IN THE SUPREME COURT OF IOWA
Supreme Court No. 23-0603

Nedzad Mehmedovic, *as the Administrator of the Estate of Hus Hari Buljic and as the Administrator of the Estate of Sedika Buljic*, Honario Garcia, *individually and as Administrator of the Estate of Reberiano Leno Garcia*, and Arturo de Jesus Hernandez and Miguel Angel Hernandez, *as Co-Administrators of the Estate of Jose Ayala*,

Appellants,

v.

Tyson Foods, Inc., Tyson Fresh Meats, Inc., John H. Tyson, Noel W. White, Dean Banks, Stephen R. Stouffer, Tom Brower, Tom Hart, Cody Brustkern, John Casey, Bret Tapken, James Hook, Doug White, Mary Jones, and Debra Adams.

Appellees.

Oscar Fernandez, *individually and as Administrator of the Estate of Isidro Fernandez,*

Appellant,

v.

Tyson Foods, Inc., Tyson Fresh Meats, Inc., John H. Tyson, Noel W. White, Dean Banks, Stephen R. Stouffer, Tom Brower, Tom Hart, Cody Brustkern, John Casey, Bret Tapken, James Hook, Doug White, Mary Jones, and Debra Adams,

Appellees.

Appeal from the Iowa District Court for Black Hawk County
The Honorable John J. Sullivan
District Court Nos. LACV140521 & LACV140822

APPELLANTS' FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law:

Statutes and Rules

Other Authorities & Citations

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court erred in dismissing fraud and gross negligence claims against co-worker executives and supervisors due to the exclusive remedy provision of the Iowa Workers' Compensation Act (IWCA), Iowa Code § 85.20(2), where the petitions provided notice of the claims, and also sufficiently alleged that each supervisor committed fraud, and that each supervisor and executive knew of the danger of an uncontrolled outbreak of COVID-19 and that injury would probably result, yet consciously failed to avoid the danger.

Case Law

Am. Nat. Bank v. Sivers, 387 N.W.2d 138 (Iowa 1986)

Beard v. Flying J, Inc., 266 F.3d 792 (8th Cir. 2001)

Benskin, Inc. v. W. Bank, 952 N.W.2d 292 (Iowa 2020)

Cincinnati Ins. Companies v. Kirk, 801 N.W.2d 856 (Iowa Ct. App. 2011)

Dier v. Peters, 815 N.W.2d 1 (Iowa 2012)

Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp., 812 N.W.2d 600 (Iowa 2012)

Henrich v. Lorenz, 448 N.W.2d 327 (Iowa 1989)

Hernandez v. Midwest Gas Co., 523 N.W.2d 300 (Iowa Ct. App. 1994)

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NuVasive, Inc. v. Miles, No. CV 2017-0720-SG, 2020 WL 5106554 (Del. Ch. Aug. 31, 2020)

Restless Media GmbH v. Johnson, No. 22-CV-80120-RAR, 2023 WL 2836971 (S.D. Fla. Feb. 1, 2023)

Simmons v. Acromark, Inc., No. 00-1625, 2002 WL 663581 (Iowa Ct. App. 2002)

Smith v. Iowa State Univ. of Sci. & Tech., 851 N.W.2d 1 (Iowa 2014)

Stessman v. Am. Black Hawk Broad. Co., 416 N.W.2d 685 (Iowa 1987)

Swanson v. McGraw, 447 N.W.2d 541 (Iowa 1989)

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Est. of Zdroik by Zdroik v. Iowa S. Ry. Co., No. 20-0233, 2021 WL 4593177 (Iowa Ct. App. Oct. 6, 2021)

Statutes and Rules

Iowa Code § 85.20(2) (2018)

Iowa R. Civ. P. 1.421(1)(f)

Iowa R. Civ. P. 1.421(1)(a)

Fed. R. Civ. P. 9(b)

II. Whether the district court erred in dismissing the fraud claims against the employer due to the exclusive remedy provision of the IWCA, Iowa Code § 85.20(1), when Iowa recognizes an exception to such exclusivity

where an employer commits or directs another to commit an intentional tort.

Case Law

Adam v. Mt. Pleasant Bank & Tr. Co., 355 N.W.2d 868 (Iowa 1984)

Baker v. Bridgestone/Firestone, 872 N.W.2d 672 (Iowa 2015)

Baker v. Westinghouse Elec. Corp., 637 N.E.2d 1271 (Ind. 1994)

Beverage v. Alcoa, Inc., 975 N.W.2d 670 (Iowa 2022)

Blankenship v. Cincinnati Milacron Chemicals, Inc., 433 N.E.2d 572 (Ohio 1982)

Boek v. Wong Hing, 231 N.W.233 (Minn. 1930)

Boggs v. Blue Diamond Coal Co., 590 F.2d 655 (6th Cir. 1979)

Brcka v. St. Paul Travelers Companies, Inc., 366 F. Supp. 2d 850 (S.D. Iowa 2005)

Byerley v. Citrus Pub., Inc., 725 So. 2d 1230 (Fla. Dist. Ct. App. 1999)

Christensen v. Hauff Brothers, 188 N.W. 851 (Iowa 1922)

Collins v. King, 545 N.W.2d 310 (Iowa 1996)

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Duffey v. Consol. Block Coal Co., 147 Iowa 225, 124 N.W. 609 (1910)

Est. of Harris v. Papa John's Pizza, 679 N.W.2d 673 (Iowa 2004)

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Hawk v. Jim Hawk Chevrolet-Buick, Inc., 282 N.W.2d 84 (Iowa 1979).

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In re G.J.A., 547 N.W.2d 3 (Iowa 1996)

Lavin v. Goldberg Bldg. Material Corp., 274 A.D. 690, 87 N.Y.S.2d 90 (N.Y. App. Div. 1949)

Lockard v. Carson, 287 N.W.2d 871 (Iowa 1980)

Mandolidis v. Elkins Indus., Inc., 246 S.E.2d 907 (W. Va. 1978)

McCoy v. Thomas L. Cardella & Assocs., No. 22-0918, 2023 WL 4034775, (Iowa June 16, 2023)

McGowan v. Brandt Const. Co., No. 09-1033, 786 N.W.2d 519, 2010 WL 2079704, (Iowa Ct. App. May 26, 2010)

Meyer v. IBP, Inc., 710 N.W.2d 213 (Iowa 2006)

Millison v. E.I. du Pont de Nemours & Co., 501 A.2d 505 (N.J. 1985)

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Rieff v. Evans, 630 N.W.2d 278 (Iowa 2001)(en banc)

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Toothman v. Hardee's Food Sys., Inc., 710 N.E.2d 880 (Ill. App. Ct. 1999)

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Tyson Foods, Inc. v. Hedlund, 740 N.W.2d 192 (Iowa 2007)

U.S. Bank v. Barbour, 770 N.W.2d 350 (Iowa 2009)

Yates v. Humphrey, 255 N.W. 639 (Iowa 1934)

Statutes and Rules

Iowa Code § 4.6 (2)

Iowa Code § 85.3(1) (2008)

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Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900-1930*, 41 J.L. & Econ. 305, 308–09 (1998)

2A Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 68.21(a), at 13–113 and 68.21(b) 13-123 (1994)

9 Larson Workers' Compensation Law §§ 103.01, 103.06, and 103.01 nn. 5 & 6

John R. Lawyer & James R. Lawyer, 15 Ia. Prac., Workers' Compensation § 8:2, Extent of employer's immunity (2022).

Report of the Employers' Liability Commission of the State of Iowa, E.H. English, state printer, 1912, Part I.

Upton Sinclair, The Jungle, 78-79 (Doubleday, Page & Co. 1906).

III. Whether the district court abused its discretion in denying requests to amend the petitions to address the court's determination that the petitions improperly grouped together the executive defendants and the supervisory defendants, where the proposed amendments did not change any issues or claims, cause delays, or prejudice the defendants.

Case Law

Baker v. City of Iowa City, 867 N.W.2d 44 (Iowa 2015)

MC Holdings, L.L.C. v. Davis Cnty. Bd. of Rev., 830 N.W.2d 325 (Iowa 2013).

Rife v. D.T. Corner, Inc., 641 N.W.2d 761 (Iowa 2002).

Statutes and Rules

Iowa R. Civ. P. 1.402.

ROUTING STATEMENT

The Iowa Supreme Court should retain this case under Iowa R. App. P. 6.1101(2)(d) and (f). The case involves the liability of corporate employers that either committed or directed others to commit a fraud that led to the deaths of their immigrant workers by COVID-19. It also involves the liability of the executives and supervisors who committed fraud or otherwise acted with wanton neglect for the safety of those same workers. The case presents fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Iowa Supreme Court. The case also presents a substantial question that will allow the Iowa Supreme Court to reaffirm the legal principle followed in Iowa – and almost every other state – that employers are not immune from liability for their intentional acts.

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from the district court's single order granting pre-answer motions to dismiss two cases, *Buljic v. Tyson Foods, Inc.* (District Court No. LACV140521) and *Fernandez v. Tyson Foods, Inc.* (District Court No. LACV140822), that were brought on behalf of four workers[1] who died of COVID-

[1] Appellants, family members of the deceased workers and administrators of their estates, are referred to as "Workers" in this brief.

19 complications against the corporate employers[2] and executive[3] and supervisory[4] co-workers whose fraud and gross negligence caused their deaths.

Course of Proceedings & Disposition

Buljic and *Fernandez* were filed in state court in June and August of 2020, respectively; the defendants thereafter removed. (*Buljic* Defs.' Joint Removal Notice, 1-2, App. pp. 0064-0065; *Fernandez* Defs.' Joint Removal Notice, 1-2, App. pp. 0067-0068). The federal court determined that removal was improper and remanded both cases. *Fernandez v. Tyson Foods, Inc.*, 509 F. Supp. 3d 1064, 1083 (N.D. Iowa 2020); *Buljic v. Tyson Foods, Inc.*, No. 20-CV-2055-LRR, 2020 WL 13042580, *15 (N.D. Iowa Dec. 28, 2020). The United States Court of Appeals for the Eighth Circuit unanimously affirmed the remand orders and denied the defendants' motions for rehearing and rehearing *en banc*. *Buljic v. Tyson Foods, Inc.,* 22 F.4th 730, 742 (8th Cir. 2021) (affirming remand orders); *Buljic v.*

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[2] Defendants Tyson Foods, Inc., and Tyson Fresh Meats, Inc. (collectively, Tyson), were the corporate employers of the Workers.

[3] The petitions often referred to the individual executive co-worker defendants collectively as Executive Defendants. (*Buljic* Second Am. Pet. ¶¶ 20-27, App. p. 0146; *Fernandez* Second Am. Pet. ¶¶ 14-22, App. p. 0197).

[4] The individual supervisory co-workers were likewise often referred to collectively as Supervisory Defendants. (*Buljic* Second Am. Pet. ¶¶ 29-35, App. pp. 0146-0147 ; *Fernandez* Second Am. Pet. ¶¶ 23-30, App. p. 0198).

Tyson Foods, Inc., Nos. 21-1010 & 21-1012, 2022 WL 521355 (8th Cir. Feb. 22, 2022) (denying rehearing and rehearing *en banc* petitions). Undeterred, the defendants unsuccessfully sought review in the United States Supreme Court. *Tyson Foods, Inc. v. Hus Hari Buljic*, No. 22-70, 215 L. Ed. 2d 45, 143 S. Ct. 773, 2023 WL 2123737 (Feb. 21, 2023). The defendants' repeated requests to stay the state court proceedings were denied. *Buljic v. Tyson Foods, Inc.*, No. 20-CV-2055-LRR, 2021 WL 7185065 (N.D. Iowa Jan. 28, 2021); *Fernandez v. Tyson Foods, Inc.*, No. 20-CV-2079-LRR, 2021 WL 1257557 (N.D. Iowa Jan. 28, 2021); *Buljic v. Tyson Foods, Inc.*, Nos. 21-1010 & 21-1012 (8th Cir. March 4, 2022).

Back in state court, the defendants moved under Iowa R.Civ.P. 1.421(1)(a) and (f) to dismiss the petitions on many different grounds, including on the ground that IWCA exclusivity provisions barred the Workers' claims. (*Buljic* Defs.' Joint Mot. Dismiss, App. pp. 0135, 0246 ; *Fernandez* Defs.' Joint Mot. Dismiss, App. pp. 0139, 0251). Tyson argued that, as the employer, Iowa Code § 85.20(1) barred the fraud claims against it. (*Buljic* Tyson's Dismissal Br., 6-11, App. pp. 0268-0273; *Fernandez* Tyson's Dismissal Br., 6-10, App. pp. 0305-0309). The Executive Defendants, as well as one of the Supervisory Defendants, Mary Jones, argued the petitions did not sufficiently allege that each committed gross negligence, or that Mary Jones committed fraud. (*Buljic* Executive Defs.' and Mary Jones' Dismissal Br., 6-15, 16, 18-20, App. pp. 0342-0351, 0352, 0354-0356

; *Fernandez* Executive Defs.' and Mary Jones' Dismissal Br. 10-17, 18-19, App. pp. 0380-0387, 0388-0389). The remaining Supervisory Defendants joined in the other defendants' briefs, and argued that the petitions insufficiently alleged gross negligence. (*Buljic*, Hart, Brustkern, Casey, Tapken, and Hook Defs.' (hereafter, Remaining Supervisory Defs.) Dismissal Br. 3-7, App. pp. 0400-0404; *Fernandez*, Remaining Supervisory Defs.' Dismissal Br. 3-7, App. pp. 0408-0412).

The Workers argued in opposition that even though the Workers suffered injuries at work, Tyson was liable for committing or directing others to commit the fraud that led to the Workers' deaths. The Workers further showed that the petitions included myriad allegations establishing the elements of fraud and of Iowa Code § 85.20(2) gross negligence (i.e., actual knowledge of the danger and that injury would probably result, and a conscious failure to avoid the danger) that were more than sufficient to put the co-worker defendants on notice of the claims. (*Buljic* Workers' Resist. Briefs, App. p.0414 ; *Fernandez* Workers' Resist. Briefs, App. p. 0499).

On January 20, 2023, the district court ordered dismissal, ruling that the IWCA precluded the claims simply because "the gist of the claims is a workplace injury." (*Buljic/Fernandez* Dismissal Order, 3 (hereafter, Order), App. pp. 0876, 0881). The court further stated that with respect to Iowa Code § 85.20(2), "[g]ross negligence must not only be specifically pled as to each co-employee defendant,

Plaintiffs must also prove that each co-employee defendants had actual, not constructive, knowledge of the peril to be apprehended or that injury is a probable result of the danger." (*Id*. at 3, App. pp. 0876, 0881). The court found the Workers' petitions insufficient to invoke § 85.20(2) for the following reasons:

> First, the allegations pled are not made as to specific defendants (the Plaintiffs "lumped" defendants together and made their allegations against them generally) and as such the pleadings do not give sufficient notice as to what duty or claim each defendant is alleged to have owed to each Plaintiff. Additionally, the allegations of gross negligence are not specifically pled as to each co-employee defendant. Neither do the allegations make any assertions that each co-employee defendant had actual knowledge of the peril to be apprehended or that injury is a probable result of the danger.

(*Id*. at 3-4, App. pp. 0876-0877, 0881-0882). The court did not analyze the exception to IWCA immunity when the employer commits or directs others to commit an intentional tort, whether the fraud claims were sufficiently pleaded, or *any* of the fact allegations supporting the fraud or gross negligence claims against any of the defendants. The only factual deficiency the court seems to have found related to the lack of individualized allegations – and had nothing to do with their substantive merits.

The Workers moved under Iowa R. Civ. P. 1.904(2), asking the court to address the omitted arguments, and, alternatively, requesting leave to amend their petitions to address the perceived improper "lumping together" of the co-worker defendants. (*Buljic* Rule 1.904(2) Mot., App. p. 0884; *Fernandez* Rule 1.904(2)

Mot., App. p. 890). On March 24, 2023, after the defendants filed their oppositions, (*Buljic* Defs.' Resist. Briefs, App. pp. 0944, 0990; *Fernandez* Defs.' Resist. Briefs, App. pp. 0967, 0995), but almost a week before the Workers' deadline to reply, the district court denied the Workers' Rule 1.904(2) motion in its entirety, without explanation. (*Buljic* Rule 1.904(2) Mot. Order, App. p. 01000; *Fernandez* Rule 1.904(2) Mot. Order, App. p. 01003). The Workers timely filed their replies. (*Buljic* Rule 1.904(2) Reply, App. p. 01005; *Fernandez* Rule 1.904(2) Reply, App. p. 01031).

On April 12, 2023, the Workers timely filed their notices of appeal. (*Buljic* NOA; *Fernandez* NOA).

STATEMENT OF FACTS[5]

The Defendants

Tyson is the corporate employer defendant. (*Buljic*, Second Am. Pet. ¶¶ 11-19, App. p. 0145-0146; *Fernandez*, Second Am. Pet. ¶¶ 5-13, App. pp. 0196-0197). Tyson operates facilities around the world, including in Waterloo, Iowa (Waterloo Facility); it is the largest meat processor in the country. (*Buljic*, Second Am. Pet. ¶¶1,11-12, App. pp. 0143, 0145; *Fernandez*, Second Am. Pet. ¶¶ 1, 6, 92,

[5] Because the propriety of a dismissal motion depends on the petitions' allegations, which are presumed true for purpose of this appeal, *Rieff v. Evans,* 630 N.W.2d 278, 284 (Iowa 2001), the fact statement is drawn directly from the petitions.

App. pp. 0195, 0196, 0209). Six of Tyson's executives, John Tyson (Chairman), Noel White (CEO), Stephen Stouffer (President), Tom Brower (Vice President of Health and Safety), Doug White (Corporate Safety Manager), and Debra Adams (Associate Director of Occupational Health), were often collectively referred to as the Executive Defendants. (*Buljic*, Second Am. Pet. ¶¶ 20-27, App. p. 0146; *Fernandez*, Second Am. Pet. ¶¶ 14-22, App. p. 0197). Six supervisors at the Waterloo Facility, Tom Hart (plant manager), James Hook (human resources director), Bret Tapken (safety lead), Cody Brustkern (upper-level manager), John Casey (upper-level manager), and Mary Jones (occupational nurse manager), were often referred to collectively as Supervisory Defendants. (*Buljic*, Second Am. Pet. ¶¶ 29-35, App. pp. 0146-0147 ; *Fernandez*, Second Am. Pet. ¶¶ 23-30, App. p. 0198). Each of the Executive and Supervisory Defendants was responsible for the health and safety of the Workers, and each owed them a duty to exercise reasonable care to prevent injuries. (*Buljic*, Second Am. Pet. ¶¶ 28, 36, 243, 266, App. pp. 0146, 0147, 0181, 0186; *Fernandez*, Second Am. Pet. ¶¶ 22, 30, 245, 268, App. pp. 0197, 0198, 0232, 0237).

Pre-COVID-19 Warnings

Years before COVID-19, Tyson was warned that a viral pandemic was probable, and that its facilities were particularly vulnerable. (*Buljic*, Second Am. Pet. ¶ 40, App. p. 0148; *Fernandez*, Second Am. Pet. ¶ 34, App. p. 0199). It was

warned to stockpile masks and other personal protective equipment (PPE), plan for spacing workers six feet apart and installing plastic barriers, slowing production lines, and having sick or potentially sick workers stay home. (*Buljic*, Second Am. Pet. ¶¶ 41-48, App. pp. 0148-0150 ; *Fernandez*, Second Am. Pet. ¶¶ 35-42, App. pp. 0199-0201). Despite the warnings and knowledge of the risks, Tyson and the Executive Defendants knowingly and intentionally refused to take these rudimentary safety steps – at the Waterloo Facility, anyway. (*Buljic*, Second Am. Pet. ¶ 49, App. p. 0150-0151; *Fernandez*, Second Am. Pet. ¶ 43, App. p. 0201-0202).

Protecting its Workers in China

That Tyson and the Executive Defendants knew exactly what to do and when to do it when the COVID-19 pandemic hit was shown by the measures they took protect their workers in Tyson's facilities in China – measures kept from the Waterloo Facility workers. By February 2020, Tyson had halted or slowed operations to stem the spread of the virus, and implemented extensive COVID-19 protocols, such as providing proper masks and other PPE, checking employees' temperatures using infrared body temperature monitors, educating employees on how to protect themselves, restricting access to the facilities (including symptomatic employees), and preventing employees from gathering in social areas. (*Buljic*, Second Am. Pet. ¶¶ 60-65, 69, App. pp. 0152, 0154; *Fernandez*, Second

Am. Pet. ¶¶ 54-59, 64, App. pp. 0203-0204, 0205). By mid-February, Tyson had also sanitized incoming cars at plant entrances; permitted only people who passed the infrared temperature monitors to enter, and required them to sanitize their hands and wear masks; and imposed a strict procedure requiring employees to don sanitized uniforms, boots, and hats, and then wash and spray their hands with sanitizer before entering the work area. (*Buljic*, Second Am. Pet. ¶ 67, App. p. 0153; *Fernandez*, Second Am. Pet. ¶ 62, App. p. 0204). Because of these protocols – which were shared with Tyson's U.S.-based operations – Chinese media reported zero COVID-19 related deaths of meat packing employees. (*Buljic*, Second Am. Pet. ¶¶ 70-71, App. p. 0154; *Fernandez*, Second Am. Pet. ¶¶ 65-66, App. p. 0205). Despite knowing of the danger and how to protect against it, the defendants refused to implement these measures at the Waterloo Facility. (*Buljic*, Second Am. Pet. ¶ 94, App. p. 0158; *Fernandez*, Second Am. Pet. ¶ 91, App. p. 0209).

Closing Tyson's Columbus Junction Facility . . .

On January 31, 2020, U.S. officials declared a national public health emergency; by March 8, COVID-19 appeared in Iowa; by March 17, its presence was confirmed in Black Hawk County. (*Buljic*, Second Am. Pet. ¶¶ 74-75, 84, App. pp. 0154, 0155; *Fernandez*, Second Am. Pet. ¶¶ 71-72, 81, App. pp. 0205, 0207). On April 5, Tyson's facility in Columbus Junction, Iowa (Columbus

Junction Facility), had 29 confirmed COVID-19 cases; the facility was closed the following day. (*Buljic*, Second Am. Pet. ¶¶ 90-91, App. p. 0157; *Fernandez*, Second Am. Pet. ¶¶ 87-88, App. p. 0208). The Executive and Supervisory Defendants transferred Columbus Junction Facility workers to the Waterloo Facility (without testing or quarantining them) to help process the hogs that were redirected from the closed Columbus Junction Facility. (*Buljic*, Second Am. Pet. ¶¶ 101, 133-35, 197-98, App. pp. 0159, 0164-0165, 0173-0174; *Fernandez*, Second Am. Pet. ¶¶ 98,130-132, 200-201, App. pp. 0210, 0215, 0225). They knew that workers were traveling back and forth between the two facilities and bringing the virus with them. (*Buljic*, Second Am. Pet. ¶ 93, App. p. 0158; *Fernandez*, Second Am. Pet. ¶ 90, App. p. 0209). The day after the Columbus Junction Facility closed, a box of rags and frayed fabric was provided at the Waterloo Facility for workers to use as "optional" face coverings. (*Buljic*, Second Am. Pet. ¶ 130, App. p. 0164; *Fernandez*, Second Am. Pet. ¶ 127, App. p. 0214).

. . . But Keeping the Waterloo Facility Operating at Full Capacity

Tyson and the Executive and Supervisory Defendants had advance notice of the danger COVID-19 posed to the workers at the Waterloo Facility, including by virtue of years' worth of warnings about how an influenza-like pandemic would impact workers, as well as the illnesses and deaths that occurred in other Tyson facilities, including the Columbus Junction Facility and its facility in Camilla,

Georgia, and other meat packing facilities around the country. (*Buljic*, Second Am. Pet. ¶¶ 49-50, 106-07, 111, 179, 197, App. pp. 0150-0151, 0160, 0161, 0171, 0173; *Fernandez*, Second Am. Pet. ¶¶ 43-44, 103-104, 108, 182, 200, App. pp. 0201-0202, 0211, 0212, 0222, 0225). By the beginning of April, each Executive and Supervisory Defendant knew that COVID-19 was rampantly spreading through the Waterloo Facility. (*Buljic*, Second Am. Pet. ¶¶ 108, 118, App. pp. 0160, 0162; *Fernandez*, Second Am. Pet. ¶ 105, 115, App. pp. 0211, 0213). Records from March that would show widespread COVID-19 prior to April 1 are unavailable, but April records revealed an exponential rise of COVID-19 in the Waterloo Facility – a rise that Defendant Tom Hart communicated to the Executive Defendants daily. (*Buljic*, Second Am. Pet. ¶¶ 117, 118, 120, 124, 127, 129, 130-31, 136-39, 143, 146, 148, 151, 152, 154, 157, 162, App. pp. 0162 - 0168; *Fernandez*, Second Am. Pet. ¶¶ 114, 115, 117, 121, 124, 126, 127-128, 133-134, 136-137, 141, 147, 149, 152-153, 155, 158, 165, App. pp. 0213-0220). On April 1, 94 Waterloo Facility employees called in sick with COVID-19 symptoms. (*Buljic*, Second Am. Pet. ¶120, App. p. 0162-0163 ; *Fernandez*, Second Am. Pet. ¶ 117, App. p. 0213). By April 6 – the same day that the Columbus Junction Facility was closed due to 29 confirmed cases – that number had more than doubled to 209. (*Buljic*, Second Am. Pet. ¶¶131, 133, App. p. 0164; *Fernandez*, Second Am. Pet. ¶¶ 128, 130, App. p. 0215). Within a week, the number would rise to 569. (*Buljic*,

Second Am. Pet. ¶ 146, App. p. 0166; *Fernandez*, Second Am. Pet. ¶¶ 147, App. p. 0217). Defendant Hart organized a betting pool for supervisors and managers to wager how many workers would test positive for COVID-19. (*Buljic*, Second Am. Pet. ¶ 164, App. p. 0169; *Fernandez*, Second Am. Pet. ¶ 167, App. p. 0220).

Despite knowing of the rampant spread of the virus, and in stark contrast to Tyson's protection of its workers in China and its closing of the Columbus Junction Facility, the Executive and Supervisory Defendants forced sick and symptomatic workers to stay at work at the Waterloo Facility unless and until they received a formal, positive COVID-19 test result (which often took several days to confirm); refused to provide proper masks; allowed workers to work without masks or other PPE; refused to slow or pause production to stem the spread of the virus; and refused to screen workers for symptoms. (*Buljic*, Second Am. Pet. ¶¶ 90-91, 97, 99, 102-04, 109, 131, 133, 135, 199-201, App. pp. 0157, 0159-0161, 0164, 0165, 0174; *Fernandez*, Second Am. Pet. ¶¶ 87-88, 94, 96, 99-101, 106, 128, 130, 132, 202-204, App. pp. 0208-0211, 0215, 0225). The Executive and Supervisory Defendants intentionally kept the Waterloo Facility operating at full speed in reckless disregard of workers' safety. (*Buljic*, Second Am. Pet. ¶¶ 112, 131, 135, App. p. 0161, 0164, 0165; *Fernandez*, Second Am. Pet. ¶¶ 109, 128, 132, App. pp. 0212, 0215). Defendant John Casey directed employees to ignore symptoms of COVID-19, required supervisors to make employees come to work even if they

had symptoms, and downplayed the dangers of COVID-19. (*Buljic*, Second Am. Pet. ¶¶ 203, 207, App. pp. 0174, 0175; *Fernandez*, Second Am. Pet. ¶¶ 206-207, 211, App. pp. 0225-0226). County health and safety officials, one of whom stated after touring the Waterloo Facility that viewing the working conditions there – workers crowded elbow to elbow, most without face coverings – "shook [him] to the core," begged Tyson to suspend or close the Waterloo Facility, but Tyson and the Executive and Supervisory Defendants refused. (*Buljic*, Second Am. Pet. ¶¶ 140-42, 149, 156, App. pp. 0165-0167; *Fernandez*, Second Am. Pet. ¶¶ 138-140, 150, 157, App. pp. 0216, 0218-0219).

The Supervisory Defendants took steps to protect themselves from the dangers they were creating in the Waterloo Facility: In March, they started avoiding the plant floor because they were afraid of contracting the virus. (*Buljic*, Second Am. Pet. ¶ 110, App. p. 0161; *Fernandez*, Second Am. Pet. ¶ 107, App. p. 0211). The Executive Defendants similarly took steps to protect themselves. (*Buljic*, Second Am. Pet. ¶¶ 83, 85, App. p. 0155-0156; *Fernandez*, Second Am. Pet. ¶¶ 80-82, App. p. 0206-0207). The workers, in contrast, were not only ordered to continue working despite showing signs of COVID-19, they were affirmatively incentivized to do so: Tyson offered $500 "thank you" bonuses *only* to employees who turned up for *every* scheduled shift during the height of the pandemic in order to incentivize sick workers to continue coming work. (*Buljic*, Second Am. Pet. ¶

205, App. p. 0174; *Fernandez*, Second Am. Pet. ¶ 209, App. p. 0226). In sharp contrast to its early closing of the Columbus Junction Facility, Tyson refused to close the Waterloo Facility until April 23 – *after* the company had processed all of the remaining hog carcasses in its cooler. (*Buljic*, Second Am. Pet. ¶ 163, App. p. 0168-0169 ; *Fernandez*, Second Am. Pet. ¶ 166, App. p. 0220).

Concealing the Dangers From the Immigrant Workers

The defendants took drastic steps to conceal the outbreak at the Waterloo Facility to keep employees coming to work: Executive Debra Adams directed occupational nurse supervisor Mary Jones to forbid staff nurses from attributing employees' COVID-19 symptoms to COVID-19; they were recorded as "flu-like symptoms," instead. (*Buljic*, Second Am. Pet. ¶ 119, App. p. 0162; *Fernandez*, Second Am. Pet. ¶ 116, App. p. 0213). The Executive Defendants ordered the Supervisory Defendants to refrain from performing contact tracing. (*Buljic*, Second Am. Pet. ¶ 125, App. p. 0163; *Fernandez*, Second Am. Pet. ¶ 122, App. p. 0214). The Supervisory Defendants ordered other supervisors to falsely deny that COVID-19 was present at the Waterloo Facility, which they did – even though hundreds of workers were calling in sick with symptoms every day. (*Buljic*, Second Am. Pet. ¶¶ 182-83, App. p. 0172; *Fernandez*, Second Am. Pet. ¶¶ 185-86, App. p. 0223). The Supervisory Defendants falsely told workers that they had to keep working to ensure Americans didn't go hungry, even though Tyson was

making record pork exports to China and record profits at the time. (*Buljic*, Second Am. Pet. ¶¶ 184, 213-15, App. p. 0172, 0176; *Fernandez*, Second Am. Pet. ¶¶ 187, 217-219, App. p. 0223, 0227-0228). The Executive Defendants publicly stated the same, despite knowing of the record exports to China. (*Buljic*, Second Am. Pet. ¶ 213, App. p. 0176; *Fernandez*, Second Am. Pet. ¶ 217, App. p. 0227). The Supervisory Defendants falsely told workers they would be notified if they had been in close contact with co-workers who tested positive for COVID-19; all defendants knew federal guidelines required notification, but they knowingly refused to provide it. (*Buljic*, Second Am. Pet. ¶¶ 185, 208, App. p. 0172, 0175; *Fernandez*, Second Am. Pet. ¶¶ 188, 212, App. p. 0223, 0226).

The Supervisory Defendants, including Tom Hart and James Hook, preyed on the vulnerable immigrant community, including the Workers, who spoke and understood little English by directing company interpreters to falsely tell immigrant workers that there was no COVID-19 outbreak at the Waterloo Facility, that there were no confirmed cases, and that county health officials had "cleared" the plant of COVID-19. (*Buljic*, Second Am. Pet. ¶¶ 186-96, App. p. 0172-0173; *Fernandez*, Second Am. Pet. ¶¶ 189-199, App. p. 0223-0225). They forbade the interpreters from discussing COVID-19 with the workers in any other respects. (*Buljic*, Second Am. Pet. ¶ 191, App. p. 0172-0173 ; *Fernandez*, Second Am. Pet. ¶ 194, App. p. 0224).

Bearing the Cost of Tyson's Record Profits

Tyson's corporate strategy worked, for Tyson: Its exports to China increased by 600% in the first quarter of 2020, and its 2020 profit from pork production was 600% higher than in 2019. (*Buljic*, Second Am. Pet. ¶¶ 214-15, App. p. 0176; *Fernandez*, Second Am. Pet. ¶¶ 218-219, App. p. 0227-0228). Tyson and the Executive Defendants knowingly and deliberately sacrificed the health and safety of the workers to secure these increased profits. (*Buljic*, Second Am. Pet. ¶¶ 216, 237, 260, App. pp. 0176, 0180, 0185; *Fernandez*, Second Am. Pet. ¶¶ 220, 239, 262, App. pp. 0228, 0231, 0236). The Workers paid the ultimate price: On April 10 and 11, Sedika Buljic had COVID-19 symptoms, but she was allowed to return to work a few days later, where she was falsely told that COVID-19 was not present in the Waterloo Facility, and that she was safe from the virus at work. (*Buljic*, Second Am. Pet. ¶¶ 139, 143, 150, App. pp. 0165, 0166-0167). On April 18, she died from COVID-19 complications. (*Buljic*, Second Am. Pet. ¶ 158, App. p. 0168). On April 13, Reberiano Garcia Leno[6] had COVID-19 symptoms; he was admitted to a hospital and placed on a ventilator a few days later, and died on April 23, isolated from his family. (*Buljic*, Second Am. Pet. ¶¶ 146, 155, 173, App. pp. 0166, 0167, 0170). Jose Ayala began exhibiting COVID-19 symptoms on about April 8. (*Buljic*, Second Am. Pet. ¶ 147, App. p. 0166). He was admitted

[6] The *Buljic* petition mistakenly identifies him as Reberiano Leno Garcia.

to the hospital on April 13, and died there, alone and isolated, on May 25. (*Buljic*, Second Am. Pet. ¶ 147, App. p. 0166). On April 12, Isidro Fernandez was admitted to the hospital with COVID-19 symptoms; two weeks later, he died there, alone. (*Fernandez*, Second Am. Pet. ¶¶ 143, 180, App. pp. 0216, 0222). Each of the Workers was infected with COVID-19 at the Waterloo Facility. (*Buljic*, Second Am. Pet. ¶¶ 3, 6, 9, App. pp. 0144-0145 ; *Fernandez*, Second Am. Pet. ¶ 3, App. p. 0196). A Black Hawk County health official attributed 90% of the county's COVID-19 cases to the Waterloo Facility. (*Buljic*, Second Am. Pet. ¶ 114, App. p. 0161; *Fernandez*, Second Am. Pet. ¶ 111, App. p. 0212). The COVID-19 outbreak in the Waterloo Facility was the largest reported workplace outbreak in the country. (*Buljic*, Second Am. Pet. ¶ 113, App. p. 0161; *Fernandez*, Second Am. Pet. ¶ 110, App. p. 0212).

The Gross Negligence and Fraud Claims

The above and other fact allegations supported the gross negligence claims against the Supervisory and Executive Defendants, and fraud claims against the Supervisory Defendants – and are sufficient to invoke the co-employee exception to workers' compensation exclusivity under Iowa Code § 85.20(2). The allegations further supported the claims against Tyson for committing or directing others to commit fraud. (*Buljic*, Second Am. Pet. ¶¶ 225-39, 240-62, 263-83, 284-96, App. pp. 0178-0181, 0181-0186, 0186-0191, 0191-0193; *Fernandez*, Second

Am. Pet. ¶¶ 227-41, 242-64, 265-85, 286-98, App. pp. 0229-0232, 0232-0236, 0237-0241, 0241-0244).

ARGUMENT

The Workers alleged that the defendants caused and exacerbated the rapid, uncontrolled spread of COVID-19 in the Waterloo Facility by refusing to implement known safety measures and ordering sick workers to continue working, and they affirmatively misled the Workers about the dangers to protect Tyson's skyrocketing profits. The allegations reveal both a fraud and a wanton neglect for the Workers' safety that make it proper for a court to hear their claims. Specifically, the detailed allegations of gross negligence and fraud against the Executive and Supervisory Defendants were more than sufficient to invoke the co-worker exception to IWCA exclusivity, Iowa Code § 85.20(2), and to give notice of the claims. As for the fraud claims against Tyson, there is an exception to IWCA exclusivity where an employer commits or directs others to commit an intentional tort, so the claims are not barred by Iowa Code § 85.20(1). Finally, if this Court determines that the allegations did not provide sufficient notice of the claims, the Workers should be allowed to amend their petitions because their proposed amendments do not change the claims or issues and are not prejudicial.

I. The Allegations in Appellants' Second Amended Petitions Satisfied Iowa Code § 85.20(2)'s Exception to IWCA Exclusivity, and Sufficiently Provided Notice.

A. Issue Preservation

The Workers preserved the issue by filing opposition briefs showing that the petitions sufficiently alleged fraud (including causation) and gross negligence against the individual co-workers defendants, and provided notice of those claims. (*Buljic,* Resistance to Tyson's Mot. to Dismiss, 72-76, App. pp. 0485-0489, Resistance to Executive Defs.' Mot. Dismiss, 2-22, App. pp. 0584-0604, Resistance to Supervisory Defs.' Mot. Dismiss, 2-12, App. pp. 0628-0638; *Fernandez,* Resistance to Tyson's Mot. to Dismiss, 71-76, App. pp. 0569-0574, Resistance to Executive Defs.' Mot. Dismiss, 2-14, App. pp. 0606-0618, 20-21, App. pp. 0624-0625, 14-20 App. pp. 0618-0624, Resistance to Supervisory Defs.' Mot. Dismiss, 2-11, App. pp. 0640-0649). The Workers further preserved their arguments in their Rule 1.904 briefing. (*Buljic* Rule 1.904 Br. 1-3, App. pp. 0896-0898, 10-18, App. pp. 0905-0913 & Reply Br. 12-18, App. pp. 1016-1022; *Fernandez* Rule 1.904 Br. 1-3, App. pp. 0920-0922, 10-18, App. pp. 0929-0937 & Reply Br. 12-18, App. pp. 1042-1048).

B. Standard of Review

A ruling on a motion to dismiss is reviewed for correction of errors at law. *U.S. Bank v. Barbour*, 770 N.W.2d 350, 353 (Iowa 2009). The framework for evaluating a dismissal under Iowa's notice-pleading standard[7] is well established:

> In considering a motion to dismiss, the court considers all well-pleaded facts to be true. A court should grant a motion to dismiss only if the petition on its face shows no right of recovery under any state of facts. Nearly every case will survive a motion to dismiss under notice pleading. Our rules of civil procedure do not require technical forms of pleadings.
> . . .
> A petition need not allege ultimate facts that support each element of the cause of action; however, a petition must contain factual allegations that give the defendant fair notice of the claim asserted so the defendant can adequately respond to the petition. The "fair notice" requirement is met if a petition informs the defendant of the incident giving rise to the claim and of the claim's general nature.

Id. at 353–54 (cleaned up). The petition is considered in the light most favorable to the plaintiff, and any doubts, uncertainties, and ambiguities are resolved in the plaintiff's favor. *Stessman v. Am. Black Hawk Broad. Co.,* 416 N.W.2d 685, 686 (Iowa 1987); *Tate v. Derifield*, 510 N.W.2d 885, 887 (Iowa 1994). These standards apply to both Rule 1.421(1)(f) (failure to state a claim) and Rule 1.421(1)(a) (lack of subject matter jurisdiction) motions. *See U.S. Bank,* 770 N.W.2d at 353–54 (applying standard to Rule 1.421(1)(f) motion); *Cincinnati Ins.*

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[7] The heightened federal pleading standard does not apply in Iowa state courts. *Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 608 (Iowa 2012).

Companies v. Kirk, 801 N.W.2d 856, 859 (Iowa Ct. App. 2011) (applying standard to Rule 1.421(1)(a) motion).

Moreover, unlike the federal and some other states' pleading rules, which require that fraud be pleaded with particularity, "[n]o comparable provision exists in Iowa; our rules contain no counterpart to Federal Rule of Civil Procedure 9(b) and thus do not expressly require fraud to be pled with particularity." *Karon v. Elliott Aviation*, 937 N.W.2d 334, 344 (Iowa 2020) (citation omitted).

Iowa's liberal notice-pleading standard has "virtually emasculated" dismissal motions, which can be sustained only where "it must be concluded that *no state of facts is conceivable* under which the plaintiff might show a right of recovery." *Unertl v. Bezanson*, 414 N.W.2d 321, 324 (Iowa 1987) (emphasis added); *U.S. Bank*, 770 N.W.2d at 353 (noting that "[n]early every case will survive a motion to dismiss under notice pleading"). As a result, "[m]otions to dismiss are disfavored[]": "Iowa is a notice pleading state. Lawyers should exercise 'professional patience' and challenge vulnerable cases by summary judgment or at trial instead of through 'premature attacks on litigation by motions to dismiss.'" *Benskin, Inc. v. W. Bank*, 952 N.W.2d 292, 296 (Iowa 2020) (citation omitted).

C. Iowa Code § 85.20(2), the Co-worker Exception to IWCA Exclusivity for Gross Negligence and Fraud

1. Gross negligence under Iowa Code § 85.20(2)

Iowa Code § 85.20(2) permits employees to recover against co-employees for "gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another[,]" which requires a showing of three elements: "(1) knowledge of the peril to be apprehended; (2) knowledge that injury is a probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the peril." *Thompson v. Bohlken*, 312 N.W.2d 501, 505 (Iowa 1981). "Wantonness" is *less blameworthy* than an intentional wrong. *Id*. Knowledge of "the danger" – which should be broadly defined – may be shown by circumstantial evidence. *Walker v. Mlakar,* 489 N.W.2d 401, 406 (Iowa 1992); *Judge v. Clark*, No. 05-1219, 2006 WL 3313794, * 6-7 (Iowa Ct. App. Nov. 6, 2006) (determining that knowledge that an explosive was in a confined space in the vicinity of the decedent co-worker was sufficient; knowledge that explosive was next to the decedent was not required); *Est. of Zdroik by Zdroik v. Iowa S. Ry. Co.*, No. 20-0233, 2021 WL 4593177, at *3 (Iowa Ct. App. Oct. 6, 2021) (accepting the plaintiff's broad characterization of "the peril" over the defendant's narrow definition in summary judgment context).

Facts pertinent to the *Thompson* inquiry include whether the defendants exposed themselves to the same risks, *see Henrich v. Lorenz*, 448 N.W.2d 327, 333 (Iowa 1989) (deeming it "significant" that the defendants had operated the equipment under the same allegedly dangerous conditions, as "[h]ad the defendants

known that these conditions and instructions would probably result in injury to the [equipment] operator, we doubt that they would have endangered themselves"); had reason to believe that the workers were not adequately protected, or that injuries would probably occur under the prevailing conditions, *id*. at 334; created the danger, *id*.; had reason to believe the workers were being exposed to a risk of imminent harm, *id*.; knew the mechanism of injury was dangerous, *Swanson v. McGraw*, 447 N.W.2d 541, 545 (Iowa 1989); had warned workers on how to avoid the danger, *id*.; had been warned about the dangers of exposure, *id*.; had ever issued protective gear to guard against the dangers, *id*.; were aware that protective measures taken were insufficient, *id*.; failed to take precautions to avoid the danger, *id*.; and whether the dangerous condition persisted over a period of time, *id*. (noting that "the probability that an injury would occur increased each day [the employee] was required to work in this dangerous condition" and that "the longer the dangerous situation persisted, the chance of injury passed from the realm of possibility to the realm of probability"). Virtually all of these facts were alleged.

2. Fraud claims satisfy Iowa Code § 85.20(2)

An intentional tort claim against co-workers may proceed even where the injuries are compensable under the IWCA. *See Smith v. Iowa State Univ. of Sci. & Tech.*, 851 N.W.2d 1, 15, 19-20 (Iowa 2014) (agreeing in case involving emotional injuries compensable under the IWCA that the intentional tort claim against co-

workers was not precluded by § 85.20); *see also Beard v. Flying J, Inc.*, 266 F.3d 792, 803 (8th Cir. 2001) (concluding that a battery claim against co-workers was not precluded by the IWCA, and recognizing the vitality of the "general rule" in Iowa that "excluded intentional torts such as [the co-employee's battery] from the exclusive jurisdiction of the workers' compensation system"). Even if there were no stand-alone independent tort exception to worker's compensation exclusivity, an intentional tort claim causing personal injuries will undoubtedly fall within the § 85.20(2) gross negligence/wanton neglect standard. *See Smith* at 19 (citing § 85.20(2)); *Thompson*, 312 N.W.2d at 505 (interpreting the term "wanton" in § 85.20(2) and noting that it is "less blameworthy than an intentional wrong"). This is particularly true where the fraud was perpetrated under circumstances showing "such lack of care as to amount to wanton neglect for the safety of another," Iowa Code § 85.20(2). Where a defendant acting negligently under these circumstances is liable, surely a defendant acting intentionally under these circumstances is liable.

The intentional tort of fraud is comprised of "(1) representation (2) falsity (3) materiality (4) scienter (5) intent to deceive (6) reliance (7) resulting in injury and damage." *Van Sickle Const. Co. v. Wachoria Commercial Morgt.*, 783 N.W.2d 684, 687 (Iowa 2010) (citation omitted). A fact is material "if it substantially affects the interest of the party alleged to have been defrauded[,]" and "a fraudulent misrepresentation is material if it is likely to induce a reasonable person to act."

Dier v. Peters, 815 N.W.2d 1, 8 (Iowa 2012) (citations omitted). Scienter is shown by allegations that the defendant had actual knowledge of the falsity, or recklessly disregarded the truth. *Id.* (citation omitted). An intent to deceive is shown by allegations that the defendant knew the representation was false or made the representation in reckless disregard of whether it was true or false. *Id.* at 9. Allegations that the plaintiff justifiably relied on the misrepresentation are sufficient to show reliance, and a petition must allege that the misrepresentations proximately caused damages. *Id*.

D. The District Court Ignored Notice-Pleading Standards and Erred in Ordering Dismissal Because the Petitions "Lumped" Together Allegations.

As a preliminary matter, the district court's ruling that dismissal was warranted due to the petitions' purportedly improper "lumping together" of defendants, (Order, 3-4, App. pp. 0876-0877), must be rejected. Under Iowa's notice pleading standards, a plaintiff need not set forth allegations of separate and distinct acts and omissions against each individual defendant. Regardless, the petitions state that the named executives "are collectively referred to as the 'Executive Defendants.'" (*Buljic* Second Am. Pet. ¶ 27, App. p. 0146; *Fernandez* Second Am. Pet. ¶ 21, App. p. 0197). Thus, each allegation against the Executive Defendants is an allegation against each named executive. *See NuVasive, Inc. v. Miles*, No. CV 2017-0720-SG, 2020 WL 5106554, at *8 (Del. Ch. Aug. 31, 2020)

(applying notice pleading standard and denying motion to dismiss complaint that "lumped together" the defendants because the allegations were that all defendants committed all the acts complained of). The same reasoning applies to the Supervisory Defendants, where the petitions state that the named supervisors "will be collectively referred to as the Supervisory Defendants.'" (*Buljic* Second Am. Pet. ¶ 35, App. p. 0147; *Fernandez* Second Am. Pet. ¶ 29, App. p. 0198). Thus, and again, each allegation against the Supervisory Defendants is an allegation against each named supervisor. No Iowa case states that common and identical allegations against a small group of similarly situated and clearly defined individual defendants cannot be grouped together. It makes no sense to require the Workers to repeat the same allegation for each of the seven Executive Defendants and six Supervisory Defendants.

Indeed, even under inapplicable but heightened federal pleading standards, when this common style of pleading is used, allegations against a defined group are read as having been alleged individually against each member of the group. *See, e.g.*, *Kyle K. v. Chapman*, 208 F.3d 940, 944 (11th Cir. 2000) ("The fact that defendants are accused collectively does not render the complaint deficient. The complaint can be fairly read to aver that all defendants are responsible for the alleged conduct."); *Restless Media GmbH v. Johnson*, No. 22-CV-80120-RAR, 2023 WL 2836971, at *7 (S.D. Fla. Feb. 1, 2023) ("When Defendants are referred

to collectively, the solution is to simply construe allegations containing the collective references as 'applying to each defendant individually.'" (citation omitted)). The allegations against the Executive and Supervisory Defendants must be read as applying to each executive and supervisor individually. In other words, the petitions allege every individual in the group did everything alleged. Any ambiguity or uncertainty on this point must, of course, be resolved in the Worker's favor. *Stessman,* 416 N.W.2d at 686; *Tate*, 510 N.W.2d at 887.

The district court further erred in concluding that the petitions, due to "lump[ing] defendants together" "do not give sufficient notice as to what duty . . . each defendant is alleged to have owed to each Plaintiff." (Order, 3-4, App. pp. 0876-0877). The petitions alleged that *each* executive and *each* supervisor was responsible for the health and safety of the Workers and owed them a duty of care. (*Buljic*, Second Am. Pet. ¶¶ 28, 36, 243, 266, App. pp. 0146, 0147, 0181, 0186; *Fernandez*, Second Am. Pet. ¶¶ 22, 30, 245, 268, App. pp. 0197, 0198, 0232, 0237). The individual defendants conceded that *every* individual co-worker defendant owed the Workers "the duty to refrain from acting with gross negligence." (*Buljic* Executive Defs.' and Mary Jones' Dismissal Br., 16-17 n.4, App. pp. 0352-0353; *Fernandez* Executive Defs.' and Mary Jones' Dismissal Br., 16 n. 3, App. p. 0386). Each co-worker defendant was aware of and conceded that each owed a duty to the Workers.

E. The Supervisory and Executive Defendants Knew of the Danger.

The petitions alleged that the Supervisory and Executive Defendants knew or should have known of the danger, which is sufficient to assert actual knowledge, and the district court erred in ruling otherwise. *See* Order, 4 (stating, erroneously, that the petitions did not allege "actual" knowledge), App. p. 0877; *Am. Nat. Bank v. Sivers*, 387 N.W.2d 138, 139 (Iowa 1986) (determining that allegations that defendants were aware *or* should have been aware of certain misrepresentations "are sufficient to assert actual knowledge").[8]

The petitions more than sufficiently alleged that the Executive and Supervisory Defendants knew the danger of an uncontrolled COVID-19 outbreak. For example, the *Swanson* employee was injured when caustic soap he was using to clean machinery leaked through a hole in his protective suit. 447 N.W.2d at 541. The *Swanson* court determined that the defendants knew of the peril because (1) the employee was working with a highly caustic soap that could cause severe burns; (2) the soap containers had labels warning that the soap was caustic; (3)

[8] Moreover, the district court erroneously relied on cases decided long after the pleading stage for its conclusion that the Workers had to "prove" actual knowledge. Order, 3 (citing *Simmons v. Acromark, Inc.*, No. 00-1625, 2002 WL 663581 (Iowa Ct. App. 2002) (directed verdict); *Walker v. Mlakar*, 489 N.W.2d 401, 403 (Iowa 1992) (directed verdict); *Kerrigan v. Errett*, 256 N.W.2d 394, 397 (Iowa 1977) (post-trial sufficiency of the evidence); *Hernandez v. Midwest Gas Co.*, 523 N.W.2d 300 (Iowa Ct. App. 1994) (summary judgment)). None of these cases support dismissal of the claims at the pleading stage.

other employees had been burned in the past; and (4) the company recognized the dangerous qualities of the soap because they furnished protective gear to employees who used it. *Id*. at 545. On these facts, it was "obvious to the defendants that the soap was dangerous." *Id*.

Here, it was even more obvious to the Supervisory and Executive Defendants that an uncontrolled COVID-19 outbreak was dangerous. COVID-19 is a highly contagious infectious respiratory disease that can result in serious injuries or death. (*Buljic*, Second Am. Pet. ¶¶ 51-53, App. p. 0151; *Fernandez*, Second Am. Pet. ¶¶ 45-47, App. p. 0202). The Executive Defendants had advanced notice of the danger COVID-19 posed to workers at the Waterloo Facility. (*Buljic*, Second Am. Pet. ¶¶ 106-08, App. p. 0160 ; *Fernandez*, Second Am. Pet. ¶¶ 103-105, App. p. 0211). They had been focused on COVID-19 since January 2020 when they formed a "company coronavirus task force" after observing the impact of COVID-19 on Tyson's China operations. (*Buljic*, Second Am. Pet. ¶¶ 73-74, App. p. 0154; *Fernandez*, Second Am. Pet. ¶¶ 68, 71, App. p. 0205).

The Supervisory and Executive Defendants also knew of the peril because on March 9, 2020, a federal agency issued guidance urging employers to increase distance between employees, install physical barriers, and provide employees with PPE. (*Buljic*, Second Am. Pet. ¶ 74, App. p. 0154 ; *Fernandez*, Second Am. Pet. ¶ 71, App. p. 0205). In early to mid-March, state and federal leaders issued several

emergency proclamations about the dangers and spread of the virus. (*Buljic*, Second Am. Pet. ¶¶ 73, 76, 78-79, App. pp. 0154, 0155; *Fernandez*, Second Am. Pet. ¶¶ 68, 73, 75-76, App. pp. 0205, 0206).

The Supervisory and Executive Defendants were also aware of the peril because in March and April 2020, they frequently communicated about strategies to keep employees working during the pandemic. (*Buljic*, Second Am. Pet. ¶ 115, App. p. 0162; *Fernandez*, Second Am. Pet. ¶ 112, App. p. 0212). By early April they knew that COVID-19 was rampantly spreading through the plant. (*Buljic*, Second Am. Pet. ¶¶ 102, 108, 118, 122, App. pp. 0160-0163; *Fernandez*, Second Am. Pet. ¶¶ 99, 105, 115, 119, App. pp. 0210, 0211,0213). They were aware that day after day, hundreds of workers were calling in sick with COVID-19 symptoms and many on the plant floor also exhibited symptoms. (*Buljic*, Second Am. Pet. ¶¶ 116, 120, 131, 136–38, 146, 148, 151–54, 157, 162, 166, App. pp. 0162, 0164-0166-0168, 0169 ; *Fernandez*, Second Am. Pet. ¶¶ 113, 117, 128, 133-134, 136, 147, 149, 152-55, 158, 165, 169, App. pp. 0212, 0213, 0215-0220). The Supervisory Defendants started avoiding the plant floor because they were afraid of contracting the virus. (*Buljic*, Second Am. Pet. ¶ 110, App. p. 0161; *Fernandez*, Second Am. Pet. ¶ 107, App. p. 0211). The Executive Defendants knew of the dire situation due to daily reports of the increasing numbers of workers calling in sick

with COVID-19 symptoms. (*Buljic*, Second Am. Pet. ¶ 118, App. p. 0162; *Fernandez*, Second Am. Pet. ¶ 115, App. p. 0213).

Finally, the Supervisory and Executive Defendants also knew of the peril because local officials repeatedly implored them to close the plant; they were aware that the Columbus Junction plant shut down after about 29 employees tested positive; and they were aware of outbreaks and safety measures at other plants. (*Buljic*, Second Am. Pet. ¶¶ 76-82, 100, 111, 122, 179, App. pp. 0154-0155, 0159, 0161, 0163, 0171 ; *Fernandez*, Second Am. Pet. ¶¶ 73-79, 97, 108, 119, 182, App. pp. 0206, 0210, 0212, 0213, 0222). The Executive Defendants affirmatively rejected local officials' attempts to protect workers' safety, including their lobbying to close the plant, and refused to cooperate with them. (*Buljic*, Second Am. Pet. ¶¶ 140-41, App. p. 0165; *Fernandez*, Second Am. Pet. ¶¶ 138-40, App. p. 0216). On April 14, local officials asked Tyson to temporarily suspend operations at the plant due to the outbreak and the risks to Tyson's employees, but Tyson, through the Executive Defendants, refused. (*Buljic*, Second Am. Pet. ¶ 149, App. p. 0166; *Fernandez*, Second Am. Pet. ¶ 150, App. p. 0218).

These facts show that not only did the co-workers know of the danger, but they also actually created it by causing or substantially increasing the risks of COVID-19 infections in the Waterloo Facility. *Cf. Henrich*, 448 N.W.2d at 334

(noting that the *Thompson* test was not satisfied where a nonparty – and not the co-workers – created the danger).

The petitions sufficiently alleged that the Supervisory and Executive Defendants knew of the danger.

F. The Supervisory and Executive Defendants Knew That Injury Was Probable.

By March, the co-worker defendants were aware that COVID-19 spread by person-to-person contact, and knew that safety precautions such as social distancing, slowing production lines, the use of plastic barriers and PPE, contact tracing, and quarantining sick employees were required to protect against its spread. (*Buljic*, Second Am. Pet. ¶ 94, App. p. 0158; *Fernandez*, Second Am. Pet. ¶ 91, App. p. 0209). Nevertheless, they refused to take these steps. (*Buljic*, Second Am. Pet. ¶ 94, App. p. 0158; *Fernandez*, Second Am. Pet. ¶ 91, App. p. 0209). The circumstances of this case thus mirror those in *Swanson*, where "the probability that an injury would occur increased each day Swanson was required to work in this dangerous condition." 447 N.W.2d at 545. Here, as in *Swanson*, the co-worker defendants knew that "the longer the dangerous situation persisted, the chance of injury passed from the realm of possibility to the realm of probability." *Id*.

In *Swanson*, the court determined the defendants knew an injury was probable because (1) the defendants knew that there was a hole in the employee's

protective suit; (2) the defendants acknowledged the probability of injury when they told the employee to protect himself the best he could; and (3) the protective gear did not provide adequate protection as it was common knowledge that the gear did not fit well. *Id*. Similarly, the Supervisory and Executive Defendants knew that injury was probable because (1) hundreds of employees were calling in sick with COVID-19 symptoms and many on the plant floor exhibited symptoms; (2) they acknowledged the probability of injury when they installed temperature check stations at the plant, provided rags and frayed fabric for employees to use as "optional" masks, and posted signs that encouraged employees to wear masks; and (3) the temperature check stations, rags and frayed fabric did not provide adequate protection as it was common knowledge that optional masking with rags, without social distancing or other protective measures, did not protect employees from the virus. (*Buljic*, Second Am. Pet. ¶¶ 116, 120, 128, 130–32, 136–39, 146, 148, 151–54, 157, 162, 166, App. pp. 0162, 0164-0169; *Fernandez*, Second Am. Pet. ¶¶ 113, 117, 125, 127-29, 133-34, 136, 147, 149, 152-55, 158, 165, 169, App. pp. 0212-0220).

In addition, Defendant Hart organized a betting pool for supervisors and managers to wager how many employees would test positive for COVID-19. (*Buljic*, Second Am. Pet. ¶ 164, App. p. 0169; *Fernandez*, Second Am. Pet. ¶ 167, App. p. 0220). He of course knew that injury was probable; indeed, he was betting

on it. The Executive Defendants further acknowledged that injury was probable by aggressively lobbying government officials for COVID-19-related liability protections in March and April, knowing that claims arising from COVID-19 related deaths were likely to be filed against them. (*Buljic*, Second Am. Pet. ¶¶ 209-11, App. p. 0175; *Fernandez*, Second Am. Pet. ¶¶ 213-15, App. pp. 0226-0227).

Moreover, the Supervisory Defendants avoided the plant floor because they were afraid of the virus, and the Executive Defendants also took special steps to protect themselves. (*Buljic*, Second Am. Pet. ¶¶ 83, 85, 110, App. p. 0155-0156, 0161; *Fernandez*, Second Am. Pet. ¶¶ 80, 82, 107, App. p. 0206, 0207, 0211). They refused to expose themselves to the same dangers to which they exposed the Workers. *Cf. Henrich*, 448 N.W.2d at 333 (finding it "significant" that the defendants exposed themselves to the same conditions the worker complained of, which they presumably would not have done had they known that injury was probable).

The petitions sufficiently alleged that the Supervisory and Executive Defendants knew that injury was probable.

G. The Supervisory and Executive Defendants Consciously Failed to Avoid the Danger.

In *Swanson*, the court determined that the defendants disregarded the danger by telling the employee to work with the defective suit until new suits arrived. 447

N.W.2d at 545. Here, the Supervisory Defendants disregarded the danger by cancelling regularly scheduled safety meetings, and by directing supervisors and interpreters to falsely deny that the virus had been detected in the plant, after they learned that Waterloo employees had tested positive. (*Buljic*, Second Am. Pet. ¶¶ 181-82, App. pp. 0171-0172; *Fernandez*, Second Am. Pet. ¶¶ 184-85, App. p. 0223). In addition, Defendants Hart and Hook, and other Supervisory Defendants, also disregarded the danger by directing interpreters to falsely tell non-English speaking employees that that were "no confirmed cases" in the plant and that the county health department had "cleared" the plant of COVID-19. (*Buljic*, Second Am. Pet. ¶¶ 189-190, App. p. 0172; *Fernandez*, Second Am. Pet. ¶¶ 192-93, App. p. 0224). Further, the Supervisory Defendants permitted or encouraged symptomatic employees, and those likely to have been exposed to COVID-19, to continue working in close proximity to other employees; the Supervisory Defendants directed symptomatic employees who were awaiting COVID-19 test results to continue working next to others until they were notified of their test results; and Defendant Casey directed supervisors and employees to ignore symptoms of COVID-19, directed supervisors to make their direct reports come to work even if they had COVID-19 symptoms, and even intercepted a sick supervisor en-route to get tested and ordered the supervisor to get back to work. (*Buljic*, Second Am. Pet. ¶¶ 96–99, 181–83, 190–91, 201–04, App. pp. 0159, 0171-

0174, ; *Fernandez*, Second Am. Pet. ¶¶ 93-96, 184-86, 192-93, 204-08, App. pp. 0209-0210, 0223-0226). They further provided ineffective rags and frayed fabric for employees to use as "optional" face coverings, (*Buljic*, Second Am. Pet. ¶ 130, App. p. 0164; *Fernandez*, Second Am. Pet. ¶ 127, App. p. 0214), much as the *Swanson* defendants expected the employee to continue working with a defective protective suit.

By early April, each of the Supervisory and Executive Defendants knew that COVID-19 was rampantly spreading through the Waterloo Facility, yet they forced symptomatic workers to continue working unless and until they tested positive for COVID-19, which often took days to confirm. (*Buljic*, Second Am. Pet. ¶¶ 108-09, App. p. 0160-0161; *Fernandez*, Second Am. Pet. ¶¶ 105-06, App. p. 0211). Despite knowing the risks of COVID-19 and the inability of workers to socially distance, they intentionally and deliberately kept the Waterloo Facility running at full capacity rather than slowing or pausing production to take protective measures. (*Buljic*, Second Am. Pet. ¶ 112, App. p. 0161; *Fernandez*, Second Am. Pet. ¶ 109, App. p. 0212). Unsurprisingly, the Waterloo Facility COVID-19 outbreak was the largest reported workplace outbreak in the country. (*Buljic*, Second Am. Pet. ¶ 113, App. p. 0161; *Fernandez*, Second Am. Pet. ¶ 110, App. p. 0212).

The Executive Defendants consciously disregarded the peril after determining that slowing or pausing production at the Waterloo Facility would cost

the company millions of dollars per day. (*Buljic*, Second Am. Pet. ¶ 253, App. p. 0184; *Fernandez*, Second Am. Pet. ¶ 255, App. p. 0235). Suspending operations at the Columbus Junction Facility after 29 employees tested positive was one thing, but the Waterloo Facility is Tyson's largest pork packing plant in the country. (*Buljic*, Second Am. Pet. ¶¶ 1, 133–36, App. pp. 0143, 0164-0165; *Fernandez*, Second Am. Pet. ¶¶ 1, 130-32, App. pp. 0195, 0215). The hogs originally sent to Columbus Junction had already been redirected to Waterloo. (*Buljic*, Second Am. Pet. ¶ 134, App. p. 0165; *Fernandez*, Second Am. Pet. ¶ 131, App. p. 0215). Rather than lose millions of dollars a day, the Executive Defendants directed the Supervisory Defendants to keep the plant operating at full speed, for as long as possible: They forbade Defendant Hart from slowing or pausing production, directed him to keep the facility running at full production at all costs for as long as possible, and directed Defendants Jones and Hook not to track the number of COVID-19 infections at the facility and not to perform contact tracing. (*Buljic*, Second Am. Pet. ¶ 254, App. p. 0184-0185; *Fernandez*, Second Am. Pet. ¶ 256, App. p. 0235).

These allegations showing that the Supervisory and Executive Defendants consciously disregarded the danger is much stronger than evidence that "the defendants consciously disregarded the obvious peril *in expecting Swanson to continue working* under these conditions." *Swanson*, 447 N.W.2d at 545 (emphasis

added). Here, the co-workers did not just "expect" the Workers to continue working under dangerous conditions, they tricked them into doing so.

The petitions sufficiently alleged that the Supervisory and Executive Defendants consciously failed to avoid the danger.

H. The Petitions Sufficiently Alleged Fraud Against the Supervisory Defendants, Including the Occupational Nurse Manager of the Waterloo Facility, Mary Jones.

The Workers satisfied Iowa's notice pleading standard in pleading their fraudulent misrepresentation claims against the Supervisory Defendants, including Mary Jones. The Workers alleged that the Supervisory Defendants, including Defendant Jones, knowingly made to Workers the following misrepresentations: COVID-19 had not been detected at and was not spreading through the facility; worker absenteeism was unrelated to COVID-19; sick workers were not permitted to enter facility; workers from other Tyson plants closed due to COVID-19 outbreaks were not permitted to enter the Waterloo Facility; symptomatic workers would be sent home immediately and would not be permitted to return until cleared by health officials; workers would be notified if they had been in close contact with an infected co-worker; safety measures implemented at the facility would prevent or mitigate the spread of COVID-19 and protect workers from infection; the Waterloo Facility needed to stay open in order to avoid U.S. meat shortages; the Waterloo Facility was a safe work environment; and Tyson was protecting

workers in the same manner or better than its workers around the world. (*Buljic*, Second Am. Pet. ¶¶ 33-35, 274-75, App. pp. 0147, 0189; *Fernandez*, Second Am. Pet. ¶¶ 27-29, 276-77, App. pp. 0198, 0239-0240).

The Workers alleged that these representations were false. (*Buljic*, Second Am. Pet. ¶¶ 274-75, App. p. 0189-0190; *Fernandez*, Second Am. Pet. ¶¶ 276-77, App. p. 0239-0240). For example, allegations regarding the call logs at the Waterloo Facility (that hundreds of workers, their numbers increasing almost daily, were calling in with COVID-19 symptoms), that workers were ordered to come to work despite showing symptoms, that Defendant Jones forbade staff from attributing symptoms to COVID-19 in an effort to conceal the outbreak, and that the Supervisory Defendants, including Defendant Jones, refused to perform contact tracing, in violation of company policies, and refused to provide masks (*Buljic*, Second Am. Pet. ¶¶ 96-97, 109, 113, 116-120, 123-31, 136-39, 143-48, 151-52, 154-55, 157, 162, 166-67, App. pp. 0159, 0161-0169; *Fernandez*, Second Am. Pet. ¶¶ 93-94, 106, 110, 113-17, 120-28, 141-49, 152-53, 155-56, 158, 165, 169-70, App. pp. 0209, 0211-0220), show that the Waterloo Facility was not safe, that the purported "safety measures" were not preventing or mitigating the spread of COVID-19, that workers would not be notified if there were a contact with an infected co-worker, that sick workers were not sent home or not permitted to come to work, that worker absenteeism was unrelated to COVID-19, and that the disease

was not present in the facility and spreading rapidly. Allegations regarding the infected workers from the Columbus Junction Facility being transferred to the Waterloo plant, (*Buljic*, Second Am. Pet. ¶¶ 93, 133-34, 197-99, App. pp. 0158, 0164-0165, 0173-0174; *Fernandez*, Second Am. Pet. ¶¶ 90, 129-30, 200-02, App. pp. 0209, 0215, 0225), further show that workers from other facilities *were* allowed to enter the Waterloo Facility.

The fraudulent misrepresentations were material, as unknowingly exposing oneself to COVID-19 affects the interests of the Workers, and the misrepresentations induced the Workers to continue working. The petitions alleged (and common sense supports) that the Workers would not have continued to go to work had they been informed of the extent of COVID-19 outbreak at the Waterloo Facility and the risks associated with continued work there. (*Buljic*, Second Am. Pet. ¶¶ 275, 277, App. pp. 0189-0190; *Fernandez*, Second Am. Pet. ¶¶ 277, 279, App. p. 0240-0241). The Supervisory Defendants falsely told workers they had a responsibility to keep working to ensure that Americans didn't go hungry, (*Buljic*, Second Am. Pet. ¶ 184, App. p. 0172; *Fernandez*, Second Am. Pet. ¶ 187, App. p. 0223), to pressure them to come to work.

The petitions alleged scienter by stating that the Supervisory Defendants, including Defendant Jones, made the representations knowing they were false. (*Buljic*, Second Am. Pet. ¶ 276, App. p. 0190; *Fernandez*, Second Am. Pet. ¶ 278,

App. p. 0240). As stated above, the Supervisory Defendants, including Defendant Jones, knew that COVID-19 was detected at and rapidly spreading throughout the Waterloo Facility, that workers were absent due to COVID-19, that no contact tracing was occurring, that sick and symptomatic workers were permitted to come to work, that the facility was not safe, and that their safety measures were inadequate—despite representing otherwise to employees, including the Workers. The "intent to deceive" element is shown by allegations by that the Supervisor Defendants intended by these false representations to deceive workers at the Waterloo Facility, including the Workers, and to induce them to continue working despite the uncontrolled COVID-19 outbreak and the associated health risk. (*Buljic*, Second Am. Pet. ¶ 278, App. p. 0190; *Fernandez*, Second Am. Pet. ¶ 280, 0241). Furthermore, the Supervisory Defendants, including Defendant Jones, knowingly made the misrepresentations set out above, satisfying the "intent to deceive" element.

The petitions alleged that the Workers relied upon the representations as true and were justified in doing so. (*Buljic*, Second Am. Pet. ¶ 279, App. p. 0190; *Fernandez*, Second Am. Pet. ¶ 281, App. p. 0241). They alleged that the Workers' injuries were the result of the Supervisory Defendants' misrepresentations, which induced the Workers to continue working, that directly and proximately caused the Workers' injuries, and were a substantial factor in causing them. (*Buljic*, Second

Am. Pet. ¶¶ 280-81, App. p. 0190; *Fernandez*, Second Am. Pet. ¶¶ 283-84, App. p. 0241). The Workers sufficiently pleaded their fraud claims, and those claims should not have been dismissed.

I. The Petitions Sufficiently Alleged Causation.

Supervisory Defendant Mary Jones and Tyson[9] sought dismissal of the fraud claims based on a purported failure to plead causation. The petitions more than adequately pleaded causation. They alleged that the Workers would not have continued coming to work had they been informed of the extent of the COVID-19 outbreak and the health risks associated with their continued work during the outbreak. (*Buljic*, Second Am. Pet. ¶¶ 229-33, 277-80, App. pp. 0179-0180, 0190; *Fernandez*, Second Am. Pet. ¶¶ 231-235, 279-81, App. pp. 0230-0231, 0240-0241). They alleged that the misrepresentations directly and proximately caused their injuries, and were a substantial factor in causing them. (*Buljic*, Second Am. Pet. ¶¶ 229-33, 280-81, App. pp. 0179-0180, 0190; *Fernandez*, Second Am. Pet. ¶¶ 279-80, App. pp. 0240-0241). Each of the Workers was alleged to have been infected with COVID-19 at the Waterloo Facility. (*Buljic*, Second Am. Pet. ¶¶ 3, 6, 9, App. pp. 0144-0145; *Fernandez*, Second Am. Pet. ¶ 3, App. p. 0196). Additional allegations support an inference that the misrepresentations that induced

[9] The fraud claim against Tyson is addressed in more detail in section II. D., but its causation argument is presented here because it mirrors the one made by Defendant Jones.

the Workers to continue working in the dangerous environment caused the Workers' injuries: A grossly disproportionate number of Tyson's Waterloo workers became infected with COVID-19, as compared to the rest of Black Hawk County and the state. (*Buljic*, Second Am. Pet. ¶ 219, App. p. 0177; *Fernandez*, Second Am. Pet. ¶ 223, App. p. 0228). Data showed an increased prevalence of COVID-19 in the Waterloo Facility resulting in a greater incidence of death from COVID-19 by up to 50% over Black Hawk County's baseline rate. (*Buljic*, Second Am. Pet. ¶ 220, App. p. 0177; *Fernandez*, Second Am. Pet. ¶ 224, App. p. 0228). A Waterloo clinic reported that 99% of its early COVID-19 cases either worked at the Waterloo Facility or lived with someone who did. (*Buljic*, Second Am. Pet. ¶ 92, App. p. 0158; *Fernandez*, Second Am. Pet. ¶ 89, App. p. 0208). Public health officials attributed nearly all (90%) of Black Hawk County's COVID-19 cases to the Waterloo Facility, which had the largest workplace outbreak in the country. (*Buljic*, Second Am. Pet. ¶¶ 113-14, App. p. 0161; *Fernandez*, Second Am. Pet. ¶¶ 110-11, App. p. 0212). Moreover, the petitions alleged facts from which it can be inferred that had Tyson implemented the procedures it had implemented in China months earlier, the Waterloo Facility would have experienced zero COVID-19 related deaths. (*Buljic*, Second Am. Pet. ¶¶ 70-71, 77, App. pp. 0154-0155; *Fernandez*, Second Am. Pet. ¶ 65-66, 74, App. pp. 0205-0206).

In sum, the Workers alleged that they relied on the misrepresentations and were thereby induced to continue working at the Waterloo Facility. The Workers alleged that they developed COVID-19 at the dangerous facility teeming with infected workers because of the misrepresentations. And given the statistics above, the Workers alleged that the misrepresentations, at a minimum, increased their risk of infection. *See, e.g.*, *Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726, 742 (Iowa 2009) (noting that *proof* of legal cause required evidence that "the tortious aspect of the conduct increased the risk of the damages claimed"). The Workers sufficiently pleaded cause.

II. The IWCA Does Not Bar an Action Against an Employer for Intentional Torts That the Employer Committed or Directed.

A. Issue Preservation

The Workers preserved the issue by filing oppositions showing that Tyson is not immune from liability for the intentional tort it committed or directed others to commit. (*Buljic* Resistance to Tyson's Mot. Dismiss, 72-83, App. pp. 0485-0496; *Fernandez* Resistance to Tyson's Mot. to Dismiss, 76-82, App. pp. 0574-0580). The Workers further preserved their arguments in their Rule 1.904 briefing. (*Buljic* Rule 1.904 Br., 4-9, App. pp. 0899-0904 & Reply Br., 4-12, App. pp. 1008-1016; *Fernandez* Rule 1.904 Br., 4-9, App. pp. 0923-0928 & Reply Br., 4-12, App. pp. 1034-1042).

B. Standard of Review

A district court's ruling on a motion to dismiss is reviewed for correction of errors at law. *U.S. Bank*, 770 N.W.2d at 353. The framework for evaluating a dismissal motion is set out above in section I. B. Standard of Review.

C. The Intentional Tort Exception to IWCA Exclusivity

While Iowa Code § 85.20(1) commits certain claims against an employer to the exclusive jurisdiction of the Iowa Division of Workers' Compensation (DWC), the Iowa Supreme Court has recognized that claims against an employer may proceed in court where the employer committed or directed an intentional tort. It has never ruled that an employer may intentionally harm an employee and remain immune to civil suit. Iowa, like almost every other state, refuses to allow employers to intentionally lie to and injure their employees while enjoying workers' compensation immunity. Applying a worker's compensation exclusivity bar to intentional torts would be "a perversion of the purpose of the act." *Boek v. Wong Hing*, 231 N.W.233, 233 (Minn. 1930).

1. *Nelson v. Winnebago Indus., Inc.*, 619 N.W.2d 385 (Iowa 2000), Affirms That the IWCA Does Not Bar Suit Against a Corporate Employer For the Intentional Torts It Commits Through Its Alter Ego or Directs Others to Commit.

Nelson thoroughly examines two independent ways of avoiding the IWCA exclusivity bar: (1) alleging that the employer "commanded or expressly authorized" another to commit, or through its alter ego committed, an intentional

tort; or (2) alleging that the injuries fall outside the scope of the IWCA. In *Nelson*, the employee was injured during a going-away party. 619 N.W.2d at 386. As part of a prank, his coworkers bound his legs and arms with duct tape and carried him to a shower area. *Id*. He was injured when his co-workers dropped him. *Id*. He sued his employer, Winnebago, for false imprisonment and battery, and sued his coworkers for their gross negligence. *Id*. at 387, 389-90.

The employee claimed that the IWCA did not bar his suit against Winnebago, as Winnebago was liable because a supervisor implicitly approved the prank. *Id*. at 386-87. In rejecting this argument, the *Nelson* court relied on Professor Larson's treatise for the rule that suits against an employer for the intentional torts of one who *is not* the alter ego of a corporate employer, but is instead a mere supervising employee, are barred:

> *When the person who intentionally injures the employee* <u>*is not*</u> the employer in person nor *a person who is realistically the alter ego of the corporation*, but merely a foreman, supervisor or manager, both the legal and moral reasons for permitting a common-law suit against the employer collapse, and a substantial majority of modern cases bar a damage suit against the employer.

Id. at 387 (citing 2A Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 68.21(a), at 13–113 (1994) (hereafter, Larson) (emphasis added)). The rationale for the rule was as follows:

> The legal reason for permitting the common-law suit for direct assault by the employer or coemployee, as we have seen, is that the same person cannot commit an intentional assault and then allege it was

> accidental. This does not apply when the assailant and the defendant are two entirely different people. *Unless the employer has commanded or expressly authorized the assault, it cannot be said to be intentional from his standpoint* any more than from the standpoint of any third person. Realistically, it to him is just one more industrial mishap in the factory, of the sort he has a right to consider exclusively covered by the compensation system.

Id. at 387-88 (citing Larson § 68.21(b), at 13-123 (emphasis added)). The court concluded, "[i]n this case, the plaintiff did not claim Winnebago 'commanded or expressly authorized the assault' by its supervisory employee, so this case falls squarely under the general rule. *We agree with the rationale of the rule and the rule itself*." *Id*. at 388 (emphasis added). Where the supervisor was not alleged to be the employer's alter ego, and the employee did not claim that the employer "commanded or expressly authorized" the intentional tort, the court turned to the second method of avoiding the exclusivity bar: showing that the injuries are not compensable under the IWCA. *See id*. (stating that in the absence of a claim that Winnebago commanded or authorized the assault, Winnebago was not liable for the intentional torts of its supervisory employee "*unless* as alleged by the plaintiff, his *injuries fall outside the workers' compensation law*" (emphasis added)).

To make such a showing, the employee offered a creative, quirky, but ultimately unsuccessful argument that because a claim of false imprisonment or battery does not require a physical injury as a condition to recovery in all cases, his claims fell outside the scope of the IWCA – which provides remedies for physical

injuries. *Id*. at 388-89. The *Nelson* court had little trouble disposing of this argument:

> The problem with the plaintiff's argument is that, *while he asserts causes of action against his employer that may in some circumstances provide a remedy for nonphysical injuries, that is not the gist of his suit. He does not demand damages for nonphysical injuries* . . . . A mere labeling of a claim for injuries as false imprisonment or battery because in some circumstances those torts *may* be compensable without a physical injury cannot avoid the exclusivity of workers' compensation if the gist of the claim is for bodily injury.

Id. at 389 (emphasis added). In other words, when it comes to the *second* method of avoiding IWCA exclusivity (i.e., showing that the "injuries fall outside the workers' compensation law[,]" *id*. at 389) for claims against an employer, if the gist of the claim is for an injury that falls within the IWCA (i.e., one that "arises out of and in the course of employment," Iowa Code § 85.3(1)), a claim against an employer will be barred.

The intentional tort exception to IWCA immunity discussed in *Nelson* is well-established. In *Est. of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 681 (Iowa 2004), the court quoted the entire passage from *Nelson* quoted above, including the "alter ego" and the "commanded or authorized" rules, but concluded that there was an "insufficient showing in the record that the *Nelson* standard has been satisfied" where the plaintiff did not argue that the employer "commanded or expressly authorized" the co-worker's assault. If there were no exception, the court would simply have noted that the employer was immune from suit.

Obviously, the "*Nelson* standard" is established in Iowa. *See also McCoy v. Thomas L. Cardella & Assocs.*, No. 22-0918, 2023 WL 4034775, at *5 (Iowa June 16, 2023) (recognizing, in a case lacking allegations that the employer directed the co-employee to commit the intentional tort, *Nelson*'s "general rule" that a corporate employer is liable if its alter ego commits an intentional tort, but finding the rule inapplicable to the negligent supervision claim before it); *Brcka v. St. Paul Travelers Companies, Inc.,* 366 F. Supp. 2d 850, 855-56 (S.D. Iowa 2005) (noting rule in Iowa that "unlike . . . negligence actions," intentional tort claims against the employer are not precluded by the IWCA, and should not be dismissed at the pleadings stage) & *id*. at 855 ("Additionally, as the Eighth Circuit has recognized, '[t]he *Nelson* court ... did not state or even intimate that it was abandoning the general rule that excludes intentional torts ... from the exclusive jurisdiction of the workers' compensation system.'" (citation omitted)); John R. Lawyer & James R. Lawyer, 15 Ia. Prac., Workers' Compensation § 8:2, Extent of employer's immunity (2022) (noting limited nature of employer immunity, as "tort claims against the employer for intentional acts of supervisors are barred *where there is no showing the acts were expressly authorized or ordered by the employer*." (emphasis added) (footnote omitted)). Corporate employers in Iowa are not immune for intentional torts they commit through their alter egos or direct others to commit.

2. Public Policy Supports the Majority Rule That Employers May Be Sued for Their Intentional Torts.

Iowa is not alone. Almost every state allows claims against an employer for its willful misconduct. *See* 9 Larson Workers' Compensation Law §§ 103.01, 103.06, and 103.01 nn. 5 & 6 (identifying 39 states, including Iowa, as recognizing the employer intentional tort exception). Sound public policy underlies the rule that employers are not protected when they commit or direct others to commit intentional torts.

a. The Iowa Legislature Addressed Negligence – Not Intentional Torts – in Enacting the IWCA.

The legal landscape prior to the enactment of workers' compensation laws is generally described as follows:

> Prior to workers' compensation, an employer's legal obligation to compensate an injured worker was determined by the common-law rules of *negligence*. [T]he injured worker bore the burden of proving that his employer had failed to exercise "due care" in protecting the injured worker from the accident and that the employer's negligence was the proximate cause of the injury. *Even if an employer was found to be negligent, he could escape liability through three common-law defenses: that the employee had assumed the risks associated with the employment (assumption of risk), that a coworker (fellow servant) had caused the accident, or that the worker himself was negligent or had not exercised due care (contributory negligence).* Workers' compensation altered employers' workplace accident liability. . ..

Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900-1930*, 41 J.L. & Econ. 305, 308–09 (1998) (emphasis added) (hereafter, Fishback); *see also Millison v. E.I. du Pont de*

Nemours & Co., 501 A.2d 505, 512 (N.J. 1985) (explaining that employers were protected from liability by "the 'unholy trinity' of employer defenses—contributory negligence, assumption of risk, and the fellow servant rule" (citations omitted)); E.H. Downey, Work Accident Indemnity in Iowa, 19-27, 48-49, Iowa Economic History Series, State Historical Society of Iowa (1912), available at http://publications.iowa.gov/18922/ (last visited May 10, 2023) (noting that "[e]mployer's liability is but a branch of the law of negligence[,]" describing the problems with the three employer defenses to negligence, noting that "the principle of negligence as a basis of indemnifying work accidents has been discarded as barbarous and out of date by every civilized nation except our own," and approving of the proposed workers' compensation legislation, as "there is no question . . . that the law of negligence should be abrogated"). The much-criticized "unholy trinity" of defenses applies to negligence claims, not intentional torts. *See* Iowa Code § 87.21 (directing that an employer failing to insure must rebut the presumption of negligence without relying on the defenses of contributory negligence, assumption of risk, and fellow servant); *Lockard v. Carson,* 287 N.W.2d 871, 878 (Iowa 1980) (noting common law rule that negligence is not a defense to an intentional tort); *Duffey v. Consol. Block Coal Co.*, 147 Iowa 225, 124 N.W. 609, 610 (1910) ("Assumption of risk in its true sense [refers] to those risks arising out of the negligence of the master when such

negligence is known to the employee, and the danger therefrom appreciated by him.").

Against this backdrop, the Iowa Legislature created an Employer's Liability Commission to "investigate the problem of industrial accidents," and report its conclusions with a draft bill. 1911 Iowa Acts Ch. 205, p.230. The Commission's report addresses accidents and negligence principles, including noting that to recover under the common law, an employee had to not only prove that the employer was negligent, she also had to prove that neither she nor her co-worker was negligent, and that her injury did not come within the doctrine of assumed risk – defenses that "have been the subject of much criticism." Report of the Employers' Liability Commission of the State of Iowa (1912), Part I, at 3 (noting Commission's purpose to investigate the problem of industrial accidents and related liability law), 12 (contrasting other states' workers' compensation plans with "the old law [where] recoveries were forbidden unless the employe could show the employer to have been at fault, in other words guilty of negligence"), 15-16 (summarizing Iowa's common-law rules regarding the employer's negligence and the employee's burden, and noting criticism), and 20 (describing proposed

provision whereby an employer rejecting the plan is deprived of the three common-law defenses, and is presumed negligent).[10]

Iowa's 1913 workers' compensation law was built upon the Commission's proposals, and was enacted with an eye towards an employer's negligence:

> "In actions by an employé against an employer for personal injury sustained arising out of and in the course of the employment, where the employer has elected to reject the provisions of this act, it shall be presumed that the injury to the employé was the direct result and growing out of the negligence of the employer, and that such negligence was the proximate cause of the injury; and in such cases the burden of proof shall rest upon the employer to rebut the presumption of negligence." Chapter 8a, part 1, § 2477m, in subdivision c (4), Supplement Code 1913.

> We have no doubt that the Legislature, in framing this provision, had in mind the then condition of the law touching the subject-matter covered by the statute, and recognized that under that law the master owed certain masterial duties to his servant, a failure to discharge which, resulting in injury, created liability on the part of the master. It recognized that it was the duty of the master … to exercise *reasonable care* to see that the servant had a *reasonably safe place in which to work*; . . . to furnish the servant *reasonably safe tools* and appliances with which to do the work assigned him; that a failure to do this, resulting in injury, created a liability on the part of the master.

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[10] The complete Report of the Employer's Liability Commission is comprised of two parts: The report, proposed bill, and 23 appendices form Part I; transcripts of public hearings comprise Part II. The report is available to view online at https://babel.hathitrust.org/cgi/pt?id=uc1.$b46621&view=1up&seq=1 (last visited June 23, 2023).

Mitchell v. Swanwood Coal Co., 166 N.W. 391, 392 (Iowa 1918) (emphasis added). As noted, workers seeking recovery against their negligent employers were unable to overcome the "unholy trinity" of negligence defenses under the common law; Iowa's workers' compensation scheme abrogated those defenses for participating employers. *See Mitchell*, 166 N.W. at 392-93, 395-96 (noting the employee's burden to prove the employer's negligence under the common law, and that the 1913 law abrogated the employer defenses). Employers have a choice when it comes to workplace accidents: Elect the workers' compensation system and provide a certain remedy without regard to fault or reject the system and risk uncertain remedies determined in the absence of common-law negligence defenses. *See Mitchell*, 166 N.W. at 392-93, 395-96; Chapter 8a, part 1, § 2477m, (c)(1-3), Iowa Supplement Code 1913; Iowa Code § 87.21; *see also* Fishback, 41 J.L. & Econ. at 313–14 (noting that "employers who did not choose workers' compensation were stripped of their assumption of risk, fellow servant, and contributory negligence defenses").

The purpose of the IWCA is to protect workers injured by industrial accidents. *Yates v. Humphrey*, 255 N.W. 639, 642 (Iowa 1934) (noting that the law "was intended to relieve against the hardships resulting from the many unfortunate accidents which do take place in this age of extensive use of complicated machines and appliances[,]" and that "[t]he intention was to

compensate all accidental injuries" (citations omitted)); *Disbrow v. Deering Implement Co.*, 9 N.W.2d 378, 384 (Iowa 1943) (noting the law "was designed to aid and protect the industrial worker and his dependents against the hazards of the worker's employment, and to cast upon the industry in which he is employed a share of the burden resulting from industrial accidents. Such legislation is primarily for the benefit of such worker"). Another purpose is to ensure that the costs of industrial accidents are borne by industry, not the employee. *Tepesch v. Johnson*, 296 N.W. 740, 742–43 (Iowa 1941) (noting purpose "to impose upon industrial enterprise the burden and cost of hazards of employment and to make such cost a part of the 'overhead' of the trade or business").

To accomplish their purposes, workers' compensation schemes imposed a "bargain," or *quid pro quo*: Employers compensate employees for work-related injuries, and in exchange, employees give up certain rights to sue the employer for the industrial accidents in which they were injured. *Baker v. Bridgestone/Firestone*, 872 N.W.2d 672, 676-77 (Iowa 2015). An employer that fails to provide insurance or to self-insure is not entitled to the exclusivity bar, is presumed negligent, and is precluded from raising negligence defenses. Iowa Code § 87.21.

b. Employer Immunity for Intentional Torts Undermines the Goals of a Workers' Compensation System and Is Not Supported by the Text or History of the IWCA.

The history, text, and purposes of the IWCA – which is like workers' compensation regimes around the country – indicate that employers are not immune for their intentional torts. *See* Iowa Code § 4.6 (2), (4) (directing courts interpreting an ambiguous statute to consider "[t]he circumstances under which the statute was enacted" and "[t]he common law"); *In re G.J.A.*, 547 N.W.2d 3, 6 (Iowa 1996) (noting considerations of "the legislative history, the object to be accomplished, the evils to be remedied, and the purpose for which the statute was enacted").

First, extending the immunity afforded to employers by the workers' compensation system to intentional torts would defeat the legislative goal of workplace safety. As the Ohio Supreme Court explained,

> Indeed, workers' compensation Acts were designed to improve the plight of the injured worker, and to hold that intentional torts are covered under the Act would be tantamount to encouraging such conduct, and this clearly cannot be reconciled with the motivating spirit and purpose of the Act.
> . . .
> Affording an employer immunity for his intentional behavior certainly would not promote [a safe and injury-free work] environment, for an employer could commit intentional acts with impunity with the knowledge that, at the very most, his workers' compensation premiums may rise slightly.

Blankenship v. Cincinnati Milacron Chemicals, Inc., 433 N.E.2d 572, 577 (Ohio 1982). The analysis is particularly apt here, where county health officials pleaded with Tyson to slow or pause production for the sake of its workers, and Tyson

refused for the sake of its profits. (*Buljic*, Second Am. Pet. ¶¶ 140-42, 149, 156, App. pp. 0165-0167; *Fernandez*, Second Am. Pet. ¶¶ 138-40, 150, 157, App. pp. 0216, 0218-0219).

Second, the law was enacted to address negligence, not intentional torts. The Iowa Legislature addressed the criticisms of the preexisting system of negligence liability and defenses by directing that, as a penalty for refusing to participate in the workers' compensation system by providing traditional or self-insurance,[11] employers were (and are) subject to suit in which their negligence is presumed, and they cannot rebut that presumption by resorting to the traditional negligence defenses of assumption of risk, fellow servant, or contributory negligence. Iowa Code § 87.21. That the penalty for rejecting the system makes no mention of intentional torts is a strong indicator that the Legislature was addressing only negligence and accidental injuries. Indeed, it would make little sense to reward a participating employer with immunity for both negligence *and* intentional torts, but to penalize a non-participating one with liability for *only* negligence. It cannot be presumed that the non-participating employer gets to "keep" any immunity for intentional torts purportedly created by the new system. The only logical reason for not penalizing the non-participating employer with

[11] All employers are presumed to have accepted the IWCA, but the exclusive remedy provision does not apply where employers fail to provide insurance or to self-insure. Iowa Code §§ 85.3, 85.71.

liability for intentional torts is that the entire scheme has nothing to do with an employer's intentional torts; there is no penalty of liability for intentional torts precisely because there is no countervailing reward of immunity for intentional torts under the system. As the Indiana Supreme Court explained,

> Historically, workers compensation was concerned not with intentional torts but with the intolerable results that flowed from the common law's treatment of workers' negligence actions. . . .
> The battery of defenses which the courts used prior to the compensation act to enforce the fault requirement was especially devastating to workers. The defenses of assumption of risk, fellow servant and contributory negligence, dubbed the unholy trinity by Dean Prosser, prevented recovery by some eighty percent of those workers who litigated their injury claims. These defenses were of no avail in an intentional tort action, however, and employees stood a chance of recovering in such suits. We think it improbable that the legislature intended to foreclose common law actions in those few cases in which employees historically were able to prevail.

Baker v. Westinghouse Elec. Corp., 637 N.E.2d 1271, 1273–74 (Ind. 1994).

The Iowa Legislature was concerned with negligence – not intentional torts – when it enacted workers' compensation legislation, and the immunity it created is for negligent acts, not intentional ones. *See Blankenship*, 433 N.E.2d at 577 ("But the protection afforded by the Act has always been for negligent acts and not for intentional tortious conduct.").

Third, and relatedly, there is no indication that the Iowa Legislature intended to abolish an employee's pre-existing, common-law remedy for intentional torts by enacting the IWCA. It must be remembered that such legislation was enacted in

derogation of the common law. *Day v. Town Club*, 241 Iowa 1264, 1267, 45 N.W.2d 222, 225 (1950). Unless the language of a statute *directly* negates the common law, the statute must be interpreted in conformity with the common law. *Rieff,* 630 N.W.2d at 285. "[S]tatutes will not be construed as taking away common law rights existing at the time of enactment unless that result is 'imperatively' required by the language of the statute." *Collins v. King,* 545 N.W.2d 310, 312 (Iowa 1996); *see also Beverage v. Alcoa, Inc.*, 975 N.W.2d 670, 686–87 (Iowa 2022) (applying rule to interpret an immunity statute as inapplicable to common law claims against premises owner, reasoning that "[i]f the general assembly intended to eliminate all common law claims against all defendants except asbestos product manufacturers or sellers, it could have much more directly done so"). The IWCA, as originally enacted and currently, makes no mention of an employer's intentional torts. This legislative silence cannot be interpreted as announcing a sweeping new rule abrogating an employee's common-law right to sue her employer for its intentional torts.[12, 13]

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[12] The court in *Boggs v. Blue Diamond Coal Co*. approved of the Kentucky courts' practice of interpreting its workers' compensation statute's coverage provisions broadly and immunity provisions narrowly, explaining:

> Professor Arthur Larson, a leading authority in the field, justifies this approach for the following reasons:
> There is no strong reason of compensation policy for destroying common law rights . . . and every presumption should be on the side

Fourth, there is no indication that the parties to the "bargain" ever contemplated the relinquishment of an employee's common-law rights for intentionally caused injuries that were unaffected by the traditional common-law defenses available in a negligence action. As the court in *Christensen v. Hauff*

> of preserving those rights, once basic compensation protection has been assured . . . . All the reasons for making the wrongdoer bear the costs of his wrongdoings still apply, including the moral rightness of this result as well as the salutary effect it tends to have as an incentive to careful conduct and safe work practices.
>
> We agree that every presumption should be on the side of preserving common law rights in the absence of compelling statutory language or social policy justification.

590 F.2d 655, 659–60 (6th Cir. 1979) (cleaned up). The Iowa Court of Appeals agrees. *Crees v. Chiles*, 437 N.W.2d 249, 253 (Iowa Ct. App. 1988) ("[T]the coverage provisions of our Worker's Compensation Act should be liberally construed and the immunity provisions should be narrowly construed." (citing *Boggs*)).

[13] There is no question but that employees had a common law right to sue their employers for intentional torts. And as one court observed,

> The workmen's compensation system completely supplanted the common law tort system only with respect to [n]egligently caused industrial accidents, and employers and employees gained certain advantages and lost certain rights they had heretofore enjoyed. Entrepeneurs [*sic*] were not given the right to carry on their enterprises without any regard to the life and limb of the participants in the endeavor and free from all common law liability.

Mandolidis v. Elkins Indus., Inc., 246 S.E.2d 907, 913 (W. Va. 1978) (superseded by statute on other grounds).

Brothers noted in discussing injuries subject to the worker's compensation scheme, "[i]f the conclusion may be logically reached that the workman's injury followed as a natural incident of his work and was reasonably contemplated in his employment, then it may be said to have arisen out of the employment." 188 N.W. 851, 853 (Iowa 1922), *overruled on other grounds by Hawk v. Jim Hawk Chevrolet-Buick, Inc.*, 282 N.W.2d 84, 91 (Iowa 1979) (citation omitted). No worker would reasonably contemplate that her employer would have the right to intentionally injure her as a natural incident of her work.[14] In this sense, an intentional tort does not "arise out of and in the course of employment," Iowa Code § 85.3(1), and therefore an intentional tort claim falls outside of the IWCA.

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[14] According to an article by "DRI- The Voice of the Defense Bar," the defense bar agrees:

> In essence, it is only where it would not make sense to rely upon the historical *quid pro quo* in rejecting an employee's common-law action against his employer that courts have allowed such claims, such as where an employer intentionally injures its employee . . . . In such circumstances, the underlying rationale appears to be that, in reaching the bargained-for exchange whereby employees gave up their right to sue their employers at common law, and employers accepted responsibility for workplace injuries irrespective of fault, neither party contemplated that employers would intentionally injure their employees . . . .

For the Defense, Attempts at Circumvention: Exclusive Remedy Doctrine, 48 No. 3 DRI For Def. 15 (March 6, 2006).

Fifth, a fundamental principle underlying the IWCA is that a worker's injury is loss borne by the industry, "in a sense an item of the cost of production, and as such, passed on to the consumer of the product," *Tunnicliff v. Bettendorf*, 204 Iowa 168, 214 N.W. 516 (1927), but allowing employers to pass on to consumers the cost of their intentional torts would be an affront to the dignity of every worker in Iowa, as the *Blankenship* concurrence noted:

> [P]rohibiting an employee from suing his or her employer for intentional tortious injury would allow a corporation to "cost-out" an investment decision to kill workers. This abdication of employer responsibility . . . is an affront to the dignity of every single working man and working woman in Ohio.

Blankenship, 433 N.E.2d at 579 (Celebrezze, J., concurring). Iowa employers should not be allowed to shift the cost of their intentional torts to consumers, and effectively buy a right to injure or kill their workers. Such a rule would not only be an affront to workers, it would also be an affront to justice. *Lavin v. Goldberg Bldg. Material Corp.*, 274 A.D. 690, 693–94, 87 N.Y.S.2d 90, 93–94 (N.Y. App. Div. 1949) ("It would be abhorrent to our sense of justice to hold that an employer may assault his employee and then compel the injured workman to accept the meagre allowance provided by the Workmen's Compensation Law."); *Boek*, 231 N.W. at 233–34 ("No case has been cited where it has been held that one who willfully assaults and injures a workman while in the course of his employment be he an employee, employer or a stranger, when sued for the tort can successfully

interpose as a defense [workers' compensation exclusivity]. And we think none can be found, for it would be a perversion of the purpose of the act to so hold.").

In sum, there is no principled reason for allowing employers to act intentionally to injure or kill their workers and provide them with the shield of immunity that was created to defend against only negligence. A rule permitting an employer to escape liability for its intentional torts ignores the history of the IWCA, and undermines its most basic, fundamental purpose: To protect Iowa's workers. Neither the Iowa Legislature nor the Iowa Supreme Court has condoned such a result. Indeed, the *Nelson* standard is alive and well in Iowa, and for good reasons. It is only fair to hold corporate employers such as Tyson responsible for their deception. This is particularly true where the fraud perpetrated on the Workers was motivated by corporate profits *and* took advantage of the vulnerable immigrant community *and* was made under circumstances revealing a wanton neglect for the safety of the Workers. Allowing Tyson to escape liability on these facts would undermine Iowa's policy of protecting its workforce, and cannot be countenanced in a modern, civil society.

D. The Petitions Sufficiently Alleged That Tyson Committed or Directed Others to Commit Fraud.

The petitions alleged that Tyson committed fraud through its executives and supervisors, the realistic alter egos of the corporation, and that Tyson effectively "commanded or expressly authorized" the fraud of the named executives and

supervisors. These allegations satisfy the *Nelson* standard. As for the alter-ego allegations, the Workers named as defendants high level executives such as chairmen, presidents, and CEOs of the Tyson entities, including a namesake of the corporation, John H. Tyson, as well as high-level supervisors. (*Buljic*, Second Am. Pet. ¶¶ 20-35, App. pp. 0146-0147; *Fernandez*, Second Am. Pet. ¶¶ 14-22, App. p. 0197). They alleged that the Tyson entities acted through these individuals. (*Buljic*, Second Am. Pet. at ¶¶ 13, 16, 225-239, App. pp. 0145, 0178-0181; *Fernandez*, Second Am. Pet. ¶¶ 8, 10, 227-41, App. pp. 0196, 0229-0232). Under Iowa's notice-pleading standards, use of the phrase "alter ego" is not required; what matters is that nothing in the petitions compels the conclusion that these defendants lacked authority to make policy, control over the safety measures taken by the company, or other indicia of alter-ego status.[15] Moreover, Tyson did not seek dismissal on the ground that the individual defendants were not acting as its alter egos.

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[15] Whether a party possesses sufficient control over the corporation to warrant alter-ego status is a heavily fact-laden inquiry. *See, e.g., Toothman v. Hardee's Food Sys., Inc.*, 710 N.E.2d 880, 886 (Ill. App. Ct. 1999) (noting that a defendant "having authority to control the policies and procedures of the corporation as an officer, shareholder, or manager of the corporation" may be an alter ego); *see generally Adam v. Mt. Pleasant Bank & Tr. Co.*, 355 N.W.2d 868, 872 (Iowa 1984) (reversing summary judgment due to a fact question regarding alter-ego status).

As for the "commanded or expressly authorized" aspect of the *Nelson* standard, the Workers alleged that Tyson "directed" – which is the functional equivalent of "commanded or expressly authorized" – the misrepresentations made by the Executive and Supervisory Defendants. (*Buljic*, Second Am. Pet. at ¶ 228, App. p. 0179; *Fernandez*, Second Am. Pet. ¶ 230, App. p. 0230). Tyson did not seek dismissal on the ground that it did not direct others to commit fraud.

The Workers alleged Tyson committed or directed the same misrepresentations that were described in the argument section I. H., above. (*Buljic*, Second Am. Pet. ¶ 227(a)-(k), App. pp. 0178-0179; *Fernandez*, Second Am. Pet. ¶ 229(a)-(k), App. pp. 0229-0230). The Workers alleged that the representations were false; they were material in that the Workers would not have continued working at the plant absent them; the statements were knowingly made and that Tyson knew it was wrong to make such statements; the statements were intended to deceive and induce the Workers to continue working despite dangers at the plant; and the Workers justifiably relied on the misrepresentations, which caused the Workers' injuries. (*Buljic*, Second Am. Pet. at ¶¶ 228-233, App. pp. 0179-0180; *Fernandez*, Second Am. Pet. ¶¶ 230-35, App. pp. 0230-0231). The allegations stated a claim of fraud against Tyson sufficient to satisfy the *Nelson* standard, and the district court erred in dismissing the Workers' fraud claims against Tyson simply because the "gist" of their claims was for bodily injuries.

E. Tyson's Argument Regarding the Workers' Filing For Benefits Raises an Estoppel Issue.

Tyson argued that the claims against it should be dismissed because the Workers filed for workers' compensation benefits. (*Buljic* Tyson's Br. Mot. Dismiss, 5-8, App. pp. 0267-0270; *Fernandez* Tyson's Br. Mot. Dismiss, 6-9, App. pp. 0305-0308). It argued that the Workers failed to exhaust their administrative remedies, and further complained that allowing the claims to proceed in court would upset the meritorious and "carefully drawn compromise" of the IWCA, under which employees give up certain rights in exchange for employers paying benefits regardless of fault, as "workers' compensation claimants have a way, other than through judicial process, to resolve their claims against employers." (*Buljic*, Tyson's Br. Mot. Dismiss, 7, 9, App. pp. 0269, 0271; *Fernandez*, Tyson's Br. Mot. Dismiss, 9, App. p. 0308) (quoting *Suckow v. NEOWA FS, Inc.*, 445 N.W.2d 776, 778-79 (Iowa 1989)). Tyson is wrong on its first point. Merely filing a claim for workers' compensation benefits is no bar to suit. *See Danker v. Wilimek*, 577 N.W.2d 634, 636 (Iowa 1998) (employee deemed to have elected remedy under Iowa Code § 87.21 upon actually receiving benefits, and not upon applying for them).

Tyson's second point, and its heavy reliance on the *quid pro quo* of the IWCA, however, raises an estoppel issue. The judicial estoppel doctrine applies in the workers' compensation context and may be raised at any time. *Tyson Foods,*

Inc. v. Hedlund, 740 N.W.2d 192, 195 (Iowa 2007) (noting that "because judicial estoppel is intended to protect the integrity of the fact-finding process," "the issue may properly be raised by courts, even at the appellate stage, on their own motion" (citation omitted)). The doctrine prohibits a party that has successfully asserted a position in one proceeding from asserting an inconsistent position in another proceeding. *Id*. at 196. Judicial estoppel principles apply here: On the one hand, Tyson argues that workers' compensation is the exclusive remedy because the Workers' injuries arose out of and in the course of employment (i.e., are work-related injuries), but on the other hand, Tyson denies the same to avoid paying workers' compensation benefits.

Specifically, by relying on Iowa Code § 85.20(1) for its claim to immunity, Tyson is necessarily taking the position that workers' compensation benefits are "recoverable" for the Workers' injuries. This is because the IWCA exclusivity statute is inapplicable if benefits are not recoverable:

> The rights and remedies provided in this chapter . . . for an employee . . . *on account of injury . . . for which benefits under this chapter . . . are recoverable*, *shall be the exclusive and only rights and remedies* of the employee . . . , the employee's . . . personal or legal representatives, dependents, or next of kin, at common law or otherwise, *on account of such injury* . . . against any of the following:
>
> 1. Against the employee's employer.

Iowa Code § 85.20(1) (emphasis added). Benefits are only recoverable for work-related injuries – ones that arose out of and in the course of employment. Iowa

Code § 85.3(1) ("Every employer . . . shall provide . . . and pay compensation according to the provisions of this chapter for any and all personal injuries sustained by an employee arising out of and in the course of the employment . . . .").[16]

But in the DWC proceedings, Tyson has taken the inconsistent position that the injuries alleged were *not* work-related injuries. (*See Buljic* Tyson's Br. Mot. Dismiss, 5, App. p. 0267; *Fernandez* Tyson's Br. Mot. Dismiss, 5, App. p. 0304).[17] The DWC proceedings have since been stayed. Still, if the Workers are precluded from pursuing their claims in court due to § 85.20(1), Tyson should be judicially estopped from denying liability for benefits in the DWC proceedings on the grounds that the injuries were not work related. *See, e.g.*, *Byerley v. Citrus Pub., Inc.*, 725 So. 2d 1230, 1232 (Fla. Dist. Ct. App. 1999) (applying estoppel principles to hold that an employer who denies workers' compensation benefits because an employee *was not* injured in the course and scope of employment

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[16] "[A]rising out of and in the course of employment" means that the injury was related to the working environment or conditions of the job ("arising out of"), and it coincided with the time and place of employment ("in the course of"). *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 224 (Iowa 2006). The "arising out of" element is established where the working environment condition "increased the risk of injury." *Id*. at 225.

[17] *Buljic* DWC Petition; *Buljic* DWC Answer, ¶¶ 2, 3, 7, 9 (Tyson denying that Sedika Buljic sustained a work-related injury and denying that she sustained an injury "arising out of or in the course and scope of her employment"). Tyson's DWC answers in the other Workers' cases contained the same denials.

cannot be shielded from a tort lawsuit under the workers' compensation exclusivity statute by then claiming the employee *was* injured in the course and scope of employment because allowing employers to do so "would eviscerate the Workers' Compensation Act and allow employers to avoid all liability for employee job related injuries."); *Guzman v. Laguna Dev. Corp.*, 2009-NMCA-116, ¶¶ 11-15, 147 N.M. 244, 248–49, 219 P.3d 12, 16–17 (applying doctrine where the defendants successfully argued before the agency that no benefits were available because the employee's death was not within the course and scope of his employment, but then received summary judgment at the district court after they argued that workers' compensation provided the exclusive remedy); *cf. McGowan v. Brandt Const. Co.*, No. 09-1033, 786 N.W.2d 519, 2010 WL 2079704, *9-10 (Iowa Ct. App. May 26, 2010) (employer's position that the injury occurred within the course of employment judicially estopped it from thereafter disputing that it was liable for *some* injury, even if it were not judicially estopped from disputing the extent of the injury). Because it would be patently unfair for there to be a ruling in Tyson's favor that is grounded on § 85.20(1) and the *quid pro quo* of the workers' compensation scheme, only to have Tyson to take an inconsistent position and escape liability in the DWC proceedings, the Workers' claims should be allowed to proceed unless and until Tyson admits that the Workers' injuries

"ar[ose] out of and in the course of the employment," and that the Workers are entitled to at least some measure of workers' compensation benefits.

III. The District Court Abused Its Discretion in Rejecting the Workers' Request For Leave to Amend.

A. Issue Preservation

The Workers preserved the issue in their Rule 1.904 briefing, which included a copy of the Workers' proposed amendments. (*Buljic* Rule 1.904 Br., 18-23, App. pp. 0913-0918 and Exhibit C, & Reply Br., 18-22, App. pp. 1022-1026; *Fernandez* Rule 1.904 Br., 18-23, App. pp. 0937-0942 and Exhibit C & Reply Br., 18-22, App. pp. 1048-1052).

B. Standard of Review

A ruling on a motion to amend pleadings is reviewed for an abuse of discretion, which is found "when the court bases its decision on clearly untenable grounds or to an extent clearly unreasonable." *Rife*, 641 N.W.2d at 766. Leave to amend "shall be freely given when justice so requires." Iowa R. Civ. P. 1.402. "[P]ermitting amendments should be the rule and denial should be the exception." *Baker v. City of Iowa City*, 867 N.W.2d 44, 51 (Iowa 2015). Amendments should be allowed where the amendment does not substantially change the issues in the case. *Id.* There is a strong preference for resolving cases on the merits instead of on procedural errors. *MC Holdings, L.L.C. v. Davis Cnty. Bd. of Rev.*, 830 N.W.2d 325, 328-29, 330 n.2 (Iowa 2013).

C. The Workers Should Have Been Allowed To Reorganize Their Allegations So Their Claims Could Be Decided on the Merits.

If the Court agrees that the Workers failed to provide notice by "lumping together" the defendants, it should reverse the district court's denial of the Workers' request to amend their petitions to allege their claims more specifically against each individual co-worker defendant. Justice supports allowing the amendments, and nothing supports denying it.

First, because the amendments were intended to address the purportedly improper "lumping together" of the co-worker defendants, the Workers sought only to "unlump" their allegations by making separate, individualized allegations against each co-worker defendant. No substantive changes to the facts, claims, or petitions were proposed; no new claims were made, and no new legal theories or issues were raised. (*See Buljic*, Proposed Third. Amend. Pet. ¶¶ 228-40, 254-392, 405-507, 519-30; *Fernandez*, Proposed Third. Amend. Pet. ¶¶ 228-40, 253-532). The proposed amendments simply replaced the set of allegations in a single count against the Executive Defendants and the set of allegations in a single count against the Supervisory Defendants with several sets of allegations – one for each of the executives and supervisors. So, for example, what had been one count alleged against Executive Defendants became six separate counts – one for each executive. The changes were, admittedly, non-substantive – but they should have been allowed precisely because they did not change the issues or the claims.

Second, the amendment would not result in any meaningful delays. There have been no answers filed, no exchange of discovery, and no trial date set. Appellees can hardly complain about any delays, given their repeated attempts to obtain federal-court jurisdiction, including their repeated motions to stay and rehearing petitions, as set out above.

Third, the defendants did not argue and could not argue that granting leave to amend would prejudice them.

Fourth, the amendments are not futile. The proposed separate, individualized allegations properly addressed the court's concern. (The district court did not examine any of the factual allegations supporting the claims, or note any inadequacies with respect to them, so the Workers had no substantively deficient factual allegations to cure by an amendment.)

Finally, while there may be criticisms of post-dismissal requests to amend, the Workers have found no case in which a district court properly denied leave to amend *solely* because it was requested after dismissal – a result that would be particularly unfair in this case, where dismissal was sought on myriad grounds, including the Iowa COVID-19 Response and Back-to Business Act (Back-to-Business Act). Pleading deficiencies were alleged not only with respect to each element of the gross negligence exception of § 85.20(2) and each element of fraud, they were also alleged with respect to the Back-to-Business Act provisions relating

to actual malice, a reckless disregard of substantial and unnecessary risk, or intentional exposure, and its safe harbor provision. (*Buljic*, Tyson's Dismissal Br. 12-13, 13-18, App. pp. 0274-0275, 0276-0280, Executive Defs.' and Mary Jones' Dismissal Br. 6-15, 16, 18-20, App. pp. 0342-0352, 0354-0356, Remaining Supervisory Defs.' Dismissal Br. 3-7, App. pp. 0400-0404; *Fernandez*, Tyson's Dismissal Br. 13-18, App. pp. 0312-0317, Executive Defs.' and Mary Jones' Dismissal Br. 6-16, 17, 18-20, App. pp. 0376-0390, Remaining Supervisory Defs.' Dismissal Br. 5-7, App. pp. 0410-0412). 11-13). A plaintiff cannot be expected to submit proposed amendments that would address each and every deficiency alleged just in case the district court might find one aspect of one argument compelling. This is particularly true here, where the district court's dismissal of the co-worker claims was grounded not on any substantive deficiencies of the alleged facts, but on a purportedly improper "lumping together" of co-worker defendants – a ruling that cannot stand under Iowa's well-established notice pleading framework.

In sum, the Workers' requests for leave to amend should have been granted. The district court offered *no* explanation for denying the requests. It abused its discretion because there are no tenable grounds supporting its unreasonable denial.

CONCLUSION

The Workers' petitions satisfied the notice pleading standards long followed by Iowa courts to adequately state a claim against the individually named executive and supervisory defendants for fraud and gross negligence, meeting the gross negligence exception to IWCA exclusivity. The petitions also sufficiently alleged acts by the corporate defendant employers meeting the intentional tort exception to employer immunity under the IWCA. To the extent that the district court's decision to dismiss the cases was based on a perceived deficiency with how the Workers grouped allegations against the executive and supervisory defendants, the court should have allowed the Workers the opportunity to amend, as any deficiency was one of purely form over substance. This Court should reverse the district court's order dismissing the cases, and remand the cases for further proceedings, or in the alternative, reverse the district court's order denying the Workers' motion for leave to amend and remand the cases for further proceedings.

REQUEST FOR ORAL ARGUMENT

The Workers hereby request oral argument.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitations of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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On this 29th day of September, 2023, the Workers served Appellants' Final Brief on all other parties to this appeal by e-mailing one copy thereof to the respective counsel for said parties:

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