IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 21-0374

POLK COUNTY NO. LACL148208

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WAKONDA CLUB,
Plaintiff-Appellant,

v.

SELECTIVE INSURANCE OF AMERICA,
Defendant-Appellee.

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APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY
THE HONORABLE CELENE GOGERTY

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FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Pages**

Other Authorities

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT ERRED IN DETERMINING THAT THE POLICY REQUIRES PHYSICAL ALERATION OF PROPERTY TO TRIGGER COVERAGE

Cases

Milligan v. Grinnell Mutual Reinsurance Co. (No. 1-050 / 00-1452 (Iowa Ct. App. Apr. 27, 2001)

Serendipitous, LLC/Melt v. Cincinnati Ins. Co., 2:20-CV-00873-MHH, 2021 WL 1816960 (N.D. Ala. May 6, 2021)

Other Authorities

11th Edition of Black's Law Dictionary (2019)

Infected Judgment: Problematic Rush to Conventional Wisdom in Insurance Coverage Denial in a Pandemic, 27 Conn. Ins. L.J. 185 (2020)

National Association of Insurance Commissioner, Glossary of Insurance Terms

II. WHETHER THE DISTRICT COURT MISAPPLIED THE LAW ON THE MOTION FOR SUMMARY JUDGMENT

Other Authorities

Iowa Rules of Civil Procedure 1.981(5)

III. WHETHER THE DISTRICT COURT ERRED IN RULING THAT THE VIRUS EXCLUSION APPLIES TO THESE CIRCUMSTANCES

Cases

City of West Liberty v. Employers Mutual Casualty Company, No. 16-1972, 2018 WL 1182764 (Iowa Ct. App. Mar. 7, 2018)

McKinley Development Leasing Company, Ltd. et al. v. Westfield Insurance Company, Case No. 2020CV00815, 2021 WL 506266 (Stark County Ohio, Feb. 9, 2021)

Other Authorities

Governor's February 7, 2021, Proclamation

REPLY ARGUMENT

Plaintiff–Appellant Wakonda Club, pursuant to Iowa Rule of Appellate Procedure 6.903(4), hereby submits the following argument in reply to the Appellees' brief. While Plaintiff–Appellant's Brief and Argument adequately addresses the issues presented for review, a reply is necessary to address certain contentions raised by the Appellee and recent cases in this ongoing and constantly evolving litigation.

I. HISTORICAL SIGNIFICANCE OF BUSINESS INTERRUPTION LITIGATION

The importance and impact of this appeal cannot be overstated. This litigation is in its truest sense litigation of small business vs. big business. Amicus briefs have been filed by the American Property Casualty Insurance Association and the National Association of Mutual Insurance Companies in the appeals pending before the Eighth Circuit involving Iowa cases. *River on Vintage, Inc. v. Ill. Cas. Co*., 503 F. Supp. 3d 884 (S.D. Iowa 2020); *Gerleman Mgmt., Inc. v. Atl. States Ins. Co*., 506 F. Supp. 3d 663 (S.D. Iowa 2020); *Palmer Holdings & Invs., Inc. v. Integrity Ins. Co*., 505 F. Supp. 3d 842 (S.D. Iowa 2020); *Lisette Enters., Ltd. v. Regent Ins. Co*., --- F. Supp. 3d ---, 2021 WL 1804618 (S.D. Iowa May 6, 2021). An amicus brief has also been filed by the Restaurant Law Center and the Iowa Restaurant Association in the Eighth Circuit Court of Appeals. *Id*. From the amicus briefs, we know the restaurants and food service in Iowa involve 6,400 locations and accounted for an

estimated $4.9 billion in sales in 2019. The food service industry in 2019 provided more than 150,000 jobs in Iowa, and 6.6 percent of Iowa's total employment. According to the amicus brief filed by the Iowa Restaurant Association, the state is expected to lose more than 1,000 restaurants and roughly $1 billion of revenue because of business closures.

According to the amicus briefs filed by the insurance industry, the APCIA's member companies alone write $412 billion in direct written premiums, representing nearly 60 percent of the U.S. property/casualty market. Iowa businesses/restaurants paid millions of dollars of premiums in one year, with total monthly premiums for commercial property policies amounting to $48 million.

The insurance industry wrote the entirety of the policies sold to businesses throughout Iowa and the country. The policies written by the insurers and Appellee use the Insurance Services Offices (ISO) language, which is contained in virtually every policy, including the Appellant's Policy. The restaurant industry and Appellant had no input into drafting these contracts of adhesion. Businesses that purchased these policies believed they were buying "business interruption" and "all-risks" coverage. Ask any business forced to close as a result of the Governor's Proclamation as to whether they believed they in fact had purchased business interruption coverage protecting them from the resulting losses, and they would

uniformly say "yes." Indeed, the entire purpose of business interruption coverage is to protect businesses from events causing the interruption of their businesses.

This Court can distinguish itself in the massive litigation taking place all over the United States by giving true meaning to all the bedrock legal principles of interpretation of insurance contracts that have been adopted in Iowa and universally throughout the United States, which promote finding coverage in favor of insureds when there are ambiguities in the policies and holding insurers accountable for their own drafting deficiencies. A multi-billion-dollar industry which is solely and exclusively responsible for writing contracts of adhesion should be held to the highest standard possible. The Appellee-insurer should define critical terms contained in the policies and not ask this Court to re-write the policies. The Appellee-insurer should correctly utilize basic grammar in drafting the policies and not ask this Court to re-write the policies. The Appellee-insurer should write clear and explicit exclusions and not ask this Court to re-write the policies. This Court should require those who write contracts of adhesion to live up to the intent of policies for which they collected millions and millions of dollars of premiums.

II. STATUS OF LITIGATION THROUGHOUT THE COUNTRY

Appellant acknowledges that the majority of courts nationwide have ruled in favor of the insurers in the business interruption litigation. However, this litigation

is not a scorecard contest, and well-reasoned decisions continue to come out every day finding in favor of coverage, or that a material fact dispute precludes dismissal.

In *Am. Fam. Mut. Ins. Co. v. Petersen*, 679 N.W.2d 571, 573 (Iowa 2004), former Chief Justice Cady stated that disagreement of courts is a strong indication of an ambiguity. Former Chief Justice Cady Cady's comments in the *Petersen* case are simply basic common sense. Wakonda does not misapprehend the scope of the court's statement. This Court should also consider *Macheca Transport v. Philadelphia Indem. Ins. Co*., 649 F.3d 661 (8th Cir. 2011), where the court stated "[t]he fact that several jurisdictions have reached divergent conclusions about the meaning of the term "collapse" is evidence of the term's ambiguity under Missouri law."

While the majority of courts have held that COVID-19 does not result in a direct physical loss of or damage to property, at least *sixty* courts nationwide, state and federal, have concluded that pandemic-related losses could result in a direct physical loss, or, at the very least, that the language is ambiguous. These well-reasoned decisions demonstrate that competent and qualified judges reviewing policies written by the Insurance Services Offices (ISO) have found there to be ambiguities in the policies. The wide-ranging decisions demonstrate compelling evidence of there being two reasonable interpretations of the language at issue in this case. And yet, the positions taken by the Appellee are that any decisions that have

disagreed with its position are "flawed." Appellee states the decisions are "outlier cases" and are distinguishable, wrongly decided, or both. Evidently, we are to believe that over sixty state and federal judges from all over the country are incompetent and not capable of making well-reasoned decisions. Remembering the words of former Chief Justice Cady, these "outlier" decisions represent approximately 30 percent of all state court decisions that have been rendered in the business interruption cases to date.[1]

This case presents the opportunity for the Iowa Supreme Court to right a ship which has gone adrift both in Iowa and throughout the country. The recent Journal article "Infected Judgment: Problematic Rush to Conventional Wisdom in Insurance Coverage Denial in a Pandemic," 27 Conn. Ins. L.J. 185 (2020) articulates why the majority opinions to date do not reflect well on the legal system. A review of "Infected Judgment. . ." is an eye-opener. As stated in the article, the federal courts' analysis to date has "too often been glib, superficial, conclusory and sometimes in de facto disregard of the ground rules of contract construction and applicable state insurance law precedent." The same would be true of the state court decisions that have ruled against insureds such as in the instant case. There has been a cascade effect that appears to have taken hold with attendant reflex resistance to Covid coverage like lemmings going off a cliff. These comments are not intended to

[1] https://cclt.law.upenn.edu/judicial-rulings/

disparage any particular decision or judge, but a close analysis of the bedrock principles of insurance contract causes one to wonder what has happened in this litigation? Our clients trust this Court to not rush to judgment, but to examine the issues closely, apply the well-established principles of insurance contract interpretation, and to allow the parties to have their day in court.

Appellant needs to address Appellee's accusation that Appellant's statement was incorrect of Appellee's Proof Brief. (Pages 45, 43). The first brief submitted by Appellant was on May 27, 2021. In the brief, it was asserted that "the majority of state courts ruling on business interruption claims and applying state law have been decided in favor of the insured." That was a true and accurate statement at the time the data was collected. Appellant relied on the Covid Coverage Litigation Tracker, https://cclt.law.upenn.edu, and when the data was retrieved to use in Appellant's brief, it is true and accurate that there were thirty-three state cases favoring the insured and only thirty state cases favoring the insurer. Subsequently since the time of filing Appellant's brief, and after Appellee filed its brief, more and more Covid litigation has developed and been recorded by the Covid Coverage Litigation Tracker. Now, instead of sixty-three state cases there are one hundred and twenty-one state cases that have a ruling on a motion to dismiss. Since our initial data collection in preparation of our May 27, 2021, brief, more and more state law cases have been ruled on. Appellant acknowledges that as of current, thirty-one percent of

state cases favor the insured (insurer motions to dismiss denied, insurer motion for summary judgment denied, and insured motions for summary judgment granted are included in the pro-insured count) and sixty-nine percent of state cases favor the insurer (insured motions for summary judgment denied, insurer motion to dismiss granted, and insurer motions for summary judgment granted are included in the pro-insured count). The Appellee is correct that the balance has shifted. It should, however, be noted that of the state cases in favor of the insurer, sixty-eight percent of those come from just five states (New York, California, New Jersey, Florida, and Illinois). The source of the Covid Coverage Litigation Tracker has also stated that insurers have been more vocal about reporting and sharing their successes than insureds, hence the spike in insurer favored rulings.

III. THE POLICY DOES NOT REQUIRE PHYSICAL ALERATION OF PROPERTY TO TRIGGER COVERAGE

Similarly, insurers such as Appellee should be held accountable for failing to define key terms of the policy. The thousands of cases that are being brought to the courts in this business interruption litigation involve policies that do not define key terms such as "loss," "damage," "physical loss." Policies that do not clearly and specifically articulate exclusions that the defendants rely upon. If "loss of use" was not intended to be covered, why would the insurer not clearly and explicitly state that "loss of use" is not covered? Instead, the Appellee and other defendants in these cases rely upon the Courts to rewrite the policy and interpret undefined terms such

as "direct physical loss of or damage to" to deny coverage. Again, basic English grammar, as recognized in the *Tucker* decision, explains the significance of the use of the word "of" as compared to the word "to." Amazingly, Appellee makes light of the *Tucker* decision. Contrary to the assertions of Appellee, words do matter and are of great significance to a court's interpreting an insurance contract. This Court should give consideration to the analysis in *Seifert v. IMT Ins. Co*., CV 20-1102 (JRT/DTS), 2021 WL 2228158 (D. Minn. June 2, 2021):

> As courts have stated when considering similar business interruption claims, "to" and "of" are not interchangeable; that is, they mean distinctly different things. See, e.g., Seoul Taco Holdings, LLC v. Cincinnati Ins. Co., No. 20-1249, —— F.Supp.3d ——, ——, 2021 WL 1889866, at *6 (E.D. Mo. May 11, 2021); T & E Chicago LLC v. Cincinnati Ins. Co., 501 F.Supp.3d 647, 652 (N.D. Ill. 2020); see also Source Food, 465 F.3d at 838 ("[T]he policy's use of the word 'to' in the policy language 'direct physical loss to property' is significant. [Plaintiff's] argument might be stronger if the policy's language included the word 'of' rather than 'to,' as in 'direct physical loss of property[.]' ").
>
> "To" is a preposition indicating an action toward a thing reached, or contact. "Of," on the other hand, is a preposition indicating "belonging or a possessive relationship,"9 with "possessive" meaning "manifesting possession," or occupying and controlling property.10 Thus, "direct physical loss to" involves a force acting toward and reaching property, a contact that leads to an immediate and materially perceptible destruction or deprivation of the property itself. See, e.g., Promotional Headwear Int'l v. Cincinnati Ins. Co., 504 F.Supp.3d 1191, 1201-02 (D. Kan. 2020). "Direct physical loss of," however, is a severing of an owner's possession of property, one which causes an immediate and materially perceptible inability to occupy and control property as intended.

The Appellee advances several themes in response to Appellant's brief, including the contention that the policy contains a "physicality requirement" that can only be triggered by an actual alteration or damage to property. The problem is that nowhere in the policy is it written that a "direct physical loss" requires an actual alteration or actual "damage" to the property to trigger coverage. We know damage is not the same as physical loss because the Appellee wrote the Policy in the disjunctive. There are no clear and explicit terms stating that there must be a physical alteration to the property for there to be a "direct physical loss of property." Nowhere in the policy is there a clear and explicit exclusion for a claim based upon total loss of use of the property just as if the property had been stolen, become inaccessible, or destroyed by fire, wind, hail, or flood.

Appellee attempts to give credence to its interpretation of direct physical loss of or damage to property by reliance upon *Milligan v. Grinnell Mutual Reinsurance Co.* (No. 1-050 / 00-1452 (Iowa Ct. App. Apr. 27, 2001)). Quite simply, the 2 ½ page unpublished decision by the Iowa Court of Appeals does not address the issues raised in this case. The policy language being interpreted in *Milligan* was different than that in the instant case. It was a fire insurance policy case trying to decide whether the action was filed within the statute of limitations. *Milligan* relied upon a 1990 version of Black's Law Dictionary to give a much more restricted definition of the word loss as meaning damage or destruction. This Court must not rely upon

an outdated definition. *Milligan's* 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 of which this country has never seen in over 100 years.

Appellee argues that Wakonda seeks to rid the policy of the "physicality requirement" altogether and to render the "all-risk" loss of income policy untethered to any direct physical loss of or damage to the property. Yet Appellee cannot state where in the Policy it states that actual alteration of property is required to trigger coverage. Appellee refuses to take any responsibility for the ambiguity it created by the complete failure to explain the terms and exclusions of the policy clearly and explicitly. Appellee goes so far as to accuse Wakonda of "cherry picking" the word "loss" and seizing on a dictionary definition which includes "deprivation" or the act of losing possession, loss of use and enjoyment – all of which are contained in Webster's Dictionary. Contrary to Appellee's argument, Appellant is following the axiom that if a term is undefined, the Court routinely looks to dictionaries to determine the definition.

In that regard, the Court should consider the recent dictionary definition decision in *Serendipitous, LLC/Melt v. Cincinnati Ins. Co.*, 2:20-CV-00873-MHH, 2021 WL 1816960 (N.D. Ala. May 6, 2021). The court in *Serendipitous*, citing Merriam-Webster, stated that "loss means the restaurants' separation from business

property that is physically intact." *Serendipitous, LLC/Melt v. Cincinnati Ins. Co*., 2:20-CV-00873-MHH, 2021 WL 1816960, at *4 (N.D. Ala. May 6, 2021). The 11th Edition of Black's Law Dictionary of 2019 defines loss as follows:

> **loss** (bef.12c) **1.** An undesirable outcome of a risk; the disappearance or diminution of value, usu. In an unexpected or relatively unpredictable way. When the loss is a decrease in value, the usual method of calculating the loss is to ascertain the amount by which a thing's original cost exceeds its later selling price. **2.** *Tax* The excess of a property's adjusted value over the amount realized from its sale or other disposition. IRC (26 USCA) § 1001. Also termed *realized loss*. See AMOUNT REALIZED. Cf. GAIN (3). **3.** *Insurance*. The amount of financial detriment caused by an insured person's death or an insured property's damage, for which the insurer becomes liable. **4.** The failure to maintain possession of a thing.

The most apropos definition is item no. 4 "the failure to maintain possession of a thing." Although Appellant did not actually lose possession of their property, they initially were completely and totally denied the use of the property, causing its business to be so functionally impaired to be the equivalent of losing "possession of a thing."

The Connecticut Insurance Law Journal article "Infected Judgment" clearly lays out the various definitions of "loss" and "damage". As noted in "Infected Judgment", "[d]ictionary definitions support policyholders at least as much as insurers." *Id* at 234. The authors of "Infected Judgment" go on to list Merriam-Webster definitions of "damage," "loss," "lose," and physical":

> **damage** [means] **1** : loss or harm resulting from injury to person, property, or reputation . . .

> **loss** [means] **1** : DESTRUCTION, RUIN **2** a : the act of losing possession **b** : the harm or privation resulting form loss or separation **c** : an instance of losing . . . **4 a** : failure to gain, win, obtain, or utilize . . . **5** : decrease in amount, magnitude, or degree. . .
> **lose** [means] **1 a** : to bring to destruction . . . **3** : to suffer deprivation of: part with esp. in an unforeseen or accidental manner . . . vi **1**: to undergo deprivation of something of value. . .
> **physical** [means] **1 a** : having material existence : perceptible esp. through the senses and subject to the laws of nature . . . **b** : of or relating to material things . . .
>
> Applying this mix of Merriam-Webster definitions suggests that one might reasonably find a "physical loss" when a policyholder is deprived of something material—such as use of one's business, especially if the loss takes place in an unanticipated manner through something like a pandemic that spurs government-ordered use of the business property."

Id at 234.

Perhaps the trump card on the issue of dictionary definitions might be the National Association of Insurance Commissioner and the Center for Insurance Policy and Research definition of loss. The NAIC glossary defines "loss" as "physical damage to property or bodily injury, including loss of use or income." See, www.naic.org/consumer_glossary.htm (last accessed on August 13, 2021) (emphasis added). The NAIC Glossary of Insurance Terms states that "[t]his page provides a glossary of insurance terms and definitions that are commonly used in the insurance business. . . The definitions in this glossary are developed by the NAIC Research and Actuarial Department staff based on various insurance references. These definitions represent a common or general use of the term."

Appellee should accept responsibility for the dereliction of its duty to define terms clearly and explicitly in the policy and to clearly and explicitly state exclusions. Absolutely none of the key terms in the policy were defined by the Appellee. As a result, the plain meaning of these terms should apply. The closure orders at issue caused Wakonda to sustain a direct physical loss of its property.

IV. THE DISTRICT COURT MISAPPLIED THE LAW ON THE MOTION FOR SUMMARY JUDGMENT

Unlike a motion to dismiss, a motion for summary judgment allows the trial court the opportunity to review pleadings, depositions, answers to interrogatories, admissions on file and affidavits. IRCP 1.981(5) specifically provides for affidavits in defending a Motion for Summary Judgment. In this instance, the trial court had before it Appellee's detailed Statement of Material Disputed Facts in Support of its Resistance and, further, Plaintiff's Statement of Undisputed Facts in Support of the Resistance to Motion for Summary Judgment with attachments, including the affidavits of Rheanne Kinney, Brad Winterbottom, David Schneider, Jonathan Roth, Susan Voss and Professor Robertson. The lower court wholly ignored the affidavits in its ruling. Significant issues of material facts were presented to the court precluding dismissal.

This Court must consider the stage at which the majority of cases in the business interruption litigation have been decided. Over 500 COVID-19 business interruption cases have been filed since 2020 and 93 percent of those cases have had

a ruling on a Motion to Dismiss. Over 400 cases were dismissed by an insurer's Motion to Dismiss. On the contrary, only 40 cases have a decision based on a Motion for Summary Judgment. Insureds have only been successful in 12 percent of cases at the motion to dismiss stage compared to almost three times as successful when a judge considers the issue for summary judgment. Insureds have been successful in 30 percent of cases at the motion for summary judgment stage. While the majority of cases are decided in favor of the insurer, it is important to recognize that those decisions are based strictly on the pleadings with no external evidence nor an opportunity for discovery.

V. THE VIRUS EXCLUSION DOES NOT APPLY

Selective asserts that the virus exclusion is unambiguous and that the alleged losses were directly or indirectly caused by the virus. There is absolutely no evidence that the virus was a cause of Appellant's closure. The virus itself did not cause Appellant's losses. When the restrictions were lifted on February 7, 2021, the virus was still out there, (Governor's February 7, 2021 Proclamation) and the virus is still out there today. Wakonda has remained open, and it has done exactly what it could have done were it not for the March 17, 2020, Governor's Proclamation. This fact is absolute proof that the virus did not cause the Appellant's closing. Appellee did not inspect Appellant's premises at all. Appellee has no proof of the virus causing Appellant's closure.

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*. This is clearly the situation in the present case, as both Appellant and Appellee have presented arguments supporting both sides of this issue. There is no doubt that the language used in the policy is susceptible to more than one reasonable interpretation. It should be noted that Judge Forchione stated that '[i]n preparing for oral argument, this Court spent over 20 hours reviewing all the cases that have been submitted to the Court, in addition to conducting its own research on this unique issue." *Id* at 3.

It is also important to note that the policy in question is an all-risk policy. According to the court in *City of West Liberty v. Employers Mutual Casualty Company*, No. 16-1972, 2018 WL 1182764 (Iowa Ct. App. Mar. 7, 2018), an all-risk policy requires clear and explicit exclusions. This case involves a contract of adhesion written solely by the Appellee with billions of dollars of resources to write clear and explicit contracts. *Id*. Based on the foregoing evidence of ambiguous language, Appellee's all-risk policy does not have clear and explicit exclusions.

With a clear ambiguity present and a lack of explicit exclusions, the policy language must be interpreted in favor of the insured pursuant to the policy and pursuant to Iowa law.

There is no question Wakonda's policy contains an endorsement that states "loss or damage caused by or resulting from any virus." As noted by the Appellee, Wakonda did devote a significant amount of time (13 paragraphs) to discussing COVID-19 and the background which led to the issuance of the Governor's Proclamation. And yes, the Proclamation was issued because of the concerns of COVID-19 being a respiratory virus. The Court can take judicial notice of the fact that a pandemic was and is still today a result of COVID-19. Appellee argues that Wakonda does an about-face and contends in its brief that its claim was not caused by or resulting from COVID-19. Wakonda has been 100 percent consistent from the beginning of this case that COVID-19 itself was not the cause of its business interruption. There is absolutely no proof of the facilities of Wakonda being infected with COVID-19, and no proof of its employees or customers being infected with COVID-19. Wakonda has clearly stated that it closed because of the Proclamation and if it had not closed, it would have been subject to criminal charges and/or loss of licenses for its operation if it failed to follow the Proclamation. Further, contrary to the allegations of Appellee, Appellant did, in fact, plead "a direct physical loss of

or damage to" its property. *See* Petition P. 37-38; *see also* Amended Petition P. 42, 74.

The fact is that the Governor rescinded its previous Proclamation closing restaurants on February 7, 2021. Even though the Proclamation has been rescinded, the pandemic still exists. People are still becoming infected with COVID-19 and the respiratory virus is still at large. The virus has not disappeared. Wakonda and other restaurants have reopened as fully as they are capable of doing, despite the pandemic still existing and the virus still spreading. This is absolute proof that the sole cause of Wakonda closing and being restricted in its operation was the Governor's Proclamation and continuing modifications of the Governor's original Proclamation. It was not the virus that caused the closure, and this fact completely dispels Appellee's argument that it was the virus that caused or resulted in the closure. The virus may have caused Governors to issue Proclamations, but the virus did not cause Wakonda and/or other restaurants to close. There is a complete and total distinction that destroys Appellee's argument of causation. Wakonda could have remained open and performed reasonable and rational mitigation processes. Appellee argues that the proclamation was not issued in isolation – of course, it was not. (Page 21). It was issued because of concern of public health and as a result of the pandemic. That being said, the virus did not close every business. Wakonda could have remained open like other businesses such as gas stations, grocery stores, and pharmacies.

Businesses up and down the street were open. Food stores, drug stores, gas stations, all remained open. Appellee and other insurance carriers can no longer hide behind an illusionary exclusion.

Lastly, as has been pointed out by several courts, the virus exclusion itself could have been handled differently by the insurance industry and Appellee. The affidavit of Susan Voss, former Insurance Commissioner, also points this out. Appellee could have clearly and explicitly excluded closures due to a pandemic, but it did not.

VI. THE SUSPENSION OF APPELLANT'S OPERATIONS WAS CAUSED BY "DIRECT PHYSICAL LOSS OF" OR DAMAGE TO PROPERTY AT THE INSURED PREMISES

Appellee argues Wakonda did not claim any "injury to or destruction to realty or other loss physical in nature." Appellee presents a "simple example" of a fire physically destroying or damaging property. Wakonda, however, explicitly alleges in its Amended Petition that the proclamation resulted in a physical loss. (Amend. Pet. P. 42, 74). Coverage for an insured who totally loses the use of its property is also common sense. The proclamation was just as destructive and damaging to the insured as a fire. In either case, the insured has lost the use of its property. What does business interruption coverage mean if the insured is not covered for the total loss of use of their property? Very simply, if "loss of use" was an exclusion, why was it not clearly and explicitly stated in the Policy? If Selective wished to limit

liability of 'direct physical loss' to require a physical alteration of property, "then Defendants, as drafters of the policy, were required to do so explicitly." *Elegant Massage, LLC v. State Farm Mutual Auto. Ins. Co.*, 2020 WL 7249624, *6-10 (E.D. Va. Dec. 9, 2020).

Appellee further suggests that the "period of restoration" implies that there must be physical damage. However, the need to repair, rebuild or replace property is exactly what happens when property is "lost" or when property is stolen. When property is "lost" or stolen, the period of restoration is the time it takes for that property to be replaced. Appellant's property was clearly "lost" and its property was restored when the restrictions were fully lifted. However, Appellee argues that there was no period of restoration. (Page 17). It is obvious that restoring the property that has been damaged by fire requires the rebuilding of the property for a period of time. However, it is also obvious that restoration from the proclamation of the Governor – ordering the businesses to close – takes place when the proclamation is lifted. As a result of the proclamations being lifted, businesses were allowed to resume their prior business operations and utilize their properties.

Appellee's reading of the Policy clearly misinterprets the reading of the Policy as a whole. Appellee's Policy should not be read in a vacuum, only giving weight to Appellee's self-serving assertions. Appellee further states that it is necessary that the property be completely destroyed or that there is a dispossession of the property.

This is false and yet another excessive overstatement made by Appellee. The property of a business can be lost or damaged but not completely destroyed; in such circumstances, the business is interrupted and cannot operate. A partial fire or a partial flood are examples of this, with key elements of the business being damaged, requiring repairs or replacement to begin operating again. The same is true of the Governor's Proclamation in the present case. The Proclamation shut down Appellant's businesses; when the Proclamation was partially lifted Appellant tried to mitigate its damages and began operating on a limited 50 percent occupancy basis until the Proclamation was fully lifted, which eventually allowed it to continue its operations.

VII. APPELLEE IGNORES ESTABLISHED PRINCIPLES IN DETERMINING INTENT OF THE PARTIES

It is notable that Appellee spends little, if any, time discussing the cardinal rule in interpretation and construction of contracts—that being to determine the intent of the parties. In *Connie's Construction Co., Inc. v. Fireman's Fund Ins. Co.*, 227 N.W.2d 207 (Iowa 1975) the Supreme Court interpreted a contractor's liability insurance policy. In doing so, the court stated that "interpretation" of 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 Construction Co.* cited *Hamilton v. Wosepka*, 261 Iowa 299, 154 N.W.2d

164 (1967), in which Justice Manson 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 District Court's failure to consider the affidavits of Roth, Kinney, Schneider, Professor Robertson, Voss, and Winterbottom in ruling on the motion for summary judgment was clearly in error. As previously stated, Iowa Rule of Civil Procedure 1.981(3) and (5) clearly contemplate the use of affidavits in resisting a motion.

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 engages 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 Wakonda purchased an "all-risk" policy that covered its business losses under these circumstances. It is a total fallacy of Appellee to claim that the intention of the insured in this case is reflected solely by the words contained in the policy. Ordinary businesspeople are entitled to rely upon the plain language of the policy and the ordinary definitions of words in the policy when determining their coverage. The affidavits of Winterbottom, Kinney, Schneider, and Roth clearly articulate their understanding and intent of purchasing an "all-risk" policy that gave Wakonda the broadest coverage possible and would cover losses under these circumstances. As stated by Justice Mason in *Hamilton*, the "ambiguity-on-its-face" rule is truly a vestigial remain of a notion prevailing in 'primitive law.' This Court should recognize such and welcome the consideration of the situation of the parties. How else does an insured have the chance to battle the insurer, who is the drafter of what we know to be "contracts of adhesion."

The Appellee states that policies with business interruption coverage were never intended to provide coverage for economic losses untethered to physical "loss" or physical "damage". That may have been the intent of the industry as evidenced by the use of the Insurance Services Offices (ISO) policies, but if so, it should have clearly and explicitly stated the specific intent (including how "loss" differs from "damage" in these contracts of adhesion). The Appellee states these policies are

important coverages for losses caused by perils such as fire. Nowhere in the policy does it state that the policies are limited to losses caused by fire, wind, hail, or vandalism. The losses incurred by the insured due to the Proclamation are just as devastating as if there had been a fire, wind, hail, or vandalism. The Appellee indicates that ignoring the plain language of these policies would open floodgates to all manner of claims. The simple remedy to avoid opening the floodgates would have been to issue policies that were explicit and clear in stating that the policies did not cover losses for the loss of use of property. Or to state clearly and explicitly that there must be an alteration or damage to the actual property. The policies simply do not state that.

CONCLUSION

Even if this Court prefers Selective's interpretation of the coverage requirements and exclusions, it cannot say as a matter of law that Wakonda's interpretation is unreasonable. This Court should reverse the District Court's ruling granting Defendant's Motion for Summary Judgment, accordingly.

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REQUEST FOR ORAL ARGUMENT

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

CERTIFICATE OF COST

I hereby certify that the costs of printing the Appellant's proof reply brief was $0.00 and that that amount has been paid in full 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 5,882 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1)

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Dated: August 18, 2021

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on August 30, 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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