CASE NOS. A23-0374; A23-0484

STATE OF MINNESOTA
IN COURT OF APPEALS

Andrea Anderson,

Appellant/Plaintiff,

vs.

Aitkin Pharmacy Services, LLC dba Thrifty White Pharmacy and George Badeaux,

Respondents/Defendants.

On appeal from Aitkin County, Ninth Judicial District
Honorable David F. Hermerding, Judge Presiding.

BRIEF OF RESPONDENT/DEFENDANT AITKIN PHARMACY SERVICES

Ranelle Leier, No. 277587
FOX ROTHSCHILD LLP
City Center
33 South Sixth Street
Suite 3600
Minneapolis, Minnesota 55402
612.607.7000
rleier@foxrothschild.com

Attorneys for Respondent Aitkin Pharmacy Services, LLC dba Thrifty White Pharmacy

Counsel continued on the following page

Jess Braverman, No. 397332
Christy L. Hall, No. 392627
GENDER JUSTICE
663 University Ave W.
St. Paul, Minnesota 55104
651.789.2090
Jess.braverman@genderjustic.us
Christy.hall@genderjustice.us

Kristin G. Marttila, No. 346007
Rachel A. Kitze Collins, No. 396555
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Ave S., Suite 2200
Minneapolis, MN 55401
612.339.6900
kgmarttila@locklaw.com
rakitzecollins@locklaw.com

Attorneys for Appellant/Plaintiff Andrea Anderson

Charles R. Shreffler, No. 0183295
SHREFFLER LAW LTD.
16233 Kenyon Ave., Suite 200
Lakeville, Minnesota 55044
6123872.8000
chuck@chucklaw.com

Rory T. Gray, admitted *pro hac vice*
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Road
Suite D-1100
Lawrenceville, GA 30043
770.339.0774
rgray@adflegal.org

Attorneys for Respondent/Defendant George Badeaux

TABLE OF CONTENTS

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

I. Aitkin Pharmacy Had a Procedure in Place in January 2019 to Ensure That All Prescriptions for Emergency Contraception Were Filled. 3

II. Mr. Badeaux and Ms. Anderson's Interaction on January 21, 2019. 4

III. Aitkin Pharmacy's Plan To Fill Prescriptions For Emergency Contraceptives Was Consistent With The Minnesota Board of Pharmacy's 1999 Position Statement. 6

ARGUMENT 9

I. VIEWING THE EVIDENCE AT TRIAL IN THE LIGHT MOST FAVORABLE TO AITKIN PHARMACY, PLAINTIFF IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW. 9

A. Standard of Review. 9

B. The Jury Properly Concluded That Aitkin Pharmacy Did Not Discriminate Against Ms. Anderson in a Place of Public Accommodation. 10

1. The evidence supports the jury's conclusion that Aitkin Pharmacy did not discriminate against Plaintiff in public accommodations. 12

C. The Jury's Conclusion That Aitkin Pharmacy Was Not Liable for Business Discrimination Was Supported by Substantial Evidence. 15

1. The trial court correctly instructed the jury as to the appropriate definition of intentional under the MHRA. 15

2. The jury's conclusion that Aitkin Pharmacy did not refuse to do business with Ms. Anderson was supported by substantial evidence. 18

D. Aitkin Pharmacy Had a Legitimate Business Purpose For Its Plan to File Prescriptions for Emergency Contraceptives. 20

II. WHEN EVALUATING THE JURY'S VERDICT IN THE LIGHT MOST FAVORABLE TO AITKIN PHARMACY, THE PREPONDERANCE OF THE EVIDENCE FULLY SUPPORTS THE JURY'S VERDICT AND IT SHOULD BE NOT DISTURBED. 22

A. Standard of Review. 22

B. The Trial Court Did Not Abuse Its Discretion When Instructing The Jury. 24

1. The trial court properly instructed the jury that Aitkin Pharmacy and Mr. Badeaux were separate defendants. 25

2. The trial court's instruction on the definition of intentional conduct under the MHRA was proper. 27

3. The trial court did not abuse its discretion by including an instruction regarding "material disadvantage" and "tangible change in conditions" as part of Plaintiff's public accommodation claim. 28

4. The trial court did not abuse its discretion when instructing the jury on protected class. 29

C. Rulings On Evidentiary Matters Rest Within The Sound Discretion Of The Trial Court And Will Only Be Reversed Upon A Showing Of Clear Abuse Of Discretion. 30

1. The trial court did not abuse its discretion in excluding evidence of Aitkin Pharmacy's subsequent written policy on prescriptions for emergency contraception. 31

2. The trial court properly admitted Ms. Anderson's therapy records. 33

CONCLUSION 36

TABLE OF AUTHORITIES

Page(s)

Cases

B.M.B. v. State Farm Fire & Cas. Co.,
664 N.W.2d 817 (Minn. 2003).....9

Bahr v. Capella Univ.,
788 N.W.2d 76 (Minn. 2010).....12, 28

Baker v. Amtrak Nat. R.R. Passenger Corp.,
588 N.W.2d 749 (Minn. Ct. App. 1999).....20, 22

Beck v. Groe,
245 Minn. 28, 70 N.W.2d 886 (1955).....11

Brannum v. Mo. Dep't of Corr.,
518 F.3d 542 (8th Cir. 2008) 29

Bray v. Alexandria Women's Health Clinic,
506 U.S. 263 (1993).....14

Brewer v. Columbia Park Medical Group, P.A., et al.,
No. CX-97-6327, 2000 WL 35486562 (Minn. Dist. Ct. May 26, 2000) 30

Burchett v. Target Corp.,
340 F.3d 510 (8th Cir. 2003) 28

Casanova v. Tri-Cnty. Cmty. Corr.,
No. A19-1996, 2020 WL 4280999 (Minn. Ct. App. July 27, 2020).....27

Christie v. Estate of Christie,
911 N.W.2d 833 (Minn. 2018).....22

Conover v. Northern State Power Co.,
313 N.W.2d 397 (Minn. 1981).....23

Darmer v. State Farm Fire and Casualty Co.,
611 F.Supp.3d 726 (D. Minn. 2020).....16

Dobbs v. Jackson Women's Health Organization,
597 U.S. ___, 142 S. Ct. 2228 (2022).....14

Doe v. Archdiocese of Saint Paul and Minneapolis,
817 N.W.2d 150 (Minn. 2012).....9

Geduldig v. Aiello,
417 U.S. 484 (1974).....14

George v. Estate of Baker,
724 N.W.2d 1 (Minn. 2006).....30, 31

Goins v. W. Grp.,
635 N.W.2D 717 (MINN. 2001).....10, 13

Gold Star Taxi and Transp. Ser. v. Mall of America,
987 F.Supp. 741 (D. Minn. 1997).....28

Gunderson v. Olson,
399 N.W.2d 166 (Minn. Ct. App. 1987).....22

H Window Co. v. Cascade Wood Prod., Inc.,
596 N.W.2d 271 (Minn. Ct. App. 1999).....24

Hair v. Miller,
374 N.W.2d 223 (Minn. Ct. App. 1985).....22

Henschke v. Young,
28 N.W.2d 766 (Minn. 1947).....30

Hubbard v. United Press Int'l, Inc.,
330 N.W.2d 428 (Minn. 1983).....14

Jennie-O-Foods, Inc. v. Safe-Glo Products Corp.,
582 N.W.2d 576 (Minn. Ct. App. 1998).....30

Jerry's Enters., Inc., v. Larkin, Hoffman, Daly & Lindgren, Ltd.,
711 N.W.2d 811 (Minn. 2006).....9

Johnson v. United States,
520 U.S. 461 (1997).....25

Jones v. Fitzgerald,
285 F.3d 705 (8th Cir. 2002).....29

Koenig v. Ludowese,
308 Minn. 380, 243 N.W.2d 29 (1976).....23

Leuba v. Bailey,
88 N.W.2d 73 (Minn. 1957).....22

Longbehn v. Schoenrock,
727 N.W.2d 153 (Minn. Ct. App. 2007).....10

Longen v. Fed'l Express Corp.,
113 F.Supp.2d 1367 (D. Minn. 2000).....29

McKay's Family Dodge v. Hardrives, Inc.,
480 N.W.2d 141 (Minn. Ct. App. 1992).....23

Meagher v. Kavli,
97 N.W.2d 370 (Minn. 1959).....22

Monson v. Rochester Athletic Club,
759 N.W.2D 60 (Minn. Ct. App. 2009).....10, 11, 13

Moore v. Hoff,
821 N.W.2d 591 (Minn. Ct. App. 2012).....9

Navarre v. S. Washington Cty. Schools,
652 N.W.2d 9 (Minn. 2002).....34

Pouliot v. Fitzsimmons,
582 N.W.2d 221 (Minn. 1998).....10

Reeves v. Sanderson Plumbing Prods. Inc.,
530 U.S. 133 (2000).....14

Rumble v. Fairview Health Servs.,
No. 14-CV-2037, 2015 WL 1197415 (D. Minn. 2015).....12, 28, 29

Sanderson v. State,
601 N.W.2d 219 (Minn. Ct. App. 1999).....24

State v. Cross,
577 N.W.2d 721 (Minn. 1998).....25

State v. Crowsbreast,
629 N.W. 2d 433 (Minn. 2001).....25

State v. Gray,
456 N.W. 2d 251 (Minn. 1990).....24

State v. Larson,
281 N.W.2d 481 (Minn. 1979).....25

State v. Nunn,
561 N.W.2d 902 (Minn. 1997).....31

State v. Oates,
611 N.W.2d 580 (Minn. Ct. App. 2000).....24

State v. Persitz,
518 N.W.2d 843 (Minn. 1994).....24

State v. Traxler,
583 N.W.2d 556 (Minn. 1998).....24

State v. Turnipseed,
297 N.W.2d 308 (Minn. 1980).....24

Torchwood Properties, LLC v. McKinnon,
784 N.W.2d 416 (Minn. Ct. App. 2010).....22, 23, 34

Victor v. Sell,
222 N.W.2d 337 (1974) 27

Wild v. Rarig,
234 N.W.2d 775 (Minn. 1975).....23

Statutes

Minn. Stat. § 363A.11, subd. 1(a)(1) 11, 12

Minn. Stat. § 363A.17(3) 11, 15, 28

Other Authorities

Minn. R. Civ. P. 59.01 .....22, 23

Minn. R. Evid. 407.....31

Restatement (Second) of Torts § 8A.....27

STATEMENT OF ISSUES

I. Is Appellant entitled to a judgment as a matter of law when Appellant failed to prove that she was intentionally discriminated against on the basis of her sex and Respondents had a policy in place to ensure that prescriptions for emergency contraception were timely filled?

II. Did the trial court abuse its discretion in denying Appellant's motion for a new trial where ample evidence supported the jury's verdict and Appellant has not shown any prejudicial errors in the trial court's jury instructions or evidentiary rulings?

Most Appropriate Authorities:

- Minn. Stat. § 363A.11
- Minn. Stat. § 363A.17
- *Goins v. W. Grp.*, 635 N.W.2d 717 (Minn. 2001)
- *Monson v. Rochester Athletic Club*, 759 N.W.2d 60 (Minn. Ct. App. 2009)

STATEMENT OF THE CASE

After a five-day jury trial, which included approximately nine hours of deliberations, the jury returned a verdict in favor of Defendants/Respondents Aitkin Pharmacy Services, LLC d/b/a Thrifty White Pharmacy ("Aitkin Pharmacy") and George Badeaux ("Mr. Badeaux") on all counts, concluding that Defendants had not discriminated against Plaintiff/Appellant Andrea Anderson ("Ms. Anderson") in violation of the Minnesota Human Rights Act ("MHRA").

The undisputed evidence presented at trial was that Aitkin Pharmacy had a procedure in place to ensure that prescriptions for emergency contraception would get filled in a timely manner. Preferably, such prescriptions would be filled at Aitkin Pharmacy but, if that would not possible, then Aitkin Pharmacy would transfer the prescription to another pharmacy of the customer's choice. Further, even Ms. Anderson does not dispute that if she had not chosen to transfer her prescription to another pharmacy, it would have been filled at Aitkin Pharmacy the same day the drug was delivered by Aitkin Pharmacy's prescription drug supplier.

The district court correctly instructed the jury regarding the appropriate law to apply. And, after evaluating all the evidence, the jury came back with a verdict finding that neither Aitkin Pharmacy nor Mr. Badeaux had discriminated against Ms. Anderson. Because the jury's verdict is fully supported by the evidence and complies with applicable law, there is no basis to negate it. The Court should affirm the jury verdict and the judgment below.

STATEMENT OF FACTS

I. Aitkin Pharmacy Had a Procedure in Place in January 2019 to Ensure That All Prescriptions for Emergency Contraception Were Filled.

This case involves the prescription drug ella, a form of emergency contraception. It does not involve Plan B or any other type of emergency contraception. There are over 20,000 prescription drugs approved by the United States Food and Drug Administration ("FDA") and the FDA does not require that pharmacies carry certain drugs. Trial Transcript ("Tr.") at 695:1–13. Aitkin Pharmacy did not and does not carry ella in stock. Tr. at 472:15-25. As such, there will always be some delay in filling a prescription for ella. In the 11 years that Aitkin Pharmacy has owned the pharmacy McGregor, Minnesota, it has only been presented with one prescription for ella – Ms. Anderson's. Tr. at 729:17–730:6.

On Monday, January 21, 2019, the day Ms. Anderson received her prescription for the emergency contraceptive ella, Aitkin Pharmacy had a procedure in place for filling prescriptions for emergency contraception. Tr. at 584:19 – 586:5. Both Mr. Badeaux and Matthew Hutera, the managing partner of Aitkin Pharmacy,[1] testified as to this policy. *Id.*; Tr. at 684:11 – 685:14. The first priority was to fill the prescription at Aitkin Pharmacy, if possible. As such, if a pharmacist without a conscious objection to dispensing emergency contraception was working with Mr. Badeaux, that pharmacist would fill the prescription. *Id.* If not, Mr. Badeaux would attempt to have another pharmacist come to the store and

[1] Mr. Hutera is the sole owner Midwest Pharmacies LLC, the holding company for Defendant Aitkin Pharmacy. Tr. at 288:24 – 289:24.

fill it. *Id.* But, if another pharmacist was unavailable, or if the customer wanted to have the prescription filled elsewhere, then Aitkin Pharmacy would transfer the prescription to a different pharmacy of the customer's choosing. *Id.*; Tr. at 587:5 – 588:3.

Aitkin Pharmacy did not have an objection to or any type of store policy against filling prescriptions for emergency contraception. To the contrary, Mr. Hutera testified that to the extent possible, he wanted every prescription presented to Aitkin Pharmacy to be filled at Aitkin Pharmacy, including those for emergency contraception. Tr. at 681:1-18. Mr. Hutera also testified that Aitkin Pharmacy did in fact fill prescriptions for emergency contraception during the time Mr. Badeaux was employed at Aitkin Pharmacy – both before and after January 21, 2019. Tr. at 679:13-21.

II. Mr. Badeaux and Ms. Anderson's Interaction on January 21, 2019.

When Ms. Anderson spoke with the nurse at her doctor's office on January 21, 2019, she received a prescription for ella, a form of emergency contraception. Tr. at 430:19 – 431:14. The nurse told her that she had five days to take the prescription from the date of unprotected sex. Tr. at 431:15-20; 471:24 – 472:6. The nurse also told her that not a lot of pharmacies carry ella. Tr. at 432:1-7. When Aitkin Pharmacy received the prescription from Ms. Anderson's doctor's office, it did not have ella in stock so the pharmacy technician placed the drug on Aitkin Pharmacy's order list for its drug wholesaler. Tr. at 472:15-25. The drug was scheduled to arrive at Aitkin Pharmacy the next day, on January 22. Tr. at 196:10-19.

When Mr. Badeaux saw ella on the drug order list, he was not familiar with ella so he reviewed the drug label information. Tr. at 592:9-25. He testified that he read the

mechanism of action for ella and, according to its United States Food Drug and Device Administration-approved label, one of the ways ella works is that it may impact the ability of a fertilized egg to implant in the uterus. Tr. at 594:3 – 595:4. Mr. Badeaux testified that this mechanism of action violated his conscious. Tr. at 597:16 – 598:21. No one, including Ms. Anderson, disputes that Mr. Badeaux has a firmly held conscious objection to filling prescriptions for emergency contraception that work in this manner. Tr. at 470:1-4.

Mr. Badeaux further testified that he knew another pharmacist, Anthony Grand, was scheduled to work the next day. Tr. at 602:12-25. Mr. Grand did not have an objection to dispensing emergency contraception, and Mr. Badeaux knew this because he asked Mr. Grand when he hired him approximately three months earlier, in October 2018. Tr. at 615:10-24. Mr. Badeaux further testified that the *only reason* he called Ms. Anderson was because of the predicted snowstorm that was forecast to impact the area on January 21 – 22, and he wanted to make sure that she received her prescription. Tr. at 602:12 – 603:11; 606:7-9.

When he called and spoke with Ms. Anderson on January 21, Mr. Badeaux told her that another pharmacist was scheduled to work the next day and that this other pharmacist would dispense her prescription. Tr. at 601:6-20. Mr. Badeaux told Ms. Anderson that there was a possibility that Mr. Grand would not be able to make it to the pharmacy because of the predicted snowstorm. Tr. at 602:5-18. He also told Ms. Anderson that if he was the only pharmacist on duty that day, he would not dispense her prescription because of his beliefs. Tr. at 602:19 – 603:22. Mr. Badeaux then began discussing with Ms. Anderson the option of keeping her prescription at Aitkin Pharmacy or transferring it to another

pharmacy of her choice. Tr. at 604:3-14. Mr. Badeaux told her that the prescription could be transferred to any pharmacy of her choice. *Id.* But before he finished this part of the conversation, Ms. Anderson hung up on him. Tr. at 606:19 – 607:6.

Ms. Anderson admitted that during this conversation she became upset and angry. Tr. at 471:2-7; 615:25 – 616:12. She also told Mr. Badeaux that she hoped he was confident with his decision and that she was "going to do something about it." Tr. at 471:8-12; 688:4-11. It is undisputed that Ms. Anderson hung up on this conversation. Mr. Badeaux testified that he did not end the call because he did not think the call was over, and that they were still discussing Ms. Anderson's options. Tr. at 606:22 – 607:6; 616:13-18. During this call, Mr. Badeaux never told Ms. Anderson that Aitkin Pharmacy would not fill her prescription. Tr. at 607:7-9.

Even after Ms. Anderson ended the call, Mr. Badeaux did not remove ella from Aitkin Pharmacy's drug order list. Instead, he left it on the order in the event Ms. Anderson came to the pharmacy the next day. Tr. at 607:10-22. Further, as soon as Mr. Badeaux received the request to transfer Ms. Anderson's prescription to a different pharmacy, he did so. And it was then, and only then, that he removed ella from the drug order list. *Id.*; Tr. at 616:22 – 617:12.

III. Aitkin Pharmacy's Plan To Fill Prescriptions For Emergency Contraceptives Was Consistent With The Minnesota Board of Pharmacy's 1999 Position Statement.

In 1999, shortly after the FDA approved the first form of emergency contraception, commonly called "Plan B," the Minnesota Board of Pharmacy issued a position statement recognizing that pharmacists may refuse to dispense prescriptions for the "morning after"

pill for "personal, moral, ethical, or religious reasons." ADD-1.[2] The Board of Pharmacy position was issued 20 years prior to this incident and does not use the terms "Plan B" or even "emergency contraception." *Id.*

In its newsletter, the Board took the position that individual pharmacists could refuse to dispense prescriptions for the morning after pill, whether that be for personal, moral, ethical, or religious reasons. *Id.* The Board's position also stated that if a pharmacist had an objection to dispensing Plan B, they should provide an alternative for the patient. That alternative could be having another pharmacist at the pharmacy fill the prescription. Or, it could mean transferring the prescription to another pharmacy. The Board guidance does not state that the prescription drug should be immediately available to the customer. Rather, it provides that alternatives for filling the prescription should be. *Id.*

In approximately 2015, Mr. Hutera learned that Mr. Badeaux had a conscious objection to dispensing prescriptions for emergency contraception. Tr. at 680:14 -24. In discussing his objection, Mr. Badeaux told Mr. Hutera about the Minnesota Board of Pharmacy newsletter from 1999. Tr. at 681:1 – 682:6. Mr. Hutera went to the Board of Pharmacy website and read the position statement. Tr. at 681:19 – 682:6.

Mr. Hutera testified that he took several factors into consideration when working with Mr. Badeaux to establish the Aitkin Pharmacy procedures for emergency contraceptives. He reviewed the Board of Pharmacy's position statement on the Board's website, including how it allowed pharmacists to decline to dispense Plan B. Tr. at 684:11-

[2] Citations to "ADD" are to the Addendum to Appellant/Plaintiff's Brief.

21. He did not believe he had the ability to require Mr. Badeaux to fill prescriptions for emergency contraception. Tr. at 716:5 – 15. He also considered the realities of operating a pharmacy in small town Minnesota. In order to dispense prescription drugs at a pharmacy, the Board of Pharmacy requires that a pharmacist be on duty. Tr. at 675:23 – 676:9. Aitkin Pharmacy has struggled to find pharmacists. In order to meet demand, Aitkin Pharmacy has had to rely on a retired pharmacist who was only willing to work on a very limited basis to help cover for vacations or other similar events (Tr. at 678:10-22) and has had to hire pharmacists that commute an hour or more each way to the store in order to staff the pharmacy. Tr. at 679:4-8; 611:3-9. Further, Aitkin Pharmacy had a job opening for a pharmacist posted for over a year before it was able to fill the opening. Tr. at 696:15-21. Aitkin Pharmacy could not afford to hire a second pharmacist to work or be "on call" whenever Mr. Badeaux was working. Tr. at 686:16 – 687:8.

Ms. Anderson was treated the same way as any other customer with a prescription for a drug that Aitkin Pharmacy did not carry. If customer had a prescription for a drug that Aitkin Pharmacy did not carry, the pharmacy would order the drug or transfer out the prescription to the pharmacy of the client's choosing. Tr. at 695:14 – 696:8. Aitkin Pharmacy would not decide for the customer where to send the prescription. Rather, given the pharmacy's client base, it would allow the customer to decide. Tr. at 695:25 – 696:8; 587:5-17.

ARGUMENT

I. VIEWING THE EVIDENCE AT TRIAL IN THE LIGHT MOST FAVORABLE TO AITKIN PHARMACY, PLAINTIFF IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

A. Standard of Review.

Appellant courts review a district court's decision to deny a motion for judgment as a matter of law *de novo*. In applying the *de novo* standard, this Court must view the evidence in a light most favorable to the nonmoving party. *B.M.B. v. State Farm Fire & Cas. Co.*, 664 N.W.2d 817, 821 (Minn. 2003). The trial court's decision will be affirmed if it can be sustained on any grounds. *Doe v. Archdiocese of Saint Paul and Minneapolis*, 817 N.W.2d 150,163 (Minn. 2012).

Judgment as a matter of law should be granted "only in those unequivocal cases where (1) in the light of the evidence as a whole, it would clearly be the duty of the [district] court to set aside a contrary verdict as being manifestly against the entire evidence, or where (2) it would be contrary to the law applicable to the case." *Moore v. Hoff*, 821 N.W.2d 591, 595 (Minn. Ct. App. 2012) (citing *Jerry's Enters., Inc., v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006)). Thus, "[t]he jury's verdict will not be set aside 'if it can be sustained on any reasonable theory of the evidence.'" *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. Ct. App. 2007) (citing *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998)).

B. The Jury Properly Concluded That Aitkin Pharmacy Did Not Discriminate Against Ms. Anderson in a Place of Public Accommodation.

A plaintiff claiming discrimination in the context of public accommodation must show disparate treatment and discriminatory intent. Unlike discrimination claims in the employment law context, Plaintiff must show that her protected status – here her sex – "actually played a role" in the defendant's decision-making process, and proof of discriminatory motive is "critical." *Goins v. W. Grp.*, 635 N.W.2d 717, 722 (Minn. 2001) (quotations omitted). The jury correctly concluded that Plaintiff failed to meet her burden.

A plaintiff is not allowed to proceed under a disparate impact theory, as is permissible in the employment context. *Monson v. Rochester Athletic Club*, 759 N.W.2d 60, 67 (Minn. Ct. App. 2009) (holding that a disparate-impact theory of proof is not available for claims arising under the public accommodations provision of the MHRA).

The Minnesota Court of Appeals has required proof of disparate treatment in cases involving alleged public accommodation discrimination. In *Monson*, the Court of Appeals upheld the dismissal of the plaintiff's public accommodation claim on summary judgment because the plaintiff failed to produce evidence that the defendant "intentionally, or even knowingly" discriminated against her. *Monson*, 759 N.W.2d at 64. The Court of Appeals recognized that "different sections of the MHRA use different language to define prohibited conduct" and explained that, unlike the employment provisions:

> the public-accommodations provision of the MHRA does not include such effects-based language and, instead, provides only that '[i]t is an unfair discriminatory practice . . . to deny any person the full and equal enjoyment

> of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of . . . sex.' Minn. Stat. § 363A.11, subd. 1(a)(1). The text of this section focuses solely on the public-accommodation provider's conduct in denying the full and fair enjoyment of the accommodation and does not address the effects of the provider's conduct caused by other factors. According, we conclude that the disparate-impact theory is not available for claims arising under this section.

Id. at 67.

Plaintiff takes great pains to argue that the MHRA should be liberally construed, "[b]ut a liberal construction cannot enlarge the MHRA beyond its clear and definite scope." *Monson*, 759 N.W.2d at 65 (citing *Beck v. Groe*, 245 Minn. 28, 44, 70 N.W.2d 886, 897 (1955) (holding that "remedial nature" of statue does not justify adoption of a "meaning not intended by the legislature"). The public accommodations provision of the MHRA focuses solely on the provider's conduct; it "does not address the *effects* of the provider's conduct caused by other factors." *Id.* at 67 (emphasis added) (holding that the disparate impact theory does not apply to claims of public accommodation discrimination under the MHRA). Likewise, the use of the words "*intentionally* refuse to do business" in the business discrimination provision of the MHRA requires the plaintiff to show disparate treatment and discriminatory intent. Minn. Stat. § 363A.17(3) (emphasis added).

Therefore, in order to prevail at trial, Ms. Anderson was required to convince the jury that Aitkin Pharmacy intended to discriminate against her because of her sex. She failed to meet her burden, and the jury's verdict should be affirmed.

1. The evidence supports the jury's conclusion that Aitkin Pharmacy did not discriminate against Plaintiff in public accommodations.

The trial court correctly instructed the jury regarding the elements of public accommodation discrimination. The jury instruction essentially parroted the statutory language in Minnesota Statute § 363A.11, subd. 1(a)(1). Specifically, the elements set forth in the jury instruction are:

> 1. [Ms. Anderson] is a member of a protected class; and
>
> 2. That Thrifty White denied her full and equal enjoyment in goods or services because of her sex.

ADD-15.

The instruction does not state that Plaintiff was required to show an outright refusal of goods or services in order to prove her claim. Instead, the trial court correctly instructed the jury and the jury instructions provide appropriate guidance on how to apply the "full and equal enjoyment" language of the statute. In order to establish an actionable claim under the Act, the complaining party must show "'some tangible change in . . . conditions,' or some 'material . . . disadvantage.'" *Rumble v. Fairview Health Servs.*, No. 14-CV-2037 (SRN/FLN), 2015 WL 1197415 (D. Minn. 2015) at *38 (quoting *Bahr v. Capella Univ.*, 788 N.W.2d 76, 83 (Minn. 2010)). Thus, there was no error in the law the jury was told to apply.

In addition, the uncontroverted testimony at trial was that Ms. Anderson was given the same options as any other customer with a prescription for a drug for which Aitkin

Pharmacy did not have in stock. If a customer at Aitkin Pharmacy had a prescription for a drug that the pharmacy did not have in stock, they would be given the option of having the prescription filled the next day (or as soon as the drug was available) or of having the prescription transferred to another pharmacy of the patient's choosing. Tr. at 695:14 – 696:8. Those were the same options in Aitkin Pharmacy's plan regarding how to treat prescriptions for emergency contraceptives when Mr. Badeaux was working, and the same options given to Ms. Anderson.

The question for the jury was whether Aitkin Pharmacy treated Ms. Anderson like others outside of the protected class when faced with a prescription for a drug that the pharmacy did not have in stock. And the jury found that the answer to this question is yes. There is more than sufficient evidence to support this determination.

In order to succeed on her claim of public accommodations discrimination, Ms. Anderson also needed to prove that Aitkin Pharmacy's conduct was "because of her sex." The trial court properly instructed the jury that "[t]he phrase 'because of her sex' means that sex was more likely than not the motivating reason behind Thrifty White's alleged denial of full and equal enjoyment in goods or services. Sex does not have to be the only reason motivating the discrimination or denial." ADD-17. To establish a claim for discrimination under the public accommodations provision of the MHRA, Plaintiff must show disparate treatment. *Monson*, 759 N.W2d at 63 (requiring proof of discriminatory motive in public accommodations claims). Ms. Anderson was required to prove that the protected characteristic "actually motivated" the conduct at issue. *Goins*, 635 N.W.2d at 722 (Minn. 2011) ("When a plaintiff alleges disparate treatment, liability 'depends on

whether the protected trait . . . actually motivated the employer's decision.'" (quoting *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 141 (2000)). As repeatedly recognized by Minnesota courts, "proof of discriminatory motive is critical." *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 441 n.12 (Minn. 1983). The instruction given to the jury properly set forth the applicable law.

In applying the law to the facts of this case, the jury found that Ms. Anderson did not establish her claim. The jury heard repeatedly throughout the trial that Mr. Badeaux's actions were not based on sex – but rather on his uncontested deeply-held personal beliefs. The jury found this testimony persuasive and it is more than sufficient to support the jury verdict. This is not a disparate impact case. In order to prove her case, Plaintiff needed to establish that Aitkin Pharmacy actions were motivated "because of her sex." The jury rightly determined that she did not.

In *Dobbs v. Jackson Women's Health Organization*, the United States Supreme Court discussed its precedents which "establish that a State's regulation of abortion is not a sex-based classification." 597 U.S. ___, 142 S. Ct. 2228, 2245 (2022). As stated by the Supreme Court, "[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other.' *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974). And as the Court has stated, the 'goal of preventing abortion' does not constitute 'invidiously discriminatory animus' against women. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273-74 (1993)." *Id.* at 2245-46. The *Dobbs* case does not involve claims of discrimination. Its analysis, however,

is still instructive as to whether actions related to reproductive care are sex-based. The longstanding Supreme Court precedent establishes that it is not.

For all the reasons set forth above, the jury's determination that Aitkin Pharmacy did not discriminate against Ms. Anderson in public accommodations should be affirmed.

C. The Jury's Conclusion That Aitkin Pharmacy Was Not Liable for Business Discrimination Was Supported by Substantial Evidence.

Based upon the evidence presented at trial, the jury properly determined that Ms. Anderson was not subjected to business discrimination. Despite Plaintiff's arguments otherwise, the jury analyzed the testimony and concluded that Ms. Anderson had failed to prove the elements of her claim. As the trial court concluded in its order on the parties' motions for summary judgment, there was a disputed fact as to whether Defendants refused to serve Plaintiff, *i.e.*, whether they refused to do business with her. Index #99 (Order and Memorandum, filed May 17, 2021 at 6). That precise question was put to the jury and the jury determined that Ms. Anderson failed to prove her case. The jury's verdict is supported by the evidence and should stand.

1. The trial court correctly instructed the jury as to the appropriate definition of intentional under the MHRA.

In order to prevail on her claim of business discrimination, Plaintiff was required to show that Defendants intentionally refused to do business with her because of her sex.

The MHRA defines business discrimination as "***intentionally*** refus[ing] to do business . . . because of the person's . . . sex." Minn. Stat. § 363A.17(3) (emphasis added). As required by the statutory language, courts have held that a plaintiff asserting a business discrimination claim under the MHRA cannot survive a motion for summary judgment

when she fails to "provide a single fact indicative of [discriminatory] animus." *Darmer v. State Farm Fire and Casualty Co.*, 611 F.Supp.3d 726, 744 (D. Minn. 2020).

The jury correctly found that Defendants did not act with the requisite intent that is required for a business discrimination claim under the MHRA. Plaintiff argues that she met this element because Aitkin Pharmacy knew that the plan it developed with Mr. Badeaux would cause women seeking emergency contraception to be unable to fill prescriptions for emergency contraception. (Appellant's Br. at 22.) First, this is not the standard. Second, that is an incorrect statement. Third, and most importantly, the jury concluded otherwise.

This case is about Ms. Anderson and her prescription for ella, not Plan B or another drug that Aitkin Pharmacy carried. Plaintiff attempts to attack Aitkin Pharmacy's plan to as not strictly following the protocols of a 20-year old guidance statement issued by the Board of Pharmacy when Plan B first became available for dispensing. (Aitkin Pharmacy does not agree that its plan runs afoul of the Board's position statement.) But then, Plaintiff admits that whether or not the plan follows the guidance does not prove or disprove Plaintiff's claims.

As Mr. Badeaux testified, he believed that the plan that was put in place at Aitkin Pharmacy was consistent with the Board of Pharmacy guidance and in fact, better met the needs of Aitkin Pharmacy's customers. Tr. at 587:18 – 588:3. Both Mr. Badeaux and Mr. Hutera testified that Aitkin Pharmacy's customers came from the surrounding area and in all directions. Instead of directing customers where to get a prescription filled, the plan allowed the prescription to be transferred to the pharmacy of the customer's choice. Tr. at

586:20 – 588:3. For example, Aitkin Pharmacy was not going to send a customer to Moose Lake if they lived closer to Aitkin. Further, the Board of Pharmacy guidance states that alternatives should be immediately available. It does not state that the *drug* must be immediately available. ADD-1. At the time the policy at Aitkin Pharmacy was put in place, both Mr. Hutera and Mr. Badeaux knew that Plan B was readily available at nearby pharmacies, both with a prescription and as an over-the-counter drug. There was no need to make a specific arrangement with a specific pharmacy. Both Mr. Hutera and Mr. Badeaux testified that they believed that the plan adopted by Aitkin Pharmacy adequately addressed prescriptions for emergency contraception. Tr. at 585:9 – 586:5.

Further, neither Mr. Badeaux nor Mr. Hutera were familiar with the drug ella prior to January 21, 2019. Tr. at 592:9-18; 694:19-25. As Mr. Hutera testified, Ms. Anderson's prescription for ella is the only prescription for ella that has been presented at Aitkin Pharmacy in 11 years. Tr. at 730:3-6. Plaintiff's own expert agreed that the vast majority of pharmacies, and even fewer in rural areas, do not carry ella in stock. Tr. at 384:20 – 38:13. There are over 20,000 prescription drugs on the market. Pharmacies are not required to carry all of them, or any particular drug. Tr. at 695:1-13.

The jury instructions correctly state that "'[i]ntent' or 'intentionally' means that a person: (a) Wants to cause the consequences of his or her acts, or (b) Knows that his or her acts are substantially certain to cause those consequences." ADD-19. Aitkin Pharmacy had procedures in place to ensure that prescriptions for emergency contraception would be filled, and filled timely. These procedures were intended to provide that all prescriptions would be dispensed, and to the extent possible, would be dispensed at Aitkin Pharmacy. It

is undisputed that Ms. Anderson's prescription would have been filled at Aitkin Pharmacy if she had not transferred her prescription.

Based upon its verdict, the jury found this testimony credible. This testimony, when viewed in a light favorable to Defendants as it is must be, is more than sufficient to sustain the jury verdict.

2. The jury's conclusion that Aitkin Pharmacy did not refuse to do business with Ms. Anderson was supported by substantial evidence.

The trial court determined that the issue of whether Aitkin Pharmacy and Mr. Badeaux refused to do business with Ms. Anderson was a fact issue for the jury to decide. The jury heard all the evidence and decided this question in favor of Defendants and its decision should be upheld. Aitkin Pharmacy's policy was to fill all prescriptions at Aitkin Pharmacy to the extent possible. It had a plan in place to make that happen, while still recognizing Mr. Badeaux's firmly-held conscious objection. Aitkin Pharmacy did not refuse to do business with Ms. Anderson. While Aitkin Pharmacy knew it could not make Mr. Badeaux fill such prescriptions, Aitkin Pharmacy had other pharmacists on staff that would fill the prescription.

Mr. Grand, the other pharmacist at Aitkin Pharmacy, was scheduled to work on January 22 and he would have dispensed Ms. Anderson's prescription for ella. Tr. at 602:12-25; 615:10-24. Mr. Badeaux never told Ms. Anderson that Aitkin Pharmacy would not fill her prescription. Tr. at 607:7-9. If Ms. Anderson would have left her prescription at Aitkin Pharmacy, she would have received her prescription when she arrived to pick it up.

Plaintiff admitted that she got angry during her call with Mr. Badeaux on January 21, 2019. She testified that she was upset, that she got emotional, and that she swore during the call. Tr. at 471:2-7; 615:25 – 616:12. She also told him that she hoped he was confident in his position and that she was going to do something about it. Tr. at 471:8-12; 688:4-11. And then she hung up. It is undisputed that Ms. Anderson ended the call. Tr. at 606:22 – 607:6; 616:13-18. Mr. Badeaux testified that he believed he was still discussing options with Ms. Anderson. *Id.* Despite this, Mr. Badeaux did not remove ella for the drug order list. Tr. at 607:10-22.

After Ms. Anderson hung up the phone, she then made the choice to transfer her prescription. And when Mr. Badeaux received the transfer request from Walgreens in Brainerd, he immediately transferred Ms. Anderson's prescription. Only after he completed the transfer did Mr. Badeaux remove ella from the list of drugs to be ordered from Aitkin Pharmacy's wholesaler. Tr. at 616:22 – 617:12.

Ms. Anderson asserts several faults in what Mr. Badeaux said and did not say to her during their conversation. This ignores that fact that Ms. Anderson ended the call and did not give Mr. Badeaux the opportunity to complete the conversation.

While Plaintiff tries to argue that Mr. Badeaux's motivation for calling Ms. Anderson was to put up roadblocks and hinder her ability to get her prescription filled, (Appellant's Br. at 21), every reasonable inference from the evidence must be drawn in favor of the jury's verdict. Mr. Badeaux testified that he called Ms. Anderson in order to assist her to make sure that her prescription was timely filled. Tr. at 602:12 – 603:11; 606:7-9. That Ms. Anderson does not believe Mr. Badeaux is of no moment. The

reasonable inference to be drawn from Mr. Badeaux's testimony, which was fully supported by his conduct, was that Mr. Badeaux was attempting to help Ms. Anderson fill her prescription, but that he would not take part in dispensing it. If he truly wanted to put up roadblocks in Ms. Anderson's way, he could have told her that Aitkin Pharmacy was unable to get the drug from its wholesaler in a timely manner or that he was concerned that the delivery would not make it to the pharmacy because of the predicted snowstorm.

Witness credibility determinations fall squarely within the province of the jury. The jury did not believe Ms. Anderson's version and instead sided with Defendants. This Court may not disregard the jury's determination. On a motion for judgment as a matter of law, all reasonable inferences must be made in favor of the verdict. A motion for judgment as a matter of law "will only be granted when it would be impossible for reasonable minds to come to a different conclusion." *Baker v. Amtrak Nat. R.R. Passenger Corp.*, 588 N.W.2d 749, 752 (Minn. Ct. App. 1999). That is not the case here. Rather, the evidence overwhelmingly supports the jury's decision.

Based upon these facts, it was reasonable for the jury to conclude that Aitkin Pharmacy did not refuse to do business with Ms. Anderson in violation of the MHRA. As such, the jury verdict should stand.

D. Aitkin Pharmacy Had a Legitimate Business Purpose For Its Plan to File Prescriptions for Emergency Contraceptives.

Because the jury concluded that Aitkin Pharmacy did not engage in business discrimination against Ms. Anderson, it did not answer the question as to whether it had a legitimate business purpose for its actions. Nonetheless, ample evidence was admitted at

trial for the jury to conclude that Defendants had a legitimate business purpose in implementing the procedures they did to address prescriptions for emergency contraception. "A 'legitimate business purpose' means there is an overriding legitimate, non-discriminatory business purpose necessary for safe and efficient operation of the business, and there are no other acceptable alternative policies or practices which would better accomplish the business purpose or accomplish it equally well with a lesser differential discriminatory impact." ADD-18.

Mr. Hutera testified about how he reviewed the Minnesota Board of Pharmacy newsletter and how the Board's position was that pharmacists could refuse to dispense for moral, religious, and personal reasons. Tr. at 684:11-21. He testified about the realities of operating an independent pharmacy in rural Minnesota. He testified about his difficulties in finding pharmacists to work in McGregor, Minnesota. Tr. at 678:10-22; 679:4-8. He testified about how he had a position for a pharmacist open for over a year. Tr. at 696:15-21. He also testified that he could not afford to staff two pharmacists at all times or even always have a second pharmacist "on call" when Mr. Badeaux was working. Tr. at 686:16 – 687:8. Economically, this was not a viable option for Aitkin Pharmacy.

Mr. Hutera's testimony shows that Aitkin Pharmacy had a legitimate business purpose for implementing the plan it had in place to fill prescriptions for emergency contraception. Simply put, having this policy in place allowed Aitkin Pharmacy to remain in business. A reasonable jury could have weighed the testimony presented for each element and decided there was insufficient evidence to support a claim for business discrimination.

II. WHEN EVALUATING THE JURY'S VERDICT IN THE LIGHT MOST FAVORABLE TO AITKIN PHARMACY, THE PREPONDERANCE OF THE EVIDENCE FULLY SUPPORTS THE JURY'S VERDICT AND IT SHOULD BE NOT DISTURBED.

A. Standard of Review.

This Court reviews a trial court's decision denying a motion for a new trial for an abuse of discretion. *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018).

"A motion for a new trial should be cautiously and sparingly granted by a trial court." *Baker*, 588 N.W.2d at 753 (citing *Leuba v. Bailey*, 88 N.W.2d 73, 83 (Minn. 1957)); *see also Leuba v. Bailey*, 88 N.W.2d 73, 83 (Minn. 1957) ("Recognizing the well-established rule that motions for a new trial should be granted cautiously and sparingly and only in the furtherance of substantial justice . . ."); *Hair v. Miller*, 374 N.W.2d 223, 225 (Minn. Ct. App. 1985) ("A trial court should be reluctant in granting a new trial."); *Gunderson v. Olson*, 399 N.W.2d 166, 168 (Minn. Ct. App. 1987) ("A new trial should be granted only if there is a strong probability that it will render a different result.").

To prevail on a motion for new trial, a court "must find a cause specified in [Minnesota Rule of Civil Procedure 59.01] *and* must further find that prejudice has resulted to the opposing party." *Id.* (citing *Meagher v. Kavli*, 97 N.W.2d 370, 376 (Minn. 1959)) (emphasis added); *see also Torchwood Properties, LLC v. McKinnon*, 784 N.W.2d 416, 419 (Minn. Ct. App. 2010) ("It is not enough that [the moving party's] motion established the existence of one of these bases. [The moving party] also had to establish to the district court that it was actually prejudiced . . ."). The moving party must show prejudice "because prejudice is '[t]he primary consideration in determining whether to grant a new trial.'"

Torchwood, 784 N.W.2d at 419 (quoting *Wild v. Rarig*, 234 N.W.2d 775, 786 (Minn. 1975)).

Judges considering a motion for a new trial based upon Rule 59.01(g), "should exercise the authority granted by the Rule with reluctance and caution, particularly in cases where there are no expressed and articulable reasons, based upon demonstrable circumstances or events, which support a conclusion that injustice has been done." *Koenig v. Ludowese*, 308 Minn. 380, 384, 243 N.W.2d 29, 31 (1976). Further, "[a] motion for a new trial made upon the ground that the jury verdict is not supported by the evidence should be granted only in cases where the preponderance of the evidence clearly suggests jury mistake, improper motive, bias, or caprice." *Conover v. Northern State Power Co.,* 313 N.W.2d 397, 408 (Minn. 1981). In evaluating a motion for a new trial, the evidence must be viewed "in a light most favorable to the prevailing party and [the court] must sustain the verdict unless it is manifestly contrary to the evidence." *McKay's Family Dodge v. Hardrives, Inc.*, 480 N.W.2d 141, 147 (Minn. Ct. App. 1992) (citation omitted).

The jury worked diligently and dispassionately, returning a unanimous verdict after over nine hours of deliberation. The preponderance of the evidence fully supports the jury's verdict. There is no evidence that the jury acted under a mistake or from improper motive or any other basis to overturn the jury's verdict. As such, the district court's denial of Ms. Anderson's request for a new trial should be affirmed.

B. The Trial Court Did Not Abuse Its Discretion When Instructing The Jury.

Plaintiff takes issue with several of the jury instructions issued to the jury, claiming the instructions were erroneous and warrant a new trial. Even if Plaintiff properly objected to the trial court's instructions, and this Court finds its rulings on certain jury instruction were in error (which they were not), a new trial would be required only if the error destroyed the substantial correctness of the charge, caused a miscarriage of justice, or resulted in substantial prejudice. *H Window Co. v. Cascade Wood Prod., Inc.*, 596 N.W.2d 271, 277 (Minn. Ct. App. 1999) (reversing order for new trial and reinstating original jury verdict).

Trial courts are granted "considerable latitude" in the selection of language for jury instructions. *State v. Persitz*, 518 N.W.2d 843, 848 (Minn. 1994); *State v. Oates*, 611 N.W.2d 580, 584 (Minn. Ct. App. 2000); *State v. Gray*, 456 N.W. 2d 251, 258 (Minn. 1990). Upon the review of a trial court's refusal to give requested instructions, an appellate court will not reverse "absent a demonstrated abuse" of the trial court's discretion. *Sanderson v. State*, 601 N.W.2d 219, 224 (Minn. Ct. App. 1999) (stating that jury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case. Claims of error must show that the instructions, considered as a whole, materially misstated the law. *State v. Traxler*, 583 N.W.2d 556, 560 (Minn. 1998); *State v. Turnipseed*, 297 N.W.2d 308, 312 (Minn. 1980). A party's failure to propose specific instructions or to object to instructions before they are given constitutes a waiver of the right to appeal unless the instructions contain plain error

affecting substantial rights or an error of fundamental law and the error seriously affects the fairness integrity or reputation of judicial proceedings. *State v. Crowsbreast*, 629 N.W. 2d 433, 437 (Minn. 2001) *citing Johnson v. United States*, 520 U.S. 461,466-67 (1997); *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). Even when instructions are erroneous, appellate courts will not reverse for errors in instructions unless the errors are prejudicial. *State v. Larson*, 281 N.W.2d 481, 485 (Minn. 1979).

As shown below, none of Plaintiff's objections have any merit, or would have resulted in a different verdict at trial.

1. The trial court properly instructed the jury that Aitkin Pharmacy and Mr. Badeaux were separate defendants.

Plaintiff erroneously asserts that the trial court instructed the jury that it could not hold Aitkin Pharmacy liable for the actions of Mr. Badeaux. this is not an accurate characterization of the jury instructions and tellingly, Plaintiff fails to cite or quote the jury instruction that purportedly states this.

Plaintiff also ignores that in December 2021, Plaintiff asked the trial court to instruct the jury as follows:

> **Multiple Defendants**
>
> There are two defendants in this lawsuit.
> Answer the questions for each defendant as though the lawsuits were being tried separately.
> Each defendant must be judged separately.
> Do not let your judgment about one defendant influence your judgment about the other(s).
> View these instructions separately as they apply to Thrifty White Pharmacy and Mr. Badeaux.

Index #113 (Pltf's Proposed Jury Instructions, at 15.)

In the more than seven months leading up to trial, Plaintiff did not propose a new instruction or ask that this instruction not be given. Agreeing with Plaintiff's request, the trial court instructed the jury with the standard "Multiple Defendants" civil jury instruction, following the language requested by Plaintiff. ADD-12.

Further, Plaintiff's argument is premised on the assumption that the actions of Mr. Badeaux were discriminatory. This premise is faulty. The jury carefully considered all the evidence, drew reasonable inferences therefrom, and made its credibility determinations. And it came back with a verdict that Mr. Badeaux's actions were NOT discriminatory. As such, Plaintiff is unable to show that she was prejudiced in anyway or that the jury would have reached a different result.

Plaintiff cites cases for the proposition that an employee's conduct could be used to show that a company discriminated against an individual. There is no dispute that a company can only act through people. And this concept is well within the understanding of a jury. There was no need to provide that instruction to the jury. Plaintiff also faults the trial court for not instructing the jury that Aitkin Pharmacy could be liable for discrimination by virtue of adopting a discriminatory policy that is enforced by its employees. This language was unnecessary. Throughout the trial, Mr. Hutera and Mr. Badeaux testified that the procedures in place at Aitkin Pharmacy in January 2019 was Aitkin Pharmacy's policy. There was no testimony or argument that the policy was Mr. Badeaux's personal policy or that it was somehow not adopted by Aitkin Pharmacy. Lastly, the uncontroverted trial testimony was that Mr. Badeaux was the pharmacist-in-charge at Aitkin Pharmacy in January 2019. There was no basis for any jury confusion.

In sum, the instructions provided to the jury were well within the "considerable latitude" afford to the trial court. Plaintiff is not able to show the substantial prejudice required to support her motion. As such, her request for a new trial on this issue should be denied.

2. The trial court's instruction on the definition of intentional conduct under the MHRA was proper.

The trial court properly instructed the jury as to the definition of "intent" and "intentional." The jury instructions defined "intent" or "intentionally" to mean that a person:

(a) Wants to cause the consequences of his or her acts, or

(b) Knows that his or her acts are substantially certain to cause those consequences.

ADD-19; ADD-22 – 23.

The Minnesota Supreme Court indicated approval of this definition by noting its use throughout the Restatement (Second) of Torts § 8A (1965). *See Victor v. Sell*, 222 N.W.2d 337, 340 (1974) ("The word "intent" is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."). Courts have continued to apply this definition when considering intentional acts. *See Casanova v. Tri-Cnty. Cmty. Corr.*, No. A19-1996, 2020 WL 4280999, at *7 (Minn. Ct. App. July 27, 2020) (applying same definition to various tort and discrimination claims, including claims brought under the Minnesota Human Rights Act). As such, the trial court properly instructed the jury as to the definition of intentionally to be applied in this case.

Moreover, the MHRA's business discrimination provision uses the term "intentionally" when describing the acts that violate its prohibitions. Minn. Stat. § 363A.17(3). As such, proof of intent is a necessary element of the claim. Courts have interpreted "intentionally" to mean "purposeful discrimination." *See Gold Star Taxi and Transp. Ser. v. Mall of America*, 987 F.Supp. 741, 745 (D. Minn. 1997) (concluding that "to prevail on a claim under the statutes, a plaintiff must prove purposeful discrimination."). Purposeful means more than simply intending the act, it means intending to discriminate. The trial court properly instructed the jury on this required element.

3. The trial court did not abuse its discretion by including an instruction regarding "material disadvantage" and "tangible change in conditions" as part of Plaintiff's public accommodation claim.

Plaintiff incorrectly states that it was an error to instruct the jury on what constitutes public accommodation discrimination under the MHRA. Specifically, Ms. Anderson takes issue with the phrases "material disadvantage" and "tangible change in conditions" being used in the instruction. However, these exact terms are used when analyzing public accommodation discrimination claims under the MHRA.

Cases interpreting the MHRA have defined a denial of "full and equal enjoyment" as when an individual receives some different "tangible change in conditions" or some "material disadvantage," in the goods and services offered to the public. *See Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415, at *19 (D. Minn. Mar. 16, 2015) (internal alterations omitted) (*quoting Bahr v. Capella Univ.*, 788 N.W.2d 76, 83 (Minn. 2010) (using "material disadvantage compared to others"); *Burchett v. Target*

Corp., 340 F.3d 510, 518 (8th Cir. 2003); *Brannum v. Mo. Dep't of Corr.*, 518 F.3d 542, 549 (8th Cir. 2008); *Jones v. Fitzgerald*, 285 F.3d 705, 714 (8th Cir. 2002); *see also Longen v. Fed'l Express Corp.*, 113 F.Supp.2d 1367, 1376 (D. Minn. 2000).

Plaintiff argues that the trial court added an extra element to the public accommodation claim. That is incorrect. The trial court instructed the jury on the meaning of an element of Plaintiff's claim, denial of "full and equal enjoyment in goods or services." The trial court correctly instructed the jury that denial of "full and equal enjoyment" in goods or services means that "Anderson received a material disadvantage or a tangible change in conditions in the goods or services offered to the public." The trial court cited the case law supporting this definition in its ruling on the parties' motions in limine. ADD-89. As the trial court noted, "[t]hese cases are clear that an outright refusal of service is not necessary to sustain a claim of discrimination." *Id.* These cases are also clear that "an actionable MHRA claim must include 'some tangible change in . . . conditions,' or some 'material . . . disadvantage.'" *Rumble v. Fairview Health Servs.*, No. 14-CV-2037 (SRN/FLN), 2015 WL 1197415 (D. Minn. 2015) at *38. The jury instruction properly set forth the standard for the jury to apply.

Simply put, this jury instruction was proper and does not provide a basis for a new trial.

4. The trial court did not abuse its discretion when instructing the jury on protected class.

Members of the jury would understand that sex is a protected class. Anyone that has transacted business, been an employer or employee, or rented or purchased a residence

would know this. The term has a common, ordinary meaning. That sex is a protected class also would be clear taking these jury instructions as a whole. Plaintiff did not seek a clarifying instruction. Rather, Plaintiff's objection was that the trial court declined to define protected class as "seeking emergency contraception." That is not a protected class under the MHRA.

The overwhelming weight of the evidence supports the jury determination that Plaintiff failed to establish the other elements of her public accommodation discrimination claim. Therefore, Plaintiff is unable to show any prejudice and this argument does not support a new trial.

C. Rulings On Evidentiary Matters Rest Within The Sound Discretion Of The Trial Court And Will Only Be Reversed Upon A Showing Of Clear Abuse Of Discretion.

"The question of whether to admit or exclude evidence rests within the broad discretion of the trial court. . . . Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Brewer v. Columbia Park Medical Group, P.A., et al.*, No. CX-97-6327, 2000 WL 35486562 (Minn. Dist. Ct. May 26, 2000) (quoting *Jennie-O-Foods, Inc. v. Safe-Glo Products Corp.*, 582 N.W.2d 576, 580 (Minn. Ct. App. 1998)) (denying motion for new trial). Even if evidence is admitted in error, erroneous evidentiary rulings by the trial court do not automatically entitle the objecting party to relief, and the person claiming error has the burden to show that the error had a prejudicial effect. *Henschke v. Young*, 28 N.W.2d 766, 769 (Minn. 1947). An evidentiary error is prejudicial ***only if*** it might reasonably have influenced the jury and changed the result of the trial. *George v. Estate of Baker*, 724

N.W.2d 1, 9 (Minn. 2006). Admitting evidence that is cumulative or that is corroborated by other evidence constitutes harmless error and will not warrant a new trial. *Id.*

Plaintiff claims two separate evidentiary rulings allegedly deprived her of a fair trial. First, that the trial court erred in its rulings regarding subsequent remedial measures and prohibiting the evidence from being presented to the jury. Second, that the trial court erroneously admitted her therapy record. As analyzed below, both evidentiary rulings were proper and provide no basis for a new trial.

1. The trial court did not abuse its discretion in excluding evidence of Aitkin Pharmacy's subsequent written policy on prescriptions for emergency contraception.

Under Rule 407 of the Minnesota Rules of Evidence, alleged evidence of a subsequent measure is not admissible to prove culpable conduct. The trial court agreed that this rule applies to the written policy that Aitkin Pharmacy implemented in February 2019, after the incident at issue in this case. ADD-99 ("This motion will be granted as subsequent remedial measures are clearly barred by Minn. R. Evid. 407."). The admission of evidence rests within the broad discretion of the district court. *State v. Nunn*, 561 N.W.2d 902, 906-07 (Minn. 1997). Nothing occurred during trial to justify the trial court changing its decision and the trial court properly exercised its discretion by excluding this evidence.

Plaintiff failed to demonstrate both at trial and on appeal that an exception to the exclusion of subsequent remedial measures under Rule 407 should apply. First, Plaintiff misstates the procedures that were in place at Aitkin Pharmacy both before and after January 21, 2019. As both Mr. Hutera and Mr. Badeaux testified, the procedure in place

on January 21 was that if a prescription for emergency contraception was presented at the pharmacy when Mr. Badeaux and another pharmacist were working, the other pharmacist (who was known not to have an objection to dispensing emergency contraception), that pharmacist would fill the prescription. If not, Mr. Badeaux would attempt to have another pharmacist come to the store and fill it. If another pharmacist was unavailable, or if the customer wanted to have the prescription filled elsewhere, then Aitkin Pharmacy would transfer the prescription to a different pharmacy of the customer's choosing. Tr. at 684:11 – 685:14; 587:5 – 588:3. To be absolutely clear, part of the pre-January 21, 2019 procedure was for Mr. Badeaux to contact another pharmacist to come to the store and fill the prescription if Mr. Badeaux was working alone. Plaintiff's assertion that Aitkin Pharmacy's policy to contact another pharmacist was only put in place after this incident is flat wrong. Both Mr. Hutera and Mr. Badeaux clearly and consistently testified to the procedures that were in place at Aitkin Pharmacy prior to this incident.

Further, Plaintiff mischaracterizes Mr. Hutera's testimony regarding the economic feasibility of paying a second pharmacist whenever Mr. Badeaux was working. Specifically, Mr. Hutera testified that it was not feasible to schedule and pay a second pharmacist to always work with Mr. Badeaux or pay a second pharmacist to always be available to come to the pharmacy when Mr. Badeaux was working. Tr. at 686:16 – 687:8. Mr. Hutera testified that paying for a second pharmacist did not make economic sense for Aitkin Pharmacy if it wanted to stay in business.

Plaintiff's argument that the policy set forth in the February 2019 email exchange somehow undercuts this testimony is deeply flawed. That document says nothing about

paying a second pharmacist to always be on call. Despite Plaintiff's attempt to make it otherwise, Aitkin Pharmacy never had a policy either before or after January 2019 that involved paying a back-up pharmacist to be on call to dispense prescriptions for emergency contraception. Anthony Grand, another pharmacist employed at Aitkin Pharmacy, was already scheduled to work the next day – when ella would arrive at the pharmacy. Mr. Badeaux already knew that Mr. Grand did not have an objecting to dispensing emergency contraception. There was no need to contact him, or another pharmacist, to come into work the next day.

Critically, Plaintiff fails to demonstrate how this would impact the case or to identify a legitimate purpose for which the written policy would be admissible. This evidence goes to whether Aitkin Pharmacy had a legitimate business reason for its policy regarding filling prescriptions for emergency contraception. The jury never reached this question because it found that neither Aitkin Pharmacy nor Mr. Badeaux discriminated against Ms. Anderson. ADD-31 – 32. Thus, Ms. Anderson has failed to show how she was prejudiced by the trial court's ruling.

The trial court did not commit error by excluding this document. Determinations regarding what evidence is admissible is well within the court's discretion, and the trial court appropriately excluded it at trial.

2. The trial court properly admitted Ms. Anderson's therapy records.

While Plaintiff restates the procedural history related to her request to not have her therapy records admitted at trial, she fails to explain why or how this evidence being

admitted at trial prejudiced her. Nowhere does Plaintiff explain how the admittance of the evidence affected the outcome of this trial, let alone resulted in prejudice to her that caused the jury find for Defendants. These records were relevant to Plaintiff's alleged damages, not to Defendant's liability. But, because the jury found no liability as to either Aitkin Pharmacy or Mr. Badeaux, the admission of these records was harmless.

More importantly, the admission of Plaintiff's therapy records was proper. Simply being upset with the publication of her therapeutic record to a factfinder does not alone warrant a mistrial. *Torchwood*, 784 N.W.2d 416, 419 (Minn. Ct. App. 2010) (the moving party "ha[s] to establish to the district court that it was ***actually prejudiced***"). "[P]rejudice is the primary consideration in determining whether to grant a new trial," and "the refusal to grant a new trial will be reversed only if misconduct is so prejudicial that it would be unjust to allow the result to stand." *Id.* (quotations omitted).

The trial court ruled that Ms. Anderson placed her medical condition in controversy by alleging that she experienced emotional distress as a result of the incident alleged in her complaint and waived any medical privilege. Index #43 (finding that "[a]n understanding of [Ms. Anderson's] mental condition is necessary to determine damages here."). The trial court's rationale applies equally to the decision to admit the records at trial. Plaintiff's therapy records were necessary at trial to evaluate her testimony regarding her state of mind, the impact of the events of January 21, 2019 on her mental state, and her credibility as a witness. *See, e.g.*, *Navarre v. S. Washington Cty. Schools*, 652 N.W.2d 9, 30-31 (Minn. 2002). Further, the therapy records were also necessary for the jury to evaluate the jury instruction on pre-existing medical conditions and the impact of such on Ms. Anderson's

alleged damages. The records demonstrated other sources of emotional distress in Ms. Anderson's life, unrelate to this lawsuit. In addition, the therapy records made clear Ms. Anderson only discussed her experience in getting her prescription for ella one time during her sessions. All of this was relevant to Plaintiff's alleged damages.

Further, the jury was instructed on Plaintiff's duty to mitigate her damages. The therapy records were relevant to show that Ms. Anderson had a qualified, trusted therapist prior to January 2019, but apparently made the decision not to seek help for her alleged emotional distress and to quit therapy despite her obligation to mitigate any damages. This evidence was highly relevant to the issues at trial, and to the issue of Plaintiff's credibility as a witness.

Despite the trial court's ruling on Plaintiff's motion *in limine* related to the records, Plaintiff failed to offer a redacted version of Ms. Anderson's therapy records. Instead, counsel only asked that the trial court admit the therapy notes for the single day Ms. Anderson briefly mentioned the incident. When the trial court denied that request, counsel did not request to redact any portion of the therapy records that contained such alleged irrelevant and prejudicial statement. By failing to do so, Plaintiff has waived this argument.

In short, Plaintiff has failed to show how this relevant evidence—which she put at issue—prejudiced her or affected the outcome of the trial to create a verdict contrary to the law or a preponderance of the evidence. As such, Plaintiff fails to show how the admissible of her therapy records would necessitate a new trial.

CONCLUSION

After hearing the testimony and evaluating the credibility of the parties and their witnesses, the jury spent nine hours deliberating. The jury concluded that neither Aitkin Pharmacy nor Mr. Badeaux discriminated against Ms. Anderson under the MHRA. The jury's verdict is fully supported by the evidence and the law. Plaintiff has failed to show that this is one of the rare "unequivocal cases" in which the jury's verdict should be disregarded. The jury's verdict should be affirmed in all respects.

Respectfully submitted,

Dated: August 14, 2023

FOX ROTHSCHILD LLP

/s/ Ranelle Leier

Ranelle Leier
City Center
33 South Sixth Street
Suite 3600
Minneapolis, MN 55402
Tel: 612.607.7000
Fax: 612.607.7100
rleier@FoxRothschild.com
Attorneys for Respondent/Defendant Aitkin Pharmacy Services, LLC dba Thrifty White Pharmacy

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the following requirements:

1. The brief was drafted using Microsoft Word 365 word processing software.
2. This brief was drafted using Times New Roman 13-point font, compliant with the typeface requirements; and
3. There are 9,610 words in this brief.

Dated: August 14, 2023

FOX ROTHSCHILD LLP

/s/ Ranelle Leier

Ranelle Leier
City Center
33 South Sixth Street
Suite 3600
Minneapolis, MN 55402
Tel: 612.607.7000
Fax: 612.607.7100
rleier@FoxRothschild.com
Attorneys for Respondent/Defendant
Aitkin Pharmacy Services, LLC dba
Thrifty White Pharmacy