THE SUPREME COURT OF IOWA

Supreme Court No. 22-0917

Blackhawk County No. LACV141273

RON MEYERS,

Petitioner-Appellant

vs.

CITY OF CEDAR FALLS, IOWA,

Respondent-Appellee

APPEAL FROM THE IOWA DISTRICT COURT FOR BLACKHAWK COUNTY

THE HONORABLE JOEL DALRYMPLE

PETITIONER-APPELLANT FINAL BRIEF

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ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals because it requires the application of existing legal principals. Iowa R. App. P. 6.1101(3) (a-b). This appeal does not present a substantial issue of first impression. The district court misapplied existing law on whether Plaintiff-Appellant generated a genuine dispute of material fact regarding Defendant-Appellee's knowledge of the condition of the diving board.

STATEMENT OF THE CASE

Plaintiff-Appellant Ron Myers ("Myers") filed his Petition on October 23, 2020 alleging one count of premises liability and one count of negligence against Defendant-Appellee City of Cedar Falls, Iowa ("Defendant"). (APP.000005) Defendant filed an Answer on November 20, 2020. On February 1, 2021 Defendant amended its Answer and asserted the affirmative defense of qualified immunity. (APP.000011)

Defendant moved for summary judgment on its qualified immunity defense on January 28, 2022. Myers filed a resistance to the dispositive motion on February 22, 2022. The district court issued an order granting summary judgment on April 28, 2022. (APP.000015) Myers filed a Motion to Reconsider on February 5, 2022, which was resisted by Defendant. (APP.000020) The district court denied Myers' Motion to Reconsider on

May 19, 2022. (APP.000029) Myers filed this appeal on May 27, 2022. (APP.000031)

STATEMENT OF THE FACTS

On July 19, 2019 Myers and his family were at The Falls Aquatic Center, which is owned and operated by Defendant. (APP.000011 ¶ 2) Myers was intending to jump off of the one-meter diving boar, when he ran forward on the board and bounced near its end. (APP.000087) As he bounced, his left leg slipped causing him to come down with his full body weight on his right knee/leg rupturing his quadriceps tendon. (APP.000087-88)

The diving board in question was a 16 foot Duraflex Diving Board ("Board") installed in 2012. (APP.000164 p. 16:5-7; APP.000081, APP.000085) Defendants removed the Board from regular use and replaced it at the end of the 2019 season. (APP.000082) During the seven years the Board was in service it was never resurfaced. (APP.0000173 p. 50:10-14) From 2016 until the date of Myers' injury the Board was never cleaned. (APP.000195 p. 24:13-25:2)

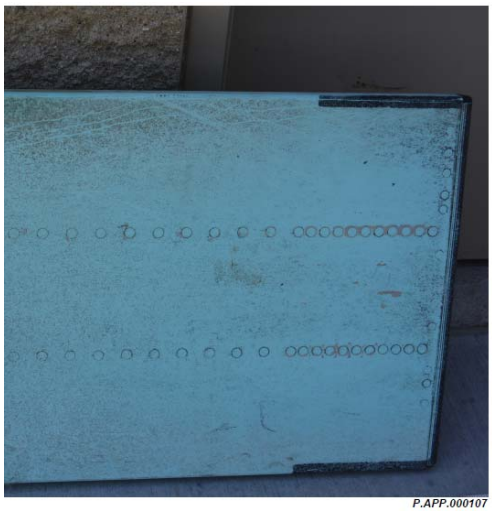
Duraflex, the diving board manufacturer, publishes maintenance guidelines for its products. According to the maintenance guidelines the diving board surface must be tested frequently and found to be sufficiently

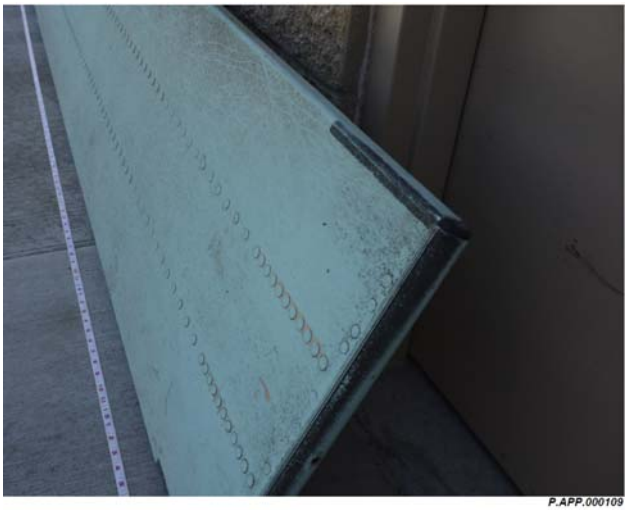
slip resistant when wet. The manufacturer also notes that years of normal wear will cause the board to become slippery. (APP.000046) Despite these warnings, the Defendant never performed any of this required maintenance to the Board in question. (APP.000047)

The end of the Board (also called the take-off area) was smooth and lacked the grit, roughness or texture needed to make it a non-slip surface. (APP.000229 pp. 87:10-88:14; APP.000042) The erosion of the non-slip material was caused by the constant pounding on the end of the board from divers, as well as the effects of direct sunlight and pool chemicals. The erosion of the non-slip material happens slowly, over time. The Board did not have a non-slip surface at the take-off area for months, or even years, before Myers was injured. (APP.000229 pp. 87:10-88:14; APP.000042)

Defendant inspects the Board when it is removed at the end of each season. (APP.000081) When the Board was removed at the end of the 2018 season it did not have an anti-slip surface at the take-off area. (APP.000229 pp. 87:10-88:14) Defendant inspects the Board when it is installed at the beginning of each season. (APP.000081) At the time the Board was installed at the beginning of the 2019 season it did not have an anti-slip surface at the take-off area. (APP.000229 pp. 87:10-88:14)

Defendant periodically inspects the Board during the season. (APP.000081) During these periodic inspections the Board did not have an anti-slip surface at the take-off area. (APP.000229 pp. 87:10-88:14) The non-slip surface had worn through so much that the aluminum paint was visible beneath it. It was smooth as a baby's bottom. (APP.000219 p. 46:4-9) The erosion of the non-slip at the take-off area is apparent from photographs of the Board taken after Plaintiff was injured, including the exposure of the aluminum paint beneath the surface:





Defendant knew that the Administrative Rules of the State of Iowa required diving boards to have a slip-resistant surface. (APP.000196 pp. 28:15-29:9; APP.000197 p. 30:14-22) Defendant admits they inspected the Board at the beginning and end of the swim season and periodically during the season. (APP.000081) A reasonable jury could easily conclude that Defendant knew that the take-off area of the Board did not have a slip

resistant surface and therefore did not comply with Iowa Admin. R. 641—15.5(13)(a)(5). Defendant knowingly violated a rule of the Department of Public Health, thereby committing a simple misdemeanor.

ARGUMENT

BRIEF POINT I

A REASONABLE JURY COULD FIND THAT DEFENDANT-APPELLEE KNEW THE DIVING BOARD LACKED A SLIP RESISTANT SURFACE

PRESERVATION OF ERROR AND STANDARD OF REVIEW

Myers has preserved error on Brief Point I by raising the issue before the district court in his Resistance to Defendant's Motion for Summary Judgment. The issues discussed below that were not addressed in the district court's ruling were then brought to the lower court's attention through Myers' Motion to Reconsider.

Appellate review of a district court's grant of summary judgment is for correction of errors at law. Iowa R. App. P. 6.907; *Clinkscales v. Nelson Sec., Inc.*, 697 N.W.2d 836, 840-41 (Iowa 2005). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Iowa R. Civ. P. 1.981(3). The party

making the motion for summary judgment has the burden to establish the non-existence of any genuine and material fact issue and that it is entitled to judgment as a matter of law. *Farm Bureau Mutual Insurance Co. v. Milney*, 424 N.W.2d 422, 423 (Iowa 1988); *Drainage District #119, Clay County v. Incorporated City of Spencer*, 268 N.W.2d 493, 499 (Iowa 1978). An issue of fact is "genuine" when the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Fees v. Mutual Fire and Automobile Insurance Co.*, 490 N.W.2d 55, 57 (Iowa 1992). An issue of fact is "material" when, considering the underlying law, its determination might affect the outcome of the lawsuit. *Id.*

In ruling on a summary judgment motion, the Court must examine the record in the light most favorable to the nonmoving party. *Sandbulte v. Farm Bureau Mutual Insurance Co.*, 343 N.W.2d 457, 464 (Iowa 1984). "A proper grant of summary judgment depends on the legal consequences flowing from the undisputed facts or from the facts viewed most favorably toward the resisting party." *Boles v. State Farm Fire and Casualty Co.*, 494 N.W.2d 656, 657 (Iowa 1992). The evidence of the nonmoving party is to be believed. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). "Every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party, and a fact question is generated if

reasonable minds can differ on how the issue should be resolved." *Williams v. Davenport Communications Limited Partnership*, 438 N.W.2d 855, 856 (Iowa Ct. App. 1989).

A. DEFENDANT IS NOT ENTITLED TO IMMUNITY IF PLAINTIFF GENERATES FACT DISPUTES REGARDING WHETHER THE DIVING BOARD LACKED A SLIP-RESISTANT SURFACE AND WHETHER DEFENDANT HAD KNOWLEDGE OF THIS DEFECTIVE CONDITION

Iowa law regarding municipal liability relating to a pool or spa necessarily begins with Iowa Code § 670.4(1)(l) (2021). That section grants municipalities immunity from claims related to a swimming pool or spa with one notable exception: "unless the claim is based upon an act or omission of an officer or employee of the municipality and the act or omission constitutes actual malice or a criminal offense." Iowa Code § 670.4(l)(l) (2021). A municipality is not entitled to immunity if the injuries were caused by the municipality's violation of a rule or regulation and if violation of that regulation constitutes a crime. In this case, Defendant violated the rule requiring a slip resistant board. Iowa Admin. Code r. 641-15.4(4)(c)(6) (2021). Defendant's violation of that rule constitutes a simple misdemeanor. Iowa Code § 135.38 (2021).

The Iowa Supreme Court in *Sanon v. City of Pella* directly addressed the interplay of Sections 135.38 and 670.4(1)(l). 865 N.W.2d 506 (2015).

In that case, the plaintiff argued that immunity from Chapter 670 was lost because the defendant city knowingly violated a rule issued by the Department of Public Health regulating swimming pools. *Id.* at 512. The Iowa Supreme Court agreed and held that the city's knowing violation of a rule found in Iowa Admin. Code r. 641—15.4[1] waived the immunity from Section 670.4. *Id.* at 514.

Applying the *Sanon* decision to the present case, Myers must demonstrate two facts to defeat immunity. First, Myers must show that the Defendant violated a rule issued by the Department of Public Health. Second, Myers must show that this was a knowing violation. If a reasonable jury could conclude that Myers established both facts, Defendant is not entitled to immunity under Section 670.4. *See id.*

In this case, the administrative rule violated by Defendant is Iowa Admin. r. 641—15.4(4)(c)(6). This Rule states: "Diving boards and platforms shall have a slip-resistant surface." This Rule is phrased in the present tense, and demonstrates that diving boards must be slip-resistant when installed and into the future. *See* Iowa Code § 4.1(33) (2021) (stating "Words in the present tense include the future."). If the Rule only required diving boards to be slip-resistant when installed it would not have used a

[1] The Rule relied upon in *Sanon* required that the main drain of a swimming pool be clearly visible from the deck. Iowa Admin Code r. 641—15.4(m)(2)(l)(2009).

present tense verb. *See U.S. v. Wilson*, 503 U.S. 329, 333 (Iowa 1992) (holding "Congress' use of a verb tense is significant in construing statutes.").

As discussed below, the Board lacked a slip-resistant surface in violation of the administrative rule. The Board had this defective condition both prior to and at the time of Myers' fall. Additionally, Myers generated a genuine dispute of fact regarding whether Defendant knew about this rule violation.

B. PLAINTIFF GENERATED A FACT ISSUE REGARDING WHETHER THE BOARD LACKED A SLIP-RESISTANCE SURFACE

Iowa Administrative Rule 641—15.4(4)(c)(6) states: "Diving boards and platforms shall have a slip-resistant surface." The record before the district court clearly shows that Myers has generated a fact issue on whether the Board had a slip-resistant surface. Myers has direct evidence that the Board in this case lacked a slip-resistant surface.

1. The Board itself plainly shows a lack of slip-resistant surface

The best evidence that the Board lacked a slipped resistant surface is the Board itself. The grit material—which creates the slip-resistant surface—at the end of the Board has completely worn off. (APP.000244) This is best demonstrated by feeling the Board. (APP.000244)

Unfortunately, the district court refused to examine the Board even when Myers requested the court do so through his Motion to Reconsider.[2] (APP.000020) Instead of construing the evidence in the light most favorable to Myers, the district court concluded the Board had a slip resistant surface without actually examining the most crucial piece of evidence. (APP.000029) This approach is inapposite with the requirement that the court view the evidence in a light most favorable to Myers, and make all reasonable inferences in Myers' favor. *See Sandbulte*, 343 N.W.2d at 464; *Williams*, 438 N.W.2d at 856.

2. Testimony and interrogatory answers show the Board lacked a slip-resistant surface

Myers also showed the Board lacked a slip resistant surface through his Interrogatory Answers and deposition testimony. The following excerpts of Myers deposition show that the board lacked a slip resistant surface:

> Q: Okay. Did that register in your mind that, you know, I've got a slippery board or anything?
>
> A: It caused me a little concern. After this I didn't go off the board again for almost two hours so –
>
> Q: **Did you tell anybody that, hey, you think the board is too slippery?**
>
> A: **I may have told my son.**

[2] The Board is in the sole custody and control of Defendants, who have thus far failed to produce it as evidence to the district court.

(APP.000135 p. 22:5-13) (emphasis added)

Q: And do you know what violations of the State Code you think were violated?

A: The number of the Code?

Q: No. I mean do you know what was violated?

A: **Well, State Code states that the surface of a diving board shall have sufficient grit to prevent slippage.**

Q: Okay. And that's what you're thinking is –

A: That's paraphrasing, but I've read the Code so I know it exists.

Q: **And that's –**

A: **Yes.**

Q: **-- what you think has been violated?**

A: **Yes.**

(APP.000145 p. 63:5-20) (emphasis added)

Q: And did you get a call from someone that you perceived as their supervisor?

A: Yes.

Q: Who was that?

A: Bruce Verink.

Q: When did Bruce give you a call?

A: July 22nd, I believe.

Q: And what did you two talk about?

A: **We talked about the lack of grit on the surface at the end of the diving board.**

Q: **You told him there was a lack of grit?**

A: **Yes.**

Q: What did he say to you?

A: He said he would look into it and get back to me.

(APP.000136 p. 27: 2-17) (emphasis added)

Bruce Verink, Defendant's Recreation and Community Programs Manager, confirmed in his deposition that Myers reported the Board was slippery:

Q: Okay. So tell me what you remember about the phone call you had with Ron that Monday, Ron Myers that Monday.

A: I believe it was to inform me that he was injured out there and **their diving board was too slippery, in his opinion.**

(APP.000177 p. 68:16-21)

The above testimony from Myers shows that the Board had a slippery surface on the day of his injury, and that he warned his son about the slippery surface. The slippery character of the Board was so memorable to Myers that he reported it again to Verink days later. Myers also directly

testified that the condition of the Board violated the Administrative Rule requiring diving boards to have slip-resistant surfaces.

Myers reiterated this testimony in his Answer to Defendant's Interrogatory No. 2:

> **INTERROGATORY NO. 2:** Describe in detail how you claim the incident occurred, including a narrative of what observations you made relative to the cause of the incident.
> **ANSWER:**
> **. . . The anti-slip or grit on the diving board was worn down, but I thought the board was safe for use.**

(APP.000087-88 No. 2) (emphasis added) All of this testimony is direct evidence that the Board lacked a slip-resistant surface as required by the rule. Given this direct evidence, it was error for the district court to conclude there was no dispute of fact regarding the Board's lack of a slip-resistant surface.

3. Myers' expert witness's report and testimony show the Board lacked a slip-resistant surface

Plaintiff s retained Thomas Griffiths as an expert witness in this case. Dr. Griffiths is well-credentialed in the field of aquatic safety and, before arriving at his opinions in this matter, reviewed the depositions as well as examined photographs of the Board and other materials produced in the course of discovery. (APP.000042). It is Dr. Griffiths' opinion, as set forth in his report, that the Board did not have slip-resistant surface and that the

slip-resistant surface eroded over time. After reviewing the deposition testimony in this case Dr. Griffiths concluded: "it is clear regular required maintenance to the diving Board Ron Meyers [sic] used when he was injured was NEVER performed." (APP.000047) Dr. Griffiths also reviewed the manufacturer's recommendations and noted: "Even though Duraflex international recommends daily and monthly cleaning, no such cleaning was performed for the entire life of the diving board." (*Id.*)

Dr. Griffiths also opined directly about the anti-slip nature of the Board: "simply stated the take-off area of the incident diving board was smooth rather than rough and non-slip as it should have been." (*Id.*) The degradation of the gritty surface on the board takes time: "This erosion of the non-slip material is caused by the constant pounding on the end of the board produced by divers, as well as the adverse effects of direct sunlight and swimming pool chemicals." (*Id.*)

Dr. Griffiths expounded on his report in his deposition. He testified that he could determine just from reviewing the photographs of the Board that "the board here was as smooth as a baby's butt[.]" (APP.000219 p. 46:4-9) Dr. Griffiths repeated this testimony that the board was slippery and lacked a nonslip surface. His testimony was based on the photographs of the board, as well as the video of Myers' injury:

Q: And so it is your belief that the end of this board was likely slippery?

A: **It was definitely slippery because there was no abrasion left.** The paint was worn thin, so that it began to remove. It would have been wet without any mold or algae, with just water on it because there was no abrasion, and there was no nonslip surface there.

(APP.000220 pp. 50:19-51:2) (emphasis added)

Q: So you don't know the degree to which there is no more grippy sand on it, grippy surface?

A: At the time of the incident I can't determine exactly how slippery it was, but based upon the photographs when you blow that up, **you can clearly see that the surface was significantly deteriorated and flat.** There was no abrasion left. Also, I might add in reviewing the video many times last night, when his two feet hit the end of the board, they whipped out from underneath him. In observing similar accidents and seeing similar videotapes I would suggest to you that **if there was some abrasion, some nonslip material left on the board, [Myers'] feet wouldn't have skyrocketed out of there the way that did. I don't think he would have slipped as forcefully and with rotation, with as much velocity as he did if there was any significant nonslip material left on the board.**

(APP.000221 pp. 52:22-53:18) (emphasis added)

Q: That is going to enhance somebody's chances of slipping and falling on a diving board regardless of the surface of the diving board, is it not?

A: Well, with the caveat that the flatter and more slipper and - - and nonslip - - and the less nonslip the end is where his feet are touching, the more likely he is to slip and more likely he is to have a serious injury. What you're saying is true, but **[Myers'] slippage and resulting injury are exacerbated by the slipperiness of the board, which is produced by not having a nonslip surface.**

(APP.000222-223 pp. 58:20-59:8) (emphasis added)

Q: If you look also in the - - in the top right-hand corner of this exhibit, it says "The boards" - - in the dark blue part of the exhibit it says, "The boards are coated with a slip-resistant surface."

A: When it comes from - -

Q: Is that correct?

A: When it comes from the manufacturer, that's correct. **That slip-resistant coating was not on the end of this particular board at The Falls when those pictures were taken.**

(APP.000225 p. 68:15-25) (emphasis added)

Q: **This is RM 000615. I believe this is a photograph taken by Ron's wife shortly after he was injured.** Do you recall seeing this in your file, Dr. Griffiths?

A: I did at one time, yes. . . .

Q: And in terms of the condition of the board - - I can make this bigger. You just tell me what you want me to do it, but - -

. . .

A: So her photograph is not quite as clear as the previous photographs where the board was leaning up against the building, but even though it's not quite as clear, you can still see the deterioration of the paint at the end; for instance there looks to be a small smudge in the middle.

Q: (Indicating.)

A: That's right. **That's bare aluminum alloy showing, and the dark spots surrounding all of the rivets on either side also is where the alloy is exposed with no paint and no grit and, - - and that strongly suggests that that entire area has been worn off.** If you look just to the left - - on the left border, you can actually - - I don't know if you can blow it up more - -

Q: (Indicating.)

A: - - but where that arrow is, where the cursor is, that's very rough and abrasive, and that is where the algae and mold grow - - grow, **which is less of a problem than the lack of nonslip material in the middle of the landing area, so, anyway, that's - - that confirms that what we saw after the incident was in existence close to the incident.**

(APP.000229 p. 84:4-85:22) (emphasis added)

Dr. Griffiths repeated his assertions that the Board was slippery and lacked a gritty, non-slip surface time and again in his deposition. There is no plausible argument that Defendant's allegation that the board had a slip-resistant surface was "undisputed." It was inappropriate for the district court

to conclude that Myers failed to generate a dispute of material facts on this issue.

C. PLAINTIFF GENERATED A FACT ISSUE REGARDING WHETHER DEFENDANT HAD KNOWLEDGE OF THE BOARD'S LACK OF A SLIP-RESISTANT SURFACE

Under long established Iowa law, a plaintiff may prove that another person had knowledge of a fact through circumstantial evidence. *See e.g. Aylesworth v. Chicago, R.I & P.R. Co.*, 30 Iowa 459 (Iowa 1870) (holding "knowledge, as before remarked, may be shown by proof, direct or circumstantial"). Given Defendants significant experience in the field of swimming pool operations, the open and obvious nature of the rule violation, and their repeated exposure to the rule violation, Myers has more than carried his burden of generating a fact issue on Defendant's knowledge of the rule violation.

1. Iowa law on proving a defendants' knowledge

A plaintiff in a civil action—just like the State in a criminal action—is **not** required to prove knowledge through direct evidence. "Knowledge, of course, may be proved by circumstantial evidence." *Loghry v. Capel*, 132 N.W.2d 417, 420 (Iowa 1965). Iowa Supreme Court decisions are replete with instances of proving knowledge through inferences and circumstantial evidence. The Court has repeatedly and expressly held that knowledge may

be proven though circumstantial evidence. *See id.*; *State v. Henderson*, 908 N.W.2d 868, 878 (Iowa 2018) (holding "Of course, knowledge can be proved by circumstantial evidence."); *State v. Ogle*, 367 N.W.2d 289, 291 (Iowa Ct. App. 1985) (holding "Knowledge may be proved by direct or circumstantial evidence."); *State v. Gates*, 306 N.W.2d 720, FN 1 (Iowa 1981) (approving use of jury instruction that stated "Knowledge may be proved by direct or circumstantial evidence."); *Caruso v. Apts. Downtown, Inc.*, 880 N.W.2d 465, 474 (Iowa 2016) (holding "Actual knowledge may be established by direct proof, of course, but it also may be established by circumstantial evidence sufficient to infer a person's mental state."). Despite the clear law in this area, and without citation to contrary authority, the district court "simply disagree[d] with the assertions of the plaintiff regarding a requirement of knowledge through direct evidence." (APP.000029)

The Iowa Supreme Court case of *Loghry v. Capel* provides helpful guidance on determining when circumstantial evidence is sufficient to prove knowledge. 132 N.W.2d 417 (Iowa 1965). In *Loghry* the plaintiff brought an action for fraud based on the defendants' failure to disclose foundation defects of a house purchased from defendants. *Id.* at 418. The case hinged on whether plaintiff could prove that defendant knew the subsoil the house

was built on was "fill dirt". In particular, plaintiff needed to prove that the defendant knew the "fill dirt" extended below the foundations of the house, creating unstable ground beneath the foundations. *See id.* at 419-20. The level of the "fill dirt" was not likely observable from a mere surface inspection, and instead required an engineering study. *Id.*

Relying on Wigmore's Code of Evidence, *Loghry* held that "[a] person's knowledge, belief, or consciousness of a matter may be evidenced circumstantially (a) by external circumstances likely to produce such a state of mind[.]" *Id.* at 420. "Such circumstances may be classified, in their nature of operations, as follows: (1) *Direct exposure* of the matter to the person's sight, hearing, or the like[.]" *Id.* (quoting Rule 65, Wigmore's Code of Evidence, at 96).

The *Loghry* court found the following facts important to their analysis of whether the plaintiff proved that defendant had knowledge of the level of fill dirt:

(1) Defendant denied knowledge of the full extent of the fill; but

(2) The defendant had over ten years' experience in the relevant field;

(3) There was direct evidence of the defective nature of the lot:

a. At the time the defendant purchased the lots they were raw dirt, but there was testimony that it was obvious the lots had been filled;

b. The defendant paid one-half of the bill of a testing engineer who found that the fill level extended below the foundation footings, constituting direct evidence of the defective condition; and

(4) The excavation and construction were done under defendants' direction—even though he subcontracted out all work—showing that he was exposed to the condition.

Id. at 420. *Loghry* held that the above was enough to conclude defendants had knowledge of the defective condition despite the defendant's testimony denying said knowledge. *Id.* at 421. The verdict in favor of the plaintiffs was supported by substantial evidence. *Id.*

2. Plaintiff generated a genuine dispute of material fact regarding whether Defendant had knowledge of the defective condition

Applying *Loghry* to the facts of this case, it is clear that a reasonable jury could conclude that Defendants had knowledge of the defective condition: in this case the lack of a non-slip surface on the Board. Just like in *Loghry*, the Defendant denies actual knowledge of the defective

condition. However, at the summary judgment stage a denial of knowledge of a fact is not fatal if there is circumstantial evidence of that knowledge. *See id.; see also Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 807 (1994) (holding "this court has long held that mere denial of knowledge" will not defeat proof of said knowledge).

a. Defendant is more experienced in the relevant field than the defendant in Loghry

Defendant was more experienced in the relevant field—here pool operations—than the defendant in *Loghry*. Bruce Verink, Defendant's Recreation and Community Programs Manager, had been a Certified Pool Operator for nearly forty (40) years. (APP.000162 p. 8:4-12) In addition, Christopher Schoentag, Defendant's Aquatics Supervisor, had been a Certified Pool Operator for multiple years at the time of Myers' fall. (APP.000191 p. 5:18-25; APP.000192 p. 10:19-22) Defendant's agents in this case had far more experience than the defendant in *Loghry*.

b. There is strong, direct evidence of the defective condition

There is strong, direct evidence that there was in fact a defective condition, as discussed in Section B *supra*. Unlike in *Loghry*, the defective condition was observable from a cursory inspection and did not require an engineering study to ascertain the defect. Myers testified that he could tell the board was slippery after going off the board a single time. (APP.000135

p. 22:5-13) Dr. Griffiths could tell the board was as "smooth as a baby's butt" from simply reviewing photographs of the board. (APP.000219 p. 46:4-9)

c. Defendant was repeatedly exposed to this defective condition

Myers is also able to show that Defendant was repeatedly exposed to this defective condition. Dr. Griffiths testified that the defective condition of the board predated Plaintiffs' fall, at a minimum, by several months:

> Q: All right, there was some - - Do you recall some testimony - - and it may be an interrogatory answer as well - - that the Defendant removes the board at the end of each swimming season; correct?
>
> A: Yes.
>
> Q: So that would be in August or early September. At the time the board was removed at the end of the 2018 swimming season, would - - in your opinion would the - - the take-off area, the amount of nonslip on the take-off area - - would it be similar to what we looked at in the photographs, RM 000615?
>
> A: I would think so because it was less than two months later as far as its use was concerned, so I would think so.
>
> Q: And then when they - - And then do you recall that there was - - that the Defendant employees also inspect the board when they put the board in at the beginning of the - - in the spring for the beginning of the swim season?

A: Right.

Q: And at the time that they would have put the board in in the spring of 2019 would there have been no nonslip surface on the take-off area of the board as depicted in the photograph?

A: Yeah, I would anticipate that; yes.

(APP.000229-230 pp. 87:10-88:14) Viewing Griffiths testimony in the light most favorable to Myers, a reasonably jury could easily conclude—and the Court must conclude for purposes of summary judgment—that the Board lacked a slip-resistant surface when it was taken out of service at the end of the 2018 season and when it was put back in service for the 2019 swim season.

Defendant admitted that it inspects the board both when it is taken out of service and when it is put back in service, as well as during the summer. Defendant stated:

> The diving board is removed at the end of each season. The board is reinstalled the following spring for the upcoming season. **The board is inspected during that process. The board is also inspected during the season to make sure it is safe and secure.**

(APP.000066) (emphasis added)

Defendants further admitted that the non-slip surface was a specific focus of the inspection:

Q: Does the inspection involve - - what else does it - - besides looking for cracks, what else is inspected?

A: Taking a look at the surface of it, where the bolts go through. The bolts themselves. The diving board standard that it connects to. The handrails.

Q: **And is the grit on the board also inspected?**

A: **It's taken a look at yes.**

Q: And what - - what sort of - - **what are you looking for when you're looking for the grit, there's enough grit?**

A: **In our opinion, does it have enough grit to hold the feet and keep them from sliding on the board.**

(APP.000171 pp. 41:23-42:13) Schoentag also confirmed that the Board's visual inspection includes checking the level of grit. (APP.000195 p. 23:1-4)

There could be no better exposure to the defective condition than multiple inspections of the Board at the time it is in the defective condition. Myers argument on this point is further bolstered by Defendant's emphasis on looking for the exact defect that led to the Rule violation—the level of grit on the board. This if far stronger evidence of exposure to the defective condition than the evidence in *Loghry*. In *Loghry*, the Court concluded that the mere fact the defendant paid for half of the engineering study was enough to establish knowledge of the result of that study. *Loghry*, 132 N.W.2d at 421. In contrast, the Defendant in this case admits to conducting

its own inspections on multiple occasions of an obviously defective condition.

It is fundamental that a party's knowledge of a fact or condition may be proved through circumstantial evidence. Courts have generally found a party's experience with and exposure to the fact or condition is strong circumstantial evidence of knowledge. Myers has produced more than sufficient circumstantial evidence of Defendant's knowledge of the defective condition of the board. The district court erred in concluding that Defendant's allegation to the contrary was "undisputed".

D. CONCLUSION

The district court erred when it concluded that Myers failed to generate a fact dispute regarding the Board's lack of a slip-resistant surface. The district court also erred by imposing a direct proof requirement on Myers and then finding that Myers could not prove Defendant had knowledge of the Board's lack of a slip-resistant surface. Because Myers generated a genuine dispute of fact on these two issues, Defendant was not entitled to qualified immunity under Section 670.4. Therefore, Defendant was not entitled to summary judgment and the district court's decision should be reversed and the matter remanded for further proceedings.

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CERTIFICATE OF FILING AND SERVICE

I certify that on **October 12, 2022** I electronically filed this Final Brief with the Clerk of Court using the ECF system, which sent notification of same to:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. of App. P. 6.903(1)(g)(1) because this brief contains 5,465 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) (table of contents, table of authorities, statement of issues and certificates).

2. 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 2010 in Times New Roman 14 pt.

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