IN THE SUPREME COURT OF NORTH CAROLINA

No. 353PA23

Filed 13 December 2024

CATO CORPORATION, a Delaware corporation, et al.

v.

ZURICH AMERICAN INSURANCE COMPANY, a New York corporation

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, No. 23-305 (N.C. Ct. App. Nov. 21, 2023) (unpublished), affirming an order entered on 10 January 2023 by Judge Forrest Donald Bridges in Superior Court, Mecklenburg County. Heard in the Supreme Court on 22 October 2024.

Robinson, Bradshaw & Hinson, P.A., by Matthew W. Sawchak, R. Steven DeGeorge, and Benjamin C. DeCelle; and Kozyak Tropin & Throckmorton LLP, by Benjamin J. Widlanski, pro hac vice, Dwayne A. Robinson, pro hac vice, and Gail A. McQuilkin, pro hac vice, for plaintiff-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Gary S. Parsons and Kimberly M. Marston; Squire Patton Boggs (US) LLP, by Lauren S. Kuley, pro hac vice; and Teague Campbell Dennis & Gorham LLP, by William A. Bulfer, Megan N. Silver, and Daniel T. Strong, for defendant-appellee.

EARLS, Justice.

This is a companion case to *North State Deli, LLC v. Cincinnati Insurance Co.*, No. 225PA21-2 (N.C. Dec. 13, 2024), also announced today. There, we held that restaurant policyholders stated a claim for insurance coverage when COVID-19-related government orders caused the restaurants to suspend business operations

due to the loss of use of and access to the restaurants' physical property. Such losses amounted to a "direct physical loss" under the terms of that policy, we concluded. We

Under *North State Deli*, No. 225PA21-2, we conclude that Cato failed to allege facts sufficient to state a claim for insurance coverage due to direct physical loss of or damage to property because the contamination exclusion precludes coverage for direct physical losses caused by viruses. Therefore, we affirm the Court of Appeals' judgment.

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In reviewing a trial court's grant of a Rule 12(b)(6) motion, we examine "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *State ex rel. Stein v. Kinston Charter Acad.*, 379 N.C. 560, 572 (2021) (quoting *Bridges v. Parrish*, 366 N.C. 539, 541 (2013)). The summary below follows from the factual allegations in Cato's complaint and subsequent judicial proceedings.

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In July 2019, Cato purchased an "all-risk" commercial property insurance policy from Zurich American Insurance Company. That policy provides $250 million in coverage for the benefit of Cato and its named subsidiaries in exchange for substantial premiums. A copy of the policy was attached as an exhibit to Cato's initial complaint and incorporated therein by reference.

Like the policy at issue in *North State Deli*, No. 225PA21-2, Cato's policy is an "all-risk" commercial property insurance policy. That means the policy defines the scope of covered risks by its exclusions. *See N. State Deli*, No. 225PA21-2, slip op. at

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As Cato alleges, beginning in March 2020, the COVID-19 virus "physically inundated" Cato's stores.[1] The virus's "physical impacts . . . damaged [Cato's] properties" and rendered them "uninhabitable, unfit, unsafe and unusable." Government orders forced Cato's stores to close and set limits and conditions on how they could later reopen. Cato had to "remediate and reconfigure" its physical spaces "because of the pervasiveness of the COVID Virus, including its direct physical impacts on property." Cato incurred significant revenue losses because of the virus's impairment of its property and related government ma 792 t3u

Deceptive Trade Practices Act.

Zurich moved to dismiss all of Cato's claims under North Carolina Rule of Civil Procedure 12(b)(6) for failure to state a claim. *See* N.C.G.S. § 1A-1, Rule 12(b)(6) (2023). After a hearing, the trial court concluded that the decision of the Court of Appeals in *North State Deli*, 284 N.C. App. 330, was "authoritative and warrants dismissal" of Cato's claims. In particular, it observed that "in order for a loss to be covered by the policy, the loss must have resulted from physical harm to the property of the insured." Cato's allegations that the COVID-19 virus physically damaged the covered property were "not sufficient to overcome" that caselaw.

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allegations were, in the view of the Court of Appeals, "unwarranted deductions of fact" not entitled to the presumption of truth at the motion to dismiss stage, *id.* at 10 (quoting *Sutton v. Duke*, 277 N.C. 94, 98 (1970)). The Court of Appeals did not reach the issue of whether coverage was barred by a policy exclusion, reasoning that an insurer has no burden to prove a policy exclusion until a prima facie case of coverage is shown. *Id.* at 14 (citing *Fortune Ins. Co. v. Owens*, 351 N.C. 424, 430 (2000)). The Court of Appeals affirmed the trial court's order dismissing Cato's complaint, and Cato again appealed. We allowed Cato's petition for discretionary review on 21 May 2024.

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We conclude that Cato sufficiently alleged a "direct physical loss of or damage" to property under the approach we articulated in *North State Deli*, No. 225PA21-**2**. However, Zurich met its burden to prove the contamination exclusion applies, and therefore, Cato's claims were properly dismissed. We address each issue in turn.

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state of facts which could be proved in support of the claim." *Est. of Graham v. Lambert*, 385 N.C. 644, 656 (2024) (quoting *Sutton*, 277 N.C. at 103).

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a claim. *Id*. The motion is properly granted "(1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint on its face reveals the absence of fact sufficient to make a good claim; [or] (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim." *Jackson v. Bumgardner*, 318 N.C. 172, 175 (1986). On a Rule 12(b)(6) motion, well-pleaded allegations of fact in the complaint are treated as true, but conclusions of law are not. *Id.* at 174–75. Factual inferences should be viewed "in the light most favorable to the nonmoving party." *See CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51 (2016) (quoting *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 682 (1987)).

"Questions concerning the meaning of contractual provisions in an insurance policy are reviewed *de novo* on appeal." *Register v. White*, 358 N.C. 691, 693 (2004). As we explained in *North State Deli*, when interpreting a contract for insurance, the plain language and ordinary meaning of the policy control unless the contract specifically defines certain terms or the context suggests otherwise. No. 225PA21-2, slip op. at 11–12. The contract "should be given that construction which a reasonable person in the position of the insured would have understood it to mean." *Id.* at 12 (quoting *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 43 (1978)). Where the language of a

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§ 1A-1, Rule 12(b) (2023). One part of the policy explicitly excludes coverage for losses resulting

Cato responds that this is not the operative definition of "contamination" or "contaminant" in its policy. Instead, it says that it alleged it paid a higher premium for a different definition of "contamination." That revised definition is located in a series of "amendatory endorsements" at the end of the policy, which appear with labels corresponding to specific states—thirty-one states, in fact. Cato argues that the "Amendatory Endorsement – Louisiana" policy provision amended Cato's coverage by deleting the definition of "contamination" listed in the main body of the policy and described above, replacing it with one that excludes viruses. Thus, it contends, viral contamination is covered.

Cato's argument that its North Carolina policy incorporates the Louisiana amendatory endorsement is unpersuasive. To start, Cato's complaint does not allege, as a factual matter, that it bargained for the Louisiana endorsement to apply to its policy covering properties not in Louisiana. The complaint makes a general allegation that not having a *virus exclusion* in an "all-risk" policy means Cato paid a higher premium for virus coverage. It specifically defines that *virus exclusion* as a standalone "Exclusion Of Loss Due To Virus or Bacteria" that it alleges is "contained in most of [Zurich's] other all risks property insurance policies."[3] Then, in a footnote, the complaint alleges that the separate *contamination exclusion* does not preclude coverage for Cato's losses. But it does not explain why. Nor does it argue that it has

[3] That separate virus exclusion allegedly states that Zurich "will not pay for loss or damage caused by or resulting from any virus."