Nos. A23-0374; A23-0484

STATE OF MINNESOTA
IN COURT OF APPEALS

Andrea Anderson

Appellant/Plaintiff,

v.

Aitkin Pharmacy Services, LLC dba Thrifty White Pharmacy and George Badeaux

Respondents/Defendants

On appeal from Aitkin County, Ninth Judicial District
Honorable David F. Hermerding, Judge Presiding.

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I. INTRODUCTION

Respondents provide no meaningful rebuttal to Anderson's claims that they discriminated against her based on a protected status and that they are liable for the harm they caused. Instead, they raise new arguments for the first time on appeal regarding the constitutionality of the MHRA as applied to Badeaux. Badeaux waived these arguments below. Regarding the issues properly before this court, had the jury been accurately instructed and been able to consider appropriate, relevant evidence, it would have found that Respondents discriminated against Ms. Anderson because of pregnancy, and are liable for their discriminatory actions.

A. Respondents Mistate and Selectively Omit Material Facts

First, Appellant must correct several factual misstatements and omissions made by Respondents in their briefs.

1. Thrifty White Adopted a Policy Impacting All Patients Needing Emergency Contraception

The first two sentences of Appellee Thrifty White's brief mischaracterize its policy as being only about ella, not about emergency contraception ("EC") broadly. This characterization ignores three undisputed facts: 1) Respondents' policies and practices applied to any form of EC; 2) at least three women before Anderson presented Badeaux with legitimate prescriptions for Plan B and were turned away without their prescriptions, Trial Tr. at 211:5-220:12; and 3) while it is true that Plan B (unlike ella) is available over the counter or by prescription, purchasing Plan B over the counter is not a "full and equal" substitute because this requires the patient to pay the full cost out of pocket

without insurance cost-sharing. *Id.* at 192:20-193:3. Thrifty White's policy applied categorically to, and harmed, all patients seeking EC.

2. Respondents Misstate the 1999 Pharmacy Board Bulletin and Thrifty White Did Not Make Meaningful Options Immediately Available to Anderson

Respondents cite self-serving excerpts of the 1999 Minnesota Board of Pharmacy Newsletter, but fail to acknowledge its overall message, which is that ensuring timely access to EC is about "protecting the public," and pharmacists have an affirmative "obligation" to plan ahead if they intend to turn patients away. ADD-1. Badeaux never alerted staff that they may be called in to fill prescriptions for him, never called in back-up staff on other occasions when he refused service, and made no arrangements with nearby pharmacies. *Id.* at 243:8-245:2; 258:2-25; 265:2-20.

Badeaux claims he made "three alternatives" available to Anderson: (1) keep the prescription at Thrifty White (where she could not be sure she would receive her time-sensitive prescription the next day, *id.* at 264:23-25); (2) transfer it to CVS; or (3) transfer it somewhere else. Badeaux Br. at 4. But the second and third options were the same because Badeaux had not made *advance arrangements* with any pharmacy, and when Anderson tried co-defendant CVS, she was turned away. Trial Tr. at 267:22-268:18.[1] *See id.* at 436:5-14; *see also* Dkt. 137 at 4-5. More importantly, the so-called "options" do not involve affirmative acts on Thrifty White's part. They are simply what any person must do if she is refused service by an employee of a public accommodation because of her

[1] Ms. Anderson and CVS voluntarily resolved the relevant claims without admission or finding of liability.

protected status—she can either hope another employee will be willing to serve her or she must go elsewhere. She still faces the emotional and financial harm of the discrimination.

3. Anderson's Need for Her Prescription Was Time-Sensitive, With Life-Altering Implications

Respondents further attempt to downplay the impact of their actions by emphasizing that Anderson had five days to take EC. Badeaux Br. at 9, 31; Thrifty White ("TW") Br. at 4. This ignores the uncontroverted trial testimony that EC must be taken as soon as possible to prevent a pregnancy. Trial Tr. at 338:13-22. There is a five-day outer limit on taking EC because sperm die after five days and can no longer fertilize an egg, so taking EC serves no purpose after that point. *Id.* at 327:5-17. Most women do not know when they ovulate, and if Anderson ovulated before taking EC, she risked pregnancy—and then deciding between either another painful and medically complicated labor, or having an abortion. Hutera and Badeaux chose to disregard the 1999 Pharmacy Board guidance and failed to provide any meaningful alternatives. Anderson, like many patients before her, was left to find another pharmacy willing to provide her with time-sensitive medication.

4. Respondents Repeatedly Mischaracterize the Pre- and Post-Incident Plan

Both at trial and on appeal, Respondents mischaracterize their pre- and post-incident plans for handling prescriptions for EC. Before the incident with Anderson, Respondents had no plan to have Badeaux call a second pharmacist to come in to fill the prescription, and indeed he had never done so. Trial Tr. at 258:11-22; 262:14-263:7. It was not until after Anderson was turned away that the plan was revised to require Badeaux to call another pharmacist for backup. *See* ADD-1-2; MIL Tr. at 66:1-17 [Dkt. 196]. As discussed below,

Anderson was not permitted to introduce material evidence clarifying the policy, impeaching any arguably contrary testimony, or rebutting claims of infeasibility, which prejudiced the outcome of the trial.

II. ARGUMENT

A. Anderson Is Entitled to Judgment As a Matter of Law

Respondents adopted and enforced a facially discriminatory policy, and they are liable for their actions.

1. A Policy that Categorically Denies Full and Equal Goods and Services to Women Seeking EC Is a Facially Discriminatory Policy Even if Adopted for Reasons Related to a Pharmacist's Religious Beliefs

The MHRA expressly states that "sex includes, but is not limited to, pregnancy, childbirth, and disabilities related to pregnancy or childbirth." Minn. Stat. § 363A.03 subd. 42. Under well-established Minnesota law, discrimination based on pregnancy is disparate treatment based on sex. *Minn. Min. and Mfg. Co. v. State*, 289 N.W.2d 396, 399 (Minn. 1979) (hereinafter *3M v. State*); *see also* Amicus Curiae Br. for Ntl. Women's Law Ctr., at 4-12.[2]

In arguing otherwise, Respondents cite to *Geduldig v. Aiello,* 417 U.S. 484 (1974). In *Geduldig*, the Supreme Court held that excluding pregnancy-related disabilities from disability benefits coverage is not unlawful discrimination for purposes of federal equal-

[2] *Monson v. Rochester Athletic Club*, 759 N.W.2d 60 (Minn. App. 2009), holding that disparate impact claims cannot be brought against places of public accommodations, is inapposite because Anderson brings a disparate treatment claim. *3M v. State*, 289 N.W.2d at 399. Additionally, as Anderson noted in her Reply to CVS's Motion for Summary Judgment, *Monson* was wrongly decided. Dkt. 72 at 12 n.4.

protection analyses. *Id.* at 495. Respondents also cite a 1976 case, *General Electric Co. v. Gilbert*, wherein the U.S. Supreme Court cited to *Geduldig* and held that under Title VII, excluding pregnancy benefits from disability coverage is a facially neutral policy—not disparate treatment based on sex—so plaintiff's only path forward would be proving disparate impact. 429 U.S. 125, 133-134 (1976). But this Court cannot apply the logic of these cases to the MHRA, because the 1977 amendments to the MHRA not only repudiated these cases, they clarified that *Geduldig* and *Gilbert* have never been law in Minnesota. *3M v. State*, 289 N.W.2d at 399 (noting the 1977 amendments clarified that discriminatory treatment related to pregnancy is disparate treatment based on sex under the MHRA). If Respondents want to set pregnancy-related discrimination protections for Minnesotans back over 50 years, they must lobby the legislature, not the courts.[3]

Badeaux argues that the court should look to an Eighth Circuit case analyzing the federal Pregnancy Discrimination Act of 1978 ("PDA"), *In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936 (8th Cir. 2007), for instruction on the MHRA's application to contraception. In *Union Pacific*, the Eighth Circuit

[3] Badeaux argues that a refusal to dispense EC is not discrimination based on pregnancy. Badeaux Br. at 25. But as the Supreme Court has clarified, it does not matter if other factors besides protected status contributed to a discriminatory decision, as long as changing the protected status would have yielded a different choice. *See Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1741 (2020). Badeaux singled out Anderson, like other women before her, for a refusal to fill a valid prescription expressly because he believed Ms. Anderson and those other women may have been pregnant. Put another way, Thrifty White and Badeaux singled out patients in need of EC, a medication used only by women to prevent pregnancy, for a denial of full and equal access to goods and services. *See Erickson v. Bartell Drug Co*., 141 F. Supp. 2d 1266 (W.D. Wash. 2001). This is sex discrimination under Minnesota law.

unceremoniously rejected the EEOC's interpretation of the PDA, which was that refusing to cover contraception in an employee benefits plan relates to pregnancy and *is* disparate treatment based on sex under the PDA. *Union Pac.*, 479 F.3d at 938-39. In finding Union Pacific had not discriminated based on sex by denying coverage for contraception, the court relied heavily on the fact that it was dealing with a denial of coverage for all contraception used by both males and females. *Id*. Although Anderson takes issue with the court's analysis, a disputation is unnecessary because in this case the only contraception Badeaux refuses to dispense is EC, which is prescribed only to those who may become pregnant. In any event, *Union Pacific* is irrelevant because "the [MHRA] has provided more expansive protections to Minnesotans than federal law." *Kenneh v. Homeward Bound, Inc*., 944 N.W.2d 222, 229 (Minn. 2020) (citations omitted). This is no less true than when it comes to discrimination based on pregnancy and contraception. *3M v. State*, 289 N.W.2d at 399.[4]

Respondents further argue that the McDonnell Douglas analysis should apply here. But Anderson presented direct evidence of discrimination: Respondents expressly targeted Anderson for a denial of "full and equal access" pursuant to a policy singling out women with EC prescriptions to prevent pregnancy because these women may be pregnant. Assuming the McDonnell Douglas analysis applies at all outside of the employment context, *see* Amicus Curiae Br. of Nat'l Empl. Lawyers Assoc. at 2-4, it does not apply to

[4] To the extent the court chooses to look to PDA interpretation for guidance, it should look to a case more in line with Minnesota precedent on pregnancy-related discrimination such as *Erickson v. Bartell Drug Co*., 141 F. Supp. 2d 1266 (W.D. Wash. 2001) (finding refusal to cover contraception is disparate treatment based on sex under the PDA and noting that there is no reason to disregard the EEOC guidance on the topic).

direct-evidence cases. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) ("[T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination" such as a facially discriminatory policy); *Friend v. Gopher Co., Inc*., 771 N.W.2d 33, 38 (Minn. App. 2009) ("A plaintiff proceeding under a direct-evidence framework need not establish a McDonnell Douglas prima facie case.") (citation omitted).

Regardless of whether this is a direct or circumstantial evidence case, Badeaux's argument peppered throughout his brief is that religious motivations "aren't an affirmative defense; they explain why [he] didn't violate the MHRA in the first place" and he therefore did not need to litigate an exemption. Badeaux Br. at 24-26; 39-46. This argument is unavailing. For example, when the owner of Piggie Park restaurant refused to serve Black customers because his sincere "religious beliefs compel[led] him to oppose any integration of the races whatever," *Newman v. Piggie Park Enters., Inc*., 256 F. Supp. 941, 944 (D.S.C. 1966), he was nevertheless liable for adopting and enforcing a discriminatory policy. *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968).

Badeaux argues that his religious beliefs negate "animus." Badeaux Br. at 25. But animus is not necessary for liability under the MHRA. *LaPoint v. Family Orthodontics, P.A*., 892 N.W.2d 506, 517 (Minn. 2017) (noting that a protected status can unlawfully motivate conduct even where a defendant does not have any animus towards that protected status). The "absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect." *Int'l Union v. Johnson Controls*, 499 U.S. 187, 199 (1991); *see also 3M v. State*, 289 N.W.2d at 400 (policy expressly

singling out pregnancy for denial for benefits is discriminatory even if underlying reason for adopting the policy was cost-savings, not animus).

Badeaux cites to no cases for their novel proposition that a party's religious beliefs negate liability in the absence of a constitutional or statutory exemption. Parties who claim their discriminatory behaviors were motivated by their religious beliefs raise constitutional defenses precisely because their discriminatory behavior *would* subject them to liability even if it were motivated by their religious beliefs about same-sex marriage, pregnancy, contraception, or anything else. *See, e.g.*, *State by McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985) (finding sports club liable for religiously-based discrimination and rejecting its as-applied constitutional challenge to MHRA); *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023) (ruling on as-applied free speech challenge to Colorado's anti-discrimination law because 303 Creative would otherwise be liable for its religiously-based discrimination against gay couples).

Badeaux cites *Rasmussen v. Glass* for the proposition that religious beliefs somehow preclude a finding of liability for unlawful discrimination even without a constitutional exemption, but an accurate reading of *Glass* compels the opposite conclusion. 498 N.W.2d 508 (Minn. App. 1993). In *Glass,* the court found that an anti-discrimination ordinance did not require a delivery driver to deliver food to an abortion clinic because the clinic was not covered by the ordinance. *Id.* at 514. The court then went on to note that even if the ordinance was construed in a way that covered the clinic, appellant's religiously motivated refusal to deliver the food *would* have violated the ordinance. The court then conducted a constitutional analysis, which required a separate

determination of whether the law was narrowly tailored to achieve a compelling government interest. The court found that the ordinance would be unconstitutional as applied to Glass because the government does not have a compelling interest in requiring businesses to deliver take-out to one another as this type of activity is not a matter of public health or safety. *Id*.

Badeaux further misstates the constitutional avoidance doctrine. He claims that under this doctrine, if a defendant alleges that a law violates his religious beliefs, then the court should simply agree and exempt the defendant entirely from that law. Badeaux Br. at 40. This is not how the doctrine works. What Badeaux is asking this Court to do is to grant him a backdoor as-applied exemption from the MHRA. Constitutional avoidance applies when a party affirmatively raises a constitutional issue with a statute, which did not happen here. At that point the court, not the defendant, decides if there is a reasonable way to read the law so that it does not violate the constitution. *Limmer v. Ritchie*, 819 N.W.2d 622, 628 (Minn. 2012). Any interpretation of law under the constitutional avoidance doctrine must be "reasonable." *Id.* (citations omitted). It is not reasonable to interpret the MHRA as permitting a public accommodation to turn away pharmacy patients in need of time-sensitive medication because of sex without any effective safeguards (such as the 1999 Pharmacy Board Guidance or the subsequent measures Respondents put in place only after Anderson and numerous others were turned away), as Badeaux suggests.

2. Respondents Waived the Issue of Whether the MHRA Violates Their Constitutional Rights and the Issue Cannot Be Litigated for the First Time on Appeal

Badeaux has never raised or litigated a constitutional challenge to the MHRA. A party may not raise a new legal argument for the first time on appeal, "nor may a party obtain review by raising the same general issue litigated below but under a different theory." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). It would be reversible error for this Court to consider Badeaux's arguments for the first time on appeal. *Id*. at 584.

Badeaux did not merely decline to raise a constitutional claim, he expressly waived the issue. In February 2021, after the deadline to amend pleadings had long expired and mid-way through summary-judgment briefing, Badeaux's counsel emailed the parties that he had neglected to plead in his answer an affirmative defense of freedom of conscience under the Minnesota Constitution, and asked if parties would consent to late amendment. Mot. in Limine No. 1 [Dkt. 109]; Anderson Br. Supp. Mot. in Limine [Dkt. 110] ("MIL Br.") at 7. Anderson did not consent and noted that Badeaux would need to move to amend and also provide notice to the state if he wished to raise a constitutional challenge to the MHRA. *Id*. Badeaux filed no motion to amend, did not raise the defense with the court, did not provide notice to the state. In the email exchange referenced in Anderson's MIL, he further informed parties that he was "not challenging the constitutionality of a statute and had no such intention." As a result, Ms. Anderson sought to preclude any reference to "improper, waived, and inapplicable defenses," including any suggestion that the case involved constitutional or other religion-based claims or defenses as none had been raised. MIL Br. at 6-7. In response, Badeaux disclaimed any constitutional argument on the record.

MIL Tr. at 66:1-22 [Dkt 196] ("I'm not somehow asking the Court to open the door to these constitutional arguments. We have no intention of making them and would expect some kind of an objection at trial if we did.") The district court granted the motion in limine.[5] Dkt. 144 at 1, 4-5.

Additionally, for Badeaux to raise a constitutional challenge to the MHRA, he was required to give notice to the Attorney General. Minn. R. Civ. P. 5A; *State v. Jorgenson*, 934 N.W.2d 362, n.2 (Minn. Ct. App. 2019) (noting that appellate courts require strict adherence to Rule 5A); *see generally* Amicus Curiae Br. of Minn. Attorney General. When a constitutionality argument is raised, governmental authorities may have to be joined, involuntarily if necessary. *See* Minn. R. Civ. P. 19; *Unbank Co., LLP v. Merwin Drug Co., Inc*., 677 N.W.2d 105, 108 (Minn. App. 2004) (dismissing a case where Commissioner of Commerce was a necessary party and was given notice but not joined). The 5A requirement is not *pro forma*. If the state chooses to participate in litigation, it is entitled to discovery, fact development, briefing, and trial on issues separate and apart from the question of liability, such as the state's interest in the challenged law. *Infra* II.A.3. None of this happened here because Badeaux waived the issue.

[5] Although Badeaux's waiver was explicit and on the record, constitutional rights can be waived even implicitly. *State v. Blom*, 682 N.W.2d 578, 617 (2004) ("A court may imply a waiver from a defendant's conduct.") (citation omitted).

3. Consideration of Waived Constitutional Claims For The First Time On Appeal Would Deprive Anderson and the State the Opportunity to Develop Relevant Facts And Arguments

When a party raises a free exercise claim under the Minnesota constitution, which did not happen here, the court then determines whether the challenged law is narrowly tailored to achieve a compelling government interest. *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990); *Skeen v. State*, 505 N.W.2d 299, 312 (Minn. 1993). Constitutional review involves a case-specific fact-intensive inquiry.[6] This Court cannot find in favor of Badeaux without giving Anderson or the state the opportunity for relevant fact development and argument at the district court.

On the question of the state's compelling interest, the district court would have had to consider factors such as the public policy provision of the MHRA, Minn. Stat. § 363A.02, the 1999 pharmacy bulletin emphasizing access to EC as an issue of patient safety, ADD-1, and HF1/SF1, enacted in 2023 and codified at Minn. Stat. § 145.409, reiterating that Minnesota has a compelling interest in ensuring that "every individual has a fundamental right to make autonomous decisions about the individual's own reproductive health, including the fundamental right to use or refuse to use reproductive health care," "includ[ing] … contraception." As the Minnesota Supreme Court noted in a previous unsuccessful as-applied challenge to the constitutionality of the MHRA on free exercise grounds:

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[6] In *303 Creative*, for example, the ruling was specific to businesses engaged in artistic expression and the majority chided the dissent for claiming that the ruling was not fact-specific and would be applied broadly to businesses open to the public. 143 S. Ct. at 2318.

> In a pluralistic and democratic society, government has a responsibility to insure that all its citizens have equal opportunity for employment, promotion, and job retention without having to overcome the artificial and largely irrelevant barriers occurring from gender, status, or beliefs to the main decision of competence to perform the work. Likewise, the government has a responsibility to afford its citizens equal access to all accommodations open to the general public.

McClure, 370 N.W.2d at 853.

The district court would then have had to determine whether the MHRA is narrowly tailored to achieve the compelling government interest, as ultimately framed by the court. In *McClure*, for example, the court found that the MHRA constitutes the least restrictive means to achieve the state's goals. The *McClure* court observed:

> We agree with the Commissioner that the state's overriding interest permits of no exemption to appellants in this case. Notwithstanding the fact that the [MHRA] as applied here infringes upon sincerely held religious beliefs and imposes upon the free exercise thereof, when appellants entered into the economic arena and began trafficking in the market place, they have subjected themselves to the standards the legislature has prescribed not only for the benefit of prospective and existing employees, but also for the benefit of the citizens of the state as a whole in an effort to eliminate pernicious discrimination.

Id. The district court here was not asked to address the question of whether the MHRA is narrowly tailored to achieve a compelling government interest in this case, nor did it actually address this question in any rulings below.[7]

[7] The MHRA requires Thrifty White, whose owner and staff other than Badeaux have no religious objection to EC, to ensure Anderson gets her EC in a timely manner without added cost, shame, or stigma, like any other patient seeking to fill a time-sensitive prescription. This perhaps could have been accomplished by adherence to the 1999 Pharmacy Board guidance or by adopting the subsequent remedial measure sooner, neither of which burdens Badeaux's religious beliefs, but again, the district court did not delve into this question because no constitutional claim had been raised.

The court also was not asked to consider a federal constitutional claim. Under federal law, free exercise claims challenging state-level "neutral, generally applicable law[s]" such as the MHRA are subject to rational basis review, not strict scrutiny. *Emp't Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872, 880 (1990).[8] The district court was not asked to address the question of whether ensuring pharmacies open to the public do not discriminate against patients in need of time-sensitive medication prescribed by their doctors is rationally related to a legitimate government interest.

Badeaux cannot seek a constitutional exemption for the first time on appeal after waiving the issue at the district court, denying Anderson and the State the opportunity to develop a factual record and brief the issue. It would be an error for this court to consider a constitutional claim at this stage in light of Badeaux's own litigation choices below.

Anderson provided direct evidence demonstrating that Thrifty White and Badeaux subjected her to disparate treatment based on sex, Respondents waived any constitutional exemptions, Respondents identified no relevant statutory exemptions, and Anderson is entitled to JMOL.

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[8] The federal cases cited by Respondents and amici applying strict scrutiny to federal constitutional claims are inapposite. Strict scrutiny applied in *Hobby Lobby* because it was a Religious Freedom Restoration Act ("RFRA") challenge to a federal law, but RFRA categorically does not apply to state laws like the MHRA. *Burwell v. Hobby Lobby*, 573 U.S. 682, 688-89 (2014); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding RFRA does not apply to state laws). Strict scrutiny was used in *303 Creative* because it was a free speech case, not a free exercise case. 143 S. Ct. at 2308. And it was applied in *Fulton* because Philadelphia's foster care agency contract at issue allowed the commissioner discretion to exempt individual agencies from the non-discrimination provisions, which meant that the contract's anti-discrimination provision was not generally applicable and *Smith* did not apply. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021).

B. Appellant Is Entitled to a New Trial

In the event this Court finds Anderson is not entitled to JMOL, because Appellant was prejudiced by numerous errors in jury instructions and the verdict is inconsistent with the evidence, Appellant is entitled to a new trial.

1. The Court's Omission of an Agency Instruction Was a Clear and Prejudicial Error of Law

The Court's error regarding the multiple-defendants instruction was fully laid out in Appellant's opening brief. App Br. 33-37. Thrifty White's primary response is that Anderson herself requested the multiple defendant instruction, and that there "was no need" for an agency instruction. But when Anderson proposed the multiple-defendants instruction, she contemporaneously requested an agency instruction. Dkt. 113 at 16. The multiple-defendant instruction related to punitive damages, and the agency instruction related to liability, both of which Anderson expected to be tried together. Months later, on the eve of trial, Badeaux requested bifurcation of the punitive damages issue. Then, in draft instructions the parties received mid-trial, the Court proposed keeping the multiple-defendant instruction, and omitting any instruction regarding agency. Anderson promptly objected and asked again for an agency instruction on the grounds that such an instruction is crucial on liability, and that the multiple-defendant instruction alone would be misleading. Trial Tr. at 767:1-769:13; 831:10-833:17; *see also* ADD-30. The district court decided otherwise.

Because there was no public accommodations claim against Badeaux, and because the jury was told to consider Badeaux separate from Thrifty White, there is more than a

reasonable likelihood that the jury thought Badeaux denied Anderson "full and equal enjoyment" of goods and services, but that they could not hold Thrifty White accountable for Badeaux's actions. This conclusion is further bolstered by the jury's illogical findings that while Badeaux caused Anderson $25,000 in emotional harm, Thrifty White did not deny her full and equal enjoyment of their goods and services. Taken together, the Court's multiple-defendant instruction, coupled with the lack of instruction regarding agency, was a clear error of law and "might reasonably have influenced the jury and changed the result of the trial." *George v. Estate of Baker*, 724 N.W.2d 1, 9 (Minn. 2006).

2. The Court Erred in Defining Intent for the Jury

The district court erred in granting Thrifty White's request for a jury instruction on "intent" inappropriately imported from intentional torts. For intentional torts, the actor must "intend the consequences of an act, not simply the act itself." *Kawaauhau v. Geiger*, 523 U.S. 57, 58 (1998) (citations and quotations omitted). But for discrimination claims, intent is established by showing that there is a link between the protected class and the action alleged to be discriminatory. *See LaPoint*, 892 N.W.2d at 513; Amicus Curiae Br. of Comm'r of MDHR, at 15 ("Under the MHRA, discrimination in the area of business occurs when a defendant 'intentionally refuse[s] to do business' with a plaintiff 'because of' that plaintiff's protected class. Minn. Stat. § 363A.17(3).").

Badeaux notes that the Eighth Circuit has stated that "intentional" is a "term of art" with "a fixed technical meaning" and Badeaux argues that therefore, under the MHRA, a business must "act with intent to cause" a specific result. Badeaux Br. 35 (citing *In re Geiger*, 113 F.3d 848, 852 (8th Cir. 1997)). But the fact that the Eighth Circuit, in *Geiger*,

chose to interpret the federal Bankruptcy code as requiring "what the law has for generations called an intentional tort" in order to exempt a debt from discharge in bankruptcy, *see id.*, has no bearing whatsoever on the MHRA.

Badeaux further suggests that Anderson was the one who intentionally refused to do business with Thrifty White based on Badeaux's religious beliefs, and not the other way around. Badeaux Br. 34-35. But Anderson never asked Badeaux to share his religious beliefs with her as a condition for her doing business with Thrifty White. She simply wanted timely access to her prescription medication. Respondents' conduct put Anderson at risk of unwelcome pregnancy, and having to choose between another medically complicated and painful labor or an abortion. To this day, as evidenced by their filings, Respondents do not seem to grasp the very real repercussions of their joint decision to leave patients seeking to prevent pregnancy to fend for themselves.

3. George Badeaux Aided and Abetted Thrifty White's Discrimination

Badeaux incorrectly states the standard for aiding-and-abetting liability under the MHRA. As *Matthews v. Eichorn Motors, Inc.* makes clear, the proper standard comes from the Restatement (Second) of Torts § 876(b)). 800 N.W.2d 823, 828-30 (Minn. App. 2011). A plaintiff must establish that (1) the primary wrongdoer's conduct violated the MHRA, and (2) the abettor knows that the conduct is discriminatory and provides substantial assistance or encouragement. *Id*. at 830. While *Matthews* phrases this element as "knew that [the primary wrongdoer]'s conduct violated the MHRA," *id.*, this does not mean that a plaintiff must show that the defendant-abettor is a legal expert aware of the text and case law of the MHRA. Such an interpretation would be wholly inconsistent with the

Restatement § 876(b) standard: knowing that "the other's conduct constitutes a breach of duty." Under the MHRA, this element translates to knowing that the conduct is discriminatory, in that it treats the plaintiff differently than others based on a protected status. Badeaux knew that he was treating Anderson differently than other customers because he believed she may be pregnant.

Badeaux wrongly argues that Anderson's aiding and abetting claim fails because Badeaux is the sole alleged discriminator and thus cannot aid and abet his own discriminatory conduct. Badeaux Br. 38. But this is incorrect. An employee may be held liable for aiding and abetting an employer's MHRA violation to the extent that an employer's liability did not arise solely from that employee's own conduct. *See Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 801 (Minn. 2013). Here, Thrifty White's liability does not arise solely from Badeaux's own conduct: Badeaux and Hutera jointly developed the facially discriminatory policy in place that allowed Badeaux to turn away patients with EC prescriptions, Trial Tr. at 252:1-17; 301:25-302:19, and by Hutera's own admission, Badeaux was acting pursuant to that joint policy when he turned Anderson away. *Id*. at 310:14-311:18. Badeaux is not the sole discriminator, and he may be held liable for aiding and abetting Thrifty White's MHRA violation.

4. The District Court Erred in Equating the Public Accommodation Provision of the MHRA with Employment Law

The court erred in defining "full and equal enjoyment" of public accommodations as "a material disadvantage or a tangible change on conditions in the goods or services offered to the public," a standard borrowed from the employment law definition of "terms

and conditions of employment." Employment-law tests should not be imported into public accommodations law, as the two areas of law serve distinct functions, require different elements, and involve different legal standards. *See Abel v. Abbott Nw. Hosp.*, 947 N.W.2d 58, 69 (Minn. 2020) (noting that public accommodations and employment discrimination provisions involve different elements).

The purpose of public accommodation discrimination provision is "to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984) (evaluating public accommodation claim brought under the MHRA and citing *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241 (1964)). "'Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his [social identity].'" *Heart of Atlanta Motel,* 379 U.S. at 292 (Goldberg, J., concurring) (citing S. Rep. No. 872, 88th Cong., 2d Sess., 16.). Public accommodations law gives careful attention to dignitary harm, even when it does not readily translate into tangible, material disadvantages.

In *Bray v. Starbucks Corp.*, No. A17-0823, 2017 WL 6567695 (Minn. App. Dec. 26, 2017), a Starbucks customer was mistreated by staff due to his transgender status, and alleged "emotional distress, shame, humiliation, and embarrassment." *Id.* at *2. The Court of Appeals declined to apply employment discrimination precedent about "a threshold level of adverse conduct" necessary to sustain a claim to Bray's public accommodation claim. *Id*. at *7. It reversed the district court's grant of summary judgment to Starbucks, finding

that the plaintiff had established a prima facie case of discrimination. *Id.* In other words, humiliation alone can rise to the point of denying full and equal enjoyment of goods and services. *See id*.

Even if Anderson ultimately got her prescription elsewhere, that does not redress the "stigmatizing injury" of denial. *Roberts*, 468 U.S. at 625. Correcting the district court's error is crucial not just for Anderson herself but also for the citizens of Minnesota, as the jury instructions provided below impermissibly narrow the MHRA's protections and undermine its core purpose of protecting equal dignity in public life.

5. Excluding Thrifty White's Post-Incident Policy Constituted Reversible Error

The district court's refusal to admit the written EC policy Thrifty White adopted after Anderson's incident was improper, and prejudiced Anderson. Anderson did not seek to introduce this evidence for any prohibited purpose. *See Myers v. Hearth Techs., Inc.*, 621 N.W.2d 787, 792 (Minn. App. 2001) (evidence of subsequent remedial measures is barred only "under certain circumstances").

Respondents argue, falsely, that the pre-2019 EC policy, like the policy adopted after Anderson, was that if Badeaux was the only pharmacist on duty, he would contact another pharmacist to come in and promptly fill the prescription, and only if that was not possible would Badeaux offer to transfer the prescription elsewhere. TW Br. at 32. The testimony cited in support of that statement says nothing of the sort. *Id*. In fact Hutera's testimony was that Badeaux treated Anderson in perfect compliance with the policy then in place, Trial Tr. at 310:14-311:18, and Badeaux made no such call for Anderson. *Id.* at

258:11-25. Badeaux testified that he "d[id]n't recall" if, prior to Anderson's prescription, he had talked with other Thrifty White pharmacists about them coming in to fill EC prescriptions during Badeaux's shift, but "I know we talked about coming in *after* the prescription for Andrea." *Id*. at 258:11-25 (emphasis added). The district court prevented Appellant from questioning Badeaux about the differences between the policies before and after Anderson. *Id.* at 279:11-284:4. Hutera subsequently testified that under the pre-2019 policy, Badeaux would not have called any other pharmacists so long as someone other than Badeaux was scheduled to work that day or the next. *Id.* at 303:3-21. But the policy adopted only after Anderson was turned away requires Badeaux to call another pharmacist to come in to fill EC prescriptions. ADD-2. Respondents' argument that the old policy is essentially the same as the new policy is illogical and contrary to the trial record and to Respondents' own pre-trial motion to exclude the policy, describing it as a "subsequent remedial measure." *See* MIL Tr. at 66:1-17 (Badeaux's counsel arguing to exclude the new policy because "[t]hese changes were made in good faith, and they should not be used as evidence against either of the Defendants because of Rule 407"). Excluding evidence of the revised policy deprived Anderson of the opportunity to clarify the policy in place at the time of her prescription.

Further, the exclusion of this evidence left unchecked Respondents' repeated assertions that it was not feasible to have an unscheduled pharmacist come in to fill EC prescriptions if needed. *E.g.*, Trial Tr. at 686:16-687:8; 712:7-12 (Hutera testifying "[u]nless one of my scheduled pharmacists could," it was not feasible to have anyone come in immediately to fill a prescription that Badeaux intended to refuse). The fact that it indeed

was feasible to call another staff pharmacist, ask them to come in, and offer them an extra shift if they wanted it—as contemplated by the revised policy—demonstrates that it was feasible to provide less discriminatory, more seamless service to patients seeking to fill EC prescriptions.

Excluding evidence of the subsequent policy deprived Anderson of the ability to clarify the lack of safeguards in place at the time, and meant she could not rebut Respondents' express claims that calling in another pharmacist to fill EC prescriptions when Badeaux was working alone would be infeasible. Without the 2019 policy clearly establishing Thrifty White could have feasibly done more, a jury might reasonably have concluded that Thrifty White did all it could for Anderson, and that Anderson received nothing more than "minor differences in services or access to goods," such that her public accommodations claim did not succeed (under the Court's erroneous instruction). Finally, evidence of the subsequent remedial measure would have been relevant to disproving any claimed "legitimate business purpose" defense to the business discrimination claim, namely that calling pharmacists to come in if Badeaux was working alone would have effectively put the store out of business.

6. The District Court Erred and Abused Its Discretion in Admitting All of Appellant's Therapy Records Where She Sought Damages Solely Based on Shame, Stress, Embarrassment and Similar Harms

The district court erred in ruling that Anderson had waived her medical privilege by alleging emotional distress at Respondents' discriminatory conduct. Under Minnesota law, a party waives their medical privilege if they voluntarily place a physical or mental condition in controversy. Minn. R. Civ. P. 35. If a party does not put her medical condition

"in controversy," her medical records are not discoverable. *Muller v. Rogers*, 534 N.W.2d 724, 727 (Minn. App. 1995). Merely seeking emotional distress damages does not put a party's mental health "in controversy." *Gillson v. State Dept. of Nat. Res.*, 492 N.W.2d 835, 842-43 (Minn. App. 1992).

In Minnesota state courts, plaintiffs' medical records receive heightened protections compared to federal court. *See Njema v. Wells Fargo Bank, N.A.*, Civ. No. 13-519 (PJS/JSM), 2014 WL 12648466, at *4-5 (D. Minn. Nov. 4, 2014). In federal court, providing medical records falls under Fed. R. Civ. P. 26, governing general discovery, which does not contain an "in controversy" standard. Fed. R. Civ. P. 35, which includes an "in controversy" standard, governs only medical examinations. By contrast, in Minnesota state court, the "in controversy" standard expressly governs both medical examinations (under Minn. R. Civ. P. 35.01) *and medical records* (under Minn. R. Civ. P. 35.03).

Therapy notes are entitled to the highest protection, for good reason. Release of therapy notes requires special consent by law, and while a patient can typically view their medical records and see, for example, results of blood tests or summaries of doctor's appointments, a patient would never have such access to therapy notes. As the Department of Health and Human Services explained in its commentary on the HIPAA privacy rules:

> the rationale for providing special protection for psychotherapy notes is not only that they contain particularly sensitive information, but also that they are the personal notes of the therapist, intended to help him or her recall the therapy discussion and are of little or no use to others not involved in the therapy. Information in these notes is not intended to communicate to, or even be seen by, persons other than the therapist.

45 C.F.R. § 164.501 *comment* (2000). It is as damaging to Anderson herself to read these notes as it is to her family to have her most private, intimate comments about them exposed in court. Anderson is entitled to tell a jury the negative emotions she experienced as a result of discriminatory conduct without breaching that societally important confidence and trust.

It was an error for the district court to rule that Anderson had waived the privilege, order discovery into her therapy records, and admit the records at trial in full. The Court of Appeals should rule on this issue to clarify the standard for district courts and ensure that discrimination plaintiffs do not lose their privilege in deeply personal medical records, and harm any ongoing relationships with their therapists, merely by alleging that they experienced feelings of shame and embarrassment that often accompany discrimination.

III. CONCLUSION

For the foregoing reasons, this Court should reverse the district court's denial of Anderson's JMOL motion or, in the alternative, reverse the denial of her motion for a new trial. In either event, the case should be remanded to the district court—either for a trial on punitive damages (if judgment as a matter of law is entered) or on liability and damages (if a new trial is ordered).

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the following requirements:

1. The brief was drafted using Microsoft Word 365 word-processing software.
2. This brief was drafted using Times New Roman 13-point font, compliant with the typeface requirements; and
3. There are 6,815 words in this brief.

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