SUPREME COURT NO. 20-0484
POLK COUNTY DISTRICT COURT NO. LACL138797

IN THE SUPREME COURT OF IOWA

Jesse Vroegh,

Plaintiff-Appellee/Cross-Appellant

v.

Wellmark Inc., d/b/a Wellmark Blue Cross and Blue Shield of Iowa,

Defendant-Cross-Appellee,

and

Iowa Department of Corrections, Iowa Department of Administrative Services, and Patti Wachtendorf in her Official Capacity,

Defendants-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE SCOTT D. ROSENBERG, JUDGE
AND DAVID MAY, JUDGE

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ARGUMENT

It is undisputed by Wellmark that the employer-provided health insurance benefits plan challenged in this case was discriminatory in violation of ICRA. On the merits, Wellmark makes two main arguments—one on the facts and one on the law. On the facts, it claims that the material facts were undisputed and show it did not engage in unlawful discrimination. (Wellmark Cross-Appellee Br. [hereinafter "Wellmark Br."] at 44-56). On the law, it argues that it cannot be liable as a person, agent, or aider and abettor under ICRA because it was a third-party administrator of the plan. (Wellmark Br. at 56-83). Both arguments fail. As set forth below and in Vroegh's main brief, there is a genuine issue of material facts. (Vroegh Appellee/Cross-Appellant Br. [hereinafter "Vroegh Br."] at 93-136). Viewing these facts in a light favorable to Vroegh as required, a reasonable jury could find Wellmark had significant control over the discriminatory plan design, implementation, and administration, for which it is liable under Sections 216.6, 216.6A, and 216.11. *Id.* The district court's grant of summary judgment in favor of Wellmark was reversible error.

In addition to these two arguments on the merits, Wellmark makes two procedural arguments, stating that Vroegh relies on the trial record to prevail on his summary judgment appeal, and that Vroegh's appeal is moot because he has obtained the maximum relief available from the State. (Wellmark Br. at 42-43; 84). Both claims are incorrect.

These arguments are set forth in turn below.

I. On the facts: There are disputed material facts supporting a reasonable jury finding that Wellmark engaged in discriminatory employment practices.

In presenting this Court with factual arguments better suited for closing argument at trial than an appeal of summary judgment, Wellmark, like the district court, has ignored the record of disputed facts, and fails to meet its substantial burden of proving an absence of any material factual dispute. (Wellmark Br. at 44-56). Accordingly, the question whether Wellmark's involvement was sufficiently extensive for it to be liable for its role in the discrimination Vroegh experienced is a question that should have been properly decided by a jury, rather than on summary judgment.

Vroegh demonstrated a significant number of material facts supporting a reasonable jury determination that Wellmark's control over the design, implementation, and administration of the discriminatory insurance benefit was significant, that Wellmark acted as an agent for the State, and that Wellmark aided and abetted the State's unlawful discrimination. (Vroegh Br. at 36-47, 95-137); (App. 1190-1206, 1207-15). A few examples follow:

- Wellmark's medical director drafted the exclusion at issue in this case and proposed it to the State. (App. 1232 at 14:23-15:18, 1233 at 17:17-18:23, 1272 at 16:10-17:5); (Confidential App. [hereinafter "Conf. App."] 604 at 26:5-27:18).
- The State's RFP contained no request for, or exclusion to, gender affirming surgery. (App. 648-714).
- The RFP did, by contrast, require Wellmark to "comply with all applicable federal, state, and local laws, rules, ordinances, regulations and orders when performing the services under this Agreement, including without limitation, all laws applicable to the prevention of

discrimination in employment…" (App. 701). These laws obviously include the Iowa Civil Rights Act.

- The Plan included coverage for medically necessary surgery—and did not exclude coverage for gender affirming surgery until Wellmark's medical director suggested its inclusion—which creates doubt for a reasonable fact-finder about Wellmark's claim that the exclusion always existed. (Conf. App. 629-30).
- The exclusion at issue in this case did not appear in the State's Insurance Plan until 2015, after its addition at the recommendation of Wellmark's medical director. (*Compare* Conf. App. 138 (showing no gender reassignment surgery exclusions in 2014 Plan), *and* Conf. App. 232 (showing newly-added exclusion in 2015 Plan), 397, 473 at 39:21-41:15).
- Wellmark had the role of denying the request of Vroegh's physician for preauthorization of coverage, which would not have occurred but for Wellmark's

denial of it because its purpose was to treat Vroegh's gender dysphoria. (Conf. App. 558-61, 580-84).

- The State relied on Wellmark to determine what health insurance benefits were appropriate to cover both in the insurance plan at issue here and also in the Iowa Medicaid plan. (App. 979-81).
- State employees' testified that they understood communications from Wellmark employees to mean the Plan at issue in this case only excluded coverage for surgery because of Wellmark's addition of the exclusionary language. (App. 1251 at 33:6-1253 at 38:12).
- Wellmark, not the State, had the role of initiating Plan changes. (App. 1257 at 13:13-23, 1272 at 16:10-1273 at 18:25).
- Consistent with this role, Wellmark was the party to recommend specific language to change the Plan after the denial of Vroegh's coverage because the Plan violated the nondiscrimination requirements of the

Affordable Care Act; the State adopted this change. (App. 958-60, 962-63, 129, 1262 at 46:12-24, 48:22-49, 1266 at 70:2-14).

- Wellmark had authority to deviate from the plan's terms given to it by the State. (Conf. App. 278-80, 558-60, 562-579); (App. 1260 at 41:1-19, 1240 at 24:23-1243 at 34:10,1244 at 87:24-1246 at 94:18).
- Wellmark also had authority to make determinations regarding coverage claims and appeals given it by the State. (*Id.*).
- Wellmark's appeals process for Vroegh and other State employees did not include appeal to the State of Iowa, independent of Wellmark, for an employee who was dissatisfied with Wellmark's decision. (*Id.*).

Thus, contrary to the picture Wellmark tries to paint, there is a significant dispute of material facts in this case. Wellmark has the right to make its factual case to a *jury* that its role did not amount to significant control, that it was not an agent of the State,

and that it did not aid and abet the State's unlawful discrimination. Vroegh likewise deserves to make his case to a jury that it did.

II. On the law: ICRA allows Wellmark to be liable as a person, agent, or aider and abettor.

A. Wellmark may be liable as a "person" for employment discrimination.

Wellmark argues that because it was not Vroegh's employer or supervisor, it cannot be liable under section 216.6 as a "person" for its role in the discriminatory plan design, implementation, or administration. (Wellmark Br. at 57-62). As set forth below, the plain text of the statute and the cases interpreting it demonstrate that this argument is meritless.

Wellmark cites to this Court's decisions in *Grahek v. Voluntary Hosp. Co-op. Ass'n of Iowa, Inc.*, 473 N.W.2d 31 (Iowa 1991), and *Zepeda v. Fort Des Moines Men's Corr. Facility*, 586 N.W.2d 364 (Iowa 1998); (Wellmark Br. at 57-58). But *Grahek* is no longer the rule. After *Grahek*, the Iowa Supreme Court decided *Sahai*, which expressly acknowledged the liability of non-employer and non-supervisor persons for employment discrimination under ICRA. *Sahai v. Davies*, 557 N.W.2d 898, 901 (Iowa 1997)

(determining Iowa Code § 216.6(1)(a) "extends the prohibition of the act to some situations in which a person guilty of discriminatory conduct is not the actual employer of the person discriminated against[.]").

A non-employer person may be liable under ICRA when it "play[s] a role" in the discriminatory employment practice, *id.* at 900, "is responsible for the action of which [plaintiff] complains", *Zepeda*, 586 N.W.2d at 365, or was "in a position to control" the employer's relevant employment decisions, *Johnson v. BE&K Construction Co., LLC,* 593 F. Supp. 2d 1044, 1049-50 (S.D. Iowa 2009). Unlike Title VII, which applies to employers, employment agencies, and labor organizations, 42 U.S.C.A. § 2000e-2, ICRA applies more broadly to "persons" who "discriminate in employment." *Vivian v. Madison*, 601 N.W.2d 872, 874 (Iowa 1999). "Person" is defined in the statute as, "one or more individuals, partnerships, associations, corporations, legal representatives, trustees, receivers, and the State of Iowa and all political subdivisions and agencies thereof." Iowa Code § 216.2(2). Thus,

Vroegh does not need to prove that Wellmark was his employer or for it to be liable under ICRA.

Nor does *Zepeda* stand for the proposition for which Wellmark cited it. In *Zepeda*, this Court acknowledged that a third party "person" *could* be liable for employment discrimination under ICRA, but found that the particular defendant in that case was not liable. *Zepeda*, 586 N.W.2d at 365. Unlike the facts in *Zepeda*, the facts in this case show Wellmark's substantial role in plan design, implementation, and administration. (*See* Argument Part I, above).

For the first time on appeal, Wellmark argues that the *Godfrey* case held that only supervisors, and no other "persons", could be liable under ICRA. (Wellmark Br. at 57 n.7, 58) (citing *Godfrey v. State,* 898 N.W.2d 844 (Iowa 2017)). To the contrary, *Godfrey* decided the question of the availability of *Bivens*-type constitutional claims where an adequate remedy under ICRA is available for the same underlying discrimination. *Id.* at 876-879. It did not set forth any holding about liability of non-supervisor persons under ICRA.

Specifically, Wellmark's citation to page 881 of the *Godfrey* case, containing former Chief Justice Cady's concurrence, appears in error, as it does not speak to the issue of non-employer liability under ICRA at all. *Id.* at 881 (Cady, C.J., concurring in part and dissenting in part).

The cited footnote on page 879 of the opinion simply recognizes that ICRA allows non-employer "supervisors" to be liable, citing *Vivian*. *Id.* at 879 n.8. Wellmark makes too much of the final sentence of the footnote providing that "[t]o the extent the individual defendants are not 'supervisors' of Godfrey, they are not within the scope of the Iowa Civil Rights Act and there is no adequate remedy as to them." *Id.* First, the sentence is indisputably dicta. Second, the plain language of ICRA establishes the liability of "persons"—which is the basis for supervisor liability as discussed in *Vivian*. Iowa Code § 216.6(1)(a) (setting out liability for a "person" who discriminates); Iowa Code § 216.2(2) (defining "person"); *Vivian*, 601 N.W.2d at 874-78) (construing liability of a "person"). It's quite a stretch to argue that this Court intended that single sentence of dicta in a footnote in a case about *Bivens*-like

claims under the Iowa Constitution to overrule the Court's previous discussions of liability under ICRA for non-employer "persons" in *Sahai* and *Vivian*, and to reject the reasoning of the federal court decisions in *Asplund*, *Whitney*, *Blazek*, and *Johnson*.

Wellmark's argument that this Court should disregard those federal court decisions should also be rejected. (Wellmark Br. at 58-59; 58 n.8). The reasoning of those decisions is consistent with the plain text of section 216.6(1) as well as this Court's precedent in *Vivian* and *Sahai*. (*See* Vroegh Br. at 52-57) (citing *Asplund v. iPCS Wireless, Inc.*, 602 F. Supp. 2d 1005 (N.D. Iowa 2008); *Whitney v. Franklin Gen. Hosp.*, 2015 WL 1809586 (N.D. Iowa 2015) (unpublished); *Blazek v. U.S. Cellular Corp.*, 937 F. Supp. 2d 1003 (N.D. Iowa 2011); *Johnson*, 593 F. Supp. 2d at 1044.).

Wellmark attempts to distinguish from those federal cases only by pointing out that none are about third-party insurance administrators. (Wellmark Br. at 58-59). But Wellmark fails to provide any argument as to why the analysis of those cases should not apply to third-party administrators who exercised a sufficient degree of control over the unlawful discrimination prohibited by

ICRA, as it does like the other non-employer persons in those cases. (*See* Argument Part I, above; *see also* Vroegh Br. at 101-103).

Wellmark also argues that most[1] of the federal cases should be disregarded because they were at the motion to dismiss stage "when the district court was required to accept the facts pleaded as true." (Wellmark Br. at 59). This statement is meaningless, because the relevant point is that ICRA allows plaintiffs to sue non-employer and non-supervisor "persons" as a matter of law—not whether the plaintiffs in those cases ultimately met their burden of proof later at trial.

Finally, Wellmark makes a slippery-slope policy argument that "chaos" will ensue unless the Court carves out third-party administrators as an exception to the plain text of ICRA allowing liability for "persons".[2] (Wellmark Br. at 59-62). This fear is

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[1] The *Whitney* case was decided on summary judgment. *Whitney*, 2015 WL 1809586.

[2] This argument is also unpreserved, because it wasn't made below. *Teamsters Loc. Union No. 421 v. City of Dubuque*, 706 N.W.2d 709, 713 (Iowa 2005) (citing *In re Marriage of Okland*, 699 N.W.2d 260, 266 (Iowa 2005). It also exceeds the role of the Court in construing statutes. *See State v. Ross*, 941 N.W.2d 341, 347 (Iowa 2020) (quoting *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 590

unwarranted. Vroegh is not asking for third-party administrators to assume the cost of insurance claims that self-funded plans deny, but only to be held responsible for its role in discriminating. Vroegh has presented facts showing Wellmark was not a passive administrator here, but met the criteria for liability of "persons", agents, and aiders and abettors of discrimination under ICRA. (*See* Argument Part I, above). Prohibiting Wellmark and other third-party administrators from taking on the significant role that Wellmark voluntarily undertook in the creation, implementation, and administration of a facially discriminatory policy falls far short of requiring them to "ensure each and every coverage term of every plan they service does not pose a legal risk". (Wellmark Br. at 60). Rather, avoiding liability under the ICRA is simple: do not create or agree to administer plan terms which *on their face* exclude benefits based simply on a covered individual's membership in any ICRA-protected category in violation of state and federal law.

(Iowa 2004) (Court's role is not to "change the meaning of a statute.")).

Wellmark asks for immunity for third-party administrators under ICRA—which is found nowhere in the statute—no matter what 'role they play', are 'responsible for', or are 'in a position to control' a facially discriminatory employment decision. *Sahai*, 557 N.W.2d at 900; *Zepeda*, 586 N.W.2d at 365; *Johnson*, 593 F. Supp. 2d at 1049-50. No insurer need serve as "unretained legal counsel" in order to recognize and omit such obvious discriminatory language from the plans it offers.[3] Vroegh only asks the Court to allow him to try his case to the jury that Wellmark should be accountable for its *own* role in the unlawful discrimination against him.

The State's assumption of the financial risk in paying for Vroegh's medical care under the Master Service Agreement ("MSA") does not negate Wellmark's responsibility for the fundamentally discriminatory Plan which, viewing the facts in Vroegh's favor as required, Wellmark helped to design and

[3] Indeed, Wellmark voluntarily assumed the very active and substantial role that it had, both recommending to the State that it add the discriminatory exclusion, and later alerting the State that the language violated federal law. (App. 958-60, 962-63, 129, 1262 at 46:12-24, 48:22-49:1, 1266 at 70:2-14).

administer. Neither case Wellmark cites in support of this policy argument provide any guidance here. (Wellmark Br. at 60). *Zolner* analyzed whether a third-party administrator which administered the employer's FMLA leave plan was the plaintiff's joint "employer" under the FMLA. *Zolner v. U.S. Bank Nat'l Ass'n,* Civ. No. 4:15-cv-00048, 2015 U.S. Dist. LEXIS 160550 (W.D. Ky. Dec. 1, 2015). The court held it was not, as the plaintiff did not allege she was employed by the third-party administrator. *America's Health Ins. Plans v. Hudgens*, 742 F.3d 1319, 1324 (11th Cir. 2014) is even further afield. (Wellmark Br. at 60). That case deals with questions of associational standing and federal preemption of state law under ERISA. *Id.* Here, Vroegh has not brought an FMLA or ERISA claim, nor does he claim Wellmark was his "employer." Rather, he argues that Wellmark should be held liable as a "person" under the ICRA's broad coverage mandate. As this Court has recognized, ICRA's liability for "persons" is broader than analogous federal employment law. *Vivian*, 601 N.W.2d at 874-78. Wellmark's "chaos" policy argument is thus unpreserved, illogical, and not supported by the cases it cites.

In sum, Wellmark's arguments that it may not be liable as a matter of law under ICRA because it was not Vroegh's employer or supervisor are inconsistent with the plain text of the statute and the state and federal caselaw construing it.

B. Wellmark may be liable as a "person" for wage/benefits discrimination.

Wellmark argues that "the liability for 'persons' under section 216 addressed above does not apply to claims brought under section 216.6A," expressly governing wage and benefit discrimination. (Wellmark Br. at 70-71).[4] However, the plain text of section 216.6A places wage discrimination firmly within the context of an "*additional* unfair or discriminatory practice," in reference to section 216.6.[5] Iowa Code § 216.6A (emphasis added); *cf. In re Estate of Sampson*, 838 N.W.2d 663, 667 (Iowa 2013) (relying on section

[4] Wellmark concedes that agents, and aiders and abettors, may be liable for wage/benefits under section 216.6A. (Wellmark Br. at 70, 72).

[5] Discriminatory pay practices are actionable against any "person" who engages in them under both sections 216.6 and 216.6A. *Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 567 (Iowa 2015).

titles as an aid to interpretation); *State v. Tague*, 676 N.W.2d 197, 201–03 (Iowa 2004) (same).

Wellmark's argument that "persons" are not liable for wage discrimination under section 216.6A is further belied by the remedies section of ICRA, which allow a claimant "aggrieved by a discriminatory or unfair practice" to "commence a cause of action for relief against a *person*, employer, employment agency, or labor organization." Iowa Code § 216.15(1) (emphasis added); *Vivian*, 601 N.W.2d at 873-74. Because wage discrimination under section 216.6A is "a discriminatory or unfair practice," the plain text of section 216.15(1) allows the claimant to bring that claim against a non-employer "person" when appropriate, as here.

Wellmark's narrow reading is also contrary to the legislature's direction that ICRA "shall be construed broadly to effectuate its purpose" to curb unlawful discriminatory practices. Iowa Code § 216.18(1) (2018); *Probasco v. Iowa Civil Rights Comm'n*, 420 N.W.2d 432, 435 (Iowa 1988). This Court, "faced with competing legal interpretations of the Iowa Civil Rights Act must keep in mind the legislative direction of broadly interpreting the

Act when choosing among plausible legal alternatives." *Pippen v. State*, 854 N.W.2d 1, 28 (Iowa 2014).

Wellmark's argument that "persons" may not be liable under section 216.6A is without merit.

C. Wellmark may be liable as an agent for employment and wage/benefits discrimination.

Wellmark concedes that ICRA makes agents liable for employment and wage/benefits discrimination, but argues, based on disputed material facts, that it was not an agent of the State in discriminating against Vroegh. (Wellmark's Br. at 62-70, 71). Yet the question on appeal is not whether Vroegh has proven definitively that it was or was not an agent, but whether a reasonable jury, viewing the facts in a light favorable to Vroegh, could find that it was. This Court's prior precedent holds that the existence of an agency relationship is a matter unquestionably best suited to the jury, not the district court on summary judgment. *Pillsbury Co. v. Ward*, 250 N.W.2d 35, 38 (Iowa 1977). As such, the district court's resolution of *disputed* material facts in favor of Wellmark to find that it was not acting as an agent for the State was reversible error.

Wellmark's attempt to distinguish from the analogous federal court decisions Vroegh cites in his brief on the basis that some (not even all) of those decisions were decided at the motion to dismiss stage has no merit. (Wellmark's Br. at 67 n.11; Vroegh Br. at 110-117). The lower bar to survive a motion to dismiss is only relevant as to factual assertions—not to questions of law, for which Vroegh cites them.

In service of their misplaced factual arguments, Wellmark points to the MSA it had with the State to argue that it did not act as an agent for the State. (Wellmark's Br. at 62, 65). However, as this Court has repeatedly held, such a contractual disclaimer does not disprove an agency relationship; instead, the matter is a factual question for the jury. *See C & J Vantage Leasing Co. v. Outlook Farm Golf Club, LLC*, 784 N.W.2d 753, 759 (Iowa 2010); *Pillsbury Co.*, 250 N.W.2d at 38; *Metro. Prop. & Cas. Ins. Co. v. Auto-Owners Mut. Ins. Co.*, 924 N.W.2d 833, 841 (Iowa 2019). Here, Vroegh pointed to ample record evidence before the district court to survive summary judgment against him on the question of whether an agency relationship existed. (*See* Vroegh Br. at 109-110, 117-118,

120-123). Wellmark will be able to point to the MSA as one piece of evidence when it makes its case to the jury, but Vroegh will be able to point to many other pieces of evidence showing it acted as the State's agent.

For example, the State held Wellmark out as the authority to determine coverage claims and appeals of claim denials. (Conf. App. 278-80, 558-60, 562-79; App. 1260, 1240-43). Employees who were dissatisfied with Wellmark's decisions had no right to appeal that decision to the State; instead, the State delegated claim appeals to Wellmark solely. (App. 1252, 1260, 1240-43; Conf. App. 278-80, 558-60, 562-79). As the record, which must be viewed in a light favorable to Vroegh at this stage, shows, the State relied heavily on Wellmark to act on its behalf both as to Plan design and administration. (Conf. App. 473, 397; App. 1273-74); (*See also* Argument, Part I, above) (setting out additional disputed facts relevant to the question of agency which must be decided by a jury).

Wellmark also repeatedly implies that it cannot be liable as a matter of law because the Iowa Insurance Division reviewed and approved the Plan at issue. (Wellmark Br. at 28, 30, 33, 51). This is

a red herring. The Iowa Insurance Division approves all plans sold in the state. (App. 1116). That does not mean that the Division has determined that the plan complies with state or federal nondiscrimination law, including ICRA. The fact that all insurance sold in the state is approved by the Division does not negate liability for persons, employers, or public accommodations that discriminate through insurance plans that violate ICRA. *Cf. Good v. Iowa Dep't of Human Servs.*, 924 N.W.2d 853, 862–63 (Iowa 2019) (holding that the categorical ban on Medicaid reimbursement for gender-affirming surgery violated ICRAs protections against gender-identity discrimination in public accommodations).

On the cases, Wellmark tries to minimize *Spirt,* questioning whether it "remains good law." (Wellmark Br. at 66 n.10). But subsequent cases in the Second Circuit have reaffirmed the decision's core holding that "where an employer has delegated one of its core duties to a third party that third party can incur liability under Title VII." *See Gulino v. New York State Educ. Dep't*, 460 F.3d 361 (2d. Cir. 2006); *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054 (2d Cir. 1982), vacated on other grounds, 463 U.S. 1223 (1983).

Indeed, *Spirt*'s reasoning was based on the U.S. Supreme Court's reasoning in *City of Los Angeles*, *Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978), where the Court provided, "We do not suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells," *id.* at 732, and that "Title VII applies to 'an agent' of a covered employer." *Id.* at 718, n.33.

Further, the 2017 *Boyden* case that Wellmark cites as persuasive authority itself cites *Spirt* and *Carparts* as authoritative, and applies the tests for third-party agency liability under Title VII set out in those cases. (Wellmark Br. at 68-69); *Boyden v. Conlin*, 2017 WL 5592688 at *4-5 (W.D. Wis. Nov. 20, 2017). Nor can Wellmark contest the currency of *Carparts, Brown*, and *Alam*—all cited by Vroegh along with *Spirt* in his opening Brief supporting his claim that a reasonable jury could find Wellmark liable an agent of the State in discriminating against Vroegh. (Vroegh Br. at 112-121); *See Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994);

Brown v. Bank of America, N.A., 5 F. Supp. 3d 121 (D. Me. 2014); *Alam v. Miller Brewing Co.*, 709 F.3d 662 (7th Cir. 2013).

As explained in Vroegh's opening brief, Wellmark's reliance on *Boyden* is misplaced. (Vroegh Br. at 118-121). The third-party administrator in *Boyden* most analogous to Wellmark, ETF, was *not* dismissed, because the court reasoned that "the injury can be fairly traced to ETF," whose "role as *administrator* of the group health program ma[de] it and [the Secretary of ETF] proper defendants." *Boyden*, 2018 WL 2191733, at *4. The district court dismissed the other third-party insurance company from the suit based on specific facts which are quite different than the relationship between Wellmark and the State. *Boyden v. Conlin*, 2018 WL 4473347, at *3-5 (W.D. Wis. Sept. 18, 2018); (Vroegh Br. at 119-123). The district court in *Boyden* acknowledged that third-party administrators could act as agents of the employer in providing discriminatory benefits under Title VII. *Id.* at *4 (examining the facts of the case pursuant to the tests of agency liability under *Spirt*, *Carparts*, and *Alam*). Its refusal to dismiss the third-party administrator that played a role akin to Wellmark's—

determining which services should be covered under the offered health insurance plans—*supports* Vroegh's argument that Wellmark should be found liable as an agent. (*See* Argument Part I, above; Vroegh Br. at 109-110, 117-118, 120-123).

Wellmark's reliance on *Klassy* and *Weyer* is similarly problematic. (Wellmark Br. at 67-68). The federal district court in *Klassy* found that an insurance company was not an employer's agent because the record failed to show that the insurance company "exist[ed] solely for the purpose of enabling plaintiff[]'s employer, [], to delegate its responsibility to provide health benefits for its employees or that plaintiffs are required to participate in the [insurance] plan." *Klassy v. Physicians Plus Ins. Co.*, 276 F. Supp. 2d 952, 959-60 (W.D. Wis. 2003).[6] In Vroegh's case, in contrast, the State *had* delegated to Wellmark the job of running the State's employer-sponsored health care insurance plan to meet its obligations to its employees. (App. 720-27, 1257, 1272-73).

[6] *Klassy* was also decided prior to the Seventh Circuit's decision in *Alam*, cited by Vroegh in his brief, and likely would have been different if it had come after. (Vroegh Br. at 115).

The *Weyer* case is similarly unhelpful to Wellmark. (Wellmark Br. at 67-68). That case was an ADA public accommodation case, not an employment case. *Weyer v. Twentieth Century Fox Film Corp.,* 198 F.3d 1104, 1112 (9th Cir. 2000). The court even noted that "neither Fox nor UNUM question Weyer's ability to bring suit regarding her employment relationship under Title III." *Id*. The dismissal of the insurer in that case has no bearing on whether there existed an agent-principal relationship in the provision of healthcare as employment discrimination under either Title III of the ADA, Title VII, or of course, ICRA.

Finally, *Tovar* does not stand for the proposition for which Wellmark cites it. (Wellmark Br. at 69, 69 n.12). Indeed, it is actually helpful authority to Vroegh, because in *Tovar*, the Eighth Circuit overturned the district court's dismissal of the non-employer third-party administrators of the health plan named as co-defendants. *Tovar v. Essentia Health*, 857 F.3d 771, 775-76 (8th Cir. 2017). An insured employee had brought a Title VII sex discrimination action against her employer and the administrator of its health insurance plan on her own behalf after it denied

coverage for her son, a plan beneficiary, to receive gender affirming surgery. *Id.* at 773-74. The court dismissed the Title VII claim because it determined that discrimination against a non-employee beneficiary on the basis of sex did not satisfy the definition of sex discrimination against an employee. *Id.* at 775-76. That particular piece of the holding has no applicability to Vroegh's case, of course, as Vroegh is unquestionably an employee for purposes of his ICRA claims. But on the matter of the plaintiff's ACA claim, which *is* relevant to Vroegh's case, the Eighth Circuit specifically overturned the district court's dismissal of the health plan administrator, disagreeing with the district court's determination that a third-party administrator of an employer's self-funded health insurance plan could not be liable as a matter of law. *Id.* at 778 ("If Health Partners, Inc. and/or HPAI [the third-party administrators] provided Essentia [the employer] with a discriminatory plan document, Tovar's [the employee's] alleged injuries could well be traceable to and redressable through damages by those defendants notwithstanding the fact that Essentia subsequently adopted the plan and maintained control over its terms").

On remand, the district court rejected the third-party administrator's argument that it "[could not] be held liable for administering the plan whose allegedly discriminatory terms were under the sole control of the [employer]." *Tovar,* 2018 W.L. 4516949, *4 (D. Minn. Sept. 20, 2018) ("Nothing in Section 1557 [incorporating the nondiscrimination provisions of Title VII], explicitly or implicitly, suggests that [third-party administrators] are exempt from the statute's nondiscrimination requirements. Accordingly, the Court concludes that [the third-party administrators] may be held liable under Section 1557.").

Because the facts regarding Wellmark's role in creating, implementing, and administering the discriminatory Plan, viewed in a light favorable to Vroegh, reasonably support a finding that it acted as an agent of the employer in this case, summary judgment for Wellmark on the matter of agency liability was reversible error.

D. Wellmark may be liable for aiding and abetting employment and wage/benefit discrimination.

Wellmark argues for the first time on appeal that it cannot be liable for aiding and abetting a discriminatory employment practice under section 216.11 because it was not a supervisor or employee of

the State. (Wellmark Br. at 73). It also argues that its role did not rise to the level of aiding and abetting under any of the three potential tests to establish liability under section 216.11. (Wellmark Br. at 74-83). These arguments only highlight the factual disputes in this case and fail as a matter of law.

First, Wellmark failed to preserve this argument by failing to make it below. (App. 124-30). Wellmark's argument also disregards the plain language of ICRA's aiding and abetting liability provision, which is one of the ways in which the ICRA is broader than Title VII. *Vivian*, 601 N.W.2d at 874. "[T]he plain language of the statute is unambiguous and subjects 'any person' to liability under ICRA for intentionally aiding, abetting, compelling, or coercing another person to engage in discriminatory practices prohibited by ICRA." *Johnson*, 593 F. Supp. 2d. at 1052 (citing Iowa Code § 216.11). If the legislature had intended to "limit liability under section 216.11 to [] supervisory employees, it easily could have done so by using terminology other than the broadly defined term 'persons'." *Id.*

Wellmark's reliance on interpretations of the Pennsylvania and New Jersey state nondiscrimination acts must be rejected.

(Wellmark Br. at 73). Rather, this Court should follow the language of section 216.11 and its interpretation by this Court and by federal courts. In *Deeds*, the Court considered whether a non-supervisor third party medical clinic could be liable for aiding and abetting discrimination. *Deeds v. City of Marion*, 914 N.W.2d 330, 349-351 (Iowa 2018). The Court found the third-party medical clinic could not be liable because the plaintiff had failed to show the employer's participation in the underlying employment practice, because the medical clinic played an advisory role only, and the advice sought was independent medical judgment. *Id.* at 351 (citing *Sahai*, 557 N.W.2d at 901). This Court thus reached the merits of the conduct of the third-party physician, who was not a supervisor or employee, but found him not liable based on facts not present in this case.

Wellmark also disregards the numerous federal court decisions applying ICRA to non-supervisors which this Court cited favorably in *Deeds*. *Id.* at 350 (citing *Blazek*, 937 F. Supp. 2d at 1025 (holding nonsupervisory co-workers could be liable under section 216.11) *and Johnson*, 593 F. Supp. 2d at 1050 (client of employer could be liable under 216.11)).

Wellmark also makes a factual argument that its actions did not rise to the level of aiding and abetting under any of the applicable tests. (Wellmark Br. at 74-88). This argument is misplaced, and only highlights the material factual disputes in this case, confirming that this issue is best suited for a jury. This Court does not decide matters of disputed material facts on appeal, which Wellmark asks it to do.

Wellmark ignores the underlying facts set forth by Vroegh. These facts, viewed in a light favorable to Vroegh as required, support a reasonable determination that Wellmark aided and abetted the discriminatory conduct. (Vroegh Br. at 130-137; Argument Part I, above). For example, Wellmark, not the State, took the initiative to draft the State's Plan to specifically add the discriminatory exclusions at issue and applied that exclusion to deny Vroegh coverage despite its awareness of the medical consensus that such care is medically necessary to treat gender dysphoria for many transgender people. (*Id.*). Contrary to Wellmark's characterization, these facts, as well as the others Vroegh points to, (*id.*), show Wellmark's "distinct conduct" from

that of the State in designing, implementing, and administering the discriminatory plan under all three of the identified tests. (*Id.*). These are facts that should go to the jury, and as such, summary judgment was in error.

III. Vroegh relies solely on the Summary Judgment record below.

Wellmark's argument that Vroegh relies on the trial transcripts to support his summary judgment argument is incorrect. (Wellmark Br. at 42-44). Vroegh's Brief necessarily included both arguments as Cross-Appellant regarding summary judgment for Wellmark and those regarding trial as Appellee against the State. His brief accordingly includes parallel citations to both the summary judgment record below and the trial record. (*See* Vroegh's Br. at 101, 102-103, 110, 118, 121-122, 123, 130, 131, 132-34, 136). The cited trial transcripts indeed demonstrate consistency between Vroegh's arguments regarding Wellmark's role in the discriminatory plan and the evidence produced at trial. (*Id.*). However, Vroegh's arguments that summary judgment for Wellmark was legal error depend solely upon the summary judgment record below.

IV. Vroegh has made no concession as to Wellmark's role in the unlawful discrimination.

Wellmark repeatedly cites to the *Appellee* section of Vroegh's Brief in which he cites opposing counsel's opening statement and quotes DAS officials at trial that "the State had the ultimate authority and responsibility to determine the terms and coverage for the health benefit plans". (Wellmark Br. at 49, 51, 61); (Vroegh Br. at 92) (citing Tr. Vol. II, 69:4-10; Tr. Vol. V, 24:16-20; 35:5-25; 36:1-12; 39:7-11). But there are serious problems with Wellmark's argument, even beyond the fact that it asks the Court to use trial testimony outside of the summary judgment record in *its* favor after having just admonished that the Court should *not* do that in favor of Vroegh. (Wellmark Br. at 42-43).

First, none of the argument and testimony Wellmark cites is an admission or concession by Vroegh at all. Instead, it consists of the State's counsel's opening statement, (Tr. Vol. II, 69:4-10), and testimony elicited from State employees after it improperly sought to place all the blame for its discrimination against Vroegh on nonparties—in some cases, Wellmark, and in others, the union. (Tr. Vol. V, 24:16-20; 35:5-25; 36-12; 39:7-11). Because Wellmark had

been dismissed at the summary judgment stage, no evidence at trial was offered regarding the apportionment of responsibility and control as between Wellmark and the State, and the jury specifically did not decide those questions. It is highly misleading to characterize the State's statements about its relationship to multiple nonparties at trial as a 'concession' by Vroegh about the State's relationship to Wellmark on appeal.

Second, even if it were accurate that the State had the final authority, that fact would not obviate the liability Wellmark has for its substantial role in violating Vroegh's civil rights. To say that the State is one "but-for" cause of the discrimination against Vroegh is not to say that Wellmark cannot be an additional "but-for" cause of the discrimination. The U.S. Supreme Court recently explained this principle in finding that a person's "sex" is a but for cause of discrimination against someone because of their sexual orientation or transgender status. As the Court explained:

> Often, events have multiple but-for causes. So, for example, if a car accident occurred both because the defendant ran a red light and because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. *Cf. Burrage v. United*

States, 571 U.S. 204, 211–212, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014).

Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731, 1739 (2020). The same analysis applies here, where both the State and Wellmark's conduct were but-for causes of the discrimination. Recognition of the State's liability does not negate Wellmark's liability for its role. *See Reilly v. Anderson*, 727 N.W.2d 102, 109 (Iowa 2006).

V. Vroegh's cross-appeal is not moot.

Last, Wellmark incorporates by reference its motion to dismiss this appeal as moot. (Wellmark's Br. at 15, 84). But, as set forth fully in his Resistance, Vroegh's claims against Wellmark are not moot for three reasons: (1) Vroegh's claims against Wellmark are distinct from his claims against the State, and the jury award did not provide him with the full extent of the compensatory damages available under ICRA; (2) Vroegh's attorney fee application excluded fees and costs solely attributable to Vroegh's case against the State; (3) Dismissal is not in the interests of justice. (Vroegh Aug. 26, 2020 Resistance to Mot. to Dismiss and accompanying Exs. A-D).

Wellmark additionally argues that "with the damages and fee awards, Vroegh received the complete relief available under the ICRA." (Wellmark Br. at 27; Wellmark Aug. 31, 2020 Reply at 5, ¶10). That is inaccurate. Vroegh only pursued a portion of his total available damages against the State at trial.[7] For example, Vroegh sought and was awarded emotional distress damages against the State, not compensatory damages for out-of-pocket expenses. (App. 1488-1503; Supp. App. 5-6). In contrast, Vroegh sought compensatory relief against Wellmark. (App. 58-60); (*See* Vroegh Aug. 26, 2020 Resistance to Mot. to Dismiss and accompanying Exs. A-D) (showing, *inter alia*, that Vroegh has at least $2,170.76 in compensatory damages and more than $41,257.66 in attorney's fees attributable to Wellmark and which were *excluded* from the relief he sought from the State).[8]

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[7] Wellmark concedes it is appropriate for this Court to consider subsequent evidence unavailable at the summary judgment stage in determining the question of mootness. (Wellmark Br. at 43 n.5).

[8] Importantly, these are just some examples demonstrating that Vroegh has not been awarded complete relief for the damages and fees he has incurred. The full extent of damages, including emotional distress damages and out-of-pocket damages, and whether they are attributable to Wellmark for its role, are factual

Wellmark tries to waive $2,028.99, a portion, of these distinct damages off, claiming Vroegh never produced exhibits A-D in the course of discovery. (Wellmark Aug. 31, 2020 Reply at ¶¶13-15). However, as Wellmark acknowledges, those documents were unavailable prior to Wellmark's dismissal from the case on summary judgment. (*Id.* at ¶13). Vroegh had no ongoing duty to supplement discovery to nonparties in the case. Upon *procedendo* following an Order reversing the district court's improper grant of summary judgment, Vroegh will supplement his discovery responses as required at that time. At this stage, however, the documents are proper to demonstrate Vroegh's case against Wellmark is not moot.

Wellmark also concedes that from early on, Vroegh sought $141.77 in out-of-pocket medical expenses against Wellmark—which he did not seek against the State at trial. (Wellmark Aug. 31, 2020 Reply at ¶¶16-18). Wellmark argues that in not seeking these $141.77 in damages against the State, Vroegh has waived his

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questions for the jury which should not be decided on an appeal of summary judgment.

ability to seek those damages against Wellmark. (*Id.* at ¶18). But that is not supported by the governing cases. To the contrary, Vroegh is entitled to seek those damages which have not yet been satisfied by one liable defendant from the other defendant if it is also found jointly and severally liable. *See, e.g., Reilly*, 727 N.W.2d at 109.

Wellmark likewise attempts to characterize Vroegh's statements in support of his attorney's fees award, which is unchallenged in this appeal, as a concession that his appeal against Wellmark is moot. (Wellmark Br. at 26-27) (citing Dec. 6, 2019 Attorney Fee Hrg. Tr. p. 15, ll. 7-8; p. 28, ll. 24-25-p. 29, l. 1) and stating "Vroegh's own counsel (and the State Defendants' counsel) conceded that the ICRA claims against DAS and Wellmark relating to the provision or administration of health benefits coverage 'were [somewhat] indistinguishable.'"). But Wellmark is drawing a false equivalency. That colloquy concerned the extent to which attorney work on the case against Wellmark could reasonably be separated out from work against the State for purposes of the attorney's fee

award. It is not a blanket statement as to the extent of liability of each Defendant.

Moreover, Vroegh has demonstrated that he is *not* seeking from Wellmark the same damages and fees that he has already been awarded by the jury and district court from the State. (Vroegh Aug. 26, 2020 Resistance to Mot. to Dismiss and accompanying Exs. A-D; Dec. 6, 2019 Attorney Fee Hr. Tr. at 28, ll. 7-9; 18-24). There is no double recovery here.

CONCLUSION

For the foregoing reasons, Vroegh respectfully seeks an order reversing and remanding this matter back to the district court and requiring that Vroegh be permitted to try his case against Wellmark to the jury.

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