ELECTRONICALLY FILED AUG 17, 2021 CLERK OF SUPREME COURT

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 REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 3

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW. 7

ARGUMENT 10

I. THE COURT SHOULD NOT OVERTURN THE *GACKE* DECISION 10

II. MR. GARRISON PRESERVED THE "TAKINGS" ISSUE BY ARGUING THAT ISSUE BEFORE THE DISTRICT COURT IN THE BRIEF SUPPORTING THE MOTION TO STRIKE DEFENDANTS' STATUTORY IMMUNITY AFFIRMATIVE DEFENSES 15

III. MR. GARRISON HAS RECEIVED NO BENEFIT FROM THE IMMUNITY STATUTE. 17

IV. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT. 20

V. THE DISTRICT COURT ERRED IN FINDING THAT THE DAMAGE CAP IN IOWA CODE § 657.11A(3)(c) IS CONSTITUTIONAL. 27

CONCLUSION 34

CERTIFICATE OF COMPLIANCE 36

CERTIFICATE OF SERVICE 37

TABLE OF AUTHORITIES

Page

I. JUDICIAL DECISIONS

Beck v. Fleener,
376 N.W.2d 594 (Iowa 1985) 16

Bellach v. IMT Ins. Co.,
573 N.W.2d (Iowa 1998) 16

Benschoter v. Hakes,
232 Iowa 1354, 8 N.W.2d 481 (1943) 27-28,29

Braverman v. Eicher,
238 N.W.2d 331, 334 (Iowa 1976) 23

Channon v. United Parcel Service, Inc.,
629 N.W.2d 835 (Iowa 2001) 32

Clark v. State,
955 N.W.2d 459 (2021) 24

Dalarma v. Access Energy Coop.,
792 N.W.2d 656 (Iowa 2010) 11

DeToskey v. Ruan Transp. Corp.,
40 N.W.2d 4 (Iowa 1949). 34

Dimick v. Schiedt,
293 U.S. 474, 55 S.Ct 296 (1935) 30

Eggiman v. Self-Insured Services Co.,
718 N.W.2d 754 (Iowa 2006) 17

Feltner v. Columbia Pictures Television, Inc.,
523 U.S. 340, 118 S.Ct. 1279 (1998). 33

Freeman v. Grain Processing Corp.,
848 N.W.2d 58 (Iowa 2014). 14

Gacke v. Pork Xtra LLC,
684 N.W.2d 168 (Iowa 2004) 10,14,15,17,19

Gravert v. Nebergall,
539 N.W.2d 184 (Iowa 1995) 19,27

Hildreth v. Tomlinson,
2 Greene 360 (Iowa 1849) 10

Honomichl v. Valley View Swine LLC,
914 N.W.2d 223 (Iowa 2018) 11,13

Kiesau v. Bantz,
686 N.W.2d 164 (Iowa 2004) 10

Labrayere v. Bohr Farms LLC,
458 S.W.3d 319 (Mo. 3015). 32

Lemartec Eng'g. And Const. v. Advance Conveying Techs.,
940 N.W.2d 775 (Iowa 2020) 25

McClay v. Airport Mgmt. Servs.,
596 S.W.3d 686 (Tenn. 2020) 29,30

McElroy v. State,
703 N.W.2d 385 (Iowa 2005) 10

McIlrath v. Prestage Farms,
No. 15-1599 (Ia. App. 2016). 19

Pitcher v. Lakes Amusement Co.,
236 N.W.2d 333 (Iowa 1975) 31

Reed v. Wright,
2 Greene 15 (Iowa 1849) 33,34

Robinson v. Perpetual Services Corp.,
412 N.W.2d 562 (Iowa 1987) 21

State v. Liddell,
672 N.W.2d 805 (Iowa 2003) 11

State v. Miller,
841 N.W.2d 583 (2014) 11

State v. Osborne,
171 Iowa 678, 154 N.W. 294 (1915). 28

Steinberg-Baum & Co. v. Countryman,
247 Iowa 923, 77 N.W.2d 15 (1956). 27

Stuart v. Pilgrim,
247 Iowa 709 (1956). 11

Tull v. United States,
481 U.S. 412, 107 S.Ct. 1831 (1987) 33

Wright v. Repp Farms, Inc.,
2005 Iowa App. LEXIS 371, *5 (Ia. App. 2005) 22

II. STATUTES AND RULES

567 I.A.C. § 65.15(14). 13

Iowa Code, Chapter 468 22

Iowa Code § 459.202(b) 12

Iowa Code § 459.303. 13

Iowa Code § 459.305. 13

Iowa Code § 657.11. 27

Iowa Code § 657.11(2) 14,15,19,20

Iowa Code § 657.11(4) 18

Iowa Code § 657.11A.5 15

Iowa Constitution, Article I, § 1. 14,27,28

Iowa Rule of Appellate Procedure 6.904(3)(j). 21

Iowa Rule of Evidence 5.701. 22

Seventh Amendment to the U.S. Constitution. .30,31,32

III. OTHER AUTHORITIES

Theodore Thomas Appel, Note, *Do Legislators Under Iowa's Golden Dome Know Better? Surveying Jury-Trial Constitutional Challenges on Damage Caps and Application to the Iowa Constitution,* 106 Iowa L. Rev. 813 (2021) 31-32

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. THE COURT SHOULD NOT OVERTURN THE *GACKE* DECISION.

Dalarma v. Access Energy Coop., 792 N.W.2d 656 (Iowa 2010)

Freeman v. Grain Processing Corp., 848 N.W.2d 58 (Iowa 2014)

Gacke v. Pork Xtra LLC, 684 N.W.2d 168 (Iowa 2004)

Hildreth v. Tomlinson, 2 Greene 360 (Iowa 1849)

Honomichl v. Valley View Swine LLC, 914 N.W.2d 223 (Iowa 2018)

Kiesau v. Bantz, 686 N.W.2d 164 (Iowa 2004)

McElroy v. State, 703 N.W.2d 385 (Iowa 2005)

State v. Liddell, 672 N.W.2d 805 (Iowa 2003)

State v. Miller, 841 N.W.2d 583 (2014)

Stuart v. Pilgrim, 247 Iowa 709 (1956)

567 I.A.C. § 65.15(14)

Iowa Code § 459.202(b)

Iowa Code § 459.303

Iowa Code § 459.305

Iowa Code § 657.11(2)

Iowa Constitution, Article I, § 1

II. MR. GARRISON PRESERVED THE "TAKINGS" ISSUE BY ARGUING THAT ISSUE BEFORE THE DISTRICT COURT IN THE BRIEF SUPPORTING THE MOTION TO STRIKE DEFENDANTS' STATUTORY IMMUNITY AFFIRMATIVE DEFENSES.

Beck v. Fleener, 376 N.W.2d 594 (Iowa 1985)

Bellach v. IMT Ins. Co., 573 N.W.2d (Iowa 1998)

Eggiman v. Self-Insured Services Co., 718 N.W.2d 754 (Iowa 2006)

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)

Iowa Code § 657.11(2)

Iowa Code § 657.11A.5

III. MR. GARRISON HAS RECEIVED NO BENEFIT FROM THE IMMUNITY STATUTE.

Gacke v. Pork Xtra LLC, 684 N.W.2d 168 (Iowa 2004)

Gravert v. Nebergall, 539 N.W.2d 184 (Iowa 1995)

Honomichl v. Valley View Swine LLC, 914 N.W.2d 223 (Iowa 2018)

McIlrath v. Prestage Farms, No. 15-1599 (Ia. App. 2016)

Iowa Code § 657.11(2)

Iowa Code § 657.11(4)

IV. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT.

Braverman v. Eicher, 238 N.W.2d 331, 334 (Iowa 1976)

Clark v. State, 955 N.W.2d 459 (2021)

Lemartec Eng'g. And Const. v. Advance Conveying Techs., 940 N.W.2d 775 (Iowa 2020)

Robinson v. Perpetual Services Corp., 412 N.W.2d 562 (Iowa 1987)

Wright v. Repp Farms, Inc., 2005 Iowa App. LEXIS 371, *5 (Ia. App. 2005)

Iowa Code, Chapter 468

Iowa Code § 657.11(2)

Iowa Rule of Appellate Procedure 6.904(3)(j)

Iowa Rule of Evidence 5.701

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

Benschoter v. Hakes, 232 Iowa 1354, 8 N.W.2d 481 (1943)

Channon v. United Parcel Service, Inc., 629 N.W.2d 835 (Iowa 2001)

DeToskey v. Ruan Transp. Corp., 40 N.W.2d 4 (Iowa 1949)

Dimick v. Schiedt, 293 U.S. 474, 55 S.Ct 296 (1935)

Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 118 S.Ct. 1279 (1998)

Gravert v. Nebergall, 539 N.W.2d 184 (Iowa 1995)

Labrayere v. Bohr Farms LLC, 458 S.W.3d 319 (Mo. 3015)

McClay v. Airport Mgmt. Servs., 596 S.W.3d 686 (Tenn. 2020)

Pitcher v. Lakes Amusement Co., 236 N.W.2d 333 (Iowa 1975)

Reed v. Wright, 2 Greene 15 (Iowa 1849)

State v. Osborne, 171 Iowa 678, 154 N.W. 294 (1915)

Steinberg-Baum & Co. v. Countryman, 247 Iowa 923, 77 N.W.2d 15 (1956)

Tull v. United States, 481 U.S. 412, 107 S.Ct. 1831 (1987)

Iowa Code § 657.11

Iowa Constitution Article I, § 1

Seventh Amendment to the U.S. Constitution

Theodore Thomas Appel, Note, *Do Legislators Under Iowa's Golden Dome Know Better? Surveying Jury-Trial Constitutional Challenges on Damage Caps and Application to the Iowa Constitution,* 106 Iowa L. Rev. 813 (2021)

ARGUMENT

I. THE COURT SHOULD NOT OVERTURN THE *GACKE* DECISION.

At the outset, Defendants' and Amicus's invitation to overrule the longstanding and repeatedly affirmed precedent of *Gacke v. Pork Xtra LLC*, 684 N.W.2d 168 (Iowa 2004), should be rejected. In *McElroy v. State*, 703 N.W.2d 385, 394 (Iowa 2005), the Iowa Supreme court noted that from "the very beginnings of this court, we have guarded the venerable doctrine of *stare decisis* and required the highest possible showing that a precedent should be overruled before taking such a step." Quoting, *Kiesau v. Bantz*, 686 N.W.2d 164, 180 n.1 (Iowa 2004) (Cady, J., dissenting) and citing *Hildreth v. Tomlinson*, 2 Greene 360, 361 (Iowa 1849). "Courts adhere to the holdings of past rulings to imbue the law with continuity and predictability and help

maintain the stability essential to society." *State v. Miller*, 841 N.W.2d 583, 586 (2014). In *State v. Liddell*, 672 N.W.2d 805, 813 (Iowa 2003), the Iowa Supreme Court held, as follows:

> [I]t is of the greatest importance that the law should be settled. Fairness to the trial courts, to the legal profession, and above all to citizens generally demands that interpretations once made should be overturned only for the most cogent reasons…. Legal authority must be respected; not because it is venerable with age, but because it is important that courts, and lawyers and their clients, may know what the law is and order their affairs accordingly.

Quoting, *Stuart v. Pilgrim*, 247 Iowa 709, 714 (1956).

The *Gacke* decision was previously reaffirmed in *Honomichl v. Valley View Swine LLC*, 914 N.W.2d 223 (Iowa 2018). In rejecting the Valley View Swine's request to overturn *Gacke*, the Iowa Supreme Court reaffirmed its allegiance to the doctrine of *stare decisis*. *Id.* at 236. And again, in *Dalarma v. Access Energy Coop.*, 792 N.W.2d 656 (Iowa 2010), the Supreme Court, in a unanimous decision, reaffirmed *Gacke* as settled law.

Gacke and *Honomichl* stand for the simple proposition that under our capitalist economic system businesses are not only free to make money by the mass production of pork in CAFO's, but encouraged to do so. However, those same businesses have to pay the reasonable cost of the resources they consume in doing so. Just like New Fashion Pork has to pay for the electricity, water and feed it uses to raise pigs, it has to pay for the consumption of the clean air

and water it takes from Mr. Garrison. New Fashion Pork's argument in this case, demanding that they should be able to consume precious resources WITHOUT PAYING FOR THEM should be vehemently rejected as an affront to our capitalist economic system.

Although the Defendants and Amicus do not make any substantive argument in support of their plea for this Court to overturn *Gacke*, it is necessary to examine the arguments made in *Honomichl* to show why *Gacke* should not be overturned. The defendants argued in *Honomichl* that changes in the laws and regulations subsequent to the *Gacke* decision would be sufficient to protect neighbors from a nuisance caused by a CAFO. The flaw in that argument, however, is that those laws and regulations do not address the facts of a nuisance case. The fact that the legal separation distance between a CAFO and a neighboring residence was increased to 1875 feet for CAFOs of a certain size, Iowa Code § 459.202(b), does not mean that a neighbor living greater than that distance is somehow not significantly and negatively impacted by the odor. That separation distance is only an arbitrary number designed to make it look like the livestock industry is doing something to accommodate the neighbors. There is no indication that it is sufficient to mitigate odor. In fact, in this case the evidence established, and the district court held (Immunity Order)(App. Volume 2, p. 404), that Mr. Garrison living

one-half mile from the CAFO suffered impacts from odor. By comparison, the Honomichls lived .67 miles away from the offending CAFO. *Honomichl*, 914 N.W.2d at 277. And Scott Benjamin testified that he is impacted by the odor and lives farther from the CAFO than Mr. Garrison does (April 9, 2021 Hrg. Tr. p. 14, 17)(App. Volume 2, p. 13,14).

Nor were post-*Gacke* laws and regulations regarding the construction of CAFOs sufficient to mitigate odor, as suggested by the defendants in *Honomichl*. Iowa Code § 459.303 (manure management plans) is designed to limit application of manure on crop fields and has no relevance to mitigating odor. 567 I.A.C. § 65.15(14)(construction of manure storage pits) is designed to ensure that the storage pit does not leak. Again, that has nothing to do with odor. Although Iowa Code § 459.305 requires a large CAFO to prepare a master matrix and some of the items in the matrix address separation distances, as noted above, the separation distances are arbitrary numbers that don't preclude the CAFO from still being a nuisance. Furthermore, it only takes a 50% score to "pass" the matrix. In any other context that would be an "F." It is possible, therefore, that a CAFO could "pass" the matrix based on criteria other than separation distance from neighbors.

It has long been understood that an activity may be entirely lawful and yet constitute a nuisance because of its impairment of the use and enjoyment

of specific property. *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58 (Iowa 2014). So the statutes and regulations purporting to regulate CAFOs do not preclude a nuisance suit.

It is also important to observe that the *Gacke* decision was carefully considered by the court. The court acknowledged that the Inalienable Rights Clause of the Iowa Constitution, Article I, § 1, is not absolute and is subject to reasonable regulation by the state in the exercise of its police power. *Gacke*, 684 N.W.2d at 176. The *Gacke* court further acknowledged the legislative purpose in passing the immunity provisions in Iowa Code § 657.11(2), as follows:

> The legislature's objective of promoting animal agriculture in this state promotes the interests of the public generally and the immunity granted in this statute bears a reasonable relationship to this legislative objective. Therefore, even though individual producers are the direct beneficiaries of the statutory immunity, we think this provision is within the police power of the state.

Id. at 178. The court concluded, however, that the immunity statute was not a reasonable regulation as applied to the facts of the case and was unduly oppressive. As the court explained:

> Property owners like the Gackes bear the brunt of the undesirable impact of this statute without any corresponding benefit. Moreover, their right to use and enjoy their property is significantly impaired by a business operated as a nuisance, yet they have no remedy. Unlike a property owner who comes to a nuisance, these landowners lived on and invested in their property long before Pork Xtra constructed its confinement facilities. Under these circumstances, the police power is

> not used for its traditional purpose of insuring that individual citizens use their property right and privileges . . . Instead, one property owner – the producer – is given the right to use his property *without* dur regard for the personal and property rights of his neighbor. We conclude that section 657.11(2) as applied to the Gackes is unduly oppressive and, therefore, not a reasonable exercise of the state's police power.

Id. at 179. So the *Gacke* decision was carefully crafted to strike the right balance between the legislative intent and the rights and freedom of CAFO neighbors to the use and enjoyment of their property.

II. MR. GARRISON PRESERVED THE "TAKINGS" ISSUE BY ARGUING THAT ISSUE BEFORE THE DISTRICT COURT IN THE BRIEF SUPPORTING THE MOTION TO STRIKE DEFENDANTS' STATUTORY IMMUNITY AFFIRMATIVE DEFENSES.

Mr. Garrison sought to strike the Defendants' statutory immunity affirmative defenses by motion filed on January 21, 2021. On the same date, Mr. Garrison filed a brief supporting the motion, in which it was explained that *Gacke* and *Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223 (Iowa 2018) held that the takings clause applied to the devaluation of Mr. Garrison's property and was per se unconstitutional. See Garrison's Brief Supporting Motion to Strike, p. 11. (App. Volume 1, p. 107) The District Court rejected this argument in an order dated May 4, 2012, finding that "Plaintiff's Motion to Strike Affirmative Defenses under Iowa Code sections 657.11(2) and 657.11A.5 is denied." That Order of the District Court was specifically cited

in the Notice of Appeal filed on May 11, 2021. This issue has been reserved for appeal.

Nor does the timing of Mr. Garrison's Notice of Appeal raise an issue of preservation of error. The Notice of Appeal was filed on the same date as the district court's decision denying Mr. Garrison's Motion to Reconsider (Notice of Appeal; Motion to Reconsider)(App. Volume 2, p. 426, 410). The Motion to Reconsider was filed on May 5, 2021, 6 days prior to the district court ruling on the motion and the filing of the Notice of Appeal. So the motion was submitted to the court prior to the Notice of Appeal. Furthermore, the district court ruling on the motion (May 4, 2021 Order)(App. Volume 2, p. 404) essentially held that the motion was just a rehash of Mr. Garrison's original arguments. A motion rehashing arguments already made presents nothing for appeal. *Beck v. Fleener*, 376 N.W.2d 594 (Iowa 1985); *Bellach v. IMT Ins. Co.*, 573 N.W.2d (Iowa 1998).

Defendants also claim that the district court did not impliedly rule on the issue of the takings clause. First of all, as noted above, Mr. Garrison did argue the takings clause in his motion, so in denying the motion in its entirety, the district court necessarily denied the takings clause claim. But, more importantly, the takings clause was not at issue in the April 9, 2021 hearing. At issue was the as-applied analysis required by the *Gacke* decision regarding

the non-economic damages. The unconstitutionality of the immunity statute with respect to the devaluation of Mr. Garrison's property under the takings clause was established as a matter of law and did not require an evidentiary determination. Secondly, in following the holding in *Gacke*, the district court necessarily had to find that the takings clause made the immunity unconstitutional as to the property damage. Error is thus preserved. *Eggiman v. Self-Insured Services Co.*, 718 N.W.2d 754 (Iowa 2006).

III. MR. GARRISON HAS RECEIVED NO BENEFIT FROM THE IMMUNITY STATUTE.

In *Gacke* the Iowa Supreme court rejected the notion that a theoretical benefit from the statutory immunity provisions was sufficient to sustain the immunity, as applied. The court reasoned that "[n]otably, the Gackes receive no particular benefit from the nuisance immunity granted to their neighbors other than that inuring to the public in general." *Gacke,* 684 N.W.2d at 178. The Defendants presented ZERO evidence that any person or entity at any time even made a complaint about odor emanating from the ewes Mr. Garrison previously raised on his property, much less that Mr. Garrison rebuffed any such complaint by citing the protection of the statutory immunity provisions. Defendants' key person in this litigation, Jay Moore, testified at the hearing on April 9, 2021, that he was not aware of any complaints anyone had ever made about odor from Mr. Garrison's property. (April 9, 2021 Hrg. Tr. p. 104-

105) (App. Volume 2, p. 58-59). Mr. Garrison has received no benefit whatsoever from the statutory immunity provisions other than that "inuring to the public in general." *Id*.

Further, Mr. Garrison receives no benefit from nuisance immunity because he is a partial owner of farmland in Kossuth County on which manure from a CAFO was previously applied. The statutory immunity clearly applies only to CAFO owners and not adjacent land on which manure may be applied. If the Defendants are correct, that the immunity would apply against any rural landowner who has ever used manure as fertilizer, then the third *Gacke* factor would effectively deny constitutional protection to pretty much every rural landowner in the state. Defendants refer to Iowa Code § 657.11(4), stating that the immunity extends to the treatment or disposal of manure. However, Mr. Garrison was not the one treating or disposing of manure. The CAFO operator was the one engaged in that effort.

The Defendants claim that Mr. Garrison's argument is contradictory because he sued BWT Holdings as owner of a manure application field. But BWT Holdings was sued with respect to the trespass and drainage law claims, not nuisance. The immunity statute and the *Gacke* analysis apply only to a nuisance claim. It is the CAFO owner and operator who exercise control over the odor that would cause a nuisance.

In *Gravert v. Nebergall*, 539 N.W.2d 184 (Iowa 1995), plaintiff argued that he did not own any livestock and therefore did not receive any benefit from a boundary fence he was required to pay for, in part, pursuant to statute. The *Gravert* court held that the statute was constitutional as applied because the fence kept the neighbor's livestock off plaintiff's property, *i.e.*, plaintiff received a direct and current benefit from the statute. In other words, the provisions of the statute were not unduly oppressive on the plaintiff. *Gacke*, 684 N.W.2d at 177-178. Mr. Garrison, on the other hand, "bear[s] the brunt of the undesirable impact of [the statutory immunity] without any corresponding benefit." *Id*. at 179.

The Defendants claim that Mr. Garrison has cited no authority for the statement that the *Gacke* court gave the benefit factor a narrow interpretation. The authority is the *Gacke* decision itself. There have only been three cases addressing the application of Iowa Code § 657.11(2): *Gacke, Honomichl,* and *McIlrath v. Prestage Farms,* No. 15-1599 (Ia. App. 2016). *Honomichl* and *McIlrath* did not discuss the benefit factor, so the only authority we have is *Gacke*. For the reasons already set forth in this brief and Mr. Garrison's initial brief, it is clear that the benefit factor should be interpreted as Mr. Garrison suggests.

The Defendants have presented no evidence whatsoever to support the District Court's finding that Mr. Garrison has received a direct and current benefit from the statutory immunity provisions. Therefore, that decision must be reversed.

IV. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT.

A. Nuisance

The Defendants argue that Mr. Garrison has not proven that the exceptions to the immunity set forth in Iowa Code § 657.11(2) apply in this case. They focus on the electrostatic fence. Defendants admit, however, that the fence was a new and innovative concept. So it was not an "**existing** prudent **generally accepted** management practice," as required by the statute.

The Defendants also argue that Mr. Garrison's assertion that the fence is not effective is contradicted by his argument that if the fence was installed, it should have been installed on all four sides of the CAFO building, which allegedly infers that the fence was effective. What Mr. Garrison is saying is that if the Defendants contend that the fence is an effective odor control it was not reasonable for the operation, as required by the statute, to only have it on one side of the building.

In the end, as explained in Mr. Garrison's initial brief, whether he can prove that the statutory exceptions apply is a jury question, not appropriate for summary judgment.

B. Trespass and Drainage Law

Mr. Garrison's water test results do support his trespass and drainage law claims and are not subject to issue preclusion. Mr. Garrison presented substantial evidence, including expert testimony, that manure was being overapplied and that the overapplication was causing excess nitrogen and phosphorus to be drained to his property. The water tests establish the increased pollutants and the only change in circumstances between the earlier tests and the later tests was the Defendants' application of manure and the 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); and *Robinson v. Perpetual Services Corp.*, 412 N.W.2d 562, 568 (Iowa 1987). Typically, downhill sloping farm land in Iowa is terraced to help inhibit runoff, not pattern tiled to increase runoff. A reasonable Iowa jury could conclude that there is no reason to pattern tile a downhill sloping property like the Sanderson field, other than to increase runoff, which is

exactly why the Defendants paid a substantial sum of money to install pattern tiling. The predictable result being the increased runoff of pollutants onto Mr. Garrison's property.

Water test results don't require expert interpretation. In fact, the Defendants made their own spreadsheet of the results without any expert assistance (Water Test Data Spreadshet)(App. Volume 1, p. 317). It doesn't take an expert to know that nitrate levels in the 15-20 ppm range after 2016, post Defendants' CAFO, are greater than nitrate levels of 10 or less from 2001-2013, pre-Defendants' CAFO. Mr. Garrison was able to interpret the test results from his personal knowledge and observation. Lay opinion testimony is admissible. Iowa Rule of Evidence 5.701. The Defendants' claim that the water tests results prove nothing is an argument they can make before a jury, but is not an argument that should have been accepted by the District Court in granting Defendants' Motion for Summary Judgment. Defendants appear to be confused by the mathematical fact that 15-20 is greater than 10. An impartial Iowa jury would have no incentive to feign such mathematical ineptitude.

Regarding drainage law, the Amicus brief relies on Chapter 468 of the Iowa Code for drainage districts. In *Wright v. Repp Farms, Inc*., 2005 Iowa App. LEXIS 371, *5 (Ia. App. 2005), the Iowa Court of Appeals explained

that in Iowa there is the statutory drainage law, but also common law rules on drainage. Mr. Garrison is relying upon the common law rules. In Iowa the common law rule provides:

> There has been adopted and developed in this jurisdiction what may best be characterized as a modified civil law rule which recognizes a servitude of natural drainage as between adjoining lands. Under this concept a servient estate must accept surface waters which drain thereon from a dominant estate. On the other hand, no right exists to alter the natural system of drainage from a dominant estate in such manner as to substantially increase the servient estate burden.

Braverman v. Eicher, 238 N.W.2d 331, 334 (Iowa 1976). The Defendants have violated this rule by pattern tiling the downhill sloping property thereby causing increased polluted runoff onto Mr. Garrison's property in violation of Iowa common law drainage rules.

The amicus brief claims that drainage law is only about increasing the quantity of water on the plaintiff's land. As Mr. Garrison has previously explained, that is not correct. But even if it were, the evidence shows that the pattern tiling installed on the Defendants' field increases the quantity of water being discharged to Mr. Garrison's property (Patocka report)(App. Volume2, p. 162). And Mr. Garrison explained in his affidavit that the tiling diverted water that naturally drained to the east on to his property, thus increasing the amount of water going on his property (Garrison 1-21-21 affidavit)(App. Volume 1, p. 88).

The amicus brief also argues that the nitrogen calculator used by Paul Kassel to determine that the Defendants were overapplying manure to the field adjacent to Mr. Garrison's property applies to commercial fertilizer, not manure. Mr. Kassel, an acknowledged expert was clearly addressing the overapplication of manure. And nitrogen is nitrogen, whether it comes from manure or commercial fertilizer. In the end, this is a factual question for the jury, not for summary judgment.

C. Issue Preclusion

The Defendants argue that the federal court's ruling on summary judgment establishes issue preclusion. Issue preclusion has four elements:

1 the issue in the present case must be identical to the issue in the prior case;

2 the issue must have been raised and litigated in the prior case;

3 the issue must have been material and relevant to the disposition of the prior case; and

4 the determination of the issue in the prior case must have been essential to the resulting judgment.

Clark v. State, 955 N.W.2d 459, 465-466 (2021). None of those elements are present in this case.

First, the issues are not identical. The judgment in the federal case addressed Mr. Garrison's claims under the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act (CWA). Mr. Garrison's

trespass claim was specifically not addressed by the federal court. The Iowa Supreme Court has cautioned against defining the issue in the prior case too broadly. *Lemartec Eng'g. And Const. v. Advance Conveying Techs.*, 940 N.W.2d 775 (Iowa 2020). With respect to RCRA and CWA, the federal court described the legal standards as follows:

> RCRA does not support citizen suits for wholly past violations… RCRA's purpose is to "minimize the present and future threat to human health and the environment" by reducing hazardous waste and insuring waste is properly treated, stored, and disposed of. *Mehrig*, 516 U.S. at 483 (quoting 42 U.S.C. § 6902(b)). RCRA's citizen suit provision "permits a private party to bring suit only upon a showing that the solid or hazardous waste at issue 'may present an imminent and substantial endangerment to health or the environment.'" *Id*. At 485 (quoting 42 U.S.C. § 6972(a)(B)). The statute's reference to waste which "may present" imminent harm "excludes waste that no longer presents such a danger." *Id*. At 485-86. A harm is imminent if it threatens to occur immediately. *Id*. RCRA's language is clear that a remedy is not available for wholly past violations, and thus, a plaintiff must allege that the defendants' RCRA violation "is current and ongoing." *307 Campostella, LLC v. Mullane*, 143 F.Supp.3d 407, 413 (E.D. Va. 2015). The CWA similarly does not support citizen suits for wholly past violations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987).

Starting from that premise the federal court's ruling focused on whether there was evidence of a current and ongoing violation of the federal laws. That was a different issue than the claim of trespass in this case. A trespass can be based on just past conduct, as in this case. So, the Defendants are attempting

to define the issue too broadly by claiming that the issue is the excessive application of manure.

Second, the issue of trespass was not litigated in the federal case. As explained above, the federal court focused on RCRA and CWA claims and specifically did not address the trespass claim. The court's focus was on the determination of whether there was a continuing violation. The federal court's discussion of the evidence addressed that point. The court concluded:

> Thus, plaintiff's water tests do not establish a discernable pattern of violations nor does plaintiff provide evidence that the nitrate levels are caused by defendants' manure application. Plaintiff, then, can only point to the two wholly past violations in 2016 and 2018 in support of his RCRA and CWA claims. Just as the Court found in its prior Orders, these two instances standing alone are insufficient to support a claim that defendants' violations are imminent and ongoing.

It is clear, therefore, that the federal court was addressing a different issue than is presented in this case.

Third, trespass was not material and relevant to the federal court's decision. Again, the federal court's focus was on whether the violations were imminent and ongoing. Those issues are irrelevant in a trespass action.

Fourth, determination of the issue was not essential to the resulting judgment in federal court. Whether there were past discharges of pollutants to Mr. Garrison's property was not essential to the federal court's decision. The federal court, again, was focused on whether there was an imminent and

ongoing discharge, as required by RCRA and CWA. Therefore, the Defendants cannot rely on issue preclusion to defeat Mr. Garrison's trespass and drainage law claims.

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

A. Rights of Persons

Article I, § 1 of the Iowa Constitution, sometimes called the inalienable rights clause, establishes the right of Iowans to protect their rights to life, liberty and property, safety, and happiness. Mr. Garrison is being denied these rights by the damage cap in nuisance cases involving animal feeding operations. The Defendants are trying to turn this issue into a question of the state's police power, relying on the decisions in *Gacke* and *Honomichl.* While the *Gacke* court determined that the immunity statute, Iowa Code § 657.11, was within the police power of the state, the court emphasized that the police power must be reasonably necessary to accomplish the public purpose and not unduly oppressive upon individuals, citing *Gravert v. Nebergall*, 539 N.W.2d 184 (Iowa 1995). See also, *Steinberg-Baum & Co. v. Countryman*, 247 Iowa 923, 929, 77 N.W.2d 15, 19 (1956)("restrictions that are prohibitive, oppressive or highly injurious . . . are invalid."); *Benschoter v. Hakes*, 232 Iowa 1354, 1361, 8 N.W.2d 481, 485 (1943)("In each case it is a question

whether or not the collective benefit outweighs the specific restraint."); *State v. Osborne*, 171 Iowa 678, 693, 154 N.W. 294, 300 (1915)(Article I, section 1 includes "the right to pursue a useful and harmless business without the imposition of oppressive burdens by the lawmaking power.").

The analysis in *Gacke* and *Honomichl* applies equally well to the issue of the damage cap in this case. Even if we assume the damage cap is within the state's police power, the cap is not a reasonable non-oppressive exercise of that power. Tying what the statute calls special damages to the devaluation of real estate and adverse health damages is arbitrary and has no relationship to the facts of the case. For example, a plaintiff might have a modest home rather than a McMansion, and no provable health impacts, but would have serious loss of use and enjoyment of his or her property. In that case the damage cap would drastically violate the plaintiff's right to adequate compensation with no relationship to the facts of the plaintiff's injuries.

Nor does the damage cap promote the public interest in encouraging good agricultural practices any more than did the nuisance immunity at issue in *Gacke* and *Honomichl.* On the contrary, the damage cap would tend to encourage bad agricultural practices because the penalty would be limited. What little benefit there may be to the public from the damage cap is outweighed by the violation of a plaintiff's right to protect his or her life and

property. *Benschoter v. Hakes*, 232 Iowa 1354, 1361, 8 N.W.2d 481, 485 (1943).

B. Right to a Jury

The Defendants claim that "courts across the country" have found damage caps to be constitutional. But, as shown in Mr. Garrison's initial brief, a majority of courts "across the country" have found damage caps to be unconstitutional.

The case primarily relied upon by the Defendants 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.
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> **********************************
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> 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.

The Defendants also cite to *Pitcher v. Lakes Amusement Co.*, 236 N.W.2d 333 (Iowa 1975), asserting that *Pitcher* held that Iowa courts rely on interpretations of the Seventh Amendment to the U.S. Constitution in interpreting Iowa's right to a jury trial. But *Pitcher* did not say that. The case cited some U.S. Supreme Court cases on some general aspects of jury trial, but did not adopt Seventh Amendment case law in interpreting Iowa's right to a jury trial. In holding that a unanimous verdict was not required by the Iowa Constitution, the *Pitcher* court said:

> Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature. The question of the constitutionality of any particular modification of the law as to trial by jury resolves itself into a question of what requirements are fundamental and what are essential, a question which is necessarily, in the last analysis, one of degree.

Id. at 337. It is clear from the previous discussion in this brief that the jury's function in assessing damages is essential to the right to a jury.

And as an Iowa Law Review article describes it:

> The test for whether a legislative procedure is a reasonable regulation also appears to depend on how the new procedure would materially change the outcome of the jury trial. For example, the *Pitcher* court in determining that civil jury trials did not need a unanimous decision stated that "[a] requirement of unanimity . . . *does not materially*

> *contribute to the exercise of this commonsense judgment."* Similarly, in *Schloemer [v. Uhlenhopp,* 21 N.W.2d 457 (Iowa 1946)], the court reasoned that the demand for a jury trial "merely prescribes an orderly procedure by which the litigant may exercise" the constitutionally protected jury trial right. Thus, the procedures described in *Pitcher* and *Schloemer* merely concern the form of the jury and do not deserve fundamental protection under the Iowa Constitution. By contrast, the determination of damages by the jury is a question of substance that is inherent to the jury trial. In this light, the statement in *Pitcher* that the Iowa Constitution "protects the right to a jury trial and not any particular feature thereof should be specifically limited to alterable incidents such as the selection, size and unanimity that do not affect the jury's verdict and should not be extended to alter the verdict itself.

Theodore Thomas Appel, Note, *Do Legislators Under Iowa's Golden Dome Know Better? Surveying Jury-Trial Constitutional Challenges on Damage Caps and Application to the Iowa Constitution,* 106 Iowa L. Rev. 813 (2021)(Appel).

The amicus brief relies on the Missouri Supreme Court decision in *Labrayere v. Bohr Farms LLC*, 458 S.W.3d 319 (Mo. 3015). But that decision is irrelevant to the issues here because the plaintiffs in *Labrayere* did not allege a violation of any constitutional provision similar to Iowa's Inalienable Rights Clause or the right to a jury trial.

The Defendants also cite to *Channon v. United Parcel Service, Inc.*, 629 N.W.2d 835 (Iowa 2001), in which the court specifically said that the Seventh Amendment does not apply to jury trials in state court. But the Defendants attempt to hang their hat on dicta by the district court in the *Channon* case, in

which the court inferred that the U.S. Supreme Court decision in *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831 (1987), said that the right to a jury trial might not extend to a civil penalty under the Clean Water Act, and therefore, damages were not a part of the right to a jury. This is a misreading of *Tull*, and furthermore, a later case clarified the issue. In *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 118 S.Ct. 1279 (1998). The *Feltner* court made the distinction between a jury's determination of damages and a civil penalty, noting that historically juries were not tasked with determining a penalty. Therefore, the *Feltner* court confirmed the right to have a jury determine damages.

Two Iowa cases addressing the right to a jury trial merit discussion. In *Reed v. Wright*, 2 Greene 15 (Iowa 1849), the Iowa Supreme Court considered a law that created a commission to determine the validity of land titles, including the authority to bring legal actions without a jury trial. The court invalidated the law on several grounds, including the denial of a jury trial, saying:

> [The legislature] can make laws, but cannot subvert the constitution, which is the written will of the people, the supreme law of the land, and all legislation must be conformable with its provisions. . . . [The right to a jury trial is a] great landmark[ ] of national liberty . . . so wisely secured to the inhabitants of the territory by the ordinance, were insuperable barriers against legislative encroachment.

Id. at 21-22. It is significant that the court established the jury as an "insuperable barrier[ ] against legislative encroachment." That is exactly the point with a damage cap. It is a legislative encroachment on the function of the jury, and therefore, unconstitutional.

The other Iowa case on the right to a trial by jury is *DeToskey v. Ruan Transp. Corp.*, 40 N.W.2d 4, 6 (Iowa 1949), where the court said, "Until our system of jurisprudence determines that some other system is more satisfactory and more accurate in arriving at the real damage, we must *leave it to our juries to set the amount of recovery*." (emphasis added).

CONCLUSION

The common law claims of nuisance, trespass and drainage law have been developed over the years to protect the property rights of Iowans who suffer the impacts of assaults on their property. The Defendants in this case are asking the Court to allow them to inflict their odor and pollution on Mr. Garrison in violation of his right to the use and enjoyment of his property. Mr. Garrison requests that the Court reject the Defendants' arguments.

The district court's decisions should be reversed.

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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 6001 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
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CERTIFICATE OF SERVICE

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

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