retest—a right that would give Woods a second bite at the apple—in that the employer failed to give Woods the information concerning the cost of the confirmatory

retest, thereby effectively denying him such right. *Id.* Here, Hampe's complaint is that Mid-Iowa discarded his first specimen; but, this action deprived Hampe of nothing. Mid-Iowa did not deny Hampe the ability to provide a viable sample. Hampe could have stayed and provided a third specimen; but, his fate was determined when he left the test site, refusing to test. Hampe cannot demonstrate he was aggrieved, and therefore the District Court properly found Mid-Iowa was entitled to summary judgment.

iii. To the extent the Court finds § 730.5(7)(a) does apply to Mid-Iowa, Mid-Iowa is not liable, as Ghee did not directly monitor or observe Hampe provide his specimen.

Error Preservation: Plaintiff preserved error on issue of whether Mid-Iowa violated Iowa Code § 730.5(7)(a).

Standard of Review: Agreed.

1. Mid-Iowa substantially complied with the statute.

Hampe's argument here is simple—that an individual of a different gender directly observed or monitored him during sample collection in violation of Iowa Code section 730.5(7)(a). Section 730.5(7)(a) provides:

> 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.** . . .
>
> 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.

Iowa Code § 730.5(7)(a) (emphasis added).

Hampe's argument, while muddled, seems to presuppose that direct observation occurred, and that the conditions to do so were not satisfied. However, the record here is self-evident, and the District Court correctly acknowledged, **Ghee did not directly observe Hampe provide his specimen** (App. 935, 9/27/22 MSJ Ruling), despite Hampe's attempts to avoid acknowledging as such.

The record demonstrates that at the time of collection, Ghee led Hampe to a single stall located within a closed restroom designated as the collection site for the day. (App. 281, (Hampe Dep. 58)). The stall itself was enclosed on all sides with a door that could be closed and latched. (App. 328). Hampe entered the single stall and produced a specimen while Ghee waited on the other side of the stall, against the bathroom wall, and opposite the sink. (App. 281, (Hampe Dep. 58, 59:22–25)). Hampe admitted at deposition that "I don't know if [Ghee] could actually see me" while he was

providing his specimen and that he had no recollection of where she was standing. (App. 281, 288, (Hampe Dep. 60:3-10, 152:13-17).

The District Court found that while the Iowa Code does not define the phrase "directly monitored or observed", the language is not ambiguous, and the plain meaning should apply. (App. 947-948, 9/27/22 MSJ Ruling at pp. 13 - 14). Both "monitor" and "observe" mean "to watch". (App. 947-948, 9/27/22 MSJ Ruling at pp. 13 - 14 (citing Merriam-Webster.com)). The District Court also compared the federal regulations governing Department of Transportation drug testing, which state collectors performing a "**directly observed** collection" must "**watch** the urine go from the employee's body into the collection container." 49 C.F.R. § 40.67(h) (emphasis added). Hampe does not allege Ghee watched him urinate, nor has any party produced any evidence that so suggests.

Hampe proceeds to argue that Mid-Iowa's policies and procedures somehow prove that Ghee directly monitored or observed him; however, his insinuations are illogical. Hampe cites to the Collection Sites Requirements in Mid-Iowa's policies which state:

> **Single toilet-room facilities.** The preferred type of facility for urine collections is one with a single-toilet room with a full-length door. No one but the donor and the director[sic] observer may be present in the room. The facility must have a source of water for washing hands, but, if

> practicable, it should be outside of the closed room
> where urination occurs. . . .

(App. 311, (Def. Testing Policies)). Despite Hampe's strained, and at times nonsensical, reading of Mid-Iowa's policy, it provides Hampe no relief. First, the cited policy provides only for a *preferred, not required,* setting for sample collection. (App. 311, (Def. Testing Policies)). Second, the cited policy clearly contains a contingency for scenarios requiring direct observation, permitting the direct observer placement to watch the test subject. (App. 311, (Def. Testing Policies)). Third, and most importantly, the cited policy does not supplant the record—again, there is no record evidence to suggest Ghee directly observed, monitored, or watched Hampe provide a specimen.

Hampe's allegation that Ghee directly observed or monitored him amounts to nothing more than pure speculation and/or illegitimate inference—lacking support even in his own memory—entirely insufficient to generate a fact question or defeat summary judgment. *Godfrey v. State*, 962 N.W.2d 84, 102 (Iowa 2021) ("An inference is not legitimate if it is based upon suspicion, speculation, conjecture, surmise, or fallacious reasoning."); *see also Horn v. Airway Servs. Inc.,* 2020 WL 420834, 16 (N.D. Iowa Jan. 27, 2020) (construing Iowa law) (citing *McMahon v. Mid-Am. Constr. Co. of Iowa*, 2000 WL 1587952, at *4 (Iowa Ct. App. Oct. 25,

2000)) (aff'd summary judgment for the employer due to mere generalities of causation).

2. To the extent the Court finds Mid-Iowa did not substantially comply, Hampe was not aggrieved.

Notwithstanding Hampe's failure to generate a fact question as to the alleged statutory violation, he has also failed to generate any evidence to suggest he's been aggrieved. Again, Hampe's argument **assumes** direct observation from the outset, which **did not** occur. Regardless, the other "support" Hampe provides for his argument is inapposite and irrelevant. While he asserts that he testified at deposition he was embarrassed to have Ghee monitor him, such testimony does not exist in the record (and Hampe provides no record cite). Hampe also proffers immaterial statements from two other CGM employees, Paul Van Orsdel and Steven Fowler. Van Orsdel was not tested on December 5, 2019, and though Fowler was, neither statement (or Hampe's hearsay recount thereof) makes any difference. The question of what happened to these other employees during their respective drug tests, either on December 5, 2019 or at some other time, bear only on the question of whether **those** employees have their own respective causes of action. They cannot and should not be used to corroborate Hampe's claim without any direct reference to what happened during Hampe's test—neither

employee proclaims to be an eye witness to Hampe's sample collection. The only relevant inquiry is what occurred during Hampe's sample collection, and Hampe has failed to state a cognizable claim that he has been aggrieved. *See Dix*, 961 N.W.2d at 694 ("General claims of harm to an employee's privacy interests are not sufficient.").

iv. To the extent the Court finds § 730.5(9)(a)(1) does apply to Mid-Iowa, Mid-Iowa is not liable, as Mid-Iowa was not bound by CGM's policies.

Error Preservation: Plaintiff preserved error on issue of whether Mid-Iowa violated Iowa Code section 730.5(9)(a)(1) by failure to test within CGM's policy. However, to the extent Hampe argues that Mid-Iowa did not test within the terms of its own policies, Hampe has failed to preserve error, as the District Court did not rule on the issue, nor did Hampe file a motion under Iowa Rule of Civil Procedure 1.904 seeking same. *See State ex rel. Miller*, 834 N.W.2d at 20.

Standard of Review: Agreed.

Hampe's final allegation of statutory violation is that CGM and Mid-Iowa did not carry out the drug test within the terms of **CGM's** written policy pursuant to section 730.5(9)(a)(1). Notably, the only violations of section 730.5(9)(a)(1) alleged in Hampe's appellate brief are directed explicitly at CGM. (See Appellant's Proof Brief at pp. 65 - 66). Hampe's

allegations only make sense given that the statutory provision is specifically directed at employers, not third parties. Section 730.5(9)(a)(1) requires that Iowa employers conducting workplace drug testing carry out such tests "within the terms of a written policy which has been provided to every employee subject to testing." *Id.* This subsection contains no requirement that a third party such as Mid-Iowa have its own written policy, provide that policy to an employer's employees, assist an employer in drafting or implementing the employer's written policy, or even abide by or be bound by an employer's written policy. *See id.* Consistent with the statutory language, the District Court held at summary judgment that Hampe had failed to provide any facts or authority to support an assertion that Mid-Iowa was bound by CGM's testing policies. (App. 935, 9/27/22 MSJ Ruling). Hampe presented no evidence to suggest that Mid-Iowa was given a copy of CGM's policy or that CGM even discussed the policy with Mid-Iowa. Hampe has also failed, as detailed earlier, to support a claim that Mid-Iowa "aided" CGM in any violation of section 730.5(9)(a)(1).

Hampe does not expressly make the argument in his appellate briefing; but, Hampe argued at summary judgment before the District Court that Mid-Iowa violated CGM's policy by dumping Hampe's first specimen. (App. 935, 9/27/22 MSJ Ruling). While CGM's Controlled Substance Abuse

Policy states that "specimen collection shall be performed so that the specimen is split into two components at the time of collection . . ." (App. 193, CGM App. 28), CGM's policy does not address, much less prohibit, the sample collector performing a preliminary analysis of the specimen to assess whether it can be submitted for testing. (App. 193, CGM App. 28). Accordingly, CGM's policy did not prevent Ghee from taking the temperature of Hampe's specimen or making any other qualitative or quantitative analysis concerning the specimen. (App. 193, CGM App. 28). Ghee merely followed both Mid-Iowa's policies as well as the SAMHSA guidelines in discarding Hampe's inadequate first specimen. Hampe, on the other hand, would argue that the sample collector is required to accept whatever substance a test subject provides and send it to the lab for testing. This is neither what the statute nor CGM's policy contemplates, nor does it further the objectives of the statute.

II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO MID-IOWA ON HAMPE'S COMMON LAW CLAIMS OF FRAUD, INVASION OF PRIVACY, CONSPIRACY, AND RECKLESS DISREGARD.

Error Preservation: Plaintiff preserved error on his common laws claims for fraudulent misrepresentation, invasion of privacy, civil conspiracy, and reckless disregard.

Standard of Review: Agreed.

A. Hampe Failed to Timely Resist Mid-Iowa's Motion for Summary Judgment Related to his Common Law Claims and Therefore the District Court Properly Disregarded Hampe's Arguments.

Hampe failed to timely resist Mid-Iowa's Motion for Summary Judgment related to his common law claims, and so the District Court properly disregarded his arguments. Iowa courts have held that a party waives any argument it fails to make in a resistance to another party's motion. *See, e.g.*, *Susie v. Bennett*, 728 N.W.2d 61 (Table), at *4 (Iowa Ct. App. Nov. 30, 2006) ("Where an issue is not raised in resistance to a motion for summary judgment, and is not included in a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), it is waived."); *Joseph HAY, et al. v. Iowa Health System, et al.,* 2005 WL 5715127 (Iowa Dist. Polk Co. 2005) ("Plaintiff has offered no argument or authority in response to this argument. Therefore, any resistance to this argument is deemed waived."); *Tri-Valley v. Tech MQ Corp.*, 2018 WL 6721830 (Iowa Dist. Polk Co. 2018) ("Defendants did not file a timely resistance to Plaintiff's motion. Their right to resist is deemed waived. Their untimely filings . . . are not considered to be part of the summary judgment record"). This is a well-known and common facet of motion practice.

In an attempt to save his common law claims for this appeal, Hampe has misstated the procedural timeline in this case. The correct timeline follows:

- **March 2, 2022:** Mid-Iowa and CGM filed Motions for Summary Judgment seeking complete dismissals of Hampe's claims, including the new common law claims. (App. 107, App. 163, 3/2/22 CGM Motion for Summary Judgment and Appendix; App. 239, App. 274, 3/2/22 Mid-Iowa Motion for Summary Judgment with Appendix).
- **March 20, 2022:** Hampe filed a motion to continue the Motions for Summary Judgment hearing—set for April 15, 2022—arguing a need to conduct discovery to resist the Motions for Summary Judgment. (App. 333, 3/20/22 Hampe Motion to Continue Hearing). In his March 20 motion, Hampe specifically requested a deadline of April 1, 2022, to file a resistance following the taking of additional discovery.[7]
- **March 21, 2022:** Hampe filed a Resistance in response to CGM's Motion for Summary Judgment, with no arguments

[7] Hampe complains in his appeal that he had a "mere 3.5 months" to investigate his common law claims. However, Hampe **never** propounded any discovery requests on Mid-Iowa regarding his common law claims.

concerning his common law claims. (App. 348, 3/21/22 Hampe MSJ Resistance).

- **March 25, 2022:** Hampe filed a Resistance to Mid-Iowa's Motion for Summary Judgment, with no arguments concerning his common law claims. (App. 502, 3/25/22 Hampe MSJ Resistance).
- **March 27, 2022:** Hampe filed his Partial Motion for Summary Judgment, seeking a finding of liability as to his section 730.5 claims **only**, against both Defendants. (App. 664, 3/27/22 Hampe Motion for Summary Judgment).
- **March 31, 2022:** CGM filed its Reply in support of its Motion for Summary Judgment. (App. 709, 3/31/22 CGM MSJ Reply)
- **April 8, 2022:** Mid-Iowa filed its Reply in support of its Motion for Summary Judgment. (App. 725-748, 4/8/22 Mid-Iowa MSJ Reply with Supp. Appendix and SOAF).
- **April 11, 2022:** CGM filed its Resistance to Hampe's Partial Motion for Summary Judgment. (App. 774, 4/11/22 CGM Resistance).
- **April 15, 2022:** The Court held a hearing—originally set for oral arguments on the Defendants' Motions for Summary

Judgment—and set a new hearing as to **all Parties' Motions** for July 29, 2022, set the deadlines for any Resistance to Hampe's Partial Motion for Summary Judgment for April 29, 2022, and the deadline for Hampe's Reply for May 9, 2022. (App. 849, 4/15/22 Order).

- **April 29, 2022:** Mid-Iowa filed its Resistance to Hampe's Partial Motion for Summary Judgment. (App. 854, 871, 4/29/22 Mid-Iowa Resistance and Responses to SOF).
- **July 21, 2022:** Four months after filing his Resistances to CGM's and Mid-Iowa's Motions for Summary Judgement—and after failing to file any Replies in support of his Partial Motion for Summary Judgment—Hampe filed a Supplemental Resistance to the Defendants' Motions with defenses supporting his common law claims being raised for the first time. (App. 904, 7/21/22 Hampe Supp. Resistance).
- **July 27, 2022:** CGM resisted Hampe's untimely Supplemental Resistance. (App. 918, 7/27/22 CGM Reply to Supp. Resistance).

- **July 28, 2022:** Mid-Iowa resisted Hampe's untimely Supplemental Resistance. (App. 931, 7/28/22 Mid-Iowa Reply to Supp. Resistance).
- **July 29, 2022:** Oral arguments are held on all pending dispositive motions.

Hampe chose not to resist, or even address, Mid-Iowa's summary judgment arguments against his common law claims in his resistance. Instead, he waited to file a supplemental resistance on July 21, 2022, just eight days before the continued summary judgment hearing. The Iowa Rules of Civil Procedure contemplate that a party opposing a motion for summary judgment file one brief in resistance within 15 days from the time the motion was served. Iowa R. Civ. P. 1.981(3). If a party wishes to supplement a pleading, then they may do so only by "leave of court . . . or by written consent of the adverse party." Iowa R. Civ. P. 1.414. The rules, therefore, provide a specific framework within which a party must resist a motion for summary judgment. A party cannot simply and arbitrarily file resistances whenever the mood strikes.

As the District Court noted, "[w]hile Hampe previously requested, and received, an extension to April 1, 2022 to file his resistances, no further extensions were sought or granted." (App. 935, 9/27/22 MSJ Ruling).

Hampe also neither sought, nor received, leave of court or written consent from the adverse parties to file a supplemental resistance in this case. Accordingly, the District Court correctly and properly disregarded Hampe's July 21, 2022 supplemental resistance—the **only** pleading in which Hampe resisted Defendants' respective Motions for Summary Judgment on Hampe's common law claims.

B. The District Court Correctly Held that § 730.5 was Hampe's Exclusive Remedy.

Here, the District Court correctly held that section 730.5 was Hampe's exclusive remedy for his claims. (App. 951, 9/27/22 MSJ Ruling at p. 17). Iowa law makes as much entirely clear. *See Ferguson v. Exide Technologies, Inc.*, 936 N.W.2d 429 (Iowa 2019) ("[T]he civil cause of action provided by Iowa Code section 730.5 is the exclusive remedy for a violation of section 730.5."). 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 *Ferguson v. Exide Technologies, Inc.*, the Iowa Supreme Court considered whether an employee's wrongful termination claim was barred by the exclusive remedy provided by section 730.5. *Ferguson*, 936 N.W.2d 429. The Court 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 *Dickey v. Turner Construction Company*, the Court similarly recognized the scope of section 730.5's provisions and its provided private cause of action, 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.

Dickey v. Turner Construction Company, 421 F.Supp.3d 645 (S.D. Iowa 2019) (emphasis added).

As the District Court correctly noted, Hampe has "provided no facts beyond those addressing the statutory violations themselves." (App. 951, 9/27/22 MSJ Ruling at p. 17). Therefore, Hampe's claims are appropriately addressed under section 730.5, and the District Court properly dismissed Hampe's common law claims at summary judgment.

C. Hampe Lacks Sufficient Evidence to Support his Common law Claims.

Despite Hampe's untimely resistance to Defendants' Motions for Summary Judgment on Hampe's common law claims, and the exclusive remedy provided in section 730.5, Hampe's claims themselves substantively have no merit. Hampe presented the District Court with nothing more than speculation, conjecture, and opinion in his attempt to establish his common law claims; however, speculation, conjecture, and opinion are not facts that disrupt summary judgment. *See Horn v. Airway Servs. Inc.*, 2020 WL 420834 (N.D. Iowa Jan. 27, 2020) (holding Plaintiff's subjective belief that lacked a factual basis in the record was insufficient to defeat summary judgment). The District Court correctly found that Hampe cannot state a case on flimsy conclusory statements.

i. Hampe's fraud claim fails, as Hampe has provided no evidence of false statements made by Mid-Iowa.

To establish a claim for fraudulent misrepresentation, Hampe must prove: "(1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent to deceive, (6) reliance, and (7) resulting injury and damage." *Van Sickle Const. Co. v. Wachovia Commercial Mortg., Inc.*, 783 N.W.2d 684, 687 (Iowa 2010) (quoting *Lloyd v. Drake Univ.*, 686 N.W.2d 225, 233 (Iowa 2004)). Hampe cannot prove Mid-Iowa made any false statements, nor has he generated a fact issue as to scienter or intent to deceive on behalf of Mid-Iowa.

First and foremost, Hampe's fraudulent misrepresentation claim plainly fails because Hampe offered no evidence at summary judgment of any false statement Mid-Iowa made to Hampe. And, while Hampe's Amended Petition provides a veritable laundry list of alleged "misrepresentations" Mid-Iowa made to him during the December 5, 2019 drug test, his claim amounts to nothing more than a restatement of his section 730.5 claim in a common law context.

At its core, Hampe's fraud claim argues that Mid-Iowa represented to Hampe that it was performing drug tests in accordance with section 730.5 when it was not. Hampe's fraud claim is thus inextricably linked to his section 730.5 claim and fails along with it. As noted herein, section 730.5 does not apply to Mid-Iowa, but even if it did, Mid-Iowa substantially

complied with the statute. Furthermore, even if Hampe were to succeed on his section 730.5 claim, his fraudulent misrepresentation claim would still fail because he has not provided any evidence to suggest Mid-Iowa intended to deceive him.

Absent direct evidence of scienter and intent to deceive, a plaintiff in a fraudulent misrepresentation claim may show intent to deceive "when the speaker has **actual knowledge of the falsity of his representations** …."[8] *Van Sickle Const. Co.*, 783 N.W.2d at 688 (quoting *Garren v. First Realty, Ltd.*, 481 N.W.2d 335, 338 (Iowa 1992)) (emphasis added). However, it remains incumbent on Hampe to have offered some evidence to at least generate a fact question as to whether Mid-Iowa had such actual knowledge of falsity at the time Mid-Iowa made the false statement. This, Hampe has failed to do.

Mid-Iowa has maintained throughout this case that it followed the law. Mid-Iowa indisputably followed its own policies and procedures and industry-standard practices developed to comply with federal law decades

[8] A plaintiff may also establish the scienter and intent to deceive requirement if the plaintiff can prove the defendant "speaks in reckless disregard of whether those representations are true or false." *Van Sickle Const. Co.*, 783 N.W.2d at 688 (citation omitted). However, Hampe very specifically alleged that Defendant "made the representations and omissions to the Plaintiff **with the intent to deceive** the Plaintiff," and therefore the "reckless disregard" standard is immaterial to this matter.

ago. (App. 312, 319, 322-324 (Def. Testing Policies)). There is simply no evidence of any mal-intent from Mid-Iowa, nor is there any reason to believe Mid-Iowa knowingly carried out testing procedures that violated Iowa law. Meanwhile, Hampe's bare assertion that Mid-Iowa intended to deceive him is just that—a bare assertion, backed by no evidence whatsoever. Hampe has not come forward with even a scintilla of evidence that Mid-Iowa knowingly gave him false information or intended to mislead him in any way. Hampe failed to proffer sufficient evidence to maintain his fraudulent misrepresentation claim at summary judgment.

ii. Hampe's invasion of privacy claim fails because Hampe participated in the drug testing process willingly.

Hampe argues Mid-Iowa's drug testing procedures amounted to an invasion of his common law right to privacy. Specifically, Hampe alleged Mid-Iowa unlawfully intruded upon the seclusion of his person by observing him while he produced his urine specimen and by taking possession of his bodily fluids and his DNA. Aside from the fact that the Iowa Supreme Court has already held drug testing procedures such as Mid-Iowa's do offer sufficient privacy, *see Dix*, 961 N.W.2d at 694, Hampe's invasion of privacy claim fails for the simple reason that Hampe knowingly and voluntarily participated in the subject drug test.

In order to succeed on an intrusion upon seclusion invasion of privacy claim, Hampe must prove: (1) Mid-Iowa "intentional[ly] intru[ded] into a matter the plaintiff has a right to expect privacy"; and (2) the intrusion was "highly offensive to a reasonable person." *Koeppel v. Speirs*, 808 N.W.2d 177, 181 (Iowa 2011) (citing *Stressman v. American Black hawk Broadcasting Co.*, 416 N.W.2d 685, 687 (Iowa 1987)). Iowa law is clear, however, that a defendant cannot be liable for invasion of privacy when the plaintiff consents to the activity later complained of. *See In re Marriage of Tigges*, 758 N.W.2d 824, 830 (Iowa 2008) ("the wrongfulness of the conduct springs … from the fact that [Plaintiff's] activities were recorded **without her knowledge and consent at the time** ….") (emphasis added). This is because the intrusion upon seclusion tort is premised on "the right of the owner **to dispose of privacy as the owner wishes,**" and accordingly only protects against the act of "intentionally exposing the person in an area **cloaked with privacy**." *Koeppel*, 808 N.W.2d at 180 (citing Lawrence E. Rothstein, *Privacy or Dignity?: Electronic Monitoring in the Workplace*, 19 N.Y.L. Sch. J. Int'l & Comp. L. 379, 381–82 (2000)) (emphasis added); *accord*, *Davenport v. City of Corning*, 742 N.W.2d 605, *8 (Iowa Ct. App. 2007) (unpublished table case) (stating a plaintiff must show the "defendant intentionally intruded upon **the seclusion that the plaintiff 'has thrown**

about his or her person or affairs.'") (citations omitted) (emphasis added). The plaintiff's intent in maintaining their privacy is paramount; there can be no liability for invasion of privacy of the plaintiff willfully disregarding their own privacy interest, just as there can be no liability "if the plaintiff is already in public view." *Davenport*, 742 N.W.2d at *8 (quoting Restatement (Second) of Torts § 652B cmt. c). By extension, an individual who takes no effort to maintain their privacy, or who willfully disregards their own privacy, cannot establish a claim of intrusion upon seclusion. Such is the case, here.

Hampe's invasion of privacy claim fails for the simple reason that he willfully participated in Mid-Iowa's drug-testing procedures on December 5, 2019, without complaint. Hampe was informed that he had been randomly selected for drug testing that day and attended the drug test of his own free will. (App. 280, (Hampe Dep. 50:8 – 14, 51:21 – 23)). Mid-Iowa instructed Hampe on its drug testing procedures, and again, Hampe agreed to participate without objection. "Q: Did you report to anyone your concern about that individual being in the restroom with you during the test? A: Not at that time … I did not complain." (App. 286-287, (Hampe Dep. 141:22 – 142:14)). Hampe clearly did not have an issue with Mid-Iowa's testing employee remaining in the room while Hampe provided his urine specimen,

as **he decided** to leave the bathroom stall door open while providing the specimen, for no apparent reason. (App. 281, 288, (Hampe Dep. 60:15 – 18, 151:19 – 152:12)).

Q: So did you shut the door or not?

A: No.

Q: Did you try?

A: No.

…

Q: So why did you decide to leave the door open?

A: Because, like I said, when you're standing right there, you can't—I don't think—just trying to think. I guess I don't know.

Q: But it was your choice not to close the door; correct?

A: Yes.

(App. 281, 288, (Hampe Dep. 60:15–18, 151:19–152:12)).

Hampe's remaining privacy claims fare no better under scrutiny. Hampe alleges Mid-Iowa violated his privacy rights to his bodily fluids and DNA; however, it is undisputed that Hampe knowingly and willingly turned over his urine specimen to Mid-Iowa's testing employee for drug testing

purposes. (App. 329-330, (Ghee Statement, Instant Testing Form)). Once again, Hampe cannot credibly argue his privacy rights were violated when he voluntarily participated in the very process he claims violated his privacy. Furthermore, this complaint is largely moot—because Hampe's urine specimen was unsuitable for testing, Mid-Iowa did not retain the specimen or perform any drug tests on it; rather, Mid-Iowa disposed of both specimens immediately upon receipt, in full view of Hampe. (App. 281-282, (Hampe Dep. 61:13 – 62:15, 63:24 – 64:4)).

In short, Hampe knowingly and willfully participated in Mid-Iowa's drug testing procedures without complaint. He cannot now argue that his willful participation amounted to Mid-Iowa's invasion of his privacy, and therefore, had the District Court gotten this far, Hampe's claim still would have been dismissed at summary judgment.

iii. Hampe's conspiracy claim fails because it is not actionable under Iowa law.

Hampe's civil conspiracy claim is easily disposed of because it is not an actionable claim under Iowa law. As the Iowa Supreme Court has previously noted, "[c]ivil conspiracy is not in itself actionable; rather it is the acts causing injury undertaken in furtherance of the conspiracy which give rise to the action." *Basic Chemicals, Inc. v. Benson*, 251 N.W.2d 220, 233 (Iowa 1977) (citing *Shannon v. Gaar*, 6 N.W.2d 304, 308 (Iowa 1942));

accord, *Anderson v. Anderson Tooling, Inc.*, 928 N.W.2d 821, 826 (Iowa 2019) (stating in part, "civil conspiracy cannot support an independent cause of action …."). It is inaccurate for Hampe to represent this claim as a separate cause of action against Mid-Iowa, and it need not be treated as such.

Regardless, even if Hampe could bring a separate claim for civil conspiracy, such a claim still fails on its merits because Hampe has no evidence of a conspiracy or agreement between Mid-Iowa and CGM to wrongfully target Hampe in any way. The Iowa Supreme Court has previously held that a plaintiff's "personal, conclusory beliefs are insufficient as a matter of law to generate a fact question for the jury." *Godfrey*, 962 N.W.2d at 106 (citations omitted). A "belief, based on no evidence other than gut instinct" is simply not enough to sustain a case past the summary judgment phase. *Taylor v. Polygrams Recs.*, 1999 WL 124456, *16 (S.D.N.Y. 1999) (quoted in *Godfrey*, 962 N.W.2d at 106) (stating a plaintiff's "belief, based on no evidence other than gut instinct, that [her supervisor] treated her with hostility because of her race, cannot justifiably support an inference of discrimination" when not supported by other evidence). Hampe's bare assertions cannot overcome a motion for summary judgment absent evidence to support them—evidence that Hampe has openly admitted he does not have.

In support of his conspiracy claim, Hampe testified during his deposition that he thought Mid-Iowa and CGM "were working together just to try to target" him, for some nebulous and unknown reason, which Hampe has not been able to fully articulate. (App. 289, (Hampe Dep. 154:11 – 155:10)). Yet, Hampe has confirmed he has no support for this claim, that he does not know what Mid-Iowa's interest in targeting him would even be, and that the allegation is "[j]ust a feeling." (App. 289, (Hampe Dep. 154:11 – 155:10)). But feelings are not facts, and Hampe's subjective emotions are not evidence of a conspiracy against him. For these reasons, even if Hampe's conspiracy claim were to stand on its own legs—which it plainly does not—it would nevertheless fail on its merits due to lack of evidence.

iv. Hampe's reckless disregard claim fails because it is redundant of Hampe's statutory claims and is thereby preempted.

Finally, Hampe brought an anemic and ill-defined claim of "reckless disregard," which again amounts to little more than a retread of his section 730.5 claim by a different name. In support of this claim, Hampe has alleged that Mid-Iowa acted with reckless disregard of his "property rights and safety." However, he has made no effort to identify any specific property rights that Mid-Iowa has violated, nor has he specified any conduct placing his safety in jeopardy. Further, there is no reason to believe any of

the conduct Hampe complains of amounts to reckless behavior under Iowa law.

At common law, recklessness is "more than negligence, more than the want of ordinary care," and means "proceeding with no care coupled with disregard for consequences." *Hendricks v. Broderick*, 284 N.W.2d 209, 214 (Iowa 1979) (quoting *Vipond v. Jergensen*, 148 N.W.2d 598, 600–01 (Iowa 1967)). The Iowa Supreme Court has stated that in order to prove a claim of reckless disregard, a plaintiff "must show that the actor has intentionally done an act of an unreasonable character **in disregard of a risk known to or so obvious** that he must … have been aware of it, and so great as to make it highly probable that harm would follow." *Morris v. Leaf*, 534 N.W.2d 388, 391 (Iowa 1995) (emphasis added) (citations omitted). The risk in question must be "substantially greater than that which is necessary to make [the defendant's] conduct negligent," *Leonard ex rel. Meyer v. Behrens*, 601 N.W.2d 76, 80 (Iowa 1999) (quoting Restatement (Second) of Torts § 500 at 587), such that the consequences of the defendant's actions are "that **an injury is a probability rather than a possibility**." *Hendricks*, 284 N.W.2d at 214 (quoting *Vipond*, 148 N.W.2d at 600–01). Even if Hampe could adequately define his claim, Mid-Iowa's conduct in this case comes nowhere near this high bar.

CONCLUSION

Hampe offers no shortage of section 730.5 violations to consider in this appeal. However, this Court need not spend much time considering Hampe's substantive arguments as he largely failed to preserve error on his claims against Mid-Iowa:

Alleged Code Section	Error Preserved on Aiding Argument as to Mid-Iowa?	Error Preserved as to Direct Liability of Mid-Iowa?
730.5(1)(*l*)	No.	No.
730.5(7)[9]	No.	Yes.
730.5(8)(a)	No.	No.
730.5(9)(a)(1)	No.	Yes as to the issue of testing within CGM's policies. No as to testing within Mid-Iowa's policies.
730.5(9)(b)	No.	No.
730.5(9)(h)	No.	No.

Despite this procedural misstep, analysis of Hampe's claims will yield the District Court properly found that at summary judgment, Hampe failed to generate any fact issue as to whether Mid-Iowa substantially complied with Iowa Code section 730.5. Further, by failing to address Mid-Iowa's arguments against Hampe's redundant common law claims, Hampe conceded those issues, which were equally baseless.

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[9] *See* Section I.B generally, *supra*, which also addresses the merits of subsections 730.5(7)(a), (7)(c)(2), (7)(h) and (7)(j).

REQUEST FOR ORAL ARGUMENT

Counsel for Appellee Gadimina Enterprises, Inc. d/b/a Mid-Iowa Occupational Testing respectfully requests to be heard in oral arguments.

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The undersigned certifies that the cost of printing and duplicating necessary copies of this brief was $0.00.

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