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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Case No. 338622-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

SUN VALLEY PLAZA, LLC,
a Washington limited liability company,

Plaintiff/Appellant

vs.

ADMIRAL INSURANCE COMPANY, a corporation; and
TERRIL, LEWIS & WILKE INSURANCE, INC., a Washington
corporation,

Defendants/Respondent

BRIEF OF RESPONDENT
TERRIL, LEWIS & WILKE INSURANCE, INC.

JAMES S. BERG (WSBA #7812)
Larson Berg & Perkins PLLC
Attorneys for Respondent
Terril, Lewis & Wilke Insurance, Inc.

105 North 3rd Street
Yakima, WA 98901
Phone: (509) 457-1515
Fax: (509) 457-1027

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A. INTRODUCTION

A.1. A Case Built on Speculation. The plaintiff only possesses speculation, not actual valid evidence, as to an essential element of its case. Thus, the plaintiff does not have a viable claim.

A.2 Nature of Case & Brief Overview. This case is a dispute concerning insurance, specifically arising in the commercial context under a property policy (as distinguished from a liability policy). *See* CP 92-93; *Brief of Appellant*, p.1. The plaintiff/appellant, Sun Valley Plaza, LLC, procured the insurance through defendant/respondent Terril, Lewis & Wilke Insurance, Inc. (“Terril”) – an insurance brokerage. *See* CP 192 (11.22-25); CP 7 (11.4-6 & 15-17); *Brief of Appellant*, p.2. The insurance was issued by Admiral Insurance Company. *See* CP 7 (11.8-17); *Brief of Appellant*, p.2. Admiral was a co-defendant in this litigation, but it settled with the plaintiff and was subsequently dismissed. *See e.g.*, CP 93 (11.3-6); CP 192 (11.19-21). The only remaining parties are Sun Valley (as plaintiff/appellant) and Terril (as defendant/respondent).

The plaintiff submitted an insurance claim following its discovery of theft and vandalism at its property. The insurance claim was denied by Admiral, due, in part, to the plaintiff’s failure to install Central Station Burglar Alarms (“CSBAs”), which were required per the written conditions of the insurance. *See* CP 92-93; CP 7 (11.19-28); *Brief of*

Appellant, p.1. Following denial of the claim, the plaintiff sued Admiral (the issuer) and Terril (the brokerage). *See e.g.*, CP 6-10 (Complaint).

As against Terril (the brokerage), the plaintiff advanced a claim that it characterized as “failure to notify”. More specifically, the plaintiff alleged that Terril “failed to notify the Plaintiff of the requirement to have CSBAs on its buildings until after the loss was suffered by Plaintiff.” *See* CP 8 (ll.16-21). Terril denied any fault or liability. *See e.g.*, CP 93 (ll.12-13).

Following discovery, Terril sought summary dismissal on the basis that “neither Sun Valley nor anyone else has credible evidence of when the loss actually occurred”, thus rendering all other issues moot. *See e.g.*, CP 93 (ll.14-15); *Brief of Appellant*, p.1. The trial court agreed and dismissed the plaintiff’s claim on that basis. *See e.g.*, CP 254 (Order Granting Summary Judgment, ll.20-22: “Plaintiff has failed to present anything more than speculative evidence of an essential element of its case; namely, that the subject loss occurred during the second policy period.”); *see also Brief of Appellant*, p.1.¹

¹ To be explained below, there were two consecutive insurance policies by Admiral Insurance Company (and also a previous policy by Farmers Insurance Company). Admiral’s “2011 Policy” ran from September 15, 2011, through September 14, 2012. In turn, Admiral’s “2012 Policy” ran from September 15, 2012, through September 14, 2013. *See e.g.*, CP 92 (n.1); *Brief of Appellant*, p.2. Between the two Admiral policies, it is the 2012 Policy (the renewal policy) that is at issue because the plaintiff alleges that its loss occurred “[o]n or about November 5, 2012”. *See* CP 8

A.3. Current Procedural Setting. This appeal follows summary dismissal of the plaintiff's "failure to notify" claim against Terril (the brokerage). See *Brief of Appellant*, p.1; CP 253-254 (Order Granting Summary Judgment).

A.4. The Plaintiff's Sole Assignment of Error. The sole assignment of error raised by the plaintiff is that the trial court supposedly "erred in granting the Defendant's Motion for Summary Judgment." See *Brief of Appellant* (unnumbered page, under the heading "I. Assignment of Error").²

A.5. Issue Presented for Review – Competing Statements Thereof. Terril concurs with Sun Valley regarding designation of the issue presented for review. However, Terril believes the issue is best stated and

(Complaint: 1.19). By contrast, the plaintiff does not allege any loss during the period of the first Admiral policy (*i.e.*, on or prior to September 14, 2014). See CP 7-10 (Complaint). To be explained below, each Admiral policy was an "occurrence" policy (as distinguished from a "claims made" policy). Thus, a loss allegedly "[o]n or about November 5, 2012" (*see* CP 8 (Complaint: 1.19)) could only possibly trigger coverage under the renewal Admiral policy (*i.e.*, the 2012 policy, which took effect on September 15, 2012).

² The plaintiff cannot raise additional or different assignments of error at a later date. "RAP 10.3(a)(3) requires that an appellant state concisely each error that it claims the trial court made, along with the legal issue or issues pertaining to each alleged error." *Viereck v. Fibreboard Corp.*, 81 Wn. App. 579, 582, 915 P.2d 581, 582 (1996) (Division Two). As written by Division Three, "It is not the function or duty of [an appellate court] to search the record for errors, but only to rule on the errors specifically alleged." *Smith v. Breen*, 26 Wn. App. 802, 803, 614 P.3d 671 (1980) (Division Three) (bracketed change made). Moreover, an appellant cannot raise new issues during oral argument. *Rizzuti v. Basin Travel Serv. of Othello, Inc.*, 125 Wn. App. 602, 611, n.3, 105 P.3d 1012, 1017 (2005) (Division Three) ("We generally will not consider issues raised for the first time in oral argument.").

understood via different phraseology than that used by Sun Valley.

Plaintiff frames the issue presented for review as “whether there is evidence before the Court, either direct or circumstantial, from which reasonable persons could conclude that the damage to the property of Sun Valley occurred on or after September 15, 2012 [the commencement date of the renewal Admiral policy].” *See Brief of Appellant*, p.10 (bracketed material added). In fact, the issue before the Court is more properly framed thusly: whether the plaintiff has actual admissible evidence to prove that the date(s) of loss were after September 15, 2012, or, conversely, whether the plaintiff offers only mere speculation to suggest that the date(s) of loss were after September 15, 2012.

B. STATEMENT OF THE CASE

B.1. Plaintiff and Subject Property. The plaintiff/appellant, Sun Valley Plaza, LLC, is a limited liability company organized under Washington law. *See* CP 93 (11.22-27); CP 11 (11.21-22); CP 16-17; CP 7 (11.20-21). Sun Valley is owned by Larry Hull and Pia Hull, husband and wife. *See* CP 93 (11.22-27); CP 16-17. Larry Hull serves as the manager of the LLC entity. *See Brief of Appellant*, p.2.

Sun Valley owns real properties situated in Yakima County, Washington. *See* CP 93 (1.27) – CP 94 (1.1); CP 16 (11.14-15); CP 17 (1.6). Among those properties are the addresses of 1402 and 1416 South First

Street, Yakima, WA 98901, which are the subject property on this litigation. *See* CP 7 (Complaint: 11.24-25).³

The subject property is commercial in nature. *See e.g., Brief of Appellant*, p.2. It includes multiple buildings. *See e.g., CP 71-72* (“Declarations Page” and “Supplemental Description of Premises” of the renewal 2012 Admiral policy, containing multiple entries under the heading “BLDG#”).

B.2. Defendant/Respondent. The defendant/respondent Terril, Lewis and Wilke Insurance, Inc. (“Terril”), is a corporation organized under the laws of Washington. *See* CP 8 (Complaint: 11.4-6). Terril is a duly-licensed insurance brokerage. *Id.*

B.3. Pursuit of Replacement Coverage (following end of a Farmers policy). In 2011, Sun Valley (acting by and through Larry Hull)

³ The only property address mentioned in Sun Valley’s “Complaint” is “1416” South First Street. *See* CP 7 (11.24-25); CP 8 (11.19-20). Via its “Brief of Appellant”, Sun Valley does not recite any specific address number(s). Instead, Sun Valley simply refers to “the property”. For instance, Sun Valley writes as follows: “Commencing November 1, 2012, the property was leased to Del Matthews.” *See Brief of Appellant*, p.2. In fact, however, the property that Mr. Matthews leased was not 1416 South First Street, but, rather, a nearby address of “1408”. *See* CP 107 (“Commercial Property Lease Agreement”, ¶1. Property). That is an important distinction, because the Admiral policies only covered the addresses of 1402 and 1416 – not 1408. *See* CP 72 (“Supplemental Description of Premises” of the renewal 2012 Admiral policy, reciting only the address numbers of 1402 and 1416); CP 80 (same, as to the original 2011 Admiral policy). Thus, while it is true that Mr. Matthews leased 1408 for a period of time, it is not true that “the property” covered by the renewal 2012 Admiral policy “was leased to Mr. Matthews” as Sun Valley asserts. Rather, as confirmed by the deposition testimony of Sun Valley’s employee Caroline Nava, different buildings were leased by different tenants. *See* CP 210 (1.20) – CP 211 (1.3).

engaged Terril to seek replacement insurance coverage for a soon-expiring insurance policy that had been issued by Farmers Insurance Company. *See* CP 94 (II.10-22); CP 11 (II.24-25); CP 42-43. The Farmers policy was scheduled to lapse on September 15, 2011. *See* CP 94 (II.10-11). Due to a \$3,000,000.00 claim previously made by Sun Valley, Farmers refused to renew. *See* CP 94 (II.11-14); CP 42 (II.14-25); CP 43 (II.16-18); CP 59 (II.1-6). Sun Valley engaged Terril to assist finding a carrier willing to issue replacement coverage. *See* CP 94 (II.15-16); CP 43 (II.19-21); *Brief of Appellant*, p.2. Terril eventually secured replacement coverage for Sun Valley through Admiral Insurance Company. *See* CP 94 (II.20-22); CP 59 (II.7-17).

B.4. Consecutive Admiral Policies (the original 2011 policy, and the renewal 2012 policy). Admiral issued consecutive yearlong insurance policies to Sun Valley. The first Admiral policy (the “2011 policy”) provided coverage from September 15, 2011, through September 14, 2012. In turn, the renewal Admiral policy (the “2012 policy”) provided coverage from September 15, 2012, through September 14, 2013. *See* CP 95 (II.8-9); CP 59 (II.11-14); CP 60-64; CP 67-84 (policy documents).

B.5. Nature of Coverage Under the Admiral Policies. Each Admiral policy was a property policy (as distinguished from a liability policy). *See* CP 94 (I.23) – CP 95 (I.15); CP 67-84 (policy documents).

Each Admiral policy covered, *inter alia*, theft or vandalism – which is the type of loss that Sun Valley suffered in this case. *See e.g.*, CP 7 (Complaint: 11.19-20). Each policy was “occurrence” policy (as distinguished from “claims-made” policy). *See e.g.*, CP 94 (1.23) – CP 95 (1.1); CP 95 (n.4); CP 67-84 (policy documents). An occurrence policy only covers losses that occur during the stated policy period.⁴

B.6. Express Condition Under both Admiral Policies – Use of CSBAs. Each Admiral policy obligated Sun Valley, as a condition of coverage, to utilize Central Station Burglar Alarms (“CSBAs”) within specified buildings. *See* CP 95 (11.1-5 & 9-12); CP 27 (1.24) – CP 28 (1.24). Each policy explicitly listed the buildings wherein CSBAs had to be used.

The initial 2011 Admiral policy required CSBAs at buildings #1, 2, 3 and 7 of 1416 South First Street, and also at building #1 of 1402 South First Street. *See* CP 84 (“Burglary and Robbery Protective Systems” endorsement page of initial 2011 Admiral policy). The CSBAs requirement was enlarged under the renewal 2012 Admiral policy. The renewal policy required CSBAs at all buildings except building #5 at 1416 South First Street. *See* CP 75 (“Burglary and Robbery Protective

⁴ The distinction between “occurrence” and “claims-made” policies is discussed in multiple Washington precedents. *See e.g.*, *American Continental Ins. Co. v. Steen*, 151

Systems” endorsement page of renewal 2012 Admiral policy).⁵

B.7. Whether Sun Valley Did or Did Not Know of the CSBAs Requirement. It is undisputed both that Mr. Hull (the owner and manager of Sun Valley) was timely provided with a copy of the initial 2011 Admiral policy, and also that such policy explicitly set forth the particular CSBAs requirements then in effect. However, Mr. Hull simply chose to not read the initial 2011 Admiral policy. *See* CP 28 (11.8-9). When asked during his deposition whether he knew that the initial 2011 Admiral policy imposed a CSBAs requirement, Mr. Hull’s initial answers were, *inter alia*, “I think so” and “I would say yes”. *See* CP 27 (11.12-23). Later, Mr. Hull attempted to change his answer to “I don’t know.” *See* CP 29 (1.18) – CP 30 (1.4).⁶

In contrast, Mr. Hull did not receive a copy of the renewal 2012 Admiral policy until after the subject loss was discovered. *See* CP 96 (11.2-5). If he had timely received a copy, however, it is questionable whether he would have read it based on his failure to read the prior policy.

Wn.2d 512, 517, 91 P.3d 864, 857 (2004); *Safeco Title Ins. Co. v. Gannon*, 54 Wn. App. 330, 337, 774 P.2d 30, 34 (1989) (Division One).

⁵ The transmitted appeal record does not reveal whether the earlier Farmers policy required CSBAs within any building.

⁶ Of course, it has long been established that an insured party “will not be permitted to urge that he did not read [his policy] and that he was ignorant of its contents”. *Perry v. Continental Ins. Co.*, 178 Wn. 2d, 28, 33 P.2d 661, 662-663 (1934) (bracketed material added); *accord Trust v. Acordia Northwest, Inc.*, 115 Wn. App. 833, 842, 63 P.3d 860, 865 (2003) (Division One) (“An insured has a duty to read a policy”).

That question, however, is irrelevant to this appeal.

B.8. The Subject Loss. On some unknown date(s) in 2012, Sun Valley suffered a loss at 1416 South First Street as the result of theft and vandalism. *See e.g.*, CP 8 (Complaint: 11.19-20). Holes were cut in walls. Wiring was stripped from behind the walls and stolen, toilet fixtures were also stolen, and shower rooms were damaged. *See* CP 38 (11.6-13). The loss occurred in three separate buildings, two of which required, but lacked, CSBAs. *See* CP 95 (11.12-15).

Sun Valley discovered the loss in late October or early November, 2012. *See Brief of Appellant*, p.5. As stated in Sun Valley's "Brief of Appellant":

On or about November 5, 2012, Larry Hull [the manager of Sun Valley] inspected the property. Mr. Matthews [a tenant] [had] vacated the property⁷ on or about October 31, 2012. A staff member of Sun Valley had inspected the property shortly after Mr. Matthews vacated the property and [that staff member] reported significant damage to the property. Upon his inspection [on or about November 5, 2012], Larry Hull confirmed the damage.

Brief of Appellant, p.5 (bracketed material added).

B.9. The Date(s) of Loss Are Unknown. Sun Valley possesses no direct evidence as to the date(s) when the theft and vandalism occurred. There are no eyewitnesses to the occurrence(s). No one has admitted

⁷ As previously noted, Sun Valley's contention that Mr. Matthews leased "the property" is both misleading and false. *See supra*, p.5, n.3.

culpability, and no one was ever charged by law enforcement. No testimony was offered from Mr. Mathews (the nearby tenant).

Moreover, no Sun Valley employee had been to the property during the preceding six months. *See* CP 96 (ll.16-17); CP 34-36. Compared against the discovery of the loss in late October or early November, 2012, this means that no one from Sun Valley had been to the property since late April or early May 2012 – at which time the original 2011 Admiral policy was still in effect. Moreover, there is no evidence of anyone – from Sun Valley, Admiral or any other firm or entity – inspecting the property in anticipation of, concurrent with, or immediately following the renewal policy taking effect on September 15, 2012. Rather, the timeframe of April/May 2012 to October/November 2012 saw zero inspections of the property.

When he was deposed, Mr. Hull (the owner and manager of Sun Valley) conceded that he has “no idea” when the loss occurred. The relevant questions and answers from his deposition transcript are as follows:

- Q. Do you have any idea when [the vandalism and theft] was done?
- A. No.
- Q. Okay. It could have been done a month before [issuance of the renewal Admiral policy], for all you know; is that correct?
- A. It, it could have been done during the first policy rather

than the second one, yes.

Q. Okay.

A. Because the policies changed from September 15th, each September 15th, so if the, if the damage, if we, if we call the claim in around the 1st of November, it would only be a month and a half and then you would be back to the first policy.

Q. Okay.

A. So if, if it did take him a long time, then they would actually be operating under the first policy rather than the second one, which

(Bracketed material added.) *See* CP 96 (1.20) – CP 97 (1.8). Notably, the bulk of this testimony was volunteered by Mr. Hull, with the only intervening “questions” being the word “Okay”. Mr. Hull readily conceded the loss could have occurred “under the first policy rather than the second one”. *Id.*

In addition to Mr. Hull having “no idea” when loss occurred, nor does any other party or witness. *See e.g.*, CP 97 (11.8-9); CP 12 (11.1-2); CP 87-88. The precise date(s) of loss are simply unknown. Recognizing this factual void, Sun Valley premises its case on “circumstantial evidence” and “reasonable inferences” based thereon. *See Brief of Appellant*, pp.9-10.⁸

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⁸ To be explained and argued below, the supposed circumstantial evidence is actually non-evidence, and the supposed reasonable inferences are actually self-serving and illogical. *See infra*, pp.18-24 (sections D.1. and D.2.).

B.10. Properly Construed, Sun Valley's "Failure to Notify" Claim Only Pertains to the Renewal 2012 Admiral Policy (not the original 2011 Admiral policy). In its Complaint, Sun Valley referred to both Admiral policies without making any distinction between them. *See e.g.*, CP 9 (Complaint: 11.19-21, alleging that Terril failed to notify Sun Valley "of the contents of the policies"). In fact, Sun Valley's "failure to notify" claim necessarily pertains only to the renewal 2012 policy – not the original 2011 policy.

As noted above, a copy of the original 2011 Admiral policy was provided to Mr. Hull (the owner and manager of Sun Valley) in a timely manner and long before the subject loss was discovered. *See supra*, p.8 (section B.7.). Mr. Hull claims that he did not read the original policy (*see* CP 28 (11.8-9)), but he could have done so, and as a matter of law he cannot claim ignorance of the contents of that policy. *See supra*, p.8, n.6. Thus, no further "notification" about the terms of the initial 2011 policy was necessary and any "failure to notify" claim vis-à-vis that policy would be manifestly untenable. At the least, Sun Valley had constructive knowledge of the terms of the 2011 policy long before the subject loss was discovered.

Furthermore, when Sun Valley submitted its insurance claim it did so exclusively under the renewal 2012 Admiral policy – not under the

original 2011 Admiral policy (whether jointly or individually). Sun Valley submitted its insurance claim under the 2012 policy because Sun Valley contends that the loss occurred “[o]n or about November 5, 2012”. See CP 98 (ll.27-29); CP 8 (Complaint: ll.19-20). Both Admiral policies were “occurrence” policies (not “claims-made” policies), so submitting a claim under the expired 2011 policy would have made no sense.

For these reasons, it follows that any supposed “failure to notify” by Terril necessarily must pertain to the renewal 2012 Admiral policy exclusively – not to the initial 2011 Admiral policy. As further explained below, because Sun Valley’s claim relates exclusively to the 2012 policy, Sun Valley must prove that the subject loss occurred during the coverage period of that policy. If Sun Valley cannot validly make that showing – which it cannot – then all other issues are moot.

C. APPLICABLE LAW

C.1. De Novo Review. An appellate court “review[s] a summary judgment order de novo, engaging in the same inquiry as the trial court.” *Keck v. Collins*, 181 Wn. App. 67, 78, 325 P.3d 306, 311 (2014) (Division Three) (bracketed change made). It is well established that an appellate court “may affirm the superior court’s decision on any ground supported by the record.” See e.g., *Allstot v. Edwards*, 116 Wn. App. 424, 430, 65 P.3d 696, 700 (2003) (Division Three).

C.2. Record on Review – New Arguments are Not Allowed.

RAP 9.12 provides, in relevant part, as follows: “On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.” See RAP 9.12. Likewise, new arguments – beyond those presented to the trial court – cannot be raised on appeal following summary judgment. See e.g., *1519-1525 Lakeview Blvd. Condominium Ass’n v. Apartment Sales Corp.*, 101 Wn. App. 923, 932, 6 P.3d 74, 79 (2000) (Division One) (“This argument was not made to the trial court, and we therefore decline to consider it.”).

The purpose of these limitations “is to effectuate the rule that the appellate court engages in the same inquiry as the trial court.” *Washington Federation of State Employees, Council 28, AFL-CIO v. Office of Financial Management*, 121 Wn.2d 152, 157, 849 P.2d 1201, 1203 (1993).

C.3. Summary Judgment Standards. “A nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value”. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1, 7 (1986). Rather, “the nonmoving party must set forth specific facts that sufficiently rebut the moving party’s contentions and

disclose that a genuine issue as to a material fact exists.” *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d at 13, 721 P.2d at 7.

As written by the United States Supreme Court, “the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine issue of material fact*.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S. Ct. 2505, 2510 (1986) (italic emphases in original). “A material fact is one upon which the outcome of the litigation depends.” *Baldwin v. Silver*, 165 Wn. App. 463, 472, 269 P.3d 284, 289 (2011).

“An affidavit does not raise a genuine issue for trial unless it sets forth facts evidentiary in nature, *i.e.*, information as to ‘what took place, an act, an incident, a reality as distinguished from supposition or opinion.’” *Vacova Co. v. Farrell*, 62 Wn. App. 386, 395, 814 P.2d 255, 261 (1991) (partially quoting *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517, 519 (1988)).

C.4. Speculation is Not Proper Evidence. When a plaintiff offers only speculation as an essential element of its case, dismissal via summary judgment is the proper result. As written by the United States Supreme Court, “a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.”

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986) (recognized as consistent with Washington law via *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-226, 770 P.2d 182, 187-188 (1989)).

Conjectural theories are not sufficient. The Washington Supreme Court has “frequently said that, if there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture”. *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564, 569 (1947) (citations omitted). As written by Division Two, “a verdict cannot be founded on mere theory or speculation.” *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 379, 972 P.2d 475, 479 (1999); *accord Martini v. Post*, 178 Wn. App. 153, 165, 313 P.3d 473, 479 (2013) (“The plaintiff cannot rest a claim for liability on a speculative theory.”).

C.5. Circumstantial Evidence Has its Limits. Circumstantial evidence does not negate “the distinction between that which is mere conjecture and what is a reasonable inference.” *Gardner v. Seymour*, 27 Wn.2d at 808-809, 180 P.2d at 569 (quoting *Home Ins. Co. v. Northern Pac. R. Co.*, 18 Wn.2d 798, 802, 140 P.2d 507, 509 (1943)). The plaintiff’s evidence must establish “that there is a greater probability that

the thing in question, such as the occurrence of a fire, happened in such a way as to fix liability upon the person charged therewith". *Gardner v. Seymour*, 27 Wn.2d at 808-809, 180 P.2d at 569 (quoting *Home Ins. Co. v. Northern Pac. R. Co.*, 18 Wn.2d at 802, 140 P.2d at 509) (underscore emphasis added).

C.6. The Standard is Probability, Not Mere Possibility. The plaintiff must "present proof sufficient to allow a reasonable person to conclude that the harm, more probably than not, happened in such a way that the moving party should be held liable." *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 781, 133 P.3d 944, 947 (2006). Possibility is not enough; the standard is probability.

C.7. Proof Required for a Valid Property Insurance Claim Under an Occurrence Policy. When the insurance policy in question is an occurrence property policy, the insured must prove, *inter alia*, that the loss occurred during the period of coverage. As written by Division One, "in order to trigger coverage under a [property] policy, the insured must sustain a covered injury or loss, however minute, during the effective period of the policy." *Fuji v. State Farm Fire & Cas. Co.*, 71 Wn. App. 248, 250, 857 P.2d 1051, 1052 (1993) (bracketed material added).

"[T]he insured must prove that the policy covers his loss." *Truck Ins. Exch. v. BRE Properties, Inc.*, 119 Wash. App. 582, 588, 81 P.3d 929,

932 (2003) (footnote reference omitted). An insured cannot rely on speculation or guesswork. *See e.g., Baroco W., Inc. v. Scottsdale Ins. Co.*, 110 Cal. App. 4th 96, 104, 1 Cal. Rptr.3d 464, 470 (2003) (“An insured may not rely on speculation to manufacture coverage.”); *see also Charbonneau v. Wilbur Ellis Co.*, 9 Wn. App. 474, 477, 512 P.2d 1126, 1128 (1973) (concerning allegedly defective oil, wherein the court ruled as follows: “The question of whether the oil was defective is in the area of speculation. If the matter went to the trier of fact in the posture set forth in the present record, the trier of fact would be unable to do any more than speculate or guess upon the condition of the oil. Therefore, the trial court was correct in granting the motion for summary judgment.”).

D. ANALYSIS AND ARGUMENT

D.1. Sun Valley’s Claim is Contrary to the Law, Contrary to Logic, and Based on Speculation. Sun Valley has no direct proof as to the date(s) of the theft and vandalism. Notwithstanding its claim that it is relying on “circumstantial evidence”, it offers none. *See Brief of Appellant*, p.9. Rather, it infers, based upon non-evidence, when the theft and vandalism did not occur. For instance, Sun Valley stresses that “[p]rior and up to September 15, 2012, there had been no reports of damage or unusual activity at the property” and also that its employees “drove by the property on a frequent basis and did not observe any

damage or unusual activity at the property prior to September 15, 2012.”
See Brief of Appellant, pp.10-11 (##4-5); *see also id.*, pp.10-12 (##1-7, 1-9
& 1-2, emphasizing similar points). These tidbits of circumstantial
evidence are improper and unavailing.

As a matter of law, Sun Valley must submit proof “as to what took
place, an act, an incident, a reality as distinguished from supposition.” *See*
Vacova Co. v. Farrell, 62 Wn. App. at 395, 814 P.2d at 261 (internal
quotations omitted). Moreover, the operative question in this case is not
whether anything suspicious was noticed prior to September 15, 2012 (the
commencement date of the renewal 2012 Admiral policy). Rather, it is
whether Sun Valley can prove that the loss happened during the coverage
period of the renewal 2012 Admiral policy. *See e.g., Truck Ins. Exch. v.*
BRE Properties, 119 Wash. App. at 588, 81 P.3d at 932 (“the insured must
prove that the policy covers his loss.”); *Executive Auto Leasing v. Guar.*
Nat. Ins. Co., 170 Ga. App. at 862, 318 S.E.2d at 735 (“Absence of proof
of a loss during the period of coverage preclude[s] recovery under the
policy.”).

Under these legal standards, Sun Valley’s circumstantial evidence
that the loss might not have happened during the initial 2011 policy is
wholly improper. Sun Valley is trying to prove a negative (*i.e.*, when the
loss did not occur) rather than a positive (*i.e.*, when the loss did occur),

and Sun Valley is focusing on the wrong policy (because its claim against Terril relates exclusively to the renewal 2012 policy).

As a matter of logic, even if nothing suspicious was noticed prior to September 15, 2012, that does not in any way actually prove that the subject loss occurred on or after September 15, 2012. By suggesting otherwise, Sun Valley is committing the fallacy of “argument from ignorance” (a/k/a “appeal to ignorance”).

Sun Valley posits a false dichotomy in which only two possibilities exist: either (a) there must be proof that the loss occurred prior to September 15, 2012, or (b) if there is no such proof, then the loss must have occurred on or after September 15, 2012. Of course, additional possibilities exist, including: (c) that the loss did in fact occur prior to September 15, 2012, yet no confirmatory evidence of that fact has been uncovered, or (d) that the date of loss simply cannot be proven.

An ancient aphorism provides that “the absence of evidence is not the evidence of absence.” In other words, simply because no evidence seems to exist for a given proposition (*i.e.*, that the loss, perhaps, occurred prior to September 15, 2012), it does not logically follow that the proposition is false (*i.e.*, that the loss, in fact, did not occur prior to September 15, 2012). Quite the contrary, it is still entirely possible that the proposition is true and that confirmatory evidence of that truth was just

not obtained.

Applied to the instant case, these basic principles of logic render each of Sun Valley's arguments fully unavailing. So what if nothing suspicious was reported prior to September 15, 2012, as Sun Valley emphasizes? That does not prove that the loss had not yet occurred by that date. The loss could have occurred but simply gone unreported. Nothing suspicious was reported for roughly a month and a half after September 15, 2012, either.

Likewise, so what if Sun Valley's employees did not see anything amiss when they drove by the property prior to September 15, 2012, as Sun Valley emphasizes? Again, that does not prove that loss had not yet occurred by that date. Sun Valley's employees may have simply been unobservant when driving by and, more generally, there is no evidence in the record to prove that this loss (*i.e.*, theft and vandalism, of toilet parts and other items) could have been observed when driving by. *See* CP 215 (11.5-10). Consistent with this, the loss was not discovered until a representative of Sun Valley actually went onto the property in late October or early November – for the first time in six months – and conducted an inspection of the property. *See Brief of Appellant*, p.5; CP

96 (ll.16-17).⁹

Rather than admissible evidence, Sun Valley offers speculation. Mr. Hull (the owner and manager of Sun Valley) concedes that he has “no idea” when the loss occurred and volunteers that it may have been during the initial 2011 policy (rather than the at-issue renewal 2012 policy). *See* CP 96 (l.20) – CP 97 (l.8). Yet, Sun Valley wants a jury to somehow conclude what Mr. Hull cannot – that the loss occurred during the renewal 2012 Admiral policy. That would be pure conjecture, which, of course, is not allowed. *See Baroco v. Scottsdale Ins. Co.*, 110 Cal. App. 4th at 104, 1 Cal. Rptr.3d at 470 (“An insured may not rely on speculation to manufacture coverage.”); *Charbonneau v. Wilbur Ellis*, 9 Wn. App. at 477, 512 P.2d at 1128 (if the jury would be unable to do any more than speculate or guess as to an essential element, then summary dismissal is warranted).

Sun Valley possesses nothing more than a “conjectural theory” that the date(s) of loss were after September 15, 2012. Conjectural theories do

⁹ By the same analysis, Sun Valley’s emphasis that nothing was reported prior to September 15, 2012, by Del Matthews (the tenant of nearby buildings), law enforcement, the fire department, code enforcement, Pacific Power and/or any other utilities (*see Brief of Appellant*, p.12, #1) likewise fails. Tallying up the people who made no reports does not actually prove when the loss occurred. It does not matter how many people did not report anything suspicious prior to September 15, 2012. Whether one person or one thousand people made no reports prior to September 15, 2012, in no way proves that the loss occurred on or after September 15, 2012. Moreover, no one made a report after September 15, 2012, either.

not require, or permit, trial. *See Gardner v. Seymour*, 27 Wn.2d at 809, 180 P.2d at 569 (“if there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture”).

It follows that this court should affirm the trial court’s summary dismissal of Sun Valley’s claim. The alleged “circumstantial” evidence offered by Sun Valley is contrary to logic, is based upon speculation, and to allow its consideration by a jury would be contrary to the law.

D.2. It is Not a “Reasonable Inference” that the Loss Occurred After September 15, 2012. Based on the lack of any reports prior to September 15, 2012, Sun Valley contends that “[t]he only reasonable conclusion” is that the loss must have occurred after September 15, 2012. *See Brief of Appellant*, p.12. This is not at all true.

What Sun Valley asserts is not even “a” reasonable conclusion. It is not reasonable to conclude that the loss happened at the “right” time (*i.e.*, during the renewal 2012 Admiral policy) based on insufficient proof to show that the loss happened at the “wrong” time (*i.e.*, during the initial 2011 Admiral policy). If that were reasonable, then every insurance claim would be presumptively valid irrespective of the insured’s evidence. An insured could prove his legal case by simply pointing to the lack of any

evidence that the loss happened at the “wrong” time. Rather than the insured actually proving its case, the burden would effectively shift onto the defendant to disprove the insured’s case. That would be unworkable and contrary to the American system of jurisprudence.

To conclude that a loss is covered based on nothing more than the absence of proof that it is not covered is, fundamentally, not to “conclude” at all. Rather, it is to surmise or guess. True “reason” is a deduction based on actual facts, not a guess of “option two” based on a lack of evidence as to “option one”.

While it is true that the question of insurance coverage is binary (*i.e.*, coverage either does or does not exist), an insured still must prove its case. An insured must prove that the loss occurred during the period of coverage. *See e.g., Truck Ins. Exch. v. BRE Properties*, 119 Wash. App. at 588, 81 P.3d at 932 (“the insured must prove that the policy covers his loss.”). It is neither sufficient, nor “reasonable”, for the insured to point to the absence of contradictory evidence. Actual, confirmatory evidence must be presented, and Sun Valley has none whatsoever. Sun Valley only has a self-serving guess. It follows that this court should affirm the trial court’s summary dismissal of Sun Valley’s claim.

D.3. Sun Valley Offers No Citations for Assertions and Arguments. The entire “Argument” section of Sun Valley’s brief contains

no citations whatsoever – none to the factual record, and none to the law. *See Brief of Appellant*, pp.10-14. This is both curious and improper, as Sun Valley advances several factual assertions and several legal arguments in that section. For instance, Sun Valley contends – but does not substantiate – that Terril supposedly “asked the [trial] court to ignore” many different facts. Where is the proof of that? Sun Valley also contends – again without any substantiation – that it is supposedly “contrary to Mr. Hull’s testimony” that drivers passing by the property could not have seen the interior vandalism and theft. Yet Sun Valley offers no actual analysis of Mr. Hull’s testimony. *See Brief of Appellant*, pp.13-14 (bracketed material added).

RAP 10.3(a)(5) provides, in relevant part, that “[r]eference to the record must be included for each alleged factual statement.” *See* RAP 10.3(a)(5). Sun Valley has violated that rule. The entire “Argument” section of Sun Valley’s brief should be disregarded.

It is simply not possible, nor should it be necessary, for Terril to respond to factual assertions and legal arguments that are not properly substantiated by Sun Valley. Likewise, this court is not required to search the record and/or the law in hopes of discovering something that might substantiate Sun Valley’s positions.

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This is not a situation wherein an appellant's citations are only technically deficient; Sun Valley offers no citations whatsoever within its "Argument" section. The rules should be enforced, and Sun Valley's unsubstantiated assertions and arguments should be rejected.¹⁰

E. CONCLUSION

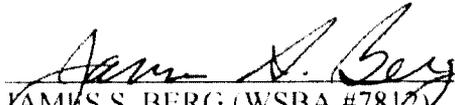
Sun Valley lacks sufficient proof. It cannot legitimately show that its loss occurred during the period of coverage of the 2012 policy. Instead, Sun Valley relies solely upon speculation and unsubstantiated assertions – neither of which is allowable.

As the insured, Sun Valley bears the burden of proving when its loss occurred. Sun Valley's owner/manager has no idea when the loss occurred. In deposition, Mr. Hull volunteered that the loss just as likely could have occurred during the first policy period (rather than the second policy period). If he can only speculate, how can a jury be expected (or allowed) to do more? It follows that the trial court's summary dismissal of Sun Valley's case should be affirmed by this court.

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¹⁰ Sun Valley's "Statement of the Case" and "Argument" sections also contain few citations. Specifically, the only citations to the factual record offered by Sun Valley are to CP 6-10, 39, 93, 178-181, and 253-254. See *Brief of Appellant*, pp.1-7. The only law cited by Sun Valley is three case law excerpts on the summary judgment standards, the de novo standard of review, and a pattern jury instruction on circumstantial evidence. See *Brief of Appellant*, pp.7-9.

DATED this 9th day of May, 2016.



JAMES S. BERG (WSBA #7812)
Carson Berg & Perkins PLLC
Attorneys for Respondent
Terril, Lewis & Wilke Insurance, Inc.

DECLARATION OF SERVICE

I, DIANA L. DEWEY, do hereby declare and state: On this day, in Yakima, Washington, I sent one original and one copy of this document via overnight U.S. mail, with postage prepaid, to the following:

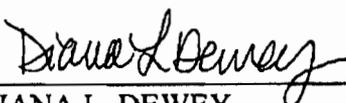
Court of Appeals, Division III
Clerk's Office
500 North Cedar Street
Spokane, WA 99201-1905

and, further, that on this day, I hand-delivered a copy of this document to the following:

James K. Adams
Wagner, Luloff & Adams
2010 West Nobhill Blvd, Suite 2
Yakima, WA 98902

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Yakima, Washington, on May 10, 2016.



DIANA L. DEWEY