

56761-6

56761-6

80368-4

NO. 56761-6

King County Superior Court Cause No. 03-2-41520-1 SEA

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

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

v.

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

BRIEF OF APPELLANT

Attorneys for Plaintiff/Appellant NCF Financial, Inc.

David M. Tall
Oseran Hahn Spring & Watts, P.S.
10900 NE Fourth Street #850
Bellevue WA 98004
425-455-3900

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2005 NOV 14 PM 2:57

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. ASSIGNMENT OF ISSUES	1
II. STATEMENT OF THE CASE.....	1
III. ARGUMENT	14
A. The Trial Court Erred in Dismissing all Claims of NCF Without Consideration of Remanding its Claim for Damaged Property Which was Returned for Trial on the Merits.	14
B. The Trial Court Erred in Failing to Distinguish NCF’s Independent Claim as an Additional Insured for Property Which was not Returned from Emerald Solutions from a Claim Asserted for Missing Property While in NCF’s Possession.	18
C. The Trial Court Erred in Failing to Find Questions of Fact, the Resolution of Which Would Support a Claim that the Property was Stolen While in Emerald Solutions’ Possession, Thereby Satisfying the Disappearance Exclusion.	27
IV. CONCLUSION.....	32

TABLE OF AUTHORITIES

Page

Cases

<u>Agricultural Ins. Co. v. A. Rothblum, Inc.</u> , 147 Misc. 865, 265 N.Y.S. 7.....	24
<u>Blasiar, Inc. v. Firemen’s Fund Ins. Co.</u> , 76 Cal. App. 4748 (1999).....	30, 32
<u>Couch on Insurance</u> , 3d. § 151:42	28, 32
<u>Del Bello v. General Accident Ins. Co. of America</u> , 185 A.D.2d 691, 585 N.Y.S.2d 918.....	19, 20, 21
<u>Libralter Plastics, Inc. v. Chubb Group of Ins.</u> , 199 Mich. App. 482, 502 N.W.2d 742 (1992).....	28, 29, 30, 32
<u>Long v. Glidden Mutual Ins. Assoc.</u> , 215 N.W.2d 271 (Iowa, 1974)	29
<u>McCormick & Co. v. Empire Ins. Group</u> , 690 F.Supp. 1212 (1988).....	26, 27, 30
<u>Miller v. Boston Insurance Company</u> , 420 P.A. 566, 218, A2d.275 (1966).....	23,25-26,30
<u>Standard Fire Ins. Co. v. Blakeslee</u> , 54 Wn. App. 1, 771 P.2d 1172 (1989).....	21
<u>Unigard Mutual v. Spokane School District</u> , 20 Wn. App. 261, 579 P.2d 1015.....	21

I. ASSIGNMENT OF ISSUES

1. The Court erred in granting summary judgment dismissing all claims of NCF based upon the St. Paul contract's disappearance exclusion, without consideration of NCF's claim for property returned in a damaged state, which claim should have been remanded to trial for determination.
2. The Court erred in failing to distinguish NCF's independent claim submitted as an additional insured for property which was not returned to NCF from Emerald Solutions from a claim for property that was missing while in NCF's possession.
3. In the alternative, the trial court erred in failing to find questions of fact, the resolution of which would support theft as the cause of loss of the subject property while in Emerald Solutions' possession.

II. 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, Defendant Emerald Solutions entered into a lease agreement with NCF under which Emerald Solutions leased computer equipment from NCF. The lease included a Master Lease

and 13 Schedules of equipment. 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 Defendant St. Paul. The coverage was placed through Defendant 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.*

To assist in determining the limits of coverage, Emerald Solutions prepared a listing report of personal property. Such file listing described computer equipment and various vendors. The file listing included NCF's leased equipment, and it appeared that the 13 schedules were referenced under numbers 001583, 001584, 001644, 001645, 001666, 001667,

001668, 001672, 001692, 001707, 001933, 001934, and 001935 within such listing. *CP 82A, pgs. 1076-1077; 1121-1153.*

NCF issued monthly invoices under the Master Lease, which Emerald Solutions paid by check, between the period of December 2000 through November 12, 2001. The lease payment due for the equipment on the 13 schedules amounted to \$47,788.96 per month. Except for the month of October, which check was received on November 2, 2001 in the amount of \$25,591.92, each monthly payment from December 2000 through November 2001 was for the full amount due for all equipment listed on Schedules 1-13. *CP 82A, pgs. 1077; 1154-1611.*

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.*

A partial October rent payment was received on November 2, 2005, and paid for the post petition rent accruing for the month of October after the filing of the petition (to wit: \$25,591.92). *CP 82A, pgs. 1077;1611.*

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 (to wit: within 11 months). *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 SBI. *CP 82A, pg. 1078.*

On December 19, 2001, Michele Nicholson of Emerald Solutions faxed to NCF's legal counsel proof of that insurance, which proof consisted of the second Evidence of Property Insurance Certificate with an effective date of May 11, 2000 and continuing until terminated, naming NCF Financial as an additional insured. *CP 82A, pgs. 1078; 1854-1857.*

On or about January 2002, NCF, through its legal representative, forwarded a demand letter to Defendant 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, Defendant 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 that was listed on Schedules 1-13 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.*

Steve White, at the time of signing his declaration in opposition to St. Paul's motion for summary judgment, was employed as a computer programmer for Compact Information Systems in Redmond Washington. He had been engaged in the IT Industry for 17 years and from 1992 until 2002, was an employee of NCF Communications, Inc., a subsidiary company of NCF Financial. *CP 79, pgs. 314-315; CP 90, pgs. 2031-2032.*

Among the services he performed for NCF was to oversee the return of leased computer equipment, inspect returned equipment, and prepare such equipment for re-use or sale. In some instances, he had to

repair equipment returned in order for it to be re-usable or sold. *CP 79, pg. 315; CP 90, pg. 2032.*

In 2002, Mr. White oversaw the return of equipment to NCF by Emerald Solutions. In most respects, it was no different than any of the other return jobs on which he worked. He would log in the equipment as it was returned. He would then inspect the equipment to determine if it was the correct equipment and if it was in good working order. He also assessed its overall condition to determine if it was reusable or capable of being sold. *CP 79, pg. 315; CP 90, pg. 2032.*

The Emerald Solutions matter was unusual in that much of the equipment that was returned was damaged. When the equipment was returned, it mostly came by truck from Portland. The trucks used were simple U-Haul type vehicles. The equipment was placed in the floor of the vehicle with no padding or other type of protection. *CP 79, pg. 315; CP 90, pg. 2032.*

As Mr. White unloaded the equipment from the trucks, some of it was visibly damaged. Some of it was not noticeably damaged until he began testing the equipment for operability. Many of the servers and workstations no longer had the original software that had been placed on those machines at the time of delivery. This diminished their value.

Almost none of the equipment had cables or cords that were necessary to operate them. In some cases, Mr. White would take parts from one computer and place them into another unit. In this way, he created one or more usable units. *CP 79, pg. 315; CP 90, pg. 2032.*

In the course of this inspection, Mr. White also determined which equipment had not been returned. In making this determination, he did not include equipment that had been rehabilitated by the transfer of parts as describe in the previous paragraph. The result of this process was a chart setting forth the number and type of missing items, as well as the replacement value for each. Mr. White routinely made such lists in the ordinary course of his duties for NCF. *CP 79, pg. 316; CP 90, p. 2033.*

Page 1 of Exhibit A to Mr. White's declaration filed in opposition to the summary judgment referenced four Princeton 17 black case pieces of computer equipment that were returned dead on arrival. That page also listed a number of Dell Celuron laptop computers that were missing power cords or adapters, essentially rendering such returned equipment useless. *CP 79, pg. 319.*

Page 2 of Exhibit A listed three Power Edge 2400 SMI's, which either failed to load or were dead on arrival. *CP 79, pg. 320.*

On that same page, two APC pieces of equipment were listed either with a major dent in the back or missing the lower front cover. *CP 79, pg. 320.*

Page 3 of Exhibit A listed a Dell Celuron with its screen shattered and multiple Dell Celurons plus Toshiba computers with power cords or adapters missing, rendering such equipment returned useless. At least five of the Toshibas were listed as dead on arrival on that page 3. There were also Dell Pentium III computers listed with RAM chips removed or scratches on the case. *CP 79, pg. 321.*

Page 3 also listed a Power Edge 6300 SMI that was dead on arrival. *CP 79, pg. 321.*

Plaintiff's amended complaint, under paragraph 3.16, stated:

After crediting payment received from sales approved by the bankruptcy court, Plaintiff made demand upon Defendant St. Paul to cover its loss for property damaged as well for property not returned and filed a Proof of Claim with Defendant St. Paul in or about May 2002, which Proof of Claim has been wholly rejected.

CP 55, pg. 295.

Consistent with that allegation, in answer to Interrogatory No. 5 of Defendant St. Paul's First Set of Interrogatories, Plaintiff stated that "its

damages include ... (iv) loss rental value of the equipment which was returned damaged or which was not returned at all ..." *CP 41, pg. 257.*

In answer to Interrogatory No. 10 of those same set of interrogatories, Plaintiff answered subsection (d) as follows, "the leased equipment was either returned damaged or not returned. NCF objects to the term "disappear" as it did not disappear from NCF." *CP 41, pg. 261.*

However, in St. Paul's reply to NCF's response to its summary judgment, St. Paul cited answer to Interrogatory No. 5 incorrectly by referencing answer to Interrogatory No. 1 and failed to include the full answer including that portion referring to "equipment which was returned damaged." *CP 87, pg. 2015.*

St. Paul further took out of context a portion of the Vitulli deposition testimony. However, that portion of the testimony cited did include the following:

Q: 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.

CP 87, pg. 2014.

In later testimony, in that same deposition, the following testimony was given:

Q: What happened to the equipment that was returned?

A: Eventually we sold what we could.

Q: When you say, “we,” is that NCF had a sale?

A: NCF. Steve White actually handled most of the sales because he was – had it all at the warehouse.

CP 41, pg. 150.

Notwithstanding the clear testimony of Steve White and his references to returned damaged property, as well as Plaintiff’s answers to Interrogatory Nos. 5 and 10, St. Paul argued to the Court that, contrary to the allegation in Plaintiff’s complaint, Plaintiff’s claim was solely limited to a claim for property which was not returned. *CP 87, pgs. 2014-2015.*

At the summary judgment motion, 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 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 while in NCF's possession. *CP 82, pgs. 1053-1074.*

The trial court granted summary judgment failing to address the claim for the property that was returned in a damaged state relying solely on the disappearance exclusion. It chose not to distinguish between a direct claim made by NCF for property that was not returned, from a claim of missing property. *RP of July 22, 2005, pgs. 25-26.*

The 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.*

In support of NCF's argument that tangible facts and circumstances existed to support theft as a basis for the loss of equipment while in Emerald Solutions' possession, NCF raised the following facts:

- A. Nearly 600 employees were laid off by the time of the rejection of the NCF lease in bankruptcy.
- B. All but one location of Emerald Solutions had been abandoned by the time it rejected the Master Lease.

- C. Emerald Solutions' representatives testified at a bankruptcy hearing that at the time of the bankruptcy, Emerald Solutions 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 or casualty or theft of assets had occurred within 12 months of the filing of its bankruptcy.
- F. The NCF equipment was computer equipment, including a substantial quantity of laptops that would be easily removable by employees as they left their office due to downsizing.
- G. There were three reports of theft in the year 2000, notwithstanding Emerald Solutions' security, which security was necessitated by the type of business in which it provided service to the computer industry.

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

Notwithstanding the same, the Court held as follows:

... I think what this really comes down to is what the exclusion language means in this particular policy which NCF is an additional insured on.

I am going to grant the motion for summary judgment on behalf of St. Paul Fire Marine and Insurance. The disappearance in inventory loss clause provides, we won't cover loss of property that is missing, where the only evidence of the loss is a shortage disclosed on taking of inventory, or other instances where there is no physical evidence of the manner of disappearance, which is phrased as to show what happened to the property.

This is the circumstance here. There is no evidence whatsoever as to what happened to this great quantity of physical equipment. ...

Mr. Tall: Your Honor, in connection with that, I was wondering if the Court was making a finding at this point that NCF is an additional insured under the contract? I believe you mentioned that.

Court: NCF is an additional insured.

Mr. Tall: Okay.

Court: However, they don't have any rights superior to Emerald Solutions.

RP of July 22, 2005, pgs. 25-26.

Plaintiff's argument to the Court did not take the position that NCF had superior rights to Emerald Solutions, but rather that as an additional

insured the disappearance clause was not applicable, as the property did not disappear while in possession of NCF. *CP 82, pgs. 1053-1074.*

Plaintiff's legal counsel, in oral argument, stated the following:

Now, I do want to finally emphasize that even if the physical absence of the property, [although it] [sic] satisfies the direct physical loss, the Court may think that there has to be a satisfaction of the disappearance clause, which, of course, we maintain there doesn't because it didn't disappear on our watch.

We delivered it. We know what happened to it. When we sustained the loss, we can definitively state what happened at that point.

RP of July 22, 2005, pg. 20 lines 17-25.

The Court entered a preliminary order pending submission of a final order referencing all pleadings filed and considered by the Court. The final order was entered on August 19, 2005, from which this appeal is taken. *RP of July 22, 2005, pg. 25 lines 21-25; CP 103A and 103B.*

III. ARGUMENT

- A. **The Trial Court Erred in Dismissing all Claims of NCF Without Consideration of Remanding its Claim for Damaged Property Which was Returned for Trial on the Merits.**

The trial court dismissed all claims of NCF on the basis of the disappearance exclusion set forth in the St. Paul insurance contract. In pertinent part, the Court ruled:

I am going to grant the motion for summary judgment on behalf of St. Paul Fire and Marine Insurance. The disappearance and inventory loss clause provides, we won't cover loss of property that is missing, where the only evidence of the loss is a shortage disclosed on taking of inventory, or other instances where there is no physical evidence of the manner of disappearance, which is phrased as to show what happened to the property.

RP of July 22, 2005, pg. 25.

In opposition to St. Paul's motion for summary judgment, NCF argued that the claim for equipment that was returned in a damaged state was distinguishable from the claim for property which was not returned and upon which St. Paul was seeking dismissal under the disappearance exclusion. The disappearance exclusion was not applicable to property which was returned damaged and therefore the summary judgment should have been denied on that basis. However, the Court dismissed this claim, too, when it dismissed all claims based upon the disappearance exclusion. Clearly this was in error.

The evidence presented to the trial court consisted of the Declarations of Joe Vitulli and Steve White. Those declarations clearly referenced the damaged property and in particular Exhibit A to the Declaration of Steve White described property which was returned but in a damaged state. Indeed, Mr. White referenced several pieces of equipment that were returned dead on arrival.

Yet, to defeat what clearly was a legitimate claim, which should have been remanded to trial, St. Paul chose to include in its reply a reference to Plaintiff's answers to interrogatories. That reference was to answer to Interrogatory No. 1, which in actuality was the answer to Interrogatory No. 5. In that reference, St. Paul deleted a critical portion of the answer, which advised that damages included loss of rental for damaged property. *CP 41, pg. 257; CP 87, pg. 2015*. St. Paul further failed to reference in its reply NCF's answer to Interrogatory No. 10 where NCF advised that its claim was for either property that was returned damage or not returned. That answer also objected to the use of the term "disappear". *CP 41, pg. 261*.

St. Paul further went on to quote a limited portion of the testimony of Joe Vitulli at his deposition. Even in that limited portion of the transcript, Mr. Vitulli did mention that the claim included property that

was “damaged.” The question and answer portion cited by St. Paul was clearly taken out of context. *CP 87, pg. 2014.*

Indeed, in one portion of that testimony, Mr. Vitulli indicated that one would not repair a power cable for \$12, but buy a new one. St. Paul’s counsel then went on to inquire that that would be a replacement cost, which was answered in the affirmative. That answer did not address whether the equipment that was returned in a useless state including without the power cable was also damaged. *CP 87, pg. 2014.*

Thereafter, the portion of the transcript cited reflects – “entire claim.” There was no answer affirmatively given to that question, although there was an indication of a nodding of the head. *CP 87, pg. 2014.*

Again, it is clear that this portion of the testimony related to the issue of a replacement of power cables and the Court made no reference to this argument in dismissing all claims, but relied solely on the disappearance exclusion.

As this Court must review the summary judgment pleadings de novo, it is respectfully argued that this claim should be remanded.

As noted in Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982), a summary judgment motion under CR 56(c) can be granted

only if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.

There was substantial evidence to support the claim for property returned in a damaged state and this claim should be remanded for trial.

B. The Trial Court Erred in Failing to Distinguish NCF's Independent Claim as an Additional Insured for Property Which was not Returned from Emerald Solutions from a Claim Asserted for Missing Property While in NCF's Possession.

The trial court correctly made the finding that NCF was an additional insured under the subject contract. It stated:

I think what this really comes down to is what the exclusion language means in this particular policy which NCF is an additional insured on ...

Mr. Tall: Your Honor, in connection with that I was wondering if the Court was making a finding at this point that NCF is an additional insured under the contract? I believe you mentioned that.

Court: NCF is an additional insured.

RP of July 22, 2005, pgs. 25-26.

Yet, in spite of that finding, the Court treated NCF's claim as if it was a claim asserted by Emerald Solutions on its own behalf regarding missing property in its possession.

St. Paul devoted little, if any, argument to the meaning and rights of an additional insured. However, case law confirms what an additional insured actually is.

In Del Bello v. General Accident Ins. Co. of America, 185 A.D.2d 691, 585 N.Y.S.2d 918, the plaintiff, Nippon Steak House, Inc., the predecessor in interest to the plaintiff Del Bello, received from the insurance agency an oral binder of insurance coverage on behalf of its tenant, First Wok. The binder was for a form of a special multi-peril insurance policy, including coverage for general liability and fire and contents damage. When informed that Nippon was the owner of the premises, the insurance agency prepared an insurance binder that included Nippon as an additional insured.

General Accident argued that the binder describing Nippon as an additional insured was limited to Nippon's coverage for liability, and therefore plaintiff had no standing under the policy with respect to its property damage claim.

The Court recognized that the insurance agency had full authority to issue and deliver binders just as Marsh had the authority to deliver binders and Certificates on behalf of St. Paul!

It found uncontroverted that the insurance agency sought property insurance protection on behalf of Nippon as an additional insured, just as Marsh sought coverage for multiple vendors, including NCF Financial, as evidenced by the Evidence of Property Insurance Certificates issued!

The Court stated that the term “additional insured:”

... has a well understood meaning in the insurance industry as an ‘entity enjoying the same protection as the named insured.’ (*Rubin, Dictionary of Insurance Terms, Bahren’s 1987*).

Id. at 692.

The aforementioned case is significant because it recognized that the term “additional insured” has a well known meaning in the insurance industry and that such an entity enjoyed the same protection as the named insured. In other words, an additional insured has standing under the contract to make a claim in its own right.

Washington law has also recognized that where coverage and exclusion is defined in terms of the “insured,” the Courts have uniformly considered the contract between the insurer and several insureds to be

separable, rather than joint, i.e., **there are separate contracts with each of the insureds!** The result is that **an excluded act of one insured does 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; cited for such proposition in Standard Fire Ins. Co. v. Blakeslee, 54 Wn. App. 1, 771 P.2d 1172 (1989).

While the above cited cases relate to liability coverage, that does not alter the rights of additional insureds under a policy whether a claim is made under liability or under property coverage as was recognized in Del Bello v. General Accident Ins. Co. of America, *supra*.

As noted under Washington law (Unigard Mutual, *supra*), the insurance contract is several and not joint as it applies to NCF. The application of this rule means that an exclusion, if asserted, in the instant case against Emerald Solutions does not necessarily bind or have any effect on NCF. NCF has the right to make its own claim. The definition of loss, as applied to NCF as an additional insured, means the loss as it occurs to NCF. Thus, the disappearance exclusion should have been interpreted as it applied to NCF and not as it applied to a claim made by Emerald Solutions.

The subject disappearance clause provides 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.

As a separate insured, this clause is applicable when NCF makes a claim for missing property occurring while in its possession. However, NCF never was missing the subject property. It entered into the Master Lease agreement and pursuant to its terms caused to be delivered to Emerald Solutions the equipment listed on the schedules, the receipt of which was acknowledged by Emerald Solutions. Thereafter, Emerald Solutions religiously paid its monthly payment for the full amount due under the lease until it filed bankruptcy in October 2001. Thereafter, it made a post petition payment for that portion of October rent that had accrued, plus the November rent until it rejected the leases.

After rejection, it was the obligation of Emerald Solutions to return the property to NCF. Some of the property was returned in a damaged state. Most was not returned. **Whatever the reason for Emerald Solutions' failure to return all the property, that reason is irrelevant.** NCF's claim arises from Emerald Solutions' failure to return its

equipment and does not arise from NCF's loss of missing property while in NCF's possession.

Of singular importance is that St. Paul provided no evidence that would defeat its burden to show that the disappearance exclusion applied. Rather, it relied upon NCF's principals acknowledging that NCF did not know the reason why Emerald Solutions failed to return its property.

NCF pointed out that the facts in this case are similar to the facts in Miller v. Boston Insurance Company, 420 P.A. 566, 218, A2d.275 (1966). In Miller, the insured was a jewelry dealer who brought a claim against his insurance to recover on a policy insuring against all risks of loss for a lost ring. The facts of the case were that the insured was a dealer in jewelry consigned the subject ring to a second dealer who, in turn, consigned the ring to a third dealer. At a later time, the third dealer stated that he had the ring in his pocket and was still trying to sell it, but the following day his dead body was recovered from the river and the ring was never returned to the second dealer or the insured. The policy contained an exception for unexplained loss, mysterious disappearance, or loss of shortage disclosed on taking inventory. The Court noted:

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.

Id. at 278 citing Agricultural Ins. Co. v. A. Rothblum, Inc., 147 Misc. 865, 265 N.Y.S. 7.

The Court went on to hold the following:

The trial judge, in the instant case drew from the Chase Rant 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 the 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. (Emphasis added)

Id. at 279.

This case is remarkably similar to the NCF claim at bar. NCF delivered leased property to Emerald Solutions. It was named as an additional insured and therefore had the rights of an insured under the policy to make its own claim. When the lease was rejected by Emerald

Solutions, it was Emerald Solutions duty under bankruptcy law to return all of the equipment. It did not do so. A physical inspection of the returned property revealed the physical absence of much of the computer equipment. NCF suffered its loss and made its claim against the St. Paul policy. **As to NCF, its physical loss occurred when the property was not returned.**

However, St. Paul argued that NCF must explain what Emerald Solutions did with the property. But, as the above noted case recognizes, that was not NCF's duty. In this connection, it must again be highlighted that NCF chose to make a claim in its own right as an additional insured. If it made a claim against Emerald Solutions and Emerald Solutions then made the claim under its insurance coverage, Emerald Solutions would be subject to the disappearance exclusion in the policy and would have to provide "some physical evidence" of what happened to the property while it was in its possession. But as to NCF, it did provide the physical evidence of what happened to its property; namely, it was delivered to and received by Emerald Solutions, which did not return it to NCF.

St. Paul attempted to distinguish the Miller case arguing that in that case the exclusion was for unexplained loss, mysterious disappearance or loss of shortage disclosed on taking inventory and that the policy was an

all risk policy. However, that attempt to distinguish the case failed to address the Court's fundamental reasoning for its decision. Inherent in its decision was the recognition that a party that delivers property to another cannot necessarily be called upon to explain what the other party did with it. If the consignor is insured, all he has to do is to advise the insurance company that he does not have the property and what happened to it. It is not a circumstance of missing property; it is a circumstance of property that is not returned.

Accordingly, whether the insurance contract in Miller was an all risk policy or not, or whether the exclusion clause had different language, the same is irrelevant. The essential point is what physical evidence does the insured have to show what it did with the property. In the Miller case, that physical evidence was the delivery of custody from one party to the other. In the instant case, it is the delivery of the equipment to Emerald Solutions and confirmation of its receipt by Emerald Solutions.

Similarly, in McCormick & Co. v. Empire Ins. Group, 690 F.Supp. 1212 (1988), the exclusion at issue excluded losses due to unexplained lost, mysterious disappearance or loss or shortage disclosed on taking inventory. The Court went on to state:

These facts if true suggest as a matter of logic that if the pepper was not stolen, either

the bailee warehouseman or its employee negligently released the pepper to a person not entitled; or the pepper is still there but lost in the caverns of the warehouse. Since pepper in its natural state does not sublimate, no other possibility exists, so the disappearance, **while unsolved**, is hardly mysterious.

Id. at 1213 (emphasis added).

The Court recognized that the claimed loss was not a typical loss of “inventory” which assumes a fungible item added to and subtracted from the stock and trade of a regularly conducted business and counted or recounted by taking inventory at the end of an accounting period. Rather, it was a circumstance of missing pepper, which was delivered to a warehouse under bailment and not returned, clearly analogous to the NCF lease with Emerald Solutions.

In summary, the trial court erred in not recognizing that as an additional insured, NCF had to be treated as a separate insured with respect to its claim. Its claim was not for property missing, but for property not returned. Thus, the disappearance clause simply was not applicable to the facts presented to support NCF’s claim as an additional insured.

C. **The Trial Court Erred in Failing to Find Questions of Fact, the Resolution of Which Would Support a Claim that the Property was Stolen While in Emerald Solutions’**

**Possession, Thereby Satisfying the Disappearance
Exclusion.**

In Couch on Insurance, 3d. § 151:42, Couch recognized that it is typically a question of fact as to whether a loss is due to theft, a covered peril, or to “mysterious disappearance.”

In the instant case, the physical absence of the property was documented, and the Court should have found a question of fact as to what happened to the property.

In Libralter Plastics, Inc. v. Chubb Group of Ins., 199 Mich. App. 482, 502 N.W.2d 742 (1992), the plaintiff manufactured plastic products and one of its customers entrusted injection molds to the plaintiff for use in producing 600 plastic boat launchers. When the customer later inquired about another production run, the plaintiff was unable to locate the molds. After further searching, the plaintiff determined that they had been lost and filed a theft claim under its coverage. As with the St. Paul contract, the Chubb contract provided coverage for loss of personal property to others not owned by the insured, but in its care, custody or control.

The Court noted that circumstantial evidence may be sufficient to establish a case. The plaintiff asserted that there was circumstantial evidence to draw an inference that the molds had been stolen. Chubb, on the other hand, argued that the evidence led to nothing more than

conjecture and that to find the molds had been stolen, the jury would have to deal in speculation.

In deciding that there was a question of fact requiring remand, the Court cited the Iowa decision of Long v. Glidden Mutual Ins. Assoc., 215 N.W.2d 271 (Iowa, 1974). In that case, Long harvested 3,000 bushels of soybeans and placed them in three overhead bins. When preparing to deliver the beans to market, Long discovered that one bin was 400 bushels short. A police investigation revealed no evidence of theft. Nonetheless, the trial court concluded that the beans had been stolen. The Iowa Supreme Court recognized that an inference of theft is justified under certain circumstances, including when property disappeared 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.

Thus, the Michigan Court recognized the following:

Consistent with Long, plaintiff in this case need not rebut every possible theory which the evidence could support. (citations omitted) If there is evidence pointing to one theory or causation, indicating the logical sequence of cause and effect, it does not matter if the evidence can support other possible theories. (citations omitted) A jury could reasonably infer based on the evidence presented here, that theft was more probable than any other theory of loss. Libralter

Plastics, Inc. v. Chubb Group of Ins., 199 Mich. App. 482, 487-488 (1992).

In Blasiar, Inc. v. Firemen's Fund Ins. Co., 76 Cal. App. 4748 (1999), the Court addressed the meaning of physical evidence, with respect to a disappearance exclusion similar to the St. Paul exclusion. The Blasiar Court found that the term "physical evidence" would have a common understanding of "tangible facts or circumstances." The Blasiar Court went on to acknowledge 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.

Critical to the Blasiar Court's decision was the fact that the claim was for its own inventory stored in its own warehouse. This is distinguishable from the instant case, or the facts presented in the Michigan decision of Libralter Plastics, Inc., supra, or the bailment situation present in McCormick & Co., supra, or the lost consigned ring in Miller v. Boston Ins. Co., supra.

In the instant case, the following facts could lead a jury to conclude that theft by employee or others occurred, namely:

- 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.

As noted by the Michigan Court citing the Iowa Court in Libralter Plastics v. Chubb, supra, 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. Id. at 488.

Couch on Insurance recognizes that it is typically a question of fact whether theft has occurred and under the Blasiar decision, only some physical evidence (i.e., tangible facts and circumstance) is needed to deny a motion for summary judgment.

In this circumstance, with all inferences flowing to the non-moving party, clearly there were tangible facts and circumstances in existence that could have led a jury to conclude that Emerald Solutions' employees or others walked off with the laptops as the locations closed or downsized, on or after Emerald Solutions' filing of the bankruptcy. Accordingly, St. Paul's motion for summary judgment should have been denied even if the Court found that the disappearance exclusion applied.

IV. CONCLUSION

The trial court erred in three respects. Clearly, the trial court failed to distinguish NCF's claim for damaged property that was returned from its claim for property that was not returned. There was evidence presented

that raised a question of fact with respect to that claim, and that claim should have been remanded to trial for determination. The Court incorrectly included that claim with the claim for property which was not returned in dismissing all claims based upon the disappearance exclusion. This Court should remand that claim to trial for determination.

The trial court further erred with respect to its treatment of NCF as an additional insured. NCF, as an additional insured, should have been treated as a separate insured. Thus, the disappearance clause had to be interpreted as it applied to NCF not Emerald Solutions.

NCF's claim was for property not returned to it, rather than property missing from it. There was clear physical evidence that NCF caused to be delivered to Emerald Solutions the subject equipment and that Emerald Solutions acknowledged receipt of the same. Subsequently, after rejection of the lease in bankruptcy, Emerald Solutions failed to return a substantial amount of equipment to NCF. From NCF's perspective, that property was not missing, it was in Emerald Solutions' possession. For whatever reason Emerald Solutions did not return that property, that reason – whether known or unknown – is irrelevant. The disappearance exclusion simply was not applicable.

It is respectfully argued that this Court should rule that the disappearance exclusion does not apply and remand NCF's claim for unreturned property to the trial court for determination of damages caused to NCF.

In the alternative, the trial court erred in failing to find a question of fact relating to the tangible facts and circumstances pointing to theft by employee or other third person. In this alternative, this Court should remand for determination of those questions of fact at trial.

RESPECTFULLY SUBMITTED on November 14, 2005.

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

By 

DAVID M. TALL, WSBA #12849

Attorneys for Plaintiff/Appellant NCF Financial,
Inc.

PROOF OF SERVICE

TO: Clerk, Division One, Court of Appeals

AND TO: Defendant/Respondent

PLEASE TAKE NOTICE on the 14th day of November, 2005,
BRIEF OF APPELLANT was filed with Division One, Court of Appeals
and served via ABC Legal Messengers, Inc. on the following:

Lawrence Gottlieb
Gordon & Polscer, LLC
1000 Second Avenue, Suite 1500
Seattle, WA 98104

Dale L. Kingman
Kingman, Peabody, Pierson & Fitzharris, P.S.
505 Madison Street, Suite 300
Seattle, WA 98104

Dated this 14th day of November, 2005.



Laura Faulstich, Legal Assistant

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2005 NOV 14 PM 2:57