IN THE IOWA SUPREME COURT

NO. 20-0023

MARK H. ANDREW, M.D., Plaintiff-Appellee,

vs.

HAMILTON COUNTY PUBLIC HOSPITAL dba VAN DIEST MEDICAL CENTER,

Defendant-Appellant.

APPEAL FROM ORDER OF DISTRICT COURT FOR HAMILTON COUNTY
Case No. LACV029306

APPELLEE'S FINAL BRIEF

GREFE & SIDNEY, P.L.C.

Mark W. Thomas AT0007832
Laura N. Martino AT0005043
500 E. Court Ave., Ste. 200
Des Moines, IA 50309
Phone: 515/245-4300
Fax: 515/245-4452
mthomas@grefesidney.com
lmartino@grefesidney.com
ATTORNEYS FOR APPELLEE

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Dr. Andrew does not disagree with the Statement of the Issues Presented for review. As set forth below, the following authorities support the District Court's denial of summary judgment.

I. The district court did not err in denying summary judgment to VDMC on Dr. Andrew's defamation claim.

Barreca v. Nickolas, 683 N.W.2d 111, 119 (Iowa 2004).

Kelly v. Iowa State Educ. Ass'n, 372 N.W.2d 288, 296–97 (Iowa Ct. App. 1985).

II. The district court did not err in holding that the compensation Dr. Andrew may have earned, had the Hospital properly terminated the agreement, constitutes "wage" under the Iowa Wage Payment Collection Act.

McClure v. Int'l Livestock Imp. Services Corp., 369 N.W.2d 801, 802 (Iowa 1985)

ROUTING STATEMENT

Dr. Andrew disagrees with Van Diest Medical Center (VDMC)'s routing statement. The case presents the application of existing legal principles. The Iowa Supreme Court has already determined that whether actual malice occurred is a question for the jury. As such, a question of fact exists. There is not a constitutional question presented nor a conflict between published decisions of the Iowa Court of Appeals or Iowa Supreme Court. Iowa R. App. P. 6.1101(2)(a-b). The issues are not of first impression

nor do the issues present questions of changing legal principles. Iowa R. App. P. 6.1101(2)(c)(f).

VDMC claims that the case presents fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court. Iowa R. App. P. 6.1101(2)(d). Dr. Andrew respectfully disagrees. The standard of "broad public importance also arises when courts decide whether to review issues that are moot. In determining whether to decide a moot issue, Iowa Courts consider:

> (1) the private or public nature of the issue; (2) the desirability of an authoritative adjudication to guide public officials in their future conduct; (3) the likelihood of the recurrence of the issue; and (4) the likelihood the issue will recur yet evade appellate review.
> *Id.* (citing *In re T.S.*, 705 N.W.2d 498, 502 (Iowa 2005)). The last factor is perhaps the most important factor, because "[i]f a matter will likely be mooted before reaching an appellate court, the issue will never be addressed." *State v. Hernandez–Lopez*, 639 N.W.2d 226, 234 (Iowa 2002).

In re A.W., 741 N.W.2d 793, 804 (Iowa 2007). In this instance, the issues at the heart of Dr. Andrew's claims - whether VDMC breached its contract with Dr. Andrew and whether, in making false or misleading reports to the National Practitioner Data Bank (NPDB) and the Iowa Board of Medicine (IBM), VDMC defamed Dr. Andrew - are not issues of broad public importance. VDMC claims that the immunities provided to physicians are in jeopardy. It is not, however, the immunity that is at issue here, but the

exception to the statute's immunity provision. There can be no doubt that hospitals, are entitled to immunity, unless they have engaged in actual malice. Whether VDMC's behavior amounted to actual malice is a question of fact, and the issues raised in this appeal speak to VDMC's failure to follow its own policies - something that is not of broad public importance to other hospital administrators across our state.

STATEMENT OF THE CASE

This case was originally filed May 12, 2017. Dr. Andrew seeks compensation for harm suffered when VDMC terminated his employment "with cause" on December 15, 2016 and, thereafter, made defamatory reports to the Iowa Board of Medicine (IBM) and the National Practitioner Data Bank (NPDB). The termination decision, something Dr. Andrew was told was an administrative decision, made without the use of peer review, not only has proven to be without basis in fact, but has now forced Dr. Andrew into an unplanned and unwanted early retirement.

Upon commencement of the lawsuit, VDMC removed to Federal Court and the case was subsequently remanded back to Hamilton County District Court after dismissal of Dr. Andrew's age discrimination claim. The Federal Court left unresolved the remaining claims so, on March 21, 2019, VDMC sought summary judgment on, among other things, plaintiff's

defamation claim and his claim pursuant to the Iowa Wage Payment Collection Act ("IWPCA"). The Hamilton County District Court, on December 20, 2019, ruled that VDMC was not entitled to summary judgment on these claims noting that issues of good faith and malice are questions for the jury. (App. 20).

VDMC sought interlocutory appeal on the summary judgment ruling, which was granted on February 7, 2020. As set forth herein, the court correctly determined that fact questions precluded summary judgment on Dr. Andrew's claims and denial of VDMC's motion was appropriate. Dr. Andrew respectfully requests that the district court's ruling be upheld.

STATEMENT OF FACTS

A. Dr. Andrew's Employment with VDMC

Dr. Mark Andrew was employed as a general surgeon for defendant Van Diest Medical Center located in Webster City, Iowa for 8 years, from August 27, 2008 to December 15, 2016. (App. 156, p. 24, ln. 13-15). Over the course of his career Dr. Andrew estimates he performed over 7,000 procedures. (App. 180, p. 251, ln. 18 - 252, ln. 7). Dr. Andrew served on VDMC's medical executive committee nearly the entirety of his employment with VDMC. (App. 159, p. 50-51).

Dr. Andrew was a highly paid member of the VDMC staff, a salary which he had earned by virtue of his education and training as a general surgeon, 31 years of experience in the field, and countless hours of call. (App. 175, p. 200, ln. 17 - 201, ln. 3).

Dr. Andrew's employment was governed by a written contract which was amended three times: August 11, 2014, December 5, 2015 and October 4, 2016. (App. 160 p. 56, ln. 5-9, App. 161-162 p. 60-62; App. 116-132; App. 133-134; App. 135-137). Each amendment occurred during Lori Rathbun's tenure as CEO of VDMC, the first amendment being the result of VDMC's affiliation with Mercy One. (App. 162, p. 63, ln. 23-25; p. 64, ln. 1-7).

The Physician Employment Agreement entered into between VDMC and Dr. Andrew on August 11, 2014 provides in relevant part:

> 9. Term and Termination. This Agreement shall be effective as of August 1, 2014 (the "Effective Date") and shall continue three (3) years (the "Initial Term"). This Agreement shall automatically renew for additional three (3) year terms unless either party provides 90 days prior written notice to the other party of its intention not to renew this Agreement (the "Initial Term" and any "Renewal Term" shall be referred to herein as the "Term"). . . .
>
> This agreement may be terminated prior to the expiration of any Term as follows:
>
> a. Without Cause. Either party may unilaterally terminate this Agreement without cause at any time by notifying the other party in writing of its intention to terminate at least 90 days prior to

> termination. In the event Hospital elects this option, Physician will continue to be eligible for employee benefit plans and will receive his compensation payments in accordance with Exhibit B during the notice period.

(App. 122).

Section 9(a) could be triggered by VDMC's termination of Dr. Andrew without cause and provides for guaranteed payment of Dr. Andrew's compensation, employee benefits, and a prorated bonus. The compensation provided to Dr. Andrew by Section 9(a) is guaranteed, whether or not Dr. Andrew performed any future labor or services for VDMC. (App. 122).

In addition to the without cause termination provisions of the contract, the agreement also sets forth grounds for immediate termination by VDMC under nine specifically identified circumstances. (App. 123). At issue is this case is paragraph 9(d)(i) which provides that a Physician may be terminated immediately if the hospital in good faith determines that the physician is not providing adequate patient care or the safety of patients is jeopardized. (App. 123).

Finally, the agreement provides that it may be terminated "for cause" which is defined as "a material breach by a party to this Agreement of one or more obligations imposed upon the party under this Agreement. If the alleged breach is not cured within thirty (30) days, the Agreement will

automatically terminate on the termination date specified in the notice." (App. 123).

B. Rathbun's Plans to Oust Dr. Andrew

Rathbun made clear to Dr. Andrew from the day she began employment with VDMC that she felt Dr. Andrew was paid too much. (App. 123, p. 63, ln. 1-6). Dr. Altman[1] confirmed that Rathbun did not want to pay physicians as much as they were making to take call. She felt that the contracts that were in place were "sweetheart contracts", and she had slowly been backing down how much VDMC was paying Dr. Andrew, because in her estimation very rarely did he have to do anything on call. (App. 145, p. 30, ln. 16-22). At least two of the amendments to Dr. Andrew's employment agreement resulted in a reduction to Dr. Andrew's overall compensation. (App. 161-162, p. 60-62).

Rathbun further complained of Dr. Andrew's production. As explained by Dr. Andrew, VDMC's administrators, including Rathbun, had alienated some of his most fruitful referral resources, but did not share in the responsibility of his lower production numbers. Dr. Andrew confirmed that a several year history of administrative actions led to low referrals from area

[1] Dr. Scott Altman served as a consultant to Lori Rathbun initially to address some issues with the emergency department and then to address relationship problems that Ms. Rathbun had with providers in the area. (App. 143, p.15-17).

physicians to VDMC. (App. 176-177, p. 204-207). Dr. Altman testified that he was brought in to assess VDMC's emergency department and to address antagonistic relationships that local providers had with the hospital. (App. 143-144, p. 15, ln. 6-17; p. 16, ln. 11-16, p. 17, ln. 2-15). For example, Rathbun felt that [Gabrielson Clinic] was "taking most of their patients to Iowa Specialty to do the surgery. So she felt there was – her word was 'out-migration' – there was a lot of out-migration, and she wasn't happy with that. She wanted them to do more of the gynecological surgery at Van Diest." (App. 145, p. 31, ln. 5-11)

In the summer of 2012, Dr. Andrew began providing back up call coverage at Hansen Family Hospital in Iowa Falls, Iowa. (App. 163, p. 67, ln 17 – 68, ln. 4). In 2014, Dr. Andrew was contracted to cover call on alternating weeks at Hansen Family Hospital which gradually morphed into clinic days and then developed into a supplemental contract with shared services between VDMC and Iowa Falls. (App. 163, p. 68, ln. 8-24; p. 71, ln. 14-18; App. 133-134).

Dr. Andrew had discussed his planned retirement with Ms. Rathbun and had indicated he intended to work until age 65, which at the time meant that he was planning to retire at the end of 2019. (App. 177, p. 208, ln. 16-20). Rathbun had other plans. In August of 2016, Lori Rathbun hired Dr.

Gayette Grimm, originally on a part-time basis, to help "cover call." (App. 199, p. 49, ln. 12-25). Rathbun soon required all new cases be referred to Dr. Grimm thereby ensuring Dr. Andrew's production numbers would remain low. (App. 138). According to Dr. Altman:

> [T]hey were bringing in a new surgeon, they were trying to gently transition Dr. Andrew out to the other hospital that they had subcontracted with and to just use him to fill in. There was even a plan for how to deal with new patients. And then this all came. And so it rapidly brought that whole process to a dramatic conclusion. . .

(App. 151, p. 75, ln. 7-14).

C. VDMC'S Peer Review Process

At the time of Dr. Andrew's termination, VDMC had an established peer review process. (App. 200, p. 64, ln. 5). As explained by Dr. Altman, "[A] system evolved where there's medical leadership and there's hospital leadership, and they have sort of a co-equal relationship. And the medical leadership's job is to ensure quality of care and administrative leader's role is to ensure the delivery of care." (App. 147, p. 33, ln. 16-21).

D. Dr. Andrew's Termination

On December 15, 2016, Lori Rathbun called Dr. Andrew into her office and provided him with a termination letter which stated that his employment contract was being terminated pursuant to paragraph 9(d): "This action is being take due to significant concerns about prescribing

practices and patient care issues." (App. 139; App. 171, p. 163, ln. 18-23). At the time of his termination there were 8 months left in the initial term of Dr. Andrew's employment agreement. (App. 139, App. 122, 129).

Dr. Andrew was told that his termination was "administrative," and that the cause of his termination was the alleged "excessive amount of medication that [T.C.] had received." (App. 171, p. 164, ln. 17-22; p. 165, ln. 7-18). Further Dr. Andrew testified that Rathbun told him that there was "another issue" (App. 171, p. 165), but she did not elaborate on that "other issue." (App. 171, p. 165, ln. 11-17).

Only later, after Dr. Andrew's termination, did Rathbun expound upon her decision:

> [M]y primary concern was after reviewing the documentation with my chief nursing officer and Dr. Scott Altman and Dr. Nicki Ehn, I became extremely alarmed about the level of opiate prescriptions that were - - pain killers that were being prescribed to this patient, the fact that pharmacies had called without response from Dr. Andrew about their concerns related to those prescriptions, notes in the chart that the pharmacies were concerned about the prescribing practices, his response after being interviewed with firing the patient immediately when he didn't see any concerns with his practice, yet there was no documentation in the chart that he fired the patient after being educated multiple times on pain management and that we had a pain management specialist, Dr. Christian Ledet, on staff, never consulted with Dr. Ledet or referred the patient over to Dr. Ledet. He maintained a practice with this patient for multiple years that did not seem appropriate for a general surgeon in practice.

(App. 195-196, p. 16, ln. 17- p. 17, ln. 13).

Lori Rathbun, was not a doctor and was not qualified to determine whether the amounts prescribed to patient T.C. were excessive. (App. 197, p. 32, ln. 14-16). Rathbun asserted that she relied upon her medical director, Dr. Ehn, a medical consultant, Dr. Altman, and nurse Lisa Ridge for that determination. (App. 197, p. 32, ln. 17-21).

On December 8, 2016, one week prior to his termination, Dr. Andrew was called in to meet with Dr. Ehn, Dr. Altman and Lisa Ridge to discuss a T.C.'s patient chart. (App. 170, p. 154, ln. 1-5). As Dr. Andrew explained, the meeting with Dr. Ehn, Dr. Altman and Lisa Ridge deviated from the established peer review process in that he was not informed of the case in advance of the meeting to prepare. (App. 170, p. 154, ln. 10-20). Further, none of the reviewers were general surgeons.

At the conclusion of this meeting, Dr. Ehn did not offer an opinion on whether the amounts prescribed to T.C. were excessive. (App. 188, p. 42, ln. 5-10). Rathbun did not seek input from the physicians on the level of severity of the medical concern – i.e. whether it rose to the level requiring "immediate termination." (App. 188, p. 42, ln. 23 – p. 43, ln. 3). Further, Dr. Ehn was not asked to make a recommendation as part of her report or subsequent to her report about what corrective action, if any, might be appropriate. (App. 188, p. 42, ln. 23 – p. 43, ln. 3).

Prior to December 15, 2016 no one at VDMC told Dr. Andrew that he was not providing adequate patient care or the safety of his patients was jeopardized by his conduct. (App. 180, p. 253, ln. 1-5). In fact, Dr. Ehn personally referred 30-50 cases to Dr. Andrew during the 2012-2016 time period testifying that prior to December of 2016 she had never seen evidence of improper prescribing practices by Dr. Andrew. (App. 183, p. 10, ln. 3-16).

Instead of addressing this prescribing concern through the formal peer review process which was established specifically to address quality of care concerns, the formal peer review process was not utilized prior to Dr. Andrew's termination to determine whether corrective action was appropriate.[2] (App. 189-190, p. 53, ln. 18 – p. 54, ln. 1; App. 201, p. 65, ln. 18-21). The process that Rathbun implemented was not an adequate substitute for peer review as evidenced by the fact that two doctors, hired as experts in this case, have both agreed that the amount of opioid medication prescribed by Dr. Andrew was not unsafe. (App. 204, p. 28, ln. 16; App. 193, pg. 38, ln 6).

[2] Dr. Ehn as a member of the medical executive committee was involved with the hospital's peer review process which was a process used to address quality of care matters. (App. 184, p. 23, ln 22; p. 25, ln 17). Prior to December of 2016 she had been involved with peer review approximately 6-12 times. (App. 184, p. 24, ln. 1).

Dr. Altman believed the case should have followed the medical staff peer review process including review by a qualified surgeon but, according to Dr. Altman, Lori Rathbun just wanted to terminate Dr. Andrew. (App. 149 p. 65, ln. 18-25). Dr. Altman, who consulted with Lori Rathbun regarding her termination decision, noted that he did not think the termination was "specifically about this event as much as it was his performance overall." (App. 149, p. 67, ln. 10-16).

Had Rathbun wanted to terminate Dr. Andrew for her concerns over his performance, she certainly was entitled to do so "without cause" and pay Dr. Andrew the severance he was owed. Instead, however, she chose to terminate Dr. Andrew's employment "with cause" and then by way of her staff and consultant, Dr. Altman, had reports submitted to the NPDB and the IBM. Throughout the reports to the IBM, Dr. Altman makes statements implying and questioning Dr. Andrew's medical judgment and treatment of two patients, one of which was never discussed with Dr. Andrew prior to his termination. Dr. Altman's report then goes on to state as to patient T.C.:

> Volume of narcotic prescribing appears to be well beyond acceptable under any circumstances. It raises questions of marked naiveté, gross incompetence, and/or collusion with the patient for self-use, dealing and/or distribution. Under any of those circumstances, should this physician's prescribing authority be reconsidered? Could this be an impaired physician who needs intervention and help?

> Non emergent bilateral orchiectomy is generally not an endeavor to be taken without significant counsel and forethought. This case appears to vary significantly from standard of care and raises questions of clinical competency. Once again, is this a one-off, or fit a pattern. His surgical competency should be reviewed. Should this physician's surgical privileges be limited by the State?

As to patient L.H. the IBM report states:

> Request assessment of both the surgical and prescribing practices. This appears to be another case of an unusual surgical process and outcome, especially given that the patient initially presented after prior unsuccessful Orthopedic interventions, combined with narcotic prescribing that appears to be excessive.
>
> Since this is the second case of excessive narcotic prescribing, further raising concern for the potential for more, can the Board of Medicine to query the Iowa (and potentially other State's) PMP by provider to identify other potentially at risk patients (if any)? The hospital would like to offer medical/surgical and pain management services to those patients.

(Confidential App. 18; Confidential App. 22).

On or about April 20, 2018 the IBM released a confidential letter, finding the complaint filed by Dr. Altman did not warrant any disciplinary action. (App. 140). Further, expert testimony provided in this case supports a finding that there was no over prescribing. (App. 204, p. 28, ln. 16; Confidential App. 40; App. 193, pg. 38, ln 6).

Unfortunately, the damage to Dr. Andrew has been done. Dr. Andrew has been unable to work since August 17, 2017. (App. 157 p. 29 ln. 12-14). Although he has sought employment with multiple locum's companies, he

had been unable to secure employment in light of the "for cause" designation of his termination. (App. 158, p. 34, ln. 12-18; p. 36, ln. 22 – p. 38, ln.1).

E. VDMC's remaining performance complaints

Although Rathbun specifically identified overprescribing to patient T.C. as the reason for Dr. Andrew's termination, VDMC has post-hoc identified other complaints with Dr. Andrew's care of patient T.C. and complaints relating to a second patient, L.H., in an effort to justify Rathbun's termination decision. Expert testimony supports a finding that Dr. Andrew's decision to prescribe narcotics and not make a pain specialist referral for either patient T.C. or L.H. was within the acceptable standard of care for a general surgeon. (App. 205, p. 39, ln. 2-9; App. 193, p. 38, ln. 1-6). Further, Dr. Andrew's retained expert has opined that less than 50% of Iowa physicians use the prescription monitoring program. (Confidential App. 40). In short, when VDMC's post-termination reasoning is scrutinized, it becomes clear that none of the stated reasons support a "for cause" termination decision.

ARGUMENT

I. SUMMARY JUDGEMENT WAS PROPERTY DENIED ON VDMC'S MOTION SEEKING DISMISSAL OF DR. ANDREW'S DEFAMATION CLAIMS

A. Error Preservation and Standard of Review

Except as to VDMC's claim that the district court erred by not addressing its opinion defense, Dr. Andrew agrees that error has been preserved on the remainder of VDMC's legal arguments asserted on appeal seeking dismissal of Dr. Andrew's defamation claims and, further agrees with VDMC's stated Standard of Review. As to the opinion defense, Dr. Andrew asserts that error was not properly preserved as set forth in Section I. D below.

B. The District Court Properly Found the Question of Actual Malice is For the Jury

VDMC first argues that the District Court's ruling failed to identify a fact question on the issue of "actual malice" which serves as an exception to VDMC's claims of qualified privilege. Instead, VDMC argues that the district court applied a libel per se standard which should not have been applied because VDMC's reports to the IBM involved a matter of public importance.

Iowa Code § 272C.8(1)(b) and Iowa Administrative Code § 653-24.1(3) provide a qualified privilege to persons making reports to the IBM. The Iowa Code and Iowa Administrative Code provisions are nearly identical. As such, only the Iowa Code section is set out in full below:

> b. *A person shall not be civilly liable as a result of filing a report or complaint with a licensing board* or peer review committee, or for the disclosure to a licensing board or its agents or employees, whether or not pursuant to a subpoena of records, documents, testimony, or other forms of information which constitute privileged matter concerning a recipient of health care services or some other person, in connection with proceedings of a peer review committee, or in connection with duties of a health care board. *However, such immunity from civil liability shall not apply if such act is done with malice*.

Iowa Code Ann. § 272C.8(1)(b).

To defeat a claim of qualified privilege, Iowa adds an additional element to plaintiff's burden of proof, that of "actual malice." The Iowa Supreme Court, in *Barreca*, adopted the United States Supreme Court's definition of "actual malice" set forth in *New York Times v. Sullivan* specifically providing that "actual malice occurs when a statement is made with knowledge that it is false or with reckless disregard for its truth or falsity." *See Barreca v. Nickolas*, 683 N.W.2d 111, 120 (Iowa 2004) (citing *New York Times v. Sullivan*, 376 U.S. 254, (1964)). As the District Court correctly recognized, the question of whether a qualified privilege is abused is ordinarily a matter for the jury. *Id*.

VDMC complains that the district court did not specifically identify in its Ruling the defamatory statement or specific issues of falsity and instead asserts that the Court applied a "libel per se" presumption. "Words are libelous per se if they are of such a nature, whether true or not, that the court

can presume as a matter of law that their publication will have libelous effect." *Haas v. Evening Democrat Co*., 107 N.W.2d 444, 447 (Iowa 1961). An attack on the integrity and moral character of a party is libelous per se. *Shaw Cleaners & Dyers, Inc. v. Des Moines Dress Club*, 245 N.W. 231, 234 (Iowa 1932). Thus, it is libel per se to make a published statement accusing a person of being a liar. *See Prewitt v. Wilson*, 103 N.W. 365, 367 (Iowa 1905); *Vinson v. Linn-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, 116 (Iowa 1984)(ruling that an employee's termination for making incorrect entries on her timecard could reasonably be taken as imputing dishonesty to the employee and could be understood as defamatory per se.); *see also Haas v. Evening Democrat Co*., 107 N.W.2d 444, 454 (1961) (providing that there was "no honorable reason" for advocating the position plaintiff advocated could be charge of dishonor or shamefulness, and was thus defamatory). Where a statement is found to be libelous per se, "proof of the defamation itself is considered to establish the existence of some damages, and the jury is permitted, without other evidence, to estimate their amount." *Barreca*, 683 N.W.2d at 116. This presumption, however, does not replace the qualified privilege provided by Iowa's Code or the requirement that "actual malice" be proven.

The record before the district court supports a finding that throughout the reports to the IBM, Dr. Altman makes statements implying and questioning Dr. Andrew's medical judgment and treatment of two patients. Specifically Dr. Altman's report to the IBM regarding patient T.C. states:

> Volume of narcotic prescribing appears to be well beyond acceptable under any circumstances. It raises questions of marked naiveté, gross incompetence, and/or collusion with the patient for self-use, dealing and/or distribution. Under any of those circumstances, should this physician's prescribing authority be reconsidered? Could this be an impaired physician who needs intervention and help?
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> Non emergent bilateral orchiectomy is generally not an endeavor to be taken without significant counsel and forethought. This case appears to vary significantly from standard of care and raises questions of clinical competency. Once again, is this a one-off, or fit a pattern. His surgical competency should be reviewed. Should this physician's surgical privileges be limited by the State?

As to patient L.H. Dr. Altman's report to the IBM states:

> Request assessment of both the surgical and prescribing practices. This appears to be another case of an unusual surgical process and outcome, especially given that the patient initially presented after prior unsuccessful Orthopedic interventions, combined with narcotic prescribing that appears to be excessive.
>
> Since this is the second case of excessive narcotic prescribing, further raising concern for the potential for more, can the Board of Medicine to query the Iowa (and potentially other State's) PMP by provider to identify other potentially at risk patients (if any)? The hospital would like to offer medical/surgical and pain management services to those patients.

(Confidential App. 18; Confidential App. 22). Such statements are clearly libel per se. As explained by this Court in *Barreca,* even where libel per se is found, the law affords defendants privileges because:

> [s]ometimes one is justified in communicating to others, without liability, defamatory information.... The law recognizes certain situations may arise in which a person, in order to protect his own interests or the interests of others, must make statements about another which are indeed libelous. When this happens, the statement is said to be privileged, which simply means no liability attaches to its publication.

Barreca, 683 N.W.2d at 117. However, "a qualified privilege is a defeasible immunity from liability; that is, a qualified privilege may be defeated under certain circumstances. [citation omitted] A qualified privilege is lost when it is abused. For example, abuse occurs when a defamatory statement is published with 'actual malice.'" *Id*.

In short, the record supports a finding of libel per se. Even where libel per se is presumed, Iowa Code § 272C.8(1)(b) and Iowa Administrative Code § 653-24.1(3) provide a qualified privilege to persons making reports to the IBM. That privilege may be lost when a defamatory statement is published with "actual malice." The District Court properly found a fact question on actual malice for the jury. As the District Court stated:

> It may be that the hospital administrator was reasonably relying upon information which she thought to be credible and accurate and that her motivation was only the health, safety and welfare of the patients in the hospital. On the other hand, the hospital administrator is alleged to

> have told Doctor Andrew she thought he was overpaid and then insisted on modifications to his pay and his duties because she thought he was not productive enough. It appears that Doctor Andrew believes that the hospital administrator was a vindictive bean counter who was looking for a quick and dirty method of pruning the hospital staff. The truth may be somewhere in the middle and the Court FINDS it is for the jury to decide the good faith and lack of malice of the hospital administrator.

(App. 21).

Where defamation is asserted against a non-media defendant Iowa's legislature has provided a framework which allows both libel per se presumptions and qualified immunity. This Court should reject VDMC's invitation to disturb that framework here.

C. The District Court Properly Found That Issues of Good Faith and Malice Are Fact Questions for the Jury

VDMC asserts that the District Court improperly applied a "good faith" standard. Specifically the District Court held:

> Neither the state nor the federal laws cited by the defense provide absolute immunity. The state statute protects statements made in good faith. The federal statute cited does not protect statements maliciously made. The Court FINDS that the issues of good faith and malice are fact questions for the jury.

(App. 20).

VDMC is correct that because it has asserted a qualified privilege Dr. Andrew is required to prove VDMC acted with actual malice – i.e. a reckless disregard for the truth or falsity of the statement. In *McCarney v. Des*

Moines Register & Tribune Co., 239 N.W.2d 152, 156 (Iowa 1976) the Iowa Supreme Court explained what constitutes reckless disregard:

> "Reckless disregard" has been held to mean a "high degree of awareness of probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 216, 13 L.Ed.2d 125, 133 (1964). It has also been said some suspicion as to the falsity of the statement must be shown to establish "reckless disregard." *Time, Inc. v. McLaney*, 406 F.2d 565, 573 (5th Cir.), cert. denied 395 U.S. 922, 89 S.Ct. 1776, 23 L.Ed.2d 239 (1969). "Serious doubt" as to the truth of the statements published was required in the case of *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262, 267 (1968), where the court said:
>
> > "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."
>
> See *Time, Inc. v. Pape*, 401 U.S. 279, 291—292, 91 S.Ct. 633, 640, 28 L.Ed.2d 45, 54—55 (1971), Rehearing denied 401 U.S. 1015, 91 S.Ct. 1248, 28 L.Ed.2d 552; See also Annot. 20 A.L.R.3d 988 (1969), and Restatement (Second) of Torts, s 580A, Comment d (Tentative Draft #21, 1975).

As the Iowa Court of Appeals elaborated in *Kelly v. Iowa State Educ. Ass'n*, 372 N.W.2d 288, 296–97 (Iowa Ct. App. 1985):

> It is clear, then, that the test of actual malice focuses on the state of mind of the defendant at the time the statement was made. Thus, negligent publication of a false defamatory statement is not actionable when the defendant was acting under the mistaken belief that the statement was true. (citation omitted). The defendant, however, cannot "automatically insure a favorable verdict by testifying that he published with a belief that the statements were true." *St. Amant v. Thompson*, 390 U.S. 727, 732, 88 S.Ct. 1323, 1326, 20 L.Ed.2d 262, 267 (1968).

> ***The finder of fact must determine whether the publication was indeed made in good faith***. ***Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call.*** Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. *Id*., 390 U.S. at 732, 88 S.Ct. at 1326, 20 L.Ed.2d at 267–68 (footnote omitted).

Id.

Contrary to the allegations made in the IBM reports, there is no evidence whatsoever to support the idea that Dr. Andrew was using prescription drugs illegally or colluding with his patient to sell drugs illegally. Dr. Altman's testified that he encouraged Lori Rathbun to slow down and use the peer review process because none of the doctors who were involved were surgeons so it was not entirely clear if a standard had been violated at all. (App. 148, p. 61, ln. 3-8; App. 149 p. 65, ln. 15-25). In the face of those doubts, VDMC proceed with the IBM reports accusing Dr. Andrew of overprescribing and illegally distributing narcotics. Dr. Altman's report to the IBM went so far beyond what any investigation may or may not have revealed that it gives rise to a question of recklessness.

The court's finding that there is a fact question to be answered by the jury on whether the reports to the IBM were made in good faith was a

correct statement of the law and Dr. Andrew should be allowed to proceed to a jury on his claim.

D. Dr. Altman's statements to the IBM were not "opinions."

VDMC next urges that Dr. Altman's statements to the IBM were "opinions" and that the district court failed to rule on this defense.

1. VDMC did not preserve error on its opinion defense

It is true that the District Court did not expressly rule on VDMC's opinion defense. As such, VDMC failed to preserve error on this issue and it may not be decided for the first time by this Court.

A party ordinarily must raise an issue and the district court must rule on that issue to ensure preservation for appellate review. *See Duck Creek Tire Serv., Inc. v. Goodyear Corners, L.C.*, 796 N.W.2d 886, 892 (Iowa 2011). Where there are alternative claims or defenses, and the district court does not rule on all alternative claims or defenses, the losing party must file a motion to preserve error on the claims or defenses not ruled on. *See Stammeyer v. Div. of Narcotics Enf't*, 721 N.W.2d 541, 548 (Iowa 2006). Following receipt of the District Court's Ruling, VDMC did not alert the District Court to the fact that it did not rule upon its "opinion" defense. As such, it has not preserved error on this issue.

2. Dr. Altman's Statements Were Not "opinions"

Neither Iowa law nor Dr. Altman's statements are so narrow as to require the exclusion of Dr. Altman's reports as opinions. As explained in *Yates v. Iowa West Racing Ass'n*, 721 N.W.2d 762 (Iowa 2006), the analysis to be applied in determining if a statement is protected as opinion is:

> [W]hether an alleged defamatory statement can reasonably be interpreted as stating actual facts and whether those facts are capable of being proven true or false. Under this analysis, 'statements of opinion can be actionable if they imply a provable false fact, or rely upon stated facts that are provably false."

I*d*. (quoting *Moldea v. New York Times Co*., 22 F.3d 310, 313 (D.C.Cir.1994). Contrary to the VDMC's assertion, Iowa courts have made clear that the form of the language used is not controlling. There may be defamation by means of a question, an indirect insinuation, an expression of belief or opinion, or sarcasm or irony. *See Kelly*, 372 N.W.2d at 295. As such, the fact that Dr. Altman couched his statements in question form or used the word "appears" is not determinative of whether the statements to the IBM are protected opinion.

Instead the court looks to (1) whether the alleged defamatory statement has a precise core of meaning for which a consensus of understanding exists, or conversely whether the statement is indefinite and ambiguous, (2) the degree to which the alleged defamatory statements are objectively capable of proof or disproof, (3) the context in which the alleged

defamatory statement occurs and (4) the broader social context into which the alleged defamatory statement fits. *Yates*, 721 N.W.2d at 770.

As to the first two elements, this Court has previously noted that "A good example of a statement with a well-defined meaning is an accusation of a crime. *Id.* at 773 (*citing Cianci v. New Times Publ'g Co*., 639 F.2d 54, 63 (2d Cir.1980)(holding that an article that implied a mayor had committed rape and that charged him with paying the alleged victim not to bring charges was not protected opinion)). Clearly, an accusation of a crime is laden with factual content and the facts are easily verifiable."

The gist of Dr. Altman's assertions to the IBM - that the volume of narcotic prescribing was excessive and that Dr. Andrew was colluding with the patient for self-use, dealing and/or distribution - are assertions that can be, and have been, proven false. They are not protected opinions as Iowa Courts have defined them.

VDMC believes that the literary context (i.e. the confidential nature of the reports and the statutory reporting requirements by other licensees) makes Dr. Altman's statements more likely to be opinion. Dr. Andrew respectfully disagrees.

First, of note is the fact that Dr. Altman was not an Iowa Medical Board Licensee nor a surgeon. Second, although the report was confidential,

Dr. Andrew in his efforts to find new employment was required to disclose the reports to potential employers, including the allegations made by VDMC, something VDMC should have anticipated. Finally, a report to the IBM is required when a licensee has knowledge that another licensee may have engaged in wrongful acts or omissions that are grounds for license revocation or suspension. There was no evidence whatsoever to support an allegation that Dr. Andrew's volume of narcotic prescribing was excessive or that he was colluding with his patient to use or sell prescription drugs. The gist of the IBM report was VDMC's verifiable and unfounded allegations of criminal conduct. It is not protected opinion.

E. VDMC is not entitled to immunity pursuant to 42 U.S.C. 11137 because VDMC did not engage in a "professional review activity" before making its report to the NPDB

Finally, VDMC complains that the District Court *sua sponte* raised the question of whether the Health Care Quality Improvement Act's (HCQIA) notice and hearing requirements may serve as a defense to VDMC's assertion of statutory immunity for its report to the NPDB. The district court stated, "In the context of defamation and libel per se and a claim of statutory immunity, the lack of notice and hearing may be an issue. The court is unable to say as a matter of law that the defense is entitled to summary judgment on either Count III or Count IV." (App. 21).

District courts are permitted under certain circumstances to raise issues and take action *sua sponte* and VDMC has not cited any authority that the district court went beyond its authority in questioning the applicability of the HCQIA's notice and hearing provisions. *See 99 Down Payment, Inc. v. Garard*, 592 N.W.2d 691 (Iowa 1999). Instead, the District Court was correct that the HCQIA grants limited immunity to those who take part in hospital peer review activities and that a failure to provide a physician with adequate notice and fair procedures precludes immunity under the HCQIA. *Sugarbaker v. SSM Health Care*, 190 F.3d 905, 915 (8th Cir. 1999).

"Consistent with the congressional goal of encouraging medical peer review, the HCQIA establishes a rebuttable presumption of immunity. See 42 U.S.C. § 11112(a). This "rebuttable presumption of § 11112(a) creates a somewhat unusual [summary judgment] standard." *Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir.1992). A court should ask whether a fact-finder viewing the evidence most favorably to the plaintiff doctor reasonably could find by a preponderance of the evidence that at least one statutory requirement was not met. *See Singh v. Blue Cross/Blue Shield of Massachusetts, Inc.*, 308 F.3d 25, 32 (1st Cir.2002). If so, defendants are not entitled to summary judgment. *See Peper v. St. Mary's Hosp. & Med. Ctr.*, 207 P.3d 881, 888 (Colo. Ct. App. 2008).

42 U.S.C. § 11112(a) sets forth the requirement that a professional review action be taken to invoke the protection set forth in the Act. The term "professional review action" is defined:

> (9) The term "professional review action" means **an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity,** which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action. In this chapter, an action is not considered to be based on the competence or professional conduct of a physician if the action is primarily based on:
>
> (A) the physician's association, or lack of association, with a professional society or association,
> (B) the physician's fees or the physician's advertising or engaging in other competitive acts intended to solicit or retain business,
> (C) the physician's participation in prepaid group health plans, salaried employment, or any other manner of delivering health services whether on a fee-for-service or other basis,
> (D) a physician's association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with, a member or members of a particular class of health care practitioner or professional, or
> (E) any other matter that does not relate to the competence or professional conduct of a physician.

42 U.S.C. § 11151(9) (emphasis added). "Professional review activity" and "professional review body" are also defined terms by the act, specifically:

> (10) The term "professional review activity" means an activity of a health care entity with respect to an individual physician--

> (A) **to determine whether the physician may have clinical privileges with respect to, or membership in, the entity,**
> (B) to determine the scope or conditions of such privileges or membership, or
> (C) to change or modify such privileges or membership.
>
> (11) The term "professional review body" means a health care entity and the governing body or any committee of a health care entity **which conducts professional review activity,** and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity.

42 U.S.C. § 11151(10) and (11).

VDMC did not provide notice nor a hearing to Dr. Andrew as required by 42 U.S.C. 11112(a)(3) as it did not engage its peer review committee in a peer review and, as such, no reporting requirement to the NPDB was triggered nor are the provisions of 42 U.S.C. § 11137 applicable. *See Brandner v. Providence Health & Services-Washington*, 394 P.3d 581 (Alaska 2017)(noting that federal courts have granted hospitals immunity under the Act only when they clearly establish that a "full and fair peer review process was used" in connection with denying hospital privileges to a physician."); *Peper*, 207 P.3d at 888-889 ("[I]n order for defendants to obtain statutory immunity, the HCQIA required that they accord statutory due process to Dr. Peper.").

VDMC has taken the position that Dr. Andrew's termination was an administrative decision. By the terms of his employment contract, his

clinical privileges terminated at the time his employment was terminated. (See letter of termination). The hospital's "professional review body" did not engage in a "professional review activity." If it had, and had it taken a "professional review action" then Dr. Andrew would have no ability to complain that the report to the NPDB was inappropriate without more, but VDMC, by way of its CEO Lori Rathbun, chose not to take such a route. Instead, as set forth in the notice of termination letter, her decision to terminate Dr. Andrew was "administrative" and therefore Dr. Andrew's clinical privileges were terminated by way of the contract, not by way of a professional review action, and a report to the NPDB was not triggered.

VDMC is correct in its assertion that Dr. Andrew did not raise the procedural requirements of the HCQIA in his summary judgment resistance. His failure to do so, however, as explained by VDMC results in VDMC being in the same position it would have been otherwise, with Dr. Andrew asserting that VDMC acted with actual malice, a question clearly for the jury. The district court correctly found that VDMC was not entitled to summary judgment on its immunity defense for its report to the NPDB.

II. THE DISTRICT COURT PROPERLY DENIED VDMC'S MOTION FOR SUMMARY JUDGMENT ON THE IOWA WAGE PAYMENT COLLECTION ACT

A. Error Preservation and Standard of Review

Dr. Andrew is in agreement that VDMC properly preserved error on its IWPCA argument and that it properly set forth the standard of review.

B. Dr. Andrew's 90 days of compensation provided under Section 9(a) of the Agreement constitutes "wages" under the Iowa Wage Payment Collection Act ("IWPCA").

If a jury finds that VDMC terminated Dr. Andrew "without cause" then Dr. Andrew is entitled to 90 days of compensation as set forth in Section 9(a) of the Agreement. Under Section 9(a), VDMC was required to provide Dr. Andrew a 90-day notice prior to his termination. By terminating Dr. Andrew without cause and without providing the 90-day notice or the compensation due thereunder, VDMC has breached the Agreement. If VDMC had given notice, however, Section 9(a) provided it with two options: (1) permit Dr. Andrew to continue performing his duties as a Physician during the notice period or (2) relieve Dr. Andrew of his duties during the notice period. In either scenario, Section 9(a) provided that Dr. Andrew would be paid for 90 days of compensation, maintain his eligibility for employee benefits, and a prorated bonus. *See* Agreement, Section 9(a). The legal question for the Court to decide is this: Do the 90 days of compensation provided to Dr. Andrew under Section 9(a) of the Agreement constitute "wages" under the IWPCA, or not?

VDMC contends that this compensation is not "wages." VDMC argues that *McClure v. Int'l Livestock Imp. Services Corp.* controls this case and Dr. Andrew's IWPCA claim must be dismissed. As discussed in more detail below, if the jury finds that VDMC would have relieved Dr. Andrew of his duties during the notice period, then Dr. Andrew satisfied all conditions precedent necessary for payment of the 90 days of compensation provided under Section 9(a) of the Agreement, and thus, this amount constitutes "wages" under the IWPCA.

The present case is not *McClure*. In *McClure*, the plaintiff agreed to exchange his labor for the employer if the employer promised to provide a 30-day notice of termination in the event the it decided to terminate plaintiff's employment. *See McClure v. Int'l Livestock Imp. Services Corp.*, 369 N.W.2d 801, 802 (Iowa 1985). When the employer terminated the plaintiff without providing the agreed-upon notice, the plaintiff sued for breach of contract and violation of the IWPCA, alleging 30 days of future lost wages as damages. *Id.* at 802–803. The district court awarded $2500.00 in contract damages, and $2500.00 in liquidated damages and attorneys' fees as provided under the IWPCA. *Id.* at 803. The Court dismissed the plaintiff's IWPCA claim on the basis that the plaintiff had not been denied compensation for labor or services rendered at the time of his termination.

Id. at 805. In other words, at the time the plaintiff was terminated, no wages were then "due and owing" because the plaintiff had been paid for all the work that he had performed up to that point—he had been paid for all the work that he had performed. Consequently, the Court limited plaintiff's damages to the amount of wages he could have earned during the 30-day notice period, the opportunity that was denied to him by the employer's breach of the notice provision. *Id.*

In this case, *McClure* only applies if the jury finds that VDMC would have permitted Dr. Andrew to continue in his work as a Physician during the notice period. If a jury makes such a finding then VDMC's breach of the notice provision denied Dr. Andrew the opportunity to earn 90 days of additional compensation. In this scenario, as in *McClure*, Dr. Andrew has no damages under IWPCA because he would not have been denied any wages for labor or services rendered at the time of his termination. In other words, if a jury determines that VDMC would have permitted Dr. Andrew to continue work during the notice period then his additional work is a condition precedent to additional compensation.

However, if the jury finds that VDMC would have relieved Dr. Andrew of his duties during the notice period, then the 90 days of compensation becomes immediately due and owing because it *would not* be

conditioned upon the performance of future labor or services. Put differently, if VDMC relieved Dr. Andrew of his duties, then Dr. Andrew immediately satisfies all conditions precedent under Section 9(a) to entitle him to the 90 days of compensation for labor and services *already rendered*. This is the key distinguishing and substantive difference between the present case and *McClure*. Whereas the *McClure* plaintiff's wages were conditioned upon future labor or services, Dr. Andrew's compensation is earned as soon as VDMC relieves him of any future performance.

Accordingly, if a jury finds that VDMC would have relieved Dr. Andrew of his duties under Section 9(a) of the Agreement, then the 90 days of compensation would have become immediately due and owing.

Dr. Andrew's compensation can be viewed simply as compensation "owed" or "severance." As noted by Court in *McClure*, the IWPCA "does not speak in the future tense; on the contrary, wages means compensation 'owed,' for services 'rendered,' and includes payments for vacation, etc. which are 'due'" *Id.* at 804. Thus, if a jury determines VDMC would have relieved Dr. Andrew of his duties, then his compensation under Section 9(a) would have become immediately "owed" because all conditions to earn the compensation would have been met at the moment. This broad interpretation of wages "owed" also fits squarely within the spirit of the law as the IWPCA

is a remedial statute that is to be "liberally construed" in favor of the employee. *See Hornby v. State*, 559 N.W.2d 23, 25 (Iowa 1997).

The Court might also construe Dr. Andrew's 90 days of compensation as "severance," as it is clearly "an amount which is granted at contract termination on account of past services . . . ." *Id.* at 805; *see also* Iowa Code §91A.2(7)(b) (defining "wages" as "vacation, holiday, sick leave, and severance payments which are due an employee under an agreement with the employer or under a policy of the employer.").[3] Although Dr. Andrew would have remained a VDMC employee during the notice period, his status as an "employee" places form over substance. If relieved of his duties then Dr. Andrew would not have been required to come to work, perform any duties, or prevented from seeking additional employment during the notice period. For all intents and purposes, the compensation provided under Section 9(a) resulting from relieving Dr. Andrew from his duties is "severance" because

[3] The general attributes of severance pay clauses discussed by the Court in *McClure* should be treated as dicta and not as providing a judicially-created definition of "severance pay" by which Section 9(a) of Dr. Andrew's employment contract should be analyzed. Nothing in the IWPCA requires a severance pay provision to be predicated upon the employee's length of employment for an employer. Rather, the Court's opinion in *McClure* should be read merely as describing what was "usually" typical of severance pay clauses 35 years ago and not black letter law. *See McClure*, 369 N.W.2d at 804–05. Indeed, Iowa cases provide examples of severance pay clauses that are not predicated on length of service. *See, e.g.*, *Bradshaw v. Cedar Rapids Airport Commission*, 903 N.W.2d 355, 358 (Iowa Ct. App. 2017) (severance clause not predicated on length of service); *Willets v. City of Creston*, 433 N.W.2d 58. 62 (Iowa Ct. App. 1988). For example, in *Willets v. City of Creston*, the Iowa Court of Appeals noted that, in a previous case, it had "characterized 'reimbursement of unused sick leave in a lump sum cash payment upon termination of employment' as a form of severance pay to be paid upon an employee leaving employment. We determined such *a payment is triggered by termination of the employment relationship, and not by the rendering of primary or additional service*." 433 N.W.2d 58, 62 (Iowa Ct. App. 1988) (emphasis added) (citing *Staff Ass'n v. Public Emp. Rel. Bd.*, 373 N.W.2d 516, 518 (Iowa Ct. App. 1985)). This is the better measure by which a contractual provision for payment to an employee following termination should be construed as "severance."

it is a contractual payment triggered by his termination. *See* BLACK'S LAW DICTIONARY (2014 ed.) (defining "severance" as "Money (apart from back wages or salary) that an employer pays to a dismissed employee.").

For these reasons the Court should uphold the district court's ruling denying VDMC's motion for summary judgment on Dr. Andrew's IWPCA claim because the compensation owed to Dr. Andrew under Section 9(a) is "wages" for purposes of the IWPCA.

CONCLUSION

For all of the foregoing reasons, the district court's ruling should be affirmed and the case remanded for trial.

REQUEST FOR NON-ORAL SUBMISSION

The Appellee believes this case can be decided on the briefs without the assistance of oral argument. However, if oral argument is granted, the Appellee request the opportunity to be heard.

CERTIFICATE OF FILING

I hereby certify I filed the foregoing Proof Brief by EDMS to the Clerk of the Iowa Supreme Court on the 15th day of June, 2020.

/s/ Laura N. Martino

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief is prepared in a proportionally spaced typeface using Word 2013 in Times New Roman 14 point and contains 8965 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: June 15, 2020

/s/ Laura N. Martino