IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 21-0623

POLK COUNTY NO. LACL148100

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JESSE'S EMBERS, LLC d/b/a JESSE'S EMBERS,
Plaintiff-Appellant

v.
WESTERN AGRICULTURAL INSURANCE COMPANY, D/B/A FARM BUREAU FINANCIAL SERVICES
Defendant-Appellee.

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APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY
THE HONORABLE JEANIE VAUDT

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FINAL BRIEF OF APPELLANT

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PROOF OF SERVICE & CERTIFICATE OF FILING

On September 24, 2021, I served this final brief on all other parties by EDMS to their respective counsel.

I further certify that I did file this brief with the Clerk of the Iowa Supreme Court by EDMS on September 24, 2021.

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ROUTING STATEMENT

Retention of this case before the Iowa Supreme Court is appropriate under Iowa R. App. P. 6.1101(2)(c) and (f).

STATEMENT OF THE CASE

This case involves interpretation and construction of undefined terms contained within an "all-risk" business interruption insurance policy. The dispute centers on whether Jesse's Embers' business income losses arising out of Governor Kim Reynolds' March 17, 2020, Proclamation ordering the closure of all bars and restaurants is a "covered loss" under the "all-risk" insurance policy Farm Bureau sold to Jesse's Embers. The dispute also centers on whether a "Virus Exclusion" within the all-risk policy excludes losses arising out of Governor Kim Reynold's March 17, 2020, Proclamation and subsequent proclamations allowing for the partial re-opening of these facilities.

Pursuant to the policy, Farm Bureau agreed to pay

> [F]or the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration". The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss…

The text of the all-risk policy is such that Farm Bureau agreed to pay for loss of business income caused by loss of ***or*** damage to property. The use of the disjunctive "or" necessarily means loss or damage is required, and that "loss" and "damage" are distinct concepts with different meanings. Applying well-established principles of insurance contract interpretation, at best an

ambiguity exists as to whether the Proclamation constitutes a "direct physical loss of or damage to" Jesse's Embers' property for which Farm Bureau agreed to compensate. This appeal centers on whether Jesse's Embers sustained such a "direct physical loss of or damage to" its property sufficient to trigger coverage under its Policy with Farm Bureau.

On August 28, 2020, Jesse's Embers filed its First Amended and Substituted Petition at Law and Jury Demand, alleging Farm Bureau breached the insurance policy it sold to Jesse's Embers by failing to compensate Jesse's Embers for loss of business income Jesse's Embers sustained as a result of Governor Reynolds' March 17, 2020 Proclamation ordering the closure of all bars and restaurants. (8/28/20 Petition)(App. at 7-20). Jesse's Embers also sought a declaratory judgment seeking an affirmative order that the policy at issue provided Jesse's Embers coverage for its business income losses under the circumstances. On September 17, 2020, Farm Bureau filed an Answer to Jesse's Embers' First Amended and Substituted Petition denying Jesse's Embers' claims, and further asserting a host of affirmative defenses purportedly excluding Jesse's Embers' claim for coverage.

On January 11, 2021, Farm Bureau filed a Motion for Summary Judgment and Brief in Support asserting Jesse's Embers did not sustain a direct physical loss or damage to its property to trigger coverage under the all-

risk policy. (1/11/21 Def's Brief in Support of Summary Judgment)(App. at 24-41, 45-46). Farm Bureau also asserted Jesse's Embers' claims for insurance benefits were excluded by the Virus Exclusion and Ordinance or Law Exclusion within the policy. (1/11/21 Def's Brief in Support of Summary Judgment)(App. at 41-43, 47-49). Lastly, Farm Bureau claimed Jesse's Embers could not present a viable claim for bad faith denial of coverage. (1/11/21 Def's Brief in Support of Summary Judgment (App. at 43-44, 49). Jesse's Embers filed a Resistance to Farm Bureau's Motion, which included a Brief in Support, Expert Witness Affidavits, Statement of Disputed Facts, and Fact Witness Affidavits. (1/29/21 Jesse's Embers' Resistance, Brief in Support and Appendix)(App. at 220-359). Following a hearing on the motion, the district court granted Farm Bureau's Motion for Summary Judgment. (4/13/21 Ruling on Def's Motion for Summary Judgment)(App. at 397-420). Jesse's Embers timely filed a notice of appeal. (5/3/21 Notice of Appeal)(App. at 421).

The question presented is whether Farm Bureau's insurance contract of adhesion was unambiguous and failed to provide coverage, or otherwise excluded Jesse's Embers' loss of business income resulting from Governor Reynolds' March 17, 2020, Proclamation ordering the closure of all bars and restaurants, and her subsequent proclamations limiting the capacity of these

businesses. Jesse's Embers asserts the all-risk policy provides coverage under these circumstances, and otherwise does not exclude such coverage. As shown below, the ordinary and common interpretation of the direct physical loss of or damage to property requirement makes clear Jesse's Embers has suffered a coverable loss under these circumstances. At the very least, Jesse's Embers' interpretation of the applicable policy provisions is reasonable, which renders the contract ambiguous. *Lucy v. Platinum Servs.*, 2018 Iowa App. LEXIS 1015 at *8 (Iowa Ct. App. Nov. 7, 2018) ("A contract is ambiguous if more than one interpretation is reasonable"). Accordingly, the Court should reverse the decision below.

STATEMENT OF THE FACTS

Jesse's Embers operates a restaurant in Des Moines. In March 2020, the business suffered a "direct physical loss of" its property because of government closure orders, which physically impaired and detrimentally altered the property and rendered it nonfunctional for its intended purpose. (Affidavit of Marty Scarpino)(App. at 258-264). Fortunately, to protect the businesses in the event it suddenly had to suspend operations for reasons outside of his control, Jesse's Embers purchased Business Income insurance from Farm Bureau Financial Services. (Policy)(App. at 64, 68, 73). In return for the payment of premiums, Farm Bureau issued Policy No. BP6023272 01

to Jesse's Embers providing these coverages. (Policy)(App. at 53, 59-65). The Policy essentially covers all covered causes of loss except for those risks that are expressly and specifically excluded. Requiring an exclusion to be expressly and specifically stated in the policy is one of the bedrock principles of Iowa insurance law. The Policy includes Farm Bureau's Businessowners Coverage Form, BP 00 03 07 13. (Policy)(App. at 68-120). Farm Bureau's Businessowner's Policy is a form policy based upon provisions drafted by the Insurance Services Office, Inc. ("ISO"). (See reference to "Copyright, Insurance Services Offices, Inc., 2011" at the bottom of each page of Form BP 00 03 07 13)(App. at 68-120). The provisions and exclusions of the ISO Policy were not the product of discussions or negotiations between Farm Bureau and Jesse's Embers. Rather, the provisions and exclusions of the "all-risk" Policy consist of standardized language and terms developed by the insurance industry through its trade association, ISO, and are used by the industry nationwide. An "all-risk" policy provides the broadest coverage available to an insured.

A. Relevant Policy Provisions

The Policy language provides in relevant part:

BUSINESSOWNERS COVERAGE FORM

*****

SECTION I – PROPERTY

A. Coverage

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss**.**

*****

1. Additional Coverages

f. Business Income

(1) Business Income

(a) We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration". The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss…

(Policy)(App. at 73). "Operations" means "your business activities occurring at the described premises." (Policy)(App. at 100).

g. Extra Expense

(1) We will pay necessary Expense you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.

(2) Extra Expense means expense incurred:

(a) To avoid or minimize the suspension of business and to continue "operations:

(i) At the described premises….

(Policy)(App. at 75). "Operations" means "your business activities occurring at the described premises." (Policy)(App. at 100).

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

j. Virus Or Bacteria

(1) Any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

(Policy)(App. at 86-87).

The policy defines a "Covered Cause of Loss" as "Direct physical loss unless the loss is excluded or limited under Section I – Property. (Policy)(App. at 69). The Policy does not define the phrase "direct physical loss of or damage to….", nor does it define "direct", "physical", "loss of", or "damage" individually. The Policy does not require or otherwise define "loss of…property" to require an actual alteration of property.

B. March 17, 2020 Proclamation

In 2019, an outbreak of illness known as COVID-19 was first identified in China, which subsequently spread to the United States. Beginning in early-March 2020, many state and local governments began issuing orders suspending or severely curtailing the operations of all non-essential or high-risk businesses, including Appellant's in-person dining and bar business. The impact on businesses whose livelihoods depend on foot-traffic, such as

Appellant's business, has been particularly staggering. On March 17, 2020, Iowa Governor Kim Reynolds issued a Proclamation closing all bars and restaurants from dine-in or in-person service. (3/17/20 Proclamation)(App. at 207-213). Section 3A of the proclamation states:

> **Restaurants and Bars:** All Restaurants and Bars are hereby closed to the general public except that to the extent permitted by applicable law, and in accordance with any recommendations of the Iowa Department of Public Health, food and beverages may be sold if such food or beverages are promptly taken from the premises, such as on a carry-out or drive-through basis, or if the food or beverage is delivered to customers off the premises.

(Proclamation)(App. at 208-209). The Proclamation caused "**direct physical loss of or damage to**" Jesse's Embers' covered property under the Policy by precluding Jesse's Embers from conducting its operations, precluding customers from patronizing the business, and otherwise frustrating the intended purpose of Jesse's Embers' business, all thereby causing the necessary suspension of operations during a period of restoration. (Affidavit of Marty Scarpino)(App. at 258-264). Indeed, failing to adhere to the Proclamation could have resulted in criminal charges and loss of Jesse's Embers' license.

C. Jesse's Embers' Claim for Insurance Benefits

Losses caused by COVID-19 and/or the Governor Reynolds Proclamation triggered the Business Income and Extra Expense coverages of

the Policy. Jesse's Embers is a relatively small size restaurant that relies primarily on sit-down dining. Jesse's Embers, to mitigate its income losses, attempted to sell carry-out orders. Jesse's Embers also opened dining facilities at 50 percent capacity as allowed by the Governor's subsequent modification of the March 17 Proclamation. Jesse's Embers under its business owner's policy submitted a claim to Farm Bureau for loss of business income because of the Governor of the State of Iowa issuing an Order closing all restaurants and food and beverage businesses throughout the state of Iowa. (Claim Denial Letter)(App. at 265-270). Jesse's Embers received a letter denying the claim for business income loss based upon the review of the policy. (Claim Denial Letter)(App. at 265-270). The purported reason for the denial of coverage as set forth in the declination letter was that there is a policy exclusion of loss due to a virus; that the business income loss must be caused by direct physical damage to the premises, and that the Civil Authority provision of the policy was not applicable. (Claim Denial Letter)(App. at 265-270). Further, the denial letter stated suspension of business was not caused by direct physical loss of or damage to property. (Claim Denial Letter)(App. at 265-270). An additional purported reason for denial of coverage was that an "Ordinance or Law" exclusion precluded coverage. (Claim Denial Letter)(App. at 265-270).

ARGUMENT

THE DISTRICT COURT'S INTERPRETATION OF THE DIRECT PHYSICAL LOSS REQUIREMENT AND VIRUS EXCLUSION MISREADS THE CONTRACTUAL TEXT AND IGNORES SEVERAL WELL-ESTABLISHED PRINCIPLES OF INSURANCE CONTRACT INTERPRETATION

Preservation of Error

Error has been preserved by virtue of Farm Bureau's motion for summary judgment, Jesse's Embers' resistance, and the district court's ruling. (1/11/21 Def's Brief in Support of MSJ; 1/29/21 Pl's Brief in Resistance and Appendix; 4/13/21 Ruling) (App. at 24-50, 222-250, 256-359).

Standard of Review

This Court reviews a district court's ruling on a motion for summary judgment for correction of errors at law. *Slaughter v. Des Moines University College of Osteopathic Medicine*, 925 N.W.2d 793, 799 (Iowa 2019).

Analysis

A. Applicable Legal Principles

1. Summary Judgment standard

Summary judgment is proper when "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 a judgment as a matter of law." Iowa R. Civ. P.

1.981(3). The trial court must look at the whole record in the light most favorable to the one against whom the motion is made. *Tasco, Inc. v. Winkel*, 281 N.W.2d 280, 282 (Iowa 1979). In this case, the Plaintiff filed a Resistance to Defendant's Motion and a Statement of Disputed Facts. The moving party has the burden to show the absence of a fact issue. *Id.* Even if the facts are undisputed, summary judgment is not appropriate if reasonable minds may draw different inferences from them. *Id.*

2. Principles of insurance contract construction and interpretation

The Iowa Supreme Court provided a comprehensive discussion of insurance policy interpretation and construction under Iowa law in *Boelman v. Grinnell Mutual Reinsurance Company,* 826 N.W.2d 494 (Iowa 2013). In *Boelman*, the Iowa Supreme Court recognized the distinction between contract interpretation and contract construction. Specifically, interpretation requires the court to give meaning to contractual words in the policy. *Id.* In contrast, "[c]onstruction is the process of giving legal effect to a contract." *Id.*

As the Iowa Supreme Court explained in *Boelman*, "Policy interpretation is always an issue for the court, unless [the court is] required to rely upon extrinsic evidence or choose between reasonable inferences from extrinsic evidence." *Id.* The court then identified several rules of "interpretation." First, "[i]f the policy does not define a term, [the court must]

give the word its ordinary meaning." *Id.*; *accord Farm Bureau Life Ins. Co. v. Holmes Murphy & Assocs., Inc.*, 831 N.W.2d 129, 134 (Iowa 2013) ("When words are left undefined in a policy, we give them their ordinary meanings—meanings which a reasonable person would give them."). When searching for the ordinary meanings of undefined terms in an insurance policy, Iowa courts commonly refer to dictionaries. *Holmes Murphy & Assocs., Inc*., 831 N.W.2d at 13.

Second, "[t]he plain meaning of the insurance contract generally prevails." *Boelman*, 826 N.W.2d at 501 (citing *Thomas v. Progressive Cas. Ins. Co*., 749 N.W.2d 678, 682 (Iowa 2008)). Third, the court must read the policy as a whole. *Id.; accord Holmes Murphy & Assocs., Inc.*, 831 N.W.2d at 134 ("We read the insurance contract in its entirety, rather than reading clauses in isolation, to determine whether a policy provision is subject to two equally proper interpretations."). Fourth, the court "will not interpret an insurance policy to render any part superfluous, unless doing so is reasonable and necessary to preserve the structure and format of the provision." *Boelman*, 826 N.W.2d at 502. Fifth, the court must "interpret the policy language from a reasonable rather than a hypertechnical viewpoint." *Id.*; *accord Holmes Murphy & Assocs., Inc.*, 831 N.W.2d at 134 ("We do not

typically give [undefined terms] meanings only specialists or experts would understand.").

The court interprets ambiguous policy provisions in favor of the insured because insurance policies are in the nature of adhesion contracts. *A.Y. McDonald Industries, Inc. v. Insurance Co. of North America*, 475 N.W.2d 607, 619 (Iowa 1991); *see also C&J Fertilizer v. Allied Mut. Ins. Co.*, 227 N.W.2d 169 (Iowa 1975). Under Iowa law "[a]mbiguity exists if, after the application of pertinent rules of interpretation to the policy, a genuine uncertainty results as to which one of two or more meanings is the proper one." *Id.* at 618; *see also Kibbee v. State Farm Fire & Cas. Co.*, 525 N.W.2d 866, 868 (Iowa 1994) (stating that a policy is ambiguous when the policy language is susceptible to two reasonable interpretations). Although "interpretation" is an issue for the court in most circumstances, "construction"—determining the "legal effect" of policy language, as interpreted—"is always a matter of law for the court." *Boelman*, 826 N.W.2d at 501. A key axiom of insurance policy interpretation states, "**[i]f the policy is ambiguous, we adopt the construction most favorable to the insured.**" *Id.* at 502. (emphasis added). An insured's failure to clearly and explicitly define a covered loss creates an ambiguity. *See Cairnes v. Grinnell Mutual Reinsurance Co.*, 398 N.W.2d 821, 824 (Iowa 1987). As to "exclusions" of

coverage in insurance policies, an insurer assumes a duty to define any limitations or exclusionary clauses in **clear** and **explicit** terms. *Boelman,* 826 N.W.2d at 502. This key axiom takes on heightened importance when the undefined terms at issue go to the heart of determining coverage.

The Iowa Supreme Court most recently reaffirmed these principles interpretation and construction of insurance contracts in *T.H.E. Insurance Company v. Glen and Estate of Booher*, 944 N.W.2d 665 (Iowa 2020). Specifically, the Iowa Supreme Court relied on the following principles in determining coverage existed in a claim for gross negligence:

(1) An insurance contract is to be interpreted from the standpoint of an ordinary person and not a specialist or expert.

(2) Insurance policies are adhesive contracts and are to be construed in the light most favorable to the insured.

(3) Ambiguities in an insurance contract are to be interpreted against the insurer.

(4) When a policy is subject to two reasonable interpretations, the court will find an ambiguity.

See generally, Id.

The Restatement of the Law of Liability Insurance, Section 4 (2019), provides additional insight regarding ambiguities and the rule that an ambiguous contract term should be interpreted against the party that supplied

the term. The comment contained in the Restatement of Law of Liability Insurance, Section 4, states:

> (1) An insurance policy term is ambiguous if there is more than one meaning to which the language of the term is reasonably susceptible when applied to the facts of the claim at issue in the context of the entire insurance policy.
>
> (2) When an insurance policy term is ambiguous as defined in subsection (1), the term is interpreted against the party that supplied the term, unless that party persuades the court that a reasonable person in the policyholder's position would not give the term that interpretation.

Id.

Based on above, "[i]t is therefore incumbent upon an insurer to define clearly and explicitly any limitations or exclusions to coverage expressed by broad promises." *Cairns v. Grinnell Mut. Reins. Co.*, 398 N.W.2d 821, 824 (Iowa 1987); *See also*, *Dirgo v. Associated Hospitals Services, Inc.*, 210 N.W.2d 647, 650 (Iowa 1973) (stating exclusions are strictly construed against the insurer).

Ultimately, if an insured's interpretation of the relevant policy provisions is reasonable and different from the insurer's interpretation, an ambiguity exists.

3. Principles of determining intent of the parties – extrinsic evidence

The cardinal rule in interpretation and construction of contracts—insurance policies is to determine the intent of the parties. In *Connie's Const.*

Co., Inc. v. Fireman's Fund Ins. Co., 227 NW2d 2007 (Iowa 1975), the Iowa Supreme Court interpreted a contractor's liability insurance policy. In doing so, the Court stated that "interpretation, the meaning of contractual words, is an issue of the court unless it depends upon extrinsic evidence or on a choice among reasonable inferences from extrinsic evidence." The Court in *Connie's Const. Co.* cited *Hamilton v. Wosepka*, 261 Iowa 299, 154 NW2d 164 (1967) in which Justice Mason in *Hamilton* engaged in a powerful analysis of the purpose of interpretation always being the discovery of actual intention. An in-depth review of *Corbin on Contracts, Williston on Contracts* and numerous insurance cases led the court to conclude that the "ambiguity-on-its-face" rule is a vestigial remain of a notion prevailing in "primitive law." Justice Mason adopted the position of *U.S. v. Lennox Metal Mfg. Co.*, 225 F.2d 302, 310 (2d Cir. 1955) in recognizing the fallacy in interpreting contractual language in a manner that would preclude the court from considering surrounding circumstances unless the language is "patently ambiguous." Iowa's well-established principles of insurance contract interpretation ring hollow if, when interpreting a policy and determining the parties' intent, the Court does not consider the situation of parties, the attendant circumstances and intentions giving rise to the purchase of the policy, and the objects a party is striving to obtain in entering into the contract.

The challenge before the Court is to determine the true "intent of the parties" at the time an adhesion contract was entered. The outcome is predetermined and fixed, unless the court engaged in discovery of the actual intention as suggested in *Hamilton*. In this business interruption claim, the clear intent of the insured, as stated in the affidavits and exhibits, was that Jesse's Embers purchased an "all-risk" policy that covered its business losses under these circumstances. For the Court to give true meaning to the bedrock principles of determining the intent of the parties to a contract of adhesion, the Court must consider the actual intent of the parties. The only way for the Court to do that is to consider the affidavit of Marty Scarpino. How else can the Court consider the issues raised in *Hamilton?*

B. The District Court Erred in Determining that the Policy did not Provide Coverage.

The District Court erred in determining that the Policy did not provide coverage. Ambiguities in the Policy preclude summary judgment with respect to Business Income coverage. The Policy provides for Business Income coverage in pertinent part as follows:

> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration". The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss…

(Policy)(App. at 73). Thus, to be entitled to coverage, Jesse's Embers must show that (1) it necessarily suspended its operations, (2) it suffered a loss of business income due to the suspension of its operations, and (3) the suspension was caused by direct physical loss of or damage to property at the described premises, which in turn directly caused the loss.

1. Jesse's Embers necessarily suspended its operations

Jesse's Embers clearly pleads and demonstrates a "suspension" of its "operations." The Policy defines "suspension", in pertinent part, as "(a) The partial slowdown or complete cessation of your business activities; or (b) That part or all of the described premises is rendered untenable, if coverage for Business Income applies." (Policy)(App. at 74). The Policy defines "operations," in pertinent part, as "your business activities occurring at the described premises." (Policy)(App. at 100).

Governor Reynolds' Proclamation closed Jesse's Embers' operations. Quite obviously, Jesse's Embers' unfortunate closure of its restaurant and bar operations constitutes a "cessation of [its] business activities." The restaurant and bar were initially closed and not doing any business at all for several months. Likewise, Jesse's Embers' operations at the Insured Premises prior to the issuance of the Proclamation constituted almost exclusively the operation of a dine-in restaurant. Accordingly, when Jesse's Embers closed its

restaurant and bar in response to the Proclamation, there was a "suspension" of its "operations" as defined by the plain language of Policy. Moreover, Jesse's Embers' suspension of operations was "necessary". While the term "necessary" is not defined by the Policy, Webster's Unabridged Dictionary ("Webster's") defines it as "required," "determined or produced by the previous condition of things," "logically unavoidable," and "compulsory." https://www.merriam-webster.com/dictionary/necessary. Here, the Proclamation prohibited in-person dining, among other things. In-person dining and bar service ***are*** Jesse's Embers' business — which it was unable to operate. Accordingly, Jesse's Embers closed its operations as required by the Proclamation and as the unavoidable result of the same.

2. Jesse's Embers suffered a loss of business income

At best a material fact dispute exists as to whether Jesse's Embers suffered a loss of business income. Jesse's Embers clearly alleges a loss of "business income" due to the suspension of its operations, and Farm Bureau does not appear to challenge that position in its motion. The Policy defines "business income" as "'[n]et income' (Net Profit or Loss before income taxes) that would have been earned or incurred if no physical loss or damage had occurred…. (Policy)(App. at 74). Upon closure of the restaurant and bar, Jesse's Embers suffered a loss of profits, and continued to suffer loss of profits

even after it was allowed to re-open on take-out basis, and then re-open for dine-in service at a 50% capacity. (Marty Scarpino Affidavit)(App. at 258-264). Accordingly, under the Policy's plain language, Jesse's Embers suffered a loss of "business income" as a result of the necessary suspension of its operations.

C. The Suspension of Jesse's Embers' Operations was Caused by a "Direct Physical Loss of" Property at the Insured Premises

The critical coverage issue in this case ultimately centers on whether the necessary suspension of Jesse's Embers' operations was caused by a direct physical loss of or damage to property. Farm Bureau's Policy provides coverage for actual loss of Business Income that an insured sustains due to a necessary suspension of operations where the suspension is caused by "direct physical loss of **or** damage to covered property at the described premises." (Policy)(App. at 73). The Policy does not define the key phrase "direct physical loss of **or** damage to . . .," nor does it define other specific key terms such as "loss," "direct," "physical," or "damage." The ambiguities were created by the drafter's failure to knowingly define key terms of the policy. Accordingly, the Court interprets undefined words in the context of the policy as a whole and avoids interpreting the policy in such a way as to render parts of the contract "surplusage." *See Fashion Fabrics of Iowa, Inc. v. Retail Inv'rs Corp.*, 266 N.W.2d 22, 26 (Iowa 1979) ("Because an agreement is to

be interpreted as a whole, it is assumed in the first instance that no part of it is superfluous; an interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect").

Farm Bureau cannot point to any provision of the Policy that purports to define "loss" to require an actual alteration of property. To the contrary, Section F.17 of the Commercial General Liability and Medical Expenses Definitions that is part of the Policy in fact defines "property damage" to include: **"[l[oss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it."** (Policy)(App. at 116-117). Literally, the only section of the Policy discussing loss of use states that property damage includes loss of use of tangible property that is not physically injured. Likewise, the Business Income coverage requires "loss of" or "damage to" property to trigger coverage, while the Civil Authority provision requires actual damage to property ("When a Covered Cause of Loss causes damage to property…." (Policy)(App. at 76). Again, reading the Policy as a whole demonstrates "loss of" property is different than "damage to" property. Simply reviewing the Policy as a whole demonstrates "loss of" property does not require property to be physically injured or altered. Farm Bureau's

attempt to argue the contrary and to ignore the Policy as a whole is an attempt to re-write the Policy. If Farm Bureau wanted to exclude loss of "use" as a covered cause of loss, or require a physical alteration to property, it could have easily done so.

With respect to the specific Policy language at issue, the use of the disjunctive "or" in the phrase "direct physical loss of or damage to" means that coverage is triggered if either a physical loss of property **or** damage to property occurs.[1] This ambiguity has also been created by the drafter failing to utilize basic well-known grammar. The concepts are clearly separate and distinct. The Policy's use of the disjunctive "or" between the terms "physical loss of" and "damage" necessarily means that either a "loss of" or "damage to" qualifies for coverage and that "loss of" is distinct from "damage to". *See Denison Municipal Utilities v. Iowa Worker's Compensation Commissioner,* 857 N.W.2d 230, 236 (Iowa 2014) (noting that use of the disjunctive "or" necessitated conclusion that statute set forth a list of alternatives). In *Manpower, Inc. v. Ins. Co. of the State of Penn.*, No 08C0085, 2009 U.S. Dist. LEXIS 108626, at 6 (E.D. Wis. Nov. 3, 2009), the insured, like Jesse's Embers

[1] A very basic tenant of the English language is the distinction between conjunctive and disjunctive construction of sentences. Disjunctive is defined as separate from alternatives. Black's Law Dictionary defines a disjunctive term as "One which is placed between two contraries by the affirming of one of which the other is taken away; it is usually expressed by the word 'or.'" Conjunctive is defined as when two parts are read together. Black's Law Dictionary defines conjunctive as "[c]onnecting in a manner denoting union. A grammatical term for particles which serve for joining or connecting together. Thus, the word "and" is called a "conjunctive," and "or" a "disjunctive," conjunction."

in this case, held an insurance policy covering damage for "direct physical loss of or damage to property." The court recognized that if such language required physical damage, then the policy would contain surplus language, and therefore, "'direct physical loss' must mean something other than 'direct physical damage'". *Id*. at 19. (*See also* Affidavits Professor Robertson and Susan Voss)(App. at 283-289, 295-300).[2]

Farm Bureau could have defined "physical loss" and "physical damage," but failed to do so. (Voss Affidavit)(App. at 283-289). Courts searching for the ordinary meanings of undefined terms in policies commonly refer to dictionaries. Webster's defines "physical" as "of or relating to material things." https://www.merriamwebster.com/dictionary/physical. Webster's defines "loss" as follows: "detriment, disadvantage or deprivation from failure to keep, have or get; something that is lost…the state of being deprived of or being without something one has had." https://www.merriam-webster.com/dictionary/loss. Webster's defines "damage" as follows: "injury or harm that reduces value or usefulness." https://www.merriam-webster.com/dictionary/damage. Webster's defines "property" as including intangible property: "something owned or possessed," "***the exclusive right to***

[2] Ms. Robertson is currently in Scotland and unable to provide a notarized affidavit. Jesse's Embers' counsel makes a professional statement that Ms. Robertson has authorized the filing of the unsigned affidavit reflecting her opinions.

possess, enjoy, and dispose of a thing: OWNERSHIP," *and "something to which a person or business has a legal title."* https://www.merriam-webster.com/dictionary/property (Emphasis added).

The Court should further note, because the Policy provides coverage for "direct physical loss ***of*** . . . property" as opposed to "direct physical loss ***to*** property," the Insured Premises themselves do not need to have suffered a direct physical loss. This is yet another example of the drafter creating an ambiguity by the failure to utilize basic grammar. Rather, all that is required to trigger coverage is that Jesse's Embers incur a direct physical loss of property at the Insured Premises. *See Turek Enters. v. State Farm Mut. Auto Ins. Co.*, No. 20-11655, 2020 WL 5258484 at *6 (E.D. Mich. Sept. 3, 2020)(explaining that plaintiff's claim that its inability to use the covered property due to the Michigan Orders constituted "physical loss to covered property" would have been plausible had the policy covered "physical loss of covered property" instead of "physical loss to covered property"). And that is exactly what happened here. As a result of the Proclamation, Jesse's Embers was deprived (i.e., a "loss") of its rights of enjoyment of the Insured Premises (i.e., "property") because it was prohibited from using the Insured Premises for its intended purpose — dine-in restaurant and bar.

Simply applying these definitions to the well-established general principles of insurance contract interpretation under Iowa law demonstrates the Proclamation constitutes "physical loss of or damage to property" under the Policy. Jesse's Embers suffered a "physical loss of . . . property," as the Proclamation "deprived" Jesse's Embers of its ability to use the Insured Premises for in-person dining, which is the essence of its business. Because Jesse's Embers could not operate the Insured Premises as a restaurant with in-person dining as it did prior to the issuance of the Proclamation — patrons were prevented from physically dining in the restaurants — Jesse's Embers was "without something they once had." Jesse's Embers "lost" its property including, without limitation, the right to "enjoy" operating the Insured Premises as restaurants with in-person dining.

The district court's ruling placed a great deal of emphasis on *Milligan v. Grinnell Reins. Co.*, No. 1-050 / 00-1452 (Iowa Ct. App. Apr. 27, 2001). The district court's heavy reliance on *Milligan* is an error. The *Milligan* two-and-a-half-page unpublished opinion that deals specifically with a fire insurance policy interpreting the suit-limitation provision for bringing a claim. *Id*. The language at issue in *Milligan* dealt with a different and more restrictive definition of "loss" so as to require damage or destruction. The *Milligan* court noted that the insureds cannot cite any authority for their

position. On the case before the court, Plaintiff is citing dozens of cases in support of the Plaintiff's position. The *Milligan* case and the instant case are not anything alike. The limited opinion does not purport to interpret or construct an "all-risk" business interruption policy as applied to government closure orders amidst a pandemic the likes which this Country has not seen in over a hundred years. Other than reciting some well-established interpretation principles, *Milligan* has no bearing on the issues at hand.

At the very least, Jesse's Embers' interpretation of the Policy is reasonable with respect to what constitutes a "direct physical loss of…property" for purpose of triggering coverage. Accordingly, an ambiguity exists that must be resolved in Jesse's Embers' favor, thereby precluding Farm Bureau's motion. Farm Bureau's attempt require physical alteration is yet another example of Defendant trying to re-write its Policy.

D. Recent Judicial Opinions Support Jesse's Embers' Claim for Coverage

Jesse's Embers acknowledges that the majority of courts that have ruled on business interruption claims premised on governmental closure orders have found against coverage. However, as discussed below, many of those cases are distinguishable for multiple reasons including, without limitation, the simple failure of many courts to apply well-established principles of insurance contract interpretation to the facts giving rise to the closures. This case

presents novel issues due to its procedural posture and expansive policy language.[3]

Henderson v. Road Restaurant Systems, Inc. v. Zurich American Ins. Co., 1:20-CV-1239, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021)(Pl. App. 38), is one of most recent cases evaluating business interruption claims and provides the proper roadmap for applying the well-established principles of insurance contract interpretation to business income provisions. In *Henderson*, the plaintiff made nearly identical claims as Jesse's Embers makes in this case. The court reviewed similar policy provisions and considered the ordinary definitions of the policy's undefined works. Upon doing so, the court held:

> Because Zurich's Policy is susceptible of more than one interpretation and because Plaintiffs have shown that they incurred "loss of **'business income'** due to the necessary **'suspension'** of their **'operations'** during the **'period of restoration'"** "caused by direct physical loss of or damage to property at a **'premises,'**" they are entitled to summary judgment on the issue of coverage under the Policy.

Henderson, 2021 WL 168422 at *12.

[3] Most recently, the United Kingdom's highest court ruled in favor of the insured business owners in the UK's version of Business Interruption cases, concluding that the insurance companies must provide coverage for losses arising out of the government's closure of businesses. *See Financial Conduct Authority v Arch Insurance* (UK) Ltd. 15 Jan 2021 [2021] UKSC 1, SC(E) on appeal from 15 Sep 2020 [2020] EWHC 2448 (Comm), DC (Flaux LJ, Butcher J). While there are differences in the coverages in the U.K. policies, the main thrust and significant of the decision is that the United Kingdom has recognized that insurer should pay on business interruption policies as result of the establishments having been closed completely or partially due to proclamations of their government.

Studio 417 v. Cincinnati Ins. Co., No. 20-cv-03127, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020)(Pl. App. 77), is another analogous litigation involving business interruption insurance claims due to governmental closure orders that also involves similar policy language. In *Studio 417*, the United States District Court for the Western of Missouri held stated the relevant governmental closure orders caused a "physical loss" because the Closure Orders prohibited or significantly restricted access to Plaintiffs' premises. *Id* at *7. In reaching its decision, the *Studio 417* court explained that the policies at issue provide coverage for "'accidental physical loss *or* accidental physical damage.'" *Id.* at *5 (emphasis sic). The court further explained that "Defendant conflates 'loss' and 'damage' in support of its argument that the Policies require a tangible, physical alteration. However, the Court must give meaning to both terms. *Id.*

Similarly, in *North State Deli, LLC v. The Cincinnati Ins. Co.*, Case No. 20-CVS-02569, 2020 WL 6281507, (N.C. Super. Oct. 09, 2020)(Pl. App. 94), the North Carolina General Court of Justice for Durham County granted the insured restaurant owners' motion for summary judgment, affirmatively holding the insurer must provide coverage under a policy similar to the one at issue in this lawsuit. The court relied upon Merriam-Webster and Black's Law Dictionary definitions in support of its ruling:

> Applying these definitions reveals that the ordinary meaning of the phrase "direct physical loss" includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions. In the context of the Policies, therefore, "direct physical loss" describes the scenario where businessowners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property. This is precisely the loss caused by the Government Orders. Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured. These decrees resulted in the immediate loss of use and access without any intervening conditions. In ordinary terms, this loss is unambiguously a "direct physical loss," and the Policies afford coverage.

Id. at *6.

Other district courts that have properly applied the well-established principles of insurance contract interpretation have reached the same conclusion. *See e.g. Nautilus Grp., Inc. v. Allianz Global Risks US*, No. C11-5281BHS, 2012 WL 760940, at * 7 (W.D. Wash. Mar. 8, 2012) (stating that 'if "physical loss" was interpreted to mean "damage," then one or the other would be superfluous"); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, Case No. 20-CV-00383 (W.D. Mo. Sept. 21, 2020) (denying defendant insurer's motion to dismiss on the same grounds as in *Studio 417*) *Urogynecology Specialist of Florida, LLC v. Sentinel Insurance Company, Ltd.,* Case No. 6:20-cv-1174, 2020 WL 5939172 (M.D. Fl. Sept. 24, 2020).

Likewise, the United States District Court for the Eastern District of Michigan recently discussed the importance of the "physical loss of or damage to" policy language present here, as opposed to other, more limiting, policy language. Specifically, in *Turek* the court rejected the plaintiff's claim for business income coverage due to its closure in response to the Michigan Orders, construing the policy to require "tangible damage" to trigger coverage. *Turkek*, 2020 WL 5258484. However, the relevant policy language in *Turek* provided coverage only for "accidental direct physical loss **to** Covered Property." *Id.* at *7. And as the *Turek* court explained, "[t]he term here is 'direct physical loss,' not 'direct physical loss or damage.' Consequently, reading 'direct physical loss' to require tangible damage does not risk redundantly interpreting 'loss' and 'damage.'" Id. at *6.

Moreover, the *Turek* court went on to further explain:

> Plaintiff suggests that "physical loss to Covered Property" includes the inability to use Covered Property. This interpretation seems consistent with one definition of "loss" but ultimately renders the word "to" meaningless. "To" is used here as a preposition indicating contact between two nouns, "direct physical loss" and "Covered Property." Accordingly, the plain meaning of "direct physical loss to Covered Property" requires that there be a loss to Covered Property; and not just any loss, a direct physical loss. Plaintiff's interpretation would be plausible if, instead, the term at issue were "accidental direct physical loss of Covered Property." *See Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006) ("[T]he policy's use of the word 'to' in the policy language 'direct physical loss to property' is significant. [The claimant's] argument might be stronger if the policy's

> language included the word 'of' rather than 'to,' as in 'direct physical loss of property' or even 'direct loss of property.'")

Id. at *6 (emphasis sic)(internal citations omitted).

Perhaps most notably, in a recent Multi-District Litigation decision in *In re Society Insurance Co.*, MDL 2964, 2021 WL 679109, *8-10 (N.D. Ill. Feb. 22, 2021) in which the United States District Court of the Northern District of Illinois determined, "a reasonable jury can find that the Plaintiff did suffer a direct 'physical' loss of property" because "shutdown orders do impose a physical limit: the restaurants are limited from using much of their physical space."

Accordingly, as explained in *Henderson, Studio 417* and *Turek*, the "direct physical loss of or damage to property" Policy language at issue here cannot be construed to require "tangible damage" to the Insured Premises because to do so would improperly conflate "loss" with "damage," when either is sufficient to trigger coverage under the Policy. Numerous courts throughout the country have similarly held that "tangible damage" such as structural alteration is not required to trigger coverage under insurance policies containing "physical loss of or damage to" property language. See, e.g., *One Place Condo., LLC v. Travelers Prop. Cas. Co. of Am.*, No. 11 C 2520, 2015 U.S. Dist. LEXIS 56565 at *25 (N.D. Ill. April 22, 2015)("where a general all-risk commercial or homeowner's policy insures against both

'loss' and 'damage' to an existing structure, 'physical' damage may take the form of loss of use of otherwise undamaged property, which in turn suffices as a covered loss"); *Prudential Prop. & Cas. Ins. Co. v. Lilliard-Roberts*, No. CV-01-1362-ST, 2002 U.S. Dist. LEXIS 20387 at *26 (D.Or. June 18, 2002) ("the inability to inhabit a building [is] a 'direct, physical loss' covered by insurance"); *American Guar. & Liab. Ins. Co. v. Ingram Micro, Inc.*, No. CIV 99-185 TUC ACM, 2000 U.S. Dist. LEXIS 7299 at *6 (D.Az. April 19, 2000)(holding that "'physical damage' is not restricted to the physical destruction of computer circuity but includes loss of access, loss of use, and loss of functionality)".

Similarly, this Court must be extremely cautious in being persuaded by the Farm Bureau's list cases cited in support of its motion. For example, *Diesel Barber Shop* and *Sandy Point Dental* involved policies that only covered "accidental direct physical loss to", etc. *Diesel Barbershop, LLC v. State Farm Lloyds*, 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, No. 20 CV 2160, 2020 WL 5630465 (N.D. Ill. Sept 21, 2020). *10E* and *Pappy's Barber Shop* imposed a permanent dispossession requirement that was not based on any language in the relevant policies. *10E, LLC v. Travelers Indemn. Co. of Conn.*, No. 2:20-cv-04418-SVW-AS, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020);

Pappy's Barber Shops, Inc. v. Farmers Group, Inc., No. 20-CV-907-CAB-BLM, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020).

Ultimately, approximately half of state courts ruling on business interruption claims and applying state law have been decided in favor of the insured. (Summary of Baker Report)(App. at 424-432). Out of the many federal court decisions ruling in favor of insurers, over one hundred of them are based in a mere five states, those states being California, Florida, Illinois, Ohio and Texas. (Summary Baker Report)(App. 424-432). **The fact that over 50 federal and state courts have found that governmental shutdown orders constituting "physical loss of property" is a "plausible" interpretation of that language means that the Policy language is, at a minimum, ambiguous.** (Summary of Baker Report)(App. at 424-432). Indeed, the late Chief Justice of the Iowa Supreme Court, Justice Cady, stated that although disparate opinions do not by themselves establish an ambiguity, disagreements of the courts do tend to show that there is "strong indication" of an ambiguity. *Am. Fam. Mut. Ins. Co. v. Petersen*, 679 N.W.2d 571, 578 (Iowa 2004), amended on denial of reh'g (May 6, 2004). The disparate decisions of state and federal courts all over the country alone is evidence of there being an ambiguity. And, of course, under Iowa law ambiguous policy language must be construed liberally in favor of coverage. Accordingly, the

only proper interpretation of the Policy in these circumstances is that the suspension of Jesse's Embers' operations was caused by "direct physical loss of or damage to property" — Jesse's Embers' loss of the ability to use the Insured Premises for their intended purpose due to the Proclamation.

E. The District Court Erred in Determining that the Virus Exclusion Applies to These Circumstances

Section B.1.j. of Farm Bureau's Policy provides it "will not pay for loss or damage cause directly or indirectly" by "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (Policy)(App. at 86-87). Jesse's Embers' claim, however, was not caused by or resulting from COVID-19. In fact, there is no claim or allegation that Jesse's Embers' Insured Premises was closed as the result of the known or confirmed presence of SARS-CoV-2 or COVID-19 or that there were no known or presumed infected persons with COVID-19 at the Insured Premises at any time. Rather, Jesse's Embers' claim was based solely on the forced closure of its restaurant and bar in response to the Proclamation, which is most certainly not a "virus".

Farm Bureau argues the COVID-19 pandemic, not the Proclamation, is the real cause of Jesse's Embers' losses and damage. That argument is belied by what is actually happening today. The COVID-19 pandemic continues to persist. In-person dining at 50% capacity has been allowed for months while

the pandemic continued to explode. Governor Reynolds lifted all restrictions on restaurants on February 7, 2021, despite the ever-present continued existence of the virus. Likewise, many businesses never closed or otherwise limited their capacity (e.g., grocery stores, gas stations, and golf courses) despite wide-spread presence of the virus. Quite simply, if the virus was the cause of Jesse's Embers' closure, it would still be closed. The circumstances of Jesse's Embers' closure and reopening are absolute proof that COVID-19 did not cause Jesse's Embers' restaurant and bar to close — the Proclamation did. This fact completely dispels Defendant's argument regarding the virus exclusion.

The *Henderson* case again provides the proper analysis to an insurer's attempt to rely on the virus exclusion to preclude coverage for government closure orders:

> Zurich argues that COVID-19 "indirectly" caused Plaintiffs to close their restaurants. But this is not entirely accurate. There was "no known or presumed infected person(s) with COVID-19 at any of the Insured Premises at any time from March 15, 2020 to April 27, 2020." Thus, it was clearly the government's orders that caused the closures. Ironically, Zurich later argues in its motion for summary judgment that the government orders "responded to a public health crisis," and were not related to any damage at the Plaintiffs' properties. This argument seems to undermine the purpose of the Microorganism exclusion which was plainly to exclude coverage for damage caused by microorganisms *at* the Plaintiffs' properties.

> The insurer, being the one who selects the language in the contract, must be specific in its use; an exclusion from liability must be clear and exact in order to be given effect. Here, Plaintiffs' argument prevails because the Microorganism exclusion does not clearly exclude loss of property caused by a government closure. Plaintiffs' restaurants were not closed because there was an outbreak of COVID-19 at their properties; they were closed as a result of governmental orders. Because Zurich's Microorganism exclusion did not identify the possibility that, even absent "the presence, growth, proliferation, spread, or any activity of "microorganisms" damaging the Plaintiffs' properties, the Plaintiffs may be required to close their dine-in restaurants due to government orders responding to a public health crisis, the Microorganism Exclusion does not apply.

Henderson, 2021 WL 168422 *14 (internal citations omitted).

Similarly, in *McKinley Development Leasing Company, Ltd. et al. v. Westfield Insurance Company*, Case No. 2020CV00815, 2021 WL 506266, (Stark County Ohio, Feb. 9, 2021), with policy language identical or materially identical to the present policy, a state court judge in Ohio stated that "the Court can only surmise that with these differing opinions, the policy is ambiguous." The *McKinley* court goes on to state that "[it] is obvious to the Court that a virus is not the same as a pandemic." *Id*.

As the court recognized in *Henderson*, going forward, Farm Bureau could undoubtedly include an exclusion for government closures in its policies. But the Policy that Jesse's Embers purchased did not contain such an exclusion. Thus, it would be contrary to Iowa's laws of contract interpretation to apply the Virus Exclusion to the unprecedented government closures that

occurred in 2020, particularly when the parties agree that Jesse's Embers' premises was not closed as the result of known or confirmed presence of COVID-19 at its location. This is the conclusion that must be reached under Iowa law because the Policy's language did not clearly identify the unusual and unforeseeable events that led to the closings of Jesse's Embers' business operations. Nor could Jesse's Embers have been aware of such an exclusion when it purchased a policy and paid premiums to Farm Bureau for coverage. (Affidavit of Susan Voss)(App. at 283-289).

F. Jesse's Embers Maintained a Reasonable Expectation of Coverage Under the Circumstances

Iowa law recognizes the doctrine of Reasonable Expectations of the insureds. See *Clark-Peterson Co., Inc. v. Independent Ins. Associates LTD*, 492 N.W.2d 675 (Iowa 1992) and *Aid Mutual Ins. v. Steffen*, 423 N.W.2d 189 (Iowa 1988). The doctrine has become a vital part of Iowa law interpreting insurance policies, as well as in other jurisdictions. *Clark-Peterson Co. Inc*. 492 N.W.2d at 677; *see also* 2 Couch on Ins., Section 22:11 (2020). Applicability of the reasonable expectations doctrine turns on proof that (1) an ordinary lay person would misunderstand the policy's coverage or (2) circumstances attributable to the insurer fostered coverage expectations. *Clark-Peterson Co., Inc.* 492 N.W.2d at 677*; see also Grinnell Select Ins. Co.*

v. Continental Western Ins. Co., 639 N.W.2d 31 (Iowa 2002). The Court may employ the doctrine if the insurance coverage eviscerates terms explicitly agreed to or is manifestly inconsistent with the purpose of the transaction for which the insurance was purchased. *Id.* The doctrine of reasonable expectations does not require as a condition precedent to its application an interpretation of a finding of ambiguity in the insurance policy. *See C&J Fertilizer v. Allied Mut. Ins. Co.*, 227 N.W.2d 169 (Iowa 1975); *see also Cogatelli v. Globe Life & Ace Mut. Ins. Co.*, 533 P.2d 737 (Idaho 1975)(noting that while ambiguities may be highly relevant in determining the reasonable expectations of an insured, the invocation and application of the doctrine does not depend on the presence of ambiguities). Once the doctrine has been shown to be applicable, "the objectively reasonable expectations of applicants and intended beneficiaries regarding insurance [policies] will be honored even though painstaking study of the policy provisions would have negated those expectations." *Clark-Peterson Co., Inc.* 492 N.W.2d at 677 (quoting *Rodman v. State Farm Mutual Automobile Insurance Co.*, 208 N.W.2d 903, 906 (Iowa 1973). When they are honored, "[r]easonable expectations may be established by proof of the underlying negotiations or inferred from the circumstances." *Steffen,* 423 N.W.2d at 192.

The Iowa Supreme Court recognized in *C&J Fertilizer, Inc.*, 227 N.W.2d 169 (Iowa 1975) that "[w]e would be derelict in our duty to administer justice if we were not to judicially know that modern insurance companies have turned to mass advertising to sell 'protection'. *Id.* at 178. The reasonable consumer depends on an insurance company to sell him a policy that works for its intended purpose. *Id.* (citing W. Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv.L.Rev. 529 (1971).

The Plaintiff bought its coverage through Eliott Milakovich, a captive agent of the Defendant. The agent did not explain in any manner the key terms of the policy which were undefined. The agent did not explain any of the ambiguities to the Plaintiff. (Marty Scarpino Affidavit). In this instance, Jesse's Embers purchased coverage for the explicit purpose of insuring its loss of profits in the event of the suspension of the business operations. An ordinary layperson would not easily understand Farm Bureau's "loss" versus "damage" language to require a physical alteration of property in order to trigger business income coverage. To the contrary, the Policy's use of "physical loss of or damage" creates the inference to a layperson that there does not have to be actual destruction of property for coverage to apply. This is particularly the case when (1) elsewhere in the Policy "damage" is defined

to include loss of use despite no physical injury and (2) the Business Income provision provides coverage for "loss or damage", while the Civil Authority provision specifically requires "damage".

Jesse's Embers' reasonable expectation of coverage under these circumstances precludes summary judgment in favor of Farm Bureau.

CONCLUSION

Farm Bureau's insurance contract case can and should be decided in Jesse's Embers' favor based on the plain language of the relevant provisions of the Policy. Even if this Court prefers Farm Bureau's interpretation of the coverage requirements and exclusions, it cannot say as a matter of law that Jesse's Embers' interpretation is unreasonable. *Grimm v. US West Communs., Inc.*, 644 N.W.2d 8, 17 (Iowa 2002) (reversing district court's ruling granting defendant's motion to dismiss where the parties offered competing interpretations of the employee handbook). Accordingly, this Court should reverse.

REQUEST FOR ORAL ARGUMENT

The Appellant hereby requests to be heard in oral argument in connection with this appeal.

COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's brief was $13.50 and that that amount has been paid in fully by counsel for Appellant.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

[X] This brief contains 9,107 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1)

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[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman, font 14 point.

Dated: September 24, 2021

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on September 24, 2021, I electronically filed the foregoing with the Clerk of the Court for the Iowa Supreme Court by using the EDMS system. I certify that all participants in the case are registered EDMS users and that service will be accomplished by the EDMS system.

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