COURT OF APPEALS
DECISION
DATED AND FILED

August 14, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2775

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

ERNIE VON SCHLEDORN LTD.,

PLAINTIFF-APPELLANT,

V.

UNITED FIRE & CASUALTY CO.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Ernie Von Schledorn appeals from the trial court's order granting summary judgment to United Fire & Casualty Company. Von Schledorn claims the trial court erroneously determined: (1) that its insurance claim was untimely; and (2) that United properly denied the claim because it was barred by an "inventory computation" exclusion in the policy. We affirm.

I. BACKGROUND

¶2 Ernie Von Schledorn, an automobile dealership, purchased a Commercial Crime Coverage policy from United Fire & Casualty. The policy contains an endorsement entitled "Employee Dishonesty Coverage Form." Although this endorsement provides coverage for the "dishonest acts committed by [employees] … with the manifest intent to … cause [the dealership] to sustain loss," it excludes coverage for those losses the dealership "proves" with inventory computations:

> **D. ADDITIONAL EXCLUSIONS, CONDITIONS AND DEFINITIONS:** In addition to the provisions in the Crime General Provisions, this Coverage Form is subject to the following:
>
> **1. Additional Exclusions:** We will not pay for loss as specified below:
>
> ….
>
> **b. Inventory Shortages:** loss, or that part of any loss, the proof of which as to its existence or amount is dependant upon:
>
> **(1)** An inventory computation; or
>
> **(2)** A profit and loss computation.

The dealership subsequently claimed it discovered a loss of approximately $174,000.00, allegedly caused by an employee who stole auto parts by manipulating the dealership's electronic records. The dealership filed a claim for this loss with United. As proof of loss, the dealership submitted various copies of invoices and order forms showing that auto parts had been electronically removed from their records, as well as a statement comparing physical versus electronic inventory over several years. The dealership then estimated its losses, stating in

its proof of loss that "losses as calculated above are further supported by inventory shortages." United denied the claim.

¶3 The dealership sued, alleging breach of the insurance contract. United moved for summary judgment, claiming that the loss was both excluded by the policy and untimely. In response, the dealership argued that it "did not rely upon an inventory loss calculation to prove the fact or the amount of the loss," and provided the affidavit of Morris Silverman, the employee who allegedly discovered the other employee's dishonesty.[1] Silverman averred that he "manually checked" invoices and computer records, and that the dishonest employee's "illegal activity was confirmed in a telephone interview … a copy of which is attached hereto." The trial court agreed with United and granted summary judgment, concluding: "Plaintiff believes an employee stole from it and … even has developed a theory for how the employee accomplished the thefts. This is not enough, without proof."

II. DISCUSSION

¶4 This appeal involves the interpretation of an insurance policy and, therefore, presents a question of law that we review *de novo*. ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis. 2d 808, 810, 456 N.W.2d 597, 598 (1990). Here, the trial court's interpretation of the insurance policy was decided on a motion for summary judgment. Our review of the trial court's grant of summary judgment is also *de novo*, and we apply the same standards and methods as did the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816, 820 (1987). First, we examine the pleadings to determine whether a proper claim for

[1] The dealership did not contend that the exclusion in the policy was invalid.

relief has been stated. ***Id.*** If the complaint states a claim and the answer joins the issue, our inquiry then turns to whether any genuine issues of material fact exist. ***Id.*** WISCONSIN STAT. § 802.08(2) (1997–98) sets forth the standard by which summary judgment motions are to be judged:[2]

> The judgment sought shall be rendered if 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.

¶5 When an insured makes a claim for a loss based on employee dishonesty, inventory computations that tend to prove the amount of an insured's loss are not excludable under the terms of a policy where "independent evidence first show[s]" the dishonest acts. ***Tri-Motors Sales, Inc. v. Travelers Indem. Co.***, 19 Wis. 2d 99, 106, 119 N.W.2d 327, 331 (1963). Independent evidence of the loss is necessary because if "inventory computations were to be admitted into evidence [without independent proof of the loss], a jury could only speculate in arriving at a verdict." ***Id.***, 19 Wis. 2d at 112, 119 N.W.2d at 334. In ***Tri-Motors***, except for those thefts admitted by the dishonest employee, the insured—who provided only inventory computations as evidence—failed to prove its loss "'wholly apart from such [inventory] computations' … as it [was] required to do

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise indicated.

under … the exclusions of the policy." ***Id.***, 19 Wis. 2d at 111–112, 119 N.W.2d at 334 (quoted source omitted).[3]

¶6 Here, the trial court correctly determined that the policy's "inventory computation" exclusion applies. The only other information presented by the dealership as evidence of its claimed loss—besides the inventory computations—was a transcript of a purported telephone conversation. This transcript, however, is inadmissible hearsay and cannot be used to support its claim. *See* WIS. STAT. § 908.01(3) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). This, of course, leaves only the inventory computations as proof of the dealership's loss. Consequently, the claim is explicitly excluded under the clear language of the policy, and we affirm the trial court's order granting summary judgment to United.

¶7 Because we have concluded that the policy excluded the claim, we do not address the issue of whether the claim was submitted timely. *See* ***Gross v.***

[3] Like the present case, the policy in ***Tri-Motors Sales, Inc. v. Travelers Indemnity Co.***, 19 Wis. 2d 99, 105, 119 N.W.2d 327, 330–331 (1963) excluded coverage for a "loss, or to that part of any loss … the proof of which, either as to its factual existence or as to its amount, is dependent upon an inventory computation or a profit-and-loss computation." Also like the present case, Tri-Motors sustained a loss "due to theft of automobile parts and accessories" by Woodward, one of Tri-Motors' employees. ***Id.***, 19 Wis. 2d at 101, 119 N.W.2d at 329. Woodward worked for Tri-Motors for approximately six months. ***Id.*** Police questioned Woodward and he admitted to stealing some, but not all, of the lost items. ***Id.***, 19 Wis. 2d at 101–102, 119 N.W.2d at 329. Tri-Motors attempted to use inventory computations to establish the amount of loss for those losses not admitted to by Woodward and for a period of time when he did not even work for the company. ***Id.***, 19 Wis. 2d at 104, 119 N.W.2d at 330. The court excluded the use of the inventory-computation evidence, holding: "Except for the thefts admitted by Woodward during the six months of his employment, plaintiff has not proved 'wholly apart from such [inventory] computations' the fact of any loss of property." ***Id.***, 19 Wis. 2d at 111, 119 N.W.2d at 334.

Hoffman, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (if decision on one point disposes of appeal, appellate court need not decide other issues raised).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999–2000).