No. 861158

IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON, DIVISION I

TULALIP TRIBES OF WASHINGTON, federally recognized Indian Tribes, and TULALIP GAMING ORGANIZATION, an instrumentality and enterprise of Tulalip Tribes of Washington,

Appellants,

v.

LEXINGTON INSURANCE COMPANY; et al.

Respondent.

APPELLANT TULALIP TRIBES' REPLY BRIEF

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I. INTRODUCTION

Appellant Tulalip Tribes of Washington (TTW) and Tulalip Gaming Organization (TGO) (collectively the "Tulalip Tribes" or just "Tribes") brought this insurance coverage action to recover business income and other losses that are covered by "all risk" insurance policies purchased from the Respondents (collectively "Insurers"). The question of "whether the presence of COVID-19 itself can cause physical alteration to a property such that the virus causes physical loss or damage to the property"[1] can only be answered after the Tribes (and the Insurers) are allowed to present evidence on that topic.

The trial court erred by deciding that question as a matter of law against the Tribes. Despite many courts denying similar insurance claims, the Tribes have pleaded sufficient facts that if proven should establish coverage under its policies. Importantly, the Insurers do not dispute that they removed the virus exclusion from the Tribes' policies in 2017. After the Tribes had already submitted claims under those

[1] *Hill and Stout, PLLC v. Mutual of Enumclaw Ins. Co.*, 200 Wn.2d 208, 217 n.4, 515 P.2d 525 (2022).

policies, the Insurers reintroduced that virus exclusion. Yet the Insurers now argue that their all-risk Policies excluded such coverage anyway. As a matter of contract law, coverage law, and common sense, the Insurers would not have had a virus exclusion if a virus could never cause "direct physical loss or damage." Given that the Tribes pleaded sufficient facts that – if proven to be true – would establish coverage, the Tribes should have been allowed to develop those facts and have this issue decided on the evidence rather than having their claims dismissed at the pleadings stage.

II. REPLY ARGUMENT

A. Respondents issued commercial "All Risk" property policies to Tulalip Tribes providing coverage for Business Interruption losses.

Tulalip Tribes is a federally recognized Indian Tribe that owns/operates business properties insured by the Respondents that generate revenue and employment opportunities for Tribal and non-Tribal members. Plaintiffs' Third Amended Complaint ("TAC") ¶¶ 1.[2] Alliant Specialty Insurance Services, Inc., and/or Alliant

[2] The Third Amended Complaint is found at pages 924-976 of the Clerks Papers and will be referred to as "TAC" throughout.

Insurance Services, Inc.[3] marketed, negotiated, drafted, underwrote and/or sold certain property and business interruption insurance and other insurance including the Tribal First Insurance Program ("TPIP") through a Seattle-based insurance broker, Brown and Brown of Washington, Inc. TAC ¶ 16.

The Tribes were issued commercial property insurance policies, which did not contain a virus exclusion. TAC ¶ 16, ¶ 46. The TPIP policy appears to differ from every other property insurance policy that has been judicially construed in connection with the COVID-19 because it excluded human pathogens as a covered cause of all loss or damage prior to 2017 and did not reinstate that exclusion until July 1, 2020, after the Tribes' claim here at issue arose.

[3] The Alliant entities contend that they are not "insurers" but otherwise make no arguments unique to themselves. Respondents Alliant's Response Brief, at 4-5. As Alliant properly concedes, even though it "disputes Tulalip's characterization of Alliant as an insurer, Tulalip's allegations that Alliant is an insurer must be taken as true" at this stage of the proceedings. Respondent Alliant's Response Brief, at 8.

B. The Tribes pleaded that the Covid-19 virus is a physical condition that renders insured property unsafe, untenable, and uninhabitable.

As early as February 26, 2020, the CDC advised that COVID-19 was spreading freely without the ability to trace the origin of new infections, and on March 11, 2020, the Director of the World Health Organization ("WHO") declared the rapidly spreading COVID-19 disease a worldwide pandemic. TAC ¶¶ 82-83. The research pleaded by the Tribes establishes that the COVID-19 virus adheres to surfaces and objects, harming and physically changing and physically altering those objects by becoming a part of their surface and making physical contact with them unsafe or unfit for their ordinary and customary use. TAC ¶ 76-77. Once the Covid-19 virus is in, on, or near property, it is easily spread by the air, people, and objects, from one area to another, causing additional direct physical loss or damage. TAC ¶ 77.

CR 12(b)(6) dismissal is only proper where "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Deegan v. Windermere Real Estate/Ctr.-Isle, Inc.*, 197 Wn. App. 875, 884, 391

P.3d 582 (2017); *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) ("CR 12(b)(6) motions should be granted only 'sparingly and with care'") (quoting *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987)). The Supreme Court of Washington has further advised that "[w]hen an area of the law involved is in the process of development, courts are reluctant to dismiss an action on the pleadings alone by way of a CR 12(b)(6) motion." *Haberman*, 109 Wn.2d at 120. On a motion to dismiss, the trial court must accept all of Plaintiffs' allegations as true, and indeed may not dismiss if there are even hypothetical facts imaginable that would support Plaintiffs' claims. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 175 Wn. App. 840, 865-66, 309 P.3d 555 (2013).

C. The Tribes sufficiently pleaded "direct physical loss or damage" entitling them to coverage under the Policies.

In *Hill & Stout*, the Court explained that its interpretation of "direct physical loss," under which a physical loss of use of property occurs where the presence of a physical phenomenon impacts or frustrates the property's functionality, is consistent with the "period of

restoration" provision of the policy. *Hill & Stout,* 200 Wn.2d at 224-25, 515 P.2d at 534. The Court further clarified that the reference to property being "repaired, rebuilt, or replaced" is satisfied where there is some physical change to the property, including where the insured is physically incapable of using the property. *Hill & Stout,* 200 Wn.2d at 225, 515 P.2d at 535. And the Supreme Court agreed that physical alteration is not required to establish direct physical loss. *Hill & Stout,* 200 Wn.2d at 221-222, 515 P.2d at 533. That it because there are "cases in which there is no physical *alteration* to the property but there is a direct physical loss under a theory of loss of functionality." *Id.* (emphasis in original). *See also Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co.*, 24 A.D.3d 743, 744, 806 N.Y.S.2d 709, 711 (App. Div. 2005)(where the "function and value" of insured's property had been "seriously impaired" there was covered physical damage).

Importantly, the Supreme Court made clear that it was not deciding "the issue of whether the presence of COVID-19 itself can cause physical alteration to a property such that the virus causes physical loss of or damage to the property" because the insured there

was not making that claim. *Hill & Stout,* 200 Wn.2d at 217 n.4, 515 P.2d at 531 n.4.

The Insurers try to downplay *Hill & Stout*'s analysis by describing it as "dicta" (Respondents' Brief, at 27) but the Supreme Court included that language for a reason. The Supreme Court was careful not to foreclose all coverage claims arising from the presence of Covid-19 on an insured's property so that in future cases insureds would have a chance to present evidence to support that "loss of functionality" theory. A dismissal on the pleadings forecloses that possibility, which is a disservice not only to the Tribes but to all Washington insureds. Allowing a case such as this to go forward to the evidence stage will allow the question of whether the presence of COVID-19 on insured premises can cause direct physical loss of functionality to be answered definitively by actual facts and evidence.

The Tribes alleged a physical change to their property as a result of the Covid-19 virus, as demonstrated by the factual allegations in its Third Amended Complaint and the science cited in support thereof. *See* TAC ¶ 125 ("the presence of the Covid-19 virus physically transformed

the content of the air in any insured location where it was present, rendering the air unsafe for individuals to breathe"); *see also* TAC ¶ 127 ("the Covid-19 virus caused direct physical damage to Plaintiffs' insured property by transforming physical objects, materials, or surfaces into 'fomites.'"). The Tribes alleged that "[t]he Covid-19 virus therefore caused direct physical damage to Plaintiffs' insured property, specifically in the air and on surfaces and objects, causing direct physical damage to property by causing physical harm to the property and otherwise making it unsafe and incapable of being used for its intended purpose." TAC ¶ 129.

Washington case law already recognizes that vapors released into a house can qualify as a "physical loss" for coverage purposes even though there was no visible damage. *Graff v. Allstate Ins. Co.*, 113 Wn. App. 799, 806, 54 P.3d 1266, *rev. denied* 149 Wn.2d 1013 (2002). As recognized by other courts, the term "loss" must mean something different from the term "damage," so being deprived of the physical use of insured property is sufficient "loss." *Ungarean v. CNA & Valley Forge Ins. Co.*, 2022 Pa. Super 204, 386 A.3d 353, 360 (2022), *rev.*

granted 301 A.3d 862 (2023).[4] There is no reason, especially at the pleading stage, that the presence of the Covid-19 virus on the Tribes' insured property should be categorically excluded from coverage.

D. Causation is inherently a fact issue and not a basis for dismissal on the pleadings.

The Insurers now claim that the Tribes' have not shown that the COVID-19 virus caused their losses. Respondents' Brief, at 44 – 49. But on a motion to dismiss, the Court must presume the truth of all facts pleaded in the Tribes' complaint. *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1988). The Court must also accept any reasonable inferences from those facts as true and can even consider hypothetical facts that could be pleaded. *Reid v. Pierce County*, 136

[4] Shortly before this brief was filed, the California Supreme Court announced its decision in *Another Planet Entertainment, LLC v. Vigilant Ins. Co.*, 2024 WL 2339132 (Cal. Supreme Court 5/23/2024). The California Supreme Court answered the Ninth Circuit's question as follows: "while we cannot and do not decide whether the COVID-19 virus can ever constitute direct physical loss or damage to property, we conclude Another Planet's allegations are insufficient to meet the definition of direct physical loss or damage to property under California law." *Another Planet*, 2024 WL 2339132 at *21. That opinion also disapproved of the analysis used by the two California Court of Appeals' decisions cited in the Tribes' Opening Brief at pages 36-38. *Another Planet*, 2024 WL 2339132 at *23 n. 9.

Wn.2d 195, 201, 961 P.2d 333 (1998). Courts should not dismiss complaints if there is any set of facts that could exist that would justify recovery. *Hoffer v. State*, 110 Wn.2d 415, 421, 755 P.2d 781, 785 (1988). If it is possible, as pleaded by the Tribes and properly inferred from their allegations, that Covid-19 caused their losses, then the Tribes should be allowed to develop their evidence to show that happened, rather than being dismissed at the pleadings stage. *Hoffer*, 110 Wn.2d at 424, 755 P.2d at 787 (reversing Rule 12(b)(6) dismissal in part because issue of causation is inherently factual issue that cannot be decided on the pleadings); *see also Hill & Stout*, 200 Wn.2d at 227, 515 P.3d at 535 (causation is usually a fact issue to be decided by the jury).

While the Insurers focus on what they view as inconsistencies or omissions from the pleadings, the Tribes' allegations are sufficient to infer that Covid-19 caused their losses. At this stage, that is all that should be necessary. Whether the Tribes can prove that is true should await the development of the evidence. If there is any doubt about whether the Tribes properly pleaded causation, the remedy should still

be reversal of the dismissal order with leave to replead. RCW 12.08.090-110.

E. The virus exclusion (or lack thereof) is relevant to interpreting the Policies.

In "all risks" policies such as those purchased by the Tribes, "any peril *that is not specifically excluded* in the policy is an insured peril." *Findlay v. United Pacific Ins. Co.*, 129 Wn.2d 368, 378, 917 P.2d 116, 121 (1996)(emphasis in original). As the Tribes specifically pleaded, these Insurers' policy forms explicitly excluded viruses as a covered cause of loss or damage prior to 2017. TAC ¶¶ 30-35. If indeed viruses such as COVID-19 could not cause "physical loss or damage," there would be no need to have such specific exclusion.

More importantly, the Policies applicable to this loss do not contain that virus exclusion. Courts interpreting insurance policies should consider the insurance purchaser's expectations and should provide the interpretation that most favors the insured. *McLaughlin v. Travelers Comm. Ins. Co.*, 196 Wn.2d 631, 641-42, 476 P.3d 1032, 1037 (2020). When the Insurers decided to remove that exclusion in the Tribes' policies after 2017, the Tribes justifiably believed that the

Policies they purchased would now provide coverage for such viral contamination. That evidence is relevant to interpreting the Policies and to interpreting the ambiguous phrase "physical loss or damage."

F. The Tribes remaining claims for coverage, including their extracontractual claims, were incorrectly dismissed, as the Tribes have adequately pleaded "direct physical loss or damage."

The Tribes do not dispute that "physical loss or damage" is necessary to all of the Tribes' coverage claims. Tulalip Tribes alleged that the presence of the COVID-19 virus directly caused a physical change in the condition of their property thus adequately pleading entitlement to Extra Expense coverage. *See* TAC ¶ 125. The Tribes adequately pleaded entitlement to Ingress/Egress coverage by alleging their covered property suffered "physical loss or damage" consistent with Washington law along with the actual presence of the COVID-19 virus within ten miles of its insured properties resulting in being dispossessed, restricted, or prevented from using all or part of the insured property. *See* TAC ¶ 113.

The Tribes also alleged extracontractual claims arising from Respondent's violations of their common law duty of good faith and

fair dealing, Washington's Consumer Protection Act, and Washington's Insurance Fair Conduct Act. *See* TAC ¶¶ 159-168. Respondents are wrong to say that the extracontractual claims were not raised in the Tribes' Opening Brief and should be precluded now. Respondents' Brief, at 62. The Tribes specifically discussed those extracontractual claims at pages 46-47 of their Opening Brief. However, as also succinctly discussed there, those extracontractual claims "turn on whether the Insurers properly denied the Tribes' insurance claims." Opening Brief, at 46. No more need to be said; if this Court reverses the dismissal of the coverage claims it should necessarily reverse the dismissal of the extracontractual claims.

III. CONCLUSION

The Tulalip Tribes properly pleaded that there should be coverage for their claims. This Court should reverse the trial court and allow this case to proceed to discovery.

I certify that this brief is in 14-point Times New Roman and contains 2484 words in compliance with the Washington Rules of Appellate Procedure. RAP 18.17.

DATED this 3rd day of June, 2024.

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I certify under penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

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4887-5486-8924.3

MILLER NASH LLP

June 03, 2024 - 11:40 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	86115-8
Appellate Court Case Title:	Tulalip Tribes of Washington et ano, Appellants v. Lexington Insurance Company et al, Respondents
Superior Court Case Number:	20-2-03604-6

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