IN THE IOWA SUPREME COURT

No. 16-1972

CITY OF WEST LIBERTY, IA, Plaintiff/Appellant, vs. EMPLOYERS MUTUAL CASUALTY COMPANY, Defendant/Appellee.	: : : : : : : : : :

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

FINAL REPLY BRIEF OF PLAINTIFF/APPELLANT

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PROOF OF SERVICE

I hereby certify that March 17, 2017, I served the Final Reply Brief of Plaintiff/Appellant on all other parties to this Appeal by serving the same with the Iowa Supreme Court EDMS.

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I further certify that on March 17, 2017, I filed the Final Reply Brief of Plaintiff/Appellant by filing the same with the Iowa Supreme Court EDMS.

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ATTORNEY'S COST CERTIFICATE

I hereby certify that the true cost of producing the necessary copies of the Final Reply Brief of Plaintiff/Appellant was $-0-, and that amount has been paid in full.

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As reflected in EMCC's Response Brief, the material facts are not disputed. However, EMCC misapprehends and misstates Iowa law regarding the efficient proximate cause rule and its application to the undisputed facts of this case. As discussed in the City's opening Brief, the Iowa Supreme Court has clearly expressed the analytical framework by which causation in the context of first party insurance losses is to be determined: the efficient proximate cause rule. Therefore, the singular issue before this Court is whether the efficient proximate cause of the City's loss was the squirrel coming in contact with the electrical equipment (a covered peril) or electrical arcing (an excluded peril). If the answer to the question is that the squirrel is the efficient proximate cause, then coverage exists. If the answer is that electric arcing is the efficient proximate cause, then coverage is excluded.

It is important to point out that EMCC has admitted, both in denying the claim and in its Answer to the City's Petition, that the squirrel caused the damage for which the City has sought recovery. Not surprisingly, but clearly as a direct result of these admissions, EMCC avoids discussing the evidence and instead engages in an overly complicated discussion of efficient proximate cause, relying in large part on decisional law from other jurisdictions as well as

secondary authority[1], to distract this Court's focus from the real issue in this case. As will be discussed below, this Court need not look any further than the controlling authority of *Qualls* and *Bettis* to resolve the issue of efficient proximate cause, the singular issue presented on appeal.

Furthermore, and contrary to the district court's ruling and EMCC's argument in this Court, Iowa law does not require, as a condition to applying the efficient proximate cause rule, that separate perils cause separate and distinct damage. Rather, the "independent damage" requirement is a fiction which EMCC has gladly adopted without a citation to any authority whatsoever. None of the controlling Iowa cases even remotely suggest that a requirement of "independent damage" exists. Not one.

Finally, EMCC urges this Court to consider extrinsic evidence which it argues supports its position that a different type of insurance coverage was available to the City which would have covered its loss. However, the Court may consider extrinsic evidence in determining the construction of an insurance policy only if the terms are ambiguous. Neither party has ever contended that any part of the Policy is ambiguous. Furthermore, the evidence proffered by

[1] Generally, secondary authority's value is limited to providing broad, general propositions of law. Indeed, as reflected in EMCC's citations to *Appleman's* and *Couch*, general propositions are stated with reference to only a few cases, none of which are Iowa cases. Therefore, though mildly instructive, this Court need look no further than the controlling Iowa primary authority in its analysis of the efficient proximate cause rule.

EMCC is irrelevant to the issue presented to this Court and suffers from numerous evidentiary infirmities. Lastly, EMCC is wrong when it asserts that the "Equipment Breakdown Endorsement" would have covered the City's loss had it chosen to purchase the Endorsement. A simple reading of the plain language of the Endorsement reflects that it would not have provided coverage to the City for its loss because the power output of the electrical equipment at issue exceeded the maximum power limitation in the Endorsement's coverage grant.

For all of these reasons, the undisputed evidence establishes that the squirrel was the efficient proximate cause of the City's loss and that the district court erred in concluding otherwise.

I. IN THE ABSENCE OF ANTI-CONCURRENT CAUSATION POLICY LANGUAGE IOWA COURTS APPLY THE EFFICIENT PROXIMATE CAUSE DOCTRINE.

EMCC devotes the first seven pages of its argument to an unnecessary general survey of anti-concurrent causation provisions in insurance policies and various courts' enforcement of them, including Iowa courts. However, EMCC's lecture is misplaced since neither party argues that an ACC provision

operates to exclude the City's loss[2].

Indeed, the placement of the "Electrical Currents" exclusion in the Policy establishes why EMCC's anti-concurrent causation provision does not operate to override Iowa's efficient proximate cause rule. The Policy sets forth two distinct categories of exclusions. The first set of exclusions is introduced by the following language:

> 1. "We" do not pay for loss or damage caused directly or indirectly by one or more of the following excluded causes or events. Such loss or damage is excluded regardless of other causes or events that contribute to or aggravate the loss, whether such causes or events act to produce the loss before, at the same time as, or after the excluded causes or events:
>
> (A1, p.10, ¶7)[3]

[2] EMCC's citation to the "Unique Coverage Issues in Flood Losses" (an article co-authored by EMCC's counsel) is interesting for several reasons. First, the quoted section of the article supports the City's argument about how the efficient proximate cause doctrine should apply when multiple perils act to cause a loss. Secondly, it just so happens that the City's counsel represented the policyholder in the case cited in the article on p. 635, *Seacor Holdings, Inc. v. Commonwealth Ins. Co*, 635 F.3d 675 (5th Cir. 2011) and, therefore, we are very familiar with the facts of that case and the Court's ruling. There, the issue was whether the singular deductible for named windstorm applied (argued by the policyholder) or whether the deductibles for loss caused by both named windstorm and flood applied (argued by the insurer). *Seacor*, 635 F.2d at 678. Significantly, the Court determined that all of the damages, even though related to flood, were caused by the named windstorm Katrina. *Seacor*, 635 F.2d at 684. In other words, absent the named windstorm, flooding would not have occurred. Accordingly, the Court determined that the efficient proximate cause of the flood damage was Hurricane Katrina and, therefore, only the named windstorm deductible should apply. *Seacor*, 635 F.3d at 682-3.

[3] References to Appendix Volume 1 are shown as "A1," while references to Appendix Volume 2 are shown as "A2."

This lead-in language in the Section 1 exclusions is a form of what is commonly known as "anti-concurrent causation" language. As the Iowa Supreme Court recognized in *Amish Connection, Inc. v. State Farm Fire & Cas. Co.*, 861 N.W.2d 230, 240-1 (Iowa 2015), the inclusion of anti-concurrent causation language is the way insurance companies contract out of the application of the efficient proximate cause rule. *Amish Connection*, 861 N.W.2d at 241. In the present Policy, within the Section 1 anti-concurrent causation exclusions are eight (8) exclusions designated as sub-paragraphs (a) – (h), none of which EMCC cited to deny the City's claim. (A1, pp. 49-51)

There is also a second section of exclusions in the Policy which begin on Page 19. (A1, p. 51) These Section 2 exclusions are introduced with the following language which does not include anti-current causation language as found in the first set of exclusions:

> 2. "We" do not pay for loss or damage which is caused by or results from one or more of the following excluded causes or events:
>
> (A1, p. 10, ¶8 and p. 51)

Significantly, within this second section of exclusions is the "Electrical Currents" exclusion, the only exclusion on which EMCC relied to deny the City's claim. *Id*. Since EMCC did not contract out of the efficient proximate cause rule by including anti-concurrent causation language to introduce the "Electrical Currents" exclusion, the Court is required to conduct an efficient

proximate cause analysis. Based upon the undisputed facts, the actions of the squirrel is the efficient proximate cause of the City's loss.

This conclusion harmonizes the Iowa Supreme Court's ruling in *Amish Connection* with its decision in *Qualls v. Farm Bureau Mutual Ins. Co*., 184 N.W.2d 710 (Iowa 1971). There, the Court recognized:

> In insurance law it is generally understood that where the peril insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produces the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss. 184 N.W.2d at 713.

In the present case, there is absolutely no dispute that the squirrel's climbing onto the electrical equipment was the initiating, proximate cause of the eventual electrical arcing. (A1, p. 87, ¶1) In other words, but-for the squirrel's actions, the electrical arcing would not have occurred. Therefore, guided by the authority of *Qualls*, the squirrel, and not the subsequent electrical arcing, is the efficient proximate cause of the damage.

Moreover, since EMCC placed the "Electrical Currents" exclusion outside of its anti-concurrent causation language, the efficient proximate cause rule must be applied by this Court. See, *Amish Connection*, 861 N.W.2d at 241-2; *Qualls*, 184 N.W.2d at 713; *Bettis v. Wayne County Mut. Ins. Assoc.*, 447 N.W.2d 569, 571 (Iowa Ct. App. 1989).

It bears noting that EMCC either misrepresents or misunderstands the City's arguments in the district court on this point. Contrary to EMCC's assertion, the City's position has remained constant throughout: that the efficient proximate cause rule warrants the conclusion that the squirrel was the cause of the loss. The City has never argued for the application of the "concurrent causation rule," a rule which has been adopted by a minority of states[4]. To the contrary, the City has always asserted that Iowa follows the efficient proximate cause rule. The reference to concurrent causes in the City's opening brief filed in the district court was for the singular purpose of explaining why the anti-concurrent causation doctrine did not apply and why, and how, the district court should apply the efficient proximate cause doctrine. Indeed, the City further explained the application of the efficient proximate cause doctrine in its Reply Brief as well. Any suggestion to the contrary is incorrect.

II. IOWA LAW DOES NOT REQUIRE THAT MULTIPLE PERILS CAUSE INDEPENDENT DAMAGE IN ORDER FOR THE EFFICIENT PROXIMATE CAUSE DOCTRINE TO APPLY

Notwithstanding EMCC's unnecessary detour into a discussion about liability insurance policies at pages 11 through 15 of its Proof Brief, it eventually reaches the actual issue in this appeal, namely, the application of

[4] New Appleman on Insurance Law Library Edition, §44.03[3] (Sept. 2016).

Iowa's efficient proximate cause rule. EMCC correctly states that the rule applies where there are two potential causes of the loss. (Appellee's Proof Brief, p. 15) However, EMCC mistakenly argues that this Court need not apply the efficient proximate cause rule, a conclusion which is predicated upon a false premise.

EMCC, following the district court's lead, erroneously asserts that the efficient proximate cause rule does not apply unless the perils causing the loss "independently damage the insured property." (Appellee's Proof Brief, p. 15). This statement is a fiction created by EMCC which is intentionally buried between citations to *Appleman*, *Couch* and *In re: Katrina Canal Breaches Litigation* so as to misleadingly suggest that these sources endorse EMCC's statement. To the contrary, nowhere in these sources is there any mention that the efficient proximate cause doctrine requires that separate perils cause "independent" or separate damage. Similarly, there is no Iowa decision which imposes an "independent damage" rule. Though EMCC relies heavily on *Clasing*, discussed further below, EMCC has not, and cannot, point to a single sentence in that case where the Court, either expressly or impliedly, imposes an "independent damage" requirement and certainly cannot point to a single sentence in *Qualls* or *Bettis* for such a non-existent requirement. The fact of the matter is that no such authority, either primary or secondary, exists.

Indeed, EMCC's argument contradicts the Iowa Supreme Court's unambiguous pronouncement of the efficient proximate cause rule which, in no uncertain terms, establishes that a peril is the efficient proximate cause of a loss if it "sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produces the result for which recovery is sought." *Qualls v. Farm Bureau Mut. Ins. Co*., 184 N.W.2d 710, 712-713 (Iowa 1971). Nowhere in *Qualls*, or in any other Iowa decision, is there the suggestion that a peril - such as the squirrel coming in contact with the City's electrical equipment - must cause "independent damage" apart from the damage for which recovery is sought from EMCC. To be certain, the rule expressly states that the insured peril need only "set other causes in motion", which then produce the damages for which recovery is sought.

Like the district court, EMCC relies primarily on *Clasing v. State Farm Fire & Cas. Co*., 2009 Iowa App. Lexis 501 (Iowa Ct. App. 2009) to create an "independent cause limitation" where none currently exists under Iowa law. The City addressed the district court's incorrect imposition of an independent damage requirement, including a discussion of *Clasing*, in its opening Brief at pages 13 through 19 and, therefore, will not repeat itself here. Instead, this Court should rely on *Qualls* and *Bettis* as those cases represent the controlling authority in Iowa and clearly define the analytical framework and broad reach of the efficient proximate cause doctrine for insurance coverage matters.

However, other aspects of EMCC's discussion of *Clasing* warrants treatment.

EMCC attempts to minimize the City's treatment of *Clasing* by taking the unusual tactic of quoting what it claims is language from the insurance policy at issue in *Clasing* even though the language cited by EMCC is not discussed or relied upon by this Court in *Clasing*. This approach raises several issues. First, the evidence EMCC cites is not a part of the record on appeal as it was never a part of the district court record. It is well-established that the Court may only consider information in the appellate record. *See, e.g., Arpy v. Arpy*, 2013 Iowa App. Lexis 1202, *6 (2013)(citing Iowa R. App. P. 6.801). Furthermore, the language cited by EMCC is incomplete and lacks sufficient context as evidenced by the use of multiple sets of ellipses in its quotation. Next, EMCC assumes, without citation to any authority, that an insurance policy cannot have more than two sets of exclusions. Indeed, it is entirely possible that a policy contains multiple sets of exclusions, some of which may be introduced by anti-current causation language and some which may not, similar to EMCC's Policy. Finally, as discussed by the City in its opening Brief, the plain meaning of the exclusionary language actually cited by this Court in *Clasing* reflects that it constitutes anti-concurrent causation language. (Appellee's Final Brief, pp. 15-18) Contrary to EMCC's argument, there is no "standard" anti-concurrent causation clause used by every property insurer in every policy and each clause must be evaluated upon its own terms.

Absent any controlling Iowa case to support its argument, EMCC relies on two cases from outside of Iowa. The two cases cited by EMCC involve electrical arcing, but neither case has ever been cited as authoritative by an Iowa court and neither case supports EMCC's argument. Indeed, it is clear from *Home Ins. Co. v. American Ins. Co.*, 537 N.Y.S.2d 516 (S.Ct., App Div., 1st Dept. 1989), that New York applies a significantly more restrictive definition of efficient proximate causation. Unlike the Iowa rule regarding efficient proximate causation as stated in *Qualls*, New York rejects the proposition that the event which "merely sets the stage" for damage is the efficient proximate cause and, instead, looks to the cause most recent in time to the physical damage. *Home Ins. Co*, 147 A.D.2d 353, 354. The broad interpretation and application of the efficient proximate cause doctrine by Iowa courts stands in stark contrast to the restrictive application in New York and, therefore, *Home Insurance* should be disregarded.

Quadrangle Dev. Corp. v. Hartford Ins. Co., 645 A.2d 1074 (D.C. App. 1994), similarly does not help EMCC and may actually support the City's position. There, electrical arcing damaged a hotel switchboard, but the insured argued that the loss was caused by a subsequent failure of a pringle switch to stop the arcing. The trial court resolved the parties' dispute regarding proximate causation in a bench trial. Unlike *Quadrangle*, and as stated previously, there is no dispute in the present case that the squirrel caused the

electrical arcing and the resulting damages. For that reason alone, the case is inapposite. The distinction notwithstanding, the trial and appellate courts in *Quadrangle* determined that the electrical arcing was the efficient proximate cause of the damage because it set the events in motion and that the failure of the switch merely allowed the arcing to continue longer than it otherwise would have. *Quadrangle*, 645 A.2d 1074, 1077. Essentially, the facts of *Quadrangle* are reverse of the undisputed facts in the present case with the squirrel being the causal, initiating event.

Iowa decisional law and the facts of this case are clear - an insured peril (such as the squirrel's contact with the electrical equipment) is considered the efficient proximate cause of a loss if that peril sets in motion other causes which, through an unbroken sequence and connection, result in the loss. *Qualls v. Farm Bureau Mut. Ins. Co.*, 184 N.W.2d at 713. As a result, there is no genuine issue of material fact that the damage to the City's property was proximately caused by a covered cause of loss and not excluded. Therefore, partial summary judgment should have been entered in the City's favor and against EMCC.

III. THE SQUIRREL WAS THE DOMINANT CAUSE OF THE CITY'S LOSS.

EMCC's reliance on the fictional "independent damage" requirement leads it to erroneously conclude that the squirrel's coming in contact with the

electrical equipment was not the "dominant" cause of the loss. Although EMCC correctly recites controlling Iowa law as set forth by this Court in *Bettis*, its application of the law is flawed.

As explained by this Court in *Bettis*, the efficient proximate cause rule set forth in *Qualls* requires the following analysis:

> When it is said that the cause to be sought is the direct and proximate cause, it is not meant that the cause or agency which is nearest in point of time or place to the result is necessarily to be chosen, since the dominant cause may be concurrent or remote in point of place or time.

Bettis, 447 N.W.2d at 571. This Court further explained that determining the efficient proximate cause does not require looking to the last act in the chain of events, but rather the predominant cause which set in motion the chain of events causing the loss. *Id*.

Despite this clear expression of how the efficient proximate cause rule must be applied, including how to determine the predominant cause, EMCC asserts that the squirrel was "a remote cause rather than the dominant cause" because the squirrel did not "independently cause any damage to insured property." (Appellee's Proof Brief, p. 23) This analysis is fundamentally flawed because it requires the application of the non-existent "independent damage" requirement.

Contrary to EMCC's argument, *Bettis* does not require independent damage. Rather, in determining that the initial collision was the efficient

proximate cause of the subsequent transmission damage in that case, the *Bettis* Court concluded that the initial collision was the "dominant cause of the transmission damage" because the collision "set the chain of events" in motion. *Bettis*, 447 N.W.2d at 571. If the front suspension collision-induced damage is the efficient proximate cause of the subsequent, towing-induced transmission damage as ruled by the *Bettis* court, then it cannot be credibly argued that the squirrel contacting the wires, which **immediately** set in motion the event (arcing) resulting in damage, was not the efficient proximate cause of the City's property damage loss in this case. In other words, to the extent that EMCC attempts to insert a temporal element into the proximate cause analysis to support its argument that the cause nearest in time to the physical damage is the efficient proximate cause, it is simply wrong. The front suspension collision in *Bettis* was significantly attenuated from a temporal perspective from the resulting physical damage as compared to the squirrel in this case.

Furthermore, EMCC's reliance on *Vorse v. Jersey Plate Glass Ins. Co*, 119 Iowa 555 (1903) is misplaced. There, the insurance policy insured the policyholder's plate glass against loss or damage except if caused by fire. *Vorse*, 119 Iowa at 556. The stipulated facts presented to the court at trial established that a match ignited gasoline used in the policyholder's building which caused an explosion and damage to the plate glass. *Id.* The insurance company argued that the damage to the plate glass was caused by fire in the

form of the match. *Vorse*, 119 Iowa at 557. The trial court disagreed and entered judgement for the policyholder. In affirming the judgment, the Iowa Supreme Court determined that the insurance company bore the burden of establishing that the purported fire was the "causa proxima" rather than the "causa remota." *Vorse*, 119 Iowa at 558. Since the fire was a remote cause, it was not the proximate cause and, therefore, the fire exclusion did not apply.

Vorse does not control the legal issue before this Court for several reasons. First, the coverage provided by the plate glass policy in in that case is significantly narrower than the all-risk policy issued by EMCC to the City and, therefore, is inapposite. Further, although not expressly overruled, *Vorse* has not been cited in Iowa since 1935 and cannot be harmonized with the expression of the efficient proximate cause rule in *Qualls* and *Bettis*. Indeed, the *Vorse* court's observation that a remote cause could not be a proximate cause of the claimed damage directly conflicts with the current, modern rule in Iowa that has taught for the past forty-five (45) years that "the dominant cause may be concurrent or remote in point of place or time." *Bettis*, 447 N.W.2d at 571.

The City's position that the squirrel is the efficient proximate cause of the loss is supported by the record evidence, specifically EMCC's expert's report and EMCC's denial letter to the City. This evidence demonstrates the following facts regarding causation:

Report of Robert Boesel – November 25, 2014 (A2, p. 18)

- It is his "… report on investigation of the cause and extent of damage. . . ."
- "a squirrel …created a high voltage electrical fault that resulted in electrical arcing." (A2, p. 18)
- "The carcass of the offending rodent was still on site and I recognized it as a gray squirrel even though the arc which was initiated through the squirrel had blown off all of its hair." (A2, p. 19)
- "This arc, once initiated by the squirrel, was self-sustaining . . . ." (A2, p. 21-22)
- **Conclusion No. 1**: The incident was commenced when a gray squirrel made contact with a bare cable clamp. . . ." (A2, p. 25)
- **Conclusion No. 2**: All of the equipment damage is the result of the sustained electrical arc that was initiated by the squirrel." (A2, p. 25)

EMCC Denial letter – November 25, 2014 (the same day as the Boesel Report) (A2, p. 28)

- "On November 7, a squirrel caused damage to equipment serving the substation transformer owned by the City of West Liberty." (A2, p. 28)
- "EMCC has investigated this event and confirmed that the damages resulted from a squirrel caused electrical arcing event." (A2, p. 28)

All of this evidence provides the factual basis for and explains why EMCC admitted that the squirrel caused a high voltage electrical fault resulting in the substantial damage to the City's property for which recovery is sought.

(A1, p. 82, ¶7) In other words, the squirrel was the efficient proximate cause of the claimed damage.

Applying well-settled Iowa law to the facts of the present case, the squirrel's contact with the electrical equipment set the entire chain of events in motion, the immediate electrical arcing and the damages claimed by the City. In other words, the facts are undisputed that **but-for** the squirrel, the loss would not have occurred. Indeed, there is absolutely no evidence that the electrical equipment broke down causing electrical arcing. The undisputed evidence establishes just the opposite. As a result, the squirrel was the dominant and efficient proximate cause of the loss which is covered under the Policy. Therefore, the district court's ruling to the contrary was incorrect and should be reversed.

IV. THE "ELECTRICAL CURRENTS" EXCLUSION CANNOT REASONABLY BE CONSTRUED AS "EFFECTIVELY" CREATING AN ANTI-CONCURRENT CAUSATION CLAUSE.

As discussed at length in EMCC's Brief and in this Reply, anti-concurrent causation clauses are enforceable in Iowa. Indeed, if EMCC had placed the "Electrical Currents" exclusion under the first section of exclusions, which are introduced by an anti-current causation clause, there would be no question that the City's claimed loss would be excluded. However, as discussed in Section I, above, since EMCC placed the "Electrical Currents"

exclusion under the second section of exclusions, which are not introduced with an anti-concurrent causation lead-in, the efficient proximate cause doctrine applies. Now, EMCC argues that the "Electrical Currents" exclusion, in and of itself, "effectively" creates an anti-current causation provision.

EMCC leaps to this conclusion by attempting to equate the anti-current causation language in *Clasing*, which the City discussed in its opening Brief at pages 15-16, with the language of the "Electrical Currents" exclusion. However, they do not resemble each other in any respect. Indeed, the anti-concurrent language in *Clasing* provides as follows:

> We do not insure for any loss to the property described in Coverages D, E or F which consists of or is *directly and immediately caused* by, one or more of the perils listed in items a. through u. below, *regardless of whether the loss occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these*… emphasis added by the Court in *Clasing*)

Clasing, 2009 Iowa App.Lexis 501, *7-8 (2009) This paragraph, containing characteristic anti-concurrent causation language, was the lead-in to the exclusion discussed in *Clasing*. In contrast to the lead-in italicized language above, the "Electrical Currents" exclusion in EMCC's Policy does not include the characteristic language of an anti-concurrent causation provision such as "*regardless of whether the loss . . . occurs as a result of any combination of*" certain enumerated exclusions. Instead, EMCC's "Electrical Currents"

exclusion simply includes an exception for loss caused by "electrical currents other than lightning."

EMCC's construction of the exception in its exclusion is incorrect. EMCC construes the exception to say that it does not pay for "loss caused by arcing other than lightning." (Appellee's Proof Brief, p. 24) However, not only does that proposition make no sense, but it also is not what the sentence actually says. Instead, the "lightning" exception modifies only the words "electrical currents" which immediately precede it. In other words, EMCC is not obligated to pay for "loss caused by electrical currents other than lightning." This is the only reasonable construction because "lightning" is certainly a form of electrical current. It cannot be reasonably argued that "lightning" is a form of arcing, which emanates from electrical equipment.

EMCC also baldly asserts that if the "Electrical Currents" exclusion does not apply to the squirrel's actions, "it would render the lightning exception illusory." (Appellee's Proof Brief, p. 24) However, EMCC fails support this *ipse dixit* argument with any basis whatsoever, nor does it explain why the exception would be rendered illusory. Consequently, this argument is patently meritless.

V. THIS COURT SHOULD NOT CONSIDER THE EXTRINSIC EVIDENCE PROFFERED BY EMCC.

Since the express terms of the Policy and Iowa law do not support EMCC's attempts to avoid its contractual obligations, EMCC urges this Court to look to extrinsic evidence relating to the purported placement history of the City's insurance with EMCC. Specifically, EMCC requests that this Court consider Exhibits 9 through 14 of Defendant's Statement of Undisputed Facts. (Appellee's Proof Brief, p. 27) Ultimately, EMCC argues that the placement history reflects that the City declined a policy endorsement for equipment breakdown, which EMCC contends would have covered the City's claimed loss caused by the squirrel. However, for reasons discussed below, this Court, just as the district court below, should decline EMCC's invitation to consider extrinsic evidence.

Even if the Court does consider the evidence, the placement history relied on by EMCC is immaterial to the present case since it pre-dates the Policy that was in effect at the time of the loss. Finally, the equipment breakdown endorsement that EMCC so strenuously argues would have covered the City's claimed loss would not, on its face, have afforded coverage, rendering EMCC's entire argument a mirage.

A.

Absent An Ambiguity, Iowa Law Precludes The Consideration Of Extrinsic Evidence.

EMCC does not dispute that this case presents the legal issue of insurance policy construction. Construction of an insurance policy is the process of giving legal effect to a contract and is always a matter of law for the court. *Boelman v. Grinnell Mut. Reinsurance Co*., 826 N.W.2d 494, 501 (Iowa 2013) In such cases, Iowa law very clearly prohibits the consideration of extrinsic evidence when construing insurance policies except in cases where an ambiguity exists. *Boelman* 826 N.W.2d at 501; *see*, *also*, *A.Y. McDonald Industries, Inc. v. Insurance Co. of North America*, 842 F.Supp.1166, 1175 (N.D. Iowa 1993). Nonetheless, if a policy is ambiguous, it must be construed most strongly against EMCC. *Amish Connection*, *86 N.W.2d* at 236; *Qualls*, 184 N.W.2d at 713.

Due to the fact that an ambiguity will be construed in favor of the City, EMCC very carefully avoids expressly stating that it believes the policy is ambiguous and, instead, raises the issue of an ambiguity only "should the court perceive any potential ambiguity" in the "Electrical Currents" exclusion. Indeed, the argument that the "Electrical Currents" exclusion may be potentially ambiguous was not raised by either the City or EMCC in the pleadings or papers in the district court and, therefore, should not be considered

now. *See, Garwick v. Iowa Dep't of Transp*., 611 N.W.2d 286, 288 (Iowa 2000) ("Issues not raised before the district court . . . cannot be raised for the first time on appeal.") Since the argument has been waived, this Court need not reach the issue of a potential ambiguity in the Policy as a predicate for considering extrinsic evidence.

B.

The Placement History Of The City's Insurance Policies Is Irrelevant To The Issue Presented To This Court.

In the event the Court is inclined to consider extrinsic evidence (though it should not do so in the absence of an ambiguity), the evidence on which EMCC relies does not support its argument that the City was offered, but declined, "an equipment breakdown endorsement that would have provided coverage for electrical arcing." (Appellee's Proof Brief, pp. 25-26). As a threshold matter, we must note that EMCC has not furnished this Court with any decisional authority which demonstrates that any court in any jurisdiction has ever decided an insurance coverage issue based upon a policy form that was admittedly not part of the policy at issue in the case. Whether an equipment breakdown endorsement was or was not available is not relevant to determining whether the squirrel was the efficient proximate cause under the terms of the Policy that was, in fact, issued to the City by EMCC. Nonetheless, EMCC's proffered evidence suffers from multiple infirmities which the City discusses individually

below, in accordance with the principle that a party moving for summary judgment shall set forth facts that are admissible in evidence. *Employers Mutual Cas. Co. v. Van Haaften*, 815 N.W.2d 17, 29 (Iowa 2012) (citing Iowa R. Civ. P. 1.981(5)).

1. **Affidavit of Robert Fulwider** (A2, p. 90)[5]

EMCC offers Mr. Fulwider's Affidavit as foundation for Exhibits 9 through 11. Mr. Fulwider is an insurance broker whose relationship with the City was terminated by the City in 2014. EMCC argues that these Exhibits reflect Mr. Fulwider's purported discussions with representatives of the City regarding its insurance needs and support his statements in the Affidavit.

Although EMCC devotes considerable discussion to explain why the materials on which Mr. Fulwider relies do not constitute hearsay, hearsay is the least of the problems with the Exhibits. Indeed, on their face, the documents bear dates from 2011 (A2, p. 37) and 2013 (A2, p.40 and A2, p. 46). Accordingly, Mr. Fulwider's statements in his Affidavit are limited to that same time frame, 2011-2013. (A2, p. 91-92, ¶¶8-14). Notwithstanding any hearsay problems, these purported discussions are patently irrelevant to the issues presented to this Court because the Policy at issue incepted on April 1, 2014,

[5] In the summary judgment proceedings in the district court, EMCC originally presented Exhibits 9 through 11 without any evidentiary foundation. As a result of the City's objections in its Reply Brief, EMCC submitted the Affidavit of Mr. Fulwider (A2, p. 90).

more than one (1) year after the latest date in EMCC's Exhibits. As page 1 of Exhibit 11 reflects, Mr. Fulwider prepared notes regarding a "City of West Liberty Annual Renewal Update" meeting on March 6, 2013 for a "common renewal date of April 1." (A2, p. 42) This renewal related to the policy period April 1, 2013 through April 1, 2014, which is not the Policy at issue in this case. (A1, p. 9, ¶4)

In the absence of any evidence reflecting communications with the City for the Policy at issue, Mr. Fulwider states that the City "did not request equipment breakdown coverage when it renewed its policy with the IAMU Safety Group Insurance Program for the renewal in 2014." (A2, p. 92, ¶15). However, this statement is devoid of any evidentiary foundation as to who allegedly did not request the coverage (which necessarily assumes that Mr. Fulwider offered the coverage in the first place), when the communication occurred and in what form the communication was. Absent this fundamental evidentiary foundation, the statement is inadmissible.

EMCC has presented no admissible evidence which establishes that Mr. Fulwider offered, and the City declined, equipment breakdown coverage for the policy period beginning April 1, 2014 and ending on April 1, 2015, which is the only potentially relevant policy period. Consequently, Exhibits 9 through 11 and Exhibit 14 do not support EMCC'S argument in any way.

2. **Affidavit of Chad Dannewitz**[6]

EMCC also submits that Affidavit of Chad Dannewitz, a Property Claims Supervisor for EMCC. However, for the reasons discussed below, Mr. Dannewitz's Affidavit lacks sufficient evidentiary foundation and should be disregarded.

Even if the Court were to consider the substance of the Affidavit, there is absolutely no foundation for the statements in Paragraphs 5, 6, 9, or 10. (A2, pp. 49-50) Indeed, each and every one of these statements relates to an underwriting issue, not a claims issue. In other words, whether a particular policy form was available to the insured, requested by the insured or offered by the insurer (through its underwriting department) prior to the inception of the policy at issue is a topic for an underwriter, not a claims adjuster. Although it may be self-evident, underwriters and claims adjusters have vastly different roles. Finally, Paragraph 8 (A2, p. 50) should be disregarded because it purports to state a legal conclusion without any evidentiary foundation.

[6] Originally, EMCC submitted an affidavit from Mr. Dannewitz (A2, p. 49) which lacked any foundation for his conclusory statements. Specifically, Mr. Dannewitz did not explain how he supposedly possessed personal knowledge of the "facts" set forth in his Affidavit. As a result, EMCC submitted a supplemental affidavit from Mr. Dannewitz (A2, p. 94) which added a statement about the affiant purportedly possessing personal knowledge about the facts in his Affidavit. However, the addition of a perfunctory statement about personal knowledge failed to cure the defect raised by the City: how does a claims supervisor have personal knowledge about the underwriting

With respect to the specific paragraphs in the Affidavit, Paragraph 5 lacks foundation because Mr. Dannewitz has offered no testimony about how he knows that an equipment breakdown endorsement was available and offered by EMCC in 2014 when the Policy incepted since he is not an underwriter.

Similarly, he has offered no facts based on personal knowledge, just conclusions, that the equipment breakdown endorsement attached to the Affidavit was "typical" in 2014 when the Policy incepted and, therefore, Paragraph 6 lacks foundation.

Paragraph 9 lacks foundation and is based upon impermissible speculation since Mr. Dannewitz has offered no testimony, based on personal knowledge, and could not reasonably have known, what the City "would have received" when the Policy incepted in 2014. Indeed, conjecture or speculation cannot be considered on summary judgment. *See*, *e.g.*, *Castro v. State*, 795 N.W.2d 789, 795 (Iowa 2011); *Butler v. Hoover Nature Trail*, 530 N.W.2d 85, 88 (Iowa Ct. App. 1994).

Paragraph 10 lacks foundation because Mr. Dannewitz, who was not involved in the underwriting process for the Policy, fails to affirmatively state how he has personal knowledge of the information to support his statement.

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and placement of a specific policy? Mr. Dannewitz provides no factual support for his statements.

Finally, with respect to Paragraph 8 of the Affidavit, Mr. Dannewitz seeks to proffer an opinion on the legal question of coverage about a policy form which is not even at issue in this case. Even if it were, it would be a question of law for a Court to decide in which case Mr. Dannewitz's bare opinion, with no evidence cited, cannot be substituted for a court's analysis and should be disregarded.

In summary, for all of these reasons, the Affidavit, in its entirety, should be disregarded as lacking sufficient evidentiary foundation to satisfy Rule 1.981(5).

C.

The Equipment Breakdown Coverage Endorsement, On Its Face, Would Not Provide Coverage For The City's Claimed Loss.

EMCC has exerted significant effort to convince this Court that an "Equipment Breakdown Endorsement" which was not a part of the insurance contract issued by EMCC to the City would have provided coverage for the City's claimed loss. Assuming for purposes of argument only, that the Endorsement attached to Mr. Dannewitz's Affidavit was available, the plain language of the Endorsement conclusively establishes that it would not have covered the City's loss.

Section A.1.b.(3) of the "Equipment Breakdown Endorsement" extends coverage to:

(3) Electrical Generating Equipment

> (a) We will pay for loss or damage to "electrical generating equipment" capable of producing a **maximum output of 500 kilowatts** based on the nameplate rating. (emphasis added)(A2, p. 51)

The Endorsement defines "Electrical Generating Equipment" to include "[e]lectrical transformers, switchgear and power lines used to convey the generated electricity. . . ." (A2, p. 53, §A.1.(d)(3)(a)(v)) The Endorsement also includes an exclusion for "electrical generating equipment" if the equipment does not meet the criteria set forth in A.1.b.(3).

Putting these terms together, coverage is afforded for damage to "electrical generating equipment" caused by electrical arcing as long as the "electrical generating equipment" is "capable of producing a maximum output of 500 kilowatts based on the nameplate rating." Otherwise, coverage is excluded. Applying these coverage terms to the facts of the present case, the Endorsement would arguably afford coverage as long as the City's transformer (i.e., "electrical generating equipment") did not exceed a maximum output of 500 kilowatts.

However, the undisputed evidence, which derives from EMCC's own expert's report, is that the "transformer is rated at 12 MW [megawatts] without fan cooling, 16 MW with the first set of fans operating, and 20 MW with both sets of fans running." (A2, p, 19) The lowest output of 12 MW (megawatts)

equates to 12,000 kilowatts[7]. Therefore, since the output of the City's transformer far exceeded the contractual limit of 500 kilowatts, the City's transformer would not have been covered under the Endorsement and any damage caused by electrical arcing would have been excluded, contrary to EMCC's argument. Consequently, EMCC's argument lacks merit and warrants no further discussion.

SUMMARY

Under Iowa law, since anti-concurrent causation language is inapplicable to the "Electrical Currents" exclusion in the Policy, the efficient proximate cause rule must be applied. In applying this rule, the undisputed, material facts establish that the squirrel was the efficient proximate cause of the City's loss. In other words, absent the squirrel contacting the electrical power equipment, the loss would not have occurred. This cannot be disputed.

As a result, the district court erred when it determined that the squirrel was not the efficient proximate cause of the loss based upon its imposition of a requirement that the squirrel cause "independent damage." However, Iowa law does not require "independent damage" for a peril to constitute the efficient proximate cause.

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[7] A kilowatt equals 1000 watts while a megawatt equals 1,000,000 watts. (www.merriam-webster.com/dictionary/kilowatt and www.merriam-webster.com/dictionary/megawatt) (last accessed February 28, 2017). Accordingly, 1 megawatt equals 1000 kilowatts.

For these reasons, as well as those discussed in detail herein and in the City's opening Brief, the City sustained a covered loss which was not excluded by any of the Policy's exclusions.

CONCLUSION

For the reasons stated above, the City respectfully requests that this Court grant the following relief:

1. Reverse the district court's ruling granting summary judgment in EMCC's favor;
2. Order that judgment be entered in favor of the City and against EMCC on the City's motion for partial summary judgment as to Count I of its Petition;
3. Remand the case to the district court for further proceedings with respect to Count II of the City's Petition; and
4. Other relief as this Court deems necessary and just.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully request oral argument on all issues presented.

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