IN THE SUPREME COURT OF IOWA

NO. 16-1972

CITY OF WEST LIBERTY,

Plaintiff-Appellant,

v.

EMPLOYERS MUTUAL CASUALTY COMPANY,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF MUSCATINE COUNTY
THE HONORABLE JUDGE PAUL L. MACEK
MUSCATINE COUNTY NO. LACV023321

APPLICATION FOR FURTHER REVIEW OF COURT OF APPEALS OPINION FILED ON MARCH 7, 2018

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QUESTIONS PRESENTED FOR REVIEW

I.

Did the Court of Appeals err when it determined it need not apply the efficient proximate cause rule set forth in *Qualls v. Farm Bureau Mutual Insurance Co.*, 184 N.W.2d 710 (Iowa 1971) to the undisputed facts of this case?

II.

Were the squirrel's actions in coming in contact with the City's power equipment the efficient proximate cause of the City's loss?

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STATEMENT SUPPORTING FURTHER REVIEW

As discussed in the detailed and thorough twenty-one (21) page dissent filed by Justice Mullins in this case, the majority's opinion reflects a drastic departure from well-established property insurance law as set forth by the Iowa Supreme Court 47 years ago in *Qualls v. Farm Bureau Mutual Insurance Co.*, 184 N.W.2d 710 (Iowa 1971). In *Qualls*, this Court held that:

> **In insurance law it is generally understood where the peril insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produces the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss**.

184 N.W.2d at 712-713 (emphasis added).

As a result, the Court of Appeals' opinion has wide reaching implications beyond the two parties in this case. Indeed, by ignoring and effectively abandoning the efficient proximate cause rule recognized in *Qualls*, policyholders in the State of Iowa, whether they are municipal entities, like the City here, Fortune 500 companies, mom-and-pop small businesses or homeowners, will be faced with conflicting decisions from this Court and the Courts of Appeals and will be impacted greatly if the Court of Appeals' opinion is not reversed.

In support of this Application, the City states that the Court of Appeals has rendered a decision that is in conflict with prior, published holdings of Iowa courts and has made various errors of law.

Specifically, the Court of Appeals:

1. Erred by failing to apply the efficient proximate cause rule set forth in *Qualls v. Farm Bureau Mutual Insurance Co.*, 184 N.W.2d 710 (Iowa 1971) and its progeny to the undisputed facts of this case resulting in the erroneous affirmance of the trial court's entry of summary judgment in favor of the EMCC.

2. Erred by failing to conclude that the squirrel's actions were the efficient proximate cause of the City's claimed loss.

BRIEF IN SUPPORT OF APPLICATION FOR FURTHER REVIEW

I.

STATEMENT OF THE FACTS

The material facts are not disputed.

The City of West Liberty (the "City") is a municipal corporation located in Muscatine County, Iowa. (A1, p. 9, ¶1)[1] Employers Mutual Casualty Company ("EMCC") is an Iowa corporation with its principal place of business located in Des Moines, Iowa and is in the business of underwriting and selling, among others, commercial property insurance policies to policyholders located throughout the United States, including Iowa. (A1, p. 9, ¶3) EMCC sold to the City insurance policy number 8B9-30-44-15, effective April 1, 2014 through April 1, 2015 (the "Policy"). (A1, p.9, ¶4) The Policy insures the electrical power plant operated by the City which is located at 107 West 2nd Street in West Liberty, Iowa. (the "Plant") (A1, p. 9, ¶5)

The Policy's insuring agreement obligates that EMCC:

> "cover direct physical loss to covered property at a 'covered location' caused by a covered peril."

(A1, p. 9, ¶6; A1, p. 38)

[1] References to the Appellate Appendix Volume 1 are shown as "A1," while references to the Appellate Appendix Volume 2 are shown as "A2."

The Policy includes two sets of exclusions. The first set of exclusions includes the following introductory paragraph:

PERILS EXCLUDED

> 1. "We" do not pay for loss or damage caused directly or indirectly by one or more of the following excluded causes or events. Such loss or damage is excluded regardless of other causes or events that contribute to or aggravate the loss, whether such causes or events act to produce the loss before, at the same time as, or after the excluded causes or events.

(A1, p. 10, ¶7; A1, p. 49)

The second set of exclusions includes a significantly different introductory paragraph and the "Electrical Currents" exclusion upon which EMCC relied in denying the City's claim:

> 2. "We" do not pay for loss or damage that is caused by or results from one or more of the following excluded causes or events:
>
> * * *
>
> g. Electrical Currents –"We" do not pay for loss caused by arcing or by electrical currents other than lightning. But if arcing or electrical currents other than lightening result in fire, "we" cover the loss or damage caused by that fire.

(A1, p. 10, ¶8; A1, p. 51 and p. 53)

On November 7, 2014, a squirrel climbed onto outdoor electrical equipment at the Plant and caused a high voltage electrical fault resulting in

electrical arcing and substantial physical damage to the City's transformer and associated electrical equipment. (A1, p. 82, EMCC Answer to Complaint, ¶7)

The damage that occurred at the Plant on November 7, 2014 constitutes direct physical loss under the Policy. (A1, p. 10, ¶9) The Plant is a "covered location" under the Policy. (A1, p. 10, ¶10) The involved transformer and associated electrical equipment are "covered property" under the Policy. (A1, p. 10- 11, ¶11) The City submitted a claim to EMCC for the Loss in the amount of $213,524.76. (A1, p. 11, ¶12 and ¶14) EMCC denied coverage for the City's Loss. (A1, p. 11, ¶13)

The City filed suit seeking a declaration that the asserted exclusion did not bar coverage and that EMCC breached its insurance contract by denying the City's claim. On cross-motions for summary judgment the district court held, as a matter of law, that the proximate cause of the City's claimed loss was electrical arcing and, therefore, the exclusion barred coverage for the City's claim. The district court entered its order on October 20, 2016. On November 14, 2016, the district court entered a *nunc pro tunc* order amending the October 20, 2016 order to reflect that judgment was being entered in EMCC's favor. On November 15, 2016, the City timely filed its notice of appeal.

On March 7, 2018, the Court of Appeals, in a 2-1 decision, affirmed the trial court's entry of summary judgment in favor of EMCC, finding that the efficient proximate cause doctrine need not be applied. The City timely filed the present Application for Further Review with this Court on March 26, 2018.

II.

ARGUMENT

A.

In Direct Conflict With Existing Iowa Law, The Court Of Appeals Expressly Disregarded The Efficient Proximate Cause Rule.

In its Opinion, the Court of Appeals incorrectly determined that it:

> need not examine the contours of efficient proximate cause because the plain language of the contract is not ambiguous, and it plainly excludes coverage for a prior event - the squirrel completing the electrical circuit – no matter how close in time, which led to arcing (except if it were caused by lightning). The policy excludes losses for damages which are "caused by or results from" arcing. "Results from" invokes but-for causation. But for arcing there would have been no loss. (Opinion, pp. 10-11)

The Court of Appeal's analysis is erroneous for several reasons. First, the application of the efficient proximate cause rule in Iowa in matters of insurance coverage is not triggered upon a finding that the contract language is ambiguous. Indeed, no Iowa court has ever imposed the requirement of ambiguity as a predicate to applying the efficient proximate cause rule.

Second, the Court of Appeals misinterpreted and misconstrued the policy on its road to announcing a new "but for" causation standard. Third, the Court of Appeals failed to acknowledge that the parties agree that the squirrel's contact with the electrical equipment was the event which set all of the events in motion and led to the electrical arcing. Therefore, even if "but for" causation was the standard, the squirrel must be considered a cause of the City's loss because but for the squirrel, there would have been no damage. This is why Iowa, and the majority of States, have adopted the efficient proximate cause standard. Under that standard, the squirrel must be considered the efficient proximate cause of the City's loss.

The Court of Appeals' failure to employ an efficient proximate cause analysis and consider the squirrel's actions in its causation determination is contrary to Iowa law. This failure was the result of the Court's erroneous interpretation and construction of the Policy which presented exclusions in two separate and distinct sets as discussed below.

1. The Court Of Appeals Misinterpreted And Misconstrued The Exclusions In The Policy Which Led To Its Erroneous Conclusion That The Efficient Proximate Cause Doctrine Did Not Apply.

The Court of Appeals correctly recognized that the Policy's insuring agreement obligates EMCC to:

> cover direct physical loss to covered property at a 'covered

location' caused by a covered peril.

(Opinion, p. 6; A1, p. 38) However, the Court of Appeals then misinterpreted and misconstrued the Policy's exclusionary language leading it to ignore this Court's long-standing efficient proximate cause rule.

Contrary to the Court of Appeal's recitation of the exclusionary language, there are two separate and distinct sets of exclusions. The first set of exclusions includes the following introductory paragraph:

PERILS EXCLUDED

> 1. "We" do not pay for loss or damage caused directly or indirectly by one or more of the following excluded causes or events. Such loss or damage is excluded regardless of other causes or events that contribute to or aggravate the loss, whether such causes or events act to produce the loss before, at the same time as, or after the excluded causes or events. (emphasis added)

(A1, p. 49) As Justice Mullins correctly observed in his dissent, language like this is commonly referred to as an "anti-concurrent causation provision" which insurers use to contract out of the doctrines of 'concurrent cause' and 'efficient proximate cause.' (Dissent, p. 30, citing Dale Joseph Gilsinger, *Validity, Construction and Application of Anticoncurrent Causation (ACC) Clauses in Insurance Policies*, 37 A.L.R. 6th 657 (2008)); *Amish Connection, Inc. v. State Farm Fire and Casualty Co.*, 861 N.W.2d 230, 241 (Iowa 2015)(recognizing the purpose of anti-concurrent causation provisions).

Absent such a provision, the efficient proximate cause rule must be applied. *Id*.

There is also a distinct second set of exclusions in the policy which, in contrast to the first set, is not preceded by an anti-concurrent causation provision. Instead, the second set is preceded by the following introductory paragraph:

> 2. "We" do not pay for loss or damage that is caused by or results from one or more of the following excluded causes or events:

(A1, p. 51) Listed below this introductory paragraph are several exclusions, including the "Electrical Currents" exclusion, each with its own introductory language referencing "caused by", "results from", or both. (A1, pp. 51-54) The "Electrical Currents" exclusion, which references only loss **"caused by"** arcing, reads as follows:

> g. **Electrical Currents** – "We" do not pay for loss caused by arcing or by electrical currents other than lightning. But if arcing or electrical currents other than lightning results in fire, "we" cover the loss or damage caused by that fire.

(A1, p. 53)

Unlike the first set of exclusions, there is no anti-concurrent causation language introducing the second set of exclusions and, as a result, EMCC did not contract out of the application of the efficient proximate cause doctrine as it relates to the "Electrical Currents" exclusion. *Amish*

Connection, 861 N.W.2d at 241. The Court of Appeals failed to recognize this important distinction. Indeed, the distinction is critical because the singular exclusion upon which Defendant relies is found within this second set of exclusions. (A1, pp. 51, 53) Therefore, since the "Electrical Currents" exclusion falls within the second set of exclusions, the efficient proximate cause rule must be applied under the facts of the present case.

Instead of recognizing that the positioning of the "Electrical Currents" exclusion determines whether the efficient proximate cause doctrine applies (if within the second set) or does not (if within the first set), the Court of Appeals engaged in an unnecessary and clearly erroneous interpretation of the phrase "results from" that neither party has ever advocated.

While the Appellate Court goes to great lengths to interpret the phrase "results from" as it appears in the introductory paragraph, the court omits from its analysis the fact that the phrases "caused by" and "results from" are used separately and differently in the twenty-one (21) separate exclusions within the second set. (A1, pp. 51-54) In fact, the phrase "results from", which is the basis for the Appellate Court's new "but for" rule, does **not** appear within paragraph 2.g. "Electrical Currents," which only refers to loss "caused by" arcing. In contrast, Exclusion 2.e. excludes loss "caused by or resulting from" the listed criminal or illegal acts. (A1, p. 52) Similarly,

Exclusion 2.f. excludes loss "which results from" one or more of the listed risks. (A1, p. 52) A full review of all twenty-one (21) of the second set of exclusions (2.a. – 2.u.) establishes that even if the Appellate Court is correct in its creation of a "but for" rule for "results from" perils, then that new rule does not apply to all twenty-one (21) of the second set exclusions.

By interpreting the phrase "results from" as creating "but for" causation, and then construing the arcing as being the "but for" cause of the City's loss, the Appellate Court has eviscerated EMCC's clear intent that the paragraph 2 exclusions be applied using Iowa's efficient proximate cause rule. Stated differently, if all of the paragraph 2 exclusions are subject to "but for" causation, as the appellate majority has construed "but for" causation, then there is no distinction between the two, clearly separate sets of exclusions. This is so because any cause in a chain of concurrent causes can be deemed a "but for" cause, and it is for this reason that courts, including Iowa's, seek to determine the efficient proximate cause of a loss. And it is because courts adopted the efficient proximate cause rule that insurers like EMCC started grouping certain of their exclusions under anti-concurrent causation lead-in provisions. *Amish Connection*, 861 N.W.2d at 241-2. The appellate court's interpretation and construction of EMCC's Policy ignores this industry-wide practice, was not advocated for by EMCC,

and is not supported by the language used by EMCC.

Without explanation, the Court of Appeals did not consider the difference between the two sets of exclusions as demonstrated by the words used in the respective introductory paragraphs. The Court of Appeals compounded its error by improperly grafting into the "Electrical Currents" exclusion the phrase "results from" even though EMCC clearly chose not to include those words when it drafted the exclusion. To be certain, EMCC never argued for "but for" causation, and EMCC never argued that the word "limited" or the phrase "results from" reflect an intent by either party to contract out of the efficient-proximate cause rule and into but for causation.

The City respectfully submits that the Appellate Court's interpretation of the phrase "results from" as creating a "but for" rule, an interpretation never advocated by either party to this insurance contract, is a clear error of law and conflicts with this Court's prior holdings in *Qualls* and its progeny.

2. The Court Of Appeals Relied On Inapposite Decisional Law To Support Its Erroneous Policy Interpretation.

To justify its erroneous and unnecessary interpretation of the phrase "results from" to equate to a "but for" analysis, the Court of Appeals relies on two United States Supreme Court opinions, both of which are patently inapposite. In *Burrage v. United States*, 134 S.Ct. 881 (2014), the Court was presented with a matter of statutory interpretation, specifically the meaning

of "results from" in the specific context of The Controlled Substances Act. *Burrage* is not an insurance case and does not discuss the efficient proximate cause rule.

Similarly, in *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775(1988), another non-insurance case, the Supreme Court considered the meaning of the phrase "because of" in the limited context of a lawsuit filed under Title VII of the Civil Rights Act of 1964. Again, the issue of the efficient proximate cause rule in the context of insurance was not an issue before the Court.

As Justice Mullins observed in his dissent, the concept of proximate cause in the insurance context is different than proximate cause in tort law. (Dissent, p. 13, citing Couch on Insurance §101.40) The same maxim should be true in terms of "proximate cause" as contemplated in federal criminal statutes and civil rights laws. There is no Iowa case which recognizes a correlation between proximate cause in those types of cases and the concept of proximate cause in insurance cases.

Indeed, in light of the Iowa cases where the Supreme Court and Court of Appeals addressed the specific issue presented in this case of whether the efficient proximate cause rule should be applied, there was no reason for the Court of Appeals to rely on inapposite United States Supreme Court law to

create a but for test when ample authority exists that the efficient proximate cause rule applies in Iowa. *Qualls v. Farm Bureau Mutual Insurance Co.*, 184 N.W.2d 710 (Iowa 1971)(discussed in Section B, below). There is no suggestion, either explicit or implied, that the but-for analysis that the Court utilized in *Burrage* and *Hopkins* for purposes of its construction of federal statutes applies more generally to the context of insurance disputes and, particularly, to the issue of the efficient proximate causation rule. Consequently, the Court of Appeals' reliance on *Burrage* and *Hopkins* was misplaced.

Notably, although the Court of Appeals references ambiguity, it did not cite to a single case where a court, whether in Iowa or elsewhere, determined that the efficient proximate cause rule could only be applied where there was an ambiguity in the policy. The reason for the omission is because no such case exists.

B.

Applying Iowa Law On Efficient Proximate Causation Establishes That The Squirrel Was The Efficient Proximate Cause Of The City's Loss.

Since the "Electrical Currents" exclusion appears in the second set of policy exclusions and is not introduced by an anti-concurrent causation clause, *Qualls v. Farm Bureau Mut. Ins. Co*., 184 N.W. 2d 710 (Iowa 1971)

governs the issue presented and requires that the efficient proximate causation rule be applied to the facts of this case.

Qualls is the seminal Iowa case addressing this question of causation under a property insurance policy. In *Qualls*, this Court reversed the district court's ruling in favor of the insurance company. 184 N.W.2d at 712. In reversing the district court, this Court stated and ruled as follows:

> **In insurance law it is generally understood where the peril insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produces the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss**.

Id. at 712-713 (emphasis added).

Using the *Qualls* statement of the proximate cause rule and construing EMCC's all-risk policy by inserting the specific, undisputed facts of this case into the rule produces the following statement:

> where the peril insured against [squirrel contacting energized cable] sets other causes in motion [immediate electric fault and arcing] which, in an unbroken sequence and connection between the act [squirrel contacting cable] and final loss [damaged equipment], produces the result for which recovery is sought [damaged equipment], the insured peril [squirrel contacting cable] is regarded as the proximate cause of the **entire** loss.

In the case at bar, the link between the squirrel and the damaged equipment for which recovery is sought is even more direct than the causation chain

analyzed by this Court in *Qualls*. Indeed, the time between the squirrel's contact with the energized cable and the destruction of the City's insured property was almost immediate. There is no dispute that had the squirrel not contacted the energized cable, there would have been no arcing and no damage to the City's property for which recovery is now sought.

The Iowa Court of Appeals' decision in *Bettis v. Wayne County Mut. Ins. Assoc*., 447 N.W.2d 569 (Iowa Ct. App. 1989), provides another clear application of the efficient proximate cause doctrine that supports the City's position. In *Bettis*, the insured tractor's front **suspension** was damaged when it struck a culvert. *Id*. at 570. While being towed to the repair shop, the insured tractor's **transmission**, undamaged in the original accident, was damaged because it was not properly lubricated during the tow. *Id.*

The insurer paid for the damaged front suspension, but refused to pay for the damaged transmission, arguing the transmission damage was not "direct loss resulting from overturn or collision" as required by the policy language. *Id.* The district court agreed with the insurer and the insured appealed.

On appeal the *Bettis* court correctly framed the efficient proximate cause rule as follows:

> In insurance law, an insured event is considered the proximate cause of a loss if the event sets in motion other causes which,

> through an unbroken sequence and connection, result in the loss.
>
> When it is said that the cause to be sought is the direct and proximate cause, it is not meant that the cause of agency which is nearest in point of time or place to the result is necessarily to be chosen, since the dominant cause may be concurrent or remote in point of time or place.
>
> Thus, we look not necessarily to the last act in the chain of events, but rather to the predominant cause which set in motion the chain of events causing the loss.

Id. at 571 (*Qualls* and other internal citations omitted). Ultimately, the *Bettis* court, following the analytical framework established in *Qualls*, ruled as follows:

> The loss in this case, the transmission damage, was the result of a chain of events set in motion by the collision, an insured event. While the defendant urges us to look at the towing as the efficient physical cause of the loss, we find the collision in the ditch was the dominant cause of the transmission damage. Therefore, the transmission damage is covered by plaintiff's collision insurance.

Id.

The City submits that if attenuated relationship between the initial collision and the subsequent, towing-induced transmission damage was sufficient to be considered the efficient proximate cause of the towing damage, then it must follow that the squirrel's contact with the energized cable, which immediately set in motion the event (arcing) resulting in the City's claimed property damage, was the efficient proximate cause of the

City's loss. This conclusion follows directly from an application of the efficient proximate causation rule in *Qualls* and *Bettis*.

The Court of Appeals' conclusion that "electrical currents" were the cause of the City's damages ignores the efficient proximate causation rule and is incongruous with its observation that "[t]he City and EMC[C] agree the squirrel created the conductive path that resulted in an electrical arc that caused substantial damage to equipment at the City's electrical substation." (Opinion, p. 2) In other words, absent the squirrel, there would have been no electrical arcing and no damage.

As the law in Iowa currently stands and should remain, the efficient proximate cause doctrine should be applied when the exclusion relied upon does not fall under the umbrella of anti-concurrent causation language. *Qualls,* 184 N.W.2d at 712; *Amish Connection, Inc. v. State Farm Fire and Casualty Co.*, 861 N.W.2d 230, 241. In the present case, the squirrel's action set the entire chain of events in motion, making it the efficient proximate cause of the City's loss. For this reason, summary judgment should have been granted in the City's favor. The Court of Appeals' disregard of the efficient proximate cause rule warrants that its judgment and the judgment of the district court be reversed.

III.

CONCLUSION

At least since 1971, Iowa courts have followed *Qualls* and applied the efficient proximate cause rule in insurance disputes where the insurance company has not properly contracted out of the rule by including an anti-current causation clause applicable to the relied upon exclusion. In the present case, there is no dispute that there is no anti-concurrent causation clause which applies to the "Electrical Currents" exclusion. This requires application of the efficient proximate cause rule to the loss facts. Applying the rule yields the conclusion that the squirrel's contact with the power equipment was the efficient proximate cause of the City's loss since it was the event which set the entire chain of events leading to the loss in motion. Absent the squirrel, there would have been no electrical arcing and no loss.

The Court of Appeals' failure to apply an efficient proximate cause analysis to the facts of this case arises from its erroneous interpretation and construction of the Policy, constitutes an error of law and is in direct conflict with the decisions of this Court and others decisions of the Court of Appeals.

As a result, the City requests that this Court further review this appeal, rule that the "Electrical Currents" exclusion does not apply to the City's loss, reverse the Court of Appeals' ruling, and return the case to the district court

for further proceedings regarding damages. The City further requests any and all other relief deemed appropriate under the circumstances.

Dated: March 26, 2018

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CERTIFICATE OF FILING

I hereby certify that on March 26, 2018, I filed this Application for Further Review of the Iowa Court of Appeals Opinion filed on March 7, 2018, by e-filing it with the Clerk of the Supreme Court, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa 50319 through the EDMS electronic filing system.

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2018, a copy of the foregoing pleading was electronically filed with the Iowa Supreme Clerk of Court. All parties of record registered with the EDMS filing system will receive notification of such filing through EDMS. Parties of record not registered with the EDMS filing system will be provided notification of this filing by U. S. Mail.

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ATTORNEY'S COST CERTIFICATE

I, Daniel P. Kresowik of Stanley, Lande & Hunter, hereby certify that the actual cost of printing the preceding Application for Further Review of the Iowa Court of Appeals Opinion filed on March 7, 2018, was $4.35, and that amount has been paid in full.

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Dated: March 26, 2018

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