NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

NATRONA HEIGHTS SUPERMARKET INC. AND FL&C DEVELOPMENT CORPORATION Appellee v. FIREMEN'S INSURANCE COMPANY OF WASHINGTON, D.C. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1105 WDA 2013

Appeal from the Judgment Entered June 12, 2013
In the Court of Common Pleas of Westmoreland County
Civil Division at No(s): 7565 of 2010

BEFORE: GANTMAN, P.J., FORD ELLIOTT, P.J.E., and OLSON, J.

MEMORANDUM BY GANTMAN, P.J.: **FILED JULY 09, 2014**

Appellant, Firemen's Insurance Company of Washington D.C., appeals from the judgment entered in the Westmoreland County Court of Common Pleas, in favor of Appellees, Natrona Heights Supermarket Inc. and FL&C Development Corporation, in this insurance coverage dispute. We affirm.

The trial court opinion fully and correctly sets forth the relevant facts of this case as follows:

> [Appellees] are two Pennsylvania companies [which] own and operate two Save-A-Lot grocery stores. One store is located in Natrona Heights (…"Natrona") and the other is located in Lower Burrell (…"FL&C"). Beginning in the spring of 2007, Natrona's anticipated gross profits noticeably began to decline, such that the Director of Operations began to inquire as to whether there was any explanation for the discrepancy. Likewise, the numbers at FL&C began to decline in 2007, and continued into 2008.

Initially, no explanation for the deviations in gross profit was apparent.

In January 2009, Natrona learned that a man, Troy Lauer, was taking shopping carts full of meat out of the store on a regular basis with the assistance of employees who would let him pass through the checkout line without paying. The police apprehended Lauer[;] and Josh Baker, an employee who participated in the theft, was taken into custody as well. Baker cooperated with law enforcement authorities and gave a statement implicating other co-workers, including a store manager, Karen Coffman, in thefts committed at both stores. Ultimately, numerous employees were implicated, either in stealing goods for themselves or in enabling customers and co-workers to steal from the stores. As one employee put it, there was "a culture of theft" that [was pervasive] in these grocery stores for years.

Upon receiving this information, [Appellees] notified their insurance carrier, [Appellant], and hired Case Sabatini & Co., a certified public accounting firm, to analyze their records and compute the amount of losses sustained from these employee thefts. Case Sabatini concluded that Natrona suffered a loss of product, at cost, of $396,5[9]8 during 2006, 2007, and 2008; and that FL&C suffered a loss of product, at cost, of $79,873 during 2007 and 2008. [Appellant] hired Matson Driscoll & Damico ("MD&D"), Certified Public Accountants, to analyze the records as well. While MD&D found that $425,000 in inventory was missing at Natrona (they did not analyze FL&C's records), [Appellant] denied the claim, stating[,] "there has been no confirmed unlawful taking of your property…and you have failed to identify the products that were stolen and/or the cost of the allegedly stolen products." In addition, [Appellant] asserts that the claim is barred both by an exclusion in the policy and the fact that the losses could be attributable to other factors other than employee theft, such as customer theft, price reduction sales, and casualty losses.

Although each agreed with the other's methodology, the difference between [Appellant's] figure of $425,000 and [Natrona's] figure of $396,000 is attributable to the fact

that [Appellant's] expert did not account for "shrink," and [Natrona and FL&C's] expert subtracted the normal historical shrink (a number derived after factoring in damaged goods, spoilage, and shoplifting) from their figures before concluding that there was a net employee theft loss.

The relevant insurance policy [("Policy")] provisions are as follows:

A. Insuring Agreements

Coverage is provided under the following insuring Agreements for which a Limit of Insurance is shown in the Declarations.

1. Employee Theft

We will pay for loss of or damage to "money," "securities" and "other property" resulting directly from "theft" committed by an "employee," whether identified or not, acting alone or in collusion with other persons.

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D. Exclusions

2. Insuring Agreement A.1. does not apply to:

b. Inventory Shortages

Loss, or that part of any loss, the proof of which as to its existence or amount is dependent upon:

(1) An inventory computation; or

(2) A profit and loss computation.

However, where you establish wholly apart from such computations that you

> have sustained a loss, then you may offer your inventory records and actual physical count of inventory in support of the amount claimed.[1]

> In addition, in deciding to deny coverage, [Appellant] relies upon Section E.1.p. of the [P]olicy, which states that [Natrona and FL&C] are required to "keep records of all property covered under this insurance so we [the insurer] can verify the amount of any loss."

(Trial Court Opinion, filed March 12, 2013, at 1-4) (internal citations omitted).

Procedurally, upon denial of their insurance claim, Appellees filed a complaint against Appellant on October 18, 2010, alleging breach of contract. Appellees also sought a declaratory judgment that Appellant was required to indemnify them for the employee theft losses. On December 2, 2010, Appellant filed an answer and new matter, to which Appellees filed a reply on January 7, 2011. On November 29, 2012, the parties proceeded to a bench trial. At the close of Appellees' case-in-chief, Appellant moved for a compulsory non-suit on the basis that Appellees failed to prove a covered loss under the Policy. The court denied Appellant's motion. On December 3, 2012, the court directed the parties to file written closing arguments. The court found in favor of Appellees on March 12, 2013. Specifically, the court awarded Appellee Natrona $394,290.00 (the $396,598.00 amount of loss

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[1] We refer to this provision of the Policy as the "Exception to the Policy Exclusion."

explained by Appellees' expert, less $2,308.00, which is the portion of the 2007 loss above the $250,000.00 Policy limit for that year), and awarded $79,873.00 to Appellee FL&C. The court also awarded Appellees pre-judgment interest at the rate of 6.00% from February 26, 2010 (the date Appellant denied Appellees' insurance claim). Appellant timely filed post-trial motions on March 21, 2013, which the court denied on June 3, 2013. On June 12, 2013, the court entered judgment on the verdict in favor of Appellees. Appellant timely filed a notice of appeal on July 2, 2013. On July 11, 2013, the court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), which Appellant timely filed on August 1, 2013.

Appellant raises three issues for our review:

> WHETHER IT WAS ERROR FOR THE TRIAL COURT TO DENY [APPELLANT'S] MOTION FOR NONSUIT WHEN [APPELLEES] HAD FAILED TO PROVE A LOSS AT THE CLOSE OF THEIR CASE IN CHIEF?
>
> WHETHER THE AWARD OF $79,873 TO [APPELLEE] FL&C DEVELOPMENT CORPORATION IS SUPPORTED BY COMPETENT EVIDENCE?
>
> WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN ITS INTERPRETATION OF THE…INSURANCE POLICY?

(Appellant's Brief at 5).[2]

Our standard and scope of review in this case is as follows:

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[2] We have reordered Appellant's issues.

> Our appellate role in cases arising from non-jury trial verdicts is to determine whether the findings of the trial court are supported by competent evidence and whether the trial court committed error in any application of the law. The findings of the trial judge in a non-jury case must be given the same weight and effect on appeal as the verdict of a jury, and the findings will not be disturbed on appeal unless predicated upon errors of law or unsupported by competent evidence in the record. Furthermore, our standard of review demands that we consider the evidence in a light most favorable to the verdict winner.

Levitt v. Patrick, 976 A.2d 581, 588-89 (Pa.Super. 2009) (quoting ***Baney v. Eoute***, 784 A.2d 132, 135 (Pa.Super. 2001)). Additionally, the well-settled standard of review for the denial of a motion for a compulsory non-suit is:

> A motion for compulsory non-suit allows a defendant to test the sufficiency of a [plaintiff's] evidence and may be entered only in cases where it is clear that the plaintiff has not established a cause of action; in making this determination, the plaintiff must be given the benefit of all reasonable inferences arising from the evidence. When so viewed, a non-suit is properly entered if the plaintiff has not introduced sufficient evidence to establish the necessary elements to maintain a cause of action; it is the duty of the trial court to make this determination prior to the submission of the case to the jury.
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> A compulsory non-suit is proper only where the facts and circumstances compel the conclusion that the defendants are not liable upon the cause of action pleaded by the plaintiff.

Church v. Tentarelli, 953 A.2d 804, 806 (Pa.Super. 2008), *appeal denied*, 599 Pa. 685, 960 A.2d 835 (2008) (quoting ***Mahan v. Am-Gard, Inc.***, 841 A.2d 1057-58 (Pa.Super. 2003), *appeal denied*, 579 Pa. 712, 858 A.2d 110

(2004)).

For purposes of disposition, we combine Appellant's issues. Appellant argues Appellees failed to submit sufficient evidence to establish a loss covered under the Policy. Appellant asserts Appellees provided only gross profit deviations to support their claims of employee theft. Appellant contends the Policy disallows use of this evidence to prove loss, and Appellees failed to provide inventory records or an actual physical count of the loss allegedly attributable to employee theft. Additionally, Appellant points to the court's statement in its opinion that it relied on **Appellant's** evidence in conjunction with Appellees' evidence, to support its decision that Appellees sustained a loss; the court's statement indicates Appellees' evidence alone failed to establish a right to recovery. On this basis, Appellant insists the trial court improperly denied its motion for compulsory nonsuit at the close of Appellees' case-in-chief.

Alternatively, even if Appellee Natrona established a loss under the Policy, Appellant argues Appellee FL&C did not sustain its burden of proof because it produced no evidence of theft or any inventory records to support its claim of loss. Specifically, Appellant asserts there was no documented theft that occurred at the FL&C store and all the witnesses testified about theft occurring only at the Natrona store.

Appellant further complains about any comparison between the Policy in this case to the insurance policy at issue in ***Movie Distributors***

Liquidating Trust v. Reliance Insurance Company, 595 A.2d 1302 (Pa.Super. 1991), *appeal denied*, 529 Pa. 658, 604 A.2d 249 (1992), because the relevant insurance policy in ***Movie Distributors*** prohibited the insured from using profit and loss computations or inventory computations to prove the existence of a loss or the amount of loss. Appellant submits that policy is distinguishable from the Policy at issue here because the Policy in this case permitted Appellees to prove the amount of loss using inventory records, under circumstances described in the Exception to the Policy Exclusion. Appellant contends the court's comment that the Policy is "valueless," similar to the policy in ***Movie Distributors***, was therefore erroneous. Appellant maintains Appellees failed to satisfy the Exception to the Policy Exclusion when they did not submit inventory records to sustain their claim of loss; instead, Appellees merely proffered gross profit deviations, which the Policy expressly prohibits. Appellant concludes the court's verdict in favor of Appellees was improper, and this Court must vacate the judgment, and enter judgment in favor of Appellant. We disagree.

The interpretation of an insurance policy is a question of law subject to *de novo* review. ***Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Insurance Company***, 589 Pa. 317, 908 A.2d 888 (2006). The primary goal in interpreting an insurance policy "is to ascertain the parties' intentions as manifested by the policy's terms." ***Id.*** at 331, 908

A.2d at 897. Like any contract, an insurance policy "must be construed in its entirety to give effect to all of its terms…." ***Pappas v. UNUM Life Insurance Company of America***, 856 A.2d 183, 189 (Pa.Super. 2004). When the language of the insurance policy is clear and unambiguous, the court "must interpret its meaning solely from…its four corners, consistent within its plainly expressed intent." ***Seven Springs Farm, Inc. v. Croker***, 748 A.2d 740, 744 (Pa.Super. 2000) (*en banc*), *aff'd*, 569 Pa. 202, 801 A.2d 1212 (2002). When a provision in the insurance policy is ambiguous, however, "the policy is to be construed in favor of the insured to further the contract's prime purpose of indemnification and against the insurer, as the insurer drafts the policy, and controls coverage." ***Kvaerner, supra***.

In ***Movie Distributors***, VTR was in the business of wholesaling video releases to dealers for personal home video use. VTR ultimately discovered employee theft occurring at one of its warehouses and filed a claim with its insurance company, Reliance Insurance Company ("Reliance"). In support of its claim, VTR presented witness accounts of theft along with evidence of profit and loss computations. Reliance denied the claim, stating the insurance policy expressly prohibited the use of inventory or profit and loss computations to prove a loss under the policy. The dispute proceeded to trial, after which a jury found in favor of VTR.

On appeal, Reliance emphasized that its policy did not apply "to loss, or to that part of any loss, as the case may be, 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." ***Movie Distributors, supra*** at 1306. This Court held that the use of inventory or profit and loss computations is permissible when there is independent evidence of the existence of a loss. ***Id.*** at 1307. VTR presented undisputed evidence of theft by VTR employees, including one employee's admission that he had been stealing the "hot" titles and reselling them, and another employee's testimony that she had observed various VTR employees stealing tapes. ***Id.*** at 1303. Thus, this Court determined VTR was permitted to establish the amount of loss using inventory and profit and loss computations, and affirmed the jury's verdict in favor of VTR. ***Id.*** at 1308.[3]

Instantly, Appellees presented, *inter alia*, the following testimony/evidence in their case-in-chief to support their claims of employee theft: (1) Joe Ferraccio, owner of Appellees Natrona Heights Supermarket, Inc. and FL&C, testified he received a phone call that Troy Lauer was stealing large quantities of meat from the Natrona store, and after informing authorities, police apprehended Mr. Lauer and Joshua Baker (an employee of

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[3] In its decision, this Court highlighted the argument posed by parties in other jurisdictions construing similar insurance policy exclusions, that to give the language in the exclusion its plain meaning would render the protection purchased with the policy valueless because, unless the thief is caught red-handed, there is no direct proof of the amount of loss. Conversely, if the thief is caught red-handed, there is no loss because the goods would be recovered. ***Id.*** at 1307.

the Natrona store who permitted Mr. Lauer to pass through the check-out points without paying); (2) Robert Karpinski, an assistant manager at the Natrona and FL&C stores, testified that Karen Coffman, manager of both supermarkets, stole from both supermarkets; (3) Mr. Karpinski also admitted stealing and that he was fired for falsifying refunds at the Natrona store; (4) Ronald Miller, CPA, offered expert testimony that there was no reasonable explanation other than theft to explain the losses experienced at the Natrona and FL&C stores; (5) Jonelle Mosthaff, an employee at the Natrona store, testified that customers in line at the Natrona store would ask her to let them leave the supermarket without paying for their merchandise because other employees permitted such behavior; (6) Ms. Mosthaff also testified that Karen Coffman and the Natrona store had a reputation of allowing stealing; (7) Ms. Mosthaff further admitted she was reprimanded for falsifying refunds; (8) Evelyn Robinson, the manager who replaced Karen Coffman for the Natrona store, explained few employees complied with company rules when she arrived; (9) Ms. Robinson also stated she had been warned to "watch" certain employees for stealing at the Natrona store, and testified that customers would ask her to slide products through the check-out belt without scanning them; and (10) the deposition testimony of Joshua Baker, in which Mr. Baker stated he saw Karen Coffman and other employees regularly take merchandise from the Natrona store without paying; Mr. Baker also admitted he was caught allowing Troy Lauer to take a

grocery cart full of meat from the store without paying. Additionally, CPA Miller offered expert testimony concerning the amount of loss sustained at each supermarket. Specifically, Mr. Miller testified that Appellee Natrona sustained a loss of $396,598.00; and Appellee FL&C sustained a loss of $79,873.00.

Following the close of Appellees' case-in-chief, Appellant moved for a compulsory non-suit, which the court denied. After trial, the court found in favor of Appellees. The court explained:

> Because we find that the cumulative witness testimony overwhelmingly establishes that [Appellees] suffered losses as a result of pervasive employee theft from 2006 thru 2008, we must consider whether [Appellees] have presented sufficient evidence to establish the dollar amount of the loss suffered that was attributable to this employee theft.
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> We will first consider whether [Appellees] established their loss through inventory records and a physical count of the inventory, as the [P]olicy requires, and whether those records support a specific dollar amount of loss attributable to employee theft. In support of [Appellees'] position, [Appellees] offered the following evidence. Joseph Ferraccio, a principal in [Appellee] companies, testified that grocery store inventory is taken two to four time a year by an outside accounting firm called Retail Grocery Inventory Services or "RGIS." It is the standard in the grocery industry to use this outside accounting firm to count grocery store inventory and, in fact, RGIS kept track of [Appellees'] inventory.
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> At the end of 2006, Ferraccio noticed for the first time that the inventory was "off a bit." Over the next couple of years, the inventory results continued to be "off," causing him to become concerned. In response, [Appellees] hired the accounting firm of Case Sabatini to analyze their financial situation in an effort to determine the extent of

the loss. At trial, [Ronald] Miller, CPA, testified on behalf of [Appellees] and explained the methodology employed by [Appellees], which calculated loss based upon a profit and loss calculation. He then explained the methodology employed by [Appellant's] forensic accounting firm, MD&D:

> Q. Now what does it mean, Mr. Miller, when Matson Driscoll says book inventory was overstated?
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> A. Well, the way I understand the work that Matson Driscoll performed was it's a different approach than what was taken in the books of Natrona Heights. If by taking the beginning inventory and costs, subtracting sales that were then reduced to costs—so, in other words, if sales in retail were $100 and cost was $80, then they would have reduced inventory by $80 for that particular example—and they came up with what the total inventory should have been at the end of the claim period. And the difference between what the total inventory should have been at the end of the claim period and what the RGIS account was[,] was approximately [$]425,000. That's my interpretation of the work that they did there.
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> Q. Would that indicate to you a loss of [$]425,000 in inventory?
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> A. It does, yes.

On the other side of the equation was the testimony of [Appellant's] expert, Marguerite Hart, CPA, from MD&D. The following is her testimony with respect to the instructions given her by the insurance carrier:

> A. Our instructions from the carrier were that because the method used by Case Sabatini, the method of discovery of the claim had been a gross profit computation, we were instructed that we needed to be able to determine that there was a theft and to value that theft based on some other method. We, in our report, showed essentially to our client that we tried to—using the financial information provided, we tried to do a roll forward to

> see if we could isolate and identify where there might have been a loss in inventory, but, as we expected, because the inventory roll forward, part of it, is directly associated with the profit and loss statement, it gives us the same result as the gross profit deviation.

At the conclusion of her analysis, [Ms.] Hart determined that the "difference of [$]425,000…was a difference in inventory." Although [Ms.] Hart agreed that some portion of the loss could have been theft-related, she refused to guess what that amount may have been.

In other words, both experts explained the results of the evaluation conducted by MD&D as having been based upon an analysis in which the physical count of the inventory by RGIS and a process referred to as "an inventory roll forward," were employed to calculate loss.

The [P]olicy clearly states that coverage does not apply to inventory shortages in which the loss's existence or amount is **solely** dependent upon an inventory computation or a profit and loss computation. However, this limitation is modified by the proviso that "where you establish wholly apart from such computations that you have sustained a loss," in other words, by independent evidence of employee theft, "then you may offer your inventory records and actual physical count of inventory in support of the amount claimed." Here, we find that the evaluation conducted by MD&D—which was based upon an analysis in which the physical count of the inventory by RGIS and a process referred to as "an inventory roll forward," was employed to calculate loss—in conjunction with the analysis conducted by Case Sabatini, meets the requirements for proof of loss under the [P]olicy. Employee theft was proven by the credible testimony of multiple witnesses and loss was calculated by reference to a reduction in inventory.

In the alternative, if we did not accept the analysis and supporting documentation of the experts as a method of calculating the loss that falls within the parameters of the insurance [P]olicy, then we would find ourselves in the same circumstances as in ***Movie Distributors***—that is,

> with a clause in the [P]olicy which renders the insurance protection purchased valueless.
>
> Accordingly, we find that [Appellees] have met their burden and proven by a preponderance of the evidence that they suffered a total employee theft loss of $476,452. Natrona should be awarded $394,290 (the $396,598 loss set forth on Exhibit 4, less $2,308, which is the portion of the 2007 loss that is above the $250,000 policy limit for that year), and FL&C should be awarded $79,873. Furthermore, [Appellees] are entitled to pre-judgment interest at the rate of 6% from February 26, 2010 (the date of [Appellant's] denial letter) to the present.

(Trial Court Opinion, filed March 12, 2013, at 5-8) (internal citations omitted) (emphasis in original). The record supports the court's sound reasoning. ***See Levitt, supra***.

Appellees presented voluminous witness testimony to support their claim of loss during their case-in-chief, including testimony from several employees and former employees of the supermarkets, some of whom actually committed the thefts at issue. Thus, Appellees established a "loss" pursuant to the Policy at Section A(1), that was not solely dependent on inventory records or profit and loss computations. As such, the Policy exclusion at Section D(2)(b) does not bar Appellees' recovery. After establishing their claim of loss through the testimony of various witnesses, Appellees then used expert testimony from CPA Miller to establish the amount of loss. Appellees' presentation of this evidence places the case squarely within the Exception to the Policy Exclusion. The record makes clear Appellees presented ample evidence during their case-in-chief to

sustain their claim of loss due to employee theft at both stores and to establish the amount of loss at both stores. The record belies Appellant's contention that Appellee FL&C presented no evidence to support its claim of employee theft or concerning the amount of loss at the FL&C store. Consequently, the court properly denied Appellant's motion for non-suit. ***See Church, supra***.

Regarding Appellant's complaint that the court used language in its opinion suggesting Appellees' evidence was sufficient only when "in conjunction with" Appellant's evidence, Appellant takes the court's comment out of context. A reading of the court's opinion, in its entirety, confirms the court found Appellees presented overwhelming credible eyewitness testimony to sustain their claim of loss and the amount of loss, without reliance on Appellant's evidence. The court simply referred to Appellant's evidence of amount of loss to note that the methodology employed by Appellant's expert and Appellees' expert reached the same conclusion.[4]

Additionally, Appellant offers nothing more than a bald assertion that Appellees' evidence of profit and loss computations does not equate to "inventory records" or "physical count" permitted under the Exception to the

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[4] Appellant's expert proffered a higher dollar amount of loss than Appellees' expert because Appellees' expert accounted for "shrink" (*i.e.*, spoilage and customer theft) while Appellant's expert did not. Appellant's expert agreed that, when accounting for shrink, she reached the same dollar loss result as Appellees' expert.

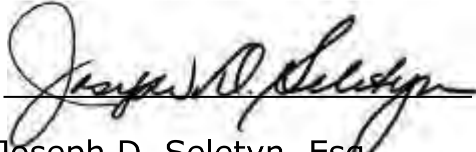
Policy Exclusion. Significantly, the Policy does not define "inventory records," "physical count," or "profit and loss computations." (***See*** Policy at Section F (definitions).) ***See also Movie Distributors, supra*** at 1306 (explaining terms inventory and profit and loss computations in insurance policy are ambiguous). Any ambiguity in the Policy is construed in favor of Appellees and against Appellant. ***See Kvaerner, supra***. Further, Mr. Ferraccio testified at trial that it is not the industry standard to keep a "perpetual" inventory system and that supermarkets generally do not keep a physical inventory of each item in the store. Importantly, **both** experts testified that the amount of loss sustained is a "loss of inventory" or "difference in inventory," and the expert testimony demonstrated that the profit and loss computations are determined using the inventory records compiled by RGIS throughout the year. RGIS takes a "physical count" of the inventory when making its computations. Therefore, Appellant's claim that Appellees failed to satisfy the Exception to the Policy Exclusion lacks merit.

Concerning Appellant's contention that ***Movie Distributors*** is inapplicable to the instant case, the court's opinion makes clear the court relied on ***Movie Distributors*** as an **alternative** basis for relief. (***See*** Trial Court Opinion at 7-8.) We agree with the trial court. To accept Appellant's interpretation that the Exception to the Policy Exclusion prohibits Appellees' evidence of profit and loss computations would render "valueless" the protection purchased with this Policy, similar to the policy in ***Movie***

Distributors. ***See id.***; ***Movie Distributors, supra***. Therefore, Appellant's issues merit no relief. Accordingly, we affirm.

Judgment affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/9/2014