IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION

UNIVERSITY MANAGEMENT, INC., COLUMBUS DELI, INC., GRILL TUPELO, LLC, AND BBC, LLC, PLAINTIFFS

v. Case No. 1:20-CV-138

STATE AUTO PROPERTY AND CASUALTY INSURANCE CO., DEFENDANT

STATE AUTO PROPERTY AND CASUALTY INSURANCE CO.'S RESPONSE MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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STATE AUTO PROPERTY AND CASUALTY INSURANCE CO.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendant, State Auto Property and Casualty Insurance Co. ("State Auto Property"), pursuant to Fed. R. Civ. P. 56, submits the following Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment.

I. INTRODUCTION AND SUMMARY

State Auto Property's Food-Borne Illness Endorsement ("FBIE") provides business interruption coverage when an alleged poisoning or infectious disease at a defined "described premises" is so pervasive within that defined "described premises" that it results in a government order forcing suspended operations at that particular "described premises." In this case, it is undisputed that there were no such allegations of a poisoning or infectious disease discovered at any one of the 15 separately insured "described premises." It is similarly undisputed that not one of the local, state, or national COVID-19 safety orders was issued as a result of any alleged poisoning or disease within any one of the various insured "described premises."

Nevertheless, the Plaintiffs in this case, 15 different restaurants each named as an independent "described premises" in the State Auto Property policy, argue that they are entitled to coverage under the FBIE. These 15 different restaurants argue with one voice that government orders across Mississippi were issued as a result of alleged infectious disease not only inside each of the 15 described premises, but at every single restaurant in the state. Courts in Texas, Pennsylvania, Wisconsin, Ohio and Tennessee have considered, and rejected, business interruption claims under the same or similar coverage provisions in precisely these circumstances, for reasons that also apply here, as discussed below.

First, Plaintiffs' arguments are incompatible with the clear and unambiguous terms of the FBIE itself. Those terms require a causal link between alleged infectious disease pervading a

"described premises" and a subsequent government order specifically responding to that allegation. This causal link is established by the requirement that the government order must be "resulting from" the poisoning or disease "at the described premises." Furthermore, the phrase "at the described premises," used three times in the FBIE and multiple times elsewhere in the Policy, refers to the discrete risk of losses emanating from within those building addresses identified in the Policy's declarations page. Plaintiffs' interpretation of the FBIE would see the policy stretched beyond recognition to insure the repercussions of government safety regulations on the state, national or world-wide level, any time an insured business felt the impact of such a regulation, regardless of whether the insured property was the cause of the regulation. This is contrary to common sense and the plain meaning of the policy provisions as a whole.

Plaintiffs seek to distract this Court from the plain meaning of the policy terms and the reading of the policy as a whole, as required by Mississippi law. To fuel this endeavor, Plaintiffs paid for "expert witnesses" to provide their own legal interpretation of the FBIE as something that insures the business repercussions of any government health or safety regulations, without any causative connection to any alleged conditions at the "described premises" insured by the policy. Of course, hiring witnesses to create their own "plain meaning of the policy" is contrary to the very notion of the "plain meaning" rule, which bestows full confidence on this Court to make contract interpretation rulings. In fact, one of the Plaintiff's "interpretation experts" had his opinion stricken in the Southern District of Mississippi for invading the province of the court.[1] As discussed at pages 7-10 *infra*, courts in Texas, Pennsylvania, Wisconsin, Ohio and Tennessee have all ruled on provisions identical or similar to the FBIE, without paid expert guidance, and found

[1] *See Russ v. Safeco Ins. Co. of Am.*, 2013 WL 1310501 (S.D. Miss. Mar. 26, 2013), striking opinions of Plaintiffs' expert in this case, Van Hedges.

that COVID-19 safety ordinances do not create a covered claim because they did not result from any specific loss or conditions at the premises insured in those cases.

While the COVID-19 pandemic has absolutely been devastating to businesses and communities across the globe, Plaintiffs' arguments cannot take the insurance for the targeted risk of conditions within defined address locations, and turn this into a funding mechanism for societal safety restrictions.

Because there is no coverage under the FBIE, Plaintiffs' prayer for judgment on their bad faith claim also fails. It is factually undisputed that no Plaintiff reported to State Auto Property any government order that was even alleged to be the result of poisoning or infectious disease at any one—let alone at every one—of the 15 "described premises." Common sense and common knowledge dictates that no amount of investigation, re-reading of government orders, or pouring over the nuances of the insurance policy would unearth facts that were not even alleged as part of the claim or unearth law that would stretch the policy into something it is not. For those reasons, explained in further detail below and in State Auto Property's own motion for summary judgment, Plaintiffs' motion should be denied.

II. MATERIAL FACTS

The material facts which compel denial of Plaintiffs' motion for summary judgment are largely set forth in State Auto Property's memorandum in support of its own motion. (Doc. 52 at pp. 11-14). To the extent they are not, or are, but warrant particular emphasis in opposing Plaintiffs' motion, they are concisely stated below and throughout State Auto Property's memorandum in opposition to Plaintiffs' motion.

A. The Commercial Property Insurance Policy and Food-Borne Illness Endorsement

State Auto Property issued a commercial property insurance policy to Plaintiffs effective from January 1, 2020 to January 1, 2021 ("the Policy"). The Policy insured various "described

premises" against risks of direct physical loss or damage subject to certain terms, conditions, limitations, and exclusions. (Doc. 53-2 at SA186-187). The "described premises" insured under the Policy are each defined separately by their respective addresses in Columbus, Starkville, Tupelo, Corinth, Hattiesburg, and Olive Branch, Mississippi. (Id. at SA020-046).

Plaintiffs seek summary judgment under the Policy's Food-Borne Illness Endorsement which states, in pertinent part, as follows:

> Additional Coverages **f.** Business Income and **g.** Extra Expense is amended to include coverage for the following Causes of Loss:
>
> **1.** The "suspension" of your "operations" **at the described premises** due to the order of a civil authority; or adverse public communications or media reports, **resulting from** the actual or alleged:
>
> **a.** Food or drink poisoning of a guest **at the described premises**; or
>
> **b.** Exposure **of the described premises** to a contagious or infections disease.
>
> **2.** The "period of restoration" for this Cause of Loss shall not exceed 30 consecutive calendar days from the date of the suspension of your "operations."

(Id. at SA245)(Emphasis added).

B. Plaintiffs' Claim for Temporary Loss of Use due to Compliance with Government Orders

Plaintiffs' Amended Complaint alleges restaurants were impacted by two government orders in particular: (1) Executive Order No. 1463, dated March 24, 2020, issued by Tate Reeves, Governor of Mississippi, Doc. 53-3 at ¶ 30; Doc. 53-7; and (2) Executive Order No. 1466, issued by Governor Reeves on April 1, 2020, Doc. 53-3 at ¶ 31; Doc. 53-8. Both orders restricted dine-in operations at eateries *throughout Mississippi* and are the sole reason Plaintiffs ceased dine-in operations at their restaurants. (Doc. 53-9, Fort Dep. 42:14-19, 45:24 – 46:3)[2] While Plaintiffs did

[2] Despite Plaintiffs' Amended Complaint referring only to the Governor's Executive Orders No. 1463 and No. 1466, Plaintiffs attach as Exhibit F to the motion for summary judgment a smattering of news articles from around the State of Mississippi alluding to or paraphrasing the Governor's

not offer dine-in service to their customers while the orders were in effect they did, contrary to the assertion in their memorandum in support of their motion for summary judgment (Doc. 54 at p. 4), offer take-out as well as carry-out or curb-side pickup:

> Q. In compliance with those executive orders, did any of the insured locations shut down completely?
>
> A. No. We were still able to offer takeout, carryout to go, those type of meals.

(Fort Dep. 46:17-21).

Significantly, for purposes of the FBIE, Plaintiffs are not aware of any *actual* exposure of any of their restaurants to the coronavirus or COVID-19:

> Q. My question for you is whether Plaintiffs are aware of any instances of actual exposure of any of the insured premises to the coronavirus?
>
> A. We are not aware of any.

(Fort Dep. 76:6-9).

Asked whether Plaintiffs are aware of any *alleged* exposure of any of their restaurants to the coronavirus or COVID-19, Plaintiffs' corporate representative could only reference the Governor's orders described above:

> Q. Are Plaintiffs aware of any allegations of exposure of any of the insured premises to the coronavirus or COVID-19?

Orders and in some instances describing measures implemented by specific counties – none of which deviate from the Governor's Orders in any material way for purposes of Plaintiffs' motion. Indeed, Plaintiffs themselves limit their discussion of Exhibit F to a single footnote devoid of any explanation as to how or why those news clippings bear on the outcome of Plaintiffs' motion. (Doc. 54 at 3-4) Given that these articles are inadmissible hearsay and otherwise are irrelevant given that the Governor's Orders speak for themselves, the news articles attached as Exhibit F should be disregarded and stricken by this Court pursuant to Fed. R. Civ P. 56(c)(2). *See Cano v. Bexar Cty., Tex.*, 280 Fed.Appx. 404, 406 (5th Cir. 2008)("Newspaper articles . . . are hearsay and therefore do not constitute summary judgment evidence."); *Roberts v. City of Shreveport*, 397 F.3d 287, 295 (5th Cir. 2005) (Finding that newspaper articles are "classic, inadmissible hearsay.").

A. Other than the governor's orders and, you know, the government of Mississippi and other locations and their preparations of their orders. I'm sure they were aware of COVID.

Q. Do you have anything to add or is that your complete answer?

A. That is my complete answer.

(Fort Dep. 77:1-11).

III. LEGAL STANDARDS

A. Summary Judgment

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party moving for summary judgment bears the initial responsibility of informing the Court of the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The burden then shifts to the nonmovant to "go beyond the pleadings and by ... affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324*; Littlefield v. Forney Indep. Sch Dist.*, 268 F.3d 275, 282 (5th Cir. 2001); *Willis v. Roche Biomedical Labs., Inc.*, 61 F.3d 313, 315 (5th Cir. 1995). "Unsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient" to support or defeat a motion for summary judgment. *Brown v. City of Houston, Tex.*, 337 F. 3d 539, 541 (5th Cir. 2003). Further, self-serving "affidavits or deposition testimony setting forth ultimate or conclusory facts and conclusions of law are insufficient to defeat a motion for summary judgment." *Clark v. America's Favorite Chicken Co.*, 110 F.3d 295, 297 (5th Cir. 1997).

B. Insurance Policy Interpretation

Under Mississippi law, an insured has the burden of proving a right to recover under an insurance policy. *Broussard v. State Farm Fire & Cas. Co.*, 523 F.3d 618, 625 (5th Cir. 2008). "[A]n insurance policy is a contract subject to the general rules of contract interpretation." *ACS*

Const. Co., Inc. of Mississippi v. CGU, 332 F.3d 885, 888 (5th Cir. 2003). It is well settled that "the object of contract interpretation is to ascertain the common intent of the parties." *Id.* "To do so, [the court] must construe the policy as a whole and review the language of the policy giving 'operative effect to every provision in order to reach a reasonable overall result.'" *Id.* (quoting *J&W Food Corp. v. State Farm Mut. Auto. Ins. Co.*, 723 So. 2d 550, 552 (Miss. 1998)).

In Mississippi "the insurance contract determines the rights of the parties unless the contractual provisions are contrary to public policy." *Gladney v. Paul Revere Life Ins. Co*., 895 F.2d 238, 241 (5th Cir. 1990) (citing *Cauthen v. National Bankers Life Ins*. Co., 88 So.2d 103, 104 (Miss. 1956)). Where an insurance contract is plain and unambiguous, it may not be rewritten by the court. *Cleveland Sch. Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2005 WL 2406087, at *3 (N.D. Miss. Sept. 27, 2005).

IV. ARGUMENT

A. There Is No Coverage Under The FBIE Because The Government Orders Did Not Result From Actual Or Alleged Poisoning or Exposure Of a Described Premises To An Infectious Disease.

The Policy includes an endorsement that provides business income coverage when an insured's operations are suspended by order of civil authority issued in response to actual or alleged poisoning or exposure of a described premises to a contagious or infectious disease. (Doc. 53-2 at SA245; Doc. 53-3 at ¶¶ 27, 35). Plaintiffs are not entitled to summary judgment with respect to the FBIE because the government orders, on their face, were not issued in response to any alleged poisoning or infectious disease at the insured premises. Instead, the orders were issued to prevent the gathering of people in certain spaces, and applied to all businesses in the state. These orders would have been issued and applied in Mississippi regardless of whether the insured premises even existed or not.

1. Recent Case Law Interpreting The FBIE Dictates That The FBIE Does Not Apply Where the Civil Order Was Not The Result Of Conditions Within the Insured Premises.

Multiple courts have applied the same rules of contract construction as exist in Mississippi, and held the FBIE or substantially similar policy provisions do not afford coverage for business income losses for COVID-19 orders that were not the result of any allegedly discovered conditions within any insured location. *See Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, --- F. Supp. 3d ---, 2021 WL 972878 (W.D. Tex. Jan. 21, 2021) (holding that a nearly identical coverage provision did not apply where the civil authority order was not issued *as a result of* actual or alleged exposure of the premises to a contagious or infectious disease but rather "were issued in response to the global pandemic"); *Isaac's Deli, Inc. v. State Auto Prop. & Cas. Ins. Co.*, 2021 WL 1945713 (E.D. Pa. May 14, 2021) (no coverage under Foodborne Illness provision because civil orders did not result from any alleged infectious disease at insured's premises); *Nashville Underground, LLC v. AMCO Ins. Co.*, 2021 WL 826754, at *10 (M.D. Tenn. Mar. 4, 2021) (no coverage where "[p]laintiff does not allege that it was the target of a specific closure order (or indeed any order) of any kind… [and where] the Amended Complaint fails to allege coverage under the Food Contamination Endorsement based on anything related specifically to the happenings at Plaintiff's own location…"); *Paradigm Care & Enrichment Center LLC v. West Bend Mut. Ins. Co.*, --- F. Supp. 3d ---, 2021 WL 1169565, at *8 (E.D. Wis. Mar. 26, 2021) (insured failed to allege coverage under similar provision, despite the insured alleging that an enrollee of its childcare center at the premises tested positive for COVID-19 shortly after closure, because the government orders that caused the business to shut down were "in response to the impact of COVID-19 on both a local and statewide basis" and not "in direct response to damage" at any particular property); *Green Beginnings, LLC v. West Bend Ins. Co.*, 2021 WL 2210116, at *7 (E.D. Wis. May 28, 2021) (holding that communicable disease coverage for suspension of operations

due to an outbreak "at the insured premises" "clearly require[d] that the plaintiff plead more than just that there was an outbreak in the region generally."); *Dakota Girls, LLC v. Philadelphia Indem. Ins. Co.*, 2021 WL 858489 (S.D. Ohio Mar. 8, 2021) (no coverage under similar endorsement because, when read as a whole, the policy provisions "contemplate an outbreak of communicable disease *on the insured's premises*, not an outbreak affecting the public at large") (emphasis added).

The *Terry Black's* court, which analyzed similar claims under a nearly identical policy provision, found that government orders imposing COVID-19 business restrictions across a state did not "result[] from" conditions "at the described premises." 2021 WL 972878, at *9. In order to give the phrase "resulting from" meaning, the court could not find that state-wide government orders imposing COVID-19 health restrictions "result from" specific allegations of infectious disease "at [a] described premises." *Id.*

Another federal district court reached a similar conclusion in *Paradigm Care & Enrichment Center, LLC v. West Bend Mutual Ins. Co.*, --- F. Supp. 3d ---, 2021 WL 1169565 (E.D. Wis. Mar. 26, 2021), where the insured sought coverage under a communicable disease provision that applied when a government authority shuts down the covered premises "due to" an outbreak of a communicable disease at the premises. *Id.* at *9. The Court held that the insured failed to allege coverage under that provision, despite the insured alleging that an enrollee of its childcare center at the premises tested positive for COVID-19 shortly after closure, because the government orders that caused the business to shut down were "in response to the impact of COVID-19 on both a local and statewide basis" and not "in direct response to a COVID-19 outbreak at" the insured's premises. *Id.*

Terry Black's and *Paradigm Care* were most recently followed by the federal district court for the Eastern District of Pennsylvania in *Isaac's Deli*, which considered the same endorsement

at issue in this case. Like those before it, the court acknowledged that the phrase "resulting from" "suggests a requirement of proximate causation." 2021 WL 1945713, at *6. Far from "resulting from" alleged exposure of the insured's premises to the coronavirus, the court noted that the Governor of Pennsylvania's orders "would have issued regardless of whether Plaintiff's restaurants experienced" an outbreak of COVID-19. *Id.* This body of case law is rooted in each state's laws requiring that insurance policies be interpreted in accordance with the common sense meaning of their terms, including the causal link required by the phrase "resulting from" in the FBIE. *See, e.g., Terry Black's*, 2021 WL 972878, at *9 (citing *Nat'l Union Fire Ins. Co. v. Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 142 (Tex. 1997) for the proposition that the phrase "resulting from" requires a causal relationship).

Plaintiffs ignore the developing body of case law described above, and instead point to *Sylvester and Sylvester, Inc. v. State Auto. Mut. Ins. Co.*, 2021 WL 137006 (Stark Cty. Ct. of Common Pleas, Ohio Jan. 7, 2021) as the only authority in support of their reading that the FBIE does not require a causal link between the government order and conditions at the described premises. (Doc. 54 at p. 9). However, *Sylvester*, decided at the pleading stage, did not even consider the significance of the phrase "resulting from" in the FBIE– or explain how it interpreted that phrase or why. The court in *Sylvester* did not consider the phrase "at the described premises" or how the phrase is used throughout the policy as a whole. More importantly, the court did not have to consider whether the insured had admissible evidence sufficient to create a genuine issue of material fact as to whether the government order(s) which suspended its operations *resulted from* actual or alleged exposure of its premises to the coronavirus.

Unlike the *Sylvester* court, this court *does* have to consider the admissible evidence submitted by the parties in support of their respective positions. The record in this case is that there

is no evidence whatsoever of an allegation of poisoning or infectious disease exposure at any one of their restaurants, which then resulted in the government orders at issue.

As in *Terry Black's* and the other cases described above, the government orders that restricted Plaintiffs' dine-in operations had nothing to do with actual or alleged conditions at Plaintiffs' premises. Rather, the orders implemented broad emergency measures directed at entire industries and sectors of the economy and were designed to limit social interactions in order to curb the spread of the virus. Plaintiffs admit as much, *see* Doc. 54 at p. 4.

2. Reading The Policy As a Whole Dictates That The FBIE Applies Only To Civil Orders Resulting From Conditions Within The Insured Premises.

Mississippi's well-established principles of contract interpretation dictate the same result reached in *Terry Black's* and its progeny. "Court[s] should look at the policy as a whole, consider all relevant portions together and, whenever possible, give operative effect to every provision in order to reach a reasonable overall result." *J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co.*, 723 So. 2d 550, 552 (Miss. 1998). That result should reflect the object of contract interpretation, which is to ascertain and give effect to the common intent of the parties. *ACS Const. Co., Inc. of Mississippi v. CGU*, 332 F.3d 885, 888 (5th Cir. 2003) (It is well settled that "the object of contract interpretation is to ascertain the common intent of the parties."). Reading the State Auto Policy as a whole, as required under Mississippi law, it is clear that the FBIE does not apply to Plaintiffs' alleged losses.

a) The Phrases "Resulting From" and "Due To" in the FBIE Require a Causal Connection That Does Not Exist Here

Mississippi courts recognize that the phrases "due to" and "resulting from", as used in the FBIE, denote a causal connection. *See Anderson v. Nationwide Mut. Fire Ins. Co.*, 2007 WL 710144, at *4 (N.D. Miss. Mar. 6, 2007) (describing the phrase "due to" as synonymous with "caused by"). Mississippi would not be alone in that regard. *See, e.g., Burrage v. United States,*

134 S. Ct. 881, 887–88 (2014) ("Results from" imposes a "requirement of actual causality"); *Jo Ann Howard & Associates, P.C. v. Cassity*, 395 F. Supp. 3d 1022, 1184 (E.D. Mo. 2019) ("'resulting from' has been interpreted to require a causal connection that is 'reasonably apparent,' such that the 'loss must be a natural and reasonable incident or consequence' of the conduct"); *Blest Investments v. Ins. Co. of State of Pennsylvania*, 189 F.3d 468, 1999 WL 511563, at *4 (5th Cir. 1999) ("the phrase 'resulting from' connotes an even tighter causal nexus […] than does the phrase 'arising out of'"); *Crose v. Humana Ins. Co.*, 823 F.3d 344, 350 (5th Cir. 2016) (holding that the phrase "due to" requires a showing of proximate causation); *Cher-D, Inc. v. Great Am. Alliance Ins. Co.*, 2009 WL 943530, at *7 (E.D. Pa. Apr. 7, 2009) (collecting cases from other jurisdictions interpreting the phrase "resulting from" as requiring proximate causation). Mississippi law in this regard is consistent with *Terry Black's* and its progeny, which, as discussed above, attributed an identical causation requirement to the phrases "resulting from" and "due to."

In the context of the FBIE, that means Plaintiffs must demonstrate a causal connection between actual or alleged exposure of the described premises to an infectious disease and the civil authority order that restricted the insureds' dine-in operations. To dispense with the requirement of a causal connection between the government orders at issue and actual or alleged exposure of the described premises to the virus would ignore the established principles of contract interpretation in direct contravention of Mississippi law.

The government orders were not caused by any conditions, actual, alleged, or otherwise, at any of the "described premises." Indeed, these orders would have been issued even if Plaintiffs' restaurants did not exist at all, because the orders had nothing whatsoever to do with conditions emanating from "the described premises." *See Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, --- F. Supp. 3d ---, 2020 WL 7395153, at *6 (E.D. Pa. Dec. 17, 2020) ("The shutdown orders

and accompanying proclamations were in response to the COVID-19 health crisis, not damage to any property – the insureds' or another's"); *Selery Fulfillment, Inc. v. Colony Ins. Co.*, --- F.Supp.3d ---, 2021 WL 963742, at *8 (E.D. Tex. Mar. 15, 2021) (The civil authority orders "were not implemented in response to any property damage – but the threat of rising coronavirus cases across the country.") Plaintiffs have produced no evidence that any of the government orders that resulted from actual or alleged exposure of any of their restaurants to the coronavirus.

b) The Phrase "at the Described Premises" in the FBIE Ties The Insured Risk to Conditions at Discrete Physical Locations

There is no evidence of anything *alleged* to have occurred – whether exposure to the virus or otherwise – at any one of the described premises. When asked whether Plaintiffs were aware of any allegations of exposure to an infectious disease at any one of the insured restaurant locations, Plaintiffs' corporate representative could point to no such allegations:

> Q. Are Plaintiffs aware of any allegations of exposure of any of the insured premises to the coronavirus or COVID-19?
>
> A. Other than the governor's orders and, you know, the government of Mississippi and other locations and their preparations of their orders. I'm sure they were aware of COVID.
>
> Q. Do you have anything to add or is that your complete answer?
>
> A. That is my complete answer.

(Fort Dep. 77:1-11).

While the Governor was certainly aware of COVID-19 when he issued Executive Orders No. 1463 and 1466, the text of those orders lack any allegation whatsoever that *any* particular "described premises," Plaintiffs' or otherwise, had been exposed to COVID-19 and must suspend operations for that reason. To the contrary, those orders explicitly state they were motivated by a desire to *prevent* exposure of people and property to the virus and, to that end, took prophylactic measures to achieve that goal. (Doc. 51-05, Mississippi Executive Order No. 1463 ("the

Mississippi State Department of Health issued a COVID-19 Update recommending that *all restaurants* and bars suspend dine-in service in order *to help slow the spread of COVID-19*…"); Doc. 51-06, Mississippi Executive Order No. 1466 ("… to further disrupt and slow the spread of the COVID-19 virus within the State…*all individuals residing in the State of Mississippi* will need to temporarily remain in their home or place of residence …")).

The clear language of the FBIE indicates that coverage is triggered by alleged conditions within the "described premises" and not external to the premises. That is consistent with the intent of a commercial property insurance policy such as the one State Auto Property issued to Plaintiffs, which is to protect the insured from harm related to the changed or altered conditions within the described premises rather than risks "exogenous to the premises themselves". *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co.*, 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014).

The "described premises" is a term of art in the Policy. It refers to the specific restaurants and delis identified in the Policy's Businessowners Special Property Coverage Declarations by their physical addresses. (*See* Doc. 53-2 at SA020-046). That phrase, used three times in the FBIE, ties the risk of loss to the specific address of the insured, not to general locations throughout a state or country. For example, the Policy's Declaration pages show separate premiums added to the Policy for each "described premises," which identifies each associated building address and occupancy type. (Doc. 53-2 at SA20-046). Therefore the phrase "at the described premises" indicates the risks being insured are specific to those emanating from the premises identified in the Policy. (*Id.* at SA245).

The contractual requirement that the order of civil authority relate specifically to conditions "at the described premises" – as opposed to conditions in the community at large – is reinforced throughout the Policy where coverage is tethered to the specific "described premises." For

example, the Policy defines "Operations" as "your business activities occurring at the **described premises**." (Doc. 53-2 at SA207) (emphasis added). Similarly, the "Period of Restoration" is defined as commencing after the "direct physical loss or damage…**at the described premises**" and ending when "the property **at the described** premises should be repaired, rebuilt or replaced." (*Id*.) (emphasis added).

The phrase "described premises" not only identifies the specific premises that State Auto Property assumed the risk of insuring, it also limits State Auto Property's risk to conditions emanating *from* those premises. Where the intent of the Policy is to provide coverage that goes beyond the physical conditions *at* the described premises, it does so with clear and unmistakable language. For instance, when the Policy intends to cover risks emanating from property other than at a described premises, it explicitly states as much. The Policy's civil authority coverage, for instance, applies when a Covered Cause of Loss causes direct physical loss of or damage "to property, other than at the described premises…" (Doc. 53-2 at SA191) (emphasis added). The FBIE does not tie coverage to damage or exposure to a contagious or infectious disease at other property; rather it limits coverage to orders of civil authority, adverse public communications, and media reports resulting from actual or alleged exposure at the described premises.

When the FBIE is read in the context of the policy as a whole, which Mississippi law requires, *J&W Food Corp.*, 723 So. 2d at 552, it is clear that it applies to suspended business operations which are the result of a government order which responds to actual or alleged exposure at a described premises. There is nothing of the sort here and Plaintiffs' motion should, accordingly, be denied.

3. Plaintiffs' Interpretation of the FBIE Would Unreasonably Create Coverage for Health Regulations Arising From Infectious Disease *Anywhere in the Community*, Thereby Violating The Intent of the Policy As A Whole.

"[A]mbiguities do not exist simply because two parties disagree over the interpretation of a policy." *U.S. Fid. & Guar. Co. v. Martin*, 998 So. 2d 956, 963 (Miss. 2008). Courts may not strive to find ambiguities where there are none. *Titan Indem. Co. v. Estes*, 825 So. 2d 651, 656 (Miss. 2002) ("[A] court must refrain from altering or changing a policy where terms are unambiguous, despite resulting hardship on the insured."). "A construction leading to an absurd, harsh or unreasonable result in a contract should be avoided unless the terms are express and free of doubt." *Frazier v. N. Miss. Shopping Ctr., Inc.*, 458 So.2d 1051, 1054 (Miss.1984). Where an insurance contract is plain and unambiguous, it may not be rewritten by the court. *Cleveland Sch. Dist.*, 2005 WL 2406087, at *3.

The FBIE provides as follows:

> Additional Coverages **f.** Business Income and **g.** Extra Expense is amended to include coverage for the following Causes of Loss:
>
> **1.** The "suspension" of your "operations" at the described premises due to the order of a civil authority; or adverse public communications or media reports, resulting from the actual or alleged:
>
> a. Food or drink poisoning of a guest at the described premises; or
>
> b. Exposure of the described premises to a contagious or infections disease.
>
> 2. The "period of restoration" for this Cause of Loss shall not exceed 30 consecutive calendar days from the date of the suspension of your "operations."

(Doc. 53-2 at SA245)(Emphasis added).

Plaintiffs argue the FBIE is ambiguous because the semicolon after the phrase "civil authority" in the above-referenced provision means the FBIE can reasonably be cleaved in two, providing coverage for: (1) the suspension of your operations at the described premises due to the order of a civil authority, on the one hand; and (2) adverse public communications or media reports,

resulting from the actual or alleged exposure of the described premises to the coronavirus, on the other. (Doc. 54 at pp. 14-16). Plaintiffs cite no authority for the reasonableness of this interpretation. There is none.

The semicolon that separates the phrase "[t]he suspension of your operations at the described premises due to the order of a civil authority" from the language that comes after it does not "separate[] two related but independent clauses" which could function as complete sentences in their own right. (Doc. 54 at p. 15). It quite obviously separates items in a list, each of which is linked to the original phrase "[t]he suspension of your operations at the described premises due to" –a civil authority order, adverse public communication, or media reports – and which must result from food or drink poisoning of a guest or exposure of the described premises to a contagious or infectious disease. *See Monticello Ins. Co. v. Hale*, 114 F. App'x. 198, 203 (6th Cir. 2004) ("[I]tems separated by semicolons are items in a list, each of which is linked to the original phrase."); *Live Nation Worldwide, Inc. v. Secura Ins.*, 423 F. Supp. 3d 383, 390 (W.D. Ky. 2019); *Country Mut. Ins. Co. v. Lawson*, 2017 WL 1207411, at *3 (Ariz. Ct. App. Mar. 31, 2017) (rejecting argument that policy was ambiguous due to use of a semicolon and coordinating conjunction instead of a period).

Plaintiffs' interpretation, where the initial clause preceded by the semicolon – "[t]he 'suspension' of your 'operations' at the described premises due to the order of a civil authority" – functions as an independent grant of coverage from the language which follows it would vastly expand the scope of coverage State Auto Property intended to provide. The language following that semicolon, which Plaintiffs' interpretation would treat as its own coverage grant, meanwhile, would make as much sense as an incomplete sentence, i.e., none:

> or adverse public communications or media reports, resulting from the actual or alleged:

a. Food or drink poisoning of a guest at the described premises; or

b. Exposure of the described premises to a contagious or infections disease.

It is simply illogical and counterintuitive for Plaintiffs to interpret the FBIE as providing coverage for health and safety shut downs that are completely unrelated to any physical conditions at the described premises when: 1) the endorsement specifies three times that it is aimed at losses resulting from conditions at the described premises (Doc. 53-1); 2) the "period of restoration" is measured by the time it takes to replace the problematic conditions at the described premises; and 3) the "period of restoration" states that it is not intended to be impacted by ordinances or laws that simply regulate the generic use of property – irrespective of those alleged conditions at the property that have been repaired, replaced, or otherwise resolved. (Doc. 53-2 at SA207)[3]

The commonsense functioning of the FBIE is that it only applies to actual or alleged conditions within the insured premises that get so bad, that they then garner such negative attention from civil authorities or media that the policyholder is forced to suspend operations. This interpretation of the risk is logical and practical. By contrast, if coverage for suspension of an insured's operations is untethered to conditions at the premises, any negative news coverage of the restaurant industry can create a claim for commercial property coverage. This is entirely detached from the risk intended to be insured in a commercial property policy and which State Auto Property intended to assume when it issued this endorsement.

[3] Section 2 of the FBIE limits the "period of restoration" for purposes of the endorsement to 30 days from the date of suspension of operations (Doc. 53-1) but does not otherwise modify or replace the definition of "period of restoration" in the Businessowners Special Property Coverage Form. (Doc. 53-2 at SA207).

4. Plaintiffs' Proffered Expert Testimony Is Legally Improper, Factually Irrelevant, and Actually Supports State Auto Property's Arguments

Finally, Plaintiffs point to testimony from their retained insurance expert, Van E. Hedges, and insurance agent, Brandt Galloway, that the FBIE affords coverage for their claims. But that is precisely what witnesses may *not* do, i.e. testify to the proper interpretation of an insurance policy and whether such policy affords coverage under a given set of facts. Courts have held, time and again, that opinions regarding the interpretation and application of insurance policy provisions are inappropriate for expert testimony. *See, e.g., Amica Mut. Ins. Co. v. Moak*, 55 F.3d 1093, 1096 n.5 (5th Cir. 1995) (noting that "[t]he interpretation of a contract is a question of law of the court" and any reliance by the district court on expert testimony interpreting the language of the insurance policy in granting summary judgment was misplaced); *Willis v. Allstate Ins. Co.*, 2014 WL 4804396 (S.D. Miss. Sept. 26, 2014)("[T]he question of whether [an insurer] had an arguable basis for denying the [insured's] claim is an issue of law for the court[.]"). This is because, among other reasons, such opinions are not the proper subjects of expert testimony and will not assist the jury in understanding the evidence or determining a fact issue as required by Fed. R. Evid. 702, and do not satisfy the standard articulated by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny. *See* Fed. R. Evid. 702 ("A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if: . . . the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact issue[.]").

Plaintiffs retained Hedges "to review the State Auto all risk policy for an opinion as to whether it provides coverage for [Plaintiffs'] loss." (Doc. 54 at p. 9). Hedges duly obliged, opining that "coverage is clearly afforded to [Plaintiffs] for its lost income claim." (Doc. 54 at p. 10). Regarding the undefined term "alleged" that appears in the FBIE, Hedges opines – apparently

based on the definition of that term in *Merriam-Webster's* dictionary – that "there was clearly an 'alleged' exposure of the described premises to a contagious or infectious disease." (Id.). This testimony is impermissible because it invades the province of the court and jury to decide the law and apply it to the facts of a given case, respectively.

Hedges knows this, even if Plaintiffs do not, as he has been barred from offering opinions that seek to provide his own hired interpretation of insurance policy terms. *See Russ*, 2013 WL 1310501. While acknowledging that expert testimony is sometimes admissible where contract language is ambiguous or involves specialized terms of art, science or trade, the Court held Hedges' opinion inadmissible "because it interprets a straightforward policy provision, and offers a legal conclusion based on the Policy provision." *Id.* (the Court also held Mr. Hedges' opinion that Safeco had a reasonable basis for denying the insured's claim under a particular exclusion was inadmissible for the same reason); *see also Haymore v. Shelter Gen. Ins. Co.*, 2020 WL 1546571, at *2 (S.D. Miss. Mar. 30, 2020) ("[C]ontract interpretation is a question of law for the court."); *Williams v. State Farm Fire & Cas. Co.*, 2007 WL 533322, at *1 (S.D. Miss. Feb. 15, 2007) ("This Court agrees that independent expert testimony concerning the interpretation of policy provisions is not appropriate. The interpretation of policy provisions is an issue of law and is within the province of the Court, not the jury…expert testimony concerning the proper interpretation of policy provisions will be excluded.").[4]

[4] Mississippi is not alone in this regard. *See, e.g., Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 410 F. Supp. 2d 417 (W.D. Pa. 2006) (expert barred from testifying as to his opinion on the application of the insurance policy to plaintiffs loss); *Coregis Ins. Co. v. City of Harrisburg*, 2005 WL 2990694 (M.D. Pa. Nov. 8, 2005) (excluding expert's testimony that insured's general liability policies afforded coverage for defense of civil rights lawsuit); *Montoya Lopez v. Allstate Ins. Co.*, 282 F. Supp. 2d 1095 (D. Ariz. 2003) (excluding expert's opinions consisting primarily of legal conclusions regarding reasonableness of insurer's actions); *Brooks v. J.C. Penney Life Ins. Co.*, 231 F. Supp. 2d 1136 (N.D. Ala. 2002) (refusing to consider expert testimony as to whether policy exclusion was ambiguous); *Breezy Point Coop. v. CIGNA Prop. & Cas. Co.*, 868 F. Supp.

Plaintiffs also quote extensively from the deposition of Brandt Galloway, Plaintiffs' insurance agent. They particularly rely upon their agent's unsubstantiated "expert conclusion" that each of Plaintiffs' restaurants "were alleged to have been exposed to COVID." (Doc. 54 at p. 12). Plaintiffs fail to mention that Galloway, in essentially the next breath, admitted to having **no idea** whether the government orders restricting Plaintiffs' dine-in services resulted from alleged exposure of any of their restaurants to the coronavirus:

> Q. Do you think that the orders of civil authority suspending operations at the insureds' premises were issued as a result of alleged exposure of those premises to COVID?
>
> A. I can't answer that on behalf of civil authorities. I have no idea. I just know it happened.
>
> Q. What happened?
>
> A. Those operations were suspended.

(Galloway Dep. 99:8-16).

To be considered on summary judgment, evidence must be capable of being "presented in admissible form at trial." *Patel v. Texas Tech Univ.*, 941 F.3d 743, 746 (5th Cir. 2019). Galloway's testimony, like that of Hedges, is not permissible for trial. *Ruiz v. Whirlpool, Inc.*, 12 F.3d 510, 513 (5th Cir. 1994) ("Testimony based on conjecture or speculation is insufficient" at summary judgment); *Am. Contractors Indem. Co. v. Reflectech, Inc.*, 2020 WL 1190477, at *8 (S.D. Miss. Mar. 12, 2020).

33 (E.D.N.Y. 1994) (excluding expert testimony that insured's delay in notification violated terms of liability insurance policy).

B. Because There Is No Coverage For Plaintiffs' Insurance Claim, Plaintiffs Cannot Prevail On Their Bad Faith and Extracontractual Damages Claims Under Mississippi Law.

As stated in State Auto Property's own motion for summary judgment, Plaintiffs' causes of action for bad faith and extracontractual damages fail as a matter of law in the absence of any coverage obligation for Plaintiffs' loss. *See Mahli, LLC v. Admiral Ins. Co.*, 2015 WL 4915701, at *18 (S.D. Miss. Aug. 18, 2015) (finding there could be no bad-faith denial of an insurance claim in the absence of coverage); *Hans Const. Co., Inc. v. Phoenix Assur. Co. of NY*, 995 F.2d 53, 55-6 (5th Cir. 1993) (insured not entitled to extracontractual damages where there was an arguable basis for denying the claim). This general proposition has been applied in other jurisdictions in the context of COVID-19 insurance litigation. *Dukes Clothing, LLC v. The Cincinnati Ins. Co.*, 2021 WL 1791488, at *4 (N.D. Ala. May 5, 2021); *DZ Jewelry, LLC v. Certain Underwriters at Lloyds London*, 2021 WL 1232778, at *7 (S.D. Tex. Mar. 12, 2021); *Terry Black's Barbecue*, 2020 WL 7351246, at *6; *Whiskey River on Vintage, Inc.*¸ 2020 WL 7258575, at *16. Accordingly, in the absence of any coverage obligation, State Auto Property – not Plaintiffs - is entitled to summary judgment on Counts II and III of the First Amended Complaint.

But even if there were coverage for Plaintiffs' business income losses, their bad faith claims would fail on their merits. Plaintiffs complain that State Auto Property did not conduct an inspection of their restaurants, that their representative's recorded interview was not recorded – though they acknowledge this was due to a recording malfunction rather than any fault or negligence on State Auto Property's part – that the government orders at issue were not reviewed, and neither the orders nor the information obtained from Mr. Fort was compared to the policy provisions to determine whether there was coverage for Plaintiffs' claim.

There is no factual allegation that, at any time, the Plaintiffs reported to State Auto Property that they believed the Mississippi COVID-19 orders were issued in response to alleged infectious

disease at any insured location. It is simply irrational for any participant in this claim to have abandoned common sense to engage in a discussion or investigation of whether Mississippi instituted COVID-19 regulations as a result of certain allegations related to any of the 15 "described premises," when everyone involved knew that was not the case.

State Auto Property did not seek an inspection of the insured premises when the claim was reported because it was told by Mr. Fort that there was no damage. (Transcript of Sherri King Deposition, attached hereto as Exhibit A, at 47:8-10, hereinafter "King Dep.") Plaintiffs never say what purpose an inspection of their restaurants would have served, or what information it would have revealed that would be relevant to State Auto Property's coverage determination.

Ms. McElligott made the decision to deny coverage for Plaintiffs' claim. (King Dep. 50:7-13) That decision was based on her review of the Policy and the facts obtained from State Auto Property's investigation, including her review of the pertinent government orders restricting restaurants' dine-in operations in Mississippi and Ms. Stivers' notes from her interview of Mr. Fort. (King Dep. 48:22 – 49:3, 88:14 – 89:6; Doc. 53-13, McElligott Dep. 26:23 – 29:18) That coverage determination was approved by Ms. McElligott's supervisor. (King Dep. 50:7-13) Sherri King, State Auto Property's corporate representative and author of the June 3, 2020 letter reiterating State Auto Property's coverage determination also reviewed the government orders at issue prior to reaffirming that coverage determination. (King Dep. 72:9-16) Significantly, Plaintiffs never dispute the accuracy or completeness of Ms. Stivers' claim note summarizing the information provided by Mr. Fort in his recorded statement. Nor do they state what additional information would have been revealed by further investigation.

Moreover, Plaintiffs' argument that State Auto Property conducted an inappropriate and pre-determined investigation rests on its unreasonable interpretation of the FBIE described above,

which would result in coverage any time business operations were impacted by a government health regulation, regardless of any connection to the insured premises. (Doc. 54 at p. 18) The fact is that State Auto Property never had information demonstrating there was coverage for Plaintiffs' claims, under the FBIE or otherwise, and no amount of investigation would change that.

V. CONCLUSION

Commercial property policies insure specific physical property and premises. Commercial property policies do not insure the mere act of conducting business activities in the absence of some alleged changed conditions at the "described premises." Where the suspended operations at issue are unrelated to any allegations of loss emanating from the insured commercial premises, then a commercial property policy does not apply.

For the reasons set forth above, State Auto Property and Casualty Insurance Company requests that this Court deny Plaintiffs' motion and, instead, grant State Auto Property's motion for summary judgment, enter an order granting judgment as a matter of law in favor of State Auto Property and against Plaintiffs on all claims, and granting any other and further relief deemed just and appropriate.

Respectfully submitted, this the 1st day of July, 2021.

STATE AUTO PROPERTY AND
CASUALTY INSURANCE CO.

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CERTIFICATE OF SERVICE

I, Michael O. Gwin, do hereby certify that I have this date caused a true and correct copy of the above and foregoing document to be filed using the ECF filing system, which electronically forwarded a copy of the same to the following:

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