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IN THE SUPREME COURT OF IOWA

Supreme Court Case No. 22-0918
Linn County Case No. LACV092819

JENA McCOY,
Plaintiff/Appellee,

v.

THOMAS L. CARDELLA & ASSOCIATES,
Defendant/Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR LINN COUNTY
HONORABLE JUDGE VALERIE L. CLAY

FINAL REPLY BRIEF OF APPELLANT

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Defendant, Thomas L. Cardella & Associates, Inc. ("TLCA"), submits its Reply Brief.

INTRODUCTION

Jena McCoy's appeal Brief concedes an extraordinary and even dispositive point. The Brief states: "In this case, Jena McCoy *could have filed a claim under the Iowa Civil Rights Act but did not*." McCoy's Brief, at 37 (emphasis supplied). This admission forecloses the legal theories McCoy pursued at trial and which the District Court allowed, because the Iowa Civil Rights Act preempts her claims. *Smidt v. Porter*, 695 N.W.2d 9, 17 (Iowa 2005) ("To the extent the ICRA provides a remedy for a particular discriminatory practice, its procedure is exclusive and the claimant asserting that practice *must pursue the remedy it affords*.") (emphasis supplied). As McCoy now acknowledges, she had a remedy under the ICRA. She was obligated to pursue that remedy, yet she failed to do so.

Both McCoy and the District Court repeatedly ignored the fundamental ICRA preemption principle that governs this case, instead treating her claims as workplace torts. This was error. Yet, even recharacterizing the claims as torts, the claims still fail, because they are preempted by workers compensation law. *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 681 (Iowa 2004) ("actions for negligent hiring, negligent supervision, or negligent retention are barred by the exclusivity provision.")

McCoy's Brief largely tries to avoid the preemption problem by quoting at length from the flawed rulings below. *See* McCoy's Brief, at 37-38, 56, 59-60. She ignores that the errors in those rulings form the very basis for the appeal. Repeating the errors does not fix their flaws. By contrast, TLCA has focused and will continue to focus on Supreme Court precedent that bars her claims.

This appeal also carries broader public policy implications. McCoy's theory of liability not only contradicts the legislature's reasoned choices to provide statutory remedies for workplace harms, but the theory also would generate massive common law exposure to Iowa employers.

In this Reply Brief, TLCA will explain why McCoy's claims are preempted, meriting vacating the judgment, and will briefly address the trial errors that alternatively compel a new trial.

ARGUMENT

I. The Iowa Civil Rights Act Bars McCoy's Negligence Claim.

As noted above, McCoy's brief concedes that her claim arises under the ICRA. This concession squarely triggers ICRA preemption. *See Smidt*, 695 N.W.2d at 17; *Cole v. Wells Fargo Bank, N.A.*, 437 F. Supp. 2d 974, 979-980 (S.D. Iowa 2006) (collecting cases). The admission also corresponds to McCoy's pleadings throughout the case and her frequent references at trial to unwanted sexual touching and commentary. Because she never filed a civil rights charge, her sexual harassment theory was unviable from the start and the case should

have been dismissed. *See Lynch v. City of Des Moines*, 454 N.W.2d 827, 831 (Iowa 1990) ("the district court has authority to consider only those [chapter 216] claims that first have been presented to the commission."). Simply calling a sexual harassment claim something else, as McCoy has done here, does not change the substance of the claim.

McCoy's Brief tries to sidestep ICRA preemption by claiming "an independent legal duty" exists on the part of TLCA "which does not flow from the provisions of the Iowa Civil Rights Act." McCoy's Brief, at 26. To the extent McCoy's claim involves sexual harassment, this assertion simply is wrong. An employer's duty to prevent and correct sexual harassment stems solely from the ICRA. *See Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553, 575 (Iowa 2017) ("We hold that plaintiffs *under the ICRA* may proceed against the employer on either a direct negligence or vicarious liability theory for supervisor harassment in a hostile-work-environment case.") (emphasis supplied). To repeat: no independent duty exists when the underlying claim involves sexual harassment. If an employer such as TLCA negligently fails to respond to complaints of sexual harassment, the employer's liability arises solely under the ICRA, not common law. *See id.; Smidt*, 695 N.W.2d at 17; *Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627, 638 (Iowa 1990).

McCoy seems to argue that an "independent legal duty" springs to life solely because negligent supervision exists as a tort. *See* McCoy's Brief, at 26. Her

Brief states: "The independent legal duty is the duty to protect customers and/or employees from the illegal conduct of its employees once the employer has been put on notice of that conduct." *Id.* This sentence overstates the holdings in the cases she cites. While the cases do acknowledge such a duty, the duty only extends to strangers to the workplace, not to employees. *See Godar v. Edwards*, 588 N.W.2d 701 (Iowa 1999); *Schoff v. Combined Ins. Co. of America*, 604 N.W.2d 43 (Iowa 1999). Thus, to the extent her Brief avers that the duty applies to "customers *and/or employees*," it misunderstands *Godar* and *Schoff*.

The only case TLCA has located that even purports to apply a negligent retention theory to cover or protect an employee is *Stricker v. Cessford Constr. Co.*, 179 F. Supp. 2d 987, 1019 (N.D. Iowa 2001). In that case, the federal court denied the employer's summary judgment motion, holding that negligent retention and supervision claims were not preempted by the ICRA, because the plaintiff also alleged assault and battery claims. But *Stricker* is readily distinguishable. First, the employer does not appear to have argued that workers compensation preempts the tort theory. *See* Section II below. Second, *Stricker* predates *Harris*, in which the Iowa Supreme Court directly held that workers compensation law preempts negligent supervision or retention claims based on an assault or battery committed by another employee. *Stricker* has no application to the facts and arguments in this case.

In the end, TLCA submits that McCoy's Petition, trial evidence and concession in her appeal brief compel the conclusion that she litigated this case under a sexual harassment theory. Because the ICRA provides the exclusive remedy for sexual harassment, the District Court erred by failing to dismiss the claims, failing to direct a verdict, erroneously instructing the jury, and failing to vacate the verdict post-trial.

II. Alternatively, the Workers Compensation Act Bars McCoy's Claims.

Alternatively, even if the Appellate Court permits McCoy to escape her admission that she "could have filed a claim under the Iowa Civil Rights Act but did not," McCoy's Brief, 37, the claim remains preempted by workers compensation law. McCoy's Brief fails to address the plain holdings in *Harris* and other cases that shield employers from workplace torts based on workers compensation preemption. *See,* e.g., *Harris*, 679 N.W.2d at 681; *Otterberg v. Farm Bureau Mutual Ins. Co.*, 696 N.W.2d 24, 30 (Iowa 2005). McCoy instead offers several unpersuasive arguments in her Brief that miss the point.

First, she cites an unpublished Court of Appeals opinion, *Delgado-Zuninga v. Dickey & Campbell Law Firm, PLC*, 908 N.W.2d 882 (Iowa Ct. App. 2017), that has been misconstrued throughout the litigation. McCoy's Brief, at 37. *Delgado* involves a situation where a Plaintiff successfully invoked rights under the ICRA. The Plaintiff then tried to assert claims under workers compensation law. The

Court held that the workers compensation commissioner lacked jurisdiction over the claims, given the Plaintiff's election of remedies. Properly understood, *Delgado-Zuninga* favors TLCA. It underscores that a Plaintiff-employee faces an either-or choice of remedy for a workplace injury that could be characterized as either sexual harassment or assault/battery. If the employee believes the claim involves sexual harassment, the remedy exists under the ICRA. If the employee believes the claim involves a workplace tort, the remedy exists under workers compensation. McCoy faced exactly this scenario, except she chose neither remedy.

Next, McCoy quotes extensively from the District Court's summary judgment ruling. McCoy's Brief, 37-38. The excerpts from the ruling merely highlight the errors in this case. For example, the District Court stated: "The Court in *Harris* barred a claim of negligent hiring, negligent supervision, and negligent retention. *This language, though, applies to cases with situations and claims similar to Harris*." McCoy's Brief, at 38, quoting ruling (emphasis supplied). In the language quoted above, the District Court seemingly imposed a carve-out to the Supreme Court's holding in *Harris*, with no explanation of the scope of the carve-out or how *Harris* can even be interpreted in this way (it cannot).

McCoy's Brief also repeats the summary judgment ruling's mistaken conclusion that "[b]ecause Plaintiff is not seeking relief for physical injuries, pursuit is not barred by the IWCA." McCoy's Brief at 38. McCoy endorses this

inaccurate analysis by urging that "[t]here was no evidence of physical injury in this case." McCoy's Brief, at 39. As TLCA explained in its opening Brief, Iowa Appellate Courts routinely have confirmed that emotional or mental injuries fall under workers compensation. *Dunlavey v. Economy Fire and Cas. Co.*, 526 N.W.2d 845, 851 (Iowa 1995); *Heartland Specialty Foods v. Johnson*, 731 N.W.2d 397, 401 (Iowa Ct. App. 2007); *Nelson v. Winnebago Industries, Inc.*, 619 N.W.2d 385, 389 (Iowa 2000). This should not even be a controversial issue. The only workplace "injuries" excluded from workers compensation are torts that do not involve any physical or mental injury, e.g. slander or false imprisonment. *Nelson*, 619 N.W.2d at 388. McCoy sought damages for mental injury. Her claim is covered.

Next, McCoy makes a novel and erroneous argument that Iowa Code Section 85.16 permits her to escape workers compensation preemption. "Section 85.16(3) prohibits compensation where an employee's injury was caused 'b[y] the willful act of a third party directed against the employee for reasons personal to the employee." *Xenia Rural Water Dist. v. Vegors*, 786 N.W.2d 250, 257 (Iowa 2010). Importantly, "Iowa Code section 85.16(3) is an affirmative defense, and, therefore, the employer bears the burden to demonstrate compensation is barred." *Id.*

As *Xenia* makes clear, section 85.16 does not provide an employee with a chance to "opt out" of workers compensation, as McCoy wants to do here. Rather, section 85.16 can be asserted only by the employer as a justification to

deny workers compensation coverage. TLCA never has invoked section 85.16. McCoy never sought workers compensation relief. McCoy also never raised this factual issue with the jury or with the workers compensation commissioner.

The record equally fails to support her position, as the evidence shows that McCoy's interactions with Thompson and Turner resulted solely from the workplace. Indeed, McCoy repeatedly disclaimed any relationship with Thompson outside the workplace. (App. 202, Tr. 127:10-24; Tr. 157:20-158:10) *See Xenia*, 786 N.W.2d at 259 ("there is no evidence in the record that [employees] Byrd and Vegors had any relationship outside of work other than as coworkers or that Byrd hit Vegors for any reason imported from outside the working environment.").

In short, under *Harris* and other precedent, McCoy's negligent supervision claim, based on an underlying assault and battery, is entirely preempted by workers compensation law.

III. The Court Improperly Allowed Kara Crain's Testimony.

Kara Crain, a mental health counselor, served as McCoy's sole witness to link her alleged experiences at TLCA with mental health damages. After the District Court initially struck Crain's testimony because her opinions related solely to sexual harassment, the District Court then allowed Crain to repackage her trial testimony to change her opinions to relate to assault and battery. This was patently unfair to TLCA, for several reasons.

First, Crain's trial testimony constitutes new expert testimony that McCoy never had disclosed. Second, TLCA could not cross-examine her about the qualitative change in testimony, because then TLCA would have opened the door to discussing sexual harassment. Third, Crain's original deposition testimony shows without doubt that McCoy herself treated this case as a sexual harassment case—something the District Court itself both observed and ignored. *See* App. 66-67 ("The transcript also reflects that Defense counsel objected every time the Plaintiff's attorney asked about 'sexual harassment,' clearly giving notice that Defense would likely seek a ruling on this issue at a later date. Nonetheless, *Plaintiff's attorney continued to refer to what allegedly happened to McCoy as 'sexual harassment.*'") (emphasis supplied).

TLCA now will cite some of the actual deposition testimony, because it shows that Crain repeatedly and consistently testified during discovery that her opinions related solely to McCoy's self-reported claims of sexual harassment, not to an assault or a battery.[1] Except as specifically noted, the questions come from McCoy's own counsel. The deposition testimony matters because it shows the extent to which the District Court erred by allowing McCoy to unveil new expert testimony at trial that flatly contradicted the case she litigated before trial.

[1] TLCA filed Crain's entire transcript with the District Court on January 28, 2022, so it is available in the Court record. *See* Notice of Filing of Deposition Transcript.

Kara Crain Deposition Testimony

Q: Do you have an opinion, Ms. Crain, as to whether the **sexual harassment issue that you've described** was, in part, the cause of her generalized anxiety disorder?

MR. SQUIRES: Objection as irrelevant and preempted by the Iowa Civil Rights Act.

Q: You may go ahead and answer, Ms. Crain.

A: Yes. I would – it's my opinion that that is part of her generalized anxiety disorder worsening. Yes.

Q: Let me ask a follow-up question to that. Given the fact that she had stressors in her life that predated the **sexual harassment issue at work**, do you have an opinion as to whether the **sexual harassment issue at work** may have exacerbated or made worse her generalized anxiety disorder?

MR. SQUIRES: Same objection. And also object it assumes facts not in evidence.

Q: You may go ahead and answer.

A: Can you repeat the question?· I'm sorry..

Q: Melissa, would you like to reread the question, please.

(The requested portion of the record was read.)

A: My experience with her is that there's many factors with her generalized anxiety disorder, and I would be confident to say that **the sexual**

harassment she survived at her job is a very understandable factor in increasing her anxiety.

Crain depo., 25:16-26:21.

Next:

Q: [D]o you have an opinion to a reasonable degree of mental health certainty as to whether the **sexual harassment component of Jena's history** has contributed in whole or in part to that diagnosis?

MR. SQUIRES: Objection as irrelevant and preempted by the Iowa Civil Rights Act and assumes facts not in evidence.

Q: You may go ahead and answer, Ms. Crain.

A: I don't know if I have as much of an opinion on the depression piece.

Q: And just to clarify, when you say you don't know if you have as much of an opinion on the depression component of the diagnosis, I take that to mean you're not as clear as to the role **the sexual harassment component of her history** has played in the formulation of that diagnosis?

MR. SQUIRES: Same objection.

A: Yeah, in my opinion, she has experienced increased hopelessness, self-esteem issues with that. You know, has experienced those detrimental effects **directly related to the sexual harassment** from what she has said.

Crain depo., 28:12-29:10.

Next:

Q: Do you have an opinion, Ms. Crain, to a reasonable degree of mental health certainty, as to whether **the sexual harassment component** of Jena McCoy's past history played any role in your diagnosis of chronic posttraumatic stress disorder?

MR. SQUIRES: Objection as irrelevant, preempted by the Iowa Civil Rights Act, and assumes facts not in evidence.

Q: You may go ahead and answer.

A: Yes.

Q: What is that opinion?

MR. SQUIRES: Same objection.

A: Sure. So much of her PTSD stems from her early sexual abuse and her sexual assault. I do, in my opinion, see her level of PTSD symptoms, especially avoidance and the negative cognitions or negative view of self and world, **to be very much tied to recent sexual harassment and ongoing litigation.**

Crain depo., 33:24-34:17.

Next:

Q: Given the history that you received from Jena McCoy **about the sexual harassment incident at work**, do you have an opinion as to whether that

stressor played any role in the diagnosis of panic disorder without agoraphobia with moderate panic attacks?

MR. SQUIRES: Objection as irrelevant, preempted by the Iowa Civil Rights Act, and assumes facts not in evidence.

A: Yes.

Q: And what is your opinion on that issue?

A: Yeah, my – from how she describes her symptoms, especially her panic symptoms regarding men, being triggered by that, and the nature of how she describes **her sexual harassment** and fear of seeing him – even after leaving employment, feeling discomfort around that, yeah, I think that it's reasonable – my opinion is it's reasonable to say that **her sexual harassment worsened her panic attacks.**

Crain depo., 36:22-37:16.

Next:

Q. And do you have an opinion as to whether those concerns that she voiced to you are in any way related to what she reported to you as the **sexual harassment at work** in her past history?

MR. SQUIRES:· Objection as irrelevant, preempted by the Iowa Civil Rights Act, and assumes facts not in evidence.

A: Yes.

Q: I noticed – we got from your group faxed in this morning the most recent opportunity that you had to evaluate Jena was, I believe, on September 3 of this year? Does that sound right?

A: I'm going to take a peek. Yes.

Q: And as I read through the note, particularly under the category of "Session Focus," it appears to me that she opened up to you to some extent about the **sexual harassment experience** that she had had in her past history.

A: She did, yes.

MR. SQUIRES: Objection. What's the question?

Q: Whether she opened up to Ms. Crain **about the sexual harassment** that she previously had reported in her work history?

MR. SQUIRES: Objection as irrelevant, preempted by the Iowa Civil Rights Act. Also constitutes hearsay.

A: **Yes, she did speak of her experience of sexual harassment in her previous workplace.**

Crain depo., 40:14-41:20.

On cross examination, Crain confirmed the point:

Q: Is it accurate that when Ms. McCoy voiced complaints about her prior workplace, **she characterized her complaints as arising from sexual harassment?**

A: Yes.

Q: And that remains her characterization of it up through this month?

A: Correct.

Crain depo. 53:13-20.

Based on the foregoing, the prejudice to TLCA to allowing Crain to modify her trial testimony is clear. From day one, McCoy litigated the case as a sexual harassment case. Her mental health counselor gave opinions in discovery about her diagnoses resulting from alleged sexual harassment. Then, at trial, with the opinions stricken, McCoy reframed her entire theory of the case to elicit Crain's revamped testimony, even though *McCoy herself* led Crain down the path of sexual harassment at her deposition. McCoy cannot have it both ways. She cannot elicit expert opinions about sexual harassment in discovery, then disown and replace the opinions at trial to circumvent her failure to file a civil rights charge.

IV. The Court Should Order a new Trial Based on Misconduct.

TLCA will limit its Reply Brief on this point to McCoy's closing argument, in which counsel referenced an NBA player's salary in connection with McCoy's damages claim. McCoy's Brief does not discuss the case law TLCA cites in support of its position, namely *Kinseth v. Weil-McLain*, 913 N.W.2d 55, 67 (Iowa 2018); *Kipp v. Stanford*, 949 N.W.2d 249, at *5 (Iowa Ct. App. 2020) (unpublished opinion); *McCabe v. Mais*, 580 F. Supp. 2d 815, 834 (N.D. Iowa 2008) *affirmed in part, reversed in part on other grounds by McCabe v. Parker*, 608 F.3d 1068 (8th Cir.

2010). Each of these cases addresses improper conduct in closing argument, including references to professional athletes' salaries.

McCoy asserts that her counsel referred to James Harden's $40 million salary "merely to highlight the extent we value as a society a fully functioning human being in our society." McCoy' Brief, at 52. She further asserts that the improper reference to Harden's salary should be excused because "[t]his is not a case where counsel repeatedly ignored the Court's admonishment and repeated the same alleged conduct." McCoy's Brief, at 55.

Her first assertion highlights the problem. In asking for hundreds of thousands of dollars in damages, McCoy's counsel told the jury: "Let me put that [$750,000 figure] in a little bit of context for you," followed by counsel referencing Harden's $40 million salary. The goal was to use the salary of a fully-functional NBA star as a means to imply value for McCoy's own alleged diminished functioning. When measured against $40 million, $750,000 sounds less outlandish.

But's McCoy's comparison was and remains inapt for two reasons. First, McCoy sought only emotional damages, not lost wages or lost earning capacity, meaning Harden's salary or anyone else's salary is irrelevant (to say nothing of being sourced via ESPN in counsel's hotel room). Second, even if McCoy had claimed lost wages, the wages of an NBA player have nothing to do with her own

earning capacity. Using the compensation of an elite athlete to desensitize the jury to large numbers is plainly inflammatory and prejudicial.

McCoy's second assertion, that she did not repeat the objectionable conduct, lacks legal support. McCoy did not cite any cases to suggest a litigant gets a free pass if the litigant does not repeat objectionable conduct. While the Court may weigh the cumulative effect of misconduct, *see Kinseth*, 913 N.W.2d at 73, "[w]hen [counsel] departs from the legitimate purpose of properly presenting the evidence and the conclusions to be drawn therefrom, they must assume the responsibility for such improper conduct." *Kinseth*, 913 N.W.2d at 67 (citation omitted).

V. The Inconsistent Verdict Form Requires a New Trial.

A new trial separately is required due to the inconsistent verdict. The jury both absolved Mitch Turner from assaulting McCoy and also found TLCA liable for negligently supervising him. Those two findings cannot coexist. In arguing against the inconsistent verdict, McCoy suggests that an employer can be liable for negligent supervision regardless of whether the negligently supervised employee commits a tort. McCoy's Brief, at 58. More specifically, she asserts the jury could find TLCA liable for negligently supervising Turner even if he did not commit an assault. *Id.* The District Court essentially made the same mistake. *See* App. 120.

TLCA believes this is a dangerous misapplication of negligent supervision law. Case law (which does not even extend the tort to employees bringing claims against their employers), establishes liability only if the negligently supervised employee commits an "underlying tort or wrongful act." *Schoff*, 604 N.W.2d at 53. McCoy urged at trial that the underlying wrongful act committed by Turner was an assault, and the jury was so instructed. Now, on appeal, McCoy reverses course, arguing that negligence can arise without an underlying tort. This not only ignores *Schoff*, but effectively would permit a jury to find an employer liable any time the jury disagrees with a personnel decision. For example, McCoy asserts that TLCA was negligent simply because it assigned Turner to supervise her. McCoy's Brief, at 58. If such a decision by an employer can lead to tort claims in the workplace, there is no end to liability. Every workplace decision would be subject to jury review, even a routine decision by a supervisor to give a poor performance evaluation.

In sum, because the jury absolved Turner of tortious conduct, yet also found TLCA liable for negligently supervising Turner, the verdict is inconsistent and should be vacated.

CONCLUSION

WHEREFORE, Defendant, Thomas L. Cardella & Associates, Inc., respectfully requests this Court vacate the judgment below and order judgment be

entered in favor of TLCA; or, alternatively, remand for a new trial with instructions for the District Court as necessary.

Dated: January 5, 2023

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/s/ Vernon P. Squires
Vernon P. Squires

January 5, 2023
Date

CERTIFICATE OF SERVICE

I certify that on January 5, 2023, I served the foregoing Final Reply Brief of Defendant-Appellant by electronically filing the document with EDMS, which will notify all parties of the electronic filing.

/s/ Vernon P. Squires
Vernon P. Squires

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I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Final Reply Brief of Defendant-Appellant is $N/A and that the amount has been paid in full by Defendant-Appellant.

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