In the Supreme Court of Iowa

NO: 21-0652

GORDON GARRISON,

Plaintiff-Appellant,

vs.

NEW FASHION PORK LLP, and
BWT HOLDINGS LLLP,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR EMMET COUNTY
HONORABLE CHARLES BORTH, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

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Section 54 of the Kentucky constitution

Charles T. McCormick, *Handbook on the Law of Damages* 24 (1935)

N. William Hines, *Here We Go Again: A Third Legislative Attempt to Protect Polluting Iowa CAFOs from Neighbors' Nuisance Actions*, 103 Iowa L. Rev. 41 (2018)

Senate Video at *https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20170314163649480&dt=2017-03-14*

STATEMENT OF THE CASE

1. Nature of the Case

On June 1, 2020, Gordon Garrison filed a Petition in the Iowa District Court for Emmet County, alleging nuisance, trespass and violation of Iowa drainage law, arising from the operation by the Defendants of a confined animal feeding operation (Petition)(App. Volume 1, p. 32). During the course of the proceedings, Mr. Garrison filed a motion challenging the constitutionality of the immunity granted to animal feeding operations in Iowa Code §§ 657.11(3)(c) and 657.11A(2) (Immunity Motion)(App. Volume 1, p. 95). Mr. Garrison also filed a motion challenging the constitutionality of the damage cap in Iowa Code § 657.11A(3)(c) (Damage Cap Motion)(App. Volume 1, p. 121). The district court denied both motions.

The Defendants filed a motion for summary judgment (Summary Judgment Motion)(App. Volume 1, p. 239). The district court granted that motion on May 10, 2021 (Summary Judgment Ruling)(App. Volume 2, p. 415).

Mr. Garrison filed a Notice of Appeal on May 11, 2021 (Notice of Appeal)(App. Volume 2, p. 426).

2. Statement of the Facts

Gordon Garrison resides on property he owns in Emmet County, Iowa. The property comprises approximately 300 acres and some of it is farmed, but most of it is being cared for in restoration of the "Prairie Pothole" ecology that was indigenous to northwest Iowa (Garrison Affidavit)(App. Volume 1, p. 88). Mr. Garrison has spent considerable effort and expense in caring for and restoring his property (Garrison Affidavit; Garrison Answer to Interrogatory 25)(App. Volume 1, p. 88; Volume 1, page 373). Defendant, New Fashion Pork LLP, owns and operates a confined animal feeding operation (CAFO) directly adjacent and uphill from Mr. Garrison's property in Emmet County. The farmland owned by Defendant, BWT Holdings LLLP, adjacent to the Garrison farm is known as the Sanderson property. This CAFO is permitted to hold 4,400 hogs weighing 55 pounds or more, or a total of 1,760 animal units (Def. Answer, ¶ 2)(App. Volume 1, p. 38). The CAFO was populated with animals starting in December of 2015 (Def. Answer, ¶ 5)(App. Volume 1, p. 38).

Prior to the CAFO commencing operation, from 2001 to 2013, Mr. Garrison took 32 water samples from the stream on his property that flows from the adjacent field now owned by BWT Holdings. All of these samples, with one exception, had nitrate levels of 10 ppm or less (Garrison Affidavit; test results)(App. Volume 1, p. 88; Volume 2, p. 80). Defendants began applying manure from their CAFO in the fall of 2016. Mr. Garrison took water samples from April 15, 2016 until July 20, 2020. The test results show approximately a doubling of the nitrate discharge during the time the Defendants were applying manure to the Sanderson field compared to the 2001-2013 test results (Garrison Affidavit; test results)(App. Volume 1, p. 88; Volume 2, p. 81-161). The Defendants also took water samples from the location where the water from the Sanderson field enters the water that flows onto Mr. Garrison's property. Those tests showed elevated levels of nitrate (Def. test results)(App. Volume 2, p. 295-302).

Manure from the Defendants' CAFO was applied to the Sanderson field in the fall of 2016, 2017, 2018 and spring of 2019. There were no precipitation or rain events during the application periods that would have created stormwater runoff from the field to Mr. Garrison's property (Garrison Affidavit; manure application records)(App. Volume 1, p. 88; Volume 2, p. 290). The report of Roger Patocka, a professional engineer, explains the

drainage from the Sanderson field to Mr. Garrison's property, both from surface runoff and subsurface drainage through the pattern tiling on the Sanderson field (Patocka report)(App. Volume 2, p. 162). The report of another expert, Robert Streit, a consulting agronomist, explains why the application rate of manure on the Sanderson field exceeds what would be agronomically appropriate (Streit report)(App. Volume 2, p. 183). The report of Paul Kassel, an ISU Extension agronomist, explains why the application of manure on the Sanderson field exceeds what is agronomically appropriate (Kassel report)(App. Volume 2, p. 185).

Sarah Withers, a New Fashion Pork employee who prepared the manure management plans (MMPs) for the Sanderson CAFO, testified in her deposition that she uses the manure analysis and the crop yield information to compile the MMPs (Withers depo. p. 11-12)(App. Volume 1, p. 46-47). She further testified that the crop yield information is provided by Iowa DNR (Withers depo. p. 12)(App. Volume 1, p. 47). Paul Kassel, an agronomist with ISU Extension Service, has stated that the DNR standard for determining nitrogen as used in the MMPs is based on a factor of 1.2 pounds of nitrogen per bushel of expected corn production. Mr. Kassel explains that this results in an overapplication of manure (Kassel report)(App. Volume 2, p. 185).

Robert Streit, Mr. Garrison's expert agronomist, agrees with Mr. Kassel's analysis (Streit report)(App. Volume 2, p. 183).

The Defendants installed a pattern tiling system on the Sanderson field in April of 2017. This pattern tiling system directs all of the water drainage from the field to three outlets that discharge water directly to a wetland restoration and stream that flows to Mr. Garrison's property (Depo. Ex. 1; Depo. Ex. 2; Garrison affidavit)(App. Volume 1, p. 43; Volume 1, p. 44; Volume 1, p. 88). The Defendants contend that the pattern tiling was installed on the Sanderson field to increase corn yield, but the Defendants admit that their crop records show a significant decrease in yield after the pattern tiling was installed.

As a result of prior litigation between these parties in federal court, the Defendants ceased applying manure on the Sanderson field after the spring 2019 application (Jay Moore depo. p. 48-49)(App. Volume 1, p. 57). The water test results after the spring of 2019 show a general decrease in nitrogen (test results)(App. Volume 2, p. 81). Robert Streit stated:

> Nitrogen is in the mix and it can be extracted in the nitrate, ammonia or the amino acid form. While nitrogen is always thought of as being beneficial, having too much nitrate-N available will lead to increased growth of weak stalks, and increased susceptibility to insect and disease attack. The nitrate form is very soluble and leachable. It does not adhere, become absorbed or adsorbed to the soil particles. Therefore, when and if excessive nitrates are present in or near the root zone, they can move with any water flowing through the soil by

> gravity or out through tile lines. With gravity pulling the tile line water downhill from the manure field above Mr. Garrison's ground, **it is very plausible that the increased nitrate level in the tile came from the BWT field.** (emphasis added).

(Streit report)(App. Volume 2, p. 183). And Paul Kassel has stated, "Therefore, this extra N may contribute to nitrate loss from this field." (Kassel report)(App. Volume 2, p. 185).

There have been two documented discharges of manure from the Sanderson field after the Defendants began operation there. In the fall of 2016 the analysis of the manure in the storage pit underrepresented the amount of manure in the pit, resulting in a higher content of nutrients than was represented. The manure application was done when the field was saturated with water so the field could not absorb the manure and the manure discharged to Mr. Garrison's property (Garrison affidavit)(App. Volume 1, p. 88). The second incident occurred in December of 2018. Manure was applied to frozen ground on the Sanderson field, and the Iowa DNR confirmed that manure ran off from the field to Mr. Garrison's property (DNR consent order)(App. Volume 2, p. 276).

Mr. Garrison also included in this action a claim for nuisance arising from the impact of odor from the Defendants' CAFO. He prepared an odor calendar showing how often he was subjected to noxious fumes from the CAFO (odor calendar)(App. Volume 2, p. 189). The calendars show that Mr.

Garrison experiences fetid odor about once every three days (odor calendar)(App. Volume 2, p. 189). They also show that Mr. Garrison experienced dizziness and nausea. There were times when Mr. Garrison would be outdoors on his property and he would have to go back inside his house because of the odor (April 9, 2021 Hrg. Tr. p. 69)(App. Volume 2, p. 31).

Mr. Garrison's son, Matthew, confirmed that the odor impacted use and enjoyment of Mr. Garrison's property (Matt Garrison affidavit; April 9, 2021 Hrg. Tr. p. 25-28)(App. Volume 1, p. 371; Volume 2, p. 17-20). Kevin Moore (no relation to Jay Moore), who lived between the CAFO building and Mr. Garrison's property, testified that he and his family were affected by the odor (Kevin Moore depo. p. 12-13)(App. Volume 1, p. 52). Scott Benjamin, who lives even farther away from the CAFO than Mr. Garrison, testified that he and his wife are impacted by the odor (Benjamin affidavit; April 9, 2021 Hrg. Tr. p. 17-18)(App. Volume 1, p. 87; Volume 2, p. 14-15).

The Defendants' CAFO building has large fans on all four sides that blow exhaust fumes from the manure pit and the inside of the building (Jay Moore depo. p. 63-65; Baumgartner depo. p. 15, 17, 20-23; photos of building)(App. Volume 1, p. 58-59; Volume 1, p. 67,68,69; Volume 2, p. 283). The Defendants installed an electrostatic fence along the end of the CAFO building facing Mr. Garrison's property only after Mr. Garrison documented

odor from the facility (Garrison supp. affidavit)(App. Volume 1, p. 368). No fence was installed along the other sides of the building, most significantly on the sides where the fans were blowing exhaust directly from the manure pit (Baumgartner depo. p. 21; Garrison supp. affidavit)(App. Volume 1, p. 69; Volume 1, p. 368). And even the fence that was installed perhaps only reduces odor by 30 percent at best (Baumgartner depo. p. 12)(App. Volume 1, p. 67).

Because of the odor and water pollution, Mr. Garrison's property has suffered a significant decrease in value (Brent Taylor supplemental report; April 9, 2021 Hrg. Tr. p. 35, 38, 40-41)(App. Volume 2, p. 187; Volume 2, p. 22,25,26-27).

ROUTING STATEMENT

Pursuant to Iowa Rule of Appellate Procedure 6.1101(3), this case should be transferred to the Iowa Court of Appeals because it involves the application of existing legal principles.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT THE STATUTORY IMMUNITY IN IOWA CODE §§ 657.11(2) AND 657.11A(2) IS CONSTITUTIONAL AS APPLIED.

A. Preservation of the Issue for Review

This issue was preserved for review by Mr. Garrison filing a motion to strike the Defendants' affirmative defense based on the statutory immunity

(Immunity Motion)(App. Volume 1, p. 95) and the district court holding an evidentiary hearing and issuing an order (Immunity Order)(App. Volume 2, p. 404).

B. Standard of Review

This issue is reviewed for errors of law. *Gravert v. Nebergall*, 539 N.W.2d 184 (Iowa 1995). Constitutional issues are reviewed de novo. *Gacke v. Pork Xtra LLC*, 684 N.W.2d 168 (Iowa 2004). A statute is presumed to be constitutional and the burden is on the party challenging the statute to rebut that presumption. *Id*.

C. Argument

Iowa Code §§ 657.11 and 657.11A both create immunity in nuisance suits filed against animal feeding operations. Their language is virtually identical. The Iowa Supreme Court has addressed the constitutionality of § 657.11(2) on two previous occasions. In *Gacke v. Pork Xtra LLC*, 684 N.W.2d 168 (Iowa 2004), the court noted that the "the Gackes live across the road from two hog confinement buildings owned and operated by Pork Extra LLC, a family farm corporation. The confinement facilities were built in 1996 and sit approximately 1300 feet north of the plaintiffs' farmstead, where the plaintiffs have resided since 1974." *Id*. At 171.

The Gackes alleged that the statute was unconstitutional as a violation of Article I, Section 18, of the Iowa Constitution, known as the Takings Clause. That clause provides, in part, that "[p]rivate property shall not be taken for public use without just compensation first being made . . . ." The *Gacke* court, with respect to damages for decrease in value of the plaintiff's property, reaffirmed the holding in *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998), that the statutory immunity violates the Takings Clause, and to the extent of property damages, there are no circumstances under which the immunity would be constitutional. As the *Gacke* court put it:

> In conclusion, we hold that *Bormann* and state takings jurisprudence requires us to invalidate the statutory immunity only insofar as it prevents property owners subjected to a nuisance from recovering damages for the diminution in value of their property.

So, the Defendants cannot rely at all on the immunity in §§ 657.11 and 657.11A with respect to Mr. Garrison's claim for diminution in value of his property. Therefore, the district court erred in applying an as-applied constitutional analysis to all aspects of the statutory immunity, including the claim for property damage.

With respect to damages for loss of use and enjoyment of property in a nuisance case, the *Gacke* court held that the statutory immunity was unconstitutional as applied, pursuant to Article I, Section 1 of the Iowa Constitution. That section provides:

> All men and women are by nature, free and equal, and have certain inalienable rights – among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.

The *Gacke* court held that "the Gackes' desire to enjoy their home free from noxious odors is a right protected by Article I, Section 1 of the Iowa Constitution . . . . [T]he plaintiffs' right to possess their property includes their right to use and enjoy it." *Gacke*, 684 N.W.2d at 177. The *Gacke* court considered and concluded that "the means adopted by the legislature to accomplish its objective" were not "reasonably necessary" and were "unduly oppressive." *Id*. at 178.

The court held that the statute was unconstitutional as applied to the Gackes based on three facts in the case: (1) the plaintiffs resided on their property for years before the defendant's CAFO was constructed and the plaintiffs had made improvements on their property; (2) the plaintiffs suffered significant hardship as a result of the defendant's CAFO; and (3) the plaintiffs received no benefit from the statutory immunity beyond that of the general public. *Id*.

The *Gacke* decision was reaffirmed in *Honomichl v. Valley View Swine LLC*, 914 N.W.2d 223 (Iowa 2018). In that case the district court found that the Honomichls satisfied the three *Gacke* factors and held that the statute was unconstitutional as applied to them. On appeal, the defendant claimed that

changes in Iowa law required the court to reexamine the holding in *Gacke*. Those changes in the law included an increased separation distance between the CAFO and adjacent landowners, a requirement for a manure management plan, and a requirement that the CAFO "pass" the master matrix. *Id*. at 236-237.

In response to that argument, the court said:

> Despite these significant statutory and regulatory changes, the analytical framework set forth by the *Gacke* factors, even with its limitations, are still compatible with present conditions. Changes in the regulatory scheme limiting CAFOs would appear to benefit the adjacent landowners, at least in theory. But the fighting issue remains whether section 657.11(2), as applied to the particular facts of the instant case, is constitutional. Neither party has suggested an alternative legal framework to utilize in such cases, and the court is unable to discern a satisfactory alternative standard to apply. Accordingly, district courts presiding over cases of this nature should apply the *Gacke* factors to analyze an as-applied constitutional challenge.

Id. at 237.

Further, in rejecting the defendant's request to overturn *Gacke*, the court reaffirmed its allegiance to the doctrine of stare decisis. The court said:

> The defendants' request for us to reexamine the validity of *Gacke* requires us to consider our adherence to stare decisis. "[T]he principle of stare decisis demands that we respect prior precedent and that we do not overturn them merely because we might have come to a different conclusion." *State v. Bruce*, 795 N.W.2d 1, 3 (Iowa 2011). Nevertheless, "we must revisit our prior decisions if those decisions are flawed and incompatible with present conditions." *State v. Thompson*, 856 N.W.2d 915, 920 (Iowa 2014). "[W]hen a rule, after it has been found to be inconsistent with the sense of justice or with the

> social welfare, there should be less hesitation in frank avowal and full abandonment." *McElroy v. State*, 703 N.W.2d 385, 395 (Iowa 2005). . . . In revisiting our prior decisions, we essentially must decide "whether more harm will be done by overruling our previous cases in order to install what we think is clearly the correct principle, or by adhering to an unsound decision in the interest of the rule of stare decisis." *State v. Liddell*, 672 N.W.2d 805, 813 (Iowa 2003)(quoting *Stuart v. Pilgrim*, 247 Iowa 709, 713-14, 74 N.W.2d 212, 215 (1956). In this case, we must revisit *Gacke* to determine whether "compelling reasons exist to overturn our prior interpretation." *State v. Williams*, 895 N.W.2d 856, 860 (Iowa 2017).

Honomichl, 914 N.W.2d at 236.

Relying on the *Gacke* factors, as reaffirmed in *Honomichl*, the district court in Mr. Garrison's case held an evidentiary hearing to determine the constitutionality of the nuisance immunity statutes as applied to this case. The court issued an Order on May 4, 2021 (May 4, 2021 Order)(App. Volume 2, p. 404). The court found that Mr. Garrison had lived on his property over 40 years prior to the Defendants' CAFO being constructed, and that Mr. Garrison had spent effort and expense in caring for and restoring his property. Thus, the first *Gacke* factor was satisfied. The Defendants have not cross appealed to contest that holding of the district court.

Next, the court found that Mr. Garrison sustained significant hardship as a result of odor from the Defendant's CAFO. So the second *Gacke* factor was also satisfied. The Defendants have also not cross appealed to contest that holding of the district court.

The court erred, however, in its analysis of the third *Gacke* factor, finding that Mr. Garrison was receiving a benefit from the nuisance immunity statute beyond that of the general public. The court found that the fact that Mr. Garrison had raised sheep on his property in prior years and had established a compost pile from the sheep manure on his property somehow apparently subjected Mr. Garrison to liability for a nuisance suit from some unnamed and unknown source that was defended by reliance on the immunity. The court also found that Mr. Garrison receives a benefit from nuisance immunity because he is a partial owner of farmland in Kossuth County on which manure from a CAFO has been applied, even though the immunity clearly applies only to CAFOs and not adjacent land on which manure may be applied. The district court also failed to cite any actual nuisance complaint previously made to support this conclusion.

The district court misapprehended the nature of the third *Gacke* factor. The facts the district court relied upon to establish that Mr. Garrison received a benefit from the statutory immunity "beyond that of the general public" prove just the opposite, i.e., that Mr. Garrison has received no benefit from the statutory immunity beyond that of the general public. Like any other member of the community, if Mr. Garrison engaged in conduct that was covered by the immunity provision and another member of the community made a nuisance

claim against him, then he could avail himself of the immunity. *Gacke*, 684 N.W.2d at 178. Assuming for the sake of argument that Mr. Garrison's former sheep raising operation could have allowed him to take advantage of the immunity provision, the district court's citation of past conduct by Mr. Garrison runs directly contrary to the precise language used by the *Gacke* court in setting out the third factor. The facts cited by the district court do not establish that Mr. Garrison has received any benefit from the immunity provision other than some theoretical future immunity from some unknown future nuisance claim that would also be available to anyone else.

The *Gacke* court addressed this factor in the context of deciding whether the legislation was "unduly oppressive." In doing so the court examined the decision in *Gravert v. Nebergall*, 539 N.W.2d 184 (Iowa 1995). In that case the plaintiff and defendant shared a boundary fence that was also the boundary between the City of Tipton and rural Cedar County. The plaintiff lived in the city and the defendant was on the rural side of the fence. The plaintiff challenged the constitutionality of the fencing law that makes adjoining landowners responsible for half of the fence, because, the plaintiff contended, he did not have livestock and therefore did not receive any benefit from the fence. The court held that the statute was constitutional as applied to the plaintiff in that case because the plaintiff received the benefit that the fence

kept the neighbor's livestock out of the plaintiff's property. In other words, the plaintiff was receiving a direct, concrete and current benefit from the statute. Note also that in *Gravert* the neighbor's livestock were not theoretical, i.e., a potential future benefit if the neighbor at some point would purchase livestock, then the fence would keep that future potential livestock off of plaintiff's property. The holding in *Gravert* was based on actual livestock that was present and prohibited from grazing on plaintiff's land by the fence in question.

In this case Mr. Garrison does not receive any direct, concrete and current benefit from the immunity statutes. The Defendants presented no evidence whatsoever of any complaints made by any neighbors with regard to any properties in which Mr. Garrison has an ownership interest. Jay Moore testified at the hearing on April 9, 2021 that he was not aware of any complaints anyone had made about odor from Mr. Garrison's property (April 9, 2021 Hrg. Tr. p. 104-105)(App. Volume 2, p. 58-59). The Defendants had the opportunity at the *Gacke* hearing to present evidence that some neighbor of Mr. Garrison's at any point in time in the past was offended by the odor of any of the animals kept on his property, or any animal waste applied to his property and complained, and Defendants completely failed to present any such evidence. The benefit, as asserted by the Defendants in this case, is nothing but theoretical speculation about some possible future benefit that

could come to Mr. Garrison if a neighbor were to make a complaint about any livestock on any property he owns. That is not sufficient to meet the standard set out in *Gravert,* as adopted by *Gacke*, that the benefit conferred must be real and not some theoretical benefit dreamed up in the minds of defense counsel.

With respect to his former sheep raising operation and accompanying compost pile on his property, Mr. Garrison no longer has sheep on his property. Furthermore, Mr. Garrison testified that he never received any complaints about his sheep and there was nothing about that operation that could be considered a nuisance (April 9, 2021, Hrg. Tr. p. 69)(App. Volume 2, p. 31). And the compost pile, likewise, never received any complaints. Photos in evidence showed that the pile is covered with vegetation, which would minimize any odor (photo of compost pile)(App. Volume 2, p. 294). If Jay Moore claims he smelled odor from the compost pile, there is no indication that the odor rose to the level of being a nuisance, or that Mr. Moore ever contemplated filing a nuisance suit. The evidence certainly established that neither the sheep operation nor the compost pile created an odor so offensive that it significantly impaired another person's use and enjoyment of that person's life and property.

With respect to Mr. Garrison's property in Kossuth County, he is not the owner or operator of the animal feeding operation. (April 9, 2021 Hrg. Tr. p. 68)(App. Volume 2, p. 30). Further, the building that would be the source of odor and a nuisance action is not on Mr. Garrison's property (April 9, 2021 Hrg. Tr. p. 86)(App. Volume 2, p. 48). It is the owner or operator of the operation that would be sued for nuisance and would be the beneficiary of the nuisance immunity, not the person who allows manure to be applied to that person's field. For example, the Defendant in the nuisance claim in this case is the CAFO operator and owner, and not an adjacent landowner who has allowed manure from the CAFO to be applied to their property. Mr. Garrison testified that there have never been any complaints about odor from the property. The only argument the Defendants could make was that somehow sometime in the future someone might make a nuisance claim against the owner of the animal feeding operation and somehow that would affect Mr. Garrison to the extent that he would benefit from the nuisance immunity. That argument is far too hypothetical and speculative to satisfy the *Gacke* analysis, as explained in *Gravert.*

It is also important to note that the provisions of §§ 657.11 and 657.11A specifically apply only to protect animal feeding operations. So no person or entity could possibly benefit from the immunity in those statutes but the owner

or operator of an animal feeding operation. Any suggestion that the benefit referred to in the *Gacke* factor can extend beyond the specific language in the statutes has no basis. Although the *Gacke* court did not clearly articulate the parameters of the benefit factor, it is clear from the discussion and context that it is a very narrowly defined concept. The court made it clear that a statute is oppressive if it fails to protect a person who is subject to significant hardship when the person has been on the property long before the CAFO and has expended time, effort and expense in improving the property. Any benefit that would overcome that oppression must be narrowly defined. In this case, even if Mr. Garrison's raising of sheep could be considered an animal feeding operation, he does not have that operation now and could not be sued for nuisance. And he certainly does not own or operate an animal feeding operation in Kossuth County so he could not be sued there, either.

There was simply no basis for the district court to find that Mr. Garrison receives a benefit from the statutory nuisance immunity.

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS.

A. Preservation of the Issue for Review

This issue was preserved for review by the Defendants filing a Motion for Summary Judgment (Summary judgment motion)(App. Volume 1, p. 239), Mr. Garrison filing a Resistance (Summary judgment resistance)(App.

Volume 1, p. 375), and the Court issuing an Order granting summary judgment (Summary judgment ruling)(App. Volume 2, p. 415).

B. Standard of Review

Summary judgment is appropriate only if there is "no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Iowa Rule of Civil Procedure 1.981(3). The party seeking the summary judgment has the burden of proof, and the court considering a motion for summary judgment must view the evidence in the light most favorable to the nonmoving party. *Clinkscales v. Nelson Sec., Inc.*, 697 N.W.2d 836, 841 (Iowa 2005).

A fact question exists unless "no reasonable minds can differ on how the issue should be resolved." *Walker v. Gribble*, 689 N.W.2d 104, 108 (Iowa 2004). The court must accord to the nonmoving party every legitimate inference that can be reasonably deduced from the record. An inference is legitimate if it is rational, reasonable, and otherwise permissible under the governing substantive law, and not based on speculation or conjecture. *Phillips v. Covenant Clinic*, 625 N.W.2d 714 (Iowa 2001). Summary judgment is proper when the record reveals only a conflict over the legal consequences of undisputed facts. The moving party is required to affirmatively establish

that the undisputed facts support judgment under the controlling law. *Castro v. State*, 795 N.W.2d 789 (Iowa 2011).

Even if the facts are undisputed, summary judgment is not proper if reasonable minds could draw different inferences from them and reach different conclusions. *Clinkscales*, 697 N.W.2d at 841. A court deciding a motion for summary judgment must not weigh the evidence, but rather simply inquire whether a reasonable factfinder at trial faced with the evidence presented could return a verdict for the nonmoving party. Mere skepticism of a plaintiff's claim is not sufficient reason to prevent the plaintiff's claim from being tried. *Id.*

This Court reviews a district court ruling granting summary judgment for correction of errors at law. *Honomichl*, 914 N.W.2d 223 (Iowa 2018).

C. Argument

As described above, Mr. Garrison presented three claims for relief: nuisance related to the odor from the Defendants' CAFO, trespass related to discharge of pollution to Mr. Garrison's property from overapplication of manure on the Defendants' field, and violation of Iowa drainage law by diverting pollution-carrying water from the Defendants' field to Mr. Garrison's property. The trespass and drainage claims rely on essentially the same evidence.

The district court granted summary judgment to the Defendants on all three claims (Summary judgment ruling)(App. Volume 2, p. 415).

1. Nuisance

A nuisance is an actionable interference with a person's interest in the private use and enjoyment of the person's land. Parties must use their own property in such a manner that they will not unreasonably interfere with or disturb their neighbor's reasonable use and enjoyment of the neighbor's property. *Weinhold v. Wolff*, 555 N.W.2d 454 (Iowa 1996).

As explained in the argument herein on the preceding issue, Mr. Garrison established that the statutory immunity for nuisance suits does not apply in this case. The statutes are facially unconstitutional with respect to damages for diminution of property value, and they are unconstitutional as applied to the facts in this case. Furthermore, the district court, in ruling on the *Gacke* factors, held that Mr. Garrison has suffered a nuisance from the Defendants' CAFO operation.

But even without the immunity, Mr. Garrison presented facts that preclude summary judgment. It is important to point out first that the nuisance claim is based strictly on odor, not the water pollution claims. This was made clear in the hearing on April 9 (April 9, 2021 Hrg. Tr. p. 9-10)(App. Volume 2, p. 11-12). Next, the immunity statutes contain exceptions to the immunity

protection for animal feeding operations. Those exceptions are either of the following:

> a. The failure to comply with a federal statute or regulation or a state statute or rule which applies to the animal feeding operation.
>
> b. Both of the following:
>
> > (1) The animal feeding operation unreasonably and for substantial periods of time interferes with the person's life and property.
> >
> > (2) The animal feeding operation failed to use existing prudent generally accepted management practices reasonable for the operation.

Iowa Code §§ 657.11(2) and 657.11A(5).

Mr. Garrison submitted substantial evidence that the Defendants' animal feeding operation has unreasonably interfered with his life and property for substantial periods. And the district court made that finding in its May 4, 2021 Order (App. Volume 2, p. 404), as explained in the argument herein on the preceding issue.

The record further shows that the Defendants have not used existing prudent generally accepted management practices reasonable for the operation. First, it is important to note that the statute does not define what are generally accepted management practices reasonable for the operation. Is it reasonable for the operation to create odors that cause the kind of impacts that Mr. Garrison and his witnesses describe? Nor is there any indication as to what

management practices are generally accepted. That certainly makes the issue a jury question not appropriate for resolution by summary judgment. The issue of existing prudent generally accepted management practices reasonable for the operation, by its terms, depends on reasonableness, just like negligence. On that very basis of reasonableness being a nebulous concept dependent on subjective views of the facts, negligence has been held to rarely be susceptible of summary judgment. *Daboll v. Hoden*, 222 N.W.2d 727 (Iowa 1974); Iowa Rule of Apellate Procedure 6.904(3)(j).

Defendants identified a witness named John Baumgartner who is with a company that builds and installs electrostatic fences. These fences allegedly capture particles that carry odor-causing chemicals (Baumgartner depo. p. 8-9)(App. Volume 1, p. 66). One of these fences was installed on the north end of the Defendants' CAFO building (Baumgartner depo. p. 13)(App. Volume 1, p. 67). This was the first fence Mr. Baumgartner's company had ever installed (Baumgartner depo. p. 11-12)(App. Volume 1, p. 66-67), so it was not a generally accepted management practice. Mr. Baumgartner had no discussion with the Defendants about installing a fence on the other sides of the building, even though there are exhaust fans on all four sides of the building (Baumgartner depo. p. 15; photos of CAFO building)(App. Volume 1, p. 67; Volume 2, page 283). When Mr. Baumgartner was asked in deposition how

effective the fence was in reducing odors, he cited a study that concluded the fence was only about 30% effective in reducing odors (Baumgartner depo. p. 12)(App. Volume 1, p. 67). So, the summary of Mr. Baumgartner's testimony was that the electrostatic fence is not a generally accepted management practice and that only putting the fence on one side of the building is not reasonable for the operation because there are fans on all four sides of the building dispersing odor.

In addition, the Defendants did not plant trees around the CAFO building to mitigate the odor (aerial photo of CAFO building)(App. Volume 2, p. 282). Jay Moore told Mr. Garrison that the Defendants would plant trees along the property line with Mr. Garrison's property, but no trees were ever planted (Garrison March 18, 2021 affidavit)(App. Volume 1, p. 368).

The foregoing clearly raises factual issues as to whether the Defendants have used existing prudent generally accepted management practices reasonable for the operation. It is the Defendants' burden in supporting a motion for summary judgment to show that there are no factual issues. The purpose of a summary judgment is not for the court to weigh evidence and decide the case, but only to decide if there are factual issues that should be decided by a jury.

Therefore, the district court erred in granting summary judgment on Mr. Garrison's nuisance claim.

2. Trespass

Trespass occurs when a defendant causes a thing, e.g., pollutants, to enter the land possessed by another. *Robert's River Rides v. Steamboat Devel. Corp.*, 520 N.W.2d 294 (Iowa 1994). In this case Mr. Garrison alleges that the Defendants, in overapplying manure from their CAFO to the crop field adjacent to Mr. Garrison's property, allowed excess manure to enter Mr. Garrison's property.

The Defendants caused damage to Mr. Garrison's property by causing pollution to be discharged from their operation to Mr. Garrison's property. They have done this by overapplying manure to the crop field adjacent to Mr. Garrison's property. Overapplication means that more manure is being applied to the field than the crops need for optimum fertilization. The excess manure not being used by the crops then runs off, either on the surface of the field or through tiling or groundwater under the surface. This runoff contains pollutants, primarily nitrogen and phosphorus, which adversely impact the water on Mr. Garrison's property.

Mr. Garrison presented substantial evidence that manure was being overapplied and that the overapplication was causing excess nitrogen and phosphorus to be drained to his property.

First, Mr. Garrison had results of water tests showing increased levels of pollutants after the Defendants began applying manure to the adjacent field. Mr. Garrison took samples from 2001-2013 (2001-2013 water test results)(App. Volume 2, p. 80). He also took samples from 2016-2019, when the Defendants were applying manure to the field (2016-2019 water test results)(App. Volume 2, p. 81). In the 2001-2013 test results the nitrate level never exceeded 10 ppm, with one exception when chicken litter was applied. The 2016-2019 results, on the other hand, showed 46 results above 10 ppm and only 18 results at 10 ppm or below. The only change in circumstances between the earlier tests and the later tests was the Defendants' application of manure and installation of pattern tiling. A reasonable jury could find causation on these facts. The question of proximate cause is a question of fact that may be taken from the jury only in exceptional cases. Iowa Rule of Appellate Procedure 6.904(3)(j); *Robinson v. Perpetual Services Corp.*, 412 N.W.2d 562, 568 (Iowa 1987).

The district court claimed that these test results did not prove anything because Mr. Garrison did not have an expert to testify about what the test

results mean. The court was incorrect for two reasons. The test results are easily interpreted and do not require an expert. And Mr. Garrison is an agricultural engineer and has had training in taking and interpreting water test results (Garrison January 2021 affidavit)(App. Volume 1, p. 88).

In addition, Mr. Garrison had experts who established that the overapplication of manure and the pattern tiling of the crop field caused the pollution to Mr. Garrison's property. Two of Mr. Garrison's experts, Robert Streit and Paul Kassel, professional agronomists, explain why the application of manure by the Defendants exceeds the appropriate agronomic rate (Streit and Kassel reports)(App. Volume 2, p. 183; Volume 2, page 185). Mr. Streit explained how too much nitrogen harms the crops so the crops won't use it. Nitrates do not adhere to soil particles and are soluble and leachable. So if excessive nitrates are present near the root zone of the plants, they move with water flowing through the soil. Mr. Streit has calculated from the nitrogen content of the manure in the Defendants' CAFO that the manure was applied at a rate exceeding the appropriate amount needed to fertilize the crops.

Mr. Kassel reviewed the manure management plan (MMP) for the Defendants' operation. The MMP purports to calculate how much manure can agronomically be applied to the crop field based on the Defendants' specific operation. Mr. Kassel noted that the current rule of the Iowa Department of

Natural Resources (IDNR) for MMP's is to use a factor of 1.2 pounds of nitrogen per bushel of expected corn production on the field where the manure is to be applied. Iowa State University, however, through research has determined a Corn Nitrogen Rate Calculator. Mr. Kassel found that the recommended nitrogen rate determined by the Calculator would be about 180 pounds per acre. The Defendants' MMP, however, allows a nitrogen application rate of 232 pounds per acre, about 52 pounds per acre above what is recommended by the Corn Nitrogen Rate Calculator. This excessive nitrogen application would lead to loss of nitrate from the field. The Defendants did not present any contrary expert testimony in the record and their own water tests showed elevated levels of nitrogen and phosphorus.

In addition, Roger Patocka, a professional engineer, has explained how the Defendants' pattern tiling of the field adjacent to Mr. Garrison's property directs more discharge to Mr. Garrison's property than would otherwise be the case (Patocka report)(App. Volume 2, p. 162). Mr. Patocka noted that the natural surface drainage from the Defendants' field flows toward Mr. Garrison's property into the receiving stream that flows into Mr. Garrison's wetland on his property, and then to the West Fork of the Des Moines River. Mr. Patocka then discussed the pattern tiling installed in the Defendants' field. He explained that the purpose of drainage tile is obviously to drain water.

Tiling modifies the natural subsurface flow of groundwater. In this case Mr. Patocka concluded that the pattern tiling on Defendants' field directs most of the drainage to the outflow pipe into the stream that flows into Mr. Garrison's property.

Mr. Patocka also submitted a rebuttal report in response to an expert designated by the Defendants (Patocka rebuttal report)(App. Volume 2, p. 178). Mr. Patocka observed that the Defendants' expert did not address the relevant issues. In conclusion, Mr. Patocka's rebuttal report states:

> The Sanderson field lies in the steeper portions of western Emmet County. Admittedly, some private random drainage tiles have been installed, over the past century or so, in some smaller local areas in western Emmet County. The area containing the Sanderson fields have never been organized as a drainage district in Emmet County because of the dominant, relatively steep soil slopes and catchment areas with relatively steep gradients for drainageways. Since much of the Sanderson site lies on sloping land that exhibits significant (to highly erodible) slopes for surface drainage, it obviously is a good candidate for soil conservation measures. However, pattern tiling may not be as effective a measure to counteract erosion on steeper soils, while optimizing pollution control and realizing compatible crop production.

Therefore, the district court erred in determining that Mr. Garrison did not present a factual issue supporting his trespass claim.

3. Violation of Iowa Drainage Law

Under Iowa drainage law "liability . . . exists if (1) the manner or method of drainage is substantially changed and (2) actual damage results."

O'Tool v. Hathaway, 461 N.W.2d 161, 163 (Iowa 1990). A corollary of that rule is an overriding requirement that one must exercise ordinary care in the use of one's property so as not to injure the rights of neighboring landowners. *Oak Leaf Country Club v. Wilson*, 257 N.W.2d 739, 745 (Iowa 1977).

In April of 2017 the Defendants installed pattern tiling on the field adjacent to Mr. Garrison's property. The field is in the shape of a backwards "L." Prior to that installation of the tile, there was an elevated spur right at the inside corner of the backwards "L" that caused the drainage on the land to split at that point with the drainage from the horizontal eastern portion of the backward "L" to not naturally drain onto Mr. Garrison's property. When the Defendants put in the pattern tiling on the Sanderson property (Dep. Ex 2)(App. Volume 1, p. 44), they trenched through that elevated spur which caused substantially more of the drainage to flow to Mr. Garrison's property to the north rather than follow the natural course of flow south or onto the wetland portion of the adjacent property located in the crux of the backward "L" shaped Sanderson farm (Garrison January 2021 Affidavit)(App. Volume 1, p. 88).

By substantially changing the drainage from the Sanderson field by pattern tiling and causing increased water and pollution to be directed onto Mr. Garrison's property, the Defendants violated Iowa drainage law.

III. THE DISTRICT COURT ERRED IN FINDING THAT THE DAMAGE CAP IN IOWA CODE § 657.11A(3)(c) IS CONSTITUTIONAL.

A. Preservation of the Issue for Review

This issue was preserved for review by Mr. Garrison filing a motion challenging the constitutionality of the damage cap (damage cap motion)(App. Volume 1, p. 121) and the district court issuing an order denying the motion (damage cap order)(App. Volume 1, p. 377) .

B. Standard of Review

This issue is reviewed for errors of law. *Gravert v. Nebergall*, 539 N.W.2d 184 (Iowa 1995). Constitutional issues are reviewed de novo. *Gacke v. Pork Xtra LLC*, 684 N.W.2d 168 (Iowa 2004). A statute is presumed to be constitutional and the burden is on the party challenging the statute to rebut that presumption. *Id*.

C. Argument

Iowa Code § 657.11A(3) states, in part, that a plaintiff may recover compensatory special damages caused by a nuisance:

> However, the total damages awarded to a person under this paragraph [] shall not exceed one and one-half times the sum of any damages awarded to the person for [diminution of property value and damages due to adverse health condition].

Damages in livestock nuisance cases have been described as follows:

> Special damages in nuisance cases are not subject to any precise rule for ascertaining damages because these damages are not susceptible of exact measurement. . . . [The damages represent] personal inconvenience, annoyance, discomfort, and loss of full enjoyment of the property caused by the [nuisance].

Weinhold v. Wolff, 555 N.W.2d 454,465-466 (Iowa 1996).

1. The Statute is Unconstitutional on its Face

A facial challenge to the constitutionality of a statute asserts that no application of the statute could be constitutional under any set of facts. *Honomichl*, 914 N.W.2d at 231. In this case, as will be discussed below, the damage cap in § 657.11A(3) violates fundamental rights of any person bringing a nuisance suit against a livestock operation. If a person has the right to bring a nuisance suit, the damage cap would apply in all circumstances for any such suit.

It is clear that the damage cap in § 657.11A applies no matter what the facts of the case are, as long as the jury finds that a nuisance exists. The statue flatly limits the compensatory damages, except for diminution of value of real property and adverse health impacts, to one and one-half times the damages for the real property and health damages. There are no exceptions and no considerations related to the specific facts of the case. The damage cap is a purely arbitrary standard with no apparent basis or rationale.

It is worth noting that although the Iowa courts have apparently not had occasion to address the constitutionality of damage caps under state law or the Iowa Constitution, other states have addressed damage caps under their respective state constitutions.

Five states even prohibit damage caps in their state constitutions.

● Article II, § 31 of the Arizona constitution provides, "No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person."

● Article V, § 32 of the Arkansas constitution provides, "No law shall be enacted in this state limiting the amount of damages to be recovered for injuries resulting in death or for injuries to persons."

● Section 54 of the Kentucky constitution provides, "The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."

● Article III, § 18 of the Pennsylvania constitution provides in part, "[I]n no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property."

● Article 10, § 4 of the Wyoming constitution provides in part, "No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person."

A. <u>Rights of Persons</u>

Article I, Section 1 of the Iowa Constitution states:

> All men and women are, by nature, free and equal, and have certain inalienable rights – among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.

This provision was described by Justice Appel in his dissent in *State v. Brown*, 930 N.W.2d 840 (Iowa 2019), as follows:

> The Iowa Constitution includes sweeping language in the inalienable rights clause of Article I, Section 1 based on the Virginia Declaration of Rights, incorporated by Thomas Jefferson into the Declaration of Independence, but not embraced by Madison in the United States Constitution because of fear such language would provoke controversy with slave states. No such hesitation in Iowa. Indeed, George Ells, Chairman of the Committee on the Preamble and Bill of Rights, stated the committee wanted provisions in the Iowa Bill of Rights that "would enlarge, and not curtail the rights of the people" and would "put upon record every guarantee that could be legitimately placed there in order that Iowa . . . might also have the best and most clearly defined Bill of Rights." 1 The Debates at 100. Ells further stated that "the Bill of Rights is of more importance than all the other clauses in the Constitution put together, because it is the foundation and written security upon which the people rest their rights." Id at 103.

Article I, Section 1 can be divided into three rights: the right to defend life and liberty, the right to possess and protect property, and the right to safety and happiness. If a plaintiff establishes a nuisance, which must be assumed to be the case if the question of damages is reached, the rights protected by Article I, Section 1 are clearly implicated. The plaintiff is defending his or her life and liberty, i.e., the right to enjoy life and the liberty to live on one's own

property in comfort and without annoyance. Also, a nuisance suit is the legal remedy for protecting one's property from devaluation and interference. Finally, the essence of a nuisance case is the loss of the safety and happiness of possessing and enjoying one's own property.

Arbitrarily limiting the damages that a jury has properly awarded violates these rights. The purpose of a damage award is to adequately compensate the plaintiff for the injury inflicted. It is adequate damages that give life to the rights enshrined in Article I, Section 1. Without adequate damages being awarded, a plaintiff cannot really defend his life and liberty in defending the enjoyment and liberty to live on one's own property; nor to protect one's property from interference; nor to preserve and protect one's safety and happiness in one's own property.

B. <u>Right to a Jury</u>

Article I, Section 9 of the Iowa Constitution states:

The right of trial by jury shall remain inviolate.

Trial by jury in civil cases is a fundamental right for claims created by common law, such as nuisance and trespass. *State ex rel. Bishop v. Travis*, 306 N.W.2d 733 (Iowa 1981). A statute infringing on fundamental rights is subject to strict scrutiny analysis. *Planned Parenthood v. Reynolds*, 915 N.W.2d 266 (Iowa 2018); *State v. Russell*, 897 N.W.2d 717 (Iowa 2017). A statute will

survive strict scrutiny only if it is narrowly tailored to serve a compelling government interest. *Id*. A compelling government interest is one which is essential and necessary, rather than simply a matter of choice, preference or discretion. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

The alleged governmental interest set forth in § 657.11A is:

> to encourage persons involved in animal agriculture to adopt existing prudent and generally utilized management practices for their animal feeding operation, thereby enhancing the fundamental role of animal agriculture in this state by providing a reasonable level of protection to persons engaged in animal agricultural production from certain types of nuisance actions.

This hardly describes a governmental interest that is essential and necessary. In fact, this is essentially the same alleged interest claimed to support the immunity established in § 657.11, which has been declared unconstitutional even in a rational basis analysis. *Gacke v. Pork Xtra LLC*, 684 N.W.2d 168 (Iowa 2004); *Honomichl v. Valley View Swine LLC*, 914 N.W.2d 223 (Iowa 2018). So, if that interest cannot survive even a rational basis analysis, it certainly cannot survive a strict scrutiny analysis.

Most of the decisions in other states holding that damage caps are unconstitutional were based on the right to trial by jury. Those other state constitutions have a provision almost identical to Iowa's, that the right to trial by jury is inviolate.

In *Moore v. Mobile Infirmary Ass'n.*, 592 So.2d 156 (Ala. 1991), the Alabama Supreme Court held that a statute limiting damages in medical malpractice cases was unconstitutional in violation of the right to a jury trial. Article I, § 11 of the Alabama Constitution states that "the right of trial by jury shall remain inviolate." The court emphasized that the right to trial by jury includes the right to have the jury assess damages, especially non-economic damages that are not susceptible of precise measurement.

The Georgia Supreme Court, in *Atlanta Oculoplastic Surgery v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010), held that a limit on non-economic damages in medical malpractice cases violated the right to trial by jury and was unconstitutional. Article I, § 1 of the Georgia Constitution states, "the right to trial by jury shall remain inviolate." The court held that a damage cap nullifies the jury's verdict and therefore infringes on a plaintiff's right to have the case, including damages, determined by a jury.

The Illinois Supreme Court, in *Lebron v. Gottlien Mem'l. Hosp.*, 930 N.E.2d 895 (Ill. 2010), took a somewhat different approach in holding a damage cap in medical malpractice cases unconstitutional. The court held that the damage cap violated the separation of powers established in the Illinois Constitution because the legislature was infringing on the power of a function

of the judiciary, a separate branch of government. This was simply another way of saying that the damage cap infringed on the right to a jury.

In *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509 (Kan. 2019), the Kansas Supreme Court held that a damage cap in all personal injury actions violated the right to trial by jury. The Kansas Bill of Rights, § 5, states that "the right to trial by jury shall be inviolate." The court first determined that the right to a jury is "a basic and fundamental feature of American jurisprudence." Because the right to a jury is a fundamental right, the court said a presumption of constitutionality of a statute infringing on that right does not apply. The court concluded by saying:

> The individual right to trial by jury cannot "remain inviolate" when an injured party is deprived of the jury's constitutionally assigned role of determining damages according to the particular facts of the case.

Id. at 514-515.

In *Lakin v. Senco Products, Inc.*, 987 P.2d 463 (Or. 1999), the Oregon Supreme Court held that a damage cap violated the right to a jury trial. Article I, § 17 of the Oregon Constitution states, "In all civil cases the right of Trial by Jury shall remain inviolate." At issue was a statute that placed a cap on non-economic damages in all civil cases. The defendant in that case argued that the jury was allowed to assess damages, but the cap required the court to reduce any damages above the cap. The court rejected that argument, citing

Charles T. McCormick, *Handbook on the Law of Damages* 24 (1935), that "The amount of damages . . . from the beginning of trial by jury, was a 'fact' to be found by the jurors." So, a plaintiff has the constitutional right to all the damages assessed by the jury.

The Washington Supreme Court, in *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989), also held that damages are a question of fact to be determined by a jury. Article I, § 21 of the Washington Constitution states in part, "The right of trial by jury shall remain inviolate." The court also responded to the defendant's argument that the damage cap was no different than a judge's power of remittitur. Remittitur is a finding by a court, based on the specific facts of a case and subject to the court's discretion, that the damages are not supported by the facts. A damage cap, on the other hand, is an arbitrary limit on damages irrespective of the facts of the case.

In all of these cases the language in the respective state constitutions regarding the right to a jury is essentially identical to the language in the Iowa Constitution. A damage cap takes from a plaintiff the constitutional right to a decision by a jury. Section 657.11A(3) is therefore an unconstitutional violation of the right to a jury trial.

There are a few cases that have found damage caps to be constitutional. A recent case representative of this line of decisions is *McClay v. Airport Mgmt.*

Servs., 596 S.W.3d 686 (Tenn. 2020). That case involved a cap on noneconomic damages in civil cases in general. The Tennessee constitution contained a provision identical to Iowa's that the right of trial by jury shall remain inviolate. The majority opinion in *McClay* acknowledged that determination of the amount of damages incurred by the plaintiff is a question of fact for the jury. The majority then cited prior Tennessee cases purporting to state that the legislature can establish what causes of action a plaintiff can bring and what remedies a plaintiff may seek. The majority then made the leap of logic that a jury can determine as a question of fact the amount of damages sustained by the plaintiff but then the judge, pursuant to the legislatively imposed damage cap, must nullify the jury's verdict and reduce the jury's award if it exceeds the cap, and that such a procedure does not violate the right to a jury. More specifically the majority cited to an Ohio case that said, "so long as the fact-finding process is not intruded upon and the resulting findings of fact are not ignored or replaced by another body's findings, awards may be altered as a matter of law." *Id*. at 692. The problem with this statement is that the fact-finding process is being intruded upon if the jury's fact finding as to damages is being overruled and nullified by a legislative mandate with no relevance to the facts of the case.

Judge Clark's dissenting opinion in *McClay* quoted from the United States Supreme Court opinion in *Dimick v. Schiedt*, 293 U.S. 474, 480, 487, 55 S.Ct. 296 (1935), interpreting the right to a jury trial in the Seventh Amendment to the U.S. Constitution:

> [T]he common law rule as it existed at the time of the adoption of the Constitution [was that] in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it.
>
> **********
>
> It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present role in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. But here we are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution. The distinction is fundamental . . . .

In short, the legislature can change the law but not the constitution. The right to trial by jury is constitutional and cannot be changed by the legislature.

C. <u>Equal Protection</u>

> Article I, § 6 of the Iowa Constitution states:
>
> 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.

This is essentially an equal protection clause. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). To prove an equal protection violation, a plaintiff must first establish that the statute treats similarly situated individuals differently. *McQuistion v. City of Clinton*, 872 N.W.2d 817 (Iowa 2015). Although equal protection does not demand that a statute apply equally to all persons, it does require that persons similarly situated **with respect to the legitimate purpose of the law** receive similar treatment. *Racing Assoc. Of Central Iowa v. Fitzgerald*, 675 N.W.2d 1 (Iowa 2004) (RACI). The statute must serve a legitimate governmental interest and the claimed state interest must be realistically conceivable. *Id*. This requires the court to determine if the claimed state interest has a basis in fact. *Id*. Although a statute relating to economic policy and regulation is entitled to deference, "a citizen's guarantee of equal protection is violated if desirable legislative goals are achieved by the state through wholly arbitrary classifications or otherwise invidious discrimination." *Federal Land Bank v. Arnold*, 426 N.W.2d 153, 156 (Iowa 1988).

Based on the foregoing, it is necessary to determine the nature of the discriminatory treatment imposed by § 657.11A(3), the claimed purpose of the discrimination, and whether the alleged purpose has a basis in fact. The nature of the discrimination in this case has two aspects. One is the unequal treatment by the damage cap between plaintiffs who are able to prove significant non-

economic damages in excess of 150% of the loss of value in their property and those plaintiffs who do not have such significant damages. The other type of discrimination is between plaintiffs injured by a nuisance other than an animal feeding operation and plaintiffs injured by a nuisance from an animal feeding operation. Plaintiffs in the first class of nuisance cases have no limitation on the damages they can recover, while the latter class have arbitrary limits imposed by § 657.11A.

The claimed purpose of the discrimination is set forth in § 657.11A(1)(a) and (b), as follows:

> 1.a. *Findings*. The general assembly finds that important public interests are advanced by preserving and encouraging the expansion of responsible animal agricultural production in this state which provides employment opportunities in and economic growth for rural Iowa, contributes tax revenues to the state and to local communities, and protects our valuable natural resources.
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> 1.b. *Purpose*. The purpose of this section is to encourage persons involved in animal agriculture to adopt existing prudent and generally utilized management practices for their animal feeding operations, thereby enhancing the fundamental role of animal agriculture in this state by providing a reasonable level of protection to persons engaged in animal agricultural production from certain types of nuisance actions.

There was no evidence presented to the legislature, however, that the status quo in effect in 2017, when § 657.11A was passed, had discouraged the expansion of animal feeding operations in Iowa. In fact, by 2018 the number of animal feeding operations in Iowa was growing at a rate of around 200 per

year. N. William Hines, *Here We Go Again: A Third Legislative Attempt to Protect Polluting Iowa CAFOs from Neighbors' Nuisance Actions*, 103 Iowa L. Rev. 41, 43 (2018)(Hines).

It is obvious that the New Fashion Pork CAFO at issue in this case was not discouraged from constructing and operating its facility in 2015, 11 years after the *Gacke* decision. It is also significant that the Iowa Senate debate on § 657.11A did not even mention the damage cap. See, Senate Video at *https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20170314163649480&dt=2017-03-14*. Furthermore, in that Senate Video Senator Zumbach, the floor manager of the bill, admitted in response to a question, that the livestock industry was in a "growth culture." Also, when Senator Zumbach was asked what problem the legislation was supposed to address, his nonsensical response was that it would enable a young farmer to go to the bank and get a loan to construct a CAFO. Of course, the bank only cares if the farmer can repay the loan, not whether the legislature places restrictions on nuisance suits. Senator Zumbach could not show that restrictions on nuisance suits would advance the alleged purpose for the statute. So there was no basis in fact for the alleged purpose of the legislation.

In summary, the stated purpose of § 657.11A is to encourage alleged existing prudent and generally utilized management practices in animal agriculture. But limiting nuisance suits would tend to have just the opposite effect. Encouraging good conduct by imposing liability on wrongdoers is one of the salient purposes of civil litigation. As shown above there was no proof that the legislation would achieve its stated purpose. More specifically, the damage cap certainly has no relevance to encouraging good conduct by CAFO operators. Again, it would have just the opposite effect. In our system of civil justice it is understood that holding actors accountable for wrongful conduct inhibits that conduct. It is also understood that refusing to hold actors accountable for their conduct encourages them to continue to engage in that conduct.

Nothing in the stated purpose of § 657.11A justifies the discrimination imposed by the damage cap. There is no reason that plaintiffs in CAFO nuisance cases should be treated differently than plaintiffs in other nuisance cases. This is especially true if the plaintiff established his or her residence before the CAFO was constructed. Nor is there any basis for discriminating against plaintiffs in CAFO nuisance cases on the basis of the damage limitations in § 657.11A. In fact, the damage cap creates two perverse impacts. Because the cap relates to non-economic damages and is based on the

diminution of value in the real estate, a plaintiff with more valuable real estate would be entitled to more damages than a plaintiff with real estate of lesser value, even though the owner of the less valuable real estate may be subject to a more serious nuisance. Also, a plaintiff who has more serious non-economic damages is adversely impacted by the damage cap than a plaintiff who has less serious non-economic damages.

Courts in other states have addressed damage caps with respect to equal protection. It does not appear, however, that any of these cases involved damage caps specifically in nuisance cases. The cases address damage caps in medical malpractice cases or in civil damage actions in general.

In *Beason v. I.E. Miller Services, Inc.,* 441 P.3d 1107 (Okla. 2019), the Oklahoma Supreme Court held that a statute that limited non-economic damages in all personal injury actions, but exempted from that limitation wrongful death actions, violated equal protection. The court said that the damage cap targeted for different treatment members of the entire class of similarly situated persons who sue to recover for bodily injury. Likewise, all plaintiffs in nuisance cases should be treated equally.

In *Estate of McCall v. United States*, 134 So.3d 894 (Fla. 2014), the Florida Supreme Court held that a cap on damages in medical malpractice cases violated equal protection because the cap did not bear a rational

relationship to the stated purpose of the cap, i.e., the alleged medical malpractice insurance crisis in Florida. The court determined, first of all, that it was unfair to restrict the damages of the most seriously injured plaintiffs. Secondly, the court reviewed the facts and found that the medical malpractice "crisis' was not primarily caused by allegedly excessive damage awards. So the denial of equal protection did not bear a reasonable relationship to the purported basis for the damage cap. That is exactly the situation we have with respect to § 657.11A(3). As explained above, there was no need to encourage animal feeding operations which were already in a "growth culture," and a damage cap certainly would not add to that.

D. Due Process

Substantive due process is similar to equal protection. *Behm v. City of Cedar Rapids*, 922 N.W.2d 524 (Iowa 2019). If a fundamental right is involved, the defendant must show that there is a compelling state interest to be protected and that the means chosen in the statute to promote the alleged purpose of the statute is narrowly tailored to achieve its objectives. *Id*. As explained above, a nuisance plaintiff has a fundamental right to a jury trial and to have the jury determine damages.

Even if a fundamental right were not involved, a defendant must show that there is a reasonable relationship between the purpose of the statute and

the means chosen to advance that purpose. *Id*. As explained above, there was no showing that there was a valid concern about allegedly protecting animal feeding operations and there was no showing that the damage cap imposed by § 657.11A(3) would advance that purpose.

CONCLUSION

For all of the reasons stated above, the district court's denial of Mr. Garrison's motions challenging the constitutionality of the immunity granted to animal feeding operations in Iowa Code §§ 657.11(3)(c) and 657.11A(2) and the constitutionality of the damage cap in Iowa Code § 657.11A(3)(c) must be reversed. Further, the district court's issuance of summary judgment on behalf of the Defendants on all of Mr. Garrison's claims must also be reversed. The matter should be remanded for trial on all issues with instructions to the district court to find the immunity provisions and damage cap unconstitutional.

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REQUEST FOR ORAL ARGUMENT

The Plaintiff-Appellant respectfully requests oral argument on all of the issues in this appeal.

/s/ Wallace L. Taylor
WALLACE L. TAYLOR

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R.App.P.6.903(1)(d) and Iowa R.App.P.6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in font size 14 and contains 11,361 words, excluding the parts of the brief exempted by Iowa R.App.P.6.903(1)(g)(1).

___ August 17, 2021_____ /s/ *Wallace L. Taylor*

DATE WALLACE L. TAYLOR

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of August, 2021, I electronically filed the Appellant's Brief with the Supreme Court of Iowa, and that a copy was served electronically on:

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