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**SUPREME COURT
OF THE STATE OF WASHINGTON**

(Court of Appeals No. 56761-6-I)

NCF FINANCIAL, INC., a Washington corporation,
Plaintiff/Petitioner

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY,
a Minnesota corporation,
Defendant/Respondent

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COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner NCF Financial, Inc., Appellant, requests the Supreme Court to accept review of the Court of Appeals decision terminating review designated in Part B of this Petition.

B. COURT OF APPEALS DECISION

Petitioner requests that Supreme Court review those portions of the Court of Appeals' decision which precludes insurance coverage for NCF due to the "disappearance – inventory loss" exclusion contained in the policy. Petitioner also requests that the Supreme Court review that portion of the Court of Appeals' decision denying coverage to NCF for allegedly insufficient evidence of theft within the meaning of the policy. The Court of Appeals decision was filed on February 20, 2007. Respondent St. Paul Fire & Marine Insurance Company filed a Motion for Reconsideration. In an Order filed on June 5, 2007, the Court of Appeals denied Respondent's Motion for Reconsideration. A copy of the Court of Appeal's decision is set forth in the Appendix at pages A1 through A16. A copy of the order denying Respondent's Motion for Reconsideration is set forth in the Appendix at page A17.

C. ISSUES PRESENTED FOR REVIEW

1. Should the Supreme Court review the Court of Appeals' decision denying coverage to NCF as a third party additional insured not in

possession of the insured property based upon a disappearance-inventory loss exclusion, in view of the fact that it is a matter of first impression which has overwhelming public interest affecting both the Banking and Insurance Industries?

D. STATEMENT OF THE CASE

NCF is in the business of leasing computer equipment to companies nationally. *CP 82A, pg. 1076.*

On or about November 15, 1999, Emerald Solutions entered into a lease agreement with NCF under which Emerald Solutions leased computer equipment from NCF. Pursuant to the lease, Emerald Solutions was required to acquire insurance coverage for the computer equipment and to ensure that NCF was named as an additional insured under such insurance coverage. *CP 82A, pgs. 1076; 1084-1118.*

Emerald Solutions obtained such coverage through Respondent St. Paul. The coverage was placed through Marsh USA, Inc. ("Marsh"), a licensed and authorized agent of St. Paul. Marsh, on behalf of St. Paul, issued an Evidence of Property Insurance Certificate confirming NCF as an additional insured. Subsequently, a second Evidence of Property Insurance was issued by Marsh naming NCF as an additional insured. Such second Certificate was issued by Marsh and signed by its

representative, Suzanne Shockney, confirming such status would continue from May 11, 2000 until coverage was terminated. *CP 80, pg. 342; CP 82A, pgs. 1076; 1120.*

On October 16, 2001, Emerald Solutions, which at that time was operating as Emerald-Delaware, Inc., filed bankruptcy in the United States Bankruptcy Court, District of Oregon, under cause no. 30140297. *CP 82A, pgs. 1077; 1613-1852.*

Under Question 8 set forth in the Statement of Affairs attached to the bankruptcy petition regarding losses relating to theft or other casualty within the one (1) year immediately preceding the filing of the bankruptcy, Emerald Solutions' answer was "none." There were three instances of loss by reason of theft in or about September, October and November 2000, albeit only one occurred within 12 months of filing. *CP 82A, pgs. 1077-1078; 1082; 1784.*

At one of the very early bankruptcy hearings (on belief the first meeting of creditors), Joe Vitulli, NCF's Vice President, was present while the debtor's representative and creditors raised the issue of insurance coverage. The bankruptcy judge specifically ordered that insurance coverage continue for all property pending an anticipated sale of assets to a third party. *CP 82A, pg. 1078.*

On or about January 2002, NCF, through its legal representative, forwarded a demand letter to St. Paul and its agent, Marsh, placing St. Paul on notice of a potential claim and demanding a copy of the insurance contract issued by St. Paul to Emerald Solutions. *CP 82A, pgs. 1858-1859.*

On or about January 22, 2002, Emerald Solutions completed its return of what it claimed to be all leased equipment of NCF and on or about that date Plaintiff's employee, Steve White, conducted an inspection of the equipment to determine what equipment was returned and what equipment was damaged, and if so, whether the same could be repaired on an economical basis. That inspection revealed that much of the equipment covered by the insurance policy had not been returned or, if returned, returned in a damaged state. *CP 82A, pg. 1079; CP 79, pgs. 314-332; CP 90, pgs. 2031-2033.*

At the Trial Court summary judgment hearing, Plaintiff argued that NCF as an additional insured had the right to make its own independent claim and to be treated as a separate insured under the contract and under Washington law. As such, the disappearance exclusion was not applicable to that portion of NCF's claim regarding equipment not returned, as the claim was not for missing property. Plaintiff argued that it was undisputed

that the subject equipment was delivered to and received by Emerald Solutions. Emerald Solutions consistently paid its lease payments throughout the term of the Master Lease and that when it chose to reject the leases, Emerald Solutions failed to return all the equipment. Thus, NCF's claim for property which was not returned was wholly distinguishable from a claim made for property missing by a party in possession. *CP 82, pgs. 1053-1074.*

The Trial Court granted summary judgment to Respondent, failing to distinguish between a direct claim made by NCF for property that was not returned from a claim of missing property and relying solely upon the "disappearance" exclusion clause. *RP of July 22, 2005, pgs. 25-26.*

The Trial Court further failed to find circumstantial evidence that provided some tangible facts and circumstances pointing to theft as a basis for the loss. *RP of July 22, 2005, pgs. 25-26.*

On February 20, 2007, the Court of Appeals filed its unpublished opinion in this matter. The Court of Appeals' decision had three elements: (1) the Court determined that there was a material issue of fact as to whether NCF was an additional insured under the policy; (2) the Court determined that, notwithstanding this question of fact, the disappearance-inventory loss exclusion controlled as NCF could not provide sufficient

evidence as to what happened to the property while in Emerald Solutions' possession; and (3) NCF had not provided significant evidence to create a question of fact that the equipment had been stolen. Thus, the Court affirmed the Trial Court's decision dismissing that portion of NCF's insurance claim for property that was not returned to NCF by Emerald Solutions. Respondent St. Paul filed a Motion for Reconsideration. The Court of Appeals filed its denial of St. Paul's Motion on June 5, 2007.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

i. Basis for Review

RAP 13.4 provides that the Supreme Court should accept petitions which involve an issue of substantial public interest that should be determined by the Supreme Court. The issues presented to the Court are a matter of first impression in the State of Washington. Courts in other jurisdictions that have ruled on this issue have ruled inconsistently. As the effect of the Court's ruling on the disappearance-inventory loss exclusion has significant bearing on the public, including the Banking and Insurance Industries, it is respectfully argued that review should be granted.

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ii. The Policy Exclusion Is Not What It Appears To Be

In its decision, the Court of Appeals determined that a provision in the insurance policy at issue precluded NCF from recovering under the policy. This provision reads as follows:

Disappearance – Inventory loss. We won't cover loss of property that is missing where the only evidence of the loss is a shortage disclosed on taking inventory, or other instances where there is no physical evidence to show what happened to the property. *CP 41, Ex. L*

This provision is in a preprinted insurance policy, which contemplates only two parties to the agreement, namely the Insurer and the Named Insured. Thus, review of the exclusion must be placed in context. As applied to the Named Insured, this party has control over its property and properly the exclusion requires that the Named Insured provide physical evidence of property in its possession. But how should this exclusion apply to an additional insured which is a Lessor (NCF) or a Lender such as a Bank?

The Court of Appeals based its decision in large part on the California case Blasiar, Inc. v. Fireman's Fund Insurance Company, 76 Cal.App.4th, 748, 90 Cal.Rptr.2d 374 (1999). In that case the plaintiff insured personal property held in a warehouse owned and operated by the

plaintiff. As such, the property insured was within that party's possession and control. The insurance policy in that case had a provision substantially similar to that set forth above. The California court ruled, as did the Court of Appeals in this case, that the "disappearance" language precluded recovery.

On the facts of Blasiar, the California court's decision makes sense. The party was in control of the property. The insurance contract was between the insurance company and the party in control of the property. The party in control conducted an inventory regarding its property. The party in control was in a position to know what was happening with the insured property. If Emerald Solutions had been the plaintiff in this action, one could easily understand the Court of Appeals' decision. Emerald Solutions was in possession of the insured property. The insurance contract was directly between Emerald Solutions and Respondent. Accordingly, it makes sense to hold Emerald Solutions accountable under the "disappearance" language.

The facts of this case do not begin to approximate the facts in Blasiar. NCF was an additional insured under the policy, not the policy holder. The computer equipment which was covered by the policy was purchased by NCF from third party vendors and shipped directly to

Emerald Solutions. NCF received confirmation of receipt from Emerald Solutions. As such, NCF can explain exactly what it did with the property. It shipped it to Emerald Solutions and when Emerald Solutions rejected NCF's leases in bankruptcy, NCF demanded the return of the property from Emerald Solutions. Whatever the reason for Emerald Solutions' failure to return is irrelevant. The property was never missing from NCF. Moreover, NCF never conducted inventory of the property. It did conduct an inspection of property that was returned by Emerald Solutions.

These facts are more akin to the long line of "jeweler's block" cases which are exemplified by Miller v. Boston, 218 A.2d 275 (Pa. 1966). In Miller, a ring was in the possession of a third party dealer and out of the control of the party claiming under the insurance policy. That third party dealer ended up dead and the ring was nowhere to be found. The Pennsylvania court ruled that the "disappearance" clause in the policy did not exclude coverage for the plaintiff because the property was not in plaintiff's possession or control, nor was the plaintiff in a position to monitor its whereabouts.

The jeweler's block cases are in keeping with Washington law regarding additional insureds. For many years, Washington courts have ruled that an exclusion as to an insured may not bar coverage for

additional insureds who have not engaged in the excluded conduct. See, Unigard Mutual v. Spokane School District, 20 Wn.App. 261, 579 P.2d 1015 (1978); Standard Fire Insurance Co. v. Blakeslee, 54 Wn.App. 1, 771 P.2d 1172 (1989). The insurance contract is several and not joint as applied to additional insureds. As such, the provisions in the insurance contract must be applied to the party making the claim based upon its circumstances.

In this instance, that means that the “disappearance” provision must be read according to NCF’s position vis-a-vis the equipment and not that of Emerald Solutions. In order for the property to go missing (and thus be within the “disappearance” clause), NCF must have had possession of the property. Not being in possession of the equipment, the “disappearance” clause in the insurance contract cannot be applied to NCF as it would be to Emerald Solutions because the property did not go missing from NCF, it went missing from Emerald Solutions. See, e.g., Miller. NCF’s claim was for Emerald Solutions’ failure to deliver the property to NCF as demanded. Such a claim is wholly different from and entirely outside of the terms of the “disappearance” clause. In ruling as it did, the Court of Appeals misread not only the insurance policy but the law as applied to situations similar to this case (e.g. the jeweler’s block

cases). By applying inapposite case law to the situation, the Court of Appeals has provided inappropriate guidance to the business community in this state.

The public policy ramifications of this decision should not be ignored. Every year there are likely to be thousands of instances in which a third party requires a party with whom it does business to take out insurance and name that third party as an additional insured. A bank may require a borrower to name the bank as an additional insured as a requirement for a loan. The bank may be providing cash in order for a business to acquire product. The bank is unlikely to ever set foot within the walls of the borrower's business. Yet, on the Court of Appeals' decision, the bank would not have coverage under the policy should the purchased products go unaccounted for. That would place the bank's investment at greater risk than it believed it might be, thus defeating the purpose of the insurance coverage for the bank. This undermines the ability of borrowers to acquire credit. A Seattle company might lease equipment for use by a customer in Clarkston, requiring that customer to insure the equipment while in the customer's possession. Under the Court of Appeals' ruling, the Seattle company becomes responsible for monitoring the whereabouts of a piece of equipment located hundreds of

miles away. If the Seattle company does not properly monitor that equipment, it could well lose the protection of the insurance coverage provided by its customer.

If the Court of Appeals' decision is not overturned, the implications for the lending industry are staggering. Thousands of policies currently held by banks and other lenders could be rendered suspect, if not worthless. The costs of lending would undoubtedly rise if only to provide an additional cushion to cover potential losses or to acquire insurance to cover losses which are not covered by existing policies. Who wins in this scenario? The insurance industry. Who loses? Almost everyone else.

iii. Theft coverage

The Court of Appeals also ruled that NCF did not have coverage under the policy because there was no physical evidence to show how the property disappeared. The Court of Appeals ruled as it did by distinguishing Libraltar Plastics, Inc. v. Chubb Group of Insurance Companies, 502 N.W.2d 724 (Mich.App. 1993). This case, and several others, had been cited by NCF in support of its claim that NCF had provided sufficient evidence to demonstrate that the portion of the equipment which was not returned by Emerald Solutions had been stolen.

The Court of Appeals cited the “mysterious disappearance” language in the Libraltar policy.

The Court of Appeals failed to note that the cases cited by NCF all stand for a similar proposition – that circumstantial evidence can provide sufficient basis to presume that the “disappearance” of property was the result of theft. See, e.g., Long v. Glidden Mutual Ins. Assoc., 215 N.W.2d 271 (Iowa, 1974); Libraltar; Miller. The Court of Appeals appears to have ignored the Blasiar decision upon which it based much of its decision. In that case, the California court stated that “physical evidence” would have a common understanding of “tangible facts or circumstances.” The Blasiar Court also stated that to defeat the exclusion required the showing of only some physical evidence (i.e., tangible facts and circumstances) of how the property was lost.

NCF provided at least seven different factual circumstances which would satisfy the Blasiar test:

- a) nearly 600 employees were laid off by the time of the rejection of the NCF lease;
- b) all but one location of Emerald Solutions was abandoned by the time it rejected the Master Lease;

- c) Emerald Solutions' representatives testified that at the time of bankruptcy it was confronted with a surplus of equipment due to the downsizing and closure of locations;
- d) the premises of Emerald Solutions were secured and required ID for entry as noted in the Regional Reporting Inspection Report;
- e) Emerald Solutions, in the Statement of Affairs attached to its bankruptcy petition, stated under oath that no loss, casualty or theft occurred within 12 months of the filing of its bankruptcy;
- f) the NCF equipment was computer equipment, including a substantial quantity of laptops which would be easily removable by employees as they left their office due to downsizing; and
- g) there were three reports of theft in year 2000, notwithstanding Emerald Solutions' security, necessitated by the type of business in which it provided service in the computer industry.

CP 80, pgs. 1053-1074; CP 82A, pgs. 1077-1078; 1082; 1784.

The Court of Appeals' reliance upon the "mysterious disappearance" portion of the Libraltar policy is misplaced. While the Libraltar court cites only the phrase "mysterious disappearance" from the policy language, it cites to the Long case as being of similar language. The exclusion clause in that case went well beyond "mysterious disappearance" to cover several different scenarios, including language that is closer to the provision in the instant case. See, Long, 215 N.W.2d at 273.

Summary judgment rules require that all inferences are to be construed in favor of the non-moving party. The Trial Court and the Court of Appeals failed to consider that the evidence provided by NCF meets the standard set forth in Libraltar, Long and Blasiar. The evidence presented by NCF is not speculation or argumentative assertions, but concrete facts which can lead one to believe that the equipment was stolen by disgruntled employees. As such, the Court of Appeals' reliance on White v. State, 131 Wn.2d 1, 929 P.2d 396 (1997) is misplaced. There are sufficient questions of fact for a jury to decide whether the equipment was stolen. With these questions of fact remaining unresolved, summary judgment (and its affirmance) are inappropriate and should be overturned.

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F. CONCLUSION

NCF requests that the Supreme Court grant its request for review. Upon review, NCF requests that the Court reverse the ruling of the Court of Appeals in so far as it precludes recovery by NCF for property not returned by Emerald Solutions to NCF. NCF further requests that the Court state that the “disappearance” clause in the policy on which the Trial Court and the Court of Appeals based their decisions does not apply to third parties, such as NCF, who are not in possession or control of the property which is the basis of the claim. NCF requests that the Supreme Court either rule directly in NCF’s favor or remand the case to the Trial Court for a decision in keeping with the rule laid down by the Supreme Court. NCF further requests that the Supreme Court overturn that portion of the Court of Appeals decision which precludes recovery under the “disappearance” provision due to insufficient evidence of theft and remand this matter for determination on such matter by the Trier of Fact.

RESPECTFULLY SUBMITTED on June 28, 2007.

OSERAN, HAHN, SPRING & WATTS, P.S.

By  _____
DAVID M. TALL, WSBA #12849
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PROOF OF SERVICE

TO: Clerk, Division One, Court of Appeals

AND TO: Defendant/Respondent

PLEASE TAKE NOTICE on the 2nd day of July, 2007, PETITION FOR REVIEW was filed with Division One, Court of Appeals and served via ABC Legal Messengers, Inc. on the following:

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STATE OF WASHINGTON
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Dated this 2nd day of July, 2007.


Laura Faulstich, Legal Assistant

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

NCF FINANCIAL, INC., a Washington corporation,)	
)	No. 56761-6-1
Appellant,)	
)	UNPUBLISHED OPINION
v.)	
)	
ST. PAUL FIRE & MARINE INSURANCE COMPANY, a Minnesota corporation,)	
)	
Respondent.)	FILED: <u>February 20, 2007</u>

SCHINDLER, A.C.J. – This is a property insurance coverage dispute between Northwest Computer Financial, Inc. (NCF) and St. Paul Fire and Marine Insurance Company (St. Paul). NCF leased computer equipment to Emerald Solutions, Inc. (Emerald). Under the terms of the lease, Emerald agreed to insure the computer equipment and name NCF as an additional insured on the property insurance policy. After filing for bankruptcy, Emerald returned the leased equipment to NCF. St. Paul denied NCF's claim for missing and damaged computer equipment. NCF sued Emerald; Emerald Delaware, Inc.; St. Paul; and the insurance agent, Marsh USA, Inc. (Marsh), alleging breach of contract, negligence, and damages. On summary judgment, the trial court dismissed NCF's lawsuit against St. Paul. NCF contends it is entitled to coverage for the missing and damaged equipment as an additional insured

A,

under Emerald's policy with St. Paul. We conclude there are material issues of fact about whether NCF is an additional insured. Even if NCF is an additional insured, we conclude the unambiguous terms of the "Disappearance-inventory loss" exclusion preclude coverage for NCF's claim for missing computer equipment. But there are material questions of fact concerning coverage for NCF's claim for damaged computer equipment. We affirm in part, reverse in part, and remand.

FACTS

Emerald is a wholly owned subsidiary of Emerald-Delaware. Emerald leased computer equipment from NCF for its internet consulting, design, and technology operations at thirteen locations nationwide. Under the "Master Lease Agreement," Emerald agreed to obtain property insurance for the leased equipment, name NCF as an additional insured, and provide 30 days notice if the policy was "cancelled or altered."

Emerald obtained property protection insurance from St. Paul through an insurance agent, Marsh. The first policy was in effect from May 11, 1999 to May 11, 2000 (First Policy).¹ "Emerald Solutions, Inc." was the named insured on the First Policy. The policy states that mortgagees and loss payees are identified "[p]er certificates on file with the company." On December 16, 1999, Marsh issued an Evidence of Property Insurance Certificate (EPI) and a Certificate of Liability Insurance (CLI). The EPI and the CLI state that NCF is named as an additional insured on the First Policy for the leased computer equipment.

¹ Policy number TE0700143.

The second policy St. Paul issued to Emerald (Second Policy)² states it is in effect beginning May 11, 2000 until terminated. There is no reference to mortgagees and loss payees or certificates in the Second Policy. But on June 22, 2000, Marsh issued an EPI and a CLI stating that NCF was an additional insured on the Second Policy for the leased computer equipment.

In 2001, Emerald experienced financial difficulties and its parent corporation, Emerald-Delaware, Inc., assumed Emerald's assets and liabilities. On October 16, 2001, Emerald-Delaware filed for bankruptcy. While in bankruptcy, Emerald-Delaware obtained a third policy through Marsh for the leased computer equipment (Third Policy).³ The Third Policy states it is in effect from November 11, 2001 to February 11, 2002. The Third Policy also states it is a "renewal." The record does not show that NCF received notice of the Third Policy. There is also no indication that an EPI or a CLI was issued for the Third Policy.

In October, Emerald-Delaware paid NCF the amount due to lease the equipment through November 2001. But in December, Emerald-Delaware rejected the Master Lease effective December 31, 2001. After rejecting the Master Lease, Emerald-Delaware began returning the leased computer equipment to NCF. In January 2002, an NCF employee, Steve White, prepared an inventory identifying unreturned equipment and documenting the condition of the returned equipment. When NCF demanded that Emerald-Delaware return all the leased equipment in late

² Policy number TE01900068.

³ Policy number TE01900390.

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January 2002, Emerald-Delaware stated all the leased computer equipment was returned.

On May 30, 2002, NCF submitted an insurance claim under the Second Policy for approximately \$1 million in replacement costs for missing and damaged equipment. At St. Paul's request, NCF submitted a Proof of Loss for the claim. On April 18, 2003, St. Paul denied coverage and rejected NCF's claim.

On November 26, 2003, NCF filed a complaint for damages against Emerald, Emerald-Delaware, and St. Paul for breach of contract and negligence. In March 2005, NCF filed an amended complaint for damages, adding a claim for breach of contract against Marsh and alleging NCF was an assignee of Emerald's rights under the insurance policy. In April 2004, Emerald and Emerald-Delaware assigned their rights under the insurance policies to NCF.

St. Paul filed a motion for summary judgment asserting NCF was not an additional insured under the Third Policy. And even if NCF was an additional insured, St. Paul argued there was no evidence of "direct, physical loss or damage" for covered property and the policy unambiguously excluded coverage for missing property under the "Disappearance – inventory loss" provision. The trial court decided NCF was an additional insured under the Third Policy. But based on the "Disappearance – inventory loss" exclusion, the court dismissed NCF's lawsuit against St. Paul. NCF then stipulated to dismiss Marsh and a default judgment was entered against Emerald-Delaware and Emerald Solutions.

ANALYSIS

NCF claims it is entitled to coverage and the trial court erred in dismissing its claims as an additional insured for missing and damaged computer equipment under the "Disappearance – inventory loss" exclusion.⁴ NCF also asserts the trial court erred in not considering its claim for damaged property.

On review of summary judgment, this court engages in the same inquiry as the trial court. Reynolds v. Hicks, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). Summary judgment is proper only if there are no issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Quadrant Corp. v. Am. States Ins. Co., 154 Wn.2d 165, 171, 110 P.3d 733 (2005); Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 642, 618 P.2d 96 (1980). "A material fact is one upon which the outcome of the litigation depends, in whole or in part." Barrie at 642. Facts and reasonable inferences are construed in the light most favorable to the nonmoving party. Wolstein v. Yorkshire Ins. Co., 97 Wn. App. 201, 205, 985 P.2d 400 (1999). Only when reasonable minds could reach but one conclusion on the evidence should the court grant summary judgment. Smith v. Safeco, Ins. Co., 150 Wn.2d 478, 485, 78 P.3d 1274 (2003).

The interpretation of an insurance policy is a question of law. Wright v. Safeco Ins. Co. of Am., 124 Wn. App. 263, 271, 109 P.3d 1 (2004). But where coverage turns

⁴ Relying on the court's oral ruling, NCF argues that substantial evidence supports the court's finding that it is an additional insured under the Third Policy. But our review on summary judgment is de novo and the trial court's findings of fact are superfluous. Hill v. Cox, 110 Wn. App. 394, 403, 41 P.3d 495 (2002).

on the particular fact situation, the issue is a mixed question of law and fact. Estate of Adams v. Great Am. Ins. Cos., 87 Wn. App. 883, 886-887, 942 P.2d 1087 (1997).

The determination of coverage is a two-step process. The insured must first establish that the loss falls within scope of the policy's covered losses. Diamaco, Inc. v. Aetna Cas. & Sur. Co., 97 Wn. App. 335, 337, 983 P.2d 707 (1999). "This includes establishing who is insured, the type of risk insured against, and the existence of an insurance contract." Olivine v. United Capitol Ins. Co., 147 Wn.2d 148, 164, 52 P.3d 494 (2002). To avoid responsibility for the loss, the burden is on the insurer to establish that the loss is excluded by specific language in the policy. Diamaco, 97 Wn. App. at 165.

There is no dispute that Emerald agreed to obtain an insurance policy for the leased computer equipment and name NCF as an additional insured. The Master Lease provides the insurance policy shall:

(i) name Lessor and any Assignee as additional insureds and loss payees as their interests may appear; (ii) provide that such policy may not be cancelled or altered without thirty (30) days prior notice to Lessor and Assignee

The record shows that Emerald obtained three property insurance policies from St. Paul. The First Policy was in effect from May 11, 1999 to May 11, 2000. The Second Policy states the effective date begins May 11, 2000 and continues until "TERMINATED." And the Third Policy states that the effective date is November 11, 2001 to February 11, 2002. While NCF is not identified as an additional insured in any of the policies, St. Paul concedes Marsh was authorized to issue an EPI and a CLI identifying NCF as an additional insured for the First Policy and for the Second Policy.

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But there is no evidence in the record that an EPI or a CLI was issued for the Third Policy.

NCF sued St. Paul on November 26, 2003. There is no dispute that all three policies contain a two-year suit limitation provision.

Any lawsuit to recover on a property claim must begin within 2 years after the date on which the direct physical loss or damage occurred.

NCF concedes the two-year lawsuit limitation is valid. NCF also concedes its loss occurred during the term of the Third Policy – November 11, 2001 to February 11, 2002. But NCF argues its lawsuit is not barred by the two-year limitation because it is an additional insured entitled to coverage for the missing and damaged equipment.⁵

Additional Insured

The first question is whether NCF is an additional insured under the Third Policy. St. Paul admits that the EPI issued for the First Policy and the Second Policy identify NCF as “having the rights of an additional insured.” But relying on Postlewait Constr., Inc. v. Great Am. Ins. Cos., 106 Wn.2d 96, 720 P.2d 805 (1986), St. Paul argues that NCF has no standing to sue because it is not named as an additional insured in any of the policies.

NCF claims Postlewait is distinguishable and it is entitled to coverage as an additional insured because it was not notified that the Second Policy was terminated.

⁵ For the first time in its reply brief, NCF also argues that even if it is not an additional insured, it is entitled to coverage as Emerald's assignee. We will not consider arguments raised for the first time in a reply brief. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

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We agree that Postlewait is distinguishable, but conclude there are material issues of fact concerning whether NCF is entitled to coverage as an additional insured under the Third Policy.

In Postlewait, the lessor was not named as an additional insured or loss payee on the lessee's insurance policy. The lessor relied on a CLI issued by the insurance broker to argue that the insurer intended to assume a direct obligation to the lessor. Postlewait, 106 Wn.2d at 100. In determining whether the lessor was entitled to coverage, the court stated the parties to the insurance contract had to clearly assume a direct obligation to the third party lessor. "The creation of a third-party beneficiary contract requires that the parties intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract." Id. at 99 (quoting Lonsdale v. Chesterfield, 99 Wn.2d 353, 361, 662 P.2d 385 (1983)). Whether the promisor intended a direct obligation is determined by objectively construing the terms of the contract and the facts and circumstances surrounding the agreement. Postlewait, 106 Wn.2d at 100. The court in Postlewait concluded that the only purpose of the CLI was to inform the lessor that insurance was obtained, and the CLI did not establish the lessor was an intended beneficiary of the policy. Postlewait, 106 Wn.2d at 101.

Here, unlike in Postlewait, there is evidence that St. Paul intended to assume a direct obligation to NCF as an additional insured under the Second Policy. Marsh as the authorized agent for St. Paul, issued both a CLI and an EPI for the Second Policy. The CLI states that it is issued as "a matter of information only and confers no rights

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upon the certificate holder” and does not “amend, extend or alter the coverage afforded” by the policy. But by contrast, the EPI expressly states that it is “evidence that insurance as identified below has been issued, is in force and conveys all the rights and privileges afforded under the policy.” The EPI also explicitly identifies NCF as an additional insured for the leased equipment. “Certificate Holder is Additional Insured as respects equipment leased by the Named Insured, per Master Lease 99-11090. Supplementary Schedule No. 001.”

There is no dispute the Second Policy was effective until “termination” and NCF did not receive any notice terminating the Second Policy. NCF asserts that as a result of St. Paul’s failure to provide such notice, NCF is entitled to coverage as an additional insured under the Third Policy. In support of its argument, NCF relies on (1) the provisions in the EPI and CLI, (2) RCW 48.18.290, and (3) Olivine Corp. v. United Capitol Ins. Co., 147 Wn.2d 148, 52 P.2d 494 (2002), rev. denied, 153 Wn.2d 1011, 111 P.3d 1190 (2005).

The Second Policy states, “[t]his policy will begin on 05/11/00 and will continue until TERMINATED.” In the Second Policy, St. Paul agrees to send notice of termination to “any mortgage holder, and any other person or organization named in this policy as having an interest in covered property . . .” at least “20 days before coverage will end”

The EPI states NCF is an additional insured under the Second Policy.

The policy is subject to the premiums, forms, and rules in effect for each policy period. Should the policy be terminated, the company will give the additional interest identified below 30 days written notice, and will send notification of any changes to the policy that would affect that interest, in accordance with the policy provisions or as required by law.

The CLI also states NCF is an additional insured under the Second Policy.

Should any of the above described policies be cancelled before the expiration date thereof, the issuing insurer will endeavor to mail 30 days written notice to the certificate holder named to the left, but failure to do so shall impose no obligation or liability of any kind upon the insurer, its agents or representatives.

Former RCW 48.18.290 provides that in the event an insurer cancels a policy, notice of cancellation must be delivered to any person who has an interest in the policy.⁶ The term "cancellation," as used in former RCW 48.18.290, "refers to a unilateral act of the insurer terminating coverage during the policy term." Safeco Ins. Co. v. Irish, 37 Wn. App. 554, 558, 681 P.2d 1294 (1984). In Olivine, the court held that notice under RCW 48.18.290 is a mandatory condition precedent to effective cancellation by the insurer and because the insurer failed to comply with the notice requirement, the policy remained in force. Olivine, 147 Wn.2d at 163.

Viewing the evidence in the light most favorable to NCF, there are material issues of fact as to whether NCF is an additional insured under the Second Policy. Assuming without deciding that NCF is an additional insured under the Second Policy, we conclude that under the terms of the policy, the language of the EPI and CLI, the

⁶ Former RCW 48.18.290 provides in pertinent part:

(1) Cancellation by the insurer of any policy which by its terms is cancellable at the option of the insurer, or of any binder based on such policy which does not contain a clearly stated expiration date, may be effected as to any interest only upon compliance with the following:

(a) Written notice of such cancellation, accompanied by the actual reason therefor, must be actually delivered or mailed to the named insured not less than forty-five days prior to the effective date of the cancellation except for cancellation of insurance policies for nonpayment of premiums, which notice shall be not less than ten days prior to such date and except for cancellation of fire insurance policies under chapter 48.53 RCW, which notice shall not be less than five days prior to such date;

(b) Like notice must also be so delivered or mailed to each mortgagee, pledgee, or other person shown by the policy to have an interest in any loss which may occur thereunder. For purposes of this subsection (1) (b), "delivered" includes electronic transmittal, facsimile, or personal delivery.

requirements of former RCW 48.18.290 and Olivine, NCF was entitled to notice from St. Paul when the Second Policy was terminated.⁷

“Disappearance – inventory loss” Exclusion

Even if NCF is an additional insured, St. Paul contends the “Disappearance – inventory loss” provision unambiguously excludes coverage for NCF’s claim. There are no Washington cases interpreting similar exclusionary language. St. Paul relies on a California case with an almost identical exclusion, Blasiar Inc. v. Fireman’s Fund Ins. Co., 90 Cal. Rptr. 2d 374 (Cal. App. 1999), to argue NCF’s claim is excluded. NCF primarily relies on Miller v. Boston, 218 A.2d 275 (Pa. 1966), to argue the “Disappearance – inventory loss” exclusion does not apply to a lessor’s claim for unreturned equipment.

St. Paul excludes coverage for “Disappearance – inventory loss.”

Disappearance – inventory loss. We won’t cover loss of property that is missing where the only evidence of the loss is a shortage disclosed on taking inventory, or other instances where there is no physical evidence to show what happened to the property.

An insurance policy’s language is given the same reasonable and sensible construction as that given by the average person buying insurance. Butzberger v. Foster, 151 Wn.2d 396, 401, 89 P.3d 689 (2004). A court may not modify an insurance contract if the policy language is clear and unambiguous. Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567, 964 P.2d 1173 (1998)..

⁷ Olivine does not support St. Paul’s argument that it did not have to give NCF notice because Emerald no longer existed.

In Blasiar, the California case St. Paul relies on, a communications company filed a claim for missing property that it believed was stolen from the warehouse. Blasiar, 90 Cal. Rptr. 2d at 374. The insurer denied the claim based on the policy's exclusion for "[p]roperty that is missing, but there is no physical evidence to show what happened to it, such as shortage disclosed on taking inventory." Blasiar, 90 Cal. Rptr. 2d at 376. The court affirmed the trial court's dismissal based on the exclusion. The court held the exclusion was unambiguous because "physical evidence" means "tangible facts or circumstances" and the exclusion did not apply unless there was some physical evidence of what happened to the property. Blasiar, 90 Cal. Rptr. 2d at 378, 379.

NCF claims that under Miller, an additional insured lessor has no obligation to establish what happened to the property and, therefore, the exclusion does not bar recovery for the unreturned computer equipment. Miller, 218 A.2d at 275. But in Miller, the court concluded an exclusion for unexplained loss, mysterious disappearance, or loss of shortage on taking inventory was ambiguous. Id. at 280. In reaching this conclusion, the court addressed the burden of proof for the insured and the insurance company. The court held that where an insurer relies on exclusion, it has the burden to prove the exclusion applies and the insurer can meet its burden through uncontroverted testimony or admissions of the insured.⁸ Miller, 218 A.2d at 280.

⁸ NCF's reliance on McCormick & Co. v. Empire Ins. Group, 690 F. Supp. 1212 (S.D.N.Y. 1988) is also misplaced. McCormick, like Miller, addressed a provision that excluded coverage for an "unexplained loss" or a "mysterious disappearance."

Here, unlike in Miller, NCF does not argue that the language in the “Disappearance – inventory loss” provision is ambiguous. The Second and Third policies exclude coverage for missing property when there is “no physical evidence to show what happened to the property.” As in Blasiar, there is no physical evidence in the record showing what happened to the missing computer equipment. NCF admits there is no physical evidence about what happened to the missing leased equipment. In NCF’s Proof of Loss, it states that “NCF does not know exactly how its property was physically lost or damaged.” NCF also admits it “does not know the dates its property was physically lost or damaged.” Joe Vitulli, NCF’s designated CR 30(b)(6) witness, testified that Emerald did not have any information as to what happened to the property. Emerald-Delaware’s chief financial officer also testified that he had no knowledge about whether the unreturned equipment was missing before or after the bankruptcy filing.

If NCF is an additional insured, on this record we conclude the unambiguous terms of the “Disappearance – inventory loss” exclusion bars recovery for the missing computer equipment that Emerald did not return.

Theft

In the alternative, NCF argues the “Disappearance – inventory loss” exclusion does not apply because there are material issues of fact about whether the equipment was stolen.

Emerald-Delaware filed for bankruptcy in October 2001. After Emerald rejected the Master Lease, it began returning the leased computer equipment to NCF in December. By early January 2002, NCF had inspected the equipment and discovered

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a large portion of the equipment was missing. NCF claims the following circumstances create a material issue of fact about whether the equipment was stolen by Emerald's employees: a large number of employees were laid off; Emerald stated under oath no loss or theft occurred within 12 months of the filing of its bankruptcy; and there were three reports of theft in 2000 despite Emerald's security measures.

NCF relies on Libralter Plastics, Inc. v. Chubb Group of Ins. Cos., 502 N.W.2d 742 (Mich. App. 1993) to support its position that the circumstantial evidence creates a genuine issue of fact that the equipment was stolen. In Libralter, the insured submitted a claim for two heavy plastic molds that had been stored in an unsecured area on the insured's property. Libralter, 502 N.W.2d at 743. Coverage was denied based on the policy's "mysterious disappearance" exclusion. The Libralter court noted that the term "'mysterious disappearance' has been defined as: 'unknown, puzzling, and baffling circumstances which arouse wonder, curiosity, or speculation, or under circumstances which are difficult or hard to explain.'" Libralter, 502 N.W.2d at 745. The court held there was a disputed issue of material fact as to whether, under the policy language, the molds' disappearance was truly "mysterious" and the insured presented sufficient circumstantial evidence to raise a genuine issue of fact as to whether the loss could be explained by theft. Libralter at 745.

Libralter is distinguishable. Here, there is no "mysterious disappearance" exclusion. The insurance policy language is clear and unambiguous – St. Paul is not obligated to pay claims for missing property when there is no "physical evidence to show what happened to the property." NCF admits the loss was discovered when taking inventory and it does not know what happened to the missing equipment. A

party cannot rely on speculation or on argumentative assertions that unresolved factual issues remain. White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

Damaged Equipment

While the majority of NCF's claim is for missing equipment, NCF contends it is also entitled to coverage for damaged computer equipment. Viewing the evidence in the light most favorable to NCF, we conclude there are material issues of fact about whether NCF is entitled to coverage for damaged equipment.

In the April 2003 Proof of Loss, NCF states its claim is for property that was lost or damaged. NCF also alleged in its Amended Complaint that it sought damages for both lost and damaged property.

St. Paul primarily relies on Vitulli's testimony to argue NCF's entire claim is for unreturned property. But Vitulli's testimony is, at best, ambiguous. In response to the question about whether NCF's claim was for the replacement cost for all the items that were not returned, Vitulli answered, "[o]r damaged. Is that what you are saying?" When asked whether NCF was only seeking replacement costs for the entire claim, Vitulli nodded that he agreed. From this ambiguous exchange, we cannot conclude as a matter of law that NCF's claim was limited to unreturned property. And, in White's declaration, he states that while unloading the leased equipment, "some of it was visibly damaged." To the extent NCF is entitled to coverage as an additional insured, there are material issues of fact about whether it is entitled to coverage for any damaged equipment.

Conclusion

We affirm the trial court's decision to dismiss NCF's insurance claim for missing property but reverse and remand on NCF's claim against St. Paul for damaged property.⁹

Schindler, ACS

WE CONCUR:

Ernstson, J.

Becker, J.

⁹ Because we conclude that the claim for missing property is excluded under the "Disappearance – inventory loss" provision, we need not address St. Paul's argument that NCF failed to establish its claim for missing property falls within the policy's coverage for "direct physical loss or damage."

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C

Miller v. Boston Ins. Co.,
Pa. 1966.

Supreme Court of Pennsylvania.
Benjamin MILLER

v.

BOSTON INSURANCE COMPANY, Appellant,
and Jacob Friedman, Additional Defendant.
March 22, 1966.

Insured, who was a jewelry dealer, brought action of assumpsit against insurer to recover on a policy insuring against all risks of loss for loss of ring. The Court of Common Pleas No. 2 (Tried in No. 8) of Philadelphia County as of March Term, 1959; No. 1544, John J. McDevitt, President Judge, entered judgment for the insured, and the insurer appealed. The Supreme Court, at No. 225 January Term, 1965, O'Brien, J., held that where insurer issued to insured, who was a dealer in jewelry, a policy insuring against 'all risks' of loss, and on March 11 insured consigned ring to second dealer, and on following day second dealer consigned ring to a third dealer, and in July third dealer stated that he had the ring in his pocket and was still trying to sell it, and following day his body was recovered from river, and ring was never returned to second dealer or insured, insured could recover value of ring from insurer.

Judgment affirmed.

West Headnotes

[1] Insurance 217 ↪2117

217 Insurance

217XV Coverage--in General

217k2114 Evidence

217k2117 k. Burden of Proof. Most Cited

Cases

(Formerly 217k646)

It is a necessary prerequisite to recover on policy for the insured to show claim within coverage provided by the policy.

[2] Insurance 217 ↪2117

217 Insurance

217XV Coverage--in General

217k2114 Evidence

217k2117 k. Burden of Proof. Most Cited

Cases

(Formerly 217k646)

Defense based on exception or exclusion in a policy is an affirmative defense, and burden is cast on insurer to establish it.

[3] Insurance 217 ↪1831

217 Insurance

217XIII Contracts and Policies

217XIII(G) Rules of Construction

217k1830 Favoring Insureds or

Beneficiaries; Disfavoring Insurers

217k1831 k. In General. Most Cited

Cases

(Formerly 217k146.7(1))

Policy must be strictly construed against insurer which drew policy.

[4] Insurance 217 ↪2140

217 Insurance

217XVI Coverage--Property Insurance

217XVI(A) In General

217k2139 Risks or Losses Covered and

Exclusions

217k2140 k. In General. Most Cited

Cases

(Formerly 217k417.5(1))

Insurance 217 ↪2166(2)

217 Insurance

217XVI Coverage--Property Insurance

217XVI(A) In General

217k2139 Risks or Losses Covered and

Exclusions

217k2166 Acts of Insureds

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217k2166(2) k. Wrongful or Intentional Acts. Most Cited Cases
(Formerly 217k417.5(1))
"All risks policy" ordinarily covers every loss that may happen, except by fraudulent acts of insured.

[5] Insurance 217 ↪ 2140

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2139 Risks or Losses Covered and Exclusions
217k2140 k. In General. Most Cited Cases
(Formerly 217k417.5(1))

Insurance 217 ↪ 2166(2)

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2139 Risks or Losses Covered and Exclusions
217k2166 Acts of Insureds
217k2166(2) k. Wrongful or Intentional Acts. Most Cited Cases
(Formerly 217k417.5(1))
Words "all risks" in policy must be given broad and comprehensive meaning so as to cover any loss other than a wilful or fraudulent act of insured.

[6] Insurance 217 ↪ 2152

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2139 Risks or Losses Covered and Exclusions
217k2152 k. Disappearance. Most Cited Cases
(Formerly 217k417.5(1))
Where insurer issued to insured, who was a dealer in jewelry, a policy insuring against "all risks" of loss, and on March 11 insured consigned ring to second dealer, and on following day second dealer consigned ring to a third dealer, and in July third dealer stated that he had the ring in his pocket and was still trying to sell it, and following day his body

was recovered from river, and ring was never returned to second dealer or insured, insured could recover value of ring from insurer.

*568 **276 Richard W. Hopkins, White & Williams, Philadelphia, for appellant.
Cornelius C. O'Brien, Jr., Matthew J. Ryan, III, Philadelphia, for appellee.

Before BELL, C.J., and MUSMANNO, JONES, COHEN, EAGEN, O'BRIEN and ROBERTS, JJ.
O'BRIEN, Justice.

Appellee, Benjamin Miller, brought an action of assumpsit against appellant, Boston Insurance Company, to recover for the loss of a diamond ring, which was insured by appellant under a Jewelers' Block Policy. The policy insured appellee against 'all risks of loss of or damage * * * arising from any cause whatsoever except: * * * (M) Unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory'.

On March 11, 1958, Miller, a dealer in jewelry, consigned the ring to Jacob Friedman, who was also a jewelry dealer. On the following day, Friedman consigned the ring to another dealer, David Willner, who was attempting to sell the ring. Willner's body was recovered from the East River in New York City in July of 1958. The day before his death, Willner stated he had the ring 'in his pocket' and was still trying to sell it. The record is bare as to any evidence of the *569 cause of Willner's death, and the ring was not returned to either Friedman or appellee.

On August 16, 1958, appellee, by letter, requested the return of the ring from Friedman. This letter, and other inquiries, produced no results. The written memorandum under which Friedman obtained the ring from appellee holds Friedman responsible for the care, custody and return of the ring. Friedman made inquiries of Willner's Executor, and his attorney also investigated as to the whereabouts of the ring. The ring was never returned or, to appellee's knowledge, found by Friedman or any person acting in his behalf.

At trial, the jury returned a verdict for appellee

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against the appellant, the Boston Insurance Company, and the additional defendant, Jacob Friedman. The only issue the lower court submitted to the jury was whether it believed the testimony of appellee, Miller, and the additional defendant, Friedman. These issues resulted from the lower court's interpretation of the insurance policy's coverage. Following the verdict, appellant made motions for judgment n.o.v. and for a new trial. This appeal followed denial of the motions and entry of judgment on the verdict.

In *Connolly v. P.T.C.*, 420 Pa. 280, 216 A.2d 60 (1966), we stated: 'In considering a motion for judgment n.o.v., the evidence together will all reasonable inferences therefrom is considered in the light most favorable to the verdict winner. *Lewis v. United States Rubber Co.*, 414 Pa. 626, 202 A.2d 20 (1964); *Pritts v. Wigle*, 414 Pa. 309, 200 A.2d 386 (1964); *Chambers v. Montgomery*, 411 Pa. 339, 192 A.2d 355 (1963), and in reviewing on appeal, we stated in *Vignoli v. Standard M. Freight, Inc.*, 418 Pa. 214, 210 A.2d 271 (1965): 'The grant or refusal of a new trial will not be reversed on appeal, absent an abuse of discretion or error of law which controlled the outcome of the case.' See *Weed v. Kerr*, 416 Pa. 233, 205 A.2d 858 (1965), *570 and cases cited therein. Viewing the record in the light of these standards, we conclude that the judgment must be affirmed.

**277 [1][2] Initially, before considering the policy in the instant case, we must first set forth some general rules which we have held applicable to insurance policies. In *Warner v. Employers' Liability Assurance Corp.*, 390 Pa. 62, 133 A.2d 231 (1957), we said: 'While policies of insurance will be construed most strongly against insurer, *Bule Anchor Overall Co. v. Pennsylvania Lumbermens Mutual Ins. Co.*, 385 Pa. 394, 397, 123 A.2d 413, (59 A.L.R.2d 546), it is a necessary prerequisite to recovery upon a policy for the insured to show a claim within the coverage provided by the policy. *Fullmer v. Farm Bureau Mutual Auto Insurance Company*, 350 Pa. 451, 452, 39 A.2d 623.' In *Armon v. Aetna Casualty and Surety Co.*, 369 Pa. 465, 469, 87 A.2d 302, 304 (1952), we held: 'A defense based on an exception or exclusion in a policy is an affirmative one, and

the burden is cast upon the defendant to establish it. *Bowers v. Great Eastern Casualty Company*, 260 Pa. 147, 148, 149, 103 A. 536; *Watkins v. Prudential Insurance Co.*, 315 Pa. 497, 508, 173 A. 644, 650, 95 A.L.R. 869; *Zenner v. Goetz*, 324 Pa. 432, 435, 188 A. 124, 125; *Gardocki v. Polish National Alliance of United States of America*, 141 Pa.Super. 53, 59, 14 A.2d 604, 607; *Brier Hill Coal Co. v. Hartford Steam Boiler Inspection s Insurance Co. of Hartford*, 146 Pa.Super. 193, 196, 22 A.2d 230, 231.'

[3] It is hornbook law that in construing any written instrument, and particularly an insurance contract, the instrument must be strictly construed against the writer. See *Barnes v. North American Accident Insurance Co.*, 176 Pa.Super. 294, 107 A.2d 196 (1954).

Appellant in its brief indicates 'The only issue in this case is whether the plaintiff has proved 'a loss of property' under an All-Risks Policy by showing that *571 the last known consignee of the property died without returning the property to the insured.' Appellant relies chiefly upon *Mellon v. Federal Ins. Co.*, 14 F.2d 997, (D.C.S.D.N.Y. 1926), which involved damage to ship's boilers and what Judge Hand considered to be an 'all risks' policy. Judge Hand in that case stated: 'The perils clause is an 'all risk' clause, and the libellant has discharged his burden when he has proved that the loss was due to a casualty and was caused by some event, as here by the hydrostatic test, covered by the general expressions of the policy. 'He is not bound to go further, and prove the exact nature of the accident or casualty which in fact occasioned his loss.' *British & Foreign Marine Ins. Co. v. Gaunt*, (1921) A.C. 41. In the *Inchmaree* clause the casualty came within a specified risk. * * * As Lord Sumner said, in the recent case of *British & Foreign Marine Co. v. Gaunt*, (1921) 2 A.C. at page 57: 'The expression does not cover inherent vice or mere wear and tear. * * * It covers a risk, not a certainty; it is something which happens to the subject-matter from without, not the natural behavior of that subject-matter, being what it is, in the circumstances under which it is carried. Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of

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injury; he has injured them himself. Finally, the description 'all risks' does not alter the general law; only risks are covered which it is lawful to cover, and the onus of proof remains where it would have been on a policy against ordinary sea perils.' See, also, *Schloss Brothers v. Stevens*, (1906) 2 K.B. 665; *Grant Smith & Co. v. Seattle Construction & Dry Dock Co.*, (1920) A.C. 162.'

Black's Law Dictionary defines the word 'Risk' as follows: 'In insurance law; the danger or hazard of a loss of the property insured; the casualty contemplated in a contract of insurance; the degree of hazard; *572 a specified contingency or peril; and, colloquially, the specific house, factory, ship, etc., covered by the policy.'

[4][5] George B. Couch, in his excellent 'Cyclopedia of Insurance Law', 5 Couch on Insurance, p. 4152, Sec. 1169, says: "All risks.-An insurance may be in general **278 terms, by a policy covering all risks. Thus, a policy against 'all risks,' the words being inserted in writing, ordinarily covers every loss that may happen, except by the fraudulent acts of the insured.' See also *Sun Insurance Office, Ltd., v. Clay, Fla.*, 133 So.2d 735 (1961). Therefore, we must conclude that the very nature of the term 'all risks' must be given a broad and comprehensive meaning as to covering any loss other than a wilful or fraudulent act of the insured.

The basic problem before us, then, in this case, is whether appellee has proved the loss of property under the all-risks policy. The applicable rule of law was initially set forth in *Agricultural Insurance Co. v. A. Rothblum, Inc.*, 147 Misc. 865, 265 N.Y.S. 7. It was there held that the sole obligation of the plaintiff was to furnish the defendant with such explanation as it, in good faith, had received and accepted as to the time and cause of the loss. If we were to require the plaintiff to go further and guarantee the accuracy of the explanation of the loss that might have been given to it by the person to whom custody of the goods had been entrusted and who, himself, might be guilty of a fraud unknown to the plaintiff, the inclusive character of the coverage afforded by the insurance policy would be a mere delusion. If the custodian of the property converted

the same and was guilty of a breach of trust, the defendant should establish that fact. This rule was followed in *Chase Rand Corp. v. Central Ins. Co. of Baltimore*, 63 F.Supp. 626 (D.C.S.D.N.Y. 1945); Affirmed 152 F.2d 963, (2nd Cir.1945), in which the plaintiff brought an action to recover from the defendant*573 Insurance Company for the alleged loss of a quantity of jewelry protected under the provisions of a Jewelers' Block Insurance Policy issued by the defendant. The plaintiff, at trial, proved delivery of the jewelry to Ben Levit, a jewelry dealer, on consignment. Ben Levit, in turn, entrusted certain items of jewelry which he had received from the plaintiff to his nephew, Hyman Levit, who was employed by his uncle as a salesman. Hyman Levit reported the jewelry in his custody was stolen while he was on the road going to Van Horn, Texas. There was serious question at the trial as to whether the alleged robbery, in fact, did occur. Defendant, in its answer, in addition to a general denial of the allegations set forth in the complaint, set forth six affirmative defenses, all but two of which were abandoned. The ones that remained were: '(2) That the defendant, by an exception contained in the policy, is without liability, if loss, damage or expense occurs to the assured as a result of a theft or an act of dishonest character on the part of the assured or his employee, or any person to whom the insured property may be delivered or entrusted. It is then alleged that the jewelry in question was entrusted to Ben Levit on memorandum, and that he, in violation of his trust, delivered the same to Hyman Levit and that the loss was due to a breach of trust. (6) That the loss, if it occurred at all, was the result of the conversion of plaintiff's merchandise by Hyman Levit, to whom Ben Levit had entrusted it, and such conversion is not within the terms of the policy.'

The court, in following the rule set forth in *Agricultural Insurance Co. v. A. Rothblum, Inc.*, supra, held that: 'Neither of these defenses, in my judgment, has been established, and if either of them is to be available to defendant, it is defendant's burden to sustain the same. As has been previously said, the condition of this record is insufficient to enable me to find *574 that the loss was due to any malfeasance on the part of Hyman Levit. My suspicions of his good faith are based, more or less,

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upon drawing one inference from another, and this process of reasoning cannot be utilized for the purpose of making a judicial determination. In addition, I do not believe that plaintiff is required, as defendant contends, to bear the burden of proving the loss was due to the robbery of Hyman Levit. * * *

In a brief Per Curiam opinion, the Circuit Court of Appeals, Second Circuit, 152 F.2d 963, p. 964, in affirming the decision, **279 stated: 'The statements as to plaintiff's information about the theft from the consignee's employee in the complaint were surplusage. The burden of proving that the loss came within the exception rested on defendant. *Agricultural Insurance Co. v. Rothblum*, 147 Misc. 865, 265 N.Y.S. 7.'

The trial judge, in the instant case, drew from the *Chase Rand* case, supra, the proper conclusion, stating: 'The true significance of this case is that all the plaintiff must prove to make out a prima facie case, is that upon making demand of the return of jewelry covered by an 'all risk' policy, the jewelry was not returned. He has the additional burden of giving to the insurer whatever reason or cause of the loss was given him, in good faith, but plaintiff need not prove the actual cause of the loss at the trial.'

In *Balogh v. Jewelers Mutual Insurance Co.*, 167 F.Supp. 763 (S.D.Fla.1958); Affirmed 272 F.2d 889, plaintiff brought an action on an all risk insurance policy. A box containing certain rings was missing. A thorough search was made for the ring box and rings but they were never found. There was no evidence of possible entry, either of the store or the safe where the box was stored. The missing rings were insured under provisions of a Jewelers Mutual policy. Various defenses were raised by the respective defendants, similar *575 to those in the instant case. In considering the first defense, that of mysterious disappearance, the court very clearly and, we believe, correctly answers this question, stating: 'Considering the first defense-mysterious disappearance-raised by *Jeweler's* as a defense to the suit brought against it by *Julien and Harriet Balogh*, and by *Western Assurance* as a defense to the suit brought against it by *David Balogh*, we must begin with the

proposition that this is not a theft policy. Plaintiffs in the respective suits are not required to show a theft before they are entitled to recover. The policy here involved is much broader and is of the type known as an 'all-risk' policy. It is axiomatic that plaintiff must show that the loss falls within the risks insured against, but it is also axiomatic, that it is for the defendant to show that the loss was not due to one of the risks insured against but rather to an excepted cause. It would seem that all plaintiff need show in such a case is a loss, since losses from all causes are covered. Defendant, arguing that a mysterious disappearance is 'any disappearance the circumstances of which excite-and at the same time baffle-wonder or curiosity.' attempts to distinguish between the classic cases of lost or misplaced property, and a case which is baffling and therefore a mysterious disappearance. Assuming that it has proved its point, at least in the first instance, defendant argues that plaintiff was therefore under the obligation to go forward and prove a theft, and, having failed to do so, cannot recover. As can be seen, defendant relies to a large extent on semantics. Under his theory, any loss, the exact cause of which could not be proved by at least a preponderance of the evidence, would automatically be classed as a mysterious disappearance, and recovery would be defeated unless the plaintiff could prove a theft, embezzlement, or some other specific cause. What then becomes of the 'all-risk' feature of the policy? As the Court said in *576 *Chase Rand Corporation v. Central Ins. Co. of Baltimore*, in construing such a feature of a jeweler's block policy: 'Plaintiff's sole obligation was to furnish defendant with such explanation, as it, in good faith, received and accepted concerning the time and cause of the loss, and this it has done. If plaintiff were required to go further * * * the inclusive character of the coverage of the insurance policy would be a Delusion, and a snare' (Emphasis in original) citing and relying upon *Agricultural Insurance Co. v. A. Rothblum, Inc.*, which had held that 'in an action by the insured against insurer, the onus would not be upon the insured to allege and prove, as a condition precedent, that the loss was not occasioned by the specified exceptions. Rather it would be incumbent upon the insurer to allege and prove, as a condition subsequent,**280 that the loss arose from one of the excepted causes.'

420 Pa. 566, 218 A.2d 275
(Cite as: 420 Pa. 566, 218 A.2d 275)

'If the clauses in each of the policies, that of Jeweler's Mutual and that of Western Assurance, be examined, it will be found that they read: 'This Policy Insures Against All Risks Of Loss Of Or Damage To The Above Described Property Arising From Any Cause Whatsoever Except:

'* * *

“(M) Unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory.”

In considering either the unexplained loss, mysterious disappearance, or shortage on taking inventory, the court further states: 'It would appear that the phrase 'disclosed on taking inventory' not being set off by commas, was intended to modify disappearance and loss as well as shortage. In fact the whole exception seems to concern itself with losses, disappearances or shortages disclosed upon the taking of inventory. At least it is equally susceptible of such an interpretation and the ambiguity is to be resolved against the party drawing the instrument. Furthermore such an interpretation would be more in keeping with the 'all-risk' feature of *577 the policy than would defendant's suggested interpretation. It must be observed that the cases upon which defendant relies do not involve 'all-risk' policies, but rather theft policies, in which a mysterious disappearance is made prima facie evidence of theft. This type of policy is so different from that with which we are here concerned that the cases construing such theft policies are of little or no weight in the present situation.'

In *Wzontek v. Zurich Ins. Co.*, 418 Pa. 30, 208 A.2d 861 (1965), we determined the insurance company to be liable under a policy insuring Braden. The insurance company, in that case, sought to avoid liability by contending that the loss came within an exception of their policy. We followed our earlier decision reached in *Newman v. Massachusetts Bonding & Ins. Co.*, 361 Pa. 587, 65 A.2d 417 (1949): 'The Coverage Analysis recited the business of the assured (commercial photographers) and provided that the coverage was on 'all operations-including studios.' The court must give effect to every word that can be given effect. By the familiar rule applicable in such

circumstances, that typewritten provision, which is the parties last expression of their intention, must be given effect to the exclusion of the printed portions in Exclusion (h) (Citing cases).'

[6] In giving effect to each word in the policy issued by the Boston Insurance Company to Benjamin Miller, we must reach the conclusion that 'against all risks of loss or damage to the above described property from any cause whatsoever. * * *' means that the loss in question must fall within the limits of that provision. It would be both unfair and unreasonable under a policy such as this to make the insured prove more than the loss.

As the burden of proof that a loss comes within the scope of an exception or an exclusion in a policy is an affirmative one, it necessarily follows that the burden *578 is placed upon the defendant. 'It is only where the existence of facts constituting an affirmative defense is admitted by the plaintiff, or is established by uncontradicted testimony in the plaintiff's case, that such a burden is removed from the defendant.' *Armon v. Aetna Casualty and Surety Co.*, supra. No such condition exists in the instant record and, appellant having failed to carry its burden of establishing an affirmative defense, we conclude that the loss does not fall within the exclusionary provisions of the insurance policy.

Judgment affirmed.

Pa. 1966.
Miller v. Boston Ins. Co.
420 Pa. 566, 218 A.2d 275

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Westlaw.

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C

Long v. Glidden Mut. Ins. Ass'n,
Iowa 1974.

Supreme Court of Iowa.
Alvin LONG and Winifred McKeon, Appellees,

v.

GLIDDEN MUTUAL INSURANCE
ASSOCIATION and Sac Farmers Mutual Insurance
Association, Appellants.
No. 56051.

Feb. 20, 1974.

Actions by owner and lessor of farm against their respective crop theft insurers to recover for theft of soybeans. The District Court, Carroll County, Edward J. Flattery, J., rendered judgment for the insureds and the insurers appealed. The Supreme Court, McCormick, J., held that the term 'theft' within the meaning of the crop theft policies was popular meaning as a word of general and broad connotation covering any wrongful appropriation of another's property to the use of the taker, that proof of theft required more than proof of mere disappearance, that fact that the soybeans were of a quantity and bulk not readily susceptible to being accidentally mislaid or lost gave rise to an inference of theft, that there was sufficient circumstantial evidence to support finding that the loss of the 400 bushels of soybeans was due to theft and that substantial evidence supported trial court's finding that the loss was caused by theft rather than an excluded event.

Affirmed.

Rees, J., dissented and filed opinion in which Moore, C.J., and Uhlenhopp, J., joined.

Harris, J., took no part.
West Headnotes

[1] Appeal and Error 30 ↪1010.1(6)

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings

30XVI(I)3 Findings of Court

30k1010 Sufficiency of Evidence in

Support

30k1010.1 In General

30k1010.1(6) k. Substantial

Evidence. Most Cited Cases

(Formerly 30k1(6))

Trial court's findings of fact in a law action are binding on the Supreme Court if supported by substantial evidence.

[2] Appeal and Error 30 ↪931(1)

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k931 Findings of Court or Referee

30k931(1) k. In General. Most Cited

Cases

Supreme Court will view evidence in a law action in light most favorable to the sustaining of the trial court's findings of fact.

[3] Evidence 157 ↪587

157 Evidence

157XIV Weight and Sufficiency

157k587 k. Circumstantial Evidence. Most

Cited Cases

Trial 388 ↪382

388 Trial

388X Trial by Court

388X(A) Hearing and Determination of Cause

388k381 Rulings on Weight and

Sufficiency of Evidence

388k382 k. In General. Most Cited

Cases

Where circumstantial evidence is relied on to

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establish case, it must be sufficient to make the theory asserted reasonably probable, not merely possible, and more probable than any other theory based on such evidence; however, it is generally for the trier of fact to say whether circumstantial evidence meets this test.

[4] Insurance 217 ↪2207

217 Insurance

217XVI Coverage--Property Insurance
217XVI(B) Crop Insurance
217k2207 k. Evidence. Most Cited Cases
(Formerly 217k429.1(1))

Insureds under policies for crop theft had burden to present substantial evidence that soybeans were lost through theft.

[5] Insurance 217 ↪2201

217 Insurance

217XVI Coverage--Property Insurance
217XVI(A) In General
217k2196 Evidence
217k2201 k. Weight and Sufficiency.

Most Cited Cases

(Formerly 217k429.1(5))

Circumstantial evidence may be sufficient to establish that soybeans, insured by crop theft policies, were lost through theft.

[6] Insurance 217 ↪2153(1)

217 Insurance

217XVI Coverage--Property Insurance
217XVI(A) In General
217k2139 Risks or Losses Covered and

Exclusions

217k2153 Theft or Burglary
217k2153(1) k. In General. Most

Cited Cases

(Formerly 217k425(1))

Insurance 217 ↪2204

217 Insurance

217XVI Coverage--Property Insurance
217XVI(B) Crop Insurance
217k2204 k. Risks or Losses. Most Cited

Cases

(Formerly 217k1825, 217k146.5(5))

Where the term "theft" was not defined in crop theft policy, it had its popular meaning as a word of general and broad connotation meaning any wrongful appropriation of another's property to the use of the taker.

[7] Insurance 217 ↪2199

217 Insurance

217XVI Coverage--Property Insurance
217XVI(A) In General
217k2196 Evidence

217k2199 k. Burden of Proof. Most Cited Cases

(Formerly 217k429.1(1))

An insured need not prove the identity of the thief in order to recover under theft policy.

[8] Insurance 217 ↪2198

217 Insurance

217XVI Coverage--Property Insurance
217XVI(A) In General
217k2196 Evidence

217k2198 k. Presumptions. Most Cited Cases

(Formerly 217k429.1(5))

Proof of theft of insured property requires more than proof of mere disappearance, but an inference of theft is justified when property disappears without the knowledge or authority of its owner in circumstances tending to show it was not accidentally mislaid or lost and did not stray by itself.

[9] Insurance 217 ↪2153(1)

217 Insurance

217XVI Coverage--Property Insurance
217XVI(A) In General
217k2139 Risks or Losses Covered and

Exclusions

217k2153 Theft or Burglary
217k2153(1) k. In General. Most

Cited Cases

(Formerly 217k429.1(5))

Where the 400 bushels of soybeans insured under

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crop theft policy were of quantity and bulk not readily susceptible to being accidentally mislaid or lost and the beans were stored in such a way that they could be stolen without leaving a sign of entry, there was sufficient circumstantial evidence in action to recover under crop theft policies to support trial court's finding that the soybeans were lost by theft.

[10] Insurance 217 ⇨2117

217 Insurance
217XV Coverage--in General
217k2114 Evidence
217k2117 k. Burden of Proof. Most Cited Cases
(Formerly 217k646)
Any insurer has the burden to prove the applicability of a policy exclusion.

[11] Insurance 217 ⇨2207

217 Insurance
217XVI Coverage--Property Insurance
217XVI(B) Crop Insurance
217k2207 k. Evidence. Most Cited Cases
(Formerly 217k429.1(1))
The insureds under crop theft policies were not required to negate the exclusion for loss caused by mysterious disappearance, inventory shortage, or other unaccountable shortage, in order to present a prima facie case of theft.

[12] Insurance 217 ⇨2207

217 Insurance
217XVI Coverage--Property Insurance
217XVI(B) Crop Insurance
217k2207 k. Evidence. Most Cited Cases
(Formerly 217k429.1(1))
Once the insured has offered substantial evidence of theft of insured crops, the burden is on the crop theft insurer who asserts exclusion of loss caused by mysterious disappearance, inventory shortage, or other unaccountable shortage, to prove the loss was caused by an excluded event.

[13] Insurance 217 ⇨2201

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2196 Evidence
217k2201 k. Weight and Sufficiency.
Most Cited Cases
(Formerly 217k429.1(5))
Substantial evidence supported trial court's finding that insureds' loss of 400 bushels of soybeans was caused by theft rather than by an excluded event.

*272 Ronald H. Schechtman, Carroll, for appellant.
David E. Green, Carroll, for appellees.
Considered en banc.
McCORMICK, Justice.
Defendants appeal judgment in a law action tried to the court allowing plaintiffs theft insurance recovery for loss of 400 bushels of soybeans. The sole issue is the sufficiency of evidence to support trial court's finding the loss was caused by theft. We affirm.

[1][2][3] Trial court findings of fact in a law action are binding on us if supported by substantial evidence. We view the evidence in its most favorable light to sustain those findings. Where, as here, circumstantial evidence is relied on, it must be sufficient to make the theory asserted reasonably probable, not merely possible, and more probable than any other theory based on such evidence; however, it is generally for the trier of fact to say whether circumstantial evidence meets this test.

Plaintiff Alvin Long leases a Carroll County farm owned by plaintiff Winifred *273 McKeon on a crop share basis. Long was insured against crop theft by defendant Sac Farmers Mutual Insurance Association and McKeon was similarly insured with defendant Glidden Mutual Insurance Association.

Trial court found Long harvested about 3000 bushels of soybeans from the McKeon land in 1971 and put them in three overhead bins of a corn crib on the farm. During February 1972 Long inspected the granary and noted the bins were full. On March 7, 1972, while preparing to deliver the beans to market, Long discovered one of the bushels short. He immediately notified insurance agent and the

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sheriff. Investigation disclosed no evidence of tire marks or spilled beans at the scene. A hard-surfaced driveway extended from the road to the crib. The building was unlocked. Beans could be unloaded by gravity through a spout which would lower to within a foot of a wagon or truck box. Trial court concluded the beans were stolen by a thief using a truck which entered the crib alleyway from the driveway.

In denying coverage of the loss defendants rely on a provision common to their policies:

'* * * Loss by theft of insured personal property shall require substantial proof of theft by the insured. No coverage shall apply to loss caused by or resulting from mysterious disappearance or to loss discovered through inventory, or to loss by other unaccountable shortages.'

Two questions are presented by this appeal. Did plaintiffs offer substantial proof of theft? Did defendants prove coverage was excluded as a matter of law?

[4][5] I. Plaintiffs' evidence. Under the law and policy terms plaintiffs had the burden to present substantial evidence the beans were lost through theft. *Cole v. Hartford Acc. & Ind. Co.*, 242 Iowa 416, 46 N.W.2d 811 (1951); 21 *Appleman, Insurance Law and Practice*, s 12238 at 180 (1962). Circumstantial evidence may be sufficient. *Kroloff v. Southern Surety Co.*, 197 Iowa 1244, 198 N.W. 629 (1924).

[6][7] The term 'theft' is not defined in the policy. It thus has its popular meaning as a word of general and broad connotation covering any wrongful appropriation of another's property to the use of the taker. *Fidelity & Casualty Co. of New York v. Wathen*, 205 Ky. 511, 266 S.W. 4 (1924); 5 *Appleman, Insurance Law and Practice*, supra, s 3171 at 490-491; see *Rodman v. State Farm Mutual Automobile Ins. Co.*, 208 N.W.2d 903, 905-906 (Iowa 1973). An insured need not prove the identity of the thief. *Weir v. Central Nat. F. Ins. Co.*, 194 Iowa 446, 189 N.W. 794 (1922).

[8] Proof of theft requires more than proof of mere disappearance. But an inference of theft is justified

when property disappears without the knowledge or authority of its owner in circumstances tending to show it was not accidentally mislaid or lost and did not stray by itself. See, e.g., *Weir v. Central Nat. F. Ins. Co.*, supra (automobile disappeared from repair shop); *Sowden v. United States Fidelity & Guaranty Co.*, 122 Kan. 375, 252 P. 208 (1927) (jewelry disappeared from the top of a chiffonier in plaintiff's home).

[9] The soybeans were of a quantity and bulk not readily susceptible to being accidentally mislaid or lost. See *Hayward v. Employer's Liability Assur. Corporation*, 214 Mo.App. 101, 257 S.W. 1083, 1084 (1924) (theft of liquor-'The property here is of bulk and proportion that could not easily be lost or misplaced.'). Further, unlike livestock, soybeans will not stray away by themselves. Cf. *Gifford v. M.F.A. Mutual Insurance Co.*, 437 S.W.2d 714 (Mo.App.1969) (cattle); *Raff v. Farm Bureau Insurance Co. of Nebraska*, 181 Neb. 444, 149 N.W.2d 52 (1967) (hogs).

Absence of tire marks, spillage and physical indicia of forcible entry in this case is not inconsistent with a finding of theft. *274 Unfortunately, the beans were stored in such a way they could be stolen without leaving a sign of entry.

There was sufficient circumstantial evidence to allow the trier of fact to find it reasonably probable, and more probable than any other theory based on the evidence, that the 400 bushels of beans were taken from the granary in late February or early March 1972 by some person for his own use without the consent of plaintiffs. Hence there was substantial proof of theft.

[10][11][12] II. The exclusion. Defendants rely on the policy provision excluding coverage of loss caused by mysterious disappearance, inventory shortage, or other unaccountable shortage. They overlook the fact an insurer has the burden to prove the applicability of a policy exclusion. *Rich v. Dyna Technology, Inc.*, 204 N.W.2d 867, 871 (Iowa 1973). The insured is not required to negate the exclusion in order to present a prima facie case of theft. *Jewelers Mutual Insurance Company v. Balogh*, 272 F.2d 889 (5 Cir. 1959). Once the

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insured has offered substantial evidence of theft the burden is on the insurer who asserts the exclusion to prove the loss was caused by an excluded event. 21 Appleman, Insurance Law and Practice, supra, s 12238 at 182; 46 C.J.S. Insurance s 1359 at 561.

[13] Trial court found plaintiffs' loss was caused by theft rather than an excluded event. This finding is supported by substantial evidence. Defendants did not establish their defense as a matter of law. Trial court's judgment must be sustained.

Affirmed.

All Justices concur except REES, J., MOORE, C.J., and UHLENHOPP, J., who dissent.

HARRIS, J., takes no part.

REES, Justice (dissenting).

I find myself unable to agree with the majority, and dissent.

I. The majority ignores what to me appears to be a very significant body of evidence in the record.

Plaintiff Long testified that he had planted 100 acres of land to beans, and that he harvested a crop averaging 30 bushels per acre, or an aggregate of 3000 bushels. A witness, Clausen, testified he combined the beans and that they averaged about 30 bushels per acre, although he admitted such was an approximation and the yield could have varied two bushels either way. Long testified that during the crop year 1971 he had suffered some hail damage to his bean crop, and that he had about a 35 percent loss for which he recovered on a policy of hail insurance, and he further estimated that without the hail the beans would probably have produced 40 bushels per acre. I believe it is significant that the estimated crop without the hail damage would have, according to the testimony of the plaintiff, yielded 40 bushels per acre, or an aggregate of 4000 bushels, and that by his own testimony his crop was minimized by the hail loss to the extent of 35 percent thereof, and that by his own testimony therefore the bean crop would not have yielded more than 65 percent of the 4000 bushels or a net of 2600 bushels, which is the exact amount of beans which were available for disposition. Long testified he sold 2500 bushels and kept 100 bushels of beans

for seed.

Long further testified that he found no evidence of theft or larceny of the beans, only that the beans were gone. The deputy sheriff who investigated also testified that he found no evidence of theft or larceny, that he found no grain spilled in the driveway or in any area proximate to the crib or bin and no other evidence tending to show that the soybeans had been the subject of theft.

I think it is further significant that no one in investigating the alleged theft contacted the occupant of the dwelling house on the farm which was only 150 feet from the crib where the beans were stored. It appears that a tenant, Janssen, lived in the *275 farmhouse and used the driveway of the crib to park his pickup truck to keep it out of the weather. Neither the deputy sheriff who investigated the alleged larceny nor Long made any inquiry of Janssen as to any suspicious circumstances or concerning any knowledge Janssen might have had about any beans being removed from the crib.

I do not agree that there was sufficient substantial evidence adduced to permit the court as a trier of fact to find it was reasonably probable, and more probable than any other theory based on such evidence, that any beans were taken from the granary in late February or early March by some person for his own use without the consent of the plaintiffs.

I recognize our review of the facts is limited to determining whether the trial court's findings of fact are supported by substantial evidence and that if they are so supported they are binding upon us. Rule 344(f)(1), Rules of Civil Procedure.

We may not, however, abdicate our responsibility to review the record to determine the sufficiency of the evidence to provide support for the trial court's findings of fact.

I am unable to find from the record there was substantial proof of theft.

II. Nor am I able to agree with the majority that 'theft' is not defined in the policy. The majority

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assumes the policy clause which is set out in its opinion is an EXCLUSION clause and that therefore the insurer has the burden of proof. In my judgment the clause referred to is essentially a definition of 'theft.' Contrary to the conclusion of the majority that 'theft' is not defined in the policy, the clause referred to defines 'theft', and distinguishes it from 'mysterious disappearance', and therefore the broad definition of theft which usually applies and which the majority relies on does not apply here. Otherwise we would read said clause out of the policy.

In Raff v. Farm Bureau Ins. Co. of Neb., 181 Neb. 444, 149 N.W.2d 52, 54, the court said:

* * * The provisions material to this risk are as follows: '(f) Theft and overturn. This insurance is extended to include direct loss by theft (but excluding escape, mysterious disappearance, inventory shortages, wrongful conversion and embezzlement), and overturn. * * *'

Continuing at page 55 of 149 N.W.2d: 'In popular usage, the word 'theft' is another name for 'larceny'. As a general rule, however, the term as used in an insurance policy is not necessarily synonymous with larceny, but may have a much broader and more inclusive meaning. It could cover pilferage, swindling, embezzlement, conversion, and other unlawful appropriations as well as larceny. Here, however, it is apparent that the term is used in a much more restricted sense than is usually the case. While it is not necessary to arrive at a precise definition herein, it is evidence 'theft' must be construed to mean something other than escape, mysterious disappearance, inventory shortage, wrongful conversion, or embezzlement, because these are specific exclusions in the policy.'

So, as in the matter before us, the term 'theft' is not used in the broad sense, but means something other than mysterious disappearance, inventory loss or unaccountable shortage. Therefore this is not a case of placing the burden of proof on the insurer to prove an Exclusion; it is a case where the insured is required to prove he comes within the term 'theft' which does not embrace or encompass mysterious disappearances. Therefore in any case where an

insured's evidence shows mysterious disappearance, as the evidence does here, plaintiff has not established his own case in the first instance. To hold otherwise completely nullifies the clause and writes the same out of the policy.

*276 Under the rationale of the majority it would be difficult to envision a factual situation where a mysterious disappearance could be established.

The plaintiffs have not established in the first instance they lost any beans, in any manner. In the second place, they did not establish the beans, if any were missing, were the subject of theft or that the policies of the defendants indemnified them under the circumstances and the evidence in the record before us.

I would reverse the trial court.

MOORE, C.J., and UHLENHOPP, J., join this dissent.

Iowa 1974.
Long v. Glidden Mut. Ins. Ass'n
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199 Mich.App. 482, 502 N.W.2d 742
 (Cite as: 199 Mich.App. 482, 502 N.W.2d 742)

▷
 Libralter Plastics, Inc. v. Chubb Group of Ins.
 Companies
 Mich.App., 1993.

Court of Appeals of Michigan.
 LIBRALTER PLASTICS, INC., Plaintiff-Appellant,
 v.
 CHUBB GROUP OF INSURANCE COMPANIES,
 a foreign corporation, and Federal Insurance
 Company, a foreign corporation,
 Defendants-Appellees.
 Docket No. 132745.

Submitted Nov. 18, 1992, at Lansing.
 Decided May 3, 1993, at 9:00 a.m.
 Released for Publication July 30, 1993.

Manufacturer brought action against insurers under its commercial property policy for replacement costs of two kirksite injection molds which disappeared from its premises. The Circuit Court, Oakland County, Martin B. Breighner, Visiting Judge, granted summary disposition for insurers, ruling that mysterious disappearance exclusionary clause applied. Manufacturer appealed. The Court of Appeals, Marilyn J. Kelly, J., held that: (1) genuine issue of material fact was raised as to whether molds disappeared as a result of theft or mysterious disappearance, and (2) insurers had burden of proving that mysterious disappearance exclusionary clause precluded recovery.

Reversed and remanded.

Taylor, P.J., filed dissenting opinion.
 West Headnotes
 [1] Insurance 217 ⇨1805

217 Insurance
 217XIII Contracts and Policies
 217XIII(G) Rules of Construction
 217k1805 k. In General. Most Cited Cases
 (Formerly 217k146.1(2))

In construing insurance contract, courts must first determine whether coverage exists, and if coverage exists, whether an exclusion precludes coverage.

[2] Judgment 228 ⇨181(2)

228 Judgment
 228V On Motion or Summary Proceeding
 228k181 Grounds for Summary Judgment
 228k181(2) k. Absence of Issue of Fact.
 Most Cited Cases
 Motion for summary disposition on ground that there is no genuine issue of material fact tests whether there is factual support for claim. MCR 2.116(C)(10).

[3] Judgment 228 ⇨185(2)

228 Judgment
 228V On Motion or Summary Proceeding
 228k182 Motion or Other Application
 228k185 Evidence in General
 228k185(2) k. Presumptions and
 Burden of Proof. Most Cited Cases
 On motion for summary disposition on ground that there is no genuine issue of material fact, trial court must give benefit of reasonable doubt to nonmoving party and must determine whether record might be developed which would leave open an issue upon which reasonable minds could differ, and all reasonable inferences are drawn in favor of nonmoving party. MCR 2.116(C)(10).

[4] Judgment 228 ⇨185(2)

228 Judgment
 228V On Motion or Summary Proceeding
 228k182 Motion or Other Application
 228k185 Evidence in General
 228k185(2) k. Presumptions and
 Burden of Proof. Most Cited Cases

Judgment 228 ⇨185(4)

199 Mich.App. 482, 502 N.W.2d 742
(Cite as: 199 Mich.App. 482, 502 N.W.2d 742)

228 Judgment

228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(4) k. Documentary Evidence
or Official Record. Most Cited Cases
Party opposing motion for summary disposition on
ground that there is no genuine issue of material
fact may not rest upon mere allegations or denials in
pleadings but, rather, it must set forth specific facts
using documentary evidence to show existence of
genuine issue for trial. MCR 2.116(C)(10).

[5] Evidence 157 ↪587

157 Evidence

157XIV Weight and Sufficiency
157k587 k. Circumstantial Evidence. Most
Cited Cases
Circumstantial evidence may be sufficient to
establish case.

[6] Judgment 228 ↪185(2)

228 Judgment

228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and
Burden of Proof. Most Cited Cases
Parties opposing motion for summary disposition
must present more than conjecture and speculation
to meet their burden of providing evidentiary proof
establishing genuine issue of material fact. MCR
2.116(C)(10).

[7] Judgment 228 ↪185(1)

228 Judgment

228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(1) k. In General. Most Cited
Cases
"Conjecture" is simply an explanation consistent
with known facts or conditions, but not deducible
from them as reasonable inference and, therefore, it
cannot be used to defeat motion for summary
judgment.

[8] Judgment 228 ↪185(5)

228 Judgment

228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(5) k. Weight and Sufficiency.
Most Cited Cases
Evidence pointing to one theory of causation,
indicating logical sequence of cause and effect, will
provide sufficient basis to defeat motion for
summary judgment, and it does not matter if
evidence can support other plausible theories.

[9] Judgment 228 ↪185.3(12)

228 Judgment

228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in
Particular Cases
228k185.3(12) k. Insurance. Most
Cited Cases
Evidence that two kirksite injection molds which
disappeared from manufacturer's premises weighed
400 pounds each and could not be easily moved,
that kirksite which composed molds was valuable
alloy used in plastic injection mold manufacturing
industry, that molds were easily melted and recast
for constructing other molds, that molds were
outside when loss occurred, and that person skilled
in industry would expect such molds had been
stolen if they became lost and unaccounted for
raised genuine issue of material fact as to whether
molds disappeared as a result of theft or "mysterious
disappearance" as defined by
exclusionary clause of commercial property policy.

[10] Insurance 217 ↪2199

217 Insurance

217XVI Coverage--Property Insurance
217XVI(A) In General
217k2196 Evidence
217k2199 k. Burden of Proof. Most
Cited Cases
(Formerly 217k429.1(1))
Since manufacturer introduced sufficient evidence
to establish prima facie case of theft of two kirksite

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injection molds, burden shifted to insurers to prove that mysterious disappearance exclusionary clause of commercial property policy precluded recovery.

*483 Butzel Long by James E. Wynne and Daniel R.W. Rustmann, Detroit, for plaintiff-appellant. Gregory & Associates, P.C., by Alan G. Gregory, Troy, for defendants-appellees.

Before TAYLOR, P.J., and SHEPHERD and MARILYN J. KELLY, JJ.
MARILYN J. KELLY, Judge.

This case involves interpretation of language in defendants' insurance policy covering plaintiff's business property. Plaintiff appeals from an Oakland Circuit Court order granting summary disposition to defendants under MCR 2.116(C)(10). Plaintiff argues that the trial court *484 erred in granting the motion, because a genuine issue of material fact exists. We agree and reverse.

I

Plaintiff manufactures plastic products and is insured by defendants. Defendant Federal Insurance Company is a member of defendant Chubb Group of Insurance Companies.

One of plaintiff's customers entrusted two kirksite injection molds to plaintiff for use in producing six hundred plastic boat launchers. Plaintiff originally stored the molds inside its production buildings. In time, it moved them to an unsecured area on its property out-of-doors. When the owner later inquired about another production run, plaintiff was unable to locate the molds. After further searching, plaintiff determined that they had been lost and filed a theft claim under its commercial insurance policy with defendants. Defendant Chubb denied the claim.

Plaintiff filed suit against defendants for the replacement cost of the molds. Defendants filed a motion for summary disposition asserting that no genuine issue of material fact existed; the loss of the molds fell within the insurance clause exclusion for "mysterious disappearances." Defendants

supported the motion with deposition testimony from plaintiff's vice-president, Robert Bretz. He stated that the molds had disappeared, and he was uncertain whether they had been stolen.

Plaintiff countered the deposition testimony with statements from an affidavit by Bretz. In it, Bretz asserted that kirksite has intrinsic value in the injection mold industry and is easily melted and recast for constructing other molds. He indicated that persons skilled in the industry, including himself, would consider molds of this substance *485 to be stolen if they became lost and unaccounted for.

The trial court granted defendants' motion for summary disposition, ruling that the mysterious disappearance exclusionary clause applied.

II

[1] In construing an insurance contract, courts must first determine whether coverage exists. *Allstate Ins. Co. v. Freeman*, 432 Mich. 656, 668, 443 N.W.2d 734 (1989). Next, they must determine whether an exclusion precludes coverage. *Id.* Therefore, we first determine whether plaintiff in this case created a genuine issue of material fact that coverage existed for the loss of the molds.

[2][3][4] A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. In **744 deciding on it, the trial court must give the benefit of reasonable doubt to the nonmoving party. It determines whether a record might be developed which would leave open an issue upon which reasonable minds could differ. *Hutchinson v. Allegan Co. Bd. of Road Comm'rs. (On Remand)*, 192 Mich.App. 472, 480-481, 481 N.W.2d 807 (1992). All reasonable inferences are drawn in favor of the nonmoving party. *Perez v. KFC Nat'l Management Co., Inc.*, 183 Mich.App. 265, 267-268, 454 N.W.2d 145 (1990), citing *Dagen v. Hastings Mutual Ins. Co.*, 166 Mich.App. 225, 229, 420 N.W.2d 111 (1987). The party opposing the motion may not rest upon mere allegations or denials in the pleadings. It must set forth specific facts using documentary evidence to

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show the existence of a genuine issue for trial. *Hutchinson*, 192 Mich.App. at 481, 481 N.W.2d 807.

The insurance policy in this case provides coverage for loss to personal property of others not owned by the insured but in its care, custody or *486 control. Plaintiff asserts that the facts presented would lead a jury to conclude that the molds had been stolen, a loss insured under the policy. Although loss by theft is not explicitly mentioned as a covered loss in the insurance policy, both parties agree that defendants' coverage would apply if the molds were stolen.

Plaintiff asserts that there was adequate circumstantial evidence from which the jury could draw an inference that the molds had been stolen. The two molds weighed four hundred pounds each and could not be easily moved. The kirksite which composed them is a valuable alloy used in the plastic injection mold manufacturing industry. The molds were outside when the loss occurred. Defendants argue that this evidence led to nothing more than conjecture and that, to find the molds had been stolen, the jury would have to deal in speculation.

[5][6][7] Circumstantial evidence may be sufficient to establish a case. *Firemen's Ins. Co. v. Sterling Coal Co.*, 348 Mich. 564, 83 N.W.2d 319 (1957). However, parties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact. *McCune v. Meijer, Inc.*, 156 Mich.App. 561, 563, 402 N.W.2d 6 (1986), citing *Szidik v. Podsiadlo*, 109 Mich.App. 446, 451, 311 N.W.2d 386 (1981). A conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. *Kaminski v. Grand Trunk W.R. Co.*, 347 Mich. 417, 422, 79 N.W.2d 899 (1956), citing *City of Bessemer v. Clowdus*, 261 Ala. 388, 394, 74 So.2d 259 (1954).

III

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Michigan courts have yet to interpret insurance *487 policy language similar to that used here. However, other jurisdictions have addressed the same language in similar factual situations. See *Long v. Glidden Mutual Ins. Ass'n.*, 215 N.W.2d 271 (Iowa, 1974).

In the *Long* case, the plaintiffs were covered under an insurance policy for crop theft. The policy expressly excluded loss caused by a mysterious disappearance. Long harvested three thousand bushels of soybeans and placed them in three overhead bins. When preparing to deliver the beans to market, Long discovered that one bin was four hundred bushels short. A police investigation revealed no evidence of theft. Nonetheless, the trial court concluded that the beans had been stolen.

In *Long*, the Iowa Supreme Court recognized that an inference of theft is justified under certain circumstances. These include when property disappears without the owner's knowledge or authority, appears not to have been accidentally mislaid or lost and could not have strayed by itself. *Id.*, at 273. The beans were of a quantity and bulk not readily susceptible to being accidentally mislaid or lost. *Id.* Unlike livestock, they could not walk away. The absence of indicia of a forced entry was not relevant, because the beans were stored in such a manner that they could have been stolen without leaving signs of entry. *Id.*, at 273-274. The court concluded that there was sufficient circumstantial evidence to **745 allow the trier of fact to conclude that theft was more probable than any other theory.

IV

[8] Consistent with *Long*, plaintiff in this case need not rebut every possible theory which the evidence *488 could support. See *Kaminski*, 347 Mich. at 422, 79 N.W.2d 899; *Long*, at 274. Cf. *Raff v. Farm Bureau Ins. Co. of Nebraska*, 181 Neb. 444, 149 N.W.2d 52 (1967). If there is evidence pointing to one theory of causation, indicating a logical sequence of cause and effect, it does not matter if the evidence can support other plausible theories. *Kaminski*, 347 Mich. at 422, 79 N.W.2d 899.

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[9] A jury could reasonably infer based on the evidence presented here that theft was more probable than any other theory of loss. The inference could be drawn from the following facts: (1) the ponderous size of the molds; (2) their slight mobility; (3) their high value; (4) their easily-melted composition; (5) their placement outside; and, (6) the affidavit by Bretz that persons skilled in the industry would expect such molds had been stolen if they became lost and unaccounted for. This evidence was more than mere conjecture and was sufficient to withstand a motion for summary disposition.

V

[10] Since plaintiff introduced sufficient evidence to establish a prima facie case of theft, the burden shifted to defendants to prove that the mysterious disappearance exclusionary clause precluded recovery. *Long*, at 274, citing 21 Appleman, Insurance Law & Practice, § 12238, p 182 (1962); 46 CJS, Insurance, § 1359, p 561. The term "mysterious disappearance" has been defined as: "unknown, puzzling, and baffling circumstances which arouse wonder, curiosity, or speculation, or under circumstances which are difficult or hard to explain." *Raff*, 181 Neb. at 447, 149 N.W.2d 52.

In arguing that the exclusionary clause should apply here, defendants rely heavily on the fact that plaintiff's inventory system was inadequate. In fact, plaintiff had a history of mislocating tools *489 belonging to other individuals. Robert Bretz testified during his deposition that it was not unusual for plaintiff to conduct more than one search for a tool.

Although defendants presented evidence supporting their theory that the molds mysteriously disappeared, we conclude that reasonable minds could differ on whether they disappeared as the result of theft or mystery. Therefore, we find that the trial court erred in granting summary disposition.

Reversed and remanded. We do not retain jurisdiction.

SHEPHERD, J., concurred.
TAYLOR, Presiding Judge (*dissenting*).

I disagree with the majority's conclusion that plaintiff presented any proof, either direct or circumstantial, that the molds were stolen. All that plaintiff has shown is that these molds are gone, and that plaintiff doesn't know where they went or why they are gone. I would find that the affidavit purporting to contain proof of theft in reality contains nothing more than conjecture and speculation,^{FN1} *Kaminski v. Grand Trunk W.R. Co.*, 347 Mich. 417, 422, 79 N.W.2d 899 (1956), and accordingly that plaintiff failed in its burden under MCR 2.116(C)(10). *McCart v. J. Walter Thompson USA, Inc.*, 437 Mich. 109, 115, 469 N.W.2d 284 (1991).

FN1. It is my view that both the deposition and the affidavit of Robert Bretz were merely speculative, while the majority found evidence of theft in Bretz' affidavit. However, his affidavit contradicts his earlier deposition testimony in this regard contrary to *Gamet v. Jenks*, 38 Mich.App. 719, 726, 197 N.W.2d 160 (1972), and its progeny, which precludes a party from creating factual issues by submitting an affidavit contradicting his own prior testimony. Thus, even if Bretz' affidavit does not contain evidence of theft, it may not properly be used to defend a motion for summary disposition.

I would affirm.

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Westlaw

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C

BLASIAR, INC., Plaintiff and Appellant, v.
 FIREMAN'S FUND INSURANCE COMPANY,
 Defendant and Respondent.
 Cal.App.2.Dist.

BLASIAR, INC., Plaintiff and Appellant,
 v.

FIREMAN'S FUND INSURANCE COMPANY,
 Defendant and Respondent.

No. B124055.

Court of Appeal, Second District, Division 4,
 California.
 Aug. 25, 1999.

SUMMARY

A company brought an action for breach of contract and declaratory relief against its insurer, after defendant denied plaintiff's claim under a portfolio policy for property that plaintiff believed had been stolen from its warehouse. The trial court entered judgment for defendant, finding that the policy's mysterious disappearance exclusion was not ambiguous and that, on the facts presented, plaintiff's loss was not covered. (Superior Court of Los Angeles County, No. GC018711, Jan A. Pluim, Judge.)

The Court of Appeal affirmed the judgment. The court held that the mysterious disappearance exclusion, which applied to property that was missing without any physical evidence to show what happened to it, was not ambiguous. The court further held that substantial evidence supported the trial court's conclusion that there was no physical evidence that tended to account for what happened to the property identified as lost. (Opinion by Kuhl, J., ^{FN*} with Epstein, Acting P. J., and Curry, J., concurring.)

FN* Judge of the Los Angeles Superior

Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d, 1e) Insurance Contracts and Coverage § 45-- Coverage of Contracts--Portfolio Policy--Mysterious Disappearance Exclusion--Ambiguity--Property Missing From Insured's Warehouse.

In an action for breach of contract and declaratory relief brought by a company against its insurer after defendant denied plaintiff's claim under a portfolio policy for property that plaintiff believed had been *749 stolen from its warehouse, the trial court properly found that the policy's mysterious disappearance exclusion, which applied to property that was missing without any physical evidence to show what happened to it, such as shortage disclosed on taking inventory, was not ambiguous. First, the term "physical evidence" was not inherently ambiguous. Although the words of an exclusion must be part of the working vocabulary of the average person, and must be phrased in a logical manner, the words "physical" and "evidence" are not terms outside of common usage. Nor was the absence of a policy definition of the term or of case law interpreting the term an indication of ambiguity. Second, the language of the exclusion clearly stated that it applied only if there was no physical evidence to show what happened to the insured's property. Third, it was not reasonable to interpret the exclusion to require evidence of where a thief took the property. A commonsense reading of the exclusion was that it required only some physical evidence of how the property was lost. Fourth, it was clear from the language of the exclusion as a whole, and from its context in the policy, that the phrase "shortage disclosed on taking inventory"

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was properly construed as an example of sufficient physical evidence, or as an example of what would not qualify as physical evidence.

[See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 699, 700; Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 1998) ¶ 4:150.]

(2) Insurance Contracts and Coverage § 11--Interpretation of Contracts--As Question of Law. Interpretation of the language of an insurance policy is a question of law. A trial court's interpretation subject to de novo review.

(3) Insurance Contracts and Coverage § 11--Interpretation of Contracts-- Common and Ordinary Meaning of Words.

Insurance contracts, like all contracts, are interpreted to give effect to the mutual intention of the parties which, if possible, is inferred solely from the written provisions of the contract. When the parties do not offer any extrinsic evidence bearing on contract interpretation, the language of the insurance contract should be interpreted according to the common and ordinary meaning of the words of the contract. Unless used by the parties in a technical sense or a special meaning is given to them by usage, the clear and explicit meaning of the written provisions of a contract, interpreted in their ordinary and popular sense, controls judicial interpretation.

(4a, 4b, 4c) Insurance Contracts and Coverage § 10--Interpretation of Contracts--Ambiguous Policy Provision.

An insurance policy *750 provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. However, language in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract. Courts will not strain to create an ambiguity where none exists. When a policy limitation is at issue, the language of the limitation must be plain and clear. The absence from the policy of a definition of a term does not by itself render the term ambiguous. Further, language in a contract must be construed in the circumstances of that case and cannot be found to be ambiguous in the abstract. There cannot be an ambiguity per se,

i.e., an ambiguity unrelated to an application.

(5) Insurance Contracts and Coverage § 10--Interpretation of Contracts--In Context of Whole.

Language of an insurance policy should be construed in the context of the instrument as a whole with regard to its intended function in the policy.

(6a, 6b) Insurance Contracts and Coverage § 45--Coverage of Contracts-- Portfolio Policy--Mysterious Disappearance Exclusion--Application--Sufficiency of Evidence--Property Missing From Insured's Warehouse.

In a company's action against its insurer brought after defendant, based on the portfolio policy's mysterious disappearance exclusion, denied plaintiff's claim for property that plaintiff believed had been stolen from its warehouse, substantial evidence supported the trial court's conclusion that there was no physical evidence that tended to account for what happened to the lost property. The exclusion applied to property that was missing without any physical evidence to show what happened to it, such as shortage disclosed on taking inventory. There was substantial evidence that two incidents that occurred just prior to the date on which the missing items were discovered, the tripping of a burglar alarm and the disruption of an office, had nothing to do with any theft of property. There was no sign of entry on either occasion. There was no indication that property in the warehouse was disturbed, moved, or taken on either occasion. There was evidence that rodents had been causing false alarms, and there was evidence that several people had access to the disturbed office.

(7) Appellate Review § 135--Scope of Review--Presumptions--Judgment of Lower Court.

A judgment of the lower court is presumed correct, and all intendments and presumptions are indulged to support it on matters as to which the record is silent. Error must be affirmatively shown. Where no statement of decision is requested, it must be *751 presumed that the trial court found facts necessary to support the judgment.

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COUNSEL

Smith, Arnold & Gyben, Douglas P. Smith and William A. Elliott for Plaintiff and Appellant.
Sedgwick, Detert, Moran & Arnold, John E. Feeley and Tae J. Im for Defendant and Respondent.

KUHL, J. FN*

FN* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Blasiar, Inc., doing business as Alert Communications (Alert) made a claim against an insurance policy issued by Fireman's Fund Insurance Company (Fireman's Fund) for property that Alert believed had been stolen from its warehouse. Fireman's Fund denied the claim, citing an exclusion for "[p]roperty that is missing, but there is no physical evidence to show what happened to it, such as shortage disclosed on taking inventory."

Alert brought an action against Fireman's Fund for breach of contract and declaratory relief, arguing that the exclusion is ambiguous and that Alert had presented evidence tending to show that the missing inventory had been stolen. After a court trial, the trial judge concluded that the exclusion is not ambiguous and held that, on the facts presented, Alert's loss was not covered. The trial court therefore entered judgment for Fireman's Fund. We agree that the exclusion is not ambiguous and further hold that the trial court's ruling finding no coverage for the loss is supported by substantial evidence. We therefore affirm the judgment.

Factual and Procedural Background

Alert installs telephone systems for business customers. Alert maintained a warehouse and some offices at 1224 East Main Street in Alhambra, California. The inventory stored in the warehouse included telephone instruments, printed circuit boards and microprocessors.

Alert was insured for certain losses under a portfolio policy (Policy) with Fireman's Fund. Alert's inventory at the warehouse location on Main

Street in Alhambra was covered property under the terms of the Policy. *752

On January 23, 1996, about 9:56 p.m., Alert's manager, Terri Goldman, received a telephone call notifying her that the burglar alarm for the Main Street warehouse was sounding. Goldman went to the warehouse accompanied by another Alert employee. They did not observe any signs of unauthorized entry nor did they see any evidence suggesting theft of stock or other property. They reset the burglar alarm and left. Around this time Alert had problems with rodents setting off false alarms in the warehouse.

On January 24, 1996, the Alert general manager wrote a memorandum referring to a "strange scenario" regarding certain inventory. The memorandum states that "[a]pparently our stock levels are not adding up to our perpetual [inventory] numbers in PhoneBiz. I am not certain what this means yet. I'm not sure if we have experienced a theft or if we have some kind of accounting error." The memorandum indicated that the matter would be further analyzed as part of the quarterly physical inventory scheduled for February 1, 1996.

On January 29, 1996, Dyan Ortbal returned to her office at Alert after the weekend. She noticed that files had been knocked off her desk and onto the floor and that they had not been picked up. Her office had not been in that condition when she had left the preceding Friday. Ortbal's office was located next to the warehouse. Ortbal did not notice anything missing from her office and she did not notice any sign of forced entry into her office by a window or door. Ortbal looked at the inventory in the warehouse and did not notice anything missing. However she testified that she could not have determined whether inventory was missing just by looking at it because of the way the inventory was stacked. No one except Ortbal's superiors had permission to go into her office over the weekend.

Alert conducted a physical inventory count on about January 31, 1996. By comparing the results of the physical inventory count with the company's perpetual inventory records, Alert determined that it had an inventory shortage valued at \$92,311. The

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company's perpetual inventory was based on computer records of items received and sold.

Alert did not report the events of January 24 or 29 or the January 31 inventory shortage to the police or to Fireman's Fund at the time these events occurred.

Subsequent to January 31, 1996, Alert experienced thefts of inventory from the warehouse, believed to have occurred between February 14 and March 4, 1996. The thefts were discovered because an air-conditioning unit *753 in a window at the insured premises was noted to have been pushed into the warehouse and the window was broken. The air-conditioning unit that was used as the point of entry was in Orbal's office.

About March 5, 1996, Alert reported three claims to Fireman's Fund. Two claims concerned the thefts believed to have occurred between February 14 and March 4, 1996. One claim was for the \$92,311 loss discovered in the January 31 inventory.

After meeting with Alert and investigating the claims, Fireman's Fund paid Alert \$83,523.87 for the thefts of inventory believed to have occurred at the insured premises between February 14 and March 4, 1996. Fireman's Fund denied coverage for the \$92,311 claim for losses occurring prior to February 4, 1996.

Fireman Fund's denial was based on the Policy's "mysterious disappearance exclusion" which provides: "1. We will not pay for loss of or damage to; ... (d). Property that is missing, but there is no physical evidence to show what happened to it, such as shortage disclosed on taking inventory."

Alert brought this action seeking a declaration that the Policy covers the \$92,311 loss and alleging a cause of action for breach of contract. The case was tried to the court largely on stipulated facts. The trial court rejected Alert's contention that the Policy exclusion in question is ambiguous and ruled for Fireman's Fund on the ground that there was no physical evidence to show what happened to the \$92,311 in missing inventory.

Alert filed a timely notice of appeal.

Discussion

(1a) Alert's first contention is that the mysterious disappearance exclusion of the Policy is ambiguous. (2) On this issue the trial court's determination is subject to de novo review. "[I]nterpretation of an insurance policy is a question of law." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18 [44 Cal.Rptr.2d 370, 900 P.2d 619].)

(3) Insurance contracts, like all contracts, are interpreted to give effect to the mutual intention of the parties, which, if possible, is inferred solely from the written provisions of the contract. (11 Cal.4th at p. 18.) In this case no party offered any extrinsic evidence bearing on contract interpretation. Therefore the language of the insurance contract should be interpreted *754 according to the common and ordinary meaning of the words of the contract. "The 'clear and explicit' meaning of [the written provisions of a contract], interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' [citation], controls judicial interpretation. [Citation.]" (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822 [274 Cal.Rptr. 820, 799 P.2d 1253].)

(4a) "A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. [Citation.] But language in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract. [Citation.] Courts will not strain to create an ambiguity where none exists. [Citation.]" (*Waller v. Truck Ins. Exchange, Inc., supra*, 11 Cal.4th at pp. 18-19.) When a policy limitation is at issue, the language of the limitation must be plain and clear. (*Feurzeig v. Insurance Co. of the West* (1997) 59 Cal.App.4th 1276, 1283 [69 Cal.Rptr.2d 629].)

(1b) Alert argues that the Policy's mysterious disappearance exclusion is ambiguous in four respects. First, Alert argues that the term "physical evidence" is ambiguous. According to Alert, the meaning of the term is indeterminate because it is not defined by the Policy or by case law.

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We agree with Alert that the words of an exclusion must be part of the working vocabulary of the average person, and must be phrased in a logical manner. (See Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 1998) ¶ 4:150, p. 4-31.) But the words “physical” and “evidence” are not technical terms outside of common usage. The Oxford English Dictionary defines “evidence” as “[a]n appearance from which inferences may be drawn; an indication, mark, sign, token, trace” and as “[g]round for belief; testimony or facts tending to prove or disprove any conclusion.” The same reference source defines “physical” as “[o]f or pertaining to material nature, or to the phenomenal universe perceived by the senses; pertaining to or connected with matter; material.” (3 Oxford English Dict. (1933) pp. 346-347, 806.) One way of restating the common understanding of the phrase “physical evidence” is “tangible facts or circumstances.” The phrase is not inherently ambiguous.

Alert complains that the Policy contains no definition of “physical evidence.” (4b) But “[t]he absence from the policy of a definition of [a] term ... does not *by itself* render the term ambiguous.... Indeed, any rule that rigidly presumed ambiguity from the absence of a definition would be illogical and unworkable.” (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 866 [*75521 Cal.Rptr.2d 691, 855 P.2d 1263], italics in original.) Under some circumstances, the absence of a definition could be a factor to consider in determining whether a term is ambiguous; for example, where the words in question do not have a generally accepted meaning or where a technical term is used. (*Id.* at p. 867.) Here, however, a policy definition only would have served to restate non-technical, generally understandable terms by using other words. (1c) The absence of a policy definition does not make the words “physical evidence” ambiguous.

Nor is the absence of case law interpreting the policy language an indication of ambiguity. If it were necessary for policy language to be interpreted in a published court opinion before it could be considered unambiguous, the first case to consider any particular policy language always would hold

that the previously uninterpreted language was ambiguous. Obviously this would be an absurd result.

Alert offers an example that purportedly demonstrates why the term “physical evidence” is ambiguous. Alert hypothesizes a scenario in which a percipient witness watches a burglar enter an insured's building and leave carrying property. The burglar does not leave fingerprints, footprints or signs of forced entry. Because the Policy uses the term “physical evidence,” Alert contends that the exclusion might apply even though a witness can testify about the burglary. The answer to Alert's hypothetical really is not in doubt. Just as Ortbal's testimony about the condition of her office is testimony about physical evidence, testimony about the physical movements of a burglar into and out of a building and about the carrying of property would be testimony about physical evidence of theft. Fireman's Fund agrees with this construction.

But even if the answer to Alert's hypothetical were in doubt, this would not create an ambiguity that would affect application of the exclusion in this case. (4c) “ '[L]anguage in a contract must be construed ... in the circumstances of that case, and cannot be found to be ambiguous in the abstract.' [Citation.] 'There cannot be an ambiguity per se, i.e. an ambiguity unrelated to an application.' [Citation.] ” (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.*, *supra*, 5 Cal.4th at p. 867, italics omitted.) The ambiguity that Alert postulates based on its hypothetical is indeed a hypothetical ambiguity unrelated to the facts of this case. It cannot affect interpretation of the Policy on the facts presented here.

(1d) Second, Alert argues that the exclusion is ambiguous because it is unclear what quantum of physical evidence is required by the exclusion. The exclusion states that the insurer will not pay for loss of “[p]roperty that is *756 missing, but there is *no* physical evidence to show what happened to it” (Italics added.) The clear import of this language is that the exclusion will *not* apply if there is *some* physical evidence of what happened to the property. Fireman's Fund agrees with this interpretation. It adopts the position that “[w]here there exists

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evidence that is *probative or at least suggestive* of what happened to the missing property, the exclusion does not apply.” (Italics added.) The language of the exclusion clearly states that it applies only if there is no physical evidence to show what happened to the insured's property.

Third, Alert finds ambiguity in the phrase “to show what happened to” the missing property. Alert posits that this phrase might be interpreted to require evidence of where the property was taken or the ultimate disposition of the property. “ ‘Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists.’ ” (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.*, *supra*, 5 Cal.4th at p. 867, quoting *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 807 [180 Cal.Rptr. 628, 640 P.2d 764].) It is not reasonable to interpret the exclusion to require evidence of where a thief took the property. A commonsense reading of the exclusion is that it requires only some physical evidence of how the property was lost.

(5) Language of an insurance policy should be construed in the context of the instrument as a whole “ ‘with regard to its intended function in the policy.’ ” (*Feurzeig v. Insurance Co. of the West*, *supra*, 59 Cal.App.4th at pp. 1282-1283.) The Policy also includes an exclusion for theft by employees. When the Policy is read as a whole, it is clear that Fireman's Fund was not agreeing to insure against employee dishonesty or losses due to erroneous inventories. The point of requiring some physical evidence “to show what happened to” the property is for the insurer to have some assurance that the property was lost by theft, not to require proof of how the thief disposed of the property.

(1e) Fourth, Alert argues that it is uncertain whether the exclusion's reference to “shortage disclosed on taking inventory” should be construed as an example of sufficient physical evidence, or an example of what will not qualify as physical evidence. It is clear from the language of the exclusion as a whole, and from its context in the Policy, that a “shortage disclosed on taking inventory” is used as an example of a situation where “[p]roperty ... is missing, but there is no

physical evidence to show what happened to it ...” An inventory by itself does not show what happened to any property. It only establishes what property is on hand at a point in time, allowing a comparison to property on hand at other times and to records of property acquired and sold. This construction of the “shortage disclosed on taking *757 inventory” clause is consistent with the purpose of the exclusion: to exclude unexplained losses.

We hold that the court below correctly concluded that the mysterious disappearance exclusion is not ambiguous. (6a) Alert argues, however, that the trial court erroneously determined that there was no physical evidence to show what happened to the missing inventory items.

(7) “A judgment of the lower court is presumed correct, and all intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. [Citation.] Where no statement of decision is requested, it must be presumed that the trial court found facts necessary to support the judgment. [Citations.]” (*Roffinella v. Sherinian* (1986) 179 Cal.App.3d 230, 236 [224 Cal.Rptr. 502].) Given the short length of the trial, no statement of decision was required, and the trial court only stated his conclusion orally. (See Code Civ. Proc., § 632 [statement of decision may be made orally after a trial of one day or less].) Therefore we must uphold the judgment of the trial court if any analysis of the facts would support the conclusion that the exclusion applies.

(6b) The evidence concerning the tripping of the burglar alarm on January 23 and the disruption of Ortbal's office on the weekend prior to January 29 certainly qualify as “physical evidence.” The issue is whether the trial court properly could have concluded that these incidents were not “physical evidence to show what happened to” the property that was identified as lost on the basis of the January 31 inventory. There was substantial evidence that the two incidents had nothing to do with any theft of property. There was no sign of entry on either occasion. There was no indication that property in the warehouse was disturbed, moved or taken on either occasion. Ortbal's office

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was not found to be disturbed after the tripping of the burglar alarm on January 23. The state of Ortbal's office on January 29 thus is not evidence that any entry occurred on January 23. There was evidence that a rodent problem had been causing false alarms. There was evidence that some persons other than Ortbal had access to her office. Ortbal testified that there was no sign of entry into her office by window on January 29, thus distinguishing the incident of January 29 from later incidents when entry was made through the window air conditioner in Ortbal's office.

There was substantial evidence in the record to support the trial court's conclusion that there was no physical evidence that tended to account for what happened to the property identified as lost in the January 31 inventory. Thus the decision of the trial court must be upheld. *758

Disposition

The judgment in favor of Fireman's Fund is affirmed. Fireman's Fund shall recover its costs on appeal.

Epstein, Acting P. J., and Curry, J., concurred. *759
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