IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-0183

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STATE OF IOWA,
Plaintiff-Appellee,

vs.

ABRAHAM WATKINS,
Defendant-Appellant.

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APPEAL FROM THE IOWA DISTRICT COURT
FOR VAN BUREN COUNTY
THE HONORABLE JAMES A. DREW, JUDGE

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# APPELLEE'S BRIEF

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## ROUTING STATEMENT

This case should be transferred to the Court of Appeals because it presents issues that require the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a).

## STATEMENT OF THE CASE

### Nature of the Case

The Defendant-Appellant, Abraham Watkins, appeals the trial court's removal order.

### Course of Proceedings

Defendant-Appellant Abraham Watkins ("Watkins") was elected part-time Van Buren County Attorney and took office on January 1, 2015. On August 9, 2016, Mr. Watkins' legal assistant, Jasmin Wallingford ("Wallingford"), submitted her letter of resignation complaining of a "hostile work environment," stating that she "learned many things in [her] time here, including what makes a hostile work environment." Appx. p. 228. After an investigation, the Van Buren County Board of Supervisors voted to pursue a petition for removal under Chapter 66. F. Montgomery Brown, J.D., was appointed special prosecutor to prosecute the removal proceeding against Mr. Watkins. After a five day trial in equity, the trial court found Mr. Watkins committed misconduct or maladministration of

office by continually engaging in sexually harassing behavior and ordered Mr. Watkins removed from office effective January 3, 2017.

**Facts**

Mr. Watkins and his wife, Renee Watkins ("Mrs. Watkins"), moved to Keosauqua, Iowa in 2014, where Mr. Watkins opened a solo law practice working out of his home.[1] Mrs. Watkins assisted Mr. Watkins' law practice however she could and in September of 2014, Mr. Watkins hired Ms. Wallingford, then 20 years of age, to work as his legal assistant. TT 160:6-8, 328:25-329:7; TT 147:1-4; TT 149:21-150:4. When Mr. Watkins took office as County Attorney in January of 2015, Ms. Wallingford continued to work for Mr. Watkins, working 29 hours doing County work and approximately 11 hours doing his private practice work. TT 150:5-9. Chris Kauffman, a retired police officer for the City of Bettendorf and a reserved deputy for the City of Van Buren, became a good family friend to the Watkins. TT 56:15-19, 57:8-15, 58:15-17. Mr. Kauffman, in fact, was the person who

[1] Mr. Watkins lived in a two story house where he and his family lived on the second floor, while the first floor was used as his law office. TT 328:5-7; Appx. p. 182 at ¶¶ 1.c and 2.b. After Mr. Watkins was elected County Attorney, the County of Van Buren paid Mr. Watkins rent for the office space in his residence. TT 443:9-12, 577:24-578:1.

suggested and encouraged Mr. Watkins to run for the County Attorney position. *See* TT 58:18-59:13. Mr. Kauffman described Mr. Watkins as an individual who did not have a filter, especially when it came to sexual topics. Mr. Kauffman recalled that Mr. Watkins would share sexual stories in inappropriate settings and offered to show him pictures of his wife naked "frequently." *See* TT 74:4-23, 76:25-77:22, 78:6-11, 78:20-79:3, 79:8-10.

On or about April of 2015, Mr. Watkins hired Virginia Barchman as a part-time Assistant County Attorney.[2] TT2 106:8-10. Initially, Ms. Barchman worked in the same first floor office area as Ms. Wallingford.[3] Appx. p. 182 at ¶ 2.b; TT2 149:21-150:3. Ms. Barchman testified that she saw Mr. Watkins come into the first floor office area in his underwear and silky pajama bottoms that outlined his lower anatomy, heard Mr. Watkins ask Ms. Wallingford whether her "vagina was broke," heard Mr. Watkins comment that a female

[2] Ms. Barchman was semi-retired at the time after a 30 year career as a prosecutor, recently having retired as an Assistant Attorney General for the Iowa Attorney General's office in 2010. Appx. p. 357-358; TT2 105:22-106:4.

[3] Ms. Barchman subsequently moved to a different area to work.

attorney with the initials T.Q. be referred to as T. Quif,[4] and Mr. Watkins showed a nude picture of his pregnant wife painted in blue to Ms. Barchman. *See generally* Appx. pp. 180-181.

On August 9, 2016, Ms. Wallingford resigned from her position due to hostile work environment, later noting "Mr. Watkins' behavior toward me became progressively more unwelcome and offensive." Appx. pp. 193-194. Ms. Wallingford stated that "Mr. Watkins frequently behaved in my presence and made comments of a sexual nature that made me uncomfortable. . . I resigned because his conduct toward me and in my presence made me uncomfortable to a degree that I could no longer tolerate." Appx. pp. 193-194. Ms. Wallingford testified that during her employment with Mr. Watkins when he was County Attorney, Mr. Watkins came to the first floor office area in his underwear, Mr. Watkins videotaped his wife squirting her breast milk inside of Ms. Wallingford's car and later showed Ms. Wallingford the video, Mr. Watkins showed Ms. Wallingford two pictures of his wife—one of Mrs. Watkins from behind naked below the waist and another of Mrs. Watkins' vaginal area, Mr. Watkins told Ms. Wallingford that her "boobs were

[4] At Mr. Watkins' direction, Mrs. Watkins told Ms. Barchman that "quif" meant vaginal fart.

distracting him," Mr. Watkins commented to Ms. Wallingford about the breasts of a courthouse employee, wondering if she wore a padded bra or if they were "really that big," Mr. Watkins would complain to Ms. Wallingford that his wife "never wanted to have sex" and wished he had a wife who wanted to have sex all the time, Mr. Watkins stated to Ms. Wallingford (referring to a female client), "Man, I wouldn't want to see her naked," Mr. Watkins made a sexual joke about the floor cleaner "Bona" that was used by the young Amish women who were cleaning the office, Mr. Watkins asked Ms. Wallingford if "her vagina was still broke," and Mr. Watkins told Ms. Wallingford that he was glad he kept "naked pictures" of old girlfriends. *See generally* Appx. pp. 193-194, 195-199.

After Ms. Wallingford resigned, Mr. Watkins hired 20 year old Tayt Waibel ("Waibel"), who began working for the office in August 2016. Ms. Waibel testified that "stuff was just taken pervertedly [sic]" in the office and Ms. Waibel heard Mr. Watkins say to Holly Richardson, another female employee, "Oh, Holly, you like big cocks." Sometime after the petition for removal was filed against Mr. Watkins, Mr. Watkins called Ms. Waibel, but she was unable to answer the phone because she had been in the shower. When she

explained to Mr. Watkins why she could not answer the phone, he stated that she "should have FaceTimed him when she was in the shower naked." He then said something to the effect, "This is probably why I'm in trouble for sexual harassment." *See generally* Appx. p. 359; TT 25:25-26:19.

Based on these and other serious allegations, the Board of Supervisors voted to pursue a removal proceeding under Chapter 66 to remove Mr. Watkins from office. F. Montgomery Brown, J.D. was appointed special prosecutor to prosecute the petition for removal against Mr. Watkins. Appx. pp. 10-11 (appointing special prosecutor "pursuant to Iowa Code Sections 66.12 and 331.754(4)"). In its Third Amended Petition, the State alleged Mr. Watkins engaged in willful misconduct or maladministration in office in violation of Iowa Code section 66.1A(2) when he (1) engaged in acts creating a hostile work environment and/or constituting sexual harassment, (2) supplied alcohol to a minor in violation of Iowa Code sections 123.47(1) and 123.47(2)(a), (3) retaliation, (4) accepting private employment which caused conflict of interest as County Attorney, and (5) engaged in intoxication in violation of Iowa Code section 66.1A(6). On January 3, 2017, after a five day trial in equity, the trial court ordered Mr.

Watkins removed from office for willful misconduct or maladministration of office by engaging in sexually harassing conduct. Appx. pp. 160-169.

## ARGUMENT

### I. The Removal Action Was Lawfully Initiated

#### Preservation and Standard of Review

The State agrees that error was preserved on whether the Board of Supervisors lawfully empowered F. Montgomery Brown to initiate the petition for removal. The State agrees that issues of statutory interpretation are reviewed de novo.

#### Merits

The trial court correctly analyzed and resolved the issue of whether the removal action was lawfully initiated, stating:

> A Board of Supervisors has the authority to appoint an attorney to act as county attorney when the elected county attorney has a conflict of interest. Iowa Code 331.754(4). This is a civil proceeding in which the defendant, as county attorney, has an obvious conflict of interest. Mr. Brown, having been duly appointed, has the same authority as a county attorney with respect to the matter for which he or she is appointed. Iowa Code 331.754(5). For these reasons, and for the reasons urged by the State, the court concludes that Mr. Brown is a "county attorney" for purposes of Iowa Code 66.3(5). Therefore the Motion to Dismiss must be denied.

Appx. pp. 45-46. Iowa Code section 331.754(4) explicitly empowers a board of supervisors to "appoint an attorney to act as county attorney in a civil proceeding if the county attorney and all assistant county attorneys are disqualified by a conflict of interest. . . ."[5] The trial court correctly regarded the conflict of interest here as obvious, and Mr. Watkins has not argued otherwise.

Mr. Watkins, however, contends that because section 331.754(4) applies to civil proceedings, it has no application in this Chapter 66 removal proceeding because a removal proceeding is not "civil" but rather is "more akin to a criminal matter." Def.'s Page Proof Br. at 14 (citing *City of Des Moines v. Dist. Court of Polk County*, 41 N.W.2d 36, 39 (Iowa 1950) (noting that removal proceedings are "penal or quasi-criminal in character")). *City of Des Moines*, however, did not involve the interpretation of section 331.754 grant of authority; rather, when *City of Des Moines* compared removal proceedings with criminal prosecutions, it was for the limited purpose of assessing the costs associated with the action,

[5] Iowa Code section 331.754(1) also provides comparable authority, permitting a board to appoint an attorney to act as county attorney in the case of "disability" of the county attorney, where "disability" includes a conflict of interest. *See Polk County Conference Bd. v. Sarcone*, 516 N.W.2d 817, 821 (Iowa 1994).

noting that in both contexts the county attorney is acting in the interest of the public generally, as opposed to simply representing a particular client. 41 N.W.2d at 39-40. The *City of Des Moines* Court, moreover, acknowledged that the controlling statute expressly provided that a removal proceeding was "summary in its nature and shall be triable as an equitable action." *Id.* at 37 (quoting Iowa Code § 66.18). Section 66.18 still requires removal actions to be summary proceedings in equity, and such actions are unquestionably civil proceedings.

Next, Mr. Watkins contends that "allowing the Board of Supervisors to appoint an attorney via Iowa Code § 331.754(4) to initiate a removal proceeding [impermissibly] allows the Board of Supervisors to exercise the powers of a County Attorney." Def.'s Page Proof Br. at 13-14. The board of supervisors' authority to appoint an attorney to act as county attorney under section 331.754(4), however, only arises if the county attorney has a disqualifying conflict of interest as to a particular civil proceeding. That was precisely the case with this removal action and no impermissible action has been taken by the Board. Mr. Watkins further asserts—without citation to any authority—that only an *elected* county attorney is empowered by

section 66.3(5) to file a removal petition, not an acting county attorney appointed by a board of supervisors pursuant to section 331.754(4). Def.'s Page Proof Br. at 12. The applicable statutes, however, contain no such limitation. Indeed, section 331.754(5) explicitly provides that an "acting county attorney has the same authority and is subject to the same responsibilities as a county attorney." In turn, section 66.3 permits a removal petition to be filed by a county attorney, who in this case was Mr. Brown—an acting county attorney with all of the authority and responsibilities of an elected county attorney. Appx. pp. 10-11 (appointing special prosecutor "pursuant to Iowa Code Sections 66.12 and 331.754(4)").

Finally, Mr. Watkins argues that section 66.12, which provides that the court "may" appoint an attorney to prosecute a removal action against a county attorney must be interpreted as the exclusive means of removing a county attorney, otherwise section 66.12 "will be rendered superfluous" if a board of supervisors may use section 331.754(4) in connection with the removal of a county attorney.[6] *See*

[6] No part of section 66.12 is rendered superfluous because that section provides important alternative means of removing a county attorney, such as when removal is initiated by the attorney general or voters (subsections 66.3(1) & (3)).

Def.'s Page Proof Br. at 15. As noted above, in the present case, the trial court did appoint Mr. Brown as special prosecutor pursuant to sections 66.12 and 331.754(4). In any event, section 66.12 cannot reasonably be interpreted as the exclusive means of removing a county attorney.

First, the language of section 66.12 dates to 1909 (Acts 1909, 33rd G.A., ch.78, § 2) and must be interpreted in the light of subsequent legislative and constitutional developments.[7] In 1988, the General Assembly empowered boards of supervisors to appoint an acting county attorney when the county attorney is subject to a disability—the power now reflected in the first sentence of section 331.754(1). In 2002, the General Assembly enacted the current sections 331.754(4) and (5), empowering a board of supervisors to appoint an acting county attorney in conflict situations and imbuing the appointee with plenary powers. Although these later enactments clearly addressed the same subject matter as section 66.12—namely,

[7] For example, modern proceedings to remove a county attorney have dimensions well beyond the ken of members of the 1909 general assembly. Under some circumstances, a county's prompt and decisive remedial effort to remove a county attorney may be key to avoiding civil liability. *See Erickson-Puttman v. Gill*, 212 F. Supp. 2d 960 (N.D. Iowa 2002).

the appointment of an acting county attorney—neither statute indicates any legislative intent to establish section 66.12 as exclusive.

As for constitutional developments, the addition of the home rule amendments to the Iowa Constitution in 1978 affected a new approach to how a county's powers were to be interpreted. Iowa Const. article III, § 39A (1978 Amendment). Instead of looking to state law for specific authorization to perform an act or function on behalf of its citizens, counties were imbued with broad home rule authority, limited only by what the General Assembly effectively reserved to the state. In applying home rule principles to a board of supervisors' authority to take a particular action, the Iowa Supreme Court has said:

> [W]e must consider two concepts: (1) the county's home rule authority, and (2) the state's power to abrogate or preempt local action. These concepts and their interrelationship are set forth in Iowa's constitutional grant of county home rule authority. See Iowa Const. art. III, § 39A (added by amend. 37 in 1978). Under this constitutional amendment, counties have the power "to determine their local affairs and government," but only to the extent those determinations are "not inconsistent with the laws of the general assembly." *Id*. The goal of this amendment was to grant counties "power to rule their local affairs and government subject to the superior authority of the general assembly."

*Goodell v. Humboldt County*, 575 N.W.2d 486, 491-92 (Iowa 1998) (internal citations omitted). The *Goodell* Court further observed that "[a]n exercise of county power is not inconsistent with a state law unless it is irreconcilable with the state law," Id. At 492 (citing Iowa Code § 331.301(4)). This means that "a county may exercise its home rule powers on matters that are also the subject of state law" and that "counties now have the authority to act 'unless a particular power has been denied them by statute.'" *Id.* (quoting *City of Des Moines v. Master Builders of Iowa*, 498 N.W.2d 702, 703-04 (Iowa 1993)). Accordingly, in this case, the action of the Board of Supervisors and the subsequent initiation of the petition for removal were lawful.[8] *See id.* at 492-93, 499-500.

The State respectfully requests that this Court affirm the trial court's dismissal order and hold that the petition for removal was lawfully initiated.

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[8] Here, the Board has not taken action expressly forbidden by the state, nor has it forbidden an action expressly permitted by the state, the Board's action was not preempted, and section 66.12 does not "contain an expression of legislative intent to eliminate home rule authority" or any stated desire to effect uniform statewide regulation. *See Goodell*, 575 N.W.2d at 500.

## II. The State Proved That Watkins Committed Willful Misconduct or Maladministration in Office When He Engaged in Sexual Harassing Conduct

### Preservation and Standard of Review

Mr. Watkins does not state that error was preserved. The standard of review for a removal proceeding is "[d]e novo review of the evidence." *State v. Callaway*, 268 N.W.2d 841, 842 (Iowa 1978). In such an appeal, there is "essentially but one question before [the reviewing court] . . . Does the record complied below contain sufficient evidence of misconduct on the part of the defendant[] as [an] elected public official[] to necessitate [his] removal from office under the provisions of Chapter 66." *State v. Bartz*, 224 N.W.2d 632, 634 (Iowa 1974). In resolving this question, the reviewing court will "give weight to findings of the trial court, but nonetheless assume the responsibility of reviewing the entire record in determining the case anew on appeal." *Id.*

### Merits

#### A. Watkins' Sexually Harassing Conduct

The Iowa Supreme Court defined "'clear, satisfactory and convincing' standard of proof as the establishment of facts by more than a preponderance of the evidence, but something less than

establishing a factual situation beyond a reasonable doubt." *Bartz*, 224 N.W2d at 638. Here, the State proved by clear, satisfactory and convincing evidence that Mr. Watkins engaged in sexually harassing conduct, as set forth below:

1. Mr. Watkins Shows Ms. Wallingford Pictures of His Wife's Vagina

Ms. Wallingford testified that Mr. Watkins showed her pictures of his wife on his cell phone, one picture was of Mrs. Watkins "bent kind of behind, like looking behind her, and it looked like it was from the camera underneath of her" and the other picture was of Mrs. Watkins' vagina. TT 157:15-157:22. In both pictures, Mrs. Watkins was nude below the waist. TT 158:1-4. In the first picture, Ms. Wallingford saw Mrs. Watkins' "butt," and in the second picture, Ms. Wallingford saw Mrs. Watkins' "full vagina." TT 158:5-8. Ms. Wallingford never asked to see such pictures and was "very uncomfortable." TT 158:14-22. Mrs. Watkins admits that there are nude photos of her taken by Mr. Watkins and admits that she was present when Mr. Watkins showed Ms. Wallingford a naked picture of her "on accident" but she nonetheless told him to stop it. TT 316:13-317:8. Even Mr. Watkins cannot deny that he showed pictures of his wife's vagina to Ms. Wallingford. Appx. p. 265 (Watkins Depo.

209:17-23) (Q: Did you show [Ms. Wallingford] pictures of your wife's vagina? A: I don't recall doing that. But she says I did, and my wife says I did, so I cannot categorically deny that.").[9]

2. Mr. Watkins Makes and Shows Video of His Wife Spraying Breast Milk

Sometime in June of 2015, Mr. Watkins, Mrs. Watkins, and Ms. Wallingford went out for lunch. TT 159:3-160:2. While Ms. Wallingford was driving back to the office, Mrs. Watkins squirted breast milk in the car while Mr. Watkins videotaped it. TT 160:22-161:3. At least a month after the videotaping, Ms. Wallingford was walking back to her desk when Mr. Watkins said something to the effect of, "hey, do you remember this" and showed her the video. TT 161:4-19. Mrs. Watkins testified that the breast milk incident did occur, Mr. Watkins did videotape it, but she believed that *she* showed Ms. Wallingford the video (even though the video was on Mr. Watkins' phone). TT 564:6-8; TT 564:12-19; Appx. p. 266 (Watkins Depo. 214:7-19). Mr. Watkins testified that he didn't recall if he showed Ms. Wallingford the video but does recall making the video on his phone. Appx. p. 266 (Watkins Depo. 214:20-23; 214:7-12).

[9] Mr. Kauffman testified that Mr. Watkins "frequently" offered to show Mr. Kauffman naked pictures of his wife, which Mr. Kauffman always declined. TT 74:19-23.

Ms. Wallingford viewed this video to be sexual or quasi-sexual in nature. TT 159:3-5.

3. Mr. Watkins Wore Underwear Into Office Area

During trial, five independent witnesses testified that they personally saw Mr. Watkins in his underwear in the office area. Ms. Wallingford testified that it was "very awkward" when [Mr. Watkins] came down half-dressed [in his underwear]" (Appx. pp. 269-270 (Wallingford Depo. 74:24-75:4)), and "found it very uncomfortable when [Mr. Watkins] was in [ ] just his underwear." Appx. p. 270 (Wallingford Depo. 76:6-23). Ms. Barchman also testified that while she was working on the first floor office area with Ms. Wallingford, she saw Mr. Watkins in the office area in knit briefs with his hands cupped over his lower anatomy, as well as silky pajama bottoms which were revealing of his anatomy. TT2 at 106:15-107:25; TT2 149:21-150:3. Ms. Barchman found these incidents to be inappropriate and told Mr. Watkins that they (Ms. Wallingford and Ms. Barchman) were not married to him and they should not have to see him in such attire. TT2 at 106:21-23; TT2 107:8-25. Mr. Kauffman, a personal and professional friend, also testified that on one occasion when he was at the office, he saw Mr. Watkins in his

underwear. TT 61:5-24; TT 83:21-84:1. Mr. David Paulek, a client of Mr. Watkins' private practice, also testified that he saw Mr. Watkins in his underwear when he and his wife visited the office to pick up some documents. TT 355:2-356:14; TT 362:7-363:12. Even Mrs. Watkins acknowledged Mr. Watkins did come into the first floor office area in his boxer briefs "once or twice." TT 555:14-556:5. Indeed, with such overwhelming evidence, even Mr. Watkins conceded that he does not dispute Ms. Wallingford's testimony about Mr. Watkins coming into the office area in his underwear. Appx. p. 258 (Watkins Depo. 195:20-22 ("You know, like I've said, I believe Jasmin [Wallingford], the way she told those, those are possible.")); *see also* Appx. p. 254 (Watkins Depo 123:19-25 (conceding that between Ms. Wallingford's and Mrs. Watkins' testimony about him coming to the office area in boxer briefs that "might have happened")).

4. Mr. Watkins Comments that Ms. Wallingford's Vagina is Broke

Ms. Wallingford testified that after she told Mr. Watkins that she was going to see a gynecologist after his persistent inquiry, Mr. Watkins would ask if her vagina was still broke. TT 181:22-182:16. Ms. Wallingford recalls at least one time Mr. Watkins made that

comment, but believes it was more than once. TT 182:17-19; TT 251:19-21. Ms. Wallingford was "not happy" with Mr. Watkins' comment. TT 182:20-21. Ms. Barchman testified that on one occasion she heard Mr. Watkins ask Ms. Wallingford if her vagina was still broke. TT2 109:20-110:3. Ms. Barchman testified that when Mr. Watkins repeated himself, Mrs. Watkins was walking in, made eye contact with Ms. Barchman, then Mrs. Watkins started "remonstrating with Mr. Watkins" and said that he could not talk to Ms. Wallingford in that manner. TT2 110:4-25. Mrs. Watkins, however, testified that she did not believe Mr. Watkins made any comments about Ms. Wallingford's broken vagina, but rather believed that *she* made the broken vagina comments "enough" times in Mr. Watkins' presence. TT 314:9-19. Mr. Watkins agrees that a statement about broken vagina would be unprofessional and inappropriate. Appx. pp. 263-264 (Watkins Depo. 207:19-208:5).

5. Mr. Watkins' Comments about Boobs to Ms. Wallingford

Ms. Wallingford testified that when she and Mr. Watkins were having a meeting, he said that her "boobs were distracting him" and that if she "ever went clubbing, [she] should wear that shirt out." TT 173:5-12. Mr. Watkins denies making such a statement, and further

contends that he does not see a sexual component in such a statement in any event. Appx. pp. 261-262 (Watkins Depo. 205:9-206:25). Ms. Wallingford also testified that Mr. Watkins made comments to her about a female clerk's breasts. TT 173:21-23; TT 174:2-3; TT 174:6-9. Specifically, Mr. Watkins had a birthday party for his daughter and a female clerk was in attendance. Ms. Wallingford stated that the following work day, Mr. Watkins stated that he "had to look to see if the [female clerk] wore a padded bra or if her boobs were really that big." TT 174:6-175:23. Mr. Kauffman, who was also at the birthday party, testified that Mr. Watkins was "appraising the lady's chest" and wanted to know whether her breasts were real or a push-up bra. TT 76:3-5; TT 76:9-77:3. Mr. Kauffman stated that it was not unusual for Mr. Watkins to make such comments about women. TT 77:4-6.

6. Mr. Watkins Comments about Sex with His Wife to Ms. Wallingford

Ms. Wallingford testified that Mr. Watkins, unsolicited, stated that his wife never wanted to have sex with him. TT 181:2-4; TT 181:9-10; Appx. pp. 195-199. On another occasion, Mr. Watkins and Ms. Wallingford were talking about winning the lottery and Mr. Watkins stated that "he just wished that he had a wife that had sex with him all the time." TT 181:5-8; Appx. pp. 195-199. Mrs. Watkins

testified that she did not think she was present when Mr. Watkins complained to Ms. Wallingford about not having enough sex, but stated that "[i]t could have happened." TT 558:2-6.[10] Ms. Wallingford's testimony is further supported by Mr. Kauffman. Mr. Kauffman testified that Mr. Watkins "always" talked about sexually-related subjects in inappropriate settings and liked to talk about sex. TT 74:4-18.

7. Mr. Watkins Makes Sexually Charged Comments to Ms. Wallingford

Ms. Wallingford testified that on or about August 7, 2016 (the day before she resigned), that Mr. Watkins told her that he was glad he kept old naked pictures of his girlfriends so he could look at them. TT 177:20-178:9; Appx. pp. 195-199. On another occasion, Mr. Watkins referred to a client that he would not like to see naked. TT 179:5-11; Appx. p. 187-191. On another occasion, Mr. Watkins recounted a sexually related reference to Ms. Wallingford that he said to the young Amish ladies that cleaned for him, referencing the floor cleaner they used called "Bono." TT 180:7-19; TT 170:7-13; Appx. p.

[10] Mrs. Watkins quickly corrected herself in her answer, "A. It could have happened. I mean I don't think so." TT 558:6.

195-199. Mr. Watkins does not deny that the "Bona" reference occurred. Def.'s Page Proof Br. at 48.

8. Mr. Watkins Comments a Female Attorney be Referred to as "T.Quif"

Ms. Barchman testified that on one occasion when she was looking for an email address of another female attorney, Ms. Barchman said in passing that they should refer to that attorney as T.Q. (her initials). Then, Mr. Watkins, in the presence of Ms. Barchman, Ms. Wallingford, and Mrs. Watkins stated that they should refer to the female attorney as "T. Quif." When Ms. Barchman expressed confusion as to what that meant, Mr. Watkins had his wife, Mrs. Watkins, explain to Ms. Barchman that "quif" meant "vaginal fart." TT2 111:16-112:14; Appx. pp. 180-181.

9. Mr. Watkins Shows Nude Body Painted Picture of his Wife

Ms. Barchman testified sometime after January 2016, when she was working in Mr. Watkins' office with him, Mr. Watkins showed her a picture of his pregnant, naked wife, body painted in blue on his computer. Mr. Watkins then said something to the effect of, isn't my wife beautiful. Ms. Barchman looked away in response. TT3 42:21-43:5; TT3 43:22-24; TT3 44:11-45:3; TT3 45:14-16. Mr. Watkins does

not dispute that this occurred, but contends that it was inadvertent. Def.'s Page Proof Br. at 50.

10. Mr. Watkins' Comments About "Big Cocks" and FaceTime in Shower

After Ms. Wallingford resigned, Mr. Watkins hired 20 year old Tayt Waibel as a legal assistant to do the County work. TT 54:5-9; TT 21:13-22:12. Ms. Waibel testified of "stuff being taken pervertedly [sic]" by Mr. Watkins during her time at the office. TT 25:25-26:7. On one occasion, Ms. Waibel recalled that Mr. Watkins said something to the effect that Holly likes big cocks.[11] TT 26:8-19.

Sometime in mid-September 2016, Ms. Waibel began working for Mr. Watkins as a babysitter, as that role seemed to be a better fit than as a legal assistant. TT 22:13-17; TT 26:20-27:4. Ms. Waibel testified that the Saturday after Mr. Watkins was served with the petition for removal, Mr. Watkins called her because Ms. Waibel was supposed to watch his children. TT 27:12-19; TT 27:25-28:13. Ms. Waibel missed Mr. Watkins' call because she was in the shower, and when she returned his call and explained why she did not pick up, Mr. Watkins said that Ms. Waibel should have FaceTimed him while in

[11] Holly Richardson, a current employee, testified that she recalled talking about tomatoes and stating that she liked "Big Beefs" a breed of tomatoes good for making salsa. TT3 117:17-118:1

the shower. TT 28:21-29:8. Ms. Waibel understood that statement to mean that she should have video chatted with Mr. Watkins while she was naked and in the shower. TT 29:20-30:1. Ms. Waibel testified that Mr. Watkins then said something to the effect, this is probably why I am in trouble for sexual harassment and I should not say things like this. TT 30:13-17; Appx. p. 359. Ms. Waibel quit her babysitting job the following Monday because she did not feel comfortable.[12] TT 30:21-31:7.

### B. Trial Court's Factual Finding of Sexually Harassing Conduct

Based on the evidence presented, the trial court made the following factual findings (which all occurred while Mr. Watkins was the County Attorney):

> On two occasions while Ms. Wallingford was present Mr. Watkins entered the work area wearing boxer briefs. On one of those occasions he walked over and stood next to Ms. Wallingford while she was working at her desk.
>
> On one occasion Mr. Watkins had Ms. Wallingford drive him and his wife to a restaurant in Burlington. On the return trip Mrs. Watkins, who had recently given birth, squirted her breast milk on the inside of Ms. Wallingford's

[12] Despite Mr. Watkins' contentions to the contrary, Ms. Waibel did not agree to babysit for Mr. Watkins after the FaceTime comment. Def.'s Page Proof Br. at 52-53. Rather, when asked by Mr. Watkins if she could babysit if he needed her, she merely replied that she would if she was not busy. TT 52:22-53:1; TT 53:6-10; TT 53:14-16.

car. Mr. Watkins filmed the episode. Approximately a month later he showed the video to Ms. Wallingford.

On another occasion the Watkins had Ms. Wallingford stay for dinner. During the evening Mr. Watkins showed Ms. Wallingford two pictures of his wife. One depicted her from behind naked below the waist and the other was a photograph of her vaginal area.

On another occasion Mr. Watkins told Ms. Wallingford that her "boobs were distracting him."

On another occasion Mr. Watkins commented to Ms. Wallingford about the breasts of a courthouse employee. He wondered if she wore a padded bra or if they were "really that big."

On another occasion, after seeing an overweight woman, he stated to Ms. Wallingford, "Man, I wouldn't want to see her naked."

On another occasion Mr. Watkins made a joke in front of Ms. Wallingford and two Amish women who were cleaning the office. The joke had a sexual connotation and was based on the floor cleaner they were using called "Bona."

Mr. Watkins complained to Ms. Wallingford that his wife "never wanted to have sex." He stated that he wished he had a wife who wanted to have sex all the time.

In the fall of 2015 Ms. Wallingford was having some health issues. Mr. Watkins asked her if "her vagina was still broke."

Mr. Watkins told Ms. Wallingford that he had "naked pictures" of old girlfriends. He also stated that he was glad he kept them.

Appx. pp. 161-163.

Virginia Barchman began working as the Assistant Van Buren County Attorney in April of 2015. Ms. Barchman had been retired after a long career as an Area Prosecutor with the Iowa Attorney General's Office.

Ms. Barchman observed Mr. Watkins enter the work area in his underwear. Ms. Barchman protested and Mr. Watkins cupped his hands over his genital area. On another occasion Ms. Barchman observed Mr. Watkins in silky pajama bottoms that revealed the outline of his genitals.

On an occasion when Mr. Watkins and the staff were discussing a female attorney he stated that she should be referred to as "T. Quif." Ms. Barchman did not know the meaning of the term. Mr. Watkins asked his wife to tell her. Ms. Barchman was informed that "quif" was a word for a "vaginal fart."

On another occasion Mr. Watkins asked Ms. Barchman to look at something on his computer screen. It was a photograph of his wife who was nude but covered in blue body paint. Mr. Watkins made a comment about his wife's beauty. Ms. Barchman is adamant that the photograph she saw is not the one offered into evidence as Exhibit 33.

After Jasmin Wallingford resigned Mr. Watkins hired Tayt Waibel, who began working for the office in August 2016. She worked exclusively on county attorney business. Ms. Waibel testified that "stuff was just taken pervertedly" in the office. Another young woman, Holly Richardson, was also working in the office at that time. Ms. Waibel heard Mr. Watkins say to Ms. Richardson, "Oh, Holly, you like big cocks."

After this action was filed Mr. Watkins called Ms. Waibel, but she was unable to answer the phone because she had been in the shower. When she explained to Mr. Watkins

> why she could not answer the phone, he stated that she "should have FaceTimed him when she was in the shower naked." He then said, "This is probably why I'm in trouble for sexual harassment."
>
> Christopher Kauffman is a retired police officer who now lives in Van Buren County. He befriended Mr. Watkins and encouraged him to run for county attorney. According to Mr. Kauffman, Mr. Watkins likes to talk about sex and frequently offered to show him naked pictures of his wife. Mr. Watkins also made a comment to Mr. Kauffman regarding the breasts of a courthouse employee.

Appx. pp. 163-164.

The trial court found the State's witnesses to be credible because their testimonies were consistent with other State's witnesses and it was apparent that Ms. Wallingford, Ms. Waibel, and Mr. Kauffman were not eager to testify against Mr. Watkins. Appx. p. 164; *see In re Marriage of McDermott,* 827 N.W.2d 671, 676 (Iowa 2013) ("We give weight to the findings of the district court, particularly concerning the credibility of witnesses; however, those findings are not binding upon us."). The trial court found Ms. Barchman "confident and emphatic" while testifying. Appx. p. 164. The trial court "did not see or hear anything from any of the State's witnesses that would indicate they were fabricating their testimony" and they had no significant personal interest in the outcome of the

case."[13] Appx. pp. 164-165. Indeed, Ms. Wallingford was a 20 year old who admired Mr. Watkins when she first started her employment (Appx. p. 267 (Wallingford Depo. 43:13-16)) and is someone who has nothing to gain by testifying against Mr. Watkins.

Based on the evidence, the trial court further found that "Mr. Watkins engaged in a pattern of conduct that [was] unacceptable. . . [and which most] would consider. . .outrageous or even shocking." Appx. p. 166. Based on the evidence, the trial court correctly concluded that Mr. Watkins' "actions were clearly intentional" and "[g]iven the extent and stunning nature of his conduct one can, and in the [trial court's] opinion must, infer that he was acting with a bad or evil purpose." Appx. p. 167. The sexually harassing actions of Mr. Watkins was much more than a mere failure to act more "conservatively and professionally" (Def.'s Page Proof Br. at 21), but rather consisted of "sexually related banter" and "images, that have

[13] Despite Mr. Watkins' implications to the contrary, Ms. Barchman did not have a significant personal interest in the outcome of the removal proceeding. In fact, even before the Board voted to pursue Mr. Watkins' removal, Ms. Barchman made clear that she had no interest in running for County Attorney (being semi-retired at 70 years old), but would be willing to help keep things going. Appx. p. 291.

no place in a work setting. . . especially true for a county attorney's office." Appx. p. 167.

### C. Hostile Work Environment

The fundamental premise of a hostile work environment claim is that each discrete acts may not amount to a discriminatory act in isolation, but such acts combined rise to the level of a hostile work environment. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002), *superseded in non-relevant part by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 6 ("Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. . . . It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. . . . Such claims are based on the cumulative effect of individual act."). In his brief, Mr. Watkins seeks to view each sexually harassing act in isolation and attempts to dismiss each instance as a mere offensive or tasteless joke. The law does not support such an analysis. Indeed, in reviewing the overwhelming evidence and the "cumulative effect" of the individual acts, the State proved that Mr. Watkins committed

"willful misconduct or maladministration in office" when he engaged in sexual harassment. Iowa Code § 66.1A(2).[14]

Here, it is undisputed that when Ms. Wallingford resigned from her job, she complained of a "hostile work environment," even stating that she "learned many things in [her] time here, including what makes a hostile work environment." Appx. p. 355. Wallingford further explained in her affidavit that she quit her job because "Mr. Watkins' behavior toward me became progressively more unwelcome and offensive." Appx. pp. 193-194. Ms. Wallingford stated that "Mr. Watkins frequently behaved in my presence and made comments of a sexual nature that made me uncomfortable. . . I resigned because his conduct toward me and in my presence made me uncomfortable to a degree that I could no longer tolerate." Appx. pp. 193-194. In reviewing the totality of events, the trial court correctly held that Mr. Watkins committed sexual harassment and acted with bad or evil purpose. Appx. pp. 166-167.

[14] Here, Mr. Watkins' sexually harassing acts constituted willful misconduct or maladministration of office in violation of Iowa Code section 66.1A(2) regardless of whether his sexually harassing acts violated the Iowa Civil Rights Act and/or the Iowa Rules of Professional Conduct.

In viewing the overwhelming evidence of Mr. Watkins' repeated sexually inappropriate conduct, the State proved by clear, satisfactory and convincing evidence that "Mr. Watkins has engaged in misconduct or maladministration by regularly committing sexual harassment." Appx. p. 160; *see also Nat'l R.R. Passenger Corp.*, 536 U.S. at 115 (stating that hostile environment claims are "based on the cumulative effect of individual act"). Mr. Watkins attempts to isolate each sexually harassing act as discrete acts which amount to nothing more than inappropriate jokes among friendly co-workers. Mr. Watkins, however, fails to mention the cumulative effect of the acts occurring in the context of Mr. Watkins' escalating drinking, Ms. Wallingford feeling verbally abused by Mr. Watkins, and being "scare[d]" of Mr. Watkins at times. Appx. p. 271 (Wallingford Depo. 89:16-25)).

### D. Mr. Watkins' Acted Willfully and with Bad or With an Evil Purpose

The Iowa Supreme Court has stated where a public official is charged with misconduct or maladministration under section 66.1, "a showing is required that the alleged misconduct was committed willfully and with an evil purpose." *Bartz*, 224 N.W.2d at 638. "'Willfully' has been held to mean intentionally, deliberately, with a

bad or evil purpose, contrary to known duty." *State v. Naumann*, 239 N.W. 93, 94 (Iowa 1931) (quoting *State v. Roth*, 144 N.W. 339, 344 (Iowa 1913)). In *Bartz*, the State sought to remove Worth County Supervisors from office. 224 N.W.2d at 633. The trial court dismissed the removal actions because it determined that defendants did not violate the underlying statutes with evil or corrupt motive. *Id.* at 638. In reversing the trial court's dismissal of the removal actions, the Iowa Supreme Court concluded "[t]he record [was] replete with evidence defendants' activities in office, with particular reference to their loose management of county funds, their acceptance of gratuities from contractors with whom they were required to deal in their official capacities, and their acts in claiming payment for mileage not traveled, fell well below the standards of conduct expected of public officials" and ordered the defendants removed from office. *Id.* at 638-39.

Here, the trial court concluded that Mr. Watkins acted intentionally and willfully. Appx. p. 167. In its analysis, the trial court explained that because "[i]ntent is seldom susceptible to proof by direct evidence [ ] [p]roving intent usually depends on circumstantial evidence and the inferences a fact-finder may draw

from the evidence." Appx. p. 166 (citing *State v. Sinclair*, 622 N.W.2d 772, 780 (Iowa Ct. App. 2000)). The evidence in the record demonstrated that "Mr. Watkins' inappropriate conduct was pervasive and existed over a significant period of time thereby negating any claim of mistake or an isolated lapse of judgment. His actions were clearly intentional." Appx. p. 167. Indeed, Mr. Watkins was aware of his need to conform his behavior to the Iowa Rules of Professional Conduct (Appx. p. 255 (Watkins Depo. 153:6-19)), was aware that as a lawyer holding public office he assumed legal responsibilities beyond those of other citizens (Appx. p. 255 (Watkins Depo. 153:20-25)), was aware that as an elected official he needed to be held to the highest standard of legal and ethical behavior (Appx. p. 256 (Watkins Depo. 154:8-12)), and was aware that the County handbook prohibited sexual harassment (Appx. p. 257 (Watkins Depo. 190:17-22); Appx. pp. 176-178, 179), but nonetheless engaged in sexually harassing conduct "contrary to [his] known dut[ies]." *Naumann*, 239 N.W. at 94. Based on the clear, satisfactory and convincing evidence, the trial court correctly concluded that "[g]iven the extent and stunning nature of [Mr. Watkins'] conduct one can,

and in the [trial court's] opinion must, infer that he was acting with a bad or evil purpose." Appx. p. 167.

In *Callaway*, the State petitioned to remove a sheriff for willful misconduct involving physical assaults on prisoners in five separate occasions. 268 N.W.2d 842. After adopting the trial court's factual findings, the *Callaway* Court agreed that the "defendant's conduct reflect[ed] a pattern of assaulting prisoners without justification." *Id.* at 842, 847. In affirming the trial court's decision to remove the sheriff from office, the Iowa Supreme Court explained that this was "not a case of a momentary lapse or of a few mistakes in judgment" but was "a case of repeated, deliberate brutality to prisoners." *Id.* at 848. Similarly, Mr. Watkins' actions set forth above do not constitute a momentary lapse in judgment, but rather exhibited a pattern of sexually harassing conduct. *See* Appx. p. 166 ("During his tenure as County Attorney, Mr. Watkins engaged in a pattern of conduct that is unacceptable by any reasonable standard . . . [and which most would consider] to be outrageous or even shocking."). Accordingly, based on the clear, satisfactory and convincing evidence in the record, the State proved that Mr. Watkins acted intentionally and with a bad or evil purpose.

### E. Mr. Watkins' Removal Served the Public Interest

The "primary purpose behind the removal statute is the protection of public interests." *State v. Meek*, 127 N.W.1023, 1026 (Iowa 1910). Here, the County of Van Buren was on notice of a complaint of a hostile work environment. Appx. pp. 193-194; TT2 40:2-42:6. Based on Ms. Wallingford's resignation letter referencing a hostile work environment, the County of Van Buren had a duty to investigate. Even Mr. Watkins agrees that once the County had notice of a hostile work environment, it had a duty to investigate it. Appx. p. 259 (Watkins Depo. 198:16-21). There is uncontested testimony that the actions of Mr. Watkins exposed the County of Van Buren to monetary liability. TT 381:4-382:4; *see also* Appx. pp. 360-363; Appx. pp. 272-299; *see generally Erickson-Puttmann*, 212 F. Supp. 2d 960.

Here, the trial court stated it did not take the removal of an elected official lightly, but reasoned that "Mr. Watkins has created a potential liability for the county and, in light of his history, there is little reason to believe he would not continue to act in the same manner going forward." Appx. p. 167. The trial court explained that "[c]itizens have the right to trust that their elected officials will not

engage in certain types of behaviors in the workplace [and] Mr. Watkins has repeatedly violated that trust." Appx. p. 167. Mark Meek testified that as a Van Buren County supervisor, his duties included protecting County employees from sexual harassment in the workplace, protecting County monies from unreasonable expenditures, and protecting the County from liability for wrongs committed by County employees. TT3 82:13-24. Supervisor Meek further testified that the citizens of Van Buren County had a right to have a county attorney that does not sexually harass County employees. TT3 82:25-83:3. Based on these duties and expectations of the Van Buren County citizens, Supervisor Meek believed that his decision to vote to pursue Mr. Watkins' removal was in the best interest of the County—a decision he still stands by. TT3 83:11-21.

The trial court correctly removed Mr. Watkins from office. Indeed, based on the clear, satisfactory and convincing evidence in the record, the sexually harassing conduct that Mr. Watkins' engaged in as County Attorney was "exceptional" and "Chapter 66 is designed for such cases." *Callaway*, 268 N.W.2d at 849; *see also Meek*, ("The very object of this statute is to rid the community of a corrupt, incapable, or unworthy official." (internal quotation and citation

omitted)). This Court, therefore, should affirm the trial court's removal decision.

## III. The Van Buren County Employee Handbook Did Not Create a Contract With Watkins

### Preservation and Standard of Review

Mr. Watkins did not preserve error on the issue of whether the Van Buren County employee handbook created a contract for an impartial investigator. *See Meier v. Senecaut*, 641 N.W.2d 532, 537-41 (Iowa 2002). Mr. Watkins raised this issue in his motion to dismiss and in his post-trial brief, but the trial court did not address this issue in its Order on Defendant's Motion to Dismiss or in its Removal Order. Thus, to properly preserve error for appeal on this issue, Mr. Watkins was required to file a motion to give the trial court "an opportunity to address its failure to rule on the issue either by making a ruling or refusing to do so." *Id.* at 539. Otherwise, error is not preserved on the issue. *Id.* Here, Mr. Watkins did not file any such motion with the trial court. Accordingly, error was not preserved. *See, e.g., Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 751 n.4 (Iowa 2006) (stating that "[w]hen a district court fails to rule on an issue properly raised by a party, the party who raised the issue

must file a motion requesting a ruling in order to preserve error for appeal").

Mr. Watkins may argue that the trial court's rulings necessarily considered and rejected this argument when it ruled that Mr. Watkins should be removed. However, that argument must fail. As the Iowa Supreme Court has stated, the "appellate principle that we assume the district court rejected each defense to a claim on its merits, even though the district court did not address each defense in its ruling" is "not a rule of error preservation, but a rule governing [the] scope of review when an issue is raised and decided by the district court and the record or ruling on appeal contains incomplete findings or conclusions." *Meier*, 641 N.W.2d at 539. This assumption, therefore, "is not a replacement for the requirement to preserve error and cannot be used in this case to satisfy the preservation of error requirement that an issue on review be first decided by the district court." *Id.* at 540. To the extent that this Court finds that error was preserved on this issue, the standard of review for rulings on motion to dismiss is for errors at law. *Meier*, 641 N.W.2d at 537.

**Merits**

The Iowa Supreme Court has explained that to determine whether the language of a handbook is objectively definite to create a contract, the court considers: "(1) Is the handbook in general and the [at issue] procedures in particular mere guidelines or a statement of policy, or are they directives. . . (2) Is the language of the [at issue] procedures detailed and definite or general and vague . . . and (3) Does the employer have the power to alter the procedures at will or are they invariable?" *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 286-87 (Iowa 1995) (citing *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 662 (Mo. 1988) (en banc) ("The handbook was merely an informational statement of McDonnell's self-imposed policies"); *Hunt v. I.B.M. Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 856-58 (Minn. 1986) (vague language fails to provide any detailed or definite disciplinary procedure); *McDonnell Douglas Corp.*, 745 S.W.2d at 662 (handbook "provided that the rules were subject to change at any time"; thus, there was no contract)). The court will consider these factors to determine if an employee "is reasonably justified in understanding a commitment has been made." *Id.* at 287.

The *Anderson* Court explained further that a disclaimer can "prevent the formation of a contract by clarifying the intent of the employer not to make an offer." *Id.* In reviewing the disclaimer language, the court considers (1) "is the disclaimer clear in its terms: does the disclaimer state that the handbook does not create any rights, or does not alter the at-will employment status?" and (2) "is the coverage of the disclaimer unambiguous: what is the scope of its applicability?" *Id* at 288.

Here, the Van Buren County handbook contains a clear and prominent disclaimer in the handbook (it is the first item on the second page, written in bold, set off in a box with the header "DISCLAIMER"). Appx. pp. 176-178. It states:

> This handbook is provided for information purposes only. The policies, procedures, benefits, and plans described in the handbook may be revised by the County without prior notice. The County retains the exclusive right to change, add to, eliminate, or modify any of the policies in the handbook at any time at its discretion, with or without notice.

Appx. pp. 176-178. The disclaimer further states:

> This employee handbook is not intended to create any contractual rights in favor of you or the County. This handbook is not to be construed as an employment contract or as a promise that you will be employed for any specific period of time. Employment can be terminated at any time at the will of either you or the County. Nothing

> in this handbook changes the at-will nature of your employment with the County.

Appx. pp. 176-178. Mr. Watkins, moreover, expressly acknowledged that "this handbook is not a contract of employment" when he signed the acknowledgment of receipt form. Appx. p. 179. Given the explicit disclaimer, no reasonable person reading the handbook could believe that the Van Buren County assented to be bound by the provisions of the employee handbook.[15] *See Anderson*, 540 N.W.2d at 289. Accordingly, the employee handbook did not create a contract for an impartial investigator.[16] This Court, therefore, should not

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[15] Specifically, Mr. Watkins contends that the provision of the handbook which states that after a complaint of sexual harassment is received, the "County Attorney or the Board of Supervisors will promptly name an impartial investigator" was not followed. Appx. p. 177. The State notes that the investigator hired, Thomas H. Miller, disclosed during the closed session when he presented the findings of his investigation and no decisions were yet made on whether to pursue the removal option, that he did not interview Mr. Watkins because Ms. Wallingford's allegations were corroborated by two witnesses, had known Ms. Barchman for approximately thirty years, that he previously supervised her and considered her a friend, and also disclosed that he could not prosecute the petition for removal case himself (if the Board elected that option) due to acceptance of other employment. *See* Appx. pp. 310-311, 329-330, 324, 218, 319, 320-321.

[16] The fact that Mr. Watkins was removed from office after a trial on the merits should moot his argument that the Board relied on the

dismiss the petition for removal because the employee handbook did not create a contact.

## IV. Swanson and Salmon Did Not "Infect" the Removal Proceeding With Conflicts of Interest

### Preservation and Standard of Review

Mr. Watkins did not preserve error on the issue of whether the removal petition should be dismissed because of Jon Swanson's and Carlton Salmons'[17] alleged conflict of interest "infecting" the deliberations on possibly pursuing a petition for removal. *See Meier*, 641 N.W.2d at 537-41. Mr. Watkins raised this issue in his post-trial brief, but the trial court did not address this issue in its Removal Order. Thus, as discussed above in Section III, to properly preserve error for appeal on this issue, Mr. Watkins was required to file a motion to give the trial court "an opportunity to address its failure to rule on the issue either by making a ruling or refusing to do so." *Id*. at 539. Otherwise, error is not preserved on the issue. *Id*. Here, Mr. Watkins did not file any such motion with the trial court. Accordingly, error was not preserved. *See*, *e.g.*, *Boyle*, 710 N.W.2d at

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findings of an alleged partial investigator to pursue a petition for removal in the first instance.

[17] Jon Swanson and Carl Salmons are attorneys for the County of Van Buren through the Heartland Insurance Risk Pool, a self-insured group composed of ten counties. TT2 35:18-37:12.

751 n.4 (stating that "[w]hen a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal").

Mr. Watkins may argue that the trial court's rulings necessarily considered and rejected this argument when it ruled that Mr. Watkins should be removed. However, as discussed in Section III (Preservation and Standard of Review), that argument must fail. To the extent that this Court finds that error was preserved on this issue, the standard of review is for errors at law.

**Merits**

Mr. Swanson's substantive involvement with Mr. Watkins as it related to Ms. Wallingford's resignation letter amounted to speaking with Mr. Watkins about the resignation letter, looking into the matter, preparing a draft letter accepting the resignation, reporting the initial findings to the Board, and recommending an investigation. *See* Appx. p. 230, 231-232; TT2 48:19-49:5, 49:11-50:1, 51:8-23. The mere fact that Mr. Swanson, as the attorney for the County of Van Buren through the risk pool, was Mr. Watkins' first point of legal contact does not make Mr. Swanson's presence in the closed sessions a conflict of interest that "infected" the Board of Supervisors' decision

to vote to pursue a removal action. *See generally* Appx. p. 272-299, 300-346; *see also* TT2 51:19-52:13, 53:6-15, 59:7-24. Indeed, the information Mr. Swanson shared regarding Ms. Wallingford's resignation was more procedural and ministerial in nature. *See* Appx. pp. 274, 280, 283. Of significance, Mr. Swanson and Mr. Carlton at all times relevant represented the County of Van Buren, not Mr. Watkins. *See* TT 5:1-6; TT 14:16-21, 15:20-16:20; TT2 36:22-37:4, 39:14-40:1. In any event, Mr. Swanson's presence at the closed sessions did not "infect" the Board of Supervisors' decision to pursue a removal action and Mr. Swanson's presence did not violate Mr. Watkins' rights.

Accordingly, this Court should not dismiss the petition for removal because of Mr. Swanson's attendance in the closed sessions.

## V. The Van Buren Board of Supervisors Were Not Required to Pursue Other Options

### Preservation and Standard of Review

Mr. Watkins did not preserve error on the issue of whether the removal petition should be dismissed because the Board of Supervisors did not pursue other options. *See Meier*, 641 N.W.2d at 537-41. Mr. Watkins raised this issue to some extent in his motion to

dismiss (arguing progressive discipline should have been used under the employee handbook) and in his post-trial brief, but the trial court did not address this issue in its Order on Defendant's Motion to Dismiss or in its Removal Order. Thus, as discussed above in Section III (Preservation and Standard of Review), to properly preserve error for appeal on this issue, Mr. Watkins was required to file a motion to give the trial court "an opportunity to address its failure to rule on the issue either by making a ruling or refusing to do so." *Id.* at 539. Otherwise, error is not preserved on the issue. *Id.* Here, Mr. Watkins did not file any such motion with the trial court. Accordingly, error was not preserved. *See, e.g.*, *Boyle*, 710 N.W.2d at 751 n.4 (stating that "[w]hen a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal").

Mr. Watkins may argue that the trial court's rulings necessarily considered and rejected this argument when it ruled that Mr. Watkins should be removed. However, as discussed in Section III (Preservation and Standard of Review), that argument must fail. To the extent that this Court finds that error was preserved on this issue,

the standard of review for rulings on motion to dismiss is for errors at law. *Meier*, 641 N.W.2d at 537.

**Merits**

As discussed above in Section III (Merits), the Van Buren County employee handbook did not create a contract. The disclaimer contained in the handbook was clear. Thus, any provision relating to progressive discipline in the handbook was not a contractual term that the Board of Supervisors had to use with Mr. Watkins. Moreover, even Mr. Watkins acknowledged that the Board had no disciplinary power over him. Appx. p. 260 (Watkins Depo. 199:22-25 (agreeing Board had no power to fire Mr. Watkins)). The Board of Supervisors, moreover, was not obligated to pursue other options under Chapter 66 or any other laws. Stated differently, the Board of Supervisors did not violate any law when they voted to pursue a petition for removal, as opposed to other "less drastic options" as suggested by Mr. Watkins.[18] Indeed, the Board of Supervisors'

[18] Even in employment discrimination cases the Iowa courts acknowledge that "employment-discrimination laws have not vested in the [ ] courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers," *Valline v. Murken*, No. 02-0843, 2003 WL 21361344, at *5 (Iowa Ct. App. June 13, 2003) (internal citation, quotation and

decision to seek removal was appropriate given Mr. Watkins' actions at issue and potential liability to the County. *See generally Erickson-Puttmann*, 212 F. Supp. 2d at 960. Here, equity does not require dismissal, especially where a trial court sitting in equity ruled to remove Mr. Watkins from office. The Board of Supervisors was not obligated to use progressive discipline or pursue other options.

This Court, therefore, should not dismiss the petition for removal because the Board of Supervisors did not pursue other options over a removal.

## VI. The Statute Does Not Permit Recovery of Attorney's Fees for Unsuccessful Claims

### Preservation and Standard of Review

The State agrees that Mr. Watkins preserved error on requesting partial attorney's fees. The standard of review is for an abuse of discretion. *NevadaCare, Inc. v. Dep't of Human Servs.*, 783 N.W.2d 459, 469 (Iowa 2010). An abuse of discretion standard implicitly recognizes that a decision "is a judgment call on the part of the trial court." *State v. Rodriquez*, 636 N.W.2d 234, 240 (Iowa 2001). Thus, the trial court's decision will not be disturbed unless it

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emphasis omitted), yet Mr. Watkins seeks to have his petition for removal dismissed on that very basis.

"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).

**Merits**

Mr. Watkins alleges that because the State asserted five independent grounds for Mr. Watkins' removal from office and the trial court only found that Mr. Watkins should be removed from office for his sexual harassment (not on the other grounds), he should recover 80% of his total legal bills. Def.'s Page Proof Br. at 65. The clear language of the applicable statute, Iowa Code section 66.23, does not support Mr. Watkins' contention. The statute on attorney's fees provides, "[i]f the *petition* for removal is *dismissed*, the defendant shall be reimbursed for the reasonable and necessary expenses incurred by the defendant in making a defense, including reasonable attorney's fees, as determined by the court." Iowa Code § 66.23 (emphasis added). That is, attorney's fees are awarded only when the actual petition for removal is dismissed and the elected official is *not* removed from office. *See City of Des Moines*, 41 N.W.2d at 41 (explaining public official to recover the expense of their defense "who defeats an action for his removal from office"). As the

trial court correctly stated in denying Mr. Watkins' motion for partial fees, "courts sitting in equity are bound by statute" and "the language of the relevant statute in this case is clear. Attorney fees can be awarded only if the *petition* is dismissed. In this case the State prevailed." Appx. p. 174 (emphasis added).

Here, because the language of section 66.23 "is unambiguous, it expresses the intent of the legislature. . . ." *See McGill v. Fish*, 790 N.W.2d 113, 118 (Iowa 2010) ("We do not search for legislative intent beyond the express language of a statute when that language is plain and the meaning is clear."); *City of Des Moines*, 41 N.W.2d at 39 ("There is no ambiguity or lack of clarity in section 66.23."). Moreover, the cases cited by Mr. Watkins are inapposite. In *Curry v. City of Portage*, the Wisconsin statute at issue provided the council with complete discretion to reimburse any city official for costs and attorney's fees expended in defending his or her official position. 217 N.W. 705, 706 (Wisc. 1928). The *Curry* Court explained the permissive nature of the statute provided council with discretion to reimburse officers where litigation arose from a faithful discharge of official duties compared to those that were not. *See id.* at 707 (stating "it is now well settled that public moneys may be appropriated for

claims founded in equity or justice, in gratitude or charity"). Thus, the Wisconsin court held that given the permissive nature of the statutory language, the statute did not guarantee that all public officials would be treated alike in whether they would be reimbursed any amount for costs and attorney's fees, as there was no such legislative purpose. *See id.* at 706, 707.

The other case cited by Mr. Watkins, *Hensley v. Eckerhart*, is also inapposite, as *Hensley* addressed attorney's fees under 42 U.S.C. section 1988, which provides "that in federal civil rights actions 'the court, in its discretion, may allow the *prevailing* party, other than the United States, a reasonable attorney's fee as part of the costs.'" 461 U.S. 424 (1983) (emphasis added). It is plain that section 1988 does not apply in this case, but even if the "partial success" theory applied in this case, here, Mr. Watkins *cannot* be considered a prevailing party in the first instance when he was ordered removed from office. *See id*. at 433 (explaining "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit" *Id.* (internal citation and quotation omitted)).

There is no inherent right to attorney's fees, rather, it is dictated by the applicable statute. Here, the language of section 66.23 is clear—necessary and reasonable expenses are awarded "[i]f the *petition* for removal is dismissed. . . ." Iowa Code § 66.23. In this case, because the State was successful in its petition for removal and the petition for removal was not dismissed, this Court should affirm the trial court's order denying attorney's fees under section 66.23.

## CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court: (1) affirm the trial court's order denying the motion to dismiss, (2) affirm the trial court's order removing Mr. Watkins from office, and (3) affirm the trial court's order denying attorney's fees.

## REQUEST FOR ORAL ARUGMENT

The State requests oral argument.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

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