MAMA JO'S INC. V. SPARTA INSURANCE CO.: "DIRECT PHYSICAL LOSS" REQUIREMENT IN INSURANCE POLICIES RESTRICTS CLEANING AND BUSINESS INCOME LOSS CLAIMS

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In *Mama Jo's Inc. v. Sparta Insurance Co.*, the United States Court of Appeals for the Eleventh Circuit held that an insurer properly denied coverage for a restaurant's cleaning and business interruption claims because neither claim satisfied the policy's "direct physical loss" requirement.[1] The court also affirmed that courts may exclude expert testimony that fails to satisfy certain standards of reliability and admissibility.[2]

Miami restaurant Mama Jo's Inc., doing business as Berries ("Berries"), is partially enclosed by a retractable awning, wall, and roof system.[3] When opened, the system exposes the restaurant's interior to the elements.[4] From December 2013 to June 2015, roadway construction along the street adjacent to the restaurant's entrance and seating areas generated dust and debris that drifted into the restaurant.[5] Berries cleaned the restaurant daily using its normal cleaning methods, and the restaurant remained open every day during this period, but customer traffic decreased.[6]

Sparta Insurance Company ("Sparta") insured Berries from September 19, 2013 to September 19, 2014 through an "all risk" commercial property insurance policy that included a Building and Personal Property Coverage Form and a Business Income (and Extra Expense) Coverage Form.[7] The former covered "direct physical loss of or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss."[8] Under the policy, a covered cause of loss was defined as a "'Risk[] of Direct Physical

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[1] Mama Jo's Inc. v. Sparta Ins. Co., No. 18-12887, 2020 WL 4782369, at *8–9 (11th Cir. Aug. 18, 2020).

[2] *Id.* at *7.

[3] *Id.* at *1.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Mama Jo's Inc.*, 2020 WL 4782369, at *1.

[8] *Id.*

Loss unless the loss is' excluded or limited."[9] The Business Income (and Extra Expense) Coverage Form provided that Sparta would pay for "the actual loss of Business Income [Berries] sustain[ed] due to the necessary 'suspension' of [Berries'] 'operations' during the 'period of restoration.'"[10] According to the policy, a direct physical loss of or damage to covered property must be the cause of the suspension.[11]

On December 12, 2014, Berries submitted a claim to Sparta regarding the dust and debris produced by the roadway construction.[12] Berries' public adjuster told Sparta that the scope of the loss included cleaning of the floors, walls, tables, chairs, and countertops, and that the estimate to clean and paint the restaurant, less a deductible, was $13,775.58.[13] Berries also submitted a business income claim in the amount of $292,550.84 because 2014 sales were lower than expected given prior years' sales growth.[14] In 2017, Sparta denied Berries' claim because Berries failed to show evidence of physical damage and a direct physical loss.[15]

Berries initially brought suit in Florida state court in May 2017, and Sparta removed the action to the United States District Court for the Southern District of Florida based on diversity jurisdiction.[16] In February 2018, Berries served amended answers to interrogatories and identified new damages for replacement of its awning, retractable roof, and audio and lighting systems, as well as for HVAC repairs, totaling $319,688.57.[17] To link these additional damages to the construction, Berries offered the testimony of three expert witnesses: a specialist in audio and lighting systems, an employee with the installer of the restaurant's awnings and retractable roof, and a civil and structural engineer.[18] In April 2018, Sparta filed a motion to preclude the expert witnesses' testimony, and the parties filed cross motions for summary judgment.[19]

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[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* at *2.
[13] *Mama Jo's Inc.*, 2020 WL 4782369, at *2.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at *3–4.
[19] *Mama Jo's Inc.*, 2020 WL 4782369, at *4.

The district court granted Sparta's evidentiary and summary judgment motions.[20] It found that the experts' "methodologies on the issue of causation were unreliable or nonexistent, and their testimony was speculative."[21] Without this expert testimony, Berries could not prove causation regarding the new damages claimed in 2018.[22] Regarding Berries' initial claim, the district court determined that the policy did not cover cleaning because cleaning alone did not satisfy the policy's meaning of damage or direct physical loss.[23] Further, the court interpreted the policy such that "direct physical loss" refers to tangible damage that causes the property to "become unsatisfactory for future use or requires repairs."[24] Finally, the court found that the claim for lower-than-expected sales was not covered because Berries could not show that it had "suffered a 'necessary "suspension"' of its 'operations' as the result of a 'direct physical loss.'"[25]

On appeal, Berries argued that the district court erred in three ways: (1) by deciding that "direct physical loss" does not encompass cleaning and requires a showing that the property be rendered unusable; (2) by requiring that a suspension of operations be the result of physical damage; and (3) in excluding Berries' experts.[26]

The Eleventh Circuit first examined whether the district court abused its discretion in excluding the expert witnesses according to the standards articulated through Federal Rule of Evidence 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, and *Kuhmo Tire Co. v. Carmichael*.[27] The court aims to ensure that an expert "'employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field,'" and, on evidentiary rulings, gives the district court "'considerable

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[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.* at *5.
[24] *Id.*
[25] *Mama Jo's Inc.*, 2020 WL 4782369, at *5.
[26] *Id.*
[27] *Id. See also* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993) (holding that judges have a gatekeeping role to screen out unreliable expert testimony); Kilpatrick v. Breg, Inc., 613 F.3d 1329, 1335 (11th Cir. 2010) (explaining that trial courts under *Daubert* may consider factors, including whether the expert's theory can be and has been tested and whether the scientific community generally accepts the technique, in determining whether to admit expert testimony); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147–49 (1999) (clarifying that the gatekeeping function governs technical and other specialized knowledge in addition to scientific testimony); FED. R. EVID. 702.

leeway'" in determining the reliability of expert testimony.[28] District courts are guided by a non-exhaustive list of factors in considering the reliability and admissibility of expert testimony: "(1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential error rate of the technique; and (4) whether the technique is generally accepted in the scientific community."[29]

Affirming the district court, the Eleventh Circuit found no abuse of discretion in excluding the three experts.[30] Alex Posada, the audio and lighting specialist, identified a diagnostic test that could identify the cause of speaker and light issues but did not perform it, and he failed to demonstrate that his methodology could reliably show that the dust he observed in 2018 on the lighting fixtures came from the earlier road construction.[31] He "provided nothing more than speculation about the cause of the damage to the audio and lighting systems."[32] The second expert witness, Christopher Thompson, visually inspected the awnings and retractable roof two years after the road construction.[33] He could not say what caused a part of the retractable roof to break and performed no testing of the dust on the awnings and roof, despite testifying that it came from the construction.[34] Nothing showed whether his methodology was reliable or scientific.[35] Finally, Alfredo Brizuela, a cause and origin expert, conducted a visual inspection of the restaurant two years after the road construction ended, reviewed photographs, and conducted no sampling or testing of the dust and sediment.[36] Despite his lack of testing, Brizuela concluded that the damage to the restaurant was caused by the road construction.[37]

Overall, Berries' expert witnesses failed to establish the factors necessary to admit their testimony.[38] Therefore, the court determined that the district court correctly excluded their opinions, which "inexorably led to the

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[28] *Mama Jo's Inc.*, 2020 WL 4782369, at *5 (quoting *Kumho Tire Co.*, 526 U.S. at 152).
[29] *Id.* (citing *Kilpatrick*, 613 F.3d at 1335).
[30] *Id.* at *7–8.
[31] *Id.* at *6.
[32] *Id.* at *7.
[33] *Id.*
[34] *Mama Jo's Inc.*, 2020 WL 4782369, at *7.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*

swing of the summary judgment axe."[39] Without this expert testimony to link the damages Berries claimed in 2018 to the road construction ending years earlier, the court held that the district court properly granted Sparta's motion for summary judgment on Berries' claim for 2018 damages.[40]

Next, the court examined Berries' business cleaning and income loss claim and asked whether Berries established that it had suffered a direct physical loss, as required by the policy's Building and Personal Property Coverage Form.[41] The court cited a Florida court's definition of "direct physical loss" as "'the diminution of value of something,'" noting that the words "direct" and "physical" modify loss to require that the damage be actual.[42]

Regarding the cleaning claim, the court highlighted the fact that only cleaning and painting were required and there was "no need for removal or replacement of items at that time."[43] The policy provided that Sparta would "'pay for direct physical loss of or damage to Covered Property . . . .'"[44] The court concluded that the district court properly granted summary judgment for Sparta because, "under Florida law, an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'"[45]

Regarding the business income loss claim, the court reiterated that any suspension of operations must be attributable to direct physical loss, according to the insurance policy.[46] The policy stated that Sparta would pay for "'the actual loss of Business Income [the insured] sustain[ed] due to the necessary "suspension" of . . . "operations" during the "period of restoration."'"[47] Berries did not provide any evidence that it either suffered a direct physical loss or suspended operations.[48] Berries argued that the district court ignored evidence that Berries had to close sections of the

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[39] *Id.* at *8.
[40] *Mama Jo's Inc.*, 2020 WL 4782369, at *8.
[41] *Id.* The court reiterated that an "all risks" policy is not an "all loss" policy, and Berries' all risks policy "does not extend coverage for every conceivable loss." *Id.* (quoting Sebo v. Am. Home Assurance Co., 208 So. 3d 694, 696–97 (Fla. 2016)).
[42] *Id. See* Homeowners Choice Prop. & Cas. v. Maspons, 211 So. 3d 1067, 1069 (Fla. Dist. Ct. App. 2017).
[43] *Mama Jo's Inc.*, 2020 WL 4782369, at *8.
[44] *Id.*
[45] *Id.* (citing *Maspons*, 211 So. 3d at 1069).
[46] *Id.* at *9.
[47] *Id.*
[48] *Id.*

restaurant for cleaning, which caused a slowdown of business and, thus, should qualify as a "period of restoration" in the policy language.[49] However, the court concluded that, regardless of the district court's analysis on this point, Sparta still would be entitled to summary judgment on the business income loss claim because any suspension of operations must be caused by direct physical loss of or damage to property, which Berries failed to show.[50]

Arguably, the *Mama Jo's* decision may impact business interruption insurance claims related to losses caused by the COVID-19 pandemic.[51] For example, in *Malaube, LLC v. Greenwich Insurance Co.*, a restaurant sought "to recover insurance benefits for the loss of business income as a result of government shutdowns in response to the COVID-19 pandemic."[52] The magistrate judge denied the restaurant coverage and cited *Mama Jo's* as support of its holding that the loss of use for purely economic reasons was not recoverable under the policy when such policies cover "direct physical loss."[53] In comparing this case to *Mama Jo's*, the magistrate judge noted that Berries' evidence of dust and debris was stronger than the *Malaube* plaintiff's claim that two Florida Emergency orders closed his restaurant's indoor dining area.[54]

Currently, "no physical loss/damage" is the most commonly cited basis for motions to dismiss in COVID-19 insurance coverage litigation.[55] The *Mama Jo's* decision may be used by insurance companies arguing that denial of claims was proper based on the lack of any "direct physical loss," as required by many policies. Though pandemic-related case law is still developing, *Mama Jo's* may have major impacts on the outcome of such litigation.

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[49] *Mama Jo's Inc.*, 2020 WL 4782369, at *9.
[50] *Id.*
[51] Andrew G. Simpson, *Claims for Business Income Loss Due to Construction Dust Denied in Pre-COVID Case*, INSURANCE JOURNAL (Aug. 21, 2020), https://www.insurancejournal.com/news/southeast/2020/08/21/579718.htm [https://perma.cc/G4NP-9EPG].
[52] Malaube, LLC v. Greenwich Ins. Co., No. 20-22615-Civ-WILLIAMS/TORRES, 2020 WL 5051581, at *1 (S.D. Fla. Aug. 26, 2020).
[53] *Id.* at *8.
[54] *Id.*
[55] Ins. L. Analytics, *Covid Coverage Litigation Tracker*, UNIV. OF PA. CAREY L. SCH., https://cclt.law.upenn.edu/ [https://perma.cc/P36S-WR75] (last visited Sep. 13, 2020).