IN THE SUPREME COURT OF IOWA

NO. 16-1972

CITY OF WEST LIBERTY,

Plaintiff-Appellant,

vs.

EMPLOYERS MUTUAL CASUALTY COMPANY,

Defendant-Appellee.

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

APPELLEE'S RESISTANCE TO APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS NO. 16-1972

DATE OF IOWA COURT OF APPEALS DECISION: MAR. 7, 2018

Sean M. O'Brien AT0005874
Catherine M. Lucas AT0010893
BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE, P.C.
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-8004
Phone: (515) 246-5894
Fax: (515) 246-5808
E-Mail: obrien.sean@bradshawlaw.com

E-Mail: lucas.catherine@bradshawlaw.com

ATTORNEYS FOR DEFENDANT-APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

ISSUES PRESENTED FOR REVIEW

I. Whether the Court of Appeals erred when it determined it need not apply the efficient-proximate-cause rule?

Clasing v. State Farm Fire & Cas. Co., No. 08-1237, 2009 WL 1492044 (Iowa Ct. App May 29, 2009)

Qualls v. Farm Bureau Mut. Ins. Co., 184 N.W.2d 710 (Iowa 1971)

Bettis v. Wayne County Mut. Ins. Ass'n, 447 N.W.2d 569 (Iowa Ct. App. 1989)

Grinnell Mut. Reins. Co. v. Emp'rs Mut. Cas. Co., 494 N.W.2d 690 (Iowa 1993)

Jordan v. Iowa Mut. Tornado Ins. Co. of Des Moines, 130 N.W. 177 (Iowa 1911)

Kalell v. Mutual Fire & Auto Ins. Co., 471 N.W.2d 865 (Iowa 1991)

Vorse v. Jersey Plate Glass Ins. Co., 95 N.W. 569 (Iowa 1903)

II. If the efficient-proximate-cause doctrine is applied, does the result change?

Clasing v. State Farm Fire & Cas. Co., No. 08-1237, 2009 WL 1492044 (Iowa Ct. App May 29, 2009)

Qualls v. Farm Bureau Mut. Ins. Co., 184 N.W.2d 710 (Iowa 1971)

Bettis v. Wayne County Mut. Ins. Ass'n, 447 N.W.2d 569 (Iowa Ct. App. 1989)

Grinnell Mut. Reins. Co. v. Emp'rs Mut. Cas. Co., 494 N.W.2d 690 (Iowa 1993)

Jordan v. Iowa Mut. Tornado Ins. Co. of Des Moines, 130 N.W. 177 (Iowa 1911)

Kalell v. Mutual Fire & Auto Ins. Co., 471 N.W.2d 865 (Iowa 1991)

Vorse v. Jersey Plate Glass Ins. Co., 95 N.W. 569 (Iowa 1903)

RESISTANCE TO APPLICATION FOR FURTHER REVIEW

COMES NOW the Defendant-Appellee, Employers Mutual Casualty Company (EMCC), pursuant to Iowa Rule of Appellate Procedure 6.1103(2), and hereby resists the Application for Further Review filed by Plaintiff-Appellant, West Liberty (the City). Contrary to the City's assertions, the Iowa Court of Appeals decision was correct and should not be reviewed because (1) the decision is not contrary to published case law; and (2) even if the Court of Appeals erred in not applying the efficient-proximate-cause doctrine as suggested by the City, if it was applied, the outcome would be the same—no coverage for this claim. Accordingly, Plaintiff has failed to articulate any of the substantial grounds specified by Iowa Rule of Appellate Procedure 6.1103(1)(b) to support further review of the Court of Appeals decision. The Iowa Supreme Court should, therefore, deny the City's Application for Further Review.

WHEREFORE, the Defendant-Appellee, EMCC, respectfully requests this Court deny Plaintiff-Appellant's Application for Further Review.

BRIEF IN SUPPORT OF EMCC'S RESISTANCE TO THE APPLICATION FOR FURTHER REVIEW

STATEMENT OF FACTS

EMCC defers to the City's statement of facts with a few clarifications. First, the parties do not dispute the sequence of events that culminated in the loss for which the City seeks compensation under the policy of insurance. The incident involves damage to a substation transformer and associated equipment located at the City's electrical power plant. (App. Vol. I p. 9; App. Vol II p. 18). The incident commenced when a gray squirrel made contact with a bare electrical cable clamp energized at 7,200 volts while still touching the grounded steel frame member which supported the electrical cable attached to the clamp. (App. Vol. II pp. 18, 25) The actions of the squirrel did not independently cause any damage. (App. Vol. II pp. 26–27). However, the squirrel's action created a conductive path that resulted in an electrical arc that caused substantial damage to equipment at the City's electrical power plant. (App. Vol. II pp. 26–27). While the parties agree on this sequence of events, they contest the cause of the loss under the terms of the property insurance policy EMCC issued to the City and whether the electrical currents exclusion applies to preclude coverage.

ARGUMENT

Pursuant to Iowa Rule of Appellate Procedure 6.1103, this case is not appropriate for further review by this Court. The "character of the reasons" that would support review include: (1) a decision "in conflict with" a prior decision on "an important matter"; (2) a decision on "a substantial question of constitutional law or an important question of law that" this Court should decide; (3) a decision where there is "an important question of changing legal principles;" and (4) a decision where there is "an issue of broad public importance" that this Court should "ultimately determine." Iowa R. App. P. 6.1103.

Contrary to the City's arguments, none of the characteristics outlined in Rule 6.1103 are present in this case. The City only argues the first characteristic: whether the decision is in conflict with a decision of this Court. The City mentions the Court of Appeals decision may have wide reaching implications, but provides no support for that passing assertion. The Court of Appeals decision is not in conflict with existing case law and even if it is, further review is not warranted because the outcome would not change even if the City's position is accepted. These arguments will be addressed in turn below.

I. THE COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH EXISTING LAW BECAUSE THE EFFICIENT-PROXIMATE-CAUSE RULE DID NOT APPLY

The crux of The City's argument is that the Court of Appeals decision is inconsistent with Iowa law because it failed to apply to efficient-proximate-cause rule. Contrary to the dissent's position "[i]t's just simply complicated," it is just simply simple. *See* Opinion, J. Doyle Dissent at 13. The efficient-proximate-cause doctrine applies only when two or more perils caused damage to the insured property. Jeffery E. Thomas and Susan Randall, eds., *New Appleman on Insurance Law Library Edition,* § 44.03 (1); *In re Katrina Canal Breaches* Litigation, 495 F.3d 191, 222–23 (5th Cir. 2007). Here, one peril—electrical arcing–existed. One peril—electrical arcing—caused damage. The only peril at issue—electrical arcing—is subject to a coverage exclusion. This case is a simple as that.

A. The Efficient-Proximate-Cause Doctrine is Not Applicable When there is Only One Cause

The Court of Appeals was correct in not applying the efficient-proximate-cause rule and its decision is not contrary to published cases. The efficient-proximate-cause rule does not come into play here: only one peril–arcing—caused damage to the City's property and therefore, the loss is excluded from coverage. The Court of Appeals held, 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 lightening). (Decision at *10-11).

The Court of Appeals found it was undisputed the squirrel by itself caused no damage. The sole cause of damage to the City's property was the electrical arc: the policy excludes coverage for damaged cause by an electrical arc. To have an electrical arc, there must always be something that completes the arc. Electrical arcing can be triggered by a number of different events. The exclusion provides it applies to loss caused by arcing other than lightning. If this court were to interpret the exclusion as allowing coverage for electrical arcing initiated by the actions of the squirrel, it would render the lightning exception illusory.[1] The court must interpret the terms of the exclusion, where possible, so as to give effect to each part. Because the electrical currents exclusion applies to all electrical arcing losses unless caused by lightning, the policy does not cover the City's claim.

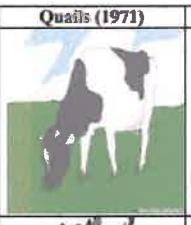
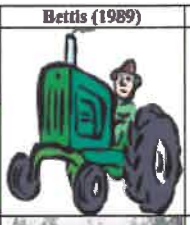
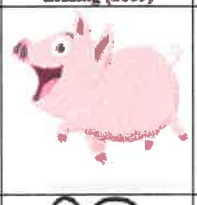
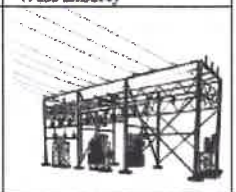
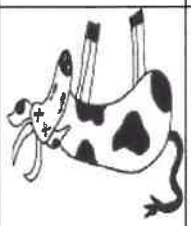
---

[1] The Court of Appeals noted a squirrel coming into contact with and shorting out electrical equipment is not an uncommon occurrence. (Opinion p. 8 n. 3). Squirrels coming into contact with transformers and other equipment causing arcing is a cost of doing business. As discussed before the district court and Court of Appeals, this arcing can be insured against through an equipment breakdown policy. The installation of guards will also prevent the arcing. The City chose to do neither here.

The reliance on the efficient-proximate-cause cases in Judge Doyle's dissent is easily distinguishable. The cases can be summarized as follows:

	Vorse (1903)	Quails (1971)	Bettis (1989)	Clasing
Property Loss	Plate Glass	Cattle	Tractor	Hogs
Cause #1 Remote or Initial	Fire: A lit match ignites gasoline vapor, resulting in an explosion.	Bite: A wild animal infected with pseudorabies bites cattle or bites hogs that, in turn, bite the cattle.	Collison: A tractor strikes a culvert, damaging the tractor's front suspension.	Ice Storm: An ice storm causes a power outage and prevents a curtain from dropping to permit ventilation in a barn.
Cause #2 Immediate or closest in time or place	Explosion: The concussive force of the explosion shatters a plate glass window.	Disease: The cattle contract pseudorabies and perish.	Towing: While being towed without the engine running, additional damage occurred to the tractor's transmission	Suffocation/Hyperthermia: Hogs in the barn die due to either suffocation or hyperthermia.
Efficient Proximate Cause	Explosion (Immediate)	Bite (Remote)	Collision (Remote)	Suffocation or Hyperthermia (Immediate)

Or, in the pictorial format provided as a demonstrative to the Court of Appeals at oral argument:

	Quails (1971)	Bettis (1989)	Vorse (1903)	Clasing (2009)	West Liberty
Property that Sustained Loss					
Cause #1 Remote or Initial					
Cause #2 Immediate or closest in time or place					
Efficient Proximate Cause	Wild Animal Bite (Remote)	Collision with Culvert (Remote)	Explosion (Immediate)	Suffocation or Hyperthermia (Immediate)	Electrical Arcing (Immediate)

It is clear from these charts summarizing the efficient-proximate-cause cases, when the doctrine is applicable; there are two causes of loss: the cow being bitten by a wild animal and later dying of disease, or the tractor sustaining suspension damage when hitting a culvert and later sustaining further damage to the transmission while being towed. In each of these cases, two perils independently caused damage. In contrast, Iowa appellate courts have declined to apply the efficient-proximate-cause doctrine to situations in which the peril alleged to have caused the loss did not independently damage the property insured: the flame of the match did not harm the plate glass in *Vorse* nor did the ice storm harm pigs in *Clasing*. Here, our wayward squirrel, by himself, did no harm. The Court of Appeals was correct in declining to apply the efficient-proximate-cause doctrine and further review is therefore, unwarranted.

B. Discussions of Anti-Concurrent Causation Provisions Are Not Applicable

The City now tries to further complicate the issue by a discussion of anti-concurrent cause provisions. The City initially made this suggestion to the district court that it should apply the concurrent causation doctrine to resolve the coverage dispute with EMCC. (App. Vol. I pp. 99–101). However, as discussed in EMCC's brief before the Court of Appeals, the

City based its concurrent causation doctrine argument on some discussion in the Iowa Supreme Court's decision in *Amish Connection.* The *Amish Connection* case examined a claim for water damage to a tenant's improvements and inventory after a corroded interior drainage pipe ruptured during a rain storm and released rainwater inside the building. Both the majority and dissenting opinions in *Amish Connection* discussed the different approaches to concurrent causation. *Amish Connection, Inc. v. State Farm Fire and Cas. Co.*, 861 N.W.2d 230, 241-42, 244-46 (Iowa 2015). The discussion proved to be dicta, however, because the majority found the rain limitation applied to preclude coverage regardless of whether of any other cause contributed to the loss. *Id.* at 240-41, 243.

A close examination of case law reveals Iowa courts consistently have applied the concurrent causation rule in third-party liability claims[2] and the efficient proximate cause rule in first-party property cases.[3] Courts in other

---

[2] *Kalell v. Mutual Fire & Auto Ins. Co.*, 471 N.W.2d 865, 868 (Iowa 1991) (interpreting motor vehicle exclusion in homeowners liability policy); *Grinnell Mut. Reins. Co. v. Emp'rs Mut. Cas. Co.*, 494 N.W.2d 690, 693–94 (Iowa 1993) (interpreting motor vehicle exclusion in general liability policy).

[3] See *Clasing v. State Farm Fire & Cas. Co.*, No. 08-1237, 2009 WL 1492044 (Iowa Ct. App May 29, 2009) (interpreting a livestock suffocation exclusion in a property insurance policy); *Bettis*, 471 N.W.2d at 570-71 (interpreting scope of property insuring agreement for direct loss resulting from overturn or collision); *Quails*, 184 N.W.2d at, 713 (interpreting scope of property insuring agreement for loss of livestock by attack of dogs or wild

jurisdictions generally follow this same distinction between first party and third party coverage. *Couch 3d* § 101:56. Why the distinction? Because under all risk property insurance, the policy generally covers all risks of physical loss while the exclusions limit coverage for the loss. Jeffery E. Thomas and Susan Randall, eds., *New Appleman on Insurance Law Library Edition,* § 44.03 (13) at 25 (hereinafter "Appleman"). Under a liability policy, the initial focus centers on the insured's legal obligation to pay for injury or damage. *Id.* If a claim under a property insurance policy involves multiples causes of loss, the coverage question focuses on causation, not tort liability. *Id.* A covered peril usually can be asserted to exist somewhere in the chain of causation in cases involving multiple causes, and applying the concurrent causation rule to property insurance cases would effectively nullify the exclusions in all risk policies. *Id.* at 26. Therefore, based on this understanding of concurrent causation principles as applied to first-party property insurance claims by Iowa courts reveals the City's argument lacks merit. The dissent stated the efficient-proximate-cause doctrine is applicable and the policy does not contract out of the doctrine as it pertains to the electrical currents exclusion. The dissent relies upon Justice Hecht's dissent

---

animals) ; *Jordan v. Iowa Mut. Tornado Ins. Co. of Des Moines,* 130 N.W. 177, 181 (Iowa 1911) (analyzing whether wind versus blowing snow caused loss under property policy insuring livestock).

in *Amish Connection, Inc.* for the proposition that causation can get confusing and "particularly troublesome" in "instances of multiple causes—where two or more occurrences lead to a loss and at least one is covered by the policy and another is not covered or excluded." (Dissent at *13-14 (citing *Amish Connection, Inc. v. State Farm Fire & Cas. Co.*, 861 N.W.2d 230, 244 (Iowa 2015) (Hecht, J., dissenting) (further citation omitted)). But here, there are not multiple causes: the squirrel did not cause damage, electrical arcing caused damage.

A careful study and synthesis of Iowa case law reveals it to be clear and in no need of clarification. There is only one cause: arcing. The efficient-proximate-cause doctrine is wholly inapplicable and the Court of Appeals did not err is refusing to applying the not-applicable doctrine. The request for further review should be denied in its entirety.

II. EVEN IF THE COURT OF APPEALS ERRED IN ITS REASONING, THE RESULT WOULD NOT CHANGE

In Section B of its application for further review, the City argues if the Court of Appeals applied the efficient-proximate-cause doctrine, it would have found the squirrel was the efficient proximate cause of the City's loss. Specifically, the City argues the Court of Appeals "[e]rred by failing to conclude that the squirrel's actions were the efficient proximate cause of the

City's claimed loss." (Application p. 6). Simply arguing the Court of Appeals was wrong is not one of the grounds for further review enumerated in Iowa Rule of Appellate Procedure 6.1103.

However, to the extent this is a proper argument to request further review, even if the efficient-proximate-cause rule does apply, the arcing, an excluded peril, must be deemed the dominant cause of the loss and therefore the loss is excluded from coverage.

The City argues 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 must be regarded as the efficient proximate cause of the entire loss. This incomplete statement does not accurately reflect Iowa law because Iowa courts have recognized both immediate and remote causes can be deemed the efficient proximate cause.

As one insurance commentator noted:

> Courts do apply this standard [the efficient proximate cause doctrine]] in different ways. Some jurisdictions look to the "the initial cause" or "the cause that sets the others in motion." Others look for the cause closest in time or closest in place to the loss. Others look to the most important cause or the dominating cause.

Jeffery E. Thomas and Susan Randall, eds., New Appleman on Insurance Law Library Edition § 44.03(11) at 23. Iowa law follows the latter approach

and looks to the dominant cause. As the Iowa Court of Appeals explained in *Bettis v. Wayne County Mut. Ins. Assoc.*, 447 N.W.2d 569, 571 (Iowa Ct. App. 1989), "When it is said that the cause to be sought is the direct and proximate cause, it is not meant that the cause or 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." Indeed, Iowa courts have found both concurrent and remote events to be the dominant cause of the loss.

As shown in both of the charts above, in *Bettis*, the court considered coverage for a tractor that sustained damage to the front suspension when it struck a culvert. The tractor sustained additional damage while being towed for repairs without the engine running, thus preventing the transmission from being properly lubricated. The tractor owner's policy provided coverage for direct loss resulting from collision. The owner's insurer paid for the collision damage, but it denied coverage for the transmission damage on the basis that it was not the direct result of the collision. The court examined the efficient proximate cause doctrine and, as previously mentioned, noted "the dominant cause may be concurrent or remote in point of time or place." *Id.* at 571. The court then applied the doctrine and found, under the facts of the case, the collision to be the dominant cause of the transmission damage. *Id.*

Thus, the court found the remote cause to be the dominant cause under the facts of the particular case. *See also Qualls,* 184 N.W.2d at 713 (finding the bite of a wild animal—a remote cause—to be the efficient proximate cause of the death of heifers that died from pseudorabies after being bitten).

In *Vorse v. Jersey Plate Glass Ins. Co.*, 93 N.W. 569 (Iowa 1903), the court considered coverage under a plate glass insurance policy. The policy had an exclusion for loss caused by fire. Plate glass in the insured building shattered following the explosion of gasoline being used within the building for the purpose of cleaning clothes. A match or light in the room ignited the explosion. A fire occurred following the explosion that caused additional damage to the building. The insurer denied coverage, in part, because it determined the damage to the glass occurred due to fire. The court rejected the argument with the following explanation:

> The fire must be shown to be the causa proxima, not the causa remota. If the injury is entirely due to concussion, the fact that it was caused by fire does not make the fire the proximate cause, but the cause of the cause, and consequentially the causa remota, instead of the causa proxima.

Id. at 570. Thus, the court found the cause closest in time to be the dominant cause. *See also Clasing,* 2009 WL 1492044 (finding hyperthermia or suffocation—the cause closest in time to the hogs deaths—to be the efficient proximate cause of the loss rather than the ice storm—a remote cause—

which set in motion the conditions which led to the hyperthermia or suffocation of the hogs).

Applying these principles to the present matter, the court can reach only one conclusion: electrical arcing must be deemed the dominant cause of the loss, and the electrical currents exclusion applies to preclude coverage. Like the fire in *Vorse* and the ice storm in *Clasing*, the squirrel here must be viewed, at best, as a remote cause rather than the dominant cause of the loss. The squirrel did not independently cause any damage to insured property, just as the fire did not damage the plate glass nor did the ice storm kill the hogs. This fact stands in contrast to *Bettis,* where the collision with the culvert caused damage to the front suspension and set in motion the need to tow the vehicle to the shop for repairs. It also stands in contrast to *Qualls* where the bite of the wild animal initially harmed the heifer and allowed for the transmissions of pseudorabies. For these reasons, the Court of Appeals decision affirming the district court's well-reasoned decision granting summary judgment should not be disturbed.

CONCLUSION

For the reasons and authorities herein, West Liberty has failed to articulate any of the substantial grounds specified by the Iowa Rules of Appellate Procedure to warrant further review of the Court of Appeals

decision. Indeed, the decision of the Court of Appeals is consistent with prior decisions of this Court, does not involve substantial questions of constitutional law or changing legal principles, and is not of broad public importance. Accordingly, this Court should deny Plaintiffs' Application for Further Review.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(l) or (2) because:

[x] this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 point and contains 2,839 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(l) or

[ ] this brief has been prepared in a monospaced typeface using [state name of typeface] in [state font size] and contains [state the number of] lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

/s/Sean M. O'Brien
Sean M. O'Brien AT0005874

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of Defendant-Appellant's Resistance to the Application for Further Review was filed with the Clerk of the Iowa

Supreme Court via EDMS and served upon the following persons by EDMS on the 9th day of April, 2018.

/s/ Sean M. O'Brien
Sean M. O'Brien AT0005874

Amber J. Hardin
Stanley, Lande & Hunter, a P.C.
Suite 400, 301 Iowa Avenue
Muscatine, IA 52761

Scott A. Ruksakiati
Thomas A. Vickers
Vanek, Vickers & Masini, P.C.
55 West Monroe, Suite 3500
Chicago, IL 60603

ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost of printing the foregoing resistance was the sum of $ N/A (EDMS).

/s/ Sean M. O'Brien
Sean M. O'Brien AT0005874