Supreme Court No. 1032111

Court of Appeals No. 852850

IN THE WASHINGTON SUPREME COURT

QUEST DIAGNOSTICS, INCORPORATED,

Petitioner,

v.

AIG SPECIALTY INSURANCE COMPANY, et al.,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This case does not meet the criteria for review. There is no "substantial public interest" under RAP 13.4(b)(4) because Petitioner Quest Diagnostics advanced a unique argument for a narrow form of insurance coverage with specialized requirements. The Court of Appeals correctly issued an unpublished opinion, which is of "no precedential value and are not binding on any court." GR 14.1(a).

Review is also unwarranted because the opinion does not "conflict[] with" precedent. Pet. 14, 29. Rather, the Court of Appeals correctly affirmed judgment on the pleadings based on this Court's decision in *Hill & Stout, PLLC v. Mutual of Enumclaw Ins. Co.*, 200 Wn.2d 208, 515 P.3d 525 (2022). Several independent grounds not reached by the Court of Appeals support the opinion's result too.

II. COUNTERSTATEMENT OF THE CASE

A. Quest's Property Policies Insure Against Direct Physical Loss or Damage to Property

Quest is a medical diagnostics company based in New Jersey. CP 1, 3. Quest purchased property insurance from Insurers. Each Insurer issued its own policy, the relevant terms of which are the same (with one additional exclusion in certain policies as noted below).[1] The core insuring clause is that the policies insure "direct physical loss or damage to *property*":

> 5. Loss or Damage Insured
>
> This policy insures against all risk of direct physical loss or damage to *property* … except as hereinafter excluded.

CP 345.[2]

The policies cover direct physical loss or damage to Quest's property and certain business income losses resulting

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[1] CP 321-96, 536-63, 565-89, 1105-60, 1221-1305, 1309-83, 1387-1457, and 1459-1559.

[2] All italics and underlining added unless noted. Bold is original in the policies.

from *insured* loss or damage (i.e. covered direct physical loss or damage to property):

> 7. Coverage
>
> This policy insures the interest of the Insured in the following:
>
> A. Real and Personal Property
>
> All real and personal property ... including but not limited to the following… Improvements and betterments…
>
> B. Business Interruption - Gross Earnings
>
> 1. *Loss* due to the necessary interruption of business conducted by the Insured *…resulting from loss or damage insured herein* and occurring during the term of this policy to real and/or personal property described in Clause 7.A…
>
> C. Business Interruption – Loss of Profits
>
> 1. *Loss* of gross profit as hereinafter defined, resulting from interruption of or interference with the business and *caused by loss or damage to real or personal property* as described in Clause 7. A. of this policy during the term of the policy.

CP 349-50.

Quest did *not* seek to recover business income losses under the foregoing "Real and Personal Property" or "Business Interruption" coverages, which have a $750 million limit. CP 6, 337. Instead, Quest sought recovery under an *extension* of these coverages—applicable for only a 30-day period and providing a $50 million limit. CP 3, 341.

1. The Civil Authority Extension Requires Insured Physical Loss or Damage to Property *and* a Government Order Prohibiting Access to Property

The Civil Authority extension applies only if there is a covered Business Interruption loss *and* additional requirements are met:

> 8. Extensions of Coverage
>
> THIS CLAUSE EXTENDS THE COVERAGES DESCRIBED IN CLAUSES 7.B, 7.C…
>
> B. Interruption by Civil or Military Authority
>
> This policy is *extended to insure loss* sustained during the period not to exceed 30 days *when as a result of, direct physical loss or damage not excluded in Clause 6., access to property*

> within 5 miles of the Insured's Location is prohibited by order or action of Civil or Military Authority.

CP 341, 356-57.

The limit of liability provision for the Civil Authority extension explains that "*Insured direct physical loss or damage* must occur within five (5) miles from the Insured's premises in order for coverage to apply." CP 341. The "insured direct physical loss or damage" to which the Civil Authority extension applies is the "Loss or Damage Insured" stated in Section 5 of the policies—namely, "direct physical loss or damage *to property*." CP 345.

The policies specify that Business Income coverage (7.B and 7.C) and its Civil Authority extension (8.B.) are subject to the "Period of Recovery"—a time beginning when direct physical loss or damage to property occurs and ending when that physically lost or damaged property can be rebuilt, repaired, or replaced:

9. Loss Provisions Applicable to Clauses 7.B., 7.C. … and 8

A. Period of Recovery

The length of time for which loss may be claimed is referred to as the period of recovery and:

1. shall commence with the date of such loss or damage and shall not be limited by the date of expiration of this policy;

2. shall not exceed such length of time as would be required with the exercise of due diligence and dispatch to *rebuild, repair, or replace the property that has been destroyed or damaged*; …

CP 357-58.

2. The Policies Exclude Losses Caused by Virus

Quest's policies exclude certain causes of loss, including losses caused by virus:

6. Loss or Damage Excluded

This policy does not insure the following…

F. …loss or damage arising out of the dispersal, release or escape of **contaminants** or **pollutants**...

CP 345, 347. "Virus" is included in the definition of "**pollutants** or **contaminants**." CP 381.

B. Quest Files Suit for Pandemic-Related Losses Despite Not Meeting Its Policies' Requirements, Including Physical Loss or Damage to Property

Quest sued its property Insurers claiming it was entitled to Civil Authority coverage because "civil authority orders" were issued due to "SARS-CoV-2 virus (the 'coronavirus') in the communities of Quest's insured properties and those of Quest's customers." CP 1-3. Unlike most COVID-19 lawsuits, which broadly allege civil authority orders caused a complete loss of use of the policyholder's own business premises, Quest more narrowly alleges the civil authority orders "prohibited access of patrons to the business premises of Quest's [health care provider] customers," for "*non-essential"* medical procedures. CP 2-3, 9-14, 15-16. As a result, Quest alleges these orders "*limited* those *customers'* requests for Quest's diagnostic testing services." *Id.*

Quest does not allege that any order prohibited patients from accessing property for *essential* services—only that "non-essential" medical procedures were not allowed. So, based on Quest's own allegations, some patients *could* access customer premises, and access to those properties was not "prohibited." Quest did not identify any property that was physically damaged, physically lost, or required repair, rebuilding, or replacement.

Like the policyholders in nearly every COVID-19 lawsuit, Quest asserted the legal conclusion—echoing contractual wording—that "there was substantial physical loss or damage to property," without pleading any facts in support. CP 15-16. Quest also contends that injury to people is sufficient for coverage under its policies' civil authority coverage. CP 2-3, 15-16; App. Br. 11, 24-28, 53-61.

C. The Superior Court Granted Judgment on the Pleadings and the Court of Appeals Affirmed

Insurers moved for judgment on the pleadings on three grounds: (1) Quest failed to allege that access to property was

prohibited; (2) Quest failed to allege that the government COVID-19 orders were the result of direct physical loss or damage to any relevant property; and (3) Quest alleged losses caused by a virus and the policies' exclusion of losses caused by viruses barred coverage. CP 284.[3] The Superior Court granted Insurers' motion and the Court of Appeals unanimously affirmed in an unpublished order, reaching only Insurers' second argument. CP 995; *see* Op.

The Court of Appeals found that the Civil Authority coverage required physical loss or damage *to property*—not physical loss or damage to *anything*, like people, as Quest had argued. Op. 8-10. "Viewing the Policies as a whole," the court explained that "the plain language shows coverage for losses associated with the loss of or damage to only property." Op. 9. The court noted that clause 5 (the Loss or Damage Insured provision) explicitly insured only against "direct physical loss

[3] Certain insurers argued that a microorganism exclusion in their policies also precluded coverage. CP 517, 590.

or damage *to property*." *Id.* This limitation to property, the court explained, was also reiterated in numerous other policy clauses, like clauses 7 and 8 (extending business interruption coverage to "certain losses caused by loss or damage to 'property' other than the insured's). Op. 3-4, 9-10. The court found further support in clause 9 (period of recovery) of the policies, which limits coverage to the time required to "rebuild, repair, or replace the property that has been destroyed or damaged." Op. 9.

Acknowledging that Quest is a national company claiming national losses, the court focused on the Washington allegations. Op. 1-5, 11-12. Following this Court's decision in *Hill & Stout*, which considered the same requirement of "direct physical loss or damage" to property, the court found Quest's allegations insufficient as a matter of Washington law. Op. 10-12.

Because Quest could not meet one requirement for Civil Authority coverage, the court affirmed dismissal without

reaching another requirement: that such orders *prohibit access* to property within a five-mile radius of Quest's covered location. *See* Op. 1, 11, 13. Nor did the opinion address Insurers' argument that the Pollutants and Contaminants Exclusion barred coverage, or certain insurers' additional argument that their Microorganisms Exclusion also did so. Op. 13 n. 14. All of these issues would further independently support the dismissal of Quest's suit.

III. WHY REVIEW SHOULD BE DENIED

Review should be denied because the Court of Appeal's unpublished opinion did not create any new law and is not binding precedent. Even if the opinion had been published, it merely applies existing Washington law as established under *Hill & Stout* to a similar pandemic-related property insurance dispute concerning a materially identical requirement for

coverage—that is, "direct physical loss or damage" to property.[4]

Quest nonetheless contends that review is warranted because, according to Quest, the opinion "contradict[s]" *Hill & Stout*. Pet. 1-2, 14, 28-29; RAP 13.4(b)(1) and (4). On the contrary, the Court of Appeal's opinion follows *Hill & Stout* in the context of a similar pandemic-related property insurance dispute concerning a materially identical requirement for coverage—that is, "direct physical loss or damage" to property.[5]

In *Hill & Stout*, this Court held that a property policy's requirement of "direct physical loss or damage" to property means that "something physically must happen to the

[4] Quest does not argue that the opinion "conflict[s] with a published decision of the Court of Appeals" (RAP 13.4(b)(2)), or that it concerns any constitutional question (RAP 13.4(b)(3)).

[5] Quest does not argue that the opinion "conflict[s] with a published decision of the Court of Appeals" (RAP 13.4(b)(2)), or that it concerns any constitutional question (RAP 13.4(b)(3)).

property"—mere intangible harms, like economic harms or the loss of use of property, is not enough. 200 Wn.2d at 221-24. Because the insured alleged only that pandemic-related government orders made it unable to operate its businesses in the way it wanted, and not that property was actually physically harmed or lost in any way, the Court affirmed the finding of no coverage. The Court also independently determined that the insured's claims were precluded by a virus exclusion in its policy. 200 Wn.2d at 212.

Quest argues that *Hill & Stout* "allowed for the possibility that COVID could cause direct physical loss or damage" to property. Pet. 15. Quest is incorrect.

While this Court recognized in dicta 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," this Court made clear that the COVID-19 case before the Court was "not one of them." *Hill & Stout*, 200 Wn.2d at 221. This Court explained that even under a loss of

functionality test, there must be some "*physical* loss of functionality to the *property*." *Id.* (original emphasis). That is, something must have "*physically* prevented use of the property or rendered it useless," or "rendered [property] unsafe or uninhabitable because of a dangerous physical condition." *Id*. at 221-22 (original emphasis); *see also id.* at 223-24 ("even under a loss of functionality test there must be some *physical* effect on the property").

Having established that physical harm or actual physical loss of property is still required under a "loss of functionality" theory, this Court agreed with U.S. District Judge Rothstein's conclusion "that COVID-19 does not trigger direct physical loss or damage" to property and "that COVID-19 and related government closures do not amount to 'direct physical loss of property.'" *Id.* at 223-24. And although not dispositive, this Court found further support in the ever-growing "national consensus" that "COVID-19 and related governmental orders

do not cause physical loss of or damage to a property and do not trigger coverage under similar policy language." *Id.* at 224.

Outside of its allegations about the alleged presence of the COVID-19 virus at its customers' facilities, Quest alleged no facts to establish that relevant property was *physically* harmed or *physically* lost in any way, as required for coverage. Therefore, the Court of Appeals correctly affirmed judgment on the pleadings.

Even if this Court's *Hill & Stout* opinion were read to imply that presence of COVID-19 may "physically prevent use" of property or render property "useless" or "uninhabitable," that is not what Quest alleged. Quest alleged that its customers were limited in what services they could perform, but that their properties were used, useful, and habitable because they were used for essential services. *See* CP 9-14, 15-16. Therefore, the facts that Quest alleged did not fit within its theory, even if were to be accepted.

Applying *Hill & Stout* (Op. 10-11), the Court of Appeals correctly determined that Quest failed to allege that presence of COVID-19 at any relevant property "caused direct imminent danger to [that] property or physically rendered [that] property useless, uninhabitable, or unsafe because of a dangerous physical condition." Op. 11. The Court of Appeals rightly ignored the complaint's mere legal conclusions along these lines, which mentioned no specific property at all.[6] *Howell v. Dep't of Soc. & Health Servs.*, 7 Wn. App. 2d 899, 910, 436 P.3d 368 (2019) (on pleading motion, courts do not "accept legal conclusions as correct, even when couched as facts in the complaint").

[6] *See* Pet. 8-9 and 17 n. 2 (all relying on allegations that the "COVID-19 public health crisis has directly and physically damaged property… and has caused the loss of use of property across the State of Washington [and other states]"; and that "coronavirus was present on property" nationwide, "physically altering those properties and causing them to become physically uninhabitable, unsafe, and unfit for their normal and intended uses, thereby resulting in physical loss or damage to property.")

Quest's reliance on government orders does not alter this result. *See* Pet. 5-8, 9-11. Contrary to Quest's contention, none of the orders identified support "that the existence of COVID-induced property damage was a basis for those orders' prohibition of access to facilities that caused Quest's business income losses." Pet. 18, 20. For example, Quest points to Washington Governor Jay Inslee's multiple pandemic-related orders to argue that they were issued "because the COVID pandemic 'remains a public disaster affecting life, health, property or the public peace.'" Pet. 6, citing CP 9–10, 688–700. But as the Court of Appeals stated, this language "does not explain why the governor issued the orders. Instead, it cites the basis for the governor's authority to prohibit activity under his state emergency powers." Op. 12 n. 12.

Finally, Quest objects that the Court of Appeals only addressed Governor Inslee's orders. Pet. 6, 13-14, 18, 23. But Quest has not supplied any reason that any other jurisdiction's orders necessitate a different result. Thus, the Court of Appeals

did not "ignore[] the possibility" that other states' orders "had been based on any property having lost its functionality because of the presence of COVID." Pet. 18. Quest never alleged that *any* governmental order identified *any* property that suffered physical loss or damage from COVID-19.

A. There Is No Issue of Substantial Public Interest

Hill & Stout does not suggest that "a policyholder can plead and prove COVID-related direct physical loss or damage to property under a theory of 'loss of functionality'" (Pet. 24)—so there is no need to explain "how" or "what physical effect on property is sufficient to constitute loss" (*id*.). That is the only purported "public interest" Quest divines here, and it does not exist.

As noted above, Quest pleads itself out of its own theory by alleging only that patients could not obtain non-essential services. In other words, according to Quest's own allegations, patients seeking essential medical services could continue to

access medical facilities, which remained operational, in use, and habitable.

Likewise, no "issues implicated by Quest's appeal" can "affect the ability of [any] Washington policyholders to obtain property and business interruption insurance coverage." Pet. 25. The unpublished Court of Appeals opinion has "no precedential value" and "Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss" it. GR 14.1.

Finally, even if trial courts have applied *Hill & Stout* differently to the cases before them (Pet. 25-27), it is the Court of Appeals' role to resolve those differences by correcting erroneous rulings.

B. This Case Does Not *Present* Quest's "Issues," as Dismissal of Quest's Suit is Warranted for at Least Three Independent Grounds Not Reached by the Court of Appeals

Apart from any answer this Court could give on either "issue" in the Petition, this case would come out the same on remand, which makes this case a poor vehicle for review, *even if* this case met RAP 13.4(b)(1) or (4), which it does not.

1. New Jersey Law Would Apply Here If *Hill & Stout* Did Not Fully Dispose of Quest's Claims, and New Jersey Law Fully Forecloses Quest's Claims

Quest is headquartered in New Jersey. CP 3. If a conflict between Washington and New Jersey law existed, New Jersey law would apply. Certain Resp. Corr. Br. at 15 and n. 4. Quest did not contest that point in its reply to the Court of Appeals, *see* Reply, and, therefore, concedes the issue.

While Washington law does not conflict with New Jersey law since *both* foreclose Quest's claims, to the extent Quest argues that its claim is not completely disposed of by *Hill & Stout*, a conflict would exist, and the New Jersey Supreme Court's decision in *AC Ocean Walk, LLC v. Am. Guarantee & Liab. Ins. Co*., 307 A.3d 1174 (N.J. 2024), would dispose of Quest's claims and require dismissal of Quest's suit. *AC Ocean Walk* explicitly rejected the argument that presence of COVID-19 caused physical loss or damage to property. *Id*. at 1180, 1185-89 (accepting allegation that policyholder closed casinos to the public due to actual or suspected presence of COVID-19,

complaint did not allege direct physical loss or damage to property as a matter of law). Therefore, if *Hill & Stout* does not foreclose Quest's claim, New Jersey law applies, and *AC Ocean Walk* does foreclose it.

Review by this Court is an idle exercise for this reason alone.

2. Quest Failed to Allege Facts Showing That Access to Property Was Prohibited

The Civil Authority coverage Quest sought also requires that *as a result of* direct physical loss or damage to property, "an order of civil authority *prohibited access* within five miles of its covered location." Op. 11; CP 357.

Quest alleged only that its customers were limited to performing essential medical services. This allegation does not establish that access to customer facilities was "prohibited"—the properties continued to be open and accessible to those seeking non-elective, essential medical procedures.

Government orders restricting certain types of business functions or activities from taking place at a property—such as

non-essential medical care or indoor dining—do not "prohibit access" to property. This Court recognized that government COVID-19 orders did not prohibit access to property. *Hill & Stout,* 200 Wn.2d at 220 ("property was in [the policyholder's] possession, the property was still functional and able to be used, and *[the policyholder] was not prevented from entering the property*").

The New Jersey Appellate Division recognized the same thing. *Mac Property Group LLC v. Selective Fire & Cas. Ins. Co.*, 473 N.J. Super. 1, 20, 30, 278 A.3d 272, 289 (App. Div. 2022) (orders limiting a restaurant to carry-out and delivery service and disallowing in-person dining "neither prohibited access to plaintiffs' premises nor prevented plaintiff owners from being on their premises, but merely restricted their business activities," such that civil authority coverage requiring an "action of civil authority that prohibits access" to insured's premises did not apply). Other courts reach the same result under similar policy language. *Wilson v. USI Ins. Serv. LLC*, 57

F.4th 131, 138, 147 (3d Cir. 2023); *Brown Jug, Inc. v. Cincinnati Ins. Co.*, 27 F.4th 398, 400, 405 (6th Cir. 2022). Quest alleged nothing more than the policyholders in these cases did.

Quest argued that Civil Authority coverage "does not specify whose access must be prohibited or that all access be prohibited." App. Br. 32 (emphasis omitted). In other words, Quest argued that the *lack* of any words qualifying "prohibited access" must mean that a qualification should be *added.* But courts cannot rewrite contracts. *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 891, 167 P.3d 610 (2007); *Pierce v. Aetna Cas. & Sur. Co.*, 29 Wn. App. 32, 36, 627 P.2d 152 (1981). The policies require that "access to property within 5 miles of the Insured's Location is prohibited by order or action of Civil or Military Authority." CP 357. "Access to property ... is prohibited" is an unqualified requirement. No additional words are needed to make it more unqualified.

In sum, Quest's claim for Civil Authority fails because Quest does not allege facts showing that any order actually *prohibited* access to relevant property. The Court of Appeals could have affirmed judgment on the pleadings on this basis.

3. The Pollution and Contamination and Microorganism Exclusions Barred Quest's Losses

The Court of Appeals also could have affirmed based on the policies' exclusion for losses arising from the dispersal of viruses. The Petition claims that Quest's policies "do not contain a virus exclusion" (Pet. 15-16 n. 1), when in fact, they do. The policies exclude coverage for "loss or damage arising out of the dispersal, release or escape of **contaminants** or **pollutants** into ... the atmosphere"—and define "**Pollutants or contaminants**" to include "any ... virus." CP 347, 381.

Quest's claim falls squarely within this exclusion. Quest alleges that government orders were issued "because of the … pervasive presence of the SARS CoV-2 virus … in the communities of Quest's insured properties and those of Quest's

customers" and "because of the presence of and rapid spread of the coronavirus." CP 2-3, 15-16.

As Quest acknowledges, this Court determined in *Hill & Stout* that "coronavirus … caused Governor Inslee to issue the relevant Proclamation." Pet. 15 n. 1. Thus, the Court of Appeals could have affirmed on the basis this exclusion. *See Hill & Stout*, 200 Wn.2d at 227 (holding "the causal chain is clear: COVID-19 is unique and Governor Inslee issued the Proclamation because of it").

Quest sought to limit this exclusion to "traditional environmental pollution." App. Br. 52-53. However, state high courts addressing similar exclusions reject that argument, including the New Jersey Supreme Court. *AC Ocean Walk*, 307 A.3d at 1190; *see also Starr Surplus Lines Ins. Co. v. Eighth Judicial Dist. Ct.*, 535 P.3d 254, 267-69 (Nev. 2023); *APX Operating Co., LLC v. HDI Glob. Ins. Co.*, 2021 WL 5370062, at *2, 7 (Del. Super. Ct. Nov. 18, 2021), *aff'd*, 285 A.3d 840 (Del. 2022).

Quest also argued that "pollution" exclusions in a distinct Commercial General Liability policy have been interpreted to apply only to "environmental pollution." App. Br. 48-50 (citing *Kent Farms, Inc. v. Zurich Ins. Co.*, 140 Wn.2d 396, 401-02, 998 P.2d 292 (2000) (diesel fuel that overflowed from negligently maintained or operated equipment and choked claimant "was not acting as a 'pollutant'"). But *Kent Farms* did not hold that any reference to pollution in an exclusion limits that exclusion to "environmental pollution." Rather, as this Court has since concluded, "the *Kent Farms* discussion of traditional environmental harms is limited by the facts of that case." *Quadrant Corp. v. American States Ins. Co*., 154 Wn.2d 165, 167-84, 110 P.3d 733 (2005).

Quest also argued the exclusion did not apply because COVID-19 was not released or dispersed "'from a fixed place' into the environment." App. Br. 48 (citing *Queen City Farms v. Central Nat'l*, 126 Wn.2d 50, 78-79, 882 P.2d 703 (1994)). But *Queen City* is inapposite. Addressing a *liability policy's*

pollution exclusion, it held that depositing waste into disposal pits did not constitute a "release" or "escape" of pollutants implicating the exclusion, unless there was subsequent migration from the pits. *Id. Queen City* did not hold that every exclusion referencing pollution requires hazardous substances to escape or be dispersed from a "fixed place" or "containment area," as Quest argued. COVID-19 spreads because people sneeze or cough. "What is a sneeze or cough if not a discharge or dispersal?" *Northwell Health, Inc. v. Lexington Ins. Co*., 550 F. Supp. 3d 108, 121 (S.D.N.Y. 2021).

The policies' pollution and contamination exclusion applies here, and provides an independent basis for affirming. So too does the microorganism exclusion in certain insurers' policies. CP 517, 590.

C. Quest's Second "Issue" Is Not Presented at All

Quest asks: "Did the Court of Appeals decision contradict this Court's prior holdings establishing the proper standards for reviewing a Rule 12(c) motion for judgment on

the pleadings by affirming the dismissal of Quest's complaint on grounds that the complaint did not 'show' (*i.e.*, prove) details of the 'direct physical loss or damage' to property caused by COVID," even though—according to Quest—it "pled the existence of such physical loss or damage to property"? Pet. 2. Apart from being a pure "error" argument meeting no RAP 13.4(b) criterion, Quest misreads the Court of Appeals' opinion.

The Court of Appeals properly reviewed the trial court's judgment on the pleadings *de novo* and understood its obligation to assume the truth of facts pled in the complaint. Op. 6-7. Quest agrees that the Court of Appeals "correctly recited" the controlling standards, but claims that it "violate[d] those standards" by referencing Quest's failure to "show" facts that could establish coverage under its policy. Pet. 22-23. Quest contends that this meant the court demanded summary-judgment level proof at the pleading stage. Pet. 18-19, 23-24.

Not so. The Court of Appeals used the word "show" the

same way this Court used the word "prove" in explaining the proper standard for judgment on the pleadings:

> We treat a CR 12(c) motion for judgment on the pleadings identically to a CR 12(b)(6) motion to dismiss for failure to state a claim. Like a CR 12(b)(6) motion, *the purpose is to determine if a plaintiff can prove any set of facts* that would justify relief.

P.E. Sys., LLC v. CPI Corp., 176 Wn.2d 198, 203, 289 P.3d 638 (2012). That is all the Court of Appeals meant by saying it affirmed "[b]ecause Quest fail[ed] to show that the presence of COVID-19 resulted in physical loss or damage to property causing the governor to issue stay-at-home orders." Op. 2, 13. In other words, the panel agreed with the trial court that, based on Quest's allegations, Quest could not prove any set of facts justifying coverage under the policies.

This use of the word "show" is reflected in other portions of the opinion too. For example, in describing the parties' positions at page 6, the Court of Appeals explains that:

- Insurers "argued that Quest's complaint failed to show

direct physical loss or damage to property under the Policies' civil authority provision," while

- Quest argued "it need not show loss or damage to 'property' under the civil authority clause."

This was the court's shorthand (unpublished) description of the parties' competing views of what Quest would ultimately have to prove to justify relief—and thus whether Quest's allegations sufficiently "showed" that it would be entitled to coverage or not.

This carried through to the Court's analysis entitled "Sufficiency of Quest's Complaint." There it rejected Quest's argument "that even if it must *[ultimately] show* physical loss or damage to property to recover under the civil authority provision of the Policies, its complaint *sufficiently alleges* that COVID-19 caused such loss." Op. 10. Insurers never argued, and the Court of Appeals never held, that Quest had to *prove* anything at the pleadings stage.

With this context, and the earlier explanation of the standards of review, it is clear the Court of Appeals understood that no actual proof standard applied at this stage. So, when the court said "Quest's allegations do not show that the presence of COVID-19 caused direct imminent danger to property … [or] that the governor entered the proclamations in response to any dangerous physical conditions resulting from damage to property" (Op. 11), there is only one reasonable reading. The Court of Appeals determined that Quest's complaint revealed it could not "prove any set of facts that would justify relief." *P.E. Sys., LLC*, 176 Wn.2d at 203.

Finally, the notice-pleading standard does not save Quest's claim or require a different outcome. Pet. 20-21. While Washington's pleading standard requires courts to accept pleaded facts as true on a pleadings motion, dismissal is nonetheless warranted where, as here, a plaintiff's claim "remain[s] legally insufficient under [its] hypothetical facts," *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 843

(2015). As the courts below agreed, without alleging any property that had been physically harmed, physically lost, or rendered useless, uninhabitable, or in need of repair, replacement, or rebuilding, Quest cannot establish any "direct physical loss or damage" to property, as required for coverage. On this basis alone, Quest's claim "remain[s] legally insufficient under [its] hypothetical facts," and the Court of Appeals properly affirmed dismissal of its claim.

IV. CONCLUSION

This Court should deny review.

I certify that this brief contains 4,967 words in compliance with RAP 18.17.

Respectfully submitted July 29, 2024.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on this 29th day of July, 2024, I caused to be filed and served a copy of the foregoing **ANSWER TO PETITION FOR REVIEW** on all counsel of record via the Washington State Appellate Court's e-filing application and/or electronic mail.

DATED this 29TH day of July, 2024, at Edmonds, Washington.

s/ Lou Rosenkranz
Lou Rosenkranz, Legal Assistant

LANE POWELL PC

July 29, 2024 - 2:21 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,211-1
Appellate Court Case Title:	Quest Diagnostics, Inc. v. AIG Specialty Insurance Co., et al.

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