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' REPLY BRIEF

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INTRODUCTION

The position of Defendants-Appellants, Patrick Knueven ("Patrick") and Mary Knueven ("Mary"), remains unaltered. Indeed, the arguments set forth in Plaintiff-Appellee Des Moines Civil and Human Rights Commission's ("the Commission") brief advocate for precisely what Defendants have respectfully urged this Court to address: unduly exposing landlords, such as Patrick, to liability under the legal concept of steering for *any conceivable action* alleged to have discouraged a protected tenant from securing housing. This is regardless of whether steering's requisite elements, including, but not limited to directing prospective tenants to other geographic areas according to their protective class, have been met or whether the landlord's alleged steering is supported by existing caselaw. Effectively, the Commission seeks to create Iowa law, allowing prospective, protected tenants to raise their arms and exclaim, "Steering!" following any interaction with a landlord perceived by that tenant to be unpleasant or lacking sufficient information. Such an amorphous standard is not only ill-defined, but will create havoc for landlords and Iowa courts prospectively.

Ultimately, Defendants rely on their January 20, 2022 brief as written. Nevertheless, the Commission's brief begs a response as to certain areas of discussion, which are set forth herein.

ARGUMENT

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

The parties agree that this issue was preserved for appeal, and that the applicable standard of review is for errors at law. *See* Appellee's March 4, 2022 Brief ("Brief"), p. 26; *see also Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa 2010).

A. Alleged Housing Discrimination by Charging Higher Rent to Protected Tenants is not Before this Court.

As an initial matter, in its brief, the Commission makes numerous references to evidence and testimony surrounding allegations that Patrick charged higher rent on the basis of religion and national origin. *See* Brief, pp. 17-22, 24, 42-44. These arguments are not before the Court as the jury determined that neither Patrick nor Mary were guilty of such allegations. *See* May 20, 2021 Verdict Form, Count I (App. p. 111).

The Commission did not appeal the jury's determination or move for a new trial on this issue. Thus, it should be precluded from now arguing varying rental quotes as evidence of discrimination. *See Fenceroy v. Gelita USA, Inc.*, 908 N.W.2d 235, 248 (Iowa 2018) (an issue is not preserved for appeal unless raised and ruled upon at the district court level). Consequently, Defendants

request that this Court not consider any of the Commission's allegations regarding varying rental quotes as evidence of discrimination.

B. The Commission's Desired Standard for Steering is Unsupported by Existing Law and Applicable Precedent.

The Commission admittedly adopts a "broad interpretation of steering." Brief, p. 25. Yet, the standard for steering that the Commission requests this Court to enforce is unsupported by existing law, and simply does not exist.

1. Prevailing Law and Precedent do not Support Steering without Limitation.

The Commission's brief fails to address that the City of Des Moines Municipal Code section 62-101(a)(10) is the operative authority at issue as it is the sole provision that expressly references "steering." *See* City of Des Moines Municipal Code § 62-101(a)(10) (2022) (categorizing steering as "channel[ing] a prospective buyer into or away from an area" because of their protected characteristic). Rather, the Commission relies on Iowa Code § 216.8(1)(a) and City of Des Moines Municipal Code section 62-101(a), which allegedly provide for steering under the sections' "otherwise make unavailable" language. *See* Brief, pp. 29-30 (acknowledging that those sections do not expressly contain steering).

In support of its position that steering "is a form of otherwise making housing unavailable in violation of 42 U.S.C.A. § 3604(a)," the Commission

cites to *Harris v. Vanderburg, et al.* Brief, p. 29 (citing No. 4:19-CV-111-D, 2022 WL 421132, at *6 (E.D.N.C. Feb. 10, 2022)). However, an examination of *Harris* is telling. Indeed, the case notes that section 3604(a) (containing the "otherwise make unavailable" language) "'does not reach every event that might conceivably affect the availability of housing.'" *Harris*, 2022 WL 421132, at *5 (quoting *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 192 (4th Cir. 1999) (quotation omitted)). Rather, "the statute 'ensure[s] that no one is denied the right to live where they choose for discriminatory reasons.'" *Id.*

Assuming that steering finds life under "otherwise make unavailable" language, *Harris* nevertheless corroborates the notion that steering is not a boundless legal principal, applicable to "every event that might conceivably affect the availability of housing," such as the landlord's tone of voice, perceived helpfulness, degree of volunteering information regarding the property's surrounding neighborhood, and so forth. *Glendening*, 174 F.3d at 192. Instead, the focus is on preventing discrimination by ensuring that a prospective tenant is not "denied the right to live where they choose." *Id*.

In this matter, the record is clear that no one was denied housing by Patrick—even assuming that the Commission's testers were genuinely interested (which they were not). 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 classes. City of Des Moines Municipal Code § 62-101(a)(1) (2022); *see also* 42 U.S.C.A. § 3604(a) (2022). Certainly, Patrick did not "steer or channel a prospective buyer into or away from an area," let alone because of their protected characteristic. City of Des Moines Municipal Code § 62-101(a)(10) (2022). In fact, no tester did so much as to attempt to complete an application. Therefore, without the evidence of any such denial as discussed in *Harris*, the intent of section 3604(a) is not served in this case, and the Commission's desired definition of steering does not exist. *Harris*, 2022 WL 421132, at *5 (quoting *Glendening*, 174 F.3d at 192 (quotation omitted)); *see also Harris*, 2022 WL 421132, at *7 (in refusing to hold property manager liable under section 3604(a), the court observed "no defendant refused to rent to the Harrises and no defendant refused to negotiate a rental with the Harrises").

The Commission cannot hide from (and did not counter in its brief) the fact that caselaw is absent from any jurisdiction which appears to support the Commission's view of steering. In other words, no legal body has held that steering is considered "*any action* to discourage prospective tenants from the

housing they desire because of their protected status." Brief, p. 30 (emphasis added). No caselaw supports 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. *See Id.* at pp. 32, 42, 46 (accusing Patrick of not being friendly, having a "hostile demeanor," and providing "terse answers" to questions). No caselaw creates liability against a landlord for steering if the landlord does not volunteer information not specifically requested by a prospective tenant. *See Id.* at p. 42 (criticizing Patrick for not "volunteer[ing] information about the unit"). Indeed, while the Commission hopes this to be steering's applicable standard, it lacks recognized backing.

2. The Commission's Cited Study Reinforces Steering's Foundational Elements.

Contrary to the Commission's position, steering is not a broad, unrestricted concept, but rather one tied to a foundational showing of directing individuals to and away from a geographic area according to their protected characteristic. *See, e.g., 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) (discussing 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"). Actually, the Commission's own authority backs Patrick's position.

For the first time, the Commission cites to a 2012 study performed by the United States Department of Housing and Urban Development (HUD), which it claims "analyzed the helpfulness of agents in showing rental properties as a factor" in determining whether steering occurred. Brief, p. 32 (citing Housing Discrimination Against Racial and Ethnic Minorities 2012, U.S. Dept. of Housing and Urban Dev., p. 10 (June 2013), https://www.huduser.gov/portal/publications/pdf/hud-514_hds2012.pdf). As the Commission did not previously address this study with the District Court, it should be rejected. Nevertheless, should the Court consider its merits, a closer review of the study is telling for numerous reasons.

First, the study analyzed "sales *steering*," which it defined as "the practice of real estate agents guiding minority homeseekers away from homes in integrated or white neighborhoods by offering homes in minority neighborhoods." *Id.* at 13 (emphasis in original). This definition is consistent with recognized caselaw on steering, and as was explained in detail throughout Defendants' brief. *See Village of Bellwood v. Dwivedi, et al.*, 895 F.2d 1521, 1525 (7th Cir. 1990) (considering whether agencies were steering African-American buyers to specific areas according to their race and White buyers to adjoining suburbs); 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 Cabrera v. Jakabovitz*, 24 F.3d 372, 377-78 (2nd Cir. 1994) (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).

Moreover, additional caselaw cited by the Commission in its brief further supports HUD's definition of "sales steering," in which a lessor directed a protected tester away from a White residential complex partly by "suggest[ing] that the tester check with other trailer parks in the Baltimore metropolitan region, giving him directions to those parks." *Walker v. Todd Village, LLC*, 419 F.Supp.2d 743, 746 (D. Md. 2006). Clearly, had HUD considered steering to be a more expansive, unstructured concept (as the Commission advocates) it would have defined it differently. Housing Discrimination Against Racial and Ethnic Minorities 2012, HUD, p. 13.

Next, the study analyzed "[b]oth racial/ethnic and class steering" by comparing tract characteristics. *Id.* at 30. Specifically, HUD analyzed racial/ethnic steering by comparing "the racial composition of census tracts

where homes were recommended or shown to the white and minority testers."[1] On the other hand, examining class steering involved comparing "the average socioeconomic characteristics of neighborhoods shown to the white and minority testers."[2] *Id.* at 31.

Therefore, when determining whether steering was taking place, HUD placed emphasis not on the subjective experience of the tester, but rather on geographical considerations. *See Id.* at 30-31. Indeed, HUD accounted for racial and socioeconomic compositions within given neighborhoods to determine whether testers were being directed to or away from area according to their race, ethnicity, and/or social class. *See Id*. This, again, is consistent with steering's recognized caselaw, which considers steering in the context of channeling buyers to specific areas according to their race. *See, e.g.*, *Village of Bellwood*, 895 F.2d at 1525.

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[1] HUD went on to explain: "If the white tester is shown homes in neighborhoods with a higher average percentage of non-Hispanic whites than the homes shown the minority tester, this counts as a segregation-reinforcing instance of differential treatment. If the reverse occurs, the test is coded as integration reinforcing." *Id*.

[2] Indicators included "the tract-level homeownership rate, percentage nonpoor, and the median home value" to ultimately decide whether "the average over the homes recommended or shown favors the white or minority tester." *Id.* at 31.

HUD's final steering analysis compared agent/broker comments to white and minority testers "to assess whether the comments reinforce segregation." Housing Discrimination Against Racial and Ethnic Minorities 2012, HUD, p. 31. However, the comments were limited to the respective neighborhood, and were categorized as either "positive" or "negative." *Id*. This, again, places emphasis on geographical considerations, as opposed to the tester's subjective experience with the agent. *Id*. Notably, nowhere in the study was evidence or analysis centered around the agent's tone of voice, the detail by which they responded to a tester, facial gestures, whether the agent volunteered unsolicited information, was considered friendly, or exhibited "any [other] action to discourage prospective tenants from the housing they desire because of their protected status." Brief, p. 30. These factors—which the Commission argues are direct indicators of steering—are merely unsupported outside of the Commission's own belief and desire.

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. *See* Trial Transcript (Vol. III), pp. 118-19, 125-26; Trial Transcript (Vol. IV), pp. 9-11, 16-17 (citing Proposed Instructions, p. 12 (App. p. 46)). Indeed, as detailed herein, the Commission failed to prove

steering at trial, and continues to rely on a standard that is unsupported by existing law.

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

The parties agree that this issue was preserved for appeal, and that the applicable standard of review is for errors at law. *See* Brief, p. 41; *see also Shinn v. Iowa Mut. Ins. Co.*, 610 N.W.2d 538, 541 (Iowa Ct. App. 2000).

A. As the District Court's Instructions did not Accurately State Existing Law Regarding "Steering," the Instructions Mislead the Jury's Decision Making.

The Commission correctly states that jury instructions must convey the applicable law. *See* Brief, p. 33 (citing *State v. Davis*, 951 N.W.2d 8, 17 (Iowa 2020)). However, the District Court's instructions did not fulfill this requirement as they did not instruct the jury on the elements required to establish a legal claim of steering, in accordance with existing precedent and legal authority.

Contrary to the Commission's assertion, Patrick's proposed jury instructions did not misstate the law on steering. *See* Brief, p. 35. In fact, the language in Patrick's proposed instructions was taken directly from applicable caselaw and the City of Des Moines Municipal Code. *Compare* Defendants' Proposed Statement of the of Case, Jury Instructions, and Verdict Form, p. 12

(App. p. 46) (requiring that Patrick "took some steps to show or guide the tester to an alternative property according to their" protected characteristic) to *Village of Bellwood*, 895 F.2d at 1531 (the court finding that "Black testers were primarily shown homes in integrated Bellwood; white testers were primarily shown homes in the adjacent white suburbs"); *see also* City of Des Moines Municipal Code § 62-101(a)(10) (unlawful for any person to "[s]teer or channel a prospective buyer *into or away from an area* because of" their protected characteristic) (emphasis added). So, too, were Patrick's recast jury instructions. *Compare* Defendants' Recast Jury Instructions, p. 4 (App. p. 75) (requiring that Patrick "presented undesirable conditions of a property offered by the Defendants with the intent to steer or channel a prospective buyer into or away from an area") to *Village of Bellwood*, 895 F.2d at 1528-34 (the court making 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 also* City of Des Moines Municipal Code § 62-101(a)(10).

Notwithstanding the foregoing, and despite direct legal support, the District Court also chose not to instruct the jury regarding: (1) whether a protected class member attempted to rent or purchase Defendants' properties; (2) whether Defendants 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; (3) whether to find in Defendants' favor if the jury determined that Defendants had a legitimate non-discriminatory reason for attempting to direct or "steer" a prospective buyer; and (4) whether to find in Defendants' favor if the jury determined that Defendants did not suggest some alternative property to prospective buyers. *See* Jury Instructions, Nos. 13-14 (App. pp. 100-101); *see also* City of Des Moines Municipal Code § 62-101(a)(1), (10); *Cabrera v. Jakabovitz*, 24 F.3d 372, 381 (2nd Cir. 1994) (holding that a claimant must prove that they were "denied the opportunity to rent"); *Village of Bellwood*, 895 F.2d at 1528-34.

Lastly, the Commission's brief fails to explain why references to tone of voice, the detail by which a party responds to a question, facial gestures, and so forth were properly excluded from the jury's instructions when no legal authority has recognized such factors in steering analysis. *See* Defendants' Proposed Statement of the of Case, Jury Instructions, and Verdict Form, p. 12 (App. p. 46); Defendants' Recast Jury Instructions, p. 4 (App. p. 75).

The District Court's instructions incorrectly supported the notion that any action may be steering, so long as it somehow "discourages" the protected tester from pursing housing. *See* Brief, p. 34 (citing Jury Instruction No. 13 (App. p. 100). This instruction is an incorrect statement of applicable law and, therefore, mislead the jury's decision making. *See Deboom v. Raining Rose*,

Inc., 772 N.W.2d 1, 5 (Iowa 2009) ("Reversal is warranted if the instructions have misled the jury.").

The Commission argues that "the legal standards for discriminatory steering have evolved to address the less obvious steering actions that may occur today," but cites no authority in support of its contention. Brief, p. 37. In reality, steering is rooted in what Defendants sought to include in their proposed and recast jury instructions detailed herein. *See* Defendants' Proposed Statement of the of Case, Jury Instructions, and Verdict Form, p. 12 (App. p. 46); Defendants' Recast Jury Instructions, p. 4 (App. p. 75).

A. Gender.

The Commission argues that "no value" would have resulted had Patrick been permitted to include gender as a protected classification in jury instructions. *See* Brief, p. 40. This may be true regarding whether value would have been added to the Commission's case; however, this is not accurate as it relates to Patrick. Indeed, including gender within the jury instructions would have allowed the jury to consider that Patrick was renting to women, and not simply to tenants under a narrow scope of religion and national origin. Trial Transcript (Vol. III), pp. 137 (14-25) – 138 (1). By the Court preventing Patrick from doing so, error of law resulted. 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 record and associated law continues to show that 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 Directed Verdict. *See* 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)).

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.

The parties agree that this issue was preserved for appeal, and that the applicable standard of review is for abuse of discretion. *See* Brief, p. 51; *see also State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004).

A. The Commission Sought to Establish Patrick's "Consistent Pattern" of Behavior, contradicting what Iowa Rule of Evidence 5.404(b) Seeks to Exclude.

During trial, evidence of the Commission's 2015/2016 testing was admitted over Patrick's objection. *See* Trial Testimony (Vol. II), pp. 5 (4-22) - 6 (19-25). In its proof belief, the Commission argues that this admission did not generate an abuse of direction, yet in doing so, highlights what Iowa Rule of Evidence 5.404(b) seeks to exclude. Indeed, the Commission makes numerous references to the 2015/2016 tester evidence being vital to establish

Patrick's "consistent pattern" of behavior, "the same pattern of conduct" towards those of protected characteristics. *See* Brief, pp. 46, 52, 55.

Importantly, "[r]ule 404(b) prohibits the admission of bad act evidence to prove the character of a defendant in order to show action in conformity therewith." *United States v. Warren*, 951 F.3d 946, 950 (8th Cir. 2020). This Court has previously emphasized that the public policy in excluding prior bad acts evidence "'is founded not on a belief that the evidence is irrelevant, but rather on a fear that juries will tend to give it excessive weight.'" *State v. Sullivan*, 679 N.W.2d 19, 24 (Iowa 2004) (quoting *United States v. Daniels*, 770 F.2d 1111, 1116 (D.C. Cir. 1985)); *see also State v. Doolin*, 942 N.W.2d 500, 546 (Iowa 2020) (J. Appel, dissenting) ("evidence of prior bad acts is thought to be simply too prejudicial to be provided to a jury").

In this case, there is little room for doubt that the jury placed "excessive weight" on the improperly admitted 2015/2016 testing evidence. *Sullivan*, 679 N.W.2d at 24. Whereas the Commission's 2017 testing evidence consisted of a single "control" telephone call and a brief "tester" call, the same cannot be said for the Commission's 2015/2016 testing evidence. *See* Commission Trial Exhibit 3—Recording, Laurie call to Pat (App. p. 57); Commission Trial Exhibit 7—Recording, Carla call to Pat Knueven (App. p. 59). Indeed, the Commission spent the majority of its case-in-chief detailing

its 2015/2016 investigation with testimony from four testers, each of whom described their interactions with Patrick. *See* 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).

Without the 2015/2016 testing evidence, the jury would not have heard three audio records from various testers (over Patrick's objection). *See* Igram Testimony, Trial Transcript (Vol. II), pp. 65 (11-13, 17-25) – 68 (3-9); Commission Trial Exhibit 20—Recording, Nadia Igram, call to Pat Knueven (App. p. 61); Commission Trial Exhibit 22—Recording, Nadia Igram, visit to 2907 S.E. 10th (App. p. 62); Abdi Testimony, Trial Transcript (Vol. III), p. 6 (14-25); Commission Trial Exhibit 12—Recording, Deeq Abdi call to Pat Knueven (App. p. 60). Without the 2015/2016 testing evidence, the jury would not have heard tester, Deeq Abdi, summarily conclude 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). Absent evidence of the 2015/2016 testing, the jury would not have heard testimony or audio regarding any site visits at Patrick's properties. Igram Testimony, Trial Transcript (Vol. II), p. 68-70, 78-82; Commission Trial Exhibit 22—Recording, Nadia Igram, visit to 2907 S.E. 10th (App. p. 62);

Fultz Testimony, Trial Transcript (Vol. II), pp. 94-96; Mashek Testimony, Trial Transcript (Vol. II), pp. 120-122.

Perhaps most importantly, without admission of the 2015/2016 testing evidence, the Commission would have presented drastically limited evidence to the jury in support of what it alleges amounts to steering. In other words, without the 2015/2016 testing evidence, the jury would not have heard tester, Igram's belief that Patrick discouraged her housing availability by (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 but asked 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). Furthermore, the jury would have heard far less testimony and evidence that Patrick was (1) "audibly negative," "curt," and acting "inconvenienced or irritated" when speaking with a protected tester over the phone, but "friendly" and conversational when speaking with a control tester; and (2) "sigh[ing]," "sound[ing] annoyed," and was uncommunicative with tester Igram during a site visit (which Igram attributed to her use of a Hijab) yet was accommodating and attentive with a control tester during their site

visits. 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). It was based on these findings that the Commission concluded Patrick's actions amounted to "illegal steering on the basis of religion and national origin." Petition, ¶ 33 (App. p. 12).

Notably, in its Brief, the Commission never contests that to be actionable, its 2015/2016 investigation must have been filed within 300 days following its final day of testing. *See* City of Des Moines Municipal Code § 62-2(b) (2022) ("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."). It did not. Instead, the basis for its claim at trial was a result of taking its stale 2015/2016 investigatory findings and bootstrapping them onto its slim 2017 investigation. The result of this "quick fix" at trial was undue prejudice to Patrick.

Finally, "prior bad act evidence offered for a proper purpose may still be excluded under [Iowa Rule of Evidence 5.403] if its probative value is substantially outweighed by the risk of unfair prejudice." *White Commc'ns, LLC v. Synergies3 Tec Servs., LLC*, No. 4:18-cv-00124-RGE-CFB, 2019 WL

12529185, at *2 (S.D. Iowa Sept. 6, 2019). Patrick denies that the 2015/2016 testing evidence was admitted for a proper purpose. However, in the event that this Court holds otherwise, it must not overlook the applicability of Iowa Rule of Evidence 5.403. *See Id*. For the reasons detailed above, any probative value gained by the Commission in admitting this evidence was drastically outweighed by the prejudice imposed on Patrick. Iowa R. Evid. 5.403.

1. This Matter's Timeline Proves no "Consistent Pattern" of Conduct.

To the extent that the Commission relies on the 2015/2016 testing evidence establishing a "consistent pattern" of conduct, no such "consistent pattern" exists in light of the nature of the conduct and this matter's timeline. The dissimilarity was addressed in Patrick's opening brief. Moreover, 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 Patrick's housing practices. Thus, the Commission did not merely withhold from taking action against Patrick "for some time" after its 2015/2016 testing, but well beyond the time allotted by City of Des Moines Municipal Code section 62-2(b). Brief, p. 17; *see also* City of Des Moines Municipal Code § 62-2(b) (2022) ("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."). Same or even

similar behavior too far attenuated can hardly evidence a "consistent pattern" of conduct—particularly when the Commission's own code provision dictates that such behavior is stale. *See* City of Des Moines Municipal Code § 62-2(b) (2022) ("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."). Therefore, the 2015/2016 testing evidence is not sufficiently reliable to warrant its admission. *Compare to Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (holding that admission of prior acts was reliable "background evidence" due to "many" instances of discrimination by a single employer, against a single employee, regarding a single characteristic (i.e., race), within the same hostile work environment, and showed a continuation of the racially insensitive work environment experienced by the employee).

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* City of Des Moines Municipal Code § 62-2(b) (2022).

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

The parties agree that this issue was preserved for appeal, and that the applicable standard of review is for abuse of discretion. *See* Brief, p. 57; *see also City of Des Moines v. Ogden*, 909 N.W.2d 417, 423 (Iowa 2018).

A. Patrick's Offer of Proof was Necessary to Combat the Commission Proactively "Opening the Door" to Prejudicial Character Evidence.

The Commission argues that Patrick's proposed offer of proof was invalid, in part, as it would have gone against his requested motion in limine and would not have assisted the jury in determining whether Patrick discriminated against potential tenants. *See* Brief, pp. 58-59. Such a position disregards the timing of when Patrick's offer of proof was made, and the purpose for which it served. Indeed, Patrick's offer of proof was attempted only after the Commission was permitted to proactively "open the door" to prejudicial character evidence during its case-in-chief, before Patrick offered evidence of his character whatsoever. Trial Transcript (Vol. III), p. 89 (3-12). Patrick held no desire to act contrary to his motion in limine (which moved to exclude other claims of discrimination made against him) but instead attempted to counteract an abuse of discretion—admitting evidence of the Commission's 2015/2016 tester evidence. *See State v. Osborn*, 200 N.W.2d 798, 808 (Iowa 1972) (opposing party is prevented from placing character

evidence into issue); *see also* Defendants' May 3, 2021 Motion in Limine, ¶ 8 (App. p. 33). Moreover, the primary purpose of the offer of proof was not to establish a fact for the jury's determination, but to mitigate the Commission's improper introduction of prior bad acts evidence. *See* Iowa R. Evid. 5.404(b)(2), Iowa R. Evid. 5.405 (2022).

It is irrelevant whether the offer of proof (consisting of a prior Iowa Civil Rights Commission Order) fit squarely within the subject matter confines of the present case. *See* Brief, p. 58 (the Commission arguing that the offer of proof dealt with a different form of discrimination, an existing tenant as opposed to a perspective tenant). What was material to Patrick's offer of proof was that in 2016 (the applicable time frame at issue in this case) a complaint alleging discrimination was filed against him by a tenant, and Patrick prevailed before the Iowa Civil Rights Commission. *See* Trial Transcript (Vol. III), pp. 85-86; *see also* Court's Exhibit 1 (App. pp. 76-84). Had the Commission not been permitted to unilaterally introduce prior bad acts evidence, Patrick's offer of proof would neither have been sought nor necessary. *See* Iowa R. Evid. 5.404(b)(2), 5.405 (2022).

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 his offer of proof to rebut the same. Patrick,

again, maintains that the District Court committed an abuse of discretion in denying Patrick's evidence. In the event of a remand, the Court should allow Patrick's evidence if the 2015/2016 evidence was properly admitted.

CONCLUSION

The Commission maintains that Patrick "acted to make [the testers] feel unwelcome so that they would understand, without him saying it, that his housing was unavailable to them." Brief, p. 63. What the Commission misunderstands is that such assumed, subjective evidence does not amount to steering under the law. If it did, lessors and property owners alike would be subjected to rolling discrimination claims by prospective, protected tenants who did not leave the leasing office with "warm fuzzies." Such an amorphous standard cannot stand.

Thus, Defendant Patrick Knueven prays that the Court reverse the decision of the District Court. Any other result will contradict the clear language of applicable law, including, but not limited to City of Des Moines Municipal Code section 62-101(a), the Iowa Civil Rights Act, the Fair Housing Act, and associated caselaw.

Respectfully submitted,

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CERTIFICATE OF COST

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

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Appellants' Reply 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(3) and Iowa R. Elec. P. 16.315(1)(b).

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

This forgoing Appellants' Proof Reply Brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) 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 5,303 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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