SUPREME COURT NO. 17-2068
JASPER COUNTY CASE NOS. CVCV120693, LACV120352, LACV120367, LACV120368, LACV120370, LACV120371

IN THE
SUPREME COURT OF IOWA

DILLON CLARK, AGNES DUSABE, MUSA EZEIRIG, ZARPKA GREEN, DUSTY NYONEE, AND ABRAHAM TARPEH,

Plaintiffs-Appellants,

v.

RYAN HOENICKE, DANIELLE WILLIAMS, CLEO BOYD, ALLEN FINCUM, TERRY VAN HUYSEN, JIM BAILEY, TPI IOWA, LLC, TPI COMPOSITES, INC., DAVID LLOYD, MAT MARTIN, AND BARB SINNOTT,

Defendants-Appellees.

ON INTERLOCUTORY APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR JASPER COUNTY
HONORABLE TERRY RICKERS, DISTRICT COURT JUDGE

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page(s)

United States Supreme Court

Iowa Supreme Court

Constitutional Provisions, Statutes and Rules

Other

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER IOWA CODE SECTION 517.5 VIOLATES EQUAL PROTECTION UNDER ARTICLE 1, SECTION 6 OF THE IOWA CONSTITUTION

Cases

Bowen v. Kaplan, 237 N.W.2d 799 (Iowa 1976)
Feld v. Borkowski, 790 N.W.2d 72 (Iowa 2010)
Fireman's Fund Am. Ins. Co. vs. Coleman, 394 So. 2d 334 (Ala. 1980)
Gartner v. Iowa Dep't of Public Health, 830 N.W.2d 335 (Iowa 2013)
Godfrey v. State, 752 N.W.2d 413 (Iowa 2008)
Harlow v. Fitzgerald, 457 U.S. 800 (1982)
In re Detention of Garren, 620 N.W.2d 275, 286 (Iowa 2000)
Miranda v. Said, 836 N.W.2d 8 (Iowa 2013)
Rees v. City of Shenandoah, 682 N.W.2d 77 (Iowa 2004)
Santi v. Santi, 633 N.W.2d 312 (Iowa 2001)
Seivert v. Resnick, 342 N.W.2d 484 (Iowa 1982)
Slater vs. Farmland Mut. Ins. Co., 334 N.W.2d 738 (Iowa 1983)
Slaughter-House Cases, 83 U.S. 36 (1872)
State v. Hernandez-Lopez, 639 N.W.2d 226 (Iowa 2002)
State v. Klawonn, 609 N.W.2d 515 (Iowa 2000)
Suckow v. NEOWA FS, Inc., 445 N.W.2d 776 (Iowa 1989)
Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)
Yount v. Johnson, 915 P.2d 314 (N.M. 1996)

Statutes and Rules

U.S. Const. amend. XIV

Iowa Const. art. 1, § 1
Iowa Const. art. 1, § 2
Iowa Const. art. 1, § 6

Iowa Code § 85.20 (2017)
Iowa Code § 88.1 (2017)
Iowa Code § 232.73 (2017)
Iowa Code § 517.5 (2017)
Iowa Code § 669.14 (2017)
Iowa Code § 730.5(11)(a) (2017)

II. SECTION 517.5 IS UNCONSTITUTIONAL AS A DENIAL OF INALIENABLE RIGHTS UNDER ARTICLE 1, SECTION 1 OF THE IOWA CONSTITUTION

Cases

Christopher v. Harbury, 536 U.S. 403 (2002)
Fireman's Fund Am. Ins. Co. vs. Coleman, 394 So. 2d 334 (Ala. 1980)
Gacke vs. Pork Xtra, L.L.C., 684 N.W.2d 168 (Iowa 2004)
Gibb v. Hansen, 286 N.W.2d 180 (Iowa 1979)
Gravert v. Nebergall, 539 N.W.2d 184 (Iowa 1995)
May's Drug Stores v. State Tax Comm'n, 242 Iowa 319 (Iowa 1950)
Suckow v. NEOWA FS, Inc., 445 N.W.2d 776 (Iowa 1989)

Statutes and Rules

Iowa Code § 517.5 (2017)

III. IOWA CODE SECTION 517.5 IS UNCONSTITUTIONAL AS A DENIAL OF DUE PROCESS UNDER ARTICLE 1, SECTION 9 OF THE IOWA CONSTITUTION

Statutes and Rules

Iowa Const. art. 1, § 9

Iowa Code § 517.5 (2017)

ROUTING STATEMENT

Because this case involves a substantial constitutional question as to the validity of a statute, retention by the Iowa Supreme Court would be appropriate. Iowa R. App. P. 6.1101.

STATEMENT OF THE CASE

This interlocutory appeal ensues in response to the district court granting Defendant Insurance Company of the State of Pennsylvania's ("Insurance Co.") Pre-Answer Motions to Dismiss in various cases that have been consolidated under this one appeal. The six appellants-plaintiffs allege that Insurance Co. was TPI Iowa, LLC's ("TPI") workers compensation insurance carrier when their individual claims arose. Appellants further allege that Insurance Co. failed to conduct an adequate insurance inspection of the TPI manufacturing facility in Newton, Iowa, and/or that it negligently conducted workplace inspections that failed to detect and report hazardous conditions which ultimately cause Appellants' injuries.

On September 21, 2017, Insurance Co. filed a pre-answer motion to dismiss all claims pending against it in the four related cases filed by Agnes Dusabe ("Dusabe") (LACV120367), Musa Ezeirig ("Ezeirig") ((LACV120368), Zarpka Green ("Green") (LACV120370), and Abraham Tarpeh ("Tarpeh") (LACV120317).

On October 6, 2017, Dusabe, Ezeirig, Green, and Tarpeh filed resistances to Insurance Co.'s motion to dismiss under their respective case numbers.

On October 16, 2017, Insurance Co. filed a reply in support of its pre-answer motion to dismiss against Dusabe, Ezeirig, Green, and Tarpeh.

On November 15, 2017, Insurance Co. filed a pre-answer motion to dismiss all claims pending against it in the case filed by Dillon Clark (LACV120693).

On November 22, 2017, following consideration of the parties' briefs, parties' oral arguments, and the contents of the court file, the Iowa District Court for Jasper County found and concluded that Insurance Co.'s pre-answer motion to dismiss claims against it should be granted in Dusabe's, Ezeirig's, Green's, and Tarpeh's cases.

On November 27, 2017, Clark filed a resistance to Insurance Co.'s motion to dismiss.

On December 4, 2017, Insurance Co. filed a reply in support of its pre-answer motion to dismiss against Clark.

On December 5, 2017, the Iowa District Court for Jasper County found and concluded that Insurance Co.'s pre-answer motion to dismiss all claims against it should be granted in Clark's case, adopting the rationale from the November 22, 2017, ruling.

On December 17, 2017, Clark, Dusabe, Ezeirig, Green, and Tarpeh timely filed their notices of appeal. This appeal ensued under two different Iowa Supreme Court case numbers: 17-2068(Clark) and 17-2069 (Dusabe, Ezeirig, Green, and Tarpeh).

On January 5, 2018, Insurance Co. filed a pre-answer motion to dismiss all claims pending against it in the case filed by Dusty Nyonee (LACV120352).

On January 15, 2018, Nyonee filed a resistance to Insurance Co.'s motion to dismiss.

On January 19, 2018, Insurance Co. filed a reply in support of its pre-answer motion to dismiss against Nyonee.

On February 6, 2018, the Iowa District Court for Jasper County found and concluded that Insurance Co.'s pre-answer motion to dismiss all claims against it should be granted in Nyonee's case, adopting the rationale from the November 22, 2017, ruling.

On March 5, 2018, Nyonee timely filed his notice of appeal. This appeal ensued under case number 18-0392.

On March 5, 2018, the Iowa Supreme Court ordered that Clark's appeal be consolidated with that of Dusabe, Ezeirig, Green, and Tarpeh, and all filings since have been filed under case number 17-2068.

On March 29, 2018, the Iowa Supreme Court ordered that Nyonee's appeal be consolidated with that of Clark, Dusabe, Ezeirig, Green, and Tarpeh, and all filings since have been filed under case number 17-2068.

STATEMENT OF FACTS

Basic Background

TPI Iowa ("TPI") is a wind blade manufacturing business located at 2300 North 33rd Avenue, Newton, Iowa. (App. at 18). At all times material, the Insurance Company of the State of Pennsylvania ("Insurance Co.") was TPI's workers compensation insurer. At all times material, Plaintiffs were either prospective, current, or former employees. (App. at 18). TPI Iowa employs hundreds of employees at the Newton, Iowa, manufacturing plant. (App. at 18). TPI Composites ("TPI Composites") holds itself out as the largest United States-based independent manufacturer of wind blades in the wind energy market. (App. at 170). In 2015, TPI Composites reported revenue of $586,000,000.00. (App. at 170). As a part of the wind blade manufacturing process, TPI's employees work with hazardous chemicals. (App. at 10). Since August 13, 2008, TPI has documented approximately 350 injuries on its Iowa OSHA logs resulting from chemical exposure to its employees at the Newton, Iowa, manufacturing plant. (App. at 12).

The Chemicals

TPI's employees work with a hazardous chemical called EPIKURE Curing Agent MGS RIMH 3166 ("Curing Agent") while manufacturing the wind blades. (App. at 11). The Curing Agent is a mixture including the following ingredients: Alkyleteramine, Cycioaliphatic Amine, Aliphatic

Polyamine, Amine-Epoxy Resin Adduct and Organic Acid. (App. at 11). TPI's employees also work with EPIKURE Resin MGS RIMR 135 ("Resin") while manufacturing the wind blades. (App. at 11). The Resin is a mixture including the following ingredients: 4, 4'-Isopropylidenediphenol-Epichlorohydren Copolymer and Oxirane, 2, 2'-(1, 6 Hexanediylbis (Oxymethylene))Bis-. (App. at 11). TPI's employees also work with Dry Layup Adhesives ("Adhesives") while manufacturing the wind blades. (App. at 170). In addition to the Curing Agent, the Resin, and the Adhesives, TPI employees work with other toxic chemicals (Curing Agent, Resin, Adhesives, and other toxic chemicals will collectively be referred to as "Chemicals" for the remainder of this brief).

Resin

The Resin is classified as a substance or mixture that is known to cause skin corrosion or irritation, serious eye damage, skin sensitization, cancer, damage to fertility, damage to unborn children, respiratory irritation, and damage to the reproductive system. (App. at 11). According to the Resin's safety data sheets, individuals working with it must use personal protective equipment ("PPE") in order to avoid contracting the chemical's known hazards. (App. at 11). According to the Resin's safety data sheets, individuals working with the Resin must only work it outdoors or in well-ventilated areas in order to avoid contracting the Resin's known hazards. (App. at 11). According to the Resin's safety data sheets, individuals working with the Resin

must not wear contaminated clothing out of the workplace in order to avoid contracting the Resin's known hazards. (App. at 12).

Curing Agent

The Curing Agent is classified as a substance or mixture that is toxic following a single oral or dermal exposure. (App. at 12). The Curing Agent is classified as a substance or mixture that causes skin corrosion or irritation, serious eye damage or eye irritation, respiratory sensitization, skin sensitization, reproductive system damage, damage to fertility, and allergy or asthma symptoms or breathing difficulties if inhaled. (App. at 12). According to the Curing Agent's safety data sheets, individuals working with the Curing Agent must wear PPE in order to avoid contracting the Curing Agent's known hazards. (App. at 12). According to the Curing Agent's safety data sheets, if an individual is exposed to, inhales, or ingests it, medical attention is required. (App. at 12).

Adhesives

The Adhesives are flammable liquefied gases and/or vapors. (App. at 171). The Adhesives are known to cause adverse target organ effects, birth defects, other reproductive hrm, eye irritation, skin irritation, respiratory tract irritation, cardiac sensitization, simple asphyxiation, gastrointestinal irritation, central nervous system depression, liver effects, kidney effects, bladder effects, and peripheral neuropathy. (App. at 171).

The Plaintiffs

Dillon Clark

Dillon Clark ("Clark") was first employed by TPI in or around 2012. (App. at 12). Clark left employment with TPI in late 2015. (App. at 12). While employed at TPI, Clark worked in molding, spar cap, trailing edge, pre-fabs, and NCR. (App. at 12). Clark worked directly with the Chemicals on a daily basis. (App. at 13). Clark was not provided with sufficient PPE to protect him from the known hazards of the Chemicals he worked with at TPI. (App. at 13). The PPE provided to Clark did not prevent exposure, inhalation, or ingestion of the Chemicals. (App. at 13). Defendants knew this. (App. at 13).

While employed at TPI, Clark reported to Defendants that his skin was breaking out with bumps and rashes. (App. at 13). At the time that Clark reported his symptoms, employees at TPI instructed Clark to continue working. (App. at 13). On or about December 16, 2015, Clark broke out with severe rashes all over his body, including breakouts on his face, hands, arms, and eyes. (App. at 13). Clark did not have any contact dermatitis prior to being exposed to the Chemicals while working at TPI. (App. at 13). Clark decided it was in his best interest for his health and wellbeing to end his employment at TPI. (App. at 13). To date, Clark continues to suffer adverse symptoms from the Chemicals, including breaking out near his eyes, on his feet, and on his hands as a result of the exposure to the Chemicals. (App. at 13).

Agnes Dusabe

Agnes Dusabe ("Dusabe") was first employed by TPI in or around May of 2016. (App. at 171). Dusabe's work duties at TPI included, but were not limited to, the molding department and the painting department. (App. at 172). Dusabe worked directly with the Chemicals on a daily basis. (App. at 172). Dusabe was not provided with sufficient PPE to protect her from the known hazards of the Chemicals she worked with at TPI. (App. at 172). The PPE provided to Dusabe did not prevent exposure, inhalation, or ingestion of the Chemicals. (App. at 172). Defendants knew this. (App. at 172).

In September of 2016, while employed at TPI, Dusabe reported to TPI that her face was breaking out with bumps and rashes. (App. at 172). Dusabe further reported to TPI that she had been pregnant and had miscarried her child. (App. at 172). Dusabe further reported to TPI that she was experiencing irregular vaginal bleeding. (App. at 172). At the time Dusabe reported her injuries, TPI sent her to Dr. Miller, a physician. (App. at 172). Dr. Miller conducted a skin patch test and determined that her face breakouts were not related to her employment at TPI and instructed her to return to work. (App. at 172). Dusabe returned to work at TPI and continued to suffer from the effects of the Chemicals. (App. at 172).

In November of 2016, while at work at TPI, Dusabe began to experience irregular vaginal bleeding. (App. at 173). Dusabe excused herself to

the restroom to attend to the bleeding. (App. at 173). While in the restroom, Dusabe removed her PPE and discovered that her undergarments were covered in blood and that the blood had flown down her legs. (App. at 173). Dusabe did the best she could to clean up, exited the restroom, and went on break. (App. at 173). Dusabe returned to work after break. (App. at 173).

Two days later, Dusabe was summoned to the human resources department. (App. at 173). Human resources informed her that they had received a complaint that Dusabe was away from work for too long while she was in the restroom. (App. at 173). Dusabe explained that she was tending to the bleeding in the restroom and that the additional time was necessary due to the bleeding. (App. at 173). Dusabe was terminated from employment at TPI. (App. at 173).

Dusabe continues to suffer adverse symptoms from the Chemicals. (App. at 173). Dusabe has breakouts and scars all over her face due to skin breakouts and rashes. (App. at 173). Dusabe continues to experience irregular vaginal bleeding. (App. at 173).

Musa Ezeirig

Musa Ezeirig ("Ezeirig") was employed by TPI in 2016. (App. at 257). Ezeirig's work duties at TPI included, but were not limited to, the molding department. (App. at 258). While in the molding department, Ezeirig would enter the wind lades to apply the Chemicals to the wind blades. (App. at 258).

Ezeirig worked with the Chemicals on a daily basis. (App. at 258). Ezeirig was not provided with sufficient PPE to protect him from the known hazards of the Chemicals he worked with at TPI. (App. at 258). The PPE provided to Ezeirig did not prevent exposure, inhalation, or ingestion of the Chemicals. (App. at 258). Defendants knew this. (App. at 258).

While employed at TPI, Ezeirig reported to Defendants that his skin was breaking out with bumps and rashes. (App. at 25). At the time that Ezeirig initially reported his symptoms, TPI did not sent Ezeirig to a doctor. (App. at 258). Instead, Defendants instructed Ezeirig to participate in a three-step program that was administered by non-medical professionals and consisted of applying lotions and bandages to his open rashes and wounds. (App. at 258). At the time that Ezeirig initially reported his symptoms, TPI instructed him to continue working. (App. at 258).

Ezeirig continues to suffer adverse symptoms from the Chemicals. (App. at 258). Ezeirig itches all over his body as a result of exposure to the Chemicals. (App. at 258). Ezeirig continues to break out with bumps and rashes as a result of his exposure to the Chemicals. (App. at 258).

Zarpka Green

Zarpka Green ("Green") was employed by TPI in or around May of 2015. (App. at 347). Green's work duties included, but were not limited to, the molding department. (App. at 348). While in the molding department, Green

would enter the wind blades and apply the Chemicals to the wind blades. (App. at 348). Green worked directly with the Chemicals on a daily basis. (App. at 348). Green was not provided with sufficient PPE to protect her from the known hazards of the Chemicals she worked with at TPI. (App. at 348). The PPE provided to Green did not prevent exposure, inhalation, or ingestion of the Chemicals. (App. at 348). Defendants knew this. (App. at 348).

While employed at TPI, Green reported to TPI that her skin was breaking out with bumps and rashes. (App. at 348). At the time that Green initially reported her symptoms, TPI did not send her to a doctor. (App. at 348). Instead, TPI instructed Green to participate in a three-step program that was administered by non-medical professionals and consisted of applying lotions and bandages to her open rashes and wounds. (App. at 348). At the time that Green reported her symptoms, employees at TPI also instructed Green to return to work. (App. at 348).

On or about January 4, 2016, Green suffered a horrific breakout of rashes and burns all over her body. (App. at 348). Green's eyes swelled shut. (App. at 348). Green suffered open wounds on her eyelids. (App. at 348). This incident occurred months after she first experienced and reported initial symptoms to TPI. (App. at 348). In January of 2016, TPI sent Green to Dr. Miller, a physician. (App. at 349). Dr. Miller concluded that Green had a permanent allergy to epoxy resin and told Green that she was to avoid epoxy

resin. (App. at 349). Green did not have an allergy to epoxy resin prior to being exposed to the Chemicals while working at TPI. (App. at 349). Green requested an accommodation from TPI to comply with the doctor's orders and restrictions. (App. at 349). Upon receipt of Green's request for an accommodation, TPI did not engage Green in an interactive, collaborative process to attempt to accommodate her newly formed disability. (App. at 349). Instead, TPI denied Green's request. (App. at 349). Instead, TPI terminated Green's employment with TPI. (App. at 349).

Green continues to suffer adverse symptoms from exposure to the Chemicals. (App. at 349). Green continues to itch all over her body as a result of exposure to the Chemicals. (App. at 349).

Dusty Nyonee

Dusty Nyonee ("Nyonee") was first employed by TPI in or around November of 2013. (App. at 66). Nyonee's work duties at TPI included, but were not limited to, mold preparation, laying the nonsandy, laying the fiberglass, and laying the foam on the wind blades. (App. at 66). Nyonee worked directly with the Chemicals on a daily basis. (App. at 66). Nyonee was not provided with sufficient PPE to protect him from the known hazards of the Chemicals he worked with at TPI. (App. at 66). The PPE provided to Nyonee did not prevent exposure, inhalation, or ingestion of the Chemicals. (App. at 66). Defendants knew this. (App. at 66).

While employed at TPI, Nyonee reported to TPI that his skin was breaking out with bumps and rashes on his upper arms and lower legs and that he was experiencing respiratory problems. (App. at 66). At the time that Nyonee initially reported his symptoms to TPI, TPI did not send Nyonee to a doctor. (App. at 67). Instead, TPI instructed Nyonee to participate in a three-step program that was administered by non-medical professionals and consisted of applying lotions and bandages to his open rashes and wounds. (App. at 67). At the time that Nyonee initially reported his symptoms to TPI, TPI instructed Nyonee to continue working. (App. at 67).

On or about October 23, 2015, Nyonee broke out with severe rashes all over his body. (App. at 67). This occurred months after he experienced his initial symptoms. (App. at 67). In October of 2015, TPI sent Nyonee to see Dr. Miller, a physician. (App. at 67). Dr. Miller concluded that Nyonee had a permanent allergy to epoxy resin and told Nyonee that he was to avoid epoxy resin. (App. at 67). Nyonee did not have an allergy to epoxy resin prior to being exposed to the Chemicals while working at TPI. (App. at 67). Nyonee requested an accommodation from TPI to comply with the doctor's orders and restrictions. (App. at 67). Instead, TPI denied Nyonee's request for an accommodation. (App. at 67). Instead, TPI terminated Nyonee's employment with TPI. (App. at 67).

Nyonee continues to suffer adverse symptoms from his exposure to the Chemicals. (App. at 67). Nyonee itches all over his body as a result of his exposure to the Chemicals. (App. at 67). Nyonee has congestion in his throat and lungs as a result of his exposure to the Chemicals. (App. at 67). Nyonee has erectile dysfunction as a result of his exposure to the Chemicals. (App. at 67).

Abraham Tarpeh

Abraham Tarpeh ("Tarpeh") began employment with TPI on or about November 18, 2013. (App. at 443). Tarpeh's work duties at TPI included, but were not limited to, the molding department. (App. at 443). While in the molding department, Tarpeh would enter wind blades and apply the Chemicals to the wind blades. (App. at 443). Tarpeh was not provided with sufficient PPE to protect him from the known hazards of the Chemicals he worked with at TPI. (App. at 443). The PPE provided to the Tarpeh did not prevent exposure, inhalation, or ingestion of the Chemicals. (App. at 443). Defendants knew this. Tarpeh (App. at 443).

While employed at TPI, Tarpeh reported to TPI that his skin was breaking out with bumps and rashes on his upper arms and lower legs. (App. at 443). Tarpeh was also experiencing respiratory problems. (App. at 443). At the time that Tarpeh initially reported his symptoms to TPI, TPI did not send Tarpeh to a doctor. (App. at 443). Instead, TPI instructed Tarpeh to participate in a three-step program that was administered by non-medical professionals

and consisted of applying lotions and bandages to his open rashes and wounds. (App. at 443). At the time that Tarpeh initially reported his symptoms to TPI, TPI also instructed Tarpeh to continue working. (App. at 444).

On or about October 29, 2015, Tarpeh broke out with severe rashes all over his body. (App. at 444). These symptoms occurred months after he experienced and reported initial symptoms to TPI. (App. at 444). In October of 2015, TPI sent Tarpeh to see Dr. Miller, a physician. (App. at 444). Dr. Miller concluded that Tarpeh had a permanent allergy to epoxy resin and told Tarpeh that he was to avoid epoxy resin. (App. at 444). Tarpeh did not have an allergy to epoxy resin prior to being exposed to the Chemicals while working at TPI. (App. at 444). Tarpeh requested an accommodation from TPI to comply with the doctor's orders and restrictions. (App. at 444). Upon receipt of Tarpeh's request for an accommodation, TPI did not engage Tarpeh in an interactive, collaborative process to attempt to accommodate his newly formed disability. (App. at 444). Instead, TPI denied Tarpeh's request for an accommodation. (App. at 444). Instead, TPI terminated Tarpeh's employment with TPI. (App. at 444).

Tarpeh continues to suffer adverse symptoms as a result of his exposure to the Chemicals. (App. at 444). Tarpeh itches all over his body as a result of his exposure to the Chemicals. (App. at 444). Tarpeh continues to experience

congestion in his throat and lungs as a result of his exposure to the Chemicals. (App. at 444).

ARGUMENT

Preservation of Error:

Appellants preserved error by filing resistances to Insurance Co.'s pre-answer motion to dismiss for failure to state a claim and obtaining a ruling.

Standard of Review:

The appellate courts review motions to dismiss for failure to state of claim for corrections of errors at law. *Rees v. City of Shenandoah*, 682 N.W.2d 77, 78 (Iowa 2004).

Furthermore, the appellate court reviews claims based on a violation of that state constitution de novo. *Godfrey v. State*, 752 N.W.2d 413 (Iowa 2008).

I. IOWA CODE SECTION 517.5 VIOLATES EQUAL PROTECTION UNDER ARTICLE 1, SECTION 6 OF THE IOWA CONSTITUTION

The foundational principle of equal protection is expressed in Article 1, Section 6 of the Iowa Constitution, which provides: "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Iowa Const. art. 1, § 6[1]; *Varnum v. Brien*, 763 N.W.2d 862, 878 (Iowa 2009); *see also* Iowa Const. art. 1, § 1 ("All

[1] It is also worth noting that the title of Section 6 is "Laws uniform."

men and women are, by nature, free and equal, and have certain inalienable rights . . . ."); Iowa Const. art. 1, § 2 ("All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right, at all times, to alter or reform the same, whenever the public good may require it.").

A. **Strict Scrutiny, Rather Than Rational Basis Analysis, Should Be Applied to Appellants' Claims Against Insurance Co.**

While Iowa Code section 517.5 is contained in a separate statutory scheme than the Iowa workers' compensation statute found at Iowa Code section 85.20, the Iowa Supreme Court's analysis in two cases involving equal protection claims are highly instructive to these equal protection claims because (1) both statutes pertain to workplace safety, and (2) the suspect classification in both statutes includes members of the same class: employers, co-employees, and non-co-employees.

In *Suckow v. NEOWA FS, Inc.*, the Iowa Supreme Court addressed Plaintiff Richard Suckow's ("Suckow") claim that Iowa Code section 85.20 violated the equal protection clauses in the Fourteenth Amendment to the United States Constitution and article 1, section 6 of the Iowa Constitution. 445 N.W.2d 776 (Iowa 1989). Suckow asserted that the statute violated the equal protection clauses because it granted his employer, NEOWA FS, Inc. ("NEOWA"), immunity for its negligent acts asserted by Suckow

against NEOWA while Suckow was working in the scope of his employment. Iowa Code section 85.20 provides:

> The rights and remedies provided in this chapter . . . for an employee . . . on account of injury . . . shall be the exclusive and only rights and remedies of the employee . . . at common law or otherwise, on account of such injury . . . against . . . :
>
> 1. Against the employee's employer.
> 2. Against any other employee of such employer, provided that such injury . . . arises out of and in the course of such employment and is not caused by the other employee's gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another

Iowa Code § 85.20 (2017).

Suckow argued that a strict scrutiny analysis was appropriate because section 85.20's immunity provision precluded his fundamental right of access to the courts. *Suckow*, 445 N.W.2d at 778. However, the Court distinguished access to judicial process *in itself* from access to judicial process that is essential to the exercise of a fundamental right. *Id.* Accordingly, the Court instructed Suckow that a strict scrutiny only applies to the latter. *Id.* The Court concluded that access to judicial process for workers compensation claimants against their employers is not essential to the exercise of any fundamental right because the Iowa legislature has passed a statutory scheme that provides a way, other than through judicial process, to resolve their claims against employers. *Id.* Important to the Court's reasoning was the scheme's quid pro quo between employers and employees. *Id.* The Court pointed out: "Employees give up their

common law rights of actions against employers. In return employers give up their common law defenses and must pay employees for all work-related injuries regardless of fault." *Id.* at 779.

Even though the Court declined to apply strict scrutiny, Suckow argued that even under a rational basis analysis, section 85.20 violates equal protection because section 85.20's distinction in liability for employer tortfeasors and co-employee tortfeasors does not further the purposes of the workers compensation law. *Id.* In response to this argument, the Court pointed to the case of *Seivert v. Resnick* where it had evaluated an equal protection claim with a slightly different class of tortfeasors: co-employee tortfeasors and non-co-employee tortfeasors. *Id.* (citing *Seivert v. Resnick*, 342 N.W.2d 484 (Iowa 1982)). The *Seivert* court acknowledged that section 85.20's limited immunity provision for co-employees treats co-employee tortfeasors differently than non-co-employee tortfeasors because non-co-employee tortfeasors have no immunity. *Id.*

However, the court concluded that the state had a rational basis for providing co-employees with limited immunity due to the fact that a co-employee is "working under the direction of the employer and comporting his conduct to the employer's directions." *Id.* (quoting *Seivert*, 342 N.W.2d at 485). Implicit in the court's decision to again apply a rational basis analysis was the

fact that a co-employee only had qualified immunity as opposed to absolute immunity.

Additionally, the court also found it important to note that it thought that a co-employee was a part of the quid pro quo because a co-employee had also given up some of his or her rights under the statute. Thus, while the standard under the statute for maintaining a cause of action against a co-employee was heightened to gross negligence, like Suckow, Seivert's access to the court system had not been completely denied. This justified the court's decision to apply a rational basis standard. Notably, the *Suckow* and *Seivert* courts identified all of the above-mentioned members as a part of the same class. However, despite the following different levels of immunity, the courts concluded that the distinctions did not violated equal protection:

- employer tortfeasors: absolute immunity
- co-employee tortfeasors: limited immunity
- non-co-employee tortfeasors: no immunity

Id.

As a preliminary observation, Iowa Code section 517.5's grant of *absolute* immunity to a private entity must be met with extreme skepticism. Indeed, under Iowa law, physicians who provide information to investigators for the purposes of child abuse investigations are not even afforded "absolute"

immunity. *See* Iowa Code § 232.73 (2017) (granting qualified immunity to physicians who in good faith, provide information to child abuse investigators). Similarly, employers do not have absolute immunity when they drug test their workforce. *See* Iowa Code § 730.5(11)(a) (2017) (granting qualified immunity to an employer who administers a drug test in good faith).

In fact, there is a legitimate argument that the statute should be stricken for the sole reason that absolute immunity has never been extended to any individual, entity, or official with the exception of judges, prosecutors and other similar officials, and the president of the United States of America. *See Harlow v. Fitzgerald*, 457 U.S. 800, 800–01 (1982). Nevertheless, because the statute at issue completely bars Appellants' to access the court system as a means to seek recovery against Insurance Co., the statute must pass a strict scrutiny analysis to be upheld as constitutional. *See Slaughter-House Cases*, 83 U.S. 36, 39 (1872) (holding that an individual has a fundamental right to sue).

1. Section 517.5 is not narrowly tailored to serve a compelling government interest.

Iowa Code section 517.5 must pass a strict scrutiny analysis to be upheld as constitutional because Appellants have no other way, other than through judicial process, to pursue a remedy against Insurance Co. *See id.*; *see also Suckow*, 445 N.W.2d at 779 (comparing the right of access to the court system in itself versus access to the court system to pursue a fundamental right). Government

action that infringes on a fundamental right must be narrowly tailored to serve a compelling government interest. *State v. Hernandez-Lopez*, 639 N.W.2d 226, 238 (Iowa 2002) (citing *Santi v. Santi*, 633 N.W.2d 312, 318 (Iowa 2001); *In re Detention of Garren*, 620 N.W.2d 275, 286 (Iowa 2000); *Klawonn*, 609 N.W.2d 515, 519 (Iowa 2000)).

There is no meaningful dispute that the purpose of Iowa Code section 517.5 is to eradicate unsafe workplaces by encouraging workplace inspections. Admittedly, workplace safety is an important government interest. However, absolute immunity for insurance companies that conduct inspections is not compelling because the Iowa government has an alternative means through Iowa Code section 88.6 to conduct workplace inspections. *Id.*

Even if immunity for insurance companies who conduct inspections was a compelling governmental interest, Iowa Code section 517.5 is not narrowly tailored because the statute does not further its own purpose. As Insurance Co. points out in its Motion to Dismiss, in *Bowen vs. Kaplan*, the Iowa Supreme Court concluded that under the predecessor statute, claims for failure to inspect are barred by the statute. 237 N.W.2d 799, 801–02 (Iowa 1976). As such, an insurance company has no reason to perform any inspection at all. Therefore, the statute cannot possibly further its intended purpose to eradicate unsafe workplaces via conducting inspections because there is no incentive for an insurance company to perform an inspection nor is there a consequence for

an insurance company's failure to inspect. Thus, the statute literally serves no purpose except to provide insurance companies with absolute immunity.

Even if a failure to inspect claim was a viable cause of action in Iowa, the notion that immunity promotes accountability is a faulty premise that defies the basic tenets of a tort based system. While this appears to be an issue of first impression in Iowa, the Alabama Supreme Court has addressed the issue of whether immunity encourages insurance companies to make safety inspections.[2] In *Fireman's Fund American Insurance Company vs. Coleman*, a statute that granted statutory immunity to insurance carriers for inspections was held unconstitutional as an abuse of the State's police power. 394 So. 2d 334 (Ala. 1980).

In concurring with the Court's opinion, Justice Jones provided a thorough analysis stating why immunity for workplace inspections does not further workplace safety. Pertinent parts of his concurrence read as follows:

> The immunity's social objective, justifying the legislative exercise of the State's police power, insists the carrier, is to eradicate unsafe working conditions. Implicit in this proposed concept is the notion that the implementing purpose of granting workmen's

[2] In *Slater vs. Farmland Mut. Ins. Co.*, 334 N.W.2d 738 (Iowa 1983) the Iowa Supreme Court reviewed Iowa Code section 517.5 and determined Plaintiff lacked a cause of action to assert a negligent inspection claim against the insurance company because the Iowa legislature had abolished Plaintiff's common law right. However, the Iowa Supreme Court declined to address whether the statute violated article 1, section 6 of the Iowa Constitution because no ruling was made on the issue at the district court level. As such, here, Plaintiff's constitutional claims are a matter of first impression. *Id.* at 730.

compensation insurance carrier immunity is to foster industrial safety, and that liability for injury-producing negligent discharge of its voluntarily assumed duty of plant safety inspections materially hampers this benevolent undertaking.

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This argument that compensation carriers need immunity to be encourage to make safety inspections has been answered by a number of courts with the observation that the carrier's undertaking is not entirely motivated by altruistic considerations. The carrier itself benefits from the introduction of improved safety procedures as a result of reducing accident an injuries, thereby also reducing accident and injuries, thereby also reducing claims. In addition, it can be noted that compensation carriers advertise their safety programs as sales promotions, so it is not at all certain that carriers do not have enough self-interest at stake to continue their safety inspections even without immunity from tort liability. Indeed, there is no claim that the carriers awaited the enactment of the immunity amendment to commence their practice of performing plant safety inspections.

Beyond its unsubstantiated premise, the difficulty I have with this public policy argument is in its contradiction to the basic tenets of the common law fault-based tort system. The public policy argument made by compensation carriers, albeit somewhat simplified, is essentially that the public interest in greater safety will be advance by absolving carriers from tort liability. This is contrary to common experience and accountability for culpable conduct promotes, rather than undermines, the public good.

Inherent in our system of reparation for culpably induced injuries is the deterrent factor. While deterrence is more explicit in the punitive damages aspect of willful or wanton conduct, accountability for lack of due care likewise encourages, not discourages, responsibility. Special relationships, to be sure, are viewed under certain circumstances as justifying the modification of the requisite standard of care, but the elimination of liability has yet to be accepted as a substitute for a standard conducive to the exercise of a higher degree of care or for a resultant safer society.

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> I adhere to the view, which I believe comports with contemporary societal values, that to hold a person liable for his carelessness is to make him more careful. It is, indeed, a person's paradoxical nature to say to his neighbor, "if you will not hold me responsible for my misconduct, I will be more careful"; while on the other hand, it is inherent in his nature to be more careful if he knows he will be held responsible. From this dual capacity for human excesses springs the time-tested fault-based system of reparation for injury its fountainhead being the imposition of a duty to act prudently not to inflict injury to another, and its result being safer conditions for all of us.

Id. at 344–46. (citations omitted). Like Alabama, Iowa's tort system is designed to deter future bad conduct by holding individuals responsible for their unreasonable actions. *See Feld v. Borkowski*, 790 N.W.2d 72, 88 (Iowa 2010) (citing *Yount v. Johnson*, 915 P.2d 314, 342 (N.M. 1996)); *see also Miranda v. Said*, 836 N.W.2d 8, 34 (Iowa 2013).

Therefore, this Court should adopt Justice Jones's reasoning that holding an insurance company liable for its own carelessness makes it more careful, not the other way around. Accordingly this Court should declare Iowa Code section 517.5 unconstitutional because the statute is not tailored to a compelling governmental interest when it does not even support its own intended purpose—workplace safety.

B. **Iowa Code Section 517.5 Does Not *Rationally* Advance a Reasonable and Identifiable Governmental Objective**

In addition to the reasoning held in Part I.B.1, even if strict scrutiny is not applied in this case, the district court erred in ruling that there exists a rational basis to provide private inspectors with absolute immunity and state inspectors only with qualified immunity. Under chapter 88 of the Iowa Code, the Labor Commissioner is permitted to make workplace inspections in order to carry out the purpose of chapter 88. The purpose of chapter 88 is "to assure so far as possible *every working person* in the state *safe and healthful* working conditions and to preserve human resources . . . ." Iowa Code § 88.1 (2017) (emphasis added).

The district court cited the purpose of Iowa Code section 517.5 as being to merely encourage inspections by private entities that offer workers' compensation policies, not to require them to do so.

It strains credulity that the grant of absolute immunity to private inspectors against claims for neglect inspections or failure to inspect is a rational way to provide safe and healthful working conditions. The case at hand is a prime example as to how this linkage is, in fact, irrational. Here, since August 13, 2008, TPI had documented approximately 350 injuries in its Iowa OSHA logs that resulted from exposure to the Chemicals at the Newton, Iowa, manufacturing plant. The PPE provided is inadequate, and the side effects of

exposure to these chemicals is severe. There is absolutely zero rationality in providing immunity to inspectors to "encourage inspections," especially when there seems to be a very obvious, actual rational way of assuring "so far as possible every working person in the state safe and healthful working conditions": require workers' compensation insurers to conduct inspections. Even if the court remains unconvinced, another rational approach could be to require inspections under certain conditions, such as when the insured incurs over 350 chemical injuries over a number of years for which it must discharge the employee and cycle in a healthy one before discarding him or her when they too develop chemical injuries. Total and absolute immunity for Insurance Co. inspectors at TPI should not be at the expense of the abuse of these workers' bodies. As such, Iowa Code section 517.5 is unconstitutional, and Insurance Co. should be reinstated as a party to this case.

C. **The Privileges and *Immunities* Clause Operates Upon State and Private Inspectors in a Non-Uniform Manner**

Iowa Code section 517.5 creates a systems of disparate treatment of two members of the same class: safety inspectors. On the one hand, the State may conduct safety inspections, receiving qualified immunity for tort claims. *See* Iowa Code § 669.14 (2017). On the other hand, private insurance companies receive absolute immunity for conducting (or not conducting, as is the case here) the same workplace safety inspection. Yet, the equal protection guarantee

under the Iowa Constitution requires that laws treat all those who are similarly situated with respect to the purposes of the law alike. *Gartner v. Iowa Dep't of Public Health*, 830 N.W.2d 335, 351 (Iowa 2013).

Review of the predecessor to Iowa Code section 517.5 sheds light on the legislative intent regarding workplace safety inspections. Iowa Code section 88A.14 provided, in part: "The labor commissioner may accept, without cost to the state, inspections performed by insurance company inspectors or other qualified inspectors when evidence of their qualifications satisfactory to the labor commissioner has been furnished." This is important because it reflected the intent of the General Assembly to allow workplace safety inspections to be performed by either the division or labor or by insurance company inspectors. Yet, each class receives categorically separate levels of immunity for tortious claims, creating disparate treatment of members of the same class (inspectors).

Appellee makes much of the fact that plaintiffs alone are able to assert that they themselves have been harmed by uneven application of the privileges and immunities clause. The fact that the majority of the time this is the manner in which claims shake out should not deter this court from recognizing that the clause applies to "immunities" as well.As discussed in Part I.B, there is no rational basis to grant absolute immunity to a private insurance company and yet grant only qualified immunity to the State. Accordingly, Iowa Code section 517.5 violates the equal protection clause of the Iowa Constitution.

II. IOWA CODE SECTION 517.5 IS UNCONSTITUTIONAL AS A DENIAL OF INALIENABLE RIGHTS UNDER ARTICLE 1, SECTION 1 OF THE IOWA CONSTITUTION

Article 1, section 1 of the Iowa Constitution is referred to as the inalienable rights clause. The inalienable rights clause was enacted "to secure citizens' pre-existing common law rights (sometimes known as natural rights) from unwarranted government restrictions. *Gacke vs. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 176 (Iowa 2004) (citing *May's Drug Stores v. State Tax Comm'n*, 242 Iowa 319, 329 (Iowa 1950)). The inalienable rights clause is not absolute. *Gacke*, 684 N.W.2d at 176. It is "subject to reasonable regulation by the state in the exercise of its police power." *Id.* (citing *Gibb v. Hansen*, 286 N.W.2d 180, 186 (Iowa 1979)) (stating liberty as used in article 1, section 1 "'implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community'"). Thus, to determine whether a statute violates the inalienable rights clause of the Iowa Constitution, the following must be determined:

- Whether the right asserted by Appellants is protected by the inalienable rights clause; and
- Whether the statute is a reasonable exercise of the government's police power.

See id. (citing *Steinberg-Baum & Co. v. Countryman*, 77 N.W.2d 15, 18–19 (Iowa 1956)).

A. Existence of protected right

Under both Iowa and federal law, the right of access to the courts is a right that falls within the parameters of the respective statutes' inalienable rights clauses. *See Christopher v. Harbury*, 536 U.S. 403, 414–15 (2002) (holding that the point of recognizing an access claim is to provide the opportunity to seek judicial relief for some wrong); *see also Suckow*, 445 N.W.2d at 779 (holding that where a petitioner has no way, other than through judicial process, to resolve a claim against a tortfeasor, the right of access is a fundamental right). As such, there is no meaningful dispute regarding the existence of Appellants' protected right of access to the Courts.

B. Reasonableness of statute as an exercise of police power

"Police power refers to the legislature's broad, inherent power to pass laws that promote the public health, safety, and welfare." *Id.* (quoting *Gravert v. Nebergall*, 539 N.W.2d 184, 186 (Iowa 1995)). In *Gravert*, the Court set for the following standard to determine whether the legislature had lawfully exercised its police power:

> To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary

> for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Id.

As articulated throughout this brief, the legislative purpose of Iowa Code section 517.5 was to eradicate unsafe workplaces by encouraging insurance companies to conduct workplace inspections without the fear of being sued. Admittedly, workplace safety impacts almost the entire general public. As such, it appears that a portion of the *Gravert* standard is satisfied. However, because the statute does not require inspections and eliminates a cause of action against an insurance company for failure to inspect, it simply cannot be said that the general public require the interference; that the means are reasonably necessary for the accomplishment of the purpose; or that the means are not unduly oppressive upon individuals.

It is important to note that the Alabama Supreme Court case cited in Appellants' equal protection analysis, previously struck down the Alabama immunity statute finding that it violated Alabama's inalienable rights clause. *Fireman's Fund Am. Ins. Co.*, 394 So. 2d at 344. Thus the Alabama Court's analysis is even more relevant here. Without regurgitating Appellants' entire equal protection analysis, the following points indicate why Iowa Code section 517.5 violates Iowa's inalienable rights clause as well:

- It is a faulty premise to argue that the public interest in greater safety will be advanced by absolving carriers from tort liability; thus, since the grant of absolute immunity does not further the statute's intended purpose, it cannot be seen as reasonably necessary
- It is a faulty premise to argue that that the grant of absolute immunity encourages insurance companies to conduct workplace safety inspections because the statute bars a cause of action for failure to inspect and there is not requirement for an insurance company to make an inspection.
- The statute is unduly oppressive to Appellants because it wholly denies access to the Court system

III. IOWA CODE SECTION 517.5 IS UNCONSTITUTIONAL AS A DENIAL OF DUE PROCESS UNDER ARTICLE 1, SECTION 9 OF THE IOWA CONSTITUTION

"The right of trial by jury shall remain inviolate . . . [and] no person shall be deprived of life, liberty, or property, without due process of law." Iowa Const. art. 1, § 9. For the reasons articulated above, Iowa Code section 517.5 is also a violation of Appellants' right to a jury trial. Therefore, section 517.5 is unconstitutional.

CONCLUSION

For the reasons articulated herein, Appellants respectfully request that this Court find that Iowa Code § 517.5 is unconstitutional, reverse the Order granting Insurance Co.'s Pre-Answer Motion to Dismiss for Failure to State a Claim, and remand for trial.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellants requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the costs of printing this brief was $0.00 because it was filed electronically.

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