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 REPLY BRIEF AMENDED

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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)

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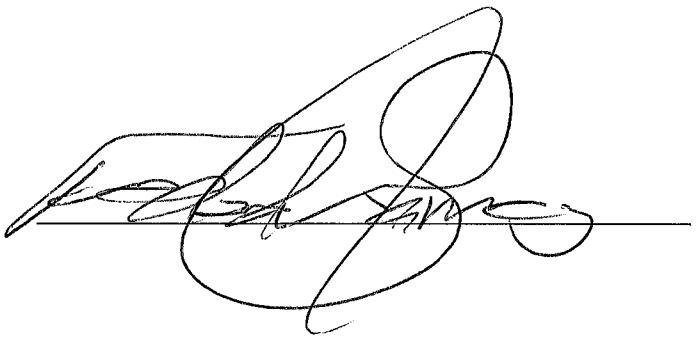

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A. THE CONTINUING STORM DOCTRINE SHOULD BE ABANDONED IN LIGHT OF THE IOWA SUPREME COURT'S ADOPTION OF THE RESTATEMENT (THIRD) OF TORTS, LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, SECTION 7

Plaintiff does not argue, as Defendant incorrectly asserts, that the Iowa Supreme Court's adoption of Section 7 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm in *Thompson v. Kaczinski,* 774 N.W.2d 829 (Iowa 2009) abrogated the continuing storm doctrine. (D's brief, p. 12). Instead, Plaintiff argues that since Section 7 has been affirmatively adopted by the Court, a solid basis now exists for abandoning the continuing storm doctrine, which is the decision Plaintiff asks this Court to make today.

In light of Section 7's adoption, the continuing storm doctrine is simply no longer necessary for applying a duty-of-reasonable-care analysis. Section 7 makes it clear that this duty exists when an actor's conduct creates a risk of physical harm. Restatement (Third) of Torts: Liability for Physical and Emotional Harm, Section 7(a) (Am Law. Inst. 2012). It also provides that in exceptional cases, a court may decide that no duty existed or that the duty should be modified. *Id.,* at Section 7(b). This may be appropriate

"when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases". *Id.*

Significant differences exist between the continuing storm doctrine and Section 7 which warrant abandoning the doctrine in favor of Section 7. Unlike the continuing storm doctrine, Section 7's general duty analysis can be applied to a wide range of circumstances in which physical harm occurs, including where an individual is injured on snow or ice-covered walkways. Moreover, Section 7 differs from the continuing storm doctrine, in that it removes the element of foreseeability from the consideration of whether a duty exists. Due to its broad applicability Section 7 eliminates the need for the much more narrow continuing storm doctrine. It also provides an updated analysis of existence of duty which excludes the foreseeability of risk as a factor in establishing duty. As Section 7 is applicable to snow and ice injuries and because it changes the existence-of-duty analysis, the continuing storm doctrine should be abandoned in favor of Section 7.

Plaintiff does not argue that the policy considerations associated with the continuing storm doctrine are invalid. The basic principle of the doctrine that an on-going storm may render it inexpedient or impractical for a property owner to take immediate action with respect to clearing walkways is not in dispute. Certainly, under appropriate circumstances a court may

decide to excuse or modify a property owner's duty, pursuant to Section 7(b)'s "exceptional cases". The Court's adoption of Section 7 does not foreclose a property owner's ability to present a defense that weather conditions prevented timely removal of snow and ice. The doctrine itself, however, should, be replaced by Section 7's updated duty analysis.

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

Defendant endeavors to convince this Court that accumulation-depositing storm was in progress during the time that Plaintiff fell which prevented it from clearing its walks. However, all evidence in the records suggests otherwise. Plaintiff slipped on ice that had ***previously accumulated***. Previously accumulated snow or ice does not qualify as a "continuing storm". Moreover, at the time of her fall, it was misting, which leaves no accumulation. It was not snowing. Freezing rain was not falling. No weather-related incident prevented Defendant from clearing its walkway at the time of Plaintiff's fall.

Mist can in no way be categorized as a "continuing storm" under Iowa law and, thus, does not allow for the application of the doctrine. See, *Alcala v. Marriott International, Inc.*, 880 N.W.2d 699, 711 (Iowa 2016). In other words, precipitation which has the capacity to build up on a walkway, such

as snow, ice or freezing rain, was not actively falling or accumulating at Plaintiff's location at the time that she was injured. Therefore, the continuing storm doctrine does not apply.[1]

The official climatological weather records indicate that 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). Defendant's hired expert claims trace amounts of snow and a brief period of freezing rain over the noon hour, along with rain beginning between 6 p.m. and 7 p.m. (***A000105-06***). This contradicts the self-authenticating information in the government records. Moreover, Defendant's expert's report contains no evidence of a "continuing storm" depositing measurable precipitation at the time and location of Plaintiff's fall that would legally relieve Defendant of its duty to clear the walkway.

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[1] Defendant repeatedly cites *Rochford v. G.K. Development, Inc.*, 845 N.W.2d 715 (Iowa Ct. App. 2014) to support its position. But *Rochford* is distinguishable because in that case it was undisputed that the plaintiff fell during a freezing rainfall (an on-going storm creating accumulation).

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

Defendant's claim that "[w]eather reports and evidence submitted by both Plaintiff and Defendant prove that a storm existed at the time of Plaintiff's injuries" is demonstrably false. (D's brief, p. 21). The official government records show that ***no*** snow, ice pellets or hail occurred in the Ames area on February 22, 2018, only 0.00 to 0.16 inches of rain or melted snow. (***A000107-18***) (emphasis added). Rain, melted snow and mist do not leave an accumulation and do not constitute a "continuing storm". To the extent that Defendant challenges this evidence, this fact is disputed and should be viewed in the light most favorable to Plaintiff.

The district court's misidentification of Defendant's hired expert's report as Plaintiff's exhibit was a material error which affected the outcome of this case.[2] The district court mistakenly accepted Defendant's hired expert's weather report as true instead of Plaintiff's NOAA and National Weather Service reports. (***A000235-46***). As previously discussed, the official government records and Defendant's hired expert's report are at

[2] An issue is "material" if it might affect the outcome of the suit. *C & J Vantage Leasing Co. v. Outlook Farm Golf Club, LLC*, 784 N.W.2d 753, 756 (Iowa 2010).

odds. The district court should have accepted ***Plaintiff's*** weather report exhibits as true, as (1) they are the official, self-authenticating government documents and (2) every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party. *Scheckel v. Jackson County*, 467 N.W.2d 286, 289 (Iowa Ct. App. 1991). If reasonable minds can differ on how a material fact issue should be resolved, summary judgment should not be granted. *Feld v. Borkowski,* 790 N.W.2d 72, 75 (Iowa 2010).

Defendant's statement that "Plaintiff's own deposition testimony evidence that misting rain occurred at the time of her fall, which was freezing on the sidewalk" is a gross misrepresentation. (D's brief, p. 22). Plaintiff testified only that it was misting at the time that she fell. She ***did not*** testify that "misting rain" was present or that it was "freezing on the sidewalk", as Defendant alleges.

The district court's error was not harmless, as Defendant contends. (D's brief, p. 22). It directly resulted in the district court's decision to grant summary judgment, effectively extinguishing Plaintiff's claim. If Defendant wishes to claim harmless error, as is the case with an affirmative defense, it must prove it. See, i.e. *Rivera v. Woodward Resource Center*, 865 N.W.2d 887, 903 (Iowa 2015) (discussing non-constitutional trial errors-challenge to

jury instruction; burden to show harmless error is generally placed upon the party claiming harmlessness); i.e., *Holliday v. Rain and Hail LLC*, 690 N.W.2d 59, 63-65 (Iowa 2003) (burden of proof regarding an affirmative defense is on the party alleging such defense).

The Iowa Supreme Court has stated:

> "Where a nonconstitutional error [is] claimed, the test for determining whether the evidence [is] prejudicial and therefore require[s] reversal [is] this: 'Does it sufficiently appear that the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice?'"

State v. Ness, 907 N.W.2d 484, 488 (Iowa 2018) (where defendant contended district court erred in admitting results of a breath test) (citations omitted). In many cases, courts simply assume prejudice unless the record affirmatively establishes that none existed. *Rivera*, 865 N.W.2d 887, 903 (Iowa 2015), citing *State v. Hanes*, 790 N.W.2d 545, 550 (Iowa 2010); see also, *Rutten v. Investors Life Insurance Co. of Iowa*, 258, Iowa 140 N.W.2d 101, 107 (Iowa 1966) ("[W]hen error appears prejudice will be presumed, until the contrary affirmatively appears.") (discussing errors in exclusion of evidence); *Herold v. Shagnasty's, Inc.*, No. 4-394/03-0894 (Iowa Ct. App. 9/9/04) (unreported) (party claiming harmless error must affirmatively establish absence of prejudice, discussing erroneous admission of hearsay).

"Harmless error may be found, for example, if the record affirmatively establishes that a party has not been injuriously affected by the alleged error or that there has not been a miscarriage of justice." *State v. Hanes*, 790 N.W.2d 545, 550 (Iowa 2010). Where an error affects a successful party, application of the doctrine is relatively straightforward. *Rivera*, 865 N.W.2d 887, 903 (Iowa 2015). Any error is clearly harmless and reversal is not required. *Id.* (citations omitted). However, where the alleged error affects an unsuccessful party, injury and injustice must be analyzed. Prejudicial error must be reversed. See, i.e. *Koenig v. Koenig*, 766 N.W.2d 635, 637 (Iowa 2009) (discussing jury instruction error).

In this case, summary judgment was entered against Plaintiff based upon the incorrect identification of a critical exhibit. But for this misidentification, the trial court would have afforded Plaintiff, as the non-moving party, the inference that her weather records – not Defendant's expert's report - were correct. Plaintiff's substantial rights were affected by this error. It was the exact opposite of harmless and warrants reversal.

V.
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.

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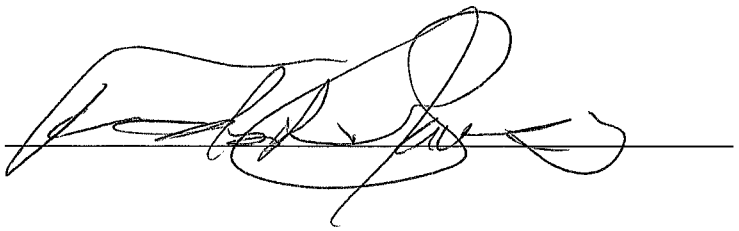
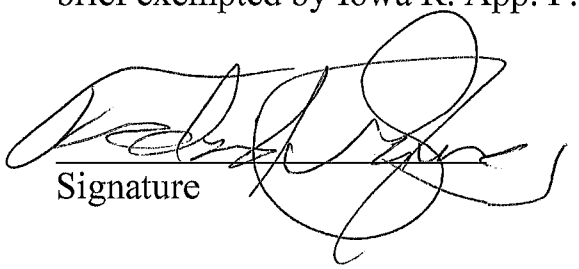
VI.
CERTIFICATE OF COST

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



VII.
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 1,702 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).



Signature

27th December 2017
Date