IN THE IOWA SUPREME COURT

SUPREME COURT NO.
21-1092

DES MOINES CIVIL AND HUMAN RIGHTS COMMISSION,
Plaintiff-Appellee
v.
PATRICK KNUEVEN and **MARY KNUEVEN,**
Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT FOR POLK COUNTY
THE HONORABLE SARAH CRANE

APPELLANTS' BRIEF

JOHN F. FATINO
NICHOLAS J. GRAL
WHITFIELD & EDDY, P.L.C.
699 Walnut, Suite 2000
Des Moines, Iowa 50309
Telephone: (515) 288-6041
Fax: (515) 246-1474
Email: fatino@whitfieldlaw.com
gral@whitfieldlaw.com

ATTORNEYS FOR DEFENDANTS-APPELLANTS,
PATRICK KNUEVEN and MARY KNUEVEN

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ROUTING STATEMENT

This appeal should be retained by the Iowa Supreme Court because this case involves substantial issues of first impression and impacts the rights of both landlords and prospective tenants subject to one or more protected classes. Also, the case requires this Court's enunciation of an important legal principle ("steering") and its interplay with local (City of Des Moines Municipal Code Chapter 62 – Human Rights) and state statutes (Iowa Code Chapter 216 – Iowa Civil Rights Act). Consequently, the case should be retained by the Court. Iowa R. App. P. 6.1101(2)(c), (d), (f).

STATEMENT OF THE CASE

A. Nature of the Case

Defendant Patrick Knueven ("Patrick") and his spouse, Mary Knueven ("Mary"), own multiple residential properties in Des Moines for which Patrick serves as landlord and rents the properties to tenants. In the underlying litigation, Plaintiff Des Moines Civil and Human Rights Commission ("the Commission") alleged that Patrick and Mary engaged in intentional housing discrimination in 2017. The Commission alleged that the Knuevens did this in two ways. First, by charging higher rent because of a potential tenant(s)' religion or national origin. Second, by the "steering" of buyers to other

properties. Notably, the present appeal does not concern the merits of the Commission's first allegation (a claim on which the Knuevens prevailed), but instead focuses on whether Patrick engaged in unlawful "steering."[1]

Patrick appeals the District Court's denial of his judgment notwithstanding the verdict as the Commission failed to prove the legal principle of "steering" during its case-in-chief. Second, Patrick appeals the determination of the District Court not to instruct the jury on the requisite elements of "steering," as requested. Patrick also appeals the District Court's admission of prior bad acts evidence that did not concern the charges in question, and resulted in undue prejudice. In the same vein, Patrick appeals the District Court's refusal to permit evidence of Patrick's good character. Lastly, Patrick appeals the determination of the District Court to permit impeachment of Patrick with collateral testimony in an unrelated matter. Each of the foregoing issues are included within Knueven's timely Notice of Appeal.

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[1] Following jury trial, the Knuevens were found not guilty of the first alleged offense. *See* May 20, 2021 Verdict Form ("Verdict Form") (App. pp. 111-113). Likewise, the jury found that Mary did not engage in "steering," but found that Patrick had engaged in "steering." *See Id*.

B. Course of Proceedings

Litigation in this case did not begin until June 2019. At that time, the Commission filed its Petition and Request for Injunctive Relief (the "Petition") against the Knuevens. Petition (App. pp. 6-13). The Petition contained two counts against the Knuevens, including (1) discrimination by charging higher rent based on religion and national origin; and (2) discrimination by steering away from available housing. *Id.* (App. pp. 6-13). In their August 2, 2019 Answer, Affirmative Defenses, and Jury Demand (the "Answer"), the Knuevens denied any alleged wrongdoing or liability. Answer (App. p. 14-24).

On May 17, 2021, this matter proceeded to jury trial before the Honorable Judge Sarah E. Crane. On May 20, 2021, the case was submitted to the jury for deliberation and a verdict returned later that day. Verdict Form (App. pp. 111-113).

The jury found Mary not guilty on both counts. *Id.* (App. pp. 111-113). The jury found Patrick not guilty as to Count I (the higher rent allegation), but did find guilt on Count II pertaining to "steering." *Id.* (App. pp. 111-113). The jury imposed a civil penalty against Patrick in the amount of $50,000.00. *Id.* at Question No. 4 (App. pp. 111-112).

On May 28, 2021, Judge Crane entered that certain Order for Judgment, which enforced the jury's May 20, 2021 verdict ("Order for Judgment"). Order for Judgment (App. p. 114-115). On June 1, 2021, Patrick timely filed his combined Motion for Judgment Notwithstanding the Verdict and Motion for New Trial (the "Combined Motion"). Combined Motion (App. pp. 116-122). On June 16, 2021, hearing was conducted on these matters. Ultimately, the District Court denied Patrick's motions in its July 12, 2021 Order. Order Denying Motion for New Trial and Motion for Judgment Notwithstanding the Verdict (App. pp. 124-129).

On August 10, 2021, the Knuevens timely filed their Notice of Appeal. Defendants' Notice of Appeal (App. p. 130-132).[2]

[2] Defendants specified in their Notice of Appeal that Mary was named as an appellant because she had a separate claim for attorney fees pending. Defendants' Notice of Appeal fn. 1 (App. p. 130). Furthermore, the Knuevens intended to consolidate their appeals upon the Court's ruling. *Id.* (App. p. 130). On October 1, 2021, the Knuevens did so, and consolidation was granted by the Court on November 1, 2021. *See* October 1, 2021 Motion to Consolidate Appeals and Waive Filing Fee (App. pp. 141-143*); see* also November 1, 2021 Order re: Consolidation (App. pp. 144-146). Mary remains a party because of the lingering attorney fee issue. *See* Section IV. The Knuevens filed their Second Notice of Appeal to preserve jurisdiction over same. *See* Defendants' (Second) Notice of Appeal (App. pp. 138-140).

On September 9, 2021, the Court entered its Order Denying Motion for Injunctive Relief and Awarding Attorney Fees ("Order re: Fees"). Order re: Fees (App. p. 133-137). It not only denied the Commission's request for an injunctive relief, but also awarded attorney fees in the following amounts: (1) $9,472.91 to the Commission; and (2) $13,631.20 to Mary Knueven. *Id.* at p. 4 (App. p. 136); *see also* City of Des Moines Municipal Code § 62-107(m) (2021) (entitling a "prevailing party" to attorney's fees). On September 28, 2021, the Knuevens filed their second Notice of Appeal ("Second Notice of Appeal"). Second Notice of Appeal (App. pp. 138-140).

On October 1, 2021, the Knuevens moved to consolidate their appeals, pursuant to Iowa Rule of Appellate Procedure 6.103(2). Motion to Consolidate Appeals and Waive Filing Fee (App. pp. 141-143); *see also* Iowa R. App. P. 6.103(2) (2021). On November 1, 2021, the Court entered its Order, consolidating the Knuevens' appeals and adopting a single briefing schedule. Order re: Motion to Consolidate (App. pp. 144-146); *see also* Notice of Briefing Deadline.

STATEMENT OF FACTS

The actual events which caused the Commission to bring this case occurred in 2017. Those facts will be demonstrated below. However, in an

effort to bolster its weak case, the Commission introduced prior acts of evidence (over Patrick's objection) from a former, stale investigation in 2015 and 2016. The testimony will be summarized below, as well.

2017 Investigation

In August 2017, the Commission attempted to jumpstart an investigation of the Knuevens' housing practices. Commission Trial Exhibit 3—Recording, Laurie call to Pat (App. p. 57); Trial Transcript (Vol. II), pp. 53 (13-25) – 54 (1-3); Petition, ¶ 17 (App. p. 8). Over the Knuevens' objection, the jury heard audio recording of an August 7, 2017 telephone call between Patrick and a control (i.e., white) "tester" who claimed to be calling on behalf of the Omaha Refugee Resettlement Program. Commission Trial Exhibit 3—Recording, Laurie call to Pat (App. p. 57); Trial Transcript (Vol. II), pp. 53 (13-25) – 54 (1-3). Patrick responded by asking, "Aright, what do you got?" Commission Trial Exhibit 3—Recording, Laurie call to Pat (App. p. 57); Petition, ¶ 24 (App. p. 9). The tester inquired about one of the Knuevens' properties, purportedly on behalf of a Muslim couple from Pakistan. Commission Trial Exhibit 3 (App. p.57). Patrick informed the tester that the property was still available. *Id.* (App. p. 57) .

The jury also heard (over the Kuevens' objection) an audio recording of Patrick's August 10, 2017 conversation with a control tester, Carla Cox, who called Patrick and inquired into the availability of a duplex. Commission Trial Exhibit 7—Recording, Carla call to Pat Knueven (App. p. 59); Testimony of Carla Cox ("Cox Testimony"), Trial Transcript (Vol. II), p. 50 (10).

It was later admitted that there was no family being assisted by the Omaha Refugee Resettlement Program; therefore, no family was actually denied housing as a result of their interactions with Patrick. *Id.* at p. 58 (19-24). Furthermore, Cox neither applied nor was denied the opportunity to rent the duplex that she discussed with Patrick on August 10, 2017. *Id.* at p. 59 (6-11); *see also* Knueven Testimony, Trial Transcript (Vol. III), p. 78 (15-20) (neither Cox nor the Omaha Refugee Resettlement Program ever subsequently contacted Knueven to apply for an apartment or regarding the placement of refugees in Knueven's property).

Nevertheless, a formal investigation by the Commission followed, pursuant to 42 U.S.C. § 3610 (Federal Fair Housing Act) and City of Des Moines Municipal Code Chapter 62 (Human Rights). *Id.* at ¶ 10. On May 21, 2019, the Commission's investigation completed and the Commission

filed its notice of probable cause determination. Testimony of Joshua Barr ("Barr Testimony), Trial Transcript (Vol. II), p. 22 (15-19); Petition, ¶ 11. To no surprise, the Commission determined that the allegations made in its complaint were founded. Barr Testimony, Trial Transcript (Vol. II), p. 22 (15-19); Petition, ¶ 12 (App. p.8). Thereafter, the underlying litigation commenced. Barr Testimony, Trial Transcript (Vol. II), p. 22 (15-19).

2015 and 2016 Investigation

Based upon the admittedly weak evidence from 2017, over Patrick's objection, the District Court allowed evidence from prior tests collected during the Commission's original, 2015/2016 investigation.[3] The record will reflect the following efforts by the Commission to investigate the Knuevens.

[3] Prior to the presentation of evidence to the jury, the trial court ruled that evidence of the Commission's 2015/2016 investigation (including testimony from its testers) was admissible, despite such evidence falling outside the period prescribed by City of Des Moines Municipal Code section 62-2(b). Trial Testimony (Vol. II), p. 5 (4-22); *see also* City of Des Moines Municipal Code § 62-2(b) (2021). The trial court held that such evidence was admissible and relevant to Patrick's motive or intent to discriminate. Trial Transcript (Vol. II), p. 5 (4-22); *see also* Commission's Supplemental Resistance to Defendants' Motion in Limine ("Supplemental Resistance"), ¶ 4, p. 2 (App. p. 67) (arguing that evidence of discriminatory motive "demonstrates the consistent pattern that when Mr. Knueven believes he is dealing with someone of a protected religion or national origin, he is uncooperative and reticent to provide information"). Thereafter, trial testimony commenced.

Between December 2015 to late January 2016, the Commission utilized various "testers" who posed as potential renters and either called the Knuevens or performed site visits at the Knuevens' properties. Petition, ¶¶ 31-32 (App. pp. 10-12); Barr Testimony, Trial Transcript (Vol. II), pp. 21 (23-25) – 22 (1, 10-14). Testers recorded their interactions with the Knuevens both in person and via telephone. Barr Testimony, Trial Transcript (Vol. II), p. 22 (10-14). Furthermore, the testers also documented their encounters in detailed written reports, which were prepared by the testers at or near the time of their investigation. *See, e.g.*, Testimony of Nadia Igram ("Igram Testimony"), Trial Transcript (Vol. II), pp. 84 (19-25) – 85 (16-18).[4]

Over the course of this roughly five-week investigation, four testers were used. Igram Testimony, Trial Transcript (Vol. II), p. 63 (9-11); Testimony of Chris Fultz ("Fultz Testimony"), Trial Transcript (Vol. II), p. 92 (17-20); Testimony of Jody Mashek ("Mashek Testimony"), Trial Transcript (Vol. II), p. 115 (4-9, 12-13); Testimony of Deeq Abdi ("Abdi Testimony"), Trial Transcript (Vol. III), p. 3 (23-25). During that time, a combination of phone calls and property visits were performed by control

[4] The Knuevens note that all tester reports were excluded at trial as hearsay. Trial Transcript (Vol. II), p. 73 (10-18).

testers and testers subject to one or more protected classes (i.e., religion and national origin). *See, e.g.*, Commission Trial Exhibits 12, 22 (App. pp. 60, 62); *See also* Fultz Testimony, Trial Transcript (Vol. II), pp. 92 (17-20), 99 (6-10). Pursuant to the District Court's ruling, the jury heard testimony and evidence from each of the Commission's four testers used during its 2015/2016 investigation, beginning with Nadia Igram. Igram Testimony, Trial Transcript (Vol. II), p. 63.[5]

I. Nadia Igram

The jury was told that, on January 28, 2016, Igram contacted Patrick by phone, during which time she inquired into one of the Knuevens' properties. *Id.* at pp. 64 (17-21) – 65 (16). Over the Knuevens' objection, a recording of same was admitted into evidence and played for the jury. *Id.* at p. 65 (11-13, 17-25); Commission Trial Exhibit 20—Recording, Nadia Igram, call to Pat Knueven (App. p. 61). Igram described the initial conversation as "pleasant," and that Patrick seemed interested, forthcoming and polite. Igram Testimony, Trial Transcript (Vol. II), p. 67 (3-8). Notably, there was no discussion during

[5] Igram identifies as an Arab, Muslim woman. Igram Testimony, Trial Transcript (Vol. II), p. 82 (19-25).

the initial call regarding religion and national origin. *Id.* at pp. 83 (23-25) – 84 (3-4).

Again, over the Knuevens' objection, the District Court admitted a recording of Igram's subsequent, January 29, 2016 site visit, which was then played for the jury. *Id.* at p. 68 (3-9); Commission Trial Exhibit 22—Recording, Nadia Igram, visit to 2907 S.E. 10th (App. p. 62). Thereafter, Igram testified to several observations regarding her site visit with Patrick. These included Patrick (1) not "really say[ing] hi;" (2) not shaking Igram's hand; (3) seeming "a little disappointed that [Igram] came without [her] husband;" (4) not taking off his shoes while asking Igram to do so; (5) allegedly avoiding Igram by being in separate rooms of the property; (6) supposedly muttering expletives under his breath; and (7) providing short answers to questions. Igram Testimony, Trial Transcript (Vol. II), pp. 69 (16, 18-19) – 70 (1-2, 12-13), 80 (13-17) – 81 (16), 86 (14-15). Igram also made it known to the jury that she was wearing a Hijab during her site visit, yet admitted that no discussion took place during the site visit regarding Igram's race or national origin. *Id.* at pp. 69 (5-7), 87 (4-9).

On cross-examination, Igram further admitted that Patrick discussed the property's lease terms with her, as well as answered questions regarding

utilities, lawn care and snow removal, maintenance, the surrounding neighborhood and local schools. *Id.* at pp. 87 (22-25) – 88. Notably, Igram admitted that she and her family were not actually looking to move into the Knuevens' property. *Id.* at p. 79 (7-8). Igram agreed that she never completed an application to rent or attempted to buy the Knuevens' property. *Id.* at p. 91 (8-19).

II. Chris Fultz

The jury then heard testimony (over the Knuevens' objection) from control tester, Chris Fultz, regarding, in part, his December 22, 2015 telephone call and December 23, 2015 site visit with Patrick.[6] Fultz Testimony, Trial Transcript (Vol. II), pp. 93 (24-25), 94 (10-13), 95 (6-15). Neither of these events were recorded. *Id.* at p. 101 (5-9). Yet, Fultz described the site visit as "uneventful." *Id.* at p. 96 (13). He admitted on cross-examination that no discussions occurred with Patrick regarding the racial composition of the neighborhood. *Id.* at p. 105 (20-23). Fultz testified that he was neither legitimately interested in renting nor purchasing the Knuevens' property. *Id.* at pp. 108 (22-25) – 109 (4-6); *See also* Testimony of Patrick

[6] Fultz identifies as a white male. Fultz Testimony, Trial Transcript (Vol. II), p. 99 (6-10).

Knueven ("Knueven Testimony"), Trial Transcript (Vol. III), pp. 78 (24-25) – 79 (1-3) (Chris Fultz never applied to rent the Knuevens' property).

III. Jody Mashek

Over the Knuevens' objection, tester, Jody Mashek, testified to a January 27, 2016 telephone call and January 29, 2016 site visit with Patrick.[7] Mashek Testimony, Trial Transcript (Vol. II), pp. 116 (8-13), 118 (221-22), 120 (5-9, 18-21). Neither of these events were recorded. *Id.* at pp. 124 (9-11), 126 (14-16). According to Mashek, during the telephone call, Patrick asked the name of her employer, how long she had worked there, and how many people would be living in the property. *Id.* at p. 119 (2-6). Mashek testified that during the January 29, 2016 site visit, Patrick lead her on a tour of the property, notified her of recent maintenance and new appliances, and complimented the neighborhood. *Id.* at pp. 120 (22-25) – 121 (1-18). Knueven did not raise objections to children living in the property, inquire whether Mashek was disabled, discuss gender, ask if Mashek was married, volunteer information about the lease, or shake Mashek's hand. *Id.* at pp. 125 (7-20), 127 (24-25) – 128 (1-3), 129 (14-16) – 130 (7-9).

[7] Mashek identifies as a white female. Mashek Testimony, Trial Transcript (Vol. II), p. 122 (17-19).

Mashek testified that, following her site visit, she did not make further arrangements to apply for or lease the Knuevens' property. *Id.* at p. 130 (12-15). Moreover, Mashek did not offer to purchase the property. *Id.* at 130 (16-17).

IV. Deeq Abdi

Lastly, testimony was presented by tester, Deeq Abdi, regarding two phone calls between he and the Knuevens that took place in December 2015.[8] Abdi Testimony, Trial Transcript (Vol. III), pp. 4 (18-20), 6 (2), 9 (14-17). Over the Knuevens' objection, the jury heard an audio recording of a December 28, 2015 call with Patrick. *Id.* at p. 6 (14-25); Commission Trial Exhibit 12—Recording, Deeq Abdi call to Pat Knueven. Following the recording, Abdi then summarily concluded that Patrick "was biased and not willing to rent that apartment to me based on my dialect or my background." Abdi Testimony, Trial Transcript (Vol. III), p. 7 (13-14). He attributed this belief to Patrick "tr[ying] to avoid" Abdi by telling him that the property was already rented, and not providing additional reasoning for why it was already rented. *Id.* at (16-25). However, it was also Abdi's recollection at trial that

[8] Abdi is a non-native English speaker with an accent. Abdi Testimony, Trial Transcript (Vol. III), p. 8 (14-20).

he spoke with a *female* named Pat. *Id.* at 11 (16-17). Abdi admitted that Patrick never asked about his race, ethnicity, religion or whether Abdi was disabled. *Id.* at pp. 13 (19-25) – 14 (4-12). Furthermore, Abdi admitted that he did not know whether the Knuevens' properties were, in fact, available. *Id.* at 15 (10-18). Abdi never called Patrick again. Knueven Testimony, Trial Transcript (Vol. III), p. 79 (12-13).

As alleged by the Commission in its pleadings, relevant observations made during this initial investigatory period include:

1. While speaking over the phone with a protected tester, Patrick was "audibly negative" and "curt," allegedly conveying that he was "inconvenienced or irritated;"

2. Yet, during a telephone conversation with a control tester, Patrick was "friendly" and conversational;

3. Patrick "sighed," "sounded annoyed," and was being uncommunicative with a protected tester during a site visit, which the Commission attributed to the protected tester's use of a Hijab;

4. However, during a site visit with a control tester, Patrick was conversational, accommodating and attentive.

Petition, ¶¶ 23, 31-32 (App. pp. 9, 10-12); *See also* Testimony of Emily Cohen, Trial Transcript (Vol. III), p. 34 (13, 16) (the Commission describing Knueven as "very pleasant, interactive, engaged" when speaking with a control tester, but "very short, curt [ ], not engaging," when speaking with a

protected tester). The Commission concluded that such findings amounted to "illegal steering on the basis of religion and national origin." Petition, ¶ 33 (App. p. 12). However, the Commission filed no housing discrimination complaint against the Knuevens within 300 days following their 2015/2016 investigation. *See* City of Des Moines Municipal Code § 62-2(b) (2021) ("Any complaint must be filed within 300 days after the complainant knew or should have known of the most recent act constituting the alleged illegal discriminatory practice."). The trail went cold. It was not until August 7, 2017, or 556 days following the Commission's most recent 2016 testing, that the Commission attempted to jumpstart their investigation into the Knuevens' housing practices.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT FAILED TO GRANT A JUDGMENT NOTWITHSTANDING THE VERDICT AS THE COMMISSION FAILED TO PROVE "STEERING."

A. Preservation of Issue for Appeal

The Commission's failure to prove "steering" was properly preserved for appeal in numerous instances. First, the issue was addressed at trial during Patrick's Motion for Directed Verdict, and by timely objecting to the jury instructions detailing "steering." Trial Transcript (Vol. III), pp. 118-19, 125-

26; Trial Transcript (Vol. IV), pp. 9-11, 16-17 (citing Proposed Jury Instructions, p. 12 (App. p. 46)). Patrick's position is detailed in his June 1, 2021 Motion for Judgment Notwithstanding the Verdict and Motion for New Trial. *See* Combined Motion, ¶¶ 4-5 (App. p. 117); *see also* June 16, 2021 Hearing re: Pending Motions (App. p. 123).

Second, "steering" was addressed in Patrick's requested jury instructions. *See* Defendants' Recast Jury Instructions, p. 4 (App. p. 75); *see also* Defendants' Proposed Statement of the Case, Jury Instructions, and Verdict Form ("Proposed Jury Instructions"), p. 12 (App. p. 46).

B. Standard of Review

The standard of review associated with a District Court's denial of a motion for judgment notwithstanding the verdict is for correction of errors at law. *See Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa 2010). The reviewing court must determine "whether sufficient evidence existed to justify submitting the case to the jury at the conclusion of the trial." *Lee v. State*, 815 N.W.2d 731, 736 (Iowa 2012). This requires substantial evidence supporting each element of the Commission's claim. *See Garr v. City of Ottumwa*, 846 N.W.2d 865, 869 (Iowa 2014). "Evidence is substantial when reasonable minds would accept the evidence as adequate to

reach the same findings." *Doe v. Cent. Iowa Health Sys.*, 766 N.W.2d 787, 790 (Iowa 2009). The evidence is viewed in the light most favorable to the nonmoving party. *See Id*.

C. Discussion

1. "Steering," Generally.

Before it is explained why the Commission failed to prove "steering," a discussion is warranted regarding the legal principle generally. Under Des Moines Municipal Code section 62-101(a):

> It shall be an illegal discriminatory housing practice for any person, or for any owner . . . to:
> …
> (10) Steer or channel a prospective buyer into or away from an area because of race, sex, sexual orientation, gender identity, creed, religion, national origin, ancestry, color, disability, familiar status, or source of income, by action by a real estate broker or salesperson which is intended to influence the choice of a prospective dwelling buyer on the basis of racial, religious, national origin, sex, sexual orientation, gender identity, religion, national origin, color, disability, ancestry, familiar status, or source of income.

City of Des Moines Municipal Code § 62-101(a)(10) (2021). While this is the only instance where "steering" is expressly noted in Chapter 62 (and is, therefore, controlling) the Commission has argued that other subsections of section 62-101(a) also provide for same, including:

> (1) Refuse to sell, lease or rent after making a bona fide offer; refuse to show or represent that a dwelling is unavailable; or refuse to negotiate for the sale, lease, or rental of any dwelling or refuse to sublease or assign or otherwise make unavailable or deny a dwelling to any person because of race, religion, creed, color, sex, sexual orientation, gender identity, national origin, ancestry, disability, familiar status, or source of income.
> . . .
> (4) Discriminate in the furnishing of any facilities or services for any dwelling because of race, religion, creed, color, sex, sexual orientation, gender identity, national origin, ancestry, disability, familiar status, or source of income.
> . . .
> (8) Aid, incite, compel, coerce, or participate in the doing of any act declared to be a discriminatory housing practice under this section; attempt, directly or indirectly, to commit any act declared by this section to be a discriminatory practice; or attempt in any fashion to coerce, intimidate, compel, threaten, interfere, or in any other fashion force any person not to cooperate or participate in any hearing or other proceeding conducted by the human rights commission or its staff.

Id. at City of Des Moines Municipal Code §§ 62-101(a)(1), (4), (8) (2021); Trial Transcript (Vol. III), p. 144; Trial Transcript (Vol. IV), p. 10 (1-8) (the District Court concluding that steering is not limited to section 62-101(a)(10)). Similar provisions likewise exist under both state and federal law, although "steering" is not expressly contained therein as it is in the City of Des Moines Municipal Code section 62-101(a)(10). *See e.g.*, 42 U.S.C.A. §§ 3604(a), (b) (2021) (Federal Fair Housing Act addressing housing discrimination); *see*

also Iowa Code §§ 216.8(1)(a), (b) (2021) (Iowa Civil Rights Act addressing housing discrimination).

This Court will find little discussion of "steering" under Iowa law. Indeed, the concept has proven rare, necessitating the parties to utilize persuasive authority from other jurisdictions in this matter. Yet, it is clear that the Commission relies heavily on "steering" as an expansive, far-reaching concept, applicable to nearly *any* alleged discriminatory practice in housing untied from the actual language employed in the City of Des Moines Municipal Code. However, this stance is unsupported as precedent unambiguously establishes that, in order to find "steering," there must be a protected class member who seeks to buy or rent housing from the defendant. *See, e.g.*, *Cabrera v. Jakabovitz*, 24 F.3d 372, 381 (2nd Cir. 1994); *see also* City of Des Moines Municipal Code § 62-101(a)(10) (2021) ("steering" occurs with respect to purchasers).

Next, there must be proof of an adverse action by the defendant. This is exemplified in *Cabrera v. Jakabovitz* where an investigation into housing practices revealed that the defendant was directing (or "steering") White purchasers to predominantly White neighborhoods, while directing minority purchasers to properties in predominantly minority neighborhoods. *See* 24

F.3d at 377-78. Some minority purchasers were told by the defendant that no housing was available at all. *Id.* at 378.

The United States Court of Appeals for the Second Circuit held that the plaintiff was entitled to prevail if they showed (1) their status as a protected class member; (2) that they "sought and w[ere] qualified for" the housing; (3) that they were "**denied** the opportunity to rent" the housing; and (4) the housing remained available thereafter. *Id.* at 381 (emphasis added). Thus, the defendant must perform some action which denies or obstructs the protected class member from receiving housing. *Id.*

This concept is echoed in *Village of Bellwood v. Dwivedi, et al.* where the discussion surrounded whether agencies were steering African-American buyers to specific areas according to their race and White buyers to adjoining suburbs. *See* 895 F.2d 1521, 1525 (7th Cir. 1990). The court analyzed the "comparative experience of white and black testers," and found that "[b]lack testers were primarily shown homes in integrated Bellwood; white testers were primarily shown homes in the adjacent white suburbs." *Id.* at 1531. Thus, "steering" was not discussed as an all-encompassing, amorphous principle, but rather in the context of protected class members being directed to specific properties based on their protected characteristic. *See Id.* The court

made room for "steering" in the form of presenting undesirable conditions with the intent to channel a prospective buyer into or away from an area. *See Id.* at 1528-34. However, no evidence or analysis centered around the defendants' tone of voice, the detail by which they responded to questions, facial gestures, and so forth. *See Id.*

"Steering" has been further defined, as well. Indeed, it has been construed as "the practice of encouraging patterns of racial segregation by steering members of a protected class **away from building and neighborhoods** inhabited by members of other races or groups." *Fair. Hous. Justice Ctr., Inc. v. Broadway Crescent Realty, Inc.*, No. 10 Civ. 34(CM), 2011 WL 856095, at *6 (S.D.N.Y. Mar. 9, 2011) (emphasis added). Steering has also been discussed in the context of directing "families with small children to first-floor entry apartments only." *Fair Hous. Cong. v. Weber*, 993 F. Supp. 1286, 1290 (C.D. Cal. 1997). Each of these holdings carries the understanding that prospective purchasers maintain the right to be free from disinformation from sellers regarding available housing. *See City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1095 (7th Cir. 1992) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). Notably, no caselaw from any jurisdiction appears to support that a

defendant's tone of voice, the detail by which they respond to a question, facial gestures, and so forth, amount to steering as a matter of law.

2. The Commission Failed to Prove "Steering" as a Matter of Law.

The Commission's Petition failed to alleged the requisite facts for "steering" and the requisite testimony was not provided at trial. *See generally* Petition (App. pp. 6-13); *see also* Iowa R. Civ. P. 1.1003(1) (2021) (judgment notwithstanding the verdict warranted when a pleading fails to allege material facts necessary to constitute complete claim). During trial, the Commission admitted that its testers were not actually looking for housing. Barr Testimony, Trial Transcript (Vol. II), p. 28 (25) – 29 (1-8). The testers, themselves, testified that they did not legitimately pursue the Knuevens' properties. *See* Igram Testimony, Trial Transcript (Vol. II), pp. 79 (7-8), 91 (8-19) (Igram and her family were not truly looking to move into the Knuevens' property; she never completed an application or attempted to purchase same); Fultz Testimony, Trial Transcript (Vol. II), pp. 108 (22-25) – 109 (4-6) (Fultz was neither interested in renting nor purchasing the Knuevens' property); Mashek Testimony, Trial Transcript (Vol. II), p. 130 (12-15) (following her site visit, Mashek did not apply for or lease the Knuevens' property); Knueven Testimony, Trial Transcript (Vol. III), p. 79

(12-13) (following his December 28, 2015 phone call, Abdi never contacted Patrick again); Cox Testimony, Trial Transcript (Vol. II), pp. 58 (19-24) – 59 (6-11) (no refugee family was denied housing by Patrick, and Cox neither applied for nor was denied the opportunity to rent the Knuevens' property). Patrick further echoed the testers' remarks. *See* Knueven Testimony, Trial Transcript (Vol. III), pp. 79 (20-25) – 80 (1-4) (testifying that no tester, whether over the phone or during a site visit, offered to purchase any of the Knuevens' properties, notwithstanding the fact that none of the Knuevens' properties were for sale).

Based on the foregoing, and after the close of evidence, argument was heard on the Knuevens' Motion for Directed Verdict. Trial Transcript (Vol. III), p. 118. Counsel maintained, in part, that the evidence was absent of anyone attempting to purchase the Knuevens' properties, or the Knuevens refusing to sell their properties. *Id.* at pp. 118 (23-25) – 119 (1-5) (citing City of Des Moines Municipal Code § 62-101(a)(10) (2021)). More specifically, there was no refusal by Patrick to: (1) "sell, lease or rent" after a bona fide offer; (2) "show" a dwelling; (3) "negotiate" a dwelling's "sale, lease or rental;" or (4) "sublease or assign or otherwise make unavailable or deny a dwelling" based on one or more protected class. City of Des Moines

Municipal Code § 62-101(a)(1) (2021); *see also Cabrera*, 24 F.3d at 381. Such absence of evidence or testimony, alone, warranted the grant of the Knuevens' Motion for Directed Verdict and (subsequently) Motion for Judgment Notwithstanding the Verdict. Trial Testimony (Vol. III), p. 118 (23-25) – 119 (1-5), 125 (22-25) – 126 (1-4)[9]; Combined Motion, ¶¶ 1-5 (App. pp. 116-117). Yet, counsel additionally argued that, without such a standard, the jury would be left to grapple with the amorphous concept of "steering," and whether the Knuevens' alleged "lack of information" to testers qualifies as same. Trial Transcript (Vol. III), pp. 125 (1-25) – 126 (1-4); *see also* Section II below.

The District Court denied the Knuevens' Motion for Directed Verdict on grounds that testers are appropriate for proving evidence that housing discrimination is taking place, as opposed to requiring the actual renter being denied housing. Trial Transcript (Vol. IV), p. 9 (18-25). Regarding "steering," specifically, the court held that the Commission was not required to operate solely under City of Des Moines Municipal Code section 62-

[9] Arguing "No one applied and no one was denied because that's the standard, and the evidence in the record is such that no one – the Knuevens didn't direct [testers] to different properties, they didn't say there was anything available and the government certainly has never proven that on the folks who did say something wasn't available that that was untruthful."

101(a)(10), which refers to buyers. Rather, "steering is a type of discrimination in terms of making housing otherwise unavailable or in refusing to furnish or provide housing." *Id.* at p. 10 (6-8).

Although the District Court denied Patrick's motion, Patrick's testimony, likewise, reflected the absence of "steering," in further support of directed verdict. The jury was advised by Patrick that he neither attempted to direct prospective tenants to other properties nor "steer" them to units in areas that may align with their race or ethnicity. Knueven Testimony, Trial Transcript (Vol. III), p. 80 (5-13); *see also* City of Des Moines Municipal Code § 62-101(a)(10) (2021). Moreover, Patrick recounted his history of renting to immigrants. *Id.* at p. 80 (14-15). He does not maintain information on his tenants' demographics. *Id.* at pp. 80 (16-22) – 81 (10-14, 19-23). Patrick unequivocally rents their properties to individuals regardless of their race, religion or national origin. *Id.* at pp. 81 (24-25) – 82 (1, 4-19).

It follows, therefore, that Patrick was entitled to a directed verdict as to the Commission's claim of "steering" before the case was submitted to the jury. *See* Iowa R. Civ. P. 1.1003(2) (2021). Furthermore, in light of the jury's verdict against Patrick as to "steering," it reasons that the jury's verdict was not sustained by sufficient evidence or was contrary to the evidence presented.

See Iowa R. Civ. P. 1.1004(6), (8), (9) (2021). For all of the foregoing reasons, the District Court should have granted Patrick's Motion for Directed Verdict and committed reversible error in denying same.

II. THE DISTRICT COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY ON THE ELEMENTS REQUIRED TO ESTABLISH A LEGAL CLAIM OF "STEERING."

A. Preservation of Issue for Appeal

This issue was properly preserved for appeal because Patrick requested certain instructions which the Court denied. *See* Defendants' Recast Jury Instructions, p. 4 (App. p. 75); *see also* Proposed Jury Instructions, p. 12 (App. p. 46); *see also* Trial Transcript (Vol. III), p. 138 (2-8); Trial Transcript (Vol. IV), pp. 16 (22-25) – 17 (1-6, 17-25). The issue was likewise addressed at trial during Patrick's Motion for Directed Verdict and by timely objecting to the jury instructions detailing "steering" because they did not include the language requested by Patrick. Trial Transcript (Vol. III), pp. 118-19, 125-26; Trial Transcript (Vol. IV), pp. 16-17 (citing Proposed Jury Instructions, p. 12 (App. p.46). Finally, Patrick's position is detailed in his June 1, 2021 Motion for Judgment Notwithstanding the Verdict and Motion for New Trial. *See* Combined Motion, ¶¶ 4-5 (App. pp. 116-117).

B. Standard of Review

This Court's standard of review pertaining to jury instructions is "whether prejudicial error by the trial court has occurred. Instructions must be considered as a whole, and if the jury has not been misled there is no reversible error." *Thavenet v. Davis*, 589 N.W.2d 233, 236 (Iowa 1999) (citations omitted)." Similarly, review pertaining to a trial court's formulation of jury instructions is for errors at law. *Shinn v. Iowa Mut. Ins. Co.*, 610 N.W.2d 538, 541 (Iowa Ct. App. 2000). Such error occurs when "instructions materially misstate the law or have misled the jury." *Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553, 570 (Iowa 2017). The jury instructions must be considered as a whole. *See Id*.

C. Discussion

Patrick excepted and objected to the District Court's instructions regarding "steering" to the extent that no definitive definition of "steering" was included therein. Trial Transcript (Vol. IV), p. 16 (8-10); Jury Instructions Nos. 13-14 (App. pp. 100-101). Patrick offered his proposed instruction on "steering," which read as follows:

> In order to find "steering" in violation of the law, you must find that the Defendants took some steps to show or guide the tester to an alternative property according to their race, national origin, gender or religion, or presented information that the property was

> undesirable for the prospect because of the tester's race, national origin, gender or religion. Tone of voice, choice of radio stations, facial gestures, etc. are not steering under the law.

Proposed Jury Instruction, p. 12, ¶ 2 (App. p. 46); Trial Transcript (Vol. IV), p. 16 (17-21). Prior to the District Court's issuance of jury instructions, Patrick had additionally submitted a recast "steering" jury instruction for the District Court's consideration. Defendants' Recast Jury Instructions, p. 4 (App. p. 75). To the extent that the District Court was unwilling to insert a full definition of "steering," Patrick alternatively sought inclusion of the portion that tone of voice, choice of radio stations, the detail by which a party responds to questioning, facial gestures, and so forth, do not qualify as "steering" under the law. Proposed Jury Instruction, p. 12, ¶ 2 (App. p. 46); Defendants' Recast Jury Instructions, p. 4, ¶ 7 (App. p. 75); Trial Transcript (Vol. IV), p. 17 (11-16). The District Court, however, overruled Patrick's objections and proceeded with administering its crafted "steering" instructions. Jury Instructions, Nos. 13-14 (App. pp. 100-101).

1. The Instructions do not Accurately Reflect "Steering," Resulting in Errors of Law.

The District Court committed reversible error in rejecting the Knuevens' proposed jury instructions regarding "steering." Combined Motion, ¶¶ 15-18 (App. pp. 120-121); Iowa R. Civ. P. 1.1104(8) (2021).

Namely, the District Court incorrectly focused on "steering" as "discouraging the protected tester from pursuing the housing and encouraging someone not of the protected class to pursue such housing," rather than instructing the jury on the fundamental elements necessary to establish such a claim. Jury Instructions, Nos. 13-14 at (3) (App. pp. 100-101). In other words, the District Court's instructions were silent as to whether a protected class member attempted to rent or purchase the Knuevens' properties. *Id.* at Nos. 13-14 (App. pp. 100-101); *see also* City of Des Moines Municipal Code §§ 62-101(a)(1), (10) (2021). The instructions did not address whether the Knuevens refused to sell, lease or rent their properties to a protected purchaser after a bona fide offer was made, or otherwise performed some affirmative act to deny housing. Jury Instructions, Nos. 13-14 (App. pp. 100-101); City of Des Moines Municipal Code § 62-101(a)(1) (2021); *see also Cabrera*, 24 F.3d at 381. Perhaps most notably, the instructions were silent on whether Patrick had "steered" or channeled a prospective buyer into or away from an area based on the prospective buyer's protected characteristic. Jury Instructions, Nos. 13-14 (App. pp. 100-101); *see also* City of Des Moines Municipal Code § 62-101(a)(10) (2021).

Additionally, the instructions did not consider whether the Knuevens presented information that the property was undesirable for the prospective buyer because of their protected status. Jury Instructions, Nos. 13-14 (App. pp. 100-101); *see also Village of Bellwood*, 895 F.2d at 1528-34. The jury was not afforded the opportunity to find in the Knuevens' favor if it concluded that the Knuevens had legitimate non-discriminatory reasons for attempting to direct or "steer" a prospective buyer. *See Id*. Finally, the instructions did not state that, if found based upon the evidence, the Knuevens did not suggest some alternative properties to prospective buyers, the jury's verdict must have been for the Knuevens. *Id.*; *see also* City of Des Moines Municipal Code § 62-101(a)(10) (2021).

Based on the foregoing, the District Court's instructions were not in accordance with "steering" precedent. Indeed, as previously outlined, "steering" requires some affirmative act that denies housing for a protected purchaser. *See Cabrera*, 24 F.3d at 381; Trial Transcript (Vol. III), pp. 140 (13-18), 144 (23-25) – 145 (1-4) (discussing *Cabrera*). This affirmative act has been interpreted to involve guiding a prospective buyer to an alternative property according to their protected class, or presenting information that the property was undesirable for the prospective buyer because of their protected

class. *See Village of Bellwood*, 895 F.2d at 1528-34; Trial Transcript (Vol. III), p. 140 (5-12) (discussing *Village of Bellwood*); *see also Broadway Crescent Realty, Inc.*, 2011 WL 856095, at *6 (defining steering as "the practice of encouraging patterns of racial segregation by steering members of a protected class away from building and neighborhoods inhabited by members of other races or groups"); *see also Weber*, 993 F. Supp. at 1290 (alleged steering of "families with small children to first-floor entry apartments only").

Furthermore, the jury should have received instructions to find in the Knuevens' favor if the jury concluded that Patrick had legitimate non-discriminatory reasons for attempting to direct or "steer" a prospective buyer (which Patrick denied). Defendants' Recast Jury Instructions, p. 4 (App. p. 75); Combined Motion, ¶ 16 (App. p. 121). As noted in *Village of Bellwood*, a prima facie case of "steering" places on the defendant "the burden of giving a non-invidious reason for the difference in treatment." 895 F.2d at 1531; *see also* 895 F.2d at 1533-34. The Knuevens did so during trial by denying any difference in treatment. Thus, during their deliberations, the jury should have been able to consider any legitimate non-discriminatory reason for his

conduct, with the option to find in favor of Patrick. Defendants' Recast Jury Instructions, p. 4 (App. p. 75); Combined Motion, ¶ 16 (App. p. 121).

It was reversible error for the District Court to not include the Knuevens' proposed language that tone of voice, the detail by which a party responds to a question, facial gestures, and so forth, are not "steering" under the law. *See* Proposed Jury Instruction, p. 12, ¶ 2 (App. p. 46); Defendants' Recast Jury Instructions, p. 4, ¶ 7 (App. p. 75). Indeed, no caselaw from any jurisdiction has supported these behaviors as "steering," and in light of the Commission's evidence at trial, the jury should have been instructed accordingly. *See* Igram Testimony, Trial Transcript (Vol. II), pp. 69 (16, 18-19) – 70 (1-2, 12-13), 80 (13-17) – 81 (16) (testimony that Patrick was not conversational, seemed "disappointed" that Igram was without her husband, allegedly avoided her and provided short answers to questions); Abdi Testimony, Trial Transcript (Vol. III), p. 7 (16-25) (testimony that Patrick was "tr[ing] to avoid" Abdi and did not provide additional reasoning for why the unit was no longer available); Cohen Testimony, Trial Transcript (Vol. III), p. 34 (16) (testimony from the Commission that Patrick is "very short, curt [ ] , not engaging" when speaking with a protected tester). Importantly, by setting the precedent that such behaviors (or a general "lack of providing

helpful information") *may* be considered evidence of "steering" under Iowa law, landlords possess ambiguous guidance, at best, as to what constitutes unlawful conduct when dealing with a prospective tenant subject to one or more protected classes. Trial Transcript (Vol. III), pp. 141 (17-25) – 142 (1-9). This, in turn, runs the risk of unduly subjecting landlords to investigations and potential litigation pursuant to ill-defined standards.

Lastly, an error of law occurred as the jury instructions did not require a verdict in the Knuevens' favor if the jury determined that, based upon the evidence, the Knuevens did not suggest some alternative properties to prospective buyers. Proposed Jury Instruction, p. 12 (App. p. 46); Defendants' Recast Jury Instructions, p. 4 (App. p. 75); Combined Motion, ¶ 18 (App. p. 121). This instruction, again, reiterates the findings of established caselaw concerning "steering." *See Cabrera*, 24 F.3d at 377-78 (directing White purchasers to predominantly White neighborhoods, while directing minority purchasers to properties in predominantly minority neighborhoods); *Village of Bellwood*, 895 F.2d at 1525 (concerning whether agencies were steering African-American buyers to specific areas according to their race and White buyers to adjoining suburbs); *Broadway Crescent Realty, Inc.*, 2011 WL 856095, at *6 (defining steering as "the practice of encouraging patterns

of racial segregation by steering members of a protected class away from building and neighborhoods inhabited by members of other races or groups"); *see also Weber*, 993 F. Supp. at 1290 (alleged steering of "families with small children to first-floor entry apartments only").

Separately, counsel argued that the jury's instructions should include the protected class of gender, in addition to religion and national origin. Trial Transcript (Vol. III), pp. 137 (14-25) – 138 (1). Counsel reasoned that, during the Commission's case-in-chief, the jury heard a number of recordings with individuals holding multiple protected characteristics. *Id.* Moreover, the Commission's Director, Joshua Barr, conceded during his examination that sex is a suspect classification. Barr Testimony (Vol. II), pp. 17 (7), 24 (6-26) – 25 (1-8). Therefore, the jury should have been allowed to contemplate that the Knuevens were renting to women, and not simply to those under a narrow scope of religion and national origin. Trial Transcript (Vol. III), pp. 137 (14-25) – 138 (1). The Knuevens timely objected to the District Court's instructions for failing to include gender, which additionally resulted in error of law. Trial Transcript (Vol. IV), pp. 16 (1-7), 18 (2-6); *see also* Combined Motion, ¶¶ 14-15 (App. pp. 120-121).

For all of the foregoing reasons, the District Court erred when it failed to instruct the jury on the fundamental elements of "steering," decided not to include Patrick's desired jury instructions regarding same, and denied Patrick's Motion for Direct Verdict.

III. THE DISTRICT COURT ERRED WHEN IT ALLOWED THE COMMISSION TO OFFER UNDULY PREJUDICIAL PRIOR BAD ACTS EVIDENCE THAT DID NOT CONCERN THE CHARGES IN QUESTION.

A. Preservation of Issue for Appeal

Efforts to keep this prejudicial information out of the proceeding started before *trial*. Specifically, the Knuevens forewarned the District Court of anticipated prior bad act evidence in their Motion in Limine. *See* Defendants' Motion in Limine, ¶ 4 (App. pp. 29-30); *see also* Transcript of Proceedings—Final Pretrial Conference Motions in Limine ("Pretrial Conference"), pp. 26 (24-25) – 28 (5); *see also* Trial Transcript (Vol. II), p. 5 (2-22). Timely objections were made to same once presented at trial. *See* Trial Transcript (Vol. II), p. 6 (19-25); Igram Testimony, Trial Transcript (Vol. II), pp. 65, 68; Fultz Testimony, Trial Transcript (Vol. II), pp. 93-95; Mashek Testimony, Trial Transcript (Vol. II), p. 116; Abdi Testimony, Trial Transcript (Vol. III), p. 6. Patrick again preserved the issues for appeal in his June 1, 2021 Motion

for Judgment Notwithstanding the Verdict and Motion for New Trial. Combined Motion, ¶ 11 (App. p. 119).

B. Standard of Review

An abuse of discretion standard is applied when considering whether the trial court properly admitted prior-bad-acts evidence. *See State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004). "An abuse of discretion occurs when the court's decision is based on a ground or reason that is clearly untenable or when the court's discretion is exercised to a clearly unreasonable degree." *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 160 (Iowa 2004).

C. Discussion

In his May 3, 2021 Motion in Limine, Patrick argued that the Commission should be precluded from mentioning, commenting on, referring to, or offering testimony or evidence regarding stale "steering" allegations.[10] Motion in Limine, ¶ 4 (App. pp. 29-30). This was further argued during the parties' May 7, 2021 Pretrial Conference. Pretrial Conference, pp. 26 (24-25) – 28 (5) (App. p. 65). Notably, according to Des Moines Municipal Code section 62-2(b), any complaint by a person alleging illegal discriminatory

[10] As discussed below, a stale "steering" allegation is one in which a complaint was not filed within 300 days of the alleged discriminatory act.

practice must be filed "within 300 days after the complainant knew or should have known of the most recent act constituting the alleged illegal discriminatory practice." Des Moines Municipal Code § 62-2(b) (2021).

Patrick argued that the foregoing ordinance provision was material in this matter as the Commission filed its housing discrimination complaint on February 2, 2018, alleging that Patrick engaged in isolated instances of "illegal discriminatory practices." Petition, ¶ 8 (App. p. 7). The Commission's Petition alleges that, on February 18, 2019, the Commission's housing discrimination complaint was amended to add an allegation of illegal steering, stemming from incidents dating back to December 2015, January 2016, and August 2017. *Id.* at ¶¶ 9, 28, 31-32 (App. pp. 7, 10, 10-12). Based on the language of Des Moines Municipal Code section 62-2(b), Patrick argued that the 2015 and 2016 steering allegations were, therefore, stale and should have been excluded from evidence. *See* Defendants' Motion in Limine, ¶ 4 (App. pp. 29-30); *see also* Pretrial Conference, pp. 26 (24-25) – 28 (5) (App. p. 65).

Specifically, prior to August 2017, the most recent alleged instance of illegal steering was January 29, 2016, when tester, Nadia Igram, performed a site visit. Igram Testimony, Trial Transcript (Vol. II), p. 68 (3-9). Three

hundred days thereafter was November 24, 2016. As of that date, no complaint was filed against Patrick. Petition, ¶ 8 (App. p. 7). Rather, after January 29, 2016, the next "act constituting [an] alleged illegal discriminatory practice" occurred on August 7, 2017, or 556 days following when the Commission "knew or should have known" of illegal steering. Des Moines Municipal Code § 62-2(b) (2021); Cox Testimony, Trial Transcript (Vol. II), p. 50 (19-22).

In realty, the Commission utilized four testers over a one-month period between December 2015 and January 2016. Igram Testimony, Trial Transcript (Vol. II), p. 63 (9-11); Fultz Testimony, Trial Transcript (Vol. II), p. 92 (17-20); Mashek Testimony, Trial Transcript (Vol. II), p. 115 (4-9, 12-13); Abdi Testimony, Trial Transcript (Vol. III), p. 3 (23-25). Thereafter, more than a year and a half passed, or until August 2017, before any subsequent allegation of steering arose. Commission Trial Exhibit 3—Recording, Laurie call to Pat (App. p. 57); Trial Transcript (Vol. II), pp. 53 (13-25). Therefore, the illegal steering alleged to have occurred in December 2015 through January 2016 was not addressed within the period proscribed in Des Moines Municipal Code section 62-2(b). In fact, the Commission's illegal steering allegations dating back to December 2015 and January 2016

were not addressed until the Commission amended its housing discrimination complaint on February 18, 2019, or 1,116 days after the January 29, 2016 steering took place. Petition, ¶ 9 (App. p. 7). Patrick argued that these steering allegations are, thus, untimely, stale, and should have been excluded pursuant to Des Moines Municipal Code section 62-2(b). *See* Defendants' Motion in Limine, ¶ 4 (App. pp. 29-30); *see also* Pretrial Conference, pp. 26 (24-25) – 28 (5) (App. p. 65).

In his Motion in Limine, Patrick preserved his arguments by citing to Iowa Rules of Evidence 5.403 and 5.404 Patrick first argued that the staleness of these allegations would undoubtedly prejudice him at trial. Defendants' Motion in Limine, ¶ 4, p. 6 (App. p. 30). This prejudice would substantially outweigh any probative value gained from admittance of the stale steering allegations. *See Id.* (App. p. 30) (citing Iowa R. Evid. 5.403). Second, Patrick argued that admittance of the stale steering allegations would constitute improper character evidence. *See Id.* (citing Iowa R. Evid. 5.404).

1. The Commission's Position and Patrick's Response Thereto.

In response, the Commission argued that evidence of alleged past steering conduct by Patrick was relevant to proving that national origin and religion were motivating factors to Patrick's conduct in August 2017.

Commission's Resistance to Defendants' Motions in Limine, ¶ 4 (App pp. 29-30). The Commission sought to establish a "consistent pattern that when Mr. Knueven believes he is dealing with someone of a protected religion or national origin, he is unhelpful." *Id.* at p. 4 (App. p. 28 The Commission argued that "[i]t has been repeatedly held that evidence of past discriminatory actions can be used as background evidence to support a timely claim." Supplemental Resistance, ¶ 4, p. 2 (App. p. 67) (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002)).

Instead, the Commission guised improper character evidence as material relevant to Patrick's motivation to commit discriminatory actions. Yet, motive is not an element of "steering" that must be proven. *See* Laurie Kratky Dore, *Evidence of Other Crimes, Wrongs or Acts*, 7 Ia. Prac., Evidence § 5.404:6 (2020) ("Motive is rarely an element of a charge or claim and thus need not be proven. Therefore, the trial court should examine whether the asserted motive evidenced is needed relevant to an issue in the case or is merely being used as an excuse to introduce character through prior bad acts."); *see also* City of Des Moines Municipal Code § 52-101(a) (2021) (void of language requiring evidence of motive to establish discrimination). Practically, the Commission's intent was to introduce evidence of stale

investigative findings, as opposed to Patrick's state of mind such motive evidence would tend to support.

Reliance on *Nat'l R.R. Passenger Corp. v. Morgan* does not apply to this case. *See* 536 U.S. 101 (2002). Indeed, *Morgan* infers a requirement that "the prior acts" to be used as "background evidence in support of a timely claim" involve substantially similar, if not identical, circumstances to the "timely" circumstances. *Id.* at 113. *Morgan* was decided in the context of an African-American employee asserting "many" discriminatory acts suffered "throughout his employment" with a single employer. *Id.* at 104, 106. All discriminatory acts were centered around one facet: the employee's race. *See Id.* at 120. In other words, each of the "many" instances of discrimination were by a single employer, against a single employee, regarding a single characteristic (i.e., race), within the same hostile work environment. *See Id.* It was, therefore, reasonable to admit prior acts that were considered reliable "background evidence" to show a continuation of the racially insensitive work environment experienced by the employee. *Id.* at 113.

The circumstances in *Morgan* do not carry over to the present case. Here, there is no allegation of "many" discriminatory acts committed against a single individual, concerning the same protected class, over a continuous

period. Rather, alleged discriminatory conduct took place over a one-month period in 2015/2016. Barr Testimony, Trial Transcript (Vol. II), pp. 21 (23-25) – 22 (1). The conduct concerned alleged "steering" based on (1) a telephone call where an "irritated" tone was used with a tester who had an unidentified, but "obvious audible accident;" and (2) an in-person site visit with a tester who was Muslim and used a Hijab. Petition, ¶¶ 31-32 (App. pp. 10-11); Abdi Testimony, Trial Transcript (Vol. III), p. 4-7; Igram Testimony, Trial Transcript (Vol. II), pp. 69-70, 80-81. It was not until 557 days thereafter that subsequent discriminatory conduct allegedly took place, and involved a separate string of testers concerning different properties. Cox Testimony, Trial Transcript (Vol. II), p. 50 (19-22); Petition, ¶¶ 18, 31 (102 E. Kenyan v. 307 SW Porter) (App. pp. 8, 10-11). Furthermore, this time, the alleged discrimination took place through a phone call where higher rent was quoted for prospective tenants identified as Muslins from Pakistan. Commission Trial Exhibit 3—Recording, Laurie call to Pat (App. p. 57). Following 2016, it took all of 1,116 days for alleged "steering" to come to light through the amendment of the City's discrimination complaint. Petition, ¶ 9 (App. p. 7).

Contrary to *Morgan*, this matter involves no continuous, racially insensitive environment. Alleged discriminatory actions are not against the

same individual or individuals, nor involve the same protected class. Petition, ¶ 33 (App. p. 12). Separate rental properties are at issue. Defendants' Trial Exhibit D—List of Rental Properties (App. p. 64). A 557-day gap exists in between instances of alleged discrimination. Cox Testimony, Trial Transcript (Vol. II), p. 50 (19-22). Each instance of alleged discrimination is not substantially similar to the next. *Compare* Igram Testimony, Trial Transcript (Vol. II), pp. 69-70, 80-81 *with* Commission Trial Exhibit 3—Recording, Laurie call to Pat (App. p. 57). Surely, these attenuated circumstances are not what the United States Supreme Court had in mind when it permitted the use of prior acts as background evidence to support the same ongoing discrimination.

It is worth noting that the Court in *Morgan* also held that "'strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.'" 536 U.S. at 108 (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980)). The procedural requirements found within Des Moines Municipal Code section 62-2(b) are short for a reason: to encourage prompt processing of discrimination charges. *See Id.* (noting that the short deadlines evidenced Congress' intent to encourage swift processing of discrimination charges). In this matter, justice

is promoted by the adherence to the limitations period set forth in Des Moines Municipal Code section 62-2(b). Doing so not only encourages prompt action against discriminatory charges, but excludes prejudicial evidence of past, stale steering allegations.

Through the introduction of the 2015/2016 investigatory evidence, Patrick was unduly prejudiced. Prior to trial, this prejudice was anticipated by not only Patrick, but also Judge McLellan during the parties' Pretrial Conference:

> Without proving that those 2015 and 2016 complaints were in fact steering violations, I think it gives – it creates a situation with the jurors – I think if they're seeing that, Well, they've proven it as to the 2017, 2018, whatever year we're talking about where this occurred, and we have these other prior bad acts, and so it bolsters what [the Commission] did later.
>
> I have problems with that because I think you're getting into prior actions that you're attempting to use to establish the prior acts that you're seeking the relief – the bad acts you're seeking relief on. I think I – I have a problem with that.

Pretrial Conference, pp. 28 (23-25) – 29 (1-10) (App. p. 65). As the foregoing argument reflects, this evidence only served to inflame the jury's passion and prejudice. *See State v. Newell*, 710 N.W.2d 6, 23 (Iowa 2006) ("In evaluating the prejudice factor, we consider the likelihood that the prior-acts evidence will prompt the jury to base its decision on an improper emotional response

toward the defendant."). Counsel moved for a new trial based upon this ground, as well. *See* Combined Motion, ¶ 12 (App. p. 119).

Reversible error was committed, therefore, by the District Court through its admission of unduly prejudicial prior bad acts evidence. The evidence and associated testimony were not only outside the period prescribed by Des Moines Municipal Code section 62-2(b), but also did not support the Commission's alleged basis (i.e., Patrick's state of mind such motive evidence would tend to support). *See* Des Moines Municipal Code § 62-2(b) (2021).

IV. THE DISTRICT COURT ERRED WHEN IT DENIED THE DEFENDANT THE OPPORTUNITY TO PRESENT EVIDENCE OF DEFENDANT'S GOOD CHARACTER.

A. Preservation of Issue for Appeal

The District Court's denial of Patrick's presentation of good character evidence was properly preserved for appeal because Patrick made an offer of proof with respect to the proposed exhibit. Trial Transcript (Vol. III), pp. 85-86, 90 (10-25) – 91 (1-2). In addition, Patrick addressed the issue in his June 1, 2021 Motion for New Trial. Combined Motion, ¶ 10 (App. pp. 118-119).

B. Standard of Review

Evidentiary rulings are reviewed for an abuse of discretion. *See City of Des Moines v. Ogden*, 909 N.W.2d 417, 423 (Iowa 2018). "An abuse of

discretion occurs when the court's decision is based on a ground or reason that is clearly untenable or when the court's discretion is exercised to a clearly unreasonable degree." *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 160 (Iowa 2004).

C. Discussion

During his case-in-chief, Patrick submitted an offer of proof, aimed at rebutting the Commission's improper "prior bad acts" evidence, consisting of the stale 2015/2016 investigatory findings, through admission of "good" character evidence. Trial Transcript (Vol. III), pp. 85-86; *see also* Iowa R. Evid. 5.404(b)(2), 5.405 (2021). Specifically, the offer of proof consisted of testimony from Patrick that in 2016 (the applicable time frame at issue in this case) a complaint was filed against him by a tenant, and that Patrick prevailed before the Iowa Civil Rights Commission. *Id.* at p. 91 (5-11). Counsel made particular mention that this offer of proof arose after the Commission was permitted to unilaterally present prior bad acts evidence without Patrick having first presented "good" character evidence. *Id.* at p. 89 (3-12). The District Court excluded Patrick's offer of proof (in part) as it was "not comparable to the motive evidence that [the District Court] allowed from the Commission." *Id.* at p. 90 (22-24). (For context, counsel put into the record

an October 2016 No Probable Cause Order from Administrative Law Judge Barbara Tapscott, which concerned unfounded allegations of disability discrimination against Knueven.) Court's Exhibit 1 (App. pp.76-84).

The District Court committed an abuse of discretion for multiple reasons. First, it permitted the Commission to proactively "open the door" to prejudicial character evidence during its case-in-chief, before Patrick offered evidence of his character whatsoever. Indeed, it has been made "abundantly clear that unless a defendant has placed his general character in issue it is improper to show that he is of bad character." *United States v. Parker*, 491 F.2d 517, 523 (8th Cir. 1973); *United States v. Bledsoe*, 531 F.2d 888, 892 (8th Cir. 1976) (such evidence is inadmissible). Put another way, the District Court allowed the Commission to unilaterally place into evidence materials that would have only been deemed admissible in the event that Patrick first offered evidence of his character. *See State v. Osborn*, 200 N.W.2d 798, 808 (Iowa 1972) (opposing party is prevented from placing character evidence into issue).

Second, the District Court erred when it prevented Patrick from rebutting the Commission's showing of improper character evidence. Normally, in a civil action, evidence of a party's good character is not

admissible unless that party's character has been placed directly in issue. *See Koonts v. Farmers Mut. Ins. Ass'n of Ven Buren Cty.*, 16 N.W.2d 20, 94 (Iowa 1944). Clearly, Patrick's character was placed in issue after the Commission was permitted to unilaterally call it into question through the admission of prior bad acts testimony. Trial Testimony (Vol. II), p. 5 (4-22). Despite Patrick offering relevant rebuttal evidence, the District Court refused to allow its admission. Trial Transcript (Vol. III), p. 90; Court's Exhibit 1 (App. pp. 76-84). Had the District Court ruled otherwise, the jury could have considered a similar instance where Patrick faced allegations of discrimination, but received a ruling in his favor. Court's Exhibit 1 (App. pp. 76-84); *see also State v. Crisman*, 57 N.W.2d 207, 211 (Iowa 1953) (good character evidence is considered by the jury with all other testimony).

Thus, in light of the Commission's unilateral presentation of prior bad acts evidence without Patrick having first presented "good" character evidence, Patrick was entitled to submit evidence to rebut the same. The District Court committed an abuse of discretion in denying Patrick's evidence. In the event of a remand, the Court should allow the evidence if the 2015/2016 evidence was properly admitted.

V. THE DISTRICT COURT ERRED WHEN IT ALLOWED FOR IMPEACHMENT OF THE DEFENDANT WITH COLLATERAL TESTIMONY IN AN UNRELATED MATTER.

A. Preservation of Issue for Appeal

The District Court's admission of impeachment evidence at trial was timely objected to by Patrick, thereby preserving the issue for appeal. Trial Transcript (Vol. III), p. 101 (12-18). Furthermore, the issue was additionally addressed in Patrick's June 1, 2021 Motion for New Trial. Combined Motion, ¶ 11 (App. p. 119).

B. Standard of Review

Evidentiary rulings are reviewed for an abuse of discretion. *See City of Des Moines v. Ogden*, 909 N.W.2d 417, 423 (Iowa 2018). "An abuse of discretion occurs when the court's decision is based on a ground or reason that is clearly untenable or when the court's discretion is exercised to a clearly unreasonable degree." *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 160 (Iowa 2004).

C. Discussion

During the Commission's cross-examination, Patrick testified that the rent for one of his properties was raised in 2017, and based on discussions he had with property managers, Renters Warehouse. Knueven Testimony, Trial

Transcript (Vol. III), pp. 100 (15-25) – 101 (1-3). At the time that rent was raised, the subject property was sitting vacant. *Id.* at p. 100 (21-23). Patrick testified that this was the first time he had raised rent on a vacant property during his years as a landlord. *Id.* at p. 101 (4-6).

Prior deposition testimony of Patrick was then used for impeachment purposes. The deposition was conducted by the Commission's counsel in another (unrelated) litigation where Patrick was represented by separate counsel, and deposed on issues collateral to the matter at hand.[11] Trial Transcript (Vol. III), p. 105 (10-20). Specifically, the impeachment testimony concerned whether or not Patrick had raised rents on vacant properties in the past. *Id*.

Following objection and a sidebar, counsel for the Knuevens stipulated that the parties were involved in a separate litigation over real estate (not discrimination) in which the City of Des Moines took Patrick's deposition. *Id.* at p. 101 (19-25); *see also* Trial Transcript (Vol. III), p. 117 (8-25). The Commission proceeded to impeach Patrick on the basis that his prior deposition testimony in this unrelated matter contained statements that were

[11] *See Patrick Knueven and Mary Knueven v. City of Des Moines, Iowa, et al.*, Case No. CVCV058828 (Iowa District Court for Polk County).

made to suggest Patrick had raised rents on vacant properties in the past. *Id.* at p.105 (10-20).[12]

The use of the deposition transcript further prevented Patrick from having a fair trial. Under Iowa law, "[i]t is well settled . . . the right to impeach by prior inconsistent statement is not without limit. The subject of the inconsistent statement, if it is to be admissible, must be material and not collateral to the facts of the case." *State v. Hill*, 243 N.W.2d 567, 571 (Iowa 1976). Whether Patrick had previously raised rent on vacant properties was secondary and subordinate to the issues before the District Court (i.e., whether Patrick discriminated against those of protected status by charging higher rent or by "steering" them away from housing). *See Black's Law Dictionary*, Collateral, 317 (Bryan A. Garner ed., 10th ed. 2014). Moreover, the litigation from which the transcript stemmed concerned real estate, not discrimination. Trial Transcript (Vol. III), p. 101 (19-24). Collectively, these findings dictate

[12] Q. Mr. Knueven, the transcript indicates that I asked you, "If the amounts of rent you have received hasn't decreased because of the City easement, how is it that the City easement has caused you to lose rental income?" I'm going to bring it up to you.
A. The answer to that is "It makes it more difficult to increase the rents."
Q. And the second sentence of that answer, could you read that as well?
A. "You can't increase the rents to what it should be" which I think I just said.

that the Commission's impeachment was unreasonable and an abuse of the District Court's discretion. *See City of Des Moines v. Ogden*, 909 N.W.2d 417, 423 (Iowa 2018).

Based on the foregoing, Patrick was further prevented from receiving a fair trial. An abuse of discretion occurred when the District Court allowed Patrick's impeachment through deposition testimony from an unrelated litigation and on issues collateral to the matter at hand. If the case is remanded for trial, the evidence held be excluded.

VI. TO THE EXTENT THIS COURT OVERTURNS THE DISTRICT COURT'S RULING IN APPELLANTS' FAVOR, THE COMMISSION WILL NO LONGER BE DEEMED A "PREVAILING PARTY" ENTITLED TO ATTORNEY FEES.

A. Preservation of Issue for Appeal

This issue was properly preserved for appeal through the Knuevens' Notice of Appeal filings. Specifically, within the Knueven's initial Notice of Appeal, it was detailed that Mary was named in the appeal "because she has a separate claim for attorney fees pending. Upon that ruling, Appellants will move to consolidate the appeal." Notice of Appeal, p. 1 fn. 1 (citations omitted) (App. p. 130). The Knuevens did so by timely filing their Second Notice of Appeal, following the District Court's September 9, 2021 Order. Second Notice of Appeal (App. pp. 138-140); Order re: Fees (App. pp. 133-

137). On November 1, 2021, the Court granted consolidation. *See* November 1, 2021 Order re: Consolidation (App. pp. 144-146).

B. Standard of Review

"[W]e review de novo the threshold and, in this case, decisive legal question of which litigant is the prevailing party. We review for an abuse of discretion the District Court's actual award of fees and costs." *Doc Magic, Inc. v. Mortgage Partnership of American, L.L.C.*, 729 F.3d 808, 812 (8th Cir. 2013); *see also Lee v. State*, 906 N.W.2d 186, 194 (Iowa 2018) (holding that an abuse of discretion standard is used when reviewing the grounds for a court's award of fees). A de novo level of review applies in this matter as the Knuevens are not challenging the District Court's determination of the Commission as a prevailing party, but rather the consequences stemming from a ruling by this Court in the Knuevens' favor.

C. Discussion

According to Des Moines Municipal Code § 62-107(m), "[a] court in a civil action brought under this section . . . may award reasonable attorney's fees to the prevailing party and assess court costs against the non-prevailing party." Des Moines Municipal Code § 62-107(m) (2021). The District Court

cited this ordinance in support of its September 9, 2021 attorney fee award ruling. *See* Order re: Fees, p. 2 (App. p. 134).

In the event that this Court rules in Patrick's favor (thereby overturning the District Court's rulings) this Court must also overturn the Commission's attorney fee award. Simply, the Commission will no longer be considered a "prevailing party" within the meaning of Section 62-107(m). Indeed, a prevailing party is defined as one "'in whose favor a judgment is rendered, regardless of the amount of damages awarded.'" *NCJC, Inc. v. WMG, L.C.*, 960 N.W.2d 58, 62 (Iowa 2021) (quoting Prevailing Party, *Black's Law Dictionary* (11th ed. 2019)) (emphasis omitted). Moreover, it is within this Court's power to hold a trial court's award of fees moot in light of the Court's rulings on appeal. *See Burns v. Bd. of Nursing*, 495 N.W.2d 698, 701 (Iowa 1993) ("What we have said renders moot a trial court holding allowing attorney fees for Burns' counsel . . . Fee awards, under the statute, can be awarded only to the prevailing party. Because Burns does not prevail under our review, the award must be set aside.").

In light of the foregoing, the Knuevens request that this Court set aside the District Court's attorney fee award in favor of the Commission, in the event that the Commission is no longer considered a "prevailing party" under

Iowa law. *See* Des Moines Municipal Code § 62-107(m) (2021); *Burns*, 495 N.W.2d at 701. Moreover, Patrick requests that the Court then remand the matter for a determination of attorney fees in Patrick's favor.

CONCLUSION

Patrick Knueven prays that the Court reverse the decision of the District Court, and find:

I. The District Court erred when it failed to grant a judgment notwithstanding the verdict as the Commission failed to prove "steering;"

II. The District Court erred when it failed to instruct the jury on the elements required to establish a legal claim of "steering;"

III. The District Court erred when it allowed the Commission to offer unduly prejudicial prior bad acts evidence that did not concern the charges in question;

IV. The District Court erred when it denied Knueven the opportunity to present evidence of his good character, and in the event of a remand, the Court should allow the evidence if the 2015/2016 investigation evidence was properly admitted;

V. The District Court erred when it allowed for impeachment of Knueven with collateral testimony in an unrelated matter; and

VI. To the extent that this Court overturns the District Court's ruling in the Knuevens' favor, the Commission is no longer a "prevailing party," entitled to attorney fees. Patrick requests that the Court then remand the matter for a determination of attorney fees in Patrick's favor.

Any other result will contradict the clear language of applicable law, including, but not limited to Des Moines Municipal Code section 62-101(a) the Iowa Civil Rights Act, the Fair Housing Act, and associated caselaw. Moreover, a ruling affirming the District Court will generate substantial implications for landlords of this State who may be subjected to legal action for alleged unpleasant behavior to a member of a protected class, such as tone of voice or facial gestures.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests to be heard at oral argument regarding the issues set forth above.

Respectfully submitted,

WHITFIELD & EDDY, P.L.C.
699 Walnut Street, Suite 2000
Des Moines, IA 50309-4195
Telephone: (515) 288-6041
Facsimile: (515) 246-1474

By: */s/ John F. Fatino*
John F. Fatino
fatino@whitfieldlaw.com

By: */s/ Nicholas J. Gral*
Nicholas J. Gral
gral@whitfieldlaw.com

ATTORNEYS FOR PATRICK KNUEVEN and MARY KNUEVEN

CERTIFICATE OF COST

The undersigned hereby certifies that the cost of printing the foregoing Appellants' Brief is $ 0.00

By: */s/ John F. Fatino*
John F. Fatino

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Appellants' Brief was served upon the attorneys of record listed below by electronic filing and electronic delivery to the parties via the EDMS system on April 8, 2022, pursuant to Iowa R. App. P. 6.901(1) (2021) and Iowa Ct. R. 16.404 (2021).

By: */s/ John F. Fatino*
John F. Fatino

Luke DeSmet
Michelle Mackel-Wiederanders
Assistant City Attorney
City of Des Moines
400 Robert D. Ray Drive
Des Moines, IA 50309

ATTORNEYS FOR DES MOINES CIVIL
AND HUMAN RIGHTS COMMISSION

CERTIFICATE OF FILING

The undersigned hereby certifies that the foregoing Appellants' Brief was filed with the Iowa Supreme Court by electronically filing the same on April 8, 2022, pursuant to Iowa R. App. P. 6.901(1) (2021) and Iowa Ct. R. 16.404 (2021).

By: */s/ John F. Fatino*
John F. Fatino

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

This forgoing Proof Brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*e*) and 6.903(1)(*g*)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 pt and contains 11,989 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

By: */s/ John F. Fatino*
John F. Fatino