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No. 62828-3

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN 16 PM 4:17

S&K MOTORS, INC. d/b/a PINNACLE MAZDA,
a Washington corporation,

Plaintiff/Appellant,

v.

HARCO NATIONAL INSURANCE COMPANY,

Defendant/Respondent.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT AND AUTHORITY	1
A. Pinnacle Mazda Suffered a Loss of \$72,305.	1
B. The \$72,305 Loss Resulted Directly From One “Occurrence.”	2
C. Harco’s Policy Covers Pinnacle Mazda’s Loss Up to \$27,590.....	4
D. Recovery Does Not Accrue to Harco’s Benefit Until After Pinnacle Mazda Has Been Made Whole.	6
1. The Language of the Policy Provides Pinnacle Mazda Must First Be Made Whole.	6
2. Washington Law Requires That the Insured First Be Made Whole.	8
III. CONCLUSION.....	10

TABLE OF AUTHORITIES

Page

Cases

Bordeaux, Inc. v. American Safety Ins. Co., 145 Wn. App. 687, 186 P. 3d 1188 (2008); *rev. denied* No. 82276-0 (2009)..... 2, 5

Meas v. State Farm Fire & Cas. Co., 130 Wn. App. 527, 123 P.3d 519 (2005)..... 8, 9

Thiringer v. American Motors Insurance Co., 91 Wn.2d 215, 588 P.2d 191 (1978)..... 1, 8

Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 15 P.3d 115 (2000)..... 5, 7

I. INTRODUCTION

The portion of Employee Theft loss that Pinnacle Mazda suffered before it discovered the thefts is covered by the policy of insurance (the “Policy”) Harco sold Pinnacle Mazda. Pinnacle Mazda does not argue here for an “expansion” of *Thiringer v. American Motors Insurance Co.*, 91 Wn.2d 215, 220, 588 P.2d 191 (1978), and its progeny, as Harco suggests. Br. of Resp’t at 8. Instead, Pinnacle Mazda seeks application of the express terms of the policy of insurance at issue—as well as the supporting *Thiringer* principles—such that Pinnacle Mazda can recover from its insurer the covered portion of its loss. Harco argues for a forfeiture of all coverage merely because the risk of loss shifted to Pinnacle Mazda *after* discovery of the covered employee thefts. The windfall to Harco realized in the trial court should be reversed, and Harco should be required to comply with its contractual obligation to insure Pinnacle Mazda.

II. ARGUMENT AND AUTHORITY

A. Pinnacle Mazda Suffered a Loss of \$72,305.

Pinnacle Mazda’s insurer, Harco, promised to provide coverage for loss that Pinnacle Mazda sustained because of employee theft:

A. Insuring Agreements

Coverage is provided under the following
Insuring Agreements . . . and *applies to loss*

*that you sustain resulting directly from an
“occurrence” taking place during the
Policy Period shown in the Declarations*

....

1. Employee Theft

We will pay for loss of or damage to
“money”, “securities” and “other property”
resulting directly from “theft” committed by
an “employee”, whether identified or not,
acting alone or in collusion with other
persons.

CP 49 (emphasis added). Contrary to Harco’s suggestion that Pinnacle Mazda had no loss in this case, Pinnacle Mazda suffered a loss resulting directly from twenty two acts of employee theft taking place during the Policy Period shown in the Declarations. The loss totals \$72,305.

**B. The \$72,305 Loss Resulted Directly From One
“Occurrence.”**

Without support from the Policy it issued, Harco argues that there were two “occurrences” in this case: one before Pinnacle Mazda discovered the thefts, and one after. This is incorrect.

“The courts liberally construe insurance policies to provide coverage whenever possible.” *Bordeaux, Inc. v. American Safety Ins. Co.*, 145 Wn. App. 687, 694, 186 P. 3d 1188 (2008); *rev. denied* No. 82276-0 (2009). “If terms are defined in a policy, then the term should be interpreted in accordance with that policy definition.” *Id.* “Occurrence” is

defined in the policy. CP 61-62. By definition, all twenty-two thefts by one employee make up one “occurrence”:

“Occurrence” means . . . under Insuring Agreement A.1:

. . .

(2) The combined total of all separate acts whether or not related; or

(3) A series of acts whether or not related

committed by an “employee” acting alone or in collusion with other persons, *during the Policy Period shown in the Declarations* except as provided under [unrelated conditions].

CP 61–62 (definition 14) (emphasis added). The “Policy Period shown in the Declarations” is unambiguously September 1, 2006 through September 1, 2007. CP 41. Because the thefts took place between November 16, 2006 and April 30, 2007, they are “a series of acts” or “separate acts” taking place “during the Policy Period shown in the Declarations.” CP 61–62. All of the thefts between September 1, 2006 and September 1, 2007, then, make up one “occurrence” by the unambiguous terms of the Policy and its definitions. *Id.*

Harco argues that case law on which Pinnacle Mazda relies is distinguishable because the “occurrence” in those cases is a single event, such as a car accident. Harco’s argument has no relevance here: in each

coverage case—including this one—the “occurrence” is defined by the policy at issue. In an auto policy, “occurrence” may be defined to mean one car accident. Here of course, the Policy does not limit the definition of “occurrence” to a single event. It includes a “series of acts” or even “separate acts” to make up one “occurrence,” *as long as all the events or acts take place “during the Policy Period shown in the Declarations.”* CP 61–62 (emphasis added).

Because the Policy’s “occurrence” definition contemplates *all* acts during the Policy Period, Pinnacle Mazda’s loss of \$72,305 resulted directly from one “occurrence.” Harco agreed to pay for all loss “resulting directly from an ‘occurrence’ taking place during the Policy Period.” Therefore, Harco cannot escape its coverage responsibility by redefining “occurrence” to mean something contrary to the Policy definition.

C. Harco’s Policy Covers Pinnacle Mazda’s Loss Up to \$27,590.

Before Pinnacle Mazda discovered the Employee Thefts, the employee stole \$27,590. This portion of the loss, less deductible, is covered under Insuring Agreement I.A. Pinnacle Mazda has conceded that the full amount of the loss is not covered under the Policy because, by condition, the Policy shifts the risk of Employee Thefts which take place

after Pinnacle Mazda discovers the activities of a thieving employee.

CP 59. Pinnacle Mazda does not dispute that this Policy condition applies.

In this action, however, Harco seeks to shift the risk of the *entire* loss to Pinnacle Mazda by disclaiming all coverage. This approach has no support in the Policy. The condition, CP 59, does not seek to redefine “occurrence” or the “Policy Period shown in the Declarations.” Thus, Harco’s coverage provision still extends to the loss “*resulting directly from an ‘occurrence’ taking place during the Policy Period shown in the Declarations.*” CP 49 (emphasis added). The condition does not divide the thefts into two “occurrences,” as Harco implies. The condition’s sole function is to cap the covered portion of the loss at the amount which was stolen before Pinnacle Mazda discovered the thefts. This amount is \$27,590.

To the extent that any ambiguity exists in the meaning of the condition or its effect on other terms of the policy, the ambiguity must be resolved in Pinnacle Mazda’s favor. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 666, 15 P.3d 115 (2000); *Bordeaux*, 145 Wn. App. at 694.

D. Recovery Does Not Accrue to Harco's Benefit Until After Pinnacle Mazda Has Been Made Whole.

1. The Language of the Policy Provides Pinnacle Mazda Must First Be Made Whole.

The Policy itself requires that Pinnacle Mazda be fully compensated for its loss:

Any recovery or salvage on a loss will accrue entirely to our benefit until the sum paid by us has been made up. But, we will be entitled to any other recovery only after you have been fully compensated for the loss.

CP 64 (emphasis added). The first sentence does not apply to these facts, as Harco undisputedly has not paid any sum at all. Therefore, applying the second sentence, Harco is entitled to any "other recovery" only after Pinnacle Mazda has been fully compensated for the loss.

By withholding amounts from the employee's paychecks, Pinnacle Mazda recovered only a portion of the \$72,305 loss. Pinnacle Mazda, therefore, has not been made whole for the loss. Harco describes Pinnacle Mazda's efforts to recover the covered portion of the loss from its insurer as a "shell game" because the withholdings from the employee's paycheck were referenced in an agreement between Pinnacle Mazda and the employee. CP 76. However, the employee never intended to honor the agreement, and indeed breached the agreement immediately by stealing even more from Pinnacle Mazda during the period of supposed recovery.

Harco may argue that Pinnacle Mazda assumed the risk he would continue to steal by keeping a thief on the payroll. However, the Policy shifts the risk to Pinnacle Mazda's only *after* Pinnacle Mazda discovered the theft. CP 59. Before the discovery, Harco bears the risk. *Id.* The policy covers that portion of the loss that Pinnacle Mazda suffered before discovering the theft, and the amounts withheld from Steve Casino's paycheck do not accrue to Harco's benefit until Pinnacle Mazda is made whole for its loss.

Harco's only response is that the entirety of the "occurrence" took place before discovery of the thefts, thus the entirety of the loss flowed from the employee's activities before Pinnacle Mazda discovered the thefts. Therefore, Harco concludes, Pinnacle Mazda has been made whole and is seeking a double recovery. However, as described in the preceding sections, neither Harco's premises nor its conclusion is supported by the facts, the law, or the Policy of insurance.

It is the insurer's burden to establish the insured will enjoy a double recovery. *Weyerhaeuser Co.*, 142 Wn.2d at 674-75. Here, Pinnacle Mazda's loss is \$72,305, and its sources of recovery (the Harco Policy and the employee) total less than \$50,000. There will be no double recovery.

2. Washington Law Requires That the Insured First Be Made Whole.

Not only the express terms of the policy, but also established law in Washington, require that Pinnacle Mazda be made whole before Harco benefits from any recovery from the tortfeasor. *E.g., Thiringer*, 91 Wn.2d at 219 (“while an insurer is entitled to be reimbursed to the extent that its insured recovers payment for the same loss from a tort-feasor responsible for the damage, it can recover only the excess which the insured has received from the wrongdoer, remaining after the insured is *fully compensated for his loss*”).

The reasoning in *Meas v. State Farm Fire & Cas. Co.*, 130 Wn. App. 527, 530, 123 P.3d 519 (2005), cited by Harco, actually supports Pinnacle Mazda’s position. In that case, a person injured in a car accident made a property damage claim under his own insurance, State Farm. State Farm paid the claim.

State Farm’s right to recover payments made under the collision coverage payment at issue in the case stated:

[T]he right of recovery of any party we pay passes to us. Such party shall:

- (1) not hurt our rights to recover; and
- (2) help us get our money back. Our right to recover our payments applies only after the insured has been fully compensated

for the bodily injury, property damage *or* loss.

Meas, 130 Wn. App. at 530. Therefore, after paying the property loss, State Farm sought, and received, reimbursement from the tortfeasor's insurer. The insured sued State Farm because it had not been made whole on its *bodily injury* claim before State Farm sought recovery on the *property damage* claim. State Farm won summary judgment.

The Court of Appeals affirmed, holding:

The meaning is plain that for property damage where there is classic subrogation, the insured is to be made whole for *the same loss*, i.e., the property damage, before the carrier can recover payment from the tortfeasor. But the property damage subrogation does not relate to the right of reimbursement for personal injuries under the policy language. Here, Meas was fully compensated or "made whole" for *the property loss* claimed under his collision coverage when he received payment from [his insurer].

Id. at 538. Because the property loss was a distinct loss, State Farm could recover its payment against the insurer.

The recovery provisions in *Meas* and this case are inapposite. In *Meas*, the recovery provision contemplates that an insured can be made whole separately in different types of losses (*e.g.*, property damage *or* bodily injury). The recovery provision in the Harco Policy simply pertains

to “the loss.” CP 64. In this case, Pinnacle Mazda has not suffered two distinct losses like the insured in *Meas*, and the recovery provision does not apply to distinct losses. Pinnacle Mazda has suffered one loss, and has not yet been made whole for it. Harco should be required to pay the covered portion of the loss.

III. CONCLUSION

Pinnacle Mazda only requests that Harco pay the portion of the loss that it suffered before discovering an employee’s thefts in February 2007. This is exactly what Harco promised to do when it sold the Policy to Pinnacle Mazda. Pinnacle Mazda has not been made whole for its loss because the amount the tortfeasor paid does not come close to the amount Pinnacle Mazda lost. Harco does not face an increased risk in this case, and Pinnacle Mazda will not enjoy a double recovery. The Court should reverse the decision of the trial court and enter summary judgment in favor of Pinnacle Mazda on its breach of contract claim.

RESPECTFULLY SUBMITTED this 18th day of June, 2009.

GORDON TILDEN THOMAS & CORDELL LLP

By 

Franklin D. Cordell, WSBA #26392

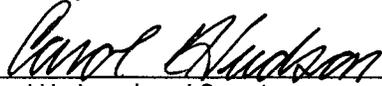
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Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused a true and correct copy of this document to be delivered via ABC Legal Messengers, Inc. to: ROBERT C. LEVIN, counsel for defendant/respondent, at the regular office address thereof.

Dated this 18th day of June, 2009 at Seattle, Washington.



Carol Hudson, Legal Secretary
Gordon Tilden Thomas & Cordell LLP

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