IN THE SUPREME COURT OF IOWA

No. 18-1092

ANNETT HOLDINGS, INC.

Appellant,

versus

ANTHONY ROLAND,

Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE KAREN ROMANO
NO. CVCV051326

APPELLANT'S FINAL BRIEF

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ROUTING STATEMENT

This case involves the application of existing legal principles and should be transferred to the Court of Appeals pursuant to Iowa Rule of Appellate Procedure 6.401.

STATEMENT OF THE FACTS

A. Course of Proceedings

Roland filed a motion to compel discovery filed on November 3, 2017. (App. 229-301). TMC resisted Roland's motion, requesting the Court to stay discovery pending a determination on class certification, and requested the Court decertify the purported class. (App. 302).

B. Factual Background

TMC is a Des Moines, Iowa based flatbed trucking company that transports freight across the United States. Generally its drivers work over-the-road, meaning they are routinely out on the road for several days at a time. The majority of TMC's over-the-road drivers reside in states other than Iowa. In addition to its Des Moines headquarters, TMC has satellite locations in North Carolina and Missouri.

As allowed by Iowa's Workers' Compensation Act, when hired, TMC's employees agree to receive workers' compensation benefits under Iowa law in the event of a work injury during their employment with TMC. This agreement is contained in a document titled "Memorandum of Understanding" (hereinafter "MOU") which all drivers sign as a condition of employment. (App. 16). Additionally, the MOU provides TMC may offer to employees with temporary work restrictions temporary modified duty work in Des Moines while recovering from work injuries. (App. 16). The MOU specifies TMC will pay travel expenses and provide lodging while employees are in Des Moines performing modified duty work. (App. 16). It further provides benefits would be suspended pursuant to Iowa Code Section 85.33(3) if the employee refused the modified duty work offer. (App. 16).

Roland signed a MOU when he was hired. (App.58). The version of the MOU signed by Roland was created after TMC's modified work program was criticized by the former workers' compensation commissioner in the case of *Neal v. Annett Holding*, 814 N.W.2d 512 (Iowa 2012); (App. 16). In that case, former commissioner Godfrey held the modified work TMC offered the employee in Des Moines was not suitable given the distance from the employee's home. *Id.* at 516. That decision was reversed by the district court based on statutory interpretation.

Id. at 517. The employee sought further appeal and it was retained by the Iowa Supreme Court. *Id.*

In a March 2, 2012 ruling, a majority of justices (4-3 split) held Section 85.33 did not prohibit the commissioner from considering the geographic location of the offered modified work in determining its suitability. *Id.*at 522. On the issue of whether substantial evidence in the record supported the commissioner's conclusion that the offered work was unsuitable, the majority acknowledged "the evidence in the record could have led a reasonable factfinder come to a conclusion different than that reached by the commission. The issue before us, however, is not whether the employer had a substantial basis for asserting the offered job was in fact suitable. The question is whether the determination of the commissioner should be affirmed." *Id.* at 514. Given the deferential standard of review for agency factual findings, the majority found no legal error in the commissioner's ruling. *Id.* at 525. In so holding, the majority specifically noted there was no evidence that the employee had agreed to relocate to Des Moines in the event of a work injury. *Id.*

Subsequent to the *Neal* decision, TMC amended the MOU to include an acknowledgment by employees that TMC may offer temporary modified duty work in Des Moines in the event of a work injury and there is no known reason

why they would be unable to temporarily relocate to Des Moines for modified duty work. (App. 16).

On March 4, 2014, Roland suffered a work injury to his elbow. (App. 18). On examination, conservative treatment was recommended and he was assigned temporary work restrictions. (App. 134). At that time, TMC offered him modified duty work in Des Moines which he accepted. (App. 224). While working light duty in Des Moines, Roland received conservative medical treatment. (App. 224). Roland went home (Oxford, Alabama) more frequently than every other weekend at TMC's expense. (App. 18). During one of his trips home, Roland requested an evaluation with Dr. John Payne, an orthopedic surgeon who previously treated him for a personal injury. (App. 18). TMC authorized the evaluation. Dr. Payne recommended surgery to repair Roland's elbow which was performed on May 9, 2014. (App. 18).

Following surgery, Roland was taken off work for a period of time and remained at home. He was subsequently released to return to work with restrictions on May 20, 2014. (App. 135). At that time, Annett Holdings again offered Roland modified duty work in Des Moines which he accepted. (App. 135). Within two weeks of being released to modified duty work, Roland retained attorney Chris Spaulding who notified TMC that Roland objected to having physical therapy in

Iowa because of the distance from Roland's home. (App. 108). Attorney Spaulding demanded TMC authorize Roland to receive therapy in Anniston, Alabama. (App. 25). Annett Holdings denied the request, explaining the distance of physical therapy from Roland's home did not render the care being provided unsuitable because Roland had relocated temporarily to Iowa for light duty. (App. 134-137).

On June 5, 2014 Roland filed an application for alternative medical care with the Iowa Workers' Compensation Commissioner. (App. 67). The stated reason of dissatisfaction by Roland was having to participate in physical therapy in Des Moines, Iowa while there for light duty. (App. 67-68). Roland asserted all of his physical therapy should occur in Anniston, Alabama, and requested the agency to enter an order requiring TMC to provide him with physical therapy there. (App. 68).

A telephone hearing on Roland's alternative medical care petition occurred on June 17, 2014, with Workers' Compensation Deputy Erin Pals. (App. 67). Following the hearing, Deputy Pals entered a decision on June 18, 2014 granting Roland's petition for alternative medical care, and ordering his medical treatment be transferred to Anniston, Alabama under the care of Dr. Payne. (App. 73). Deputy Pals concluded the physical therapy Roland was receiving in Des Moines,

Iowa was inferior to the physical therapy he was receiving in Alabama, and was unduly inconvenient to Roland. (App. 72). Deputy Pals further found the Memorandum of Understanding (hereinafter "MOU") signed by Roland agreeing to perform modified duty work in Des Moines violated Iowa Code Section 85.17 to the extent it attempted to eliminate the "reasonable" and "not unduly inconvenient" requirements from Iowa Code section 85.27. (App. 73).

TMC timely sought judicial review from Deputy Pals' alternative medical care decision. The district court's ruling on Petition for Judicial Review was entered on December 12, 2014. (App. 75). Therein, the Honorable Arthur Gamble affirmed the agency's decision granting alternative medical care, finding it was supported by substantial evidence and was not the product of legal error. (App. 87-90). Subsequently, TMC filed an appeal with the Iowa Supreme Court, which was transferred to the Iowa Court of Appeals. (App. 93). The Iowa Court of Appeals affirmed the agency's ruling on February 10, 2016, concluding *as applied in this case*, the agency did not err in concluding the MOU violated Iowa Code section 85.18. (App. 105).

Following the agency's June 18 decision granting alternative medical care to Roland, Roland continued to intermittently perform modified duty work (and receive physical therapy) in Des Moines through November of 2014.[1] (App. 225).

B. Course of Proceedings

Roland filed the instant action, alleging TMC deprived him of his statutory rights in violation of Iowa Code Section 85.18 and acted in bad faith.[2] Roland's alleged damages include workers' compensation healing period benefits, permanent partial disability benefits, medical benefits and/or reasonable and necessary medical care. (App. 60-61). Because TMC did not discontinue its modified work program following the rulings of the Agency, District Court and Court of Appeals, Roland's amended petition further alleges he and all similarly situated persons have suffered a deprivation of their statutory rights and were damaged by TMC's bad faith, in the following ways: (a) loss of time traveling to and from Plaintiff's home and other class members' home to Iowa; (b) pain and

[1] Roland received physical therapy in Alabama during the periods of time he was not in Des Moines performing modified duty work.

[2] Any claim that TMC's continuation of its modified work program itself was in bad faith was rejected by the legislature in recently amending Iowa Code Section 85.33(3), which effective July 1, 2017, states: "Work offered at the employer's principal place of business or established place of operation where the employee has previously worked is presumed to be geographically suitable for an employee whose duties involve travel away from the employer's place of business or established place of operation more than fifty percent of the time." This amendment was adopted in part, to specifically overrule the holding in Neal v. Annett Holdings.

suffering and mental distress associated with deprivation of the statutory right, loss of time and treatment as well as unnecessary travel, sometimes contrary to their physicians' recommendation; (c) loss of weekly indemnity benefits when refusing to travel to Iowa; and/or (d) pain and suffering and mental distress associated with deprivation of the statutory right, loss of time, loss of weekly benefits, and/or treatment. (App. 61). Roland's amended petition additionally seeks punitive damages. (App. 62). TMC filed a motion to dismiss Roland's Amended Petition for Failure to State a Claim. (App. 128). Roland resisted the motion to dismiss (App. 127-131), and the court denied it on October 24, 2016. (App. 222).

TMC sought interlocutory appeal from this Court. (App. 365). While the Application was pending, TMC filed an answer denying the allegations in Roland's Petition. (App. 224-228). The parties jointly motioned the district court to continue the pretrial conference until TMC's Application for Interlocutory Appeal was ruled on. On December 13, 2016 this Court denied TMC's Application for Interlocutory Appeal. (App. 365). Trial was subsequently set for November of 2018. (App. 365).

The parties exchanged discovery which included substantial class discovery propounded by Roland on TMC. (App. 232-272). After TMC refused to answer the class related discovery, Roland filed a motion to compel. (App. 229-231).

TMC filed a resistance and motion to decertify the case as a class action. (App. 302-335). Roland in turn filed a response requesting the district court to certify the case as a class action. (App. 336-351). A hearing was held before Judge Romano, who subsequently issued a ruling on Roland's Motion to Compel and Motion to Certify the case as a class action on May 30, 2018. (App. 364-375). Therein, Judge Romano directed Roland to submit an additional filing addressing the requirements of Iowa Rule of Civil Procedure 1.276(1). (App. 374). Plaintiff filed his pleading related to 1.276(1) on June 7, 2018, and the district court subsequently entered a final order certifying the case as a class action. (App. 376-387). TMC timely filed its notice of appeal from both Orders related to class certification. (App. 388). TMC subsequently sought and was granted a stay of the district court proceedings pending resolution of this appeal.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CERTIFYING THE PURPORTED CLASS.

A. Standard of Review and Preservation of Error.

This Court reviews a district court's decision on class certification for abuse of discretion. *Weizberg v. City of Des Moines*, 2018 WL 417518 (Iowa 2018) (citation omitted). TMC preserved error on the issues raised on appeal by filing a

motion to decertify the purported class and resisting Roland's motion to certify the class at the district court level. TMC has an unqualified right to appeal from an order certifying an action as a class action. *Martin v. Amana Refrigeration, Inc.*, 435 N.W.2d 364 (Iowa 1989).

B. Iowa Rules Regarding Class Certification

Iowa Rules of Civil Procedure 1.261 through 1.263 dictate when class certification is allowable. Iowa's rules regarding certification of class actions closely resemble Federal Rule of Civil Procedure 23. *Freeman v. Grain Processing Corp.*, 895 N.W.2d 105 (Iowa 2017). For that reason, Iowa courts have relied on federal authorities construing similar provisions of the Federal rules in interpreting Iowa's class certification rules. *Id.* at 116; *see also Luttenegger v. Conseco Financial Servicing Corp.*, 671 N.W.2d 425 (Iowa 2003) (Because rules 1.261 through 1.263 closely resemble Federal Rule of Civil Procedure 23, we may rely on federal authorities construing similar provisions of federal rule 23).

Rule 1.261 states one or more members of the class may sue or be sued as representative parties on behalf of all in a class action if both of the following are true:

> 1. The class is so numerous or so constituted that joinder of all members, whether or not otherwise required or permitted, is impracticable.
>
> 2. There is a question of law or fact common to the class.

Regarding the first requirement, a class with 40 or more members has been recognized as the range within which impracticability of joinder is presumed. *City of Dubuque v. Iowa Trust*, 519 NW2d 786, 792 (Iowa 1994) (citations omitted). The second requirement of Rule 1.261 requires a question of law or fact common to the class; this is sometimes referred to as commonality. In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court discussed the query in a district court's determination on commonality. 564 U.S. 338, 349, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011). In *Dukes*, the plaintiffs sought to certify a class action of all women employed at Wal-Mart stores nationwide since 1998, alleging Wal-Mart's promotion policies discriminated on the basis of sex in violation of Title VII. *Id.* at 346, 131 S.Ct. at 2549. The *Dukes* Court noted commonality "is easy to misread, since '[a]ny competently crafted class complaint literally raises common "questions."'" *Id*. at 349, 131 S.Ct. at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131–32 (2009)). But "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Id*. at 349–50, 131 S.Ct. at 2551

(quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157, 102 S.Ct. 2364, 2370, 72 L.Ed.2d 740 (1982)). It is not sufficient that class members "have all suffered a violation of the same provision of law." *Id*. at 350, 131 S.Ct. at 2551. Rather, "claims must depend on a common contention" of "such a nature that it is capable of class-wide resolution—which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. The trial court's focus is directed at whether "class members have common complaints that can be presented by designated representatives in a unified proceeding." *Comes v. Microsoft Corp.*, 696 N.W.2d 318 (Iowa 2005).

C. The District Court's Finding That A Common Question Existed Across the Class Because Each Purported Class Member Suffered a Violation of Statutory Rights Because MOU Violates Iowa Code Section 85.17 is Incorrect.

The initial determination requires a finding of a question of law or fact common to the class. I.R.C.P. 1.261(2). This is often referred to the commonality requirement. The district court held this requirement was met, finding a determination of whether the MOU violated statutory rights is common to all proposed class members. (App. 366). The district court's finding blurs the issues. The commonality element requires the class members to suffer the same injury.

An allegation that all class members suffered a violation of the same statute is not sufficient.

In its unpublished decision, the Iowa Court of Appeals addressed TMC's argument that the Deputy Commissioner erred in concluding the MOU violated Iowa Code Section 85.18. *Annett Holdings, Inc. v. Roland*, 2016 WL 541265 *6 (Iowa App. 2016). In deciding the issue, the Court found TMC, by enforcing the MOU and transferring care mid-stream caused Roland to lose consistency in treatment, was inferior to treatment he was receiving, and interfered with his ability to use a medically prescribed cooling device. *Id.* The Court concluded "**[a]s applied in this case,** we conclude the agency did not err in concluding the MOU violated section 85.18." The Court of Appeals did not conclude that the MOU on its face violated Iowa Code section 85.18. A violation of Section 85.18 occurs when an employer uses a contract to avoid its obligation to provide workers' compensation benefits to an injured worker. This necessarily requires the fact finder to consider the facts and circumstances relevant to each class member and whether TMC used the MOU to avoid its obligation to provide workers' compensation benefits to each member. Not every employee who signed the MOU, had a work injury and came to Iowa to perform light duty and received medical care were deprived of workers' compensation benefits (the alleged

statutory deprivation). As explained in more detail below, many employees chose to come to Iowa and receive medical care after suffering a work injury and therefore were not deprived of any benefits. (App. 284-301). This fact undermines the district court's conclusion that for the deprivation of statutory rights claim, each class member suffered the same injury when they were required to come to Iowa for light duty work and receive medical care. (App. 366). Commonality, i.e., proof of each class member suffering the same injury, does not exist for all class members on the deprivation of statutory rights claim, and the district court erred in holding otherwise.

Further, the district court incorrectly held each class member suffered the same injury under the bad faith theory of liability. The district court held "[e]ach class member would have the same injury, that benefits were denied if the employee did not come to Iowa for light duty and/or medical care was unreasonable and inconvenient by being provided in Iowa hundreds of miles from their home." (App. 368). The purported class does not even include employees whose benefits were suspended for refusing to come to Iowa for light duty and receive medical care. The employees who did come to Iowa for light duty and who received medical care in Iowa received workers' compensation benefits, including medical care based on the facts and circumstances of each individual's work

injury. There is simply no commonality among the class members under Roland's bad faith theory of liability and the district court erred in holding otherwise.

D. The District Court Further Erred in Holding the Class Should Be Permitted For the Fair and Efficient Adjudication of the Controversy.

Even if the commonality requirement was met in this case, the district court nevertheless abused its discretion in certifying the case as a class action because class litigation would not be a fair or efficient way for the parties to adjudicate the claims in this case.

Certification pursuant to Rule 1.262 is allowed if the court finds all of the following:

> a. The requirements of rule 1.261 have been satisfied.
> b. A class action should be permitted for the fair and efficient adjudication of the controversy.
> c. The representative parties fairly and adequately will protect the interests of the class.

I.R.C.P. 1.262(2). Relating to the fair and efficient adjudication requirement in 1.262(b), Rule 1.263 provides a list of factors the court is to consider, among other relevant factors, in determining whether the class action should be permitted for the fair and efficient adjudication of the controversy. They are:

> a. Whether a joint or common interest exists among members of the class.

b. Whether the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for a party opposing the class.

c. Whether adjudications with respect to individual members of the class as a practical matter would be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests.

d. Whether a party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole.

e. Whether common questions of law or fact predominate over any questions affecting only individual members.

f. Whether other means of adjudicating the claims and defenses are impracticable or inefficient.

g. Whether a class-action offers the most appropriate means of adjudicating the claims and defenses.

h. Whether members who are not representative parties have a substantial interest in individually controlling the prosecution or defense of separate actions.

i. Whether the class action involves a claim that is or has been the 3subject of a class-action, a government action, or other proceeding.

j. Whether it is desirable to bring the class action in another forum.

k. Whether management of the class action poses unusual difficulties.

> l. Whether any conflict of laws issues involved pose unusual difficulties.
>
> m. Whether the claims of individual class members are insignificant in the amounts or interest involved, in view of the complexities of the issues and expenses of the litigation, to afford significant relief to the members of the class.

I.R.C.P. 1.263(1).

1. The District Court Erred In Holding the Legality of the MOU Is a Common Issue that Predominates Over Individual Questions.

The district court erred in concluding the legality of the MOU presents a common question that predominates over all other questions related to Roland's claims. (App. 370). The MOU is not per se illegal under Iowa Code Section 85.18. Legality of a contract under Section 85.18 hinges on whether the employer uses it to avoid its obligations under Iowa Code Chapter 85. Each case must be examined on a case by case basis. It is impossible for either party to present relevant evidence for all employees in a single unified proceeding. Assuming for sake of argument that Roland has a valid cause of action under Section 85.18, the predominate question for each employee will be whether TMC used the MOU in a manner that deprived that employee of some benefit under Chapter 85 that he or she did not receive. Roland's bad faith claim necessarily requires an individual assessment of whether TMC's actions in each case were reasonable, both

objectively and subjectively. For both claims, individual questions predominate over common questions with regard to calculating damages, especially non-economic damage amounts which will vary for each employee, and requiring an individualized assessment of each. For these reasons, class certification is not appropriate as a matter of law and should have been denied.

The predominance factor in Rule 1.263(1)(e) asks whether "common questions of law or fact predominate over any questions affecting only individual members." I.R.C.P. 1.263(1)(e). Athough the fair and efficient prong includes several factors for consideration, courts routinely deny class certification where the plaintiff fails to prove common issues central to the case predominate over individual issues; i.e., that presentation of the issue can be presented by the representative in a unified proceeding and resolved for the entire class. Predominance of commonality asks whether the class members have common issues that predominate over individual issues. *Anderson Contracting, Inc. v. DSM Copolymers, Inc.*, 776 N.W.2d 846, 848 (Iowa 2009). The question of whether common or individual issues predominate has been characterized as "fairly complex." *Vignaroli V. Blue Cross of Iowa*, 360 N.W.2d 741, 744 (Iowa 1985). Predominance "necessitates a 'close look' at 'the difficulties likely to be encountered in the management of a class action.'" *Vos v. Farm Bureau Life Ins.*

Co., 667 N.W.2d 36, 46 (Iowa 2003) (quoting *Rothwell v. Chubb Life Ins. Co. of Am.*, 191 F.R.D. 25, 28–29 (D. N.H. 1998)). The predominance inquiry is "qualitative rather than quantitative"; merely "a common question does not end the inquiry." *Ebert v. General Mills*, 823 F.3d 472, 478 (8th Cir. 2016) (quoted in *Freeman v. Grain Processing Corporation*, 895 N.W.2d 105 (Iowa 2017)).

Where the nature of the claims pled, including requested damages, requires an individual assessment of each purported class member's alleged injury and resulting damages, courts routinely refuse to certify a class. *See e.g. Kaser v. Swann*, 141 F.R.D. 337, 341 (M.D. Fla. 1991) ("To show the existence of a fiduciary relationship the members of the class would have to prove that an exchange of trust and confidence occurred between each plaintiff and the [defendant]. This would require testimony from every [plaintiff] and, as such makes this case unsuited for class certification.") (cited in *Vos v. Farm Bureau Life Ins. Co.*, 667 N.W.2d 36 (Iowa 2003)); *Semenko v. Wendy's Int'l Inc.*, 2013 WL 1568407 (W.D. Pa. 2013) (finding class certification not proper on defendant's motion where plaintiff could not satisfy the requirements of Rule 23 in a case alleging ADA discrimination for denial of employment and failure to accommodate because of the individualized and different nature of each purported class member's claim); *Manning v. Boston Medical Ctr. Corp.*, 2012 WL

1355673,* 3 (D. Mass. 2012) (granting defendant's motion to strike class allegations where court found that plaintiff's allegations, even if all reasonable inferences were drawn in their favor, are not sufficient to show that it was possible that there were similarly situated persons entitled to relief pursuant to statute or that common issues of fact predominated under rule 23 in FLSA case that would require highly particularized inquiries including the dates of meal breaks and training, job-related activities performed prior to shifts, whether activities constituted compensable work, whether any compensation was paid and how it was calculated).

In the case of *Thompson v. Merck & Co., Inc.*, 2004 WL 62710, *2 (E.D. Pa. 2004), the plaintiff filed suit against his employer Merck, alleging racial discrimination on his behalf as well as hundreds of similarly situated employees. The court pointed out the defendant would have defenses unique to each individual claim of discrimination, including applicability of the statute of limitations, res judicata, signed settlement agreements and other legitimate, non-discriminatory reasons for its actions. *Id.* at *3. Under these circumstances, the court found the action would degenerate in practice into multiple lawsuits separately tried, which is inconsistent with the class action model. *Id.* The court further explained the plaintiff's request for compensatory and punitive damages on behalf of each class

member would ***necessarily require individualized proof of injury.*** *Id.* at *4 (emphasis added). For example, the claims for mental anguish and pain and suffering would necessarily require a determination of whether and how each class member was personally affected by the alleged discriminatory conduct. *Id.* The court explained these types of damages, awarded on intangible injuries and interests, are uniquely dependent on the subjective and intangible differences of each class member's individual circumstances. *Id.* In support of its explanation, the *Thompson* Court cited the following comment from the Fifth Circuit's decision in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998), a case involving claims of discrimination:

> "the plaintiff's claims for compensatory and punitive damages must therefore focus almost entirely on facts and issues specific to individuals rather than the case as a whole: what kind of discrimination was each plaintiff subjected to, how did it affect each plaintiff emotionally and physically, at work and at home, what medical treatment did each plaintiff receive and at what expense…."

Id. The *Thompson* court concluded **as a matter of law**, the plaintiff's claims could not satisfy the prerequisites for class certification under Rule 23. *Id.* (emphasis added).

It is common for courts to summarily deny class certification, even without allowing discovery, where the nature of the claims and requested damages alone

automatically renders the matters unsuitable for class certification. *See Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011) (concluding class certification was not appropriate in lawsuit alleging deceptive advertising where law of the place of injury would control and involve consideration of multiple states laws on consumer protection); *Thornton v. State Farm Mut. Auto Ins. Co., Inc.*, 2006 WL 3359482, *4 (N.D. Ohio 2006) (denying class certification in case alleging defendant failed to obtain a salvage title to vehicles, noting each claim would require an individualized valuation and assessment of the reduction in value caused by a salvaged title); *Mantolete v. Bolger*, 767 F.2d 1416, 1424–25 (9th Cir.1985) (affirming refusal to certify case filed under the Rehabilitation Act of 1973 as a class action where inquiry into the individual's medical and work history as well as an inquiry into other factors bearing on the person's fitness for a given position would be necessary); *Lumpkin v. E. I. Du Pont de Nemours & Co.*, 161 F.R.D. 480, 481 (M.D. Ga. 1995) (holding record failed to show any basis for certification of a class action where generalized proof would not be acceptable for individual discrimination claims).

Despite the issue of predominance being a fairly complex one, the district court's entire analysis of the issue consisted of three sentences. (App. 368). In this case, presentation of both sides of the case would necessarily involve testimony

from each purported class member. The nature of Roland's claims and requested damages are not compatible with class certification, each requiring proof of an injury in fact and the extent of each individual's injury to determine damages. TMC similarly would be entitled to present evidence on any available defenses for each individual claim. As set forth more fully below, the district court abused its discretion in finding the legality of the MOU predominated over any other questions concerning Roland's claims. This court should reverse the district court and remand the case with instructions to decertify the class.

2. Evidence of Predominance of Common Issue Central to the Claim is Akin to Liability Evidence and Roland Cannot Present Liability Evidence in a Unified Manner.

On the face of Roland's petition, it is clear there are no questions common to the class predominate over individual issues on either of his claims. The predominance inquiry requires an analysis of whether a prima facie showing of liability can be proved by common evidence or whether this showing varies from member to member. *Arvitt v. Relistar Life Ins. Co.*, 615 F.3d 1023, 1029 (8th Cir. 2010). The nature of the evidence that will suffice to resolve a question determines whether the question is common or individual. *Seabron v. American Family Mut. Ins. Co.*, 2013 WL 3713652 (D.C. Col. 2013) (citing *In re Visa*

Check/MasterMoney Antitrust Litig., 280 F.3d 124, 136-40 (2d Cir. 2001)). If, to make a prima facie showing on a given question, the members of the proposed class will need to present evidence that varies from member to member, then it is an individual question. *Id.* If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question. *Id.*

Roland's first cause of action against TMC is first party bad faith. First party bad faith in this case requires proof that (1) TMC had no reasonable basis for denying workers' compensation benefits to each class member and (2) TMC knew, or had reason to know, that its denial of workers' compensation benefits to each class member was without basis. *Rodda v. Vermeer Mfg.*, 734 N.W.2d 480, 483 (Iowa 2007) (citations omitted). The first element is an objective one, the second element is subjective. *Id.* at 483. A reasonable basis for denying workers' compensation benefits exists if the claim is fairly debatable as to either a matter of fact or law. A claim is fairly debatable when it is open to dispute on any logical basis. *Id.*.

By its nature, any inquiry into the reasonableness of TMC's handling of workers' compensation claims is fact-specific. Whether TMC acted reasonably is judged by the entire course of conduct between it and each individual. The finder of fact must take into account all information known by TMC at the time a

decision is made. The highly individualized nature of the inquiry into whether TMC acted reasonable in handling workers' compensation claims makes bad faith claims inappropriate for class determination. That is particularly true in this case where Roland's claim of bad faith alleges TMC failed to provide reasonable medical care under Iowa Code Section 85.27 to its employees. Iowa Code Section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obligated to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care…. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

Iowa Code Section 85.27(4). A determination of whether medical care offered by an employer satisfies the requirements of section 85.27(4) therefore necessarily involves evidence regarding (1) how promptly the care was offered; (2) whether the care was reasonably suited to treat the injury; (3) whether the offered care was unduly inconvenient to the employee; (4) whether the employee was dissatisfied with the care; and (4) available alternative care. *Long v. Roberts Dairy Co.*, 528

N.W.2d 122, 123 (Iowa 1995). The injured worker has the burden of establishing the employer's choice of medical treatment is unreasonable under Section 85.27. *Id.* at 124. Determining what care is reasonable under the statute is a question of fact. *Id.*

Importantly, on the issue of predominance, Section 85.27(4) specifically acknowledges the employer and employee may reach an agreement on medical care. This is significant because TMC and injured employees routinely reached agreements on the medical care it authorized. (App. 284-301). Several employees within the purported class signed affidavits affirming that the location of the medical care each received was agreed upon, and not unilaterally forced by TMC. (App. 284-301). A claim of deprivation of prompt and reasonable medical care under Section 85.27 has to take into consideration the actual language of that statute, including the language allowing an employer and employee to agree on medical care. At trial, TMC must be allowed to introduce evidence concerning agreements on medical care it reached with the purported class members. The factfinder would be instructed to determine whether an agreement was reached in deciding whether TMC fulfilled its obligations under Section 85.27. Each purported class member would be called to testify at trial regarding his or her

discussions with TMC about medical care, including any dissatisfaction with the care received to treat the work injury.

This is exactly the type of individualized assessments requiring mini trials that other courts have held are not conducive to class litigation. *See e.g. Ostrof v. State Farm Mut. Auto. Ins. Co.*, 200 F.R.D. 521, 531 (D. Md. 2001) (string citation) *Ross–Randolph v. Allstate Ins. Co.*, 2001 WL 36042162 (D. Md. May 11, 2001) (denying class certification on bad faith failure to pay benefits, concluding there was a lack of any authority supporting class certification in case based on an insurer's failure to undertake a 'reasonable and necessary' analysis as to each member's individual claims"); *Ammons v. Am. Family Mut. Ins. Co.*, 897 P.2d 860, 863 (Colo.Ct.App.1995) (holding class certification inappropriate in suit to recoup "reasonable and necessary" transportation expenses incurred for treatment of injuries arising from automobile accidents because "what is 'reasonable and necessary' may depend on the particular circumstances of individual cases"); *Ralph v. Am. Family Mut. Ins. Co.*, 835 S.W.2d 522, 524 (Mo. Ct. App. 1992) (same); *McDonald v. Prudential Ins. Co.*, 1999 WL 102796, at *4 (N.D. Ill. Feb. 19, 1999) (refusing to certify a class action against insurer where "reasonableness" and "medical necessity" would have to be determined on case-by-case basis); *Hylaszek v. Aetna Life Ins. Co.*, 1998 WL 381064, at *4 (N.D. Ill. July 1, 1998)

(commonality and manageability not satisfied where court would be required "to conduct a series of mini-trials to examine numerous factual issues, including … the medical necessity of [particular] treatment in each individual case"); *Scott v. Ambassador Ins. Co.*, 426 N.E.2d 952, 954 (Ill. Ct. App. 1981) ("adjudication of the named plaintiffs' claim [sic] would not establish a right to recovery in any of the other purported class members" because of "necessity of making individual factual determinations as to whether each class member was 'legally entitled' to damages from an uninsured motorist for bodily injuries sustained"); *Fietsam v. Connecticut Gen. Life Ins. Co.*, 1994 WL 323313, at *6 (N.D. Ill. June 27, 1994)).

This point is made particularly clear in the case of *Kartman v. State Farm Auto. Ins. Co.*, 634 F.3d 883, 891 (7th Cir. 2011). In *Kartman*, the plaintiff filed suit individually and on behalf of a purported class alleging bad faith against State Farm for undervaluing hail damage claims. *Id.* The court noted bad faith required a showing that the insurer wrongfully denied the claim and knew there was no rational basis for doing so. *Id.* Therefore, to prove their claims of bad faith against State Farm, the plaintiffs were required to establish their claims were underpaid or wrongly denied in the first place. *Id.* This requirement alone, the court explained, barred class action certification because it cannot be established on a class-wide basis and instead would require proof that a compensable loss occurred and was

underpaid or not paid at all, based on consideration of the nature of the damage to each plaintiff's roof and the amount paid to repair it. *Id.* Other courts have reached similar conclusions in factually similar cases. *Halvorson v. Auto-Owners Ins. Co*., 718 F.3d 773, 777 (8th Cir. 2013) (holding individual questions necessary to determine breach of contract and bad faith against insurer overwhelmed questions common to the class, making certification inappropriate); *Johnson v. GEICO Cas. Co.*, 310 F.R.D 246 (D. Del. 2015) (holding breach of contract claim against insurer not suitable for class treatment because individualized inquiries would be required to determine whether each class member's claim was medically necessary and their expenses reasonable); *St. Louis Park Chiropractic, P.A. v. Fed. Ins. Co.*, 342 Fed. Appx. 809, 914 (3d Cir. 2009) (rejecting class certification for plaintiffs claiming that reduction of claims was unreasonable and in bad faith, explaining the "graveman" of plaintiff's claim, failure to pay reasonable expenses, was not-cognizable as individualized inquiries of reasonableness would be required).

Seabron v. American Family Mut. Ins. Co., 2013 WL 3713652 (D. Colo. 2013) is another case alleging bad faith against an insurer on behalf of a purported class. The plaintiff in *Seabron* alleged American Family did not have uniform claims processing standards as required by Colorado law, an issue common to the

entire putative class. Notwithstanding, the court explained the common questions did not predominate over individual questions because the plaintiffs could not establish their bad faith claims by relying solely on the defendant's lack of uniform claims processing standards. *Id.* at *7. While the lack of uniform standards could be considered by the jury in deciding whether American Family acted in bad faith, the jury must also consider the individual facts and circumstances of each claim to answer the ultimate question or whether the defendants' actions in a particular case were reasonable. *Id.* The court further explained, "[b]y its nature, any inquiry into an insurer's reasonableness is fact-specific. Whether an insurer acted reasonably is judged by the entire course of conduct between the parties **and the finder of fact must take into account all information known by the insurer at the time a decision is made**." *Id.* at *9 (citations omitted) (emphasis added). The court noted therefore, "[i]n most cases the highly individualized nature of the inquiry into whether an insured acted reasonable in a particular case makes bad faith claims inappropriate for class determination." *Id.* (citing *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 892 (7th Cir. 2011)).

Similarly in the case at bar, the legality of the MOU **as applied** requires a case by case assessment reviewing whether and to what extent TMC enforced the MOU and required the injured worker to come to Iowa for light duty and while in

Iowa receive medical care. Individual facts and circumstances of each claim would need to be considered to answer the ultimate question of whether TMC's actions in a particular case deprived the employee of statutory rights and whether TMC's actions were reasonable both objectively and subjectively. As a matter of due process, TMC must be allowed to submit evidence concerning its reasonableness as to how it handled each purported class member's workers' compensation claim. Individual questions clearly predominate over any common ones, and the legality of the MOU is in fact an individual question because whether TMC enforced the MOU in a manner that violates 85.18 depends on the individual facts and circumstances of the case. Class certification must be reversed.

3. Individual Questions Related to Damage Calculations Predominate As there are No Common Questions Related to Damages.

Similarly, the damages pled would necessarily vary for each class member and require testimony from each purported class member. Although individualized damages inquiries do not preclude class certification in all causes, the predominance requirement is not met where determination of damages will involve variations in proof for each purported plaintiff. For example, in this case, the non-economic damages (pain and suffering and mental anguish) assessment alone would be highly individualized for each purported class member. *See Wambsgans*

v. Price, 274 N.W.2d 362, 366 (Iowa 1979) (holding treating husband and wife as a single plaintiff for fixing damages for mental anguish was error; "[m]ental anguish is suffered individually, not jointly, and differs greatly from person to person.") This is an additional reason why class certification is not appropriate in this case, because Roland did not show a method of computing damages on a class-wide basis. *See Comcost Corp. v. Behrend*, 133 S.Ct. 1426, 1433 (2013) (plaintiff must show a method of computing class-wide damages at the certification stage); *see also Seabron v. American Family Mut. Ins. Co.*, 2013 WL 3713652 (D. Colo. 2013) (holding individualized questions for each class member regarding non-economic damages in case alleging bad faith would be significant, and an additional reason to deny class certification).

The alleged economic damages of the purported class members would similarly require an individualized assessment for each member. Roland's petition seeks workers' compensation benefits including weekly healing period benefits, permanent partial disability benefits, medical benefits and/or reasonable and necessary medical care. Notwithstanding the fact that the determination of an injured worker's entitlement to workers' compensation benefits is a matter vested solely within the authority of the workers' compensation commissioner, calculation of unpaid workers' compensation benefits would require the factfinder

to consider for each class member (1) the nature and extent of the injury; (2) medical care received for the injury; (3) the amount of benefits previously paid, (4) the benefit compensation rate, (5) benefits awarded in arbitration, if any, (5) TMC's defenses to the payment of benefits; and (5) any settlement agreement with TMC.[3] Clearly, calculation of economic damages for each class member would require evidence similar to what would be presented in a workers' compensation administrative proceeding. *See Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 2013 WL 3389469 (10th Cir. 2013) ("[P]predominance may be destroyed if individualized issues [with regard to damages] will overwhelm those questions common to the class."); *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) ("To be sure, individualized damage determinations cut against class certification."). The individualized evidence required to prove each class members economic and non-economic damages clearly weighs against class certification.

CONCLUSION

The substantial weight of authority demonstrates the district court abused its discretion in granting class certification in this case. TMC cannot find, nor did the district court or Roland cite another case (federal or state) with similar facts in

which class certification was determined to be appropriate. Instead, the courts uniformly deny class certification in cases involving similar types of claims. The district court spent three sentences analyzing whether common questions predominate over individual ones. With all due respect to the district court, those three sentences contain no real analysis at all, but rather make conclusory allegations without any explanation how the conclusions are reached. An appropriate analysis reveals class certification simply will not work in this case. The district court abused its discretion in certify the class and should be reversed.

REQUEST FOR ORAL ARGUMENT

Defendants respectfully request to be heard in oral argument upon submission of this appeal.

PROOF OF SERVICE

The undersigned certifies that on the January 3, 2019, she served the Appellant's Final Brief on counsel for the Appellee electronically using the

EDMS. Per Rule 16.317(1)(a), this constitutes service of the document for the purposes of the Iowa Court Rules.

/s/ Sasha L. Monthei

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because it contains 7,791 words, excluding the parts of the brief exempted.

2. This brief complies with the typeface requirement of Iowa Rule of Appellate Procedure 6.903(1)(e) because it has been prepared in proportionately spaced typeface using Microsoft Word 2010 in Times New Roman 14 point type.

/s/ Sasha L. Monthei

CERTIFICATE OF COST

The undersigned certifies the cost of this final brief (amount actually paid for printing or duplicating paper copies of briefs) was $0.00.

/s/ Sasha L. Monthei