NOT FOR PUBLICATION

FILED

MAY 19 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ASPEN LODGING GROUP, LLC; ASPEN TENNESSEE, LLC; ASPEN MALLORY HOLDINGS, LLC; DELUXE RESTAURANT, LLC; ASPEN IMPERIAL, LLC; VANCE HOTEL ASSOCIATES, LLC; KS TACOMA HOTEL, LLC; ROOSEVELT HOTEL OWNER, LLC; THEODORE F&B, LLC; PORTLAND GOVERNOR HOTEL ACQUISITION, LLC; PORTLAND HOTEL, LLC; DOSSIER F&B, LLC; HOTEL AMBASSADOR NOLA, LLC; VILLA PALM SPRINGS OWNER, LLC; 930 SANDY BAR, LLC, Plaintiffs-Appellants, and VANCOUVER CLINIC INC., PS, Plaintiff, v. AFFILIATED FM INSURANCE COMPANY, Defendant-Appellee.	No. 21-35472 D.C. No. 2:20-cv-01038-BJR MEMORANDUM*

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

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

Submitted March 31, 2023[**]
Seattle, Washington

Before: NGUYEN and HURWITZ, Circuit Judges, and PREGERSON,[***] District Judge.

In this insurance coverage action, Aspen Lodging Group LLC seeks reimbursement from Affiliated FM Insurance Company ("AFM") for business losses incurred at a hotel during the COVID-19 pandemic. Applying Washington law, the district court granted AFM's cross-motion for partial summary judgment. *See Nguyen v. Travelers Cas. Ins. Co. of Am.*, 541 F. Supp. 3d 1200, 1245 (W.D. Wash. 2021). We have jurisdiction under 28 U.S.C. § 1291. Reviewing the summary judgment de novo, *WildEarth Guardians v. Provencio*, 923 F.3d 655, 664 (9th Cir. 2019), we affirm.

1. To establish coverage under Washington law, an "insured must show the loss falls within the scope of the policy's insured losses." *McDonald v. State Farm Fire & Cas. Co.*, 837 P.2d 1000, 1003–04 (Wash. 1992). AFM's policy covers loss

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

[***] The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

"as a direct result of physical loss or damage." The Washington Supreme Court recently observed that "in order to recover under a property insurance policy for physical loss of or damage to the property, something *physically* must happen to the property." *Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co.*, 515 P.3d 525, 533 (Wash. 2022). The court held that the "loss of intended use and loss of business income" caused by the Governor's orders "is not a *physical* loss of property," *id.* at 532, and stated that it agreed with the district court's conclusion here that "there must be some *physical* effect on the property" to trigger coverage, *id.* at 534. Although *Hill & Stout* dealt only with a claim that the Governor's orders triggered coverage, the court also noted, as did the district court here, "the strong, if not unanimous, consensus around the country" that COVID-19 itself does not cause a direct physical loss of property. *Id.*; *see Nguyen*, 541 F. Supp. 3d at 1207.

Hill & Stout acknowledged "that there are likely 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.* at 533. But, in rejecting a claim by dentists for business losses caused by the COVID-19 pandemic, the court held that "this case is not one of them" because there was "no *physical* loss of functionality to the *property*." *Id.* "[T]here was no alleged imminent danger to the property, no contamination with a problematic substance, and nothing that *physically* prevented use of the property or rendered it useless; nor were the dental offices rendered unsafe or uninhabitable

because of a dangerous physical condition." *Id.* The same is true here.

Although the policy's Communicable Disease provision provides coverage even without physical loss or damage, it requires the actual presence of COVID-19, which Aspen does not allege.

2. Even assuming coverage under the AFM policy, its Contamination exclusion applies. The policy excludes coverage for "**Contamination**, and any cost due to **contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy." "**Contamination**" is defined to include "any condition of property due to the actual or suspected presence of . . . bacteria, virus, disease causing or illness causing agent." *See Overton v. Consol. Ins. Co.*, 38 P.3d 322, 329 (Wash. 2002); *Hill & Stout*, 515 P.3d at 536–37 (finding a virus exclusion applicable to a claim for property damage allegedly caused by COVID-19).[1]

AFFIRMED.

[1] Given the guidance in *Hill & Stout*, we decline to certify the coverage question to the Washington Supreme Court.