No. 22-70

IN THE

Supreme Court of the United States

TYSON FOODS, INC., et al.,

Petitioners,

v.

HUS HARI BULJIC, OSCAR FERNANDEZ, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

Respondents Has Hari Buljic, Honorario Garcia, Arturo de Jesus Hernandez, Miguel Angel Hernandez, and Oscar Fernandez submit this supplemental brief under Rule 15.8 to apprise the Court that, on January 20, 2023, the Iowa District Court for Black Hawk County issued an order granting Tyson's motions to dismiss the actions at issue in the petition. The order is attached as an appendix to this brief. Respondents disagree with that order and are currently considering their options, including reconsideration and/or a potential appeal. Nonetheless, the state court's decision highlights the unsuitability of these cases for review.

ARGUMENT

After the Eighth Circuit denied Tyson's request for a stay pending certiorari and issued its mandate in these cases in March 2022, Pet. App. 22, the cases returned to the Iowa District Court for Black Hawk County, where they had been initiated in the summer of 2020. Tyson did not seek a stay from this Court, or from the state trial court, and it obtained the maximum extension of time before filing its petition for a writ of certiorari. Meanwhile, Tyson moved to dismiss both actions on five different grounds, including that the plaintiffs' claims were barred by the Iowa Workers' Compensation Act (IWCA), Ia. Code § 85.20(1).

On January 20, 2023, the state court granted Tyson's motions in a consolidated order, agreeing with Tyson that plaintiffs' sole remedy for the deaths of their loved ones was the state's workers' compensation regime and holding that the IWCA's exception to exclusivity for gross negligence by a co-employee, Ia.

Code § 85.20(2), did not apply based on the facts alleged. Appendix 5a–8a. Accordingly, the court dismissed both cases. *Id.* 8a.

Petitioners believe that the state court's decision was in error, and are currently considering their options, including reconsideration and/or a potential appeal. Nonetheless, the dismissal presents an additional reason to deny Tyson's petition. After nearly a year of litigation in the state court culminating in an appealable order granting Tyson the relief it sought, consideration by this Court whether to resume litigation of this case in the federal courts would make no sense now even if there were a colorable argument that Tyson's removal arguments might otherwise merit review. The order also confirms that the issues in this case are matters of state law, properly adjudicated by state courts, and that removal to federal court is not necessary to ensure adjudication "upon the merits of the state-law question free from local interests or prejudice" against Tyson. *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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JOHN CASEY, BRET TAPKEN, JAMES HOOK, DOUG WHITE, MARY JONES, AND DEBRA ADAMS, DEFENDANTS.	
OSCAR FERNANDEZ, INIDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ISIDRO FERNANDEZ, PLAINTIFF, 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, DEFENDANTS.	CASE NO. LACV140822

On September 12, 2022, these matters came before the Court on the Defendants' Joint Motion to Dismiss. Plaintiffs appeared by counsel, Thomas P. Frerichs,

Mel C. Orchard, III, and G. Bryan Ulmer, III. Defendants Tyson Foods, Inc., Tyson Fresh Meats, Inc., John H. Tyson, Noel W. White, Dean Banks, Stephen R. Stouffer, Tom Brower, Doug White, Mary Jones and Debra Adams, appeared by counsel, Christopher Coleman and Kevin Driscoll. Defendants Tom Hart, Cody Brustkern, John Casey, Bret Tapken, and James Hook appeared by counsel, David Yoshimura.

Defendants John H. Tyson, Noel W. White, Dean Banks, Stephen R. Stouffer, Tom Brower, Doug White, Mary Jones and Debra Adams are referred to in the pleadings as the "Executive Defendants". Defendants Tom Hart, Cody Brustkern, John Casey, Bret Tapken, and James Hook are referred to as the "Supervisory Defendants."

Plaintiffs and Defendants have provided extensive briefing and arguments in this matter, to which the Court has had the opportunity to review.

Defendants move to dismiss for lack of subject matter jurisdiction and failure to state a claim for which relief can be granted.

The gist of the Plaintiffs' claims—who are all administrators of the estates of deceased individuals - allege that the deceased individuals were previously employed by Tyson and that they suffered workplace injury while working at Tyson. In particular, that while these individuals were working at Tyson's Waterloo, Iowa facility during the early days of the COVID-19 pandemic, that each contracted COVID-19 at Tyson's Waterloo, Iowa facility and each died from complications arising out of the COVID-19 infection. They further allege that the defendants failed to take

reasonable precautions to protect these employees during the pandemic.

More specifically, the Plaintiff(s) in each of the above-captioned cases assert that Defendants Tyson Foods, Inc., and Tyson Fresh Meats, Inc., engaged in fraudulent misrepresentation and are vicariously liable; that Executive Defendants engaged in gross negligence; that Supervisory Defendants engaged in gross negligence and fraudulent misrepresentation; and Executive Defendants Mary Jones and Deb Adams engaged in gross negligence and breach of duty. Plaintiffs also seek punitive damages against all defendants.

The threshold issue that the Court must determine, and that the Defendants raise, is whether or not the District Court has subject matter jurisdiction to consider the Plaintiffs' claims. Defendants assert that the Iowa Workers Compensation Act (IWCA) provides that the Division of Workers Compensation has exclusive jurisdiction to consider the Plaintiffs' claims. Plaintiffs assert that the District Court has subject matter jurisdiction as these claims fall under the exception provided in the IWCA. The Court would note that the Plaintiffs currently have pending claims before the Division of Workers Compensation.

It is well settled that the IWCA provides the exclusive remedy for an employee against an employer and employees of that employer for a workplace related injury. Iowa Code Section 85.20 provides in relevant part, the following:

85.20 Rights of employee exclusive.

The rights and remedies provided in this chapter, chapter 85A, or chapter 85B for an employee, or

> a student participating in a work-based learning opportunity as provided in section 85.61, on account of injury, occupational disease, or occupational hearing loss for which benefits under this chapter, chapter 85A, or chapter 85B are recoverable, shall be the exclusive and only rights and remedies of the employee or student, the employee's or student's personal or legal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury, occupational disease, or occupational hearing loss against any of the following:
>
> 1. Against the employee's employer.
>
> 2. Against 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…

In these matters, the Plaintiffs have characterized their respective claims as fraudulent misrepresentation, vicarious liability, gross negligence, and breach of duty.

No matter how the Plaintiffs have characterized their respective causes of action, they are still subject to the IWCA as the gist of their claims is that each decedent was infected in the workplace with COVID-19, that they died as a result of the infection, and that each suffered a workplace injury. As the gist of each claim is a workplace injury, Iowa law requires each Plaintiff to seek their remedy with the Division of Workers' Compensation. See *Nelson v. Winnebago Industries*, 619 N.W.2d 385 (Iowa 2000) ("if the

essence of the action is recovery for physical injury or death, including in "physical" the kinds of mental or nervous injury that cause disability, the action should be barred even if it can be cast in the form of a normally non-physical tort"); See also *Cincinnati Ins. Cos. v. Kirk*, 801 N.W.2d 856 (Iowa Ct. App. 2011) (*Nelson* is also applicable to claims of fraud.).

The Plaintiffs argue that they have pled sufficient facts to meet the employee exception contained in Iowa Code Sec. 85.20(2). The requirements of this statute impose a substantial burden on a plaintiff attempting to sue a co-employee because it requires wanton neglect. *Id.*

The Supreme Court has adopted the following test to establish a co-employee's gross negligence amounting to such lack of care as to amount to wanton neglect under section 85.20(2): (1) knowledge of the peril to be apprehended; (2) knowledge that injury is a probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the peril." *Nelson v. Winnebago Indus., Inc.,* 619 N.W.2d 385, 390 (Iowa 2000).

Gross negligence must not only be specifically pled as to each co-employee defendant, Plaintiffs must also prove that each employee co-employee defendant had actual, not constructive, knowledge of the peril to be apprehended or that injury is a probable result of the danger. See *Simmons v. Acromark, Inc.*, No. 00-1625, 2002 WL 663581 (Iowa Ct. App. 2002) (Gross negligence claims apply separately to each defendant); *Walker v. Mlakar*, 489 N.W.2d 401, 403 (Iowa 1992) (affirming dismissal, ruling that allegations that co-employees held positions of "manager of safety, health and environment" and "safety engineer" were

"insufficient, standing alone, to [demonstrate] 'actual knowledge' of [unsafe workplace conditions]"); see also *Kerrigan v. Errett*, 256 N.W.2d 394, 397 (Iowa 1977)(pre-amended statute suits based on ordinary negligence, but personal liability still could not be imposed upon the officer, agent, or employee simply because of his general administrative responsibility for performance of some function of the employment. He must have a personal duty towards the injured plaintiff, breach of which specifically has caused the plaintiff's damages); *Hernandez v. Midwest Gas Co.*, 523 N.W.2d 300 (Iowa Ct. App. 1994)(To satisfy the required element of knowledge of probable injury, the Petition must allege "that the defendants knew their actions would place their co-employee in imminent danger, so that someone would more likely than not be injured by the conduct").

The Plaintiffs' causes of action do not meet the exception under Iowa Code Sec. 85.20(2) as they cannot satisfy the test outlined in *Nelson*. First, the allegations pled are not made as to specific defendants (the Plaintiffs "lumped" defendants together and made their allegations against them generally) and as such the pleadings do not give sufficient notice as to what duty or claim each defendant is alleged to have owed to each Plaintiff. Additionally, the allegations of gross negligence are not specifically pled as to each co-employee defendant. Neither do the allegations make any assertions that each co-employee defendant had actual knowledge of the peril to be apprehended or that injury is a probable result of the danger.

While the Court recognizes the tragic circumstances that arose from the situation, the law requires that Plaintiffs' claims proceed under the Iowa Division of Workers' Compensation pursuant to the

IWCA. This Court lacks the subject matter jurisdiction to consider the Plaintiffs' claims. The Court does not find that the Plaintiffs have pled sufficient facts as to each individual defendant that rise to the level of gross negligence amounting to wanton neglect that would remove these matters from the jurisdiction of the Iowa Division of Workers' Compensation.

As the Court has determined that it does not have subject matter jurisdiction in these matters, the Court does not address the other issues raised in the Defendants' motion.

IT IS THEREFORE ORDERED THAT the Defendants' joint motion to dismiss is GRANTED. Each of these matters are dismissed. Costs of each action are assessed to the respective Plaintiffs.

So Ordered.