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IN THE
COURT OF APPEALS OF INDIANA

Indiana Repertory Theatre, Inc.,
Appellant-Plaintiff,

v.

The Cincinnati Casualty Company,
Appellee-Defendant

February 13, 2023

Court of Appeals Case No. 21A-CP-2848

Appeal from the Marion Superior Court

The Honorable Heather A. Welch, Judge

Trial Court Cause No. 49D01-2004-PL-13137

Opinion by Judge Vaidik
Chief Judge Altice and Judge Crone concur.

Vaidik, Judge.

Case Summary

[1] Last year, a panel of this Court held that the temporary closure and loss of use of the Indiana Repertory Theatre ("IRT") due to the general societal danger presented by the COVID-19 pandemic did not constitute "physical loss" or "physical damage" to the theatre that would trigger business-income coverage under IRT's property-insurance policy with The Cincinnati Casualty Company ("Cincinnati"). *Ind. Repertory Theatre v. Cincinnati Cas. Co.*, 180 N.E.3d 403 (Ind. Ct. App. 2022), *reh'g denied*, *trans. denied* ("*IRT I*"). IRT is now back before us with a different theory based on the specific conditions inside the theatre. It argues there is a genuine issue of material fact as to whether virus particles caused physical loss or damage to the air and surfaces in the theatre. We hold, as a matter of law, that virus particles do not cause physical loss or damage to property so as to qualify as a covered loss under the terms of IRT's policy.

Facts and Procedural History

[1] In March 2020, during the early days of the COVID-19 pandemic, IRT decided to close its downtown Indianapolis theatre to the public "to protect the health and well-being of [its] patrons, staff, and artists." Appellant's App. Vol. II p. 81. While IRT continued using the theatre for limited purposes, it submitted a claim for business-income coverage under its property-insurance policy with Cincinnati. The business-income coverage form provides, in relevant part:

> We will pay for the actual loss of "Business Income" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to property at "premises" which are described in the Declarations and for which a "Business Income" Limit of Insurance is shown in the Declarations. The "loss" must be caused by or result from a Covered Cause of Loss.

Id. at 182. "Loss" is defined as "accidental physical loss or accidental physical damage." *Id.* at 190. "Period of restoration" is the period of time that: "**a.** Begins at the time of direct 'loss'. **b.** Ends on the earlier of: **(1)** The date when the property at the 'premises' should be repaired, rebuilt or replaced with reasonable speed and similar quality; or **(2)** The date when business is resumed at a new permanent location." *Id.* "Suspension" includes "[t]he slowdown or cessation of your business activities[.]" *Id.*

[2] Cincinnati denied IRT's claim, explaining:

> At the threshold, there must be direct physical loss or damage to Covered Property caused by a covered cause of loss in order for the claim to be covered. . . . Direct physical loss or damage generally means a physical effect on Covered Property, such as deformation, permanent change in physical appearance or other manifestation of a physical effect. Your notice of claim indicates that your claim involves Coronavirus. However, the fact of the pandemic, without more, is not direct physical loss or damage to property at the premises.

Id. at 74.

[3] IRT immediately sued Cincinnati for a declaratory judgment.[1] It offered two theories in support of coverage. First, IRT asserted that the closure and loss of use of the theatre due to the general societal danger presented by the COVID virus (SARS-CoV-2) constitutes a "physical loss" regardless of whether the virus was present in the theatre. In March 2021, the trial court granted Cincinnati summary judgment on this loss-of-use theory, concluding that "the Policy requires physical alteration to the premises to trigger the business income coverage" and that "IRT's loss of use does not have any physical impact on its property." Appellant's App. Vol. III p. 93.

[4] After the trial court issued that order, IRT pursued the alternative theory that the virus was present in the theatre and physically altered the air and surfaces. It relied on expert declarations from three scientists (which are discussed below). In December 2021, the court granted Cincinnati summary judgment on this presence theory, concluding that there is a genuine issue of material fact as to whether the virus was present in the theatre but that, even if it was present, it did not physically alter the air or surfaces. Among other things, the court found, "The fact that the virus can be removed by cleaning or over time dies on its own establishes that it does not cause physical, structural alteration[.]" Appellant's App. Vol. II p. 60.

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[1] IRT also brought a negligence claim against its insurance agent, McGowan Insurance Group, for "failing to advise IRT of specialty policies such as event cancellation policy." Appellant's App. Vol. II p. 78. That claim is not at issue in this appeal and was not at issue in the first appeal.

[5] IRT first appealed the trial court's March 2021 order rejecting the loss-of-use theory. A panel of this Court affirmed, holding that to have either "physical loss" or "physical damage" there must be some "physical alteration or impact" to property and that the mere "loss of use of [the] theatre due to the COVID-19 pandemic" did not satisfy this requirement. *IRT I*, 180 N.E.3d at 410-11. The panel denied rehearing, and the Supreme Court denied transfer.

[6] IRT now appeals the trial court's December 2021 order rejecting the presence theory.[2]

Discussion and Decision

[7] We review a motion for summary judgment de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). That is, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C).

[8] IRT contends that its designated evidence creates a genuine issue of material fact as to whether the COVID virus physically altered the air and surfaces inside the theatre, precluding summary judgment for Cincinnati. Cincinnati

[2] We held oral argument on January 17, 2023. We thank counsel for their helpful presentations. We also thank Purdue University, United Policyholders, and the American Property Casualty Insurance Association for their informative amicus briefs.

argues the trial court correctly found otherwise. In the alternative, Cincinnati asserts that (1) IRT failed to make the threshold showing that the virus was present in the theatre, (2) air is not "property" under IRT's policy, and (3) even if coverage was triggered, the Acts or Decisions Exclusion in the policy applies. We need not reach those alternative arguments. We agree with the trial court that, even if the virus was present, it did not physically alter the theatre.

[9] In claiming the theatre was physically altered, IRT relied on declarations from Dr. Brian Dixon, the Director of Public Health Informatics at the Regenstrief Institute in Indianapolis and a faculty member at IUPUI's Fairbanks School of Public Health; Mark Wood, who is also on the faculty at the Fairbanks School and who worked as an industrial hygienist for Eli Lilly for nearly thirty years; and Dr. Sergey Grinshpun, a faculty member at the University of Cincinnati College of Medicine who specializes in thermophysics and aerosol science. Dr. Dixon stated that infected people "repeatedly eject" respiratory droplets that can "remain aloft and travel significant distances" and that virus particles can "attach" to solid surfaces through "intermolecular electric attractions[.]" Appellant's App. Vol. IV pp. 18, 19. Wood stated that "[t]he presence of SARS-CoV-2 in the air of an indoor space physically alters and transforms that air into something akin to second-hand smoke" and that "[w]hen the virus comes into proximity with a solid surface, it binds to and thereby alters that surface." *Id.* at 95, 98. And Dr. Grinshpun stated that "any hazardous airborne component introduced in an indoor environment negatively affects (or alters) air quality in this environment" and that "[p]ortions of the virus exterior may bind to

surfaces, depending on the chemistry of the surface and environmental conditions." *Id.* at 106.[3]

[10] The trial court did not take issue with the opinions that virus particles can linger in the air and attach or bind to surfaces. However, the court found that these facts do not amount to physical alteration of the air and surfaces because it is undisputed that "the SARS-CoV-2 virus can be cleaned or dies on its own naturally." Appellant's App. Vol. II pp. 53, 59. On appeal, IRT emphasizes that its experts opined that cleaning and air filtration, while helpful, are not completely effective in eliminating the virus. But the experts agreed that virus particles not eliminated by cleaning eventually die on their own. The trial court acknowledged that the virus can "repopulate"—new particles take the place of the old—but found that fact to be irrelevant because the new particles will also die naturally if not eliminated by cleaning first. *Id.* at 60. Ultimately, the court believed "IRT and its experts conflate the potential presence of SARS-CoV-2 inside the theatre with physical alteration to property." *Id.* at 57. We agree with and adopt all these conclusions.

[11] Moreover, as IRT acknowledges, the trial court's decision is consistent with the great weight of authority from around the country. Numerous courts have considered physical-alteration arguments like the one IRT makes, and the large

[3] As the trial court noted, none of IRT's experts opined that virus particles alter the structure of the gas molecules that make up "air," as opposed to simply existing alongside those gas molecules. Appellant's App. Vol. II p. 57.

majority have rejected them. We will not attempt to catalogue those decisions here. A few examples will suffice. The Massachusetts Supreme Judicial Court has held, "Evanescent presence of a harmful airborne substance that will quickly dissipate on its own, or surface-level contamination that can be removed by simple cleaning, does not physically alter or affect property." *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266, 1276 (Mass. 2022). Similarly, the Wisconsin Supreme Court has concluded that "the presence of COVID-19 does not constitute a physical loss of or damage to property because it does not alter the appearance, shape, color, structure, or other material dimension of the property" and "does not necessitate structural repairs or remediation; it can be removed from a surface with a disinfectant." *Colectivo Coffee Roasters, Inc. v. Soc'y Ins.*, 974 N.W.2d 442, 447-48 (Wis. 2022). And the Seventh Circuit, in an opinion by Judge David Hamilton, held that the Conrad hotel down the street from the IRT was not physically altered even if "virus particles physically attached to surfaces." *Circle Block Partners, LLC v. Fireman's Fund Ins. Co.*, 44 F.4th 1014, 1020 (7th Cir. 2022). There are many, many more. We now join that majority and hold that the COVID virus did not physically alter IRT's theatre.

[12] While IRT purports to accept and apply the holding in *IRT I* that physical alteration is required, it also cites several pre-COVID cases from other jurisdictions where coverage (or at least the possibility of coverage) was found based on contamination by a gas, substance, or odor even though there was no "tangible" or "structural" alteration to the property. *Mellin v. N. Sec. Ins. Co.*,

115 A.3d 799 (N.H. 2015) (cat urine odor); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997) (asbestos fibers); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, Civ. No. 2:12-cv-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) (ammonia); *Matzner v. Seaco Ins. Co.*, No. CIV. A. 96-0498-B, 1998 WL 566658 (Mass. Super. Ct. Aug. 12, 1998) (carbon monoxide). But the contamination involved in those cases left insured property physically unusable or uninhabitable, at least temporarily. *See Mellin*, 115 A.3d at 805 ("Evidence that a change rendered the insured property temporarily or permanently unusable or uninhabitable may support a finding that the loss was a physical loss to the insured property."); *Sentinel Mgmt. Co.*, 563 N.W.2d at 300 ("Although asbestos contamination does not result in tangible injury to the physical structure of a building, a building's function may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants."); *Gregory Packaging*, 2014 WL 6675934, at *3 (release of ammonia rendered building "temporarily unfit for occupancy and use" and "physically incapacitated"); *Matzner*, 1998 WL 566658, at *1 (fire department directed tenants to leave apartment because of "unacceptably high level of carbon monoxide").

[13] The COVID virus, on the other hand, does not render property unusable or uninhabitable. Here, after closing to the public, IRT filmed a performance with a limited audience, had a custodian in the building every day, and eventually started work and rehearsals for a 2020-21 virtual season. We agree with the courts that have distinguished the COVID virus from the contamination at

issue in the pre-COVID cases cited by IRT. *See, e.g., Neuro-Commc'n Servs., Inc. v. Cincinnati Ins. Co.*, --- N.E.3d ---, 2022 WL 17573883, at *6 (Ohio Dec. 12, 2022) (holding that insured's premises "were not wholly uninhabitable" and "were unsafe only to the extent that they served as an indoor space in which people could gather and Covid could be transmitted"); *Wilson v. USI Ins. Serv. LLC*, 57 F.4th 131, 146 (3d Cir. 2023) ("Even at its peak, buildings in which the coronavirus inevitably amassed – such as hospitals and grocery stores – remained open and inhabitable."); *United Talent Agency v. Vigilant Ins. Co.*, 77 Cal. App. 5th 821, 838 (2022) (explaining that "the presence of the virus does not render a property useless or uninhabitable, even though it may affect how people interact with and within a particular space"); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 334 (7th Cir. 2021) (finding no "physical loss" where the preferred use of the premises was "partially limited" by the COVID virus but "other uses remained possible"), *reh'g denied*.

* * * *

[14] The issue in this case is not whether IRT lost income because of the COVID-19 pandemic. It undoubtedly did, just like countless other businesses. The issue is whether that loss is covered by IRT's insurance policy. The answer is no, because the COVID virus did not physically alter the theatre or otherwise render it physically useless or uninhabitable. We therefore affirm the trial court's grant of summary judgment for Cincinnati.

[15] Affirmed.

Altice, C.J., and Crone, J., concur.