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' AMENDED FINAL REPLY BRIEF

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Report of the Employer's Liability Commission of the State of Iowa, E.H. English, state printer, 1912.

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ARGUMENT

I. Notice-Pleading Standards Apply.

Defendants cannot avoid the consequences of using a pre-answer motion to dismiss by arguing that *something* (what, exactly, is not clear) other than notice-pleading standards apply, *see* Tyson, Executive Defendants, and Supervisor Mary Jones Appellees' (collectively, Tyson) Br. 32-33; Remaining Supervisory Appellees' (collectively, Supervisors) Br. 17-21. Defendants made it clear below that their jurisdictional challenge under Iowa Rule of Civil Procedure 1.421(1)(*a*) stands or falls on their concomitant assertion that the Workers failed to state a claim on which relief could be granted under subsection (*f*) because they did not sufficiently plead exceptions to workers' compensation exclusivity. (*Buljic* Defs.' Joint Mot. Dismiss 1-2, App. pp. 0246-0247; *Fernandez* Defs.' Joint Mot. Dismiss 1, App. p. 0251; *Buljic* Remaining Supervisory Defs.' Dismissal Br. 4, App. p.

0398) ("Without an affirmative demonstration of actual 'gross negligence amounting to . . . wanton neglect for the safety of another,' section 85.20 vests jurisdiction over the claim to the DWC."), 7 ("*The Petition fails to state a claim* under the statutory heightened gross negligence standard, *and this Court therefore lacks jurisdiction* over the Plaintiffs' IWCA claims." (emphasis added)); *Fernandez* Remaining Supervisory Defs.' Dismissal Br. 4, 7 (same), App. pp. 0409, 0412; *Buljic* Tyson Dismissal Br. 2, App. p. 0264 ("Pursuant to the IWCA, *this Court lacks jurisdiction* over the claim against Tyson, *and the Petition should be dismissed under* Iowa Rule of Civil Procedure 1.421(1)*(a) and (f) on that basis alone*." (emphasis added)); *Fernandez* Tyson Dismissal Br. 2 (same)).[1] Where Defendants' jurisdictional challenge is grounded on arguments that the Workers failed to state a claim upon which relief could be granted by not sufficiently alleging exceptions to workers' compensation exclusivity, an analysis undisputedly

[1] Whether the Court should reverse the intentional tort exception recognized in *Nelson v. Winnebago Indus., Inc.*, 619 N.W.2d 385 (Iowa 2000), presents a question of law not reliant on the petitions' allegations, but whether the petitions sufficiently invoked the exception must be determined under the notice-pleading standard. Tyson does not address this distinction, and its attempt to avoid the notice-pleading standard should be rejected.

governed by the authority cited by the Workers, notice-pleading standards apply.[2]

Moreover, that dismissal is required whenever a jurisdictional defect is found[3] doesn't preclude applying notice-pleading standards when the issue is raised on a motion to dismiss. In *Mormann v. Iowa Workforce Dev.*, 913 N.W.2d 554, 564–66 (Iowa 2018), the court discussed methods for resolving jurisdictional disputes prior to trial, including (1) a motion to dismiss, where "all the well-pleaded allegations in the petition would be deemed as true, and the motion to dismiss would be granted *only if there were no conceivable set of facts* under which the nonmoving party would be entitled to relief"; (2) considering additional matters outside the pleadings under summary judgment standards; or (3) holding a post-discovery trial-type hearing, with factual issues reviewed for substantial evidence. *Id*. at

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[2] Defendants' reliance on a partially concurring opinion in *Marek v. Johnson*, 954 N.W.2d 782, 2020 WL 7021707 (Iowa Ct. App. 2020), *aff'd in part and vacated in part*, 958 N.W.2d 172 (Iowa 2021), is puzzling because *Marek* did not involve a lack of "subject matter jurisdiction" (it's not even mentioned by the Iowa Supreme Court), but concerned whether a governmental board's ruling could be challenged through a declaratory judgment action, as opposed to the judicial review process. Moreover, the worker's compensation scheme contains exceptions, and is not as exclusive as the judicial review process.

[3] There is no jurisdictional defect here, as the petitions sufficiently alleged exceptions to workers' compensation exclusivity.

564-66 (emphasis added); *see also Cincinnati Ins. Cos. v. Kirk*, 801 N.W.2d 856, 859 (Iowa Ct. App. 2011) (reviewing dismissal of workers' compensation case for lack of subject matter jurisdiction, and stating that dismissal would only be affirmed if the petition "shows no right of recovery under any state of facts"); *Holmstrom v. Sir*, 590 N.W.2d 538, 539-40 (Iowa 1999) (reversing grant of motion to dismiss petition alleging many "purely ecclesiastical matters" that courts lacked jurisdiction to hear, after viewing the allegations and resolving doubts in the plaintiffs' favor, and noting that dismissal motions are sustained "only if the petition on its face shows no right of recovery under any stated facts[]"). Defendants' motion is subject to the low bar that is the "under no conceivable set of facts" notice-pleading standard. Under this standard, which has "emasculated" dismissal motions, arguments that the petitions insufficiently pleaded gross negligence, fraud, and/or causation fail.

II. The Coworker Allegations Satisfied Iowa Code § 85.20(2)'s Exception to IWCA Exclusivity.

A. The Petitions Alleged Gross Negligence as to Each Coworker.

The Court should reject Defendants' invocation of the "group pleading" doctrine and their complaint regarding duty allegations, Tyson's Br. 52-57. Under the "group pleading" doctrine, "plaintiffs may impute false or misleading statements conveyed in annual reports, quarterly and

year-end financial results, or other group-published information to corporate officers." *In re McLeod USA Inc.*, No. C02-001-MWB, 2004 WL 1070570, at *4 (N.D. Iowa Mar. 31, 2004). The ruling in *Schwartzco Enters. LLC v. TMH Mgmt., LLC*, 60 F. Supp. 3d 331 (E.D.N.Y. 2014), that a plaintiff subject to federal pleading standards may not rely on the doctrine to show gross negligence is irrelevant because the Workers did not make "group pleading" allegations.

Moreover, "[i]n *Schwartzco*, plaintiffs' gross negligence claim was dismissed because the group pleading failed to distinguish among the conduct of [various] defendants … *where the claim … turned specifically on each defendant's distinct duties and actions*." *New York Am. Water Co., Inc. v. Dow Chem. Co.*, No. 19CV2150NGRLM, 2020 WL 9427226, at *4 (E.D.N.Y. Dec. 11, 2020)(emphasis added). The Workers' allegations did not group together defendants with separate and distinct duties or who have undertaken separate and distinct acts. Again, allegations containing group references are to be construed as applying to each member of the group. *Kyle K. v. Chapman*, 208 F.3d 940, 944 (11th Cir. 2000).

Finally, as set out at Appellants' Am. Br. 42, the petitions alleged that each coworker defendant was responsible for the health and safety of the Workers, and owed them a duty of care, and the coworker defendants

conceded that each of them owed such a duty. Arguments that "job titles" (such as "safety manager") and "general administrative responsibilities" are insufficient, Tyson's Br. 54-56, are unpersuasive because the Workers are not seeking to impose liability based solely on the fact that executives or supervisors had certain job titles or general administrative responsibilities, nor do they rely on any "presumption" that a job title satisfies the actual knowledge, or any other, requirement.

B. The Petitions Sufficiently Alleged Actual Knowledge of the Danger and That Injury was Probable.

The Workers rely on their briefing at Appellants' Am. Br. 37-38, 40-42,43-49, but address points raised in Defendants' responses.

First, Defendants note the allegation that the coworker defendants "knew or should have known" of the danger of a COVID-19 outbreak, but seemingly hope to distract this Court from the word "knew" in the allegation by italicizing only "should have known." *See* Tyson's Br. 58. The actual knowledge allegation does not disappear because Defendants refuse to italicize it.

Second, the cases Defendants cite are inapposite:

In *Nelson*, 619 N.W.2d at 391, a summary judgment case, the plaintiff was wrapped in duct tape and could not move; no reasonable fact finder could conclude that injury was probable when such an immobilized person

"was supported by seven or eight full-grown men" and "carried a distance of only ten to fifteen (or as many as thirty) feet, at a height of only two feet[.]" The *Nelson* facts distinguish themselves.

In *Dudley v. Ellis*, 486 N.W.2d 281, 283–84 (Iowa 1992), a post-trial motion case, the worksite incorporated "fail-safe" mechanisms, and the explosion was caused by several factors, including a defendant's negligence, the plaintiff's negligence (49%), and the failure of protective devices. Also, the same procedure had been followed many times without incident, and the defendant likely did not think injury was probable given that he was in the vault where the explosion occurred and subjected to the same risk. *Id*. Here, there were *no* fail-safe mechanisms; the Workers were not at fault for being tricked into coming to work; the Waterloo Facility procedures were the *opposite* of known, successful procedures Tyson implemented in China; and the individual defendants avoided the plant floor and took other steps to ensure they were not exposed to the same dangers.

In *Woodruff Const. Co. v. Mains*, 406 N.W.2d 787, 789 (Iowa 1987), a post-trial motion case, a worker had removed decayed roofing that exposed a hole earlier in the day. Later, as he walked on the roof towards the foreman, he walked into the hole and was injured. *Id*. At least 25 decayed areas had been exposed and repaired without incident. *Id*. The court

rejected the argument that the foreman was grossly negligent because he was abusive towards the worker that day (which caused the worker to be inattentive), as the worker had plenty of room on the roof and could easily get to the foreman without walking over the hole. *Id*. at 790. Here, Defendants hid the dangers; the absence of protective measures made it impossible for the Workers to work safely; and hundreds of workers were calling in sick every day due to the dangerous conditions created by Defendants.

In *Anderson v. Bushong*, 829 N.W.2d 191(Table), 2013 WL 530961, at *1 (Iowa Ct. App. 2013), the worker's crew cut holes in decking and covered them with plywood. The worker later lifted the plywood and accidently stepped into a hole and was injured. *Id*. Two coworkers responsible for safety and training had visited the jobsite previously, *id*. at *2, and knew the coverings violated safety standards, *id*. at *4-5. The court concluded that this was insufficient to establish knowledge that injury was probable. *Id*. at *5. It was typical to use plywood to cover holes, and in the 30-year history of the company no employee had been injured as a result. *Id*. Moreover, *no* worker had "any inkling" someone would probably be injured by the noncompliant covering. *Id*. at *6. Here, Defendants' operation of the Waterloo Facility was not typical, and they knew hundreds

of employees were injured as a result. They knew they were lying about contact tracing and the rampant spread of COVID-19. They had much more than "an[] inkling" that workers would be injured—Defendant Hart was even, quite literally, betting on it.

The cases are procedurally distinguishable (summary judgment or post-trial motions), as well. Defendants' claim that this does not matter, Tyson's Br. 50 (emphasizing difficulty of *proving* gross negligence), 56, 58 n.11, reflects their improper attempt to avoid notice-pleading standards.

Finally, the argument that the Workers must allege not just knowledge of the "peril," but knowledge of "death due to idiosyncratic complications from COVID-19," Supervisor Br. 25-26 & 25 n.5, must be rejected. The peril is the hazard that could cause an injury, not the injury itself. *See, e.g.*, *Walker v. Mlakar*, 489 N.W.2d 401, 404, 407 (Iowa 1992) (requiring knowledge of a "hazard" or "condition," which was a drop-off in a tunnel, and noting lack of evidence "of defendants' actual knowledge of the drop-off causing Clifton's injuries").[4] Supervisors cite no case requiring

[4] The "peril" should not be narrowly defined under notice-pleading standards. In *Est. of Zdroik by Zdroik v. Iowa S. Ry. Co.*, No. 20-0233, 2021 WL 4593177, at *3 n.2 (Iowa Ct. App. Oct. 6, 2021), the court rejected the defendant's narrow definition, and accepted the plaintiff's broad characterization "[f]or purposes of summary judgment." Surely the same view should be taken at the pleading stage, which imposes a heavier burden on defendants.

knowledge of a specific injury—that is not the law. In *Walker*, there was no requirement of knowledge that the worker would die, as opposed to break a leg. A coworker cannot escape liability by simply disclaiming, for example, knowledge that a left leg—as opposed to the right—would be broken.

C. The Petitions Sufficiently Alleged Conscious Disregard of the Peril.

The Workers again rely on their briefing at Appellants' Am. Br. 37-38, 40-42, 49-52, but address points raised in Defendants' responses. First, the Workers do not rely solely on Defendants' myriad violations of health and safety guidelines, so Defendants' argument that such violations, alone, are insufficient, Tyson's Br. 65, should be rejected. Second, Defendants' claim that a direct order is required, Tyson's Br. 64, is flat wrong. *Anderson*, 2013 WL 530961, at *7 ("While a defendant's affirmative order is common in cases establishing gross negligence under section 85.20, *it is not necessary*." (emphasis added)).

D. The Petitions Sufficiently Alleged Fraud.

The Workers rely on their briefing at Appellants' Am. Br. 38-42, 52-58, but address points raised in Defendants' responses. First, Defendants' fraud was perpetrated under circumstances showing "such lack of care as to amount to wanton neglect for the safety of another," and easily fits within Iowa Code § 85.20(2). That the elements of fraud do not exactly mirror the

Thompson test, *see* Tyson Br. 66-67, does not matter. *See, e.g.*, *Smith v. Iowa State Univ. of Sci. & Tech.*, 851 N.W.2d 1, 19 (Iowa 2014) (agreeing that intentional infliction of emotional distress (IIED) claim falls within §85.20(2)) & *id*. at 26 (setting out IIED claim elements, which do not include knowledge of the peril or that injury is probable, or a conscious failure to avoid the peril).

Second, Defendants claim that *Polar Insulation, Inc. v. Garling Const., Inc.*, 888 N.W.2d 902, 2016 WL 6396208 (Iowa Ct. App. 2016), "require[es] the intent to deceive a specific individual," Tyson Br. 68, but that case involved *evidence*, not *allegations*, and requires no such thing. In reviewing evidence of intent to deceive the plaintiff corporation, the court did not mention any particular individual within the corporation. 2016 WL 6396208, at * 3. Defendants also rely on *Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726 (Iowa 2009), Tyson Br. 68-69, to complain that the Workers did not plead causation, but that case involved a sufficiency-of-the-evidence challenge to a jury verdict, not pleadings. *Id*. at 730, 735. As discussed at Appellees' Am. Br. 38-42, 52-58, the Workers sufficiently pleaded fraud and causation. [5]

[5] Beyond the solitary (and incorrect) claim that the Workers did not allege that they were injured by Ms. Jones' fraud, Tyson Br. 68-69, Defendants do not argue that causation was insufficiently pleaded.

III. Employers Are Liable for the Intentional Torts They Commit or Direct.

A. Legislative History, Interpretive Rules, and Public Policy Support the *Nelson* Rule and May Be Considered.

Tyson fails to refute the policies, interpretive rules, and legislative history supporting the *Nelson* rule, and complains that legislative history is irrelevant. Tyson's Br. 42 n.9. But the Workers are not writing on a clean slate; they are simply asking the Court to apply the already-recognized *Nelson* rule, which is supported by the cited legislative history, interpretive rules, and public policy—all of which are relevant to show there is no good reason for retreating from the rule.

Tyson's argument that Ohio and Indiana cases "undermine" the Worker's argument should be rejected. Tyson misleadingly suggests that in *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 433 N.E.2d 572 (Ohio 1982), the court merely recognized an intentional tort exception that was already set out in a statute. Not so. The predecessor statute to the one Tyson cites was enacted *in response to Blankenship*. *See Kaminski v. Metal & Wire Prods. Co.*, 927 N.E.2d 1066, 1075–76 (Ohio 2010) (setting out history). Tyson's complaint regarding the Indiana case, *Baker v. Westinghouse Elec. Corp.*, 637 N.E.2d 1271, 1274 (Ind. 1994), ignores the

legislative history and policies that supported the court's interpretation of "accident."[6]

Even if ambiguity were required, the Workers have shown it. Iowa law penalizes a nonparticipating employer by precluding it from raising defenses to *negligence* in a lawsuit, and creates a presumption that the employer was *negligent* and its *negligence* caused injury:

> Any employer [that improperly fails to insure] is liable to an employee for a personal injury in the course of and arising out of the employment, and the employee may enforce the liability by an action at law for damages. . . . In [such actions], the following rules apply:
>
> 1. It shall be presumed:
>
> a. That the injury to the employee was the direct result and growing out of the *negligence* of the employer.
>
> b. That such *negligence* was the proximate cause of the injury.
>
> 2. The burden of proof shall rest upon the employer to rebut the *presumption of negligence*, and the employer shall not be permitted to [use] any defense of the common law, including

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[6] That the IWCA lacks the word "accident" was "the mere result" of using two state's laws (including Ohio's)—both of which lacked the word—"as a pattern for the Iowa act[,]" and "no cognizance was taken of the omission" in the 1912 Iowa Employer's Liability Commission Report. Robert Shaw, *Workmen's Compensation: Recoveries for Heart Disease*, 4 Drake L. Rev. 2, 134-35 n.6 (May 1955). Courts interpret the IWCA to benefit workers *more* by not requiring an "accident" to obtain benefits. *See Sondag v. Ferris Hardware*, 220 N.W.2d 903, 905 (Iowa 1974) (noting Iowa's "liberal rule permitting compensation for personal injury even though it does not arise out of an 'accident'").

> the defenses of contributory negligence, assumption of risk and the fellow servant rule.

Iowa Code § 87.21(1) & (2)(emphasis added). That § 87.21 speaks in terms of negligence, and makes no mention of intentional torts, creates ambiguity as to whether Iowa Code § 85.20 encompasses intentional torts. *See Beverage v. Alcoa, Inc.*, 975 N.W.2d 670, 680 (Iowa 2022) (noting that ambiguity may arise "when the provision is considered in the context of the entire statute or other related statutes," and that "even if the meaning of words might seem clear on their face, their context can create ambiguity" (citations omitted)). Also, there is an ambiguity regarding whether an injury caused by an employer's intentional tort truly "arises out of employment," Iowa Code § 85.3(1). The IWCA makes no mention of intentional torts. *See, e.g.*, *Bryan v. Utah Int'l*, 533 P.2d 892, 893-95 (Utah 1975)(reviewing history and purpose of legislation and determining that exclusivity provision omitting references to intentional torts did not apply to the intentional tort claim against coworker, but did apply to the claim against the employer where there was no allegation that the employer "directed" the tort).

In sum, the cited materials may be considered as support for the *Nelson* rule, as well aids in interpreting the IWCA.[7]

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[7] The argument that the Iowa Legislature knows how to amend the IWCA, Tyson's Br. 42, is correct as far as it goes. It just doesn't go very

B. The Intentional Tort Exception Applies to Corporate Employers.

Tyson's peculiar argument that the *Nelson* rule applies only to individual employers or sole proprietors should be rejected as unsupported, illogical, and bad policy. The language Tyson misinterprets distinguishes between intentional torts independently committed by a coworker (and for which an employer is not vicariously liable), and intentional torts committed at the command/authorization of the employer, or by one who is the alter ego of the employer (and for which an employer is directly liable)[8]:

> Professor Larson similarly concludes that the intentional tort exception, which is generally recognized in other jurisdictions, should apply to *corporate employers* only where the "assailant is, by virtue of control or ownership, in effect the alter ego of the *corporation*," or where the *corporate employer* specifically authorizes the assault. The mere fact that an employer may be liable for conduct under a theory of *respondeat superior*, according to Professor Larson, should not impute the conduct itself to the employer so as to trigger the exception from workers' compensation coverage. *Id.*

Medina v. Herrera, 927 S.W.2d 597, 601 (Tex. 1996) (citation omitted) (emphasis added). In *Meerbrey v. Marshall Field & Co.* 564 N.E.2d 1222, 1227 (Ill. 1990), the plaintiff similarly sought to impose *respondeat superior*

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far. The 1974 amendment *was the result of* a court's interpretation of the IWCA. *See Thompson v. Bohlken*, 312 N.W.2d 501, 504 (Iowa 1981). That a legislature amends a statute in response to a court ruling does not mean that a court cannot rule.

[8] The Workers claim Tyson is directly—not vicariously— liable for fraud.

liability on the department store for its employee's intentional torts. Relying on Professor Larson's treatise, the court explained that the legal justification for allowing a direct claim against an employer that commits the intentional tort does not apply where an employee seeks to impose vicariously liability. *Id*. (citation omitted). The action against the employer was barred "because the plaintiff has not alleged that Marshall Field committed, or expressly authorized its agent to commit, an intentional tort …." *Id*. "Marshall Field," of course, refers to the corporate employer, *id*. at 1124—and not to a Mr. Marshall Field. Likewise, Winnebago Industries, Inc., was not liable because "the plaintiff did not claim Winnebago 'commanded or expressly authorized the assault'"—and not because it was a corporation. *Nelson*, 619 N.W.2d at 388; *see also Est. of Harris*, 679 N.W.2d at 681 (considering the liability of corporate employer, but finding *Nelson* standard not satisfied).

Moreover, the IWCA applies equally to all employers, regardless of their form. *See* Iowa Code § 85.61(3)(a)(defining "employer" to include "[a] person, firm, association, or corporation"). Tyson offers no principled reason why an owner of a local butcher shop should be liable for committing or directing an intentional tort, yet a multinational conglomerate should not.

Finally, Tyson's argument is illogical. The Larson treatise addresses an intentional tort committed by one "who is the alter ego of *the*

corporation." *Nelson*, 619 N.W.2d at 387 (emphasis added). An individual or sole proprietorship is not a corporation. Also, an employer is liable if it "commands or expressly authorizes" an intentional tort, but it is nonsensical to say that an employer must command or expressly authorize *itself* to commit an intentional tort. The *Nelson* rule applies to corporate employers.

C. The Cases on Which Tyson Relies, Tyson's Br. 36-39, Are Inapposite.

In neither *Wolodkewitsch v. TPI Iowa, LLC*, 989 N.W.2d 805 (Table), 2022 WL 16631228 (Iowa Ct. App. 2022) nor *Mielke v. Ashland, Inc.*, No. 4:05-CV-88, 2005 WL 8157992 (S.D. Iowa July 29, 2005), did the plaintiff allege that the employer committed through its alter ego or directed others to commit an intentional tort. *Cincinnati Ins. Cos.*, 801 N.W.2d at 858, involved an insurer's claim against an employee who fraudulently obtained workers' compensation benefits, not an employee's claim that the employer committed or directed fraud.[9] In *Sican v. JBS S.A.*, No. 4:22-CV-00180, 2023 WL 2643851, at *7 (S.D. Iowa Mar. 23, 2023), the plaintiffs did not address the exclusivity argument or invoke the *Nelson* rule. In *Harned v. Farmland Foods, Inc.,* 331 N.W.2d 98, 101 (Iowa 1983), "plaintiffs' claim

[9] Section 85.20(2) is not mentioned in the case, which makes Defendants' reliance on it, Supervisors' Br. 28-29, perplexing. In any case, arguments regarding "adequate remedy" and "extrinsic and collateral" matters were never raised below, and are waived.

was simply one of failure to provide requested care. There is nothing to indicate an intentional tort." The plaintiff brought intentional tort claims against his coworkers—not his employer—in *Smith*, 851 N.W.2d at 19-20. The plaintiff in *Henrich v. Lorenz*, 448 N.W.2d 327, 330, 329, 331 (Iowa 1989), brought gross negligence claims (not intentional tort claims) against her coworkers (not her employer). Finally, in *McCoy v. Thomas L. Cardella & Assocs.*, 992 N.W.2d 223, 229-30 (Iowa 2023), the court noted the "alter ego" aspect of the *Nelson* rule, but determined that the plaintiffs' *negligent supervision* claim was barred by the IWCA.

Tyson's out-of-state cases fare no better. In *Barker v. Tyson Foods, Inc.*, No. CV 21-223, 2021 WL 5769538, at *3 (E.D. Pa. Dec. 6, 2021), the plaintiff failed to allege facts fitting within Pennsylvania's intentional tort exception, which differs from the *Nelson* rule. *Est. of de Ruiz v. ConAgra Foods Packaged Foods, LLC*, 601 F. Supp. 3d 368, 372-73 (E.D. Wis. 2022), involved a negligence claim, not an intentional tort. *Smith v. Corecivic of Tennessee LLC*, No. 3:20-CV-0808, 2021 WL 927357, at *1, 3 (S.D. Cal. Mar. 10, 2021), involved a prison guard who did not contract COVID-19, but felt forced to resign due to her employer's failure to provide a safe working environment. She did not invoke the *Nelson* rule or allege that the employer committed fraud.

Defendants cite no case rejecting the *Nelson* rule in the face of allegations that an employer committed through its alter ego or directed an intentional tort that injured an employee.

D. Estoppel Principles Apply.

At the DWC, Tyson insisted that the Workers' injuries did not arise out of employment, but the exclusivity Tyson seeks here is only available for injuries that arose out of employment. *See* Iowa Code §§ 85.20(1), 85.3(1). Tyson's attempt to avoid estoppel by trying to distinguish its arguments before the DWC (which Tyson now claims is grounded on causation) and this Court (which Tyson claims is instead grounded on the assertion that the injuries "arose out of" employment), Tyson's Br. 46-48, fails. An injury cannot "arise out of" employment under § 85.3(1) unless there is a "causal connection" between the conditions of employment and the injury. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 222 (Iowa 2006). Because a challenge to the causal connection is *necessarily* a challenge to the "arise out of" requirement, Tyson is taking an inconsistent position on the same issue—"arise out of"—in the two proceedings. Equally unavailing is Tyson's assertion that its inconsistent arguments are for two different purposes, i.e., (1) to avoid the court's exercise of jurisdiction over the Workers' claims; and (2) to avoid paying benefits in the DWC proceedings, as that is precisely

what *every* employer subject to estoppel is trying to do. Tyson's inconsistent positions on the "arise out of" issue render estoppel appropriate.

IV. Iowa's COVID-19 Response and Back-to-Business Act Limited Liability Act (Act) Does Not Bar the Workers' Claims.

A. The Court Should Decline to Consider the Act.

Defendants fail to include a statement on error preservation and standard of review, as required by Iowa R. App. P. 6.903(3). The parties presented arguments below regarding the Act, but the district court did not rule on the Act, nor did Defendants raise the issue again. The issue is waived. *See 33 Carpenters Constr., Inc. v. State Farm Life & Cas. Co.*, 939 N.W.2d 69, 75 (Iowa 2020) (citing 2019 decision for its holding that "error was not preserved on a ground raised in a motion to dismiss that the court denied on other grounds, and the party failed to raise the issue again in district court"). The Court should refrain from being the first to interpret the Act, including whether the retroactive application of it is unconstitutional. *See e.g.*, *Nahas v. Polk Cnty.*, 991 N.W.2d 770, 784 (Iowa 2023) (refraining from considering statute's constitutionality where the district court did not rule on it).

Should the Court address it, the Act does not support dismissal because (1) the Workers sufficiently pleaded facts allowing their claims

under the Act; (2) retroactive application of the Act is unconstitutional; and, alternatively (3) the Act does not apply.

The constitutionality and interpretation of a statute are reviewed de novo. *City of Coralville v. Iowa Utilities Bd.*, 750 N.W.2d 523, 527 (Iowa 2008). Notice-pleading standards apply to the Defendants' Iowa R. Civ. P. 1.421(f) dismissal. *U.S. Bank v. Barbour*, 770 N.W.2d 350, 353-54 (Iowa 2009).

B. Immunity Statute Interpretive Rules Do Not Apply.

Defendants' labeling the Act an "Immunity Statute," *see* Tyson's Br. 72-73, 76, to take advantage of certain interpretation principles should be rejected. Unlike the statutes in the cases Tyson cites setting out the interpretive rules to "construe statutory immunity provisions broadly" and "exceptions to immunity narrowly," Tyson's Br. 72, the Act does not provide immunity, but states only that it does not "affect any statutory or common law immunity or limitation of liability." Iowa Code § 686D.8(4); *cf. Nelson v. Lindaman*, 867 N.W.2d 1, 7-9 (Iowa 2015) (analyzing statute expressly providing "immunity" to reporters of suspected child abuse, Iowa Code § 232.73(1)); *Cubit v. Mahaska Cnty.*, 677 N.W.2d 777, 780-84 (Iowa 2004) (reviewing a statute that declares that a municipality "shall be immune" from claims emanating from emergency responses). The Act does

not provide immunity, and the interpretive rules Defendants rely on do not apply.[10]

C. The Policy Considerations in the Cases Defendants Cite Do Not Apply.

Defendants raise the specter of a flood of litigation if the Act is not construed as they hope, but the cases they cite are inapposite. *Kuci-emba v. Victory Woodworks, Inc.*, 531 P.3d 924, 938-50 (Cal. 2023) and *Ruiz v. ConAgra Foods Packaged Foods LLC*, 606 F. Supp. 3d 881, 882 (E.D. Wis. 2022), involved claims of *nonemployee* spouses whose employee spouses became infected at work and brought the virus home.[11] Concerns of unlimited liability to third-parties in *Kuci-emba* and *Ruiz* are not at issue here, where liability extends only to the Workers.

D. The Petitions Sufficiently Alleged Facts Satisfying the Act's Requirements.

The Act limits liability for injuries caused by COVID-19 *unless* a defendant 1) recklessly disregarded a substantial and unnecessary risk that others would be exposed to COVID-19; **or** 2) exposed an individual through conduct constituting actual malice; **or** 3) intentionally exposed an individual.

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[10] While parties (and the courts) sometimes use the word immunity in a colloquial sense, the Court should reject Defendants' attempt to characterize the Act as alleviating the need to even have to defend against a suit.

[11] Wisconsin's COVID-19 statute did not apply in *Ruiz*, 606 F.Supp. 3d at 889, and *Kuci-emba* did not involve such a statute.

Iowa Code §686D.4. The petitions need only meet one of these exceptions, but they meet all three.

1. Defendants' Acts and Omissions Were in Reckless Disregard for the Safety of the Workers.

"Reckless disregard" is defined as follows:

> The actor's conduct is in reckless disregard of the safety of another if he *does an act or intentionally fails to do an act* which it is his duty to the others to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Restatement (Second) of Torts § 500 (1965), at 587 (emphasis added).

The petitions allege Defendants' reckless disregard for the Workers' safety. Defendants knew they were required to notify employees of positive tests, yet they knowingly refused to do so. (*Buljic*, Second Am. Pet. ¶ 208, App. p. 0175; *Fernandez*, Second Am. Pet.¶ 212, App. p. 0226). By March 2020, Defendants knew the risk of being infected with COVID-19 was substantially greater if protective measures were not implemented, (*Buljic*, Second Am. Pet. ¶ 94, App. p. 0158; *Fernandez*, Second Am. Pet.¶ 91, App. p. 0209), yet they recklessly, maliciously, and intentionally refused to implement protective measures until after the Workers were infected and the Waterloo Facility suspended operations. (*Buljic*, Second Am. Pet. ¶¶ 40-

224, App. pp. 0148-0178; *Fernandez*, Second Am. Pet.¶¶ 34-226, App. pp. 0199-0229). By purposely requiring infected and symptomatic workers to return to work, (*Buljic*, Second Am. Pet. ¶¶ 102-04, App. p. 0160; *Fernandez*, Second Am. Pet.¶¶ 99-101, App. pp. 0210-0211), and without any safety precautions, Defendants multiplied the Workers' risk of infection. Defendants required symptomatic workers to come in unless and until they tested positive. (*Buljic*, Second Am. Pet. ¶¶ 108-09, App. pp. 0160-0161 ; *Fernandez*, Second Am. Pet. ¶¶ 105-06, App. p. 0211). Tyson offered bonuses to incentivize sick workers to come to work. (*Buljic*, Second Am. Pet. ¶ 205, App. p. 0174; *Fernandez*, Second Am. Pet.¶ 209, App. p. 0226). Defendants created an unreasonable risk of physical harm to the Workers. (*See generally*, *Buljic*, Second Am. Pet. ¶¶ 40-224, App. pp. 0148-0178; *Fernandez*, Second Am. Pet.¶¶ 34-226, App. pp. 0199-0229). Even after the pandemic began wreaking havoc, Defendants intentionally failed to implement protective measures, making the risk of COVID-19 infection substantially greater than if Defendants were merely negligent. By continuing to operate the Waterloo Facility in the face of dramatically rising COVID-19 infections, fraudulently inducing workers to continue working, and intentionally failing to implement safety measures—all of which, as Defendants knew, led to hundreds of employees calling in sick daily—

Defendants disregarded the known and obvious risk of COVID-19 infection, and made it highly probable that harm would follow. (*Buljic*, Second Am. Pet. ¶¶ 90-91, 94, 112, 115-23, 125-26, 128-76, App. pp. 0157, 0158, 0161-0171; *Fernandez*, Second Am. Pet.¶¶ 87-88, 91, 109, 112-20, 122-23, 125-79, App. pp. 0208, 0209, 0212-0222).

2. Defendants Acted with Actual Malice.

Actual malice has been described as a "knowing or reckless disregard for the truth." *Barreca v. Nickolas*, 683 N.W.2d 111, 123 (Iowa 2004). The petitions alleged that Tyson and the Supervisors "knowingly and falsely" made "material" misrepresentations to the Workers. (*Buljic*, Second Am. Pet. ¶¶ 226-27, 229, 274-77, App. pp. 0178-0179, 0189-0190; *Fernandez*, Second Am. Pet.¶¶ 228-29, 231, 276-79, App. pp. 0229-0230, 0239-0241). They knew the misrepresentations were false, and that it was wrong to make them. (*Buljic*, Second Am. Pet. ¶¶ 228, 276, App. pp. ; *Fernandez*, Second Am. Pet.¶¶ 230, 278, App. pp. 0230, 0240). They made the misrepresentations despite knowing that hundreds of workers were sick and many tested positive, and that COVID-19 was rapidly spreading through the workforce, with the intent to deceive and induce the Workers to continue working during the outbreak. (*Buljic*, Second Am. Pet. ¶¶ 230, 232, 236, 274-82, App. pp. 0179, 0180, 0189-0190; *Fernandez*, Second Am. Pet.¶¶

232, 234, 276-84, App. pp. 0230, 0213, 0239-0241). Defendants exposed the Workers through conduct constituting a "knowing or reckless disregard of the truth."

3. Defendants Intentionally Exposed the Workers to COVID-19.

Intentionality is often described in the context of punitive damages: "Willful and wanton conduct involves intentional, unreasonable acts in disregard of a known or obvious risk so great as to make it highly probable that harm would follow." *Cawthorn v. Catholic Health Initiatives Corp*., 743 N.W.2d 525, 529 (Iowa 2007). Defendants intended to expose the Workers in total disregard of the known and obvious risks of contracting COVID-19 as to make it highly probable that the Workers would be harmed. (*Buljic*, Second Am. Pet. ¶¶ 40-224, App, pp. 0148-0178; *Fernandez*, Second Am. Pet.¶¶ 34-226, App. pp. 0199-0229). Tyson knowingly and intentionally prioritized profits over the well-being of its workers. (*Buljic*, Second Am. Pet. ¶ 237, App. p. 0180; *Fernandez*, Second Am. Pet.¶ 239, App. p. 0231). Tyson's misrepresentations were made to induce its employees to continue working despite Tyson knowing that several hundred workers were sick, many workers had tested positive, and COVID-19 was rapidly spreading through the plant, and create the inference that Tyson intentionally exposed its workers to COVID-19 so that it could enjoy soaring profits and

increasing exports China. (*Buljic*, Second Am. Pet. ¶¶ 227, 236, 214-16, App. pp. 0178-0179, 0180, 0176; *Fernandez*, Second Am. Pet.¶¶ 229, 238, 218-20, App. pp. 0229-0230, 0231, 0227-0228). The Executives, too, knowingly and intentionally prioritized profits over the Workers' safety. (*Buljic*, Second Am. Pet. ¶¶ 253-61, App. pp. 0184-0185; *Fernandez*, Second Am. Pet.¶¶ 255-63, App. pp. 0235-0236).

E. Defendants' Mischaracterization of the Allegations Must Be Rejected.

Defendants' cursory discussion of the petitions' allegations at Tyson's Br. 75 ignores the rule that allegations must be viewed in the Workers' favor. The petitions alleged that while Tyson purportedly restricted "some" visitor access, Supervisory Defendants directed employees to go to the Columbus Junction Facility during its COVID-19 outbreak (and those employees were not tested or quarantined upon their return), and there was *no* restriction keeping contractors likely exposed to COVID-19 from entering the Waterloo Facility. (*Buljic*, Second Am. Pet. ¶¶ 100-01, App. pp. 0210-0211 ; *Fernandez*, Second Am. Pet.¶¶ 97-98, App. p. 0210). While Supervisory Defendants "reportedly" instructed an infected worker to quarantine, the worker was directed to return to work without a negative test and while he was still symptomatic; Tyson did no contact tracing, nor did it notify coworkers who worked nearby. (*Buljic*, Second Am. Pet. ¶¶ 122-23,

App. p. 0163; *Fernandez*, Second Am. Pet.¶¶ 119-20, App. pp. 0213-0214).[12] Defendants misleadingly claim the petitions alleged that they took employees' temperatures, but the cited allegation also states that Tyson knew the temperature checks did not work and that workers could pass through them even if they were ill. (*Buljic*, Second Am. Pet. ¶ 132, App. p. 0164; *Fernandez*, Second Am. Pet.¶ 129, App. p. 0215). Most egregious is Defendants' misrepresentation that the petitions alleged that they "provid[ed] facial coverings[,]" when the cited allegation actually states that they "provided a box of rags and frayed fabric" for use as "optional" face coverings. (*Buljic*, Second Am. Pet. ¶ 130, App. p. 0164; *Fernandez*, Second Am. Pet.¶ 127, App. p. 0214). Defendants' misrepresentation of four allegations out of hundreds showing recklessness, malice, and intentionality does not support dismissal.

F. Retroactively Applying the Act Unconstitutionally Impairs the Workers' Vested Rights.

The Act, effective July 1, 2020, purports to apply retroactively to January 1, 2020. Iowa Code §§ 686D.8, 3.7(1). Because the Workers'

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[12] Moreover, Supervisory Defendants directed company interpreters to falsely tell immigrant workers that there was no COVID-19 outbreak, and that health officials had "cleared" the plant of COVID-19. (*Buljic*, Second Am. Pet. ¶¶ 186-96, App. pp. 0172-0173 ; *Fernandez*, Second Am. Pet. ¶¶ 189-99, App. pp. 0223-0225).

claims vested prior to July 1, 2020, the Act cannot be applied to their claims without violating their due process rights.

Retroactive laws are "inoperative" when they "disturb or interfere with vested rights." *Iowa R.R. Land Co. v. Soper*, 39 Iowa 112, 117 (1874); *see also Galusha v. Wendt*, 114 Iowa 597, 87 N.W. 512, 514 (1901)("[T]he fact that a statute is made retroactive by express terms ... will not render it unconstitutional, save so far as contractual or vested rights are impaired."). In *Thorp v. Casey's General Stores, Inc.,* 446 N.W.2d 457, 459 (Iowa 1989), Casey's convenience store sold alcohol to a drunk driver who killed Thorp's son in 1985, when Iowa allowed a claim against a licensee that sold or gave alcohol to an intoxicated person. A 1986 amendment expressly applicable to cases filed after its effective date created liability only if the licensee sold *and served* alcohol. *Id*. at 459-60. Casey's sold alcohol but did not serve it for consumption. *Id*. at 459. Thorp filed her action in 1987. *Id*. at 460. The court agreed that Thorp's right to file a lawsuit prior to the amendment was an accrued right that vested when she was injured. *Id*. at 460-61. Moreover, the amendment was substantive, not merely procedural or remedial, because it created, defined, and regulated rights. *Id*. at 461-62.[13] The court

[13] A remedial or procedural statute may be applied retroactively, *see Schuler v. Rodberg*, 516 N.W.2d 902, 904 (Iowa 1994*)*, without implicating due process.

concluded that Thorp "had a vested property right in her cause of action against Casey's and that the retroactive application of the 1986 amendment destroyed that right in violation of due process under both the federal and state constitutions." *Id*. at 463.

Courts have similarly reasoned that retroactively applying COVID-19 legislation to vested rights is unconstitutional. *See Ferretti v. Nova Southeastern Univ., Inc.*, 586 F.Supp.3d 1260, 1264-65, 1266-67, 1269-70 (S.D. Fla. 2022) (finding Florida's statute could not be retroactively applied to impair claims that vested prior to its effective date); *Fiore v. Univ. of Tampa*, 568 F. Supp. 3d 350, 363 (S.D.N.Y. 2021) (same).

Here, the Act is substantive because it regulates the Workers' claims; it places new burdens on the Workers and creates new defenses. The Workers' claims accrued and vested in April 2020, well before the Act's effective date. The Act cannot constitutionally destroy or impair the Workers' vested rights in their claims.

Defendants' argument that the Act can be constitutionally applied simply because the Workers retained claims to workers' compensation benefits under the Act, Tyson's Br. 76-77, should be rejected because it conflates a vested right in a *cause of action* with a much lesser right in a claim for limited benefits. Moreover, due process prohibits "impairing" or

"disturbing" vested rights, not just eliminating them. That the Workers retain a much more limited right is irrelevant—it is the significant impairment of the Workers' vested rights in their causes of action that renders applying the Act violative of due process.

G. Alternatively, the Act Does Not Apply to the Workers' Claims.

The Act cannot affect the Workers' rights to bring their claims against the individual defendants, or the limits Defendants seek to apply to the Workers' claims. The Act directs 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). "Affect" means to "produce an effect on" or "influence in some way." *Affect*, Black's Law Dictionary (11th ed. 2019); *see also Bank of Am., N.A. v. Schulte*, 843 N.W.2d 876, 880 (Iowa 2014) (giving undefined words "their common, ordinary meaning"). The Workers' rights to bring claims against the coworkers are grounded on § 85.20(2), which is encompassed by § 686D.8(3). To the extent § 85.20 exclusivity constitutes a "limit," the Workers' claims against the coworkers *and* Tyson fall within § 686D.8(3). The Act cannot "affect[]" the Workers' rights to bring—or place limits on— their claims, and the limited scope of the Act must be respected. *See Bank of Am., N.A.*, 843 N.W.2d at 880 (refusing to extend a statute by construction).

V. Leave to Amend Should Have Been Granted.

The Workers' amendments are not futile because they cure the purported error of "lumping together" the defendants. Moreover, Defendants cite no case in which an amendment request was properly denied *solely* because it was made after dismissal. In *Plymouth Cnty., Iowa ex rel. Raymond v. MERSCORP, Inc.*, 287 F.R.D. 449 (N.D. Iowa 2012), the plaintiff sought to change legal theories after dismissal, *id*. at 464, and its amendments were futile, *id*. at 465-67. Here, the Workers are not raising new legal theories, and their amendments are not futile. In *Meade v. Christie*, 974 N.W.2d 770, 779-80 (Iowa 2022), the factual allegations were deemed insufficient, yet the plaintiff failed to identify any new facts that could save his claims. Here, the district court did not deem fact allegations inadequate, so the Workers had no factual deficiencies to "cure" by amendment. Amendment requests should not be denied simply because they are made after dismissal.

CONCLUSION

The Court should reverse district court's dismissal, or reverse its denial of the motion to amend.

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) because:

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CERTIFICATE OF SERVICE

On this 12th day of October, 2023, the Workers served Appellants' Amended Final Reply 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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