IN THE SUPREME COURT OF IOWA

Supreme Court Case No. 20-1454
Story County Case No. LACV051186

RONALD HAMPTON, *Plaintiff-Appellant*

v.

MARTIN MARIETTA MATERIALS, INC.
AND DOUG ROBEY, *Defendants-Appellees.*

Appeal from the Iowa District for Story County
The Honorable James Ellefson

DEFENDANTS-APPELLEES' FINAL BRIEF

Mike Birrer
mbirrer@ccsb.com
Parker Graham
pgraham@ccsb.com
CARRINGTON, COLEMAN,
SLOMAN & BLUMENTHAL, LLP
901 Main Street, Suite 5500
Dallas, Texas 75202
Phone: (214) 855-3350
Fax: (214) 580-2641

Jaki Samuelson
samuelson@whitfieldlaw.com
WHITFIELD & EDDY, P.L.C.
699 Walnut Street, Suite 2000
Des Moines, Iowa 50309
Phone: (515) 288-6041
Fax: (515) 246-1474

Attorneys for Appellees

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ROUTING STATEMENT

Defendants respectfully submit that the Supreme Court should retain this case. The parties' disagreement about the causation standard for retaliation claims under the Iowa Civil Rights Act, and about this Court's prior opinions, should be addressed by the Supreme Court under the criteria of Iowa Rule of Appellate Procedure 6.1101(2).

STATEMENT OF THE CASE

Martin Marietta terminated Ronald Hampton's employment because an independent investigation concluded that he violated a zero-tolerance safety policy. Hampton sued Martin Marietta and Plant Manager Doug Robey under five different theories, before eventually settling on retaliation under the Iowa Civil Rights Act. After seventeen months of discovery, Defendants moved for summary judgment. The District Court granted Defendants' motion. Hampton appealed.

STATEMENT OF FACTS

1. Scope of facts addressed.

Rather than stating "the facts relevant to the issues presented for review," IOWA. R. APP. P. 6.903(2)(f), Hampton overloaded his brief with assertions that are immaterial and needlessly salacious.[1] As the Court knows, summary judgment weeds out "paper cases" and concerns only specific material facts supported by competent evidence. *Slaughter v. Des Moines Univ.*, 925 N.W.2d 793, 808 (Iowa 2019). Defendants will stick to the relevant facts.

2. Supervisors must follow and enforce safety rules.

Ron Hampton was a foreman at Martin Marietta's Ames Mine, where he supervised roughly 25 employees. Hampton Dep. 18:5-2 (App. 53), 22:3-5 (App. 54), 50:20-22 (App. 61). As a supervisor,

[1] Among many examples, Hampton details offensive statements Justin Marshall purportedly made about another employee's genitalia, which are not germane to any issue on appeal. *Compare* Hampton's Brief at 12 (cataloging Marshall's offensive comments) *with* Hampton's Brief at 25 (stating the protected-activity element is not at issue). What is more, Hampton stressed in his deposition: "I didn't hear Justin [Marshall] say anything inappropriate on the radio or anything." Hampton Dep. 272:14-16 (App. 116).

Hampton's key job duties included strictly following and enforcing safety rules. *Id.* 20:25-22:23 (App. 53-54), 50:20-22 (App. 61). Hampton reported to Assistant Plant Manager Anson Flaspohler, who reported to Plant Manager Doug Robey. *Id.* 20:11-24 (App. 53).

3. Hampton agrees to the LOTO policy.

Martin Marietta strictly enforces safety rules. *Id.* 21:5-22:2 (App. 53). Among the most important is the Lockout/Tagout policy ("LOTO") that prevents an unintended energy release from electrocuting or crushing someone. *Id.* 29:9-30:7 (App. 55-56), 50:23-25 (App. 61), 61:21-62:8 (App. 63-64); Exs. 3 (App. 255-61) & 5 (App. 265-83). In short, when equipment needs to be fixed, the policy requires shutting off and locking a power source (lockout) and placing a "Do Not Operate" tag on the equipment (tagout) pending repair. Ex. 3 (App. 255-61).[2] "Only after ascertaining that the machine is ready to perform safely" can it be returned to service. Ex. 3 (App. 258). Anyone

[2] Unlike stationary equipment that is hard-wired to an electrical box, mobile equipment in need of repair requires only a tag, not a lock. Hampton Dep. 55:3-15 (App. 62); Ex. 3, p. 6 (App. 260).

who removes a tag is guaranteeing that the equipment is correctly repaired and ready for service. Hampton Dep. 64:23-65:8 (App. 64).

Hampton acknowledged twice, in writing, that he understood and agreed to the LOTO policy. *Id.* 37:14-38:12 (App. 57-58), 40:10-22 (App. 58); Ex. 4 (App. 262-64). Under the policy, apparent LOTO violations automatically trigger a Human Resources ("HR") investigation, and if that investigation concludes an employee clearly violated LOTO, he will be "immediately terminated." *Id.* 40:10-41:8 (App. 58), 47:8-14 (App. 60), 200:14-18 (App. 98); Ex. 4 (App. 262-64). Hampton agrees that if he violated LOTO he should have been immediately terminated. *Id.* 41:3-8 (App. 58).[3]

4. A government agency inspects the mine.

On August 8, 2018, Mine Safety and Health Administration ("MSHA") inspector Jeff Breon began a routine inspection of the mine. *Id.* 69:22-24 (App. 65), 73:11-16 (App. 66). Assistant Plant Manager Anson Flaspohler shadowed Breon throughout his inspection.

[3] Consistent with Martin Marietta's strict emphasis on safety, Iowa's codified public policy is to ensure workplace safety and to prevent workplace accidents. IOWA CODE § 88.1. Federal law likewise requires LOTO safeguards. *See, e.g.*, 30 C.F.R. 56.12016.

Flaspohler Dep. 140:9-18 (App. 179). During the inspection, Lead Person Jason Reifschnider noticed a plug had come loose from a welder's power cord. Hampton Dep. 80:7-12 (App. 68), 91:1-92:13 (App. 71), 95:2-9 (App. 72). Reifschnider removed the welder from service by attaching his "Do Not Operate" tag. *Id.* (App. 72).

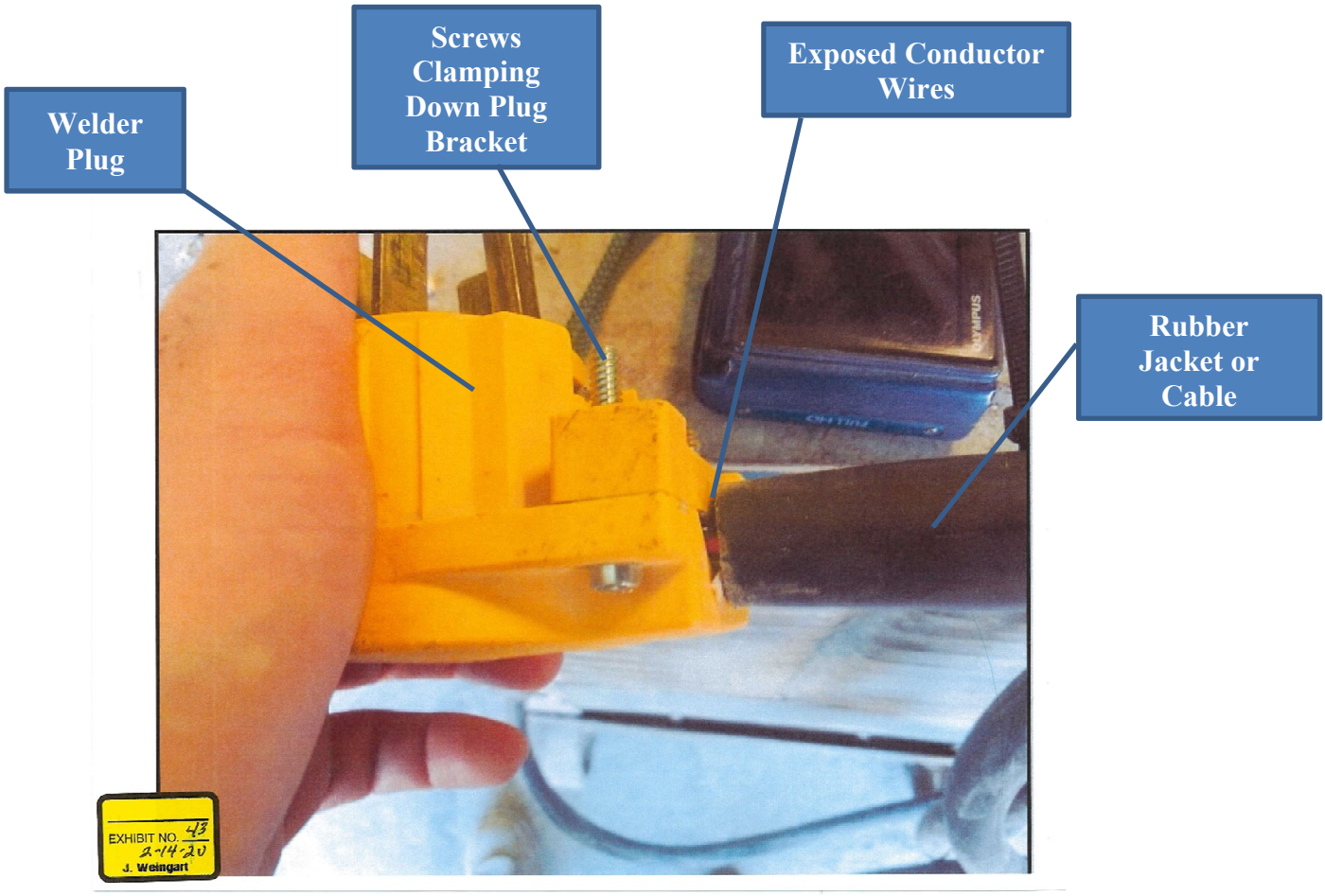
5. Hampton works on the welder and removes the tag.

This case centers on August 9, 2018—day two of MSHA's inspection. Hampton Dep. 73:11-16 (App. 66), 78:24-79:2 (App. 68); Flaspohler Dep. 139:16-21 (App. 179). When Hampton arrived that morning, he wanted to use the tagged-out welder. Hampton Dep. 88:5-15 (App. 70), 119:20-120:2 (App. 78). Deciding to fix the welder himself, Hampton tightened the screws on the plug and untagged the welder, putting it back into service. Hampton Dep. 88:5-23 (App. 70), 163:25-166:8 (App. 89-90). MSHA and HR would later conclude that Hampton's attempted repair created an extremely dangerous safety hazard.

6. The inspector cites Martin Marietta.

Shortly after Hampton untagged the welder, the MSHA inspector spotted the untagged welder with an improperly repaired

plug and cited Martin Marietta. Flaspohler Dep. 142:4-11 (App. 180), 142:16-19 (App. 180); Ex. 7 (App. 284). Flaspohler photographed the plug when MSHA issued the citation. Flaspohler Dep. 197:20-198:4 (App. 181-182), 199:1-3 (App. 182); Ex. 31 (App. 301-07); *see also* Eller Dep. 23:5-25 (App. 147), 134:13-135:15 (App. 175); Ex. 43 (App. 321). Below is Flaspohler's photo, with captions added showing the terms used throughout the depositions and exhibits summarized below. Eller Dep. 23:5-21 (App. 147), 134:13-18 (App. 175); Ex. 43 (App. 321):



According to MSHA's citation:

> The 480 volt electrical cable for the miller welder located in the top side shop had exposed conductor wires. The cable had pulled free from male plug in thus exposing the conductor wires. When this condition was found instead of reinserting the cable into the securing bracket of this plug . . . [t]he securing bracket was tighten[ed] down onto the conductor wires . . . . This condition exposes a miner to the hazard of accidental contact with 480 volt electrical current, resulting in a serious/ fatal injury.

Ex. 7 (App. 284)

In other words, properly fixing the plug required inserting the thick rubber jacket surrounding the wires into the plug bracket before tightening the screws. Eller Dep. 25:17-26:22 (App. 147-48). When the rubber jacket is properly inserted, the screws cannot be completely screwed down because the jacket is so thick, there will be visible gaps in the plug bracket. Hampton Dep. 121:6-122:13 (App. 78-79). MSHA determined that the plug had been tightened directly onto the exposed 480v wires (which are much more powerful than an ordinary electrical cord) and outside the rubber jacket, creating a potentially fatal safety hazard. Hampton Dep. 93:9-94:11 (App. 71-72); Ex. 7 (App. 284).

On the morning of August 9, Plant Manager Doug Robey was at the State Fair. Hampton Dep. 79:23-80:3 (App. 68); Robey Dep. 133:7-21 (App. 217). Hampton admits that Robey had nothing to do with the events that morning, *i.e.*, the LOTO violation and the MSHA citation. Hampton Dep. 174:21-175:3 (App. 92).

7. The citation triggers an independent investigation.

Under Martin Marietta's LOTO policy, the MSHA citation automatically triggered an HR investigation. *Id.* 47:8-14 (App. 60), 200:14-22 (App. 98). HR Director Tom Nelson selected Midwest Division Safety Manager Barrett Eller to investigate. Eller Dep. 7:8-8:22 (App. 143), 10:4-20 (App. 144); Ex. 40 (App. 308-09). Nelson and Eller worked in Des Moines, and Nelson reported to an HR employee at company headquarters in North Carolina. *Id.* (App. 308-09). The HR chain of command did not include Doug Robey or anyone else at the Ames Mine. *Id.* (App. 308-09).

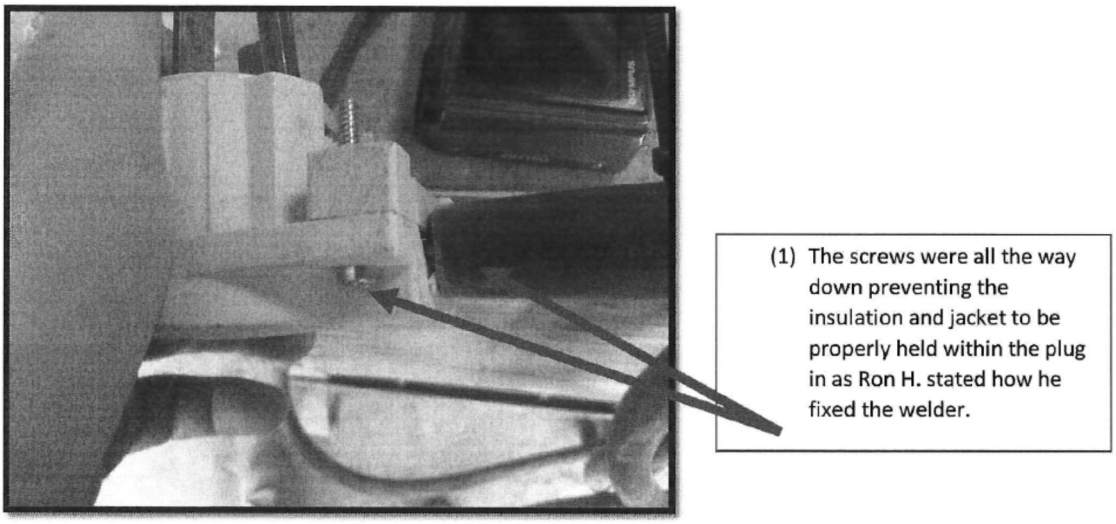
Starting on Friday, August 10, Eller investigated the MSHA citation at the mine. Eller Dep. 20:21-22:5 (App. 146-47); Ex. 42 (App. 310-20). On that first day, Eller interviewed Hampton and initially accepted his assertion that he properly repaired the loose plug. Ex. 42

(App. 310-20). Based on his initial interviews (including Hampton's statement), Eller prepared a preliminary draft report indicating that it appeared Hampton had not violated LOTO, but also noting that the investigation was ongoing. Eller Dep. 15:2-19:16 (App. 145-46).

8. New evidence changes Eller's initial conclusions.

On Monday, August 13, new evidence caused Eller to discount Hampton's statement: (1) an interview with Anson Flaspohler, who insisted Hampton did not properly repair the plug because he screwed the bracket directly onto exposed wires, without the rubber jacket; and (2) a corroborating photo that Flaspohler took precisely when MSHA issued the citation. Eller Dep. 26:24-28:16 (App. 148); Ex. 42 (App. 318-20). Eller considered the photo so critical that he pasted it into his final investigation report with his own commentary in the box with arrows. Ex. 42 (App. 319):

(Below is the picture of the cord as it was found)

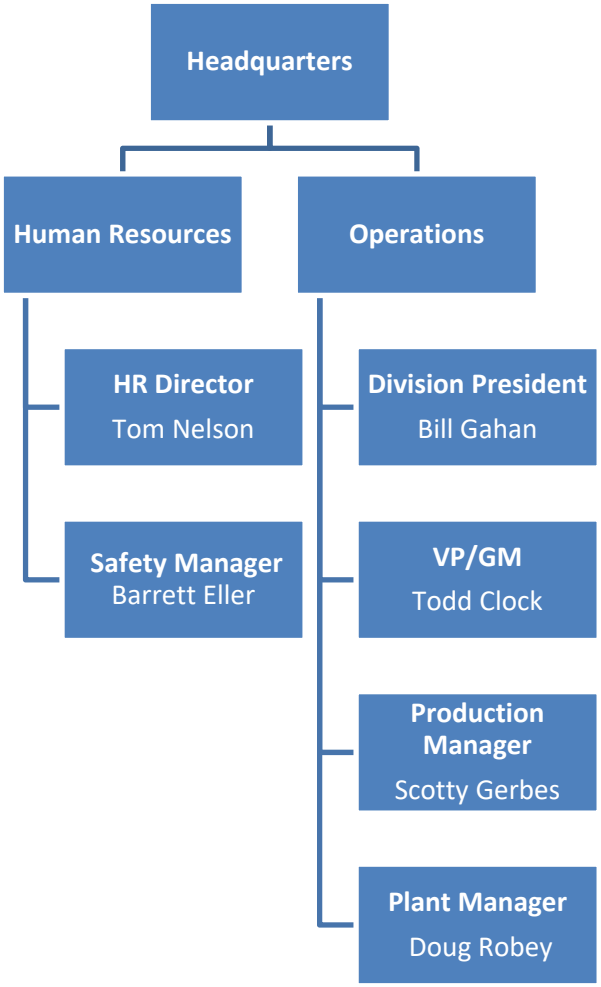


Based on his complete investigation, Eller concluded that Hampton screwed the plug onto the exposed conductor wires, without properly inserting the rubber jacket. Eller Dep. 25:3-26:13 (App. 147), 37:16-38:5 (App. 150-151); Ex. 42 (App. 319-20).[4] In short, Eller ultimately concluded that Hampton's interview statement was not credible, and that Hampton violated the LOTO policy by pulling the tag without properly fixing the welder. Eller Dep. 28:11-16 (App. 148), 33:3-10 (App. 149); Ex. 42 (App. 319-20).

[4] MSHA had reached the same conclusion about the repair. Ex. 7 (App. 284). And Hampton's own sworn statement to the Iowa Civil Rights Commission likewise matched the safety violation that the MSHA investigation found. Hampton Dep. 164:2-166:8 (App. 89-90).

9. The independent investigation causes termination.

For reference, before explaining the termination decision, this is the basic chain of command[5]:



[5] Eller Dep. 7:8-8:22 (App. 143); Gahan Dep. 11:8-13 (App. 194), 11:21-12:1 (App. 194); Gerbes Dep. 8:5-6 (App. 207), 9:1-6 (App. 207); Robey Dep 15:16-17 (App. 403); Hampton Dep. 20:11-14 (App. 53), 189:21-190:9 (App. 95-96), 234:23-24 (App. 107).

Eller submitted his final report to HR Director Tom Nelson. Eller Dep. 33:3-10 (App. 149); Ex. 42 (App. 310-20). Nelson sent Eller's report to Division President Bill Gahan and VP / GM Todd Clock, and said, "I believe Ron Hampton needs to be terminated . . ." Nelson Dep. 34:2-35:9 (App. 189); Ex. 31 (App. 301-07); *see also* Ex. 42 (App. 310-20). Gahan and Clock reviewed Eller's final report and approved the termination. Gahan Dep. 12:21-24 (App. 194), 23:5-8 (App. 195), 46:14-16 (App. 197), 48:4-8 (App. 197); Clock Dep. 60:3-61:11 (App. 202), 69:14-70:6 (App. 203-04); Ex. 31 (App. 301-07); Ex. 42 (App. 310-20). When consulted, Plant Manager Doug Robey did not mention termination, saying instead: "follow the policy. If it's lockout/tagout/tryout issue, then we need to follow the policy." Robey Dep. 181:20-182:3 (App. 218-19).

Martin Marietta terminated Hampton's employment based on the LOTO investigation's conclusions. Hampton Dep. 42:2-17 (App. 59); Nelson Dep. 34:2-13 (App. 189); Ex. 31 (App. 301-07). As Hampton admitted in his deposition, "[t]hat's why they fired me." Hampton Dep. 42:2-17 (App. 59).

10. Hampton sues Defendants for five different reasons.

In 2019, Hampton sued Martin Marietta and Plant Manager Doug Robey, claiming the LOTO investigation was not the real reason for the termination, but rather an elaborate set-up orchestrated by Robey. *See* Third Am. Pet. (App. 3-11). Why? According to Hampton, Martin Marietta secretly harbored illegal animus for ***five*** separate reasons.[6] After exploring and abandoning four of his five theories, Hampton settled on retaliation stemming from the Justin Marshall investigation as the real reason for his termination. *See* Pl.'s Notice of Dismissal (App. 12).

11. Hampton's current theory

According to Hampton's eventual theory of the case (despite his contrary deposition testimony), Martin Marietta actually terminated his employment because of another investigation five months earlier. The prior investigation, conducted by HR Manager Jeff Bizal,

[6] Hampton originally alleged that Martin Marietta terminated him for (1) suffering workplace injuries; (2) reporting workplace injuries; (3) pursuing workers' compensation benefits ***after*** termination; (4) suffering from PTSD, anxiety, and depression; and (5) participating in an earlier HR investigation. Third Am. Pet. ¶¶ 60, 67, 77 (App. 8-10).

concerned harassment complaints against then-employee Justin Marshall. Bizal Dep. 6:16-17 (App. 223), 25:7-9 (App. 224). Hampton did not contact HR about Marshall or claim that Marshall harassed him. Hampton Dep. 268:18-269:24 (App. 115); Bizal Dep. 27:9-22 (App. 225). Nor did Hampton have personal knowledge about any alleged harassment, as he put it: "I didn't hear Justin [Marshall] say anything inappropriate on the radio or anything. It was just one day they come up and said all this stuff has been happening." Hampton Dep. 272:14-16 (App. 116). Hampton relayed the employee complaints to Flaspohler, who contacted HR. Hampton Dep. 268:18-269:24 (App. 15).

Based on his investigation, Bizal recommended terminating Marshall, Robey agreed, and Martin Marietta did so in March 2018. Robey Dep. 111:19-23 (App. 215), 113:25-114:3 (App. 215-16); Bizal Dep. 30:1-8 (App. 226); Gerbes Dep. 40:21-41:7 (App. 209); Third Am. Pet. ¶ 32 (App. 6). Hampton claims that his involvement in the Justin Marshall investigation was the real reason for his termination five months later.

12. The District Court grants summary judgment.

After seventeen months of discovery and thirteen depositions, Defendants moved for summary judgment on Hampton's only remaining claim for retaliation under the Iowa Civil Rights Act. *See* Defs.' Motion for Summary Judgment (App. 28-45). The District Court granted Defendants' motion. Order. (App. 475-87). Hampton appealed.

PRESERVATION FOR REVIEW

Defendants agree that the arguments Hampton raised in his summary judgment resistance were preserved for review. *See* Hampton's Summary Judgment Response. (App. 324-62). As noted in Section 3(d) below, Hampton's brief includes a new argument about alleged comparators that was not raised in the District Court, and therefore not preserved for review.

SCOPE AND STANDARD OF REVIEW

The Court reviews District Court orders on motions for summary judgment for correction of errors at law. *Homan v. Branstad*, 887 N.W.2d 153, 163 (Iowa 2016).

SUMMARY OF THE ARGUMENT

The Court should affirm for four reasons.

First, the District Court applied the correct legal standard. And Hampton's distinction between a "motivating" and "significant" factor is immaterial because his claim fails under both tests.

Second, the District Court correctly granted summary judgment under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden-shifting framework because there is no evidence that: (i) protected activity caused Hampton's termination or; (ii) Defendants' legitimate non-retaliatory reason was pretext.

Third, there are no genuine issues of material fact and Hampton's requested inferences stem from pure speculation.

Fourth, in addition to the reasons why Hampton's claim fails as to both Defendants, Defendant Robey is not individually liable because he did not control the termination decision.

ARGUMENT

1. **The District Court applied the correct legal standard**.

Pages 26 through 37 of Hampton's brief could distill to one point: "in discrimination and retaliation cases under ICRA," courts apply the

"motivating-factor standard in instructing ***the jury***." *Hawkins v. Grinnell Reg'l Med. Ctr.*, 929 N.W.2d 261, 272 (Iowa 2019) (emphasis added). According to Hampton, *Hawkins* required the trial court to determine whether retaliation was a ***motivating*** factor (sometimes called "played-a-part"), not a ***significant*** factor (sometimes called "determining" or "but-for"). Hampton's Brief at 25.

a. The motivating-factor test does not apply.

As this Court explained in *Hedlund*, *Hawkins* "did not disturb [this Court's] prior law as it applies to summary judgment." *Hedlund v. State*, 930 N.W.2d 707, 719 n.8 (Iowa 2019). The Eighth Circuit has rejected the same argument Hampton makes here because the "Iowa Supreme Court meant what it said" in *Hedlund. Couch v. Am. Bottling Co.*, 955 F.3d 1106, 1109-10 (8th Cir. 2020). Unable to distinguish *Hedlund* or *Couch*, Hampton ignores them, citing instead over twenty cases dating back to 1932. Hampton's Brief at 24-37. Setting aside Hampton's diversion into near-century-old law, *Hedlund* and *Couch* confirm the District Court applied the correct standard.[7]

[7] Also incorrect is Hampton's assertion that the District Court cited "the dissent in *Haskenhoff*." Hampton Brief at 27. The District Court

b. Hampton's claim fails under both tests.

Even if Hampton were correct, the distinction between "significant" and "motivating" makes no substantive difference here, especially because Hampton cannot show any connection between protected activity and termination, as explained below. *Johnson v. Mental Health Inst.*, 912 N.W.2d 855, 2018 WL 351601, at *8 (Iowa Ct. App. 2018) ("Whether considering either protected activity as a significant factor or a motivating factor, [plaintiff] has failed to show a causal connection . . . ").[8] No matter the distinction, this Court affirms "where any proper basis appears in the record for a trial court's judgment, even though it is not one upon which the court based its holding." *Grefe & Sidney v. Watters*, 525 N.W.2d 821, 826 (Iowa 1994).

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cited this Court's plurality opinion, as have many other cases. Order at 6 (App. 480).

[8] *See also Deboom v. Raining Rose, Inc.*, 772 N.W.2d 1, 12 (Iowa 2009) ("[appellant] concedes the substitution of 'determining' for 'motivating' alone would not, in itself, have been error . . ."); *Haskenhoff v. Homeland Energy Sols., LLC*, 897 N.W.2d 553, 634 (Iowa 2017) (Appel, J., concurring in part and dissenting in part) (finding no "great difference" between a substantial and motivating factor).

2. The District Court correctly granted summary judgment.

The District Court correctly granted summary judgment under the *McDonnell Douglas* three-step framework: (i) Hampton must first establish a prima facie case by showing a causal connection between protected activity and termination, then (ii) Defendants must state a legitimate non-retaliatory reason for termination, and (iii) Hampton must ultimately show the reason is merely pretext for retaliation. *McDonnell Douglas*, 411 U.S. at 807; *Johnson*, 2018 WL 351601, at *7. Hampton fails to establish both causation and pretext.

a. Hampton cannot prove causation.

Hampton cannot show that protected activity caused his termination five months after the fact. There is no evidence that any decisionmaker considered the Justin Marshall investigation when deciding to terminate Hampton. Instead, an independent investigation concluded that Hampton violated LOTO, which triggered his termination under the zero-tolerance LOTO policy. *See* Hampton Dep. 42:14-17 (App. 59). Those undisputed facts negate causation. *Johnson*, 2018 WL 351601, at *8 (affirming summary judgment and finding no

causal connection when investigation concluded employee violated policy); *Roberts v. Principi*, 283 F. App'x 325, 333 (6th Cir. 2008) ("[W]hen a decisionmaker makes a decision based on an independent investigation, any causal link between the subordinate's retaliatory animosity and the adverse action is severed.").

i. The undisputed evidence debunks Hampton's theory that Robey manipulated the investigation.

Knowing that the independent investigation defeats causation, Hampton argues that Barrett Eller's HR investigation was a sham secretly orchestrated by Doug Robey, the only person with alleged animus. Hampton Dep. 348:8-12 (App. 135); Hampton's Brief at 39-47. But there is no evidence supporting that conspiracy theory, which even Hampton rejected in his deposition:

Q: Are you claiming that Barrett Eller took any actions against you based on the fact that you had reported harassment issues?

A: No.

Q: Did you think that Barrett Eller in any shape, form, or fashion had any sort of axe to grind with you?

A: No.

Q: So as far [as] Martin Marietta picking somebody to conduct the investigation, Barrett Eller was an unbiased, reasonable, capable choice; correct?

A: Yes.

Q: And so you don't have any reason to contend that Barrett Eller could not fairly investigate whether you had violated LOTO; correct?

A: Correct.

Hampton Dep. 176:4-21 (App. 92). Another fact prevented Eller from retaliating based on the Marshall investigation: Eller had no idea there was a Marshall investigation. Eller Dep. 35:22-36:2 (App. 150); *Nieves v. Bartlett*, 139 S. Ct. 1715, 1728 (2019) (retaliation impossible without knowledge of protected activity).

As for Hampton's speculation that Robey manipulated Eller, Eller's undisputed testimony debunked that theory too:

Q: During your investigation, did you collect any evidence or testimony whatsoever from Doug Robey?

A: No.

Q: Did you collect any evidence or testimony whatsoever from Scotty Gerbes?

A: No.

Q: Did you consult with Mr. Robey or Mr. Gerbes about what your report should say?

A: No.

Q: If Doug or Scotty had come to you and tried to influence the content of your report, how would you have responded?

[Objection to speculation]

A: That I would not allow them to, you know, modify the report nor modify my decision at all.

Q: And why is that?

A: Because it was an independent investigation as a human resources or safety professional, your job is to go find facts.

Eller Dep. 33:11-34:8 (App. 149). HR Director Tom Nelson recommended termination based on Eller's report, not on any input from Robey. Nelson Dep. 34:2-13 (App. 189), 39:16-21 (App. 190); Ex. 31 (App. 301-07). Division President Bill Gahan and VP/GM Clock approved the termination decision based on Eller's final report. Gahan Dep. 46:14-16 (App. 197), 48:4-8 (App. 197); Clock Dep. 60:3-61:11 (App. 202), 69:14-70:6 (App. 203-04); Ex. 31 (App. 301-07); Ex. 42 (App. 310-20).

All that ultimately remains is Hampton's speculation that any discipline after the Marshall investigation must be retaliation.

Assuming "after this, because of this" does not create a fact issue on causation, especially because five months passed between protected activity and termination. *McClain v. Metabolife*, 401 F.3d 1233, 1243 (11th Cir. 2005); *Hlubek v. Pelecky*, 701 N.W.2d 93, 96 (Iowa 2005) ("Speculation is not sufficient to generate a genuine issue of fact.").

ii. Involvement does not show causation.

Purporting to quote *Staub v. Proctor Hospital*, 562 U.S. 411, 419-20 (2011), Hampton argues he need only show someone with unlawful intent was "closely involved" in the termination decision. Hampton's Brief at 39. But the quoted words do not appear in *Staub*. Nor did mere involvement by someone with animus prove causation in that case. Instead, a "cat's paw" theory requires showing the investigator "relie[d] on facts provided by the biased supervisor," meaning the employer "effectively delegated the factfinding portion of the investigation to the biased supervisor." *Staub*, 562 U.S. at 421.

In other words, cat's paw means the decisionmaker was a "conduit, vehicle, or rubber stamp" for the retaliator. *Qamhiyah v. Iowa State Univ. of Sci. & Tech.*, 566 F.3d 733, 745 (8th Cir. 2009). That is not the case here. As explained above, HR prepared an independent

investigation report, which the decisionmakers independently considered to make their decision. *See* Gahan Dep. 12:19-24 (App. 194) ("Q: Is it more of like a rubber stamp? A: No, I wouldn't say it's a rubber stamp . . . I review the information, review the investigation, and make my decision.").

In Hampton's second-cited case, a biased supervisor initiated an unprecedented and improper investigation that led to termination. *Stacks v. Sw. Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1325 (8th Cir. 1994).[9] In contrast, Hampton admitted: (i) the MSHA citation automatically triggered the LOTO investigation; and (ii) Robey had no involvement whatsoever in the MSHA citation because he was at the State Fair when it happened. Hampton Dep. 79:23-80:3 (App. 68), 174:21-175:3 (App. 92), 175:8-18 (App. 92), 200:14-18 (App. 98).

The unremarkable fact that Robey was "involved" at the bottom of the chain of command does not show causation. *Qamhiyah*, 566 F.3d at 745 (affirming defendant's motion for summary judgment because

[9] And the supervisor said: "women in sales were the worst thing that had happened to this company" and "the business had gone downhill since the company had started hiring women and blacks." *Stacks*, 27 F.3d at 1318.

"even assuming [alleged] discrimination existed at the lower-levels of [plaintiff's] review, there is simply no evidence" that the independent decisionmakers were a "rubber stamp" for the alleged retaliator).

b. Hampton cannot prove that Martin Marietta's legitimate reason for termination is pretext.

Hampton's claim fails for a second independent reason, no evidence of pretext.

i. Hampton admits that LOTO caused termination.

Because Defendants stated a legitimate non-retaliatory reason for termination (which Hampton's brief does not contest), Hampton must prove that reason (HR's conclusion that Hampton violated LOTO) was merely pretext for retaliation. *Hedlund*, 930 N.W.2d at 720; *Johnson*, 2018 WL 351601, at *7. Hampton cannot create a fact issue on pretext, especially given this admission volunteered in his deposition:

Q: And at the end of that investigation they concluded that you had, in fact, violated LOTO; correct?

A: ***Correct. That's why they fired me***.

Q: Right. And you disagree with the conclusions of the investigation; is that correct?

A: That is correct.

Hampton Dep. 42:14-20 (App. 59) (emphasis added).

ii. Disagreeing with the decision does not prove pretext.

That Hampton disagrees with Martin Marietta's decision does not prove pretext. ***Every*** retaliation plaintiff disagrees with the reason for termination, but "[t]he showing of pretext necessary to survive summary judgment requires more than merely discrediting the employer's proffered reason for the adverse employment decision." *Grutz v. U.S. Bank Nat. Ass'n*, 695 N.W.2d 505, 2005 WL 291592, at *3 (Iowa Ct. App. 2005). Pretext means the proffered reason was not the real reason for termination, which Hampton cannot show. *Keys v. Foamex, L.P.*, 264 F. App'x 507, 510 (7th Cir. 2008).[10]

Hampton's real argument is that the investigator reached the wrong conclusion or did a bad job. In rejecting so-called "negligent investigation" claims, this Court held that "an employer has no duty to conduct a reasonable investigation in favor of an at-will employee" who can be terminated "for no reason at all." *Theisen v. Covenant Med.*

[10] *Macias Soto v. Core-Mark Intern., Inc.*, 521 F.3d 837, 842 (8th Cir. 2008) (the question "is not whether the stated basis for termination actually occurred, but whether the defendant believed it to have occurred.").

Ctr., Inc., 636 N.W.2d 74, 81-83 (Iowa 2001); *accord Wal-Mart v. Canchola*, 121 S.W.3d 735, 740 (Tex. 2003) ("although [the employer] could have terminated [the employee] without investigating the charges against him, we have encouraged employers to investigate complaints made against employees before deciding to fire them by refusing to second-guess the results of such investigations whenever they are imperfect."). Second guessing the independent HR investigator—who studied the LOTO policy, interviewed the witnesses, reviewed the evidence, weighed credibility, and prepared his report—is not pretext.

3. There are no genuine issues of material fact.

a. Hampton's requested inferences are unfounded.

Missing from the record is any admissible evidence creating a genuine issue of material fact. No matter, says Hampton, because the District Court should have drawn inferences in his favor to avoid summary judgment. An inference is a "reasonable deduction from ***proven facts***." *State v. Christian*, 723 N.W.2d 453, 2006 WL 2419031, at *6 (Iowa Ct. App. 2006) (emphasis added) (*citing State v. Hansen*, 203 N.W.2d 216, 219 (Iowa 1972)). Hampton's requested inferences sprout

from pure speculation and run headlong into undisputed evidence, as in these examples:

Unsupported Assertion	Undisputed Evidence
"A reasonable jury can decide that the LOTO allegations were raised simply to make Ron's actions seem more serious than they actually were." Hampton's Brief at 51.	Hampton testified that the MSHA citation ***automatically*** triggered the LOTO investigation, which Hampton agreed was a perfectly legitimate, understandable, and appropriate response. Hampton Dep. 175:8-18 (App. 92), 200:14-18 (App. 103). There was no contrary evidence.
"If the jury believes Gerbes (and the documents), they may well find Eller is lying." Hampton's Brief at 47.	Even Hampton disavowed that accusation in his deposition. Hampton Dep. 175:19-21 (App. 92). Hampton agreed that Eller was an unbiased, reasonable, and capable investigator—and also "very nice." *Id.* 175:21-24 (App. 92), 176:12-16 (App. 92).
The District Court should have inferred "Nelson did not rely on the photo of the plug." Hampton's Brief at 53.	Nelson's undisputed testimony could not be clearer: "Q: So what made you change your mind? A: That picture . . . Pictures speak a thousand words to validate what Anson was saying was true." Nelson Dep. 35:18-23 (App. 189). There was no contrary evidence.

Unsupported Assertion	Undisputed Evidence
"This evidence may well convince a reasonable jury that Robey's input led to Ron's termination." Hampton's Brief at 47.	When asked about Robey's so-called "input" on Tom Nelson's initial termination recommendation, Nelson testified: "Doug's input held no water with me. It was about Barrett's investigation that I made the decision." Nelson Dep. 39:16-21 (App. 190). There was no contrary evidence.

In short, Hampton's brief requests inferences that not even Hampton could stomach in his deposition. The District Court properly did not indulge inferences that were unsupported by competent evidence—indeed, contradicted by undisputed evidence.

b. Hampton's argument about how he fixed the plug is immaterial and false.

In bold, Hampton asserts: "**[MSHA] issued [Martin Marietta] a citation for the plug; however, the citation was terminated later that day *after an electrician repaired the plug exactly the same way Ron had.*"** Hampton's Brief at 21. That assertion is immaterial and incorrect.

i. How Hampton fixed the plug is immaterial.

Whether Hampton actually violated LOTO is not relevant to pretext: the critical question is whether Martin Marietta ***believed***

Hampton violated LOTO based on its independent investigation. *McNary v. Schreiber Foods, Inc.*, 535 F.3d 765, 769 (8th Cir. 2008) ("The relevant inquiry [for pretext] is not whether [the employee] actually violated the company policy," but rather "whether [the employer] believed he was guilty of the conduct."); *Valline v. Murken,* 669 N.W.2d 260 (Iowa Ct. App. 2003) (courts will not sit as "super-personnel departments reviewing the wisdom or fairness" of employment decisions); *Lissick v. Andersen*, No. CV 18-2857, 2019 WL 6324871, at *7 (D. Minn. 2019) (appeal pending) (granting summary judgment because an independent investigation concluded an employee violated LOTO). It is undisputed that Martin Marietta believed, based on the HR investigator's final conclusions, that Hampton violated LOTO. Eller Dep. 33:3-10 (App. 149).

ii. Hampton's cited evidence disproves his assertion.

Although immaterial, Hampton's assertion about how he fixed the plug leaves the false impression that Martin Marietta fabricated Hampton's LOTO violation from thin air. Examining Hampton's own

cited evidence disproves that assertion. *See* Hampton's Brief at 21 (citing Exs. 7, 11, 31, and Flaspohler Dep.).

First, Hampton cites the MSHA citation, which actually confirms that Hampton botched the repair: "instead of reinserting the cable into the securing bracket of this plug . . . [t]he securing bracket was tighten[ed] down onto the conductor wires." Ex. 7 (App. 284).

Second, Hampton cites Eller's ***preliminary*** findings based on his initial interview with Hampton. But as Eller's report goes on to explain, "[n]ew evidence" (Flaspohler's interview and photo) convinced Eller that Hampton did not fix the plug properly, as he had claimed in his interview. Ex. 11 (App. 669-672).

Third, Hampton cites Flaspohler's deposition. Hampton's Brief at 21-22. Far from supporting Hampton's current version of events, Flaspohler insisted that: (i) Hampton botched the repair; (ii) Hampton initially confessed to MSHA that he fixed the plug improperly; (iii) Hampton's later statement to Eller about properly fixing the plug was false; and (iv) Hampton violated the LOTO policy. Flaspohler Dep. 155:21-156:14 (App. 400), 160:6-15 (App. 401), 212:20-213:2 (App. 402);

Ex. 11 (App. 669-72). Therefore, besides being immaterial, Hampton's assertion about how he fixed the plug is undermined by the record.

c. The former-employee affidavits are immaterial.

Hampton cites two affidavits from former employees (Keanan Shannon and Chris Dilley) over forty times. Neither person had admissible evidence to add about the termination decision.

i. Keanan Shannon

Former part-time employee Keanan Shannon signed an affidavit originally prepared by Hampton's counsel. Shannon Dep. 5:25-6:2 (App. 229-230). At his subsequent deposition, Shannon admitted that he had no personal knowledge whatsoever about why Martin Marietta terminated Hampton's employment because Shannon voluntarily resigned months earlier to take an internship elsewhere. *Id.* 16:4-6 (App. 232), 24:12-19 (App. 234). Shannon denied personal knowledge of every other major assertion in his affidavit. *See* Defs.' Reply in Support of Summary Judgment at pp. 6-7 (App. 409-10). (chart comparing Shannon's affidavit assertions with his deposition admissions of no personal knowledge).

ii. Chris Dilley

Former employee Chris Dilley likewise signed an affidavit flattering Hampton ("Ron's only fault was that he could sometimes be too nice"), smearing Robey ("It was clear that if you crossed Justin, you crossed Doug"), and opining about what other people felt ("Darius was scared . . ."). Dilley Aff. ¶¶ 6, 41, 50 (App. 560, 563). When Defendants subpoenaed Dilley for his deposition, he defied the subpoena and refused to appear. Graham Dec. ¶¶ 2-5 (App. 459-60). Like Shannon, Dilley had no personal knowledge about the LOTO investigation or Martin Marietta's termination decision.[11]

Still, the District Court properly gave Hampton every benefit of the doubt. Considered in the light most favorable to Hampton and drawing every inference in his favor, the court concluded the affidavits showed (at the very most) that Robey had a grudge against Hampton without any connection to the termination decision. Order at 7 (App.

[11] Instead, Dilley speculated without personal knowledge based on Hampton's purported ***nature***: "I do not think Ron would have pulled the tag off the welder plug if he didn't fix it, especially with MSHA being there. It was not in Ron's nature to use it or walk away if the welder was not fixed." Dilley Aff. ¶¶ 64-65 (App. 564).

481). As explained above, animus alone does not prove causation or pretext.

d. Hampton cannot raise new arguments that were not presented below.

Citing one stray comment in his deposition, Hampton contends he "submitted evidence to the district court that the LOTO policy was not zero tolerance" because he "identified two employees" who purportedly violated LOTO, but were not terminated. Hampton's Brief at 48 n.16. But Hampton never mentioned either employee in his summary judgment response brief. And the District Court was not required to search Hampton's deposition for arguments he did not make in his brief. *In re Det. of W.*, 829 N.W.2d 589 (Iowa Ct. App. 2013) ("[j]udges are not like pigs, hunting for truffles buried in briefs.").

4. Doug Robey is not individually liable.

Hampton's claim against Robey fails for an independent reason. Only if Robey ***controlled*** Martin Marietta's termination decision—meaning he was "an equivalent to an institutional employer"—could he be individually liable. *Neppl v. Wells Fargo*, No. 4:19-CV-00387, 2020 WL 3446174, at *4 (S.D. Iowa June 3, 2020); *Nelson v. Wittern Group, Inc.*,

140 F. Supp. 2d 1001, 1009 (S.D. Iowa 2001) (citing *Vivian v. Madison*, 601 N.W.2d 872, 876 (Iowa 1999)). Advising on an adverse employment action is not control. *Sahai v. Davies*, 557 N.W.2d 898, 901 (Iowa 1997); *Nelson*, 140 F. Supp. 2d at 1010.

Here, every termination decisionmaker either outranked Robey or worked in a different chain of command. *See* Appellees' Brief at 17-18, n.5. Robey's only input during the pre-termination discussion was "follow the policy." Robey Dep. 181:20-182:3 (App. 218-19). There was no evidence that Robey controlled Martin Marietta's termination decision by somehow bending the will and independent judgment of the Division President, the Vice President and General Manager, the Production Manager, the Human Resources Director, the independent Human Resources Investigator, and the MSHA inspector.

CONCLUSION

Iowa law permitted terminating Hampton's at-will employment after MSHA first determined, and then an independent investigation confirmed, that Hampton created a potentially fatal safety hazard. Speculation about an alternative cause from many months earlier—unsupported by competent evidence and debunked by the undisputed

record—did not suffice to avoid summary judgment. Appellees respectfully request that the Court affirm the District Court's order granting summary judgment, and grant Appellees any additional relief that the Court determines is appropriate.

REQUEST FOR NON-ORAL SUBMISSION AND CONDITIONAL REQUEST FOR ORAL ARGUMENT

Appellees respectfully submit that the District Court's ruling could be readily affirmed without oral argument. If the Court does, however, decide oral argument would be beneficial, Appellees will look forward to participating.

Respectfully submitted,

s/ Mike Birrer

Mike Birrer
Texas Bar No. 00783662
mbirrer@ccsb.com
Parker Graham
Texas Bar No. 24087612
pgraham@ccsb.com
CARRINGTON, COLEMAN,
SLOMAN & BLUMENTHAL, LLP
901 Main Street, Suite 5500
Dallas, Texas 75202
Phone: (214) 855-3350
Fax: (214) 580-2641

Jaki K. Samuelson
samuelson@whitfieldlaw.com
WHITFIELD & EDDY, P.L.C.
699 Walnut Street, Suite 2000
Des Moines, Iowa 50309-4195
Phone: (515) 288-6041
Fax: (515) 246-1474

ATTORNEYS FOR APPELLEES

ATTORNEY'S COST CERTIFICATE

I, Parker Graham, certify that there was no cost paid for printing or duplicating paper copies of briefs because the appeal is was filed in the Appellate Courts' EDMS system.

s/ Parker Graham

CERTIFICATE OF COMPLIANCE

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

[**X**] This brief has been prepared in a proportionally spaced typeface (Book Antiqua) and contains 5,905 words, including the charts/graphics, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(l).

s/ Parker Graham

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief was served upon the attorneys of record listed below by electronic filing and electronic delivery to the parties via the EDMS system, pursuant to Iowa R. App. P. 6.901(3) and Iowa R. Elec. P. 16.315(1)(b).

Page Fiedler
paige@employmentlawiowa.com
Amy Beck
amy@employmentlawiowa.com
Fiedler Law Firm, P.L.C.
8831 Windsor Parkway
Johnson, IA 50131

s/ Parker Graham