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IN THE SUPREME COURT OF IOWA
No. 17-2068

DILLON CLARK, AGNES DUSABE, MUSA EZEIRIG, ZARPKA GREEN, DUSTY NYONEE, ANDABRAHAM TARPEH,

Plaintiffs-Appellants,
vs.

RYAN HOENICKE, DANIELLE WILLIAMS, CLEO BOYD, ALLEN FINCHUM, TERRY VAN HUYSEN, JIM BAILEY, MAX CARKHUFF, SCOTT GEMMELL, JERRY VANBROGEN and TPI IOWA, LLC,
Defendants,

INSURANCE COMPANY STATE OF PENNSYLVANIA,
Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR JASPER COUNTY
THE HONORABLE TERRY RICKERS

APPELLEE'S BRIEF
(ORAL ARGUMENT REQUESTED)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

ISSUES PRESENTED 5

ROUTING STATEMENT 7

STATEMENT OF THE CASE 8

STATEMENT OF FACTS 9

STANDARD OF REVIEW AND ERROR PRESERVATION.......... 9

ARGUMENT 9

I. Iowa Code Section 517.5 Does Not Violate the Equal Protection Clause Contained in Article 1, Section 6 of the Iowa Constitution. 12

II. Because Appellants lack a vested right, the statutory limitation on liability contained in Iowa Code Section 517.5 does not violate Article I, Section I of the Iowa Constitution. 39

III. Because ICSOP Is Statutorily Immune from Appellants' Claims, They Are Not Entitled to A Jury Trial.. 42

CONCLUSION.. 43

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS 45

PROOF OF SERVICE AND CERTIFICATE OF FILING............ 46

TABLE OF AUTHORITIES

Iowa Appellate Court Cases

Bowen v. Kaplan, 237 N.W.2d 799 (Iowa 1976) 17

Boylan v. Am. Motorists Ins. Co., 489 N.W.2d 742 (Iowa 1992) 11

Carter v. Rowe, No. 05-0750, 2005 WL 3478144 (Iowa Ct. App. Dec. 21, 2005) 32

Carter v. Rowe, No. 05-0750, 2005 WL 3478144, (Iowa Ct. App. Dec. 21, 2005) 19

Compare Long v. McAllister, 319 N.W.2d 256 (Iowa 1982) 10

Estate of McFarlin v. State, 881 N.W.2d 51 (Iowa 2016) 37

Fireman's Fund Am. Ins. Co. v. Coleman, 394 So. 2d 334 (Ala. 1980) 23, 25, 27

Flint v. City of Eldon, 191 Iowa 845 N.W. 344 (1921) 21

Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168 (Iowa 2004) 39

Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994) 14

Grantham v. Denke, 359 So.2d 785 (Ala.1978) 24, 26, 27

Grovijohn v. Virjon, Inc., 643 N.W.2d 200 (Iowa 2002) 31

Johnson v. Am. Leather Specialties Corp., 578 F. Supp. 2d 1154 (N.D. Iowa 2008) 19, 40

Phillips By & Through Phillips v. City of Waukee, 467 N.W.2d 218 (Iowa 1991) 42

Reed v. Brunson, 527 So. 2d 102 (Ala. 1988) 23, 27, 28, 29

Seivert vs. Resnick, 342 N.W.2d 484 .... 22, 42

Slater v. Farmland Mut. Ins. Co., 334 N.W.2d 728 (Iowa 1983) 18

State v. Hernandez-Lopez, 639 N.W.2d 226 (Iowa 2002) 29

Stringer v. Minnesota Vikings Football Club, LLC, 705 N.W.2d 746 (Minn. 2005) 27

Suckow v. NEOWA FS, Inc., 445 N.W.2d 776 (Iowa 1989) .... passim

Thompson vs. Bohlken, 312 N.W. 501 (Iowa 1981) 17, 18

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) 33, 34

W. Virginia Bd. of Educ. v. Croaff, No. 16-0532, 2017 WL 2172009 (W. Va. May 17, 2017) 38

Other Cases

Fireman's Fund Am. Ins. Co. v. Coleman, 394 So. 2d 334 (Ala. 1980) 22, 24, 26, 27

Grantham v. Denke, 359 So.2d 785 (Ala.1978) 24, 25, 26

Johnson v. Am. Leather Specialties Corp., 578 F. Supp. 2d 1154 (N.D. Iowa 2008) 18, 40

Reed v. Brunson, 527 So. 2d 102 (Ala. 1988) 23, 27, 28, 29

Stringer v. Minnesota Vikings Football Club, LLC, 705 N.W.2d 746 (Minn. 2005) 27

W. Virginia Bd. of Educ. v. Croaff, No. 16-0532, 2017 WL 2172009 (W. Va. May 17, 2017) 38

Statutes & Constitutional Provisions

Alabama Const., § 13 26

Alabama Code § 25-5-11 (1978) 25, 28

Iowa Code § 85.3(1) 9, 36

Iowa Code § 85.20(2) 28

Iowa Code § 87.1 9

Iowa Code § 515.48 21

Iowa Code § 517.1 21

Iowa Code § 517.5 .... passim

Iowa Code § 669.14(1) 38

Administrative Regulations

Iowa Admin. Code r. 876-4.10 .... 10, 15

Iowa Acts

1972 Iowa Acts (64 G.A.) ch. 1028, § 1 17

1978 Iowa Acts (67 G.A.) ch. 1168, § 1 40

1979 Iowa Acts (68 G.A.) ch. 127, § 1 40

Iowa Court Rules

Iowa R. of App. P. 6.1101 .... 7, 8

ISSUES PRESENTED

I. IOWA CODE SECTION 517.5 IS NOT UNSONSTITUTIONAL AS A VIOLATION OF EQUAL PROTECTION UNDER ARTICLE 1, SECTION 6 OF THE IOWA CONSTITUTION.

Bowen v. Kaplan, 237 N.W.2d 799 (Iowa 1976)

Boylan v. Am. Motorists Ins. Co., 489 N.W.2d 742 (Iowa 1992)

Carter v. Rowe, No. 05-0750, 2005 WL 3478144 (Iowa Ct. App. Dec. 21, 2005)

Estate of McFarlin v. State, 881 N.W.2d 51 (Iowa 2016)

Fireman's Fund Am. Ins. Co. v. Coleman, 394 So. 2d 334 (Ala. 1980)

Fabricius v. Montgomery Elevator Co., 121 N.W.2d 361 (Iowa 1963)

Flint v. City of Eldon, 191 Iowa 845 N.W. 344 (1921)

Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994)

Grantham v. Denke, 359 So.2d 785 (Ala.1978)

Grovijohn v. Virjon, Inc., 643 N.W.2d 200 (Iowa 2002)

Johnson v. Am. Leather Specialties Corp., 578 F. Supp. 2d 1154 (N.D. Iowa 2008)

Long v. McAllister, 319 N.W.2d 256 (Iowa 1982)

Phillips By & Through Phillips v. City of Waukee, 467 N.W.2d 218 (Iowa 1991)

Reed v. Brunson, 527 So. 2d 102 (Ala. 1988)

Seivert vs. Resnick, 342 N.W.2d 484

Slater v. Farmland Mut. Ins. Co., 334 N.W.2d 728 (Iowa 1983)

State v. Hernandez-Lopez, 639 N.W.2d 226 (Iowa 2002)

Stringer v. Minnesota Vikings Football Club, LLC, 705 N.W.2d 746 (Minn. 2005)

Suckow v. NEOWA FS, Inc., 445 N.W.2d 776 (Iowa 1989)

Thompson vs. Bohlken, 312 N.W. 501 (Iowa 1981)

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)

W. Virginia Bd. of Educ. v. Croaff, No. 16-0532, 2017 WL 2172009 (W. Va. May 17, 2017)

Alabama Const., § 13

Alabama Code § 25-5-11 (1978)

Iowa Code § 85.3(1)

Iowa Code § 85.20(2)

Iowa Code § 87.1

Iowa Code § 515.48

Iowa Code § 517.5

Iowa Code § 669.14(1)

Iowa Admin. Code r. 876-4.10

1972 Iowa Acts (64 G.A.) ch. 1028, § 1

II. IOWA CODE SECTION 517.5 IS NOT UNSONSTITUTIONAL AS A DENIAL OF INALIENABLE RIGHTS UNDER ARTICLE 1, SECTION 1 OF THE IOWA CONSTITUTION.

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

Johnson v. Am. Leather Specialties Corp., 578 F. Supp. 2d 1154 (N.D. Iowa 2008)

Seivert vs. Resnick, 342 N.W.2d 484

Suckow v. NEOWA FS, Inc., 445 N.W.2d 776 (Iowa 1989)

1978 Iowa Acts (67 G.A.) ch. 1168, § 1

1979 Iowa Acts (68 G.A.) ch. 127, § 1

III. IOWA CODE SECTION 517.5 IS NOT UNSONSTITUTIONAL AS A DENIAL OF DUE PROCESS UNDER ARTICLE 1, SECTION 9 OF THE IOWA CONSTITUTION.

Phillips By & Through Phillips v. City of Waukee, 467 N.W.2d 218 (Iowa 1991)

ROUTING STATEMENT

The Iowa Supreme Court should transfer this case to the Iowa Court of Appeals for the following reasons:

1. This Court has already enunciated the legal principles governing Appellants' claims arising under the Iowa Constitution, and therefore transfer to the Court of Appeals is appropriate under Iowa Rules of Appellate Procedure 6.1101(2)(*f*) and 6.1101(3)(*a*).

2. This case does not present issues of first impression, meaning retention is not warranted on that basis. *See* Iowa R. of App. P. 6.1101(2)(*c*).

3. The statute at issue has been on the books since 1978 and the principles justifying the statutory enactment—namely the workers' compensation acts—have been in place for nearly a century. As such, this case does not "present[] fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the supreme court." *See* Iowa R. of App. P. 6.1101 (2)(*d*).

STATEMENT OF THE CASE

Defendant The Insurance Company of the State of Pennsylvania ("ICSOP") agrees with Appellants' Statement of the case.

STATEMENT OF FACTS

ICSOP acknowledges that Appellants' petitions have alleged each of the facts stated in their Statement of Facts. As Appellants' petitions were dismissed for failure to state a claim, those facts must be assumed to be true.

STANDARD OF REVIEW AND ERROR PRESERVATION

ICSOP agrees with Appellants' Standard of Review and Error Preservation.

ARGUMENT

Workers' compensation statutes represent a "quid pro quo by which the employer gives up his normal defenses and assumes automatic liability, while the employee gives up his right to common law verdicts" for "any and all personal injuries sustained by an employee arising out of and in the course of the employment." *Suckow v. NEOWA FS, Inc.*, 445 N.W.2d 776, 779 (Iowa 1989) (citation omitted); *see also* Iowa Code § 85.3(1). As part of this compromise between employers and employees, the Legislature has also mandated employers provide some guarantee they will be able to pay claims by requiring them to either carry

workers' compensation insurance or meet stringent requirements to qualify as self-insured employers. Iowa Code § 87.1 (2017).

Just as the Legislature has modified the rights and protections of employers and employees as part of the grand bargain of workers' compensation laws, it has also modified the relationship between workers' compensation insurance carriers and the employees of the insured employer. For example, under the workers' compensation statutory scheme, the Legislature has given the employee a direct cause of action against the employer's insurance carrier for policy benefits. App. 514 (Iowa Admin. Code r. 876-4.10) ("Whenever any insurance carrier shall issue a policy with a clause in substance providing that jurisdiction of the employer is jurisdiction of the insurance carrier, the insurance carrier shall be deemed a party in any action against the insured."). In addition, Iowa's workers' compensation statutes impose obligations of good faith and fair dealing to third parties that would otherwise only exist between an insurer and an insured. *Compare Long v. McAllister,* 319 N.W.2d 256, 261-62 (Iowa 1982) (declining to recognize a third-party cause of action by

someone other than the insured *outside* the workers' compensation context) *with Boylan v. Am. Motorists Ins. Co.*, 489 N.W.2d 742, 743 (Iowa 1992) (recognizing a third-party, bad-faith action in the workers' compensation context).

As part of the grand bargain that lies at the foundation of workers' compensation law, the Legislature also chose to give insurance carriers immunity from civil liability for workplace inspections by enacting Iowa Code Section 517.5, the statute Appellants claim is unconstitutional in this case. If the Court determines the Legislature is not permitted to grant immunities in furtherance of the goals of the workers' compensation system, then the Court has just declared the bedrock of workers' compensation law to be unconstitutional. This is, of course, not what the constitution requires, and the Iowa Supreme Court has repeatedly upheld the various statutory immunities essential to workers' compensation law when they have been challenged. If workers' compensation statutes are to continue to exist, the District Court's dismissal of ICSOP and the constitutionality of Iowa Code Section 517.5 must be affirmed.

I. Iowa Code Section 517.5 Does Not Violate the Equal Protection Clause Contained in Article 1, Section 6 of the Iowa Constitution.

Appellants' own argument shows the fallacy in their position that Iowa Code Section 517.5 violates Iowa's Equal Protection Clause. Appellants acknowledge that the Legislature granted "absolute immunity" to employers in furtherance of the goals of the workers' compensation system, but that other tortfeasors were given limited or no immunity. Appellants' Br., at 29. Appellants acknowledge that the Iowa Supreme Court concluded granting absolute immunity to employers, but not other tortfeasors, *did not* violate equal protection. *Id.* (citing *Suckow*, 445 N.W.2d at 779). Appellants then state, "there is a legitimate argument that the statute should be stricken for the sole reason that absolute immunity has *never been extended to any individual, entity, or official* with the exception of judges, prosecutors and other similar officials, and the president of the United States of America." *Id.* at 30 (emphasis added). In light of the fact that Appellants acknowledge in the preceding sentence that the Legislature—with the Iowa Supreme Court's blessing—has granted absolute

immunity to *every employer in the state* under the workers' compensation statute, it completely contradicts the claim that such immunity has *never* been extended to any entity other than certain classes of government employees. On the contrary, granting this type of absolute immunity is the cornerstone of the workers' compensation system, and has survived an equal protection challenge on that basis.

A. Plaintiff's Equal Protection Claims Are Subject to a Rational Basis Test.

There is a

> threshold question when a litigant raises an equal protection issue: whether to decide the issue under the traditional rational basis analysis or under the more stringent strict scrutiny analysis. We apply a rational basis analysis except when a classification is suspect or involves fundamental rights.

Suckow, 445 N.W.2d at 778. Appellants acknowledge that equal protection cases involving workers' compensation statutes are instructive on how to evaluate Section 517.5. Appellants' Br., at 26. They then mistakenly claim, "Iowa Code section 517.5 must pass a strict scrutiny analysis to be upheld as constitutional because Appellants have no other way, other than through judicial process, to pursue a remedy against [ISCOP]." Appellants' Br., at

30. However, the Iowa Supreme Court has already addressed this issue twice and concluded both times that rational basis review should apply to these types of immunity statutes. *Suckow*, 445 N.W.2d at 778-79; *see also Gilleland v. Armstrong Rubber Co.*, 524 N.W.2d 404, 407 (Iowa 1994) (applying rational basis review in responses to a plaintiff's claim that a workers' compensation statute "should be subject to strict scrutiny because the entire workers' compensation scheme impinges upon the fundamental right to 'sue for damages' "). The reasoning in *Suckow* and *Gilleland* apply equally to this case and mandate rational basis review.

In *Suckow*, the plaintiff challenged Iowa Code Section 85.20—which provides that the workers' compensation acts are the employee's exclusive remedy for a variety of claims—asserting the statute violated equal protection by giving the employer absolute immunity and, like Appellants, asked the court to apply strict scrutiny because Section 85.20, like Section 517.5, allegedly "infringes on a fundamental right—his access to the courts." *Id.* at 778. The Iowa Supreme Court began by pointing out, "Suckow

incorrectly assumes that access to the courts is itself a fundamental right" and noted that "[w]here access to the judicial process is not essential to the exercise of fundamental rights the state will be free to allocate access to the judiciary machinery or any system or classification which is not totally arbitrary." *Id.* (citation and quotation marks omitted). The court concluded,

> Here the judicial process is not essential to the exercise of any fundamental right belonging to workers' compensation claimants. The State has passed comprehensive statutory schemes "to provide an expeditious and automatic remedy to injured employees." These schemes represent a compromise between employees and employers. Employees give up their common law rights of actions against employers. In return employers give up their common law defenses and must pay employees for all work-related injuries regardless of fault. . . . [W]orkers' compensation claimants have a way, other than through judicial process, to resolve their claims against employers.

Id. at 778-79. Accordingly, the court "conclude[d] section 85.20 does not infringe a fundamental right. So we do not review Suckow's equal protection challenge under a strict scrutiny analysis." *Id.* at 779.

The same principles mandate application of rational basis review in this case. ICSOP is Appellants' employer's workers'

compensation insurance carrier and, as such, Appellants must be "a party in any action against" Appellants' employer. App. 514 (Iowa Admin. Code r. 876-4.10) ("Whenever any insurance carrier shall issue a policy with a clause in substance providing that jurisdiction of the employer is jurisdiction of the insurance carrier, the insurance carrier shall be deemed a party in any action against the insured."). Thus, Appellants have the *exact same* "way, other than through judicial process, to resolve their claims against" ICSOP that Suckow had to resolve his claim against his employer—a workers' compensation claim. *See Suckow*, 445 N.W.2d at 779. The Legislature elected to give the employer in *Suckow* immunity from an employee's common law claims through Iowa Code Section 85.20, just as it decided to give an insurer like ICSOP immunity from an employee's common law claim in Section 517.5. Just like the employer in *Suckow*, ICSOP is still responsible to Appellants through the workers' compensation process. There is no basis to distinguish *Suckow* from this case, so a rational basis analysis must be applied here as well.

Moreover, the problem for Appellants is not that they lack access to the courts. They clearly do, as evidenced by the instant suit. Their problem is that they have no claim to pursue against ICSOP under Iowa law. Iowa law has gone back and forth on the issue of an employer's insurance carrier's liability to an employee. As the Iowa Supreme Court noted in *Thompson vs. Bohlken*, 312 N.W. 501 (Iowa 1981), the tort was recognized in 1963 in *Fabricius v. Montgomery Elevator Co.*, 121 N.W.2d 361 (Iowa 1963), and "[t]he legislature initially responded to *Fabricius* by prohibiting suits based on such inspections." *Thompson*, 312 N.W. at 506-07 (citing Iowa Code § 88A.14 (1966) ("No inspection of any place of employment made by insurance company inspectors . . . shall be the basis for imposition of civil liability upon the inspector or the insurance company.")); *see also Bowen v. Kaplan*, 237 N.W.2d 799, 801 (Iowa 1976) (noting the legislature enacted the immunity statute "[i]mmediately after the filing of our opinion i[n] *Fabricius*"). According to the Iowa Supreme Court, "It [was] obvious the General Assembly enacted [the immunity provision] to overrule our holding in *Fabricius*." *Bowen*, 237 N.W.2d at 801.

However, the statutory immunity was omitted from the 1972 code. *Thompson*, 312 N.W.2d at 507 ("[W]e note that in 1972 the prohibition against such suits was omitted."); *see also* 1972 Iowa Acts (64 G.A.) ch. 1028, § 1. The Legislature chose to reinstate the immunity in 1979 as Iowa Code Section 517.5. *See Slater v. Farmland Mut. Ins. Co.*, 334 N.W.2d 728, 730 (Iowa 1983) (citing Iowa Code § 517.5, eff. Jan. 1, 1979)). Because the cause of action against the carrier would not accrue until the injury occurred, and the effective date of the statute was January 1, 1979, the statute bars any claim arising out of an injury that occurred after January 1, 1979. *Id.*

The cases and statutes cited above clearly show that while, at one point, an employee may have had a "common law" claim for negligence against his or her employer's workers' compensation insurance carrier, the common law has been supplanted by the statutory immunity provision for nearly forty years. Appellants do not have any constitutional right to bring this action because, under Iowa law, "a litigant does not have a vested property right in any rule of the common law." *Carter v. Rowe*, No. 05-0750,

2005 WL 3478144, *2 (Iowa Ct. App. Dec. 21, 2005); *see also Johnson v. Am. Leather Specialties Corp.*, 578 F. Supp. 2d 1154, 1177 (N.D. Iowa 2008) (applying Iowa law and determining plaintiff had no "vested right in any rule of the common law"). Even *Fabricius*, the case that first recognized the cause of action Appellants assert, acknowledged, "The power to deprive one of a common law action is vested in the legislature under its police power upon declared public policy of the state when circumstances and conditions warrant such action." *Fabricius*, 121 N.W.2d at 366. The Legislature clearly had the power to eliminate this cause of action and therefore its decision to do so does not implicate a fundamental right under the equal protection clause. Simply put, Section 517.5 does not infringe on any of Appellants' rights because Appellants have no right to a common law cause of action. This again mandates a rational basis standard be applied to Iowa Code Section 517.5.

B. Iowa Code Section 517.5 Survives a Rational Basis Analysis.

Assuming there is a classification and that there is a right to a common law cause of action, it is clearly not a fundamental

right, and rational basis review applies, just as the court determined in *Suckow*. 445 N.W.2d at 779. Under this standard, a plaintiff's

> burden is very heavy. [The plaintiff] must demonstrate beyond a reasonable doubt that the classification in section 85.20 denies [the plaintiff] equal protection. [The plaintiff] must also point out with particularity how that denial occurs. To sustain this burden [the plaintiff] must negate every reasonable basis which may support the classification.

Id. Appellants cannot meet this burden.

Appellants state that "the purpose of Iowa Code section 517.5 is to eradicate unsafe workplaces by encouraging workplace inspections." Appellants' Br., at 31. That is *a* purpose of the statute; however, the broader purpose is to help set the balance between easing the process an employee must go through to recover from an employer and the employer's carrier for work-related conditions and granting immunities to employers and those related to employers, such as their employees and their insurance carriers. As the Iowa Supreme Court has recognized for nearly 100 years, "The fundamental reason for the enactment of [workers' compensation] legislation is to avoid litigation, lessen

the expense incident thereto, minimize appeals, and afford an efficient and speedy tribunal to determine and award compensation under the terms of this act." *Flint v. City of Eldon*, 191 Iowa 845, 183 N.W. 344, 345 (1921). Just like the immunity found in Section 85.20, the immunity granted in Section 517.5 helps achieve the fundamental goal of the workers' compensation system by avoiding litigation and lessening the expense incident thereto.

Iowa Code Chapter 517 is entitled "Employers Liability Insurance." Under Section 517.1, "Every corporation . . . writing any of the several classes of insurance authorized by section 515.48, subsection 5, paragraph "d", shall maintain reserves for outstanding losses." The classes of insurance authorized by Iowa Code Section 515.48(5)(d)

> Insure against loss in consequence of accidents or casualties of any kind to employees, *including workers' compensation*, or to persons or property resulting from any act of an employee, or any accident or casualty to person or property, or both, occurring in or connected with the transaction of insured's business, or from the operation of any machinery connected therewith; or to persons or property for which loss the insured is legally liable including an obligation of the insurer to pay

> medical, hospital, surgical, funeral or other benefits irrespective of legal liability of insured.

Iowa Code § 515.48(d) (emphasis added). The immunity conferred by Section 517.5 is therefore clearly part of the legislature's overall system for addressing claims between injured workers and injuries caused by their employers, co-employees, supervisors, and insurance carriers. This immunity serves the legitimate purpose of the Iowa Workers' Compensation Statutes to provide an expedient forum for injured workers to bring claims against their employer and their employer's carrier for work-related injuries. *See Suckow*, 445 N.W.2d at 778-79. Removing it would also cause rates to rise, as carriers issuing workers' compensation policies would face the possibility of liability on a new type of risk outside of the workers' compensation system. As the Iowa Supreme Court already determined in *Suckow* and *Seivert v. Resnick*, the Legislature acts well within its authority when it eliminates or limits an employee's cause of action against workplace participants in furtherance of the Iowa Workers' Compensation Statutes. *See also Seivert vs. Resnick*, 342 N.W.2d 484, 485

(holding statute limiting co-employee liability did not violate equal protection clause).

The bulk of Appellants' equal protection argument is a block quote from *Fireman's Fund Am. Ins. Co. v. Coleman*, 394 So. 2d 334 (Ala. 1980) (hereinafter "*Fireman's Fund*"). Appellants' Br., at 32-34. Appellants claim *Fireman's Fund* held "a statute that granted statutory immunity to insurance carriers for inspections was held unconstitutional as an abuse of the State's police power." *Id.* at 32. Unfortunately for Appellants, not only did *Fireman's Fund* not address the *equal protection clause*, it *also* was effectively overturned in *Reed v. Brunson*, 527 So. 2d 102 (Ala. 1988), which held that the immunity statute at issue *did not* violate Section 13 of the Alabama constitution. *See* 527 So. 2d at 117. On closer inspection, *Fireman's Fund* and the line of cases preceding and following it actually concluded that the legislature *has* the authority to grant an employer's carrier immunity from a suit for negligent inspections, as explained below.

In *Fireman's Fund*, the

> plaintiffs were employed by Dorsey Trailer, Inc., a corporation that manufactures flatbed and van type

> truck trailers. On July 15, 1977, while they were installing 24 -wide fiberglass scuff bands along the base of the interior walls of an unventilated van type trailer, using a highly flammable solvent-based glue, sparks from either the screwdrivers or the electric junction box into which the screwdrivers were plugged, came in contact with fumes from the glue, causing a flash fire within the trailer.
>
> Plaintiffs and their wives filed individual suits against Fireman's Fund, the compensation carrier which was also the liability carrier of Dorsey, alleging negligent and/or wanton plant inspection; and against David Logan, a vice-president of Dorsey; Shelby Bryan, Line Supervisor; Mark Holt, Director of Personnel and Labor Relations; and George Kennedy, General Supervisor over Line Supervisors; alleging negligent failure to supervise, and to correct the operation of the adhesive application process.

Id. at 335. Judgments of varying amounts were entered against each defendant, and Fireman's Fund, Logan, Kennedy, Bryan, and Holt appealed, raising the following four issues:

> 1. Should *Grantham v. Denke*, 359 So.2d 785 (Ala.1978), be overruled? If it is not overruled, should it be extended to corporate officers and supervisory employees?
>
> 2. Should *Grantham* be extended to invalidate the statutory immunity granted to compensation carriers under s 25-5-11, Code of Alabama, 1975?
>
> 3. Is the adjudication of liability supported by sufficient evidence when tested against appropriate legal standards of liability?

4. Were the damages awarded excessive?

Id. Accordingly, to properly analyze *Fireman's Fund*, one must analyze and understand three authorities: *Grantham*, Section 13 of the Alabama Constitution, and Alabama Code Section 25-5-11. Appellants do not analyze any of these sources and as a result misstate and misapply *Fireman's Fund*.

At the time of *Fireman's Fund* and the *Grantham* decision it was applying, Alabama Code Section 25-5-11 provided:

> *Where the injury or death for which compensation is payable under article 2 of this [workers' compensation] chapter was caused under circumstances also creating a legal liability for damages on the part of any party other than the employer* whether or not such party be subject to the provisions of article 2 of this chapter *the employee*, or his dependents in case of his death, *may proceed against the employer to recover compensation under article 2 of this chapter*, or may agree with the employer upon the compensation payable under article 2 of this chapter, *and at the same time may bring an action against such other party to recover damages for such injury* or death*, and the amount of such damages shall be ascertained and determined without regard to article 2 of this chapter*; *provided, however, neither an officer, director, agent, servant or employee of the same employer* nor his personal representative, nor any workmen's compensation insurance carrier of the employer, nor any officer, director, agent, servant or employee of such carrier, nor any labor union, or an official or representative thereof, making a safety inspection for the benefit of the employer or its

> employees, *shall be considered a party other than the employer against whom such an action may be brought.*

Grantham, 359 So. 2d at 786 (quoting Alabama Code § 25-5-11 (1978)) (emphasis added). Thus, in relevant part, Alabama Code Section 25-5-11 provided that if an employee suffered a compensable injury caused by a party other than the employer, the injured worker could bring a claim against the other party outside of the workers' compensation system, unless that other party happened to be "an officer, director, agent, servant or employee of the same employer" (*i.e.*, a co-employee), in which case the claim could not be brought because the defendant was immune. Section 13 of the Alabama Constitution provided, "That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by *due process of law*; and right and justice shall be administered without sale, denial, or delay." (Emphasis added.).

The question before the Alabama court in *Grantham* was whether Section 13, Alabama's due process clause, "restrict[ed] the power of the legislature . . . to bar an injured employee's *negligence action* for damages against her or his co-employee" by

enacting Section 25-5-11. *Grantham*, 359 So. 2d at 786 (emphasis added). The court determined that granting a co-employee immunity from a negligence action was unconstitutional under the due process clause of Section 13. *Id.* at 787; *see also Fireman's Fund*, 394 So. 2d at 335-36 (noting *Grantham* held "that the statutory immunity for co-employees violated [Section] 13, Constitution of Alabama, 1901, and was therefore void"). In *Fireman's Fund*, the court extended *Grantham*'s "holding as to the immunity provisions of s 25-5-11 as it relates to each of the parties defendant named herein, including the workmen's compensation insurance carrier." *Id.* at 336.

However, eight years later, the Alabama Supreme Court re-examined Alabama Code Section 25-5-11, *Grantham*, and *Fireman's Fund*, and reversed *Grantham*, determining that the statute "is not violative of § 13 of the Alabama Constitution insofar as it abolishes suits against co-employees for negligence or wantonness." *Reed*, 527 So. 2d at 117; *see also Stringer v. Minnesota Vikings Football Club, LLC*, 705 N.W.2d 746, 765 n.1 (Minn. 2005) (Hanson, J., dissenting) (recognizing *Reed* overruled

Grantham). The court noted, “Historically, § 13 was viewed to apply only in instances where a litigant had a vested interest in a particular cause of action.” *Reed*, 527 So. 2d at 114. Because the plaintiff's “injuries occurred after the Act became law, under the vested rights approach as espoused in [multiple Alabama cases] the Act passes constitutional muster with respect to Article I, § 13.” *Id.* The court also noted that even if it were to use the common law rights approach relied on in *Fireman's Fund*, the legislature *had the power to grant the immunity found in Alabama Code Section 25-5-11* and the statute was therefore constitutional. *Id.* at 114-16.

Like Alabama, Iowa law grants employers, co-employees, and the employer's insurance carrier immunity from negligence suits brought by injured workers. *Compare* Iowa Code § 85.20(2) (providing the workers' compensation act “shall be the exclusive and only rights and remedies” of an injured worker “[a]gainst any other employee of such employer, provided that such injury, occupational disease, or occupational hearing loss arises out of and in the course of such employment and is not caused by the other

employee's gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another.") *and* Iowa Code § 517.5 (granting the employer's insurance carrier immunity from suit) *with* Alabama Code § 25-5-11 (granting immunity to the employer, co-employees, and the insurance carrier). Like Alabama, Iowa courts hold that a party does not have a vested right in a rule of the common law and therefore immunity statutes are constitutional. *Compare Reed*, 527 So. 2d at 114 *with Suckow,* 445 N.W.2d at 778-79 (holding the immunity statute constitutional) *and Fabricius*, 121 N.W.2d at 366 (holding the legislature has the authority to grant immunity from a common law claim). Even under Appellants' proposed standards from Alabama law, Iowa Code Section 517.5 is constitutional.

Even if the Court were to apply a strict scrutiny test, Iowa Code Section 517.5 would still pass that test. To survive strict scrutiny, government action that infringes on a fundamental right must be narrowly tailored to serve a compelling government interest. *State v. Hernandez-Lopez*, 639 N.W.2d 226, 238 (Iowa 2002). The workers' compensation scheme serves an important

interest by balancing the expeditious disposition of suits, through the elimination of the need for proof of negligence by the employer or carrier, with the immunities granted to the employer and carrier and limited damages provided to the employee. The only way to achieve this result is to grant the immunities provided in these statutes.

In summary, Section 517.5 does not infringe on *any* right of Appellants because it merely modifies the common law and plaintiffs do not have a vested interest in the common law remaining unchanged. In addition, even if the statute did make a classification or infringe on a right, the Legislature has determined that granting workers' compensation carriers immunity from workplace inspection suits advances the interest of the workers' compensation statutory scheme and therefore is constitutional.

C. Appellants' Attempted Distinction Between Private Workplace Inspectors and Government Inspectors Does Not Amount to an Equal Protection Violation.

Appellants argue that "the district court erred in ruling that there exists a rational basis to provide private inspectors with

absolute immunity and state inspectors only with qualified immunity." Appellants' Br., at 35. They claim the

> the General Assembly [] allow[s] workplace safety inspections to be performed by either the division or labor or by insurance company inspectors. Yet, each class receives categorically separate levels of immunity for tortious claims, creating disparate treatment of members of the same class (inspectors).

Id. at 37. Contrary to Appellants' argument, this is not a violation of Article 1, Section 6 of the Iowa Constitution.[1] This argument fails because it has nothing to do with Appellants, who are *not* government inspectors and thus *cannot* raise this challenge.

"The first step of an equal protection claim is to identify the classes of similarly-situated plaintiffs singled out for differential treatment." *Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200 (Iowa 2002). The question at this "first step" is whether all *plaintiffs* are subject to the same requirements, not whether a group of *defendants* is or is not afforded a unique protection. *Id.* at 204

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[1] Appellants' Brief entitles this subsection, "The Privileges and Immunities Clause Operates Upon State and Private Inspectors in a Non-Uniform Manner." Because Appellants have only asserted an *equal protection* argument and because Article 1, Section 6 of the Iowa Constitution includes the "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens," this argument is being treated as an equal protection argument.

(concluding no plaintiffs were singled out because "all dramshop plaintiffs are subject to the same requirements of the dramshop statute"). If the plaintiff "does not articulate the class of similarly-situated plaintiffs who are allegedly treated differently under our [] statute" and if all "plaintiffs, as a unique class, are treated alike amongst themselves", then the plaintiff "has not satisfied the first step of an equal protection analysis" and the court does not need to reach the question of whether the "statute has a rational relationship to a legitimate government interest" because the plaintiff has already failed to prove the []statute is unconstitutional." *Id.*

The Iowa Court of Appeals followed this same procedure in *Carter v. Rowe*, No. 05-0750, 2005 WL 3478144 (Iowa Ct. App. Dec. 21, 2005), where the plaintiff challenged Iowa Code section 673.2, which limited the liability of the owner of a domesticated animal for injuries caused by that animal as a result of negligence. *Id.* at *1. Again, the plaintiff claimed the equal protection clause rendered the statute unconstitutional and again the court reminded the plaintiff that the pertinent question was whether all

plaintiffs injured by the activity in question were treated equally. *Id.* at *2. Because they were, the statute survived an equal protection challenge. *Id.*

This threshold test did not change in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), where the Iowa Supreme Court still began its equal protection analysis

> by recognizing the constitutional pledge of equal protection does not prohibit laws that impose classifications. Many statutes impose classifications by granting special benefits or declaring special burdens, and the equal protection clause does not require all laws to apply uniformly to all people. Instead, equal protection demands that laws treat alike all people who are "similarly situated with respect to the legitimate purposes of the law."
>
> This requirement of equal protection—that the law must treat all similarly situated people the same—has generated a narrow threshold test. Under this threshold test, *if plaintiffs cannot show as a preliminary matter that they are similarly situated*, courts do not further consider whether their different treatment under a statute is permitted under the equal protection clause.
>
> . . .
>
> [T]he similarly situated requirement cannot possibly be interpreted to require *plaintiffs* to be identical in every way to people treated more favorably by the law. No two people or groups of people are the same in every way, and nearly every equal protection claim could be run aground onto the shoals of a

> threshold analysis if the two groups needed to be a mirror image of one another. Such a threshold analysis would hollow out the constitution's promise of equal protection.
>
> Thus, equal protection before the law demands more than the equal application of the classifications made by the law. The law itself must be equal. In other words, to truly ensure equality before the law, the equal protection guarantee requires that laws treat all those who are similarly situated with respect to the purposes of the law alike. This requirement makes it impossible to pass judgment on the reasonableness of a legislative classification without taking into consideration, or identifying, the purpose of the law. The purposes of the law must be referenced in order to meaningfully evaluate whether the law equally protects all people similarly situated with respect to those purposes.

763 N.W.2d at 882–83 (emphasis added). *Varnum* thus reiterates that an equal protection challenge will continue to fail the "threshold test" "if *plaintiffs* cannot show as a preliminary matter that *they* are similarly situated" to others receiving more favorable treatment. *Id.* at 882 (emphasis added).

The application of this precedent to the case at bar is as straightforward as possible. Under Iowa Code Section 517.5, *all* plaintiffs are barred from bringing an action against their employer's workers' compensation insurance company on the basis of a workplace inspection. As in *Grovijohn* and *Carter*, all

plaintiffs claiming injury as a result of the conduct at issue are treated equally and there is no classification to be reviewed. Appellants' entire argument completely ignores this threshold question because no rational reading of the statute would lead to the conclusion that it discriminates between different classes of *plaintiffs*. Because there is no "classification", the equal protection clause is simply inapplicable to the statute and the Court need not proceed beyond step one of the analysis.

Moreover, it is entirely within the Legislature's prerogative to grant absolute immunity to insurance inspectors inspecting a place of employment for workers' compensation insurance purposes under Iowa Code Section 517.5 in furtherance of the workers' compensation system, and to decline to give that same statutory immunity to state inspectors making inspections under Iowa Code Section 88.6. This does not violate the Equal Protection Clause. First, it should be pointed out that if the state or a municipal entity were to engage "inspectors inspecting for group self-insurance purposes," then those inspectors *would* also be entitled to the same immunity under Iowa Code Section 517.5.

Thus there is not unequal treatment. All inspectors inspecting a workplace for workers' compensation purposes are immune.

Second, the employer's insurance carrier—like the employer—is *already* liable 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). Because the employer's insurance carrier is liable for injuries to employees arising out of and in the course of the employment, the carrier *already has* a motivation for improving workplace safety: a reduction in workplace injuries should thereby reduce the amount of workers' compensation claims. The state's inspectors operating under Iowa Code Section 88.6 have no such workers' compensation liability, and therefore there is a rational basis for *not* giving the state inspectors the immunity the employer's carrier is given. The employer's insurance carrier has "more at stake" than the government and therefore this is a rational basis for the Legislature's decision to give the carrier "more immunity" than the government inspectors. *Suckow*, 445 N.W.2d at 780.

Finally, as evidenced in part by the fact that Appellants have not sued the state, state inspectors of workplaces acting pursuant to Iowa Code Section 88.6 have no need for the immunity found in Section 517.5 because they are already immune from civil liability. For example, inspections are performed pursuant to Iowa Code Chapter 88 "to assure so far as possible every working person in the state safe and healthful working conditions and to preserve human resources." Iowa Code § 88.1. Thus, these inspections are carried out as part of a general duty to the public and therefore the inspectors are immune under the public-duty doctrine. *Estate of McFarlin v. State*, 881 N.W.2d 51, 58 (Iowa 2016) ("Under the public-duty doctrine, if a duty is owed to the public generally, there is no liability to an individual member of that group."). In addition, Appellants are incorrect that Iowa Code Section 669.14 only gives "qualified immunity" for inspections undertaken pursuant to Iowa Code Section 88.6. In conducting workplace inspections, including the decision not to order an inspection at all, the commissioner is immune under

Iowa Code Section 669.14(1), which grants absolute immunity from

> [a]ny claim based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a *discretionary function* or duty on the part of a state agency or an employee of the state, whether or not the discretion be abused.

Iowa Code § 669.14(1) (emphasis added). "The act of maintaining a safe workplace falls within the category of discretionary functions rather than legislative, judicial, executive, or administrative policy-making." *W. Virginia Bd. of Educ. v. Croaff*, No. 16-0532, 2017 WL 2172009, at *6 (W. Va. May 17, 2017). Because the state's inspectors already have absolute immunity under these two doctrines, private inspectors are not given any additional immunity.

Even if Appellants could assert the claims of state inspectors, there is clearly a constitutionally acceptable basis for granting protections to insurance company inspectors for workplace inspections. Appellants' equal protection challenge should be rejected.

II. BECAUSE APPELLANTS LACK A VESTED RIGHT, THE STATUTORY LIMITATION ON LIABILITY CONTAINED IN IOWA CODE SECTION 517.5 DOES NOT VIOLATE ARTICLE I, SECTION I OF THE IOWA CONSTITUTION.

Appellants correctly point out that Article I, Section I of the Iowa Constitution "was enacted 'to secure citizens' pre-existing common law rights (sometimes known as natural rights) from unwarranted government restrictions." Appellants' Br., at 38, (quoting *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 176 (Iowa 2004)). Appellants cite *Gacke* for the two-part test the Court should apply to his challenge to Iowa Code Section 517.5, and correctly observes that the Court should consider (1) whether the right asserted by the Appellants is protected by this clause, and (2) whether the statute is a reasonable exercise of the state's police power. *Gacke*, 684 N.W.2d at 176; *see also* Appellants' Br., at 38-39. However, Appellants misstate the nature of the right at issue in this case, and this error is fatal to Appellants' argument.

Appellants incorrectly assert that the right at issue is "the right of access to the courts." Appellants' Br., at 39. As discussed above, Appellants' access to the courts is *not* what is at stake in

this case. These proceedings, in and of themselves, are evidence that Appellants have access to the courts. The true question is whether Appellants have a fundamental right to have Iowa law recognize their purported *cause of action*, and Iowa courts have long answered this question with a resounding "no."[2] Turning back to *Carter*, which was decided the year after *Gacke* and applies the principles of that case, the court noted "that a litigant does not have a vested property right in any rule of the common law." *Id.* at *2; *see also Johnson v. Am. Leather Specialties Corp.*, 578 F. Supp. 2d 1154, 1177 (N.D. Iowa 2008) (applying Iowa law and determining plaintiff had no "vested right in any rule of the common law"). Under Iowa's inalienable rights provision, rights in "a cause of action which has not yet accrued are not vested and may be abolished." *Johnson*, 578 F. Supp. 2d at 1177. Iowa Code Section 517.5 was first enacted in 1978 and was last amended in

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[2] As discussed above, the Alabama Supreme Court decision Appellants cited in support of their equal protection argument and cite again in support of their due process argument relies on precedent that the Alabama court renounced two decades ago when it overturned the case underpinning *Fireman's Fund.* For brevity's sake, ICSOP's response to that argument will not be repeated in this section as well, though the analysis is equally applicable.

1979. *See* 1978 Iowa Acts (67 G.A.) ch. 1168, § 1; *see also* 1979 Iowa Acts (68 G.A.) ch. 127, § 1. It was the legislature's prerogative to abolish Appellants' cause of action, which it did in 1979, decades before any cause of action could possibly have accrued. Because Appellants have "no vested right in the former Iowa law," Iowa Code Section 517.5 does not violate Article I, Section I, of the Iowa Constitution.

Appellants are once again simply incorrect that Section 517.5 does not serve the public interest. They claim its sole purpose was to "eradicate unsafe workplaces by encouraging insurance companies to conduct workplace inspections without the fear of being sued." Appellants' Br., at 40. However, Section 517.5 has a different purpose; as the District Court noted in its order,

> The immunity conferred by section 517.5 is part of the legislature's system for addressing workers' compensation claims. This immunity serves the same legitimate purpose as other workers' compensation statutes, and that is to provide an expedient forum for injured workers to bring claims against their employer and their employer's insurance provider for work related injuries.

App. 236 (Ruling on Defendant's Motion to Dismiss, Nov. 22, 2017, at 8). There can be no dispute that granting immunity to employers and carriers with respect to liability on certain claims in exchange for imposing liability, even in the absence of negligence, on other claims, is a legitimate state interest and is served by Section 517.5 and the other workers' compensation immunities. *See Suckow*, 445 N.W.2d at 778-79; *Seivert*, 342 N.W.2d at 485. Section 517.5 does not violate Article 1, Section 1 of the Iowa Constitution.

III. BECAUSE ICSOP IS STATUTORILY IMMUNE FROM APPELLANTS' CLAIMS, THEY ARE NOT ENTITLED TO A JURY TRIAL.

Appellants devote a single paragraph to the argument that Iowa Code Section 517.5 somehow violates their right to a jury trial. Appellants' Br., at 41. This argument is baseless because Appellants' claims against ICSOP simply do not exist under Iowa law due to the immunity set forth in Section 517.5. Without a claim, there is nothing to try and the right to a jury trial is moot. A plaintiff is simply not entitled to a jury trial when the defendant

is statutorily immune to the claim. *Phillips By & Through Phillips v. City of Waukee*, 467 N.W.2d 218, 221 (Iowa 1991).

CONCLUSION

The Legislature enacted Iowa Code Section 517.5 as an important component of the workers' compensation statutory scheme. ISCOP, like the employer it insured, is required to pay certain claims to employees without proof of negligence; in exchange, the Legislature granted insurers, like ISCOP, certain immunities, including the immunity found in Iowa Code Section 517.5. This comprehensive scheme, and the statutes that comprise it, has been upheld in the face of constitutional challenges like the ones Appellants have asserted in this case. The Court should affirm the District Court's orders in this case.

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I hereby certify that on August 17, 2018, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System.

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