

COURT OF APPEAL FOR ONTARIO

CITATION: Workman Optometry Professional Corporation v. Certas Home and
Auto Insurance Company, 2024 ONCA 479

DATE: 20240614

DOCKET: COA-23-CV-0740

MacPherson, Paciocco and Wilson JJ.A.

BETWEEN

Workman Optometry Professional Corporation, 1298928 Ontario
Ltd., The Suit Shop Co. Ltd., 2328867 Ontario Inc. (o/a Booster Juice 369,
Booster Juice 388, Booster Juice 375, and Booster Juice 452), 2635774
Ontario Inc. (o/a Booster Juice 275), 2660364 Ontario Inc. (o/a Booster
Juice 200), In Harmony Dance & Wellness Ltd., Dr. Rana Taji
Optometry Professional Corporation, and Scotian Isle Baked
Goods Inc.

Plaintiffs (Appellants)

and

Certas Home and Auto Insurance Company, Co-operators General
Insurance Company, Continental Casualty Company, Economical
Mutual Insurance Company, Federated Insurance Company of
Canada, Gore Mutual Insurance Company, Intact Insurance
Company, Certain Underwriters at Lloyd's Subscribing to Policy
No. LNP2210, Certain Underwriters at Lloyd's Subscribing to Policy
No. GASS1300, Northbridge General Insurance Corporation, Novex
Insurance Company, Royal & Sun Alliance Insurance Company of
Canada, SGI Canada Insurance Services Ltd., The Dominion of
Canada General Insurance Company, The Wawanesa Mutual
Insurance Company, and Wynward Insurance Group

Defendants (Respondents)

Proceeding under the *Class Proceedings Act, 1992*

Kirk M. Baert, Vlad Calina and Alec Angle, for the appellants

Cheryl Woodin and Joseph Blinick, for the respondent The Dominion of Canada
General Insurance Company

Catherine Beagan Flood and Nicole Henderson, for the respondent The Wawanesa Mutual Insurance Company

Glenn Zakaib, Edona Vila, Raymond Ashurov and Marc-André McCann, for the respondents Certain Underwriters at Lloyd's Subscribing to Policy No. LNP2210 and Certain Underwriters at Lloyd's Subscribing to Policy No. GASS1300

Christopher Rhone, Ruby Egit and Jacqueline M. Palef, for the respondents Federated Insurance Company of Canada and Northbridge General Insurance Corporation

Kent E. Thomson, Chantelle Cseh and Chenyang Li, for the respondent Continental Casualty Company

Stephen Libin and Eric Adams, for the respondent Certas Home and Auto Insurance Company

Sarah Armstrong, David Rosenbaum and Jesse Harper, for the respondents Intact Insurance Company, Novex Insurance Company and Royal & Sun Alliance Insurance Company of Canada

C. Kirk Boggs, Jason Squire and Michael Dunk, for the respondent Gore Mutual Insurance Company

Laura Fric, Mark Sheeley and Clare Barrowman, for the respondent Economical Mutual Insurance Company

Glenn Zacher and Lesley Mercer, for the respondents Co-operators General Insurance Company and Wynward Insurance Group

Thomas J. Donnelly and Joyce Tam, for the respondent The Dominion of Canada General Insurance Company

Alexander D. Pettingill for the respondent SGI Canada Insurance Services Ltd.

Heard: June 12, 2024

On appeal from the judgment of Justice Michael A. Penny of the Superior Court of Justice, dated June 5, 2023, with reasons reported at 2023 ONSC 3356.

REASONS FOR DECISION

[1] The appellants appeal the decision of Penny J. of the Superior Court in a class action lawsuit, *Workman Optometry Professional Corporation v. Certas Home and Auto Insurance*: 2023 ONSC 3356.

[2] The appellants operate small and mid-size businesses whose business models involve customers visiting their physical premises to purchase goods and services. The COVID-19 pandemic resulted in a material reduction in their revenues.

[3] All the appellants had purchased standard form business interruption insurance policies with various Canadian insurance companies who are the defendants/respondents in the lawsuit. In the various insurance policies, the business interruption coverage insured losses of earnings or profits where the business interruption resulted from “physical loss or damage” to property.

[4] The appellants made claims for insurance coverage for their losses.

[5] The various insurers denied the claims.

[6] At a class action common issues trial, the trial judge asked and answered three questions:

- (i) Can the presence of the SARS CoV-2 virus or its variants cause physical loss or damage to property within the meaning of the business interruption provisions of each defendant’s property insurance wordings? Answer: No.

- (ii) Can an order of a civil authority in respect of business activities that was made due to the SARS CoV-2 virus or its variants cause physical loss or damage to property within the meaning of the business interruption provisions of each defendant's property insurance wordings? Answer: No.
- (iii) If the answer to either of the first two questions is "yes", are there any exclusions in any of the defendants' property insurance wordings that would result in coverage for such loss or damage being excluded? Answer: In the circumstances, it is not necessary to answer Common Issue #3.

[7] On appeal, the appellants assert that the trial judge made two errors: (1) he incorrectly held that the real or apprehended physical presence of SARS-CoV-2 on commercial property was not "physical damage" to the extent that it rendered the property dangerous; and (2) he incorrectly held that a "loss of use" resulting from the presence of SARS-CoV-2 did not amount to "physical loss" within the meaning of the various insurance policies.

[8] We do not accept these submissions. On both issues, we agree with the reasoning and conclusions of the trial judge. His reasoning is thorough and impeccable and his conclusion is correct.

[9] The appeal is dismissed. The respondents are entitled to their costs of the appeal fixed at \$135,000, inclusive of disbursements and HST.

JG MacPherson J.A.

J.A.

RA Wilson J.A.