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

Nedzad Mehmedovic, *as Admin. of the Estate of Hus Hari Buljic and as Admin. of the Estate of Sedika Buljic*, et al., Appellants, v. Tyson Foods, Inc., et al., Appellees.	Oscar Fernandez, *individually and as Admin. of the Estate of Isidro Fernandez*, Appellant, v. Tyson Foods, Inc., et al., Appellees.

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

District Court Nos. LACV140521 & LACV140822

Final Brief of Appellees

Tyson Foods, Inc., Tyson Fresh Meats, Inc.,

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

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[1] This brief is filed on behalf of Defendants-Appellees Tyson Foods, Inc. and Tyson Fresh Meats, Inc. (together, "Tyson"), and Defendants-Appellees John Tyson, Noel White, Dean Banks, Stephen Stouffer, Tom Brower, Doug White, Debra Adams, and Mary Jones (collectively, the "Individual Defendants"). The remaining five Defendants-Appellees are represented in this appeal, as in the district court, by separate counsel.

Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983)

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2A Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 68.21(a) (1994)

2. Under the IWCA, co-employees are immune from tort claims for alleged workplace injuries unless those claims satisfy a narrow exception for wanton gross negligence. The second issue presented for review is whether the trial court properly dismissed Plaintiffs' Petitions for lack of jurisdiction because they allege workplace injury tort claims against the Individual Defendants but fail to allege any facts as to how each Individual Defendant had knowledge of the peril to be apprehended, knowledge that injury is probable, and a conscious failure to avoid the peril.

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3. Iowa's COVID-19 Back-to-Business Immunity Act bars COVID-19 exposure claims except in narrow circumstances that require malice, intentional exposure, or lack of care that a plaintiff would be exposed. The third issue presented for review is whether Plaintiffs' claims are additionally barred in this Court because the allegations fail to meet the high standard for overcoming this statutory immunity.

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Center for Disease Control, COVID-19 Data Tracker (last updated Aug. 24, 2023), https://covid.cdc.gov/covid-data-tracker/#data-tracker-home

World Health Organization, COVID-19 Map of United States (last visited Aug. 24, 2023), https://covid19.who.int/region/amro/country/us

4. Under Iowa law, leave to amend a petition should be denied when it is requested only after the petition has been dismissed or when the proposed amendments would be futile. The fourth issue presented for review is whether the trial court abused its discretion by denying leave to amend where Plaintiffs had already amended three times previously, Plaintiffs did not request leave to amend until after dismissal was granted, and the proposed amendments were non-substantive and failed to cure the defects.

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ROUTING STATEMENT

This appeal should be transferred to the Court of Appeals because it turns on settled Iowa law. *See* Iowa R. App. P. 6.1101(3)(a). Plaintiffs assert workplace injury tort claims, and the district court properly dismissed those claims because they are barred by a straightforward application of the IWCA, which requires that such claims instead must be adjudicated before the Iowa Division of Workers' Compensation. Indeed, even Plaintiffs admit that this case presents—at most—an opportunity for this Court to "reaffirm" purported existing legal principles. [Appellants' Amended Proof Brief ("Pls. Br.") at 18] Plaintiffs briefly suggest that this appeal involves "fundamental and urgent issues of broad public importance," but Plaintiffs fail to identify any such issue or explain why it is "fundamental" or "urgent." [*Id.*] Accordingly, this case should be routed to the Court of Appeals for resolution. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Plaintiffs assert workplace injury tort claims arising from their employment during the COVID-19 pandemic. Those claims are barred (in this Court) by the IWCA, which provides absolute immunity to employers for workplace injury claims.

Plaintiffs allege that their relatives worked at Tyson and suffered workplace injuries during the early days of the pandemic—when Tyson was operating as federally designated critical infrastructure to preserve the nation's food supply during the first-ever fifty-state national emergency. Specifically, Plaintiffs allege that their relatives worked at Tyson's Waterloo pork-processing facility in March or April 2020, that they contracted COVID-19 at work, and that they passed away from the disease. [App. 144-45, 196]

Based on those alleged workplace injuries, Plaintiffs' Second Amended Petitions ("Petitions") assert tort claims against Tyson and thirteen individual Tyson employees. Although Plaintiffs label each cause of action slightly differently (*i.e.*, "fraudulent misrepresentation," "gross negligence," "breach of duty," and "vicarious liability"), the crux of all the claims is the same: that their employer, through its various employees, should have taken more or different workplace safety measures to protect employees from COVID-19-related injury. That claim—in all its forms—falls squarely within the IWCA and must be adjudicated before the Iowa Division of

Workers' Compensation ("DWC"), not the courts. *See* Iowa Code § 85.20. Accordingly, all Defendants moved to dismiss the Petitions for lack of jurisdiction and failure to state a claim. [*See* App. 246-55]

Relying on settled Iowa law, and consistent with decisions from across the country addressing similar claims, the Honorable John J. Sullivan of the District Court for Black Hawk County granted the Motions to Dismiss. "No matter how the Plaintiffs have characterized their respective causes of action, they are still subject to the IWCA as the gist of their claims is that each decedent . . . suffered a workplace injury." [App. 876, 881][2] The district court further noted that several Plaintiffs have in fact submitted claims to the DWC for the *very same* alleged workplace injuries involved in these cases. [App. 875, 880] The district court also properly rejected Plaintiffs' argument that they "pled sufficient facts to meet the employee [wanton gross negligence] exception contained in" the IWCA. [App. 876, 881] Indeed, the Ruling identified several independent grounds for dismissal, any of which were sufficient. And Defendants

[2] Although the two cases proceeded separately below, the parties in both cases were represented by the same counsel, and the Petitions, Motions to Dismiss, and related briefing were nearly identical. The district court therefore issued an identical Ruling on the motions to dismiss in each case. [*See* App. 874-83 (*Buljic* and *Fernandez* Rulings)] For ease, this Brief uses "Ruling" to refer to both.

asserted *additional*, independent bases for dismissal that the district court did not reach but on which this Court can independently affirm.

Ultimately, the district court dismissed the Petitions for "lack[] [of] subject matter jurisdiction" because "the law requires that Plaintiffs' claims proceed" before the DWC. [App. 877, 882] This conclusion is mandated by well-settled Iowa law and in accord with cases across the country dismissing similar claims.

Following this Ruling, Plaintiffs sought reconsideration or, alternatively, leave to amend (for a fourth time), which the district court correctly denied. This consolidated appeal followed.

STATEMENT OF FACTS

I. Factual Background

As the Court no doubt remembers, COVID-19 began spreading throughout the United States in early 2020. Ultimately, hundreds of millions of people were infected, and more than a million Americans died of complications related to COVID-19.

Tyson is one of the largest food companies in the U.S. [*See* App. 145, 196] In the early days of the pandemic, when grocery store shelves were sparse and the nation's food supply was at risk, federal officials instructed Tyson to continue operating as essential critical infrastructure to maintain the national food supply. [*See* App. 285-88, 321-25] Plaintiffs allege that their relatives—Ms. Buljic,[3] Mr. Garcia, Mr. Ayala, and Mr. Fernandez—worked at a Tyson pork-processing facility during this timeframe, when COVID-19 first reached Iowa and when Tyson's facilities were operating as essential critical infrastructure. [App. 143-44 (relevant timeframe is "March and April 2020"); App. 154 (first COVID cases in Iowa reported on March 8); App. 156 (President approved major disaster for Iowa on March 24); App. 195-96, 205, 207]

[3] While this appeal has been pending, Plaintiff Hus Hari Buljic, the husband and administrator of the estate of Ms. Buljic, passed away. In May 2023, counsel for Plaintiffs informed counsel for Defendants that they intended to "obtain a substituted administrator." Plaintiffs have not moved for substitution.

Plaintiffs allege that their relatives contracted COVID-19 "at the Waterloo facility" and passed away from the disease. [App. 144-45, 196] But the Petitions allege no facts as to how or when they contracted COVID-19, nor do they include allegations that address or rule out contraction from other community sources of infection.

Plaintiffs assert a single cause of action against Tyson for "Fraudulent Misrepresentation, Vicarious Liability and Punitive Damages." [App. 178, 229] The Petitions also allege that Tyson is "vicariously liable" for the alleged conduct of "all of its agents acting within the course and scope of their agency." [App. 180, 231]

Plaintiffs assert claims for "Gross Negligence" against the Individual Defendants and "Fraudulent Misrepresentation" against Mary Jones, an occupational nurse at the Waterloo facility. Notably, the Petitions make clear that "[a]t all relevant times, [the Individual Defendants] were acting within the course and scope of their employment" with Tyson. [App. 181, 186, 232, 237] No claims are asserted against the Individual Defendants in their individual capacities. The Petitions refer to the Individual Defendants by name only a handful of times, primarily to state their job titles, and no allegations are individually directed to most of the Individual Defendants.

Meanwhile, several Plaintiffs have asserted workers' compensation claims on behalf of Ms. Buljic, Mr. Garcia, Mr. Ayala, and

Mr. Fernandez. *See, e.g.*, *Buljic v. Tyson Fresh Meats*, Iowa Workers' Compensation Commission File No. 20700554.01; *Fernandez v. Tyson Fresh Meats*, Iowa Workers' Compensation Commission File No. 20008544.[4] Extensive discovery has already occurred in some of those proceedings. Tyson has asserted various defenses, including that Plaintiffs have thus far failed to establish causation. That causation issue (among others) has not yet been adjudicated by the DWC, and Plaintiffs have not yet exhausted their administrative remedies before that agency.

II. Procedural History

These lawsuits were filed over three years ago. By the time the district court reached Defendants' dismissal arguments, Plaintiffs had already amended their petitions three times, and Defendants had filed motions to dismiss three separate times, each time arguing that the IWCA bars these suits.

Initial filing and litigation after removal. Plaintiffs filed these nearly identical lawsuits in Black Hawk County District Court in June and August 2020, naming twenty and fourteen defendants, respectively. [App. 8-36 (twenty defendants); App. 37-63

[4] The claim regarding Mr. Ayala was denied by Tyson, and the DWC has not yet been petitioned to review Tyson's denial of that claim.

(fourteen defendants)] Tyson removed the cases to federal court. [App. 64-69]

After removal, all defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). [*See* Civil Docket, *Buljic v. Tyson Foods, Inc.*, No. 6:20-cv-02055-LRR-KEM (N.D. Iowa); Civil Docket, *Fernandez v. Tyson Foods, Inc.*, No. 6:20-cv-02079-LRR-KEM (N.D. Iowa)] In response, Plaintiffs filed first amended complaints, and then sought leave to file second amended complaints, which added various new allegations, and added and removed various defendants. The federal district court remanded the cases in December 2020, but those orders were stayed for an appeal. The Eighth Circuit affirmed the remand orders in December 2021, and the U.S. Supreme Court denied Tyson's petition for certiorari. *See Buljic v. Tyson Foods, Inc.*, 22 F.4th 730 (8th Cir. 2021), *cert. denied sub nom. Tyson Foods, Inc. v. Buljic*, 143 S. Ct. 773, 215 L. Ed. 2d 45 (2023).

Second motion to dismiss and Third Amended Complaint. Once back in district court, Plaintiffs filed their First Amended Petitions in January 2021. [App. 70-134] All Defendants moved to dismiss the First Amended Petitions under Iowa Rule of Civil Procedure ("Rule") 1.421(1)(a) and (f). [App. 135-42]

Rather than respond to those motions, Plaintiffs amended again, filing their Second Amended Petitions (the "Petitions"),

which added three new Tyson employees as defendants and a new cause of action against Deb Adams and Mary Jones. [*See generally* App. 143-245 (*Buljic* and *Fernandez* Petitions)] These Petitions used the label "Executive Defendants" to refer collectively to seven individuals, and "Supervisory Defendants" to refer collectively to six individuals. [App. 146-47, 197-98][5] These Petitions were Plaintiffs' third attempt to state a claim.

The final motions to dismiss. All Defendants moved to dismiss, for a third time, in May 2022. [App. 246-55][6]

Defendants' motions asserted six independent bases for dismissal under Rule 1.421(1)(a) and (f). Specifically, Defendants argued the Petitions (1) are barred by the IWCA; (2) are barred by the COVID-19 Back-to-Business Act; (3) fail to adequately allege fraud; (4) fail to plead gross negligence; (5) fail to plead the essential element of causation; and (6) are preempted by federal law. [*Id.*]

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[5] The "Executive Defendants" are Mr. Tyson, Mr. Noel White, Mr. Banks, Mr. Stouffer, Mr. Brower, Mr. Doug White, and Ms. Adams. [App. 146, 197] The "Supervisory Defendants" are Tom Hart, James Hook, Bret Tapken, Cody Brustkern, John Casey, and Mary Jones. [App. 146-47, 198]

[6] All Defendants jointly filed one Motion to Dismiss in each case, supported by three separate briefs as follows: (1) Tyson's Brief ("Tyson Br."), (2) the Individual Defendants' Brief ("Individuals Br."); and (3) Tom Hart, Cody Brustkern, John Casey, Bret Tapken, and James Hook's Brief ("Supervisors Br.").

In response, Plaintiffs filed three resistance briefs totaling over 115 pages in each case. [App. 414-650] Defendants filed replies. [App. 685-786] Among other things, Defendants noted that Plaintiffs spent very little ink in their lengthy resistances addressing Defendants' primary basis for dismissal: IWCA exclusivity. [*See, e.g.*, App. 691]

The district court heard oral argument on the motions to dismiss for over an hour on September 12, 2022. [App. 855-58]

Ruling and motion for reconsideration. On January 20, 2023, the district court granted Defendants' motions to dismiss. The court concluded that "the law requires that Plaintiffs' claims proceed under the [DWC's jurisdiction] pursuant to the IWCA." [App. 877, 882] The Court correctly reasoned that, although "the Plaintiffs have characterized their respective claims as fraudulent misrepresentation, vicarious liability, gross negligence, and breach of duty," dismissal is appropriate because "the gist of their claims is . . . that each suffered a workplace injury" "subject to the IWCA." [App. 876, 881] Thus, the Court ruled—citing Iowa Supreme Court precedent—that "Iowa law requires each Plaintiff to seek their remedy with the [DWC]." [App. 876, 881]

The Ruling also considered, and properly rejected, Plaintiffs' various arguments that they "pled sufficient facts to meet the employee exception contained in" the IWCA. [App. 876, 881] The Court

discussed each of the elements required under Iowa law to "establish a co-employee's gross negligence amounting to such lack of care as to amount to wanton neglect," and correctly determined that Plaintiffs failed to plead facts to satisfy those elements. [App. 876-77, 881-82] Indeed, the Court identified several independent grounds for dismissal, including that:

- "[T]he allegations of gross negligence are not specifically pled as to each co-employee defendant";
- Plaintiffs failed to allege sufficient facts to suggest that any co-employee defendant "had actual knowledge of the peril to be apprehended"; and
- Plaintiffs failed to allege sufficient facts to suggest that any "co-employee defendant had actual knowledge . . . that injury is a probable result of the danger."

[App. 877, 882] As another independent ground, the Court noted that Plaintiffs' allegations "are not made as to specific defendants . . . 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." [App. 876-77, 881-82]

Having already identified multiple independent bases for dismissal, the court declined to address Defendants' other grounds for dismissal, and ruled that dismissal was proper because the Petitions alleged claims that fall within the exclusive "jurisdiction of the [DWC]." [App. 877, 882]

Following the Ruling, Plaintiffs filed a "Motion to Reconsider, Enlarge or Amend Findings Pursuant to I.R.C.P. 1.904 or, in the Alternative, Allow Leave to Amend Petition" in each case. As explained in Defendants' resistances, those motions simply rehashed or repackaged arguments that the parties already had an opportunity to brief and that the district court already considered and correctly rejected. [*See* App. 944-89] Plaintiffs' post-dismissal Rule 1.904 motions also sought leave to amend the Petitions to make *non-substantive* changes.

The district court denied Plaintiffs' Rule 1.904 motions on March 24, 2023, and Plaintiffs then noticed this appeal. [*See* App. 1000-04]

ARGUMENT

I. The trial court properly dismissed the claims against Tyson—the employer—for lack of subject matter jurisdiction.

Preservation of Issue and Standard of Review

Defendants agree that Plaintiffs preserved error regarding the issue of exclusivity of the IWCA and lack of subject matter jurisdiction. Defendants also agree that this Court reviews motions to dismiss for correction of errors of law. *See Suckow v. NEOWA FS, Inc.*, 445 N.W.2d 776, 777 (Iowa 1989).

Defendants disagree, however, with Plaintiffs' complete conflation of the standards for evaluating a motion for *failure to state a claim* with Defendants' motions for *lack of subject matter jurisdiction*. While the two inquiries may be similar at times, a determination of proper subject matter jurisdiction at the outset of the case requires a more careful evaluation of the pleadings and whether the case is in the correct forum.

Relying on workers' compensation cases, Justice May (then Judge) recently made this point. The maxim that "courts rarely dismiss a petition for a failure to state a claim upon which any relief may be granted," (*see* Pls. Br. at 35-36), does not apply to motions to dismiss for lack of subject matter of jurisdiction. *See Marek v. Johnson*, 954 N.W.2d 782 (Table), 2020 WL 7021707, at *11 (Iowa Ct. App. 2020) (J. May, concurring), *aff'd in part and vacated in*

part, 958 N.W.2d 172 (Iowa 2021).[7] Rather, "when a statutory process is the 'exclusive' means for addressing a particular class of claims, 'the district court ha[s] no choice but to dismiss' lawsuits that attempt to raise those claims outside the 'exclusive' statutory process." *Id.* (alterations in original) (quoting *Bailey v. Batchelder*, 576 N.W.2d 334, 342 (Iowa 1998) ("Workers' compensation is an exclusive remedy which, if applicable, deprives the district court of subject matter jurisdiction. Thus, the district court had no choice but to dismiss [plaintiff's] negligence action.")).

The dispositive question below and on appeal concerns whether the district court had subject matter jurisdiction over the Petitions—not whether the Petitions stated a claim for relief (though Tyson did *argue* both, and the district court also properly concluded the Petitions did *not* state a claim against the Individual Defendants).

Argument

Applying "well settled" law that "the IWCA provides the exclusive remedy for an employee against an employer and [co-employees] for a workplace related injury," the trial court dismissed

[7] In *Marek*, Judge May voted to affirm dismissal for lack of subject matter jurisdiction, while the other two panel members reversed. On appeal to the Supreme Court, the Supreme Court agreed with Judge May and reinstated the lower court's dismissal.

Plaintiffs' Petitions for lack of subject matter jurisdiction. [App. 875, 880]

The district court was correct. Under Iowa Code § 85.20, the IWCA provides the "exclusive and only rights and remedies" for an injured employee whose injuries arose out of the workplace. As a result, an "employer is always immune from common law tort liability pursuant to" the IWCA. *Jensen v. Vanderleest*, Nos. 9-369, 98-1950, 1999 WL 975879, at *3 (Iowa Ct. App. Oct. 27, 1999); *see also Bailey*, 576 N.W.2d at 337-38. The IWCA deprives the "district court of jurisdiction of the subject matter of" a "tort suit" arising out of workplace injury, and the DWC has the "exclusive jurisdiction" over such alleged workplace injury claims. *Tigges v. City of Ames*, 356 N.W.2d 503, 509 (Iowa 1984).

The IWCA applies when an employee sustains "personal injuries . . . arising out of and in the course of the employment." Iowa Code § 85.3(1). That is exactly what the Petitions allege, and Plaintiffs do not and cannot contend otherwise. [*See* App. 143-45 (alleging Ms. Buljic, Mr. Garcia, and Mr. Ayala were "infected with COVID-19 at the Waterloo Facility" and that their injuries and damages "arise out of [their] employment with Tyson Foods"); App. 195-96 (same as to Mr. Fernandez)]

The IWCA therefore provides Plaintiffs' "exclusive and only" remedy against Defendants for their alleged workplace injuries

under Iowa Code § 85.20. *See Walker v. Mlakar*, 489 N.W.2d 401, 403 (Iowa 1992) (IWCA "is an injured worker's exclusive remedy against an employer or coemployee, thereby providing the employer and coemployee immunity from common law tort liability"). The district court properly dismissed the Petitions for lack of subject matter jurisdiction.

A. Plaintiffs' personal injury claims against Tyson—the employer—are absolutely barred in court.

Plaintiffs cannot and do not dispute that they have alleged claims of workplace injury. That ends the inquiry as to Tyson. The claims must be heard by the DWC.

As the Supreme Court has unequivocally stated: "Iowa Code chapter 85 plainly bars an employee's tort suit against her employer . . . for injuries sustained in the course of employment." *Henrich v. Lorenz*, 448 N.W.2d 327, 332 (Iowa 1989). This is a "blanket immunity" without exception for "intentional torts" (or any other kind of tort). *Harned v. Farmland Foods, Inc.*, 331 N.W.2d 98, 100 (Iowa 1983); *see Smith v. Iowa State Univ. of Sci. & Tech.*, 851 N.W.2d 1, 20 (Iowa 2014) (second alteration in original) (noting that the IWCA "foreclos[es] non-IWCA claims '[a]gainst the employee's employer' with no exception for gross negligence").

As discussed below, Plaintiffs have attempted to get around this clear bar to tort liability by casting their claims against Tyson as fraud claims. That end-run around the IWCA has been tried and rejected by Iowa courts time and again.

Plaintiffs also argue that an exception exists for the alleged "intentional torts" of an employer. To the contrary, as the statute makes clear and as Iowa courts have consistently held, *there is no exception for employers*. *See, e.g.*, *Henrich*, 448 N.W.2d at 332 (noting only "one exception" exists to workers' compensation exclusivity—for gross negligence of co-employees).

B. Plaintiffs cannot plead around the IWCA's exclusivity provision by labeling alleged workplace injury claims against an employer as "fraud."

A plaintiff cannot circumvent the IWCA by recasting a workplace injury claim against an employer as a claim for fraud when the gist of the claim is for bodily injury. *Nelson v. Winnebago Indus., Inc.*, 619 N.W.2d 385, 389 (Iowa 2000). Here, although cast in the form of a normally non-physical tort, the essence of Plaintiffs' claims is for physical injury or death. But as Iowa courts have made clear, "where a claim is predicated on the same facts as the work injury itself, simply labeling it as fraud is not sufficient to avoid the exclusivity of the Workers' Compensation Act." *Cincinnati Ins. Cos. v. Kirk*, 801 N.W.2d 856, 863 (Iowa Ct. App. 2011).

Indeed, Iowa courts have faced repeated instances of plaintiffs seeking to evade workers' compensation by labeling their workplace injury claims as fraud and other intentional torts, just as Plaintiffs do here. And the courts resoundingly reject those attempts.

In *Nelson*, an employee was seriously injured after co-employees tied him up and dropped him to the ground. Attempting to avoid workers' compensation, the plaintiff sued his employer for false imprisonment and battery, arguing those intentional tort claims fell outside the scope of the IWCA. The Supreme Court rejected this, holding: "A mere labeling of a claim for injuries [as an intentional tort] cannot avoid the exclusivity of workers' compensation if the gist of the claim is for bodily injury." *Nelson*, 619 N.W.2d at 389. "[I]f the essence of the action is recovery for physical injury or death . . . the action should be barred even if it can be cast in the form of a normally non-physical tort." *Id.* (citation omitted).

Nelson remains good law, and was recently applied by the Iowa Court of Appeals in a case where the plaintiff asserted the "intentional torts" of "fraud and breach-of-fiduciary-care" against the defendant employer arising out of workplace exposure to toxic chemicals. *Wolodkewitsch v. TPI Iowa, LLC*, 989 N.W.2d 805 (Table), 2022 WL 16631228, at *3 (Iowa Ct. App. 2022). Because the "gravamen" of the claims was for bodily injury, the claims "were

foreclosed by the exclusivity provision contained in Iowa Code section 85.20." *Id*.

Likewise, in *Mielke v. Ashland, Inc.*, a plaintiff asserted claims against an employer for fraud and conspiracy arising out of the alleged workplace death of an employee from exposure to chemicals. No. 4:05-CV-88, 2005 WL 8157992, at *4 (S.D. Iowa July 29, 2005). The complaint alleged that the employer had misrepresented facts regarding the chemical products that the employee was exposed to, withheld medical and scientific information and material facts regarding the seriousness of the chemicals, disseminated misleading information about the chemicals, and deleted material information from studies and reports about the chemicals. First Am. Compl. ¶¶ 25-26, *Mielke v. Ashland, Inc.*, No. 4:05-CV-88, 2005 WL 5366893. Citing *Nelson*, the court dismissed the claims for lack of subject matter jurisdiction, holding that where a plaintiff sues for damages from injury arising out of employment, the claim is barred by the IWCA's exclusivity provisions regardless of its "intentional tort" label. *Mielke*, 2005 WL 8157992, at *4.

Attempts to avoid workers' compensation exclusivity by alleging intentional torts against an employer have also been tried in the COVID-19 context, and the result has been the same. In *Sican v. JBS S.A.*, -- F. Supp. 3d --, 2023 WL 2643851, at *7 (S.D. Iowa Mar. 23, 2023), for example, an Iowa federal district court recently

dismissed materially similar fraud claims asserted by an employee of a meat processor against her employer, finding:

> [T]he gist of Plaintiffs' fraudulent misrepresentation claim is for bodily injury. Plaintiffs allege Defendants fraudulently misrepresented the risk of contracting COVID-19 at the plant and that Sican-Soloman—relying on Defendants' misrepresentation—contracted COVID-19 at work and subsequently died from related complications. Plaintiffs' claim seeks recovery for the same physical injury—contracting COVID-19 at the workplace—subject to workers' compensation exclusivity. As such, Plaintiffs' fraudulent misrepresentation claim is also subject to workers' compensation exclusivity.

Id. at *8. Other courts nationwide have reached similar conclusions in substantially similar cases.[8]

In short, the district court followed well-settled Iowa law in dismissing the fraud claims against Tyson.

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[8] *See, e.g.*, *Barker v. Tyson Foods, Inc.*, Civ. No. 21-223, 2021 WL 5769538, at *4 (E.D. Pa. Dec. 6, 2021) (dismissing complaint alleging workplace exposure to COVID-19 with prejudice because the workers' compensation act provided exclusive remedy and barred complaint's common-law claims); *Est. of de Ruiz by Ruiz v. ConAgra Foods Packaged Foods, LLC*, 601 F. Supp. 3d 368, 384 (E.D. Wis. 2022) (dismissing under worker's compensation exclusivity provision a claim brought by surviving family members alleging employer failed to implement adequate COVID-19 safety measures); *Smith v. Corecivic of Tenn. LLC*, No. 3:20-cv-0808-L-DEB, 2021 WL 927357, at *3 (S.D. Cal. Mar. 10, 2021) (dismissing as barred by workers' compensation exclusivity tort claims related to allegations that defendant "fail[ed] to provide a safe work environment or institute required protocols related to COVID-19").

C. There is no intentional tort exception for employers; the Larson treatise refers to a very narrow factual situation where a human assailant can be both the "employer" and a "co-employee" subject to liability.

Plaintiffs argue they can also "avoid[] the IWCA exclusivity bar" because they have allegedly asserted an intentional tort claim against Tyson. [Pls. Br. at 59]

Plaintiffs' so-called "intentional tort exception" is directly contrary to Iowa law. As just explained, fraud claims—like those Plaintiffs allege here—and other intentional tort claims are subject to the IWCA when the gist of the claim is for bodily injury. Indeed, the Iowa Supreme Court has flatly rejected Plaintiffs' contention that there is an intentional tort exception to common law immunity for workplace injury claims against employers, emphasizing that the legislature deliberately "chose not to" create one:

> The legislature is obviously aware of an employer's blanket immunity and seems anxious to protect it. **It could have created an exception for the gross negligence or intentional torts of an employer when it did so for fellow employees but chose not to do so.**

Harned, 331 N.W.2d at 100 (emphasis added).

Notwithstanding the above, Plaintiffs devote a considerable portion of their brief to arguing that their allegations could fit within a scenario mentioned in *Nelson*, which was in turn a quotation from a treatise:

> When the person who intentionally injures the employee is not 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.

619 N.W.2d at 387 (quoting 2A Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 68.21(a), at 13-113 (1994)). Thus, Plaintiffs argue that they present a scenario where the employer "commanded or expressly authorized another to commit, or through its alter ego committed, an intentional tort." [Pls. Br. at 59]

Legally, framing that scenario as an "exception" to the immunity for "employers" is problematic because there is nothing in the statute that permits the creation of that exception. But more fundamentally, Plaintiffs simply misunderstand the factual scenarios hypothesized. They are contemplating a human assailant who is both the "employer" and a "co-employee" who *can* be liable.

The statutory text has no exception. The first problem with Plaintiffs' argument for an exception for "employers" drawn from *Nelson* is that there is no exception to immunity in the statutory provision for "employers." The IWCA applies to "any and all personal injuries sustained by an employee arising out of and in the course of the employment." Iowa Code § 85.3(1). The "exclusivity" provision then clearly says that "[t]he rights and remedies provided

in this chapter . . . shall be the exclusive and only rights and remedies." *Id.* § 85.20. Any exception for employers would be re-writing the statute, as has been held many times. *Darrow v. Quaker Oats Co.*, 570 N.W.2d 649, 652 (Iowa 1997); *see also Brown v. Star Seeds, Inc.*, 614 N.W.2d 577, 581 (Iowa 2000) (noting court was "compelled" to apply the IWCA "according to its terms"); *Hartman v. Clarke Cnty. Homemakers*, 520 N.W.2d 323, 327 (Iowa Ct. App. 1994) ("The [IWCA] must not be artificially expanded by reading something into it that is not within the scope of the language used.").

Moreover, the Iowa legislature knows how to create statutory exceptions to the IWCA exclusivity provision because it has *already* done so. In 1974, the legislature amended the IWCA to permit tort claims to proceed against a co-employee who causes personal injury due to his or her "gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of" the injured employee. Iowa Code § 85.20(2); *see* 1974 Iowa Acts ch. 1111, §§ 1, 2; *Darrow*, 570 N.W.2d at 652 ("Any decision to amend [IWCA]" to include an exception "rests with the legislature, not the courts.").[9]

[9] Plaintiffs' lengthy legislative history argument (at 63-77) is irrelevant. Iowa courts will "consider legislative history to ascertain legislative intent only when a statute is ambiguous." *Midwest Auto. III, LLC v. Iowa Dep't of Transp.*, 646 N.W.2d 417, 424-25

Perhaps for that reason, while *Nelson* and some other cases mention a scenario where an "employer" might theoretically be liable in court, no Iowa court has actually found such an exception applied. For example, in *Estate of Harris v. Papa John's Pizza*, (*see* Pls. Br. at 62), the plaintiff's supervisor called plaintiff to come to the workplace after hours to confront him about a personnel issue. 679 N.W.2d 673, 681 (Iowa 2004). When the plaintiff arrived, the supervisor punched him in the chest, killing him. Despite allegations that other members of management encouraged the supervisor to confront the plaintiff, the court held the plaintiff's claims of negligent supervision against the employer were barred by the exclusivity provisions of the IWCA. And in *McCoy*, (*see* Pls. Br. at 62), the court merely cited in a parenthetical a fragment of the dicta

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(Iowa 2002). As explained, the IWCA is clear that employers are immune.

And Plaintiffs' out-of-state cases (at 69-72) undermine their position. In Ohio, intentional torts *are* subject to workers' compensation except under very narrow circumstances *that are set forth by statute*. *See Houdek v. ThyssenKrupp Materials N.A., Inc.*, 983 N.E.2d 1253, 1254 (Ohio 2012); Ohio Rev. Code § 2745.01. And in Indiana, the language of the workers' compensation statute exempted intentional torts because it covered only injuries that occurred "by accident." Ind. Code § 22-3-2-6; *see Baker v. Westinghouse Elec. Corp.*, 637 N.E.2d 1271, 1273-74 (Ind. 1994) (quoting *Evans v. Yankeetown Dock*, 491 N.E.2d 969, 972 (Ind. 1986)) ("[E]xceptions should not ordinarily be declared by the courts when the legislature speaks broadly.").

from *Nelson* with no analysis or application and went on to hold that a plaintiff is barred from "bringing a common law tort action against the employer." *McCoy v. Thomas L. Cardella & Assocs.*, 992 N.W.2d 223, 229 (Iowa 2023).

The contemplated "exception" is for identity between "employer" and "co-employee." Careful review of the passage in *Nelson*, the treatise itself, and application of common sense all reveal that the situation being contemplated is one where the "employer" is a human being capable of assaulting someone and who also qualifies as a "co-employee," for whom there is liability for certain intentional torts.

The passage from *Nelson* Plaintiffs rely upon is phrased in the negative and essentially says that when the person who assaulted the employee is *not* "the employer in person nor a person who is realistically the alter ego of the corporation," then there is no exception to the employer's immunity. *Nelson*, 619 N.W.2d at 387 (quoting 2A Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 68.21(a), at 13-113 (1994)). Rephrased in the affirmative, it is saying that when the person who assaulted the employee *is* "the employer in person or a person who is the alter ego of the corporation," then there can be liability. Either way, the contemplated assailant is a human being who can be considered the

"employer," either because he is the employer (*e.g.*, sole proprietor) or because he uses the corporation as his alter ego.

The treatise (and *Nelson*) then continue by saying that the scenario of holding the "employer" liable "does not apply when the assailant and the defendant are two entirely different people." *Id.* (citation omitted). That confirms that identity between "employer" and "co-employee" is what is being contemplated, not some kind of heightened *respondeat superior* where an "employer" will be liable in court for whatever a manager does. Indeed, *Nelson* (and the treatise) explain that there should be no "employer" liability in court where the assailant is "merely a foreman, supervisor or manager." *Id.* (citation omitted). That again demonstrates that the assailant must be a human being who is also the "employer," not merely a supervisor working for the employer.

Thus, there are many reasons why Plaintiffs do not present a case that could fit the scenario contemplated in Larson's treatise. First, Plaintiffs allege they were exposed to COVID-19 in the course of employment (at an essential business, no less) during a pandemic. That bears no resemblance to the type of criminal assault discussed in Larson. Second, the "assailant"—to the extent any of the defendants could be considered an "assailant"—must be a human being that can be equated with the "employer," *i.e.*, Tyson. Obviously, Tyson is not a sole proprietorship. And Plaintiffs'

contention (at 77-78) that Tyson is the alter ego of thirteen different individuals—all of whom held different positions at Tyson, ranging from CEO to an occupational nurse at Waterloo's facility—is both patently absurd and legally incorrect (and appears nowhere in the actual Petitions).[10]

* * *

In sum, even if—contrary to statute and controlling Iowa caselaw—there could be an exception to "employer" immunity, which no Iowa court has ever applied, the contemplated exception has no application here. It only would apply in situations where a human being commits an intentional tort, and that human being is properly considered both a "co-employee" and the "employer." That can be thought of as an exception to "employer" immunity, but a more sensible and accurate way to think of it is as a situation where an "employer" can be liable as a "co-employee."

D. Plaintiffs' "estoppel" argument lacks merit.

If Plaintiffs' claims are dismissed, as required by settled law on employer immunity, Plaintiffs request (at 80-83) that the Court

[10] A corporate entity is the alter ego of a person if, among other things, "there is such unity of interest and ownership that the individuality of the corporation and its owners have ceased." *Benson v. Richardson*, 537 N.W.2d 748, 761 (Iowa 1995). Clearly, Tyson is no one's alter ego.

"estop" Tyson from contesting liability in workers' compensation proceedings. That argument is not well taken.

Preliminarily, Plaintiffs never made this argument below. But even if they had, Plaintiffs provide no support for the premise that this Court can make estoppel rulings that could then apply in separate proceedings before the DWC. Moreover, Plaintiffs mischaracterize Tyson's arguments in the two forums. Defendants' position is simple and consistent:

> (1) Plaintiffs allege that their injuries arose out of the workplace. Those claims therefore fall within the scope of the IWCA and must be adjudicated before the DWC.
>
> (2) To obtain benefits in those workers' compensation proceedings, Plaintiffs must prove (among other things) causation—i.e., that they actually contracted the disease at work. *See, e.g.*, *Sheerin v. Holin Co.*, 380 N.W.2d 415, 417 (Iowa 1986); *see also* Iowa Code § 85A.8 (defining "occupational disease," including requirement that claimant prove that the disease is not one that an employee "would have been equally exposed outside of that occupation").

The first argument addresses jurisdiction and the scope of the IWCA based on Plaintiffs' allegations. The second concerns the separate question of whether Plaintiffs can meet their burden of proof by presenting evidence of causation to support their claim. Tyson's merits defense in DWC proceedings is similar to an employer

disputing that an employee actually slipped and fell at work as opposed to somewhere outside of work. There is no inconsistency in Tyson's arguments, and estoppel is totally inappropriate. *Wilson v. Liberty Mut. Grp.*, 666 N.W.2d 163, 166 (Iowa 2003) (judicial estoppel exists to prevent parties from benefitting from taking *inconsistent* positions in different proceedings).

II. The trial court properly ruled that Plaintiffs' claims against the Individual Defendants are barred by the IWCA and fail to state a claim.

Preservation of Issue and Standard of Review

Defendants restate their positions from Section I regarding Plaintiffs' preservation of error, standard of review, and the standard for evaluating a motion to dismiss for lack of subject matter jurisdiction.

Argument

For many of the same reasons as above regarding the claims against Tyson, the district court also correctly ruled that it lacked jurisdiction over the claims against the co-employee Individual Defendants. Indeed, the IWCA "is an injured worker's exclusive remedy against an employer *or coemployee*, thereby providing the employer *and coemployee* immunity from common law tort liability." *See Walker*, 489 N.W.2d at 403 (emphasis added).

Critically, as the district court noted, Plaintiffs do not allege truly separate claims against Tyson and the Individual Defendants;

Plaintiffs have one claim, which they have asserted against fifteen defendants in slightly different forms. The Petitions' central claim is that *Tyson*, "through" its "corporate agents"—all of whom were acting "within the course and scope of their" employment—failed to implement sufficient workplace safety measures, which failures collectively resulted in alleged workplace injuries. [App. 178-80, 229-31] That claim—against an employer or co-employee—is subject to the DWC's exclusive jurisdiction and cannot proceed in court. To hold otherwise would defeat the whole purpose of the IWCA's exclusivity provisions.

Plaintiffs try to evade the IWCA by labeling their claims as "gross negligence" or "fraud," but those mere labels are not enough to get around the IWCA. The Petitions *do not* allege that any conduct (let alone wantonly, grossly negligent conduct) by any Individual Defendant caused any Plaintiff's injuries. Without such allegations, Plaintiffs cannot rely on the IWCA's sole and narrow exception for wanton gross negligence of a co-employee.

Additionally, even if Plaintiffs' claims against the Individual Defendants could proceed in court, they fail to state a claim for multiple reasons. Either way, the district court correctly dismissed the claims against the Individual Defendants. *See* Iowa R. Civ. P. 1.421(1)(a) & (f).

A. The district court correctly ruled that the claims against the Individual Defendants are barred by the IWCA.

As explained in detail above, the IWCA applies to, and provides the exclusive remedy for, "any and all personal injuries sustained by an employee arising out of and in the course of the employment." Iowa Code § 85.3(1). Plaintiffs allege that their injuries "ar[o]se out of" Ms. Buljic, Mr. Garcia, Mr. Ayala, and Mr. Fernandez's "employment with Tyson Foods" and that the Individual Defendants "[a]t all relevant times, . . . act[ed] within the course and scope of their employment" with Tyson. [App. 144-45 (¶¶ 4, 7, 10), 181 (¶ 242), 186 (¶ 265), 196 (¶ 4), 232 (¶ 244), 237 (¶ 267)] The IWCA therefore provides Plaintiffs' "exclusive and only" remedy for alleged workplace injuries under Iowa Code § 85.20. And it applies to co-employees, including managers and executives. *See Walker*, 489 N.W.2d at 403 (IWCA provides "coemployee[s] immunity from common law tort liability"); *Henrich*, 448 N.W.2d at 332 ("executive officers and representatives of the employer" are employees for purposes of IWCA exclusivity). Under Iowa law, the only proper forum for resolving those claims is the DWC. *See Tigges*, 356 N.W.2d at 509.

There is one "narrow" exception—which is "very difficult to prove"—where a plaintiff can show that a co-employee has engaged in "gross negligence amounting to such lack of care as to amount to

wanton neglect for the safety of another." *Henrich*, 448 N.W.2d at 332; *Gerace v. 3-D Mfg. Co.*, 522 N.W.2d 312, 315 (Iowa Ct. App. 1994); *see also* Iowa Code § 85.20(2).

But Plaintiffs' mere use of the label "gross negligence" in their Petitions—when they claim workplace injury caused by *the employer's* generalized workplace safety failures to which various specified and unspecified co-employees also contributed in unspecified ways—is not enough to remove their claims from the DWC's jurisdiction. To hold otherwise would create an impermissible end-run around the IWCA's exclusivity. A plaintiff could effectively sue his or her employer for any workplace injury by simply naming a group of managers as the nominal defendants in place of the employer itself. The Iowa Supreme Court has consistently rejected similar claim manipulation to evade the IWCA. *See McCoy*, 992 N.W.2d at 225, 230 ("[A plaintiff] cannot avoid the statutory processes for seeking redress against her employer by manipulating common law theories to reach the jury."). And the Court has stringently and narrowly interpreted the co-employee gross negligence exception specifically to avoid the outcome that Plaintiffs seek here: that the exception could impermissibly "require plant safety managers and safety engineers to become the insurers of other employees for every potential peril, real or otherwise, within the plant." *Walker*, 489 N.W.2d at 405; *Dudley v. Ellis*, 486 N.W.2d 281, 283 (Iowa 1992)

("[A]dding the requirement of wantonness severely restricted the application of section 85.20.").

The district court saw through Plaintiffs' attempt to evade the statute and correctly rejected it. As the district court explained, to sue a co-employee for "gross negligence amounting to such lack of care as to amount to wanton neglect" under section 85.20(2), a plaintiff must allege that the co-employee caused his or her injury through conduct satisfying three elements: "(1) knowledge of the peril to be apprehended; (2) knowledge that injury is a probable, as opposed to possible, result of the danger; and (3) a conscious failure to avoid the peril." [App. 876 & 881 (quoting *Nelson*, 619 N.W.2d at 390 (citing *Thompson v. Bohlken*, 312 N.W.2d 501, 505 (Iowa 1981)))] But the Petitions do not and "cannot satisfy th[is] test" for multiple, independent reasons. [App. 876, 881] In other words, the Petitions affirmatively show there is no right of recovery and no jurisdiction. *See Kingsway Cathedral v. Iowa Dep't of Transp.*, 711 N.W.2d 6, 7-8 (Iowa 2006).

1. The Petitions fail to allege gross negligence as to each Individual Defendant.

The district court correctly concluded that the required elements of gross negligence must be pleaded for *each* of the Individual Defendants. *See Henrich*, 448 N.W.2d at 333 ("In order to recover

for her injuries from a coemployee, [plaintiff's] claims of gross negligence must meet all the requirements of *Thompson* as to that coemployee."); *Simmons v. Acromark, Inc.*, No. 00-1625, 2002 WL 663581, at *2 (Iowa Ct. App. Apr. 24, 2002) ("The [gross] negligence claims apply separately to each defendant."). Stated differently, a claim for gross negligence cannot be alleged through "'group pleading' . . . that fails to distinguish between the defendants." *Schwartzco Enters. LLC v. TMH Mgmt., LLC*, 60 F. Supp. 3d 331, 356 (E.D.N.Y. 2014).

But the Petitions here simply group the Individual Defendants together, allege that they were "employed . . . in managerial capacities" and "were acting within the course and scope of their employment," and assert that they collectively (together with the other defendants) engaged in various alleged acts or omissions, with little to no attempt to plead which Individual Defendant was allegedly responsible for any given conduct, let alone the injuries forming the basis of these lawsuits. [App. 181, 185-86, 188-89, 232, 236-37, 239]

Plaintiffs do not even attempt to argue that they have pleaded any individual's specific conduct. Rather, they argue that they need not identify how any defendant contributed to the injuries because their Petitions allege that "*each* executive and *each* supervisor" was (together with Tyson) "responsible for the health and safety of"

employees. [Pls. Br. at 42] In other words, Plaintiffs' argument goes, because each Individual Defendant is a high-level Tyson executive or a Waterloo nurse manager, they are all *per se* liable whenever someone is injured by unsafe workplace conditions.

But job titles are not enough. Even a "manager of safety" is not simply presumed to have actual knowledge of conditions affecting safety; actual, specific allegations of knowledge are required. *See Walker*, 489 N.W.2d at 402, 406 (affirming dismissal, ruling that allegations that co-employees held positions of "manager of safety, health and environment" and "safety engineer" were "insufficient, standing alone, to [demonstrate] 'actual knowledge' of [unsafe workplace] conditions"). Such a presumption is even less appropriate here, where most of the co-employees alleged to have been grossly negligent are not even alleged to have worked at the same facility as their co-employees.

Plaintiffs also argue (at 41) that individualized pleading is unnecessary against a "small group of similarly situated and clearly defined individual[s]." Plaintiffs provide no legal support for this proposition, and Iowa law makes clear that a plaintiff must prove gross negligence with respect to *each co-employee* under Iowa Code § 85.20(2). *E.g.*, *Simmons*, 2002 WL 663581, at *2 ("The [gross] negligence claims apply separately to each defendant."). Moreover, Plaintiffs plead no facts to suggest that the Individual Defendants

were similarly situated. The Petitions merely allege their job titles, which demonstrate the Individual Defendants held a wide range of *dissimilar* roles at Tyson, from chairman of Tyson Foods, Inc. to occupational nurse at Tyson's Waterloo facility. [*E.g.*, App. 146-47, 197-98]

By lumping the Individual Defendants together and making only general allegations against them collectively, Plaintiffs' Petitions fail to "give sufficient notice as to what" conduct each is alleged to have committed that constituted gross negligence exhibiting such lack of care as to amount to wanton neglect for the safety of Ms. Buljic, Mr. Garcia, Mr. Ayala, and Mr. Fernandez. [App. 876-77, 881-82 (Ruling at 3-4)] That is deficient pleading, and the district court correctly dismissed on this basis.

The district court was also correct that gross negligence requires pleading the rudimentary requirement that each co-employee personally breached a duty owed to each plaintiff. Indeed, even under the rule prior to amendment of § 85.20, which allowed suits among co-employees based on ordinary negligence, personal liability still could not "be imposed upon the officer, agent, or employee simply because of his general administrative responsibility for performance of some function of the employment. He must have a personal duty towards the injured plaintiff, breach of which

specifically has caused the plaintiff's damages." *See Kerrigan v. Errett*, 256 N.W.2d 394, 397 (Iowa 1977).

Here, the Petitions contain no factual allegations regarding any action personally taken by the Individual Defendants alleged to have been grossly negligent as to any Plaintiff. Plaintiffs instead rely on the shock of the pandemic and provocative but generalized allegations of Tyson's response to manufacture an overall air of corporate impropriety (which Defendants dispute). At most, the Petitions make nominally more specific allegations as to some of the Individual Defendants, but those allegations, such as public statements about COVID-19 generally or Tyson's response thereto, do not come close to wanton gross negligence. *See Henrich*, 448 N.W.2d at 333; *Good v. Tyson Foods, Inc.*, 756 N.W.2d 42, 46 (Iowa Ct. App. 2008) (rejecting claim for gross negligence brought against individual supervisor and employer because it "squarely falls within the ambit of" the IWCA) (quoting *Kloster v. Hormel Foods Corp.*, 612 N.W.2d 772, 774 (Iowa 2000)).

The legislature clearly mandated that workplace injury claims like Plaintiffs' be heard in the DWC and provided only one "narrow" exception that is "very difficult to prove" for "gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another" co-employee. *Walker*, 489 N.W.2d at 403; *Gerace*, 522 N.W.2d at 315; Iowa Code § 85.20(2).

Permitting Plaintiffs' group pleading—without any facts suggesting that any Individual Defendant committed such an affirmative act—would undercut the purpose of the IWCA's exclusivity provisions to route these claims to the DWC and not have wasteful and expensive court proceedings.

2. The Petitions fail to allege "actual knowledge that injury was probable."

The Petitions also fail to allege, as required, "that the defendants *knew* their actions would place their coemployee in *imminent* danger, so that someone would *more likely than not* be injured by the conduct." *Hernandez v. Midwest Gas Co.*, 523 N.W.2d 300, 305 (Iowa Ct. App. 1994) (emphasis added). Consistent with Iowa's "strict" application of these requirements, "an injured worker must prove . . . that a coemployee *actually* knew of a peril or hazard." *Walker*, 489 N.W.2d at 404 (emphasis added). Constructive knowledge is not enough:

> For us to say that a coemployee's constructive knowledge or constructive "consciousness" of a hazard, without any actual knowledge thereof, is adequate to establish the coemployee's "gross negligence," would be to require plant safety managers and safety engineers to become the insurers of other employees for every potential peril, real or otherwise, within the plant. Of course, the various ways workers could be injured at a plant such as [the large plant where the plaintiff worked] could be endless.

Id. at 405.

Here, beyond conclusory allegations, the Petitions allege no facts suggesting "that each co-employee defendant had actual knowledge . . . that injury [to Ms. Buljic, Mr. Garcia, Mr. Ayala, or Mr. Fernandez (or anyone else)] [wa]s a probable result of the danger." [App. 877, 882] To the contrary, the Petitions plead constructive knowledge or constructive "'consciousness' of a hazard." *See Walker*, 489 N.W.2d at 405. [App. 185 & 188 (¶¶ 256, 271) (alleging Individual Defendants "knew *or should have known* that their conduct" would cause harm) (emphasis added); App. 191 (¶¶ 285-87) (alleging Ms. Adams and Ms. Jones were aware of the general dangers of COVID-19 and that an entirely separate facility, in Columbus Junction, Iowa, had shut down); App. 236 & 239 (¶¶ 258, 273), 242 (¶¶ 288-89) (same)] The district court properly concluded that such allegations are not sufficient to plead gross negligence. [App. 876-77, 881-82][11]

Moreover, gross negligence requires not just "actual knowledge," but "knowledge that injury is a probable, as opposed to

[11] Plaintiffs (at 43 n.8) fault the district court for citing other similar cases on the basis that those cases were decided "after the pleading stage." But the fact that those plaintiffs proceeded to discovery or trial is beside the point. At the pleading stage, Plaintiffs must plead allegations (not mere conclusions) showing the court's jurisdiction and stating a claim for relief. *See Kingsway Cathedral*, 711 N.W.2d at 8. The Petitions fail to do so.

a possible, result of the danger." *Walker*, 489 N.W.2d at 403. Actual knowledge is "exceptionally difficult for plaintiffs to prove" because it requires more than a showing of the coworkers' "knowledge of the actuarial foreseeability—even certainty—that 'accidents will happen.'" *Henrich*, 448 N.W.2d at 334 n.3; *Ganka v. Clark*, 941 N.W.2d 356 (Table), 2019 WL 6358301, at *2 (Iowa Ct. App. 2019). Instead, the plaintiff "must show the defendant 'knew their actions would place their [co-employee] in imminent danger, so that someone would more likely than not be injured by the conduct.'" *Ganka*, 941 N.W.2d 356 (Table), 2019 WL 6358301, at *2 (alteration in original) (quoting *Hernandez*, 523 N.W.2d at 305).

As the cases make clear, actual knowledge that injury was probable is an extremely high bar and would seem to require near criminal misconduct. *See, e.g.*:

Nelson v. Winnebago Indus., Inc., 619 N.W.2d 385, 390-91 (Iowa 2000)

- Co-employees "sneaked up behind [the plaintiff,]" began taping him "like a 'mummy' with duct tape" until the plaintiff "couldn't move," and then seven or eight men "carried him a distance estimated by the plaintiff to be ten to fifteen feet to a shower, where he was dropped."
- But no gross negligence, because there was no evidence that the plaintiff's co-employees knew

"that injury to the plaintiff was a probable, as opposed to a possible, result" of their conduct.

Dudley v. Ellis, 486 N.W.2d 281, 283-84 (Iowa 1992)

- Co-employee prematurely activated a 120-volt wire, causing an electrical explosion resulting in severe injuries to plaintiff.

- But no gross negligence, due to lack of evidence that the co-employee knew that injury would probably result because "the explosion was caused by a combination of factors" rather than directly by the co-employee's actions.

Woodruff Constr. Co. v. Mains, 406 N.W.2d 787, 789 (Iowa 1987)

- Plaintiff's supervisor knew there was a dangerous "soft spot" on the roof that he and the plaintiff were repairing but "ordered [the plaintiff] to report to him" knowing that the soft spot was between them, causing the plaintiff to walk into the hole.

- But no gross negligence: "While [the supervisor's] abusive activities in regard to his employees could well be found to amount to negligence . . . we do not believe that the requisite showing of probability of injury required by section 85.20 was established." *Id.* at 790-91.

Anderson v. Bushong, 829 N.W.2d 191 (Table), 2013 WL 530961, at * 1 (Iowa Ct. App. 2013)

- The plaintiff "shattered his heel bones after falling eleven feet from the deck of a construction site" because his supervisors failed to "follow[] federal regulations or the construction company manual regarding safe practices for covering stairwell holes."

- But no gross negligence: "We disagree that the defendants' knowledge of the [safety] violations [at the plaintiff's worksite] satisfied the high hurdle posed by the second requirement under section 85.20—that either coworker knew [the plaintiff's] injury was a 'probable' consequence of the failure to enforce safety rules." *Id.* at *5 (citing *Thompson*, 312 N.W.2d at 505).

Again, beyond conclusory statements, the Petitions do not set forth factual allegations that any Individual Defendant had actual knowledge that Ms. Buljic, Mr. Garcia, Mr. Ayala, and Mr. Fernandez's tragic deaths during the earliest days of the pandemic were "more likely than not" to occur. At the absolute most, the allegations amount to "knowledge of the actuarial foreseeability" that the virus may present itself in the Waterloo facility, but that is not enough. *Henrich*, 448 N.W.2d at 334 n.3. And, given the highly contagious and literally ubiquitous nature of COVID-19, these allegations

could be made against anyone in any workplace, anywhere in the country.

Plaintiffs rely heavily (at 43-44, 47-50, 52) on *Swanson v. McGraw*, 447 N.W.2d 541, 545 (Iowa 1989), but that case is inapposite. There, the employee was tasked with power-washing certain equipment using highly caustic soap that would cause severe chemical burns if it contacted skin. *Id.* at 542. Just before the incident, the employee specifically informed two supervisors that "there was a hole in his [protective] suit" and requested a new suit, but the supervisors refused and ordered the employee to proceed. *Id.* In other words, two co-employees actually knew that the plaintiff was about to confront a known, immediate danger and affirmatively ordered him to do so. The allegations here, in contrast, which consist of generalized workplace safety failures attributed to Tyson and a group of thirteen co-employees collectively, come nowhere near this stringent standard.

And while preventative measures may be said to constitute an acknowledgment of the reality that COVID-19 was present within Iowa, they in no way "acknowledge" that it was more likely than not that Plaintiffs' relatives might be injured as a result of any Individual Defendant's conduct. [*See* Pls. Br. at 47] Indeed, Plaintiffs' critiques of protective measures deployed at the start of an unprecedented global pandemic only demonstrate that the Individual

Defendants actively took steps to minimize the *possibility* that any team member working at Tyson became ill. Such allegations are completely insufficient to plead gross negligence amounting to wanton neglect. And Plaintiffs' contention (at 48) that it was "common knowledge" that those same safety measures were inadequate, and that the Individual Defendants therefore had knowledge that harm was more than likely to occur to Ms. Buljic, Mr. Garcia, Mr. Ayala, and Mr. Fernandez at the Waterloo facility, makes no sense.

Nor does Plaintiffs' allegation (at 48) that the Individual Defendants "lobb[ied] government officials for COVID-19-related liability protections" show they knew harm to Plaintiffs was probable. States across the country enacted liability protections for businesses in recognition of the fact that the pandemic was, for many reasons, difficult to predict, difficult to contain, and spreading everywhere through community spread. It makes sense that governments, businesses, and places of employment were wary that they could be sued by any individual who could have contracted the disease anywhere. But the allegation that the Individual Defendants lobbied for liability protections in no way suggests that the Individual Defendants had "knowledge that harm was more than likely to occur" to Ms. Buljic or Messrs. Garcia, Ayala, or Fernandez at the Waterloo facility as a result of that conduct.

3. The Petitions fail to allege a "conscious failure to avoid the peril."

Gross negligence requires "such lack of care as to amount to wanton neglect for the safety of another," including a "conscious failure to avoid" a known peril. *Walker*, 489 N.W.2d at 403. In that regard, there is "an important difference between" a co-employee's alleged failure to act to improve safety conditions, and allegations that a co-employee affirmatively "issued directives for their co-employees to continue performing operations the supervisors knew would place the co-employees in harm's way." *See Juarez v. Horstman*, 797 N.W.2d 624 (Table), 2011 WL 441523, at *4 (Iowa Ct. App. 2011); *Walker*, 489 N.W.2d at 406 ("Plaintiff here could have established defendants' gross negligence only by showing that defendants actually knew of the drop-off but nevertheless ordered or otherwise forced Clifton to confront it.").

The Petitions here allege only that the Individual Defendants (collectively with each other and the other defendants) failed to take actions that allegedly would have improved safety conditions more than the measures that were taken. [*See, e.g.*, App. 181-83 (¶ 246(a)-(ee)) (alleging "[f]ailing" to take various actions); App. 232-34 (¶ 248(a)-(ee)) (same)] That is not remotely akin to ordering employees to walk into a known drop-off or other such perils. *Ganka*, 941 N.W.2d 356 (Table), 2019 WL 6358301, at *3 (finding

no gross negligence even though "[the defendant] could have taken steps to reduce this risk," including that he "could have permitted the use of a telehandler, arranged for his crews to have specialized training, or made sure the crewmembers read safety manuals").

Nor are allegations of failure to comply with OSHA guidelines sufficient. *See Vandelune v. Synatel Instrumentation, Ltd.*, No. C95-3087, 1999 WL 33655731, at *3 (N.D. Iowa June 23, 1999) (holding that even if the co-employee "did have actual knowledge that the sensor did not comply with OSHA regulations, this failure does not meet the test for a finding of gross negligence").

Plaintiffs argue (at 50-51) there was a conscious failure to avoid a danger of harm because they alleged that the Individual Defendants were aware other Tyson plants (and meatpacking plants generally) had cases of COVID-19 and the Individual Defendants failed to institute additional protective measures while continuing to operate (as critical infrastructure). [*See, e.g.*, App. 186-88 (¶ 267(a)-(dd)) (alleging "[f]ailing" to take various actions); App. 237-39 (¶ 269(a)-(dd)) (same)] But allegations (made with the benefit of hindsight) that the Individual Defendants (collectively with each other and the other defendants) could have done more to protect workers do not come close to meeting the bar that the Individual Defendants affirmatively "issued directives for their co-employees to continue performing operations [that] the

supervisors knew would place the co-employees in harm's way." *See Juarez*, 797 N.W.2d 624 (Table), 2011 WL 441523, at *4; *see Ganka*, 941 N.W.2d 356 (Table), 2019 WL 6358301, at *3.

Plaintiffs fail to meet the strict requirements to avail themselves of the narrow gross negligence exception to the IWCA's exclusivity for co-employee claims, which is the only path that could "remove these matters from the jurisdiction of the [DWC]." [App. 877, 882] The district court thus correctly dismissed the claims. *See Tigges*, 356 N.W.2d at 511 ("Subject matter jurisdiction should be considered before the court looks at other matters . . . .").

4. Labeling a claim against a co-employee as "fraud" does not evade the IWCA.

Plaintiffs also allege a claim for "Fraudulent Misrepresentation" against Mary Jones, but as discussed in detail above, a plaintiff cannot relabel a claim for bodily injury as an intentional tort to avoid the exclusivity of workers' compensation. *Nelson*, 619 N.W.2d at 389; *Cincinnati Ins. Cos.,* 801 N.W.2d at 863 ("[W]here a claim is predicated on the same facts as the work injury itself, simply labeling it as fraud is not sufficient to avoid the exclusivity of the Workers' Compensation Act.") Plaintiffs' fraud claim belongs in the DWC.

Attempting to sidestep the IWCA, Plaintiffs argue that their fraud claim can proceed because "an intentional tort claim causing personal injuries will undoubtedly fall within the § 85.20(2) gross negligence/wanton neglect standard." [Pls. Br. at 39] Not so. Fraud, for example, is an "intentional tort," but it does not necessarily satisfy the wanton gross negligence standard. Indeed, as Plaintiffs point out, the elements of fraud do not include *any* of the elements of gross negligence under *Thompson*. With respect to "knowledge," fraud merely requires knowledge that a statement is false, *not* knowledge of a peril, knowledge that injury is probable, or a conscious failure to avoid the peril. To satisfy the IWCA's sole exception for wanton gross negligence, those elements are required. *See Gerace*, 522 N.W.2d at 315 ("The only exception [to IWCA exclusivity] relates to a coemployee's 'gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another.'") (quoting Iowa Code § 85.20(2)). Pleading a workplace injury as one for fraudulent misrepresentation to get around the exclusivity provision is not permitted.

5. The fraud claim against Mary Jones fails for additional reasons.

Plaintiffs' fraudulent misrepresentation claim against Mary Jones must separately be dismissed for the simple reason that the Petitions do not allege facts sufficient to support any element of

that claim. The *only* factual allegations attributable to Ms. Jones are that she allegedly "forb[ade]" staff nurses from attributing employees' unconfirmed symptoms to COVID-19; was allegedly instructed by someone else not to perform contact tracing; and "directed" a supervisor to require a different employee, who was allegedly feeling sick, to come to work in late March 2022. [App. 160 (¶ 103), 162 (¶ 119), 184-85 (¶ 254), 210-11 (¶ 100), 213 (¶ 116), 235 (¶ 256)][12]

Defendants vigorously dispute those allegations, and note the implausibility that Ms. Jones, an occupational nurse, would have authority over plant supervisors to mandate workplace attendance of floor employees. But in any event, the allegations do not come close to stating a claim for fraudulent misrepresentation. Indeed, there is not even an alleged representation made by Ms. Jones, let alone a material one she knew to be false. Nor does the Petition allege (1) that Ms. Jones made any representation with the intent to deceive Ms. Buljic, Mr. Garcia, Mr. Ayala, and Mr. Fernandez,

[12] Notably, the Petition makes clear that (i) the individual, "John Doe," had not tested positive for COVID-19 when he was allegedly told to come to work, (ii) he went on to become the very first COVID-19 case at the Waterloo facility, and there was therefore no basis at the time to believe he was already infected with the virus, and (iii) when it was confirmed that he had COVID-19, Defendants "instructed [him] to quarantine for fourteen days." [App. 160 (¶ 102 & n.13), 163 (¶ 122), 210 (¶ 99 & n.13), 213 (¶ 119)] These allegations thus also fall far short of wanton gross negligence.

see Polar Insulation, Inc. v. Garling Construction, Inc., 888 N.W.2d 902 (Table), 2016 WL 6396208, at *3 (Iowa Ct. App. 2016) (requiring an intent to deceive the particular injured individual); (2) that those individuals even knew about any representation made by Ms. Jones, much less relied on it; or (3) that they were injured because of a representation as opposed to any other reason, *see Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726, 740 (Iowa 2009) (requiring both factual and proximate cause between the alleged false representation and injury). This is an independent basis requiring dismissal of the fraudulent misrepresentation claim against Ms. Jones.

Trying to deflect from these fatal deficiencies, Plaintiffs repeat allegations made against all "Supervisory Defendants" and reference the liberal pleading standard. [*See* Pls. Br. at 52-56] But that pleading standard does not permit vague allegations of conduct by other individuals to be imputed to a particular defendant merely because *the plaintiff* chose to lump all of them together and ascribe to them a particular group title ("Supervisory Defendants"). Iowa law requires that the "facts relied on to constitute the essential elements requisite to maintain an action for fraud . . . be pleaded in clear and positive terms." *See In re Lorimor's Est.*, 216 N.W.2d 349, 353 (Iowa 1974). And in any event, nothing in the Petitions fairly implies that Ms. Jones, an occupational nurse, was engaged in the

same conduct as any other Supervisory Defendant, who, by the Petition's allegations, all hold different roles from Ms. Jones.

In short, the Petitions do not provide Ms. Jones fair notice of her alleged conduct giving rise to Plaintiffs' fraudulent misrepresentation claim because the Petitions contain no allegations of any purported fraudulent misrepresentation by her. Count 3 was properly dismissed for this separate, independent reason.

B. Plaintiffs have forfeited Claim 4, which fails as a matter of law.

Plaintiffs do not address Claim 4 in their opening brief and failed to oppose dismissal of that claim in their resistances to Defendants' motions to dismiss. They have therefore waived argument on it. *See L.N.S. v. S.W.S.*, 854 N.W.2d 699, 703 (Iowa Ct. App. 2013) ("Where a party has failed to present any substantive analysis or argument on an issue, the issue has been waived.").

On the merits, that claim fails as a matter of law for multiple reasons. Titled "Gross Negligence, Breach of Duty, and Punitive Damages," Claim 4 asserts Defendants Adams and Jones are liable by virtue of their jobs as occupational nurses. [App. 191-93, 241-44] But as discussed above, job titles are not enough, *Walker*, 489 N.W.2d at 402, 406, and Plaintiffs have never provided any support for their contention that Defendants owe a particular duty based on their roles as occupational nurses. *Cf. Plowman v. Fort Madison*

Cmty. Hosp., 896 N.W.2d 393, 412 (Iowa 2017) (alteration in original) (quoting *Lab'y Corp. of Am. v. Hood*, 911 A.2d 841, 852 (Md. 2006)) (noting public policy against "extension [of tort duty]" of a medical professional "to 'an indeterminate class of people'"). Rather, Adams and Jones owed the same duty of care as any other co-employee: the duty to refrain from acting with wanton gross negligence. That has already been alleged against Adams and Jones in Claims 2 and 3. Claim 4 is duplicative and was properly dismissed for this additional, independent reason.

Finally, even if their occupations did impose a special duty onto Adams or Jones, the Petitions contain no allegations of breach or causation of those duties because they fail to allege that either Adams or Jones—in their capacities as occupational nurses or in any other capacity—even had any involvement or interaction with Ms. Buljic, Mr. Garcia, Mr. Ayala, or Mr. Fernandez.

III. Plaintiffs' Petitions are barred by Iowa's COVID-19 Immunity Act.

Preservation of Issue and Standard of Review

An appellate court can uphold a trial court ruling on any ground appearing in the record, whether decided by the trial court or not. *Sievers v. Iowa Mut. Ins. Co.*, 581 N.W.2d 633, 636 (Iowa 1998). Iowa's COVID-19 Response and Back-to-Business

Limited Liability Act provides an additional reason to affirm the trial court's dismissal.

Argument

Having determined that it lacked subject matter jurisdiction over the Petitions, the district court did not need to reach the remaining independent grounds for dismissal. But if this Court concludes the district court has jurisdiction over any of Plaintiffs' claims, it should nonetheless affirm their dismissal under the "COVID-19 Response and Back-to-Business Limited Liability Act" ("Immunity Act"). Indeed, if there was any doubt as to whether Plaintiffs' claims should proceed, the legislature has signaled clearly through the Immunity Act they should not.

The Immunity Act broadly forbids civil liability for injuries or death resulting from COVID-19 allegedly contracted on a business's premises unless a plaintiff can demonstrate the defendant "expose[d] the individual to COVID-19 through an act that constitutes actual malice," "intentionally expose[d] the individual to COVID-19," or "recklessly disregard[ed] a substantial and unnecessary risk that the individual would be exposed to COVID-19." Iowa Code § 686D.4. Iowa courts have long interpreted "recklessness" as requiring "an awareness, actual or constructive, of the unusual danger presented by the circumstances, and also a manifestation of 'no care.'" *E.g.*, *Nesci v. Willey*, 75 N.W.2d 257, 259 (Iowa 1956).

"[C]onduct arising from mere inadvertence, thoughtlessness or error in judgment, is not reckless." *Id*.

Iowa courts "construe statutory immunity provisions broadly" and "exceptions to immunity narrowly." *Nelson v. Lindaman*, 867 N.W.2d 1, 9 (Iowa 2015) (citing *Cubit v. Mahaska Cnty.*, 677 N.W.2d 777, 784 (Iowa 2004) (collecting cases construing Iowa immunity provisions broadly)).

Heeding those principles is particularly appropriate here. As of the date of this filing, there have been well over 100 million confirmed COVID-19 cases nationwide, over 1.13 million Americans have died, and over 6.2 million Americans have been hospitalized because of the disease.[13] And although Iowa is no longer tracking COVID-19 data, the State had reported over 870,000 cases by the time Defendants filed their Motions to Dismiss well over a year ago. [*See* App. 278-79, 315-16] It is no exaggeration to say that COVID-

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[13] Center for Disease Control, COVID-19 Data Tracker, https://covid.cdc.gov/covid-data-tracker/#datatracker-home (last updated Aug. 24, 2023); World Health Organization, COVID-19 Map of United States, https://covid19.who.int/region/amro/country/us (last visited Aug. 24, 2023). The CDC ceased tracking confirmed cases in May 2023, so the number of total cases is likely *significantly* higher than 100 million.

This Court may take judicial notice of facts and data contained on a governmental agency's webpage or in agency records and reports. *League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 212 (Iowa 2020); *see* Iowa R. Evid. 5.201.

19 has reached every corner of this country and every corner of daily life, from where we eat, sleep, shop, play, and work. If every place of business and every employer were forced to litigate an employee's COVID-19 illness, both the court system and Iowa's businesses would grind to a halt.

For these reasons and others, Iowa is just one of approximately 30 states to have enacted legislation evincing a clear policy decision against permitting COVID-19 exposure tort claims except in narrow circumstances. *See, e.g.*, Mo. Rev. Stat. § 537.1005; Ala. Code §§ 6-5-790(1), 6-5-792; N.C. Gen. Stat. § 99E-71; Ark. Code § 16-120-1103; Neb. Rev. Stat. § 25-3604; Ga. Code § 51-16-2; Idaho Code § 6-3403; Tex. Civ. Prac. & Rem. Code § 148.003; Ky. Rev. Stat. § 39A.275; Miss. Code § 11-71-11.

And state legislatures are not alone. Courts have also taken a pragmatic, policy-conscious view of allowing COVID-based tort claims to proceed, recognizing that having a low bar for such claims would quickly flood the system and require significant discovery into complex and difficult to prove issues of causation and other matters. As this Court knows, COVID-19 was and still is pervasive, with easy and frequently indiscernible transmission everywhere—not just the workplace. Courts have rightfully been very careful about permitting such claims to proceed in court. *See, e.g.*, *Kuciemba v. Victory Woodworks, Inc.*, 531 P.3d 924, 950 (Cal. 2023)

(declining to impose certain duties on employers that would "throw open the courthouse doors to a deluge of [COVID-19] lawsuits that would be both hard to prove and difficult to cull early in the proceedings" and that have "the potential to destroy businesses and curtail, if not outright end, the provision of essential public services"); *Ruiz v. ConAgra Foods Packaged Foods LLC*, 606 F. Supp. 3d 881, 889-90 (E.D. Wis. 2022) ("In a pandemic that has resulted in some sixty percent of the United States population contracting the virus, it becomes increasingly impractical to focus on a single outbreak. . . . [I]mposing liability under these circumstances would impose too great a burden on the defendant and would enter a field with no reasonable or principled stopping point.").

Thus, the Iowa legislature has made the standard to proceed with a claim for alleged COVID-19 exposure high. The Petitions fail to meet that standard. In fact, they *affirmatively demonstrate* that Defendants' conduct does not meet the narrow exemption from immunity under the Immunity Act. As the allegations in the Petitions make clear, Defendants implemented various measures to protect worker safety, including by providing facial coverings, restricting visitor access, taking employees' temperatures, and requiring sick employees to quarantine for at least 14 days. [*See, e.g.*, App. 159 (¶ 100), 163 (¶ 122), 164 (¶¶ 130, 132)] These allegations foreclose Plaintiffs' suggestion that Defendants acted with malice or intent

to expose Plaintiffs to COVID-19, or showed "no care" at all for the risk of exposure. *See* Iowa Code § 686D.4; *Nesci*, 75 N.W.2d at 259. While Plaintiffs contend Defendants should have adopted such measures sooner or implemented additional measures that might have improved worker safety, such allegations are a far cry from the level of culpability required to state a claim under the Immunity Act.

And, because this is an immunity statute, Plaintiffs must be required to allege facts to support each Defendant's exemption from immunity—*i.e.*, facts as to how each individual Defendant acted with malice, intent, or recklessness. Anything less than that would create an end-run around the statute and defeat the "key purpose" of statutory immunity. *See Lindaman*, 867 N.W.2d at 7 (noting "a key purpose" is to "avoid costly litigation" upfront). As is the case with satisfying the "narrow" standard for gross negligence under the IWCA, more *must be* required to state a claim under the Immunity Act than making identical allegations against entire groups of people, with little to no differentiation among them.

Finally, Defendants anticipate that Plaintiffs will argue the Immunity Act unconstitutionally deprives them of or extinguishes a vested cause of action, but that would be incorrect. The Immunity Act specifically provides that it "shall not be construed to . . . [a]ffect the rights or limits under workers' compensation as provided in

chapter 85." Iowa Code § 686D.8(3). Provided Plaintiffs satisfy the statutory requirements to recover for the alleged workplace bodily injuries before the DWC, a workers' compensation tribunal may provide appropriate redress. The statute thus does not deprive Plaintiffs of a vested right—it merely reinforces that the DWC is the proper forum to resolve Plaintiffs' claims. Moreover, courts in Iowa accord deference to a legislative command of retroactivity, even if the legislation is substantive in nature. *Cf. Pfiffner v. Roth*, 379 N.W.2d 357, 360 (Iowa 1985) (finding statute that would have *completely* deprived the plaintiff of a cause of action applied prospectively because it "d[id] not say it is to be given retrospective application").

IV. The district court properly denied leave to amend.

Preservation of Issue and Standard of Review

Defendants agree that Plaintiffs preserved their arguments regarding leave to amend, but, importantly, Plaintiffs did not make this request until their *post-dismissal* Rule 1.904 motions below. [*See* App. 913-18, 937-41] Accordingly, the standard Plaintiffs cite in their Brief before this Court (at 83-84) omits a critical component. As a starting point, "independent of any other consideration," a "post-dismissal motion to amend," like Plaintiffs' motion here, "is 'disfavored.'" *Meade v. Christie*, 974 N.W.2d 770, 780 (Iowa 2022) (quoting *Plymouth Cnty., ex rel. Raymond v. MERSCORP, Inc.*, 287

F.R.D. 449, 464 (N.D. Iowa 2012), *aff'd sub nom. Plymouth Cnty., Iowa v. Merscorp, Inc.*, 774 F.3d 1155 (8th Cir. 2014)).

Defendants agree that "a trial court has considerable discretion in ruling on a motion for leave to amend, and [the appellate courts] will reverse only when a *clear* abuse of discretion is shown." *Allison-Kesley Ag Ctr., Inc. v. Hildebrand*, 485 N.W.2d 841, 846 (Iowa 1992) (citation omitted).

Argument

The district court did not abuse its discretion in denying leave to amend, which Plaintiffs requested only *after* their Petitions had been dismissed and which would have been futile.

Iowa courts (both federal and state) have repeatedly held that "a district court does not abuse its discretion in denying a post-dismissal motion for leave to amend, where the plaintiff chose to stand on its original pleadings in the face of a motion to dismiss that identified the very deficiency upon which the court dismissed the complaint." *Plymouth Cnty., Iowa ex rel. Raymond*, 287 F.R.D. at 464; *see also Meade*, 974 N.W.2d at 780.

Here, all the relevant considerations weighed against permitting further amendment. By the time the district court issued its Ruling, Plaintiffs had already amended their Petitions three times, after being put on notice of the grounds for dismissal when the Defendants filed their original motions to dismiss in *October 2020*.

Nonetheless, in response to Defendants' motions to dismiss the Petitions, Plaintiffs filed a resistance "accompanied . . . with [over 115 pages of] brief[ing] explaining how [their] petition[s] satisfied the legal requirements to overcome [Defendants' motions]," which nowhere "made [any] mention of any request to amend." *Meade*, 974 N.W.2d at 780 (*Meade* plaintiff filed a 78-page brief). In other words, Plaintiffs "adopted a strategy of vigorously defending [their Petitions], despite [their] deficiencies" and only after dismissal "now want[] a judicial reprieve." *Id.* (quoting *U.S. ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 823 (8th Cir. 2009)) (alteration incorporated); *see Plymouth Cnty., Iowa ex rel. Raymond*, 287 F.R.D. at 464. Leave to amend was properly denied under these circumstances.

Moreover, Plaintiffs' proposed amendment would be futile, as they concede that their proposed amendments would not "mak[e] any substantive changes" to the Petitions. [App. 914, 938; *see also* Pls. Br. at 84 (admitting again that their proposed amendments would make "[n]o substantive changes to the facts, claims, or petitions")] Indeed, Plaintiffs' proposed amendments were nothing more than a clerical cut-and-paste of the exact same (conclusory) allegations from their Petitions for each co-employee Defendant.

Needless to say, this non-substantive reformatting would not address the substantive deficiencies identified by the district

court—*e.g.*, that "the pleadings do not give sufficient notice as to what duty or claim each defendant is alleged to have owed to each Plaintiff" and that the allegations against the co-employees "cannot satisfy the test outlined in *Nelson*." [App. 876-77, 881-82] If anything, the proposed amended pleadings only confirm that Plaintiffs cannot allege facts supporting the elements of gross negligence as to any co-employee defendant. The thrust of Plaintiffs' claims—however styled—is for alleged workplace bodily injury against an employer. Plaintiffs' amendment would not cure this fundamental, jurisdictional defect because it cannot be cured. Leave to amend was correctly denied. *See Plymouth Cnty., ex rel. Raymond*, 287 F.R.D. at 464 ("[A] post-dismissal motion to amend should not be granted where the proffered post-dismissal amendment suffers from the same legal or other deficiencies as the dismissed pleading, or if the proffered amendment is otherwise futile.") (citations omitted).

In sum, Plaintiffs "failed to share any facts suggesting that [they have] claims that are not barred by the [IWCA] that would warrant leave to amend." *Meade*, 974 N.W.2d at 780. The district court correctly denied their untimely, alternative request to amend the Petitions, and certainly the court did not "*clear[ly]* abuse [its] discretion." *Allison-Kesley Ag Ctr.*, 485 N.W.2d at 846 (citation omitted).

CONCLUSION

Defendants respectfully ask this Court to affirm the district court's dismissal of Plaintiffs' Petitions in full for lack of subject matter jurisdiction.

REQUEST FOR ORAL ARGUMENT

Defendants request oral argument.

Dated: October 3, 2023

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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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Dated: October 3, 2023

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CERTIFICATE OF SERVICE

I hereby certify that October 3, 2023, I served the **Final Brief of Appellees Tyson Foods, Inc., Tyson Fresh Meats, Inc., John H. Tyson, Noel W. White, Dean Banks, Stephen R. Stouffer, Tom Brower, Doug White, Debra Adams, and Mary Jones** on all other parties to this appeal by e-mailing one copy thereof to the respective counsel for said parties:

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