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NO. 56761-6-I

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

NCF FINANCIAL, INC., a Washington corporation
Appellant,

v.

ST. PAUL FIRE AND MARINE INSURANCE CO.,
Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

St. Paul Fire & Marine Insurance Company (“SPF&M”) respectfully submits this brief in response to NCF Financial Inc.’s (“NCF”) Brief of Appellant. The Honorable Michael J. Fox correctly granted SPF&M summary judgment because NCF’s coverage claim for property it leased to Emerald Solutions, Inc. (“Emerald”) that was discovered to be inexplicably missing years later is not covered under any of the two commercial property policies issued to co-defendant Emerald or the one commercial property policy issued to Emerald’s parent corporation, co-defendant Emerald-Delaware, Inc. (“Emerald-Delaware”).

To begin with, NCF’s claim for commercial property insurance coverage fails because it falls squarely within the plain language of the disappearance - inventory loss exclusion found in the only policy for which a timely claim could be made in this lawsuit; the policy issued to Emerald-Delaware (the “Third Policy”). The Third Policy expressly excludes coverage for missing property where, like here, there is no physical evidence to show what happened to the covered property.¹ As a result, the trial court correctly dismissed NCF’s claims against SPF&M as a matter of law.

¹ The identical exclusion is also found in the two policies issued to Emerald (the “First Policy” and the “Second Policy”).

NCF's rejoinder appears to be that the trial court erred because it failed to consider that NCF's claim also included property that was returned to NCF in a damaged state. NCF's basis for this argument is the allegations in the amended complaint and discovery responses, and the inadmissible statement of a witness who had no knowledge of when, where, or how any of the property that was returned to NCF was allegedly damaged before it was removed from "U-Haul type vehicles." Of course, all of this was considered and rejected by the trial court because the binding deposition testimony of NCF's CR 30(b)(6) witness on its damage claim is that NCF's entire claim is only for the replacement of property that was not returned to NCF. Moreover, NCF failed to meet its burden of producing evidence to show that any of the property removed from "U-Haul type vehicles" could be covered, as the Third Policy (like the other two) only provides coverage if, among other things, there is evidence that a covered cause of loss took place during the policy period. There is no such evidence here.²

Likewise, NCF's assertions that the disappearance - inventory loss exclusion only applies to a claim made by the named insured is misguided. NCF has already conceded on numerous occasions that it has no idea what

² NCF, in fact, has not proffered any basic claim information, such as, when, where or how the alleged loss happened (i.e., the date, location, circumstances, or number of events).

happened to the missing property and the policies clearly exclude coverage for missing property where there is no physical evidence to show what happened to the covered property. Because the exclusions make no reference to who is making the claim, and because SPF&M has demonstrated that the exclusion applies because there is no physical evidence to show what happened to the missing property, NCF's assertion that the contract exclusion somehow does not apply to it is wrong.

Moreover, NCF's alternative argument that the trial court erred in failing to find questions of fact (based on a recitation of inadmissible hearsay) which would support a finding of theft as the cause of loss, is unavailing. NCF has conceded on numerous occasions that it has no idea what happened to the missing property. NCF's attempt to rebut its binding testimony by offering up a hodgepodge of suppositions which might "lead a jury to conclude that theft by employees or others occurred"³ further concedes the obvious — there is no physical evidence to show what happened to the missing property.

Finally, because this Court can affirm the trial court's order on any theory established by the pleadings and supported by the proof,⁴ it can affirm the trial court's dismissal of NCF's claims against SPF&M on two

³ See Brief of Appellant at p. 30.

⁴ Gross v. Lynnwood, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978).

concurrent grounds. First, NCF's claim for commercial property insurance for property that is inexplicably missing does not fall within the insuring agreement of the "Third Policy." Significantly, NCF failed to meet its burden of producing any evidence to show what, if anything, happened to the equipment it leased to Emerald — other than the fact that Emerald-Delaware simply did not return all of it to NCF after going bankrupt sometime between January and February 2002. This is a critical lapse because the policy only affords commercial property coverage when there is evidence of "direct physical loss or damage" to covered property, i.e., actual physical alteration of the covered property. Similarly, there is no such evidence here.

Second, the trial court's order can be affirmed because the insurance policies do not afford NCF the right to bring a claim for coverage for its alleged loss. NCF is not identified as an insured in any of the policies. In addition, although NCF is identified as having the rights of an additional insured on an Evidence of Property Insurance ("EPI") issued by Emerald's insurance broker, those rights only apply by its own terms to the two policies that were issued to Emerald (the "First Policy" and "Second Policy"). There is no evidence, however, that a covered cause of loss took place during the First and Second Policy's effective policy periods. And even if there was such evidence, coverage for a loss

that occurred during those policies' policy period (consecutively, May 11, 1999 - November 11, 2001) would be time barred by application of the policies' suit limitation clauses, which state that an action for coverage is barred unless brought "within 2 years after the date on which direct physical loss or damage occurred." The suit limitation clauses apply here because this lawsuit was brought on November 30, 2003, more than two years after the Second Policy expired.⁵ Accordingly, NCF has no right to bring a claim because it would be time barred under the First Policy and the Second Policy, and because NCF never obtained the right to bring a claim under the Third Policy.

Consequently, the trial court's summary judgment ruling in favor of SPF&M should be affirmed in its entirety.

II. STATEMENT OF ISSUES

1. Whether the trial court was correct in dismissing NCF's claim for commercial property insurance coverage because coverage is excluded for property that is missing, where, like here, there is no physical evidence to show what happened to the property?

⁵ NCF's argument that its alleged loss occurred when it discovered the property was missing is untenable as the Washington Supreme Court in Panorama Village v. Allstate, 144 Wn.2d 130, 26 P.2d 910 (2001), held that there is no discovery rule for first party property claims — as the suit limitation clause begins to run from the time the physical loss or damage to property occurs.

2. Whether the trial court's ruling may be affirmed because NCF's claim for commercial property insurance coverage does not fall within the insuring agreement of the policies as NCF failed to meet its burden of showing that its claim involves "direct physical loss or damage" to covered property?

3. Whether the trial court's ruling may be affirmed because NCF failed to meet its burden of showing that it has the right to bring a claim for coverage?

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background

1. The parties

a. Emerald Solutions, Inc. and Emerald-Delaware, Inc.

Emerald Solutions, Inc., a wholly owned subsidiary of Emerald-Delaware, Inc., was a Portland, Oregon-based process and systems integration company that was established in 1997. Emerald provided such notable clients as American Airlines, AT&T, Nike, Texas Instruments and Walt Disney Company with internet consulting, design, and technology services from offices located throughout the United States. CP 115-117.

From November 15, 1999 through June 6, 2000, Emerald leased a number of items of computer equipment from NCF under the terms of Master Lease number 99-11090. CP 119-140. The Master Lease

incorporated thirteen Lease Schedules which, in turn, identified hundreds of items of computer equipment (lap tops, processors, monitors, cameras, printers, etc.), the date each item was leased, and the Emerald location for which the leased equipment was provided. CP 119-140. The bulk of the equipment was leased under Schedules 2 through 13.

The Master Lease required Emerald to provide NCF with evidence that the leased equipment was covered by property insurance and that NCF was named as an additional insured under the property insurance contracts. NCF, however, only received an Evidence of Property Insurance (“EPI”) for the Emerald policies. The EPIs, issued by Emeralds’ insurance broker, Marsh Advantage, lists NCF as an additional insured for SPF&M policy number TE08700143 (effective 05/11/99-05/11/00) (the “First Policy”) and TE01900068 (effective from 05/11/00 through 11/05/01) (the “Second Policy”). CP 142.

The EPIs also provides that NCF is an additional insured only for the property listed on one of the thirteen Lease Schedules, for example:

Certificate Holder (NCF Financial) is named as Additional Insured as respects equipment leased by Named Insured (Emerald Solutions Inc. of Washington), per Master Lease 99-11090, Supplementary Schedule No. 001.

CP 142.

Thus, while new coverage was subsequently purchased from SPF&M by a different named insured, Emerald-Delaware, for the period

November 11, 2001 through February 11, 2002, and although 90% of the total amount of equipment was subsequently leased by Emerald under Supplementary Schedules 2 through 13, apparently neither Emerald nor Emerald-Delaware obtained any other insurance coverage for NCF.

In 2001, Emerald-Delaware experienced financial difficulty and closed Emerald's doors. Emerald-Delaware then assumed the liabilities and obligations of Emerald and on October 16, 2001, Emerald-Delaware filed a Chapter 11 petition with the United States Bankruptcy Court for the District of Oregon. Emerald-Delaware, however, was unable to fulfill its obligations under the Master Lease, and during November 2001 and December 2001, it rejected all of the Master Lease Schedules.

CP 291-300. On December 20, 2001, the bankruptcy court also entered an order authorizing Emerald to sell off all of its non-leased assets to SBI, a non-affiliated entity. CP 177.

In November 2001, Emerald-Delaware also began returning the leased computer equipment to NCF. NCF inventoried and tested the equipment as it was being returned. CP 148. By January 24, 2002, NCF had completed its inventory of returned equipment and wrote to Emerald Delaware demanding the return of all computer equipment that had not already been returned. CP 155. In support of this demand, NCF provided

a chart listing all equipment that had been returned and identifying those items that were missing. CP 157-158.

Sometime between January and February 2002, during the winding down period of Emerald-Delaware's bankruptcy, Emerald-Delaware allegedly informed NCF that it had, in fact, returned all of the leased equipment in its possession. NCF claims that at this point, after taking an inventory, it discovered that much of its leased property had not been returned. CP 148.

To date, neither Emerald nor Emerald-Delaware has ever submitted a claim for first-party coverage for the leased equipment, and neither has tendered this lawsuit to SPF&M. In addition, neither Emerald nor Emerald-Delaware filed an appearance in this lawsuit, and an Order of Default Judgment was entered against them in the exact amount (\$1,161,148.35) identified by NCF in its claim for 1068 missing pieces of equipment. CP 2121-2122.

b. NCF Financial, Inc.

NCF is a Kirkland, Washington corporation that leases computer equipment. CP 146. As noted above, NCF leased certain equipment to Emerald between 1999 and 2000 that is now missing.

Although NCF knew as of February 2002 that Emerald-Delaware had failed to return over a thousand pieces of leased equipment, NCF

never learned what, if anything, happened to the equipment or why Emerald-Delaware failed to return it. NCF also did not file a police report regarding the missing equipment. CP 148-149 and 160.

Six months after the Master Lease schedules were rejected, on June 21, 2002, NCF filed a Motion for Allowance and Payment of Administrative Expense with the bankruptcy court to recover the alleged value of its missing equipment. CP 162-174. The bankruptcy court denied NCF's motion primarily because NCF could not explain when, where, or how its equipment disappeared and because NCF failed to sufficiently prove the value of the missing equipment. CP 176-181. To this day, NCF does not know why the leased equipment was not returned, what happened to it, when anything happened, or whether it became missing all at once or over time.

c. St. Paul Fire & Marine Insurance Company

SPF&M is a foreign insurance company that conducts insurance business in the State of Washington, having its primary place of business in St. Paul, Minnesota.

2. The insurance policies

SPF&M issued two insurance policies to Emerald:

- TE08700143 (effective 05/11/99-05/11/00) (the "First Policy"); CP 183-194 and

- TE01900068 (effective 05/11/00-11/11/01) (the “Second Policy”). CP 196-208.

SPF&M also issued an insurance policy to Emerald -Delaware:

- TE01900390 (effective 11/11/01-02/11/02) (the “Third Policy”). CP 210-221.

All three policies provide the following pertinent language:

Your Policy Period

* * *

Insuring agreements in this policy begin at 12:01 a.m., standard time, on the effective date.

Coverage ends at 12:01 a.m., standard time, on the expiration date.

* * *

Lawsuits Against Us

No one can sue us to recover under this policy unless all of its terms have been lived up to.

If your policy includes property insurance. 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.

* * *

Covered Causes Of Loss

We'll protect covered property against risks of direct physical loss or damage except as indicated in the exclusions - Losses We Won't Cover section.

* * *

Exclusions - Losses We Won't Cover

When we use the word "loss" in this section we also mean damage.

* * *

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.

* * *

Deductible

Your deductible is shown in the Coverage Summary. You'll be responsible for this amount of loss in each event. We'll pay the rest of your covered loss up to the limits of coverage that apply.

CP 183-221.

3. NCF's insurance claim

On May 30, 2002, NCF submitted a commercial party property claim to SPF&M under Emerald's Second Policy for the 1,068 items of computer equipment Emerald-Delaware had failed to return. CP 223-224. NCF enclosed a matrix, entitled "Emerald Solutions Lease 99-11090," which itemized the type and number of leased computer equipment that Emerald-Delaware did and did not return. The matrix approximated the replacement value of each missing item. Although NCF has never

actually replaced any of the missing equipment, its matrix estimated the equipment's replacement value at \$1,161,148.35.⁶ CP 226-229.

Significantly, NCF's May 30, 2002 claim letter failed to present any information that would entitle NCF to bring such a claim, and it also failed to provide any information evidencing what happened to the missing equipment. CP 223-224. On June 13, 2002, SPF&M timely responded to NCF's claim letter, requesting documentation from NCF evidencing its right to coverage under policies issued to Emerald and Emerald-Delaware. CP 231.

Having received no response to its June 13, 2002 letter to NCF, SPF&M wrote NCF again on February 6, 2003. In its letter, SPF&M advised NCF that coverage may not be afforded for its claim, as NCF had not provided any evidence that its property had suffered "direct physical loss or damage," and that certain policy exclusions may bar coverage. SPF&M's letter attached copies of pertinent policy provisions and requested that NCF submit a Proof of Loss for its claim. CP 233-235. In response, on April 4, 2003, NCF enclosed a copy of the Evidence of Property Insurance form discussed above and its Proof of Loss. CP 237-238. Significantly, NCF's Proof of Loss states, "NCF does not know how

⁶ Notably, the policies only provide replacement cost coverage for property that is actually replaced: "We won't pay on a replacement cost basis until property has actually been replaced."

its property was physically lost or stolen,” and that the date or dates anything happened to the property was not known. CP 160.

On April 18, 2003, SPF&M declined coverage for NCF’s missing property claim on the grounds that, among other things, NCF had not provided evidence that its property suffered “direct physical loss or damage” and the policies’ “disappearance - inventory loss” exclusion applied. CP 241-242. On August 22, 2003, SPF&M again responded to NCF’s continuing claim for coverage, advising that the employee dishonesty additional benefits coverage was inapplicable as the named insured had never made a claim for coverage. SPF&M referred NCF to its April 18, 2003 declination of coverage letter. CP 244.

On September 2, 2003, NCF forwarded copies of certain of Emerald-Delaware’s bankruptcy pleadings to SPF&M. In its cover letter forwarding these documents, NCF stated that while it did not know when the equipment was lost, NCF had discovered that not all of the equipment had been returned after NCF “took inventory of the returned equipment.” CP 248-250. As SPF&M’s September 22, 2003 response letter points out, none of the information NCF submitted established NCF’s date or dates of loss or the circumstances under which the property became missing. CP 252.

Finally, on October 22, 2003, in response to further claim correspondence from NCF, SPF&M wrote NCF explaining that NCF had not established that coverage was afforded for its claim and that SPF&M's position remained as stated in its April 18, 2003 declination of coverage letter. CP 254.

Accordingly, SPF&M had properly denied commercial property coverage to NCF because NCF could not show that it had a right to coverage under the policies, including the only one for which coverage is not clearly time barred, and because NCF also had not proffered any evidence to show what or when anything happened to the leased equipment. SPF&M also properly advised NCF that neither Emerald nor Emerald-Delaware had sought liability coverage for NCF's claim.

4. NCF's lawsuit

Notwithstanding the above claim facts, NCF filed this lawsuit against SPF&M on November 26, 2003. In its suit, NCF sought an award of coverage from SPF&M and of damages under Washington's Unfair Business Practices Act. NCF subsequently abandoned the latter claim when it filed its Amended Complaint. CP 291-300.

After the lawsuit was filed, NCF's responses to SPF&M's discovery further confirmed the flaws in its case. NCF conceded in deposition testimony, for example, that it has no evidence of its right to

bring a claim as an additional insured other than the EPI relating the policies issued to Emerald:

Q (Mr. Gottlieb) I asked when you came earlier today if you had any documents that you brought with you. My understanding is that your attorneys have already produced all the documents with respect to insurance, and I haven't been able to find any other evidence of property insurance except for one of the three policies for which you've brought suit and for only one of the 13 schedules. I'm wondering if you're aware of anything else that might convey some rights or benefits to your company with respect to the matters at issue in this lawsuit?

A. (Mr. Vittuli) No.

CP 147.

NCF also conceded that its claim involves an unexplained loss of missing equipment. This is apparent from NCF's statements in its Proof of Loss, discussed above, and also NCF's discovery responses. For example, in answer to an interrogatory asking NCF to explain the specific date and manner of loss for each item for which it seeks coverage, NCF gave the following response:

The leased equipment was either returned damaged or not returned.

CP 259-260.

In deposition testimony, NCF similarly conceded that it has no idea what happened to the missing leased equipment:

Q. (Mr. Gottlieb) Okay. Let's look at No. 9 where it says, "Date loss occurred," "NCF does not know the dates its property was physically lost or damaged."

Was that an accurate statement at the time?

A. (Mr. Vittuli) I think that's probably accurate. When a company is in Chapter 11 and they have multiple offices around the United States and the court has requested them to send us our equipment, it doesn't all show up on the same day where we're receiving it.

So its' – we do inventory as the equipment comes in. It might be a batch one day, might be a batch a week later, and that's what Steve White – his job was was tallying all that equipment.

So we could not know specifically when our equipment was lost or stolen until Emerald said, "you've got it all back."

Q. Well, I'm not sure you answered my question. I'm not sure I asked you if you knew when NCF knew about this problem, I'm asking you if it was true at the time that NCF did not know when its property was physically lost or damaged?

MR. TALL: Object to the form asked and answered.

MR. GOTTLIEB: No, I didn't get an answer to that or I wouldn't have asked it.

A. I was in contact with Nogi Asp regarding, "Are you shipping our equipment back?" and he's saying, you know, "yes, it's all on its way in" and dad a dad a, so eventually he says, "You've got it all back," which would have been around, you know, February or so of 2002.

So, if he's told us we've got all our equipment back and we've done an inventory of what was sent back, okay, and we're comparing it

to what we leased, then the balance is lost or stolen equipment because we never received it back.

CP 148.

In fact, apparently Emerald also had no idea what happened to the missing equipment:

Q. Okay. What did Mr. Nogi tell you happened to the equipment that wasn't returned?

A. I don't think he had any idea.

* * *

Q. Okay. And when you talked to Mr. Nogi, he didn't tell you what had happened to all this equipment that wasn't returned?

A. Well, you know, keep in mind these people are just hoping to get a paycheck week to week because they're in bankruptcy.

Q. Okay.

A. So he does not have – he's not too worried about insurance companies or leasing companies or anything like that, he's worried about where his next paycheck is coming from.

He was helpful with the information he had, but he did not tend to have a lot of information.

Q. So he couldn't tell you if one of these 3COM MHZ 56K items had been stolen; is that correct?

A. There was over a thousand pieces of equipment on the various leases, and I doubt that he remembered one specific item.

Q. So NCF was never told about the circumstances regarding the missing equipment; is that correct?

A. I think that's correct.

- Q. Okay. And did you do an investigation, let's say with respect to the Bellevue office, to find out if they had a theft, if anybody reported a theft of all the equipment that you had leased to them that was in that office?
- A. (Mr. Vittuli) We did not file a police report. Are you asking that?
- Q. (Mr. Gottlieb) I'm just asking if you did anything.
- A. We did not investigate – I did not investigate if there had been any kind of theft charges filed.

CP 149.

Indeed, NCF does not even know if a loss occurred during any policy period at issue:

- Q. Okay. The first insurance contract – and I know you're going to like this, okay, this is an insurance question, but don't let me throw you – the first insurance contract for which a claim was made has a policy period of May 11, 1999, through May 11, 2000. Okay? Do you have those dates in mind?
- A. Yep.
- Q. Okay. Does NCF have a loss that occurred during that policy period for which they're making a claim?
- A. During that period? I don't know.
- * * *
- Q. Okay. Let me re-ask my question: Do you know if a loss took place between May 11, 2000, and November 11, 2001, for which you're making a claim?
- A. I don't know if a loss took place.
- Q. And then the last policy period at issue here is a policy that was issued to Emerald-Delaware, Inc. it began on November 11, '01, and continued until February 11, 2002.

Do you know if a loss took place during that policy period?

A. Well that was during the equipment return period and that's when we determined not all the equipment was returned. So we don't know if it was lost or stolen, we just know we didn't get it back.

Q. That's when you learned about it, correct, sometime in that time frame?

A. Yes.

Q. But, again, you have no idea if the loss took place during that period?

MR. TALL: Object to the form.

Q. In other words, whether it was thrown out with the garbage, somebody came in and took it home with them, whatever happened to the thing that wasn't returned?

MR. TALL: Same objection.

A. I don't know exactly if equipment was lost during any of those specific dates that you just read.

CP 149-150.

During that same deposition, NCF acknowledged it was only making a claim for property that was missing, but not for property that may have been returned damaged. In this regard NCF testified:

Q. (Gottlieb) Okay. Is there any part of NCF's claim that has to do with the actual repair of an item that was damaged while in the possession of Emerald.

A.(Vittuli) I don't believe we put in repair costs.

Q. These are all replacement costs, then, for all items -

A. Yes

Q. in your claim?

So it would be fair to say NCF's claim is for the replacement of all items that were not returned at the end of the lease?

A. Or damaged. Is that what you're saying?

Q. Well, that's what I'm trying to find out.

A. These are replacement costs for everything that was not returned to us.

Q. Okay. Let's just kind of pursue that for a sec when you said "or damaged."

But my understanding is that the power cables, when it says, "replace or repair" -- and I go back to Mr. White's list - -it looks like they just weren't returned?

A. You can't repair a power cable for \$12, you got to buy a new one.

Q. Okay, So this is all replacement cost, correct --

A. Yes.

Q. -- the entire claim?

[The witness nods his head]

Q. Okay, thank you.

CP 2156.

B. Procedural History

SPF&M moved for summary judgment on three issues, any one of which was sufficient for the trial court to dismiss NCF's claim: 1) NCF did not have the right to bring a claim for coverage; 2) NCF failed to produce any evidence of direct physical loss or damage to property as

required by the insurance policies; and 3) the evidence, in fact, established that the disappearance - inventory loss exclusions barred coverage. CP 49-72. The trial court granted the motion and entered an order dismissing all of the claims asserted by NCF against SPF&M in this lawsuit with prejudice as a matter of law. CP 2104-2106.

To be sure, the transcript of the hearing shows that Judge Fox stated, among other things, that he found NCF to be an additional insured and that coverage was excluded by the disappearance - inventory loss exclusion. It also shows that counsel for NCF got an affirmative answer to his question of whether the court was making a finding that NCF was an additional insured. RP of July 22, 2005, p. 25, l. 1 - p. 26, l. 17. The court's order, however, does not include any "findings," CP 2115-2116, and even if it did, a ruling on the issue of whether NCF was entitled to bring a claim as an additional insured is a question of law which this Court can review *de novo*.⁷

IV. ARGUMENT

A. Summary Judgment Standard

Under Washington law, summary judgment is appropriate where "there is no genuine issue as to any material fact and the moving party is

⁷ See Robel v. Roundup Corp., 148 Wn.2d 35, 59 P.2d 611 (2002) ("Because a conclusion of law is a conclusion of law whenever it appears, any conclusions of law erroneously denominated a finding of fact will be subject to *de novo* review.").

entitled to judgment as a matter of law.” CR 56(c). Hines v. Dataline Sys. Inc., 114 Wn.2d 127, 148, 787 P.2d 8 (1990).

[A] nonmoving party may not rely on speculation or on argumentative assertions that unresolved factual issues remain. After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts which sufficiently rebut the moving party’s contentions and disclose the existence of a genuine issue as to a material fact. [citation omitted] Where reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment should be granted. [citation omitted] Summary judgment motions are important to the process of resolving disputes.

White v. State, 131 Wn.2d 1, 9, 929 P.2d 393 (1997).

A material fact is one upon which the outcome of the litigation depends. Chen v. State, 86 Wn. App. 183, 187-88, 937 P.2d 612 (1997).

If there is no issue of material fact, the court may grant summary judgment as a matter of law. State Farm Gen’l Ins. Co. v. Emerson, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984). In addition, the party bearing the burden of proof must come forward with sufficient evidence to establish the existence of each essential element of its case. Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 625, 818 P.2d 1056 (1991).

When the party bearing the burden of proof is unable to establish an essential element of its case, all other facts are immaterial and the moving party is entitled to summary judgment. Id.

The appellate court reviews orders of summary judgment by engaging in the same inquiry as the trial court. Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993).

B. The Trial Court Properly Found that Coverage is Barred by the Disappearance - Inventory Loss Exclusion

To begin with, the trial court, in dismissing NCF's claim for coverage, properly found that NCF's not entitled to coverage because the pertinent policy language contains an exclusion that bars coverage for the disappearance of property. The "Exclusions-Losses We Won't Cover" section provides:

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 220.

Washington courts consistently hold that where insurance policy language is clear and unambiguous, the court "must enforce it as written and may not modify it or create ambiguity where none exists." B&L Trucking & Constr. Co. v. Northern Ins. Co., 82 Wn. App. 646, 656, 920 P.2d 192 (1996) (citing McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 733, 837 P.2d 1000 (1992)). The policy language in this case is clear and unambiguous — there is no coverage for "property that is

missing . . . where there is no physical evidence to show what happened to the property.” CP 220.

While no Washington court has interpreted the “Disappearance - inventory loss” exclusion, a number of courts in other jurisdictions have found these exclusions unambiguous and have granted summary judgment in favor of insurers where the claims involved unexplained losses. For example, in Blasiar, Inc. v. Fireman’s Fund Ins. Co., 76 Cal. App. 4th 748, 90 Cal. Rptr. 2d 374 (1999), a California court found the disappearance - inventory loss exclusion unambiguous and barred coverage where there was no physical evidence to explain how certain telephone system components stored in a warehouse had disappeared. The policy exclusion in that case barred coverage for “property that is missing, but there is no physical evidence to show what happened to it, such as shortage disclosed on taking inventory.” Id. at 751 In affirming summary judgment in favor of the insurer, the court stated:

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

inventory” clause is consistent with the purpose of the exclusion: to exclude unexplained losses.

Id. at 756-757.

In Southern Ins. Co. v. Domino of California, 173 Cal. App. 3d 619, 219 Cal. Rptr. 112 (1986), the court held that coverage was precluded under an all-risk insurance policy where the claimant had discovered a shipment of women’s sweaters, valued at \$86,400, were unaccounted for two weeks after having been received by the policyholder. The policy in Southern Insurance barred coverage for “mere disappearance of property or loss or shortage of property disclosed on taking inventory.” Id. at 263. The court noted that while the property loss was not discovered during an “inventory” search, coverage was nevertheless precluded under the “disappearance of property” exclusion as the loss was inexplicable. Id.

In Jones v. Employers Mut. Cas. Co., 230 Neb. 549, 432 N.W.2d 535 (1988), a Nebraska court determined an all-risk property policy excluded coverage for unexplained shortages in gasoline at various pumping stations, notwithstanding evidence that employee theft was involved in loss in at least one location. The Jones court recognized an insured cannot meet its burden of showing its loss falls “within the terms of the policy” where the property inexplicably or mysteriously disappears. Id. at 558.

The Jones decision illustrates the difficulty an insured faces in proving a covered loss where property is inexplicably missing. In Jones, the court found that the insured, whose losses totaled \$36,140.21, “had no way of knowing whether one or several incidents contributed to the shortage. All he could say was that a shortage had occurred between two inventory periods. . . . The deductible was \$1,000 per occurrence. Therefore, if, for example, more than thirty-six incidents occurred at the Cornhusker station within the time period between inventories, that shortage would not be covered.” Id.

Finally, as the Second Circuit Court of Appeals pointed out in Atlantic Lines, Ltd. v. American Motorists Ins. Co., 547 F.2d 11, 13 (2d Cir. 1976), insurers who do not wish to insure the broad risk of unexplained losses “customarily incorporate an exclusionary clause in their policies exempting from coverage unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory.”

As these cases make clear, the “Disappearance - inventory loss” exclusion unambiguously precludes coverage for unexplained losses such as NCF’s inexplicably missing computer equipment. Since NCF has repeatedly conceded it cannot explain what, if anything, happened to its property and/or when an actual loss, if any, took place, SPF&M has met its burden of showing NCF’s claimed loss is barred by an express policy

exclusion. For this reason as well, SPF&M was entitled to a dismissal of NCF's claims with prejudice as a matter of law.

To avoid application of the plain language of this exclusion, NCF asserts that a Michigan case, Libralter Plastics v. Chubb, an Iowa case, Long v. Glidden Mut. Ins. Ass'n, and a New York case, McCormick & Co. v. Empire are more persuasive authority. See Brief of Appellant and CP 1062, 1068-1071. Strikingly, all three of these cases involve different contract language and, therefore, a different legal analysis.

For example, the Michigan case, Libralter, 199 Mich. App. 482, 502 N.W. 2d 742 (1993), is based on an analysis of different contract language, i.e., the "mysterious disappearance" exclusion. Moreover, it was that language which led to the dispute regarding whether the disappearance was truly "mysterious" or whether it could be explained by less mysterious means, i.e., theft.

The Iowa case, Long, 215 N.W. 2d 271 (Iowa 1974), on the other hand, not only involves different contract language, but a completely different type of insurance — fidelity coverage. While the policy in that case provided coverage for theft based on "substantial proof of theft by the insured," it further barred coverage for losses caused by a "mysterious disappearance." Similarly, in the New York case cited by NCF, McCormick, 690 F. Supp. 1212 (D.C. N.Y. 1988), the Second Circuit also

decided that different contract language was ambiguous under New York law. New York's highest court, however, has subsequently commented that the holding in McCormick "is an inaccurate interpretation of New York State law." See Maurice Goldman & Sons, Inc. v. Hanover Ins. Co., 80 N.Y.2d 986, 987, 607 N.E.2d 792 (1992).

As a close analysis reveals, each case identified by NCF involves either different contract language or inapposite legal analysis. On the other hand, SPF&M relies on cases with almost identical exclusionary language and circumstances regarding missing property that is remarkably similar to the case at bar. NCF has failed to present any sufficient reason why the disappearance - inventory loss exclusion should be inapplicable in this case.⁸

⁸ In opposing summary judgment, NCF also relied on Moneta Dev. Corp. v. General, 212 A.D. 2d 428, 622 N.Y.S.2d 930 (1995). CP 1067-1068. That case, involved a denial of coverage under contract language somewhat similar to the exclusion in this case. There, the court held that the term "physical evidence" in the exclusion was "sufficiently ambiguous to compel its interpretation in plaintiff's favor. Moneta, however, fails to track with Washington law. Under Washington law, it is a question of law whether language in an insurance contract is ambiguous and a contract is only ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable." See American Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co., 134 Wn.2d 413, 427-28, 951 P.2d 250 (1998). NCF, however, has never asserted that the exclusion at issue is ambiguous. It also has not proffered any reasonable interpretation of the "Disappearance - inventory loss" exclusion or the term "physical evidence," let alone one that is different from that advanced by SPF&M. Thus, there can be no finding of an ambiguity here.

1. NCF's entire claim is for property that was not returned

NCF asserts that the trial court erred in failing to consider that its claim involved property that was returned damaged. To the contrary, this issue was considered and rejected by the court for numerous reasons. First and foremost, in the deposition of NCF's CR 30(b)(6) corporate witness, NCF was asked to explain what NCF meant by "damaged property". NCF explained in its binding testimony⁹ that the claim for "damaged property" was merely for the reimbursement of accessory pieces missing from returned property:

Q. (Gottlieb) Okay. Is there any part of NCF's claim that has to do with the actual repair of an item that was damaged while in the possession of Emerald.

A.(Vittuli) I don't believe we put in repair costs.

Q. These are all replacement costs, then, for all items -

A. Yes

Q. in your claim?

So it would be fair to say NCF's claim is for the replacement of all items that were not returned at the end of the lease?

A. Or damaged. Is that what you're saying?

Q. Well, that's what I'm trying to find out.

⁹ See Casper v. Esteb Enters., 119 Wn. App. 759, 767-68, 82 P.3d 1223 (2004) (a corporation is bound by the deposition testimony of its designated 30(b)(6) witness).

A. These are replacement costs for everything that was not returned to us.

Q. Okay. Let's just kind of pursue that for a sec when you said "or damaged."

But my understanding is that the power cables, when it says, "replace or repair" -- and I go back to Mr. White's list - -it looks like they just weren't returned?

A. You can't repair a power cable for \$12, you got to buy a new one.

Q. Okay, So this is all replacement cost, correct --

A. Yes.

Q. -- the entire claim?

[The witness nods his head]

Q. Okay, thank you.

CP 2156.

Without question, the trial court was able to conclude from this that NCF had effectively conceded that its entire claim was for the replacement of missing equipment.¹⁰

Second, NCF's discovery responses confirm that NCF damages were only for the "value of the equipment that was not returned to the plaintiff." CP 257. This answer is consistent with the matrix NCF

¹⁰ See *Marshall v. AC&S, Inc.*, 56 Wn. App 181, 185, 782 P.2d 1107 (1989) ("When a party has given a clear answer to an unambiguous deposition question which negates the existence of a genuine issue of material fact, the party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.")

provided SPF&M with its claim, which also confirms that NCF's claim was only for the 1068 items of missing equipment. CP 226-229.

Curiously, NCF now claims that its discovery response indicates that it was also seeking to recover damages for the equipment that was allegedly returned damaged because it alleged (prior to the CR 30 (b)(6) deposition), that its damages included "lost rental value for property that was returned damaged or not returned at all." This allegation, which is refuted by the testimony of its corporate designee and the fact that the claim was only made for the property described on the matrix of missing equipment cannot provide a basis for any recovery, however, as the policies simply do not provide coverage for the lost rental value of covered business property.¹¹ As a result, NCF's assertion that there was a claim for damage to returned property that the trial court did not consider is unfounded.¹²

¹¹ The policies only provide a recovery for a covered cause of loss in the amount of the actual cash value ("ACV") or replacement cost value ("RCV") of the property, depending on certain other factors. It does not cover a loss in rental income.

¹² Once again, it is significant that NCF never met its burden of proof with respect to whether any of its lawsuit involves a covered claim as it never proffered any basic claim information such as when, where or how the alleged loss happened.

2. NCF does not somehow have rights that are superior to the named insured

NCF's also incorrectly asserts that the disappearance - inventory loss exclusion does not apply to NCF because it is not the named insured. The plain language of the exclusion provides, however, that it applies without any reference whatsoever to who is making the claim. It is applicable whenever there is no physical evidence to show what happened to the missing property — regardless of who made the claim.

NCF incorrectly relies on Standard Fire Ins. Co. v. Blakeslee, 54 Wn. App. 1, 771 P.2d 1172 (1989), and Unigard Mut. Ins. Co. v. Spokane Sch. Dist. No. 81, 20 Wn. App. 261, 579 P.2d 1015 (1978), to argue that the SPF&M commercial property insurance policy exclusions do not apply to NCF. All the court held in those cases is that an intentional act which causes a loss to be excluded from liability coverage for one named insured will not be imputed to an additional insured. 54 Wn. App. at 4, and 20 Wn. App. at 265. These cases have nothing to do with the property insurance coverage or the exclusions at issue here.

3. NCF cannot rely on inadmissible statements and rank speculation to try and create a question of fact

NCF's attempt to have this Court remand alleging that there are "numerous unresolved questions of fact" must be disregarded. NCF's "facts" are merely inadmissible statements about Emerald's

circumstances,¹³ and rank speculation about what might have happened to the property.¹⁴ What remains is an absence of any admissible physical evidence regarding what actually happened to the missing property (or when it happened, or how it happened, etc.). This is insufficient to escape the effect of this exclusion because, as the nonmoving party, NCF “may not rely on speculation or on argumentative assertions that unresolved factual issues remain.” White v. State, 131 Wn.2d 1, 9, 929 P.2d 393 (1997).

On the other hand, SPF&M relies on the testimony of NCF’s corporate CR 30(b)(6) witness who testified that NCF learned of the loss when it took an inventory of returned items and that NCF has no idea what happened to the missing property to meet its burden of producing admissible evidence on this exclusion. SPF&M also relies on NCF’s discovery responses where this admission is repeated.

¹³ Of course, none of this is relevant to show “what happened to the property.”

¹⁴ NCF suggests (based on a recitation of inadmissible hearsay) that a jury may find that covered property sent to over thirteen locations from 1999 through 2001 was lost due to theft by employees or others in Portland “sometime after November 2001.” CP 1070. This is not physical evidence of what happened to the property — it is merely speculation about what could possibly happen to the property if, in fact, it was at a certain locations at the requisite time. To be sure, this speculation about the loss amounts to nothing more than a concession that there is no physical evidence to show what happened to the missing property.

To be sure, NCF may argue that the inadmissible statements it is seeking to have this Court review are somehow admissible because the trial court did not rule on SPF&M's Motion to Strike,¹⁵ which is identified in the trial court's order as one of the pleadings it considered in rendering its ruling. CP 2116.

The rule in Washington, however, is that in opposing a motion for summary judgment, a party must provide affirmative factual evidence. See CR 56(e) and Mackey v. Graham, 99 Wn.2d 572, 663 P.2d 490, cert. denied, 464 U.S. 894 (1983). Thus, while a ruling on a motion to strike is within the trial court's discretion, the trial court should "consider only admissible evidence in a motion for summary judgment." Burmeister v. State Farm Ins. Co., 92 Wn. App. 359, 365, 966 P.2d 921 (1998) (citing King County Fire Protection Dist. No. 16 v. Housing Auth., 123 Wn.2d 819, 826, 872 P.2d 516 (1994); and Dunlap v. Wayne, 105 Wn.2d 529, 535, 716 P.2d 842 (1986)). With these rules in mind, the Washington Supreme Court held that "... a trial judge is presumed to know the rules of evidence and is presumed to have considered *only* the evidence properly before the court, and for proper purposes." In Re Harbert, 85 Wn.2d 719, 729, 538 P.2d 1212 (1975). Accordingly, although the trial

¹⁵ SPF&M moved to strike certain portions and exhibits to the Declarations of Steve White, Joe Vittuli and David Tall on the grounds that these materials, filed in opposition to SPF&M's motion for summary judgment, contained significant evidentiary infirmities. CP 2126-2153.

court did not to rule on SPF&M's motion to strike certain evidence in this matter, it does not mean that it actually considered any evidence that was inadmissible. Instead, it must be presumed that the trial court only considered admissible evidence in ruling on the motion for summary judgment and that it disregarded the hearsay and otherwise inadmissible evidence submitted via declarations by NCF.

Accordingly, the trial court's ruling should be affirmed for these reasons.

C. The Trial Court's Ruling may also be Affirmed for Other Reasons Established by the Pleadings and Supported by the Proof

The Washington Supreme Court confirms that our appellate courts are "committed to the rule that [they] will sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof." Gross v. Lynnwood, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978) (citing to State ex rel. Weiks v. Tumwater, 66 Wn.2d 33, 400 P.2d 789 (1965); and Lundberg v. Corporation of Catholic Archbishop, 55 Wn.2d 77, 346 P.2d 164 (1959)). See also Piper v. Department of Labor & Indus., 120 Wn. App. 886, 890, 86 P.3d 1231 (2004) and LaMon v. Butler, 112 Wn.2d 193, 200-201, 770 P.2d 1027 (1989) (both holding that an appellate court may affirm a trial court on any theory supported by the record).

As the foregoing cases make clear, even where there are multiple grounds upon which a trial court could have granted summary judgment, the trial court's ruling may be affirmed on any one of those grounds. In this case, for example, SPF&M moved for summary judgment on multiple grounds, any one of which was sufficient for the trial court to dismiss NCF's claim: 1) NCF did not have the right to bring a claim for coverage; 2) NCF failed to produce any evidence of direct physical loss or damage to property as required by the insurance policies; and 3) the evidence, in fact, established that the disappearance - inventory loss exclusions barred coverage. CP 49-72. The trial court granted SPF&M's motion in its entirety and entered an order dismissing all of the claims against SPF&M with prejudice as a matter of law. CP 2104-2106. The order did not specify which of the multiple grounds for dismissal the trial court found persuasive.

As a result, because the trial court's ruling may be affirmed on any one of the grounds asserted by SPF&M, if this Court finds any one ground availing, the trial court's ruling granting summary judgment in favor of SPF&M should also be affirmed for the following concurrent reasons.

1. The trial court's ruling should be affirmed because NCF's claim does not fall within the insuring agreement of any insurance policy

Determining coverage is a two-part process: An insured must first show that its loss falls within the contract's insuring agreement.

McDonald v. State Farm Fire & Cas. Co., 119 Wn 2d 724, 730, 837 P.2d 1000 (1992). Assuming the insured can do this, coverage will still not be afforded if the insurer proves the loss is excluded by specific policy language. Id. Here, there is no coverage for NCF's loss, as NCF cannot show that its loss falls within the insuring agreement, and SPF&M can prove its policies exclude this loss.

NCF seeks insurance coverage for property that was not returned to it sometime after Emerald-Delaware went bankrupt. NCF, however, has not proffered any evidence regarding what, where, when, or how anything actually happened to the property. Such a loss, therefore, does not fall within the pertinent insuring agreement, which provides:

Covered Causes Of Loss

We'll protect covered property against risks of direct physical loss or damage except as indicated in the Exclusions - Losses We Won't Cover section.

CP 219.

Based on this language, in order for NCF's loss to be covered, it must show that covered property sustained direct physical loss or damage.

NCF cannot do this, however, since it has not produced any evidence to show whether the leased property suffered any damage at all.

There is ample support for this conclusion. To begin with, general principles of insurance law provide that the term “direct physical loss or damage” requires proof that the property at issue has been physically altered:

The requirement that the loss be ‘physical,’ given the ordinary definition of that term is widely held to exclude alleged losses that are intangible or incorporeal, and thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.

10 Couch on Insurance, § 148:46 (3d ed.).

In addition, at least two Washington courts have also recognized that the term “physical loss or damage” requires evidence of actual physical alteration of the property. For example, in Wolstein v. Yorkshire Ins. Co., Ltd., 97 Wn. App. 201, 212-13, 985 P.2d 400 (1999), this Court adopted the Fifth Circuit’s definition of the term “physical loss or damage” as it pertains to property insurance. In its holding, the Fifth Circuit stated that, “[t]he language ‘physical loss or damage’ strongly implies that there was an initial satisfactory state that was changed by some external event into an unsatisfactory state -- for example, the car was undamaged before the collision dented the bumper.” Id. (quoting Trinity

Indus., Inc. v. Insurance Co. of N. America, 916 F.2d 267, 270-271 (5th Cir. 1990)).

Similarly, in Fujii v. State Farm Fire & Cas. Co., 71 Wn. App. 248, 857 P.2d 1051 (1993), a Washington appellate court affirmed summary judgment in favor of an insurer where the insureds had not proven that their property sustained discernible damage. In that case, the insureds sought first-party property coverage, arguing that their home was at risk of imminent harm from landslide due to surrounding hillside instability. Id. The insurance policy at issue required evidence of “direct physical loss or damage.” Id. The court reasoned there was no relevant loss triggering coverage under the policy because there was no evidence of “discernible physical damage” to the property. Id.

Other courts also require that a policyholder prove discernible or tangible physical damage to property in order to be entitled to coverage. In Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass’n, 793 F. Supp. 259 (D. Or. 1990), aff’d, 953 F.2d 1387 (9th Cir. 1992), an Oregon District court found that coverage was not afforded for the cost of removing asbestos which was discovered during remodeling, where the insurance policy covered only “direct physical loss” to property. The court explained its holding as follows:

There is no evidence here of physical loss, direct or otherwise. The building has remained physically intact and undamaged. The only loss is economic. The policy, by its own terms, covers only direct physical loss. The inclusion of the terms “direct” and “physical” could only have been intended to exclude indirect, nonphysical losses.

Id. at 263.

The same result was reached in Leafland Group-II, Montgomery Towers Ltd. P’ship v. Insurance Co. of N. Am., 118 N.M. 281, 881 P.2d 26 (1994). In that case, the court rejected an insured’s claim under a first-party property policy where the insured sought coverage for losses stemming from the presence of asbestos it had discovered in its property. The court noted that the insured could “point to no event that happened during the time the policy was in effect that caused “direct loss or damage” to its property.” Id. at 283.

As these cases make clear, to be afforded commercial property insurance coverage, NCF must show that its covered property sustained actual harm. In this case, NCF has simply failed to meet this burden. The only evidence NCF has provided is that Emerald-Delaware did not return certain property Emerald had leased from NCF. That is not evidence that something actually happened to physically change or alter any property. Accordingly, because NCF cannot meet an essential element of a claim for

commercial property insurance coverage, the trial court ruling may also be affirmed for this alternative reason.¹⁶

2. The trial court may be affirmed because NCF does not have the right to make a claim for coverage under any insurance policy

Alternatively, this Court can affirm the trial court for the following concurrent reason that NCF does not have the right to make a claim for coverage under any insurance policy at issue. The two policies issued to Emerald and one policy issued to Emerald-Delaware do not list NCF as a named insured. In addition, the EPIs that NCF has produced unequivocally state that NCF has the rights of an additional insured only for the policies issued to Emerald. There is no EPI for the other policy. As a result, NCF only has the rights of an additional insured, if any, under the First Policy and Second Policy.¹⁷

Those two policies, however, collectively inception 05/11/99 and expired 11/11/01, at which time coverage ended. They also contain “suit limitation” clauses, which bar coverage for claims brought two years after

¹⁶ This is also consistent with the requirement that the insured pay a deductible for each event. Where, as here, the additional insured cannot explain what happened to multiple items of property, there is no way of ascertaining how many events occurred and, therefore, no way of ascertaining how many times the deductible would apply.

¹⁷ As discussed above, NCF’s rights as an additional insured under that EPI are expressly limited to coverage for those items of equipment listed on Lease Schedule 1 of the Master Lease, but not for those items listed on Lease Schedules 2-13.

the date on which the direct physical loss or damage occurred. CP 196-208.

Under Washington law, so long as the limitations period is at least one year, RCW 48.18.200 allows a property insurer to include a suit limitation clause in its insurance policy. RCW 48.18.200(c). Washington courts have long upheld the validity of suit limitation clauses in insurance contracts. Hefner v. Great Am. Ins. Co., 126 Wash. 390, 218 P. 206 (1923).¹⁸ Washington courts have also found suit limitation clauses neither ambiguous nor unreasonable. Ashburn v. Safeco Ins. Co. of Am., 42 Wn. App. 692, 695, 713 P.2d 742 (1986). Moreover, suit limitation clauses do not violate general statutes of limitations or other statutory provisions. Wothers v. Farmers Ins. Co. of Wash., 101 Wn. App. 75, 79-80, 5 P.3d 719 (2000) (quoting Yakima Asphalt Paving Co. v. Department of Transportation, 45 Wn. App. 663, 666, 726 P.2d 1021 (1986)).

Thus, because suit limitation clauses are valid, unambiguous, reasonable and enforceable, NCF's claims against SPF&M fail for numerous reasons. First, NCF can only show that it has the rights of an additional insured, if any, for the two policies issued to Emerald. Those

¹⁸ Where the court stated, “[w]e have uniformly held that a clause in such a contract fixing a limitation of the time in which suit is sustainable is a valid one.” See also Simm v. Allstate Ins. Co., 27 Wn. App. 872, 874-75, 621 P.2d 155 (1980) (holding that the phrase “inception of loss” in property policy means date of such loss, not date on which cause of action accrued).

policies, however, only provide coverage for covered losses that occurred between 05/11/99 and 11/11/01. Thus, even if the alleged loss was covered by these policies, which it is not, NCF's suit for coverage is time barred with respect to the policies issued to Emerald because the last one expired on November 11, 2001, more than two years before November 30, 2003, the day this suit was filed.

Second, while NCF cannot show that it has the rights of an additional insured for the Third Policy, even if it could, NCF cannot seek recovery under that policy as there is no discovery rule for suit limitation clauses. RCW 48.18.200 explicitly states that the suit limitation clause period begins to run "from the date of the loss." Similarly, each SPF&M suit limitation clause states that an action for coverage must be brought "within two years after the date on which the direct physical loss or damage occurred." NCF, however, has not and cannot provide the date on which physical loss or damage occurred, if any.

An unbroken line of Washington appellate decisions also roundly rejects the applicability of a discovery rule for suit limitation clauses. For example, in Cope Constr. Co. v. American Home Assur. Co., 28 Wn. App. 38, 622 P.2d 395 (1980), Cope asked the court to read a discovery rule into the statute governing suit limitation clauses. The court unequivocally

refused. Id. at 48-49 (1980).¹⁹ More recently, in Panorama Village v. Allstate, 144 Wn.2d 130, 26 P.3d 910 (2001), the Washington Supreme Court also unequivocally refused to apply the discovery rule to a suit limitation clause. Id. at 137.²⁰

With those rules in mind, to prevent the suit limitation clause from barring the claims NCF alleges in its suit filed November 2003, NCF would have to demonstrate that it has the right to bring a timely claim for coverage and that direct physical loss or damage to covered property occurred between November 30, 2001 and February 11, 2002 — the effective dates of the Third Policy. Fatal to its claim, NCF only asserts that it discovered the alleged loss “by February 2002.” Because NCF has no evidence that any direct physical loss or damage occurred within the short time frame that would allow it to bring a timely suit for coverage, NCF’s claims against SPF&M must fail.

Of course, it is anticipated that NCF will offer numerous arguments in support of its position that it has the right to bring a claim under the Third Policy. First, NCF may assert that the EPIs issued for the Emerald Policies are applicable by operation of law to the Third Policy.

¹⁹ The court stated that “RCW 48.18.200 does not make discovery relevant to determining the validity of such provisions. The statute is concerned with the date of the *loss*, rather than the date of its *discovery*. The expanded ‘discovery rule’ . . . is simply inapplicable to RCW 48.18.200.”

²⁰ See also Chaffee v. Chaffee, 19 Wn.2d 607, 625, 145 P.2d 244 (1943).

This is based on NCF's likely reliance on Olivine v. United Capitol Ins., Co., 147 Wn.2d 148, 52 P.2d 494 (2002). But, unlike the case at bar, Olivine involves the cancellation of a "claims made" policy by a premium finance company. This is not authority which can support NCF's position that when an insurance policy terminates because the named insured no longer exists, the insurance company must give notice to certificate holders under penalty of continuing coverage.²¹ As a result, this argument should be disregarded.

Second, NCF may assert that it has a valid assignment from Emerald Delaware to assert a claim under the Third Policy on Emerald Delaware's behalf. Each policy, however, prohibits assignment without the consent of the insurer. NCF does not have evidence of SPF&M's consent to any such assignment, which renders it an invalid assignment. Additionally, notwithstanding the language prohibiting transfer without the insurers consent, Washington law only allows for an assignment of rights if the assignment is done to transfer a right to collect on a claim which occurs after the loss. See Kagele v. Aetna Life & Cas. Co., 40 Wn. App. 194, 197, 698 P.2d 90 (1985). This exception does not apply here because neither Emerald nor Emerald Delaware has ever submitted a

²¹ NCF also has an affirmative duty to read the entire insurance contract and to be on notice of its limitations. It cannot use "detrimental reliance" as an argument. See Dombrowsky v. Farmers Ins., 84 Wn. App. 245, 256, 928 P.2d 1127 (1996).

claim against SPF&M. Thus, NCF did not receive by assignment a potentially valid claim for property coverage, if any, for the Third Policy.

NCF may wish to have this Court extend Washington law and allow it the right to submit a claim against SPF&M on Emerald's behalf. In light of this request, and in addition to SPF&M's prior arguments, it is significant that in the seminal case of Henkel Corp. v. Lloyd's of London, 29 Cal. 4th 934, 62 P.3d 69 (2003), a California appellate court recently denied such a request and held that policy benefits can only be assigned without the consent of an insurer once the event giving rise to liability has occurred, "(1) when at the time of the assignment the benefit has been reduced to a claim for money due or to become due, or (2) when at the time of the assignment the insurer has breached a duty to the insured, and the assignment is of a cause of action to recover damages for that breach." Of course, neither of those circumstances is present in this case. The Henkel case recognizes that without such limitations, an insurer may face additional, uncalculated exposure, if the predecessor corporation (here the named insured, Emerald) still could bring a claim against the insurer for injury that occurred before its dissolution. Id. at 944-945. Since SPF&M might potentially still face such additional exposure, NCF's assignment analysis would be further flawed.

Finally, NCF may assert that it has the right to bring a claim for its entire insurable interest under the Third Policy. The Washington Supreme Court, however, in Postlewhite Const. v. Great American Ins. Co., 106 Wn.2d 96, 99, 720 P.2d 805(1986), held that “where a lessor is not named as an additional insured or a loss payee on the lessee’s insurance policy, the lessor is not an intended third party beneficiary of the policy and may not directly sue the insurer for breach of the insurance contract.” The holding in that case eviscerates NCF’s argument as a matter of law.

Accordingly, this Court has multiple grounds upon which it may affirm the trial court’s ruling that NCF’s claims for property insurance coverage were properly dismissed as a matter of law.

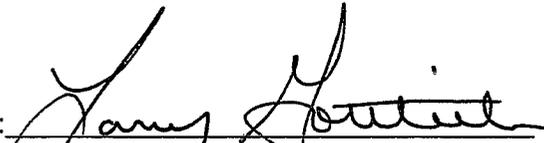
V. CONCLUSION

The trial court correctly ruled that NCF’s claim is barred by the exclusionary language found in the commercial insurance policies issued to Emerald and Emerald Delaware. That is because the contract language in the policies address the very fact pattern presented by NCF’s claim — there is no coverage provided for property that is inexplicably missing over an undefined period of time. Without facts, policy language, or law to support its position, NCF asks this Court to remand this case for a determination of fact questions that do not bear in any way on the material issues before the Court. This Court should decline the invitation to do so

and affirm the trial court's dismissal of NCF's claims against SPF&M for that reason, and for any of the other reasons set forth above.

RESPECTFULLY SUBMITTED this 13th day of December, 2005.

GORDON & POLSCER, L.L.C.

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CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Gordon & Polscer, L.L.C., whose address is 1000 Second Avenue, Suite 1500, Seattle, Washington 98104.

2) By the end of the business day on December 13, 2005, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Brief Of Respondent; and**
- **Certificate of Service.**

David M. Tall
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- Hand Delivery
- Telefax
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-

Dale L. Kingman
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- U.S. Mail
- Hand Delivery
- Telefax
- UPS
-

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

DATED this 13th day of December, 2005.

Valerie D Marsh
Valerie D. Marsh