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 FINHCUM, 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

PROOF AMENDED REPLY BRIEF FOR APPELLANTS

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I, Matthew M Sahag, certify that I did file the attached brief with the Clerk of the Iowa Supreme Court by electronically filing the brief through the EDMS system on August 16, 2018.

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TABLE OF CONTENTS

Page

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. WHILE IOWA'S WORKERS' COMPENSATION SCHEME PROVIDES APPELLANTS WITH ANOTHER WAY TO PURSUE A CLAIM AGAINST THEIR EMPLOYER/CO-EMPLOYEES, NO OTHER WAY, OTHER THAN THROUGH JUDICIAL PROCESS, IS AVAILABLE FOR APPELLANTS TO PURSUE CLAIMS AGAINST ICSOP. ACCORDINGLY, STRICT SCRUTINY IS APPROPRIATE

Cases

Fabricius v. Montgomery Elevator Co., 121 N.W.2d 361 (Iowa 1963)
Seivert v. Resnick, 342 N.W.2d 484 (Iowa 1982)
Suckow v. NEOWA FS, Inc., 445 N.W.2d 776 (Iowa 1989)

Statutes and Rules

Iowa Code § 17A.1 (1,4)
Iowa Admin Code r. 876.410

II. THE ABOLITION OF APPELLANTS' COMMON LAW RIGHT TO SUE ICSOP FOR NEGLIGENT INSPECTION AND FAILURE TO INSPECT IS AN ABUSE OF THE STATE'S POLICE POWER

Cases

Carter v. Rowe, No. 5-0750, 2005 WL 3478144, *2 (Iowa Ct. App. Dec. 21, 2005)
Duke Power v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 88 (1978).
Johnson v. Am Leather Specialties Corp., 578 F. Supp. 2d 1154, 1177 (Iowa 2008)
Gacke vs. Pork Xtra, L.L.C., 684 N.W.2d 168, 176 (Iowa 2004)
People v. McFadden, 2016 IL 117424, 61 N.W.3d 74, 79 (2016)

Statutes and Rules

Iowa Code § 517.5 (2017)
Iowa Code Chapter 673 (2017)

Other

16A. C.J.S. *Constitutional Law* § 260(a)(2005)

III. APPELLANTS HAVE IDENTIFIED A SUSPECT CLASS

Cases

Seivert v. Resnick, 342 N.W.2d 484 (Iowa 1982)
Suckow v. NEOWA FS, Inc., 445 N.W.2d 776 (Iowa 1989)

IV. UNDER ANY STANDARD (I.E. STRICT SCRUITY, RATIONAL BASIS), IOWA CODE SECTION 517.5 IS UNCONSTITUTIONAL

Cases

Fireman's Fund case. *Fireman's Fund Am. Ins. Co. v. Coleman*, 394 So. 2d 334 (Ala. 1980)
Reed v. Brunson, 527 So. 2d 102 (Ala. 1988)

Statutes and Rules

Iowa Code § 85.20 (2017)

V. THE THREE HUNDRED FIFTY (350) UNDISPUTED CHEMICAL INJURIES AT ICSOP'S INSURED DEMONSTRATE THAT THE ABSOLUTE IMMUNITY GRANTED TO INSURANCE COMPANIES UNDER IOWA CODE SECTION 517.5 IS NOT RATIONALLY RELATED TO IOWA'S INTEREST IN WORKPLACE SAFETY

Cases

Feld v. Borkowski, 790 N.W.2d 72, 88 (Iowa 2010)
Miranda v. Said, 836 N.W.2d 8, 34 (Iowa 2013)
Yount v. Johnson, 915 P.2d 314, 342 (N.M. 1996)

Statutes and Rules

Iowa Code § 517.5

REPLY ARGUMENT

VI. WHILE IOWA'S WORKERS' COMPENSATION SCHEME PROVIDES APPELLANTS WITH ANOTHER WAY TO PURSUE A CLAIM AGAINST THEIR EMPLOYER/CO-EMPLOYEES, NO OTHER WAY, OTHER THAN THROUGH JUDICIAL PROCESS, IS AVAILABLE FOR APPELLANTS TO PURSUE CLAIMS AGAINST ICSOP. ACCORDINGLY, STRICT SCRUTINY IS APPROPRIATE.

In analogizing the rational basis analysis applied in the *Suckow* case to the instant case, ICSOP ignores a blatant and important distinction between it and an employer— ICSOP is not an employer. Nor is it a co-employee. Thus, ICSOP is a third party tortfeasor, and "[t]ortfeasors who are non-co-employees have no immunity," under Iowa's worker's compensation scheme because there is no compromise of rights between an employee and a non-co-employee tortfeasor. *See Suckow v. NEOWA FS, INC.* 445 N.W.2d 776, 779 (Iowa 1989). This means that unlike their relationship with their employer and co-employees, Appellants have no way, other than through judicial process, to resolve their claims against ICSOP. *See id.*

While ICSOP overtly claims that there is no basis to distinguish the rational basis analysis applied in *Suckow* from this case, it clearly recognizes the problem it has with the distinction between ICSOP, a non-co-employee tortfeasor, and an employer as it relates to the standard that should be applied in determining whether or not the statute is unconstitutional. Appellee's Br., at 15-16. This is demonstrated by ICSOP's far-fetched argument that it was a part of the compromise of rights between employers and employees because a procedural rule exists that deems an insurance

carrier a party in any workers' compensation claim. Appellee's Br., at 15; Iowa Admin. Code r. 876.410. Unfortunately for ICSOP, its argument fails because the Iowa Administrative Procedural Act is a procedural code that is not meant to "alter the substantive rights of any person or agency. Its impact is limited to procedural rights . . . ." Iowa Code § 17A.1(1, 4). Moreover, ICSOP fails to address the "elephant in the room." If the legislature intended for insurance companies to be a part of the quid pro quo that justifies the Iowa workers' compensation scheme, why isn't the immunity provision contained in Iowa Code Chapter 85? Why did the legislature put the immunity provision in a separate statutory scheme when it responded to *Fabricius v. Montgomery Elevator Co.*, 121 N.W.2d 361 (Iowa 1963)? Indeed, the answer is because non-co-employee tortfeasors, are not a part of Iowa's workers' compensation scheme and are afforded no immunity. *See id; see also Seivert v. Resnick*, 342 N.W.2d 484 (Iowa 1982). For these reasons the Court should apply strict scrutiny.

VII. THE ABOLITION OF APPELLANTS' COMMON LAW RIGHT TO SUE ICSOP FOR NEGLIGENT INSPECTION AND FAILURE TO INSPECT IS AN ABUSE OF THE STATE'S POLICE POWER.

ICSOP also argues that Appellants' ability to bring a cause of action for negligent inspection or failure to inspect was abolished by the Iowa legislature upon reenactment of Iowa Code section 517.5. In doing so, ICSOP appears to argue that *Carter v. Rowe*, No. 5-0750, 2005 WL 3478144, at *2 (Iowa Ct. App. Dec. 21, 2005) and *Johnson v. Am Leather Specialties Corp.*, 578 F. Supp. 2d 1154, 1177 (S. D. Iowa 2008) stand for the proposition that the Iowa legislature has carte blanche authority to

entirely abolish common law causes of action so long as at the time of the abolished statute a Plaintiff has not yet been injured. Appellee's Br., at 40. ICOP's severely contorts the *Carter* Court's holding. It does so by interpreting the Court's cite to 16A. C.J.S. *Constitutional Law* § 260(a)(2005)(stating causes of action which have not yet accrued are not vested and may be abolished) verbatim and in isolation, instead of in the context in which Court provided its reasoning.

Admittedly, the *Carter* Court thought it was *significant* that Carter's cause of action did not accrue until after Iowa Code chapter 673 was enacted. *See Id.* at *2 (emphasis added); *see also* Iowa Code Chapter 673 (giving immunity from liability to the owner of a domesticated animal unless injury is committed intentionally or recklessly). However, the Court did not dispose of Carter's claim based on the sole fact that his injury occurred after the enactment of the statute. *See id.* at *2. Nor did it end its analysis. Instead, the Court went say that the abolition of common law rights may only be abolished to "attain a permissible legislative object . . . ." *Duke Power v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 (1978)). The *Carter* Court then placed additional significance on the fact that Iowa Code chapter 673 merely altered Carter's standard of recovery as opposed to completely extinguishing his right to seek recovery. *Id.*; Compare Iowa Code §517.5 (extinguishing cause of action by giving absolute immunity to private insurance company for workplace inspections). The

Carter Court concluded that the common right to sue under a "negligence standard," is not a right protected by Iowa's constitution. *Id.*

It bears repeating that the *Carter* Court acknowledged that a cause of action can only be abolished if the Court determines that the State uses its police power reasonably. *See id; see also Gacke vs. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 176 (Iowa 2004). Here, unlike Iowa Code Chapter 673, Section 517.5 does not merely alter a standard of recovery. To the contrary, it completely extinguishes Appellants' ability to seek recovery of damages sustained by ICSOP's negligent inspection or failure to inspect. *Id.* For the reasons expressed in the Appellants' brief, including Justice Shore's reasoning, the abolition of Appellants' common law right to sue ICSOP for negligent inspection and failure to inspect is not a reasonable use of the State's police power. Accordingly, the statute is unconstitutional and "void ab initio." *See People v. McFadden*, 2016 IL 117424, 61 N.W.3d 74, 79 (2016)(holding that where a statute is found to be invalid, the statute is void from the beginning). Accordingly, Appellants have a causes of action against ICSOP for negligent inspection and failure to inspect.

VIII. APPELLANTS HAVE IDENTIFIED A SUSPECT CLASS.

ICSOP next argues that Appellants have failed to identify a suspect class. First, that argument ignores the *Sievert* and *Suckow* cases—both of which accepted the Plaintiffs as a suspect class in reviewing equal protection challenges to the immunity provisions contained in Iowa's workers' compensation scheme. Second, here, the

Appellants are clearly treated differently than any other employee with a cause of action against a non-co-employee tortfeasor. Appellants' Br. at 29. Also, Appellants are clearly treated differently than any other potential plaintiff who desires to bring a negligent inspection claim against an insurance company that is not a workplace inspection (i.e. residential or commercial property insurance inspections).

IX. UNDER ANY STANDARD (I.E. STRICT SCRUITY, RATIONAL BASIS), IOWA CODE SECTION 517.5 IS UNCONSTITUTIONAL

ICSOP also criticizes Appellants' block quote of Justice Shore's concurrence in Alabama's *Fireman's Fund* case. *Fireman's Fund Am. Ins. Co. v. Coleman*, 394 So. 2d 334 (Ala. 1980). Appellee's Br. at 22-29. In doing so, ICSOP argues that *Fireman's Fund* didn't address equal protection. Appellee's Br. at 22. Appellants recognize that *Fireman's Fund* did not address equal protection. However, Justice Shore's reasoning in her concurrence is relevant to any applicable constitutional standard in this case—be it rational basis, strict scrutiny or a reasonable exercise of the State's police power. Put simply, using Justice Shore's words, the notion that absolute immunity for private insurance companies advances workplace safety defies the basic tenets of Iowa's tort system. *Id.* at 344-46. Thus, there is no standard under which Iowa Code section 517.5 can pass constitutional muster.

ICSOP also contends that *Reed v. Brunson*, 527 So. 2d 102 (Ala. 1988) wholly conflicts with *Fireman's Fund. Id.* However, ICSOP fails to acknowledge that the *Reed* Court only addressed whether it was permissible to provide immunity to co-

employees. *Id.* It did not address whether it was constitutional to give absolute immunity to third party insurance companies. *Id.* Moreover, there is a glaring difference between the Iowa and Alabama workers' compensation statutes as it relates to insurance company immunity. In Alabama, insurance company immunity is written into the actual workers' compensation statute, whereas in Iowa, immunity is conferred on insurance companies in a totally separate statutory scheme. As articulated previously, ICSOP, cannot explain how private insurance company immunity is a part of Iowa's workers' compensation scheme when it is not included in Iowa Code chapter 85.

X. THE THREE HUNDRED FIFTY (350) UNDISPUTED CHEMICAL INJURIES AT ICSOP'S INSURED DEMONSTRATE THAT THE ABSOLUTE IMMUNITY GRANTED TO INSURANCE COMPANIES UNDER IOWA CODE SECTION 517.5 IS NOT RATIONALLY RELATED TO IOWA'S INTEREST IN WORKPLACE SAFETY

As articulated in ICSOP's brief, because Appellants' petitions were dismissed for failure to state a claim, the facts alleged in the petition are taken as true. Appellee's Br. at 8. With that said, for purposes of this appeal, the following facts are true:

- ICSOP's insured, TPI Iowa, LLC ("TPI"), is a wind turbine manufacturing business located at 2300 N. 33rd Ave., Newton, IA. Clark Petition at ¶ 18.

- TPI employees hundreds of employees at its manufacturing plant in Newton, IA. Clark Petition at ¶ 20.
- As a part of the wind blade manufacturing process, TPI's employees work with hazardous chemicals while manufacturing the wind blades. Clark Petition at ¶ 21.
- The resin TPI's employees work with is a substance that is known to cause skin corrosion, serious eye damage, skin sensitization, cancer, damage to fertility, damage to the unborn child, respiratory irritation and damage to the reproduction system. Clark Petition at ¶ 27.
- The curing agent TPI's employees work with is a substance that causes skin corrosion or irritation, serious eye damage or eye irritation, respiratory sensitization, skin sensitization, reproduction system damage, damage to fertility, and allergy or asthma symptoms. Clark Petition at ¶ 32.
- The curing agent is so dangerous that it is toxic following a single oral or dermal exposure. Clark Petition at ¶ 31.
- The chemicals are dangerous enough that TPI's employees must wear personal protective equipment ("PPE") to avoid contracting the chemicals' known hazards. Clark Petition at ¶¶ 28, 33.

- Since August 13, 2008, TPI has documented approximately three hundred fifty (350) injuries on its Iowa OSHA logs from chemical exposure to its employees at its Newton, IA manufacturing plant. Clark Petition at ¶ 35.
- Despite the known dangers of the chemicals, the PPE provided by TPI was not sufficient to prevent exposure, inhalation, or ingestion of the chemicals to Appellants. Clark Petition at ¶ 42.
- TPI knew that the PPE was not sufficient to avoid a chemical injury. Clark Petition at ¶ 43.
- Appellants all suffered permanent chemical injuries. Clark Petition at ¶¶ 44–50.

Three hundred fifty injuries from known dangers, including cancer, of toxic substances does not equate to workplace safety. Indeed, the aforementioned facts represent the antithesis of workplace safety.

The Iowa Association of Business and Industry ("AIB") claims that its mission is to "nurture a favorable business, economic, governmental and social climate within the state of Iowa so [Iowa] citizens can have the opportunity to enjoy the highest possible quality of life." Amicus Curiae Br. at 5. On its website, AIB highlights its key issues in its public policy handbook—one of which is workplace safety. AIB's Key Issues, https://www.iowaabi.org/public-policy/where-we-stand (last visited August 2,

2018). AIB touts the fact that it represents over 1,500 business members which employ over 330,000 Iowans. Surely, AIB does not believe that workplace safety can be decoupled from a favorable business, economic, governmental, and social climate. AIB would not dispute that its members do not accept the premise that it is appropriate to sacrifice human safety in exchange for money.

Incredibly, however, despite AIB's purported mission and this appeal's undisputed sample of three hundred fifty (350) chemical injuries over a nine (9) year period from one employer, AIB filed an Amicus Curiae brief in support of ICSOP arguing that potential claims against insurance companies who do not inspect or negligently inspect known workplace dangers will hurt Iowans. Incredibly, AIB accepts the undisputed frequency of chemical injuries that occurred at TPI that can cause life threatening injuries, yet it still claims that the Iowa legislature had a rational basis in giving absolute immunity to insurance companies because that immunity was a part of the *quid pro quo* of the Iowa workers' compensation scheme. Amicus Curiae Br. at 10. And incredibly, AIB appears to aver that Iowans should be more worried about costs of workers' compensation insurance than human safety. Amicus Curiae Br. at 14.

The enactment of Iowa Code section 517.5 does not pass any constitutional standard, including a rational basis analysis. The 350 undisputed injuries demonstrate that absolute immunity does not foster or promote work place safety. If AIB's true aim is to foster a prosperous and safe climate for its members, it would be promoting

competent work and thorough work-place inspections. AIB would be suggesting that insurers, like ICSOP, spend money on workplace inspections to foster safety and deter injuries. And if AIB were to accept the underlying policy of Iowa's tort base system, AIB would take a different position and support the notion that potential liability for erroneous workplace inspections will actually reduce injuries, workers' compensation costs, and costs of goods. Imagine if after TPI's fiftieth chemical injury, ICSOP would have conducted an adequate workplace inspection. Would there have been 300 more? If ICSOP would have been sued for negligent inspection or failure to inspect after the fiftieth chemical injury, would there have been 300 more? If one accepts the underlying policy behind Iowa's tort based system, the answer to that question is a resounding **no**. *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).

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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