IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 19-1306

DEBRA GRIES,
Plaintiff-Appellant,

v.

AMES ECUMENICAL HOUSING, INC., d/b/a STONEHAVEN APARTMENTS,
Defendant-Appellee.

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

APPELLEE'S FINAL BRIEF AND ARGUMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Statutes:

Miscellaneous:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE CONTINUING STORM DOCTRINE WAS ABROGATED BY THE IOWA SUPREME COURT'S ADOPTION OF THE RESTATEMENT (THIRD) OF TORTS, LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, SECTION 7.

Alacla v. Marriot International Inc., 880 N.W.2d 699, 712 (Iowa 2016)
Chariton Feed & Grain, Inc. v. Harder, 369 N.W.2d 777, 782 (Iowa 1985); Iowa R. App. P. 6.907
Reuter v. Iowa Trust & Sav. Bank, 244 Iowa 939, 57 N.W.2d 225 (1953)
Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009)

II. WHETHER THE CONTINUING STORM DOCTRINE APPLIES TO THE FACTS OF THIS CASE.

Glover v. Botsford, 109 A.D.3d 1182, 971 N.Y.S.2d 771, 772 (N.Y.App.Div.2013)
Mason v. Vision Iowa Bd., 700 N.W.2d 349, 353 (Iowa 2005)
Rochford v. G.K. Development, Inc., 845 N.W.2d 715, 718 (Iowa Ct. App. 2014)

III. WHETHER THE DISTRICT COURT WAS CORRECT IN APPLYING THE CONTINUING STORM DOCTRINE TO THE FACTS OF THIS CASE.

Mason v. Vision Iowa Bd., 700 N.W.2d 349, 353 (Iowa 2005)

ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals because it presents the application of settled law and existing legal principles. Iowa R. App. P. 6.1101(3)(a) (2018).

STATEMENT OF THE CASE

Appellant-Plaintiff, Debra Gries, ("Plaintiff") filed her Petition at Law on August 23, 2018 alleging negligence against Appellee-Defendant, Ames Ecumenical Housing, Inc., d/b/a Stonehaven Apartments ("Defendant"). Plaintiff alleged that Defendant was negligent in the following ways: allowing ice to accumulate on its walkway, failing to maintain its premises in a safe condition, failure to treat its walkways when ice was present, failing to warn residents of hazardous conditions existing at the time, failing to properly train employees responsible for ice removal, and failing to exercise ordinary care. (Petition at Law, APP 6–11).

On May 7, 2019, Defendant filed a Motion for Summary Judgment arguing Defendant is immune from liability under the continuing storm doctrine. (Defendant's Motion for Summary Judgment, APP 119–120). Plaintiff Resisted Defendant's Motion for Summary Judgment on May 20, 2019, arguing the continuing storm doctrine should be abandoned given the Iowa Supreme Court's adoption of the Restatement (Third) of Torts, Section 7, (the "Restatement") and that even if the continuing storm doctrine remained viable, the application to the facts of this case is inappropriate. (Plaintiff's Brief supporting its Resistance, APP 155–161). Defendant filed its Reply to Plaintiff's Resistance on May 28 arguing that the continuing

storm doctrine and the Restatement are in complete harmony, thus, the Court did not abrogate the continuing storm when adopting the Restatement.

The Iowa District Court for Story County, the Honorable James A. McGlynn presiding, heard arguments on June 24, 2019.[1] On July 10, 2019, the Court granted Defendant's Motion for Summary Judgement in its entirety and concluded that the continuing storm doctrine applied and relieved Defendant of liability from Plaintiff's claims. (Order Granting Defense Motion for Summary Judgment, APP 243–244). The Court also highlighted other jurisdictions that have considered whether the continuing storm doctrine should be abrogated and cited legal rationales and public policy reasons as to why the doctrine should remain intact. (Order Granting Defense Motion for Summary Judgment, APP 239–246).

On July 12, 2019, Plaintiff filed a Motion to Reconsider the Court's Order Granting Defense Motion for Summary Judgment stating that the Court incorrectly referenced Exhibit B, the Report of Dan Hicks, as an exhibit submitted by Plaintiff. (Motion to Reconsider the Court's Order Granting Defense Motion for Summary Judgment, APP 247). On July 15, 2019, Defendant filed a Reply to Plaintiff's Motion to Reconsider noting that evidence submitted by Plaintiff was clear that a storm was existing at

[1] Plaintiff's Proof Brief erroneously states arguments were heard on July 7, 2019.

the time, thus, the Court's mislabeling of which party filed Exhibit B was a harmless error. (Defendant's Reply to Plaintiff's Motion to Reconsider, APP 249–250). The Court issued its Order denying Plaintiff's Motion to Reconsider and leaving its Order granting summary judgment in favor of Defendant undisturbed. (District Court Order denying Plaintiff's Motion for Reconsideration, APP 252–253). Plaintiff filed a Notice of Appeal on August 5, 2019. (Notice of Appeal, APP 255).

STATEMENT OF THE FACTS

On February 22, 2018, while exiting 421 Stonehaven Drive in Ames and walking to a taxi cab, Plaintiff slipped and fell on the sidewalk. (Petition at Law, ¶ 11, 14, APP 8). For the twenty-four (24) hour weather reporting period surrounding February 22, 2018, Ames experienced precipitation. (Defendant's Statement of Undisputed Facts ¶ 3 and Exhibits A-D, Ex. B, APP 128, 137–138). At the time Plaintiff fell, there was precipitation in the form of misting rain that formed ice on the ground. (Defendant's Statement of Undisputed Facts ¶ 6 and Exhibits A-D, Ex. C, D, APP 129, 139–141, 144). Plaintiff testified that she could tell that the sidewalk was wet and icy, and she slipped on ice that had already formed. (Defendant's Statement of Undisputed Facts ¶ 7 and Exhibits A-D, Ex. D, APP 129, 145).

Precipitation during that period was in the range of 0.21 to 0.32 inches, with some trace amounts of snow reports. (Defendant's Statement of Undisputed Facts ¶ 3 and Exhibits A-D, Ex. B, APP 128, 137–138). The temperatures in Ames on February 22, 2018 were recorded as a high of 33 degrees and a low of 10- degrees Fahrenheit according to Plaintiff's Petition, or 23-degrees Fahrenheit according to Defendant's expert report. (Petition at Law, ¶10, APP 8; Defendant's Statement of Undisputed Facts ¶ 4 and

Exhibits A-D, Ex. A–B, APP 128, 131–138). Throughout the day of February 22, 2018, precipitation fell in the form of light snow in the morning and freezing rain in the afternoon. (Defendant's Statement of Undisputed Facts ¶ 5 and Exhibits A-D, Ex. B, APP 129, 137–138). Precipitation also fell in the evening and continued through the end of the day. (Defendant's Statement of Undisputed Facts ¶ 5 and Exhibits A-D, Ex. D, APP 129, 144–145). The weather information was taken from a nearby whether observation post in Ames, Iowa, which is considered evidence that is "competent and relevant" for the purpose of showing weather conditions during the reported times. *Alcala*, 880 N.W.2d at 722 (Hecht, J. dissenting) (citing *Huston v. City of Council Bluffs*, 101 Iowa 33, 39, 69 N.W. 1130, 1131 (1897)). Furthermore, Plaintiff confirmed that the freezing rain and mist was continuing at the time of her fall. (Defendant's Statement of Undisputed Facts ¶ 6 and Exhibits A-D, Ex. D, APP 129, 144–145).

ARGUMENT

I. THE CONTINUING STORM WAS NOT ABROGATED BY THE IOWA SUPREME COURT'S ADOPTION OF THE RESTATEMENT (THIRD) OF TORTS, LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, SECTION 7.

Scope and Standard of Review

Defendant agrees that Plaintiff preserved error on this issue for appeal. Questions of law are reviewed for correction of errors at law. *Chariton Feed & Grain, Inc. v. Harder*, 369 N.W.2d 777, 782 (Iowa 1985); Iowa R. App. P. 6.907.

Argument

The continuing storm doctrine was first adopted by the Iowa Supreme Court in *Reuter v. Iowa Trust & Sav. Bank*, 244 Iowa 939, 57 N.W.2d 225 (1953). The Court stated that a landlord 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." *Reuter*, 244 Iowa at 943, 57 N.W.2d at 227 (internal citations omitted).

Plaintiff argues that the Court's adoption of the Restatement in *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009) abrogated the continuing storm doctrine. The Restatement states, "an actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm," however, the Court noted that "in exceptional cases, the

general duty to exercise reasonable care can be displaced or modified." Restatement (Third) of Torts: Liab. for Physical Harm § 7(a); *Thompson*, 774 N.W.2d at 835 (Iowa 2009). The continuing storm doctrine has been good law in Iowa since 1953 and has been affirmed by Iowa appellate courts as recently as 2014, well after the adoption of *Thompson v. Kaczinski* in 2009. (*See Rochford v. G.K. Development, Inc.*, 845 N.W.2d 715, 718 (Iowa Ct. App. 2014)).

The Restatement and the continuing storm doctrine are not in conflict—the continuing storm doctrine merely modifies, identifies, or clarifies what constitutes reasonable care during a storm and suspends certain conduct or actions due to the circumstances. *See Alacla v. Marriot International Inc.*, 880 N.W.2d 699, 712 (Iowa 2016) (stating "The continuing-storm doctrine suspends a property owner's general duty to exercise reasonable care in warning of or removing snow and ice hazards until a reasonable time after the storm because continually clearing ice and snow during an ongoing storm would be impracticable.").

Though the Restatement has been affirmatively adopted by the Iowa Supreme Court, there is no basis for abandoning the continuing storm doctrine. Plaintiff suggests that the Restatement's "newer analysis" is in conflict with the continuing storm doctrine, however, as detailed herein, the

doctrine and the Restatement are in harmony. The only "newer analysis" referenced by Plaintiff is regarding the Restatement's abandonment of the foreseeability consideration, which has no bearing on the continuing storm doctrine. Moreover, as this court has made clear, the *Thompson* opinion did not alter or erase the pre-existing principle of law that a lack of duty may be found if either the relationship between the parties or public considerations warrant such a conclusion. *McCormick v. Nikkel & Assocs., Inc.*, 819 N.W.2d 368, 371 (Iowa 2012). The continuing storm doctrine is in perfect harmony with this principle.

Plaintiff also erroneously categorizes the continuing storm doctrine as an "all-encompassing exception to the rule without consideration of case-specific facts." (Plaintiff's Brief, p. 17). Courts certainly consider case-specific facts when determining whether to apply the continuing storm doctrine, specifically, whether weather conditions existed sufficient to constitute a storm and whether said storm continued at the time of Plaintiff's injuries. The doctrine is also not an "all encompassing exception." It only applies in situations where a storm existed at the time a person becomes injured. The doctrine does not apply to shield landowners from liability from injury occurring due to snow or ice accumulation well *after* a storm

subsides. The continuing storm doctrine is a narrow exception that is applied on a case-by-case basis.

a) Alternatively, The Doctrine Fits The Exception To The General Duty Detailed In The Restatement.

Alternatively, the continuing storm doctrine would fit the exception to the general duty detailed in the Restatement. The Court in *Thompson* noted that the Restatement defines an exceptional case as one in which "an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases." Restatement (Third) of Torts: Liab. for Physical Harm § 7(b). The District Court's Order granting Defendant's Motion for Summary Judgment highlighted the principles and strong policy considerations justifying the continuing storm doctrine as an exemption from the duty to exercise reasonable care. With regards to the principle behind the doctrine, the District Court explained, "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." (Order Granting Defense Motion for Summary Judgment, p. 4, APP 235–245).

In *Reuter,* this Court also referred to the continuing storm doctrine as a "sensible and correct rule to apply to cases." 244 Iowa at 943, 57 N.W.2d at 227. There, the Court was clear as to the controlling principle for

applying the doctrine: "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*. (citing with approval *Walker v. Memorial Hospital*, 187 Va. 5, 45 S.E.2d 898, 902). Thus, a principle clearly justifies the exemption from the duty to exercise reasonable care.

Regarding public policy considerations, the District Court cited to the Supreme Court of Delaware to illustrate two important public policy considerations supporting why the continuing storm doctrine should not be abrogated: 1) people traveling during weather events benefit from businesses such as gas stations and pharmacies being open during such time, and abrogating the continuing storm doctrine may lead businesses to shut down in fear of suits over how often a landowner must shovel or salt during an active storm; and 2) some injuries are not the legal fault of anyone and are sometimes just the result of the reality that "nothing in life is entirely safe." (Order Granting Defense Motion for Summary Judgment, p. 8, APP 242; (citing *Laine vs. Speedway LLC*, 177 A.3d 1227 (2018)). As the trial court correctly pointed out, strong policy considerations justify the exemption from the duty to exercise reasonable care.

The Court's adoption of the Restatement does not conflict with the continuing storm doctrine. The doctrine is in harmony with the Restatement because it merely modifies what "reasonable care" is required during the pendency of the storm. It does not eliminate the duty, it simply defines what care is reasonable. Alternatively, the Restatement provides exemptions from the duty to exercise reasonable care and the continuing storm doctrine. Defendant respectfully requests that the Court affirm the viability of the continuing storm doctrine.

II. THE CONTINUING STORM DOCTRINE APPLIES TO THE FACTS OF THIS CASE.

Scope and Standard of Review

Defendant agrees that Plaintiff preserved error on this issue for appeal. "The standard of review for district court rulings on summary judgment is for correction of errors of law." *Mason v. Vision Iowa Bd.*, 700 N.W.2d 349, 353 (Iowa 2005).

Argument

In *Rochford v. G.K. Development, Inc.*, the Iowa Court of Appeals stated that the continuing storm doctrine "is not limited to situations where blizzard conditions exist; it also applies in situations where there is some type of less severe, yet still inclement weather." 845 N.W.2d 715, 718 (Iowa Ct. App. 2014). The continuing storm doctrine is equally applicable during

freezing rain or freezing drizzle. *Id*. (citing *Glover v. Botsford,* 109 A.D.3d 1182, 971 N.Y.S.2d 771, 772 (N.Y.App.Div.2013) (applying the "storm in progress" rule where the evidence showed "light freezing rain.") and *Amos v. NationsBank, N.A.,* 256 Va. 344, 504 S.E.2d 365, 367–68 (1998) (affirming the application of the continuing storm doctrine during light freezing drizzle)).

On the day of Plaintiff's fall, some amount of accumulation was recorded, and at the time of Plaintiff's fall, Plaintiff stated it was misting. (Defendant's Statement of Undisputed Facts ¶ 6 and Exhibits A-D, Ex. D, APP 129, 144–145). In *Alacla*, the Court noted that the Court of Appeals' holding in *Rochford* "does not clearly extend to mist or other precipitation *leaving no accumulation*." 880 N.W.2d at 711 (emphasis added). This is not to say that the doctrine does not apply when precipitation in the form of mist is present. The key question is whether precipitation causing accumulation of snow or ice existed.

Though the weather on February 22, 2018 was not of blizzard conditions, there existed ongoing precipitation classified as "mist" by Plaintiff, and weather reports show that 0.21 to 0.32 inches of precipitation were recorded. (Defendant's Statement of Undisputed Facts ¶ 3 and Exhibits A-D, Ex. A–B, APP 128, 131–138). Additionally, it is clear that

there was an accumulation caused by the precipitation, given that Plaintiff slipped on ice. (Defendant's Statement of Undisputed Facts ¶ 7 and Exhibits A-D, Ex. D, APP 129, 144–145). Plaintiff testified that she could tell that the sidewalk was wet and icy, and she slipped on ice that had already formed from the mist. (Defendant's Statement of Undisputed Facts ¶¶ 6–7 and Exhibits A-D, Ex. C–D, APP 129, 139–145).

Plaintiff attempts to generate a genuine issue of fact as to whether a storm was continuing at the time of Plaintiff's fall, however, Plaintiff's argument is guided by a misunderstanding of the standard applicable to the continuing storm doctrine. Plaintiff states "no significant precipitation fell on that day," however, the standard is not whether "significant precipitation" fell. As noted above, Iowa courts have specifically stated that the doctrine is not limited to situations where blizzard conditions exist; it also applies in situations where there is some type of *less severe*, yet still inclement winter weather. *See* e.g. *Rochford*, 845 N.W.2d at 718 (applying the continuing storm doctrine to freezing rain.). It is clear that precipitation fell on February 22, 2018 and continued through the following day. (Plaintiff's Statement of Undisputed Facts and Exhibits 1-8, at Exhibit 7, APP 109–118). Thus, it would have been inexpedient for Defendant to remove the ice that was accumulating when ice would continue to accumulate due to

weather conditions. Since precipitation and accumulation continued to occur at the time of Plaintiff's fall, and continued even into the following date, the continuing storm doctrine applies to Plaintiff's claims.

Plaintiff argues that the fact the Defendant did not call their third-party snow removal company on the night of Plaintiff's fall evidences that the weather conditions were not severe enough to warrant it, thus there was no continuing storm. Whether or not the snow removal company was called is irrelevant as to whether or not a storm was continuing at the time of Plaintiff's fall. The only relevant facts to this analysis are those pertaining to the actual weather conditions themselves, not collateral matters or actions. Since the continuing storm doctrine applied, Defendant was under no duty to call a snow removal company or otherwise remove snow or ice from its premises. *See Rochford*, 845 N.W.2d at 717.

III. THE DISTRICT COURT WAS CORRECT IN APPLYING THE CONTINUING STORM DOCTRINE TO THE FACTS OF THIS CASE.

Scope and Standard of Review

Defendant agrees that Plaintiff preserved error on this issue for appeal. "The standard of review for district court rulings on summary judgment is for correction of errors of law." *Mason*, 700 N.W.2d at 353 (Iowa 2005).

Argument

Weather reports and evidence submitted by both Plaintiff and Defendant prove that a storm existed at the time of Plaintiff's injuries. The District Court noted that the weather reports submitted by Plaintiff and Defendant "do not really contradict each other in any material way." (District Court's Order denying Plaintiff's Motion for Reconsideration, APP 252–253). Thus, there is no dispute of fact. Evidence submitted by both Plaintiff and Defendant show that there was precipitation in some form on the date in question. Plaintiff's evidence showed that up to 0.16 inches of rain or melted snow fell and that ice accumulated, as Plaintiff slipped on the accumulation of ice. (Plaintiff's Statement of Undisputed Facts and Exhibits 1-8, Ex. 7 APP 109–118). Defendant agrees that precipitation was present, and ice accumulated. (Defendant's Statement of Undisputed Facts ¶¶ 6–7 and Exhibits A-D, Ex. C–D. APP 129, 139–145). The only dispute between Plaintiff and Defendant is whether the weather conditions present constituted a storm, which is a question of law, and not fact, and a question which the District Court resolved in Defendant's favor. Weather conditions need not be a blizzard. There need only be precipitation and accumulation, both of which occurred on the date of Plaintiff's fall.

Plaintiff argues that the District Court's grant of summary judgment was in error because the court misidentified Defendant's Exhibit B, which was an expert report authored by Dan Hicks, as an exhibit submitted by Plaintiff. Such an error was harmless. Plaintiff's evidence showed that precipitation fell at some point throughout the day. (Plaintiff's Statement of Undisputed Facts and Exhibits 1-8, at Exhibits 6, 7 APP 107–118). Plaintiff's own deposition testimony evidences that misting rain occurred at the time of her fall, which was freezing on the sidewalk. (Defendant's Statement of Undisputed Facts and Exhibits A-D, Exhibit D, APP 144–145). In its Order denying Plaintiff's Motion to Reconsider, the Court made clear that "The Court continues to find that it is an undisputed fact that at all relevant times and at the location of plaintiff's apartment the air temperature fluctuated above and below the freezing point and there was a continuous period of some form of precipitation falling." (District Court's Order denying Plaintiff's Motion for Reconsideration, APP 252–253). Therefore, the Court's error in referring to Defendant's exhibit as Plaintiff's did not alter the District Court's analysis, which was further clarified by the Court in its ruling on the Plaintiff's motion to reconsider.

No genuine issue of material fact existed to render the District Court's grant of Defendant's Motion for Summary Judgment an error.

CONCLUSION

The continuing storm doctrine and the Restatement are in complete harmony. Alternatively, the Restatement supports the continued application of the continuing storm doctrine due to supported principles and strong public policy considerations. The continuing storm doctrine was appropriately applied to the facts of this case, and as no genuine issue of material fact existed to preclude a grant of summary judgment, the District Court did not err in granting Defendant's Motion for Summary Judgment.

REQUEST FOR NON-ORAL SUBMISSION

Defendant believes this case can be decided on the briefs without the assistance of oral argument. However, if oral argument is granted, the Defendant requests the opportunity to be heard.

CERTIFICATE OF COST

The undersigned certifies that the cost of printing and duplicating necessary copies of this brief was $0.00.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 3,362 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2016 in Times New Roman, 14-point font.

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CERTIFICATE OF FILING

The undersigned certifies that on December 30, 2019, Appellee's Final Brief was filed with the clerk of the Iowa Supreme Court using the EDMS system.

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