

IN THE SUPREME COURT OF IOWA

No. 23-0156

HEARTLAND CO-OP,
Plaintiff-Appellant,

v.

NATIONWIDE AGRIBUSINESS INSURANCE COMPANY,
Defendants-Appellee,

ON APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE JEFFREY D. BERT
Case No. LACL152428

DEFENDANT-APPELLEE'S FINAL BRIEF

Sean M. O'Brien AT0005874
BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE, P.C.
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-8004
Phone: (515) 246-5894
Fax: (515) 246-5808
E-Mail: obrien.sean@bradshawlaw.com
ATTORNEY FOR DEFENDANT-APPELLEE

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STATEMENT OF THE ISSUES

I. Whether the District Court correctly held that Nationwide's policy limits Heartland to a total of \$3,000,000 in earnings and extra expense coverage for loss at all covered locations as opposed to each covered location as a result of the derecho on August 10, 2020.

II. Whether the District Court correctly held the derecho caused one loss to Heartland's business under the policy's earnings and extra expense coverage.

ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals pursuant to Iowa R. App. P. 6.1101(3)(a) as it presents the application of existing legal principles.

STATEMENT OF THE CASE

This case involves an insurance coverage dispute arising from the August 10, 2020 derecho (the “Derecho”). Heartland Co-op (“Heartland”) seeks to recover loss of earnings and extra expense coverage under a policy issued by Nationwide Agribusiness Insurance Company (“Nationwide”) due to damage caused by the Derecho at a number of Heartland’s locations in Iowa. Heartland’s policy provides Nationwide will pay “no more than the Income Coverage ‘limit’ indicated in the ‘schedule of coverages’ for any one loss.” (D’s SMJ App. at 51; App. at 223). The phrase “any one loss” refers to the occurrence (or “happening”) of direct physical loss or damage as a result a covered peril that interrupts, wholly or partially, an insured’s business. The schedule of coverages for the Income Coverage lists a limit of \$3,000,000 for earnings and extra expense coverage that applies to “All ‘Covered Locations’.” (D’s SMJ App. at 58; App. at 230). This means the District Court correctly held Heartland has a total of \$3,000,000 in coverage for earnings and extra expense loss caused by the Derecho at all locations. (Ruling at 17, 19; App. at 138, 140).

Heartland’s attempt to re-write the policy to apply the \$3,000,000 limit to each location must be rejected as contrary to the express policy terms and the principles of contract interpretation. The District Court also

correctly found that no material question of fact exists that the Derecho caused one loss to Heartland's business under the policy's earnings and extra expense coverage. (Ruling at 19; App. at 140). Any suggestion that the Derecho involved multiple storms must be rejected as contrary to meteorological science and insurance principles.

STATEMENT OF FACTS

I. The Parties

Heartland operates a diversified cooperative at a number of locations that it owns throughout the states of Iowa, Nebraska, New Mexico and Texas. See Plaintiff's Petition at ¶¶ 1, 5; (D's SMJ App. at 4, 58-145; App. at 7). Heartland's business operations include the storage and trading of grain, fuel sales, and various agronomy related products and services. (D's SMJ App. at 477-480; App. at 636-39). Nationwide exists as an Iowa corporation and maintains a license as an Iowa Stock Fire and Casualty Insurance Company. (D's Answer at ¶ 3; App. at 15).

II. The Policy

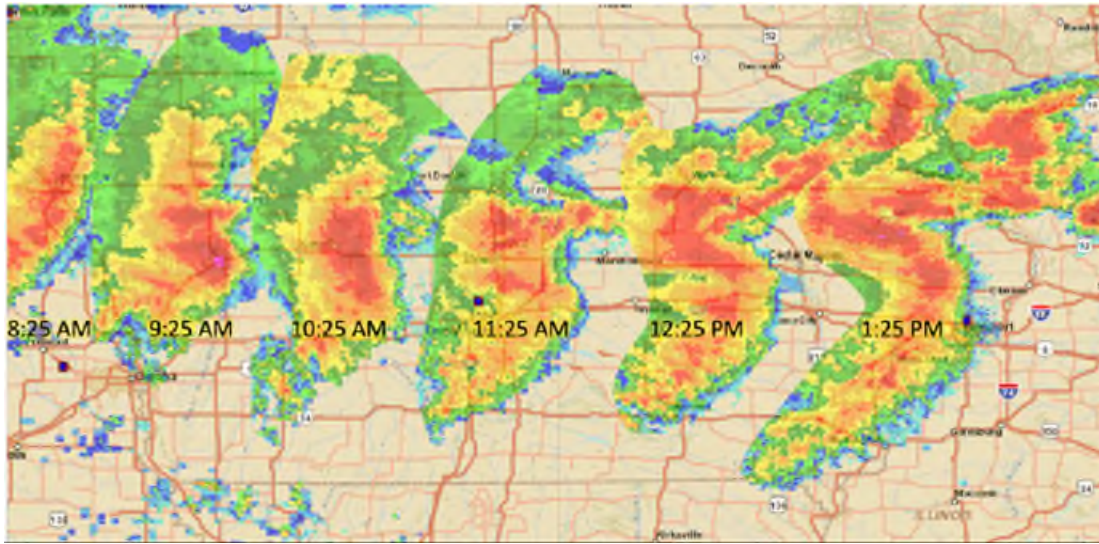
Nationwide provided Heartland with a quote for its CommercialGuard Plus Insurance Proposal, and Heartland accepted. (D's SMJ App. at 332-441; App. at 682-791). Nationwide accordingly issued Heartland Policy No. COP106061A, with effective dates of coverage from July 1, 2020 to

July 1, 2021 (the “Policy”). (D’s SMJ App. at 1-331; App. at 173–503). The Policy contains a Location Schedule listing 86 covered locations. (D’s SMJ App. at 58–145; App. at 230–317). The Location Schedule lists specific limits of insurance at each location for “Building and Personal Property Consisting of ‘Stock’” and “Building Property and Business Personal Property Excluding ‘Stock’, ‘Mobile Equipment’, and ‘Computers’.” (D’s SMJ App. at 60–145; App. at 232–317). None of the individual locations provide a separate limit for Earnings and Extra Expense coverage. (Ruling at 12; App. at 133). Instead, the Location Schedule includes an entry listing coverage limits for “All ‘Covered Locations’”, including an Earnings and Expense Limit of \$3,000,000. (D’s SMJ App. at 58; App. at 230). The parties dispute how this limit applies to Heartland’s claim, and it will be discussed further below.

III. The Derecho

On August 10, 2020, the Derecho swept eastward across Iowa and states east of Iowa. (D’s SMJ App. at 465; App. at 792). A derecho has been defined as a “widespread convectively-induced straight-line windstorm”. (D’s SMJ App. at 465; App. at 792). Damaging straight-line winds in a derecho are caused by downbursts in severe thunderstorms that are organized into a fast-moving band or bow that persists for hundreds of

miles and several hours. (D's SMJ App. at 465; App. at 792). Wide area radar images of the derecho show a north to south band of severe thunderstorms that moved rapidly eastward across Iowa, which developed a bow-like shape over the eastern part of the state:



(D's SMJ App. at 466; App. at 793). Some locations experienced multiple downbursts, with straight-line winds gusting over 100 mph, during the 30-minute to nearly one-hour period that it took for the Derecho to traverse that particular location. (D's SMJ App. at 466; App. at 793).

IV. The Insurance Claim

Heartland submitted a claim to Nationwide reporting damage at 48 locations in Iowa. (D's SMJ App. at 495; App. at 797). Nationwide investigated the claim, and it tendered payments to Heartland totaling \$131,284,460.86. (D's SMJ App. at 495; App. at 797). A dispute has

arisen, however, concerning the amount of coverage available to Heartland for its earnings and expense claim.

Heartland suggested the \$3,000,000 earnings and extra expense limit applies for each location and is triggered with the property damage part of the claim. (D's SMJ App. at 442-43; App. at 614). Nationwide explained the Policy lists a \$3,000,000 earnings and extra expense limit for all covered locations on a blanket basis. (D's SMJ App. at 471; App. at 617). Heartland challenged Nationwide's position by arguing the limit applies to any one loss, and it suffered damages from multiple storms as opposed to one windstorm. (D's SMJ App. at 446; App. at 621). Nationwide responded by reaffirming its position on the application of the limit. (D's SMJ App. at 447-49; App. at 622-24). Nationwide consulted with Lee Branscome, a meteorologist, to review Heartland's multiple storms argument. (D's SMJ App. at 449; App. at 624). Branscome reviewed readings made at weather stations, data reported by Doppler weather radar stations, weather satellite data and imagery, on-the-ground observations made by professional and volunteer weather observers, and post-storm reports of damage to structures and vegetation. (D's SMJ App. at 465; App. at 792). He authored a report analyzing this data, and he advised that "in general, the derecho is considered by meteorologists, including myself, to be a single weather

event.” (D’s SMJ App. at 467; App. at 794). Based on Branscome’s Report, Nationwide continued to view the Derecho as a single event and occurrence. (D’s SMJ App. at 449; App. at 624). Nationwide paid Heartland the \$3,000,000 limit for its earnings and extra expense coverage. (D’s SMJ App. at 473; App. at 626).

V. The Lawsuit

Heartland responded by filing the subject lawsuit asserting Nationwide breached the Policy by failing to pay Heartland earnings and extra expense loss in excess of \$3,000,000. (Plaintiff’s Petition at Count I; App. at 11–13). The parties engaged in limited discovery. Heartland provided a summary of income and extra expense losses at six sample locations. (P’s SMJ App. at 444–51; App. at 636–43). Heartland also designated as an expert witness its own meteorologist, Michael McClellan. McClellan’s report focused on what can be characterized as the storm within the storm. He explained:

As noted previously, derecho winds are the product of what meteorologists call *downbursts*. A downburst is a concentrated area of strong wind produced by a convective downdraft. Downbursts have horizontal dimensions of about 4 to 6 miles (8 to 10 kilometers), and may last for several minutes. The convective downdrafts that comprise downbursts form when air is cooled by the evaporation, melting, and/or sublimation (the direct change to vapor phase) of precipitation in thunderstorms or other convective clouds. Because the

chilled air is denser than its surroundings, it becomes negatively buoyant and accelerates down toward the ground. Derechos occur when meteorological conditions support the repeated production of downbursts within the same general area. The "*downburst clusters*" that arise in such situations may attain overall lengths of up to 50 or 60 miles (80 to 100 kilometers), and persist for several tens of minutes. Within individual downbursts there sometimes exist smaller pockets of intense winds called *microbursts*. Microbursts occur on scales (approximately 2 1/2 miles or 4 km) that are very hazardous to aircraft; several notable airline mishaps in recent decades resulted from unfortunate encounters with microbursts. Still smaller areas of extreme wind within microbursts are called *burst swaths*. Burst swaths range from about 50 to 150 yards (45 to 140 meters) in length. The damage they produce may resemble that caused by a tornado.

A typical derecho consists of numerous downburst clusters ("families of downburst clusters") that are, in turn, composed of many smaller downbursts, microbursts, and burst swaths.

(D's SMJ App. at 487; App. at 646). McClellan reported four conclusions:

- On August 10, 2020, a severe derecho swept across Iowa, causing very strong winds, extremely heavy rain and spawning several tornadoes.
- A derecho by definition is a widespread, long-lived wind storm that is associated with a band of rapidly moving individual showers and/or thunderstorms....

- It is important to note that there were dozens of individual thunderstorm cells creating multiple downburst clusters within this derecho that formed the long-lived wind storm. Each individual thunderstorm cell has its own characteristics such as cloud height, hail size, rainfall rate, wind speed and direction of movement. See figures 1, 2, 3, 4 & 5.
- Following detailed weather analysis of this wind event for each of the Heartland Co-op locations, it is very clear that each location was impacted by a gust front and then by individual thunderstorm cells which created their own damage path and intensity.

(D’s SMJ App. at 488; App. at 647). McClellan did not, however, challenge Branscome’s statement that meteorologists considered the derecho to be a single weather event.

The parties filed cross motions for summary judgment. The District Court issued a ruling that reached two primary conclusions. First, the District Court found “that under the policy Heartland is entitled to \$3,000,000 total for all coverage locations in earnings and extra expense coverage as a result of the derecho.” (Ruling at 19; App. at 140). Second, the District Court further found “that no material question of fact exists that the derecho caused one loss to Heartland’s business under the policy’s earnings and extra expense coverage,” thereby limiting Heartland’s earnings and extra expense coverage to the \$3,000,000 Nationwide had already paid.

Id. Accordingly, the District Court dismissed Heartland’s petition. This appeal followed.

ARGUMENT

I. The District Court Correctly Held that Nationwide’s Policy Unambiguously Limits Heartland to a Total of \$3,000,000 in Earnings and Extra Expense Coverage for Loss at All Covered Locations as Opposed to Each Covered Location as a Result of the Derecho.

A. Error Preservation and Standard of Review

Nationwide agrees Heartland preserved error through its Motion for Partial Summary Judgment and resistance to Nationwide’s Motion for Summary Judgment on its argument articulated in Brief Points I and II of its appeal brief. Appellate courts review the district court’s grant of summary judgment for correction of errors at law. *Sallee v. Stewart*, 827 N.W.2d 128, 132 (Iowa 2013).

B. The COP Income Coverage Part’s “How Much We Pay” Provision Caps Coverage for “Any One Loss” to the Limit Indicated in the Schedule of Coverages.

Heartland argues the District Court erred when it determined “that under the policy Heartland is entitled to \$3,000,000 total for all covered locations in earnings and extra expense coverage as a result of the derecho on August 10, 2020.” (Ruling at 19; App. at 140). A general overview of the coverage afforded by the Policy helps to explain why the \$3,000,000

earnings and extra expense coverage limit applies to loss at all covered locations rather than to each location. The Policy consists of a series of forms. The two primary forms at issue here are the Commercial Output Program (“COP”) Property Coverage Part that provides coverage for buildings and business personal property, and the COP Income Coverage Part that provides coverage for loss of earnings and extra expense in addition to other coverages. (D’s SMJ App. at 15–51; App. at 187–223). Coverage under the COP Income Coverage Part is subject to the terms and conditions of the COP Property Coverage Part. (D’s SMJ App. at 46; App. at 218).

The insuring agreement for the COP Income Coverage Part provides:

“We” provide the coverages described below during the “restoration period” when “your” “business” is necessarily wholly or partially interrupted by direct physical loss of or damage to property at a “covered location” or in the open (or in vehicles) within 1,000 feet thereof as a result of a covered peril.

(D’s SMJ App. at 46; App. at 218). The COP Income Coverage Part contains coverage for “Earnings”, “Extra Expense”, “Income Coverage Extensions”, and “Supplemental Income Coverages”. (D’s SMJ App. at 46, 48–50; App. at 218, 220–22).

The COP Income Coverage Part imposes a per loss limit on coverage:

HOW MUCH WE PAY

Other "terms" relating to How Much We Pay also apply. These "terms" are described in the Commercial Output Program - Property Coverage Part.

"We" pay no more than the Income Coverage "limit" indicated on the "schedule of coverages" for any one loss. Payment for earnings, extra expense, and "rents" combined does not exceed the "limit".

(D's SMJ App. at 51; App. at 223) (emphasis added). Thus, the Policy limits coverage under the COP Income Coverage Part to \$3,000,000 for "any of loss."

C. Reading the COP Income Coverage Part's Insuring Agreement, "Valuation" Provision, and "How Much We Pay" Provision Together, the Phrase "Any One Loss" Means the Occurrence of Direct Physical Loss or Damage at a Covered Location as a Result a Covered Peril that Interrupts, Wholly or Partially, an Insured's Business.

So, what does "any one loss" mean? The District Court found "under the totality of the words' plain meanings, 'any one loss' is an unambiguous phrase that means an indiscriminate singular amount of financial detriment suffered at all covered locations as a result of a covered peril." (Ruling at 15-16; App. at 136-37). Applying this definition, the District Court further found "the \$3 million limit applies to the combined loss as all covered locations as a result of a covered peril." (Ruling at 17; App. at 138).

The District Court's ultimate holdings should be affirmed because the Policy language commands it. A familiar rule of interpretation provides an insurance policy must be read as a whole in light of all declarations, riders or endorsements attached. *Ferguson v. Allied Mut. Ins. Co.*, 512 N.W.2d 296, 299 (Iowa 1994). As previously mentioned, the COP Income Coverage Part's insuring agreement provides coverage "during the 'period of restoration' when 'your business' is necessarily wholly or partially interrupted by direct physical loss of or damage to property at a 'covered location' ... as a result of a covered peril." The COP Income Coverage Part's "Valuation" provision further provides:

1. **Earnings** -- In determining an earnings loss "we" consider:
 - a. the experience of "your" "business", before the loss and the probable experience during the time of interruption had no loss occurred;

- b. "your" continuing operating expenses normally incurred by "your" "business", including but not limited to payroll expense necessary to resume "business" to a similar level of service that existed before the occurrence of direct physical loss or damage; and
- c. pertinent sources of information and reports including:
 - 1) "your" accounting procedures and financial records;
 - 2) bills, invoices, and other vouchers;
 - 3) contracts, deeds, and liens;
 - 4) reports on feasibility and status; and
 - 5) records documenting "your" budget and marketing objectives and results.

(D's SMJ App. at 50; App. at 222) (emphasis added). Reading these provisions together with the "How Much We pay for Loss" provision, "any one loss" means the occurrence (which the District Court interpreted as meaning the "happening") of direct physical loss or damage at a covered location as a result of a covered peril that interrupts, wholly or partially, an insured's business. (Ruling at 15; App. at 136). If there has been no occurrence of direct physical loss or damage to property at a covered location as a result a covered peril that interrupted the insured's business, then there can be no loss of earnings or extra expense coverage according to the terms of the COP Income Coverage Part.

D. The COP Income Coverage Part Earnings and Extra Expense Limit Applies Per Occurrence Consistent with the Deductible and Restoration of Limits Provisions of the COP Property Coverage Part.

This interpretation remains consistent with the terms of the COP Property Coverage Part, which are incorporated by the “How Much We Pay” provision in the COP Income Coverage Part. The COP Property Coverage Part’s “How Much We Pay” section specifies how the Policy’s deductible applies:

2. **Deductible** -- “We” pay only that part of “your” loss over the deductible amount stated on the “schedule of coverages” in any one occurrence. The deductible applies to the loss before application of any coinsurance or reporting provisions.

(D’s SMJ App. at 42; App. at 214). A condition in the COP Property Coverage Part explains how the policy limits apply to multiple losses during the policy period:

10. **Restoration of Limits** -- Except as indicated under Supplemental Coverages - Pollutant Cleanup and Removal and Supplemental Marine Coverages - Virus and Hacking Coverage, any loss “we” pay under the Commercial Output Program coverages does not reduce the “limits” applying to a later loss.

(D’s SMJ App. at 44; App. at 216). These provisions provide that both the policy limits and the deductible apply on a per occurrence basis, subject to certain exceptions not relevant here. In other words, the policy limits provisions must be read in harmony with the deductible provision to properly interpret the coverage afforded by the Policy.

E. The Schedule of Coverages Lists an Earning and Extra Expense Limit of \$3 Million For All Covered Locations.

As provided in the COP Income Coverage Part's "How Much We Pay" provision, one must consult the schedule of coverages to determine the limit for any one loss. The schedule of coverages for the COP Income Coverage Part states:

COVERAGE (check one)

- Income Coverage Does Not Apply
- Earnings, Rents, and Extra Expense
- Earnings and Extra Expense
- Rents and Extra Expense
- Extra Expense Only

LIMIT (check one)

- Income Coverage Limit - The most "we" pay for loss at any one "covered location" is:
- Refer to Scheduled Locations (check if applicable)

(D's SMJ App. at 55; App. at 227). In turn, the Locations Schedule lists a total of 86 numbered locations with geographic descriptions (town and state), starting with the following designation for Location No. 87:

Loc.
No. Covered Locations (Describe)
087 ALL "COVERED LOCATIONS"

Covered Property/Coverage Provided (Describe)	Limit
FENCES AT "COVERED LOCATIONS"	\$50,000
RAILROAD TRACKS AT "COVERED LOCATIONS"	\$2,000,000
BUSINESS PERSONAL PROPERTY CONSISTING OF SIGNS	\$50,000
EARNINGS AND EXTRA EXPENSE	\$3,000,000
BUSINESS PERSONAL PROPERTY CONSISTING OF "COMPUTERS"	\$2,000,000

(D’s SMJ App. at 58–145; App. at 230–317). Reading these provisions together, the \$3,000,000 limit for earnings and extra expense coverage applies for any one loss at all covered locations rather than to each location. For example, if we take the text from the locations schedule as directed by the schedule of coverages and insert it into the How Much We Pay provision, it results in the following illustration:

HOW MUCH WE PAY

...

“We” pay no more than ~~the Income Coverage “limit” indicated in the “schedule of coverages”~~ *\$3,000,000 for All Covered Locations* for any one loss.

(D’s SMJ App. at 51; App. at 223) (emphasis added). The District Court correctly reasoned that if Heartland desired the earnings and extra expense coverage it seeks in this action, it simply could have checked the other box in the schedule of coverages and inserted the \$3,000,000 limit there. (Ruling

at 12; App. at 133). This Court cannot strain the Policy's phrases to find Nationwide liable for coverage that Heartland elected not to purchase. *Id.*

F. Applying the Plain Language of the Policy and the Rules of Interpretation, the Earnings and Extra Expense Limit of \$3,000,000 Applies to Loss at All Covered Locations Rather Than Each Location.

Heartland contends its “more than one loss” argument constitutes a reasonable interpretation of the Policy, and any ambiguity must be construed in its favor. (Appellant's Proof Brief at 29–36). The District Court rightfully found Nationwide's proffered interpretation constitutes the only reasonable interpretation under Iowa's rules of interpretation for a number of reasons. (Ruling at 13; App. at 133).

First, courts give undefined terms in an insurance policy their ordinary meaning. *A.Y. McDonald Indus. v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 619 (Iowa 1991). In searching for the ordinary meaning of undefined terms, courts commonly refer to dictionaries. *Id.* The District Court applied definitions from Merriram-Webster Dictionary and Black's Law Dictionary to find “any” means “one, some, or all indiscriminately of whatever quantity”, “one” means “a single unit or thing”, and “loss” means “[t]he amount of financial detriment caused by ... an insured's property damage” (Ruling at 11; App. at 132). The District Court's conclusion that the phrase “any one loss” means “an indiscriminate singular amount of financial

detriment suffered at all covered locations as a result of a covered peril” remains consistent with these definitions. (Ruling at 15–16; App. at 136–37).

Second, under the rules of interpretation, Iowa courts determine the intent of the parties by looking at what the policy itself says, and the court will not strain the words or phrases of the policy in order to find liability that the policy did not intend and the insured did not purchase. *Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494, 501 (Iowa 2013). In the present matter, Heartland asks this court to replace the word “all” with the word “each” in the Locations Schedule. For example, under Heartland’s interpretation of the Policy, the Locations Schedule would apply the coverage limit to “~~All~~ Each ‘Covered Locations’”. This is not what the policy says, so Heartland’s suggestion violates the rules of interpretation.

Third, the court must strive to avoid interpreting an insurance policy to render any part superfluous. *Boelman*, 826 N.W.2d at 501. As previously mentioned, if the parties had intended the limit to apply to each location, then they would have checked the box under the schedule of coverages for the COP Income Coverage Part and inserted the applicable limit:

COVERAGE (check one)

- Income Coverage Does Not Apply
- Earnings, Rents, and Extra Expense
- Earnings and Extra Expense
- Rents and Extra Expense
- Extra Expense Only

LIMIT (check one)

- Income Coverage Limit - The most "we" pay for loss at any one "covered location" is:
- Refer to Scheduled Locations (check if applicable)

(D's SMJ App. at 55; App. at 227) (emphasis added). They did not. Interpreting the limit to apply on a per location basis would render the "Refer to Scheduled Locations" language superfluous in violation of the rules of construction.

Fourth, as previously mentioned, the rules of interpretation require that an insurance policy be read as a whole in light of all declarations, riders or endorsements attached. *Ferguson*, 512 N.W.2d at 299. Applying the earnings and extra expense limit to the total loss at all locations remains consistent with other provisions in the COP Income Coverage Part that draw distinctions between per occurrence versus per location versus aggregate limits. The COP Income Coverage "limit" applies differently to the "Income Coverage Extensions" than it does to the "Supplemental Income Coverages". The lead in paragraph for the "Income Coverage Extensions"

states the limit for the extensions are a part of and not in addition to the
Income Coverage limit:

The following Income Coverage Extensions indicate an applicable "limit" or limitation. This "limit" or limitation may also be shown on the "schedule of coverages". If a different "limit" or limitation is indicated on the "schedule of coverages", that "limit" or limitation will apply instead of the "limit" or limitation shown below.

The following Income Coverage Extensions are part of and not in addition to the applicable Income Coverage "limit".

(D's SMJ App. at 47; App. at 219) (emphasis added). The "Supplemental Income Coverages" state they apply separately to each covered location and, unless otherwise indicated, the limits are separate from and not a part of the COP Income Coverage limit:

Unless otherwise indicated, the following Supplemental Income Coverages apply separately to each "covered location".

The following Supplemental Income Coverages indicate an applicable "limit". This "limit" may also be shown on the "schedule of coverages". If a different "limit" is indicated on the "schedule of coverages", that "limit" will apply instead of the "limit" shown below.

Unless otherwise indicated, a "limit" for a Supplemental Income Coverage provided below is separate from, and not part of, the applicable Income Coverage "limit". The "limit" available for coverage described under a Supplemental Income Coverage:

- a. is the only "limit" available for the described coverage; and
- b. is not the sum of the "limit" indicated for a Supplemental Income Coverage and the Income Coverage "limit".

The "limit" provided under a Supplemental Income Coverage cannot be combined or added to the "limit" for any other Supplemental Income Coverage.

(D's SMJ App at 48; App. at 220) (emphasis added). Thus, the language of the COP Income Coverage Part draws a distinction between the per loss limit and per location limits.

Within the "Supplemental Income Coverages", the COP Income Coverage Part draws further distinctions for the application of policy limits. For example, the Dependent Locations Coverage applies on a per occurrence basis:

The most "we" pay in any one occurrence under this Supplemental Income Coverage is \$100,000.

(D's SMJ App. at 49; App. at 221). The Pollutant Cleanup and Removal Coverage applies on a per location and per occurrence basis:

The most "we" pay in any one occurrence or at any one location under this Supplemental Income Coverage is \$25,000.

(D's SMJ App. at 49; App. at 221). The Contract Penalty Coverage applies on a per occurrence and annual or aggregate limit:

The most "we" pay in any one occurrence under this Supplemental Income Coverage is \$25,000.

The most "we" pay for all covered losses under this Supplemental Income Coverage during each 12-month period of this policy is \$100,000.

(D's SMJ App. at 50; App. at 222). Given all of the options contemplated by the Policy, it becomes apparent that the policy language as a whole dictates the limit for earnings and extra expense coverage applies to the loss at all locations on a per occurrence basis.

Fifth, to conclude otherwise would lead to an absurd result. *See Central Bearings Co. v. Wolverine Ins.*, 179 N.W.2d 443, 445 (Iowa 1970) (insurance policies must be construed to achieve a fair and practical interpretation); *Boelman*, 826 N.W.2d at 501 (the court will not strain the words or phrases of the policy in order to find liability that the policy did not intend and the insured did not purchase). The Locations Schedule lists several other coverages that apply at "All 'Covered Locations'" including

Business Personal Property Consisting of “Computers” with a limit of \$2,000,000. The Locations Schedule lists the following limits for other types of property at the Glenwood, Iowa location:

Loc. No.	Covered Locations (Describe)		Limit
024	GLENWOOD, IA		
	Covered Property/Coverage Provided (Describe)		
	BUSINESS PERSONAL PROPERTY CONSISTING OF "STOCK"		\$30,000
	BUILDING PROPERTY AND BUSINESS PERSONAL PROPERTY EXCLUDING "STOCK", "MOBILE EQUIPMENT", AND "COMPUTERS"		\$90,000

(D’s SMJ App. at 83; App. at 255). It makes no sense to have a \$2,000,000 coverage limit for computers at a location where the limit for building property and business personal property excluding stock, mobile equipment, and computers is only \$90,000. This further illustrates why the phrase “All ‘Covered Locations’” means in the aggregate as opposed to each location.

The District Court also recognized the absurdity if Heartland’s “each and every loss” argument was taken to its logical conclusion. Each of Heartland’s elevators produces separate income streams, and if one elevator were out of operation longer than another, it would generate two separate and distinct losses of earnings and extra expense. The fact that the elevators were at the same location would not matter because the Policy provides coverage for “each and every loss.” The District Court correctly concluded

the parties did not intend such an interpretation under the Policy. (Ruling at 13–14; App. at 134–35).

Finally, Iowa courts consider the amount of the premium charged in relation to the risk when interpreting insurance policies. *Boelman*, 826 N.W.2d at 505 (considering the premium charged when construing endorsement to farm guard policy); *National Sur. Corp. v. Westlake Inv., LLC*, 880 N.W.2d 724, 741 (Iowa 2016) (discussing the underwriting history and premiums for commercial general liability policies); *North Star Mut. Ins. Co. v. Holty*, 402 N.W.2d 452, 456 (Iowa 1987) (considering the type of risk and the premium charged when interpreting the meaning of the motor vehicle exclusion in farm liability policy); *Iowa Nat. Mut. Ins. Co. v. Fidelity & Cas. Co. of New York*, 128 N.W.2d 891, 894 (Iowa 1964) (considering the amount of the premium charged when evaluating the reasonableness of insurer’s proffered policy interpretation of auto liability policy).

Here, Nationwide quoted Heartland the following premiums for the COP coverage:

Property/COP Premium

Covered Property	Summary of Values	Rate	Premium
Bldg Prop & BPP excl. "Stock"	\$906,034,623	0.119	\$1,078,181
"Stock"	\$870,090,274	0.076	\$297,568
Earnings/EE	\$3,000,000	0.092	\$2,760
Equipment Breakdown			\$90,429
Owned Railcars Coverage	\$2,000,000		\$5,000
Non-Owned Railcars Coverage	\$10,000,000		\$20,000
Business Personal Property consisting of "Mobile Equipment"	\$10,000,000		\$30,000
Flood coverage in adverse flood zones			\$3,750
Railroad Track	\$2,000,000		\$16,000
Vehicles	\$1,000,000		\$10,000
Terrorism Premium*			\$15,539
Total Estimated Premium			\$1,569,227

D's SMJ App. at 4, 385; App. at 176, 735). As one can see, the premium and the limit for the earnings and extra expense coverage pales in comparison to the premiums for the building, business personal property, and stock coverages. No reasonable insured could expect \$258,000,000 worth of coverage (\$3,000,000 limit x 86 locations = \$258,000,000) for a premium of \$2,760 given the comparable premiums and limits for the other coverages.

G. The Policy Does Not Contemplate Multiple Earnings and Extra Expense Losses from a Single Covered Peril.

Heartland argues that because there may be different periods of restoration at different locations due to damage caused by the Derecho, the coverage limit should apply to each location. (Appellant's Proof Brief at

32–33). Heartland further argues the earnings and extra expense limit should be applied to each location because Heartland’s procedures and records treat each location as a separate source of income. (Appellant’s Proof Brief at 33). The language of the policy simply does not support such an interpretation, and Heartland’s arguments lack merit given the nature of earnings and extra expense coverage.

The COP Income Coverage Part provides, in relevant part:

EARNINGS

"We" cover "your" actual loss of net income (net profit or loss before income taxes) that would have been earned or incurred and continuing operating expenses normally incurred by "your" "business", including but not limited to payroll expense.

...

EXTRA EXPENSE

"We" cover only the extra expenses that are necessary during the "restoration period" that "you" would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a covered peril.

(D’s SMJ App. at 46; App. at 218). The Policy offers this definition for the terms “you” and “your”:

DEFINITIONS

1. The words "you" and "your" mean the persons or organizations named as the insured on the "schedule of coverages".

(D's SMJ App. at 15; App. at 187). The schedule of coverages lists Heartland as the named insured. (D's SMJ App. at 4; App. at 176). Heartland seeks to recover loss of earnings and extra expense. While it may operate at multiple locations and track the profitability of each location, Heartland's loss of earnings are determined in the aggregate according to the terms of the Policy (i.e., "actual loss of net income"). In other words, Heartland seeks to recover for a loss of earnings and extra expense due to damage caused by the Derecho. The various locations from which it operates are all a part of its integrated business operation, as the District Court correctly noted. (Ruling at 13; App. at 134). *Primary Care Med. Ctr. v. Peerless Indem. Ins. Co.*, 780 F.Supp.2d 554 (W.D. Ky. 2011) (interpreting business income and extra expense limit to apply to loss by the named insured corporation) rather than each individual physician and employee of the corporation).

Heartland did not report a separate claim for each location; rather, it reported a single claim with damage at 48 locations. (D's SMJ App. at 495; App. at 797). Nationwide did not charge a separate deductible for each location; rather, it applied a single deductible. (D's SMJ App. at 496; App. at 798). This course of conduct reveals the parties' intent and further supports Nationwide's application of the coverage limit. *Boelman*, 826

N.W.2d at 501 (the cardinal rule for construing insurance policies holds the intent of the parties must control); *The Phoenix Ins. Co. v. Infogroup, Inc.*, 147 F.Supp.3d 815, 822 (S.D. Iowa 2015) (contract terms must be examined in the context of the entire agreement in accordance with the customs, practices, usages and terminology generally understood in the particular trade or business); *Peak v. Adams*, 799 N.W.2d 535, 544 (Iowa 2011) (when interpreting contracts, Iowa courts may look to extrinsic evidence, including the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties).

The topic of the deductible warrants further discussion. As mentioned above, the COP Income Coverage Part incorporates the terms of the COP Property Coverage Part, and the COP Property Coverage Part contains a deductible provision that applies to loss “in any one occurrence.” (D’s SMJ App. at 42; App. at 214). Two endorsements further clarify the application of the deductible. The Occurrence Deductible Endorsement provides, in relevant part:

This endorsement modifies insurance provided under the following:

COMMERCIAL OUTPUT PROGRAM - PROPERTY COVERAGE PART

SCHEDULE

Commercial General Liability Policy

Business Auto Policy

Commercial Output Program – Property Policy

The following is added to the Deductible provisions:

DEDUCTIBLE APPLYING TO LOSS UNDER MORE THAN ONE POLICY

If an occurrence gives rise to a loss under more than one policy issued by us and shown in the Schedule of this endorsement, only one deductible shall apply to all damages arising from such an occurrence, which are covered by any policy issued by us and shown in the above Schedule.

In determining which deductible applies, we will use the largest of the policy deductibles applying to the loss for any coverage provided by the applicable policies issued by us and shown in the Schedule of this endorsement.

(D’s SMJ App. at 225; App. at 397) (emphasis added). This endorsement addresses how to apply the deductible when an occurrence gives rise to a loss under more than one policy, and it illustrates the connection between an occurrence (the peril causing damage) and the loss (the pecuniary injury resulting from the occurrence).

The Windstorm or Hail Deductible Endorsement creates a special flat or percentage deductible for losses caused by or resulting from windstorm or hail.¹ (D’s SMJ App. at 194; App. at 366). This endorsement further provides:

¹ The Windstorm or Hail Deductible applies only to the scheduled locations in Texas or New Mexico. (D’s MSJ App. at 189–93; App. at 361–65).

1. **Applicable Deductible -- The Windstorm Or Hail Deductible indicated on the Windstorm Or Hail Schedule is applicable to loss or damage to covered property caused directly or indirectly by the perils of windstorm or hail.**

2. **Weather Condition Other Than Windstorm Or Hail -- Loss or damage resulting from a covered weather condition, other than windstorm or hail, will be considered to be caused by windstorm or hail and will be considered part of the windstorm or hail occurrence if the loss or damage would not have occurred without the weather conditions of windstorm or hail.**

Id. The language of these provisions reveals an intention to treat all loss or damage from a weather condition such as a windstorm as a single occurrence with a corresponding deductible and coverage limit as opposed to separate losses.

H. Heartland's Claim Does Not Involve Successive Losses.

Heartland's Brief discusses case law from other jurisdictions interpreting how coverage limits apply to successive losses. (Appellant's Proof Brief at 34–36). These cases are irrelevant to the present matter because Heartland's claim does not involve successive losses. Rather, Heartland's claim arises from the Derecho, a single storm event. (D's SMJ App. at 467; App. at 794). Moreover, Nationwide's policy contains a "restoration of limits" clause specifying, subject to several exceptions not applicable here, that any loss paid under the COP Coverages does not reduce

the limits applying to a later loss. (D’s SMJ App. at 44; App. at 216). The policies in the cited cases did not contain such a provision. Nationwide has never taken the position that the earnings and extra expense coverage limit applies to all losses during a given policy period.

In summary, Heartland’s policy provides Nationwide will pay “no more than the Income Coverage ‘limit’ indicated in the ‘schedule of coverages’ for any one loss.” The phrase “any of loss” refers to the occurrence of direct physical loss or damage as a result a covered peril that interrupts, wholly or partially, an insured’s business. The schedule of coverages for the Income Coverage lists a limit of \$3,000,000 for earnings and extra expense coverage that applies to “All ‘Covered Locations’.” This means Heartland has a total of \$3,000,000 in coverage for earnings and extra expense loss at all locations caused by the Derecho. Nationwide already paid Heartland this limit, so this Court should affirm the District Court’s ruling granting Nationwide summary judgment and dismissing Heartland’s breach of contract claim as a matter of law.

II. The Derecho Caused One Loss Under the Policy's Earnings and Extra Expense Coverage

Heartland says in a footnote in its brief that if the Court finds the phrase “any one loss” is defined by whether there was a single covered peril, as the District Court found, then it disputes the Derecho was a single

covered peril. (Appellant’s Proof Brief at 34, fn 1). This statement does not comply with Iowa Rule of Appellate Procedure 6.903(2)(g), and it may be deemed a waiver. *City of Marquette v. Gaede*, 672 N.W.2d 829, 835 (Iowa 2003) (applying Iowa R. App. P. 6.14(1)(c) which is now rule 6.903(2)(g)(3) and deeming an argument waived for failure to cite supporting authority); *Soo Line R. Co. v. Iowa Dept. of Transp.*, 521 N.W.2d 685, 691 (Iowa 1994) (reiterating the “random mention of [an] issue, without elaboration or supportive authority, is insufficient to raise the issue for [appellate] consideration”); *Hubby v. State*, 331 N.W.2d 690, 694 (Iowa 1983) (“Moreover, issues are deemed waived or abandoned when they are not stated on appeal by brief; random discussion of difficulties, unless assigned as an issue, will not be considered.”). If this Court addresses the argument, it should review the district court’s grant of summary judgment for correction of errors at law. *Sallee*, 827 N.W.2d at 132.

Whether a storm event constitutes a single occurrence under a property insurance policy appears to be a matter of first impression for Iowa courts. Three tests have emerged in the case law from other jurisdictions for determining the number of occurrences: (1) the “cause” test in which the number of occurrences equates to the number of causes of injury; (2) the “effects” test in which the number of occurrences equates to the number of

different injuries that result; and (3) the “event” or “continuous process” test which looks to the number of damage causing processes that were continuous, repetitive, and interrelated. See Francis F Mahoney III, *The Application of “Per-Occurrence” Deductible Provisions in First-Party Property Claims*, 37 Tort & Ins. L.J. 921, 924-25 (2002) (citing *Unigard Ins. Co. v. U.S. Fidelity & Guar. Co.*, 728 P.2d 780 (Idaho Ct. App. 1986)). The vast majority of jurisdictions follow the cause test. *Id.* at 925; Insurance Claims and Disputes § 11:24 (6th ed.) (see cases cited therein). A federal court applying Iowa law adopted the cause test in determining the number of occurrences under a commercial general liability policy, *Pella Corp. v. Liberty Mut. Ins. Co.*, 246 F. Supp. 3d 1247, 1257 (S.D. Iowa 2017), and the Iowa Supreme Court adopted the cause test for determining the number of accidents under an auto liability policy. *Just v. Farmers Auto. Ins. Ass’n*, 877 N.W.2d 467, 480 (Iowa 2016). Pursuant to the “cause” test, courts generally hold where one proximate, uninterrupted, and continuing cause resulted in all the injuries and damage, then there exists a single accident or occurrence. *Just*, 877 N.W.2d at 472.

Applying the “cause” test here, the Derecho must be deemed a single occurrence for numerous reasons. As evidenced by Doppler radar, the Derecho moved across Iowa and caused damage at Heartland’s various

locations in one proximate, uninterrupted and continuous event. (D's SMJ App. at 465–66; App. at 792–93). Meteorologists view the Derecho as a single storm event. (D's SMJ App. at 467; App. at 794).

The insurance industry agrees. For example, Verisk, a provider of insurance products and services, offers the PCS Catastrophe Loss Index. (D's SMJ App. at 502; App. at 804). PCS assigns a catastrophe serial number to loss events in the United States, Puerto Rico, and the U.S. Virgin Islands that cause \$25 million or more in insured property losses and affect a significant number of policy holders and insurers. (D's SMJ App. at 502; App. at 804). The PCS catastrophe serial number lets insurers track losses and reserves related to a single discrete event. (D's SMJ App. at 502; App. at 804). Many reinsurance contracts use PCS serial numbers to determine which losses will trigger reinsurance coverage. (D's SMJ App. at 502; App. at 804). PCS assigned serial number 2046 to the Derecho. (D's SMJ App. at 502; App. at 804). Consistent with industry practice, Nationwide reported the Derecho as a single occurrence under its reinsurance program. (D's SMJ App. at 502; App. at 804).

Finally, what happened in Iowa on August 10, 2020, would commonly be described as a single storm. *See Just*, 877 N.W.2d at 472 (explaining a two-collision sequence of events would be commonly referred

to as a multi-vehicle accident). Any suggestion that a contrary conclusion can be reached under the facts of this case would not be a reasonable one. The District Court agreed, and this Court should affirm and conclude as a matter of law that the Derecho constitutes a single occurrence under the Policy. (Ruling at 18–19; App. at 139–40).

CONCLUSION

For the reasons explained above, Nationwide’s Policy provides Heartland with a total of \$3,000,000 in earnings and extra expense coverage for loss at all locations caused by the Derecho. Heartland’s attempt to rewrite the policy to apply the \$3,000,000 limit to each location must be rejected as contrary to the express policy terms and the rules of interpretation. Any suggestion that the Derecho involved multiple storms must also be rejected as contrary to meteorological science and insurance principles.

CONTINGENT REQUEST FOR ORAL ARGUMENT

Appellee requests to be heard in oral argument if Appellant is granted oral argument.

Respectfully submitted,

/s/ Sean M. O'Brien

Sean M. O'Brien AT0005874

BRADSHAW, FOWLER, PROCTOR &
FAIRGRAVE, P.C.

801 Grand Avenue, Suite 3700

Des Moines, IA 50309-8004

Phone: (515) 246-5894

Fax: (515) 246-5808

E-Mail: obrien.sean@bradshawlaw.com

CERTIFICATE OF COST

I hereby certify that the costs of printing the Appellee's brief was \$0.00, exclusive of sales tax, delivery, and postage.

By: /s/ Sean M. O'Brien

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rules of Appellate Procedure 6.903(1)(d); 6.903(1)(g)(l); and 6.906(4) because this brief has been prepared in a proportionally spaced typeface using Times New Roman font in 14-point size and contains 5,973 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(l).

By: /s/ Sean M. O'Brien

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of Defendant-Appellee's Proof Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and was served via EDMS on July 5, 2023.

John F. Lorentzen
Nyemaster Goode, P.C.
700 Walnut, Suite 1600
Des Moines, IA 50309-3899
E-Mail: jfl@nyemaster.com

/s/ Sean M. O'Brien
Sean M. O'Brien AT0005874