

FILED

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARLOS O. CABALLERO, DBA Master
Orthodontics, DDS, MS, PS; WALKER &
KRAUS DDS, PLLC,

Plaintiffs-Appellants,

v.

MASSACHUSETTS BAY INSURANCE
COMPANY; CITIZENS INSURANCE
COMPANY OF AMERICA,

Defendants-Appellees.

No. 21-35510

D.C. No. 3:20-cv-05437-BJR

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Barbara Jacobs Rothstein, District Judge, Presiding

Submitted August 12, 2022**
Seattle, Washington

Before: BERZON, CHRISTEN, and FORREST, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Plaintiffs Carlos O. Caballero, et al. timely appeal the district court’s dismissal of their complaint in this insurance coverage dispute with defendants Massachusetts Bay Insurance Company and Citizens Insurance Company of America. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the order granting defendants’ motion to dismiss for failure to state a claim on which relief can be granted, *Mudpie, Inc. v. Travelers Cas. Ins. Co.*, 15 F.4th 885, 889 (9th Cir. 2021); Fed R. Civ. P. 12(b)(6), and we affirm.

We assume the parties’ familiarity with the facts and do not recite them here. Plaintiffs seek coverage under their insurance policies for economic losses incurred during the COVID-19 pandemic. Plaintiffs allege that their insurers breached their insurance contracts by refusing to cover their loss of business income and extra expenses resulting from “direct physical loss,” and losses caused by operation of “civil authority.” They also argue that the policy’s exclusions for losses caused by viruses did not bar coverage.

1. **Direct Physical Loss.** While this appeal was pending, the Washington Supreme Court held, as a matter of contractual interpretation, that claims for losses due to the Governor’s COVID-19 orders do not qualify for coverage as “direct physical loss of or damage to” property, and that the virus exclusion in that case also barred coverage. *See Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co.*, 515

P.3d 525, 528–29 (Wash. 2022). “When interpreting state law, we are bound to follow the decisions of the state’s highest court.” *Mudpie*, 15 F.4th at 889 (quoting *Diaz v. Kubler Corp.*, 785 F.3d 1326, 1329 (9th Cir. 2015)). The district court did not err in holding that plaintiffs were not entitled to coverage under the provisions covering business losses resulting from “direct physical loss.”

2. Civil Authority. Plaintiffs also assert that they may recoup their losses under a policy provision that provides coverage when an “action of civil authority . . . prohibits access” to an insured’s premises due to “direct physical loss or damage to property within one mile” of the insured property. For this provision to apply, the “action of civil authority [must be] taken in response to dangerous physical conditions resulting from the damage.” Plaintiffs’ argument fails because the complaint included no colorable allegation that the Governor entered his orders in response to any dangerous *physical* conditions that resulted from property damage rather than because of concern for public health and safety. *See Hill & Stout*, 515 P.3d at 533 (explaining that there was no physical alteration of the covered property as a result of the COVID-19 pandemic, nor was the property “rendered unsafe or uninhabitable because of a dangerous physical condition”).

3. **Virus Exclusion.** Further, because “COVID-19 initiated the causal chain that led to . . . the cause of any alleged loss of use,” the virus exclusion bars coverage. *Id.* at 528–29.

AFFIRMED.