**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

December 23, 1997

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 96-1600**

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

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**ANTHONY AND MARGARET CHICONAS,**

**PLAINTIFFS-APPELLANTS,**

**HUNTSMAN CHEMICAL CORPORATION,**

**PETITIONER-INTERVENOR-PLAINTIFF,**

**BANK ONE, MILWAUKEE, NA,**

**INTERVENOR-PLAINTIFF,**

**V.**

**LAWRENCE R. LAPORTE,**
**D/B/A LAWRENCE R. LAPORTE INSURANCE COMPANY**
**AND CONTINENTAL WESTERN INSURANCE CO.,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment and an amended judgment of the circuit court for Milwaukee County: MICHAEL J. BARRON, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

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

PER CURIAM. Anthony Chiconas and his wife, Margaret, appeal from a judgment awarding them $3,157.50, plus taxable costs. The judgment, against Continental Western Insurance Company, was for costs recoverable under an all-risk insurance policy to replace a building destroyed by fire. The Chiconases contend that trial court rulings erroneously precluded them from recovering the full amount of expenses incurred to replace the building. We conclude that the trial court properly denied the Chiconases recovery for debts discharged in bankruptcy or barred by the statute of limitations. For procedural reasons, we do not consider the Chiconases' claim for the value of their labor. We also conclude that the trial court applied the wrong standard when it found that the Chiconases had failed to meet their burden of proof regarding repairs paid for with trade materials, i.e., insulating products. Thus, we affirm the judgment except as to the Chiconases' claim for the cost of repairs paid for with insulating products. The case is remanded to the trial court for further proceedings on this issue.

The Chiconases owned the building that housed their business, Spectrum Manufacturing, Inc. Spectrum manufactured insulating products. The trial court found that the Chiconases treated Spectrum as their alter ego, and this finding is not challenged on appeal.

Insurance agent, Lawrence R. LaPorte, issued a binder for a Continental Western all-risk policy on the building; however, Continental Western declined to issue the policy. Fire destroyed the building in 1989 before the

Chiconases obtained other insurance. Continental Western refused to pay on the loss because it had declined to issue a policy. The binder, however, had an expiration date of August 1990, and after the Chiconases commenced litigation, Continental Western acknowledged coverage.[1]

Anthony Chiconas hired various entities with whom he had business dealings to rebuild the building. He and his wife also worked on the project. Unfortunately for the Chiconases, they lacked the money to pay for the work. Ultimately, the mortgage holder foreclosed on the property, Spectrum Manufacturing assigned its assets to creditors, and the Chiconases declared bankruptcy. Most of the debts for work done on the rebuilt facility were discharged in bankruptcy.

Approximately one year after the fire, while rebuilding, the Chiconases filed suit against Continental Western.[2] After the Chiconases filed bankruptcy, the trustee abandoned the claim against Continental Western. The litigation was complicated and delayed by matters not relevant to this appeal. Suffice it to say, after Continental Western admitted coverage and the Chiconases' debts were discharged in bankruptcy, the issue ultimately presented to the court

[1] Continental Western argues that the equities in this case favor it because it is obligated to pay even though it refused coverage and did not receive a premium. While this is true, the Chiconases have competing equities. They attempted to secure insurance, and they allege they were told the binder was good for one year even though coverage was refused. Additionally, they lost their business and real estate and filed bankruptcy before Continental Western admitted coverage.

[2] LaPorte was also named as a defendant, and Continental Western filed a cross-claim against him. The trial court dismissed the Chiconases' suit as to LaPorte. The cross-claim was settled after the trial court announced its decision on the Chiconases' claim. By order dated July 17, 1996, this court permitted LaPorte to participate in the appeal.

was the amount the Chiconases were entitled to recover because of coverage provided by the binder.

Continental Western argued for minimal recovery citing the Wisconsin rule limiting recovery under an indemnity policy to an insured's actual loss. *See* ***Ramsdell v. Insurance Co.***, 197 Wis. 136, 139, 221 N.W. 654, 655 (1928). Continental Western also relied on its standard policy, which contained the following language:

> **3. Replacement Cost**
>
> a. Replacement Cost (without deduction for depreciation) replaces Actual Cash Value in the Loss Condition, Valuation, of this Coverage Form.
>
> …
>
> e. We will not pay more for loss or damage on a replacement cost basis than the least of:
>
> …
>
> (3). The amount you actually spend that is necessary to repair or replace the lost or damaged property.

Further facts will be set out as relevant to the discussion of each of the Chiconases' claims.

## STANDARD OF REVIEW AND GOVERNING LAW

Although judgment was entered after a bench trial, this appeal does not raise the usual claim of sufficiency of the evidence. The essential facts relevant to the appellate issues are undisputed, and the Chiconases challenge the legal standards applied by the trial court. Whether the trial court applied the proper legal standard based on either the governing case law or the terms of the insurance contract presents a question of law, which this court reviews *de novo*. *See* ***Chernetski v. American Family Mut. Ins. Co.***, 183 Wis.2d 68, 72, 515

N.W.2d 283, 285 (Ct. App. 1994). To the extent the issues require construction of the terms of the insurance contract, this also presents a question of law. ***Waukesha Concrete Prod. Co. v. Capitol Indem. Corp.,*** 127 Wis.2d 332, 339, 379 N.W.2d 333, 336 (Ct. App. 1985).

The general principle governing this appeal is the Wisconsin rule that an indemnity policy, such as a fire insurance policy, provides payment only to the extent of actual loss. ***Ramsdell***, 197 Wis. at 138, 221 N.W. at 655. Thus, where a third party is legally obligated to make repairs and does so, an insured suffers no actual loss and is not entitled to recover under an indemnity policy. ***Id.***

The Chiconases' recovery rights are also governed by the terms of Continental Western's standard all-risk policy. *See* ***Terry v. Mongin Ins. Agency***, 105 Wis.2d 575, 581, 314 N.W.2d 349, 352 (1982) (binder construed as incorporating terms of company's standard policy). If the terms of a contract of insurance are plain and unambiguous, this court's duty is to construe the contract according to its plain meaning. ***Waukesha Concrete,*** 127 Wis.2d at 339, 379 N.W.2d at 336. When interpreting terms in an insurance policy, we use their common and ordinary meaning as defined in the dictionary. *See* ***Holsum Foods Div. of Harvest States Coops. v. Home Ins. Co.***, 162 Wis.2d 563, 568-69, 469 N.W.2d 918, 920-21 (Ct. App. 1991).

DISCHARGED DEBTS

In a pre-trial ruling, the trial court determined that the Chiconases were not entitled to recover for the debts to contractors which were discharged in bankruptcy. The Chiconases argue, however, that when the trustee in bankruptcy abandoned their claim against Continental Western pursuant to 11 U.S.C. § 554(a), it reverted to them and "stands as if no bankruptcy petition was filed."

*See* ***Dewsnup v. Timm***, 908 F.2d 588, 590 (10th Cir. 1990), *aff'd*, 502 U.S. 410 (1992). Focusing on the concept that an abandoned asset reverts as if the bankruptcy did not occur, they argue that the court must now also disregard the discharge of the contractors' claims. This position, however, is negated by ***Brown v. O'Keefe***, 300 U.S. 598 (1937), a decision cited by the Chiconases. The issue in ***Brown***, was a creditor's right to pursue a claim for assessments arising from stocks abandoned by the bankruptcy trustee. ***Id.*** at 600-01. The assessments had been listed as a debt subject to discharge, and the court recognized that the discharge in bankruptcy would extinguish the debtor's personal liability for the assessment. *See* ***id.*** at 603-07. Thus, while the trustee's abandonment gave the Chiconases the right to pursue the claim, it did not affect the amounts recoverable under the claim.

As previously noted, an indemnity policy provides for recovery only to the extent of actual loss. ***Ramsdell***, 197 Wis. at 139, 221 N.W. 655. If the insured is relieved of the obligation to pay for repairs, the insured does not sustain a loss. *See* ***Oliver v. Heritage Mut. Ins. Co.***, 179 Wis.2d 1, 24, 505 N.W.2d 452, 461 (Ct. App. 1993). When the discharge in bankruptcy relieved the Chiconases of any obligation to pay the discharged debts, the affected contractors suffered the loss, not the Chiconases.

Additionally, the language of the policy does not require a different result. The policy allows recovery only for the amounts actually spent to repair or replace the damaged property. The Chiconases did not spend any amount paying the discharged debts.

TIME-BARRED DEBT

At the time of the trial, the debt to the architect who prepared the drawings for the rebuilt structure had not been paid. The court found that the debt was incurred more than six years before trial and held that the statute of limitations for a suit to collect on the debt had expired. Consequently, the court refused to allow recovery for the debt.

The expiration of the statute of limitations bars a creditor from collecting on an account owed to it. *See* § 893.05, STATS. Thus, the Chiconases were also relieved of paying for the repairs attributable to the time-barred debt, and they suffered no loss with respect to the debt.

CLAIM FOR PERSONAL SERVICES

During the rebuilding, Anthony Chiconas acted as the general contractor, supervising the work, finding contractors, and completing some tasks himself. He claimed his wife also worked on the project. Although a pretrial ruling precluded recovery for personal services, Anthony Chiconas offered proof at trial of the value of the couple's labor for twenty-two weeks. Chiconas valued his services at the rate of $450 per week and his wife's at $200 per week.

The Chiconases contend that the fair monetary value of their personal time and effort was a recoverable loss, but they cite no authority for this proposition. Arguments unsupported by reference to legal authority will not be considered, *see* ***Lechner v. Scharrer***, 145 Wis.2d 667, 676, 429 N.W.2d 491, 495 (Ct. App. 1988).

DEBTS PAID WITH INSULATING PRODUCTS

Because the Chiconases lacked money to pay the contractors who worked on the rebuilding project, three contractors agreed to accept payment in

the form of insulating products. Anthony Chiconas delivered the products to the contractors as they needed insulation, and the contractors credited the Chiconases' accounts.

For one company, Condura Construction Company, Chiconas obtained scrap Styrofoam from construction projects, ground the scrap into insulation, and bagged it. Lawrence Vogt testified that Condura credited the Chiconases' account with $2.25 for each bag received. He testified that this was the prevailing commercial rate for the product although he also testified that this was cheaper than he could have obtained it elsewhere. Condura used the insulation in its business. Condura's total bill, fully paid with insulating product, was $37,972.33.

Robert O'Haver, who operated Oconomowoc Roofing Co., also agreed to accept insulation product in lieu of cash. He received flat board insulation. He originally charged the Chiconases $3,600, and, at trial, the account had been paid down to $1,800-$1,900. The bill was not fully paid because he seldom needed the product.

The third contractor was Owens Overhead Door Company, which billed the Chiconases $3,033. At the time of trial, the balance on the account was $432.27. Bonnie Osowski, one of the owners of Owens, testified that the payments on the account had been made with polystyrene foam insulation, which Owens used to insulate doors. She testified that the agreement to accept insulation as payment was made at the time Owens did the work for the Chiconases.

Anthony Chiconas testified that the foam used to make the insulating products for the three contractors was scrap material or was purchased from Menards. He had no records regarding the cost of material, but most was free. He

also had no records regarding the cost of a machine he purchased to grind the foam into pellet insulation, nor did he have records of the time he spent obtaining the materials and transforming them into the finished products. Although he had paid an assistant, he lacked records of the payments.

Concluding that there was a failure of proof, the trial court denied recovery for any of the accounts paid with insulating products. The court focused on the lack of evidence of the cost of producing the products and refused to accept the amount credited by the three contractors as the amount of actual loss. The Chiconases contend that the trial court used an incorrect standard. We agree.

We begin our analysis by noting that payment can be by something other than money, provided the medium is offered and accepted in good faith and is a *bona fide* settlement of the debt. *See* ***Stenbom v. Brown-Corliss Engine Co.***, 137 Wis. 564, 567, 119 N.W. 308, 309 (1909). Here, nothing in the evidence suggests that the payments made with insulating products were not *bona fide* or in good faith.[3]

As discussed earlier, the Wisconsin rule is that an indemnity policy provides recovery only to the extent of actual loss. *See* ***Ramsdell***, 197 Wis. at 139, 221 N.W. at 655. The question presented by the payments made with insulating products is how the loss is measured. ***Ramsdell*** and the cases from other jurisdictions cited by Continental Western involve situations where a third

[3] The contractors had purchased insulating products from Anthony Chiconas and his corporation before the fire. After the fire, the contractors agreed to take insulation as payment because the Chiconases could not pay cash. At least one contractor agreed to this when work was performed. Chiconas provided the insulation whenever a contractor needed it in its own business. There was no challenge to the reasonableness of the contractors' charges for their work on the rebuilding project or to the rates at which the contractors credited the Chiconases' account.

party incurred the costs of repairs, and the insured suffered no financial detriment of any kind. The cases offer no guidance on the issue of valuing payments made with trade materials such as insulating products.

The trial court applied a general standard that measured the extent of actual loss by "out-of-pocket" expenses. When it applied this standard to repairs paid with insulating products, the court required evidence of the cost to the Chiconases of producing the products. Neither Continental Western's nor LaPorte's briefs provide any legal authority, beyond ***Ramsdell*** and related cases, for such a limited standard. Nor has this court found any authority adopting the "out-of-pocket" cost of personal property used to pay repairs as the measure of the extent of actual loss.

As observed in a common legal dictionary, "loss" has no hard and fast meaning. *See* BLACK'S LAW DICTIONARY 945 (6th ed. 1990). One definition in a general dictionary that is particularly relevant to this issue is "the amount of an insured's financial detriment due to the occurrence of a stipulated contingent event (as death, injury, destruction, or damage) in such a manner as to charge the insurer with a liability under the terms of the policy." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1338 (Unabr. 3rd ed. 1976). While generally out-of-pocket costs will accurately measure financial detriment, where the two diverge, the appropriate focus is on financial detriment.

If Spectrum, which was operated as the Chiconases' alter ego, had continued and the payments been made with products from inventory, the financial detriment would be the retail price of the products because this is the amount the business would have received if the products had been sold to others instead. Although the insulating products were specifically manufactured for the

contractors by Anthony Chiconas, there is no claim that he could not have sold the products to others for the credited price. If he had sold the products to third parties (or even the contractors) and endorsed the payments over to the contractors, the financial detriment would be the total of the endorsed checks. The Chiconases' financial detriment is the same whether they raise cash by sales to, or through, third parties or whether they forego sales to third parties and deliver the products to the contractors for credit on their account. By exchanging products for repairs or for credit against debts arising from the repairs, the Chiconases suffered a financial detriment measured by the value of the products.[4] Measuring the extent of actual loss by the value of the property transferred places the Chiconases in the same financial position they would have been in, with respect to these repairs, if the fire had not occurred. *See* ***Wisconsin Screw Co. v. Fireman's Fund Ins. Co.***, 193 F. Supp. 96, 101 (E.D. Wis. 1960), *aff'd*, 297 F.2d 697 (7th Cir. 1962).

Additionally, measuring the extent of actual loss by the value of the insulating products is consistent with the plain language of the policy. The relevant language is "the amount you actually spend that is necessary to repair or replace the lost or damaged property." Continental Western apparently assumes that the language requires actual monetary payments.

The policy does not define any of the terms used in this provision. A standard English dictionary defines "spend" as "to distribute or consume in

[4] LaPorte argues that measuring the extent of actual loss by the value of the insulating products allows a double recovery of profit. This argument is disingenuous. The Chiconases are not seeking to recover profits from Continental Western, they are trying to recover what the repairs made by the three contractors actually cost them. If recovery is limited to the cost of producing the insulation product, the insurer, not the insured, receives the benefit of any profit on trade materials used as payment.

payment or expenditure: pay out: EXPEND, DISBURSE." WEBSTER'S at 2190. "Amount" is "the total number or quantity: AGGGREGATE…: SUM, NUMBER." ***Id.*** at 72. Neither term, considered individually or together, requires a particular type of expenditure, i.e., money. The idea that more than money can be spent is explicit in the legal dictionary's definition of "spend." It defines "spend" as "to consume by using in any manner; to use up, to exhaust, distribute, as to expend money or *any other possessions*." BLACK'S at 2190 (emphasis added). Here, the insulating products were distributed or consumed in payment when the Chiconases transferred them to the three contractors. The value of the products was the amount the Chiconases spent to repair the property.

Consequently, we conclude that the value of the insulating products, as evidenced by the credits allowed by the three creditors, is the proper measure of the Chiconases' damages, whether defined as the extent of actual loss or the amount actually spent for repairs. The trial court applied the wrong legal standard when it required the Chiconases to prove the cost of the insulating products. We remand the matter to the trial court for further fact-finding applying the standard set forth in this opinion.

*By the Court*.—Judgment and amended judgment affirmed in part; reversed in part and cause remanded for further proceedings.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.