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

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

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APPENDIX

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CERTIFICATION

I hereby certify that:

I have submitted an electronic copy of this appendix which complies with the requirements of Wis. Stats. § 809.19(8)(g).

I further certify that a copy of this certificate has been served with this appendix filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 20th day of July, 2021.

By: Janet E Cain

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FILED
05-18-2020
CIRCUIT COURT
DANE COUNTY, WI
2020CV001062
Honorable William Hanrahan
Branch 7

STATE OF WISCONSIN CIRCUIT COURT BRANCH DANE COUNTY

CIRCOLO, LLC d/b/a PASQUAL'S HILLDALE,
1344 E. Washington Avenue,
Madison, Wisconsin 53703

Plaintiff

Case No.
Case code: 30701, 30303

v.

SOCIETY INSURANCE, A MUTUAL COMPANY
150 Camelot Dr.
Fond du Lac, WI 54935

Defendant

COMPLAINT

Plaintiff Circolo, LLC d/b/a Pasqual's Hilldale ("Pasqual's) individually and on behalf of all others similarly situated, files suit against Society Insurance, A Mutual Company ("Society Insurance") and alleges as follows.

INTRODUCTION

1. Since March 17, 2020, Wisconsin's "Emergency Order #5" ("Emergency Order #5") has instructed all Wisconsin residents to refrain from all mass gatherings, with certain exceptions. Though lifesaving, this mandate ended dine-in service at

Wisconsin restaurants. This is not merely causing severe financial distress for restaurateurs and their employees; such closures threaten the viability of Wisconsin's restaurant scene, which is widely recognized as an economic engine, employing more than 212,000 persons and generating $3.43 billion in revenue in 2018, according to the Wisconsin Small Business Development Center.

2. Plaintiff Pasqual's in Madison, Wisconsin is among the thousands of restaurants that have been forced by the presence of coronavirus in the community and State and local orders to cease operations. Pasqual's and many Wisconsin restaurants—none of which bear fault for statewide closures—were responsible business stewards, thus paying for business interruption insurance to protect against a situation like this.

3. But insurance companies operating in Wisconsin—despite collecting premiums for such risks—are categorically denying claims from restaurants arising from the presence of the virus or Wisconsin's mandated interruption of business services. Those denials are often made with little or no investigation and without due regard for the interests of insureds.

4. Indeed, form letters denying coverage for such losses appear to rest on crabbed readings of coverage language. That gets insurance law exactly backwards—and raises the specter of bad-faith denials.

5. Pasqual's experience is no different. Pasqual's three restaurants dutifully followed Wisconsin's mandates, mandates issued to stem the spread of coronavirus in the community. Facing serious financial harm, Pasqual's filed a claim with Society Insurance for business interruption coverage.

6. Society Insurance swiftly denied the claim. Though the insurance company's reasons are cursory, the denial appears to be based on an unreasonable reading of its policy, which tracks form policies issued throughout Wisconsin on a take-it-or-leave-it basis.

7. That leaves Pasqual's in financial straits—precisely the situation the restaurant sought to avoid when it obtained coverage for business interruptions.

8. Pasqual's and other restaurants bought full-spectrum, comprehensive insurance for their *businesses* – not just for tangible damage to their premises and equipment. And for good reason. Business interruptions are a particular concern of the restaurant industry. Insurance coverage is important, if not vital, because profit margins in the restaurant industry are slim and reserve funds tend to be low.

9. Pasqual's and other Wisconsin restaurants reasonably believed they had comprehensive coverage that would apply to business interruptions under circumstances like these, where they have done everything right to protect their businesses and the public. But insurance companies like Society Insurance are cutting those lifelines – despite having pocketed significant premiums for their policies.

10. Pasqual's thus brings this action, on behalf of itself and other Wisconsin restaurants similarly situated, seeking declaratory relief, insurance coverage owed under Society Insurance's comprehensive business owners' policies, and damages.

PARTIES

11. Plaintiff Pasqual's is a limited liability company formed under the laws of Wisconsin. Pasqual's principal place of business is 1344 E. Washington Avenue, Madison, Wisconsin 53703.

12. Defendant Society Insurance is a corporation organized under the laws of Wisconsin with its principal place of business in 150 Camelot Dr. Fond du Lac, WI 54935 Fond du Lac, Wisconsin.

JURISDICTION AND VENUE

13. The Court has jurisdiction over the subject matter of this action pursuant to Article VII, section 8 of the Wisconsin Constitution and Wis. Stats. §§ 801.04 and 801.05.

14. Venue is proper in this court under Wis. Stats. §§ 801.50(2)(a) and (b).

FACTUAL BACKGROUND

15. In January 2020, early media reports documented an outbreak of a novel strain of coronavirus – COVID-19 – in Wuhan, China. By late January, it was generally understood in the scientific and public health communities that COVID-19 was

spreading through human-to-human transmission and could be transmitted by asymptomatic carriers.

16. On January 30, 2020, reports of the spread of COVID-19 outside China prompted the World Health Organization to declare the COVID-19 outbreak a "Public Health Emergency of International Concern."

17. On March 11, the World Health Organization declared COVID-19 a global health pandemic based on existing and projected infection and death rates and concerns about the speed of transmission and ultimate reach of this virus.

18. Public health officials have recognized for decades that non-pharmaceutical interventions (NPIs) can slow and stop the transmission of certain diseases. Among these are screening and testing of potentially infected persons; contact tracing and quarantining infected persons; personal protection and prevention; and social distancing. Social distancing is the maintenance of physical space between people. Social distancing can be limited – *e.g.*, reducing certain types of conduct or activities like hand-shaking – or large-scale – *e.g.*, restricting the movements of the total population.

19. A lack of central planning, shortages of key medical supplies and equipment, and the unfortunate spread of misinformation and disinformation about the risks of COVID-19 has led to widespread confusion, unrest, and uncertainty regarding the likely trajectory of this pandemic and the appropriate counter-measures necessary to mitigate the damage it could potentially cause.

20. Beginning in late February 2020, public health officials began advising various governments around the world that one of the most disruptive NPIs – population-wide social distancing – was needed to stop the transmission of COVID-19. Suddenly schools, offices, public transit, restaurants, and shops -- densely occupied spaces, heavily traveled spaces, and frequently visited spaces – were likely to become hot-spots for local transmission of COVID-19.

21. By mid-March 2020, that advice was being implemented by state and local governments across the United States.

22. Following closely on the heels of other closure orders, Wisconsin's Governor issued a statewide directive on March 17, 2020, known as "Emergency Order #5 Prohibiting Mass Gatherings of 10 People Or More." The order provided, in relevant part, that "all bars and restaurants shall close in the State of Wisconsin[.]"

23. Emergency Order #5 and its mandates issued that day—which remain in effect to date—require restaurants to cease dine-in service, though take-out is permitted if certain safety measures are in place.

PLAINTIFF'S EXPERIENCE

24. Plaintiff Pasqual's operates three restaurants and bars in Dane County, Wisconsin that that serve modern Texan-Mexican cuisine, cocktails, and craft beers in a festive setting that in name and appearance evokes a classic Southwestern cantina.

25. Pasqual's has complied with all applicable orders of Wisconsin state and local authorities. Compliance with those orders and the presence of the virus in the community has caused direct physical loss of Pasqual's insured property in that the restaurant and its equipment, furnishing, and other business personal property has been made unavailable, inoperable, useless and/or uninhabitable; and its functionality has been severely reduced if not completely or nearly eliminated.

26. The impact of these orders and the presence of the virus is felt not simply in their direct application to Pasqual's operations, but also in the damage caused to neighboring businesses and properties.

27. Even though Wisconsin revoked its mandates, Dane County extended the substance of Emergency Order #5 for all business located in the county. Therefore Pasqual's will encounter continued loss of business income due to the presence of the virus and government orders because, in issuing those orders, government officials have stated that densely occupied public spaces are dangerously unsafe, and continuing to operate the restaurant could expose Pasqual's employees and customers

to the risk of contaminated premises as well as exposing customers and workers to transmission and infection risks.

28. Plaintiff purchased comprehensive commercial liability and property insurance from Society Insurance to insure against risks the business might face. Such coverage includes business income with extra expense coverage for the loss, as well as additional "civil authority" coverage. Once triggered, the policy pays actual losses sustained for the business income and extra expense coverage.

29. To date, Plaintiff has paid all of the premiums required by Society Insurance to keep its respective policies in full force.

30. After learning of Emergency Order #5, Plaintiff reported a loss of business income under Policy BP17006026-2.

31. On or about March 20, 2020, Society Insurance denied Plaintiff's claim for coverage. In its denial letter, Society Insurance took the position that there was no coverage because "A slowdown in business due to the public's fear of the coronavirus or a suspension of business because a governmental authority (i.e. the governor or the mayor) has ordered or recommended all or certain types of businesses to close is not a direct physical loss. In addition, the actual or alleged presence of the coronavirus is not a Covered Cause of Loss."

32. Society Insurance's denial letter, on information and belief, appears to be a form letter sent in response to business interruption claims arising from Wisconsin's Emergency Order #5 and was issued without any investigation by Society Insurance, shortly after a claim was filed.

33. Business insurance policies purchased by small businesses like restaurants are not individually negotiated. At most, the prospective policyholder may elect to add specialized coverage options to a basic business insurance policy form. But the substantive terms are set unilaterally by the insurer.

34. Pasqual's policy includes common terms and phrases widely used by the insurance industry. The insurance industry typically hews closely to standardized

insurance policy forms in addressing property and liability risks, and Society Insurance did so here.

35. Society Insurance's denial is contrary to the terms and conditions of the policy and applicable law, which gives effect to plain language, construes coverage agreements broadly, narrowly construes exclusions, and construes ambiguity in favor of coverage. Insurers have the burden of proving the applicability of exclusion.

36. Society Insurance's denial of coverage breached its obligation and responsibility to provide coverage available through the policy to Plaintiff due to its covered loss of business income because it has suffered direct physical loss of its insured real and business personal property, which has been made inaccessible, inoperable, unusable, uninhabitable, and have lost all function.

37. As a result of Society Insurance's denial of coverage and breach of the insurance policy it issued, Plaintiff has suffered and will continue to suffer damages due to Society Insurance's wrongful denial of vital property and business income coverage, which Plaintiff acquired to ensure the survival of its business in these circumstances.

CLASS ALLEGATIONS

38. Pursuant to Wis. Stats. §§ 803.08(1), (2)(b), (2)(c), and (6), Plaintiff brings this class action on behalf of itself and the following proposed class (the "Class"):

> All restaurants in Wisconsin that purchased comprehensive business insurance coverage from Defendant Society Insurance, A Mutual Company, which includes coverage for business interruption, filed a claim for lost business income following Wisconsin's Emergency Order #5, and were denied coverage by Society Insurance, A Mutual Company.

39. Excluded from the Class are Defendant, any entity in which Defendant has a controlling interest, and Defendant's officers, directors, legal representatives, successors, subsidiaries, and assigns. Also excluded from the Class are any judge,

justice, or judicial officer presiding over this matter and the members of their immediate families and judicial staff.

40. Plaintiff reserves the right to amend the Class definition if discovery and further investigation reveal that the Class should be expanded, divided into subclasses, or modified in any other way.

41. This action has been brought and may properly be maintained as a class action as it satisfies, numerosity, commonality, typicality, adequacy, predominance, and superiority requirements.

42. Although the precise number of members of the Class is unknown and can only be determined through appropriate discovery, on information and belief, members of the proposed Class are so numerous that joinder of all members would be impracticable. There are tens of thousands of restaurants in Wisconsin which are governed by the Emergency Order #5 and attendant statewide dine-in restrictions, and public reporting reveals that many have filed for coverage with Society Insurance but have been denied.

43. The questions in this action are ones of common and general interest such that there is a well-defined community of interest among the members of the Classes. Common questions of law and fact include, *inter alia*:

a) Whether Defendant's comprehensive business insurance policies cover claims for lost business income under the circumstances present here;

b) Whether Defendant violates terms of its standard business insurance policies by denying claims for lost business income as described herein;

c) Whether Defendant breached the implied covenant of good faith and fair dealing in its handling of its insureds' claims;

d) Whether Defendant acted in bad faith in denying claims for lost business income without investigation or due consideration of

those claims;

e) Whether the declaratory judgment sought is appropriate; and

f) The proper measure of damages.

44. These questions predominate over any questions affecting only individual Class members. This is particularly true because, on information and belief, the terms of the Society Insurance's business insurance policies are identical or substantively identical and Society Insurance has acted uniformly with respect to such policies.

45. The claims asserted by Plaintiff in this action are typical of the claims of the members of the putative Class as the claims arise under Society Insurance's standard business insurance policies, challenge Society Insurance's standard course of conduct under those policies and seek common relief therefor.

46. Plaintiff will fairly and adequately represent and protect the interests of the members of the putative Class, as its interests coincide with, and are not antagonistic to, the other members of the Class. Plaintiff has retained counsel competent and experienced in both consumer protection, insurance coverage, and class-action litigation.

47. A class action is superior to any other method available for the fair and efficient adjudication of these claims including consistency of adjudications. Absent a class action it would be highly unlikely that the members of the Class would be able to protect their own interests because the cost of litigation through individual lawsuits might exceed the expected recovery. Moreover, a class action is a superior method for the adjudication of the controversy in that it will permit a large number of claims to be resolved in a single forum simultaneously, efficiently, and without the unnecessary hardship that would result from the prosecution of numerous individual actions and the duplication of discovery, effort, expense, and the burden of the courts that individual actions would create.

48. Defendant has acted or refused to act on grounds generally applicable to the proposed Class, thereby making appropriate final and injunctive relief with respect

to the members of the proposed Class as a whole.

49. Likewise, particular issues are appropriate for certification under Wis. Stats. § 803.08(6) because such claims present only particular, common issues, the resolution of which would advance the disposition of this matter and the parties' interests therein. Such particular issues include, but are not limited to:

a) Whether a comprehensive business insurance policy issued by Defendant cover Class members' direct physical loss of property and lost business income following the presence of coronavirus and Wisconsin's Emergency Order #5;
b) Whether the coverages for direct physical loss of property and lost business income provided by the comprehensive business insurance policies are precluded by exclusions or other limitations in those policies;
c) Whether Defendant's summary denial of claims for direct physical loss of property and lost business income, without any investigation or inquiry, constitutes bad faith
d) Whether Defendant's summary denial of claims for direct physical loss of property and lost business income, without any investigation or inquiry breached the implied covenant of good faith and fair dealing to act in good faith and with reasonable efforts to perform its contractual duties and not to impair the rights of other parties to receive the rights, benefits, and reasonable expectations under the contracts;
e) Whether Defendant's handling of claims for direct physical loss of property and lost business income associated with the presence of coronavirus and public health measures such as Wisconsin's Emergency Order #5 constitutes a breach of implied covenant of good faith and fair dealing; and

f) Whether plaintiff and Class members are entitled to actual damages and/or injunctive relief as a result of Defendant's wrongful conduct.

FIRST CAUSE OF ACTION
Declaratory Judgment

50. Plaintiff re-alleges the paragraphs above as if fully set forth herein.

51. Plaintiff purchased a comprehensive business insurance policy from Defendant.

52. Plaintiff paid all premiums required to maintain its comprehensive business insurance policy in full force.

53. The comprehensive business insurance policy includes provisions that provide coverage for the direct physical loss of or damage to the premises as well as actual loss of business income and extra expenses sustained during the suspension of operations as a result of such loss or damage.

54. On or about March 17, 2020, Wisconsin issued Emergency Order #5, mandating that all Wisconsinites refrain from all mass gatherings, with certain exceptions. This mandate required restaurants, including those owned by Plaintiffs and Class members, to cease all dine-in services. This mandate also applied to neighboring businesses, thus causing widespread closures surrounding Plaintiff's business premises and those of the Class.

55. As a direct result of this mandate and due to the presence of coronavirus in the community, Plaintiff and Class members have suffered direct physical loss of their insured property within the meaning of Society Insurance's policy resulting in substantial loss of business income.

56. These losses are insured losses under several provisions of Society's Insurance's comprehensive business insurance policy including business income and extra expense coverage and coverage for civil authority orders.

57. There are no applicable, enforceable exclusions or definitions in the insurance policies that preclude coverage for these losses.

58. Plaintiff seeks a declaration for itself and the Class that their business

income losses are covered and not precluded by exclusions or other limitations in Society Insurance's comprehensive business insurance policy.

SECOND CAUSE OF ACTION

Breach of Contract

59. Plaintiff re-alleges the paragraphs above as if fully set forth herein.

60. Plaintiff and Class members purchased comprehensive business insurance policies from Defendant to ensure against all risks (unless specifically excluded) a business might face. These policies were binding contracts that afforded Plaintiff and Class members comprehensive business insurance under the terms and conditions of the policies.

61. Plaintiff and Class members met all or substantially all of their contractual obligations, including paying all the premiums required by Defendant.

62. On or about March 17, 2020 Wisconsin issued the Emergency Order #5, mandating that all Wisconsinites refrain from all mass gatherings, with certain exceptions. This mandate required restaurants, including those owned by Plaintiffs and Class members, to cease all dine-in services. This mandate also applied to neighboring businesses, thus causing widespread closures surrounding Plaintiff's business premises and those of the Class.

63. Beginning on March 17, 2020, and continuing through the date of the filing of this Complaint, Plaintiff and Class members suffered the direct physical loss of property and lost business income as a direct result of Wisconsin's Emergency Order #5 and the presence of coronavirus in the community – losses which are covered under the comprehensive business insurance policies purchased from Defendant.

64. There are no applicable, enforceable exclusions in Plaintiff's and Class members' comprehensive business insurance policies that preclude coverage.

65. Defendant breached its contracts by denying comprehensive business insurance coverage to Plaintiff and Class members.

66. As a direct and proximate result of Defendant's denial of comprehensive

business insurance coverage to Plaintiff and Class members, Plaintiff and Class members suffered damages.

THIRD CAUSE OF ACTION

Breach of Implied Covenant of Good Faith and Fair Dealing

67. Plaintiff re-alleges the paragraphs above as if fully set forth herein.

68. Plaintiff and Class members contracted with Defendant to provide them with comprehensive business insurance to ensure against all risks (unless specifically excluded) a business might face.

69. In the states where Society Insurance does business, including Wisconsin, an implied duty of good faith and fair dealing is an element in every contract between insurance companies and their insureds.

70. Society Insurance's contracts are subject to the implied covenants of good faith and fair dealing that all parties would act in good faith and with reasonable efforts in performing their contractual duties and not to impair the rights of other parties to receive the rights, benefits, and reasonable expectations under the contracts. These included the implied covenants that Defendant would act fairly and in good faith in carrying out their contractual obligations to provide Plaintiff and Class members with comprehensive business insurance.

71. Defendant breached the implied covenant of good faith and fair dealing by:

a. Selling policies that appear to provide liberal coverage for loss of property and lost business income with the intent of interpreting undefined or poorly defined terms, undefined terms, and ambiguously written exclusions to deny coverage under circumstances foreseen by Defendant;

b. Denying coverage for loss of property and lost business income unreasonably, and without a rational basis in their policy and applicable law, by applying undefined, ambiguous, and contradictory

terms contrary to applicable rules of policy construction and the plain terms and purpose of the policy;

c. Denying Plaintiff and Class members' claims for loss of property and loss of business income without conducting a fair, unbiased and thorough investigation or inquiry;

d. Misrepresenting policy terms; and

e. Compelling policyholders, including Pasqual's, to initiate this litigation to secure the policy benefits to which they are entitled;

72. Plaintiff and Class members met all or substantially all of their contractual obligations, including by paying all the premiums required by Defendant.

73. Defendant's failure to act in good faith in providing comprehensive business insurance coverage to Plaintiff and Class members denied Plaintiffs and Class members the full benefit of their bargain.

74. Accordingly, Plaintiff and Class members have been injured as a result of Defendant's breach of the covenant of good faith and fair dealing and are entitled to damages in an amount to be proven at trial.

Fourth Cause of Action

Bad Faith Refusal to Honor Claim

75. Plaintiff re-alleges the paragraphs above as if fully set forth herein.

76. Plaintiff and Class members contracted with Defendant to provide them with comprehensive business insurance to ensure against all risks (unless specifically excluded) a business might face.

77. The comprehensive business insurance policy includes provisions that provide coverage for the direct physical loss of or damage to the premises as well as actual loss of business income and extra expenses sustained during the suspension of operations as a result of such loss or damage.

78. On or about March 17, Wisconsin issued Emergency Order #5, mandating that all Wisconsinites refrain from all mass gatherings, with certain exceptions. This

mandate required restaurants, including those owned by Plaintiffs and Class members, to cease all dine-in services. This mandate also applied to neighboring businesses, thus causing widespread closures surrounding Plaintiff's business premises and those of the Class.

79. As a direct result of this mandate and due to the presence of coronavirus in the community, Plaintiff and Class members have suffered direct physical loss of their insured property within the meaning of Society Insurance's policy resulting in substantial loss of business income.

80. Plaintiff and covered Class members reported a loss of business income under their respective business insurance policies.

81. Defendant denied Plaintiff's and covered Class members' claims for insurance coverage.

82. Defendant did not have a reasonable basis for denying Plaintiff's and the covered Class members' claims for coverage.

83. Defendant did not properly investigate plaintiff's or the covered Class members' claims, nor were the results of Defendant's investigation subject to a reasonable evaluation and review.

84. Defendant was aware that there was no reasonable basis for denying plaintiff's or the covered Class members' claims for coverage.

85. Defendant displayed a reckless indifference to the facts or proofs submitted by plaintiff and the covered Class members' claim for coverage.

PRAYER FOR RELIEF

Plaintiff, on behalf of itself and the Class, requests that the Court enter a judgment awarding the following relief:

a. An order certifying this action as a class action, appointing Plaintiff as Class Representative, and appointing Plaintiff's Counsel as Class Counsel.

b. A declaration that Plaintiff's and Class members' losses are covered

under Defendant's comprehensive business insurance policies;

c. Actual damages in the amount according to proof;

d. Injunctive or declaratory relief;

e. Pre- and post- judgment interest at the maximum rate permitted by applicable law;

f. Costs and disbursements assessed by Plaintiff in connection with this action, including reasonable attorney's fees pursuant to applicable law;

g. Attorneys' fees for Defendant's bad faith under the common fund doctrine, and all other applicable law; and

h. Such other relief as the Court deems just and proper.

JURY DEMAND

Plaintiff demands a trial by jury for all issues so triable under the law.

Dated this May 18, 2020

TURKE & STRAUSS LLP

Electronically signed by Mary C. Turke
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Attorneys for Plaintiff

FILED
02-15-2021
CIRCUIT COURT
DANE COUNTY, WI
2020CV001062

DATE SIGNED: February 15, 2021

Electronically signed by Mario White
Circuit Court Judge

THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

CIRCOLO, LLC d/b/a PASQUAL'S HILLDALE,

Plaintiff,

Case No. 2020CV001062

vs.

SOCIETY INSURANCE, A MUTUAL COMPANY.

Defendant.

ORDER GRANTING SOCIETY INSURANCE, A MUTUAL COMPANY'S MOTION TO DISMISS

IT IS HEREBY ORDERED that Defendant, Society Insurance, A Mutual Company's Motion to Dismiss pursuant to Wis. Stat. § 802.06 is GRANTED, for the reasons stated on the record on February 8, 2021, in the transcript attached hereto, and Plaintiff's Complaint is dismissed, with prejudice.

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STATE OF WISCONSIN : CIRCUIT COURT : COUNTY OF DANE
BRANCH 7

CIRCOLO, LLC, dba PASQUAL'S HILLDALE,
Plaintiff,

Case No. 2020CV001062

v.

SOCIETY INSURANCE, A MUTUAL COMPANY,
Defendant.

PROCEEDINGS: Oral Ruling

DATE: February 8, 2021

BEFORE: The Honorable Judge MARIO D. WHITE

APPEARANCES: The Plaintiff, CIRCOLO, LLC, dba PASQUAL'S HILLDALE, appeared by Attorneys MARY C. TURKE and AUSTIN DOAN of Turke & Strauss LLP; 613 Williamson Street, Suite 201; Madison, Wisconsin 53703.

The Defendant, SOCIETY INSURANCE, A MUTUAL COMPANY, appeared by Attorneys JANET E. CAIN and HEIDI L. VOGT of von Briesen & Roper SC; 411 E. Wisconsin Avenue, Suite 1000; Milwaukee, Wisconsin 53202.

All parties appeared by Zoom video.

PATRICK A. WEISHAN, RPR
Official Court Reporter
Branch 7

P R O C E E D I N G S

(Commenced at approximately 10:34 a.m.)

THE COURT: Let's go on the record. This is Circolo, LLC, doing business as Pasqual's Hilldale v. Society Insurance, a Mutual Company, 20CV1062. Can I have the appearances, please?

ATTORNEY TURKE: Good morning, Your Honor. On behalf of the plaintiff, Pasqual's, Attorney Mary Turke and Attorney Austin Doan, D-O-A-N, appear on behalf of plaintiff.

ATTORNEY CAIN: Janet Cain and Heidi Vogt, von Briesen and Roper, on behalf of Society Insurance.

THE COURT: All right. Thank you. We're here on an oral ruling. This is on the motion to dismiss that was filed by Society. I did have an opportunity to read the briefs as well as the cases that you all submitted.

I will say that this is a unique situation. I'm sure everybody who is in the position of not only Pasqual's as a business but also insurance companies is finding this is a unique area of the law, and certainly nothing on point in the state of Wisconsin has been decided by either the court of appeals or the Wisconsin Supreme Court. I did find that both parties gave me sufficient information, and I do appreciate the work that you all did both in preparing your briefs as well as the oral arguments that you gave to me, which were held back in November, November 12th of 2020.

So, having read everything, having listened to your arguments and also read the cases, I'm going to make the following decision. First of all, I'll start with the legal standard. This is a motion to dismiss, and at this point, the court will take all well pleaded facts as true when deciding the motion to dismiss, giving reasonable inferences of those facts to the nonmoving party.

Because this case involves determining whether insurance coverage exists, the court determines whether there is an initial grant of coverage. If the court finds an initial grant of coverage, it then determines if there are any exclusions to such coverage. Finally, if there are exclusions to the coverage, the court determines if there are any exemptions to those exclusions.

Insurance contracts are interpreted no differently than other contracts. The court will give effect to each term of a contract and will construe any ambiguity in favor of the insured.

In this instance, the plaintiff has alleged that due to its compliance with the state and local stay-at-home orders as well as the presence of COVID-19 in the community, it has suffered a direct physical loss of its insured property. It further alleges that its business or that its claim for business interruption coverage was denied by the defendants.

The issue before the court or an issue before the court is

whether the allegations, which are taken to be true, state a claim upon which relief could be granted. In other words, the court decides whether plaintiff's adherence to the stay-at-home orders and the presence of COVID-19 in the community constitute a direct physical loss of or damage to the covered property. Plaintiff need only plead either direct physical loss of or damage to the covered property in order to survive a motion to dismiss.

As indicated earlier, when construing the terms of a contract, the court gives meaning and effect to each word. The policy provides coverage for direct physical loss of or damage to covered property. Therefore, there are two avenues of coverage: either a direct physical loss of or damage to the covered property. And, because those two avenues are joined by the disjunctive connector "or," they are independent.

The words "loss" and "damage" by their common understanding and meaning do have overlapping meanings. However, they do not mean the same thing. The use of different words connected by the disjunctive "or" broadens the coverage even though the terms may have some overlapping meaning, and for reference you can see it's the *Pawlowski*, P-A-W-L-O-W-S-K-I, *v. American Family Insurance Company* at 322 Wis. 2d 21. That's a 2009 Wisconsin Supreme Court case.

To require plaintiff to plead direct physical damage as the only means by which to assert coverage would render the phrase

"direct physical loss" superfluous. So the court does agree with the *Manpower* court, which stated, quote, thus, "direct physical loss" must mean something other than "direct physical damage," and that's *Manpower Incorporated v. Insurance Company of the State of Pennsylvania*, Eastern District of Wisconsin, at paragraph 5.

The term "direct physical loss" is not defined by the policy, and when a policy does not define a term, the court looks to the term's common, everyday meaning. That's from *Wisconsin* [*sic*] *Mutual Insurance Company v. Falk* at 2014 WI 136, paragraph 30. So the court will turn to the dictionary definitions when defining terms.

And, as I said earlier, an insurance policy is a contract, and the court's primary purpose in interpreting a contract for insurance is to give effect to the intentions of the parties, and that's from *Folkman*, F-O-L-K-M-A-N, *v. Quamme*, Q-U-A-M-M-E, at 2003 WI 116, paragraph 12. The parties' intentions are presumed to be expressed by the language of the policy. The court construes the policy language from the perspective of a reasonably insured [*sic*], giving the words their common and ordinary meaning.

"Direct physical loss" is not found in the dictionary, so the court will combine definitions for each word individually, and these definitions come from the *American Heritage Dictionary: Fifth Edition*, 2011. "Direct" means having no intervening

persons, conditions, or agencies; immediate. "Physical" means of or relating to material things. "Loss" means the condition of being deprived or bereaved of something or someone. A reasonable insured, when seeing the phrase "direct physical loss," would necessarily believe there would have to be some material deprivation in order to make a claim for direct physical loss. This finding is consistent with the *Manpower* case. Even though no damage was done to the insured's property in *Manpower*, they were unable to use their property because of a material deprivation. They were not permitted inside the building.

I note that there were several cases that the plaintiff put forward that found that a direct physical loss does not necessarily need to be accompanied by a physical damage. I note that those cases, there was some physical thing that deprived the insured from use. And so I think that this ruling is consistent with that.

In this particular case, the plaintiffs do not allege that something of or relating to a material thing prevented the use of the property, and this court is certainly not going to hold that the stay-at-home orders, though reduced to physical form in paper, constitute a physical barrier to the plaintiff to the use of its property.

Certainly the property was not damaged. There is no allegation that it was contaminated, unlike the *Studio 417* case

in which the insured alleged that it was likely that customers, employees, and/or other visitors to the insured's property were infected with coronavirus. Similarly, there is no physical impediment to its use as in the *Manpower* case.

So, that being said, the court first of all finds that there is no ambiguity. Even though reasonable people may have different interpretations of the phrase, a difference of opinion in a term does not necessarily create an ambiguity. Otherwise, there would always be an ambiguity when attorneys disagree on the meaning of a term, and I can't remember the case, but I read a case that basically stood for that proposition that disagreement by lawyers doesn't create an ambiguity. Courts are still able to look at the definition and determine if there is an ambiguity. I don't believe that there is one in this particular case.

Based on what has been pled by the plaintiffs, I do not find that they have pled sufficient facts to show a direct physical loss of the covered property, and for those reasons, I am going to grant the motion to dismiss that has been filed.

Now, as I indicated, this is an area that is new not only in the state of Wisconsin but across the country in light of the fact that we are all in a new reality at least at this point with COVID-19. I do again want to express my thanks and appreciation to the attorneys for the work that you put into this.

Attorney Turke, if you want to have an oral or, excuse me, a written order, it's sufficient to say that for the reasons stated on the record, the motion to dismiss was granted, if there is any sort of appellate process that you want to explore and need a written order for that.

With that being said, Attorney Turke, is there anything from your perspective that we need to address?

ATTORNEY TURKE: I don't think so at this time, Your Honor. Thank you.

THE COURT: All right. And then I don't know, Attorney Cain or Attorney Vogt, which one of you is going to be speaking, but whichever one is, I guess Attorney Cain since you're the one who is unmuted, anything else from your perspective?

ATTORNEY CAIN: Judge, I would be happy to prepare the order for your signature and submit it to Attorney Turke for her approval before we submit it to the Court, if that's okay.

THE COURT: It's fine by me. It looks like Attorney Turke is nodding.

ATTORNEY TURKE: Yeah. Thank you.

THE COURT: So, if you want to do that and then send it to her, and then I will sign it once it's been sent to me.

ATTORNEY CAIN: Okay. Thank you.

THE COURT: Okay. Well, thank you all very much, and we are adjourned.

ATTORNEY TURKE: Thank you, Your Honor.

ATTORNEY CAIN: Thank you, Judge.

(Proceedings concluded at approximately 10:46 a.m.)

CERTIFICATE

I, PATRICK A. WEISHAN, do hereby certify that I am the Official Court Reporter for the Circuit Court, Branch 7, Dane County, Wisconsin; and that I have carefully compared the foregoing document with the stenographic notes taken in conjunction with this proceeding by me on February 8, 2021; and that the same is a true and correct transcript of those notes.

Electronically signed by Patrick A. Weishan, RPR, Official Court Reporter for Branch 7 of the Dane County Circuit Court, on February 10th, 2021.

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DISTRICT III

April 6, 2021

To:

Hon. Gregory B. Gill Jr.
Circuit Court Judge
320 S. Walnut St.
Appleton, WI 54911

Barb Bocik
Clerk of Circuit Court
Outagamie County Courthouse
320 S. Walnut St.
Appleton, WI 54911

Christopher E. Avallone
Janet E. Cain
Beth Kushner
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von Briesen & Roper, S.C.
Suite 1000
411 East Wisconsin Avenue
Milwaukee, WI 53202

Ryan Ray Graff
Mayer, Graff & Wallace
1425 Memorial Drive, Suite B
Manitowoc, WI 54220

You are hereby notified that the Court has entered the following order:

2021AP443 Santino, LLC v. Society Insurance, A Mutual Co.
(L.C. # 2020CV358)

Before Stark, P.J., Hruz and Seidl, JJ.

Society Insurance petitions for leave to appeal an order denying its motion to dismiss a class action insurance coverage lawsuit. The primary issue is whether language in an all risk commercial property insurance policy providing coverage for "direct physical loss of or damage to property" applies to loss of business income and other expenses arising from the alleged contaminating presence of the COVID-19 virus on the covered premises and/or government orders restricting business capacity in response to the pandemic.

We have discretion to review an order not appealable as of right when an appeal would materially advance the termination of the litigation or clarify further proceedings, protect the

petitioner from substantial or irreparable injury, or clarify an issue of general importance in the administration of justice. *See* WIS. STAT. § 808.03(2) (2019-20). We also consider the petitioner's likelihood of success on appeal, and whether the necessity of intermediate review outweighs our general policy against the piecemeal disposition of litigation. ***Cascade Mountain, Inc. v. Capitol Indem. Corp.***, 212 Wis. 2d 265, 268 n.2, 569 N.W.2d 45 (Ct. App. 1997); ***State v. Salmon***, 163 Wis. 2d 369, 374-75, 471 N.W.2d 286 (Ct. App. 1991).

The issue presented satisfies the threshold for likelihood of success on appeal because it appears to be one of first impression at the appellate level in the state, in which the parties inform us that circuit courts have reached differing conclusions. We are further persuaded than an appeal would clarify a recurring issue of general importance in the state.

Therefore,

IT IS ORDERED that the petition for leave to appeal is granted. Pursuant to WIS. STAT. RULE 809.11(2), the clerk of the circuit court or responsible court official shall return the copy of the order granting this petition and the trial court case entries maintained pursuant to WIS. STAT. § 59.40 to the clerk of this court within three days of receipt of this order. Entry of this order has the effect of the filing of the notice of appeal. WIS. STAT. RULE 809.50(3). The appellant shall file a docketing statement and statement on transcript within two weeks of the date of this order.

IT IS FURTHER ORDERED that discovery and further proceedings in the circuit court are stayed pending the resolution of this appeal.

Sheila T. Reiff
Clerk of Court of Appeals

FILED
03-01-2021
Clerk of Circuit Court
Outagamie County
2020CV000358

STATE OF WISCONSIN CIRCUIT COURT OUTAGAMIE COUNTY

SANTINO, LLC,

Plaintiff,

v. **Case No. 20-CV-358**

SOCIETY INSURANCE,
A MUTUAL COMPANY,

Defendant.

ORAL RULING (via pexip)

BEFORE: **HONORABLE GREGORY B. GILL, JR.**
Circuit Court Judge, Branch IV
Outagamie County Justice Center
Appleton, WI 54911

DATE: **March 1, 2021**

APPEARANCES: **RYAN GRAFF**
Attorney at Law
Appearing on behalf of the Plaintiff.

JANET CAIN
Attorney at Law
Appearing on behalf of the Defendant.

Joan Biese
Official Reporter, Branch IV
Outagamie County

TRANSCRIPT OF PROCEEDINGS

THE COURT: We're now on the record in 2020CV358, *Santino, LLC v. Society Insurance, et al.*

And on behalf of Santino, LLC I see that I have Attorney Ryan Graff, and on behalf of Society I have Attorney Janet Cain.

Now, I do see that I also have several other individuals by telephone who I -- I'm not able to identify, but if I could have the people by telephone.

ATTORNEY VOIGT: Yes, Your Honor. This is Attorney Heidi Vogt.

MS. CLAREY: Good morning, Your Honor, this is Deanna Clarey from Society Insurance as well.

ATTORNEY FOGGAN: Your Honor, this is Laura Foggan. I am observing today. I do represent Society Insurance but not specifically in this matter.

THE COURT: Okay. Very good. Well, welcome.

ATTORNEY FOGGAN: Thank you.

THE COURT: And then I see I also have a Heather Friedl by way of video. Miss Friedl, who are you with?

ATTORNEY CAIN: Shy may be having trouble

with her audio, but it's Heather Friedl, and she is with Society Insurance, our client.

THE COURT: She is. Okay. And I apologize. I'm getting my names from the screen, and apparently it may be time for me to upgrade my prescription a little bit in my glasses.

ATTORNEY GRAFF: She may have misspelled the name, too, Judge.

THE COURT: What's that?

ATTORNEY GRAFF: She may have misspelled her name. Did you say Friesl or Friedl, Janet?

ATTORNEY CAIN: It's Friedl. F-R-I-E-D-L.

ATTORNEY GRAFF: You don't need new glasses, Judge. She needs a new keyboard.

THE COURT: Thank goodness.

All right. We're here today on a motion to dismiss. And what I like to do in cases such as these is start out with a recitation of sort of the facts, and we'll do so at this time.

Now, Santino, LLC is a domestic limited liability company which operates a restaurant called Houdini's Escape Gastropub located at 1216 South Oneida Street, Appleton, Wisconsin. As part of its business operations, Santino purchased from Society

Insurance, A Mutual Company, certain business insurance policies.

During the course of the past year, the world has had to deal with the COVID-19, a novel virus, the effects of which range from no symptoms at all to death.

Now, in response to the COVID-19 virus, on March 12th of 2020, Wisconsin Governor Tony Evers issued Executive Order 72 declaring a health emergency in response to the COVID-19 virus. In the accompanying press release, Governor Evers reminded people of simple steps to avoid getting sick, including frequent hand washing, covering coughs and sneezes, and staying at home when sick.

Effective March 17th of 2020, Governor Evers issued a statewide moratorium on mass gatherings of people of 50 or more to mitigate the spread of COVID-19. Restaurants and bars were limited to 50 percent of seating capacity or 50 total people, whichever is less, and were required to maintain distancing of six feet between tables, booths, bar stools and ordering counters.

On March 17th Governor Evers issued Emergency Order No. 5, effective at five p.m. on March 17th, which put a statewide ban on all

gatherings of more than ten people and closed all bars and restaurants, except for delivery and pick-up orders with a distancing requiring -- requirement of six feet between customers in response to the COVID-19 emergency.

On March 24th of 2020 Governor Evers then issued Emergency Order 12, a safer at home order. Governor Evers stated, despite prior emergency orders banning mass gatherings, the rates of infection continued to drastically increase necessitating additional measures to slow the rate of infection and save lives. All individuals present within the state were ordered to stay at home or their place of residence with certain exceptions. Bars and restaurants remain limited to pick-up and delivery.

As a result of the COVID-19 emergency and related orders, Santino ceased operations resulting in a substantial loss of business income.

On or about April 10th of 2020, Santino and/or its authorized representatives made a claim with Society for loss of business income sustained as a result of the COVID-19 emergency and related orders.

Society thereafter denied the claim.

Santino then initiated the instant action

on behalf of itself and others it claims are similarly situated seeking declaratory action as well as claims for breach of contract and bad faith.

The Defendant thereafter filed a motion to dismiss, and it is that motion which is now before the Court and ripe for consideration.

Now, a motion to dismiss on the pleadings tests the legal sufficiency of the complaint. Wisconsin Statute Section 802.06(2) and *Ladd v. Uecker*, 323 Wis.2d 798, a 2010 Court of Appeals decision. For purposes of a motion to dismiss on the pleadings, the Court must accept all facts alleged in the challenged pleadings as true as well as all reasonable inferences arising from those facts. *Notz v. Everett Smith Group*, 316 Wis.2d 640, a 2009 case. A motion to dismiss on the pleadings will be granted when the Court concludes there are no conditions under which the plaintiff may recover. *Doe v. Mayo Clinic Health Systems*, 369 Wisconsin 2nd 351, a 2016 case.

Now, the defendant argues that dismissal is appropriate for several reasons: One, there is no coverage under the business income or extra expense coverage because the Plaintiff has not suffered a direct physical loss of or damage to covered

property; two, there is no coverage under the civil authority coverage because the Plaintiff's alleged loss of business income was not caused by civil authority that prohibited access to Plaintiff's premises in response to either (a) damage to other property, or (b) physical danger -- dangerous physical condition; three, there is no coverage under contamination coverage because Plaintiff's alleged loss of business income was not caused by (a) contamination which resulted in action by a governmental authority that prohibited access to the premises or production of products, (b) a contamination threat, (c) publicity resulting from the discovery of suspicious contamination; four, there is no coverage under the sue and labor provision of the policy; and, five, absence of a virus exclusion does not create coverage. And finally, because there is no coverage, Plaintiff has no claim for bad faith or statutory interest under Wisconsin Statute Section 628.46.

The Court will address the arguments in turn. That said, common to all arguments advanced is the insurance policy which was issued by the Defendant, and as such, to identify the appropriate standard by which to examine the issues.

Now, the arguments advanced all necessitate interpretation of the applicable insurance policy which was issued by Society Insurance to Santino, LLC.

Insurance policy interpretation is a three-step process. *American Family Mutual Insurance Company v. American Girl*, 268 Wis.2d 16, a 2004 case. First, the Court must examine the facts to determine whether the policy's insuring agreement makes an initial grant of coverage. The duty to defend hinges on the nature, not the merits, of the Plaintiff's claim. *Wausau Tile v. County Concrete Corp.*, 226 Wis.2d 235, a 1998 case. It is determined by comparing the allegations in the complaint to the terms of the policy. *Fireman's Fund v. Bradley*, 261 Wis.2d 4. Now, the insurer has a duty to defend its insured if the allegations contained within the four corners of the complaint would, if proved, result in a covered loss.

If there is an initial grant of coverage, the Court is to examine the exclusions to determine whether any of them precluding coverage noting exclusions operate independently. *Heaton v. Mountin*, 233 Wis.2d 154, a 2000 Court of Appeals case. If any exclusion applies, there is no coverage.

Third, the Court looks to whether any exception to the applicable exclusions reinstates coverage. As a rule, insurers are not supposed to be bound to risks which they did not contemplate and for which they receive no premium. *Rebernick v. Wausau General*, 278 Wis.2d 461. An insurer has no duty to defend an insured if the allegations in the complaint would not be covered under the policy of insurance even if true. *Water Wells v. Consol Insurance*, 369 Wis.2d 607, a 2016 case. If there is any doubt about the duty to defend, it must be insured and resolved in favor of the insured.

Now the Plaintiff's claim arises under the business income, extra expense, civil authority, contamination, sewer and labor provisions of the policy. Now in pertinent part it states, we will pay for direct physical loss or damage to covered property at the premises described in the declarations caused by or resulting from any covered loss. A covered loss is direct physical loss unless excluded. And it goes on from there.

Now, Society's policy, in summation, covers either a direct physical loss or damage to a covered property that is caused by or resulting from any covered cause of loss.

Now, as noted by Santino, the terms direct physical loss and damage are not defined individually or collectively, and so each word is given its ordinary meaning. *Leicht Transfer & Storage Company v. Pallet Central*, 387 Wis.2d 95. Undefined words and phrases are interpreted as they would be understood by a reasonable insured. Undefined words and phrases that are ambiguous are construed in favor of the insured to afford coverage. And again, that's the *Leicht Transfer* case.

Now, the Defendant does not take issue with the definition proffered by the Plaintiff, and as such, the Court will not disrupt those definitions either. Direct is characterized by close logical, casual or consequential relationship. That's found in the Merriam-Webster dictionary online. The word direct means merely immediate or proximate as distinguished from remote.

Physical is defined in part as having material existence. Again found at the Merriam-Webster dictionary online, also Black's Law Dictionary pertaining to real, tangible objects. Loss is defined as the act of losing possession or the harm or privation resulting from the loss or separation. Again, Merriam-Webster dictionary.

Now, the Plaintiff would have the Court look at each word in isolation and reach the conclusion that there has been a sufficient showing to support a claim for coverage by Society. Looking at each term in isolation lends credence to the argument. However, before this Court can make a conclusion, it is also necessary to look at the phrase as a whole. As agreed, at issue the phrase is direct physical loss or damage. It is evident that the term direct modifies the term physical which in turn modifies loss.

The conclusion is further supported by subsequent language found in the business income provision of the policy. In pertinent part, we will pay only -- or we will only pay for loss of business income that you sustain during the period of restoration that occurs within twelve consecutive months after the date of physical loss or damage.

In this context, it is evident that what is necessary for coverage under the loss provision is that the physical location, which is the subject of the policy, have some type of structural damage and that the loss must be more or less permanent such as to render it a loss. The Court again reaches this conclusion by looking at the relation of each word in

the phrase to one another. The term loss is a verb suggesting an action or occurrence. The verb is modified by the adjectives direct and physical, each adjective used to describe the type of loss and must be read in the conjunctive. In other words, the loss must both be physical and direct.

Now, while the State of Wisconsin is largely devoid of authority on this issue and, hence, precedent, other states have examined the issue. Now, the Plaintiff relies predominantly on three cases in support of its position that the COVID pandemic should be construed as having a physical nature such that it triggers the application of the insurance policy at issue.

The two cases at issue -- or two of the cases at issue arise from the same jurisdiction and judge. The third is largely distinguishable.

In both Studio 417 and Blue Springs the judge concludes that the physical presence of COVID automatically equates to physical damage to the property at issue. The Court disagrees with this conclusion. While COVID may be physically present, there is no indication that it damaged the property in a physical sense as opposed to an economic sense. For even if present, it may be undetected which is

unlike the situation with the case of Travco Insurance where there was noxious gas which rendered the property -- and I should mention that citation is 715 F.Supp.2d 699. There, the noxious gas rendered the property uninhabitable. Here, while COVID may or may not have been present, there is nothing suggesting it physically damaged or caused loss to the property at issue, other than a blanket allegation.

Similarly, the Manpower case is distinguishable. In Manpower, although the property at issue was not damaged, it was inextricably intertwined with a business that was physically damaged thus rendering the property at issue unusable.

Now turning to the issue of damage, the Plaintiff would have the Court believe that damage should be read separate from the term direct physical loss. Again, this Court disagrees. Merriam-Webster defines damage as loss or harm resulting from injury to person, property or reputation. From this definition it is clear that while damage may include loss, it may also be comprised of something less. Thus, examining the phrase as a whole, the Court concludes that the direct physical portion of the

phrase applies both to the loss and damage terms. To do otherwise would not make reasonable sense. To have a physical requirement for a loss but not when damage occurs would lead to potentially absurd results.

Now, having concluded the meaning of the terms at issue, the Court -- the Court now looks at it within the context of the complaint.

According to the complaint, the Plaintiffs and others similarly situated, sustained loss of business income, incurred extra expenses as a result of the COVID-19 emergency and emergency orders. The complaint further states that on March 16th Governor Evers issued Emergency Order No. 4 effective at 12:01 a.m. on March 17th of 2020 ordering a statewide moratorium on mass gatherings of 50 or more people to mitigate the spread of COVID-19. Restaurants and bars were limited to 50 percent of seating capacity or 50 total people, whichever is less, and required a distancing of six feet between tables, booth, bar stools and ordering counters.

The complaint goes on to state that the COVID-19 caused direct physical loss of or damage to covered property under Santino and the class members policies by damaging -- by denying use of and

damaging the covered properties and by causing a necessary -- a necessary suspension of operations.

COVID-19 caused direct physical loss and damage to Plaintiffs and other class members covered properties requiring a suspension of operations thus triggering the business income provision.

Now, here, while the Court has concluded that the damage or loss must be physical, the Court in reviewing the complaint as above -- or notes the complaint above does make such blanket allegations.

And even when the Court considers the Data Key case which allows the Court to become involved or to disregard certain blanket allegations, the Court will not do so here. In part, the Court notes that the insurance company did ask the Court to take judicial notice of the CDC guidelines, which while they may be accurate, ultimately would require the Court to go outside of the -- the pleadings.

And so in this case at this juncture, while the Court has serious concerns that there were in fact physical losses versus purely economic losses, the Court finds that this is a better -- a question better suited for summary judgment, and the Court finds that at this point in time the allegations, although bare, are sufficient such as to survive a

motion to dismiss, again noting and reiterating that the Court does have serious concerns as to the overall merits but again feels that that is better suited for a summary judgment type of motion.

And henceforth, at this point in time, the motion to dismiss based upon the pleadings alone will be denied.

Any questions, Attorney Graff?

And I should also note, in my review of other cases, there is certainly support for that approach of it being more better suited for a summary judgment motion, and I don't know that it would necessitate extensive discovery, but again, I do think that it is better suited at that level.

Attorney Graff, any questions?

ATTORNEY GRAFF: Nothing, Your Honor. Thank you very much.

THE COURT: Attorney Cain, any questions?

ATTORNEY CAIN: No, Your Honor.

THE COURT: All right. Thank you both.

And is there anything at this juncture that we need in terms of additional briefing schedules? I think we've been filling in the gaps through our scheduling order, but I want to check, Attorney Graff.

ATTORNEY GRAFF: Nothing for scheduling. I assume the Court wants an order, and I could draft it or, Janet, if you want to draft it, it doesn't really matter to me.

ATTORNEY CAIN: Sure. I'll be happy to.

THE COURT: Attorney Cain, anything else needed at this time?

ATTORNEY CAIN: No, Your Honor.

THE COURT: All right. Thank you all. And we are adjourned.

(Proceedings concluded.)

C E R T I F I C A T E

STATE OF WISCONSIN)
) ss.:
COUNTY OF OUTAGAMIE)

I, JOAN BIESE, RMR/CRR, do hereby certify that I am the official court reporter for Branch IV of the Circuit Court of Outagamie County;

That as such court reporter, I made full and correct stenographic notes of the foregoing proceedings;

That the same was later reduced to typewritten form;

And that the foregoing proceedings is a full and correct transcript of my stenographic notes so taken.

Dated this 1st day of March, 2021.

Electronically signed by
Joan Biese RPR/RMR/CRR

FILED
03-05-2021
Clerk of Circuit Court
Outagamie County
2020CV000358

DATE SIGNED: March 5, 2021

Electronically signed by Gregory B. Gill Jr.
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT OUTAGAMIE COUNTY

SANTINO, LLC, individually and on behalf of others similarly situated

Plaintiff,

Case No. 2020CV000358

vs.

SOCIETY INSURANCE, A MUTUAL COMPANY,

Defendant.

ORDER ON SOCIETY INSURANCE, A MUTUAL COMPANY'S MOTION TO DISMISS AMENDED COMPLAINT

The above-entitled action having come on for oral ruling on March 1, 2021 on Defendant Society Insurance, A Mutual Company's Motion to Dismiss, Plaintiffs having appeared by their attorneys, Mayer, Graff & Wallace LLP by Ryan R. Graff and Defendant having appeared

by its attorneys, von Briesen & Roper, s.c. by Heidi L. Vogt and Janet E. Cain, the Court having considered the briefs and submissions of counsel, IT IS HEREBY ORDERED:

1. Defendant's Motion to Dismiss is denied for the reasons set forth on the record on March 1, 2021.

36032569_1

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

COLECTIVO COFFEE ROASTERS, INC., ET AL.,

Plaintiffs,

CASE NO. 2020-CV-002597

vs.

SOCIETY INSURANCE, A MUTUAL COMPANY,

Defendant.

MOTION TO DISMISS HEARING

BEFORE THE HONORABLE LAURA GRAMLING PEREZ,
CIRCUIT COURT JUDGE
JANUARY 29, 2021

APPEARANCES:

JAY URBAN, Attorney at Law, appeared on behalf of plaintiffs via Zoom telephone conference.

JANET CAIN AND HEIDI VOGT, Attorneys at Law, appeared on behalf of the defendant via Zoom telephone conference.

GEORGENE L. LITTLEFAIR
Official Court Reporter

TRANSCRIPT OF PROCEEDINGS

THE CLERK: Case Number 2020-CV-002597, Colectivo Coffee Roasters, Inc., et al. versus Society Insurance, A Mutual Company. Your appearances, please.

MR. URBAN: Jay Urban of Urban and Taylor appears for the plaintiffs in this action. It's also an allegation of a class action.

MS. CAIN: Janet Cain and Heidi Vogt on behalf of Society Insurance.

THE COURT: Good morning, everybody. We're here today for a hearing on Society's motion to dismiss the complaint.

Before we talk about the merits of the motion, I'll note for the record that we're conducting the hearing today, perhaps ironically, given the allegations of the complaint, during a nationwide health emergency as a result of the Covid-19 Pandemic, and because of orders that have been entered by the Chief Judge of the First District Circuit Court, we're not able to safely and appropriately meet in person in the courthouse in order to conduct our hearing. Because of that we're conducting the hearing remotely using the Zoom platform.

All three counsel and I are appearing using both

a video and an audio feed. Madam clerk, madam court reporter and my law clerk are participating using only an audio feed, and there are a number of people connected with Society who are essentially observing today who are appearing using either an audio feed or by telephone.

In order to insure that the hearing is open to the public, we are streaming it live on YouTube.

Mr. Urban, I assume you don't have any objection to proceeding in this fashion today?

MR. URBAN: No, I follow the rules.

THE COURT: Ms. Cain, I assume you don't either?

MS. CAIN: No, no objection.

THE COURT: All right. Good. So let's talk about the motion. I have had the opportunity to review the parties' submissions so you should know I have read through the briefs. I may have a couple of questions for both sides as we proceed.

But, Ms. Cain, I guess I'll turn things over to you. Is there anything you'd like to particularly point my attention to or emphasize or add to your brief the arguments in your briefing?

MS. CAIN: Yes, thank you, Judge. As you know, the plaintiffs are alleging that their business operations were suspended due to the pandemic and the government orders limiting their operations to take-out

and delivery service, and therefore they claim they are entitled to coverage under the Society policies for their business income losses.

The policies provide business income and extra expense coverage when operations are suspended due to, quote, "direct physical loss of or damage to covered property," and as I'm sure the Court is aware that's really the key term that we're here to discuss today.

The plaintiffs claim that the partial temporary loss of use of their property is direct physical loss of property and that Covid-19 was, quote, on or around, unquote, their property, and it was physically damaged by the presence of Covid-19.

Under Wisconsin law and the cases from a significant majority of other jurisdictions that have addressed this term, "physical loss of or damage to property," the plaintiffs have not sustained either loss of or damage to their property so as to trigger coverage under the policies.

As this Court knows, one judge in Wisconsin, Judge David Weber in Door County, has addressed a similar situation. He held that a governor's order regulating the use of property is not a direct physical loss of property. He thoroughly analyzed the claim of Al Johnson's, a restaurant in Door County, for business

income loss when it changed its business operations to take-out and delivery only due to Governor Evers' orders. And he said, "The government order is not a physical loss, and therefore Al Johnson's suspension of its operations was not caused by a physical loss."

In addition, Judge Weber said that there had been no physical event at Al Johnson's property that led to the suspension of its operations such as there was in the *Manpower* case, which was cited by the plaintiffs and which I replied to in our reply brief. In that case the court found a physical loss did exist because there was a collapse of the building that the insured's business was in, and that collapse was a physical event that created a physical barrier between the insured and its property.

Here, like in the *Al Johnson's* case, there was no physical event and no physical barrier between the plaintiffs and their properties. In fact, they continued to use their properties throughout the pandemic. The plaintiffs argue in their brief and I imagine will argue today that this case is different from *Al Johnson's* because Al Johnson's did not make an allegation that Covid-19 was present on its property, whereas they have made such an allegation here.

However, the plaintiffs can't rest on speculative allegations or legal conclusions to survive a

motion to dismiss. They must allege facts that plausibly suggest that they're entitled to relief, and their allegation that Covid-19 was on or around their property and it has rendered their property unsafe and unfit for use is nothing more than a speculative allegation and a legal conclusion.

This Court shouldn't accept that allegation as a well pleaded fact sufficient to survive a motion to dismiss. However, even if it could be shown that Covid-19 was on their premises, it wouldn't be sufficient to show that Covid-19 caused damage to their property. The property wasn't damaged or altered in any way by the virus. They don't say there was a physical event that affected their property such as in *Manpower*. They don't allege that their property is in need of repair due to a physical change. They don't say that someone with Covid-19 was ever present on their property. They don't allege how the virus physically affected their property at all. They only say it was on or around the property.

Courts addressing Covid-19 coverage issues in other jurisdictions have made it clear that the virus doesn't harm property, and other than a conclusory allegation that their property was damaged the plaintiffs do nothing to refute this.

For example, in the case *Uncork & Create*, which was cited in my brief, a case out of West Virginia, the court stated "The novel Corona virus has no affect on the physical premises of a business." An Illinois case, *Sandy Point Dental*, held that the Corona virus does not physically alter the appearance, shape, color, structure or other material dimension of property.

And in Wisconsin the case law interpreting what physical loss is suggests that without an alteration there's no physical loss. Judge Weber found those Wisconsin cases that I've cited in my brief to be persuasive on what physical loss means. Those cases held that physical loss means tangible destruction of property or physical damage to property such as an alteration in appearance, shape, color or other material dimension. Even *Couchon Insurance*, a well known authority, states that the requirement that the loss be, quote, physical, closed quote, is widely held to preclude claims when the insured merely suffers a detrimental economic impact unaccompanied by a distinct demonstrable alteration of property. An unfounded allegation that the virus caused physical property damage or loss cannot be accepted without support for this proposition, especially in light of the many cases that it held that it simply doesn't affect property at all.

Despite plaintiffs' allegation that their property was unfit for use, they pointed to absolutely no damage to or physical change in their property whatsoever. In fact, they've continued to use their property to prepare their product and to deliver their product to customers. Employees continue to work on their property. Customers and delivery service employees are collecting orders on their property. The property hasn't been affected at all. It's in the same condition today that it was in the day before Governor Evers issued his order. The only thing that's been affected is how the plaintiffs can use the property, and that was affected by a government order, not by any physical change or intrusion on the property.

Other courts that have addressed complaints that alleged that the virus was present and that it damaged property and still denied coverage. For example, in a recent case in Georgia, *Johnson vs. Hartford Financial Services Group*, which is also cited in my brief, the Northern District of Georgia Federal Court held that even though the plaintiff alleged there was an infiltration and proliferation of the virus which caused a physical loss of or damage to their premises, this wasn't sufficient to trigger coverage, and the court granted the insurer's motion to dismiss. The court held that even if

it considered the mere presence of Covid-19 to be enough to cause a direct physical loss of or damage to property, the plaintiff still didn't state a facially plausible claim. The plaintiff never alleged that Covid-19 was ever actually on their premises. There was no allegation of anyone on the premises with the virus. The plaintiffs just alleged that because of the high number of cases in Georgia and the ease of person to person transmission it must have been on their premises. The court said this was conjecture and speculation, and the plaintiff can't rely on speculation and conjecture to survive a motion to dismiss.

The plaintiffs' allegations in this case are equally speculative, and there's no allegation that anyone was on their premises at all with the virus at anytime. This case involves restaurants that had to temporarily change their operations to take out and delivery only because the governor ordered them to cease in-person dining to stop the spread of Covid-19. They didn't cease to change their operations because there was physical loss of property or physical damage to their property. There simply wasn't. The policy requires direct physical loss of or damage to property that caused suspension of operations. There's nothing physical about the governor's orders as Judge Weber and so many other

courts across the country have recognized. There wasn't a fire, an earthquake, no collapse that affected the property that led to the suspension of their operations. There was simply an order.

Now, the plaintiffs have argued that there can be loss of property without damage to property. This is true in some situations, as some courts have found loss to mean permanent dispossession of property, even without any damage to the property. Here there was no permanent disposition. The governor's orders were temporary, not permanent. Furthermore, the plaintiffs were not dispossessed of their property at all. They continued to have access to it. They continued to use it. Their employees still showed up for work, even when the dining room was closed to the public. Their property was and still is in their possession. In fact, nothing prevented the plaintiffs from using their dining rooms. They just couldn't use them to serve customers. All that changed was how their property could be used for a temporary period of time.

The cases relied on by the plaintiffs that have found loss of property without physical damage to property involve some physical force or intrusion that compromises the property making it uninhabitable or unusable such as the collapse in *Manpower*, soot and smoke

from a wildfire, an accumulation of gasoline that infiltrated property or rock falls from an unstable retaining wall, all of which resulted in physical compromise to property and inability to inhabit the property. On the contrary, Covid-19 has no effect on the physical property of plaintiffs' businesses.

Furthermore, unlike those cases, Covid-19 did not make plaintiffs' property uninhabitable or unfit for use as I've already stated. They continued to inhabit the property and to use the property throughout the pandemic even though the virus was allegedly on or around the premises.

As one court recently stated, plaintiffs maintain their inability to use their property constitutes a direct physical loss. The court does not agree. Plaintiffs' loss of usability did not result from an immediate occurrence which tangibly altered or disturbed their property in some perceptible way. The order merely temporarily halted plaintiffs' business operations, and that case is *Drama Camp Productions*, 2020 West Law, 8018579, out of Alabama, decided on December 30, 2020.

Furthermore, the business income coverage is triggered when there's a direct physical loss of or damage to property, which I've explained there wasn't,

but only for the period of restoration. That period is defined in the policy as the period of time after direct physical loss or damage until the date when the property should be repaired, rebuilt or replaced. Here the plaintiffs' property did not need repair, rebuilding or replacement due to the presence of Covid-19, the alleged presence of Covid-19, or Governor Evers' order. This provision would make no sense if physical damage did not occur. A temporary partial loss of use of property, the loss alleged by the plaintiffs here, is not something that can be repaired, rebuilt or replaced as those terms are commonly understood. Judge Weber made specific reference to this clause in deciding the *Al Johnson's* case stating, quote, repaired, rebuilt, replaced. Seems to me that this means the loss of use without more does not constitute direct physical loss or damage, closed quote.

Another court applied common canons of construction and stated, "If we construe direct physical loss or damage to require actual harm, it gives effect to the other provisions of the policy." Considering all these terms of the policy together, it's clear that there must be direct physical loss of or damage to plaintiffs' property which requires repair, rebuilding or replacing in order to trigger coverage. Loss of use of property

due to a governor's order is not physical loss of property, and no property needs to be repaired in order for the plaintiffs to carry on their operations. Therefore, under the clear policy language, the business income and extra expense coverages do not apply.

The plaintiffs also claim they're entitled to coverage under the civil authority coverage of the policy. They had merely alleged in their complaint that, quote, The governor's orders prohibit access to other venues and businesses in the immediate areas around plaintiffs' businesses," but do not indicate what those businesses are, where those businesses are or what type of physical damage those other businesses have allegedly sustained. There are multiple requirements to trigger civil authority coverage and plaintiff doesn't meet any of them.

First, just as the plaintiffs do not plausibly allege damage to their own property, they don't plausibly allege damage to other property. They can only speculate that Covid-19 was on their own property and can only speculate it was on other property, and they can't show that even if it was present it caused any physical damage at all.

Second, the plaintiffs can't show that any civil authority prohibited access to their property because of

damage to other property. They have not alleged the governor's orders were issued because of damage to any property, much less property that was in the immediate area of their property. The orders were issued because Governor Evers wanted to stop the spread of the virus among groups of people. It was a ban on mass gatherings telling people they were safer at home, not that they couldn't go to restaurants because those restaurants were physically damaged. Even if there was damage to neighboring property, plaintiffs have not alleged that that damage to other property led to an action by civil authority to prohibit them from accessing their own property. The orders were not issued in response to neighboring property that was damaged.

Third, access to the plaintiffs' property was not prohibited. The order allowed access to the property. It didn't prohibit access. Limiting access to a part of the plaintiffs' property for dining service is not prohibiting access to their property. For these reasons the civil authority coverage is not applicable.

The plaintiffs also claim they're entitled to coverage for loss of business income under the contamination coverage provisions of Society's policies. Again, there are several requirements to trigger this coverage which are present here. First and

most importantly, there was no contamination as that term is defined in the policy. That term is defined as a defect, deficiency, inadequacy or dangerous condition in their products, merchandise or premises. It's illogical to say that there was a defect, deficiency, inadequacy or dangerous condition in products that they continued to produce at property they continued to use on a daily basis. If the plaintiffs' products were defective, inadequate or presented a dangerous condition, plaintiffs couldn't have continued to sell them but they did. If the plaintiffs' premises were defective where there was a dangerous condition on the premises, employees, customers and delivery drivers would certainly not have been allowed on the premises to prepare food or pick up food, but they were. The possible speculated presence of Covid-19 on plaintiffs' premises, which they continued to use, does not meet the definition of contamination. Even if it did, however, contamination must result in an action by a public health or governmental authority to prohibit access to the premises or production of their products. That did not happen. There was no prohibition of access, as I explained, and no prohibition on production of their products. The governor's orders were not issued because of contamination. They were issued to stop the spread of virus among people.

THE COURT: Ms. Cain, if I could just interrupt for a moment. Isn't one of the plaintiffs' products dine-in meal service? Wasn't that a part of the plaintiffs' product?

MS. CAIN: I don't think that's a part of the plaintiffs' product. I think that is one of the services that the plaintiffs --

THE COURT: So isn't it a service that they provide, then? That's part of their business is providing full-service dining services. So you seem to argue that they were able to fully continue to provide their product or carry on their business, but isn't part of their business allowing people to come in and sit down at their tables and order food and drink and stay there to consume it?

MS. CAIN: That is part of their business. I can't dispute that that's part of their business, but they weren't prohibited from operating their business. They were just told that they had to limit or restrict the way they operated their business. There still was no contamination on the premises caused by Covid-19.

THE COURT: Okay. Let me back up a little bit. You're using the word "loss" -- the word "damage" sometimes interchangeably here. There in the policy

there is coverage for a covered cost of loss. Covered costs is defined as a direct physical loss. If there is coverage, and I'm essentially describing my understanding of the policy, and then I'm going to ask you if I'm missing something. If coverage, then, a type of loss that is compensable is direct physical loss of or damage to covered property. So this language regarding damage to covered property really isn't language that's incorporated in the definition of the type of loss that's covered. It's really a part of the definition of the damages that are compensable. Do you understand what I'm getting at? Am I missing something somehow? So there are kind of two steps. First of all, is there covered loss? And then the second step, if there is, what is the insured able to collect for? And my reading of the policy says that to answer the question of whether there's a covered loss you look at whether there's a direct physical loss. If there is, then to answer the question of what losses, what damages is the insured able to recover? The answer is they're able to recover their direct physical loss over damage to covered property. So there's sort of two different definitions at issue here. Am I right about that? Do you get what I'm getting at?

MS. CAIN: I think so. Under the business

income coverage, they're entitled to recover for the business income due to suspension of operations caused by a direct physical loss of or damage to property.

THE COURT: Right. So the first issue is was the cause of this a direct physical loss?

MS. CAIN: True.

THE COURT: And your argument is essentially that the plaintiff has not alleged and cannot allege that they have suffered a direct physical loss, that there's not a covered cause of loss here?

MS. CAIN: True.

THE COURT: All right. I'd like to -- so our time is running short, and I do have a remaining calendar today, and, as I said, I have read the parties' submissions. So I'd like to give Mr. Urban an opportunity to respond. I'll give you a chance, Ms. Cain, on rebuttal briefly, but I'd like to turn things over to Mr. Urban if I can.

MS. CAIN: Sure. And that's fine because I've gone through the three types of coverage that they're alleging they're entitled, and so I think this is a good time for you to move to Mr. Urban.

THE COURT: Thank you.

Mr. Urban.

MR. URBAN: Thank you, Your Honor. So this

happens now and then, but what we have here is in the very early stages of this case a motion to dismiss. A motion to dismiss is a fatal sanction in a case. It says not only is the courthouse closed to you, but you don't even get a chance to describe what your business is. You don't even get a chance to describe what your losses are. It's asking you, Your Honor, to put your hand on the scales of justice and quash it, and they're asking you to do it, not in this case, in other cases.

So I see this debate all the time of which case did I bring? Because I'm sitting here looking at Ms. Cain and I'm sitting here looking at the Society briefing and I'm sitting here looking at their policy, and I'm saying to myself, "This ain't my case. These ain't my clients," because they're not. My clients are the clients that have a dine-in service only. This business that they were all engaged in carry-out and they could instantly flip the switch, I rejected those cases from time to time. There has to be a situation here where you cover your losses. I'm actually surprised, and I know we have some Society people on the telephone today. I'm actually surprised that Society took such great lengths to basically corner the market on writing policies for bars and restaurants to have such little regard for the various different ways of how bars and

restaurants work.

I put myself through college and law school working in bars and restaurants, and what I'm hearing today has very little to do with the true operations of those things. For example, we represent bars. You can't take out drinks from a bar. So when your bar is closed -- because Covid is everywhere. Covid is in the air. Covid is worse than smoke. Smoke you can at least see where it is. Covid is literally every single place, and even if you don't have Covid, you can still transmit Covid. And in March of this year, in April of this year, continuing all the way to this point, we know less than ten percent about Covid, but we know it is everywhere, and we know what Society's policy is. We know it doesn't have an exclusion to Covid. It does not have a virus's exclusion in its policy. That hasn't even been addressed or talked about here. So this is an all-risk policy, and they're trying to reinvent the facts that we pled because we have pled -- there's two purposes, like you said, of physical loss. There's direct physical loss and then there's physical damages. Those are not interchangeable and we pled both.

If Covid is everywhere, there's lots of ways that it can be loss. Many of my clients did not go to their premises. What did they use their open dining

rooms for? They were supposed to convert their in-house five-course hopefully someday Michelin star restaurant into a storage facility? We didn't know back when this happened what surfaces would do.

Look, Your Honor, look what pains you took in the Milwaukee County Task Force on Covid to present your rendered surfaces to antibacterialize, to put up Plexiglas so much that I've remarked, "It looks like a hockey rink in there." And these are all of the things that come out in a case factually. That's not the case that they're trying to defend against. That's the case we brought. We've brought the case that the virus is everywhere. We cited the science in our brief, and they're trying to make this Court also something that you're not, Your Honor. Are you the Court of Appeals or the Supreme Court of Georgia? Are you the U.S. Supreme Court? There is no case, no case, interpreting the Society insurance policy. Every single case that they cited in their thick brief involves a different insurance policy, a different restaurant, in a different state, with a different set of laws.

We know what Wisconsin laws require, and that is any, any, ambiguity in a policy about what physical loss is or isn't is subject to interpretation. The closest thing we have is what Judge Edelman ordered in his ruling

in his case, which wasn't a Society policy. That was an ISO policy which is really important. The Society could have adopted ISO forms and had a case exactly like all those other cases that it cites. It didn't. It chose to write its own policy.

THE COURT: Mr. Urban, if I could interrupt and ask you two questions: I'm confused because you're referring to Judge Edelman. Are you referring to Judge Weber in the Door County case, or is there a different case you're referring to that I don't have in mind right now?

MR. URBAN: On that particular point -- this is a problem of preparation. We put everything in our heads and then we spit it out too fast. The *Manpower* case, Your Honor, the federal case, where Judge Edelman addressed the direct physical loss and noted specifically with that language that it can include loss of use. I was more or less responding to the question that you asked Ms. Cain kind of how these things are different. It sounds like you've already appreciated the difference in articulation between it's an and/or proposition to the physical, not just the loss of use.

THE COURT: And can I also ask: So you say that all of the other cases that have been decided sort of on this issue related to Covid over the past, I suppose,

year, nine months, involve other policies. Do any others involve a Society policy similar to this one?

MR. URBAN: The only case that involves a Society policy that is this same policy is the *Al Johnson's* case, and I'll address that in a moment. And nobody else has -- *Al Johnson's* case was about one business operation that I know because one of the bars and restaurants that I worked in was in Door County, has goats on its roof. So just there it's a completely different business entity. They only asked to analyze that policy, and their complaint is completely different than our complaint. We didn't plead the same things that they pled. Judge Weber in that case, which, again, it's instructive. It's another circuit court judge that looked at things. But you're not the Court of Appeals judge in that case. That judge's job was to apply this policy to what *Al Johnson's* alleged, and at the end of that decision the whole reason for that decision is that the judge said several times throughout the hearing. They didn't plead what we pled here, which was there was contamination of the premises, that there was loss of use, those kind of things. They didn't plead that. He asked them to plead it. They didn't amend their complaint ever.

We analyzed this case and quoted science. The

closest case that actually we could find about this situation is the *Sentinel Management* case that we cite in the Minnesota Court of Appeals. Again, general authority, but if you want to look at some general authority, and it talked about asbestos fibers not physically altering the business structure, but there was still a physical loss because of the danger of asbestos and that it's airborne.

So we're dealing with, just like you said even before we started the hearing, Your Honor, we're dealing with some very specific things here, and what Society is asking you to do is to assume that every single other policy that they cited in their brief is Society; it's not, that every single entity is *Al Johnson's*; they're not, and our complaint isn't even the same complaint as *Al Johnson's*.

Our amended complaint alleges all these things, and we're only supposed to be looking at the four corners, and I come into this hearing today in my Zoom, and I've been to all these restaurants I represent, and they don't operate in any way that the way Society is saying that they operate. You even observed yourself some of them are dine-in, some are other ones. Tandem, who is the other named plaintiff, for example, also has a World Central Kitchen component of it, so actually those

parts of their operations in the pandemic were not affected. So this is -- these are discussions that we have at the motion for summary judgment stage. What we're talking about here is the heavy hand of the courts saying you're not getting the chance to explore these cases. At the notice pleading, we pled direct physical loss. We pled the civil authority. They're just trying to interpret what that civil authority means. The governor said, "Stay home." That includes the restaurateurs. You're to stay safe, stay home, and they're saying that you can just willy-nilly walk around, go to your property. I wouldn't do that. You'd have to have a gun to my head to have me eat at a restaurant right now. So this just completely is taking out of context this public health crisis that we've never been in before. The closest thing we've had is the SARS virus, where, by the way, a lot of those other policies cited by Society put virus exclusions in their policy. Society chose not to. After SARS a whole wave of those policies came to do that. And now they want to quibble with what the civil authority means and that you can just show up to work.

I heard Society argue today that all the employees just stayed. What? That's baffling to me. These folks shut down because you have an airborne virus

that can go anywhere and can affect anything. It can even transfer it out on me. And you're being asked to impose the ultimate sanction to say we're not even going to let the justice system consider what these losses are and what all these hundreds and thousands of businesses are throughout the state of Wisconsin based on the obligations that there is a physical loss under their individual policy. They're trying to make this case that case, and so there's five things that they're trying to do to make you put that hand of justice on you on the scales.

First, they want you to change or ignore law of a motion to dismiss which is the four corners of the complaint and the inferences from that complaint. Notice pleading. Did we plead the case? Yes. Did we plead different than *Al Johnson's*? Yes. We alleged direct physical loss and damage to the property.

Interpretation of insurance policies also is well known, and that's an ambiguity taking these things into consideration. Their policy has not been analyzed before by the Court of Appeals or the Supreme Court in this state. You are the de novo person to do that. None of those other cases are binding because they're not in Society and the Door County is not binding because it's not the same case.

Second, they want you to compare it to that same case. They want you to say this case is just like *Al Johnson's*, and it's not. We both can read the complaint in that case and the judge said, "If these two things were pled, I wouldn't be doing this." He even said, "I think a Court of Appeals might even have to look at me." It was a skin-of-the-teeth decision. I read it again this morning. He even said, "Sometimes I have to make a close call here, but I have to make it on the four corners of the complaint or the inferences from the complaint."

Third, they want you to change their policy to be like these other policies. We can't do that, Your Honor. Our clients pay good money for these policies, and they purchased these policies that they had no hand in drafting that don't have virus exclusions. The contamination clause is an all-risk policy, and they defined it as direct physical loss or damage. It's not an ISO policy.

And then the fourth thing that I already talked about is what we've already been talking about is they also want you to change the business's practices, so they want to embed in their argument that the governor shuts you down, have everybody show up to work tomorrow and just start taking out for people. At that point would

you even order something from a place? We haven't even gotten into the whole facts of this case of all the food product that had been spoliated because they had to leave the process in the property. We don't know at that point. Do you know what a restaurateur in March was thinking? Half of my clients closed their properties before the governor ordered it just because it was unsafe. If you're told that there's asbestos in your property and there's fibers in the air, a responsible business says there's a direct physical loss on my property here. It's in the air. It's everywhere. If we knew we could spot it, we wouldn't be in a pandemic because we could avoid it.

And the fifth thing that they want to do is they want to change the civil order from the governor and use that as their heavy hand to kick it out of court to say, "You can still go to your property. You can still have all your staff go to your property." Is that really what we're dealing with here in a pandemic? That we have this virus that's everywhere. It's airborne. It's toxic. It's lethal. And we're just supposed to do business as usual, turn on the spigot, and so all these arguments that Society is ultimately making that I'm not going to address here today, but I could, all have to do with profitability. That's just damages. I think you

even noted that in your question. Well, if you can't do dine-in, and could you do dine-in? Could you mitigate your damages? Could you evolve your restaurant to do something else?

Right now, for example, there's a bill pending before the legislature to allow bars to serve cocktails to go or your restaurants to serve cocktails to go. Those are damages arguments. Those are damages for a jury. Those are considerations for summary judgment. That's after we have discovery. There hasn't been any discovery in this case. Out of the gate there wasn't even an answer. It was just denied based on the policy. Most of these policies were denied within 24 hours of submitting a claim. There was no investigation.

And so we have a virus, like I said, that is absolutely everywhere. That is a physical loss. It's a physical virus. It's airborne and it can't be seen, and you're being asked to put the heaviest hand on the scales of justice that there ever is, which is a motion to dismiss to say you can't even come here and explore all the allegations that you made based on the facts of this case and the facts of this policy in the State of Wisconsin with these laws.

So the closest thing we have is the Edelman decision, the *Manpower* decision, that talks about some of

these issues, but not all of these issues, and that case allowed the case to go forward because Judge Edelman ruled that he rejected the ISOP's argument -- ISOP is the defense insurance policy in that case -- that a peril must physically damage property. He rejected that. He said there could also be other types of physical losses and so forth, including loss of use of the property, and just because you can go to a property doesn't mean you can make profit like the year before or even make money like the year before. I mean, I would imagine that Society has denied claims before when people tried to say, "Someone stole my cappuccino machine," and then they go evaluate the cappuccino machine and your cappuccino machine was broken. "It wasn't our fault." It's just like being in a car accident. "Oh, you damaged the fender of my car." "No, that was preexisting damage. That damage was there from before." This is a situation that's different. This has to do with losses arising out of Covid out of something that's airborne.

So I know that the Court has a calendar and time is short. I took special attention. I did not want to read. I think my key did a very nice brief. I thought their brief was very good, too. It just isn't this case. And so we, of course, briefed this, but I wanted to just kind of highlight it for the Court some of the ways that

this case is pled and how this is really a very important issue and an issue of very, very first impression for this Court, and if I were the judge, I would want to have a lot more information. And I'm not saying we didn't plead enough because we did. I would be wanting to consider these issues in the confines of a summary judgment after there are facts, because right now the facts that are being stated are the way that you're being asked to interpret the policies of these facts are not this policy, and they're not the way that these businesses operate. Maybe some of them, and maybe those cases will get rejected down the road. For example, I don't represent any -- we made some class allegations, but if somebody has a property that is just a drive-through -- like the McDonalds drive-through window, yes, you can eat in the property, but if you can immediately pivot to being something else, those are damages arguments, extent of damages arguments.

THE COURT: Thank you, Mr. Urban.

Ms. Cain, anything briefly on rebuttal?

MS. CAIN: Just briefly, Judge. I did refer the Court several times to the standard on a motion to dismiss and the *Data Key Partners* case in Wisconsin is one we cited in our brief, and it pretty much sets forth in detail what the Court is looking for on a motion to

dismiss and what the plaintiff needs to do. And he has to make well pleaded allegations that establish that he's entitled to the relief that he's seeking.

Mr. Urban was talking about things that he says are not in this case. What I can tell you is that many, many of the decisions cited in my brief and that have been rendered across this country do interpret the exact same language as is in the Society policy, that being the business income coverage language requiring direct physical loss of or damage to property.

What I heard from Mr. Urban was that the virus is everywhere, and what I didn't hear from him is how that causes damage to property or how a government order causes a loss of property. And I think that it's clear from Judge Weber's decision that a government order doesn't constitute a loss of property, and I realize that Judge Weber is another circuit court judge in Wisconsin, but he is the only judge thus far who has interpreted this type of language in a policy. He looked at Society's policy in great detail, and here we're asking this Court to look at Society's policy as well as the allegations they pled in their complaint to see if those allegations measure up. And based on the fact that the virus doesn't cause physical damage and the fact that there was no loss of property in this case the plaintiff

cannot survive a motion to dismiss.

I just want to speak briefly about *Manpower*, and I did talk about it initially, but Mr. Urban claims that that is the case that this Court should look as most similar. That case is not similar to this case because in that case there was a physical event, a collapse that caused physical damage, and that's why the insured in that case couldn't use their property. The court specifically said there was a physical event, a collapse, that caused a barrier between the plaintiff and his property. We have nothing like that here.

And, lastly, plaintiff talks about how some of his clients or maybe even all of his clients did not do take-out and delivery. He didn't plead anything about that in his complaint, and we're left with the case that has Colectivo as a plaintiff, which, as I understand it, is primarily a coffee and pastry-type business that clearly could have served customers with take-out and delivery despite the fact that they may not have been allowed to have customers dine in at their restaurant.

I think if the Court just looks at the allegations of the complaint and the language of the Society policy, it should find, as most other courts have found, that interpreted similar or exact same language that there was no physical loss of or damage to property

and that's fatal to plaintiffs' claim.

Thank you, Judge.

THE COURT: Thank you, Ms. Cain.

I'd like to go off the record for a moment and talk about how to proceed today. So, madam court reporter, we're off the record.

(Off the record.)

THE COURT: We're back on the record. First of all I just want to commend counsel on both sides. I thought that the briefing and the argument were excellent on this. This is certainly an interesting and somewhat novel case, and I thought that both sides have done a really excellent job of presenting your side.

This is a motion to dismiss, and we're all well aware of the legal standards on a motion to dismiss. Ms. Cain references the *Data Key Partners* case and that is certainly sort of a leading case on the standard. A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. Plaintiffs must allege facts that plausibly suggest that they're entitled to relief, and that's under *Data Key Partners vs. Permira Advisers, LLC*, which is 356 Wis. 2d 665 2014 State Supreme Court case. I note, however, that in reviewing a motion to dismiss I'm required to accept as true all well pleaded facts alleged in the complaint along with all

reasonable inferences from those facts, and that's under both *Data Key Partners* and *Kaloti Enterprises, Inc. vs. Kellogg Sales Company*, which is a 2005 State Supreme Court case, 283 Wis. 2d 555.

I am required to dismiss the claim only if it is quite clear that under no conditions can the plaintiff recover. That's under *Casteel vs. McCaughtry*, 176 Wis. 2d 571, a 1993 State Supreme Court case as well as myriad other cases, no doubt.

I also consider other important legal consideration here. The first is that it is a pretty standard aspect of contract law that any ambiguity in a contract is to be resolved against the drafter, and in Wisconsin certainly insurance contracts should be read to give the broadest possible coverage to the insured, again, resolving any ambiguities in favor of the insured and against the insurer who is, in fact, always the drafter of the policy or at least typically the drafter of the policy. Here, while I believe the defense raises a number of very interesting and perhaps ultimately very fruitful defenses, both in terms of the meaning of the policy language in this case and the facts surrounding the Covid-19 Pandemic in Milwaukee and how it affected the plaintiffs in this case, I do not believe that the defendants have established what they need to establish

in order to achieve a dismissal of the case at this point. I believe it's too early and I believe that the plaintiff has offered well pled allegations that certainly resolving any inferences and any ambiguities in the plaintiffs' favor as I must at this point, are sufficient to state a claim in this case.

So first let me talk about some of what I see as the ambiguities in the policy language. On the policy language applies here only if there is a covered cause of loss. So there's only coverage if there's a covered cause of loss, and that is defined in the policy as direct physical loss. Direct -- and essentially the defense argues that there's no direct physical loss that's been pled here, and therefore the plaintiffs' case must fail at this point. Direct physical loss is not a term that's defined in the policy. And in this case -- and I don't think it's entirely clear what it means at this point. Here, defense counsel has both in its briefing and during today's argument has often conflated the term "direct physical loss" with "damage." So essentially asserts that direct physical loss is to be some kind of physical damage to the property. If you look, though, elsewhere in the policy, there is a second sort of definition or separate policy language that states that the insurer will pay for loss of income, for

example, that is due to direct physical loss of or damage to covered property. So elsewhere in the policy there's a definition or use of the term "direct physical loss" used as well as the term "damage" to the covered property. So it would seem that looking at that direct physical loss must be something other than damage or the use of the word damage in that policy language would be surplus language, and one does not construe contract language so as to allow any of the material language to be surplus language. So I don't think that it's so clear that direct physical loss actually requires damage to the covered property.

I think that other terms in the policy are also somewhat ambiguous, including the question of what is a dangerous condition in the premises? That language is contained in the contamination clause, and an issue that didn't receive a lot of attention in the briefs and I think received almost no attention in today's arguments the meaning of the language contained in the exclusions in the policy. So I think that there is various ambiguous language in the policy that under Wisconsin law is to be construed against the insurer and that I think forecloses a dismissal today based on that contract language.

I think that discovery is necessary before sort

of discovery and perhaps further briefing applying the particular facts of this case to the policy language are necessary before the Court makes a decision ultimately as to whether the policy language applies to the circumstances here.

In talking about -- speaking of applying the policy language to the circumstances here, you know, I think Mr. Urban has sort of put his finger on the issue here. Each party states a number of cases around the country, both in connection with Covid-19 and business losses, both those recent cases and other cases involving other types of business losses. So the parties have cited myriad cases from throughout the country holding that certain types of losses are or are not covered under certain policy language.

I would say the very fact that there are many cases coming out in many different respects on these types of issues illustrates the fact that the legal issues to be decided here tend to be pretty fact specific. You tend to look pretty carefully at the specific policy language and the specific facts, the specific type of loss and type of damages as a result of that loss at issue in the case.

I think the fact that there are so many different cases that each party has been able to find

from all over the country to try to illustrate its case simply demonstrates that this is an issue that needs to be decided on a motion to dismiss, that the issues around the nature of the policy language here and the particular facts present here are such that the case is not amenable to decision on a motion to dismiss.

And I note, in particular, that the parties sort of differ regarding the upshot of the *Manpower* case and I think part of the reason for that difference is that it's not clear whether this case, the degree to which this case is like the *Manpower* case or not like the *Manpower* case and what aspects of the holding in *Manpower* are really applicable here, and I think it's difficult to make those decisions without factual discovery and without an opportunity to develop the facts in this case, both on the part of the plaintiff and on the defense.

I think that certain case law that's been cited isn't particularly helpful at this point in the litigation. For example, the defense cites the *Wisconsin Label Corp.* case which basically holds that the word "physical" has a meaning that it's not surplusage, that it means physical. And I don't disagree that in the policy here the word "physical" has meaning, but I don't believe that the *Wisconsin Label Corp.* particularly instructive at this phase in the case regarding what the

meaning of the term "direct physical loss" is in connection with this particular insurance policy.

Similarly, I'll note just sort of as an another example, the defense offers the *General Casualty vs. Rainbow Insulators* case which basically said that the term "physical injury to tangible property is unambiguous," but that is a different phrase. That's a different term than the one used in the policy here, so while the word "physical" used together with "injury to tangible property" may well be unambiguous in connection with the policy at issue in the *General Casualty Company* case, I don't believe that the holding in that case is particularly instructive in this one where there's really entirely different policy language.

You know, and just to remark on the county case. That's certainly an interesting and not unimportant case in the context of this one, both because it involves another policy issued by the defendant in this case and because it's the only other case that's been decided on this issue so far in the State of Wisconsin, and I certainly have all respect for my colleague Judge Weber in Door County. I don't believe that it is necessarily clear -- and, first of all, obviously, we all know he's another circuit court judge. His decision is by no means binding on me, both because it's not published as circuit

court decisions in Wisconsin never are, and because he is not an appellate court that is at a higher level than I am, but I certainly do take into account the decisions that my colleagues make. I think that it's important to consider the analysis and the logic brought to bear by other people who have looked at these issues. I don't believe that it's particularly clear that Judge Weber's analysis applies in this case partly because although the policy language may be the same, I don't believe the allegations are necessarily the same. And I will admit that I have not had the opportunity to go back and pull out the complaint in that case and sort of parse through it and compare it to this one, but I think it is likely that the allegations are different in many respects.

And, in any case, I do, as I've sort of alluded to you already, I do believe that to make a ruling at this point, at the motion to dismiss phase, concerning the meaning of the policy language and the strength, I should say, of the plaintiffs' allegations in its type of loss, I think necessarily requires some degree of resolution of ambiguities, including resolution of ambiguities in favor of the defense and decision on certain factual issues, neither of which I think are appropriate, and I think we would all agree that neither of which are appropriate on a motion to dismiss.

So looking at plaintiffs' allegations, I do think that the plaintiff has included certain well pled allegations that state a claim in this case. They include allegations that Covid created the physical loss, essentially the dining area, that Covid created a physical danger in and around the plaintiffs' premises, and the defense essentially argues that these allegations are speculative, and therefore they are not well pled allegations that this Court should consider on a motion to dismiss.

However, the plaintiff includes several pages of scientific and factual allegation to support that allegation, that, in fact, Covid was widespread and likely was present in the plaintiffs' restaurants and the plaintiffs' premises at the time of the governor's March 2020 orders in this case. And so I don't believe those allegations are speculative at this time.

And I should note -- and I do want to sort of note as an aside the defense has cited certain cases from other states that essentially stand for the proposition that the presence of microbial or viral contamination cannot be considered a physical loss. I don't think those cases are necessarily applicable here. Here Covid presents or potentially presents a particular type of harm in that it's not something that's sort of present on

the surfaces of premises or in the HVAC equipment in premises can be cleaned and then that's that. It is a contamination that potentially comes into the dining area with any given patron of a restaurant or eating establishment and sort of is newly present potentially with anybody who comes in and sits down and takes their mask off and enjoys their meal while perhaps talking with their friends or family. So at this point I don't think that we can definitively say that we must follow other cases that hold that to sort of the presence of microbial or viral contamination that can be cleaned and dealt with forecloses a claim for loss to the eating area in this case, to the dining area.

So I don't believe that the allegations that there was an actual physical loss, a direct physical loss of at least a portion of the covered premises, are speculative at this point. Certainly the defense raises interesting and very material factual arguments, and those are arguments that I think are appropriately made at some point in this lawsuit, but it is certainly not the rule of this Court at this point to resolve factual disputes, and so I don't believe that the defendant's factual arguments are really appropriately taken up at this point.

I also think that the plaintiff has at least

potentially alleged that the governor's order caused a physical loss of its dining areas. The allegation is that the governor prohibited dining in any restaurants, and although the defendant essentially says, "Well, that wasn't really a physical loss of those areas. You could use those areas for other things. You could still continue your business unabated and in another manner," those again bring factual issues to bear that are not appropriately considered by this Court in connection with a motion to dismiss.

Finally, I would note that among other things I think the plaintiff has appropriately alleged that the presence of or the potential for Covid in the room created a dangerous condition that caused the closing of the dining room. It may have caused the closing of the dining room on the plaintiff or plaintiffs' own action, may have caused the closing of the dining room as a result of the governor's order, but I do think there are allegations that would bring the contamination clause in the policy to bear because I think there are allegations that there was a potential and that there is a potential for Covid and that that created a dangerous condition in the premises. I want to make clear that it is not my job in connection with a motion to dismiss to resolve conflicting factual or conflicting legal arguments.

There are arguments that the defense has made that may well bear fruit down the road in connection with perhaps limiting a class, perhaps in connection with summary judgment, and perhaps if the case gets this far in connection with argument concerning how I should instruct the jury in connection with these claims, but I do believe that the complaint contains well pleaded allegations that if proven true would feasibly allow a right of recovery for the plaintiffs, and so I will decline to dismiss the case at this time.

With that, Mr. Urban, would you be so kind as to submit a proposed order for my signature?

MR. URBAN: Yes, and customarily I just say for the reasons in the pleadings and the reasons on the record and I can even share that with Ms. Cain and her team in advance. I just don't like to quibble.

THE COURT: No, I agree. I would prefer to keep it simple and state that it's for the reasons stated on the record. You can either just submit it under the five-day rule or with a letter saying you've shown it to defense counsel and they approve as to the form.

So, with that, I think we need to make clear when the defense will file an answer to the complaint.

Ms. Cain, is ten days enough or would you ask for more time?

MS. CAIN: I'd like a little more time than that, Your Honor. Could we have, say, 21 days?

THE COURT: That's fine. Why don't we say March 1st, just to give you kind of a round date?

MS. CAIN: That's fine.

THE COURT: Mr. Urban, I assume you'd have no objection to that?

MR. URBAN: No, not on those kind of things. And I will say, even in this case, we sort of grant each other some extensions and so forth so I prefer to practice that way.

THE COURT: Absolutely. I do want to get us moving because I do have another case waiting for me, so, Mr. Urban, if you could include in your proposed order that the defendant shall file an answer by March 1st that would be great.

Let's set a scheduling conference in late March, early April somewhere. And here's where madam clerk is frantically looking at my calendar trying to figure out where she can fit something in.

Although, we had that jury trial go away and perhaps set it that week.

THE CLERK: We can do a scheduling conference. How is Thursday, March 18th at 9:00 a.m.?

THE COURT: Would that work for everybody?

MR. URBAN: I have an 8:30 motion by Zoom in Dane County. I would think it would be over by 9:00. Can we do 9:30?

THE CLERK: 9:30 a.m.

MS. CAIN: That's fine, too.

THE COURT: You sure that's enough time, Mr. Urban?

MR. URBAN: You could give me more time. I just don't know if courts run behind.

THE CLERK: Can we set it at 10:30?

MR. URBAN: That's good.

MS. CAIN: That's fine.

THE COURT: Let's make it 10:30 just so we don't run the risk of falling behind if Dane County is behind or there are Zoom issues or it runs long as today's did. Anything else today?

MR. URBAN: No, nothing from plaintiffs.

MS. CAIN: Nothing from us. Thank you.

THE COURT: Excellent. Thank you, everybody. I hope you all have a good weekend.

MS. CAIN: Thanks. You, too.

MR. URBAN: Bye.

THE COURT: Bye.

(Proceedings concluded)

STATE OF WISCONSIN)
) S.S.
COUNTY OF MILWAUKEE)

I, GEORGENE L. LITTLEFAIR, C.S.R., an official court reporter, in and for the Circuit Court of Milwaukee County, do hereby certify that the foregoing is a true and correct transcript of all the proceedings had and testimony taken in the above-entitled matter as the same are contained in my original machine shorthand notes on the said trial or proceeding.

Dated February 1, 2021

Georgene L. Littlefair

(Electronically Signed)

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DISTRICT I

April 12, 2021

To:

Hon. Laura Gramling Perez
Circuit Court Judge

Beth Kushner
Von Briesen & Roper SC

John Barrett
Clerk of Circuit Court

Jay A. Urban
Urban, Taylor & Stawski

Christopher E. Avallone
von Briesen & Roper, s.c.

Heidi L. Vogt
von Briesen & Roper SC

Janet E. Cain
von Briesen & Roper, s.c.

You are hereby notified that the Court has entered the following order:

2021AP463 Colectivo Coffee Roasters v. Society Insurance
(L.C. # 2020CV2597)

Before Dugan, Donald and White, JJ.

Society Insurance, a Mutual Company, petitions for leave to appeal a nonfinal order dated March 8, 2021, denying its motion to dismiss a class action insurance coverage lawsuit. Colectivo Coffee Roasters, Inc., Tandem Restaurant, LLC d/b/a The Tandem, Wrecking Crew, Inc., Iron Grate BBQ Company, Inc., East Troy Brewery Company, Logan & Potter, Inc., Buckley's Kiskeam Inn, LLC, Other Ones MKE, LLC, BCT 5, LLC, Company Brewing, LLC, Bryhopper's Bar & Grill, LLC, The River's Bar, LLC, Etcetera by BLH, LLC, REMBS, LLC, KRO Bar, Inc., Rivermill, Inc., and Pork's Place of Kaukana, LLC, filed a response, opposing the petition. Upon this court's consideration of the petition, response, and the trial court order;

No. 2021AP463

IT IS ORDERED that the petition for leave to appeal is granted. Entry of this order has the effect of the filing of a notice of appeal. *See* WIS. STAT. RULE 809.50(3) (2019-20).[1] A copy of this order has been forwarded to the clerk of the circuit court. Pursuant to WIS. STAT. RULE 809.11(2), the clerk of the circuit court shall return the copy of the order granting this petition and the docket entries maintained pursuant to WIS. STAT. § 59.40, to the clerk of this court within three days of receipt of the order.

IT IS FURTHER ORDERED that discovery and further proceedings in the circuit court are stayed pending the resolution of this appeal.

IT IS FURTHER ORDERED that the allowance of costs, if any, will abide by the decision of this court on appeal. The Petitioner may include an additional $50 in the statement of costs if the Petitioner prevails on appeal.

Sheila T. Reiff
Clerk of Court of Appeals

FILED
AP APR 29 2021 AP
JOHN BARRETT
Clerk of Circuit Court

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

FILED
04-08-2021
CIRCUIT COURT
DANE COUNTY, WI
2020CV000957

BY THE COURT:

DATE SIGNED: April 7, 2021

Electronically signed by Jacob B. Frost
Circuit Court Judge

STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY**
BRANCH 9

BADGER CROSSING, INC.,

Plaintiff,

v. Case No. 2020CV957

SOCIETY INSURANCE, INC.,

Defendant.

DECISION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

COVID-19 and the chaos it caused turned the world upside down in 2020. Few businesses suffered as directly as the restaurant/bar industry. Many restaurants/bars held business insurance policies and made claims for losses stemming from the COVID-19 pandemic. Plaintiff, Badger Crossing, Inc., sued its insurer, Defendant, Society Insurance, Inc., to enforce the business insurance policy claiming its losses from COVID-19 fall within various clauses/coverages. Society moved to dismiss Badger's Complaint for failure to state a claim, asserting the Policy does not cover the damages alleged.

As explained below, I grant Society's Motion in part and deny it in part. I dismiss Badger's claim for coverage under the Policy's Civil Authority and Contamination clauses, as both require government action specifically prohibiting access to Badger's physical location. Badger does not allege the necessary government prohibition of access to its site. However, I deny the Motion and allow Badger's claim that coverage exists under the Policy due to a direct physical loss at its business to proceed. Badger's allegations that COVID-19 physically invaded its business location and rendered the site unsafe state a claim under the Policy, as I interpret the Policy to include invisible intrusions that render the location unsafe for humans to operate normally.

I. FACTUAL BACKGROUND.

I apply the well-known standards for a motion to dismiss to the Complaint. "To withstand a motion to dismiss, a complaint must allege facts that, if true, 'plausibly suggest a violation of applicable law.'" *State ex rel. Zecchino v. Dane Cty.*, 2018 WI App 19, ¶8, 380 Wis. 2d 453, 909 N.W.2d 203 (quoted source omitted). I accept as true all well pleaded facts and reasonable inferences arising from them. *Data Key Partners v. Permira Advisers LLC,* 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693. "If proof of the well-pleaded facts in a complaint would satisfy each element of a cause of action, then the complaint has stated a claim upon which relief may be granted." *Cattau v. Nat'l Ins. Servs. Of Wis., Inc.*, 2019 WI 46, ¶6, 386 Wis. 2d 515, 926 N.W.2d 756. However, "legal conclusions stated in the complaint are not accepted as true, and they are insufficient to enable a complaint to withstand a motion to dismiss." *Id.*

Turning to the Complaint's factual allegation, Badger operates a bar and restaurant in Cashton, Wisconsin. Compl. ¶1. Society issued Badger a business owner's policy of insurance, Policy No. TRM 474222-11 ("Policy"), with effective dates of 4/22/2019 through 4/22/2020. *Id.* at ¶10, Ex. G. The Policy included a Businessowners Special Property Coverage Form ("SPCF"). *Id.* at ¶11. Badger operated its restaurant/bar as normal until about March 16, 2020, when Wisconsin's government began issuing a series of emergency orders to address the COVID-19 pandemic. *Id.* at ¶¶32-37. These emergency orders first restricted in person seating at bars and restaurants, then banned all in-person dining, but allowed take-out and delivery service. *Id.* In response to these orders and allegedly in response to the presence of COVID-19, Badger ceased operations at its restaurant altogether. It naturally lost income as a result. *Id.* at ¶¶44, 51. Badger never explains why it could not operate take-out or delivery service.

In addition to alleging that the governmental orders led Badger to shut down, Badger also alleges that COVID-19 directly infiltrated its premises as follows:

> 46. Moreover, the continuous presence of COVID-19 on or around Plaintiff's premises has damaged property by infecting it and has rendered the premises unsafe, uninhabitable, and unfit for its intended use.
>
> 47. Upon information and belief, people carrying COVID-19 particles in, on, or about their person, have been physically present at or around Plaintiff's insured premises during the time the Policy was in effect.
>
> 48. Upon information and belief, COVID-19 particles have been physically present at or around Plaintiff's insured premises—both airborne and on surfaces and items of property at or around Plaintiff's premises—during the time the Policy was in effect and remained physically present for up to nine days.
>
> 49. Plaintiff has sustained direct physical loss and/or damage to items of property located at its premises and direct physical loss and/or damage to its premises described in the Policy as a result of the presence of COVID-19 particles and/or the COVID-19 pandemic. The presence of COVID-19 caused direct physical loss of and/or damage to the premises insured under the Policy by, among other things, damaging the property, denying

> access to the property, preventing customers from physically occupying the property, causing the property to be physically uninhabitable by customers, causing its function to be nearly eliminated or destroyed, and/or causing a suspension of business operations on the premises.

Id. at ¶¶46-49.

On March 31, 2020, Badger filed a claim with Society requesting coverage for its business interruption losses and extra expenses under the Policy, particularly the SPCF. *Id.* at ¶52. On April 1, 2020, Society denied Badger's claim. *Id.* at ¶53. Badger then filed this action. These facts form the basis of my decision. I discuss the applicable Policy language below.

II. THE COMPLAINT STATES A CLAIM FOR COVERAGE UNDER THE POLICY FOR DIRECT PHYSICAL LOSS OF PROPERTY, BUT NOT UNDER THE CONTAMINATION OR CIVIL AUTHORITY CLAUSES.

When interpreting insurance contracts, the Court first examines the facts of the insured's claim to determine whether the Policy makes an initial grant of coverage. *American Family Mut. Ins. Co. v. American Girl, Inc.*, 2004 WI 2, ¶24, 268 Wis. 2d 16, 673 N.W.2d 65. If it is clear that the Policy does not cover the claim asserted, the analysis ends there. *Id.* If coverage exists, the Court examines the exclusions to see if they preclude coverage. *Id.* Finally, if the exclusion has an exception, the Court analyzes the exception to see if it reinstates coverage. *Id.* The insured bears the burden of showing an initial grant of coverage. *Day v. Allstate Indem. Co.*, 2011 WI 24, ¶26, 332 Wis. 2d 571, 798 N.W.2d 199.

Badger accurately recites the principles I apply when interpreting the Policy:

> The Court "interpret[s] a policy's terms as they would be understood from the perspective of a reasonable person in the position of the insured." *Id.* When, from that perspective, the language is unambiguous, the policy will be applied as written. *See Shugarts v. Mohr*, 2018 WI 27, ¶20, 380 Wis. 2d 512, 909 N.W.2d 402. But when language is ambiguous, it is construed against the insurer, and in favor of coverage. *See Frost ex rel. Anderson v. Whitbeck*, 2002 WI 129, ¶19, 257 Wis. 2d 80, 654 N.W.2d 225. A term is ambiguous if it is "susceptible to more than one reasonable construction." *Id.* ¶18.

Dkt. 31 at 7-8. "When determining the ordinarily understood meaning of a word or phrase, it is appropriate to look to definitions in a recognized dictionary." *Just v. Land Reclamation, Ltd.*, 155 Wis. 2d 737, 745, 456 N.W.2d 570 (1990)(Interpreting an insurance policy.) With these principles in mind, I turn to the Policy language Badger relies on for coverage.

A. The Civil Authority and Contamination Clauses Do Not Provide Coverage.

I first address the two provisions of the Policy that plainly do not apply to the facts Badger alleged. Badger asserts that the coverage for losses when a civil authority prohibits access to the premises and losses when the premises are contaminated apply to the COVID-19 shutdown. I disagree as to both.

1. The Civil Authority Clause does not apply to Badger's self-imposed shutdown.

The Policy's Civil Authority coverage states in relevant part:

> 5. Additional Coverages
> ***
> k. Civil Authority
> When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:
> (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within the area; and
> (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Dkt. 25 at 36-7-37.

The Policy language is unambiguous - Civil Authority coverage applies only if a property near Badger's property suffers a covered cause of loss and that damage leads to a civil authority prohibiting access to the immediate vicinity of the damaged property, such that Badger's location falls within that prohibited access zone. As Badger does not allege damage to any specific property near its business, much less a civil authority banning all persons from the vicinity of that damaged property, coverage does not exist.

The only orders limiting access that Badger identifies are the State's orders banning in-person dining. Those orders do not prohibit access to Badger's location and the surrounding area. Rather, they specifically allow employees and customers to access Badger's site for take-out and delivery service. Badger's argument that a limitation on in-person dining falls within the meaning of prohibiting access stretches "prohibit" far beyond its ordinary meaning. "Prohibit" means "to forbid by authority" or to "to prevent from doing something." https://www.merriam-webster.com/dictionary/prohibit (Accessed on March 30, 2021); *Just*, 155 Wis. 2d at 745 (Dictionary definitions provide the ordinary meaning of a term). As any ordinary person would understand this definition, to "forbid" or "prevent" access means to ban all access to the site. The State came nowhere near prohibiting access by banning in-person dining, as it still allowed full employee access to prepare food and conduct delivery and take-out service. I therefore dismiss this claim without prejudice.

2. The Contamination Clause does not apply to Badger's self-imposed shutdown.

Next, the Policy's Contamination clause provides coverage in relevant part as follows:

5. Additional Coverages

***

m. Contamination

If your "operations" are suspended due to "contamination":

(1) We will pay for your costs to clean and sanitize your premises, machinery and equipment, and expenses you incur to withdraw or recall products or merchandise from the market. We will not pay for the cost or value of the product. The most we will pay for any loss or damage under this Additional overage arising out of the sum of all such expenses occurring during each separate policy period is $5,000; and

(2) We will also pay for the actual loss of Business Income and Extra Expense you sustain caused by

(a) "Contamination" that results in an action by a public health or other governmental authority that prohibits access to the described premises or production of your product.

(b) "Contamination threat"

(c) "Publicity" resulting from the discovery or suspicion of "contamination". Coverage for the actual loss of Business Income under this section will begin immediately upon the suspension of your business operations and will continue for a period not to exceed a total of three consecutive weeks after coverage begins. Coverage or necessary Extra Expense under this section will likewise begin immediately upon the suspension of your business operations and will continue only for a total of three consecutive weeks after coverage begins, or until the loss of Business Income coverage ends, whichever is longer. The coverages under this section may not be extended nor repeated. The definitions of Business Income and Extra Expense, contained in the Business Income and Extra Expense Additional Coverages section shall also apply to the additional coverages under this section.

....

(4) Additional Definitions:

(a) "Contamination" means a defect, deficiency, inadequacy or dangerous condition in your products, merchandise or premises.

....

(d) "Publicity" means a publication or broadcast by the media, of the discovery or suspicion of "contamination" at a described premise.

Dkt. 25 at 37-38.

Again, this coverage applies only if Badger suspended operations due to contamination of the premises or equipment, and then only provides up to $5,000 to cover the cost to clean up the contamination. The Complaint never alleges a specific contamination that caused Badger to close its business and clean specific equipment, thus Badger's claim fails as to the first aspect of this coverage.

To recover lost business income and special expense, Badger must show it suspended operations due to contamination resulting in a public health or other government authority prohibiting access to Badger's premises. As explained above, though Badger alleges COVID-19 did infiltrate its business location, it never alleges this infiltration resulted in a government authority prohibiting access to Badger's building. As with the Civil Authority clause, the State orders restricting all restaurants to take-out and delivery service do not prohibit access to Badger's site and are insufficient to secure coverage.

That Badger alleges that COVID-19 infiltrated the premises "upon information and belief" further confirms Badger cannot state a claim under the Contamination clause. The clause applies only if Badger suspended operations due to a specific contamination. Badger cannot suspend operations due to a contamination it is not actually aware occurred. A pleading "upon information and belief" reflects Badger does not hold current knowledge a contamination occurred, yet believes it can obtain such proof going forward. Without knowledge of a contamination, Badger cannot state a claim. I dismiss this claim without prejudice.

B. Badger States a Claim Under the Business Income and Extra Expense Coverages Because it Alleges a "Direct Physical Loss of or Damage to Covered Property" From COVID-19 Invading its Physical Business.

I saved for last the Policy claim Badger makes that is the closest call. Badger claims coverage exists under the Business Income and Extra Expenses coverages, both of which require direct physical loss of or damage to covered property. The relevant Policy language states:

> **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.
>
> ....
>
> **3. Covered Causes of Loss**
>
> Direct Physical Loss unless the loss is excluded or limited under this coverage form.
>
> ....
>
> **5. Additional Coverages**
>
> ....
>
> **g. 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 covered property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss……
>
> (b) We will only pay for loss of Business Income that you sustain during the "period of restoration" and that occurs within 12 consecutive months after the date of direct physical loss or damage.

Dkt. 4 at 2-4, 6-8.

1. Direct Physical Loss can include an event rendering a physical location unsafe for use that does not permanently cause physical damage.

The parties dispute what constitutes a direct physical loss of or damage to property. Society argues that the Policy only covers a loss or damage resulting in a physical alteration to the premises; it never provides coverage for an invisible intruder such as COVID-19 where no physical alteration to the premises itself occurs. Badger disagrees, arguing that no physical alteration to the building or premises is required if the presence of a physical, though invisible, agent such as COVID-19 causes the loss at issue. Each cites law from across the United States to support its interpretation.

Though at first (and even second) review Society's argument that "direct physical" requires some form of tangible damage to or loss of a specific piece of property to give meaning to both the terms "direct" and "physical," the argument never persuasively explains how "loss of" and "damage to" property address different scenarios. Society does not persuasively distinguish the cases holding that the presence of a dangerous gas or particle that does not permanently alter physical property but makes it unusable for a time fall within coverage for direct physical loss.

Judge Edmond Chang's decision of February 22, 2021 in *In re: Society Insurance COVID-19 Business Interruption Protection Insurance Litig.* reconciled these issues for me. MDL No. 2964 (N.D. Ill. Feb. 22, 2021) (I refer to this decision as the "MDL Decision"). Judge Chang applied Wisconsin law to the same operative policy language from Society that I interpret and apply here. In the Wisconsin case before Judge Chang, plaintiffs alleged losses caused by both the governmental orders issued in response to the COVID-19 pandemic and losses resulting from the "actual presence of the coronavirus itself on the premises." *Id.* at 3. Badger makes similar allegations. Dkt. 2 ¶¶47-49. Thus, Judge Chang's decision and reasoning applies directly to this case as well.

Judge Chang interpreted the same language from Society's Policy covering a loss of business income due to direct physical loss or damage. Judge Chang concluded that "direct physical loss of or damage to covered property" is ambiguous, as it can be interpreted both as Badger and as Society interpret it and as confirmed by the various courts interpreting the language

both ways. That the Policy refers to "loss of **or** damage to" means that "loss of" must be different from "damage to," as I must give meaning to every term used whenever possible. *Maryland Arms Ltd. P'ship v. Connell,* 2010 WI 64, ¶45, 326 Wis.2d 300, 786 N.W.2d 15. Further, I agree with Judge Chang that Badger must prove that COVID-19 and the resulting pandemic proximately caused Badger's business interruption. As Judge Chang explains:

> "A proximate cause is one that produces an injury through a natural and continuous sequence of events unbroken by any effective intervening cause." *Cleveland v. Rotman*, 297 F.3d 569, 573 (7th Cir. 2002). Even if the government shutdown orders (and not the pandemic itself) played a causal role in the Plaintiffs' losses, and even if those orders cannot be construed as a "direct physical loss," the shutdown orders were proximately caused by the pandemic. At least a reasonable jury could so find given the policy's ambiguity, in which case the policy language must be construed in favor of the Plaintiffs. *See Berg v. N.Y. Life Ins. Co.*, 831 F.3d 426, 429 (7th Cir. 2016); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1212 (Ill. 1992).

MDL Decision at 19.

Judge Chang's summary why loss of use of business space can constitute a physical loss of property reconciled for me why an invisible presence such as gas or COVID-19 can result in physical loss without causing any lasting physical damage to specific property. He explained:

> The more challenging interpretive question is whether the restrictions imposed on the Plaintiffs' use of their premises count as physical loss. Society observes, and the Plaintiffs do not contest, that most of the restaurants have been able to use their kitchens and thus continue to operate on a take-out and delivery order basis during much (if not all) of the pandemic period.
>
> > FN 5 The Plaintiffs dispute that there has been no physical "damage" to their property. According to the Plaintiffs, the coronavirus particles themselves have in fact rendered, or could render, physical harm to their property given that the virus lingers on surfaces and remains in the air even after decontamination efforts. In particular, Valley Lodge has introduced evidence as to the coronavirus' persistence on surfaces, arguing that the virus physically interacts with surfaces in restaurants, such as tables and chairs, so as to qualify as "direct physical loss or damage" under the policy. Society disputes these facts. At this stage of the case, there is no need to definitively decide that issue because, at least in the context of this dispute, "loss of" property provides for a broader scope of coverage.
>
> But the Plaintiffs have not been able to use their premises as they did for indoor, sit-down service before the pandemic. Depending on the particulars of applicable shutdown orders and the Plaintiffs' premises, some have not been able to offer on-site service at all, while others have only been able to do so at limited capacity. These on-site service restrictions have caused most of the Plaintiffs' losses for which they seek business-interruption coverage. According to Society, these losses are not "physical" because tables and chairs,

walls and floors, stovetops and sinks remain in good working order; indeed, the Plaintiffs have been able to use the premises to conduct some amount of business.

But a reasonable jury can find that the Plaintiffs did suffer a direct "physical" loss of property on their premises. First, viewed in the light most favorable to the Plaintiffs, the pandemic-caused shutdown orders do impose a physical limit: the restaurants are limited from using much of their physical space. It is not as if the shutdown orders imposed a financial limit on the restaurants by, for example, capping the dollar-amount of daily sales that each restaurant could make. No, instead the Plaintiffs cannot use (or cannot fully use) the physical space. Indeed, the policy defines "covered property" to include buildings at the premises, not just personal property or movable items. Businessowners Special Property Coverage Form, A.1.

Another way to understand the physical nature of the loss inflicted by the shutdown orders is to consider how a restaurant might mitigate against the suspension of operations caused by, say, a 25%-capacity limitation on the number of guests inside the restaurant. If the restaurant could expand its physical space, then the restaurant could serve more guests and the loss would be mitigated (at least in part). The loss is physical—or at the very least, a reasonable jury can make that finding.

Against this, Society also argues that the Court should "construe the policy as a whole," and read the coverage provision in light of the later definition of the "Period of Restoration." Remember that Society promised to pay only for loss of business income during the "period of restoration" (with a cap of 12 months after the date of direct physical loss). Businessowners Special Property Coverage Form, A.5.g(1)(b); H.12. The definition of "Period of Restoration" says that coverage for loss of business income "ends on the earlier of" "the date when the property at the described premises should be *repaired, rebuilt[,] or replaced* with reasonable speed and similar quality; or the date when business is resumed at a new permanent location." *Id.* (emphasis added). In Society's view, "repaired, rebuilt[,] or replaced" implies that covered "physical loss or damage" is necessarily tangible, requiring a physical injury to the covered property rather than mere loss of use.

This argument did give the Court some pause; after all, it is generally true that the policy language must be considered as a whole so that all of its parts fit together. But too many textual clues point the other way. First and foremost, the "Period of Restoration" describes a time period during which loss of business income will be covered, rather than an explicit definition of coverage. Instead, the explicit definition of coverage is that direct physical "loss of" property is covered—not just "damage to" property, as explained earlier. Second, the limit on the Period of Restoration does include the words "repaired" and "replaced," that is, the restoration period ends when the property at the premises is "repaired" or "replaced." There is nothing inherent in the meanings of those words that would be inconsistent with characterizing the Plaintiffs' loss of their space due to the shutdown orders as a physical loss. If, for example, the coronavirus risk could be minimized by the installation of partitions and a particular ventilation system, then the restaurants would be

> expected to "repair" the space by installing those safety features. As another example, if a restaurant could mitigate the loss caused by a percentage-capacity limit by "replacing" some of its dining-room space by opening its adjacent banquet-hall room to increase the number of guests it could serve, then the restaurant would be expected to "replace" the loss of space by doing so. So the definition of the Period of Restoration is consistent with interpreting direct physical loss of property to include the loss of physical use of the covered property imposed by the shutdown orders.

MDL Decision at 20-23 (Internal references to MDL docket items omitted).

I agree with and adopt Judge Chang's interpretation of the Policy. It best reconciles the cases confirming a physical loss can include a dangerous, noxious intrusion that temporarily renders the premises "lost" for practical purposes. COVID-19 surely could fall in that category. As Badger put it: 'At the very least, the critical phrase "direct physical loss" is ambiguous because it is susceptible to multiple interpretations when applied to these circumstances and thus must be construed in favor of coverage. *See Wadzinski v. Auto-Owners Ins. Co.*, 2012 WI 75, ¶12, 342 Wis. 2d 311, 818 N.W.2d 819 ("Ambiguities in a grant of coverage are construed broadly in favor of affording coverage.").' Dkt. 31 at 15. True. Thus, Badger states enough to survive the Motion to Dismiss, including that it lost the ability to use its entire facility due to the presence of COVID-19 there rendering the location unsafe. The COVID-19 particles are physical. So too is the space Badger alleges it lost the ability to use – its dining areas and bar. That the ability to use the physical location will resume once the COVID-19 infiltration becomes safe is of no moment. As the Biblical story of the prodigal son teaches, what is lost can return. That it returns does not change that the item was previously lost.

To be sure, though, allowing coverage for an invisible intrusion in appropriate circumstances does not mean all intrusions trigger coverage. The burden to succeed on such a claim is high. To clarify further, I turn to the case law finding different noxious intrusions caused a physical loss to explain the bounds of this coverage. The Third Circuit Court of Appeals explained:

> In the case before us, the policies cover "physical loss," as well as damage. When the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner. However, if asbestos is present in components of a structure, but is not in such form or quantity as to make the building unusable, the owner has not suffered a loss.1 The structure continues to function—it has not lost its utility. The fact that the owner may choose to seal the asbestos or replace it with some other substance as part of routine maintenance does not bring the expense within first-party coverage.
>
> ....
>
> The District Court concluded that "physical loss or damage" occurs only if an actual release of asbestos fibers from asbestos containing materials has resulted in contamination of the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable, or if there exists an imminent threat of the release of a quantity of

> asbestos fibers that would cause such loss of utility. The mere presence of asbestos, or the general threat of future damage from that presence, lacks the distinct and demonstrable character necessary for first-party insurance coverage.
>
> We agree with the District Court's articulation of the proper standard for "physical loss or damage" to a structure caused by asbestos contamination. The requirement that the contamination reach such a level in order to come within coverage limitation establishes a reasonable and realistic standard for identifying physical loss or damage. The effect of asbestos fibers in such quantity is comparable to that of fire, water or smoke on a structure's use and function. A less demanding standard would require compensation for repairs caused by the inevitable deterioration of materials used in the construction of the building. This outcome would not comport with the intent of a first-party 'all risks' insurance policy, but would transform it into a maintenance contract.

Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co., 311 F.3d 226, 236 (3d Cir. 2002). I agree and adopt that same articulation of the standard Badger must meet to prevail at trial.

Other decisions from around the country confirming a direct physical loss can include an invisible invasion of gas, etc., that causes no permanent physical damage confirm this relatively high burden to show a true loss of use. In quick succession, these examples show the need to prove the temporary invasion without permanent physical damage rendered the location unfit for human use for coverage to apply: *Western Fire Ins. Co. v. First Presbyterian Church* court held that gasoline vapors filling a church such that it was unsafe to occupy caused a covered direct physical loss, 165 Colo. 34, 437 P.2d 52 (Colo. 1968); *Port Auth. Of New York & New Jersey* held 'if "the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner" which would constitute "physical loss"', 311 F.3d 226, 236 (3d Cir. 2002); *Motorists Mutual Ins. Co. v. Hardinger* explained a bacterial contamination of a home's water supply rendering the home uninhabitable constituted a "direct physical loss", 131 Fed.Appx. 823, 825–27 (3d Cir. 2005); *Essex v. BloomSouth Flooring Corp.* deemed an odor rendering a property unusable a physical injury to property requiring coverage, 562 F.3d 399, 406 (1st Cir. 2009); and *TRAVCO Ins. Co. v. Ward*, held that toxic gases released from drywall rendering a home uninhabitable was a "direct physical loss," 715 F. Supp. 2d 699, 709 (E.D. Va. 2010), *aff'd*, 504 F. App'x. 251 (4th Cir. 2013). Thus, to constitute a direct physical loss, a COVID-19 virus intrusion into Badger's building must be significant enough to render the property unsafe for human use. Anything less does not trigger coverage. If the evidence reveals COVID-19 was present, yet business could operate with humans reasonably safely present, no direct physical loss occurred.

Though Society identifies numerous decisions holding the opposite of my ruling today, I do not find them persuasive. These decisions often interpreted different policy language, required a higher standard of causation, did not address facts similar to those here, or simply failed to persuasively give the terms "loss of" and "damage to" different meanings. Some of those decisions effectively render "loss of" synonymous with "damage to," making the language superfluous. I will not do the same.

2. No Exclusions Apply Here.

Because there is an initial grant of coverage, I must then review any exclusions that may preclude coverage. The Consequential Losses exclusion does not apply. As Society notes, this exclusion covers any "losses that are a consequence of any other reason besides actual physical loss." Dkt. 24 at 25. Society's assertion that this exclusion applies relies on its position that a direct physical loss requires physical damage to the premises, COVID-19 could not cause such a loss, and therefore any shutdown due to COVID-19 is a consequence of something other than a direct physical loss. Because Society's interpretation of direct physical loss is wrong, its position on the exclusion also fails. If Badger proves a direct intrusion of COVID-19 rendered its facilities unsafe for humans, then the loss is covered and the damages flow directly from that loss, not from a consequence of some other factor. However, I agree that this exclusion bars any claim that relies on the State orders restricting use of all restaurant/bar space for indoor dining.

The Acts or Decisions Exclusion also does not apply. Society recites the exclusion and concludes that this exclusion applies because the only cause of Badger suspending business was the State orders limiting restaurant and bar use. Because my holding is that Badger pled a loss resulting from the actual intrusion of COVID-19 into its premises, not from governmental acts or orders, the exclusion does not apply.

III. CONCLUSION.

Badger may well have a long row to hoe to survive summary judgment or prevail at trial. However, on the limited ground I noted, Badger's claim for coverage due to an alleged direct physical loss of or damage to its property by the intrusion of dangerous levels of COVID-19 into its business continues. Society's Motion to Dismiss is GRANTED as to all other claims, but denied as to the claim for coverage under the direct physical loss provision.

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DISTRICT IV

May 14, 2021

To:

Hon. Jacob B. Frost
Circuit Court Judge

Carlo Esqueda
Clerk of Circuit Court

Christopher E. Avallone

Theo Benjamin

Janet E. Cain

Lily Hough

Beth Kushner

Daniel J. Schneider

Sarah E. Siskind

Schuyler Ufkes

Heidi L. Vogt

You are hereby notified that the Court has entered the following order:

2021AP701 Badger Crossing, Inc. v. Society Insurance, Inc.
(L.C. # 2020CV957)

Before Blanchard, Kloppenburg, and Nashold, JJ.

Society Insurance petitions for leave to appeal an order denying its motion to dismiss Badger Crossing's insurance coverage lawsuit. Badger Crossing opposes the petition. The parties dispute whether language in Society's business insurance policy providing coverage for "direct physical loss of or damage to" property applies to Badger Crossing's claimed losses based on the presence of the COVID-19 virus on the covered premises.

We have discretion to review an order not appealable as of right when an appeal would materially advance the termination of the litigation or clarify further proceedings, protect the petitioner from substantial or irreparable injury, or clarify an issue of general importance in the administration of justice. *See* WIS. STAT. § 808.03(2). We also consider the petitioner's

likelihood of success on appeal, and whether the necessity of intermediate review outweighs our general policy against the piecemeal disposition of litigation. ***Cascade Mountain, Inc. v. Capitol Indem. Corp.***, 212 Wis. 2d 265, 268 n.2, 569 N.W.2d 45 (Ct. App. 1997); ***State v. Salmon***, 163 Wis. 2d 369, 374-75, 471 N.W.2d 286 (Ct. App. 1991).

After considering the petition, response, and supporting material, we determine that immediate review is warranted to clarify further proceedings and an issue of general importance in the administration of justice. The issue presented satisfies the threshold for likelihood of success on appeal because it appears to be one of first impression that has not yet been decided by this court. Additionally, this court has already granted two petitions for leave to appeal that present the same issue.

Therefore,

IT IS ORDERED that the petition for leave to appeal is granted. Entry of this order has the effect of the filing of the notice of appeal. WIS. STAT. RULE 809.50(3). Pursuant to WIS. STAT. RULE 809.11(2), the clerk of the circuit court or responsible court official shall return the copy of the order granting this petition and the circuit court case entries maintained pursuant to WIS. STAT. § 59.40 to the clerk of this court within three days of receipt of this order. The appellant shall file a docketing statement and statement on transcript within two weeks of the date of this order.

IT IS FURTHER ORDERED that discovery and further proceedings in the circuit court are stayed pending the resolution of this appeal.

No. 2021AP701

IT IS FURTHER ORDERED that the allowance of costs, if any, will abide by the decision of this court on appeal. The petitioner may include an additional $50 in the statement on costs if the petitioner prevails on appeal.

Sheila T. Reiff
Clerk of Court of Appeals

FILED
12-11-2020
Door County
Clerk of Courts
2020CV000052

DATE SIGNED: December 11, 2020

Electronically signed by Honorable David L. Weber
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT DOOR COUNTY

AL JOHNSON'S SWEDISH RESTAURANT & BUTIK, INC.,

Plaintiff,

Case No. 2020CV000052

vs.

SOCIETY INSURANCE, A MUTUAL COMPANY,

Defendant.

ORDER GRANTING SOCIETY INSURANCE, A MUTUAL COMPANY'S MOTION TO DISMISS

IT IS HEREBY ORDERED that Defendant, Society Insurance, a Mutual Company's Motion to Dismiss pursuant to Wis. Stat. § 802.06 is GRANTED, for the reasons set forth in the Transcript of Oral Ruling, dated December 4, 2020, attached hereto, and Plaintiff's Complaint is dismissed, with prejudice.

35664261_1.DOCX

STATE OF WISCONSIN : CIRCUIT COURT
DOOR COUNTY : BRANCH 2

AL JOHNSON'S SWEDISH
RESTAURANT & BUTIK, INC.,

Plaintiff,

-vs- ORAL RULING
Case No. 20-CV-52

SOCIETY INSURANCE, A
MUTUAL COMPANY,

Defendant.

DATE: December 4, 2020

BEFORE: Hon. David L. Weber
Circuit Court Judge

APPEARANCES:

LEE M. SEESE and BJORN A. JOHNSON
Attorneys at Law
Appeared by video on behalf of the Plaintiff.

JANET ELIZABETH CAIN and HEIDI L. VOGT
Attorneys at Law
Appeared by video on behalf of the Defendant.

****

PARTIAL TRANSCRIPT OF PROCEEDINGS
JUDGE'S DECISION

Reported by Holly M. Jewell, RMR

Official Court Reporter

(Previous proceedings held not transcribed pursuant to order.)

* * * * *

THE COURT: Not sure I understand. But I'm not going to belabor it anymore.

All right. Well, all right. I guess I want to say I think the parties have accurately set forth the law on motions to dismiss and insurance coverage, and I incorporate all of those provisions in their briefs herein by reference. I'm not going to recite all of those things.

I think we are here on a motion to dismiss, and a motion to dismiss challenges the sufficiency of the allegations in the complaint. I'm not here to weigh any evidence or decide if there's any evidence to support those allegations or anything else. What I do is I assume, for purposes of the motion only, that every allegation in the complaint is true. And that's what I'm doing.

And whether, you know -- whether the plaintiff could have filed an amended complaint or may file another proceeding or whatever is just not before my -- before me today. And I'm not speculating about what the plaintiff might do --

might or might not do. I must -- at this stage of the game the motion has been filed and briefed, and I must look at the four corners of the complaint as it's been filed.

And everything basically revolves around the allegations of the complaint and the applicable law. And I'm not going to summarize all of those allegations in the complaint in this case. I think we -- those are accurately set forth in the briefs, and the complaint speaks for itself, so to speak.

But I mean, as I noted last time, you know, they're -- there's no damage to Al Johnson's Restaurant that's been alleged. There's no damage to surrounding property that's been alleged. It's not alleged that the property is contaminated. It's alleged that it has the capacity or capability of being contaminated, but it's not alleged that there's any sort of contamination at Al Johnson's.

There's certainly no allegation that anybody got sick there; that the virus was transmitted to anybody there. There's certainly no allegation that the public health department, you know, closed Al Johnson's Restaurant due to the -- an outbreak, let's say, at the restaurant. There's no allegation that Al Johnson's is uninhabitable in

any way because of the virus.

Those are just some of the notable allegations in this -- in the pleadings in the complaint in this case.

Last time, you know, I think I correctly observed the issue is what does direct physical loss mean in the context of this policy. And I do believe that that issue runs through all the sub -- you know, subissues in the case, the various coverages and even the exclusions. You know, does it require some sort of alteration or demonstrable physical condition change or intrusion on the property, or doesn't it?

I don't believe that -- I agree with Mr. Seese; I don't believe that it requires a structural alteration. And I think that there are cases that talk about that, and I -- or are distinguishable from a structural alteration.

I agree with Mr. Seese it doesn't have to be permanent. I believe it could be personal property, the loss of personal property, as I stated last time. And that's referenced in the cases, and especially the Manpower case. But also the Ricoh copier case.

So you can have a permanent -- or excuse

me, a physical loss of property, and that doesn't necessarily mean physical damage to property. So I don't believe it's necessarily true that physical -- direct physical loss is superfluous to direct physical damage. I think they -- they could have different meanings.

And they add -- both phrases add something to the policy. And the basis of my opinion is, first, as I stated last time, I don't think there's any Wisconsin law directly on point -- that is to say, with basically the same policy language in the context of a motion to dismiss with the coronavirus. But there are cases -- and I referenced them last time -- but I think the Wisconsin Label case, the Advance Cable Company case, the Marina Road case and the General Casualty vs. Rainbow Insulators case, they all provide guidance for interpreting what physical loss is. And I find those cases to be persuasive.

The Manpower case -- and I went back and looked at that; I think Mr. Seese is probably centering on the following language when the Court said "Right" -- meaning the person making the claim -- "suffered a 'loss' of its interest in this property when the collapse prevented it from using

the property for its intended purposes."

So the Court is there saying there is a loss when somebody is dispossessed of the property for its intended purposes. But then the Court goes on to say -- by the way, it cites the bundle of rights that together constitute property ownership includes the owner's interest in being able to put the property to its most valuable use.

But then the Court goes on to say, "This loss was 'physical' in that it was caused by a physical event -- the collapse -- which created a physical barrier between the insured and its property. It was not an 'intangible' or 'incorporeal' loss." And there it cites Couch.

And I note from elsewhere in the decision, especially Footnote No. 7, but elsewhere in the opinion -- in the opinion, it's referenced that the entire structure, including the insured's office space, was rendered unstable by this collapse.

So it's not just a situation where there was surrounding property or something like that, or even property that had no physical proximity or direct physical proximity to the insured's premises.

On page 6 the Court says, "As explained above, although the order of the Department of Public Safety was also a cause of this loss, that order simply recognized that the collapse had rendered the entire building uninhabitable and Right's property inaccessible. The collapse was not remote from the loss, and thus was a direct loss."

But again, Footnote 7, as -- at least as I read it, basically says that the entire structure was rendered unstable and potentially unsafe. So I just think that that's a distinguishing factor from this case here.

So we get back to this issue of, you know, a loss. And did Al Johnson's suffer a loss here? I don't think there's any question that it did. And I don't have a problem with saying that the dispossession is part of that loss. I mean, I do think that there's a form of dispossession. I don't think Al Johnson's has been able to use the full bundle of rights that it's had and put the property to its highest use.

But that doesn't mean it's a physical loss, or a loss occasioned by a direct physical loss. There's no allegation in the -- this

complaint that Al Johnson's premises have been compromised in any way, and therefore I think it's distinguishable from Manpower, as again in the Manpower case there was a physical event, the collapse, which rendered the whole structure unstable. That is not the situation we have here.

So both parties have submitted all these case from other jurisdictions. Of course, those other cases are not binding on this Court, but the Court has read them.

And I agree with Mr. Seese on this as well. I don't think this is a -- you know, like a scale; you know, we've got ten cases over here and only one over here, and therefore, you know, the -- the one with the most cases wins. I don't think that that's the issue. I don't think that that's how this should be looked at.

I do think that many of the cases submitted by Society, especially the coronavirus cases -- although some of them are different in some minor respects, and maybe not so minor respects -- but I think they generally support Society's position.

And I have now looked at the cases submitted by Mr. Seese that -- the supplemental

case that I had missed, and then the cases that he cited or provided to the Court just in the last day. And so, you know, the question is, do those cases in any way change my initial impression of this case which I have given the parties?

And when I look at the Blue Springs Dental case, again, the allegations of presence of actual COVID on the premises is really a distinguishing feature in that case from what we have here. We have in that case plaintiffs allege that "it is likely customers, employees, and other visitors to insured property over the recent months were infected with coronavirus." There's certainly an allegation that the plaintiffs were deprived of the use of their property, but it's alleged that the property has been damaged; there's an allegation that there's an actual contamination by COVID-19 on the premises.

The plaintiff -- the Court explains, "The plaintiffs also explained how COVID-19 is physically transmitted by air and surfaces through droplets, aerosols, and fomites that remain infections for extended periods of time."

And again, the plaintiffs allege in their complaint "it is likely customers, employees,

and other visitors to the insured properties over the recent month were infected with the coronavirus," and that "they suspended operations due to COVID-19 to prevent physical damages to the premises by the presence or proliferation of the virus and the physical harm it could cause persons present there."

Those are just simply allegations that we don't have in this case. And I'm probably missing some other ones, too. And I just think that that's a distinguishing feature and actually supports my initial, you know, feeling about this case, that if there were allegations like that I think -- and I'm not going to rule -- I'm not going to make a ruling on that, because I think it would be tantamount to an advisory ruling, but I mean, this would be a different kind of case; this would be a different situation. But we don't have those.

The Urogynecology case I didn't think was particularly on point. I mean, it's a coronavirus case, but it's really a breach of contract type case. There's a virus exclusion. I just didn't think it was particularly persuasive one way or the other.

The Optical Services case is an oral

argument and decision without any recitation of the policy language and the allegations in the complaint. Court found that there were fact questions and just prevented summary judgment. It's a -- procedurally and factually I think different from our case.

The Independence Barbershop case there was a virus endorsement and other provisions which I think were significantly different from our case here. I think that case had limited value.

The Cajun Conti LLC case I agree with Miss Cain, there just weren't enough facts in that. It's a written judgment. It's just sort of conclusory without -- we don't really know what happened in the case; we just know what the judgment is.

The Studio 417 case is I think much like Blue Springs, and I think rendered or authored by the same judge. But once again, in that case the allegations are much different than we have here. It's -- plaintiffs seek coverage for losses created by the coronavirus pandemic. Plaintiffs allege that over the last several months it is likely that customers, employees, and/or other visitors to the insured properties were infected with COVID-19 and

that thereby -- and thereby infected the insured properties with the virus. Plaintiffs allege that COVID-19 is a physical substance, that it lives on and is active and inert -- and is active on inert physical services and is admitted into the air. Plaintiffs further allege that the presence of COVID-19 renders physical property in their vicinity unsafe and unusable, and that they were forced to suspend or reduce business at their covered premises.

I just think if we had those types of allegations this -- this may, indeed, be a different kind of a case. At least at this stage of the game, on a motion to dismiss. Maybe the parties would do discovery and find that there -- those allegations are untrue. But we just don't have those types of allegations -- allegations, which is a significant distinguishing feature, it seems to me.

So this brings me to the North State Deli case. This case, as I referenced, has slightly different policy language, but it's very similar to our case. And I do think it's a straight-on analysis of what direct physical loss is. It discusses the terms direct, physical loss,

and physical damage and loss. And it -- it really talks about loss as being defined as the act of losing possession; the harm of privation resulting from loss or separation; or the failure to gain, win, obtain, or utilize; also the state of being deprived of or of being without something that one has had.

And it basically concludes -- and I read the portion of the decision earlier that concludes that they feel that -- the Court feels that the emergency orders akin to the one that we have here was a direct physical loss because it prevented the business owners from accessing their property and gaining the full range of rights and advantages of using that property. And they said -- I think the Court said that is a physical loss as contemplated by the policy.

And then the Court says alternatively, even if the interpretation which requires some form of physical alteration to the property is reasonable, it's no more reasonable than the construction put on it by the Court and therefore the policy language is ambiguous and should be construed against the insurer.

And then the Court goes on to talk about

this -- this notion of physical loss and physical damage, because it's -- physical loss or physical damage; because it's used in the conjunction, it must have distinct meanings. And that physical damage reasonably requires alteration of the property, and that means if physical loss also requires alteration of the property or structural alteration then the term "physical damage" would be rendered meaningless.

I don't agree with that, for the reasons I've stated. I don't agree with that part, because I think, as explained by Manpower and the Richoh copier case, you can have loss without there being damage.

So what about this notion -- and this does appear to be an authority that directly contradicts -- at least in its conclusions, and the decision states, at least, is a reasonable interpretation of the policy. And so it's at least as reasonable as any other, so the language is ambiguous and should be construed against the carrier.

You know, I've thought about this case virtually for 48 hours straight. I've looked at it and I've read it 10 or -- 10 or 12 times. And I

honestly -- I've tried to -- I've tried to see how I can agree with it and accept its conclusion. But I'm compelled to disagree with the case. For a couple of reasons. And despite my best efforts to try to agree with it, I have to disagree with it.

First of all, I mean, I think it -- it does contradict the Wisconsin cases that I mentioned earlier -- Wisconsin Label, Advance Cable Company, Marina Road, General Casualty vs. Rainbow. I realize those cases are not coronavirus cases, but they provide guidance in talking about what physical loss or damage is.

But more importantly than that, I think it's contrary to the provisions of the policy -- a commonsense reading of a policy. And as I alluded to before, the unfortunate thing about this case is that we don't know what the allegations of the complaint are. But I do know what the policy provision is.

But in this respect I do agree with the period of restoration argument that Society makes. That period refers to loss or damage that requires property at the premises to be, quote, "repaired, rebuilt or replaced," unquote, with reasonable speed. Repaired, rebuilt, replaced. Seems to me

that this means the loss of use without more does not constitute direct physical loss or damage.

But also the business income provision that I talked to Mr. Seese about -- and again, I've heard arguments that this policy doesn't cover economic losses. It clearly does.

The problem is when you look at the policy it -- I gain two things from the Business Income (1)(a). I've already read it. We've read it a couple of times here. It seems to me to imply two things: One, that the suspension of operations -- the shutdown, so to speak -- is separate and distinct from the direct physical loss. They're two different things. And second, that the suspension must be caused by the direct physical loss.

And I've gone through my examples. I think this makes perfect sense when we talk about direct physical damage -- let's say the roof caving in -- or direct physical loss, loss of personal property; one leads to the other. One causes the other.

But here we have an order due to the coronavirus; it's not for cleaning, it's not for remediation, it's not because any of the corona is

on the premises, based on the allegations; it's not because anybody was infected or got sick there. And none of those allegations are in the complaint. And therefore, it seems to me, there's no loss -- physical loss or damage until the suspension takes place.

It seems to me, as I referenced, what the plaintiff is arguing is that the suspension is the physical loss. But common sense -- a commonsense reading of this policy language would dictate that they are different.

I gave kind of a factual example here of Al Johnson's not complying with the order; if they didn't comply with the order to shut down, there wouldn't be any physical harm, according to the plaintiff. There wouldn't be any physical loss. I know Al Johnson's would never do that, but it's why lawyers are probably not held in the highest esteem, because they get off on these ivory towers, I guess.

But they -- it serves a purpose, though, that in this case there was no physical loss at all. I mean, it is simply a shutdown. It was, in the words of the Manpower case, a loss. But it's not a physical loss. It's -- all of this is just

another way of showing that, it seems to me. The emergency order is not a physical loss, at least not under the scheme as set forth in the business income provision of this policy.

So -- and I -- you know, my job is to apply the law. And they told me when I took this job that there were going to be days when I'm not going to particularly enjoy what I do. And this is probably one of those days. Because -- but my -- my highest duty is to -- as best as I can -- interpret the law and apply it as best as I can, irrespective of the result. And that's what I'm doing here.

And I want to tell the parties that I'm doing this with utmost humility, because I -- I'm not saying that, you know, somebody's not going to disagree with me. I'm just doing the best I can and trying to navigate my way through these cases.

I want to say that the briefs were very well done. They were very high quality briefs. I mean, I see a lot of briefs from lawyers, and these were -- on both sides -- were very high quality.

And I understand the arguments; I'm not at all saying that the plaintiff's wrong or frivolous or anything like that. But to the extent

of my ability, the best of my ability, and interpreting the policy language and the relevant cases, this is just the way I see it. And I -- I'm concluding that the allegations in this complaint fail to state a claim for coverage under the Society policy.

I'll just tell you that both exclusions -- I mean, I think this is needless, but for the -- as we discussed last time, maybe the Courts of Appeals would prefer that I -- I talk about the exclusions. I think just for the same reasons both exclusions apply. Because there's no physical loss alleged or present I think both exclusions apply. Or damage, I should say. No physical damage.

But that, again, just turns on whether my conclusion is correct or not. I think that -- that issue runs through this case, as I've said about four times now. And if I'm wrong on that, I think that turns everything else around. But that's as best as I see it.

And Miss Cain, any questions?

MS. CAIN: No. Would you like me to submit an order granting the motion?

THE COURT: I would. But I'd like you to send it to Mr. Seese first so he approves the

form of it. I know Mr. Seese doesn't agree with it. I understand that. I hope everybody understands unfortunately in these cases there's -- people win and people lose.

But Mr. Seese, anything else?

MR. SEESE: No, I think nothing further here, Your Honor. I think we should be able to agree on the form of the order. I don't have to agree with the result to agree on the order. So --

THE COURT: Right.

MR. SEESE: -- I understand.

THE COURT: But I don't like one of these five-day letters where, you know, you submit and then -- because those tend to get lost. And then --

MR. SEESE: Yeah.

THE COURT: -- I no more -- then I sign it six days later and then there's an objection.

Miss Cain, when you submit it you can just have a short letter that Mr. Seese has approved it. And then I'll know.

MS. CAIN: Sounds good.

THE COURT: I can sign it.

MS. CAIN: Okay.

THE COURT: And I wish the parties the

best of luck going forward.

MS. CAIN: Thank you, Judge.

MR. SEESE: Thanks, Judge.

THE COURT: All right. Have a good weekend. We are in recess.

MS. VOGT: You too.

THE COURT: Thank you.

(Proceedings concluded.)

STATE OF WISCONSIN)
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COUNTY OF DOOR)

I, Holly Jewell, Official Court Reporter for Circuit Court Branch 2 and the State of Wisconsin, do hereby certify that I reported the foregoing matter and that the foregoing transcript has been carefully prepared by me with my computerized stenographic notes as taken by me in machine shorthand, and by computer-assisted transcription thereafter transcribed, and that it is a true and correct transcript of the proceedings had in said matter to the best of my knowledge and ability.

Dated this 7 day of December, 2020.

electronically signed by Holly M. Jewell
HOLLY M. JEWELL, RMR
Official Court Reporter