Reversed and Rendered and Opinion filed January 28, 2025

In The

Fourteenth Court of Appeals

NO. 14-22-00925-CV

LLOYD'S SYNDICATE 1967 SUBSCRIBING TO POLICY B0180PG1922227, SOMPO INTERNATIONAL FOR AND ON BEHALF OF ENDURANCE WORLDWIDE INSURANCE LTD., NEON LLOYD'S OF LONDON SYNDICATE NO. 2468, UNICORN UNDERWRITING LIMITED, HCC INTERNATIONAL INSURANCE COMPANY PLC FOR AND ON BEHALF OF HOUSTON CASUALTY COMPANY (UK BRANCH), ACE UNDERWRITING AGENCIES LIMITED FOR AND ON BEHALF OF SYNDICATE 2488, TALBOT UNDERWRITING LTD FOR AND ON BEHALF OF LLOYD'S UNDERWRITER SYNDICATE NO 1183 TAL, AND QBE EUROPEAN OPERATIONS PLC, Appellants

V.

BAYLOR COLLEGE OF MEDICINE, Appellee

On Appeal from the 295th District Court
Harris County, Texas
Trial Court Cause No. 2020-53316

OPINION

In an issue of first impression for this court, we answer the question: Did the presence of the SARS-CoV-2 virus (COVID-19) on insured property cause "direct physical loss of or damage to" the property? Mindful of the importance of uniformity when identical insurance provisions are interpreted in various jurisdictions, we join the vast majority of courts that have answered this question: No.

The evidence in this case is legally insufficient to support the jury's contrary answer. Accordingly, we reverse the trial court's judgment and render a judgment that Baylor College of Medicine take nothing.

I. BACKGROUND

Appellants are insurance companies that insured Baylor under an all-risks policy covering "all risks of direct physical loss of or damage to property" for a term ending in October 2020.[1] Baylor is a health-sciences university that provides clinical services, conducts medical research, and educates medical professionals. When appellants denied Baylor's claim for business interruption and other losses associated with the COVID-19 pandemic, Baylor sued for breach of contract and other claims. The case was tried to a jury, which answered "yes," to Jury Question No. 1: "Did COVID-19 cause direct physical loss of, or damage to, Baylor's property?" Consistent with the jury's damages findings, the trial court signed a final judgment awarding more than $12 million in damages and attorney's fees to Baylor, divided among each appellant.

[1] Other coverage terms pertaining to specific types of losses, such as for business interruption, had similar language requiring "direct physical loss, damage or destruction" of property.

At trial, Baylor's witnesses testified about COVID-19, how it adheres to surfaces, and what Baylor had to do to limit the transmission of the virus during the pandemic. Dr. Peter Hotez testified that he was a professor of pediatrics and molecular virology and microbiology at Baylor and the head of Baylor's Center for Vaccine Development. He was involved in developing one of the COVID-19 vaccines. He testified that the virus is released into the environment through droplets when people cough and sneeze. The virus can't be seen without an electron microscope, but the virus "alters the environment, even if you cannot see it."

The virus is transmitted primarily in three ways involving droplets containing the virus contacting a person's mucus membranes—their nose, mouth, or eyes. First, it can be transmitted when tiny droplets linger in the atmosphere and contact someone's mucus membranes or are inhaled. Next, it can be transmitted by "direct droplet contact" when larger droplets land on someone's mucus membranes. Lastly, some of those droplets will land on surfaces, which people touch and then bring to their mucus membranes. The virus has the ability to last within water droplets and in the atmosphere for a period of time, although the scientific community is "somewhat divided on that length of time, varying anywhere from hours or days to minutes." Hotez testified that people on Baylor's insured property were shedding viral matter from the beginning of the pandemic through the end of the coverage period.

Dr. James McDeavitt testified that he was broadly responsible for all the clinical work at Baylor. He was also the commander of Baylor's Incident Command Center—a process developed to make decisions and move Baylor forward during a period of crisis such as the COVID-19 pandemic. He testified

that Baylor could not close its doors during the pandemic because Baylor had to remain open to treat patients.

Hotez and McDeavitt testified similarly that Baylor took steps to limit the number of people coming into the building or regulate it in such a way as to limit their risk of acquiring COVID-19. Baylor used disinfectants and cleaners to scrub down surfaces, and Baylor installed filters and Plexiglass barriers. There was a constant, ongoing effort "to continually clean and wipe and ventilate and filter the atmosphere." These steps were taken to reduce the risk of people acquiring COVID-19 and to reduce the amount of the virus on the property. Baylor made the decision to reduce the number of in-person patient visits at its property and limit in-person classroom instruction. The number one priority was to protect the health and safety of Baylor's patients.

Hotez testified that Baylor's insured property was damaged because the "microdroplets of virus on the surfaces of the furniture, and the medical equipment, or the microdroplets of the virus in the atmosphere," made the property "less inhabitable, and far more expensive in order to try to mitigate." Hotez opined that Baylor's property was damaged by COVID-19 based on the "definition of 'damage,' which is to render an object, furniture, equipment, either less usable, which it certainly did, or of less value, which it certainly did." Hotez testified that when droplets containing the virus land on a surface, it is a "damaged surface." He clarified:

> Not damaged in the sense that it's causing physical—it's not causing destruction like taking—taking a sharp object to it or banging on it or burning it, but it's damaging it in the sense that it's—those microdroplets are making that table, that surface dangerous. Dangerous, therefore, less valuable, and, therefore, damaged.

McDeavitt testified that the virus substantially and fundamentally changed the way Baylor could use its property. He described "pre-COVID" it would take fifteen seconds to make an exam room ready for the next patient. But during the pandemic, many more steps were required, and they had to wait an hour for virus particles to settle from the air to a surface and then clean the room using specialized cleaning products.

McDeavitt testified that the presence of COVID-19 on Baylor's property resulted in direct physical loss, damage, or destruction to Baylor's real and personal property because, "We could not use the property for the purpose it was intended." He opined that the property was damaged because it was rendered "unusable or differently useable." He analogized to an arsonist setting a fire on Baylor's property every day, which then had to be repaired. Yet, McDeavitt testified that the presence of COVID-19 "did not change the—the molecular structure of our property."

Hotez testified on cross-examination that after droplets containing COVID-19 evaporate, there may be a short time when the virus is viable and transmissible, but after that, it becomes benign and can no longer infect anyone. The property becomes no longer damaged. Hotez testified that any property containing a microdroplet of influenza also would be damaged and that Baylor has experienced property damage any time flu patients have sneezed. He testified that the damage caused by COVID-19 was "physical" but not "structural." Thus, Baylor didn't have to "throw away" property such as chairs or microscopes. He was not aware of Baylor having to discard any microscopes, beds, desks, chairs, fixtures, computers, lights, exam tables, or counters as a result of the damage caused by COVID-19.

Baylor also points to testimony from appellants' witnesses, Dr. Allison Stock and Dr. Brian Flinn. Stock was an epidemiologist who worked on procedures and policies related to COVID-19. She prepared a report regarding "fomite transmission" for COVID-19. Fomite transmission is "an inanimate object that becomes almost a vector for that disease." Fomite is "surface transmission," such as if someone were to sneeze on a tabletop and someone else touched it and got a virus, "this would be a fomite." She testified that "adsorption" includes the forces that keep a virus on a surface until it is wiped off or cleaned or it degrades enough to dry out and fall off. She testified that COVID-19 is removed from a surface either by letting it sit and degrade on its own or by cleaning. The current guidance from the Centers for Disease Control is that COVID-19 is "nicely degraded and not a health risk at all" after it is on a surface for twenty-four hours. She added, "Which I think is really gross, because if I have somebody in an office space, I want somebody to clean. I want somebody to wipe that down so I'm not having to touch something where somebody sneezed on it." But, the virus is "easily wipe-able and cleanable," particularly when using isopropyl alcohol, i.e., hand sanitizer.

On cross-examination, Stock testified that viruses have mass and are "physical." When an infected person coughs or sneezes, viral particles are "going to be pretty much everywhere." Under ideal conditions, viable COVID-19 particles have been detected on surfaces for as much as seventy-two hours.

Flinn testified that he was a materials science engineer and professor, focusing on metals, ceramics, polymers, composites, fabrics, wood, and similar materials. He described adsorption as a common phenomenon that occurs all the time when molecules or atoms come near a surface. There is no chemical reaction that takes place for adsorption.

Flinn testified that when water droplets from "spit" that do not contain COVID-19 land on a surface, the surface is changed because there are deposits on the surface. But it can be wiped off and the surface returned to its original state. The material left behind by water droplets containing a virus is "[v]ery minor-ly" different, but "the spit particle won't be any different."

On cross-examination, Flinn acknowledged that some damage is invisible. He also testified that when a virus adsorbs to a surface, there is a "physical connection."

During the charge conference, appellants objected to the submission of Jury Question No. 1 because there was no evidence that COVID-19 caused direct physical loss of or damage to Baylor's property. Following the jury's verdict and the trial court's judgment awarding more than $12 million to Baylor, appellants moved for a judgment notwithstanding the verdict, arguing that there was legally insufficient evidence to support the jury's finding that COVID-19 caused direct physical loss of or damage to Baylor's property. The motion was denied by operation of law.

II. ANALYSIS

In their first and dispositive issue on appeal, appellants contend that there is legally insufficient evidence to support the jury's finding that COVID-19 caused "direct physical loss of or damage to" Baylor's property. Appellants contend that this policy language requires a "tangible alteration of, injury to, or deprivation of property," and courts across the country have overwhelmingly held that COVID-19 has no such physical effect on property as a matter of law.

A. Standard of Review and Legal Principles

Evidence is legally insufficient when the record includes no more than a scintilla of evidence to support a vital fact. *See City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of a vital fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). More than a scintilla of evidence exists if the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 228 (Tex. 2011). Thus, the ultimate test for legal sufficiency is "whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller*, 168 S.W.3d at 827.

In making this determination, we view the evidence in the light most favorable to the verdict, crediting favorable evidence if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not. *Id.* We cannot substitute our judgment for that of the jury's if the evidence falls within the zone of reasonable disagreement. *Id.* at 822.

Sometimes, whether an insured has sustained a covered loss is a question of fact for the jury. *See, e.g.*, *State Farm Lloyd's v. Hanson*, 500 S.W.3d 84, 92–94 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (reviewing evidence and upholding the jury's finding of physical loss to a roof caused by wind when the parties disputed the condition of the roof prior to a windstorm, whether wind could have caused the damage, and the extent of the damage). But often, whether a particular loss is covered by an insurance policy is a question of law dependent on the language of the policy. *See de Laurentis v. United Servs. Auto Ass'n*, 162 S.W.3d 714, 723 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (applying

the plain meaning of the policy's terms to conclude that the policy provided coverage); *see also Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 131 (Tex. 2010) (noting that "coverage for a particular risk 'depends, as it always has, on the policy's language'" (quoting *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 14 (Tex. 2007))).

We interpret insurance policies according to the rules of contract construction. *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003). If the language of an insurance policy can be given a definite or certain legal meaning, it is not ambiguous, and we construe it as a matter of law. *Id.* "We must give policy language its ordinary and generally accepted meaning unless the policy shows that the words used are intended to impart a technical or different meaning." *Id.* at 158.

"When construing an insurance policy, we are mindful of other courts' interpretations of policy language that is identical or very similar to the policy language at issue." *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015). When insurance policies contain identical provisions across jurisdictions, we strive for uniformity in construing them. *Id.* The Supreme Court of Texas has "repeatedly stressed the importance of uniformity when identical insurance provisions will necessarily be interpreted in various jurisdictions." *Id.* (quotation omitted).

B. Plain Meaning of "Direct Physical Loss of or Damage to" Property

Baylor does not contend that the relevant policy language is ambiguous, and we agree that it is not. We begin with the plain meaning of the relevant policy terms as they are not defined in the policy.

"Loss" means "the act of losing or the thing lost," and it is synonymous with "damage." *de Laurentis*, 162 S.W.3d at 722–23; *see also Loss*, Webster's Third New International Dictionary 1338 (1993) (including in the definition, "the act or fact of losing" and "the state or fact of being destroyed or placed beyond recovery"); *Loss*, Black's Law Dictionary (12th ed. 2024) ("An undesirable outcome of a risk; the disappearance or diminution of value, usu. in an unexpected or relatively unpredictable way."). "Damage" means "[l]oss or injury to person or property," especially "physical harm that is done to something or to part of someone's body," but also "any bad effect on something." *Damage*, Black's Law Dictionary (12th ed. 2024); *see also Damage*, Webster's Third New International Dictionary 571 (1993) (including in the definition, "loss due to injury" and "injury or harm to person, property, or reputation").

"Physical" means "[o]f, relating to, or involving material things; pertaining to real, tangible objects." *U.S. Metals, Inc. v. Liberty Mut. Group, Inc.*, 490 S.W.3d 20, 24 (Tex. 2015) (alteration in original, quotation omitted); *accord Physical*, Black's Law Dictionary (12th ed. 2024); *see also Physical*, Webster's Third New International Dictionary 1706 (1993) (including "of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary").

The Supreme Court of Texas addressed the meaning of "physical injury" in a commercial general liability policy when determining whether the installation of a defective product at a refinery resulted in physical injury to tangible property. *U.S. Metals*, 490 S.W.3d at 21–22. Relying on dictionary definitions of "physical and "injury," with the latter defined as "[a]ny harm or damage," the court reasoned that a "physical" injury had to be "one that is tangible." *Id.* at 24–25; *see also id.* at 27 (holding that "physical injury requires tangible, manifest harm"). Although

the installation of a defective product damaged the covered property because it increased the risk of danger from using the property and reduced the value of the property, *id.* at 24, there was no "physical" injury within the meaning of the policy until the subsequent repairs required destruction of parts of the covered property, *see id.* at 28.

In cases addressing potential coverage for "physical" loss of or damage to property resulting from the presence of COVID-19, courts across the country have required a "tangible alteration or deprivation of property." *See, e.g.*, *Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, 22 F.4th 450, 456–57 (5th Cir. 2022) (collecting cases). The U.S. Court of Appeals for the Fifth Circuit concluded that the "Texas Supreme Court would interpret a direct physical loss of property to require a tangible alteration or deprivation of property." *Id.* at 458. Our sister court, the Fifth Court of Appeals, similarly concluded that a "direct physical loss of or damage to" property requires a "tangible alteration or deprivation of the property." *Julio & Sons Co. v. Cont'l Cas. Co.*, 692 S.W.3d 877, 883 (Tex. App.—Dallas July 3, 2024, no pet.) (quotation omitted).

Considering the plain meaning of the policy language, the Supreme Court of Texas's interpretation of a "physical injury," and the rulings from courts across the nation interpreting identical or very similar language, we hold that a "direct physical loss of or damage to" property requires a tangible alteration or deprivation of the property.

C. Legally Insufficient Evidence

The COVID-19 pandemic affected the entire country. As such, courts in many jurisdictions have addressed the very question raised in this appeal. Appellants cite to dozens of cases holding that the presence of COVID-19 did not

cause a physical loss, injury, or damage to property as a matter of law. Baylor does not cite to a case holding otherwise.

In reviewing these cases, we begin with the one decided by our sister court, *Julio & Sons Co. v. Continental Casualty Co.*, 692 S.W.3d 877 (Tex. App.—Dallas July 3, 2024, no pet.). In that case, the Fifth Court of Appeals affirmed the trial court's grant of summary judgment for the insurer, holding that the insured did not present "more than a scintilla of evidence to create a genuine issue of material fact that COVID-19 caused 'direct physical loss of or damage to' its property, meaning the virus caused a distinct, demonstrable, physical alteration to the [property]." *Id.* at 887. The court recited the evidence favorable to the insured similar to the evidence here, such as (1) COVID-19 adsorbs to surfaces, which have "different physical, measurable properties" compared to surfaces without the virus; (2) the virus causes surfaces to become fomites that can be seen under a microscope; and (3) the surfaces are "modified by the physical attachment of viral properties" and "are damaged by becoming realistic vectors of concern in disease transmission." *Id.* at 885. The court also noted evidence that the virus "can be deactivated or removed with manual cleaning and disinfecting[,] and they deactivate on their own over time." *Id.*

The court relied on federal cases from within the Fifth Circuit and around the country, which similarly held that COVID-19 did not cause direct physical loss of or damage to property. *See id.* at 883 & n.1 (collecting cases). The court reasoned that "although the presence of COVID-19 may render property potentially harmful to people, it does not constitute harm to the property itself." *Id.* at 884 (citing *Terry Black's Barbecue*, 22 F.4th at 456). The virus poses "no long-term risk" to property and "does not physically damage property within the plain meaning of 'physical.'" *Id.* (quoting *Ferrer & Poirot, GP v. Cincinnati Ins. Co.*,

36 F.4th 656, 658 (5th Cir. 2022)). "Moreover, a property has not experienced a 'physical loss' or 'physical damage' when all that is required from the property owner is cleaning the surfaces or simply waiting several days for the alleged physical alteration to resolve itself." *Id.* at 886. The court reasoned that to adopt the insured's position that the presence of a virus causes physical damage to property would mean that "property everywhere would be in a constant state of damage or loss," and "would render every sneeze, cough, or exhale a tangible alteration or deprivation of property." *Id.* (quotation omitted).

Baylor adduced evidence that the COVID-19 virus itself is physical and created a physical bond with Baylor's covered property. But courts across the country have relied on reasoning similar to that employed in *Julio & Sons* to reach the same result when confronted with allegations or evidence similar to the evidence presented at the trial here—that COVID-19 physically attaches to property. The presence of COVID-19 on property, though physical itself and creating a physical bond to property, did not cause a physical loss of or damage to the property. *See, e.g.*, *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 335 (7th Cir. 2021) (applying Illinois law; "Even if the virus was present *and* physically attached itself to Sandy Point's premises, Sandy Point does not allege that the virus *altered* the physical structures to which it attached, and there is no reason to think that it could have done so."); *Baxter Sr. Living, LLC v. Zurich Am. Ins. Co.*, 556 P.3d 757, 768 (Alaska 2024) ("[B]ecause COVID-19 does not physically alter property and merely attaches to it, the presence of COVID-19 on property does not constitute 'direct physical damage.'"); *Another Planet Ent., LLC v. Vigilant Ins. Co.*, 548 P.3d 303, 329 (Cal. 2024) ("And, to the extent the change is physical, it fails to satisfy the definition of direct physical damage to property for the same reason that other allegations of microscopic bonding or adhesion is

insufficient. It does not involve damage or harm to property."); *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, 359 So. 3d 922, 926, 929 (La. 2023) (holding that "COVID-19 did not cause damage or loss that was physical in nature" despite evidence that the presence of the virus on property damaged it because "when the virus lands on property it transforms that property from noninfectious, safe, to infectious"); *Tapestry, Inc. v. Factory Mut. Ins. Co.*, 286 A.3d 1044, 1067 (Md. 2022) (holding that COVID-19 does not cause physical loss or damage to property when it does not cause tangible, concrete, and material harm to the property nor deprivation of possession of the property although COVID-19 is "physically present in the indoor air of that property [and] is also present on, adheres to, and can later be dislodged from physical items on the property"); *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266, 1276 (Mass. 2022) (reasoning that, despite allegations of loss of use of the property "caused, in some sense, by the physical properties of the virus," the "[e]vanescent 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"); *Star Surplus Lines Ins. Co. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 535 P.3d 254, 264 (Nev. 2023) (granting mandamus and directing summary judgment for the insurer despite evidence that COVID-19 "is a physical particle that deposits on the property and lasts for days" because "direct physical loss or damage to covered property requires something more involved" and COVID-19's attachment to property "does not give rise to the necessary transformative element").[2]

[2] Our research reveals one case in which a divided Supreme Court of Vermont held that similar allegations were sufficient to avoid a motion for judgment on the pleadings. *See Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co.*, 287 A.3d 515, 534–36 (Vt. 2022). But the majority noted that the "procedural posture is integral to the outcome," and a judgment on the pleadings is "disfavored" under Vermont's "extremely liberal notice-pleading standards" with

Baylor's witnesses' testimony that its property was damaged because it was temporarily dangerous to other people, and therefore less valuable, is no evidence of a tangible alteration or deprivation of the property. *See Julio & Sons*, 692 S.W.3d at 883–86; *Terry Black's Barbecue*, 22 F.4th at 456–58. Like the installation of a defective component, the presence of COVID-19 on Baylor's property may have "damaged" the property because the virus increased the risk of danger from using the property and reduced the value of the property, but there was no "physical" loss of or damage to the property. *Cf. U.S. Metals*, 490 S.W.3d at 24, 28. And Baylor does not contend that any cleaning it did to remove the virus caused physical loss of or damage to its property. *Cf. id.* at 28. Indeed, Hotez was not aware of any property that had to be discarded, and the undisputed evidence was that cleaning the property or waiting some time restored the property to its original, undamaged condition. *See Julio & Sons*, 692 S.W.3d at 886.

Baylor's witness, McDeavitt, analogized to its patrons being arsonists and lighting fires on its property. But a more apt analogy would be its patrons spilling small amounts of water that cause no tangible alteration to the property. A puddle of water may be physically present on the nonporous floor of Baylor's building and may pose a risk of injury to visitors who could slip on it, but the fact that Baylor expends resources to prevent visitors from stepping in the puddle and chooses to mop it up or let it evaporate does not mean the puddle causes "physical loss of or damage to" the floor itself. *See Baxter Sr. Living*, 556 P.3d at 768 ("COVID-19 is to property what water is to a plastic sheet: water does nothing to a plastic sheet but at most, it stays on it or *attaches* to it."). In other words, the floor isn't

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the plaintiff needing to meet an "exceedingly low" threshold to avoid dismissal. *See id.* at 533 (quotations omitted). Regardless of the procedural posture, we agree with the dissenting justices that as a matter of law, the attachment of droplets containing COVID-19 on property does not cause direct physical loss of or damage to property. *See id.* at 540–41 (Carroll, J., dissenting).

physically damaged even though the floor is dangerous and Baylor incurs financial losses to make it safe. *Cf. U.S. Metals*, 490 S.W.3d at 24, 28 (holding that the installation of a defective component does not cause "physical" damage to property although the property is damaged due to the increased risk of danger from its use and, thus, decreased value).

Striving for uniformity with other jurisdictions that have applied identical or very similar policy language, *see RSUI Indem. Co*., 466 S.W.3d at 118, we hold that there is legally insufficient evidence to support the jury's affirmative answer to Jury Question No. 1 because there is no more than a scintilla of evidence that COVID-19 caused direct physical loss of or damage to Baylor's property. Thus, the trial court erred by overruling appellants' motion for judgment notwithstanding the verdict.

Appellants' first issue is sustained.

III. CONCLUSION

Having sustained appellants' first issue, we reverse the trial court's judgment and render a judgment that Baylor take nothing.

/s/ Ken Wise
Justice

Panel consists of Justices Wise, Hart, and Bridges.