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**CLERK OF SUPREME COURT
OF WISCONSIN**

**STATE OF WISCONSIN
SUPREME COURT**

SANTINO, LLC,

Plaintiff-Respondent.

v.

APPEAL NO. 2021AP000443

SOCIETY INSURANCE,
A MUTUAL COMPANY,

Defendant-Appellant.

Circuit Court for Outagamie County, Case No. 2020-CV-000358
The Honorable Gregory B. Gill, Jr., Presiding

**SOCIETY INSURANCE, A MUTUAL COMPANY'S,
PETITION TO BYPASS**

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ISSUES FOR REVIEW

1. The Society policy issued to Santino provides Business Income and Extra Expense coverage when there is a “direct physical loss of or damage to” covered property. When businesses covered by such policies changed their operations during the COVID-19 pandemic, was that caused by “direct physical loss of or damage to” covered property?
2. The Society Policy provides Civil Authority coverage when the government prohibits access to Covered Property because of damage to other property. If businesses covered by such policies closed, even though the governmental orders allowed them to continue operating and serving customers for takeout and delivery, was access to their property “prohibited” because of damage to other property?
3. The Society Policy provides Contamination coverage when there is contamination on Covered Property, resulting in action by a governmental authority that prohibits access to the Covered Property. When businesses covered by such policies closed, although governmental orders allowed them to continue operating and serving customers for takeout and delivery, was there a “contamination” that resulted in action by the government to prohibit access to Covered Property or production of their product?
4. The Society policy excludes coverage for “Consequential Losses,” defined as “[d]elay, loss of use or loss of market.” Does the

“Consequential Losses” exclusion bar coverage for a business’ alleged losses resulting from COVID-19 or the governmental closure orders?

5. The Society policy excludes coverage for “Acts or Decisions,” defined as “[a]cts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.” Does the “Acts or Decisions” exclusion bar coverage for a business’ alleged losses resulting from the governmental closure orders?

INTRODUCTION

This case is appropriate for bypass, as it meets the criteria for Supreme Court review. A decision by the Supreme Court will help develop, clarify and harmonize the law, and the questions presented are novel ones, the resolution of which will have statewide impact. Wis. Stat. §809.62(1r). State circuit courts have issued inconsistent opinions on the issues, and there are currently four cases proceeding in the Court of Appeals involving these same issues.

STATEMENT OF THE CASE

A. Factual Background.

This case arose out of government orders partially restricting Santino’s business operations as a result of the COVID-19 pandemic, including Wisconsin’s “Safer at Home Order.” That order was subsequently declared

by this Court to be unlawful, invalid and unenforceable. *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W. 2d 900.

Santino is a Society policyholder, and claims it is entitled to coverage for its loss of business income under the Business Income, Extra Expense, Civil Authority and Contamination provisions of its policy. Based on the policy language requiring “direct physical loss of or damage to” property, Society denied Santino’s claim, because the virus does not cause physical loss of or damage to property. Further, Santino was always able to access and use its insured premises, albeit for purposes that did not involve gatherings of members of the public inside for a limited period of time.

B. Procedural Background

Santino filed an Amended Class Action Complaint on July 29, 2020, alleging “upon information and belief,” that “COVID-19 was present on or around Santino’s business premises.” (Amended Complaint ¶ 32; App.007). Santino claims it stopped operating, resulting in loss of business income, furloughed or laid off its employees, and incurred extra expenses to prevent further damage and minimize the suspension of business and continue operations. (Amended Complaint ¶ 35; App.008).

Santino’s first cause of action seeks a declaration that the Society policy provides coverage under the Business Income, Extra Expense, Civil Authority, Contamination and Sue and Labor provisions of the policy.

(Amended Complaint ¶ 45; App.011). Santino's second cause of action alleges that Society breached the contract when it denied coverage. (Amended Complaint ¶¶ 57-72; App.012-App.014). Santino's third cause of action alleges that Society acted in bad faith. (Amended Complaint ¶¶ 81-82; App.015). Finally, Santino alleges that it is entitled to statutory interest. (Amended Complaint ¶¶ 86-87; App.015).

In the Amended Complaint, Santino purported to represent all restaurant owners in the State of Wisconsin similarly situated which carried a businessowners insurance policy issued by Society that sustained loss of business income and incurred extra expense as a result of the COVID-19 emergency and Orders. (Amended Complaint ¶ 10; App.002-App.003).

Society moved to dismiss the Amended Complaint. In an oral ruling, the circuit court agreed that the Society policy requires physical alteration of Covered Property to trigger coverage. (App.041). However, the circuit court accepted as true the Amended Complaint's "blanket allegation" that Santino suffered direct physical loss of or damage to covered property, and therefore denied Society's motion to dismiss. (App.045-App.046). The circuit court did not address the additional coverages or policy exclusions. The circuit court denied Society's motion by order dated March 5, 2021. (App.049-App.050).

The Court of Appeals accepted Society's petition for leave to appeal. (App.51-App.52). Society filed its initial brief in the Court of Appeals on June 14, 2021, and Santino filed its response brief on July 16, 2021.

ARGUMENT

This case involves the threshold issue of "what constitutes direct physical loss of or damage to property?" Society's policy covers losses caused by direct physical loss of or damage to property, such as fire, windstorm or theft. Additional coverages for Business Income or Extra Expense provide coverage when insured property is damaged by fire, for example, requiring the business to suspend operations. In that event, certain losses of business income and extra expenses occurring during a "period of restoration" would be covered. However, these coverages require direct physical loss of or damage to property at the insured's premises that requires repair or replacement. Because COVID-19 did not cause direct physical loss of or damage to property, Santino's claim was denied.

Courts across the country have interpreted policy language identical to Society's policy language. The vast majority of those courts have held that government orders restricting business operations are not "physical loss of or damage to property" and the suspected or actual presence of COVID-19 on property does not constitute "physical loss of or damage to property." While Wisconsin circuit courts have interpreted the policy language at issue, they

have reached divided results and no Wisconsin appellate court has done so to date. Society requests that this Court accept its Petition to Bypass for the reasons set forth below.

I. This Case Meets the Criteria for Supreme Court Review Because a Decision by the Supreme Court will Clarify the Law, the Questions Presented are Novel, and Their Resolution will Have Statewide Impact.

In accepting the Petition for Leave to Appeal a nonfinal order in this case, the Court of Appeals, District III, recognized that the issues presented are ones of first impression and that “an appeal would clarify a recurring issue of general importance in the state.” *Santino, LLC v. Society Insurance*, 2021AP443 (App.052). No Wisconsin appellate court has addressed whether a virus that causes no physical alteration to property, and a governmental order that temporarily changes the use of property constitutes “direct physical loss of or damage to” property so as to trigger coverage for business income losses such as those claimed by Santino. No Wisconsin appellate court has addressed the meaning of “prohibit” as required to trigger Civil Authority or Contamination coverage under Society’s policy. No Wisconsin appellate court has addressed whether the alleged presence of a virus on property or in the community constitutes “contamination” of insured property as defined by the Society policy, when the insured can still use its premises and can still produce its product.

This case is a purported class action. There are potentially thousands of Society policyholders across Wisconsin who have an interest in this case. Society, another Wisconsin business, is one of many insurers who have issued similar commercial property insurance policies to Wisconsin businesses with the same or similar policy language. A decision by the Supreme Court will affect businesses and the insurance industry across Wisconsin.

Clarification of the property coverage issues by this Court will provide resolution not only for the parties to this case, but for the insurance system. The COVID-19 pandemic has created uncertainty for insureds and insurers alike, and until this Court decides how widely used property policy language will be interpreted in Wisconsin, this uncertainty will continue. A decision by this Court now will provide answers necessary to resolve the claims one way or another.

II. A Decision by the Supreme Court Will Avoid the Prospect of Conflicting Court of Appeals Decisions That Will Ultimately Likely be the Subject of Supreme Court Review.

There are a number of other cases pending in both the Wisconsin circuit courts and Wisconsin Court of Appeals involving the same issues presented in this case. All of those cases involve restaurants/bars/event venues that have claims against Society for business income losses, based on the same property insurance policy language present in this case. In total, Society filed motions to dismiss in 7 cases pending in Wisconsin circuit courts. In two of those cases, Society's motions were granted, in two of those

cases Society's motions were denied and in one case, Society's motion was granted in part and denied in part. In two cases, the circuit courts held the motions in abeyance when advised that there were other cases in the Court of Appeals addressing the issues. Four of these cases are now pending in the Court of Appeals.

This case is pending before District III of the Court of Appeals. *Santino, LLC v. Society Insurance*, 2021AP443. Circuit court Judge Gregory B. Gill agreed with Society that "direct physical loss of or damage to" property requires physical alteration of Covered Property. (App.041). He then determined that Plaintiff had made "blanket allegations" that it sustained physical loss or damage. (App.045-App.046). Noting that he had "serious concerns that there were in fact physical losses versus purely economic losses," he found that this was a question better suited for summary judgment and denied Society's motion to dismiss. (App.045). The Court of Appeals accepted Society's petition for leave to appeal. (App.051-App.052).

Circolo, LLC d/b/a Pasqual's Hilldale v. Society Insurance, 2021AP000585 is pending before District IV of the Court of Appeals. Dane County Judge Mario White granted Society's motion to dismiss, and held that the term "direct physical loss" was not ambiguous, and that it requires a "material deprivation." (App.059-App.060). He also stated that while some cases have found that a direct physical loss does not necessarily need accompanying physical damage, in those cases "there was some physical

thing that deprived the insured from use.” (App.059). Circolo did not allege that something relating to a material thing prevented the use of the property, and the court held that the stay-at-home orders did not constitute a physical barrier to the plaintiff’s use of its property. (App.059). Judge White found that Circolo had not pled sufficient facts to show a direct physical loss of its property and granted Society’s motion to dismiss. (App.060). Circolo appealed the trial court’s dismissal.

Colectivo Coffee Roasters, Inc. v. Society Insurance, 2021AP000463 is pending before District I of the Court of Appeals. Milwaukee County Judge Laura Gramling Perez denied Society’s motion to dismiss, stating that this is “certainly an interesting and somewhat novel case,” and Wisconsin law on the issue “isn’t particularly helpful.” (App.097, App.102). Judge Gramling Perez commented in her oral decision that it is not entirely clear what “direct physical loss” means (App.099); it is not clear that direct physical loss actually requires damage to covered property (App.100); the term “dangerous condition in the premises” is ambiguous (App.100); scientific and factual allegations that COVID 19 was widespread sufficed to allege that the virus was “likely present” in Plaintiffs’ premises (App.105); Plaintiffs had potentially alleged that the Governor’s Order caused a physical loss of their dining areas (App.106-App.107); and allegations that there is a potential for COVID sufficed to allege a dangerous condition in the premises. (App.107). Society filed a petition for leave to appeal Judge

Gramling Perez' decision, and the Court of Appeals accepted the petition. (App.112-App.113).

Badger Crossing, Inc. v. Society Insurance, 2021AP000701 is pending before District IV of the Court of Appeals. Dane County Judge Jacob Frost denied in part and granted in part Society's motion to dismiss. While he held that the Civil Authority and Contamination coverages did not trigger coverage, in what he determined was "the closest call," Judge Frost held that Plaintiff stated a claim under the Business Income and Extra Expense coverages, because the complaint alleged "direct physical loss of or damage to covered property." (App.119). Society filed a petition for leave to appeal, which the Court of Appeals accepted. (App.126-App.128).

Another Wisconsin circuit court granted Society's motion to dismiss in *Al Johnson's Swedish Restaurant & Butik, Inc. v. Society Insurance*, No. 20-CV-52 (Door County, WI, December 4, 2020). (App.129-App.150). Door County Judge David Weber considered Wisconsin law, the Society Policy and cases around the country in deciding whether the plaintiff had sustained a "direct physical loss of or damage to" covered property when it alleged that loss of use of the dine-in portion of its restaurant constituted "direct physical loss." Judge Weber held that the Government Order was not a "physical loss." (App.146). Judge Weber also found that the Policy required a suspension of operations *caused by* direct physical loss. (App.144). He noted that if a roof caves in or personal property is lost, the suspension would be caused by the

physical damage or physical loss. The Governor's Orders were not issued due to the coronavirus being present on the premises, or for cleaning or remediation, or because anyone sick was on the premises. (App.144-App.145). Al Johnson's did not appeal the circuit court's order.

The table below summarizes the current status of all cases filed against Society in Wisconsin state circuit courts:

| <u>CASE NAME</u> | <u>CIRCUIT COURT DECISION</u> | <u>APPEAL STATUS</u> |
|---|--|---|
| <i>Al Johnson's v. Society</i> Door County Case No. 20cv52 | Society motion to dismiss granted 12/4/2020 | Not appealed |
| <i>Colectivo v. Society</i> Milwaukee County Case No. 20cv2597 | Society motion to dismiss denied 1/29/21 | 2021AP000463 LV Petition for Leave to Appeal granted 4/12/21 |
| <i>Circolo v. Society</i> Dane County Case No. 20cv1062 | Society motion to dismiss granted 2/8/21 | 2021AP000585 Notice of Appeal filed 4/1/21 |
| <i>Santino v. Society</i> Outagamie County Case No. 20cv358 | Society Motion to dismiss denied 3/1/21 | 2021AP000443 Petition for Leave to Appeal granted 4/6/21 |
| <i>Badger Crossing v. Society</i> Dane County Case No. 20cv957 | Society motion to dismiss granted in part and denied in part 4/8/21 | 2021AP000701LV Petition for Leave to Appeal granted 5/14/21 |
| <i>City Limits v. Society</i> Manitowoc County Case No. 20cv356 | Society motion to dismiss held in abeyance pending appellate decisions | N/A |

| | | |
|----------------------------|-------------------|-----|
| <i>Mariah's of Kenosha</i> | Society motion to | N/A |
| <i>v. Society</i> | dismiss held in | |
| Kenosha County | abeyance | |
| Case No. 20cv913 | pending appellate | |
| | decisions | |

The circuit court decisions interpreting Society's policy language are conflicting. Three different districts of the Court of Appeals may also render conflicting decisions in the four cases pending before it, leading to Petitions for Review to this Court. The most efficient and economical way for the parties and others to resolve the issues is for the Supreme Court to determine how the policy language will be interpreted.

III. If This Court Accepts the Petition to Bypass, the Cases Pending in the Court of Appeals Should be Stayed.

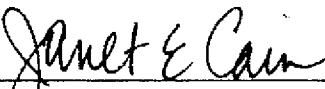
If this Court accepts the Petition to Bypass, the other cases pending in Districts I and IV of the Court of Appeals, which involve the same issues as this case, should be stayed. Supreme Court review will result in a decision that constitutes the law of the State of Wisconsin, and its decision will apply to all of the cases currently pending in the Court of Appeals and circuit courts.

CONCLUSION

Society Insurance respectfully requests that this Court accept its Petition to Bypass. Society further requests that if this Petition to Bypass is granted, all other cases pending in the Court of Appeals be stayed pending a decision by this Court.

Dated this 20th day of July, 2021.

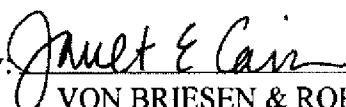
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief produced using proportional serif font. The length of this brief is 2,301 words.

Dated this 20th day of July, 2021.

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CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12)

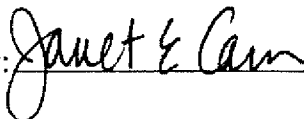
I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the electronic copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of July, 2021.

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