IN THE SUPREME COURT OF IOWA

NO. 18-1545

BRIAN AND LISA TERRY,
Appellants,

v.

MEGAN DOROTHY,

Appellees.

On Appeal from the Iowa District Court for Story County

The Honorable Bethanie Currie, Judge

APPELLANTS FINAL BRIEF

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ROUTING STATEMENT

This case should be retained by the Supreme Court of Iowa, as it presents fundamental and urgent issues of broad public importance, requiring prompt determination by the Supreme Court as set forth under Iowa Rules of Appellate Procedure 6.1101(2)(d).

STATEMENT OF THE CASE

On October 12, 2017, a Petition and Jury Demand was filed in Story County by Brian and Lisa Terry against Megan Dorothy on the grounds of gross negligence and loss of consortium. The defendant, through her attorneys then filed her first Motion for Summary Judgment on July 16, 2018 to which the plaintiffs resisted. A hearing was ultimately held and on August 27, 2018, the trial court dismissed the petition, finding in favor of the defendant's motion for summary judgment. The plaintiff timely appealed this decision by filing a Notice of Appeal on September 6, 2018.

STATEMENT OF THE FACTS

Brian Terry, a former employee of Lutheran Services in Iowa ("LSI") was injured at work on October 14, 2015. The workers' compensation case was then settled in a compromised settlement approved by the Iowa Workers' Compensation Commissioner on July 27,

2017. App. 18. The workers' compensation case was filed solely against LSI and its insurance carrier—no part of the workers' compensation action was against Brain Terry's supervisor, Megan Dorothy.

On October 12, 2017, Plaintiffs filed a gross negligence and loss of consortium claim against Brian Terry's supervisor at LSI, Megan Dorothy. Megan Dorothy. As stated in the Petition, the grounds for the gross negligence and loss of consortium case stemmed from an October 14, 2015 attack on Brian Terry by a client f LSI. As a result of the attack, Brian has suffered from a traumatic brain injury and has been unable to return to work to date. In the Petition, Brian and Lisa Terry assert that Megan Dorothy was aware of the aggressive tendencies of the client, yet Brian Terry was sent to render services for the client without assistance. Megan Dorothy also failed to warn Brian Terry of the dangers associated with working with aggressive clients. App.4-8.

ARGUMENT

I. A gross negligence claim is both permissible and appropriate under the facts of this case.

As pointed out by the Honorable Bethany Currie in her Order Granting the defendant's Motion for Summary Judgment, generally speaking "the

Iowa Workers' Compensation Act is the exclusive remedy for employees seeking to recover damages for their workplace injuries." App.9; Iowa Code § 85.20. The exception to this is when an "injury is caused by another employee's gross negligence 'amounting to such lack of care as to amount to wanton neglect for the safety of another.'" *Nelson v. Lindaman,* 867 N.W.2d 1, 10 (Iowa 2015). Accordingly, the gross negligence claim brought by Brian and Lisa Terry is both appropriate and permissible under Iowa Code section 85.20(2).

The district court order clearly states that in order to succeed in a gross negligence claim. Stating that Brian and Lisa Terry must prove:

> (1) knowledge of the peril to be apprehended; (2) knowledge that injury is a probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid peril." Walker, 489 N.W.2d at 403 (*citing Thompson v. Bohlken*, 312 N.W.2d 501, 505 (Iowa 1981)). "[J]ob descriptions are insufficient, standing alone, to constitute 'actual knowledge' of the [hazardous] conditions." *Id*. at 406. A co-employee "may be deemed 'grossly negligent' undersection 85.20 only when the employee intentionally does an act of a highly unreasonable character. *Id.* App. 9.

Despite providing this analysis, the Judge Currie never looks at gross negligence itself but rather summary judgment is granted based on the "effects of compromise settlement." Unfortunately, this is where the district court erred. While there is no dispute that an approved

settlement by the workers' compensation commissioner is binding on the parties, and that workers' compensation cases are the sole remedy against an *employer* for a work injury, neither of these points are relevant in the case at hand.

First of all, it is extremely important to point out that paragraphs 13 through 21 of the Petition in this matter specifically address gross negligence—which fall under the clear exception presented in Iowa Code §85.20. App. 5-6. These specific paragraphs discuss Ms. Dorothy as a co-employee of Brian Terry. Ms. Dorothy was the program supervisor at LSI who had the power to delegate work—including the assignment to provide care for his assailant—to Mr. Terry. *Id.*

Moreover, Brian Terry is not pursuing inconsistent remedies as a redress for the same wrong. As previously stated, Mr. Terry entered a compromise agreement with LSI pertaining to his work injury. The settlement documents for the workers' compensation matter list only LSI and their insurer as defendants. In other words, Megan Dorothy was not a party to the workers' compensation case and she was most certainly not a party to the workers' compensation settlement. In her Motion for Summary Judgment, Megan Dorothy relied on a Florida case stating that a plaintiff relinquishes her ""option to collect tort damages against any

party liable for her workers' compensation award." See *Ferraro v. Marr,* 490 So.2d 188 (Dist. Ct. App. Fla. 1986). However, it seems that there are no relevant Iowa cases stating that a co-employee not party to a workers' compensation case cannot be sued for gross negligence. In fact, it says the complete opposite in Iowa Code §85.20(2).

Beyond the fact that Iowa Code § 85.20 allows a workers' compensation claim and a gross negligence claim, possibly the most important factor of this case is the language of the workers' compensation documents themselves. App. 18-22. The actual compromise settlement documents release the workers' compensation claims relating to the October 2015 injury sustained by Brian Terry. *Id.* These documents were approved by the workers' compensation commissioner. Had the documents contemplated or intended to waive all claims in any jurisdiction—or had they presented as such—the Commissioner would have denied the documents for lack of jurisdiction. *After all, the Iowa Workers' Compensation Commissioner only has jurisdiction over Section 85 and does not have the authority beyond that.* More simply put, these are not just "settlement" documents but rather proposed orders of the agency, and thus subject to the subject matter jurisdiction of the workers' compensation commissioner. Just as a

commissioner cannot order punitive damages in workplace injury case decisions, a commissioner cannot approve an order barring a claimant from seeking remedies outside of Iowa Code chapters 85, 85A, and 86.

Comparatively, had this matter been decided at the agency level the workers' compensation arbitration decision would have still been specifically regarding Bryan Terry and LSI. The hypothetical arbitration decision could not have released Megan Dorothy from liability due to gross negligence as she was not a party to the case and the agency would have lacked jurisdiction. Therefore, no matter how you look at it, the lack of jurisdiction and the fact Megan Dorothy was never a party to the workers' compensation claim are extremely important.

Despite the fact that the settlement documents, and who was a party to the settlement is crystal clear, Judge Currie chose to ignore them. Rather, she focused on the contractual nature of a settlement, stating that the intention of the parties must be examined when interpreting settlement agreements. App. 15. This analysis by the district court is flawed. After all, if it was the intention of the parties to waive all claims against Ms. Dorothy, she would have been specifically listed in the settlement documents—and the original workers' compensation filing.

Again, bringing light to the fact that there are two separate causes of action available to Mr. Terry relating to his October 2015 injuries—the first being his settled workers' compensation claim and the second being a claim of gross negligence brought again Megan Dorothy.

Ultimately, making it clear that Brian Terry's compromise settlement before the Iowa Workers' Compensation Commission does not bar a claim against gross negligence.

II. Since a gross negligence claim is appropriate, the loss of consortium claim stands.

The district court order dismissed the loss of consortium claim filed by Lisa Terry based on the fact the gross negligence claim of Brian Terry was dismissed. In dismissing the claim, the district court stated that the "rights of recovery by the [non-injured spouse are] all based upon the [injured spouse's] right to recover for [his or] her direct injuries. Where the defendant is not guilty of a tort which would give a right of action to the [injured spouse,] the [non-injured spouse] cannot maintain an action for consequential damages." *Ziegler v. U.S. Gypsum Co.*, 251 Iowa 714, 715-716, 102 N.W.2d 152, 153 (1960).

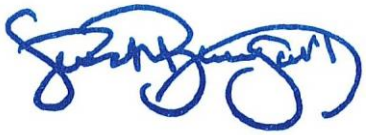
While Brian and Lisa Terry do not dispute the logic behind dismissing the loss of consortium claim, the fact that the gross negligence

claim was inappropriately dismissed, the loss of consortium claim would remain valid. Accordingly, the loss of consortium claim is a question that should be presented to the jury, secondary to Brian Terry's gross negligence claim.

CONCLUSION

Ultimately, the district court erred in dismissing not only Brian Terry's gross negligence claim against Megan Dorothy, but also Lisa Terry's loss of consortium claim. While Mr. Terry did enter a compromise workers' compensation settlement against his previous employer, LSI, this compromise settlement in no way involved his co-employee Megan Dorothy directly. Therefore, the claims brought forth in the October 12, 2017 district court petition should be reinstated and a new trial date should be set in Story County.

Respectfully submitted,



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REQUEST FOR ORAL ARGUMENT

The Appellant hereby requests an oral argument.

ATTORNEYS' COST CERTIFICATE

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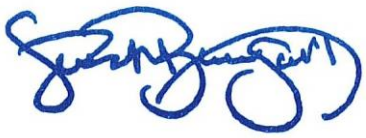

_____ January 24, 2019

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The undersigned hereby certifies that she or a person acting on her behalf will electronically file the attached Brief and Request for Oral Argument on January 24, 2019.

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Sarah M. Baumgartner, AT0012177

PROOF OF SERVICE

I certify that on January 24, 2019 I electronically filed Appellant's Proof Brief and Request for Oral Argument.

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Sarah M. Baumgartner, AT0012177