

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 25, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP2334

Cir. Ct. No. 2015CV878

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

LEICHT TRANSFER & STORAGE COMPANY,

PLAINTIFF-APPELLANT,

v.

PALLET CENTRAL ENTERPRISES, INC.,

DEFENDANT,

**TRAVELERS PROPERTY CASUALTY COMPANY, ACUITY, A MUTUAL
INSURANCE COMPANY, AND HISCOX INSURANCE COMPANY INC.,**

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Brown County:
MARC A. HAMMER, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Leicht Transfer & Storage Company (Leicht) appeals summary judgments entered in favor of its various insurers: Travelers Property Casualty Company (Travelers); Acuity, A Mutual Insurance Company (Acuity); and Hiscox Insurance Company Inc. (Hiscox). Leicht was fraudulently overcharged for pallets, a cost it normally passed on to its customer, and, as a result, it incurred a loss. In granting summary judgment, the circuit court determined that Leicht's loss was not covered under any of the policies issued by its insurers. Leicht argues the circuit court erred when it determined that neither the forgery coverage under its Acuity and Hiscox policies nor the liability coverage under its Travelers and Acuity policies covered Leicht's loss. We affirm.

BACKGROUND

¶2 Leicht provided basic warehousing services, including pallets, to Georgia-Pacific Corporation in Brown County, Wisconsin. Between January 2013 and February 2015, Leicht ordered pallets from Pallet Central Enterprises, Inc. (Pallet Central), a pallet broker. Pallet Central invoiced Leicht when it delivered pallets. Leicht paid the invoices and then billed Georgia-Pacific for using the pallets to store and transport its goods.

¶3 During this time, Pallet Central submitted invoices to Leicht for pallets Leicht had not ordered or received, and Leicht paid Pallet Central about \$505,000 in response to those invoices. It was Leicht's policy to pay any invoices from Pallet Central accompanied by delivery tickets bearing the signature of a Leicht employee. Ultimately, Leicht conducted an internal investigation of the

number of pallets invoiced by Pallet Central, which revealed that the signatures of Leicht employees had been forged on the delivery tickets for pallets Leicht never ordered or received.

¶4 A police investigation concluded that Leicht suffered a theft by use of fraudulent invoices. Georgia-Pacific demanded reimbursement from Leicht for the amounts it paid related to the undelivered pallets. Thereafter, Leicht tendered a claim for the loss to its insurers, Travelers, Acuity and Hiscox, and each denied Leicht's claim. Leicht filed suit against Pallet Central, then amended its complaint to add its insurers as defendants.

¶5 Travelers, Acuity and Hiscox each filed motions for summary judgment or declaratory judgment arguing their policies provided no coverage for Leicht's loss. The circuit court granted summary judgment to the insurers, concluding that no coverage existed under any of the policies issued to Leicht. Leicht now appeals.

DISCUSSION

¶6 We independently review a grant or denial of summary judgment, using the same methodology as the circuit court. *Hardy v. Hoeffler*, 2007 WI App 264, ¶6, 306 Wis.2d 513, 743 N.W.2d 843. Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” WIS. STAT. § 802.08(2) (2015-16).¹

¶7 This case involves the interpretation of insurance contracts, which presents questions of law that we review de novo. *See American Family Mut. Ins. Co. v. American Girl, Inc.*, 2004 WI 2, ¶23, 268 Wis. 2d 16, 673 N.W.2d 65. Judicial interpretation of an insurance policy seeks to determine and give effect to the intent of the contracting parties. *Id.* We construe insurance policies as they would be understood by a reasonable person in the position of the insured. *Id.* However, we do not interpret insurance policies to provide coverage for risks that the insurer did not contemplate or underwrite and for which it has not received a premium. *Id.*

¶8 We employ a three-step process in interpreting an insurance policy. *Id.*, ¶24. First, we examine the facts of the insured’s claim to determine whether the policy’s insuring agreement makes an initial grant of coverage. *Id.* If it is clear that the policy was not intended to cover the claim asserted, the analysis ends there. *Id.* Second, if there is an initial grant of coverage, we examine the exclusions to see whether any of them preclude coverage. *Id.* Third, if an exclusion applies, we determine whether any exception to the exclusion reinstates coverage. *Id.*

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

A. *Forgery coverage*

¶9 The Hiscox and Acuity policies issued to Leicht contained nearly identical forgery coverage. The Hiscox policy provided coverage for:

[L]oss resulting directly from Forgery or alteration of checks, drafts, promissory notes, convenience checks, [home equity line of credit] HELOC checks, or similar written promises, orders or directions to pay a sum certain in Money that are:

- (i) Made or drawn by or drawn upon You; or
- (ii) Made or drawn by one acting as your agent;

or that are purported to have been so made or drawn.

The Acuity policy covered losses involving forgery or alteration of “covered instruments,” defined as “[c]hecks, drafts, promissory notes or similar written promises, orders or directions to pay a sum certain in money,” which must be “[m]ade or drawn by or drawn upon [Leicht],” “[m]ade or drawn by one acting as [Leicht’s] agent” or “purported to have been so made or drawn.”

¶10 The circuit court determined there was no coverage because the policies covered forged checks (and similar documents), not forged bills or requests for payment. The court explained:

It cannot reasonably be argued that a delivery ticket is a direction to pay in the same way that a check, draft, or similar document is a direction to pay. A check directs a bank to pay a sum certain to the holder or bearer; a delivery ticket merely acknowledges receipt of goods. Leicht asserts that a signed delivery ticket was an intrinsic representation of a delivery and acceptance of the goods and a corresponding obligation to pay. This may be true, but that delivery ticket does not authorize an entity to pay a sum certain to whomever holds it.

(Citation omitted.)

¶11 Leicht contends the circuit court erred in determining that the Hiscox and Acuity policies did not cover Leicht’s loss related to the forged delivery tickets issued by Pallet Central. Leicht argues the forged delivery tickets should be considered a “direction to pay” under both policies. We disagree. Both policies enumerate specific covered instruments, including checks, drafts and promissory notes, and “similar written promises, orders or directions to pay a sum certain” in money. The delivery tickets Leicht relies upon were not written promises, orders or directions to pay “similar” to the enumerated documents covered under the policies. *See Oaks v. American Family Mut. Ins. Co.*, 195 Wis. 2d 42, 47-48, 535 N.W.2d 120 (Ct. App. 1995) (“A construction which gives a reasonable meaning and effect to each word or provision is preferred to one leaving part of the language useless or meaningless.”). The circuit court correctly concluded that the forged delivery tickets unambiguously were not covered “directions to pay” under the policies.

¶12 We first note that Hiscox’s and Acuity’s policies contain language providing coverage for losses resulting from the forgery or alteration of specific types of documents, none of which could be interpreted to generally cover losses resulting from any fraudulent document which falsely represents that goods have been delivered. Both policies list “check” as the first enumerated term in their respective lists of covered instruments. As neither policy defines “check,” we give the word its plain and ordinary meaning. *See id.* at 48. When determining the plain and ordinary meaning of words, we may look to definitions in a recognized dictionary. *Frank v. Wisconsin Mut. Ins. Co.*, 198 Wis. 2d 689, 695, 543 N.W.2d 535 (Ct. App. 1995). A check is defined as “a written order directing a bank to pay money as instructed: draft.” MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/check> (last visited April 23, 2018).

Here, the delivery tickets indicated the amount Leicht allegedly owed, and Leicht relied upon them to make payment to Pallet Central. However, the delivery tickets were not written orders directing a bank to pay a sum certain to Pallet Central. Therefore, the delivery tickets are dissimilar to a check.²

¶13 Nor are the delivery tickets similar to the other types of instruments listed in the Hiscox and Acuity policies—namely, drafts or promissory notes. Neither policy defines “drafts” or “promissory notes,” and we therefore again look to dictionary definitions to define those terms. The relevant dictionary definition of “draft” is “an order for the payment of money drawn by one person or bank on another.” MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/draft> (last visited April 23, 2018). A dictionary definition of “promissory note” is “a written promise to pay at a fixed or determinable future time a sum of money to a specified individual or to bearer.” MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/promissory%20note> (last visited April 23, 2018). Here, the fraudulent delivery tickets were clearly not orders for payment of money drawn by one person or bank on another, similar to drafts. Nor were the delivery tickets a promise to pay money to a specified individual or bearer, similar to promissory notes. Rather, the tickets were merely evidence of a claim that pallets were delivered by Pallet Central to Leicht. Therefore, the circuit court properly concluded that the forgery coverages contained in the Hiscox and Acuity policies do not cover the losses Leicht sustained as a result of the forged delivery tickets.

² Leicht does not argue the delivery tickets are similar to convenience checks or HELOC checks, the other types of checks listed in the Hiscox policy.

B. General liability coverage

¶14 Acuity also provided general liability coverage to Leicht. Under the Acuity policy, Acuity covered “those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies.” The Acuity policy defines “property damage” as:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the occurrence that caused it.

The circuit court concluded that there was no coverage for Leicht’s loss under the general liability coverage because Leicht had failed to show that the property in question was tangible property.

¶15 Leicht contends that the circuit court erred in its determination that the undelivered pallets for which Leicht was billed were not tangible property. “Tangible” is not defined in the Acuity policy. The dictionary definition of “tangible” is “capable of being perceived especially by the sense of touch.” MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/tangible> (last visited April 23, 2018). Therefore, the court correctly defined tangible property as property “capable of being perceived” by touch.

¶16 Leicht claims that pallets are tangible property because they are capable of being perceived, as they are made out of lumber and nails. Leicht may be correct that pallets which exist could be considered tangible property. However, the issue is whether Leicht’s loss relates to existing and identifiable tangible property. Here we are concerned with the fraudulently claimed delivery

of hypothetical pallets that Leicht never received. There is no record evidence that anyone or any entity ever possessed the pallets shown in the delivery tickets. The hypothetical pallets cannot be perceived. Therefore, they are not tangible. The underlying dispute in this case arose because the pallets represented on the fraudulent delivery tickets did not exist—including in the sense that any physical pallets had been actually allocated for Leicht. Because there is no record evidence that the undelivered pallets ever existed, the circuit court properly found that the pallets were not capable of being perceived and Leicht did not suffer a loss of tangible property.

¶17 Leicht argues that the police believed there was a loss of tangible property and points out that the police report describes the events as a “theft by use of fraudulent invoices.” However, what the police believed is irrelevant to our interpretation of the insurance policy in question. Furthermore, Leicht does not identify any mention in the police report of a loss of tangible property and fails to explain how Leicht could have lost pallets that it never possessed. If anything, it would appear the theft mentioned in the report was of the money Leicht paid to Pallet Central in return for nothing.

¶18 Similarly, Leicht argues that Georgia-Pacific believed there was a loss of tangible property. Leicht quotes from a Georgia-Pacific letter demanding repayment, which stated: “We believe that Leicht billed [Georgia-Pacific] for pallets that Leicht did not use in its services to [Georgia-Pacific].” (Emphasis in original.) Again, what Georgia-Pacific might have believed does not affect our insurance policy interpretation, and Leicht does not explain how this letter quotation evidences a loss of tangible property rather than a fraudulent overbilling. Therefore, the circuit court properly found there was no coverage under the Acuity

general liability policy because Leicht did not demonstrate either a loss of, or a loss of use of, any tangible property.

C. Cargo handling coverage

¶19 The Travelers policy provided coverage for damages Leicht, as a “Motor Carrier, Warehouseman, Freight Forwarder, Logistics Service Provider or Other Bailee,” was legally obligated to pay “for direct physical loss of or damage to Covered Property caused by or resulting from a Covered Cause of Loss.” The policy defines “Covered Property” as “lawful property of others that [Leicht] ha[s] accepted for transportation, including while temporarily stored or subject to your transportation related logistical services.” It also lists specific types of property that are *not included* in the definition of “Covered Property,” such as: accounts, bills, deeds, letters of credit, lottery or other tickets, money, currency, securities, checks, drafts, notes, evidences of debt, and commercial papers. “Covered Cause of Loss” is defined as “RISKS OF DIRECT PHYSICAL LOSS OR DAMAGE from an external cause, except for those causes of loss listed in the Exclusions.” (Emphasis in original.) Leicht does not argue the forged delivery tickets are covered property under the Travelers policy; rather, it argues the undelivered pallets were covered property.

¶20 The Travelers policy also insured against losses related to cargo handling equipment: “[Travelers] will pay for direct physical loss or damage caused by a Covered Cause of Loss to ... pallets ... owned by [Leicht] or owned by others and not accepted for transportation.” The circuit court concluded there was no coverage for Leicht’s loss under the Travelers policy because Leicht did not sustain a “direct physical loss or damage to” either “Covered Property” or cargo handling equipment. We agree.

¶21 The undelivered pallets were not “Covered Property.” The hypothetical pallets were not “property of others,” nor were they ever “accepted for transportation” under the terms of the policy. In addition, the undelivered pallets cannot be considered “tangible property” under the Acuity policy for the same reasons they cannot be considered lost or damaged under the Travelers policy. The relevant, ordinary meaning of “loss” is “the act of losing possession.” MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/loss> (last visited April 23, 2018). Leicht could not suffer a “direct physical loss or damage” to pallets that, under this record, no one ever physically possessed, including having been accepted for transportation. Accordingly, the circuit court correctly determined there was no coverage under the Travelers policy.

By the Court.—Judgments affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

