No. ___________________ FOURTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH STATE DELI, LLC d/b/a LUCKY'S DELICATESSEN, MOTHERS & SONS, LLC d/b/a MOTHERS & SONS TRATTORIA, MATEO TAPAS, L.L.C. d/b/a MATEO BAR DE TAPAS, SAINT JAMES SHELLFISH LLC d/b/a SAINT JAMES SEAFOOD, CALAMARI ENTERPRISES, INC. d/b/a PARIZADE, BIN 54, LLC d/b/a BIN 54, ARYA, INC. d/b/a CITY KITCHEN and VILLAGE BURGER, GRASSHOPPER LLC d/b/a NASHER CAFE, VERDE CAFE INCORPORATED d/b/a LOCAL 22, FLOGA, INC. d/b/a KIPOS GREEK TAVERNA, KUZINA, LLC d/b/a GOLDEN FLEECE, VIN ROUGE, INC. d/b/a VIN ROUGE, KIPOS ROSE GARDEN CLUB LLC d/b/a ROSEWATER, and GIRA SOLE, INC. d/b/a FARM TABLE and GATEHOUSE TAVERN, *Plaintiffs*, v. THE CINCINNATI INSURANCE COMPANY; THE CINCINNATI CASUALTY COMPANY; MORRIS INSURANCE AGENCY INC.; and DOES 1 THROUGH 20, INCLUSIVE, *Defendants*.	From Durham County No. COA 21-293

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PLAINTIFF-APPELLEES' PETITION FOR DISCRETIONARY REVIEW BEFORE DETERMINATION BY THE COURT OF APPEALS

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No. __________________ FOURTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NORTH STATE DELI, LLC d/b/a LUCKY'S DELICATESSEN, MOTHERS & SONS, LLC d/b/a MOTHERS & SONS TRATTORIA, MATEO TAPAS, L.L.C. d/b/a MATEO BAR DE TAPAS, SAINT JAMES SHELLFISH LLC d/b/a SAINT JAMES SEAFOOD, CALAMARI ENTERPRISES, INC. d/b/a PARIZADE, BIN 54, LLC d/b/a BIN 54, ARYA, INC. d/b/a CITY KITCHEN and VILLAGE BURGER, GRASSHOPPER LLC d/b/a NASHER CAFE, VERDE CAFE INCORPORATED d/b/a LOCAL 22, FLOGA, INC. d/b/a KIPOS GREEK TAVERNA, KUZINA, LLC d/b/a GOLDEN FLEECE, VIN ROUGE, INC. d/b/a VIN ROUGE, KIPOS ROSE GARDEN CLUB LLC d/b/a ROSEWATER, and GIRA SOLE, INC. d/b/a FARM TABLE and GATEHOUSE TAVERN, *Plaintiffs*, v. THE CINCINNATI INSURANCE COMPANY; THE CINCINNATI CASUALTY COMPANY; MORRIS INSURANCE AGENCY INC.; and DOES 1 THROUGH 20, INCLUSIVE, *Defendants*.	From Durham County No. COA 21-293

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PLAINTIFF-APPELLEES' PETITION FOR DISCRETIONARY REVIEW BEFORE DETERMINATION BY THE COURT OF APPEALS

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiff-Appellees, a collection of sixteen restaurants operating across North Carolina, respectfully petition the Supreme Court of North Carolina for discretionary review before determination by the Court of Appeals.[1] *See* N.C. Gen. Stat. § 7A-31(b); N.C. R. App. P. 15(a).

On October 9, 2020, the Durham County Superior Court entered an order declaring that Plaintiffs' business interruption insurance policies sold by The Cincinnati Insurance Company and The Cincinnati Casualty Company ("Cincinnati") provide coverage for losses incurred due to the Covid-19 pandemic and related government shutdown orders. Immediate review of this coverage dispute is appropriate because the subject matter of this appeal has significant public interest, the cause involves legal principles of major significance to the jurisprudence of the State, and delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm. *See* N.C. Gen. Stat. §§ 7A-31(b)(1)-(3).

Immediate review is also pressing because the long-term viability of small businesses across our State hangs in the balance. Business interruption

[1] The restaurants' parent companies that bring this petition are North State Deli, LLC d/b/a Lucky's Delicatessen; Mothers & Sons, LLC d/b/a Mothers & Sons Trattoria; Mateo Tapas, L.L.C. d/b/a Mateo Bar de Tapas; Saint James Shellfish LLC d/b/a Saint James Seafood; Calamari Enterprises, Inc. d/b/a Parizade; Bin 54, LLC d/b/a Bin 54; Arya, Inc. d/b/a City Kitchen and Village Burger; Grasshopper LLC d/b/a Nasher Cafe; Verde Cafe Incorporated d/b/a Local 22; Floga, Inc. d/b/a Kipos Greek Taverna; Kuzina, LLC d/b/a Golden Fleece; Vin Rouge, Inc. d/b/a Vin Rouge; Kipos Rose Garden Club LLC d/b/a Rosewater; and Gira Sole, Inc. d/b/a Farm Table and Gatehouse Tavern (collectively, "Plaintiffs").

insurance—which is designed to provide certainty during periods of lost business income caused by fortuitous risks like the government orders at issue here—will play a key role in how our State recovers from the Covid-19 pandemic.

INTRODUCTION

This case is one of thousands that have arisen out of the Covid-19 pandemic and related government shutdown orders entered across the country. These orders forced nonessential businesses to close or curtail their operations and further restricted a wide variety of activities, including group gatherings and nonessential movement by individuals. While the orders played an important role in protecting public health, they came at a cost—businesses lost the use of and access to their property, and in turn, suffered significant revenue losses.

Amidst the resulting and widespread economic devastation, businesses turned to their insurance policies for assistance, seeking coverage under so-called "business interruption" provisions. But insurers like Cincinnati responded with across-the-board denials of business interruption claims. These denials have resulted in a huge amount of litigation across the country. In North Carolina, at least hundreds of businesses have filed claims seeking coverage under policies similar or identical to those sold by Cincinnati, and at least dozens of lawsuits have been initiated in North Carolina's state and federal courts.

This petition seeks to bring clarity to this flood of litigation. At the heart of virtually every one of these lawsuits is the meaning of the threshold coverage requirement of "physical loss or physical damage." Because the government orders

prohibited owners, employees, customers, and others from physically accessing and putting business property to physical use, insureds suffered a clear "physical loss" within the meaning of their policies. Nevertheless, insurers like Cincinnati argue—without any serious linguistic analysis—that the phrase requires structural alteration to property to trigger coverage.

On October 9, 2020, the Durham County Superior Court rejected Cincinnati's argument, explaining that because the disputed language uses the conjunction "or," "a reasonable insured could understand the terms 'physical loss' and 'physical damage' to have distinct and separate meanings." The court reasoned that Plaintiffs' policies provide coverage not only when insured property is structurally altered (i.e., *damaged*), but *also* when Plaintiffs' ability to physically use or physically access that property is *lost*. The court further noted that the disputed phrase is at minimum ambiguous on this score and, in finding coverage, relied on the bedrock principle of insurance contract interpretation that ambiguities must be construed in favor of the policyholder.

Despite widespread use of the term "physical loss" in business interruption insurance, its meaning has never been addressed by this Court. Indeed, no state's supreme court has yet ruled on this issue even though insurance contract interpretation is a quintessential question of state law. But the North Carolina business community can no longer afford for this important question to await final appellate review. The long-term viability of many in this community is at stake.

As described below, this Court's direct review is necessary at this juncture for

several reasons under N.C. Gen. Stat. § 7A-31(b). First, the subject matter of this appeal has significant public interest—indeed, the trial court's ruling in this case generated nationwide press coverage. *Id.* at § 7A-31(b)(1); *infra* at 12 n.6. Second, this case involves legal principles of great significance to the jurisprudence of the State. *Id.* at § 7A-31(b)(2). Third, prompt and final adjudication of this unsettled question of state law is needed to prevent substantial harm to North Carolina businesses. *Id.* at § 7A-31(b)(3). Plaintiffs therefore respectfully request this Court take up the case for immediate review before adjudication by the Court of Appeals.

PROCEDURAL HISTORY

Plaintiffs filed this matter in the Durham County Superior Court on May 18, 2020. (R p 3).[2] Count One of the Second Amended Complaint asserts a declaratory judgment claim, seeking a declaration that Plaintiffs' insurance contracts provide coverage for losses sustained due to the Covid-19 pandemic and related government orders. (R pp 160-66). On October 9, 2020, after briefing and oral argument, the trial court entered orders denying Cincinnati's motion to dismiss in full (R p 211) and granting Plaintiffs' motion for partial summary judgment on Count One (R p 203). The trial court certified its partial summary judgment order pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. (R p 209). On November 6, 2020, Cincinnati filed a notice of appeal in the North Carolina Court of Appeals seeking review of the trial court's partial summary judgment order. (R p 215). The

[2] Citations are to the Record on Appeal filed by Cincinnati in the Court of Appeals on May 28, 2021.

appeal was docketed with the Court of Appeals on June 9, 2021.

Plaintiffs ask that this Court assume immediate jurisdiction over Cincinnati's appeal of the trial court's partial summary judgment order. Attached to this petition for consideration by the Court is a true and correct copy of the order sought to be reviewed.[3]

STATEMENT OF FACTS

A. North Carolina Limits Use of and Access to Plaintiffs' Restaurants

The facts underlying this petition are, by now, a familiar story. Beginning in March 2020 and in response to the Covid-19 pandemic, state and local governments across North Carolina issued a series of mandates suspending all non-essential business operations. *See, e.g.*, (Doc. Ex. 8) (Executive Order No. 118); (Doc. Ex. 18) (Executive Order No. 120); (Doc. Ex. 23) (Executive Order No. 121). These orders imposed sweeping limitations on the use of and access to a wide variety of North Carolina businesses. With respect to restaurants, for example, the North Carolina Secretary of Health and Human Services entered an order finding "that the use of seating areas of restaurants and bars constitute an imminent hazard for the spread of COVID-19," and for this reason, the Secretary ordered the immediate closure of all such areas. *See* (Doc. Ex. 14-16) (Order of Abatement of Imminent Hazard). Other orders imposed social distancing and sanitation requirements, prohibited all nonessential movement by North Carolina residents, and outright closed entire

[3] The version of the trial court's order included in the Record on Appeal is inadvertently missing Page 6, but the version of the order included in the Appendix attached hereto is complete.

categories of businesses including, among others, bars, health clubs, and movie theaters. *See, e.g.*, (Doc. Ex. 23) (Executive Order No. 121). Taken together, these orders expressly prohibited businesses and their employees, customers, and others from physically accessing and physically using insured business property. These losses caused Plaintiffs to experience a dramatic decrease in business income, and eventually, to close. (Doc. Ex. 160-62, 165-68, 467-71).

B. Plaintiffs' "All-Risks" Insurance Policies

To protect against these very sorts of unanticipated losses, Plaintiffs purchased "all risks" business interruption insurance coverage from defendant Cincinnati.[4] "All risks" policies cover loss or damage resulting from *any* peril, imaginable or unimaginable, unless expressly excluded. Put differently, if a risk, such as government action, is not excluded, then it is covered regardless of whether an insurer specifically considered the risk when creating the premium rate. An "all risks" policy acknowledges that businesses are subject to risks that are known *and* unknown, and this product helps businesses manage both.

At the heart of this dispute is the meaning of the phrase "physical loss . . . or physical damage" as used in Plaintiffs' Policies. Cincinnati, as sole drafter of the Policies, included this phrase in the provisions under which Plaintiffs seek coverage. For example, the Policies set forth coverage for lost business income as

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[4] Cincinnati issued four separate insurance policies that cover various groupings of Plaintiffs' sixteen restaurants. *See* (Doc. Ex. 172-447, 476-784, 786-1076, 1078-1364) (collectively, "Policies"). The Policies are the same in all material respects. For ease of reference, all citations to the Policies refer to the policy appearing first in the Rule 9(d) Documentary Exhibits. *See* (Doc. Ex. 172-447).

follows:

> 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 "loss" to property at "premises" which are described in the Declarations and for which a "Business Income" Limit of Insurance is shown in the Declarations. The "loss" must be caused by or result from a Covered Cause of Loss.

See (Doc. Ex. 281). The Policies go on to define "loss" as "accidental physical loss or accidental physical damage." *See* (Doc. Ex. 289). Unlike many business interruption policies, the Policies do not exclude virus-related causes of loss from coverage.

Cincinnati does not dispute that Plaintiffs suffered a "suspension" of "operations" or that Plaintiffs' losses were "accidental." Thus, coverage in this case turns on whether the government shutdown orders caused "direct . . . 'physical loss or . . . physical damage' to property."

C. The Trial Court Correctly Held that the Government Orders Caused a "Physical Loss"

In resisting coverage, Cincinnati's principal argument was that the language "physical loss or . . . physical damage" requires alteration to Plaintiffs' covered property. The trial court correctly rejected Cincinnati's argument, firmly grounding its reasoning in the bedrock principle of insurance policy interpretation: where disputed language is capable of multiple reasonable interpretations based on the ordinary meaning of the relevant terms, that language is ambiguous, and any ambiguities must be construed in favor of coverage. *See, e.g.*, *C. D. Spangler Constr.*

Co. v. Indus. Crankshaft & Eng'g Co., 326 N.C. 133, 142, 388 S.E.2d 557, 563 (1990); *Accardi v. Hartford Underwriters Ins. Co.*, 373 N.C. 292, 295, 838 S.E.2d 454, 456-57 (2020); *Williams v. Nationwide Mut. Ins. Co.*, 269 N.C. 235, 238, 152 S.E.2d 102, 105-06 (1967).

In applying this principle, the trial court first noted that the disputed terms "direct," "physical," and "loss" are undefined in Plaintiffs' Policies. The court therefore relied on dictionary definitions of those terms, concluding that the phrase "direct physical loss" could reasonably mean "the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions." As the court explained, "Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured." The court held that this circumstance was not just reasonably a "direct physical loss," but it was *unambiguously* a "direct physical loss."

Even if Cincinnati's interpretation requiring "alteration" were reasonable, the trial court held the Policies still afford coverage because "[Plaintiffs' interpretation] is also reasonable, rendering the Policies at least ambiguous." The trial court explained that this is especially true given that the disputed language "physical loss or . . . physical damage" utilizes the conjunction "or," meaning "at the very least . . . that a reasonable insured could understand the terms 'physical loss' and 'physical damage' to have distinct and separate meanings." The term "'physical damage' reasonably requires alteration to property." Accordingly, "physical loss"

must reasonably encompass prohibitions on the use of or access to covered property even absent structural alteration. Otherwise, the term "physical damage" would be rendered meaningless surplusage.

REASONS WHY CERTIFICATION SHOULD ISSUE

The fundamental issue in this litigation is whether the government orders qualify as a non-excluded fortuitous risk that caused direct "physical loss or physical damage" to Plaintiffs' property. The interpretive steps undertaken by the trial court apply to virtually every standardized business interruption policy sold in North Carolina (notwithstanding other differences in policy language, such as express virus exclusions not present here, that may affect the scope of coverage in other cases). Because this Court has never ruled on the scope of the phrase "physical loss or physical damage," and because the issue has taken on sudden and widespread relevance for the North Carolina business community, definitive guidance from this Court is urgently needed.

Accordingly, Plaintiffs respectfully request, pursuant to N.C. Gen. Stat. § 7A-31(b) of the North Carolina Rules of Appellate Procedure, that this Court accept this case for discretionary review before a determination is made by the Court of Appeals. Under § 7A-31(b), direct review is appropriate "when in the opinion of the Supreme Court any of the following apply":

(1) The subject matter of the appeal has significant public interest;

(2) The cause involves legal principles of major significance to the jurisprudence of the State;

(3) Delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm;

(4) The work load of the courts of the appellate division is such that the expeditious administration of justice requires certification;

(5) The subject matter of the appeal is important in overseeing the jurisdiction and integrity of the court system.

N.C. Gen. Stat. §§ 7A-31(b)(1)-(5). The circumstances presented here satisfy the first three of these independent bases for the Court's certification of this case for immediate discretionary review.

I. The Subject Matter of the Appeal Has Significant Public Interest Under § 7A-31(b)(1)

This Court may take up direct review of a case where, as here, "[t]he subject matter of the appeal has significant public interest." N.C. Gen. Stat. § 7A-31(b)(1). The present case easily satisfies this requirement.

First, the potential impacts of this case extend beyond the parties—Plaintiffs are not the only North Carolina businesses operating on a financial brink and relying on the all-risks policies sold to them. Nationally, thousands of lawsuits have been filed against insurance carriers who have issued categorical, across-the-board denials of pandemic-related business interruption claims. In North Carolina alone, at least hundreds of claims have been made for business interruption coverage, and at least dozens of lawsuits have been filed, including statewide class actions.

The reason for this significant uptick in litigation is clear: fundamental issues on the nature of business interruption coverage remain unresolved under North Carolina law. While the North Carolina lawsuits target a range of insurance

providers, each selling distinct policies with distinct language, the same question is at the heart of virtually every case: whether the pandemic and related government orders caused "physical loss or physical damage." Insureds and insurers alike are in great need of a definitive ruling on this threshold question from this Court.

Moreover, because this threshold question has escaped Supreme Court review, businesses across our State lack the information necessary to plan for and insure against future risks of business interruption. More immediately, businesses struggling under the significant financial costs of the government orders continue to lack crucial clarity into what portion of those costs will be borne by insurers as opposed to owners. Many businesses have received financial assistance from federal, state, and local governments. And businesses themselves have paid a high price. But insurers like Cincinnati—who cover "loss ***or*** damage" and who fail to exclude viruses—have refused to play their part in covering business interruptions. Absent definitive guidance on the key legal issue, businesses will remain unable to plan for the future; absent coverage, they may be forced to close.

This Court has previously granted immediate review in cases with this kind of widespread financial impact. *See, e.g.*, *Chappell v. N.C. DOT*, 374 N.C. 273, 275, 841 S.E.2d 513, 516 (2020) (granting review under N.C. Gen. Stat. § 7A-31(b)); *Fisher v. Flue-Cured Tobacco Coop. Stabilization Corp.*, 369 N.C. 202, 204, 794 S.E.2d 699, 703 (2016) (same); *C. D. Spangler*, 326 N.C. at 135, 388 S.E.2d at 558 (same). The legal issues presented here are of at least the same magnitude of public interest, if not greater, than in those previous cases. This is especially true with

respect to *C. D. Spangler*, where, like here, the party that won partial summary judgment in an insurance coverage dispute petitioned this Court for direct review under § 7A-31(b). This Court granted review and held that the policies covered losses incurred when the government ordered the insured to remove hazardous waste from its premises. *C. D. Spangler*, 326 N.C. at 135, 388 S.E.2d at 558. While in the 1990s insurers were being called upon with moderate frequency to indemnify government-mandated environmental cleanups, the Covid-19 pandemic has dealt an economic blow that is far more widespread. It is no surprise that the ensuing public interest in this appeal has been far greater than in *C. D. Spangler*.

Indeed, the topic of business interruption coverage has generated substantial discussion in public fora. Even President Trump weighed into the fray when he voiced support for holders of business interruption policies.[5] And developments *in this specific case* have generated coverage in major media outlets both in North Carolina and nationally.[6] Public interest in this case is thus significant and for this

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[5] Brittany De Lea, *Trump pressures insurers over coronavirus business coverage gray area*, FOX BUSINESS (Apr. 10, 2020), https://www.foxbusiness.com/lifestyle/trump-insurers-coronavirus-business-coverage-gray-area.

[6] *See, e.g.*, Leslie Scism, *Rare Small-Business Win in Insurer Lawsuits Keeps Hope Alive for Payouts*, WALL ST. J. (Dec. 29, 2020), https://www.wsj.com/articles/rare-small-business-win-in-insurer-lawsuits-keeps-hope-alive-for-payouts-11609237801; *Restaurant owners win suit against insurer for COVID losses*, ASSOCIATED PRESS (Oct. 29, 2020), https://apnews.com/article/business-virus-outbreak-lawsuits-north-carolina-durham-931b453836d8a5026806521ba18a162d; Drew Jackson, *Durham restaurant owners successfully sue their insurance company for COVID-19 losses*, THE NEWS & OBSERVER (Oct. 28, 2020), https://account.newsobserver.com/paywall/stop?resume=246735656 (last visited Oct. 28, 2020); Kathy Hanrahan, *Acclaimed Triangle restaurant owners win lawsuit over pandemic shutdown*, WRAL (Oct. 28, 2020),

reason alone, this Court's direct review is warranted.

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https://www.wral.com/coronavirus/acclaimed-triangle-restaurant-owners-win-lawsuit-over-pandemic-shutdown/19358957/; Adam Sobsey, *A Court Victory Gave Local Restaurateurs a Glimmer of Hope—And Set a National Precedent. But Their Insurance Company Is Fighting Back.*, INDY WEEK (Nov. 18, 2020), https://indyweek.com/food-and-drink/features/matt-kelly-Giorgios-Bakatsias-fight-against-insurance-companies/; Lauren Ohnesorge, *Court victory for Triangle restaurants could have huge stakes for insurers with Covid claims*, TRIANGLE BUSINESS JOURNAL (Oct. 22, 2020), https://www.bizjournals.com/triangle/news/2020/10/22/judge-sides-with-restaurants-against-insurer.html; Bill Cresenzo, *Restaurant owners score win in battle with insurer over COVID*, NORTH CAROLINA LAWYERS WEEKLY (Oct. 21, 2020), https://nclawyersweekly.com/2020/10/21/restaurant-owners-score-win-in-battle-with-insurer-over-covid/; *Restaurant owners win suit against insurer for COVID losses*, THE CHARLOTTE OBSERVER (Oct. 29, 2020), https://www.charlotteobserver.com/news/article246799602.html (last visited Oct. 29, 2020); Mackensy Lunsford, *Rebuilding America: Insurance companies denying restaurants' claims to recover cash*, ASHEVILLE CITIZEN TIMES (May 28, 2020), https://www.citizen-times.com/story/news/local/2020/05/28/denied-covid-19-cash-nc-restaurants-fight-insurance-companies/5230545002/; Connie Gentry, *How 2 Triangle owners are struggling to keep 17 restaurants alive*, TRIANGLE BUSINESS JOURNAL (May 21, 2020), https://www.bizjournals.com/triangle/news/2020/05/21/raleigh-durham-restaurants-sue-over-virus-coverage.html; Mike Curley, *NC Restaurants 1st To Get COVID-19 'Physical Loss' Coverage*, LAW 360 (Oct. 21, 2020), https://www.law360.com/articles/1321752/nc-restaurants-1st-to-get-covid-19-physical-loss-coverage (last visited May 24, 2021); Jacob Rund, *Cincinnati Insurance to Appeal Loss in Virus Coverage Lawsuit*, BLOOMBERG LAW (Oct. 22, 2020), https://news.bloomberglaw.com/insurance/cincinnati-insurance-to-appeal-loss-in-virus-coverage-lawsuit (last visited May 24, 2021); Rick Carroll, *Aspen restaurant takes on insurance carrier over business losses from pandemic*, ASPEN TIMES (Jan. 18, 2021), https://www.aspentimes.com/news/aspen-restaurant-takes-on-insurance-carrier-over-business-losses-from-pandemic/; Carolyn M. Branthoover, *North Carolina Court Rules In Favor Of Commercial Property Policyholders: Government's Covid-19 Shutdown Orders Caused "Physical Loss" Of Property*, THE NATIONAL LAW REVIEW (Oct. 23, 2020), https://www.natlawreview.com/article/north-carolina-court-rules-favor-commercial-property-policyholders-government-s; Lauren Ohnesorge, *Despite court win for Triangle restaurants, CEO says insurance company won't back down*, TRIANGLE BUSINESS JOURNAL (Oct. 30, 2020), https://www.bizjournals.com/triangle/news/2020/10/30/insurance-firm-not-changing-stance-despite-ruling.html.

II. This Appeal Involves Legal Principles of Major Significance to the Jurisprudence of the State Under § 7A-31(b)(2)

N.C. Gen. Stat. § 7A-31(b)(2) provides an independent basis for this Court's discretionary review where "[t]he cause involves legal principles of major significance to the jurisprudence of the State." The primary issue in this case—the ordinary meaning of the undefined phrase "physical loss or physical damage"—implicates a bedrock principle of insurance law that has long been recognized in North Carolina jurisprudence. Namely, the principle that ambiguities in an insurance contract must be resolved against the insurer.

This bedrock principle derives from the judiciary's long-running effort to find some method of reaching a sensible framework within the conceptual bounds of treating standardized, form contracts as if they were traditional "agreements," reached by bargaining between the parties. Under the realities of modern insurance practice, there exists a "special relationship between the insured and the insurer" whereby "'[policy] conditions are by and large dictated by the insurance company to the insured.'" *Fountain Powerboat Indus. v. Reliance Ins. Co.*, 119 F. Supp. 2d 552, 555 (E.D.N.C. 2000) (quoting *Great Am. Ins. Co. v. C. G. Tate Const. Co.*, 303 N.C. 387, 394, 279 S.E.2d 769, 773-74 (1981)). The ambiguity principle acknowledges this special relationship. Because insurers are the sole drafters of their policies, the principle demands that they use precision and clarity in drafting policy language. "If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder." *C. D. Spangler*, 326 N.C. at

142, 388 S.E.2d at 563; *see also Accardi*, 373 N.C. at 295, 838 S.E.2d at 456-57; *Williams*, 269 N.C. at 238, 152 S.E.2d at 105-06.

The arguments advanced by Cincinnati are a direct assault on this important jurisprudential concern. Insurers have for decades attempted to convince courts that the phrase "physical loss or physical damage" requires structural alteration to property. That effort has failed to yield uniform results. *See, e.g.*, *Fountain Powerboat*, 119 F. Supp. 2d at 556-57; *Port Auth. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (holding that "an imminent threat of the release of a quantity of asbestos fibers that would cause . . . loss of utility" constitutes "physical loss or damage" to property, even if that threat never materializes); *Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 U.S. Dist. LEXIS 74450, *17 (D. Or. June 7, 2016) ("The Court finds that defendant's interpretation, which would add the word 'structural,' . . . is not a plausible plain meaning of the term 'direct physical loss of or damage to property.'"); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-cv-04418 (WHW) (CLW), 2014 U.S. Dist. LEXIS 165232, at *13 (D.N.J. Nov. 25, 2014) ("While structural alteration provides the most obvious sign of physical damage, [courts] have also found that property can sustain physical loss or damage without experiencing structural alteration."); *see also* (R S pp 1769-72) (collecting additional cases). Nevertheless, despite these pre-pandemic rulings, Cincinnati refused to clarify or define the phrase to avoid Plaintiffs' reasonable interpretation. If a phrase as ambiguous as "physical loss" is found to require alteration to property, such a ruling would restrict both "loss" and "damage" to

meaning the same thing, thereby gutting North Carolina's bedrock principle that has long served to protect insureds.

The North Carolina Court of Appeals agrees. In *Great Am. Ins. Co. v. Mesh Cafe, Inc.*, No. COA02-840, 2003 N.C. App. LEXIS 1095, at *5-6 (N.C. Ct. App. June 3, 2003) (unpublished), *cert. denied*, 358 N.C. 154, 590 S.E.2d 862 (2003), a restaurant in Greenville sought business interruption coverage when the local utility shut off the restaurant's power due to flooding at the utility's primary substation, forcing the restaurant to close. The court was tasked with interpreting substantially the same insuring language at issue here: "direct physical loss or damage by a Covered Cause of Loss." *Id.* at *2. The insurer argued that the policy excluded flooding from the phrase "Covered Cause of Loss." But the court rejected this argument. Judge Wynn, with Judges Tyson and Steelman concurring, explained:

> Whereas a reasonable person could understand the language "by a Covered Cause of Loss" to be a prepositional phrase modifying "direct physical loss or damage," another reasonable person could understand "direct physical loss" to be an alternative to "damage by a Covered Cause of Loss" because of the conjunction "or." Therefore, the language used in the policy is reasonably susceptible of different constructions; accordingly, it must be given the construction most favorable to the insured, since the company prepared the policy and chose the language.

Id. at *5-6.

The same analysis governs here. As sole drafter of its policies, it is *Cincinnati* that must show the Policies *unambiguously* fail to provide coverage. If, on the other hand, Plaintiffs show the Policies unambiguously supply coverage, or that the

relevant language is reasonably ambiguous, a finding of coverage is mandated. Cincinnati cannot meet this high bar. Like the policy in *Mesh Cafe*, Plaintiffs' Policies set forth ambiguous coverage language that is reasonably susceptible to different constructions given use of the conjunction "or."[7]

Simply put, this State's ambiguity principle aims to protect insureds. Businesses rely on the bedrock certainty of transactions in order to manage risk. That certainty has eroded here. This case provides an opportunity for the Court to restore that certainty and ensure Plaintiffs and similarly-situated North Carolina businesses receive the benefit of their bargains under this State's long-settled ambiguity principle.

III. Absent Discretionary Review, Delay in Final Adjudication Will Cause Substantial Harm Under § 7A-31(b)(3)

This Court's direct review is also appropriate where "[d]elay in final adjudication is likely to result from failure to certify and thereby cause substantial harm." *See* N.C. Gen. Stat. § 7A-31(b)(3). Such is the case here. If this appeal were to be decided by the Court of Appeals before returning to this Court, the final

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[7] On another occasion, the Court of Appeals, construing a policy with a definition not found here, held that the phrase "direct physical loss of or damage to property" requires damage or destruction for coverage to apply. *See Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors Ins. Corp.*, 126 N.C. App. 698, 701-02, 486 S.E.2d 249, 251-52 (N.C. Ct. App. 1997). The court in *Harry's Cadillac* based its reasoning on the underlying policy's definition of the term "Period of Restoration," a definition that does not appear in the Policies at issue here. *See* (R S pp 1772-73). Even if the same "Period of Restoration" definition were implicated by the present case, the fact that the Court of Appeals has reached divergent results is at least some evidence that the disputed phrase is ambiguous. *Guyther v. Nationwide Mut. Fire Ins. Co.*, 109 N.C. App. 506, 512, 428 S.E.2d 238, 241 (N.C. Ct. App. 1993).

resolution of this case would likely take at least an additional year. But for Plaintiffs and similarly-situated businesses, even a modest delay will impose substantial harm. This is true for at least two reasons.

First, North Carolina businesses are fighting for their survival. The economic costs and burdens placed on businesses by this pandemic have been enormous and unprecedented in modern history. If this Court finds that coverage is warranted under business interruption policies like those sold by Cincinnati, covered businesses will be able to put insurance proceeds to use sooner rather than later. Time is of the essence.

Second, and more importantly, businesses need the ability to plan for the future. A predominant harm of the pandemic is the resulting uncertainty. This uncertainty is especially untenable for small businesses like Plaintiffs. For example, Plaintiffs must decide whether and when to reopen; whether and to what extent to renegotiate commercial leases; whether to spend resources recruiting and retaining skilled employees given the pandemic-induced hiring crisis; and whether to raise additional capital or debt to cover pandemic-related losses. While actual payments under a policy are crucial to the overall survival of a business, the certainty of knowing from this Court whether coverage is available in the first place is just as important for day-to-day planning purposes, regardless of the exact amount.

Without certainty as to whether their policies provide coverage, many North Carolina businesses may be forced to close forever. Plaintiffs have already been forced to permanently close at least one of their restaurants. (Doc. Ex. 170). Other

businesses across the State have also shuttered.[8] Prompt adjudication by this Court is the only available path to ensure that this coverage dispute is resolved before the worst economic consequences of the pandemic materialize.

Cincinnati agrees. Cincinnati itself has sought immediate high court review in other states. In Ohio, for example, Cincinnati requested that a federal district judge certify the same policy forms disputed here for immediate review by the Ohio Supreme Court. Cincinnati filed its motion to certify on June 1, 2020, over one year ago, arguing then that "the time to seek certification in this case is now." *See* Motion to Certify at 2, *Troy Stacy Enters. Inc. v. The Cincinnati Ins. Co.*, No. 1:20-cv-00312-MWM (S.D. Ohio June 1, 2020), ECF No. 8 ("[T]he direct physical loss issue is an Ohio law issue. It needs to be decided for the benefit of Ohio citizens."); *see also* Motion to Accept Certified Questions at 2, *Neuro-Commc'n Servs, Inc. v. The Cincinnati Ins. Co. et al.*, No. 2021-0130 (Ohio Supreme Court Feb. 17, 2021) ("The certified question here should be accepted so that the [Ohio Supreme Court] can address the legal meaning of the insurance policy language involved here, resolving that issue for all Ohioans.").[9] Plaintiffs do not agree with Cincinnati's

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[8] *See, e.g.*, *30+ Charlotte restaurants that permanently closed in 2020*, THE CHARLOTTE OBSERVER (Dec. 23, 2020), https://www.charlotteobserver.com/charlottefive/c5-around-town/c5-development/article248009365.html; *Business Closing Coverage*, WRAL, https://www.wral.com/business-closing/17636652/; Algenon Cash, *COVID-19 may wipe out 75% of North Carolina's 20,000 restaurants*, YES WEEKLY (Dec. 14, 2020), https://www.yesweekly.com/business/covid-19-may-wipe-out-75-of-north-carolina-s-20-000-restaurants/article_d8a7dc76-3e56-11eb-b0fa-d31b03656e0d.html.

[9] The Ohio Supreme Court granted certification. *See Neuro-Commc'n Servs. Inc. v. The Cincinnati Ins. Co. et al.*, No. 2021-0130, slip op. at 1 (Ohio Apr. 14, 2021), https://www.supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=226430.pdf.

characterization of the legal issues in its certification motions, but the parties are nevertheless in agreement that an expeditious final resolution of the issues presented here is warranted.

Cincinnati's position is consistent with that of the United States Judicial Panel on Multidistrict Litigation ("JPML"). In ruling on whether business interruption lawsuits filed in federal courts should be consolidated and heard before a single judge, the JPML noted that "[t]his litigation demands efficiency," emphasizing the need to determine "the most efficient means of advancing these actions towards resolution." *See* Order Denying Transfer at 2, *In re: Cincinnati Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2962 (J.P.M.L. Oct. 2, 2020), ECF No. 136. While the panel ultimately denied consolidation, it "impress[ed] upon the courts overseeing these actions the importance of advancing these actions towards resolution as quickly as possible." *Id.* at 3. To help effectuate that goal, the panel even accelerated certain JPML-related deadlines. *See* Order Denying Transfer and Directing Issuance of Show Cause Orders at 4, *In re: COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2942 (J.P.M.L. Aug. 12, 2020), ECF No. 772 ("As counsel emphasized during oral argument, . . . time is of the essence in this litigation. Many plaintiffs are on the brink of bankruptcy as a result of business lost due to the COVID-19 pandemic and the government closure orders.").

Widespread agreement on the need for urgency in this litigation is unsurprising. The long-term viability of businesses across North Carolina hangs in the balance. For this and the other reasons stated above, this Court's direct and

definitive review is warranted.

ISSUE TO BE BRIEFED

Plaintiff-Appellees respectfully request that the Court exercise discretionary review over the proposed issue on appeal set forth by Defendant-Appellant Cincinnati in the Record on Appeal filed in the Court of Appeals, and repeated here:

1. Did the trial court err in granting Plaintiff-Appellees' Motion for Partial Summary Judgment?

CONCLUSION

For the foregoing reasons, Plaintiff-Appellees respectfully request that this Court grant this Petition for Discretionary Review and exercise direct review over the appeal in this matter before adjudication by the Court of Appeals.

* * * Signature Block on Next Page * * *

Respectfully submitted this the 24th day of June, 2021.

THE PAYNTER LAW FIRM, PLLC

s/ Gagan Gupta

Gagan Gupta (NCSB #: 53119)
Email: ggupta@paynterlaw.com

I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed it.

Stuart M. Paynter (NCSB #: 42379)
Email: stuart@paynterlaw.com

106 South Churton Street, Suite 200
Hillsborough, North Carolina 27278
Telephone: (919) 245-3116
Facsimile: (866) 734-0622

Counsel for Plaintiff-Appellees North State Deli, LLC d/b/a Lucky's Delicatessen, Mothers & Sons, LLC d/b/a Mothers & Sons Trattoria, Mateo Tapas, L.L.C. d/b/a Mateo Bar de Tapas, Saint James Shellfish LLC d/b/a Saint James Seafood, Calamari Enterprises, Inc. d/b/a Parizade, Bin 54, LLC d/b/a Bin 54, Arya, Inc. d/b/a City Kitchen and Village Burger, Grasshopper LLC d/b/a Nasher Cafe, Verde Cafe Incorporated d/b/a Local 22, Floga, Inc. d/b/a Kipos Green Taverna, Kuzina, LLC d/b/a Golden Fleece, Vin Rouge, Inc. d/b/a Vin Rouge, Kipos Rose Garden Club LLC, d/b/a Rosewater, and Gira Sole, Inc. d/b/a Farm Table and Gatehouse Tavern

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the attorney is, and at all times hereinafter mentioned was, more than eighteen (18) years of age; and that on this day, copies of the foregoing will be served on the following by electronic mail:

Jim W. Phillips, Jr. (NCSB #: 12516)
Email: jphillips@brookspierce.com
Gary S. Parsons (NCSB #: 7955)
Email: gparsons@brookspierce.com
Kimberly M. Marston (NCSB #: 46231)
Email: kmarston@brookspierce.com
BROOKS PIERCE MCLENDON HUMPHREY & LEONARD, LLP
P.O. Box 26000
Greensboro, NC 27420
Telephone: (336) 373-8850
Facsimile: (336) 378-1001

Counsel for Defendant-Appellants The Cincinnati Insurance Company and The Cincinnati Casualty Company

Josh Dixon (NCSB #: 30604)
Email: jdixon@grsm.com
GORDON & REES LLP
421 Fayetteville Street, Suite 330
Raleigh, NC 27601
Phone: (843) 714-2502

Counsel for Defendant Morris Insurance Agency Inc.

The undersigned attorney certifies under penalty of perjury that the forgoing is true and correct.

* * * Signature Block on Next Page * * *

This the 24th day of June, 2021.

THE PAYNTER LAW FIRM, PLLC

s/ Gagan Gupta

Gagan Gupta (NCSB #: 53119)
Email: ggupta@paynterlaw.com

I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed it.

Stuart M. Paynter (NCSB #: 42379)
Email: stuart@paynterlaw.com

106 South Churton Street, Suite 200
Hillsborough, North Carolina 27278
Telephone: (919) 245-3116
Facsimile: (866) 734-0622

Counsel for Plaintiff-Appellees North State Deli, LLC d/b/a Lucky's Delicatessen, Mothers & Sons, LLC d/b/a Mothers & Sons Trattoria, Mateo Tapas, L.L.C. d/b/a Mateo Bar de Tapas, Saint James Shellfish LLC d/b/a Saint James Seafood, Calamari Enterprises, Inc. d/b/a Parizade, Bin 54, LLC d/b/a Bin 54, Arya, Inc. d/b/a City Kitchen and Village Burger, Grasshopper LLC d/b/a Nasher Cafe, Verde Cafe Incorporated d/b/a Local 22, Floga, Inc. d/b/a Kipos Green Taverna, Kuzina, LLC d/b/a Golden Fleece, Vin Rouge, Inc. d/b/a Vin Rouge, Kipos Rose Garden Club LLC, d/b/a Rosewater, and Gira Sole, Inc. d/b/a Farm Table and Gatehouse Tavern

APPENDIX

Trial Court's Order Granting Plaintiffs' Rule 56 Motion
for Partial Summary Judgment..App-1

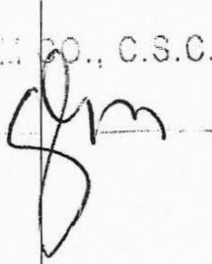
STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO. 20-CVS-02569

2020 OCT -9 P 3: 14

C.S.C.



NORTH STATE DELI, LLC d/b/a LUCKY'S DELICATESSEN, MOTHERS & SONS, LLC d/b/a MOTHERS & SONS TRATTORIA, MATEO TAPAS, L.L.C. d/b/a MATEO BAR DE TAPAS, SAINT JAMES SHELLFISH LLC d/b/a SAINT JAMES SEAFOOD, CALAMARI ENTERPRISES, INC. d/b/a PARIZADE, BIN 54, LLC d/b/a BIN 54, ARYA, INC. d/b/a CITY KITCHEN and VILLAGE BURGER, GRASSHOPPER LLC d/b/a NASHER CAFE, VERDE CAFE INCORPORATED d/b/a LOCAL 22, FLOGA, INC. d/b/a KIPOS GREEK TAVERNA, KUZINA, LLC d/b/a GOLDEN FLEECE, VIN ROUGE, INC. d/b/a VIN ROUGE, KIPOS ROSE GARDEN CLUB LLC d/b/a ROSEWATER, and GIRA SOLE, INC. d/b/a FARM TABLE and GATEHOUSE TAVERN,

Plaintiffs,

v.

THE CINCINNATI INSURANCE COMPANY; THE CINCINNATI CASUALTY COMPANY; MORRIS INSURANCE AGENCY INC.; and DOES 1 THROUGH 20, INCLUSIVE,

Defendants.

ORDER GRANTING PLAINTIFFS' RULE 56 MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER was heard on September 23, 2020, before Senior Resident Superior Court Judge Orlando F. Hudson, Jr., with Gagan Gupta appearing for the plaintiff-restaurants (including Vin Rouge, Parizade, Mateo Bar de Tapas, Rosewater, Mothers & Sons Trattoria, Saint James Seafood, Lucky's Delicatessen, Bin 54, City Kitchen, Village Burger, Nasher Cafe,

Local 22, Kipos Greek Taverna, Golden Fleece, Farm Table, and Gatehouse Tavern[1]), and Brian Reid and Drew Vanore appearing for defendant-insurers The Cincinnati Insurance Company and The Cincinnati Casualty Company (collectively, "Cincinnati"). Plaintiffs brought a Motion for Partial Summary Judgment ("Motion") with respect to Count I of their Second Amended Complaint, seeking a declaratory judgment that Cincinnati must replace Plaintiffs' lost business income and extra expenses under insurance policy contracts entered into between the parties.[2]

THE COURT, having considered the pleadings, the Motion, the briefs filed in support of and in opposition to the Motion, the oral arguments of counsel at the hearing on the Motion, the declaration of Gagan Gupta, the affidavit testimony of the Plaintiffs and their supporting affidavits of Giorgios Nikolaos Bakatsias, Matthew Raymond Kelly, and Djafar "Jay" Mehdian, the applicable law, and other appropriate matters of record, GRANTS Plaintiffs' Motion.

Upon a review of the entire record, the Court holds there are no genuine issues as to any material fact and Plaintiffs are entitled to partial summary judgment against Cincinnati as a matter of law on the issue of liability under Count I of the Second Amended Complaint. To that end, the Court sets forth its primary reasoning herein.

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[1] The parent companies of these restaurants, and the entities bringing this lawsuit, are Vin Rouge, Inc. d/b/a Vin Rouge; Calamari Enterprises, Inc. d/b/a Parizade; Mateo Tapas, L.L.C. d/b/a Mateo Bar de Tapas; Kipos Rose Garden Club LLC d/b/a Rosewater; Mothers & Sons, LLC d/b/a Mothers & Sons Trattoria; Saint James Shellfish LLC d/b/a Saint James Seafood; North State Deli, LLC d/b/a Lucky's Delicatessen; Bin 54, LLC d/b/a Bin 54; Arya, Inc. d/b/a City Kitchen and Village Burger; Grasshopper LLC d/b/a Nasher Cafe; Verde Cafe Incorporated d/b/a Local 22; Floga, Inc. d/b/a Kipos Greek Taverna; Kuzina, LLC d/b/a Golden Fleece; and Gira Sole, Inc. d/b/a Farm Table and Gatehouse Tavern (collectively, "Plaintiffs").

[2] The operative pleading to which this Order applies is the Second Amended Complaint.

I. BACKGROUND[3]

Plaintiffs, which operate sixteen restaurants in the North Carolina counties of Durham, Wake, Orange, Chatham, and Buncombe, purchased "all risk" property insurance policies ("Policies") from Cincinnati to cover their restaurants. All risk policies cover all risks of loss unless those risks are expressly excluded or limited. Plaintiffs' Policies were effective during all relevant time periods and contain the same relevant language.

The Policies include a Building and Personal Property Coverage Form and a Business Income (and Extra Expense) Coverage Form. These forms provide that Cincinnati will pay for business interruption coverage as follows:

> (1) **Business Income**
> We will pay for the actual loss of "Business Income" and "Rental Value" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct "loss" to property at a "premises" caused by or resulting from any Covered Cause of Loss.
>
> . . .
>
> (2) **Extra Expense**
> We will pay Extra Expense you sustain during the "period of restoration". Extra Expense means necessary expenses you sustain . . . during the "period of restoration" that you would not have sustained if there had been no direct "loss" to property caused by or resulting from a Covered Cause of Loss.

Under the Policies, "Covered Cause of Loss" means "direct 'loss' unless the 'loss' is excluded or limited" therein. The Policies define "loss" to mean "accidental physical loss or accidental physical damage." Therefore, absent an exclusion or limitation, the Policies provide

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[3] The Court has not resolved any disputed issues of fact, as findings of fact are unnecessary for adjudicating Plaintiffs' Motion for Partial Summary Judgment. Rather, the Court offers an overview of key undisputed facts underlying the ultimate disposition.

coverage under these provisions where the policyholder shows (i) direct "accidental physical loss" to property, ***or*** (ii) direct "accidental physical damage" to property. The Policies do not define "direct," "accidental," "physical loss," or "physical damage."

Plaintiffs seek coverage under the Policies for losses arising out of the response to the SARS-CoV-2 ("COVID-19") pandemic. Beginning in March 2020, governmental authorities across North Carolina entered civil authority orders mandating the suspension of business operations at various establishments, including Plaintiffs' restaurants (hereafter, "Government Orders"). The orders also prohibited, via stay-at-home mandates and travel restrictions, all non-essential movement by all residents.

On August 3, 2020, Plaintiffs filed their Motion for Partial Summary Judgment ("Motion"), seeking a declaratory judgment against Cincinnati under Count I that the Government Orders constitute covered perils under the Policies that caused "direct 'loss' to property" at the described premises, and that therefore Cincinnati must pay for the resulting lost Business Income and Extra Expenses as defined by the Policies. Plaintiffs' primary contention is that the Government Orders forced Plaintiffs to lose the physical use of and access to their restaurant property and premises, which constitutes a non-excluded "direct physical loss."

II. STANDARDS OF INTERPRETATION FOR INSURANCE POLICIES

The meaning of an insurance policy is a question of law, *Accardi v. Hartford Underwriters Ins. Co.*, 373 N.C. 292, 295, 838 S.E.2d 454, 456 (2020), and it is black-letter law that an undefined policy term is to be given its "ordinary meaning"; in doing so, North Carolina courts have determined that it is "appropriate to consult a standard dictionary." *Allstate Ins. Co. v. Chatterton*, 135 N.C. App. 92, 94-95, 518 S.E.2d 814, 817 (N.C. Ct. App. 1999). If the term is nevertheless "reasonably susceptible to more than one interpretation," then it is ambiguous and

only then is the contract subject to judicial construction. *Id.*; *see also Joyner v. Nationwide Ins.*, 46 N.C. App. 807, 809, 266 S.E.2d 30, 31 (1980) ("[I]n deciding whether the language is plain or ambiguous, the test is what a reasonable person in the position of the insured would have understood it to mean, and not what the insurer intended."). "[A]ny ambiguity or uncertainty as to the words used in the policy should be construed against the insurance company and in favor of the policyholder or beneficiary." *Accardi*, 373 N.C. at 295, 838 S.E.2d at 456.

III. DISCUSSION

As an initial matter, the Policies do not define the terms "direct," "physical loss," or "physical damage."[4] The Court must therefore turn first to the ordinary meaning of those terms. Merriam-Webster defines "direct," when used as an adjective, as "characterized by close logical, causal, or consequential relationship," as "stemming immediately from a source," or as "proceeding from one point to another in time or space without deviation or interruption." *Direct*, Merriam-Webster (Online ed. 2020). Merriam-Webster defines "physical" as relating to "material things" that are "perceptible especially through the senses." *Physical*, Merriam-Webster (Online ed. 2020). The term is also defined in a way that is tied to the body: "of or relating to the body." *Id.* Webster's Third New International Dictionary defines physical as "of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary." *Physical*, Webster's Third New International Dictionary (2020). The definition from Black's Law Dictionary comports: "Of, relating to, or involving material things; pertaining to real, tangible objects." *Physical*, Black's Law Dictionary (11th ed. 2019). Finally, "loss" is 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." *Loss*, Merriam-Webster (Online ed.

[4] Cincinnati does not contest whether Plaintiffs' losses were "accidental."

2020). Another dictionary defines the term as "the state of being deprived of or of being without something that one has had." *Loss*, Random House Unabridged Dictionary (Online ed. 2020).

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

The parties sharply dispute the meaning of the phrase "direct physical loss." Cincinnati argues that "the policies do not provide coverage for pure economic harm in the absence of direct physical loss to property, which requires some form of physical alteration to property." Even if Cincinnati's proffered ordinary meaning is reasonable, the ordinary meaning set forth above is also reasonable, rendering the Policies at least ambiguous. Accordingly, in giving the ambiguous terms the reasonable definition which favors coverage, the phrase "direct physical loss" includes the loss of use or access to covered property even where that property has not been structurally altered. *See Accardi*, 373 N.C. at 295, 838 S.E.2d at 456 ("[A]ny ambiguity or uncertainty as to the words used in the policy should be construed against the insurance company and in favor of the policyholder or beneficiary.").

Moreover, it is well-accepted that "[t]he various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect." *See C. D. Spangler Constr. Co. v. Industrial Crankshaft & Engineering Co.*, 326 N.C. 133, 142, 388 S.E.2d 557, 563 (1990). Here, the Policies provide coverage for "accidental physical loss ***or*** accidental physical damage." Cincinnati's argument that the Policies require physical alteration conflates "physical loss" and "physical damage." The use of the conjunction "or" means—at the very least—that a reasonable insured could understand the terms "physical loss" and "physical damage" to have distinct and separate meanings. The term "physical damage" reasonably requires alteration to property. *See Damage*, Merriam-Webster (Online ed. 2020) ("loss or harm resulting from injury to person, property, or reputation"). Under Cincinnati's argument, however, if "physical loss" also requires structural alteration to property, then the term "physical damage" would be rendered meaningless. But the Court must give meaning to both terms.

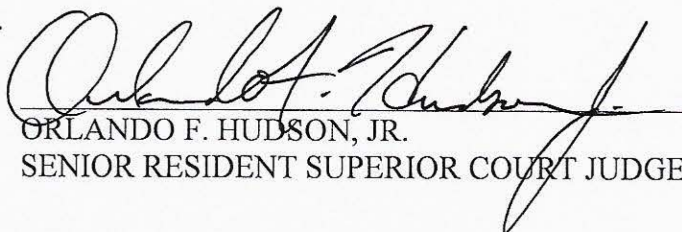
Finally, nothing in the Policies excludes coverage for Plaintiffs' losses. Notably, it is undisputed that the Policies do not exclude virus-related causes of loss. Cincinnati instead contends that three other exclusions apply: the "Ordinance or Law" exclusion, the "Acts or Decisions" exclusion, and the "Delay or Loss of Use" exclusion. Upon a review of the entire record, the Court concludes that these exclusions, based on their terms and the undisputed facts, do not apply to Plaintiffs' losses as a matter of law.

For these primary reasons, the Court concludes that the Policies provide coverage for Business Income and Extra Expenses for Plaintiffs' loss of use and access to covered property mandated by the Government Orders as a matter of law.

IV. CONCLUSION

Accordingly, Plaintiffs' Motion for Partial Summary Judgment is GRANTED. This Court certifies, pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, that this Order represents a final judgment as to Count I of the Second Amended Complaint and is immediately appealable as there is no just reason for delay of any such appeal. **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS**: That partial summary judgment is hereby granted in favor of Plaintiffs and against Cincinnati, jointly and severally, on Count I (Declaratory Judgment).

This the 7th day of October, 2020.



ORLANDO F. HUDSON, JR.
SENIOR RESIDENT SUPERIOR COURT JUDGE

CERTIFICATE OF SERVICE

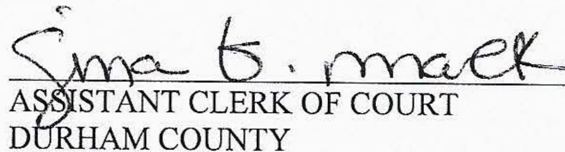
This is to certify that the undersigned has this day served the foregoing Order in the above captioned action on all parties by depositing a copy hereof in a postpaid wrapper in a post office depository under the exclusive care and custody of the United Postal Service, addressed as follows:

STUART M. PAYNTER
GAGAN GUPTA
106 S. Churton Street, Suite 200
Hillsborough, NC 27278
Counsel for Plaintiffs

ANDREW A. VANORE III
Post Office Box 1729
Raleigh, NC 27602-1729
Counsel for Defendant, The Cincinnati Insurance Company

KENDRA STARK
JUSTIN M. PULEO
421 Fayetteville Street, Suite 330
Raleigh, NC 27601
Counsel for Defendant Morris Insurance Agency, Inc.

This the 9th day of October, 2020.



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ADDENDUM

Great Am. Ins. Co. v. Mesh Cafe, Inc., No. COA02-840, 2003 N.C. App. LEXIS 1095 (N.C. Ct. App. June 3, 2003)……………1

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Great Am. Ins. Co. v. Mesh Cafe, Inc.

Court of Appeals of North Carolina

June 3, 2003, Filed

NO. COA02-840

Reporter
2003 N.C. App. LEXIS 1095 *

GREAT AMERICAN INSURANCE COMPANY, Plaintiff-Appellant, v. MESH CAFE, INC., Defendant-Appellee.

Notice: **[*1]** PURSUANT TO RULE 32(b), NORTH CAROLINA RULES OF APPELLATE PROCEDURE, THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE TWENTY-ONE DAY REHEARING PERIOD.
[*1] THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Reported at Great Am. Ins. v. Mesh Cafe, 580 S.E.2d 431, 2003 N.C. App. LEXIS 1136 (N.C. Ct. App., 2003)

Prior History: Pitt County. No. 01 CVS 3130.

Disposition: Affirmed.

Core Terms

physical loss, water supply, stations, losses, declaratory judgment, trial court, interruption, reasonably susceptible, described premises, reasonable person, insurance policy, electric power, constructions, electricity, restaurant, coverage, flooding, insured, business interruption, disputed provision, type of property, policy language, conjunction, substation, Hurricane, ambiguous, modified, Appeals, damages

Counsel: Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Phillip J. Anthony, G. Lawrence Reeves, Jr., and Daniel M. Gaylord for plaintiff-appellant.

Owens, Rouse & Nelson, P.L.L.C., by Jonathan E. Jones for defendant-appellee.

Judges: WYNN, Judge. Judges TYSON and STEELMAN concur.

Opinion by: WYNN

Opinion

Appeal by plaintiff from judgment entered 29 January 2002 by Judge Thomas Haigwood, Superior Court, Pitt County. Heard in the Court of Appeals 22 April 2003.

WYNN, Judge.

Following a declaratory judgment that an insurance policy issued by Great American Insurance Company provided business interruption coverage for Mesh Cafe, Inc.'s income losses incurred as a result of a loss of electricity due to hurricane flooding, Great American appeals. We affirm the trial court's judgment.

[*2] In April 1999, Mesh Cafe obtained commercial insurance from Great American for its restaurant in Greenville, North Carolina. In September 1999, Hurricane Floyd caused flooding in the Greenville area resulting in the loss of electrical power and water supply to Mesh Cafe for approximately 24 hours. As a result, Mesh Cafe filed an insurance claim for alleged loss due to an interruption of its business operations. When Great American denied Mesh Cafe's claim, the parties sought a declaratory judgment to interpret the following disputed provision of the policy (emphasis added):

When indicated in the Declarations that this Coverage applies, we will pay for loss of Business Income or Extra Expense, caused by the interruption of service to the described premises. *The interruption must result from direct physical loss or damage by a Covered Cause of Loss* to the property described below, if the property is located outside of a covered building described in the Declarations:

(1) Water Supply Services, meaning the following types of property supplying water to the described premises:

(a) pumping stations; and

(b) water mains.

…

(3) Power Supply Services, meaning the following **[*3]** types of property supplying electricity, steam or gas to the described premises:

(a) utility generating plants;

(b) switching stations;

(c) substations;

(d) transformers;

(e) transmission lines.

At the declaratory judgment hearing, Great American contended "direct physical loss or damage" excluded losses and damages caused by flooding. On the other hand, Mesh Cafe argued the phrase "Covered Cause of Loss" modified "damages" only and that a "direct physical loss" regardless of the cause was covered. The trial court concluded:

Mesh Cafe, Inc. suffered loss of business income based upon interruption of water and power supply based upon direct physical loss to the water supply stations and electric power supply stations providing power to Mesh Cafe, Inc.'s restaurant business, and therefore Mesh Cafe, Inc. had coverage under its policy with Great American for its losses."

On appeal by Great American from that declaratory judgment, "our function is to determine whether the record contains competent evidence to support the findings; and whether the findings support the conclusions." *Nationwide Mut. Ins. Co. v. Allison*, 51 N.C. App. 654, 657, 277 S.E.2d 473, 475 (1981). **[*4]** In this case, the trial court found Mesh Cafe lost electric power for 24 hours due to the utilities commission shutting down its main substation; lost water supply for a period of time; was forced to close its restaurant; and suffered business interruption losses and losses due to food spoilage. Moreover, the court took judicial notice that there was direct physical loss to the water supply station and electric supply station. Great American does not challenge these findings of fact on appeal; accordingly, we address the trial court's conclusions of law.

"The interpretation of language used in an insurance policy is a question of law, governed by well-established rules of construction. If an insurance policy is not ambiguous, then the court must enforce the policy as written and may not remake the policy under the guise of interpreting an ambiguous provision. Moreover, a contract of insurance should be given that construction which a reasonable person in the position of the insured would have understood it to mean and, if the language used in the policy is reasonably susceptible of different constructions, it must be given the construction most favorable to the insured, since the **[*5]** company prepared the policy and chose the language.", *Barnes v. Erie Ins. Exch.*, 156 N.C. App. 270, 576 S.E.2d 681, 684-85 (2003).

In this case, the trial court construed the conjunction "or" under the disputed provision to indicate that "direct physical loss" must be read as an alternative to "damage by a Covered Cause of Loss" and that "under a plain reading of the policy language, there is not punctuation or language indicating that Covered Cause of Loss has a connection to "direct physical loss" in that section of the policy." In essence, the trial court found that the policy language is reasonably susceptible to different constructions; we agree. Whereas a reasonable person could understand the language "by a Covered Cause of Loss" to be a prepositional phrase modifying "direct physical loss or damage," another reasonable person could understand "direct physical loss" to be an alternative to "damage by a Covered Cause of Loss" because of the conjunction "or." Therefore, the language used in the policy is reasonably susceptible of different constructions; accordingly, it must be given the construction most favorable to the insured, since the company prepared **[*6]** the policy and chose the language. *See Barnes*, ______ N.C. App. at ______, 576 S.E.2d at 684-85.

Affirmed.

Judges TYSON and STEELMAN concur.

Report per Rule 30(e).

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