IN THE SUPREME COURT OF IOWA

Supreme Court No. 19-1306
Story County No. LACV050943

DEBRA GRIES,

PLAINTIFF-APPELLANT,

v.
AMES ECUMENICAL HOUSING, INC,
d/b/a STONEHAVEN APARTMENTS,

DEFENDANT-APPELLEE.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR STORY COUNTY
THE HONORABLE JAMES A. McGLYNN

APPELLANT'S BRIEF AMENDED

FREDERICK W. JAMES AT0003925
The James Law Firm, P.C.,
2600 Grand Avenue, Suite 213; Des Moines, Iowa 50312
Telephone: (515) 246-8484; Fax: (515) 246-8767
E-mail: frederick@jameslawfirm.com

SHAWN SMITH AT0007367
Shawn Smith, Attorney at Law, PLLC
P.O. Box 523; Ames, Iowa 50010
Telephone: (515) 451-1260; Fax: (866) 864-2503
Email: office@shawnsmithlaw.com

ATTORNEYS FOR PLAINTIFF-APPELLANT

I.
CERTIFICATE OF FILING AND SERVICE

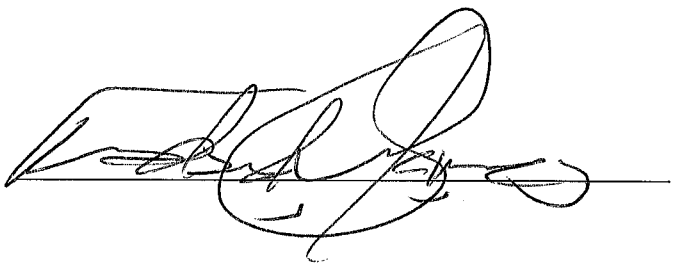
The undersigned certifies that the foregoing instrument was served upon all parties to the above-captioned cause by efiling (EDMS), on the 27th day of December, 2019.

Original filed. (EDMS)

Copies to:

MICHAEL C. RICHARDS
Davis, Brown, Koehn, Shors & Roberts, P.C.
215 10th Street, Suite 1300
Des Moines, Iowa 50309
Telephone: (515) 288-2500
Fax: (515) 243-0654
Email: mikerichards@davisbrownlaw.com
ATTORNEY FOR DEFENDANT-APPELLEE

Supreme Court Clerk
Iowa Judicial Branch Building
1111 East Court Avenue
Des Moines, Iowa 50319



II.
TABLE OF CONTENTS

III.
TABLE OF AUTHORITIES

IOWA CASES

OTHER STATE CASES

COURT RULES

OTHER SOURCES

IV.
STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. THE CONTINUING STORM DOCTRINE SHOULD BE ABANDONED IN LIGHT OF THE IOWA SUPREME COURT'S ADOPTION OF THE RESTATEMENT (THIRD) OF TORTS, LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, SECTION 7

Iowa Cases

Alcala v. Marriott International, Inc., 880 N.W.2d 699 (Iowa 2016)

Reuter v. Iowa Trust & Savings Bank, 244 Iowa 939, 57 N.W.2d 225 (1953)

State v. Merrett, 842 N.W.2d 266 (Iowa 2014)

Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009)

Other State Cases

Agnew v. Dillons, Inc., 822 P.2d 1049 (Kan. Ct. App. 1991)

Fusco v. Stewart's Ice Cream Co., 610 N.Y.S.2d 642 (1994)

Kraus v Newton, 558 A.2d 240 (Conn. 1989)

Laine v. Speedway LLC, 177 A.3d 1227 (Del. 2018)

Mattson v. St. Luke's Hospital of St. Paul,
89 N.W.2d 743 (Minn. 1958)

Walker v. Memorial Hospital, 45 S.E. 2d 898 (Va. 1948)

Other Sources

Restatement (Third) of Torts: Liability for Physical and Emotional Harm, Section 7 (Am. Law Inst. 2012)

Restatement (Third) of Torts: Liability for Physical and Emotional Harm, Section 7, cmt. j (Am. Law Inst. 2012)

B. ALTERNATIVELY, EVEN IF THE CONTINUING STORM DOCTRINE REMAINS VIABLE, ITS APPLICATION TO THE CASE AT BAR IS INAPPROPRIATE

Iowa Cases

Alcala v. Marriott International, Inc., 880 N.W.2d 699 (Iowa 2016)

Buechel v. Five Star Quality Care, Inc., 745 N.W.2d 732 (Iowa 2008)

Hovden v. City of Decorah, 261 Iowa 624, 155 N.W.2d 534 (1968)

Rochford v. G.K. Development, Inc., 845 N.W.2d 715 (Iowa Ct. App. 2014)

Roll v. Newhall, 888 N.W.2d 422 (Iowa 2016)

Wailes v. Hy-Vee, Inc., et al., 861 N.W.2d 262 (Iowa Ct. App. 2014)

Court Rules

Iowa R. Evid. 5.201(b)

C. THE DISTRICT COURT ERRED IN ITS APPLICATION OF THE CONTINUING STORM DOCTRINE TO THE FACTS OF THIS CASE

Iowa Cases

Buechel v. Five Star Quality Care, Inc., 745 N.W.2d 732 (Iowa 2008)

Holliday v. Rain and Hail LLC, 690 N.W.2d 59 (Iowa 2004)

Hovden v. City of Decorah, 261 Iowa 624, 155 N.W.2d 534 (1968)

Iowa Supreme Court Attorney Discipline Board v. Carter, 847 N.W.2d 228 (Iowa 2014)

PMX Industries v. Reich, 834 N.W.2d 872 (Iowa Ct. App. 2013)

Reuter v. Iowa Trust & Savings Bank, 244 Iowa 939, 57 N.W.2d 225 (1953)

Rochford v. G.K. Development, Inc., 845 N.W.2d 715 (Iowa Ct. App. 2014)

Roll v. Newhall, 888 N.W.2d 422 (Iowa 2016)

Wailes v. Hy-Vee, Inc., et al., 861 N.W.2d 262 (Iowa Ct. App. 2014)

Other State Cases

Amos v. NationsBank, N.A., 504 S.E. 2d 365, 367-68 (Va. 1998)

Convertini v. Stewart's Ice Cream Co.,
295 A.D. 2d 782, 743 N.Y.S. 2d 637 (N.Y. App. Div. 2002)

V.
ROUTING STATEMENT

The Iowa Supreme Court should retain jurisdiction of this matter as it presents a substantial issue of first impression with respect to whether the common law continuing storm doctrine should be abandoned in light of the Iowa Supreme Court's adoption of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm, Section 7 (Am. Law. Inst. 2012). *See,* Iowa R. App. P. 6.1101(2)(c). The ultimate answer to this question will have substantial implications, as enunciating and changing legal principles are at issue. *See*, Iowa R. App. P. 6.1101(2)(f).

VI.
STATEMENT OF THE CASE

A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

On August 23, 2018, Plaintiff filed a Petition at Law in the district court for Story County alleging negligence against Defendant for allowing ice to accumulate on its walkway, failing to maintain its premises in a safe condition, failure to treat its walkway when ice was present, failure to warn

its residents of hazardous conditions, failing to properly train its employees who were responsible for ice removal, failure to use ordinary care thereby creating a risk of physical harm and other acts and/or omissions that might constitute negligence as revealed during the discovery process. (***A000006-11)***.

On May 7, 2019, Defendant filed a motion for summary judgment on the entirety of Plaintiff's claim. (***A000119-20***). Plaintiff resisted Defendant's motion, arguing that the continuing storm doctrine should be abandoned in light of the Iowa Supreme Court's adoption of the Restatement (Third) of Torts, Liability for Physical and Emotional Harm, Section 7; alternatively, even if the continuing storm doctrine remains viable, its application to the case at bar is inappropriate, as the weather conditions at the time of Plaintiff's fall did not constitute a "continuing storm"; Defendant owed Plaintiff a duty which it breached; and that questions of material fact existed as to (1) Defendant's knowledge of the risk, (2) Defendant's acts and omissions regarding maintenance of the walkway, (3) the adequacy of Defendant's training of its employees on the walkway's maintenance, and (4) whether Defendant created a hazard by negligently treating the walkway. (***A000147-234***).

B. DISPOSITION OF THE CASE IN THE DISTRICT COURT

On July 7, 2019, the Iowa District Court for Story County, the Honorable James A. McGlynn presiding, granted Defendant's Motion for Summary Judgment. (***A000235-46***). On July 12, 2019, Plaintiff filed a timely Motion for Reconsideration. (***A000247-48***). On July 15, 2019, the district court denied Plaintiff's reconsideration motion. (***A000252-54***). On August 5, 2019, Plaintiff filed a Notice of Appeal. (***A000255-56).***

VII.
STATEMENT OF FACTS

Defendant owned and operated Stonehaven Apartments, located at 421 Stonehaven Drive, Ames, Iowa in Story County. (***A000006, ¶ 3***). The three story, 54-unit residential facility ("the Facility") caters to the needs of senior citizens and those who are mobility impaired. (***A000006, ¶ 4; A000076:16-19, A000076:24-77:1, 9-15; A000096:2-13***). Plaintiff became a resident of the Facility on February 18, 2016 after filling out an application that included, among other information, her employment status. (***A000007, ¶¶ 6, 7; A000049:9-13***). At all times relevant hereto, Plaintiff was employed as a night auditor at a local Ames, Iowa hotel. (***A000008, ¶ 8; A000050:13-22***). Her work hours were from 11:00 p.m. to 7:00 a.m. (***A000008, ¶ 8; A000051:1-5***). She generally took an Ames taxicab to

work from the Facility and back, as she did not have a drivers' license. (***A000008, ¶ 9***).

On February 22, 2018, at approximately 10:34 p.m., Plaintiff slipped and fell on the icy front main walkway of the Facility as she exited the building in order to catch a taxicab to work. (***A000008, ¶¶ 11, 14; A000052:16-22***). The National Oceanic & Atmospheric Administration (NOAA) weather report indicates that on February 22, 2018, the date of Plaintiff's fall, a mere 0.00 to 0.16 inches of rain or melted snow fell and that no snow, ice pellets or hail occurred in the Ames area. (***A000107-18***). The NOAA report indicates that that the weather stations closest to Plaintiff's residence where the fall occurred recorded rain or melted snow precipitation on the date in question in extremely small amounts as follows:

- Station 2.5 W – trace;
- Station .9 ENE – 0.0;
- Station 1.5 NNE - 0.0 inches;
- Station 2.1 N – 0.0 inches;
- Station 5 SE – trace;
- Station 8 WSW - .02 inches;
- Ames Municipal Airport – 0.16 inches.

Id. Stonehaven Apartments are approximately 1.07 nautical miles – as the crow flies - from the Ames Municipal Airport.[1]

As a result of her fall, Plaintiff broke her left ankle, injured other parts of her body, and ultimately was required to endure multiple surgeries for her injuries which are permanent and life-altering in nature and have forced her to limit her activities, lose her employment and suffer on-going pain and disability. (***A000009-10, ¶¶ 15, 18, 19; A000052:7-9, A000058:24-59:19, A000060:9-62:10***).

[1] https://www.cityofames.org/home/showdocument?id=35362

VIII.
ARGUMENT

A. THE CONTINUING STORM DOCTRINE SHOULD BE ABANDONED IN LIGHT OF THE IOWA SUPREME COURT'S ADOPTION OF THE RESTATEMENT (THIRD) OF TORTS, LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, SECTION 7

1. Preservation of Error

On August 5, 2019, Plaintiff filed a timely Notice of Appeal from the district court's July 10, 2019 ruling granting Defendant's Motion for Summary Judgment in this matter. (***A000255-56, A000235-46***).

2. Scope of Review

Questions of law are reviewed de novo. See, i.e. *State v. Merrett,* 842 N.W.2d 266, 272-73 (Iowa 2014).

3. Argument

In *Reuter v. Iowa Trust & Savings Bank*, 244 Iowa 939, 943, 57 N.W.2d 225, 227 (1953), the Iowa Supreme Court adopted the "continuing-storm doctrine", holding that:

> "a business establishment, landlord, carrier, or other inviter, in the absence of unusual circumstances, is permitted to await the end of the storm and a reasonable time thereafter to remove ice and snow from

> an outdoor entrance walk, platform, or steps. The general controlling principle is that changing conditions due to the pending storm render it inexpedient and impracticable to take earlier effective action, and that ordinary care does not require it."

Id.

The doctrine is an exception to a landowner's general duty to use ordinary care to avoid causing harm to others. Recently, however, the continued viability of this rule has been challenged. In *Alcala v. Marriott International, Inc.*, 880 N.W.2d 699 (Iowa 2016), a hotel patron brought a premises liability action against a hotel after she sustained an injury when she slipped and fell on the hotel's icy outdoor walkway. She argued for the first time that in light of the Iowa Supreme Court's adoption of Section 7 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (Am. Law Inst. 2012), the continuing storm doctrine was no longer good law in Iowa. *Id.*, at 711-12.

Section 7 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm states:

> "(a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.
>
> (b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification."

Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 7 (Am. Law Inst. 2012).

The Iowa Supreme Court adopted Section 7 in *Thompson v. Kaczinski*, 774 N.W.2d 829, 834-35 (Iowa 2009), and removed the consideration of foreseeability of risk from the determination of duty in negligence actions. While a lack of foreseeable risk in a specific case may be a basis for a no-breach determination, such a ruling is no longer a no-duty determination. *Id.,* citing Restatement (Third) of Torts: Liability for Physical and Emotional Harm (Am. Law Inst. 2012), § 7, cmt. j (emphasis added). Instead, the assessment of the foreseeability of a risk is allocated by the Restatement (Third) to the fact finder, to be considered when the jury decides if the defendant failed to exercise reasonable care. *Id.*, at 835.

The *Alcala* majority did not reach the issue of whether Section 7 applied in that case. It declined to decide the issue of whether the continuing storm doctrine has been effectively replaced by Section 7, as the parties had not addressed the issue in their appellate briefs or in the district court before the jury was instructed. *Alcala*, 880 N.W.2d 699, 712 (Iowa 2016).[2]

---

[2] But see Hecht, J. dissenting in part, who approved of the district court's decision to decline to instruct the jury on the continuing storm doctrine: "I also conclude the district court correctly declined on this record to submit the instruction proposed by Marriott on the continuing-storm doctrine." *Id.*,

Instead, the Court indicated that it preferred to wait to decide the issue with the benefit of a district court ruling and full adversarial briefing. *Id.* This Court now has before it such an opportunity.

As Section 7 has been affirmatively adopted by the Iowa Supreme Court via the *Thompson* opinion, a solid basis exists for abandoning the continuing storm doctrine in favor of Section 7's newer analysis, which covers any circumstances which might necessitate judicial review for "exceptional cases" in which a duty of care might require modification and provides guidelines for doing so, as opposed to the continuing storm doctrine's narrow application and blanket approval of granting an all-encompassing exception to the rule without consideration of case-specific facts.[3]

---

at 712 (Wiggins and Appel, JJ. joining concurrence in part and dissent in part).

[3] Defendant claimed in its motion for summary judgment that the *Thompson* Court applied the continuing storm doctrine at the same time that it adopted Section 7 represents a serious misreading of that case. *Thompson* did not involve removal of snow and ice after a storm, but the presence of defendant's trampoline in a roadway which was blown there by the wind and which caused the plaintiff motorists' injuries. It did not involve the application of the continuing storm doctrine. The passage Defendant cites reads: "A reasonable fact finder could determine that [defendants] should have known high winds occasionally occur in Iowa in September and a strong gust of wind could displace the unsecured trampoline parts the short distance from the yard to the roadway and endanger motorists. Although they were in their home for several hours after the storm passed and

The district court in the present case chose to use Delaware case law to support its decision to apply the continuing storm doctrine, but a more comprehensive approach is required.[4]

In deciding the present case, the Iowa Supreme Court now has an opportunity to weigh the appropriate factors, consider the progression of the law in other states and to choose to abrogate the continuing storm doctrine in favor of Section 7's negligence standard.

B. ALTERNATIVELY, EVEN IF THE CONTINUING STORM DOCTRINE REMAINS VIABLE, ITS APPLICATION TO THE CASE AT BAR IS INAPPROPRIATE

---

approximately two-and-a-half hours after daybreak, [defendants] did not discover their property on the nearby roadway, remove it, or warn approaching motorists of it. On this record, viewed in the light most favorable to [plaintiffs], we conclude a reasonable fact finder could find the harm suffered by [plaintiffs] resulted from the risks that made the defendants' conduct negligent." *Thompson*, 774 N.W.2d 829, 839 (Iowa 2009). It is difficult to understand how Defendant errantly concluded that the *Thompson* Court had applied the continuing storm doctrine from this language.

[4] *Laine v. Speedway LLC*, 177 A.3d 1227 (Del. 2018) and citing cases. The district court also cited Iowa's *Reuter* case and cited without discussion cases from Connecticut, Minnesota, Virginia, Kansas and New York which have recognized the continuing storm doctrine. *Kraus v Newton*, 558 A.2d 240, 243-44 (Conn. 1989); *Mattson v. St. Luke's Hospital of St. Paul,* 89 N.W.2d 743, 745 (Minn. 1958); *Walker v. Memorial Hospital*, 45 S.E. 2d 898, 902 (Va. 1948); *Agnew v. Dillons, Inc.*, 822 P.2d 1049, 1054 (Kan. Ct. App. 1991); *Fusco v. Stewart's Ice Cream Co.*, 610 N.Y.S.2d 642, 642 (1994).

1. Preservation of Error

On August 5, 2019, Plaintiff filed a timely Notice of Appeal from the district court's July 10, 2019 ruling granting Defendant's Motion for Summary Judgment in this matter. (***A000255-56, A000235-46***).

2. Scope of Review

A district court's ruling on a motion for summary judgment is reviewed for errors at law. *Buechel v. Five Star Quality Care, Inc.*, 745 N.W.2d 732, 735 (Iowa 2008). The Iowa Supreme Court examines the record before the district court to determine whether any material fact is in dispute, and if not, whether the district court correctly applied the law. *Roll v. Newhall*, 888 N.W.2d 422, 425 (Iowa 2016). "We view the record in the light most favorable to the nonmoving party and will grant that party all reasonable inferences that can be drawn from the record." *Id.* (quotation omitted).

3. Argument

In *Alcala*, the district court refused to give a continuing storm jury instruction because it concluded that there was insufficient evidence to support it. *Alcala*, 880 N.W.2d 699 (Iowa 2016). Significantly, and similar

to the weather conditions in the case at bar, it found that trace precipitation and mist do not constitute a "storm" within the plain meaning of the word or under case law applying the continuing storm doctrine. *Id.* It noted that weather records consider "mist" to be an obscuration like fog, not a type of precipitation. *Id.* It also found that witnesses' general testimony about the poor weather and slick conditions on the morning that plaintiff's injury occurred "spoke only to the persisting effects of the storm, not whether it was actively continuing at times relevant to this case." *Id.* This description describes the evidence in this case – namely, minimal precipitation, no accumulation, presence of mist, and a layer of ice which had formed on the walkway well prior to Plaintiff's fall, as opposed to actively accumulating at the time of her injury, which would be required for the continuing storm doctrine to apply.

The *Alcala* Court also pointed out that in cases where the continuing storm doctrine has been applied, snow was actively falling in the areas when the plaintiffs slipped and fell. See i.e. *Wailes v. Hy-Vee, Inc.*, 861 N.W.2d 262, 265-68 (Iowa Ct. App. 2014) (as snow was still falling at the time plaintiff fell, continuing storm doctrine was applicable); *Hovden v. City of Decorah*, 261 Iowa 624, 628, 155 N.W.2d 534, 537 (1968) (snow fell on and off during the morning that plaintiff fell and was still falling immediately

after her fall); *Rochford v. G.K. Development, Inc.,* 845 N.W.2d 715 (Iowa Ct. App. 2014) (undisputed that the plaintiff fell during a freezing rainfall).

Although the record indicates that no active storm – or any precipitation whatsoever – was occurring at the time that Plaintiff fell, Defendant disputes this. Plaintiff testified that as she exited the Facility to catch her taxicab to work that evening sometime between 10:30 p.m. and 10:45 p.m., that it was misting, but not snowing or raining and that there was no snow on the walkway where she fell. (***A000052:16-22, A000053:6-7, A000054:20-55:4, A000056:23-57:2***). Kevin Burkett, the Facility's manager, testified that at the time he arrived home from the Facility, which would have been sometime after 4:00 p.m., he did not believe it was snowing or raining and that it was not snowing or raining when he left the Facility. ***(A000087:4-6, 10-13; A000089:5-9***). Sherri Olive-Webb, a Facility employee, and her husband, Michael Webb, the Facility's contracted maintenance man, testified that they did not recall the weather conditions that day. (***A000093:10-13, A000102:3-7***).

The National Oceanic & Atmospheric Administration's (NOAA) National Environmental Satellite Data and Information Services indicates in its "Record of Climatological Observations" that a mere 0.00 to 0.16 inches

of rain or melted snow fell and that no snow, ice pellets or hail occurred in the Ames area on February 22, 2018. (***A000107-18***).[5] Defendant's expert report states that there were precipitation amounts of 0.21 to 0.32 inches with trace amounts of snow, a brief period of freezing rain over the noon hour and that precipitation in the form of rain beginning between 6 and 7 p.m. which "continued through the end of the day". (***A000105-06***). It acknowledges that there were times during this period when precipitation was not recorded at all. *Id.* Defendant's expert report differs somewhat from the official climatological records of the NOAA and the National Weather Service, creating an issue of material fact. But in any case, even Defendant's own expert report does not present evidence of a "continuing storm" depositing measurable precipitation at the time of Plaintiff's fall that would legally relieve Defendant of its duty to clear the walkway.

[5] The NOAA and National Weather Service reports are self-authenticating government documents not subject to dispute. Therefore, the Court can and should take judicial notice of these documents. See, Iowa R. Evid. 5.201(b): "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.* Official government weather log documents are such sources.

Defendant, however, claimed in its motion for summary judgment - with insufficient support - that the conditions were such that a "continuing storm" did exist at the time of Plaintiff's fall. (***A000125-26***). This is simply not the case. Even Defendant's own statement of undisputed facts, filed in support of its summary judgment motion, indicates that there were only trace amounts of snow recorded and no significant precipitation at all on that day. (***A000128***). This conflicting testimony, as well as the variations in the weather report information present substantial issues of disputed facts which the district court failed to correctly identify.

Additionally, Mr. Burkett testified that if conditions warranted it, he could have called Defendant's third-party snow removal service to clear the Facility's walkways of snow and ice and that it was his, Ms. Olive-Webb or Mr. Webb's responsibility to do so. (***A000075:7-14***).[6] He stated that if more than an inch or two of snow fell, the snow removal service was called to take care of removal. (***A000068:10-13***).

[6] Mr. Webb, however, denied in his deposition testimony that he was responsible for calling the third-party snow removal service. (***A000214:8-14***).

He claimed that this course of action was common knowledge among the Facility's employees. (***A000069:7-9***). Yet, neither Mr. Burkett nor any other Facility employee called the snow removal service on the date that Plaintiff slipped and fell, indicating that the weather conditions were not inclement enough to require such a call.

Significant questions of material fact remain as to whether a "continuing storm" existed at the time Plaintiff slipped and fell so that Defendant was excused from tending to the walkway. Evidence indicates that a continuing storm did not exist at that time and that the ice on the walkway had accumulated well in advance of Plaintiff's fall, invalidating Defendant's excuse for having failed to clear the walkway. However, since Defendant disputes this, a jury should have been allowed to decide the issue.

C. THE DISTRICT COURT ERRED IN ITS APPLICATION OF THE CONTINUING STORM DOCTRINE TO THE FACTS OF THIS CASE

1. Preservation of Error

On August 5, 2019, Plaintiff filed a timely Notice of Appeal from the district court's July 10, 2019 ruling granting Defendant's Motion for Summary Judgment in this matter. (***A000255-56, A000235-46***).

2. Scope of Review

A district court's ruling on a motion for summary judgment is reviewed for errors at law. *Buechel v. Five Star Quality Care, Inc.*, 745 N.W.2d 732, 735 (Iowa 2008). The Iowa Supreme Court examines the record before the district court to determine whether any material fact is in dispute, and if not, whether the district court correctly applied the law. *Roll v. Newhall*, 888 N.W.2d 422, 425 (Iowa 2016). "We view the record in the light most favorable to the nonmoving party and will grant that party all reasonable inferences that can be drawn from the record." *Id.* (quotation omitted).

3. Argument

The district court's Order granting Defendants' summary judgment motion erroneously stated that "[a]t all relevant times on February 22, 2018, Ames, Iowa experienced precipitation in the form of mist, rain, freezing rain and some light snow". This conclusion is incorrect and at the very least a disputed fact. Plaintiff's self-authenticating government weather reports, which may be judicially noticed as previously discussed, which were submitted in support of her resistance to summary judgment show that a mere 0.00 to 0.16 inches of rain or melted snow fell and that ***no*** snow, ice pellets or hail occurred in the Ames area on February 22, 2018. (***A000107-***

18) (emphasis added). To the extent that Defendant challenges this evidence, this fact is disputed and should be viewed in the light most favorable to Plaintiff.

However, the district court compounded its error by misidentifying Defendant's Freese Notis Weather report, submitted as Defendant's Exhibit B in support of its summary judgment motion, as ***Plaintiff's*** exhibit, which it was not[7]. Thus, the district court mistakenly accepted ***Defendant's*** weather report as true instead of Plaintiff's NOAA and National Weather Service reports. (***A000236***). ("For the purposes of this Motion for Summary Judgment, the Court will accept as true Plaintiff's Exhibit B, the report of Dan Hicks of Freese Notis Weather.")

This error drastically altered the district court's analysis. By wrongfully accepting as true that any kind of precipitation heavier than mist was present at the scene of Plaintiff's fall at the time that it occurred, the district court erroneously found that the continuing storm doctrine applied.

For example, the district court identified the "first prong of the resistance" as the assertion that the continuing storm doctrine should not

---

[7] Defendant's Freese Notis Weather report indicated "some light snow" and a "brief period of freezing rain" at the Ames, Iowa airport on February 22, 2018, contrary to the information in Plaintiff's NOAA and National Weather Service reports which indicate no freezing rain or snow on that date at the Ames, Iowa airport. (***A000105-06***).

apply because there was no "continuing storm", but then erroneously identifies Defendant's Freese Notis Weather report ("Exhibit B") as Plaintiff's exhibit as Plaintiff's support for this argument. (***A000238***). This error allowed the district court to erroneously conclude that "...Plaintiff's Exhibit B (which the district court misidentified as Plaintiff's exhibit, but was actually Defendant's exhibit), shows that a winter storm capable of putting ice on hard surfaces occurred over a period of several hours prior to the time of plaintiff's accident and it continued for some point of time after that." (***A000243***).

Nor does it appear that the district court gave any consideration to Plaintiff's additional evidence that no weather event resembling a "continuing storm" was occurring at the relevant time. Plaintiff's testimonial evidence from witnesses weigh heavily in favor of finding that the weather conditions simply did not rise to the level of severity required in order for the doctrine to apply. Yet, the district court's decision is silent as to the existence of this evidence and its conclusion that "[n]o Iowa case addresses how severe or significant the weather event has to be to qualify as

a storm" ignores the Iowa cases that provide guidance with respect to this issue. (***A000239***).[8]

The continuing storm doctrine is an affirmative defense, an exception to the general duty of a property owner to exercise reasonable care in maintaining its walkways free from snow and ice. See, *Reuter*, 244 Iowa 939, 943, 57 N.W.2d 225, 227 (1953). Thus, Defendant bears the burden of proof and must come forward with sufficient evidence to show that the

---

[8] For example, in *Rochford*, 845 N.W.2d 715, 718 (Iowa Ct. App. 2014), the Iowa Court of Appeals cited cases from other jurisdictions that addressed weather severity in relation to application of similar doctrines and then concluded that freezing rain falling at the time of the plaintiff's fall warranted application of the continuing storm doctrine. *Id.*, citing *Convertini v. Stewart's Ice Cream Co.*, 295 A.D. 2d 782, 743 N.Y.S. 2d 637, 638 (N.Y. App. Div. 2002) (court applied "storm in progress" doctrine to dismiss plaintiff's claim on summary judgment where evidence showed "light freezing rain" fell for an hour the morning of the fall and had stopped just twenty minutes before plaintiff fell); *Amos v. NationsBank, N.A.*, 504 S.E. 2d 365, 367-68 (Va. 1998) (where evidence overwhelmingly showed an ongoing ice storm with precipitation falling and freezing on the ground, premises owner was under no duty to remove the ice at the time that plaintiff fell).

Iowa cases which have applied the continuing storm doctrine have, in fact, discussed the level of weather severity which constitute a "storm" under the doctrine. See, i.e. *Wailes,* 861 N.W.2d 262, 265-68 (Iowa Ct. App. 2014) (snow was falling at the time plaintiff fell); *Hovden*, 261 Iowa 624, 628, 155 N.W.2d 534, 537 (1968) (snow fell on and off during the morning that plaintiff fell and was still falling immediately after her fall); *Rochford,* 845 N.W.2d 715 (Iowa Ct. App. 2014) (fall occurred during a freezing rainfall).

doctrine applies. See, i.e. *Iowa Supreme Court Attorney Discipline Board v. Carter*, 847 N.W.2d 228, 232 (Iowa 2014) (a defendant normally bears the burden of proof on an affirmative defense in a civil matter) (citations omitted); *Holliday v. Rain and Hail LLC*, 690 N.W.2d 59, 64-65 (Iowa 2004) (defendant asserting affirmative defense required to prove its elements); *PMX Industries v. Reich*, 834 N.W.2d 872 (Iowa Ct. App. 2013) (defendant had the burden of proof on its affirmative defense in appeal of an award of workers' compensation benefits). As it has not done so, its burden has not been met and the affirmative defense should not be allowed.

Significant questions of material fact remain as to whether a "continuing storm" existed at the time Plaintiff slipped and fell so that Defendant was excused from tending its walkway. Evidence indicates that a continuing storm ***did not*** exist at that time and that the ice on the walkway had accumulated well in advance of Plaintiff's fall, invalidating Defendant's excuse for having failed to clear the walkway. However, since Defendant disputed this, a jury should have been allowed to decide the issue. Summary judgment was inappropriate.

IX.
CONCLUSION

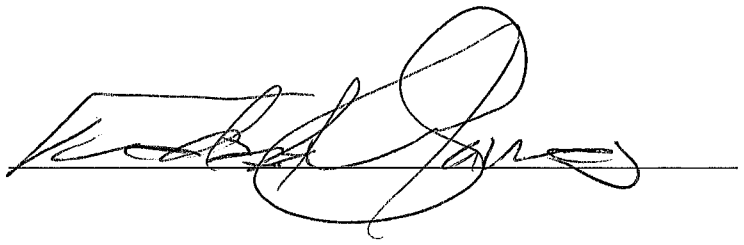
For all of these reasons, Plaintiff urges this Court to find that the district court erred in granting Defendant's Motion for Summary Judgment and to further find that the continuing storm doctrine should be abandoned in light of the Iowa Supreme Court's adoption of the Restatement (Third) of Torts, Liability for Physical and Emotional Harm, Section 7.

X.
REQUEST FOR ORAL ARGUMENT

Plaintiff hereby requests oral argument.

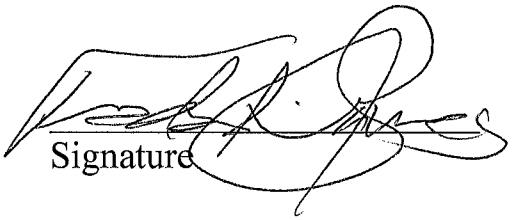
XI.
CERTIFICATE OF COST

I hereby certify that the cost of printing the foregoing Brief of Plaintiff-Appellant was $0.



XII.
CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point and contains 4,393 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).



Signature

20th December 2015

Date