SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3644-20

JENKINSON'S SOUTH, INC., and JENKINSON'S PAVILION,

Plaintiffs-Appellants,

v.

WESTCHESTER SURPLUS LINES INSURANCE COMPANY, AXIS SURPLUS INSURANCE COMPANY, EVANSTON INSURANCE COMPANY, ARCH SPECIALTY INSURANCE COMPANY, GENERAL SECURITY INDEMNITY COMPANY OF ARIZONA, CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, IRONSHORE SPECIALTY INSURANCE COMPANY, and LANDMARK AMERICAN INSURANCE COMPANY,

Defendants-Respondents.

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Argued January 10, 2023 – Decided June 13, 2023

Before Judges Sumners and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-1607-20.

Robert D. Chesler argued the cause for appellants (Anderson Kill, PC, attorneys; Robert D. Chesler, Nicholas M. Insua, and John P. Lacey, Jr., on the briefs).

Daren S. McNally argued the cause for respondent Westchester Surplus Lines Insurance Company and Kristin V. Gallagher argued the cause for respondent AXIS Surplus Insurance Company (Clyde & Co US LLP, and Kennedys CMK LLP, attorneys; Kristin V. Gallagher, Eduardo DeMarco, Daren S. McNally, and Barbara M. Almeida, of counsel and on the joint brief).

Jonathan R. MacBride and Kristin C. Cummings (Zelle LLP) of the Texas bar, admitted pro hac vice, argued the cause for respondents Evanston Insurance Company, Arch Specialty Insurance Company, General Security Indemnity Company of Arizona, Certain Underwriters at Lloyds of London, and Landmark American Insurance Company, and Jeremiah L. O'Leary argued the cause for respondent Ironshore Specialty Insurance Company (Jonathan R. MacBride, Meredith C. Schilling, Kristin C. Cummings, and Finazzo Cossolini O'Leary Meola & Hager, LLC, attorneys; Jonathan R. MacBride, Meredith C. Schilling, and Kristin C. Cummings, on the joint brief).

PER CURIAM

Plaintiffs Jenkinson's South, Inc. and Jenkinson's Pavilion own and operate boardwalk amusement and entertainment businesses (an amusement park, indoor and outdoor arcades, stores, a bar and nightclub, an indoor

aquarium, and a miniature golf complex), and various food service establishments in the Borough of Point Pleasant Beach. Beginning in spring 2020, their operations, like other businesses throughout our state and globally, were significantly disrupted or curtailed due to the COVID-19 pandemic. Plaintiffs were required to temporarily close or limit their operations pursuant to numerous "shutdown" and "stay-at-home" Executive Orders (EOs) issued in March 2020 by Governor Philip Murphy in response to the pandemic. In addition, Point Pleasant Beach issued similar emergency orders impacting plaintiffs' businesses.

Plaintiffs appeal orders by the motion judge, Craig L. Wellerson, granting summary judgment dismissal of their single-count declaratory judgment complaint, seeking a ruling that their primary and excess insurance policies with defendants entitled them to their business losses stemming from the state and municipal COVID-19 orders closing their operations. They contend the judge erred by holding: (1) their properties did not sustain direct physical loss or damage from the pandemic as required by the insurance policies; (2) their coverage claims were barred by the "loss of use" exclusion in each policy; and (3) their claims were barred by the pollution/contamination exclusion in defendants' policies that included viruses.

Because our holdings and reasonings in Mac Prop. Grp. LLC & The Cake Boutique LLC v. Selective Fire & Cas. Ins. Co., 473 N.J. Super. 1, 19-27 (App. Div.), related to physical loss or damage and loss of use arising from the pandemic apply to plaintiffs' policies, we affirm that aspect of the judge's ruling. We also affirm because, even though the policies' endorsements concerning nuclear, biological, and chemical exclusions do not mention "virus," the term "virus" is part of the definition of pollution/contaminant and coverage is separately barred under the policies' pollution/contamination exclusion.

I.

A.

In March through May 2020, in response to the COVID-19 pandemic, and mindful of an increasing number of confirmed COVID-19 cases in our state, Governor Murphy issued Executive Orders 104, 107, 143, and 147. Exec. Order No. 104 (Mar. 16, 2020), 52 N.J.R. 550(a) (Apr. 6, 2020); Exec. Order No. 107 (Mar. 21, 2020), 52 N.J.R. 554(a) (Apr. 6, 2020); Exec. Order No. 143 (May 14, 2020), 52 N.J.R. 1235(a) (June 15, 2020); and Exec. Order No. 147 (May 18, 2020), 52 N.J.R. 1243(a) (June 15, 2020). Following the Governor's lead, Point Pleasant Beach issued several emergency orders further curtailing or closing business operations along its boardwalk. These state and municipal orders are

set forth in the record. It is unnecessary to detail them as they are not points of contention on appeal; the parties do not dispute that plaintiffs' business were severely disrupted or closed.

Due to the governmental orders, plaintiffs submitted claims totaling more than $10 million to defendants and requested coverage and payment under their commercial insurance policies. Plaintiffs' insurance coverages consisted of a primary layer and a first- and second-level excess layer, with a total coverage limit of $35 million. They first alleged that, due to the numerous orders of civil authority, they sustained actual loss by not being "able to obtain business income as [they] did the year before and, thus, suffered a decrease in business income." They further alleged that each time an employee tested positive for COVID-19, it "render[ed] portions of the property unusable until the presence of the virus could be dissipated," which prevented them from operating their businesses as intended.

B.

The Primary Commercial Policies

Defendants Westchester Surplus Lines Insurance Company and Axis Surplus Insurance Company provided plaintiffs' primary insurance policies for

the relevant period. Together, their policies made them each responsible for $5 million of a shared cumulative $10 million limit of primary liability.

The primary policies defined covered causes of loss under Section II, Subsection A, which stated:

> A. PERILS INSURED: This policy insures against all risks of direct physical loss or damage to Insured Property, except as excluded.

The policies also contained a section on valuation, which stated in part:

> SECTION IV – VALUATION
>
> Except as otherwise provided in this Paragraph, adjustment of loss or damage under this Policy shall be valued at the cost to repair or replace (whichever is less) at the time and place of the loss with materials of like kind and quality, without deduction for depreciation and obsolescence.

In addition, the primary policies contained a section for time element coverage that provided coverage for a period of interruption, together with additional time element coverages that included a contingent time element, interruption by civil or military authority, and ingress and egress interference. The policies stated:

> SECTION V – TIME ELEMENT COVERAGE GROSS EARNINGS
>
> This Policy is extended to cover the actual loss sustained by the Insured during the Period of

Interruption directly resulting from a Covered Cause of Loss to any Property.

. . . .

B. PERIOD OF INTERRUPTION: In determining the amount payable under this coverage, the Period of Interruption shall be:

1. The period from the time of direct physical loss or damage insured against by this Policy to the time when, with the exercise of due diligence and dispatch, either:

a. normal operations resume, or

b. physically damaged buildings and equipment could be repaired or replaced and made ready for operations under the same or equivalent physical and operating conditions that existed prior to such loss or damage,

whichever is less. Such period of time shall not be cut short by the expiration or earlier termination date of the Policy.

. . . .

C. ADDITIONAL TIME ELEMENT COVERAGES

. . . .

5. CONTINGENT TIME ELEMENT: If direct physical loss or damage to the real or personal property of a direct supplier or direct customer of the Insured is damaged by a Covered Cause of Loss under this Policy, and such damage:

a. wholly or partially prevents any direct supplier to the Insured from supplying their goods and/or services to the Insured, or

b. wholly or partially prevents any direct customer of the Insured from accepting the Insured's goods and/or services;

then this Policy is extended to cover the actual loss sustained by the Insured during the Period of Interruption with respect to such real or personal property and to business income and extra expense. The property of the supplier or customer which sustains loss or damage must be of the type of property which would be Insured Property under this Policy.

This coverage applies to the Insured's direct suppliers or direct customers located in the COVERAGE TERRITORY.

6. INTERRUPTION BY CIVIL OR MILITARY AUTHORITY: This Policy is extended to cover the actual loss sustained during the period of time when access to the Insured's real or personal property is prohibited by an order of civil or military authority, provided that such order is a direct result of a Covered Cause of Loss or of an imminent threat of a Covered Cause of Loss to real property not insured hereunder. Such period of time begins with the effective date of the order of civil or military authority and ends when the order expires, but no later than the number of days shown in Section I., Subparagraph E.6. In no event shall the Company pay more than the Sublimit shown in Section I., Subparagraph E.6.

> 7. INGRESS & EGRESS: This Policy is extended to cover the actual loss sustained during the period of time when ingress to or egress from the Insured's real or personal property is partially or entirely prohibited or prevented or when ingress to or egress from the beach and/or the boardwalk is partially or entirely prohibited as a direct result of a Covered Cause of Loss to real property not insured hereunder. Such period of time begins on the date that ingress to or egress is prohibited or prevented and ends when ingress or egress is no longer prohibited or prevented, but no later than the number of days shown in Section I., Subparagraph E.17. In no event shall the Company pay more than the Sublimit shown in Section I., Subparagraph E.17.

Plaintiffs sought coverage for "business interruption losses" under these "Time Element Coverage" sections.

Exclusions were listed in Section II, Subsection B, which stated:

> SECTION II – COVERED CAUSES OF LOSS
>
> . . . .
>
> B. PERILS EXCLUDED:
>
> 1. The Company does not insure for loss or damage caused by the following:
>
> . . . .
>
> e. The actual, alleged or threatened release, discharge, escape or dispersal of Pollutants or Contaminants, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or

aggravated by any Covered Cause of Loss under this Policy.

However, this exclusion shall not apply to direct physical loss or damage to Insured Property arising out of seepage, contamination, or pollution caused by a Defined Peril at the Location.

. . . .

2. The Company does not insure for loss or damage caused by any of the following:

a. Delay, loss of market, or loss of use.

b. Indirect, remote, or consequential loss or damage except as provided elsewhere by this Policy.

Pollutants or contaminants were defined in Section VIII, Subsection Q, which stated:

> Pollutants or Contaminants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, virus, or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as designated by the U. S. Environmental Protection Agency.

[(Emphasis added).]

Finally, in separate amendatory exclusion endorsements, the primary policies also excluded losses arising, directly or indirectly, from chemical or biological materials. The Westchester primary policies stated:

> NUCLEAR, BIOLOGICAL, CHEMICAL, RADIOLOGICAL EXCLUSION ENDORSEMENT
>
> . . . .
>
> The following exclusions are added to your Policy or Coverage Part.
>
> This insurance does not apply to:
>
> . . . .
>
> B. Loss or damage arising directly or indirectly from the dispersal, application or release of, or exposure to, chemical, radiological, or biological materials or agents, all whether controlled or uncontrolled, or due to any act or condition incident to any of the foregoing, whether such loss be direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by, any physical loss or damage insured against by this Policy or Coverage Part, however such dispersal, application, release or exposure may have been caused.

Similarly, the Axis primary policies stated:

> NUCLEAR, CHEMICAL AND BIOLOGICAL EXCLUSION ENDORSEMENT
>
> The following exclusions are added to your Policy.

> This insurance does not apply to:
>
> . . . .
>
> B. Loss or damage arising directly or indirectly from the dispersal, application or release of, or exposure to, chemical or biological materials or agents that are harmful to property or human health, all whether controlled or uncontrolled, or due to any act or condition incident to any of the foregoing, whether such loss be direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by, any physical loss or damage insured against by this Policy, however such dispersal, application, release or exposure may have been caused.
>
> C. This exclusion applies to all coverage under the Policy notwithstanding any coverage extension or any other endorsement.

The Excess Commercial Policies

Defendants Evanston Insurance Company, Arch Specialty Insurance Company, General Security Indemnity Company of Arizona, Certain Underwriters at Lloyd's of London, and Ironshore Specialty Insurance Company provided plaintiffs first-level all-risk excess policies in which each was

responsible for a quota share portion of a combined $25 million limit of liability in excess of the $10 million underlying primary limit.[1]

Specifically, the Evanston policy had a $10 million limit of excess liability. The Arch and Ironshore policies each had a $5 million limit of excess liability. A combined policy from General Security and Lloyds, administered by Ethos Specialty Insurance Services, LLC, also had a $5 million limit of excess liability.

Defendant Landmark American Insurance Company provided plaintiffs a second-level all-risk excess policy, administered by the RSUI Group, for the relevant period, with a $10 million limit of liability in excess of the $35 million combined limit of the underlying primary and first-level excess policies. Resembling the base policy form of the primary policies, all of the excess policies included the identical language in their "SECTION II – COVERED CAUSES OF LOSS," Subsection A, regarding the scope of coverage: "PERILS INSURED: This Policy insures against all risks of direct physical loss or damage to Insured Property, except as excluded." Each of the excess policies also contained the same "valuation" language in their "SECTION IV," and each

[1] All of these policies were in effect when plaintiffs' claims arose.

of the excess policies included the same "loss of use" exclusion language in their "SECTION II – COVERED CAUSES OF LOSS," Subsection B(2), stating:

> B. PERILS EXCLUDED
>
> . . . .
>
> 2. The Company does not insure for loss or damage caused by any of the following:
>
> a. Delay, loss of market, or loss of use.
>
> b. Indirect, remote, or consequential loss or damage except as provided elsewhere in this Policy.

In addition, identical to the primary policies, all the excess policies included a "SECTION V – TIME ELEMENT COVERAGE GROSS EARNINGS," Subsection B, which provided coverage for a period of interruption, together with additional time element coverages in Subsection C that included a contingent time element, interruption by civil or military authority, and ingress and egress interference. The excess policies also required the civil or military authority orders to be "a direct result of a Covered Cause of Loss or of an imminent threat of a Covered Cause of Loss to real property not insured [under the policy]."

Further, the Evanston, Ethos, Ironshore, and Landmark excess policies incorporated the same "Pollutants or Contaminants" exclusion in their

"SECTION II – COVERED CAUSES OF LOSS," Subsection B(1)(e) as in the primary policies, and added the same definition for "Pollutants or Contaminants."

A separate exclusion endorsement for biological, chemical, or radiological materials was added in the Evanston, Arch, Ethos and Landmark excess policies. Ironshore's policies did not include the endorsement.

Specifically, the Evanston excess policies included an amendatory exclusion endorsement for biological materials that provided:

> EXCLUSION — BIOLOGICAL, RADIOLOGICAL OR CHEMICAL MATERIALS
>
> This endorsement modifies insurance provided under all Property and similar or related coverage forms attached to this policy.
>
> The following exclusion is added and is therefore not a Covered Cause of Loss:
>
> We will not pay for loss or damage caused directly or indirectly by the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> Biological, Radiological Or Chemical Materials
>
> Loss or damage caused directly or indirectly by the actual or threatened malicious use of pathogenic or poisonous biological, radiological or chemical materials, whether in time of peace or war, and regardless of who commits the act.

[(Emphasis omitted).]

The Evanston excess policies also contained a separate exclusion endorsement exclusion for organic pathogens that provided:

> EXCLUSION — ORGANIC PATHOGENS
>
> This endorsement modifies insurance provided under all Property coverage forms attached to this policy.
>
> A. The following exclusion is added and is therefore not a Covered Cause Of Loss:
>
> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless or any other cause or event that contributes concurrently or in any sequence to the loss.
>
> Organic Pathogens
>
> Presence, growth, proliferation, spread or any activity of "organic pathogens":
>
> This exclusion applies regardless of whether there is any:
>
> > 1. Direct physical loss or damage to Covered Property;
> >
> > 2. Loss of use, occupancy or functionality or decreased valuation of Covered Property or loss of Business Income;
> >
> > 3. Action required, including but not limited to, testing, repair, replacement, removal, clean-up, abatement, disposal,

> relocation, or actions taken to address medical or legal concerns; or
>
> 4. Suit or administrative proceeding, or action involving the insured.
>
> This exclusion replaces any "Fungus", Wet Rot, Dry Rot And Bacteria exclusion or other similar exclusion in this policy.
>
> B. With respect to this exclusion, the following definitions are added and replace any similar definitions in this policy:
>
> 1. "Fungus" means any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents or by-products produced or released by fungi.
>
> 2. "Organic pathogen" means:
>
> a. Any organic irritant or contaminant including, but not limited to, "fungus", wet or dry rot, bacteria, virus or other microorganisms of any type, and their by-products such as spores or mycotoxins; or
>
> b. Any disease-causing agent as classified by the Environmental Protection Agency.
>
> All other terms and conditions remain unchanged.
>
> [(Emphasis omitted).]

The Arch excess policies included a separate exclusion endorsement for losses specifically due to viruses, which provided in part:

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under this policy.

It is agreed that:

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

1. The exclusion set forth in Paragraph 2. applies to all coverages under all forms and endorsements that comprise this policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

2. [Arch] will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease. . . .

3. With respect to any loss or damage subject to the exclusion in Paragraph 2., such exclusion supersedes any exclusion relating to "pollutants".

. . . .

The terms of the exclusion in Paragraph 2., or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this policy.

All other terms and conditions of this Policy remain unchanged.

Both the Ethos and Landmark excess policies included a similar separate exclusion endorsement for pathogenic or poisonous biological materials, which provided in part:

> EXCLUSION OF PATHOGENIC OR POISONOUS BIOLOGICAL OR CHEMICAL MATERIALS
>
> This endorsement modifies insurance provided under . . . [all coverage parts]:
>
> [The following exclusion is added:]
>
> [Ethos/Landmark] will not pay for loss or damage caused directly or indirectly by the discharge, dispersal, seepage, migration, release, escape or application of any pathogenic or poisonous biological or chemical materials. Such loss or damage is excluded regardless of any causes of event that contributes concurrently or in any sequence to the loss.
>
> However, if both [A.] and [B.] below apply, we will pay up to a maximum of $10,000 for any and all claims for such loss or damage arising out of events occurring within the term of this policy:
>
> > [A]. The pathogenic or poisonous biological or chemical materials are normally kept at or brought onto your premises, with your consent, for use in your business operations at your premises; and
> >
> > [B]. The discharge, dispersal, seepage, migration, release, escape or application of the pathogenic or poisonous biological or chemical materials is accidental and is not the result of a willful or malicious act against any persons, organizations, or property of any nature.

[(Emphasis omitted).[2]]

C.

After defendants denied plaintiffs' business loss claims stemming from the state and municipal COVID-19 orders, plaintiffs filed a declaratory action seeking coverage. Following discovery, plaintiffs "moved for partial summary judgment on the basic issue that the coronavirus pandemic falls within the coverage grant of the polic[ies]." Specifically, they sought to strike defendants' affirmative defenses and obtain a declaration that they suffered a "direct physical loss" under defendants' all-risk property insurance policies. Defendants filed cross-motions for summary judgment dismissal with prejudice.

After hearing argument, Judge Wellerson reserved judgment. The judge subsequently issued orders and a written opinion denying plaintiffs' motion for summary judgment and granting defendants' cross-motions for summary judgment.

The judge rejected plaintiffs' arguments: (1) that they suffered "a direct physical loss or damage" because they "were unable to use their property for its

[2] There appears to be a misprint in the Ethos policy, as it reads: "[A]. The pathogenic or poisonous biological or chemical materials are normally kept at or brought onto [sic] your consent, for use in your business operations at your premises[.]"

intended purpose and because employees tested positive for COVID-19 at or around the time plaintiffs' facilities closed to the public"; and (2) that "the loss of functionality of [their] premises constitute[d] physical damage caused by the actual presence of COVID-19." The judge held that plaintiffs had not shown that their claims were caused by direct physical loss or damage at the property. He rejected their argument that the presence of COVID-19 at or in their buildings "was a sufficient 'direct physical loss' to the property" because it made their property dangerous. He explained that a claim for coverage based on the loss of use of plaintiffs' facilities "does not give rise to a 'direct physical loss or damage' to its property," especially since the policies contained an express exclusion stating that they do not insure for "loss or damage caused by . . . delay, loss of market, or loss of use." Although plaintiffs relied upon certifications from various employees who had been on the premises and stated they had contracted COVID-19 at or around the time the facilities were closed, the judge found "no evidence" that those employees had contracted COVID-19 "because of exposure to the property itself." Additionally, the judge found plaintiffs failed to make a showing that the concentration of COVID-19 "rose to a level where the property was rendered temporarily unsafe or unhospitable." In fact, "[n]othing in the record demonstrate[d] any level of concentration of COV[I]D-

19 at any time during the policy periods in question." The judge therefore rejected plaintiffs' request that the court "speculate on the presence of the virus immediately upon the facilities' closure."

The judge found that "[s]ince plaintiffs' loss of use of its property does not fall under a covered cause of loss under the insurance policies, plaintiff[s] [were] precluded from recovery under the civil authority provision of the policies." Each policy included an express civil authority exclusion, which covered "INTERRUPTION BY CIVIL OR MILITARY AUTHORITY," and stated that the policy was "extended to cover the actual loss . . . when access to the Insured's real or personal property is prohibited by an order of civil . . . authority, provided that such order is a direct result of a Covered Cause of Loss . . . to real property not insured hereunder." The judge explained that the executive and municipal orders were aimed at slowing the spread of COVID-19 and required plaintiffs to close their doors to the public. Those orders "did not require the actual presence of COVID-19 at plaintiffs' property to bar public access," and "were not issued due to a physical alteration of plaintiffs' property."

Judge Wellerson concluded, in any event, that the "[l]oss of use of the insured property [was] expressly excluded under the primary and excess policies." Furthermore, he found it was "undisputed" that recovery for the

presence of the COVID-19 at the property was precluded by a number of other exclusions in the policies, including those for biological, radiological or chemical materials, for pathogenic or poisonous biological or chemical materials, and for loss due to virus or bacteria. The judge, therefore, found that "plaintiffs' interpretation of the direct physical loss, the efficient proximate cause doctrine, and interpretation of the 'pollutants or contaminants', 'loss due to virus or bacteria' and biological material exclusions [wa]s misapplied to the facts and policies." Thus, he dismissed plaintiffs' claims with prejudice.

II.

Before us, plaintiffs contend the motion judge erred in granting defendants summary judgment based on his rejection of their arguments that they sustained direct physical loss or damage from the COVID-19 pandemic, thereby entitling them to coverage. These arguments are unavailing.

We conduct a de novo review of an order granting a summary judgment motion, Gilbert v. Stewart, 247 N.J. 421, 442 (2021), applying "the same standard as the trial court under Rule 4:46-2(c)," State v. Perini Corp., 221 N.J. 412, 425 (2015). In considering a summary judgment motion, "both trial and appellate courts must view the facts in the light most favorable to the non-moving part[ies]," which, in this case, are plaintiffs. Bauer v. Nesbitt, 198 N.J.

601, 604 n.1 (2009). Summary judgment is proper if the record demonstrates "no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment . . . as a matter of law." Burnett v. Gloucester Cnty. Bd. of Chosen Freeholders, 409 N.J. Super. 219, 228 (App. Div. 2009) (quoting R. 4:46-2(c)). Issues of law are subject to the de novo standard of review, and the trial court's determination of such issues is accorded no deference. Meade v. Twp. of Livingston, 249 N.J. 310, 326-27 (2021); Kaye v. Rosefielde, 223 N.J. 218, 229 (2015).

We affirm, substantially for the reasons outlined by Judge Wellerson in his comprehensive and thoughtful written opinion. We add the following comments.

The judge's reasoning is consistent with our decision in Mac Property. There, the plaintiff restaurants, bakery, gym, and childcare and learning center sought recovery under their property insurance policies for business income losses as a result of closures and restrictions ordered by the Governor to deal with the COVID-19 pandemic. The trial court dismissed their complaints with prejudice after rejecting their argument that the phrase "direct physical loss or damage" to property is ambiguous and does not require structural damage but only requires loss of use, loss of access, or loss of functionality. See Mac

Property, 473 N.J. Super. at 21-22. It found such an argument unavailing, as "[t]he term was not so confusing that average policyholders like plaintiffs could not understand that coverage extended only to instances where the insured property has suffered a detrimental physical alteration of some kind, or there was a physical loss of the insured property." Ibid. As we held, "[f]inding coverage where there has been no physical damage to property that would require repairs, rebuilding, or replacement would render the 'period of restoration' language in the contracts 'meaningless.'" Id. at 22 (quoting Port Murray Dairy Co. v. Providence Wash. Ins. Co., 52 N.J. Super. 350, 357 (Ch. Div. 1958)). We further reasoned "there was no damage to plaintiffs' equipment or property on or off-site that caused their premises to lose their physical capacity to operate, and there was no physical alteration that made their premises dangerous to enter." Id. at 23.

Here, unlike the plaintiffs in Mac Property, plaintiffs alleged that COVID-19 was present for "long periods of time" in or on their properties as evinced by a business owner and several employees who had tested positive and some of them were on the premises, making the facilities dangerous and nonfunctioning. Although they presented various articles and studies showing that COVID-19 could live on solid surfaces, plaintiffs presented no evidence proving that

COVID-19 was present on or in their facilities and caused their premises to lose their physical capacity to operate. Plaintiffs' facilities did not change because of any presence of COVID-19. While the virus poses health concerns, it does not alter physical objects. The premises did not lose value; the only loss was business income loss from their loss of use, which was not covered. "Loss of use" was expressly excluded.

III.

Plaintiffs contend the motion judge erred by holding that their claims for coverage were barred by the "loss of use" exclusion in each policy. They also contend the judge erred by holding that coverage for their claims was barred by a pollution/contamination exclusion in defendants' policies that included viruses. We need not address these contentions because the question of whether any particular type of loss or damage was excluded from coverage is irrelevant given our affirmance of the judge's ruling that plaintiffs failed to satisfy the basic coverage prerequisite demonstrating they suffered "direct physical loss or damage" to their property.

IV.

Plaintiffs contend the motion judge erred by holding that their claims were barred by the "weapons-of-mass-destruction exclusions." They assert that,

unlike the specific virus exclusion in the Arch policy, which expressly bars coverage for " loss or damage caused by or resulting from any virus," the exclusion endorsements in the other policies for nuclear, chemical, biological, or radiological materials do not explicitly refer to viruses, are not "virus exclusions," and do not bar coverage for losses from pandemics or communicable diseases. They explain that the COVID-19 virus is not biological material because it is not alive and, as a virus, cannot live on its own without binding to another cell for replication. Thus, plaintiffs argue that nothing in those endorsements excludes coverage for losses cause by a viral pandemic. We disagree.

The judge soundly reasoned that the endorsements concerning nuclear, biological, and chemical exclusions do not mention "virus" and do not address plaintiffs' argument whether COVID-19 was biological and is excluded under those exclusions. As noted, the term "virus" is part of the definition of pollution/contaminant, and coverage is separately barred under the pollution/contamination exclusion in the policies.

To the extent we have not specifically addressed arguments raised by plaintiffs, they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION